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COMMENTS ON PROPOSED DIVISION OF MOTOR VEHICLES REGULATIONS REGARDING SCHOOL BUS DRIVER CERTIFICATION [280-RICR-30-05-2]
and
ELIGIBILITY FOR PUPIL TRANSPORTATION CERTIFICATE [280-RICR-30-05-5]

December 2018

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 are, to a large extent, a repromulgation of rules already in effect at the DMV. However, we believe that the proposed adoption of these amended rules provides the necessary opportunity for the Division to revise its policies governing criminal record checks for those seeking school bus driver certification and pupil transportation certificates. These proposals, like the current regulations, continue to unduly burden individuals with past criminal records from obtaining licensing, and they do so without good cause. In fact, to the extent these rules treat people with criminal records more severely than people with serious driving infractions in their past, they are indefensible.

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 basic human needs including employment, and broad-based criminal background check disqualifications only exacerbate those barriers. Just as importantly, they are almost certain to have a disproportionate impact on Black and Latino applicants. The DMV's current and proposed rules perpetuate those

barriers. This testimony highlights only some of our major concerns and is not meant to be an exhaustive list of the problematic nature of the regulations.

Under Sections 5.6 and 5.7 of the rules governing the issuance of pupil transportation certificates, any person who has been convicted of, or pled nolo contendere to, *any* felony offense or any crime "involving moral turpitude" is automatically and permanently barred from obtaining a transportation certificate. Any person who has been convicted of, or pled nolo to, *any* misdemeanor offense within a twelve month period or more than one misdemeanor within the past five years is presumptively disqualified from obtaining a certificate unless it is determined, after a hearing, that granting a certificate "would not imperil the public health, safety and welfare." The rules for school bus driver certification, Sections 2.8 and 2.9, are identical, except that they do not include the archaic reference to crimes involving moral turpitude.

In considering these automatic and presumptive disqualifications due to past criminal offenses, it is worth comparing them to the disqualifications for *motor-vehicle related* infractions contained in those same regulatory sections. While a felony of any kind at any time is a permanent disqualification, a criminal motor vehicle offense, and even a civil *alcohol-related* driving offense, is disqualifying only if it has occurred within the past five years! Four moving violations spaced over four years is not disqualifying at all.

And while only two misdemeanor convictions within five years is enough to presumptively disqualify an applicant, a four-year old license suspension for any reason is perfectly fine, as is being at fault in three – or four or five – motor vehicle accidents, as long as the accidents took place with allowable time gaps over more than a two year period.

Thus, to give a concrete example, these rules permanently bar a person with a 20-year-old felony drug conviction from getting a school bus or pupil transportation certificate, while allowing a person with a six year old DUI conviction to qualify. This discrepancy between the leniency

shown for motor vehicle offenses and the harshness shown for an irrelevant criminal record history is nothing short of outrageous.

No category of offense should serve as a permanent and automatic disqualifier for employment or licensing. Instead, consistent with EEOC guidelines, employers – and licensing agencies like the DMV – should always take various factors into account in making these decisions, such as the amount of time that has elapsed since the crime occurred, the relevance of the conviction to the job in question, evidence of rehabilitation or mitigating circumstances, and other pertinent matters. EEOC guidelines further call for consideration of the potential discriminatory effect of utilizing convictions as automatic disqualifiers given the disproportionate impact of the criminal justice system on Black and Latino communities. Automatic disqualification based on a felony record, no matter what the circumstances, unfairly denies people with records access to economic stability.

Similarly, misdemeanor offenses totally unrelated to the certificate should not serve as a presumptive disqualification. Absent a connection to the qualifications for the certificate, a minor criminal record should not serve as a presumptive bar to getting a license.

As for the pupil transportation certificate regulation's bar on people convicted of crimes of "moral turpitude," this should be removed from the regulations altogether. Since one of the goals of this proposal is to clean up regulatory language, this term is a prime candidate for removal. No licensing statute that has been enacted in more than a decade has used this archaic term, and there is no reason to continue to keep it in these regulations.

The use of the term in law goes back over 100 years, but it received its judicial sanction in 1951 with a U.S. Supreme Court decision called *Jordan v. DeGeorge*. By a 6-3 vote, the Court held that the term was not unconstitutionally vague. The continued history of judicial interpretation

of that phrase belies that determination. To this day, courts routinely disagree on what the term means and what crimes fit into the category.

The dissenters in the Jordan case summed it up well by noting: "If we go to the dictionaries, the last resort of the baffled judge, we learn little except that the expression is redundant, for turpitude alone means moral wickedness or depravity and moral turpitude seems to mean little more than morally immoral. The Government confesses that it is 'a term that is not clearly defined.'" At the time of the decision, Black's Law Dictionary defined the phrase as "inherent baseness or vileness of principle or action; shameful wickedness or depravity." Whatever that means, one would think it would cover only pretty nasty crimes. So it's worth noting what the "depraved" crime was that the majority of the judges in Jordan concluded constituted a crime of "moral turpitude": it was conspiracy to defraud the government of taxes on distilled spirits.

Time has not been any kinder to the term. The first definition of the phrase in the current edition of Black's Law Dictionary is "conduct that is contrary to justice, honesty or morality." Not terribly helpful, and certainly not very limiting. Just a few years ago, a federal appeals court had to address the question whether the crime of being an accessory after the fact was a conviction of a crime for moral turpitude. The decision, before a 15-judge panel, led to four written opinions, ultimately with nine of the fifteen judges concluding it did not constitute "moral turpitude" and six believing it did. We therefore urge the Division to eliminate this hopelessly vague standard from the regulations. No person should fear being denied a professional certificate based on a standard that no reasonable person can truly explain with anything coming close to precision.

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 second highest rate of community supervision in the nation), more than 70,000 Rhode Islanders are

estimated to have a past felony record.[1] This is to say nothing of people with misdemeanor records. In addition, there are at least 875 state and federal laws and statutes that impede Rhode Islanders with records from obtaining gainful employment.[2]

We also firmly believe that this is an equity issue that should be of the utmost importance to state agencies. 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.[3] DMV and other state agencies should be working to reduce, not increase, this discrimination and disparity.

We therefore strongly urge the DMV to reexamine and significantly revise these regulations' criminal record check requirements to take into account the various concerns we have raised about their 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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[1] National Employment Law Project, Fair Chance Licensing Reform: Opening Pathways for People with Records to Join Licensed Professions, Appendix E, 2018. https://s27147.pcdn.co/wp-content/uploads/FairChanceLicensing-Nov-2018.pdf

[2] National Inventory of Collateral Consequences of a Conviction, Council of State Governments, 2018.

[3] Studies suggest that the impact of a criminal record on employment is 40% more damaging for black men than their white counterparts. Devah Pager, "The Mark of a Criminal Record," *American Journal of Sociology* (2003).