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CHAPTER 407

DEPARTMENT OF HUMAN SERVICES

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FILING CAPTION: Update to background checks allowing consideration of child abuse for Child Welfare subject individuals.

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RULES:

407-007-0000, 407-007-0010, 407-007-0020, 407-007-0041, 407-007-0060, 407-007-0070, 407-007-0430

AMEND: 407-007-0000

REPEAL: Temporary 407-007-0000 from DHS 5-2023

RULE TITLE: Purpose and Scope

NOTICE FILED DATE: 02/07/2024

RULE SUMMARY: This rule explains the purpose and scope of OAR 407-007-0000 to 407-007-0100. Update corrects a grammatical error and clarifies that when there is a criminal records check under these rules and under the abuse check rules (OAR 407-007-0400 to 407-007-0460), there will be one final fitness determination or outcome.

RULE TEXT:

(1) The purpose of these rules, OAR 407-007-0000 to 407-007-0100 is to supplement OAR 125-007-0200 to 125-007-0330 with guidelines and requirements specific to background checks for Oregon Department of Human Services (Department or ODHS) and Oregon Health Authority (Authority or OHA) subject individuals (SIs). These rules provide for the reasonable screening under ORS 181A.195, 181A.200, 409.027 AND 413.036 of the Department's employees, volunteers, and contractors to determine if they have a history of specific criminal behavior identified in federal or state law or rules such that they should not be allowed to work, volunteer, be employed, or otherwise perform in positions covered by these rules.

(2) These rules apply to evaluating potentially disqualifying convictions and conditions of an SI when conducting fitness determinations based upon such information. The fact that an SI is approved does not guarantee employment or placement. Except for OAR 407-007-0010, these rules do not apply to SIs covered under OAR 407-007-0200 to 407-007-0370.

(3) The Authority authorizes the Background Check Unit (BCU), a shared service of the Department and the Authority, to act on its behalf in performing criminal records checks. References in these rules to the Department or Authority are references to either or both agencies.

(4) When the position the SI is having a criminal records check for also requires an abuse check under OAR 407-007-

0400 to 407-007-0460, the result of the criminal records check and abuse check will be completed as one final fitness determination or outcome.

STATUTORY/OTHER AUTHORITY: ORS 181A.195, 181A.200, 409.050

STATUTES/OTHER IMPLEMENTED: ORS 181A.195, 181A.200, 409.010, 443.004

AMEND: 407-007-0010

RULE TITLE: Definitions

NOTICE FILED DATE: 02/07/2024

RULE SUMMARY: This rule lists the definitions for OAT 407-007-0000 to 407-007-0640. Updates include aligning the definition of abuse to current statutes, update current CJIS Security Policy version, and correct grammatical errors.

RULE TEXT:

In addition to the definitions in OAR 125-007-0210, the following definitions apply to OAR 407-007-0000 to 407-007-0640 unless otherwise noted:

- (1) "Abuse" has the meaning defined in the statutes ORS 124.005(1), 418.257(1), 419B.005(1), and 430.735(1), and in the rules promulgated to enact these statutes, corresponding to the setting in which the abuse was alleged or investigated and the vulnerable individuals associated with this abuse.
- (2) "Abuse check" means obtaining and reviewing abuse allegations, abuse investigation reports, and associated exhibits and documents for the purpose of determining whether an SI has potentially disqualifying abuse.
- (3) "Abuse investigation report" means a written report completed after an investigation into suspected abuse and retained by the Department or the Authority pursuant to ORS 124.085, 418.259, 419B.030, or 430.757, or a similar report filed in another state agency or by another state.
- (4) "Appeal process" means the process of contesting a final fitness determination of denied or approved with restrictions.
- (5) "Approved" means that a subject individual, following a final fitness determination, is fit to work, volunteer, be employed, or otherwise perform in the position listed in the criminal records check request.
- (6) "Approved with restrictions" or restricted approval means an approval in which some restriction is made to the position listed in the criminal records check request including but not limited to the SI, the SI's environment, the type or number of clients for whom the SI may provide care, or the information to which the SI has access.
- (7) "Authority" means the Oregon Health Authority.
- (8) "Authorized designee (AD)" means an individual whom the Department designates and authorizes to receive and process criminal records and abuse check requests from SIs; criminal records information, abuse investigation reports, and any other information gathered during the background check process; and to make fitness determinations.
- (9) "Background check" means a criminal records check and an abuse check.
- (10) "Background check submission date" means the date when the Background Check Unit receives a request for a criminal records check or abuse check as required by Oregon statute or administrative rule, including the subject individual's authorization for the checks.
- (11) "Background Check Unit" means the Background Check Unit (BCU), a Shared Services unit which conducts criminal records checks, abuse checks and fitness determinations for the Department and the Authority.
- (12) "Care" means the provision of care, treatment, education, training, instruction, supervision, placement services, recreation, or support to children, the elderly, or individuals with disabilities (see ORS 181A.200).
- (13) "Client" means any individual who receives services, care, or funding for care through the Department or the Authority.
- (14) "Criminal Justice Information" (CJI) means all of the Federal Bureau of Investigation (FBI) Criminal Justice Information Systems (CJIS) provided data necessary for law enforcement and civil agencies to perform their missions including but not limited to biometric, identity history, biographic, property, and case/incident history data. CJI also includes data stored in the Oregon Law Enforcement Data System (LEDS), the National Criminal Information Center (NCIC), and other criminal justice information systems files. See FBI CJIS Security Policy, version 5.9.4 (12/20/2023) or current version.
- (15) "Criminal records check" means obtaining and reviewing criminal records and includes either or both of the following:
 - (a) An Oregon criminal records check where criminal offender information is obtained from Oregon State Police (OSP)

