

CHAPTER 407
DEPARTMENT OF HUMAN SERVICES,
ADMINISTRATIVE SERVICES DIVISION AND DIRECTOR'S OFFICE

DIVISION 7
CRIMINAL HISTORY CHECKS

DHS Employees, Volunteers, and Contractors

407-007-0000

Purpose and Scope

- (1) Purpose. The purpose of these rules, OAR 407-007-0000 to 407-007-0100, is to provide for the screening under ORS 181.534 and 181.537 of the Department of Human Services' employees, volunteers, and contractors to determine if they have a history of criminal behavior such that they should not be allowed to work, volunteer, be employed, or otherwise perform in positions covered by these rules.
- (2) Rule Applicability. These rules do not apply to subject individuals covered under OAR 407-007-0200 to 407-007-0380.

Stat. Auth.: ORS 181.534, 181.537, 409.050

Stats. Implemented: ORS 181.534, 181.537, 409.010

407-007-0010

Definitions

As used in OAR 407-007-0000 to 407-007-0100, unless the context of the rule requires otherwise, the following definitions apply:

- (1) "Approved" means that a subject individual, following a final fitness determination, is eligible to work, volunteer, be employed, or otherwise perform in positions covered by these rules.
- (2) "Client" means any individual who receives services, care, or funding for care, through the Department.
- (3) "Closed Case" means a criminal history check application that has been closed without a final fitness determination.
- (4) "Criminal History Check" means obtaining and reviewing criminal history as required by these rules. The result of a criminal history check is a fitness determination or a closed case. The criminal history check includes any or all of the following:

- (a) An Oregon criminal history check, in which criminal offender information is obtained from Oregon Department of State Police (OSP) using the Law Enforcement Data System (LEDS). The Oregon criminal history check may also include a review of information from the Oregon Judicial Information Network (OJIN), Oregon Department of Corrections records, Oregon Department of Transportation Drivers and Motor Vehicles Division (DMV), local or regional criminal history information systems, or other official law enforcement agency or court records in Oregon.
 - (b) A national criminal history check, in which criminal history is obtained from the Federal Bureau of Investigation (FBI) through the use of fingerprint cards and other identifying information.
 - (c) A state-specific criminal history check, in which criminal history is obtained from law enforcement agencies, courts or other criminal history information resources located in, or regarding, a state or jurisdiction outside Oregon.
- (5) “Criminal Offender Information” means records, including fingerprints and photographs, received, compiled, and disseminated by OSP for purposes of identifying criminal offenders and alleged offenders and maintained as part of an individual’s records of arrest, the nature and disposition of criminal charges, sentencing, confinement (confinement shall not include the retention by OSP of records of transfer of inmates between penal institutions or other correctional facilities), and release, and includes the OSP Computerized Criminal History System.
 - (6) “Criminal Records Unit” means the Department’s Criminal Records Unit (CRU).
 - (7) “Denied” means that a subject individual, following a fitness determination including a weighing test, is not eligible to work, volunteer, be employed, or otherwise perform in positions covered by these rules.
 - (8) “Department” means the Department of Human Services (DHS).
 - (9) “Employee” means an individual working in the Department in any position including a new hire, promotion, demotion, direct appointment, re-employment, job rotation, developmental assignment, transfer, or temporary hire.
 - (10) “Fitness Determination” means the outcome of an application and preliminary review, or an application and criminal history check including gathering of other information as necessary, in a case that is not closed.
 - (11) “Good Cause” means a valid and sufficient reason for not complying with time frames set during the criminal history check process or contested case hearing process, and may include an explanation of circumstances beyond an individual’s reasonable control.

- (12) “Other Criminal History Information” means information obtained and used in the criminal history check process that is not “criminal offender information” from OSP. “Other criminal history information” includes police investigations and records, justice records, court records, sexual offender registration records, warrants, DMV information, information provided on the Department’s criminal history check forms, and any other information from any jurisdiction obtained by or provided to the Department for the purpose of conducting a fitness determination.
- (13) “Restricted Approval” means an approval in which some restriction is made including but not limited to the subject individual, the subject individual’s environment, the type or number of clients for whom the subject individual may care, or the information to which the subject individual has access.
- (14) “Subject Individual” means an individual 16 years old or older from whom the Department may require fingerprints for the purpose of conducting a criminal history check. A subject individual includes any of the following:
- (a) An employee of the Department.
 - (b) An individual who has been offered employment by the Department.
 - (c) An individual secured by the Department through the services of a temporary employment agency, staffing agency, or personnel services agency who is providing any of the duties or having access as described in OAR 407-007-0060(1)(c).
 - (d) A volunteer or student over whom the Department has direction and control.
 - (e) A Department client who is placed in the work experience program at a Department site.
 - (f) Any individual who is required to complete a criminal history check pursuant to ORS 181.534 and 181.537 or the authority of these rules pursuant to a contract with the Department.
 - (g) Any individual applying for a paid or volunteer position, any employee, any volunteer, any contractor, or any employee of any contractor in any of the following:
 - (A) A state operated or DHS-contracted secure residential treatment facility;
 - (B) A state operated rehabilitation facility;
 - (C) A state operated group home within the Department’s State-Operated Community Programs;

- (D) Blue Mountain Recovery Center;
- (E) Eastern Oregon Training Center; or
- (F) Oregon State Hospital.

