



NEW JERSEY LAW REVISION COMMISSION

Revised Tentative Report Relating to the Collateral Consequences of Conviction – Part I: Rehabilitated Convicted Offenders Act in N.J.S. 2A:168A-1 to -16

April 11, 2016

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **June 30, 2016**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

Vito J. Petitti, Counsel
New Jersey Law Revision Commission
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07102
973-648-4575
(Fax) 973-648-3123
Email: lct@njlrc.org
Web site: <http://www.njlrc.org>

Executive Summary

This Report recommends revisions to sections of the Rehabilitated Convicted Offenders Act (“RCOA” or “the Act”), N.J.S. 2A:168A-1 to -16. Enacted in 1968, the Act was most recently amended in 2007. Originally brought to the Commission’s attention by *In re D.H.*,¹ this project was later expanded by the Commission to include a review of the collateral consequences of criminal convictions generally. The focus of this Report is to address the current bifurcated nature of the Act since the component parts do not interact as smoothly as they could, and to resolve issues of duplication and inconsistency in the statutory language.

Project Overview

The courts that considered *In re D.H.* reviewed the question of whether an expungement erases a conviction that otherwise bars a former public official from returning to her job under N.J.S. 2C:51-2. Both the trial court and the Appellate Division held that an expungement does, since it operates to make “the arrest, conviction and any proceedings related thereto ... deemed not to have occurred”—“[u]nless otherwise provided by law.”² The New Jersey Supreme Court, however, disagreed, holding that the phrase, “[u]nless otherwise provided by law,” incorporates all other statutes, including the language of N.J.S. 2C:51-2d. Justice Long dissented, stating that the phrase should be interpreted as referring only to exceptions contained within the same chapter of Title 2C, including the mandatory disclosure of expunged records to a parole board (N.J.S. 2C:52-22) or to a judge in conjunction with setting bail or sentencing (N.J.S. 2C:52-21).³

After the Commission began work in this area of the law, the project was divided into three parts. The first part involves proposed modifications to the language of the RCOA in order to address the current “bifurcated” nature of the statute. Although the original provisions of the Act and the later revisions constitute a single Act, the component parts do not interact as smoothly as they could and additional revisions could consolidate and improve the interplay between the sections.

The second part of the project is the identification and classification of situations in which the issuance or denial of a license, employment, or other benefit, is based a determination of “moral turpitude” or “good moral character.” It appears that it could be useful to revise the statutory language so that provisions that concern similar situations are interpreted and applied in a consistent manner.

The third part of this project involves an analysis of the statutory language and the cases that concern the forfeiture of public office. This part of the project will require a determination about whether it is appropriate to distinguish between different types of public employees and different types of offenses, and to treat them differently for purposes of forfeiture.

¹ 204 N.J. 7 (2010).

² Effect of expungement, N.J.S. 2C:52-27(1981).

³ *D.H.*, 204 N.J. at 29.

National and State Resources

Interest in the collateral consequences of conviction is not limited to New Jersey. The Criminal Justice Section of the American Bar Association examined the collateral consequences of conviction in each of the states.⁴ It identified more than 1,000 New Jersey statutes and regulations containing sanctions ancillary to a criminal conviction.⁵ In addition, since the Commission began work in this area, the ABA's Criminal Justice Section constructed an interactive website – the National Inventory of the Collateral Consequences of Conviction (“NICCC”) – which contains “each jurisdiction’s collateral consequences.”⁶

The NICCC website explains, in its “Project Description” section, that

[s]ome collateral consequences serve an important and legitimate public safety or regulatory function, such as keeping firearms out of the hands of violent offenders, protecting children or the elderly from persons with a history of abuse, or barring people convicted of fraud from positions of public trust. Others are directly related to the particular crime, such as registration requirements for sex offenders, driver’s license restrictions for those convicted of serious traffic offenses, or debarment of those convicted of procurement fraud. But many others apply across the board to people convicted of crimes, without regard to any relationship between crime and consequence, and frequently without consideration of how long ago the crime occurred or what the individual has managed to accomplish since. Many consist of nothing more than a direction to conduct a criminal background check, and an unspoken warning that it is safest to reject anyone with a record. When convicted persons are limited in their ability to support themselves and to participate in the political process, this has both economic and public safety implications. When society is discouraged from recognizing and rewarding genuine rehabilitation, this has moral and social implications as well. When particular restrictions have no apparent regulatory rationale, and cannot be avoided or mitigated, they function as additional punishment, though without due process protections.⁷

Similar to the work done by the ABA’s Criminal Justice Section, the NICCC is an interactive, searchable database which identifies more than 1,000 collateral consequences of conviction for New Jersey. The database provides three methods by which an individual may choose to search: consequence category (e.g. “Business license and other property rights,” “Education,” “Employment,” etc.), consequence type (e.g. “Mandatory/Automatic,”

⁴ <http://isrweb.isr.temple.edu/projects/accproject/pages/GetStateRecords.cfm?State=NJ>

⁵ Court Security Improvement Act of 2007, *Pub. L. No.* 110-177, 110th Cong. § 510(d) (2008).

⁶ National Inventory of the Collateral Consequences of Conviction, <http://abacollateralconsequences.org/description/> (last visited Nov. 6, 2014).

⁷ National Inventory of the Collateral Consequences of Conviction, <http://abacollateralconsequences.org/description/> (last visited Nov. 7, 2014).

Discretionary,” etc.), and offense category (e.g. “Any offense,” “Any felony,” etc., “Weapons offenses,” “Sex offenses,” etc.).

