



January 26, 2010

Via Email (phrc@state.pa.us)

Homer Floyd
Executive Director
Pennsylvania Human Relations Commission
301 Chestnut Street, Ste. 300
Harrisburg, PA 17101-1702

RE: Comments Regarding the PHRC's Proposed Adoption of Policy Guidance titled, The Disparate Impact Discrimination Implications of a Denial of Employment Based on a Criminal Record

Dear Mr. Floyd:

On November 28, 2009, the Pennsylvania Human Relations Commission ("PHRC") published a request for comments on the *Proposed Adoption of Policy Guidance on The Disparate Impact Discrimination Implications of a Denial of Employment Based on a Criminal Record* ("Proposed PHRC Guidance").

The Proposed PHRC Guidance presumes that an employer's policy or practice excluding individuals on the basis of criminal conviction has a disparate impact on Blacks and Hispanics; presumes that the disparate impact is rebuttable; discusses the "Business Necessity" Defense; and states that an employer may still prevail if there is an alternative less discriminatory policy or practice available. Based on the PHRC's jurisdiction, the Proposed PHRC Guidance will apply to all employers doing business in the Commonwealth with four or more employees.

The Pennsylvania Chamber of Business and Industry ("PA Chamber") is the largest broad based business advocacy association in the Commonwealth representing thousands of

businesses of all sizes crossing all industry sectors. Our membership ranges from Fortune 100 companies to sole proprietors. The PA Chamber, the voice of Pennsylvania Business, will not repeat herein the comments of its members, which have been forwarded separately to the PHRC.¹ The PA Chamber, however, will express a variety of concerns about the Proposed PHRC Guidance, believing it is unnecessary based on the Third Circuit's ruling and the EEOC Guidance; noting that it ignores Pennsylvania's existing Criminal History Record Information Act (CHRIA); believing that the Proposed PHRC Guidance will open the floodgates of litigations, believing the timing of the Proposed PHRC Guidance for post-conditional job offer checks is questionable; noting that the Proposed PHRC Guidance is overbroad but still also omits key information, and questioning the real legal impact of the Proposed PHRC Guidance. A discussion of each, as well as the PA Chamber's recommendation, follows.

I. THE GUIDANCE IS UNNECESSARY BASED ON A THIRD CIRCUIT RULING AND THE EEOC GUIDANCE

The Proposed PHRC Guidance is unnecessary given the recent determination of the Third Circuit and the long standing existence of the EEOC's Guidance in this area. As noted in the PHRC's description of its Proposed Guidance, the Equal Employment Opportunity Commission ("EEOC") has had a Conviction Record Policy in effect since 1987.

1. The Third Circuit Has Already Carefully and Recently Considered This Issue

In *El v. SEPTA*, 418 F. Supp. 2d 659 (E.D. Pa. 2005), *aff'd in part, den'd in part* 479 F.3d 232 (3d Cir 2007), the Court presents a detailed consideration of use of an old criminal conviction within a context of hiring for a position dealing with disabled persons.

¹ The PA Chamber, however, joins in the thoughtful comments of CDIA submitted on January 25, 2010; the pertinent comments of Keswick Advisors on recidivism; and the well-researched and well-rounded comments of Reed Elsevier, Inc.

El applied for a job as a driver for a Para transit service, serving disabled passengers, which subcontracted with SEPTA. He had been convicted and served time for a second degree gang related homicide as a juvenile, some 40 years earlier. He was extended a conditional offer of employment and began the related driving course. He was terminated because of his old conviction. SEPTA's contract prohibited employment of any driver who had a record of driving under the influence or felony or misdemeanor conviction for a crime of moral turpitude or violence against persons.

El filed a claim with the EEOC which agreed that the policy had a disparate impact on Blacks and Hispanics. The EEOC also noted that there was no showing that the nature and gravity of the offense, the passage of time, and the nature of the job had been considered. The lawsuit followed.

SEPTA produced information of business necessity including experts attesting to the criminal conduct of former prisoners, risks associated with individuals with prior convictions for a violent offense, and the type of individuals serviced by the Para transit drivers and the close proximity of the services and limited persons involved. The District Court granted SEPTA summary judgment on this count.