(15) “Weighing Test” means a process carried out by the Department in which available information is considered to make the outcome of a preliminary or final fitness determination. A weighing test is only conducted when a subject individual has potentially disqualifying crimes or conditions.

Stat. Auth.: ORS 181.534, 181.537, 409.050
Stats. Implemented: ORS 181.534, 181.537

407-007-0020 Criminal History Check Required

- (1) Who Conducts Criminal History Checks.
 - (a) The Department. The Department conducts criminal history checks on all subject individuals through LEDS maintained by OSP pursuant to ORS chapter 181 and the rules adopted pursuant thereto (See OAR chapter 257, division 15).
 - (b) OSP. If a nationwide criminal records check of a subject individual is necessary, OSP shall provide the Department results of a criminal records check conducted pursuant to ORS 181.534, including fingerprint identification, through the FBI.
- (2) When Criminal History Check Is Required (New Checks and Re-checks). A subject individual is required to have a check in the following circumstances:
 - (a) Subject Individuals. An individual becomes a subject individual on or after the effective date of these rules.
 - (b) Position Change. Except as provided in section (3) of this rule, the individual, whether previously considered a subject individual or not, changes positions, and the position requires a criminal history check. Movement into a position may be due but not limited to promotion, transfer, demotion, re-employment, job rotation, developmental assignment, restoration, bumping, or recall.
 - (c) Check Required by Regulation or Contract. A criminal history check is required by federal or state laws or regulations, other rules adopted by the Department, or by contract with the Department.
 - (d) Check Is Justified. The Department has reason to believe that a criminal history check is justified. Examples include but are not limited to any indication of

possible criminal behavior or quality assurance monitoring of a previously conducted criminal history check.

- (3) **When Criminal History Check Is Not Required.**
 - (a) **Initial Review.** The Department may determine that the completion of a new criminal history check for a Department employee is not required after the completion of the DHS Criminal History Request form when:
 - (A) The subject individual who has been offered a new position has completed a previous criminal history check with an outcome of approved; and
 - (B) There has been no break in employment with the Department.
 - (b) **Criteria for Ending Check.** The criminal history check process may be ended without a new criminal history check or new fitness determination if the Department determines there is no indication of new potentially disqualifying crimes or conditions, and at least one of the following is true:
 - (A) The previous criminal history check identified no potentially disqualifying crimes or conditions as defined at that time and the Department determines that the previous fitness determination is sufficient for the new position.
 - (B) The Department determines that the new position requires the same or less responsibility or access in the duties as described in OAR 407-007-0060(1)(c).
- (4) **Reporting Criminal Activity Required.** All subject individuals shall notify the Department's Office of Human Resources within five days of being arrested, charged, or convicted of any crime.

Stat. Auth.: ORS 181.534, 181.537, 409.050

Stats. Implemented: ORS 181.534, 181.537

407-007-0030

Criminal History Check Process

- (1) **Department Access.** Only Department employees may be authorized and approved to receive and evaluate criminal offender information and other criminal history information pursuant to OAR 407-007-0230 to 407-007-0240. These employees are called authorized designees or contact persons. Only authorized designees may conduct fitness determinations.

- (2) Forms Required. The subject individual shall use the Department's form to request the criminal history check. The DHS Criminal History Request form shall include the following:
 - (a) Identifying Information. Indication of what identifying information and other information the subject individual is required to provide in order to begin the criminal history check process, including but not limited to name, aliases, date of birth, address, recent residency information, drivers license, disclosure of criminal history, and disclosure of other information to be considered in the event of a weighing test.
 - (b) Notice Regarding Social Security number. A notice regarding disclosure of Social Security number indicating that:
 - (A) The subject individual's disclosure is voluntary; and
 - (B) The Department requests the Social Security number solely for the purpose of positively identifying the subject individual during the criminal history check process.
 - (c) Fingerprinting. A notice that the subject individual is subject to fingerprinting and a criminal history check; and
 - (d) Change of Address. Direction to the subject individual to provide the Department with any change of address.
- (3) Positive Identification. The Department shall verify the identity of a subject individual which may include but is not limited to asking the subject individual for government-issued photo identification (example: drivers' license) and confirming the information on the photo identification with the subject individual, the information written on the DHS Criminal History Request form, and the information written on the fingerprint card if a national criminal history check is conducted.
- (4) Oregon Criminal History Check.
 - (a) Obtaining Information. Using information submitted on the DHS Criminal History Request form, the Department obtains criminal offender information from the LEADS system and requests other criminal history information as needed.
 - (b) Handling of Information. Criminal offender information obtained through LEADS shall be handled in accordance with applicable OSP requirements in ORS chapter 181 and the rules adopted pursuant thereto (see OAR chapter 257, division 15).
- (5) National Criminal History Check.

