



**Transportation
Security
Administration**

LEGAL GUIDANCE ON CRIMINAL HISTORY RECORDS CHECKS

Updated May 28, 2004

INTRODUCTION

This Legal Guidance document, prepared by the Office of Chief Counsel, provides information for decision makers involved in adjudicating background checks on individuals with unescorted access authority at our nation's airports. The purpose of this document is to ensure uniformity in the adjudication of background checks for airport and air carrier workers. This Legal Guidance does not create any right or benefit, substantive or procedural, legally enforceable by any party other than the Transportation Security Administration.

BACKGROUND

Section 44936 of Title 49, U.S. Code, requires the Under Secretary of Transportation for Security (now Administrator) to issue regulations requiring employment investigations, including a criminal history records check (CHRC), for screeners of the Transportation Security Administration (TSA), flight crew members, or individuals seeking unescorted access to Secure Identification Display Areas (SIDA) of an airport. On February 22, 2002, TSA issued regulations to implement this portion of the statute concerning individuals with unescorted access to secure areas of an airport, flight crew members, and screening personnel. *See* 49 C.F.R. §§ 1542.209, 1544.229, and 1544.230.

The statute and regulations prohibit employment of screeners and those individuals who have unescorted access to aircraft or a secured area of an airport when an individual has a criminal conviction (or finding of not guilty by reason of insanity) for a disqualifying offense in the previous ten-year period. The disqualifying offenses are listed in 49 U.S.C. § 44936(b)(1)(B).

WHAT IS A CONVICTION?¹

The statute and regulations specify that if an individual was convicted, or found not guilty by reason of insanity, of any disqualifying offense in the preceding 10 years², then the individual may not be granted unescorted access authority. A conviction means any finding of

¹ The definition of conviction in this guidance applies only to TSA required criminal history records checks.

² Any applicant fingerprinted after December 6, 2002, is subject to only a ten year look-back period.

guilt, plea of guilty, plea of *nolo contendere*,³ or finding of not guilty by reason of insanity. See generally, *United States Sentencing Guidelines* §4A1.2(a) (2002).

Whether a disposition of a criminal case is a conviction is a matter of Federal law. In *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983), the Supreme Court held that the defendant had been convicted for purposes of a Federal gun control statute even though under state law the defendant's sentence had been deferred. The fact that the defendant had pled guilty to the state offense was sufficient to constitute a conviction for purposes of Federal law.

TSA considers the following scenarios to be convictions (not an exclusive list):

- Person enters plea of *nolo contendere* or guilty followed by deferred adjudication or suspended imposition of sentence where court places defendant on a period of probation.
- Person enters plea of *nolo contendere* followed by a period of community supervision.
- Person is found guilty by judge or jury followed by deferred adjudication where court places defendant on a period of probation.
- Person is arrested and placed on probation pending a trial. The state revokes probation and prosecutes the person, and there is a finding of guilt.
- Person enters a plea of *nolo contendere* or guilty followed by a withheld adjudication where the court places defendant on a period of probation.

TSA considers the following scenarios not to be convictions (also not an exhaustive list):

- Person is arrested, tried, and acquitted.
- Person is arrested and placed in a first offender program.⁴ Upon successful completion of program, the person is discharged and the charges are dropped.
- Person is arrested and placed on probation pending a trial. There is no plea made in the case. Upon successful completion of a period of probation, the charges are dropped.

HOW DOES AN EXPUNGEMENT⁵ AFFECT THE CONVICTION?

A number of states allows an individual who has been convicted to seek a judicial order expunging the conviction. Expungements come in a variety of forms, but predominantly fall into two categories: (1) post-probationary period automatic expungements; and (2) post-conviction discretionary expungements.

As a general rule, where an expungement acts to nullify a conviction and the record of the conviction is maintained by the state only for purposes of sentencing in a possible subsequent

³ *Nolo contendere* is also referred to as a plea of no contest.

⁴ Generally, a statutorily created program to allow those with relatively minor offenses and no prior criminal history to avoid prosecution.