using LEDS.

(b) A national criminal records check where criminal records are obtained from the FBI through the use of fingerprint cards sent to OSP and other identifying information. A national criminal records check also includes criminal records obtained from the FBI exclusively through the use of identifying information if the FBI has determined that the SI's fingerprints are illegible.

(16) "Denied" means that a subject individual, following a fitness determination including a weighing test, is not fit to work, volunteer, be employed, or otherwise perform in the position listed in the criminal records check request.

(17) "Department" means the Department of Human Services.

(18) "Employee" in OAR 407-007-0000 to 407-007-0100, and 407-007-0400 to 407-007-0460, means an individual working in the Department or the Authority in any position including a new hire, promotion, demotion, direct appointment, re-employment, limited duration, job rotation, developmental assignment, transfer, an individual impacted by the Department's or the Authority's lay-off process, or temporary hire.

(19) "Federal Tax Information" (FTI) tax return or return information received directly from the Internal Revenue Service (IRS) or obtained through an authorized secondary source, such as Social Security Administration (SSA), Federal Office of Child Support Enforcement (OCSE), Bureau of the Fiscal Service (BFS), or Centers for Medicare and Medicaid Services (CMS), or another entity acting on behalf of the IRS pursuant to an Internal Revenue Code (IRC) 6103(p)(2)(B) Agreement.

(20) "Fingerprint capture" means taking the SI's fingerprints for a national criminal records check in a manner that meets current Oregon statutes and the OSP's capacity for receiving fingerprints.

(21) "Fitness determination" means, regarding a criminal records check and abuse check when either or both are considered, the evaluation of whether an SI is fit to hold a position, provide care, or be granted licensure, certifications, registrations or permit to provide care. Fitness determination includes:

(a) The decision regarding SI disclosures, an Oregon criminal records check, and preliminary review (a preliminary fitness determination); or

(b) The decision regarding SI disclosures, completed criminal and abuse records check when either or both are considered including the gathering of other information as necessary, and a final review by an AD (a final fitness determination).

(22) "Founded or substantiated" has the meaning given these terms in the Department or Authority's administrative rules corresponding to the setting in which the abuse was investigated.

(23) "Good cause" means a valid and sufficient reason for not complying with time frames set during the criminal records check process, abuse check process, or appeal process, including but not limited to an explanation of circumstances beyond an SI's reasonable control.

(24) "Hearing representative" means a Department employee representing the Department in a contested case hearing.

(25) "Human Resources" in OAR 407-007-0000 to 407-007-0100, and 407-007-0400 to 407-007-0460, means either the Department's Office of Human Resources or the Authority's Office of Human Resources.

(26) "Office of Training, Investigations, and Safety (OTIS)" means the Office of Training, Investigations, and Safety, formerly the Office of Adult Abuse Prevention and Investigations, a shared service of the Department and Authority which is responsible for coordinating and conducting abuse investigations and providing protective services regarding reports of abuse and neglect of vulnerable individuals.

(27) "Oregon Criminal History and Abuse Records Data System (ORCHARDS)" means the electronic and online records system used to process and maintain background checks in compliance with OAR 407-007-0000 to 407-007-0640.

(28) "Other criminal history information" means any information obtained and allowed for a fitness determination that is not criminal offender information from OSP. Other criminal history information includes but is not limited to police investigations and records, information from local or regional criminal records information systems, justice records, court records, information from the Oregon Judicial Case Information Network, sexual offender registration records, warrants, Oregon Department of Corrections records, Oregon Department of Transportation's Driver and Motor

Vehicle Services Division information, disclosures by an SI, and any other information from any jurisdiction obtained by or provided to the Department for the purpose of conducting a fitness determination during the current background check or from any previous background checks completed by the Department.