- (a) Fingerprints Required. In addition to an Oregon criminal history check, a fingerprint-based national criminal history check is required by the Department under any of the following circumstances:
 - (A) The subject individual has out of state residency evidenced by the subject individual's possession of an out of state drivers' license or living outside Oregon for 60 or more consecutive days during the previous three years.
 - (B) The LEDS check, subject individual disclosures, or any other criminal history information obtained by the Department indicates there may be criminal history outside of Oregon.
 - (C) The Department has reason to question the identity or history of the subject individual.
 - (D) The subject individual is subject to these rules due to employment or position at Oregon State Institutions under OAR 407-007-0010(14)(g).
 - (E) The subject individual is assigned duties involving any aspect of a criminal history check process or is a hearings representative in criminal history check contested cases.
 - (F) A fingerprint-based criminal history check is required by federal or state laws or regulations, other rules adopted by the Department, or by contract with the Department.
- (b) Fingerprints May Be Required. In addition to an Oregon criminal history check, the Department may require a fingerprint-based national criminal history check if the Department has reason to believe that fingerprints are needed to make a final fitness determination.
- (c) Processing of Fingerprint Card. The subject individual shall complete and submit a fingerprint card when requested by the Department.
 - (A) The subject individual shall use a fingerprint card (Example: FBI Form FD 258) provided by the Department. The Department shall give the subject individual notice regarding the Social Security number as set forth in OAR 407-007-0030.
 - (B) The subject individual shall submit the card within 21 days of the request to the Department's Criminal Records Unit.
 - (i) If the card is not received within 21 days, the Department will close the application, making it a closed case.
 - (ii) The Department may extend the time allowed for good cause.

- (C) The Department may require new fingerprint cards if previous cards are rejected by OSP or the FBI.
- (6) State-Specific Criminal History Check. The Department may also conduct a state-specific criminal history check in lieu of or in addition to a national criminal history check. Reasons for a state-specific criminal history check include but are not limited to:
 - (a) Out-of-State History. When the Department has reason to believe that out-of-state criminal history may exist.
 - (b) Illegible Fingerprints. When the Department has been unable to complete a national criminal history check due to illegible fingerprints.
 - (c) Incomplete Information. When the national criminal history check results show criminal history without final disposition or complete information about charges.
 - (d) State Not Included in FBI. When there is indication of residency or criminal history in a state that does not submit all criminal history to the FBI.
 - (e) Other Reasons. When, based on available information, the Department has reason to believe that a state-specific check is necessary.
- (7) Additional Information Required.
 - (a) Required from Subject Individual. In order to complete a criminal history check and fitness determination, the Department may require, as necessary, additional information from the subject individual such as but not limited to additional criminal, judicial, or other background information; or proof of identity.
 - (b) Investigatory Interview. If a subject individual who is a represented Department employee is required to provide additional information, the process for obtaining that information through investigatory interviews shall adhere to collective bargaining agreements on investigatory interviews.
- (8) Imminent Danger.
 - (a) New Criminal History Check. If the Department determines there is indication of criminal behavior by the subject individual that could pose a potential immediate risk to the Department, its clients or vulnerable persons, the Department shall authorize a criminal history check without the completion of a DHS Criminal History Request form.
 - (b) Opportunity to Disclose. If the Department determines that a fitness determination based on the criminal history check would be adverse to the subject individual, the Department shall provide the subject individual the opportunity to disclose

criminal history and other information as indicated in OAR 407-007-0060 before the completion of the fitness determination.

- (9) Documentation. Criminal history checks conducted under this rule shall be documented in writing.

Stat. Auth.: ORS 181.534, 181.537, 409.050

Stats. Implemented: ORS 181.534, 181.537

407-007-0040

Potentially Disqualifying Crimes

- (1) Felonies and Misdemeanors. A conviction of any of the following crimes is potentially disqualifying. The list includes offenses that are crimes and does not include offenses or convictions that are classified as violations (See ORS 161.505 through 161.565).
- (a) Any Federal Crime.
 - (b) Any U.S. Military Crime.
 - (c) Felonies and Misdemeanors in Oregon. Any felony or misdemeanor in Oregon Revised Statutes.
 - (d) Crimes Outside Oregon. Any felony or misdemeanor in a jurisdiction outside Oregon (including known crimes outside the United States) that is the substantial equivalent of any Oregon crime, or that is serious and demonstrates behavior that poses a threat or jeopardizes the safety of the Department, its clients, or vulnerable individuals as determined by the Department.
 - (e) Repealed Crimes. Any crime that is no longer codified in Oregon or other jurisdiction but that is the substantial equivalent of any crime listed in this section as determined by the Department.
- (2) Evaluation Based on Current Laws. Regardless of the conviction date, evaluations of crimes may be based on Oregon laws and laws in other jurisdictions in effect at the time of the fitness determination.
- (3) Juvenile Records. Under no circumstances may a subject individual be denied under these rules because of a juvenile record that has been expunged or set aside pursuant to ORS 419A.260 to 419A.262.
- (4) Adult Records. Under no circumstances may a subject individual be denied under these rules because of an adult record that has been set aside pursuant to ORS 137.225.