The case was subsequently considered and affirmed on this count by the Third Circuit Court of Appeals. The Court noted that it had held under the U.S. Supreme Court's *Griggs*² standard that hiring criteria must effectively measure the "minimum qualifications for successful performance of the job in question." The Court recognized a "contextual analysis" noting that convictions to be considered for an office job at corporate headquarters would be different than this SEPTA-related position dealing with disabled individuals. The Court noted both the public

² *Griggs v Duke Power*, 401 U.S. 424 (1971).

safety concern and the limitations of the SEPTA policy that limited the hiring of only persons with certain types of convictions, rather than persons with any convictions.

Hence, the Third Circuit has already provided a framework for employees and employers alike to reference with regard to convictions. Moreover, the *El* analysis allows for an individualized consideration of the circumstances in each case. The PA Chamber notes that in some ways, the Proposed PHRC Guidance is as objectionable as a per se rule utilizing any conviction to exclude an applicant from employment because it provides a presumption that use of a conviction is per se objectionable as discriminatory against Blacks and Hispanics, even though an individual employer may have an exemplary record of hiring minorities.

2. *The EEOC Has Already Adopted Guidance Applying to Most Pennsylvania Companies*

As the PHRC is well aware, Pennsylvania employers with fifteen or more employees are subject to the jurisdiction of the EEOC. The EEOC has had Guidance in effect since 1987, which is significantly less restrictive than the currently Proposed PHRC Guidance. The EEOC's Guidance already suggests that an employer consider:

1. The nature and gravity of the offense or offenses;
2. The time that has passed since the conviction and/or completion of the sentence; and
3. The nature of the job held or sought.

It was the EEOC Guidance that was at issue in the *El* case described above. It simply makes no sense to have two sets of guidance, which differ or conflict in certain aspects, applicable, in some cases, to the same Pennsylvania employers. Additionally, the EEOC Guidance already provides some protection for all but the smallest employers on the topic of convictions.

II. THE GUIDANCE IGNORES PENNSYLVANIA'S EXISTING CRIMINAL HISTORY RECORD INFORMATION ACT (CHRIA)

Pennsylvania has had a statute in place since 1980 which limits the types of convictions for which an employer may reject any applicant. If the applicant is rejected on the basis of criminal history record information, then the prospective employer must so notify the applicant in writing. The law is not enforced by any particular agency, but provides a free standing right to applicants. The CHRIA, 18 Pa. C.S.A. § 9101 *et seq.*, allows the employer to consider the context of a particular job when hiring so that applicants with convictions for assaults or sexual offenses would probably be rejected from many jobs in which they have unlimited access to dwellings on the basis that such situations could provide an invitation for repeat offenses because these employees would frequently work alone, if hired, in non-public settings. This law already provides protection for applicants who believe that they were improperly overlooked because of criminal history information. Further, the Proposed PHRC Guidance cannot repeal the CHRIA; hence conflicts between the two will arise.³ In such an event, it is anticipated that the CHRIA as

³ Interestingly, the District Court noted in *Foxworth v. Pa. State Police*, 402 F. Supp. 2d 523 (E. D. Pa. 2005) that the CHRIA did not apply because expungement of a criminal record following successful completion of an ARD program meant that there was no criminal record. The Proposed PHRC Guidance assists neither in an ARD situation nor a *nolo contendere* (no contest) plea.

Foxworth was an African American male, who submitted an application for Pennsylvania State Police cadet. He scored well on the testing and his Pennsylvania State Police criminal history check came back negative. He was given a conditional offer of employment and told to report to the state police academy. When he completed his application form, he mentioned a theft committed when he was eighteen years old at a Boston Market restaurant. He had received ARD for that offense. Following satisfactory completion of the ARD, his criminal record was expunged.

He eventually withdrew his application after the Pennsylvania State Police indicated that he would not be hired because of an automatic disqualification factor. Foxworth eventually sued under a variety of race discrimination theories. Because his disparate impact claim was impermissibly raised until after the close of discovery, it was dismissed. The Court concluded, however, that the claim fell as a matter of law even though there were known statistical disparities between African-Americans and whites in the Pennsylvania State Police. The Court also held that the “automatic disqualification factors” were justified by business necessity: ensuring public safety and police officers’ compliance with directive of law. Again, this seems like more than an appropriate outcome given the context of the position with the Pennsylvania State Police.

law will trump the PHRC Guidance, even if promulgated. *See*: Discussion of Questionable Legal Impact at VI, *infra*.