(29) "Position" means the job or placement listed on the criminal records check request or background check request for the SI to initiate an abuse check, criminal records check, or background check. Covered positions include any type of employment, volunteer placement, contract placement, or a living or visiting situation at a facility where such a background check is required.

(30) "Subject individual (SI)" in OAR 407-007-0000 to 407-007-0100, and 407-007-0400 to 407-007-0460, means an individual on whom the Department may conduct a criminal records check and from whom the Department may require fingerprints for the purpose of conducting a national criminal records check. An SI includes any of the following:

(a) A Department employee.

(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 section (30)(e) of this rule.

(d) A Department client who is placed in the Work Experience or JOBS Plus program at a Department site.

(e) An individual who provides or seeks to provide services to the Department at Department facilities, sites, or offices as a contractor, subcontractor, vendor, volunteer under Department direction and control, or student under Department direction and control who:

(A) May have contact with clients;

(B) Has access to personal information about employees of the Department, clients, or members of the public, including but not limited to Social Security numbers, dates of birth, driver license numbers, medical information, personal financial information, or criminal background information;

(C) Has 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) Has access to property held in trust or to private property in the temporary custody of the state;

(E) Has payroll or fiscal functions or responsibility for:

(i) Receiving, receipting or depositing money or negotiable instruments;

(ii) Billing, collections, setting up financial accounts, or other financial transactions; or

(iii) Purchasing or selling property;

(F) Provides security, design or construction services for government buildings, grounds, or facilities;

(G) Has access to critical infrastructure or secure facilities information; or

(H) Is providing information technology services and has control over or access to information technology systems.

(f) Any individual applying for employment or a volunteer placement or any employee, volunteer, contractor, or employee of any contractor in any of the following:

(A) A State-operated or Authority-contracted secure residential treatment facility;

(B) A State-operated group home within the Department's Stabilization and Crisis Unit;

(C) Oregon State Hospital (OSH).

(31) "Weighing test" means a process carried out by the Department in which available information is considered to make a fitness determination.

STATUTORY/OTHER AUTHORITY: ORS 181A.195, 181A.200, 409.050

STATUTES/OTHER IMPLEMENTED: ORS 181A.195, 181A.200, 409.010

AMEND: 407-007-0020

RULE TITLE: Criminal History Check Required

NOTICE FILED DATE: 02/07/2024

RULE SUMMARY: This rule explains when a background check is required for individuals subject to this rule. Updated to current version of the CJIS Security Policy.

RULE TEXT:

(1) SIs must have a criminal records check in the following circumstances:

(a) If an individual becomes an SI on or after the effective date of these rules.

(b) Except as provided in section (2) of this rule, if the individual, whether previously considered an SI or not, changes positions, and the position requires a criminal records check.

(A) Change in a position may include but is not limited to promotion, transfer, demotion, re-employment, any return after break in service, temporary hire, agency temporary hire, temporary hire to permanent hire, lateral transfer from one district or unit to another district or unit, job rotation, rotation to permanent, developmental assignment, work out of class, work out of class to permanent, direct appointment, restoration, layoff, or recall. Change in a position also includes a substantial change in job duties indicating more responsibility or access in the duties as described in OAR 407-007-0060(3), as written in the SI's position description.

(B) Change in a position would not include a lateral transfer in which the SI maintains the same position title, same classification within the same unit or district, and with the same job duties as written in the SI's position description.

(c) If the Department has reason to believe that a criminal records check is justified. Examples include but are not limited to credible evidence of new potentially disqualifying convictions or conditions by an SI or quality assurance monitoring of a previously conducted criminal records check.

(d) If the SI's position requires use or access to CJI, or CJIS clearance pursuant to the FBI CJIS Security Policy, version 5.9.4 (12/20/2023) or current version.

(e) If the SI's position in state services requires use or access to FTI, the SI must have a new criminal records check every five years.

(2) Human Resources may determine that conducting a new criminal records check and fitness determination for an employee is not required.

(a) After submission of a criminal records check, Human Resources may consider ending the criminal records check if:

(A) The SI who has been offered a new position has completed a previous criminal records check and fitness determination with an outcome of approved; and

(B) There has been no break in employment with the Department.

(b) Human Resources may cease the criminal records check without making a new fitness determination if there is no indication of new potentially disqualifying crimes or conditions, and at least one of the following is true:

(A) The previous criminal records check identified no potentially disqualifying crimes or conditions as defined at that time and Human Resources determines that the previous fitness determination is sufficient for the new position.