Collateral Consequences of Criminal Convictions: Law, Policy and Practice written by Margaret Colgate Love, Jenny Roberts, and Cecelia Klingele was published in early 2013 to serve as “a comprehensive resource for practicing civil and criminal lawyers, judges, and policymakers on the legal restrictions and penalties resulting from a criminal conviction over and above the court-imposed sentence.”⁸ A 2014 New Jersey-specific practice guide, *New Jersey Collateral Consequences*, was co-authored by John C. Lore, III, Clinical Professor and Director of Trial Advocacy at Rutgers School of Law – Camden.⁹ This “comprehensive resource” was described as a first for New Jersey,¹⁰ and the authors explained that “statutes have been located, analyzed, and summarized to include relevant information relating to the particular consequence at issue as well as any opportunities for rehabilitation that might exist under that particular statute.”¹¹

Rehabilitated Convicted Offenders Act (“RCOA”) Background

The Commission’s work in this area of the law included a review of the collateral consequences of criminal convictions imposed by state law. For the class of statutes which merely authorize – but do not require – a licensing agency to impose a collateral consequence, the Commission recognized that it might be appropriate to take action so that such sanctions are applied only after considering whether past offenses are relevant to the employment or benefit at issue. The Commission turned to the Rehabilitated Convicted Offenders Act. When the RCOA was reviewed, the Commission discovered that despite its laudable goals and the 2007 amendment providing a formal procedure for obtaining a certificate of rehabilitation, challenges associated with the interpretation and application of the Act remain.

In re Schmidt,¹² arguably excluded from the RCOA’s purview any statutory scheme that evidences “special treatment” by the Legislature and exempted the Division of Alcoholic Beverage Control (“ABC”) on the basis of its status as a law enforcement agency, under N.J.S. 2A:168A-6. *Schmidt* arose from a suspension of wholesale licenses by the ABC “because of previous convictions of licensee’s corporate president[,]” and a denial of an application by another corporation for a transportation permit since “its officers and stock holders were merely serving as a ‘front’ for [the] president[.]”¹³ C. Schmidt & Sons, Inc. and C. Schmidt & Sons, Inc. of New Jersey (collectively “Schmidt”) appealed the ABC’s suspension and denial.

⁸ National Association of Criminal Defense Lawyers, <http://www.nacdl.org/News.aspx?id=26526> (last visited Nov. 7, 2014).

⁹ Cathy K. Donovan, *Law Professor Co-authors Book on New Jersey Collateral Consequences, a First for the State*, Rutgers Today (Nov. 6, 2014, 1:41 PM), <http://news.rutgers.edu/news-release/law-professor-co-authors-book-new-jersey-collateral-consequences-first-state/20140225#.VFvEaPnF9qV>

¹⁰ *Id.*

¹¹ *Id.*

¹² 79 N.J. 344 (1979).

¹³ *Id.* at 344.

The Appellate Division held that due to the Act's "stated purpose" and broad nature, "the ABC in its licensing activities is subject to the RCOA and must comply with the requirements of that act."¹⁴ However, it also held that the ABC was not exempt from the Act pursuant to N.J.S. 2A:168-6 because "*the clear thrust of the statutory exception goes to law enforcement activities and the persons who perform them*, and does not apply to the licensing functions of those agencies."¹⁵

The Supreme Court of New Jersey affirmed in part but reversed the Appellate Division's "judgment which held that the ABC, in its licensing activities, is subject to the RCOA."¹⁶ "The Division of Alcoholic Beverage Control is *unique among licensing agencies* in that it has broad law enforcement powers."¹⁷ In addition, it found that the Alcoholic Beverage Control Act contained provisions that "disqualif[ed] a person convicted of a crime involving moral turpitude (or his privies) from licensure[.]" but the act also allowed the Director to "approve the employment of such a person by a licensee," and "enter an order removing the statutory disqualification" pursuant to certain statutory conditions.¹⁸ Based on these findings, the Supreme Court viewed the aforementioned provisions as *special treatment* (and later as savings provisions, *infra*) by the Legislature that exempted the ABC from the RCOA's scope. The Supreme Court also noted that the ABC has been treated as unique since "from the earliest [] history of our State the sale of intoxicating liquor has been dealt with by the Legislature in an exceptional way."¹⁹ Thus, the Supreme Court held that the ABC is exempt from the RCOA due to its special legislative treatment and broad law enforcement power.

Maietta v. N.J. Racing Comm'n,²⁰ later held that, absent "'savings' provisions" in an agency's governing statutes, the RCOA was applicable to the agency.²¹ *Maietta* involved an applicant ("Maietta") appealing a decision of the New Jersey Racing Commission ("Racing Commission") to deny him a groom's license on the basis of his drug-related criminal record. The Appellate Division reversed the Racing Commission's denial, holding that the RCOA "applies to the [Racing] Commission's licensing function, and that under the circumstances the [Racing] Commission erred in denying licensure to respondent after having adopted the findings of an Administrative Law Judge[.]"²² The Supreme Court of New Jersey affirmed and "place[d] considerable reliance on the reasoning of ... the Appellate Division[.]"²³

In affirming the Appellate Division, the Supreme Court distinguished "between the statutory schemes affecting the [Division of Alcoholic Beverage Control ("ABC")] and the [Racing] Commission that require dissimilar treatment in respect of the RCOA[.]" since the Racing Commission argued that "it should be exempt from the RCOA for the same reasons that

¹⁴ *Id.* at 351.

¹⁵ *Ibid* (emphasis added).

¹⁶ *Id.* at 352.

¹⁷ *Id.* at 354 (emphasis added); *see ibid.* (listing the authority of the ABC's Director, deputies, inspectors and investigators.)

¹⁸ *Id.* at 353-54.

¹⁹ *Id.* at 353 (citing *Blanck v. Mayor and Borough Council of Magnolia*, 38 N.J. 484 (1962)).

²⁰ 93 N.J. 1 (1983).

²¹ *Id.* at 8.

²² *Id.* at 3.

