

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Child and Family Services Agency
Office of General Counsel



MLA 07-03 (Criminal Offenses -
Suitability Determinations)
February 21, 2007

MEMORANDUM OF LEGAL ADVICE

Issue

What is the responsibility of the Child and Family Services Agency ("CFSA"), under Title II of D.C. Law 15-353, the Child and Youth, Safety and Health Omnibus Amendment Act of 2004, effective April 13, 2005 (the "Act") (D.C. Official Code § 4-1501.01 *et seq.*) (Supp. 2006), as amended on an emergency basis by Title II, § 204 of the Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007 (the "Emergency Act"), effective January 16, 2007 (D.C. Act 17-10),¹ when it receives information that a current employee has committed a criminal offense, or other derogatory information, from a credible source?

Conclusion

For the reasons stated below, we have concluded that under the Act, the CFSA is required to: 1) conduct a criminal background check of an employee when it receives credible information about a criminal offense or other derogatory information; and 2) based on the background check report, determine whether to take any administration action against the employee, up to and including removal.

General Provisions - Introduction

Under Title II, § 202(3), the Act established a criminal background check program that covers District government agencies that provide direct services to children or youth and private entities that contract with the District to provide direct services to children or youth, or for the benefit of children or youth, that affect the health, safety and welfare of children or youth. Title II does not, however, cover foster parents or grantees.

¹ Permanent legislation, the Omnibus Public Safety Amendment Act of 2006 (D.C. Act 16-482, 54 DCR 8610, 10/27/06), is pending and is slated to become law in April 2007. It contains the same language as D.C. Act 17-10, which expires April 16, 2007, and amended § 205(c)(5) of D.C. Law 15-353 (D.C. Official Code § 4-1501.05(c)(5)) and added a new section 205a. D.C. Act 17-10 and the pending permanent legislation excludes from the list of criminal offenses, theft, fraud, forgery, extortion, or blackmail, and trespass or injury to property, and specifically states that sexual offenses do not include sodomy between consenting adults. In addition, § 205a outlines factors for assessing information from a background check and requires that appeal notices be provided to individuals. Further, there is currently Emergency and Proposed Rulemaking (54 DCR 1049, 02/02/07) which addresses the emergency legislative amendments, as applicable to District government employees.

As a result, covered District government agencies and their contractors are required to conduct criminal background checks and investigations of certain individuals through the records systems of the U.S. Federal Bureau of Investigations and the D.C. Metropolitan Police Department. In addition, traffic records checks are required through the D.C. Department of Motor Vehicles, in the case of an employee or volunteer who has to drive a motor vehicle to transport children in the course of performing his or her duties. (Section 204 of the Act).

Under § 203(a) of the Act, covered agencies and contractors must conduct criminal background checks, and traffic records checks where applicable, of the following individuals who are in or are seeking positions with duties and responsibilities covered under the Act:

- Employees;
- unsupervised volunteers;
- applicants who are seeking paid employment; and
- applicants who wish to provide unsupervised voluntary services.

In addition, current employees and unsupervised volunteers are required to submit to periodic criminal background checks while in a covered position. However, individuals who are not in positions that bring them in direct contact with children or youth are not required to submit to criminal background checks. Likewise, supervised volunteers do not have to submit to a background check, but they may be required to submit to a traffic records check. (Section 203(b), (c), (g) of the Act).

Further, with regard to District government employees, the CFSA is a covered agency under the Act, as specified in Chapter 4, § 412.4 of the ensuing D.C. Personnel Regulations (2005) (“regulations”) and the current Emergency and Proposed Rulemaking (54 DCR 1049, 02/02/07) (“rules”). Moreover, given that the personnel authority for the CFSA is the Director of the agency, the CFSA has the authority to administer the programs under the Act. See, D.C. Official Code §§ 1-603.01(14), 1-603.01(17)(XX), 1-604.06(b)(17)), 4-1303.01a(a), 4-1303.03(a-1)(8)) (2001 and Supp. 2006).