(B) Human Resources determines that the new position requires the same or less responsibility or access in the duties as described in OAR 407-007-0060(3).

(3) All SIs shall notify Human Resources within five days of being arrested, charged, or convicted of any crime.

STATUTORY/OTHER AUTHORITY: ORS 181A.195, 181A.200, 409.050

STATUTES/OTHER IMPLEMENTED: ORS 181A.195, 181A.200, 409.010

AMEND: 407-007-0041

RULE TITLE: Potentially Disqualifying Convictions

NOTICE FILED DATE: 02/07/2024

RULE SUMMARY: This rule includes all the convictions that are considered potentially disqualifying for subject individuals under OAR 407-007-0000 to 407-007-0100. Updates include the removal of incorrect and duplicated crimes.

RULE TEXT:

(1) A conviction of any of the crimes listed in these rules is potentially disqualifying. Offenses or convictions that are classified as less than a misdemeanor, such as violations or infractions, are not potentially disqualifying (see ORS 161.505 to 161.565).

(2) The crimes listed in this section are permanent review crimes which require that a fitness determination with a weighing test be completed regardless of date of conviction.

(a) ORS 163.095, Aggravated murder

(b) ORS 163.107, Murder I

(c) ORS 163.115, Murder II

(d) ORS 163.118, Manslaughter I

(e) ORS 163.125, Manslaughter II

(f) ORS 163.145, Criminally negligent homicide

(g) ORS 163.149, Aggravated vehicular homicide

(h) ORS 163.165, Assault III

(i) ORS 163.175, Assault II

(j) ORS 163.185, Assault I

(k) ORS 163.187, Strangulation

(L) ORS 163.200, Criminal mistreatment II

(m) ORS 163.205, Criminal mistreatment I

(n) ORS 163.225, Kidnapping II

(o) ORS 163.235, Kidnapping I

(p) ORS 163.263, Subjecting another person to involuntary servitude in the second degree

(q) ORS 163.264, Subjecting another person to involuntary servitude in the first degree

(r) ORS 163.266, Trafficking in persons

(s) ORS 163.275, Coercion

(t) ORS 163.355, Rape III

(u) ORS 163.365, Rape II

(v) ORS 163.375, Rape I

(w) ORS 163.385, Sodomy III

(x) ORS 163.395, Sodomy II

(y) ORS 163.405, Sodomy I

(z) ORS 163.408, Unlawful sexual penetration II

(aa) ORS 163.411, Unlawful sexual penetration I

(bb) ORS 163.413, Purchasing sex with a minor, if the courts designate the offense as a sex crime pursuant to ORS 163.413(3)(d), or the offense is the defendant's second or subsequent convictions under ORS 163.413(3)(b)(B)

(cc) ORS 163.415, Sexual abuse III

(dd) ORS 163.425, Sexual abuse II

(ee) ORS 163.427, Sexual abuse I

(ff) ORS 163.432, Online sexual corruption of a child in the second degree, if the offender reasonably believed the child to be more than five years younger than the offender

(gg) ORS 163.433, Online sexual corruption of a child in the first degree, if the offender reasonably believed the child to be more than five years younger than the offender

(hh) ORS 163.435, Contributing to the sexual delinquency of a minor

(ii) ORS 163.445, Sexual misconduct, if the offender is at least 18 years of age

(jj) ORS 163.465, Public indecency

(kk) ORS 163.467, Private indecency

(LL) ORS 163.525, Incest, with a child victim

(mm) ORS 163.535, Abandonment of a child

(nn) ORS 163.537, Buying or selling a person under 18 years of age

(oo) ORS 163.547, Child neglect I

(pp) ORS 163.670, Using child in display of sexually explicit conduct

(qq) ORS 163.680, Paying for viewing a child's sexually explicit conduct

(rr) ORS 163.684, Encouraging child sexual abuse I

(ss) ORS 163.686, Encouraging child sexual abuse II

(tt) ORS 163.687, Encouraging child sexual abuse III

(uu) ORS 163.688, Possession of materials depicting sexually explicit conduct of a child I

(vv) ORS 163.689, Possession of materials depicting sexually explicit conduct of a child II

(ww) ORS 163.700, Invasion of personal privacy II

(xx) ORS 163.701, Invasion of personal privacy I

(yy) ORS 163A.005, All crimes listed in definition of "Sex Crime", including Transporting child pornography into the state