²³ *Ibid.*

applied to the ABC.”²⁴ The ABC’s governing statute, however, provided “savings provisions that cut back on the apparent absolute authority of the director ... [and] remove the statutory disqualification in certain instances” thus serving “the same purpose as the RCOA.”²⁵ Since the Racing Commission’s governing statute does not contain similar provisions, the Court “[held] that the [Racing] Commission is subject to the provisions of the RCOA.”²⁶

The Racing Commission also argued that “it should be considered a ‘law enforcement agency,’” exempting it from the scope of the RCOA like the ABC, *supra*.²⁷ The Supreme Court distinguished between the Racing Commission’s law enforcement powers and the ABC’s, following the findings in *Schmidt* that the statutory provisions governing the ABC grant it broad powers, whereas the statutes governing the Racing Commission do not; and the Racing Commission is required to report to and cooperate with the State police under specified circumstances.²⁸

Other difficulties in applying the RCOA arose from the lack of a statutory standard for weighing a past offense apparently relevant to licensure when an applicant presents a certificate of rehabilitation.²⁹ Courts upholding the refusals of agencies to issue licenses have consequently done so in a manner that appears to undermine the very purpose of a certificate of rehabilitation: only the *effect* of a conviction is removed by the certificate, whereas the underlying blemish of inappropriate “conduct” remains.³⁰ *Storcella v. Dep’t of Treasury*,³¹ however, provides a different interpretation of the relevant provision. The Court in that case held that N.J.S. 2A:168A-3 does not preclude a licensing authority from contemplating a past conviction in the event of an executive pardon; it merely prohibits the entity from *automatically* “disqualifying or discriminating against” an applicant on that basis.³² It appears that the current statutory language provides inadequate guidance for a licensing agency in such circumstances.

Legislative Developments in New Jersey

As a part of its work in this area, the Commission also reviewed legislation introduced or enacted in the 2012-13, 2014-15, and 2016-17 legislative sessions. Of the 23 potentially relevant

²⁴ *Id.* at 7.

²⁵ *Id.* at 7-8.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Id.* at 8-10.

²⁹ See N.J.S. 2A:168A-3.

³⁰ See *Hyland v. Kehayas*, 157 N.J. Super. 258, 262 (App. Div. 1978) (“[R]espondent’s argument overlooks the fact that the action under review does not involve disqualification or discrimination because of a conviction of crime. The determination by the board consisted of a revocation for misconduct, a standard which does not depend upon a criminal conviction. Hence the provisions of the [RCOA] are inapplicable notwithstanding that the underlying misconduct may have also given rise to a criminal conviction.”); see also *Bevacqua v. Renna*, 213 N.J. Super. 554, 561-62 (App. Div. 1986) (“A person whose license has been revoked by a licensing authority for violation of its regulations, whether evidenced by a conviction of an offense or established by other means, is not simply a convicted offender. Rather, such a person has violated the trust reposed in him by the licensing authority and thereby demonstrated a lack of the professional responsibility and moral qualities required for continued licensure.”).

³¹ 296 N.J. Super. 238 (App. Div. 1997).

³² *Id.* at 243.

bills reviewed, three appeared to be the most significant, although none have a direct impact on the Commission's work. Those three are: (1) A1999 "'The Opportunity to Compete Act,' establish[ing] certain employment rights for persons with criminal record,"³³; (2) A830, which "[p]rohibits public and private employers from discriminating against ex-convicts"³⁴; and (3) A1864, which "[a]ddresses various concerns affecting post-release employment."³⁵ The remaining bills either established criminal background checks for certain professions or established certain crimes as grounds for disqualification.

A1999 ("The Opportunity to Compete Act" or "TOCA") was enacted as P.L.2014, c.32 on August 11, 2014. TOCA recognizes the obstacles and barriers to employment faced by those with a criminal history, and provides that employers may not require an applicant for employment – during the *initial employment application process* – to complete any application that inquires about the applicant's criminal history or to answer any questions about the applicant's criminal history. TOCA pertains to both public and private employers meeting the definition of "employer" contained in the Act.³⁶

A830 was introduced and referred to committee during the 2014-15 legislative session (and was introduced the previous session as well), but there have been no other developments to this time. The goal of the bill, as expressed in the Sponsor's Statement, was to "prohibit all public and private employers from discriminating against ex-convicts. Public and private employers would be prohibited from denying a person a license or employment because the person has previously been convicted of a criminal offense or because the person has been determined to lack "good moral character" based on a previous conviction." A830 appeared to be designed to work in conjunction with the RCOA since it directed employers to consider a certificate issued under section 2A:168A-7, et seq.

A1864 was introduced and referred to committee during the 2016-17 legislative session, i.e., the legislative session at time of this Report's publication (and was introduced during the two previous sessions as well), but there have been no other developments to this time. A1864 deals with multiple areas of the statute and, as explained in the Sponsor's Statement, it provides that: (1) a person whose driver's license had been suspended for certain motor vehicle violations would be allowed to apply for a restricted use license; (2) the Chief Administrator of the Motor Vehicle Commission has discretion in deciding whether a person's license should be suspended for an out-of-state drug conviction; (3) a potential employee may affirmatively demonstrate

³³ A1999, 216th Leg., Reg. Sess. (N.J. 2014).

³⁴ A830, 216th Leg., Reg. Sess. (N.J. 2014).

³⁵ A1864, 217th Leg., Reg. Sess. (N.J. 2016).

³⁶ N.J.S. 34:6B-14. TOCA also provides, that

[n]othing set forth in this section shall be construed to prohibit an employer from requiring an applicant for employment to complete an employment application that makes any inquiries regarding an applicant's criminal record after the initial employment application process has concluded or from making any oral or written inquiries regarding an applicant's criminal record after the initial employment application process has concluded. The provisions of this section shall not preclude an employer from refusing to hire an applicant for employment based upon the applicant's criminal record, unless the criminal record or relevant portion thereof has been expunged or erased through executive pardon, provided that such refusal is consistent with other applicable laws, rules and regulations.

rehabilitation when seeking employment at an airport; (4) an alcoholic beverage licensee may only use the results of a criminal history record background check as a factor in determining whether a person is qualified to be employed in the establishment; (5) State, county or municipal employers are prohibited from requiring a person to disclose criminal convictions on an application for employment; (6) all public and private employers are prohibited from discriminating against ex-convicts and provide for the Commission on Civil Rights to enforce the provisions of this bill and those employers would be prohibited from denying a person a license or employment because the person has previously been convicted of a criminal offense or because the person has been determined to lack “good moral character” based on a previous conviction. Like A830, A1864 appears to be designed to work in conjunction with the RCOA since it also refers to a certificate of rehabilitation.