⁵ For the sake of convenience, expungement, unless otherwise indicated, encompasses both set-asides and expungements.

criminal trial, the expungement acts to nullify the conviction for purposes of the CHRC statute and regulations. If however, the expungement has conditions on it, the expungement will not act to nullify the conviction for purposes of the CHRC statute and regulations. Some examples of such conditions include the following (not an exhaustive list):

- Person may not own a firearm based on the conviction.
- Person may not be hired as a police officer or teacher.
- Person may not work as a health care provider.

Therefore, some expungements remove the disabling effect of the underlying conviction and some expungements do not. To determine whether an expungement acts to nullify a conviction for purposes of the CHRC statute and regulations, adjudicators should look to the specific provisions of state law under which the expungement was granted. Questions regarding the effect an expungement has on a conviction may be forwarded to TSA's Office of Chief Counsel. (See Attachment A).

In addition, several states, notably California and Minnesota⁶, have statutory provisions that allow certain felony convictions to be treated as misdemeanors. This operation of law can usually occur in one of two ways:

- The individual is arrested and charged with a felony offense. The individual pleads guilty or is found guilty and based on the sentence received, the felony automatically is classified as a misdemeanor.
- The individual is arrested and charged with a felony offense. The individual pleads guilty or is found guilty and is sentenced for the felony offense and placed on probation. Upon successful completion of probation, the offense is reduced to a misdemeanor.

In both cases, once the felony is reduced to a misdemeanor, the adjudicator would need to determine if the misdemeanor level offense is disqualifying under the CHRC statute and regulations. (See below for more on misdemeanor offenses.)

ARE MISDEMEANOR CONVICTIONS DISQUALIFYING?

A conviction for a misdemeanor offense may act to disqualify an individual for purposes of the CHRC statute and regulations. In *United States v. Baer*, 2003 U.S. App. LEXIS 6023 (4th Cir. 2003), the Fourth Circuit held that unless otherwise specified within § 44936, a conviction for any offense (even a misdemeanor offense) listed in the CHRC statute and regulations acts to disqualify an individual from unescorted access authority. For example, § 44936(b)(1)(B)(ix) specifies "unlawful possession, sale, distribution, or manufacture of an explosive or weapon." This provision encompasses both misdemeanors and felonies and thus a felony or misdemeanor conviction for one of these offenses is a disqualifying offense. See *Baer* (a misdemeanor firearms offense falls within the list of disqualifying offenses in § 44936). Conversely, § 44936(b)(1)(B)(xi) specifies "armed or *felony* unarmed robbery." (Emphasis added). Therefore,

⁶ See California Penal Code § 17(b) and Minnesota Statute § 609.13.

only a felony level conviction for unarmed robbery is a disqualifying offense. Thus, a variety of misdemeanor offenses, mostly related to illegal use or possession of a weapon⁷ can be disqualifying for purposes of the CHRC statute and regulations.

WHAT EFFECT DOES A PARDON HAVE?

Most states, either through the governor's office or a state board of pardons and paroles, have the power to grant pardons to persons convicted of a crime. TSA has taken the position that all pardons will act to nullify the underlying conviction for purposes of the CHRC statute and regulations.

ARE JUVENILE CRIMINAL RECORDS APPLICABLE?

Generally, juvenile records should not be considered for purposes of the criminal history records check statute. However, when a juvenile is tried and convicted as an adult, the criminal record should be considered when determining whether the individual has a disqualifying offense.

WHAT IF A RECORD FAILS TO INDICATE THE DISPOSITION OF AN ARREST?

Due to a variety of reasons, CHRC records from the Federal Bureau of Investigation (FBI) may not show a disposition for an arrest. Therefore, it is necessary to investigate open dispositions and determine what, if any, disposition occurred. *See generally* 49 C.F.R §§ 1542.209(g), 1544.229(g). In all cases, even for arrests outside the ten-year period, the offense should be investigated to determine the disposition of the arrest. Because the date of conviction is the key in the 10-year determination, relying solely on the date of arrest does not necessarily guarantee that the offense is outside the 10-year period. For instance, an arrest may have occurred 10 ½ year ago, but because of the legal criminal justice process, the conviction could have been 9 years ago.

