

# ERASING EXPUNGEMENTS

*Past sins continue to haunt prospective employees*

By Barbara K. Letcher

There is a common misconception that an expunged record of a criminal conviction can no longer impact the individual whose record has been expunged. However, that is not always true in the employment context. Expunged criminal records can resurface in the employment background checks and applications for professional licensing. In some cases, criminal conviction may even prevent one from pursuing a chosen career.

Ohio law allows a first time offender to apply to the sentencing court to have the record of his or her conviction sealed. In the case of a felony conviction, the individual can apply after three years. In a misdemeanor conviction, the individual can apply after one year. Anyone who has been arrested for a misdemeanor and has forfeited bail can apply after one year to have the record of the bail forfeiture sealed. An order sealing the record of the conviction restores the individual to all rights and privileges not otherwise restored by termination of the sentence, by probation or by final release on parole or post-release control.

Under certain circumstances expungement of the criminal conviction does not effect a blanket restoration of rights and privileges or in effect, clear the slate. The legislature has carved out specific instances in which the sealed records may be inspected. While many of the circumstances identified relate to subsequent criminal charges impacting the individual who has just had a record expunged, there are also a number of instances identified which bear directly on the individual's future employment. For example, the statute allows sealed records to be inspected by any authorized employee of a law enforcement agency or by the Department of Rehabilitation and Corrections as part of a background check for employment as a law enforcement or corrections officer.

A number of occupations require applicants to obtain a certificate issued by the executive director of the Ohio Peace Officer Training Commission which attests to satisfactory completion of an approved basic training program. Individuals must have certification to be employed as peace officers; national resources law enforcement officers, state university law enforcement officers; special police officers for the Department of Mental Health or the Department of Mental Retardation and Developmental Disabilities; enforcement agents for the Department of Public Safety, and special police officers for a Port Authority. Bailiffs and deputy bailiffs must have certification to be hired in our state courts as well as criminal investigators employed by the state public defender and required to carry a firearm.

The individual seeking a certificate of completion of peace officer basic training must disclose any previous felony conviction or plea of guilty to a felony. A criminal history records check is required and any person who has been convicted of or pled guilty to a felony, or failed to disclose a criminal conviction of or plea of guilty to a felony, cannot be awarded a certificate by the Ohio Peace Officer Training Commission. Ohio law allows the Bureau of Criminal Identification and Investigation to inspect the sealed record of any applicant's criminal conviction as part of the certification process. An expunged record of a felony conviction disclosed would prevent certification.

The potential for disclosure of expunged records extends well beyond those individuals seeking certification to work in law enforcement. The Bureau of Criminal Identification and Investigation may also inspect the expunged records of any



Barbara K. Letcher,  
Lane Alton & Horst

individual who is applying for employment with a school district; a board of mental retardation and developmental disabilities or any entity under contract with such a board, a home health agency, a child day care center, Head Start, or a public children's services agency. Similarly, employers may obtain access to expunged criminal records of individuals applying for employment in positions providing direct care to older adults.

Access to expunged records is further extended by Section 2953.33(B) of the Ohio Revised Code. That section provides in relevant part that "in any application for employment, license, or other right or privilege . . . , a person may be questioned only with respect to convictions not sealed, . . . unless the question bears a direct and substantial relationship to the position for which the person is being considered." The statute allows for broader inquiry into expunged records where the employer can show that an inquiry into an applicant's criminal background is required. For example, a financial institution considering an applicant for a position of trust may have a substantial interest in knowing whether the applicant has ever been convicted of embezzlement.

The statute was enacted, in part, to allow broader access to sealed criminal convictions for use in the context of professional licensing. In some cases, one of the criteria for obtaining a professional license is good moral character, and at least one court of appeals in this state has held that an expunged conviction, in and of itself, is sufficient grounds to deny a professional license.<sup>1</sup> For example, expunged convictions disclosed pursuant to R.C. 2953.33(B) have resulted in the denial of licenses issued by the Counselor and Social Workers Board<sup>2</sup> and the Ohio State Board of Pharmacy.<sup>3</sup> Likewise, the Board of Commissioners on Character and Fitness reviewing applications for admission to the Bar of the State of Ohio can consider an expunged conviction to determine whether an applicant is fit to practice law.

Where there is some nexus between the applicant's criminal record and the position of employment or license sought, inquiry into an expunged record is permitted. Thus, an expunged criminal record can continue to haunt an individual long after the record is sealed by the court.

<sup>1</sup> *Szep v. Ohio State Bd. of Pharmacy* (1995), 106 Ohio App.3d 621, 626, 666 N.E.2d 662

<sup>2</sup> *Schmitt v. Counselor and Social Workers Bd.*, Lake App. No. 2001-L-234, 2003 Ohio 3496, ¶40

<sup>3</sup> *Szep v. Ohio State Bd. of Pharmacy*, *supra*.



bletcher@lah4law.com