Stat. Auth.: ORS 181.534, 181.537, 409.050

Stats. Implemented: ORS 181.534, 181.537

407-007-0050

Other Potentially Disqualifying Conditions

The following are potentially disqualifying conditions:

- (1) **Sex Offender.** The subject individual is a registered sex offender in any jurisdiction. There is a rebuttable presumption that an individual is likely to engage in conduct that would pose a significant risk to the Department, its clients, or vulnerable individuals if the subject individual has been designated a predatory sex offender as provided in ORS 181.585 or found to be a sexually violent dangerous offender under ORS 144.635 (or similar statutes in other jurisdictions).
- (2) **Warrants.** The subject individual has an outstanding warrant.
- (3) **Probation, Parole, or Post-Prison Supervision.** The subject individual is currently on probation, parole, or post-prison supervision for any crime, regardless of the original conviction date (or date of guilty or no contest plea if there is no conviction date), as of the date the DHS Criminal History Request form was signed or the date the Department conducted a criminal history check due to imminent danger.
- (4) **Parole or Probation Violation.** The subject individual is found in violation of post-prison supervision, parole, or probation for any crime regardless of the original conviction date (or date of guilty or no contest plea if there is no conviction date), within five years or less from the date the DHS Criminal History Request form was signed or the date the Department conducted a criminal history check due to imminent danger.
- (5) **Juvenile Adjudication.** Adjudication in a juvenile court, finding that the subject individual was responsible for a potentially disqualifying crime that would result in a conviction if committed by an adult.
- (6) **Guilty Except for Insanity.** A finding of “guilty except for insanity,” “guilty except by reason of insanity,” “not guilty by reason of insanity,” “responsible except for insanity,” or similarly worded disposition regarding a potentially disqualifying crime.
- (7) **Unresolved Arrests, Charges or Indictments.** An unresolved arrest, charge, or a pending indictment for a potentially disqualifying crime.
- (8) **Deferred Sentence or Diversion Program.** The subject individual has a deferred sentence, conditional discharge, or is participating in a diversion program for any potentially disqualifying crime.
- (9) **False Statement.** A “false statement” by the subject individual to the Department, including provision of materially false information, false information regarding criminal history, or failure to disclose information regarding criminal history.

407-007-0060

Information Considered

- (1) Consideration of Other Information. If the subject individual has potentially disqualifying crimes or conditions, the Department shall consider any information disclosed by the subject individual or otherwise known when making the fitness determination. This information includes but is not limited to:
 - (a) Potentially Disqualifying Crimes or Conditions. Circumstances regarding the nature of potentially disqualifying crimes and conditions may include but are not limited to:
 - (A) Age of the subject individual at time of the potentially disqualifying crime or condition.
 - (B) Details of incidents leading to the charges of potentially disqualifying crimes or resulting in potentially disqualifying conditions.
 - (C) Facts that support the conviction or other potentially disqualifying condition.
 - (D) Passage of time since commission of the crime or potentially disqualifying condition.
 - (E) Consideration of Oregon or federal laws, regulations, or rules covering the position, or the Department, in regard to the potentially disqualifying crimes or conditions.
 - (b) Other Circumstances. The Department shall also consider other factors when relevant information is available including but not limited to:
 - (A) Other information related to criminal activity including charges, arrests, pending indictments, or convictions. Other behavior involving contact with law enforcement may also be reviewed if information is relevant to other criminal history or shows a pattern relevant to criminal history.
 - (B) Periods of incarceration.
 - (C) Status of and compliance with parole, post-prison supervision, or probation.
 - (D) Whether a conviction was set aside and the legal effect of the setting aside the conviction.