III. THE PROPOSED PHRC GUIDANCE OPENS THE FLOODGATES OF LITIGATION

The Proposed PHRC Guidance opens the floodgates for additional litigation. Ironically, many of those in the know are commenting that the number of employment related cases is expected to rise in 2010, just as it did in 2009, a year in which the EEOC experienced the second highest number of charges ever.⁴ The Proposed PHRC Guidance increases the potential for PHRC lawsuits as well. Whether or not an employer wins is almost immaterial when the cost of defense of a lawsuit, especially by small employers, is a major expenditure. The framework of the Proposed PHRC Guidance with its presumption and shifting burdens of proof is particularly difficult to defend against. Unfortunately, it is not uncommon for companies to eventually settle claims just to avoid the ongoing soft costs of litigation, including but not limited to the diversion of efforts from productive company pursuits to defense of the complaint, charge or lawsuit.

The Proposed PHRC Guidance will provide yet another way in which applicants or employees, who have convictions, can challenge decisions made by employers on a totally independent basis such as inadequate skill sets or perceived inability to work as part of an existing team of employees. In the words of one Chamber member: “My biggest concern is that we do not have a very diversified pool of potential candidates in our area. Therefore, an individual who was not selected could EASILY claim disparate impact when, of course, the real reason they were not selected would be due to job skills.” In effect, the Proposed PHRC Guidance may create, intentionally or unintentionally, a super protected class of “convicted

⁴ Source: EEOC website at www.eeoc.gov/eeoc/statistics/enforcement/index.cfm

Blacks and Hispanics,” resulting in reverse discrimination suits by non-convicted Blacks, Hispanics and Whites.

The concern regarding convictions and skill sets is not a hypothetical concern. It has happened before. In a case involving civil service employees, the Commonwealth Court reversed the reinstatement and back pay of a Psychiatric Aide I at Norristown State Hospital who had a conviction for Burglary with Intent to Commit Murder. The case was ultimately overturned, finding that non-merit factors were not the reason for the employee’s termination. *Norristown State Hospital v. Bruce*, 69 Pa. Commw. 298, 450 A.2d 1093 (1982).

Employers are already defending against negligent hiring lawsuits. Background checks serve as a useful means for employers to establish that they have taken responsible and reasonable action as a matter of public policy to avoid hiring persons who otherwise threaten the safety of other employees and the public in general. To remove this ability to obtain information about convictions would adversely impact on the employer’s right to hire the best person for a position. Unfortunately, a conviction may have lasting ramifications on a person’s ability to obtain employment because any conviction indicates that the same person was found not to have followed legal rules and requirements by a jury of his/her peers or has admitted guilt through a plea. Convictions often pose a “contextual concern” to employers about matters related to the workplace or interaction with other employees or customers, rather than a concern about “hard job skills,” e.g. computer abilities. For certain employers, the Proposed PHRC Guidance will serve as yet another reason not to hire at a time when the economy really needs job creation.⁵

⁵ According to new sources on January 25, 2010, President Obama is asking Congress to release additional TARP money to small businesses to encourage job creation by small businesses. Additionally, CNN Money.com citing Automatic Date Processing, reports that small companies shed another 25,000 jobs in December for the 23rd consecutive month of payroll cuts. Job creation is expected to be a feature of the President’s State of the Union address tomorrow.

IV. THE TIMING SUGGESTED IN THE PROPOSED PHRC GUIDANCE FOR POST-CONDITIONAL JOB OFFER CHECKS IS QUESTIONABLE

The Proposed PHRC Guidance recommends that an employer only inquire about convictions *after* a conditional job offer is made. As you know, an employer is already limited for disability purposes to sending an applicant for a job related medical examination after making a post- conditional job offer. To add another criteria to this post-conditional job offer severely dilutes the meaningfulness of the conditional offer. Many employers consider honesty to be a contextual requirement of all jobs. Delaying background checks on convictions will only result in delaying the start of qualified applicants into jobs, and dishonesty is a component of many convictions. Even the websites for obtaining clearance indicate that a delay of fourteen days from submission of all required information is not unusual. This timing also ignores the statutory requirement for school employees, child care workers, elder care workers or others providing services through the Department of Welfare’s county agency system to submit background check information as a statutory condition of eligibility for employment in all schools in the Commonwealth..