(zz) ORS 164.055, Theft I

(aaa) ORS 164.057, Aggravated theft I

(bbb) ORS 164.098, Organized retail theft

(ccc) ORS 164.125, Theft of services

(ddd) ORS 164.215, Burglary II

(eee) ORS 164.225, Burglary I

(fff) ORS 164.325, Arson I

(ggg) ORS 164.377, Computer crime

(hhh) ORS 164.405, Robbery II

(iii) ORS 164.415, Robbery I

(jjj) ORS 165.013, Forgery I

(kkk) ORS 165.022, Criminal possession of a forged instrument I

(LLL) ORS 165.032, Criminal possession of a forgery device

(mmm) ORS 165.800, Identity theft

(nnn) ORS 165.803, Aggravated identity theft

(ooo) ORS 167.012, Promoting prostitution

(ppp) ORS 167.017, Compelling prostitution

(qqq) ORS 167.057, Luring a minor

(rrr) ORS 167.320, Animal abuse I

(sss) ORS 167.322, Aggravated animal abuse I

(ttt) ORS 167.333, Sexual assault of animal

(uuu) ORS 475.752(1), (2), and (6), Prohibited acts generally (regarding delivery and manufacture drug crimes; formerly ORS 475.840, 2005-2011)

(vvv) ORS 475.806, Unlawful manufacture of hydrocodone

(www) ORS 475.808, Unlawful manufacture of hydrocodone within 1,000 feet of school

(xxx) ORS 475.810, Unlawful delivery of hydrocodone

- (yyy) ORS 475.812, Unlawful delivery of hydrocodone within 1,000 feet of school
- (zzz) ORS 475.816, Unlawful manufacture of methadone
- (aaaa) ORS 475.818, Unlawful manufacture of methadone within 1,000 feet of school
- (bbbb) ORS 475.820, Unlawful delivery of methadone
- (cccc) ORS 475.822, Unlawful delivery of methadone within 1,000 feet of school
- (dddd) ORS 475.826, Unlawful manufacture of oxycodone
- (eeee) ORS 475.828, Unlawful manufacture of oxycodone within 1,000 feet of school
- (ffff) ORS 475.830, Unlawful delivery of oxycodone
- (gggg) ORS 475.832, Unlawful delivery of oxycodone within 1,000 feet of school
- (hhhh) ORS 475.840(1) and (2), Prohibited acts generally (regarding delivery and manufacture drug crimes formerly ORS 475.992; renumbered to ORS 475.752 in 2011)
- (iiii) ORS 475.846, Unlawful manufacture of heroin
- (jjjj) ORS 475.848, Unlawful manufacture of heroin within 1,000 feet of school
- (kkkk) ORS 475.850, Unlawful delivery of heroin
- (LLLL) ORS 475.852, Unlawful delivery of heroin within 1,000 feet of school
- (mmmm) ORS 475.866, Unlawful manufacture of 3,4-methylenedioxymethamphetamine
- (nnnn) ORS 475.868, Unlawful manufacture of 3,4-methylenedioxymethamphetamine within 1,000 feet of school
- (oooo) ORS 475.870, Unlawful delivery of 3,4-methylenedioxymethamphetamine
- (pppp) ORS 475.872, Unlawful delivery of 3,4-methylenedioxymethamphetamine within 1,000 feet of school
- (qqqq) ORS 475.876, Unlawful manufacture of cocaine
- (rrrr) ORS 475.878, Unlawful manufacture of cocaine within 1,000 feet of school
- (ssss) ORS 475.880, Unlawful delivery of cocaine
- (tttt) ORS 475.882, Unlawful delivery of cocaine within 1,000 feet of school
- (uuuuu) ORS 475.886, Unlawful manufacture of methamphetamine
- (vvvv) ORS 475.888, Unlawful manufacture of methamphetamine within 1,000 feet of school
- (wwww) ORS 475.890, Unlawful delivery of methamphetamine
- (xxxx) ORS 475.892, Unlawful delivery of methamphetamine within 1,000 feet of school
- (yyyy) ORS 475.904, Unlawful delivery of controlled substance within 1,000 feet of school
- (zzzz) ORS 475.906, Penalties for distribution to minors
- (aaaaa) ORS 475.908, Causing another person to ingest a controlled substance
- (bbbbb) ORS 475.910, Application of controlled substance to the body of another person
- (ccccc) ORS 475.914, Prohibited acts for registrants (with the Oregon State Board of Pharmacy)
- (dddd) ORS 475C.333, Prohibition against giving marijuana item as prize
- (eeee) ORS 475C.345, Unlawful delivery of marijuana item
- (ffff) ORS 475C.349, Unlawful manufacture of marijuana item
- (ggggg) ORS 475C.373, Unlawful sale or delivery of marijuana paraphernalia
- (hhhhh) Any crime of attempt, solicitation, or conspiracy to commit a crime listed in this section pursuant to ORS 161.405, 161.435, or 161.450
- (iiiiii) Any crime in any other jurisdiction that is the substantial equivalent of any of the Oregon crimes listed in section (2) of this rule, as determined by BCU. This includes any U.S. military crimes which are the substantial equivalent of crimes listed in section (2) of this rule.
- (3) The crimes listed in this section are ten-year review crimes which require that a fitness determination with a weighing test be completed if the date of conviction is within ten years of the background check submission.
 - (a) Any misdemeanor or felony not listed in section (2) or (4) of this rule in Oregon or any other jurisdiction. This includes U.S. military crimes not considered to be the substantial equivalent of crimes listed in section (1) of this rule.
 - (b) Any crime of attempt, solicitation, or conspiracy to commit a crime listed in this section pursuant to ORS 161.405 or 161.435