- (E) Evidence of drug or alcohol issues directly related to criminal activity or potentially disqualifying conditions, including history of use, manufacturing, delivery, treatment, rehabilitation, and relapse.
 - (F) Evidence of other treatment or rehabilitation related to criminal activity, potentially disqualifying conditions or other factors listed in this rule. This includes but is not limited to assessments, evaluations or risk assessments before or after treatment or rehabilitation.
 - (G) Likelihood of repetition of criminal behavior or behaviors leading to potentially disqualifying conditions, including but not limited to patterns of criminal activity or behavior, or whether the subject individual appears to accept responsibility for past actions, as determined by the Department.
 - (H) Changes in circumstances subsequent to the criminal activity or disqualifying conditions.
 - (I) Information from protective services investigations or abuse and neglect reports pursuant to ORS 409.025 and 409.027.
 - (J) Education.
 - (K) Work history (employee or volunteer).
 - (L) History regarding licensure, certification, or training for licensure or certification.
 - (M) Written recommendations from current or past employers.
 - (N) Indication that criminal history or record has been disclosed to the Department or other employers.
 - (O) Indication of the subject individual's cooperation, honesty, or the making of a false statement during the criminal history check process.
- (c) Relevancy of History to Position. The relevancy of the subject individual's criminal history or potentially disqualifying condition to the paid or volunteer position, or to the environment of the position, shall be considered. Consideration includes the relation between the subject individual's potentially disqualifying crimes or conditions and the following tasks or duties in the position:
- (A) Access to or direct contact with Department clients, client property, or client funds.

- (B) Access to information technology services, or control over or access to information technology systems that would allow an individual holding the position to harm the information technology systems or the information contained in the systems.
- (C) Access to information, the disclosure of which is prohibited by state or federal laws, rules or regulations, or information that is defined as confidential under state or federal laws, rules, or regulations.
- (D) Access to payroll functions.
- (E) Responsibility for receiving, receipting, or depositing money or negotiable instruments.
- (F) Responsibility for billing, collections, or other financial transactions.
- (G) Access to mail received or sent to the Department, including interagency mail, or access to any mail facilities in the Department.
- (H) Responsibility for auditing the Department or other governmental agencies.
- (I) Responsibility for any personnel or human resources functions.
- (J) Access to personal information about employees, clients, or members of the public including Social Security numbers, dates of birth, drivers' license numbers, residency information, medical information, personal financial information, criminal offender information, or other criminal history information.
- (K) Access to medications, chemicals, or hazardous materials or access to facilities in which medications, chemicals and hazardous materials are present, or access to information regarding the transportation of medications, chemicals, or hazardous materials.
- (L) Access to property to which access is restricted in order to protect the health or safety of the public.
- (M) Responsibility for security, design, or construction services related to government buildings, grounds or facilities, or buildings, owned, leased, or rented for government purposes.
- (N) Access to critical infrastructure or security-sensitive facilities or information.

- (2) Fitness Determination with Available Information. If the Department requests other information for the purpose of conducting a weighing test, and the subject individual does not respond in a stated time period, the Department shall make a fitness determination based on available information or close the case.

Stat. Auth.: ORS 181.534, 181.537, 409.050

Stats. Implemented: ORS 181.534, 181.537

407-007-0070

Fitness Determinations

- (1) Preliminary Fitness Determination. A preliminary fitness determination is required to determine if a subject individual may work, volunteer, be employed, or otherwise perform in positions covered by these rules prior to a final fitness determination. The Department may not allow a subject individual to work, volunteer, or otherwise perform in positions covered by these rules prior to the completion of a preliminary fitness determination.
- (a) DHS Criminal History Request Form Completed. The subject individual shall complete and submit a DHS Criminal History Request form.
- (b) Preliminary Fitness Determination Required. The CRU shall complete a preliminary fitness determination and send notice to the hiring manager.
- (c) Preliminary Fitness Determination Outcomes. After review of the DHS Criminal History Request form, the CRU shall make one of the following determinations:
- (A) Hired on a Preliminary Basis. A subject individual may be hired or accepted into a position on a preliminary basis and allowed to participate in the training for, orientation to, and work activities of volunteering, employment, or other positions covered by these rules. The term “hired on a preliminary basis” is applicable only during the timeframe prior to a final fitness determination.
- (i) If there is no indication of a potentially disqualifying crime or condition on the DHS Criminal History Request form and the Department has no reason to believe the subject individual has potentially disqualifying history, the subject individual may be hired on a preliminary basis.
- (ii) When a subject individual discloses convictions or arrests for a potentially disqualifying crime, or any other potentially disqualifying condition, the individual may be hired on a preliminary basis only after the completion of a weighing test. A subject individual may be hired on a preliminary basis only if, based on information available at the time, the Department

determines that more likely than not that the subject individual poses no potential threat to the Department, its clients, or vulnerable persons.

- (B) No Hiring Allowed. When a subject individual discloses a conviction or arrest for a potentially disqualifying crime or any other potentially disqualifying condition the Department shall conduct a weighing test. The Department may not hire on a preliminary basis if the Department determines that:
 - (i) The subject individual may pose a potential threat to the Department, its clients, or vulnerable persons;
 - (ii) There is not enough available information to determine the level of potential threat posed by the subject individual;
 - (iii) The subject individual has previously been denied under these rules or other Department criminal history check rules; or
 - (iv) The subject individual is currently involved in contesting a criminal history check under these or other Department criminal history check rules.

