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COMMENTS ON PROPOSED BHDDH REGULATIONS FOR THE LICENSING OF ORGANIZATIONS AND FACILITIES LICENSED BY BHDDH [212-RICR-10-00-1]
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This testimony is being submitted on behalf of the ACLU of Rhode Island, the Rhode Island Commission for Human Rights, Direct Action for Rights and Equality, and JustLeadershipUSA.

These proposed regulations make a number of substantive changes to the rules governing the licensing of organizations and facilities – and concomitantly, the hiring of thousands of employees – under BHDDH's jurisdiction. In this testimony, we wish to raise our deep concerns about one aspect of this proposal in particular, and that is Section 1.21(D), which addresses the disqualification of individuals from employment based on a criminal record check.

Our organizations have been concerned for many years about the use, and continued expansion, of criminal record checks for job applicants and for professional occupational licensing. People exiting the criminal justice system already face enormous barriers to rehabilitation, and broad-based criminal background check disqualifications only exacerbate those barriers. Just as importantly, they are almost certain to have a disproportionate impact on applicants of color.

Section 1.21(D) establishes a two-tier system for evaluating an applicant's past criminal record. The first tier is a lengthy list of offenses for which the person is automatically and permanently barred from any employment, volunteering or consulting at any facility or organization licensed by BHDDH if the employment "involves routine contact with patients,

residents or clients without the presence of other employees." The second tier includes a separate lengthy list of offenses which do not automatically disqualify an applicant, but presumptively do so unless he or she can "demonstrate his or her long-standing record of excellence in person-to-person care as a rebuttal." As explained in more detail below, however, this second tier is essentially an automatic ban as well.

We find these broad-based provisions problematic for a host of reasons, including the following:

• The list of disqualifying offenses (both automatic and presumptive) encompasses not only convictions, but also arrests not followed by convictions. However, an employer's consideration of a job applicant's arrest record is generally illegal under the state's Fair Employment Practices Act. R.I.G.L. §28-5-7(7). It is also a potential violation of Title VII of the Civil Rights Act of 1964, since the EEOC has determined that the use of such records can have a discriminatory impact on the basis of race and national origin. The regulation thus appears to encourage employers to violate the law. In any event, consideration of a person's arrest history is an inappropriate undermining of the presumption of innocence and such information should play no role in an organization or facility's consideration of a candidate.

• We do not know if this was intended, but as worded, the disqualifications required by Section 1.21(D) apply to individuals who are not "serving in a caring capacity in a program or service operated or licensed by BHDDH," but are merely residing in a household where such services are provided. If so, this will leave many persons with disabilities seeking home-based services in a bind: in order to accept services, they may need to require a family member to move out of the house, which in many instances may not be possible and may even be counter-productive to the individual's health and well-being.

• More generally, no category of offense should serve as a permanent and automatic disqualifier for employment or licensing. Instead, consistent with EEOC guidelines, employers should always be able to take various factors into account in making these decisions, such as the circumstances surrounding the offense, the amount of time that has elapsed since the crime occurred, evidence of rehabilitation and other relevant matters. Automatic disqualification, no matter what the circumstances, is unfair.

• In any event, the list of Tier 1 offenses is extremely broad, and especially problematic by containing no time limits in most instances. For example, without diminishing the seriousness of a "felony assault" conviction, it is worth noting that felony assault need not actually result in any injury to a third party. R.I.G.L. §11-5-2(a). "Felony larceny" covers a broad array of illegal conduct that could have been committed when the applicant was a teenager, yet that conduct will permanently disqualify him or her for decades to come from a wide range of jobs in this large and growing sector of employment.

• As troubling as the lengthy list of offenses in Tier 1 are, they are rendered meaningless anyway with the Section's additional inclusion of generic qualifiers. For example, one of the Tier 1 offenses is any felony "involving violence." Section 1.21(D)(1)(a)(27). It would seem unnecessary in light of the many specific violent offenses already included in the list, but by failing to define it in any way, it would appear to cover, among many other offenses, felonies committed by the applicant even where the only violence "involved" was committed by another party.

• Worst of all, the last "offense" mentioned is so all-encompassing as to completely obliterate the notion that this is a carefully tailored list. Under Section 1.21(D)(1)(a)(36), a person can be permanently disqualified from employment for "any other crime that would indicate that the employment of the person could endanger the health or welfare of patients, clients, or

residents." A skittish employer could use this to justify disqualifying just about any applicant with a criminal record.

• Exemption 36 also undercuts the seemingly limiting language in Section 1.21(D)(3), requiring police to notify an employer of an applicant's criminal record only if "an item of disqualifying nature has been discovered." Since potentially any criminal offense could qualify under Exemption 36, employers are likely to be notified if a background check reveals any criminal history whatsoever, thus undermining the privacy rights of applicants and encouraging facilities to discriminate against individuals with some type of past criminal history.

• The Tier 2 level is, unfortunately, just as troubling. Making all felony drug offenses and prostitution offenses presumptively disqualifying for employment shows a woeful disregard for rehabilitation and redemption, and for the positive benefits that individuals who have overcome that criminal history can bring to employment like this. It is deeply disturbing to know that a teenager who was forced to engage in prostitution to financially survive and who turns their life around will still have to prove their worth in order to qualify for a job in this field. Similarly, individuals who ran afoul of drug offenses in their younger days can, for precisely that reason, serve as exemplary employees helping other individuals with substance use disorders.

• More to the point, the regulatory standard for allowing somebody with these Tier 2 offenses to be employed will be impossible for almost anybody to meet. That is because, in order to rebut the presumption of disqualification, applicants must, as noted above, demonstrate a "long-standing record of excellence in person-to-person care." That means that virtually the only people who will be able to rebut the presumption are those who were already working in this field when they committed their crime. If it occurred beforehand, they will never be able to show a long-

standing record of excellence because they will never be able to qualify for a job involving "person-to-person care" in the first place. This is a true Catch-22.

Regulations like these impact a startling number of Rhode Islanders; not only do we have a staggering 23,000-plus citizens currently under probation or parole supervision, the number of Rhode Islanders with a past felony record is estimated to be between 39,000 and 51,000—this is to say nothing of people with misdemeanor records.

We also firmly believe that this is an equity issue that should be of the utmost importance to an agency like BHDDH. As in other states, Rhode Islanders involved in the criminal justice system are disproportionately people of color, who are already more likely than their white peers to face discrimination in employment. BHDDH should be a critical agency working to reduce, not increase, this discrimination and disparity.

We therefore strongly urge BHDDH to reexamine and significantly revise Section 1.21 to take into account the various concerns we have raised about its reach and impact.

If the concerns we have raised are not addressed, we request that, pursuant to R.I.G.L. §42-35-2.6, you provide us with a statement of the reasons for not accepting our arguments. Thank you for considering our views.

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