- (4) Two or more convictions of ORS 813.010 (Driving under the Influence of Intoxicants (DUII)) or ORS 830.325 (Operating Boat while under Influence of Intoxicants) or a misdemeanor conviction under a law in any jurisdiction that imposes criminal penalties for operating a vehicle or boat while under the influences of intoxicants, are potentially disqualifying if they have occurred within five years of the date of the background check submission.
- (a) A single conviction of a crime in section (4) of this rule is not considered potentially disqualifying regardless of the date of conviction.
- (b) If an SI has two or more convictions of a crime in section (4) of this rule and only one, or none, occurred within five years from the date of the background check submission, the convictions are not potentially disqualifying.
- (5) Evaluations of crimes may be based on available information in Oregon laws and laws in other jurisdictions regarding the crime.
- (6) Under no circumstances may a crime be considered potentially disqualifying if it is:
- (a) Related to marijuana if the crime is no longer a criminal offense in the originating jurisdiction.
- (b) Part of a juvenile record that has been expunged pursuant to ORS 419A.260 to 419A.262.
- (c) Part of an adult record that has been set aside pursuant to ORS 137.225.

STATUTORY/OTHER AUTHORITY: ORS 181A.195, ORS 409.050

STATUTES/OTHER IMPLEMENTED: ORS 181A.195

AMEND: 407-007-0060

REPEAL: Temporary 407-007-0060 from DHS 5-2023

RULE TITLE: Weighing Test

NOTICE FILED DATE: 02/07/2024

RULE SUMMARY: If an individual subject to OAR 407-007-0000 to 407-007-0100 has potentially disqualifying convictions or conditions, this rule lists the factors that the Department must consider in a weighing test to determine fitness for the position being sought. This rule as updated language making clear that, if the individual also has potentially disqualifying abuse under ORA 407-007-0400 to 407-007-0460, the Department must also consider the factors in OAR 407-007-0430 in a weighing test.

RULE TEXT:

If the SI has potentially disqualifying convictions under OAR 407-007-0041, or potentially disqualifying conditions under OAR 407-007-0050, the Department conducts a weighing test. If the SI is subject to an abuse check in accordance with OAR 407-007-0400 to 407-007-0460 and has potentially disqualifying abuse, the weighing test includes the consideration of factors in this rule and in OAR 407-007-0430. The weighing test includes consideration of factors pursuant to ORS 181A.195 and the following if available at the time of the weighing test:

(1) Circumstances regarding the nature of potentially disqualifying crimes and conditions including but not limited to:

- (a) Age, maturity and capacity of the SI at time of the potentially disqualifying conviction or condition.
- (b) Details of incidents leading to or resulting in potentially disqualifying convictions or conditions.
- (c) If there are more than one potentially disqualifying conviction or condition (including potentially disqualifying abuse defined in OAR 407-007-0410), the timeline, frequency and relation between potentially disqualifying history.
- (d) Facts that support the potentially disqualifying conviction or condition.
- (e) Passage of time since commission of the crime or potentially disqualifying condition.
- (f) Consideration of state or federal laws, regulations, or rules covering the position or the Department, regarding the potentially disqualifying convictions or conditions.
- (g) Consideration of state or federal laws, regulations, or rules that impact what is considered potentially disqualifying.

For example:

(A) Effective February 1, 2021, most possession crimes in Oregon were reduced to violations, making them no longer potentially disqualifying.

(B) The Department may give less weight to a potentially disqualifying conviction or condition which is only potentially disqualifying because it was a crime at the time it occurred but at the time of the weighing test is no longer considered a crime nor is associated with any potentially disqualifying conviction or condition.

(C) The consideration given potentially disqualifying convictions or conditions impacted by federal laws, regulations, or rules is determined by the number of these potentially disqualifying convictions or conditions and evaluation of relevant factors in sections (1), (2) and (3).