Criminal Background Checks - Employees

At the beginning of the criminal background check program and prior to the CFSA conducting checks, an employee in a covered position has to be provided with certain notifications regarding the program and its procedures, as required under § 204 of the Act, § 205 of the Emergency Act, and § 412.21 of the rules. Subsequent to the program’s commencement (2005) and after initial criminal background checks have been conducted, employees occupying covered positions are thereafter subject to periodic criminal background checks within two years of the initial check and every two years thereafter (§ 203(g) of the Act; §§ 412.2-412.3 and 412.36-412.38 of the rules). Further, an employee who is detailed, temporarily promoted, or temporarily reassigned from a non-covered position to a covered position is subject to an initial criminal background check and periodic checks thereafter (§ 412.14(f) of the rules).

Prior to a criminal background check being conducted, under § 205 of the Emergency Act and § 412.21 of the rules, an employee has to sign an affirmation that he has not been convicted of a crime, has pleaded nolo contendere, is on probation before judgment or placement of a case upon

a stet docket, or has been found not guilty by reason of insanity, for any sexual offenses or intrafamily offenses in the District of Columbia or their equivalent in any other state or territory, or for any of the following felony offenses or their equivalent in another state or territory:

1. Murder, attempted murder, manslaughter, or arson;
2. Assault, assault with a dangerous weapon, mayhem, malicious disfigurement, or threats to do bodily harm;
3. Burglary;
4. Robbery;
5. Kidnapping;
6. Illegal use or possession of a firearm;
7. Sexual offenses, including indecent exposure; promoting, procuring, compelling, soliciting, or engaging in prostitution; corrupting minors (sexual relations with children); molesting; voyeurism; committing sex acts in public; incest; rape; sexual assault; sexual battery; or sexual abuse; but excluding sodomy between consenting adults;
8. Child abuse or cruelty to children; or
9. Unlawful distribution of or possession with intent to distribute a controlled substance.

In addition, each year, covered employees are required to sign affirmations regarding the commission of criminal offenses since the date of the most recent background check. They are also required to immediately inform their supervisors if any criminal activity occurs, i.e., arrests and convictions. (Section 412.36(1), (2) of the rules). Further, employees are required to undergo a criminal background check when the following circumstances occur (§ 412.37 of the rules):

1. Derogatory information about the employee, of a nature that will impact the employee's suitability to continue performing the duties of the covered position, is disclosed to the CFSA by a credible source or sources, or is independently discovered by the CFSA; or
2. Information about a criminal offense committed by the employee, such as the criminal offenses listed above, is disclosed to the CFSA by a credible source or sources, or is independently discovered by the CFSA.

Based on the outcome of the criminal background check, the CFSA may choose to terminate an employee. In the case of termination, the CFSA must adequately notify the employee who is entitled to obtain a copy of the criminal background check report and to challenge the accuracy and completeness of the report. (Section 205(6), (7) of the Act; §§ 412.21(c), (d), 412.29 of the rules).

Suitability Determinations – Employees

Employees of the CFSA are not only held to the requirements under the Act and § 412 of the regulations and rules, but as an employer, the District government has the authority to determine if employees and candidates for employment are suitable in efficiency, character, conduct, and reputation (§ 412.38 of the rules; see, also, generally, D.C. Official Code § 601.01 *et seq.* (2006);

and Chapter 4 of the regulations).² An employee's conduct is also governed by District rules of ethics and federal laws and regulations (see, D.C. Official Code § 618.01 *et seq.* (2006), and Chapter 18 of the regulations). Therefore, in considering any administrative action that may be taken against an employee in a covered position, the CFSA may consider such additional laws and regulations.