The introduction of a number of bills addressing the impact of criminal convictions suggests an ongoing legislative interest in the issues relevant to the Commission’s work.

Other Jurisdictions

The Commission’s work in this area of the law also included a review of the law in other states, the District of Columbia (“D.C.”), and Puerto Rico, in an effort to identify provisions similar in type to the RCOA. It appears that only 15 jurisdictions have RCOA-like provisions,³⁷ the fundamental goals of which are to enable former offenders to return to the workforce and society as contributing citizens. No consistent treatment of the issue among the states was noted.

Although most of the jurisdictions reviewed prohibit hiring entities from disqualifying or discriminating against an individual based solely or in part on their criminal history, only two in addition to the RCOA allow an individual to obtain a certificate of rehabilitation.³⁸ The provisions in three other jurisdictions do not include the issuance of a certificate of rehabilitation, but they do establish programs designed to reintegrate former convicted offenders into society.³⁹

Not all of the jurisdictions establish prima facie evidence of rehabilitation. Eight include provisions doing so, but what constitutes prima facie evidence varies from jurisdiction to jurisdiction. Jurisdictions that do not identify prima facie evidence of rehabilitation have either nothing in its place, give discretion to the entity in making a determination of rehabilitation,⁴⁰ or allow the applicant to rebut evidence opposing his or her claim of rehabilitation.⁴¹

Finally, not every jurisdiction provides the entities to which its provisions apply with a method of determining whether the former offender’s conviction(s) relate adversely or directly to the position applied for. Eight jurisdictions provide such a method but the methods vary by jurisdiction. The RCOA, for example, contains a list of factors that licensing authorities must use

³⁷ The fifteen states include Arkansas, Arizona, California, Colorado, Connecticut, Kentucky, Louisiana, Michigan, Minnesota, Montana, New Mexico, New York, Pennsylvania, Tennessee, Texas, Virginia, and the District of Columbia.

³⁸ See Ann. Cal. Penal Code §4852 and McKinney’s Correction Law Ch. 43, Art. 23.

³⁹ These jurisdictions include Louisiana, Texas, and Virginia.

⁴⁰ Kentucky

⁴¹ Michigan

when determining a conviction relates adversely to the position applied for. By contrast, Arkansas' provision only provides that "in determining eligibility under this section, a board, commission, department, or an agency may take into consideration conviction of certain crimes that have not been annulled, expunged, or pardoned," given that "such convictions shall not operate as an automatic bar to registration, certification, or licensing for any trade, profession, or occupation."⁴²

Proposed Changes

The Appendix that follows contains the proposed revisions to the RCOA. Not every aspect of the RCOA is proposed for revision. No substantive changes are proposed to the following sections: N.J.S. 2A:168A-1, N.J.S. 2A:168A-5, N.J.S. 2A:168A-8, N.J.S. 2A:168A-10, N.J.S. 2A:168A-11, N.J.S. 2A:168A-15, and N.J.S. 2A:168A-16.

One general but non-substantive change from the current RCOA is the proposal for a recodification. Since a number of sections were relocated or deleted, the cleanest solution seemed to be to recodify the revised provisions as 2A:168B-x, rather than 2A:168A-x. The specific and substantive proposals are described below.

⁴² A.C.A. §§ 17-1-103(b)(1)(A)-(b)(1)(B) (2005).

Appendix

The definitions contained in the Act have been proposed for consolidation and subsections have been added to the “Definitions” section (N.J.S. 2A:168B-2). The definition of “licensing authority” was taken from N.J.S. 2A:168A-2 and the definitions of “public employment”, “qualified offender” and “supervising authority” were moved from N.J.S. 2A:168A-7. Subsection a. of N.J.S. 2A:168B-2, which includes a definition of “criminal conviction” is new and it was added for the sake of consistency throughout the Act. Language making reference to the violation of a municipal ordinance has been tentatively included in subsection a. in the interest of obtaining feedback, but it is not clear if that language should remain.

Changes to subsections c.(2)(A) and (B) reflect the effort to modify the statutory language to distinguish law enforcement activities from the licensing functions of various agencies. Since the phrase “law enforcement officer” is undefined in the statute, a reference to N.J.S. 43:15A-97, which contains a definition of the term, has been included for clarity and in an effort to solicit comment regarding the need for a definition of the term as well as the scope of the definition chosen. That broad and inclusive provision defines “law enforcement officer” as:

any permanent and full-time employee of the State of New Jersey holding one of the following titles: motor vehicles officer, motor vehicles sergeant, motor vehicles lieutenant, motor vehicles captain, assistant chief, bureau of enforcement, and chief, bureau of enforcement in the Division of Motor Vehicles, and highway patrol officer, sergeant highway patrol bureau, lieutenant highway patrol bureau, captain highway patrol bureau, assistant chief highway patrol bureau, chief highway patrol bureau in the Division of State Police, and inspector, investigator, and administrative inspector in the Division of Alcoholic Beverage Control, and inspector recruit alcoholic beverage control, inspector alcoholic beverage control, senior inspector alcoholic beverage control, principal inspector alcoholic beverage control, supervising inspector alcoholic beverage control in the Division of State Police, and conservation officer, assistant district conservation officer and district conservation officer in the Division of Fish and Game, and assistant chief marine police and senior marine patrolman in the Division of Resource Development, and marine police officer, senior marine police officer, principal marine police officer in the Division of State Police, and inspector, officer, senior inspector, and principal inspector in the Division of Shell Fisheries, any permanent and full-time active county detective, lieutenant of county detectives, captain of county detectives, chief of county detectives, and county investigator in the offices of the county prosecutors, and sheriff's officer, sergeant sheriff's officer, lieutenant sheriff's officer, captain sheriff's officer, chief sheriff's officer, and sheriff's investigator in the offices of the county sheriffs and any patrolman or other police

officer of the Board of Commissioners of the Palisades Interstate Park appointed pursuant to R.S. 32:14-21.⁴³

Retaining the specific exclusion for “corrections officer” in the definition of “employment” may not be necessary since the proposed reference to the definition of “law enforcement officer” includes corrections officers as well. In subsection d., defining “qualified offender,” the sentence establishing what constitutes a conviction has been divided into subsections for ease of review.