V. THE PROPOSED PHRC GUIDANCE REQUIRES TECHNICAL WORK PRIOR TO ISSUANCE FOR IT LACKS CLARITY, IT IS OVERBROAD AND YET STILL OMITTS KEY INFORMATION

The Proposed PHRC Guidance, as drafted, consists of some seven (7) pages and two Appendices. The Proposed PHRC Guidance needs technical work. The listing in Appendix “A” contains two separate categories. The first part of the first appendix, Appendix “A”, is a listing of Employment Prohibited by Law, and the second is a listing of convictions which jeopardize licensure under Pennsylvania Law, used by the Department of State and various other state and

local licensing authorities.⁶ In the event that the Department of State does not license an individual, and a license is required for employment in a given position, the employer has no discretion to disregard the determination of the Department of State. The same would be true of revocation of a license by either the Department of State or any other licensing board, e.g. state Board of Bar Examiners or the state Disciplinary Board for attorneys. The information contained in the second portion of Appendix “A” adds nothing to the clarity of the Proposed PHRC Guidance as applied to employers.⁷

The listing of Employment Prohibited by Law is currently under-inclusive. For example, there is no reference to attorneys, lawyers or legal counsels, massage therapists, physical or occupational therapy assistants, to name just a few⁸. Additionally, 24 P.S. § 17-1724-A Relating to Charter School Employees and volunteers is not mentioned in the text. 24 P.S. §1-111 is referenced with regard to Philadelphia Schools when it actually applies to both public and private schools, student teachers and PIAA officials. 23 Pa.C.S. §6334 requires background checks on a broad class of employees and more, including child care workers, prospective adoptive and foster parents, persons over 14 years of age who live with the same, foster parents, and independent contractors providing child care services. We have also been informed by an insurance industry member that background checks for felony convictions involving breaches of trust and dishonesty are used in the insurance industry as a protection against the criminal penalties provided in 18 U.S.C. § 1033, and that the Pennsylvania Insurance Department has similar requirements.

⁶ For example, there is no reference to attorneys, lawyers or legal counsels, massage therapists, physical or occupational therapy assistants to name a few.

⁷ Appendix “B” is similar in substantial part to the Proposed PHRC Guidance, and does not seem to add anything to the Proposed PHRC Guidance.

⁸ This listing of examples is not designed to be all inclusive.

Since the Proposed PHRC Guidance refers to the list as “illustrative,” it is important that it is not only complete, but frequently updated.

VI. THE LEGAL IMPACT OF THE PROPOSED PHRC GUIDANCE IS QUESTIONABLE

Even if the Proposed PHRC Guidance were to be issued, it would not have the force and effect of law and Pennsylvania Courts would utilize a case by case analysis of its application:

Because they are not issued in accordance with the procedures specified in the Administrative Procedure Act, HIM guidelines are merely interpretive rules. *Daughters of Miriam Center for the Aged v. Mathews*, 590 F.2d 1250, 1255 (3rd Cir. 1978). Interpretive rules, while not controlling upon the courts, constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The weight of such a ruling depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.*

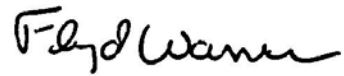
Montgomery Co. Geriatric Center v. Dept. of Public Welfare, 75 Pa. Commw. 248, 462 A.2d 325 (1983). The *Skidmore* deference referenced above is the lowest level of deference extended to a federal agency. This is particularly true since the Proposed PHRC Guidance is at odds with the CHRIA.

VII. CONCLUSION AND RECOMMENDATION

The PA Chamber recommends that the PHRC simply forgo implementation of any Proposed PHRC Guidance for all the reasons expressed above. Since it is only guidance, the deference given to it by the Courts will be questionable at best; the Guidance will only add to the already heavy burden on employers to select the best qualified applicant; and it does nothing to enhance economic development and job creation within the Commonwealth.

Thank you for the opportunity to present comments on the Proposed PHRC Guidance. We hope that the PHRC will rethink the need to promulgate the Proposed PHRC Guidance, since it provides very little protection to employees, and further hampers employers in their already difficult task of creating jobs and obtaining the most qualified employees to fill those jobs.

Sincerely,

A handwritten signature in black ink that reads "Floyd Warner". The signature is written in a cursive style with a large initial "F" and a long, sweeping underline.

Floyd Warner
President