(2) Other factors when available including but not limited to:

- (a) Periods of incarceration, including rehabilitation or other impacts on SI.
- (b) Status of and compliance with parole, post-prison supervision, or probation regarding potentially disqualifying convictions or conditions.
- (c) Evidence of drug or alcohol issues directly related to potentially disqualifying convictions or conditions.
- (d) Evidence of other treatment or rehabilitation related to potentially disqualifying convictions or conditions.
- (e) Likelihood of repetition of behaviors leading to potentially disqualifying convictions or conditions.
- (f) Changes in circumstances subsequent to the criminal activity or disqualifying conditions including but not limited to:
 - (A) History of high school, college, or other education related accomplishments.
 - (B) Work history (employee or volunteer).
 - (C) History regarding licensure, certification, or training for licensure or certification.
 - (D) Written recommendations from current or past employers.

- (g) Indication of the SI's cooperation, honesty during the background check process, including:
- (A) Acknowledgment and acceptance of responsibility of potentially disqualifying convictions and conditions; or
 - (B) Providing false, incomplete or misleading information regarding potentially disqualifying convictions and conditions, or any subsequent circumstances.
- (3) The Department must consider the relevancy of the SI's potentially disqualifying convictions or conditions to the position or to the environment of the position. Consideration includes the relation between the SI's potentially disqualifying convictions 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, driver license numbers, residency information, medical information, personal financial information, criminal offender information, or other criminal records information.
 - (k) Access to medications, chemicals, or hazardous materials; 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. This includes 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.
 - (o) Access or use of CJI, or the need for CJIS clearance.
 - (p) Access or use of FTI.

STATUTORY/OTHER AUTHORITY: ORS 181A.195, 181A.200, 409.050

STATUTES/OTHER IMPLEMENTED: ORS 181A.195, 181A.200, 409.010, 443.008

AMEND: 407-007-0070

REPEAL: Temporary 407-007-0070 from DHS 5-2023

RULE TITLE: Final Fitness Determinations

NOTICE FILED DATE: 02/07/2024

RULE SUMMARY: This rule indicates the potential outcomes after a criminal records check (and weighing test if needed; also explain what could lead to closing the background check without a final determination. Updates included clarification that the final fitness determination is for a criminal records check and, if required, an abuse check. This update leads to the removal of one of the reasons for closing a criminal records check without a final fitness determination.

RULE TEXT:

The Department shall make a final fitness determination in accordance with OAR 125-007-0260 and this rules after all necessary criminal records checks and a weighing test, if necessary, have been completed.

(1) The Department may obtain and consider additional information as necessary to complete the final fitness determination. Particularly in weighing tests where it appears the outcome may be adverse to an SI, the Department shall attempt to obtain additional information for the weighing test from the SI directly through correspondence, phone, or both.

(2) The final fitness determination of a criminal records check, and an abuse check if required in accordance with OAR 407-007-0400 to 407-007-0460, shall result in one of the following outcomes:

(a) The Department may approve an SI if:

(A) The SI has no potentially disqualifying convictions or potentially disqualifying conditions; or

(B) The SI has potentially disqualifying convictions or potentially disqualifying conditions and, after a weighing test with available information, the Department determines that more likely than not the SI poses no risk to the Department, its clients, or vulnerable persons.

(b) The Department may approve an SI with restrictions if, after a weighing test with available information, it determines that more likely than not that the SI poses no risk to the Department, its clients, or vulnerable persons, if certain restrictions are placed on the SI, such as but not limited to restrictions to one or more specific clients, position duties, or environments. The Department shall complete a new background check and fitness determination on the SI before removing a restriction. A fitness determination of approved with restrictions shall only be considered for the following SIs:

(A) 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(3).

(B) A volunteer or student under Department direction and control.

(C) A Department client who is placed in a Work Experience or JOBS Plus program at a Department site.

(D) Any individual who is required to complete a criminal records check pursuant to the statutory authority of ORS 181A.195 and 181A.200 or the authority of these rules pursuant to a contract with the Department.

(c) The Department shall deny an SI whom it determines, after a weighing test with available information, more likely than not poses a risk to the Department, its clients, or vulnerable individuals.

(d) The Department shall consider a criminal records check to have any outcome of incomplete fitness determination in the following circumstances:

(A) The Department or SI discontinues the application or the SI fails to cooperate with the criminal records check or fitness determination process, including but not limited to refusal to be fingerprinted or failing to respond in a timely manner to requests from the Department. The criminal records check request is considered closed and there are no hearing rights for the SI.