Proposed N.J.S. 2A:168B-3 (N.J.S. 2A:168A-2) has been renamed “Application of Act” and subsections have been added for ease of review. Subsection a. seeks to address an issue that first arose in 1979, when the Supreme Court removed from the Act’s purview any statutory scheme that evinces “special treatment” by the Legislature.⁴⁴ This holding was later narrowed to exempt only licensing authorities whose governing statutes feature “savings provisions.” “Savings provisions” are clauses that “serve the same purpose as the RCOA” by providing mechanisms to remove “statutory disqualification[s]” to employment.⁴⁵ To this time, however, the case law has not distinguished between “savings provisions” that are equivalent to the RCOA and those that have little remedial effect.⁴⁶

Subsection b. attempts to address inconsistencies resulting from the RCOA’s lack of guidance to licensing authorities that consider the applications of persons who possess certificates of rehabilitation but whose convictions directly and adversely relate to the occupation, trade, vocation, profession, or business at issue. It is intended to address those cases in which a certificate of rehabilitation is said to remove the effect of a conviction, but not the underlying blemish of inappropriate “conduct” that gave rise to that conviction.⁴⁷

Subsection e. is the current 2A:168A-6, but was modified in an effort to clarify that the law enforcement exemption only extends to an agency’s employment of law enforcement officers. The reasoning is based on that employed by Judge Pressler in *In re Schmidt*, which

⁴³ N.J.S. § 43:15A-97 (1985).

⁴⁴ See *In re Schmidt*, 79 N.J. 344, 354 (1979).

⁴⁵ *Maietta*, 93 N.J. at 8 (1983).

⁴⁶ *Id.*

⁴⁷ See, e.g., *Hyland v. Kehayas*, 157 N.J. Super. 258, 262 (App. Div. 1978) (“[R]espondent’s argument overlooks the fact that the action under review does not involve disqualification or discrimination because of a conviction of crime. The determination by the board consisted of a revocation for misconduct, a standard which does not depend upon a criminal conviction. Hence the provisions of the [RCOA] are inapplicable notwithstanding that the underlying misconduct may have also given rise to a criminal conviction.”). See also *Bevacqua v. Renna*, 213 N.J. Super. 554, 561-62 (App. Div. 1986) (“A person whose license has been revoked by a licensing authority for violation of its regulations, whether evidenced by a conviction of an offense or established by other means, is not simply a convicted offender. Rather, such a person has violated the trust reposed in him by the licensing authority and thereby demonstrated a lack of the professional responsibility and moral qualities required for continued licensure.”); *Storcella v. Dep’t of Treasury*, 296 N.J. Super. 238, 243 (App. Div. 1997) (holding that N.J.S. 2A:168A-3 does not preclude a licensing authority from contemplating a past conviction in the event of an executive pardon; it merely prohibits the entity from automatically “disqualifying or discriminating against” an applicant on that basis).

conceptually separates the licensing function of a multi-purpose agency from its statutory authority to enforce laws in certain regulated areas.⁴⁸ Subsection f. is the current 2A:168A-12.

The current 2A:168A-4 is proposed for elimination. More research and input from commenters is needed to determine its continuing viability. Of concern to the Commission is the fact that the manner in which addiction is viewed and treated has changed since the Act was enacted. Further, the manner in which “addiction” is determined is not clear, nor is the application of the Act to drugs taken pursuant to a lawful prescription. Moreover, this section does not seem to apply to an applicant’s criminal background but focuses on an applicant’s conduct.

Proposed 2A:168B-4 is the current section 2A:168A-7. Subsection c. of this section was relocated to the definitions section of the Act, and a new subsection c. is the original, final paragraph of 2A:168A-7(b)(3).

Proposed 2A:168B-5 is section 2A:168A-3. Subsection a. is the current N.J.S. 2A:168A-9 and subsection b. contains the revised language of the current section. Some of the language in subsection a. is proposed for deletion since it repeats the Act’s function.

Draft

The proposed changes to the current statute are shown with underlining and strikeout below.

2A:168B-1. Legislative findings

The Legislature finds and declares that it is in the public interest to assist the rehabilitation of convicted offenders by removing impediments and restrictions upon their ability to obtain employment or to participate in vocational or educational rehabilitation programs based solely upon the existence of a criminal record.

Therefore, the Legislature finds and declares that notwithstanding the contrary provisions of any law or rule or regulation issued pursuant to law, a person shall not be disqualified or discriminated against by any licensing authority because of any conviction for a crime, unless N.J.S. 2C:51-2 is applicable or unless the conviction relates adversely to the occupation, trade, vocation, profession or business for which the license or certificate is sought.