- (d) Active Supervision While Hired on a Preliminary Basis. A subject individual who is hired on a preliminary basis shall be actively supervised at all times by an individual who has been approved without restrictions pursuant to these rules or previous Department criminal history check rules.
 - (A) At all times the individual providing active supervision shall do all of the following:
 - (i) Be in the same building as the subject individual or, if outdoors be within line of sight or hearing of the subject individual;
 - (ii) Know where the subject individual is and what the subject individual is doing; and
 - (iii) Periodically observe the actions of the subject individual.

 - (B) A subject individual who was approved without restrictions within the previous 24 months through a documented criminal history check pursuant to these rules or other DHS criminal history check rules may work after being hired on a preliminary basis without active supervision. The 24 month time frame is calculated from the date of previous approval to the date starting the new position. This exemption is not allowed in any of the following situations:

- (i) If the subject individual cannot provide documented proof that he or she worked continuously under the previous approval for at least one year.
 - (ii) If there is evidence of criminal activity within the previous 24 months.
 - (ii) If, as determined by the Department, the job duties in the new position are so substantially different from the previous position that the previous fitness determination is inadequate for the current position.
- (e) Revocation.
 - (A) The Department may immediately remove a subject individual hired on a preliminary basis for the following reasons:
 - (i) There is any indication of falsification of the application.
 - (ii) The subject individual fails to disclose convictions for any potentially disqualifying crimes, any arrests that did not result in convictions, or any out of state arrests or convictions.
 - (iii) The Department determines that allowing the subject individual to be hired on a preliminary basis is not appropriate, based on the application, criminal history, position duties, or regulations regarding the position.
 - (B) Revocation pursuant to this section is not subject to hearing or appeal.
- (f) Hiring or Placement Not Required. Nothing in this rule is intended to require that a subject individual, who is eligible for being hired on a preliminary basis be allowed to work, volunteer, be employed, or otherwise perform in positions covered by these rules prior to a final fitness determination.
- (2) Final Fitness Determination. The Department shall conduct a final fitness determination after all necessary criminal history checks have been completed. The Department may obtain and consider additional information as necessary to complete the final fitness determination.
 - (a) Final Fitness Determination Outcomes.
 - (A) Approved. The Department may approve a subject individual if:

- (i) The subject individual has no potentially disqualifying crimes or potentially disqualifying conditions; or
 - (ii) The subject individual has potentially disqualifying crimes or potentially disqualifying conditions and, after a weighing test, the Department determines that more likely than not that the subject individual poses no risk to the Department, its clients, or vulnerable persons.
- (B) Approved with Restrictions. The Department may approve a subject individual with restrictions if it determines that more likely than not that the subject individual poses no risk to the Department, its clients, or vulnerable persons, if certain restrictions are placed on the subject individual, such as but not limited to restrictions to one or more specific clients, job duties, or environments. The Department shall complete a new criminal history check and fitness determination on the subject individual before removing a restriction. A fitness determination of approved with restrictions shall only be considered for the following subject individuals:
- (i) An individual secured by the Department through the services of a temporary employment agency, staffing agency, or personnel services agency who is providing any of the duties or having access as described in OAR 407-007-0060(1)(c).
 - (ii) A volunteer or student over whom the Department has direction and control.
 - (iii) A Department client who is placed in a work experience program at a Department site.
 - (iv) Any individual who is required to complete a criminal history check pursuant to the statutory authority of ORS 181.534 and 181.537 or the authority of these rules pursuant to a contract with the Department.
- (C) Denied. The Department shall deny a subject individual whom it determines, after a weighing test, more likely than not poses a risk to the Department, its clients, or vulnerable individuals.
- (d) Fitness Determination by the CRU. The CRU may assist in or handle final fitness determinations as requested by Department staff.
- (3) Closed Case.
- (a) Incomplete Application. If the subject individual discontinues the application or fails to cooperate with the criminal history check process, the application is

considered incomplete and will be closed. Discontinuance or failure to cooperate includes but is not limited to the following circumstances:

- (A) The subject individual refuses to be fingerprinted when required by these rules.
 - (B) The subject individual fails to respond within a stated period of time to a request for corrections to the application, fingerprints, or provide any other information necessary to conduct a criminal history check and there is not enough information available to make a fitness determination.
 - (C) The subject individual withdraws the application, leaves the position prior to completion of the check, or cannot be located or contacted by the Department.
 - (D) The subject individual is determined to be ineligible for the position for reasons other than the criminal history check.
- (b) No Hearing Rights. When the application is closed without a final fitness determination, there is no right to contesting the closure.
- (4) Notice to Subject Individual. Upon completion of a final fitness determination resulting in denied or approved with restrictions, the Department shall provide written notice to the subject individual.
- (a) Notice of Fitness Determination. The notice shall:
 - (A) Be in a Department approved format;
 - (B) Include information regarding appeal rights and the notice becoming a final order in the event of a withdrawal or a failure to appear at the hearing; and
 - (C) Be mailed or hand-delivered to the subject individual as soon as possible, but not later than 14 calendar days after the decision. The effective date of action shall be recorded on the form.
 - (b) Other Documents. The Department shall also provide employees with all formal disciplinary documents and letters up to and including a letter of dismissal.
- (5) Termination Following Denial or Closed Case. When a subject individual is denied or a case is closed, the individual shall not be allowed to work, volunteer, be employed, or otherwise perform in positions covered by these rules. A denial or closed case applies only to the position and application in question.

