



The Association of the Bar of the City of New York

Committee on Mental Health Law

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Commissioner Sharon Carpinello, RN, Ph.D.
New York State Office of Mental Health
44 Holland Avenue
Albany, NY 12229

Re: Criminal Background Checks and the Fingerprinting Law

Dear Commissioner Carpinello:

The Mental Health Law Committee of the New York City Bar Association (“the Committee”) would like to take this opportunity to express our concerns regarding Part 550 of 14 N.Y.C.R.R. (“the Fingerprinting Regulations”), promulgated under the “Fingerprinting Law,” Executive Law § 845-b and Mental Hygiene Law §§ 16.33 and 31.35. We respect the intent behind the legislation that requires providers of direct mental health services contracted with, or licensed by, the New York State Office of Mental Health (“OMH”) and the NYS Office of Mental Retardation and Developmental Disabilities (“OMRDD”) to investigate the criminal history of prospective employees and volunteers.¹ The Committee understands that the Legislature passed this law in order to reduce the commission of crimes against some of our most vulnerable citizens by assisting employers in identifying applicants whose history could indicate that they might take advantage of a position of trust.²

Under the Fingerprinting Law, a felony conviction for a sex offense at any time, a felony conviction in the past 10 years for a crime involving violence, or a conviction at any time for physically endangering the welfare of an incompetent or disabled person are presumptively disqualifying while convictions for other felonies may be disqualifying.³ Alarming, a much wider net has been cast. In practice, OMH disqualifies any applicant whose background check reveals any criminal conviction – not just felonies – unless they provide information

¹ The law requires OMH and OMRDD providers to obtain fingerprints from prospective employees/volunteers and submit them to the Department of Criminal Justice Services (“DCJS”) to obtain a history of their criminal involvement.

² Memorandum in Support, NYS Senate Bill S.7562.

³ Exec. Law § 845-b(5)(a).

as to why they should not be disqualified. By “flagging” individuals with lesser crimes, the Fingerprinting Regulations as applied are over-inclusive. By targeting those individuals who are not within the Law’s sphere of disqualifying crimes, applicants are unnecessarily being hindered from obtaining employment. Likewise, over-inclusive application of the Law is deterring employers from hiring well-qualified applicants who honestly disclose their criminal conviction history.

A careful determination of the qualifications of an applicant requires a comprehensive consideration of what such applicant brings to the job. Therefore, the Committee recommends a set of adjustments regarding the promulgation and implementation of the Fingerprinting Regulations. We believe that qualified professionals, including peer specialists who have a history of criminal justice system involvement, should not be unnecessarily prevented from joining the mental health workforce.

The Committee believes that OMH should consider mitigating factors such as the applicant’s rehabilitation efforts, letters of recommendation, and other materials concurrently with review of the prospective applicant’s potentially disqualifying criminal history. We are particularly committed to ensuring that individuals living with psychiatric disabilities have an opportunity to join the workforce when they are ready and able to do so. With invaluable first-hand experience, peers are often among the most effective components of a mental health treatment team. Hinged on self-awareness and empowerment, the peer recovery movement allows those with a history of mental illness to actively shape and participate in their own wellness. By limiting service providers’ ability to hire mental health consumers with forensic histories, however, the Fingerprinting Law both counters efforts in the peer recovery movement and unnecessarily limits utilization of these key therapeutic agents. While the Committee understands the vital need to protect psychiatrically disabled patients, we are concerned that the implementation of this Law furthers the stigmatization of forensic mental health consumers, and fails to protect both the applicant and the consumer of services. Only when the applicant’s criminal background provides fair cause for concern and the applicant is unable to counter such concern, can disqualification from employment be justified under the law.

Under the Fingerprinting Regulations, OMH has broad discretion to determine when an applicant must be disqualified from working directly and unsupervised with psychiatrically disabled individuals. For example, if OMH determines that an applicant who is presumptively disqualified due to a conviction for one of the aforementioned three classes of crimes will not jeopardize the health, safety, or welfare of consumers it may approve their employment.⁴ But if the background check reveals a conviction for a crime that does not presumptively disqualify the applicant from employment, OMH must act upon such information in a manner consistent with Article 23-a.⁵

Article 23-a provides that people ought not be discriminated against in employment as a result of a criminal conviction unless the conviction is for a crime directly related to the work sought or that the employment would unreasonably risk the public’s property or safety.⁶ The law

⁴ 14 N.Y.C.R.R.; §550.6(a)(1)(ii).

⁵ 14 N.Y.C.R.R. § 550.6(a)(1)(iii).

⁶ NY Corr. Law §753.

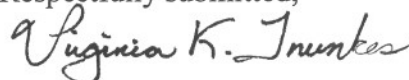
then enumerates factors which an employer ought to consider regarding previous criminal convictions including: the duties and responsibilities of the sought-after job; the bearing of the crime on the person's fitness for the job; the time elapsed since committing the crime; the person's age at the time; the seriousness of the offense; the evidence of rehabilitation; and the state's interest in protecting property and safety.⁷ Thus, OMH is required to first determine that the specific crime is related to the work the applicant seeks or that the crime indicates a risk to the public. Only after such a finding should OMH request information from the applicant regarding the enumerated factors. In practice, by requiring every applicant who has a conviction history to prove why they should not be disqualified, OMH skips the crucial first step and places the entire burden of proving they are employable upon the applicant. Again, the Committee recommends that OMH assume the burden imposed upon it by the Corrections Law and its own regulations.

Finally, the Committee is concerned that the Fingerprinting Regulations afford disqualified applicants no appeals process. The regulations provide that, "(P)rior to making a determination to deny an application pursuant to subdivision (a) of this section, the Office shall afford the prospective employee or volunteer an opportunity to explain in writing, within ten calendar days from the date the notification was mailed, why the application should not be denied."⁸ But since no administrative appeal is provided, the only review of OMH's determination open to a disqualified applicant is through Article 78 of the C.P.L.R., a burdensome process.

At minimum, the Committee urges OMH to provide a greater period of time for applicants to provide documentation. Ten days is often not nearly enough for a person to gather the kind of records that OMH requests, let alone the additional medical, educational and community evidence that could mean the difference between employment and disqualification. Moreover, applicants who are employed contingent on OMH's review of their background check may have an expectation of continued employment that may entitle them to greater due process rights than those not already hired. For those individuals particularly, a meaningful right to be heard on OMH's disqualification is needed. The Committee encourages OMH to amend the Fingerprinting Regulations to provide a fair process to applicants and conditional employees subject to the law.

The Committee appreciates the opportunity to join OMH in ensuring both the safety of New York's vulnerable populations and the rights of those who have a troubled past to become fully-participating members of the community. For the reasons set forth herein, we believe that those laudable goals are neither mutually exclusive, nor constrained by law. In fact, we believe that the goal of the applicable laws can only be met by seeking and achieving both ends.

Respectfully submitted,



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Chair, Committee on Mental Health Law

⁷ NY Corr. Law §753.

⁸ 14 N.Y.C.R.R. §550.6(b).

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