2A:168B-2. Definitions

For purposes of this act:

⁴⁸ *In re Schmidt*, 158 N.J. Super. 595, 602 (App. Div. 1978) (noting that most licensing authorities are charged with enforcing their governing statutes, which, coupled with the erroneous view that an agency’s “excepted law enforcement function immunize[s] it from compliance with the [RCOA] in respect of its licensing function,” would leave “few, if any, licensing authorities to which the [RCOA] would remain applicable”).

a. “Criminal conviction” shall mean that an individual was convicted of, including by way of a plea of guilty to, the commission of:

- (1) a crime;
- (2) a disorderly person’s offense;
- (3) a violation of a municipal ordinance.

b. “Licensing authority” shall mean a State, county or municipal ~~department, board,~~ officer or agency, authorized to pass upon the qualifications of any applicant for:

- (1) a license, ~~or~~ certificate of authority, or qualification to engage in the practice of a profession or business; or
- (2) ~~for~~ admission to an examination to qualify for such a license or certificate.

c. “Public employment” shall mean employment by a State, county, or municipal agency, but shall not include:

- (1) elected office, or
- (2) employment ~~in~~:
 - (A) as a law enforcement officer as defined in N.J.S. 43:15A-97,
 - (B) as a corrections officer,
 - (C) in the judiciary,
 - (D) in a position related to homeland security or emergency management,or
 - (E) in any position that has access to sensitive information that could threaten the public health, welfare, or safety.

d. “Qualified offender” refers to a person who has one criminal conviction or who has convictions for more than one crime charged in separate counts of one indictment or accusation. ~~Multiple convictions charged in two indictments or two accusations, or one indictment and one accusation filed in the same court prior to entry of judgment under any of them, shall be deemed to be one conviction.~~ The following shall be deemed to be one conviction:

- (1) multiple convictions charged in two indictments or two accusations, or
- (2) one indictment and one accusation filed in the same court prior to entry of judgment under any of them.

Convictions of crimes entered more than 10 years prior to an application for a certificate under this act shall not be considered in determining whether a person has one criminal conviction. In the case of a person seeking relief at the time of sentencing, qualified offender means a person who will have one conviction, as set forth in this ~~paragraph~~ subsection, upon sentencing and issuance of the judgment of conviction.

e. “Supervising authority” shall mean the court in the case of a person who was subject to probation or who was not required to serve a period of supervision, or the State Parole Board in the case of a person who was under parole supervision.

2A:168B-3. ~~Granting application for license or certificate or for admission to qualifying examination; grounds for refusal; written statement~~ Application of act

a. ~~Notwithstanding the~~ This act supersedes contrary provisions of any law or rule or regulation issued pursuant to law and is applicable to all licensing authorities.

b. ~~Except as set forth in subsection c. of this section, no State, county or municipal department, board, officer or agency, hereinafter referred to as “licensing authority” authorized to pass upon the qualifications of any applicant for a license or certificate of authority or qualification to engage in the practice of a profession or business or for admission to an examination to qualify for such a license or certificate may disqualify or discriminate against an applicant for a license or certificate or an application for admission to a qualifying examination on the grounds that the applicant has been convicted of a crime, or adjudged a disorderly person or a record of a criminal conviction. When this subsection is applicable, the licensing authority also may not disqualify or discriminate against an applicant or application on the basis of any conduct that give rise to the criminal conviction.~~

c. ~~except that~~ A licensing authority may disqualify or discriminate against an applicant for a license or certificate on the basis of a criminal conviction if:

(1) N.J.S. 2C:51-2, relating to the forfeiture of public office, is applicable;

(2) or any disqualifying criminal activity set forth in subsection a. of section 7 of P.L. 2009, c. 53 (C.17:11C-57), pertaining to mortgage loan originators, is applicable,
~~or~~

(3) the applicant is seeking employment as a law enforcement officer; or

(4) if a conviction for a crime relates adversely to the occupation, trade, vocation, profession or business for which the license or certificate is sought.

d. In determining that a criminal conviction ~~for a crime~~ relates adversely to the occupation, trade, vocation, profession or business as described in subsection c. of this section, the licensing authority shall explain in writing how the following factors, ~~or any other factors,~~ relate to the license or certificate sought:

~~a.~~ (1) The nature and duties of the occupation, trade, vocation, profession or business, a license or certificate for which the person is applying;

~~b.~~ (2) Nature and seriousness of the crime;

~~c.~~ (3) Circumstances under which the crime occurred;

~~d.~~ (4) Date of the crime;

~~e.~~ (5) Age of the person when the crime was committed;

~~f.~~(6) Whether the crime was an isolated or repeated incident;

~~g.~~(7) Social conditions which may have contributed to the crime;

~~h.~~(8) Any evidence of rehabilitation, including:

(A) A certificate of rehabilitation obtained pursuant to this act,

(B) good conduct in prison or in the community,

(C) counseling or psychiatric treatment received,

(D) acquisition of additional academic or vocational schooling,

(E) successful participation in correctional work-release programs, or

(F) the recommendation of persons who have or have had the applicant under their supervision; and

(9) Any other factors the licensing authority deems relevant.

e. This act shall not be applicable apply to any law enforcement agency with regard to that agency's employment of law enforcement officers, but shall apply to the licensing function of any such agency.; however, Nothing herein in this act shall preclude a law enforcement agency in its discretion from adopting the policies and procedures set forth herein and applying them to the hiring of law enforcement officers.

f. This act [FN1] shall not apply to private employers. A private employer may, in its sole and complete discretion, consider a certificate issued under this statute in making employment decisions. Nothing in this section shall be construed to create any right, privilege, or duty or to change any right, privilege, or duty existing under law.

2A:168B-4. Certificates of rehabilitation; relief from disabilities, forfeitures or bars; definitions

a. Notwithstanding any law to the contrary, a certificate of rehabilitation may be issued in accordance with the provisions of this act [FN1] that suspends certain disabilities, forfeitures or bars to employment or professional licensure or certification that apply to persons with a record of a criminal conviction convicted of criminal offenses.

b. A certificate of rehabilitation issued pursuant to this act shall have the effect of relieving disabilities, forfeitures or bars, except those established or required by federal law, to:

(1) public employment, as defined in this section;

(2) qualification for a license or certification to engage in the practice of a profession, occupation or business, except the practice of law, or as a mortgage loan originator, or residential mortgage lender or residential mortgage broker as a qualified

individual licensee, pursuant to the "New Jersey Residential Mortgage Lending Act," sections 1 through 39 of P.L.2009, c. 53(C.17:11C-51 et seq.); or

(3) admission to an examination to qualify for that license or certification, except for the bar examination, a qualified written test for a mortgage loan originator, or residential mortgage lender or broker as a qualified individual licensee, or an examination for a law enforcement, homeland security, or emergency management position.

c. A certificate issued pursuant to this act may be limited to one or more enumerated disabilities, forfeitures or bars, or may relieve the subject of all disabilities, forfeitures or bars that may be affected by the act.