An employee who fails a criminal background check may be subject to administrative action up to and including removal, or reassignment to a non-covered position (§§ 412.38-412.39 of the rules; see, also, D.C. Official Code § 1-616.51 *et seq.* (2006 and Supp. 2006), and Chapter 16 of the regulations.). Further, an employee who intentionally misinforms or misleads the CFSA when completing the signed affirmation, or who fails to make the appropriate disclosures, is subject to administrative action up to and including removal (§ 412.38 of the rules).

In determining the type of administrative action to be taken, the CFSA has to consider factors and variables such as the type of criminal offenses a check reveals. Section 205a of the Emergency Act and §§ 412.24-412.25 of the rules provide that in assessing information obtained from a criminal background check, a disqualification or presumption against employment shall not be created unless it is determined that the individual poses a present danger to children or youth. In making this determination, the following factors are to be considered:

1. The specific duties and responsibilities necessarily related to the employment;
2. The bearing, if any, the criminal offense for which the person was previously convicted will have on his or her fitness or ability to perform one or more of such duties or responsibilities;
3. The time which has elapsed since the occurrence of the criminal offense;
4. The age of the person at the time of the occurrence of the criminal offense;
5. The frequency and seriousness of the criminal offense;
6. Any information produced by the person, or produced on his or her behalf, regarding his or her rehabilitation and good conduct since the occurrence of the criminal offense; and
7. The public policy that it is beneficial generally for ex-offenders to obtain employment.

However, under § 205a of the Emergency Act, the CFSA shall not employ an individual who has been convicted of, has pleaded *nolo contendere* to, is on probation before judgment or placement of a case on the stet docket because of, or has been found not guilty by reason of insanity for any sexual offenses involving a minor. Therefore, employees who have any such criminal record must be terminated and shall not be reassigned (§§ 412.38-412.39 of the rules).

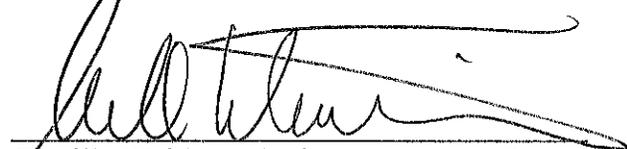
Accordingly, as stated above, when the CFSA receives information that a current employee in a covered position has committed a criminal offense, the agency must conduct a criminal background check and determine whether to take administrative action. Removal is required when a background check reveals that the employee has been convicted of, has pleaded *nolo contendere* to, is on probation before judgment or placement of a case on the stet docket because of, or has been found not guilty by reason of insanity for any sexual offenses involving a minor.

² Exclusive of the Act and the ensuing regulations and rules, in some cases, negotiated agreements take precedence over some of the additional statutory and regulatory provisions mentioned here (§ 403.1 of the regulations).

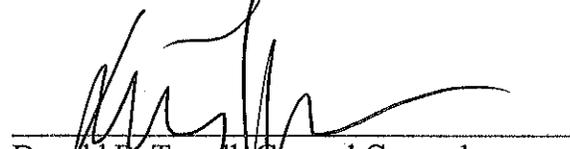
Authorities:

1. Title II of D.C. Law 15-353, the Child and Youth, Safety and Health Omnibus Amendment Act of 2004, effective April 13, 2005 (D.C. Official Code § 4-1501.01 *et seq.*) (Supp. 2006); and Title II, § 204 of the Omnibus Public Safety Congressional Review Emergency Amendment Act of 2007, effective January 16, 2007 (D.C. Act 17-10).
2. D.C. Official Code § 1-616.51 *et seq.* (2006 & Supp. 2006).
3. D.C. Official Code § 1-618.01 *et seq.* (2006 & Supp. 2006).
4. Chapter 4 of the D.C. Personnel Regulations (Organization for Personnel Management/ Suitability); Chapter 4, § 412 of the Emergency and Proposed Rulemaking (54 DCR 1049, 02/02/07) .
5. Chapter 16 of the D.C. Personnel Regulations (General Discipline and Grievances).
6. Chapter 18 of the D.C. Personnel Regulations (Employee Conduct).

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