The investigation may involve simply asking the applicant to provide verifiable documentation of the outcome of the case. The credentialing authority may wish to investigate the matter on its own by contacting the arresting or prosecuting agency independently. In most cases, the Federal, state, or local court in the jurisdiction will have the information necessary to properly adjudicate the offense.

ADDITIONAL CRITERIA FOR PROHIBITING ACCESS TO SIDA – SUITABILITY DETERMINATIONS

In addition to the disqualifying offenses set forth in the CHRC statute and regulations, a credentialing authority may apply its own criteria in making a decision to grant or deny unescorted access authority. For instance, an individual's background check shows a 12-year old conviction for an offense that is listed in the statute as disqualifying. However, because the

⁷ In addition to firearms, knives, and explosives, the term weapon encompasses other items, including asps, nunchakus, brass knuckles, kubatons, throwing stars, stun guns, black jacks, and mace.

conviction is outside the 10-year limit of the statute, the individual is not automatically disqualified from receiving unescorted access authority. The credentialing authority, based on its own suitability determination, may consider the fact of the 12-year old conviction for purposes of deciding whether or not to grant unescorted access authority. Based upon the differences in certain state laws, credentialing authority decision makers should consult with their own legal counsel in making such determinations.

FURTHER ASSISTANCE

TSA is committed to working with airports and air carriers to continue to ensure that the statute and regulations are applied fairly and consistently bearing in mind that people's jobs are at stake but balanced against the goal of ensuring the security of the Nation's air transportation system. For further assistance, please contact the Field Counsel in your region or Stephen Brundage, an attorney in the Office of Chief Counsel at TSA Headquarters, email: Stephen.Brundage@dhs.gov. To request a formal interpretation of the CHRC statute and regulations, please send a written request for interpretation to:

The Office of Chief Counsel
Attn: Stephen Brundage
Transportation Security Administration
TSA Headquarters, West Building (TSA-2)
701 Army Navy Drive
Arlington, VA 22202-4220

State	Expungement/Set Aside Available to Convicted Person?	Does Expungement/Set Aside Nullify Conviction?
Alabama	No	N/A
Alaska	No	N/A
Arizona	Yes	No
Arkansas	Yes	No
California	Yes	No
Colorado	No	N/A
Connecticut	No	N/A
Delaware	No	N/A
District of Columbia	No	N/A
Florida	Yes	No
Georgia	No	N/A
Hawaii	No	N/A
Idaho	Yes	Yes - after successful completion of probation
Illinois	No	N/A
Indiana	No	N/A
Iowa	No	N/A
Kansas	Yes	No
Kentucky	Yes	Yes - for some misdemeanor convictions
Louisiana	Yes	No
Maine	No	N/A
Maryland	Yes	No
Massachusetts	Yes	No
Michigan	Yes	Yes
Minnesota	Yes	No
Mississippi	Yes	Yes
Missouri	No	N/A
Montana	Yes	Yes - for deferred imposition dismissal
Nebraska	Yes	No
Nevada	Yes	Yes - Sealing of conviction record for limited number of offenses
New Hampshire	Yes	Yes

New Jersey	Yes	No
New Mexico	No	N/A
New York	No	N/A
North Carolina	Yes	Yes - Limited to First Offense
North Dakota	Yes	No
Ohio	Yes	No
Oklahoma	Yes	Yes
Oregon	Yes	Yes
Pennsylvania	Yes	Yes
Puerto Rico	No	N/A
Rhode Island	Yes	No
South Carolina	Yes	Yes - Limited to First Offense
South Dakota	Yes	Yes - after successful completion of probation
Tennessee	Yes	Yes
Texas	No	N/A
U.S. Virgin Islands	Yes	Yes – Limited cases
Utah	Yes	No
Vermont	Yes	Yes - after successful completion of probation from deferred sentence
Virginia	No	N/A
Washington	No	N/A
West Virginia	No	N/A
Wisconsin	Yes	Yes - Limited to Misdemeanors
Wyoming	No	N/A

Shaded states have expungements/set-asides that can nullify a conviction.