~~e. For purposes of this act:~~

~~(1) "Public employment" shall mean employment by a State, county, or municipal agency, but shall not include elected office, or employment in law enforcement, corrections, the judiciary, in a position related to homeland security or emergency management, or any position that has access to sensitive information that could threaten the public health, welfare, or safety.~~

~~(2) "Qualified offender" refers to a person who has one criminal conviction or who has convictions for more than one crime charged in separate counts of one indictment or accusation. Multiple convictions charged in two indictments or two accusations, or one indictment and one accusation filed in the same court prior to entry of judgment under any of them, shall be deemed to be one conviction. Convictions of crimes entered more than 10 years prior to an application for a certificate under this act shall not be considered in determining whether a person has one criminal conviction. In the case of a person seeking relief at the time of sentencing, qualified offender means a person who will have one conviction, as set forth in this paragraph, upon sentencing and issuance of the judgment of conviction.~~

~~(3) "Supervising authority" shall mean the court in the case of a person who was subject to probation or who was not required to serve a period of supervision, or the State Parole Board in the case of a person who was under parole supervision.~~

2A:168B-5. Presumption Evidence of rehabilitation

a. A certificate of rehabilitation issued pursuant to this act ~~{FN1}~~ shall ~~be presumptive evidence~~ create a rebuttable presumption of the subject's rehabilitation when considered in regard to public employment as defined in this act, or in conjunction with any licensing, or certification process to which this act applies, ~~which in any particular case may or may not be overcome by other evidence or information. A certificate granted under this act shall not prevent any judicial, administrative, licensing or other body, board, authority or public official from relying on grounds other than the fact of the criminal conviction in exercising any discretionary authority, if any, to suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege or to determine eligibility or suitability for employment. The issuance of a written statement of denial by a licensing authority pursuant to N.J.S. 2A:168A-2(d), shall provide a justification for overcoming the presumption.~~

b. The licensing authority shall be precluded from disqualifying or discriminating against the applicant if the applicant presents presentation to a licensing authority of evidence of:

(1) a pardon or of the expungement of a criminal conviction, pursuant to N.J.S. 2A:164-28, or of

(2) a certificate of the Federal or State Parole Board, or of the Chief Probation Officer of a United States District Court or a county who has supervised the applicant's probation, that the applicant has achieved a degree of rehabilitation indicating that his engaging in the proposed employment would not be incompatible with the welfare of society. ~~shall preclude a licensing authority from disqualifying or discriminating against the applicant.~~

~~2A:168A-4. Addiction to drugs or intoxicating liquors within four months of application~~

~~A licensing authority may disqualify or discriminate against an applicant for a license or certificate on the grounds that the applicant has within 4 months of the application for admission to a qualifying examination been addicted to the habitual use of drugs or intoxicating liquors.~~

~~2A:168A-6. Inapplicability of act to law enforcement agencies~~

~~This act shall not be applicable to any law enforcement agency; however, nothing herein shall preclude a law enforcement agency in its discretion from adopting the policies and procedures set forth herein.~~

2A:168B-6. Certificate; issuance and application; eligibility

A certificate may be issued pursuant to this act ~~{FN1}~~ as follows:

a. (1) A court, in its discretion, may issue a certificate at the time of sentencing if the applicant:

(A) is a qualified offender, who is being sentenced to a non-incarcerative sentence for a second, third or fourth degree crime;

(B) has established that a specific licensing or employment disqualification, forfeiture or bar, will apply to him, and may endanger his ability to maintain existing public employment or employment for which he has made application, or to engage in a business enterprise for which a license or certification is required;

(C) has no pending criminal charges, and there is no information presented that such a charge is imminent; and

(D) has established that the relief is consistent with the public interest.

(2) A certificate issued under this subsection shall apply only to the specific disability, forfeiture or bar that is affected, which must be specifically described in the certificate document.

b. (1) A supervising authority may issue a certificate in regard to a qualified offender who is, or had previously been, under supervision by the supervising authority if the supervising authority determines that:

(A) the applicant is convicted of a second, third or fourth degree offense and is eligible for relief under subsection c. of this section;

(B) the applicant has not been convicted of a crime since the conviction for which he is under supervision, has no pending criminal charge, and there is no information presented that such a charge is imminent;

(C) issuing the certificate will not pose a substantial risk to public safety; and

(D) issuing the certificate will assist in the successful reintegration of the offender and is consistent with the public interest.

(2) A certificate issued pursuant to this subsection may suspend disabilities, forfeitures and bars generally within the limits of this act, or only certain disabilities, forfeitures and bars, specifically named in the certificate document.

c. A qualified offender is eligible for relief under subsection b. of this section if the offender has not been convicted of:

(1) a first degree crime;

(2) an offense to which ~~section 2 of P.L.1997, c. 117 (C.2C:43-7.2)~~ applies;

(3) a second degree offense defined in chapters 13, 14, 15, 16, 24, 27, 30, 33, 38 of Title 2C of the New Jersey Statutes;

(4) a violation of subsection a. of N.J.S. 2C:24-4 or paragraph (4) of subsection b. of N.J.S. 2C:24-4;

(5) a crime requiring registration pursuant to ~~section 2 of P.L.1994, c. 133 (C.2C:7-2)~~;

(6) a crime committed against a public entity or against a public officer;

(7) a crime enumerated in subsection b. of ~~section 2 of P.L.2007, c. 49 (C.43:1-3.1)~~ committed by a public employee, which involves or touches upon the employee's office, position or employment, such that the crime was related directly to the person's performance in, or circumstances flowing from, the specific public office or employment held by the person;

(8) any crime committed against a person 16 years of age or younger, or a disabled or handicapped person; or

(9) a conspiracy or attempt to commit any of the crimes described in this subsection.

d. (1) A supervising authority may issue a certificate in regard to a qualified offender, when three years have passed since the applicant has completed the incarcerative or supervisory portion of his sentence, whichever is later, and the supervising authority finds that:

(A) the applicant is eligible for such relief as defined in subsection e. of this section;

(B) issuing the certificate does not pose a substantial risk to public safety; and

(C) issuing the certificate will assist in the successful reintegration of the offender and is consistent with the public interest.

