

JUNE 18, 2007

## PENNSYLVANIA

### I. Automatic Restoration of Rights:

No person “confined in a penal institution” is eligible to vote. 25 Pa. Cons. Stat. §§ 2602(w), 3146.1.\* The right to vote is restored automatically upon release from prison. *United States v. Essig*, 10 F.3d 968 (3d Cir. 1993). The disability has been interpreted to apply only to persons convicted of a felony. 1974 Op. Att’y Gen. Pa. 186, No. 47 (1974).\*\*

A person convicted of a crime punishable by imprisonment for more than one year is ineligible to serve as a juror. 42 Pa. Cons. Stat. § 4502(a)(3). Persons convicted of bribery, perjury or “other infamous crime” (any felony) may not be elected to the General Assembly or hold any “office of profit or trust” in the state. Pa. Const. art. 4, § 18(d)(3). (This disability has been interpreted to apply only to elected or appointed office, and has not been extended to mere public employment.) These civil disabilities are removed only upon a Governor’s pardon. Pa. Const. art. 4, § 9(a); 37 Pa. Code ch. 81, *available at* <http://www.pacode.com/secure/data/037/chapter81/chap81toc.html>.

### II. Discretionary Restoration Mechanisms:

#### A. Executive pardon:

- *Authority*: Under the Pennsylvania Constitution the Governor has power to pardon, but he may not act unless he receives a favorable recommendation from a majority of the Board of Pardons (unanimous in the case of life sentences). Pa. Const. art 4, § 9(a): “no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, and in the case of a sentence of death or life imprisonment, on the unanimous recommendation in writing of the Board of Pardons, after full hearing in open session, upon due public notice.”

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\* In 2005 the Pennsylvania General Assembly passed a bill that would have extended the period of disenfranchisement to felony offenders on parole and probation, as well as those actually incarcerated. See H.R. 1318, Session of 2005. This bill was vetoed by Governor Rendell in March of 2006. See <http://www.governor.state.pa.us/governor/cwp/view.asp?a=3&q=445679>.

\*\* 25 Pa. Cons. Stat § 1301(a) provides that a person may not be permitted to register to vote if they have been confined in a prison during the past five years. However, in *Mixon v. Com.*, 759 A. 2d 442, (Cmwlth 2000), *affirmed* 783 A. 2d 442 (Pa. 2001), the court held that there was no rational basis for precluding the registration of those who were incarcerated within last five years and who were not registered previously, when those who were legally registered prior to incarceration could vote upon their release.

- *Administration:* Board of Pardon composed of Lieutenant Governor, who serves as Chairman; the Attorney General; and three members appointed by the Governor for six year terms with the approval of a majority of the members elected to the Senate. Pa. Const. art. 4, § 9(b). The three appointed members are a corrections expert, a crime victim representative, and doctor of medicine, psychiatrist or psychologist. *Id.*
- *Eligibility:* No eligibility waiting period, even prisoners may apply. (Consideration currently being given to inaugurating an eligibility waiting period to ease administrative burdens, subject to waiver.) Convictions obtained in other jurisdictions not eligible for Pennsylvania pardon.
- *Effect:* Pardon restores all rights lost as a result of conviction, and entitles recipient to judicial expungement. *Commonwealth v. C.S.*, 534 A.2d 1053 (Pa. 1987). Pardoned or expunged conviction may not be used in a licensing decision. 18 Pa. Cons. Stat. § 9124(b).
- *Process:* In no case may pardon be recommended without a public hearing, and “due public notice.” Under elaborate Board rules governing clemency process, application (obtained for \$8 fee from Board) includes questions relating to offense, subsequent rehabilitation. Individual must file application and ten copies, five passport photos, and filing fee of \$25 (which may be waived upon proof of indigence). 37 Pa. Code §§ 81.221, 81.225. Application is public and may be inspected. § 81.227. Agents from the Pennsylvania Board of Probation and Parole conduct investigations for the Board of Pardons. Applications are sent to trial court, DA and DOC for recommendation. § 81.226(a). After all pertinent information has been compiled, the application will be reviewed for listing in a subsequent month's calendar.

On merit review by Board, two votes are required for a public hearing, except that a vote by a majority of the Board is required for prisoners serving life sentences or sentences for crimes of violence. § 81.231. If a hearing is denied, application is deemed denied at that time. § 81.226(b). The applicant and the person representing the applicant will be advised whether or not a public hearing is granted, as well as, the time and place of the hearing.

When a hearing is granted, applicants must appear personally before the Board. In every case prior to the public hearing, a legal notice will be published in a newspaper of general circulation in the county or counties where the applicant committed the crime(s) for which he/she is seeking clemency. The notice will include the applicant's name, conviction and the date and place of the hearing. Hearings of the Board are public and a record is kept. § 81.263. In non-capital cases 15 minutes allotted each side for presentation. Deliberations conducted in executive session after public hearing, decision announced publicly. § 81.301(a). Under Constitution, recommendation of the Board is by majority, except that it must be

unanimous in capital and life sentence cases. Pa. Const. art 4, § 9(a). Board provides the Governor with a written recommendation in every case, including the reasons for its recommendation.

