

STATE OF TENNESSEE

OFFICE OF THE
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Opinion No. 03-095

Consideration of prior foreign convictions (set aside) for qualification of police officers.

QUESTIONS

1. Whether a person who was “convicted or pleaded guilty to or entered a plea of *nolo contendere* to any felony charge or to any violation of any federal or state laws or city ordinances relating to force, violence, theft, dishonesty, gambling, liquor or controlled substances” in the state of Arizona, where the conviction/plea was subsequently set aside according to Ariz. Rev. Stat. Ann. § 13-907, would be disqualified from employment as a full-time, part-time, temporary, reserve or auxiliary police officer or special deputy under the provisions of Tenn. Code Ann. § 38-8-106(4), establishing qualifications for police officers.

2. Whether county security officers employed as campus, housing, airport and other local security officers, are required to be certified by the Tennessee Peace Officers Standards and Training Commission under Tenn. Code Ann. § 5-7-118.

OPINION

1. Yes. Where a person has been convicted of or pleaded guilty or entered a plea of *nolo contendere* to a charge or violation as set forth at Tenn. Code Ann. § 38-8-106(4), such person is not eligible for employment as a police officer in the State of Tennessee, even though the conviction or plea was entered in the State of Arizona and was subsequently set aside under Ariz. Rev. Stat. Ann. §13-907.

2. Yes. Tenn. Code § 5-7-118(b) requires that “[a]ll security officers employed pursuant to this section must meet the minimum certification requirements of the peace officers standards and training commission.” However, this requirement only applies in counties with populations exceeding 800,000.

ANALYSIS

1. Previous convictions set aside under Arizona law.

Tenn. Code Ann. § 38-8-106(4) clearly bars *any person* convicted of or having pleaded guilty or having entered a plea of *nolo contendere* to certain types of offenses from employment as a police officer in the State of Tennessee. No distinction is made for such convictions or pleas in foreign

state courts. To the contrary, the language of the statute suggests its applicability to “any violation of any federal or state laws” of certain enumerated types.

Tennessee law allows the removal and destruction, i.e., expungement, of public records regarding criminal arrests and charges not resulting in criminal convictions. Tenn. Code Ann. § 40-32-101(a)(1). Under a program of judicial diversion, a qualified defendant may enter into a period of probation, during which judgment is deferred. Upon the defendant’s successful completion of probation, he/she may request expungement of the criminal record in that case. Tenn. Code Ann. § 40-35-313.

This office has previously opined whether the Peace Officers Standards and Training Commission could consider a police officer’s/applicant’s conviction of a crime subsequently expunged or diverted: “The Commission may consider the fact that an individual has been convicted of one of the crimes enumerated in Tenn. Code Ann. § 38-8-106(4) regardless of whether the conviction has been expunged or whether post-trial (judicial) diversion was granted.” Op. Att’y Gen. No. 00-026 (Tenn. A.G., Feb. 15, 2000) We reasoned:

It appears to be the general law that while expungement of the record of a criminal conviction may remove many of the disabilities of a criminal conviction, it does not remove the fact of a conviction for purposes of determining one’s fitness to practice a particular profession or calling. . . . Because § 38-8-106(4) is a qualifications section for police officers, the Commission may consider the conviction despite an expungement of the record of such conviction.”

Id. at *2.

The result is no different where an Arizona conviction is involved. Indeed, it appears that under Arizona law, the “setting aside” of a conviction constitutes a restoration of civil rights, but does not “expunge” the conviction in the classical sense of that term.¹ *Russell v. Royal Maccabees Life Insurance Company*, 74 P.2d 443, 447 (Ariz. Ct. App. 1998)(rev. denied March 31, 1999). A “setting aside” under Ariz. Rev. Stat. Ann. § 13-907(A) “does not expunge or remove the fact of conviction in Arizona (for purposes of its use in a subsequent prosecution). *See also* Op. Att’y Gen. No. I83-042 (R83-041) (Ariz. A.G., April 21, 1983) where the Arizona Attorney General opined that “an expungement does not remove the fact of conviction in Arizona” for purposes of determining whether to issue a license to be a private investigator, security guard or polygraph examiner.

Consequently, it is the opinion of this office that an individual convicted or having pled guilty or entered a plea of *nolo contendere* to an offense relating to force, violence, theft, dishonesty, gambling, liquor or controlled substances in Arizona would be barred from employment as a police officer in the State of Tennessee.

¹To “expunge” means “[t]o erase or destroy.” Black’s Law Dictionary (7th ed. 1999)

2. Certification requirements for county security officers.

Regarding the certification requirement for county security officers, i.e., security officers employed by the county government, the Tennessee legislature has manifested a clear interest in requiring the county governments of Tennessee to maintain the same minimum standards for certification of security personnel as is required of peace officers at the state level. Under the express terms of Tenn. Code Ann. § 5-7-118: “All security officers employed pursuant to this section must meet the minimum certification requirements of the peace officers standards and training commission.” However, it should be noted that this requirement only applies in those counties where the population exceeds 800,000.² Therefore, there is no such requirement in counties with lesser populations.

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²Under Tenn. Code Ann. § 5-7-118(e), “[t]he provisions of this section only apply in any county having a population in excess of eight hundred thousand (800,000), according to the 1990 federal census or any subsequent federal census.”