(2) The certificate issued pursuant to this subsection may suspend disabilities, forfeitures and bars generally within the limits of this act, or only certain disabilities, forfeitures and bars specifically named in the certificate document.

e. A qualified offender is eligible for relief under subsection d. of this section if he has remained without criminal involvement since his conviction, including that he has not subsequently been convicted of a crime, has no pending charges for any crime, and there is no information presented that such a charge is imminent; and is applying for relief from a conviction other than:

(1) a first degree crime;

(2) any of the offenses to which ~~section 2 of P.L.1997, c. 117(C.2C:43-7.2)~~ applies;

(3) a violation of subsection a. of N.J.S. 2C:24-4 or paragraph (4) of subsection b. of N.J.S. 2C:24-4;

(4) a crime requiring registration pursuant to ~~section 2 of P.L.1994, c. 133(C.2C:7-2);~~

(5) a crime enumerated in subsection b. of ~~section 2 of P.L.2007, c. 49 (C.43:1-3.1)~~ committed by a public employee, which involves or touches upon the employee's office, position or employment, such that the crime was related directly to the person's performance in, or circumstances flowing from, the specific public office or employment held by the person;

(6) a crime committed against a person 16 years of age or younger, or a disabled or handicapped person; or

(7) a conspiracy or attempt to commit any offense described in this paragraph.

~~2A:168A-9. Certificate as presumptive evidence of rehabilitation~~

~~A certificate issued pursuant to this act [FN1] shall be presumptive evidence of the subject's rehabilitation when considered in regard to public employment as defined in this act, or in conjunction with any licensing, or certification process to which this act applies, which in any particular case may or may not be overcome by other evidence or information. A certificate granted under this act shall not prevent any judicial, administrative, licensing or other body, board, authority or public official from relying on grounds other than the fact of the criminal conviction in exercising any discretionary authority, if any, to suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege or to determine eligibility or suitability for employment.~~

2A:168B-7. Supervising authority; notice to prosecutor of certificate or application for a certificate

In all cases, the applicant or the supervising authority shall provide notice to the prosecutor of either the issuance of a certificate or the pendency of an application for a certificate, or both, pursuant to procedures that shall be developed and published by the supervising authority within thirty days of the effective date of this act. {FN1}

2A:168B-8. Revocation and reinstatement of certificate; disorderly persons offense

a. A certificate granted pursuant to this act {FN1} shall no longer be valid if the person who is the subject of the certificate is indicted for a first or second degree crime or convicted of a crime.

b. Upon presentation of satisfactory proof that the criminal charges or indictment have been dismissed, or of an acquittal after trial, a certificate revoked under the circumstances described in subsection a. of this section may be reinstated by the issuing entity.

c. A certificate may be revoked at any time upon application of the prosecutor or on the supervising authority's own initiative when information is received that circumstances have materially changed such that the relief would not be authorized under this act or is no longer in the public interest. The supervising authority revoking such a certificate shall notify the subject of the certificate of the revocation.

d. In addition to any other offense that may apply, a person who knowingly uses or attempts to use a revoked certificate, or a certificate that is no longer valid, in order to obtain a benefit or avoid a disqualification shall be guilty of a disorderly persons offense. For the purposes of this subsection, "uses or attempts to use," shall include knowing failure to disclose to an employer or other affected public entity the revocation or invalidity of a certificate.

2A:168A-12. Certificates; application to private employers

~~This act {FN1} shall not apply to private employers. A private employer may, in its sole and complete discretion, consider a certificate issued under this statute in making employment decisions. Nothing in this section shall be construed to create any right, privilege, or duty or to change any right, privilege, or duty existing under law.~~

2A:168A-13. Evaluation of effectiveness of implementation; system of recording certificates

~~The State Parole Board and the Administrative Office of the Courts shall report to the Governor and the Legislature on or before the first day of the thirteenth month after the effective date of this act {FN1} an evaluation of the effectiveness of the implementation of this act, including the number of applications received, considered and granted under the act. Entities issuing certificates shall develop a system of recording the certificates and provide information to prospective employers regarding whether a certificate has been issued or is valid.~~

2A:168A-14. Report; impact of a prior criminal conviction on private employment opportunities

~~The Department of Labor and Workforce Development shall prepare a report detailing the impact of a prior criminal conviction on private employment opportunities for ex-offenders. The department shall consult with the State Parole Board, and may consult with and seek the assistance of other executive branch agencies, municipalities, agencies and any interested parties. The report shall include identification of barriers faced by ex-offenders seeking private employment, including those set forth in law, regulation and policies of private employers. The report shall analyze the effect of the hiring policies of employers with more than 100 employees on the employment of ex-offenders. In order to encourage cooperation, identities of employers and entities contacted in the course of preparing the report shall remain confidential. The results of this study shall be reported to the Governor and the Legislature within 180 days from the effective date of this act. [FN1]~~

2A:168B-9. Regulated employment pursuant to approved program of vocational or educational rehabilitation

Notwithstanding the contrary provisions of any law or rule or regulation issued pursuant to law, any licensing authority may permit any person subject to correctional supervision in this State to engage in regulated employment pursuant to an approved program of vocational or educational rehabilitation.

2A:168B-10. Pardons by governor

Nothing in this act shall be deemed to alter, limit or affect the manner of applying for pardons to the Governor, and a certificate issued under this act ~~[FN1]~~ shall not be deemed or construed to be a pardon.

2A:168B-11. Promulgation of regulations, rules or guidelines

The State Parole Board shall promulgate any regulations or issue guidelines necessary to effectuate the provisions of this act. The court may publish rules or guidelines to implement this act. ~~[FN1]~~