- (a) Dismissal or Discharge of Employees. The process for a Department employee's removal from service or dismissal shall adhere to Department-wide Support Services policies on discharge, Department of Administrative Services Human Resource Services Division policies on dismissal, and collective bargaining agreements on discharge, as applicable.
 - (b) Dismissal of All Other Subject Individuals. For all other subject individuals, a denial or closed case shall result in immediate dismissal.
- (6) Documentation. Preliminary and final fitness determinations shall be documented in writing, including any details as needed such as but not limited to the restrictions in a restricted approval, the potentially disqualifying crimes or convictions in a denial, or the reasons for a closed case.
- (7) No Binding Precedent. The Department shall make new fitness determinations for each application. The outcome of previous fitness determinations does not ensure the same outcome of a new fitness determination.

Stat. Auth.: ORS 181.534, 181.537, 409.050

Stats. Implemented: ORS 181.534, 181.537

407-007-0080

Contesting a Final Fitness Determination

- (1) Fitness Determinations to Contest. A final fitness determination of denied or approved with restrictions is considered an adverse outcome. A subject individual with an adverse outcome may contest that outcome.
- (2) Work Pending Appeal Prohibited. If a subject individual is denied, then the individual may not work, volunteer, be employed, or otherwise perform in positions covered by these rules. A subject individual appealing a restricted approval may only work under the terms of the restriction during the appeal.
- (3) Employment Not Guaranteed. If an adverse outcome is changed at any time during the appeal process, such change does not guarantee employment or placement.
- (4) History Disputed.
 - (a) Correcting Disputed History. If a subject individual wishes to challenge the accuracy or completeness of criminal offender information provided by OSP, the FBI, or other criminal history information from other agencies reporting information to the Department, the subject individual may appeal to the entity providing the information. Such challenges are not subject to the Department's appeal process.

- (b) Disputed and Undisputed History. If a subject individual is disputing some criminal history and challenging a final fitness determination on other undisputed criminal history, no new fitness determination can be completed until the issue of the disputed history is resolved, and documentation of the resolution is provided to the Department.
- (5) Legal Representation. The subject individual has the right to represent himself or herself or have a legal representative during the appeal process. The subject individual may not be represented by a lay person. In this rule, the term “subject individual” shall be considered to include the subject individual’s legal representative.
- (6) Challenging the Fitness Determination. A subject individual who wishes to challenge an adverse fitness determination may appeal the determination by requesting a contested case hearing. The appeal process is conducted pursuant to ORS 183.411 through 183.497 and the Attorney General’s Uniform and Model Rules of Procedure for the Office of Administrative Hearings (OAH), OAR 137-003-0501 to 137-003-0700.
 - (a) Appeal. To request a contested case hearing, the subject individual shall complete and sign the DHS Hearing Request form. The form is provided with a notice of fitness determination and is also available by contacting the CRU.
 - (b) Deadline for Appeal. The completed and signed form must be received by the Department:
 - (A) For Department employees and individuals offered employment by the Department, not later than 15 calendar days after the effective date of action listed on the notice of the fitness determination.
 - (B) For all other subject individuals, not later than 45 calendar days after the effective date of action listed on the notice of the fitness determination.
 - (c) Untimely Appeal. In the event a request for an appeal is not timely, the Department will determine, based on a written statement from the subject individual and available information, if there is good cause to proceed with the appeal.
 - (d) Hearing on Timeliness. The Department may refer an untimely request to the OAH for a hearing on the issue of timeliness.
- (7) Criminal History Check. The Department may conduct additional criminal history checks during the appeal process to update or verify the subject individual’s criminal history.
- (8) Contested Case Hearing.
 - (a) Procedural Documents and Exhibits. The Department shall provide to the administrative law judge and the subject individual a complete copy of available

information. The notice of contested case and prehearing summary shall be mailed by certified mail through the U.S. Postal Service. All other documents shall be mailed by regular first class mail.

