

MEMORANDUM OF LAW

DATE: December 15, 1992

TO: Larry Gardner, Labor Relations Manager

FROM: City Attorney

SUBJECT: Criminal Convictions of Employees

Recently the State Legislature passed Assembly Bill 2986. This bill requires that individuals who work with and supervise children, and who are employed by public entities, submit to fingerprinting. Pursuant to the statute, the prints are forwarded to the Department of Justice ("DOJ") and criminal histories of the applicants are returned to the public entity. You have asked for parameters of which criminal convictions may be a bar to employment.

Preliminarily, the Civil Service Rules provide some guidelines as to what criminal activity may be a bar to City employment. The rules grant broad discretion to the Personnel Director. Specifically, Rule II Section 6(e) states the Personnel Director may disqualify an applicant if he or she "has been guilty of any crime which would adversely affect job performance or public safety." Additionally, Rule XI section 3(g) provides that an employee may be removed or suspended from employment if the employee "has been convicted of a criminal offense involving moral turpitude." The new state law should not be construed to limit powers granted to the Personnel Director or the Civil Service Commission but rather to work in conjunction with existing rules to achieve the best possible City work force. The following should provide the necessary guidance for enforcement of the new legislation.

Unfortunately, in adopting the bill, the Legislature provided no insight as to what criminal history it deems unacceptable in an individual who will be working with children. The courts, however, have offered some guidelines regarding actions which may bar an individual from public employment. In *Morrison v. State Board of Education*, 1 Cal. 3d 214, 234 (1969), the court said: "No person can be denied government employment because of factors unconnected with the responsibilities of that employment." In *Morrison*, the court went on to say: "an individual can be removed from the teaching profession only upon

a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher." Id. at 235. The court gave further insight about the necessary nexus between one's actions and one's employment when it said:

Discipline or employment . . . must be based on more than failure of good behavior; it must be of such a nature as to reflect upon his job. That is, it must bear some rational relationship to his employment and must be of such character that it can easily result in the impairment or disruption of the public service.

Warren v. State Personnel Bd., 94 Cal. App. 3d 95, 104 (1979).

Using the guidelines of the courts, it is clear that criminal convictions, if they are to be utilized as a selection criteria, must be related to the job descriptions if they are to be a bar to employment. It is equally clear that there must be a danger of some definable harm. Since the employees in question will be working with children, I have looked to the California Education Code to provide some parameters.

Education Code section 44346 provides that an individual may be denied certification (for teaching) for the following reasons. Specifically, that the individual:

- (1) Has been determined to be a sexual psychopath under the provisions of Article 1 (commencing with Section 6300), Chapter 2, Part 2, Division 6 of the Welfare and Institutions Code or under similar provisions of law of any other state.
- (2) Has been convicted of any sex offense as defined in Section 44010.
- (3) Has been convicted of a controlled substance offense as defined in Section 44011.

However, the statute goes on to say:

- (b) Notwithstanding paragraphs (2) and (3) of subdivision (a), no person shall be denied a credential solely on the basis that he or she has been convicted of a crime specified in paragraphs (2) and (3) of subdivision (a) if the person has obtained a

certificate of rehabilitation under Section 4852.01 and following of the Penal Code, and if his or her probation has been terminated and the information or accusation has been dismissed pursuant to Section 1203.4 of the Penal Code.

- (c) Notwithstanding paragraph (3) of subdivision (a) or subdivision (b), the commission may issue a credential to a person convicted of a controlled substance offense as defined in Section 44011 if the commission determines from the evidence presented that the person has been rehabilitated for at least five years, or has received a certificate of rehabilitation and pardon pursuant to Section 4852.01 of the Penal Code, or if the accusation or information against the person has been dismissed and he or she has been released from all disabilities and penalties resulting from the offense pursuant to Section 1203.4 of the Penal Code.

The specific sex offenses found in Education Code section 44010 are as follows:

- (a) Any offense defined in Section 261.5, Statutory rape 266, Procurement 267, Abduction of minor for prostitution 285, Incest 286, Sodomy with minor 288, Lewd or lascivious acts involving children 288a, Oral copulation with minor 647.6, Annoying or molesting children or former Section 647a, subdivision 1, 2, 3, or 4 of Section 261, Rape or subdivision (a) or (d) of Section 647 Disorderly conduct; Restrictions on probation of the Penal Code.
- (b) Any offense defined in former subdivision 5 of former Section 647 of the Penal Code repealed by Chapter 560 of the Statutes of 1961, or any offense defined in former subdivision

2 of former Section 311 of the Penal Code repealed by Chapter 2147 of the Statutes of 1961, if the offense defined in such sections was committed prior to September 15, 1961, to the same extent that such an offense committed prior to such date was a sex offense for the purposes of this section prior to September 15, 1961.

- (c) Any offense defined in Section 314 of the Penal Code committed on or after September 15, 1961.
- (d) Any offense defined in former subdivision 1 of former Section 311 of the Penal Code repealed by Chapter 2147 of the Statutes of 1961 committed on or after September 7, 1955, and prior to September 15, 1961.
- (e) Any offense involving lewd and lascivious conduct under Section 272 of the Penal Code committed on or after September 15, 1961.
- (f) Any offense involving lewd and lascivious conduct under former Section 702 of the Welfare and Institutions Code repealed by Chapter 1616 of the Statutes of 1961, if such offense was committed prior to September 15, 1961, to the same extent that such an offense committed prior to such date was a sex offense for the purposes of this section prior to September 15, 1961.
- (g) Any offense defined in Section 286 or 288a of the Penal Code prior to the effective date of the amendment of either section enacted at the 1975-76 Regular Session of the Legislature committed prior to the effective date of the amendment.
- (h) Any attempt to commit any of the above-mentioned offenses.
- (i) Any offense committed or attempted in any other state which,

if committed or attempted in this state, would have been punishable as one or more of the above-mentioned offenses.

The specific controlled substance offenses listed in Education Code section 44011 are:

- (a) Any offense in Sections 11350  
Unlawful possession 11351 Unlawful possession for sale 11351.5  
Possession of cocaine base for sale 11352 Unlawful transportation, sale, administration, etc. 11352.5 Fine in addition to imprisonment 11353 Inducement of minor's violation by person 18 years of age or over 11353.1 Enhancement of sentence 11353.5 Preparation or distribution in specified places 11353.6 Citation of section; Violation on or near elementary or secondary school 11353.7 Preparation for sale, sale or distribution of controlled substance to minor in public park 11354 Inducement of minor's violation by person under age of 18 11355 Unlawful sale or transportation pursuant to agreement, inclusive, 11366, Opening or maintaining place for trafficking in controlled substance 11368, Prescription for narcotic drug 11377 Possession to 11382, Sale, transportation, or distribution of controlled substance pursuant to agreement inclusive, and 11550 Prohibited using, or being under influence of, controlled substance; Misdemeanor and punishment; Probation of the Health and Safety Code.
- (b) Any offense committed or attempted in any other state or against the laws of the United States which, if committed or attempted in this state, would have been punished as one or more of the above-mentioned

offenses.

- (c) Any offense committed under former Sections 11500 to 11503, inclusive, 11557, 11715, and 11721 of the Health and Safety Code.

Any criminal guidelines promulgated by the City should include, but not be limited to, the above crimes. However, each applicant should be evaluated on an individual basis and there must be a showing of the requisite nexus to the job description. The caveat regarding rehabilitation should be adhered to as former addicts who can show proof of rehabilitation may be protected by the Americans with Disabilities Act.

If you have any further questions, please contact me.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall

Deputy City Attorney

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cc Kent Lewis

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