Community Legal Services of Philadelphia has excellent description of Pennsylvania pardon process on its website.

<http://www.clsphila.org/Content.aspx?id=634>

- *Frequency of Grants:*

2006: 360 applications granted “merit review,” 189 granted public hearing, 144 recommended favorably, 27 granted by Governor and 2 denied.

2005: 617 applications received, 360 granted “merit review,” 188 granted public hearing; 140 recommended favorably, 52 granted by Governor and 5 denied.

2004: 578 applications received, 406 granted “merit review,” 205 granted public hearing; 152 recommended favorably, 71 granted by Governor and 5 denied.

2003: 564 received, 329 reviewed, 191 granted public hearing, 153 recommended favorably, 42 granted, 9 denied.

2002: 488 received, 303 reviewed, 164 granted hearing, 164 heard, 127 recommended favorably, 123 granted and four denied.

2001: 367 filed, 275 reviewed, 146 granted hearing, 138 heard, 122 recommended favorably, 121 granted

2000: 332 received, 245 reviewed, 106 granted hearing, 87 recommended favorably, 84 granted.

Source: Pennsylvania Board of Pardons.

- Comments: The number of applications filed with the Board has more than doubled in the last 6 full years, from 261 in 1999 to 578 in 2004. Substantial number of pardon applications in recent years (20%) involve very minor “summary” offenses committed long ago (typically retail theft), which are posing an obstacle to the applicant’s working in educational institution, health care, and other professions. Consideration being given to legislation to allow Secretary of State to grant “certificate of employability.” Problems with health care professions in particular. Also, school districts will not hire people with conviction, even if very dated (shoplifting convictions dominate pardon caseload.)
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B. Judicial sealing or expungement of adult felony convictions:

- *Authority:* Gubernatorial pardon entitles recipient to judicial expungement, after which an offender may deny that he has been convicted. *Commonwealth v. C.S.*, 534 A.2d 1053 (Pa. 1987). Expungement may be granted where a person has reached age 70 and has not been arrested for 10 years. 18 Pa. Cons. Stat. § 9122(b)(1). Finally, expungement of arrest records is available from court where case handled pursuant to Accelerated Rehabilitative Disposition, and defendant successfully completes terms of ARD probation, with the exception of certain sex offenses. § 9122(b)(1). Under a 2004 law, expungement is mandatory in the case of underage drinking summary convictions (§ 6308 of the Crimes Code) if the applicant is over 21 at the time of asking for expungement. Other than this, there is currently no authority for post-conviction expungement. A number of proposals have recently been introduced into the Pennsylvania legislature to expand expungement authority for misdemeanors and summary offenses, but as of September 2005 none had passed.
- *Effect of expungement:* Records destroyed except that the prosecuting attorney and the central repository shall, and the court may, maintain a list of the names and other criminal history record information of persons whose records are required by law or court rule to be expunged where the individual has successfully completed the conditions of any pretrial or post-trial diversion or probation program. Such information shall be used solely for the purpose of determining subsequent eligibility for such programs and for identifying persons in criminal investigations. Such information shall be made available to any court or law enforcement agency upon request. § 9122(c).
- *Arrest records:* Arrest records must be expunged by central repository where no disposition received within a year, or where a court orders expungement. § 9122(a). With regard to court records, the Pennsylvania courts recognize a constitutional right to seek expungement of an arrest record. *See, e.g., Commonwealth v. Armstrong*, 434 A.2d 1205, 1206 (Pa. 1981); *Commonwealth v. Wexler*, 431 A.2d 877, 879 (Pa. 1981); *Commonwealth v. Malone*, 366 A.2d 584, 487-88 (Pa. Super.1976)(noting serious losses that can be caused by an arrest record, including reputational and economic injury). This right is an adjunct of due process and is not dependent upon express statutory authority. *Commonwealth v. Armstrong*, 434 A.2d at 1206; *see also Commonwealth v. Rose*, 263 Pa.Super. 349, 397 A.2d 1243 (1979). “In determining whether justice requires expungement, the Court, in each particular case, must balance the individual's right to be free from the harm attendant to the maintenance of the arrest record against the Commonwealth's interest in preserving such records.” *Commonwealth v. Wexler*, 431 A.2d at 879 (1981). The factors that must be considered in making such a determination include, but are not limited to: [T]he strength of the Commonwealth's case against the petitioner, the reasons the Commonwealth gives for wishing to retain the records, the petitioner's age, criminal record, and employment history, the length of time that has elapsed between the arrest and the petition to expunge, and the specific adverse consequences the petitioner may endure should expunction be denied. *Id.* (quoting

*Commonwealth v. Iacino*, 270 Pa.Super. 350, 411 A.2d 754, 759 (1979) (Spaeth, J., concurring)).