- (b) Public Attendance. The contested case hearing is not open to the public.
 - (c) New Fitness Determination. The administrative law judge shall make a new fitness determination based on the evidence and the contested case hearing record.
- (9) Proposed and Final Orders.
- (a) Notice of Fitness Determination as Final Order. In the following situations, the notice of fitness determination issued is final as if the subject individual never requested a hearing:
 - (A) Failure to request a hearing in the time allotted in this rule. No other document will be issued after the notice of fitness determination.
 - (B) Withdrawal of the request for hearing at any time during the appeal process.
 - (b) Informal Disposition. The Department may make an informal disposition based on review of available information and discussion with the subject individual. The Department shall issue a final order and new notice of fitness determination.
 - (c) Dismissal Order.
 - (A) The subject individual may withdraw a hearing request verbally or in writing at any time before the issuance of a final order. A dismissal order due to the withdrawal is effective the date it is received by the Department or the OAH. The subject individual may cancel the withdrawal in writing up to 14 calendar days after the date of withdrawal.
 - (B) A hearing request is dismissed by the Department when the subject individual fails to appear at the time and place specified for the contested case hearing. The order is effective on the date scheduled for the hearing.
 - (d) Order After Hearing. After a hearing, the administrative law judge shall issue a proposed and final order.
 - (A) If no written exceptions are received by the Department within 14 calendar days after the service of the proposed and final order, the proposed and final order shall become the final order.
 - (B) If timely written exceptions to the proposed and final order are received by the Department, the Department's Director or the Director's designee shall

consider the exceptions and serve a final order, or request a revised proposed and final order from the administrative law judge.

- (e) Reconsideration and Rehearing. Dismissal orders due to the subject individual's withdrawal, dismissal orders due to failure to appear, and final orders are subject to reconsideration or rehearing petitions with 60 calendar days after the order is served, pursuant to OAR 137-003-0675.

Stat. Auth.: ORS 181.534, 181.537, 409.050

Stats. Implemented: ORS 181.534, 181.537, 183.341

407-007-0090

Record Keeping, Confidentiality

- (1) LEDS Reports. All LEDS reports are confidential and shall be maintained by the Department in accordance with applicable OSP requirements in ORS chapter 181 and the rules adopted pursuant thereto (see OAR chapter 257, division 15).
 - (a) LEDS Access. LEDS reports are confidential and may only be shared with approved Department employees if there is a need to know consistent with these rules.
 - (b) Subject Individual Access. The LEDS report, and photocopies of the LEDS report, may not be shown or given to the subject individual.
- (2) National (FBI) Information. The results of a national criminal history check provided by the FBI, or through OSP, are confidential and may not be disseminated by the Department, with the following exceptions:
 - (a) Subject Individual Request. If a fingerprint-based criminal history check was conducted on the subject individual, the subject individual shall be provided a copy of the results if requested.
 - (b) Contested Case Hearing Exhibits. If authorized by the subject individual, the results of the national criminal history check shall be provided as exhibits during the contested case hearing.
- (3) Department Forms and Other Documentation. All completed DHS Criminal History Request forms, other criminal history information and other records collected or developed during the criminal history check process shall be kept confidential and disseminated only on a need-to-know basis.
- (4) Retention. All criminal history check documents shall be retained and destroyed pursuant to federal law and records retention schedules published by Oregon State Archives.

Stat. Auth.: ORS 181.534, 181.537, 409.050

Stats. Implemented: ORS 181.534, 181.537

407-007-0100

Variations

- (1) **Criteria for a Variance.** The Department may grant a variance based upon a demonstration by the Department program area or work unit that the variance would not pose a significant risk to the Department, its clients, or vulnerable individuals.
- (2) **Variance Application.** The program office or work unit requesting a variance shall submit in writing, an application to the Department's Administrative Services Division that contains the following:
 - (a) The section of the rule from which the variance is sought;
 - (b) The reason for the proposed variance;
 - (c) The alternative practice, service, method, concept or procedure proposed;
 - (d) A plan and timetable for compliance with the section of the rule from which the variance is sought; and
 - (e) An explanation on how the safety and well-being of the Department or affected individuals will be ensured during the time the variance period is in effect.
- (3) **Department Review.** The Assistant Director for the Department's Administrative Services Division or designee may approve or deny the request for a variance.
- (4) **Notification.** The Department shall notify the program office or work unit of the decision. This notice shall be sent within 30 days of the receipt of the request by the Department with a copy to other relevant sections of the Department.
- (5) **Appeal Application.** Appeal of the denial of a variance request shall be made in writing to the Director of the Department, whose decision shall be final.
- (6) **Duration of Variance.** The duration of the variance shall be determined by the Department. All variances shall be reapplied for before the duration of the variance expires.
- (7) **Implementation.** The Department program office or work unit may implement a variance only after written approval from the Department is received.
- (8) **No Precedent.** Granting a variance does not set a precedent for subsequent requests for variances.

- (9) Fitness Determination Outcomes Not Subject. The outcome of a fitness determination made pursuant to these rules is not subject to variance. Challenges to fitness determinations may only be through contested case hearing rights set forth in these rules or alternative options available to Department employees.

Stat. Auth.: ORS 181.537, 409.010, 409.050

Stats. Implemented: ORS 181.537