- *Effect*: As noted above, pardoned or expunged convictions may not be considered by a licensing board. 18 Pa. Cons. Stat. § 9124(b). Nor may summary offenses. *Id.*
- *Firearm*: Firearms rights may be restored by county court if a conviction has been vacated or pardoned, or if federal rights restored and 10 years passed since most recent conviction (excluding time spent in prison). 18 Pa. Cons. Stat. § 6105(d)(3). Procedure enacted in 2002 permits people with a single conviction under old Pennsylvania laws (with certain exceptions) to regain firearms rights through court of common pleas without having to be pardoned, unless “the applicant’s character and reputation is such that the applicant would be likely to act in a manner dangerous to public safety.” § 6105.1(a). (This provision intended to deal with old traffic violations made grounds for denial of firearms privileges.) This restoration also restores right to vote, serve on jury and hold public office. § 6105.1(e).

C. Administrative certificate: N/A

### III. Nondiscrimination in Licensing and Employment:

Like New York, Wisconsin and Hawaii, Pennsylvania has a comprehensive nondiscrimination law covering licensure and both public and private employment. 18 Pa. Cons. Stat. §§ 9124, 9125. However, unlike these three states, Pennsylvania’s law has no administrative mechanism for enforcement, and does not provide for attorneys fees.

Occupational licensing authorities may consider a conviction, but it “shall not preclude the issuance of a license, certificate, registration or permit.” 18 Pa. Cons. Stat. § 9124(a). Licensing Boards may consider only misdemeanor convictions that “relate to” the occupation. § 9124(c). Pardoned or expunged convictions may not be considered in a licensing decision, nor may convictions “which do not relate to the applicant’s suitability for the license, certificate, registration or permit.” § 9124(b).

For both public and private employment, “[f]elony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant’s suitability for employment in the position for which he has applied.” § 9125(b). (Certain job categories exempted by statute elsewhere in code, like health care). The statute requires the employer to notify the applicant in writing if the decision to deny employment or licensure is based in whole or in part on criminal history. §§ 9124(d), 9125(c). *See El v. SEPTA*, 297 F. Supp. 2d 758 (E.D. Pa. 2003)(under the Pennsylvania Constitution and the Pennsylvania Criminal History Record Information Act, it is against public policy to summarily reject an individual for employment as a driver of disabled people, on the ground that the individual has a prior criminal record, unless in doing so the employer is furthering a legitimate public objective (citing *Cisco v. United Parcel Servs., Inc.*, 476 A.2d 1340 (Pa. 1984)(employee properly dismissed where criminal

charges arose from performance of his duties)). Section 9125 does not provide for remedies or enforcement, but the Pennsylvania courts have held that a lawsuit can be brought to enforce its provisions under a common law “public policy violation” tort theory. *See Cisco v. United Parcel, supra*, 476 A. 2d at 1343.

Per Se Employment Barriers: Pennsylvania has one of the broadest laws in the country disqualifying people with any sort of criminal record from working with the elderly, mentally ill, or retarded, whether in nursing homes or personal care facilities. Penalties for violations of these laws involve both fines for the health care facility and potentially prison for facility administrators. This law was limited by the Pennsylvania Supreme Court in *Nixon v. Commonwealth*, 839 A.2d 277, 288-89 (Pa. 2003) (state could not refuse to re-employ convicted persons while continuing to employ similarly situated persons with no break in service).

The lifetime ban on employment of people with aggravated assault convictions in the Child Protective Services Law has also been held unconstitutional. *See Warren County Human Services v. State Civil Service Comm’n*, 844 A. 2d 70, 74 (Pa. Comm.), petition for appeal denied, 863 A. 2d 1152 (Pa. 2004). Notwithstanding this decision, in 2006 the Pennsylvania legislature extended to law to a range of occupations in which workers have “significant likelihood of regular contact with children.” 23 Pa. Cons. Stat. § 6344.2(A). Although the scope of this law is unclear, the statute specifically identifies social services workers, mental health professionals, clergy, counselors, librarians, and doctors.

State law also prohibits people with certain convictions from working in child care, long-term and elder care, police forces, and schools. A study by Community Legal Services of Philadelphia found 40 professions in Pennsylvania in which an occupational license may be denied because of a criminal record, from accountant to veterinarian.

Municipal Hiring Policies: On November 1, 2006, the Philadelphia City Council held a hearing on a bill to strictly limit hiring discrimination against people with criminal records. Modeled after the Boston ordinance, the Philadelphia bill would require the employer to “first review the qualifications of an applicant and determine that an applicant or current employee is otherwise qualified for the relevant position before the Employer may conduct a criminal record check.” The Philadelphia bill also goes further than the Boston ordinance by applying not only to city agencies and private vendors that do business with city, but also to all private companies employing more than 10 people within the City of Philadelphia. <http://webapps.phila.gov/council/attachments/2144.pdf>