(B) BCU determines that the SI is ineligible for the position due to federal requirements, state statutes, or for reasons other than criminal history. The criminal records check request is considered closed and SI has no hearing rights.

(C) BCU or the QE withdraws or closes the background check request before a final fitness determination for any

reason. The background check request is considered closed and the SI has no hearing rights.

(D) The SI withdraws the application, leaves the position prior to completion of the background check, or the Department cannot locate or contact the SI. The background check request is considered closed and the SI has no hearing rights.

(3) Upon completion of a final fitness determination, the Department shall provide the SI with written notice, which shall:

(a) Be in a Department approved format;

(b) Include information regarding appeal rights for denied or approved with restrictions outcomes if appeal is allowed.

The notice shall also include a statement that it becomes a final order by default in the event of a withdrawal or a failure to participate during the appeal or hearing; and

(c) Be mailed or hand-delivered to the SI no later than 14 calendar days after the decision. The effective date of action shall be recorded on the notice.

(d) Human Resources shall also provide employees with all formal disciplinary documents and letters up to and including a letter of dismissal.

(4) When an SI is denied, the Department may not allow the SI to work, volunteer, be employed, or otherwise perform in the position listed in the criminal records check request. A denial applies only to the position in question.

(a) The process for a Department employee's removal from service or dismissal shall adhere to Department-wide Support Services discharge policies, Department of Administrative Services' Human Resource Services Division dismissal policies, and collective bargaining agreements on discharge, as applicable.

(b) For all other SIs, a denial shall result in immediate dismissal.

(5) Final fitness determinations shall be documented in writing, including any other necessary details including but not limited to restrictions in a restricted approval or potentially disqualifying crimes or conditions in a denial.

(6) The Department shall make new fitness determinations for each application. The outcome of previous fitness determinations does not set a precedent for subsequent fitness determinations.

STATUTORY/OTHER AUTHORITY: ORS 181A.195, 181A.200, 409.050

STATUTES/OTHER IMPLEMENTED: ORS 181A.195, 181A.200, 409.010

AMEND: 407-007-0430

REPEAL: Temporary 407-007-0430 from DHS 5-2023

RULE TITLE: Applicants to the Department

NOTICE FILED DATE: 02/07/2024

RULE SUMMARY: This rule explains the abuse check process for applicants to the Department, including the weighing required if an individual has potentially disqualifying abuse. Updates clarify that when an abuse check is applicable, it is done along with a criminal records check under OAR 407-007-0000 to 407-007-0100; additional information regarding the consideration of any child abuse for applicants to the Department's Child Welfare includes review of history and consultation with Human Resources when making a final determination of approved.

RULE TEXT:

(1) Subject to any applicable collective bargaining agreements, this rule applies to any SI who is:

- (a) Offered employment or volunteer placement with the Department;
- (b) Offered a change in employment or volunteer placement within the Department.
- (c) An employee of any contractor in any of the following:
 - (A) A State-operated or Authority-contracted secure residential treatment facility;
 - (B) A State-operated residential training home within SACU;
 - (C) Oregon State Hospital.

(2) The Department requires an SI to have an abuse check, along with a criminal records check under OAR 407-007-0000 to 407-007-0100 resulting in one final fitness determination, in the following circumstances:

- (a) An SI is offered employment, volunteer placement, or work under a contract with the Department.
- (b) An SI is currently employed by or volunteering with the Department and is offered a new position within the Department. A change in a position requiring an abuse check may be due to but not limited to promotion, transfer, demotion, re-employment, job rotation, developmental assignment, restoration, bumping, or recall. For the abuse check to be required, there must be, as determined by the Office of Human Resources:
 - (A) A significant change in position duties or responsibilities; or
 - (B) A change in position classification.

(3) Using identifying information submitted to the Department, the Department shall conduct an abuse check to determine if the SI has potentially disqualifying abuse.

(a) In order to complete an abuse check and fitness determination, the Department may require additional information from the SI including but not limited to additional background information or documentation regarding circumstances since the abuse occurred.

(b) If an SI is a represented Department employee, the process for obtaining additional information through investigatory interviews shall adhere to collective bargaining agreements on investigatory interviews.

(4) The Department shall determine whether a start date for an SI may be set based on the SI's disclosures, a preliminary review of Oregon criminal history and an abuse check.

(5) If an SI has potentially disqualifying abuse, the Department shall conduct a weighing test in order to make a fitness determination. Factors to consider in a weighing test include but are not limited to:

- (a) The details regarding the abuse including but not limited to:
 - (A) Circumstances leading to the incident of abuse;
 - (B) The nature or type of abuse; and
 - (C) Other information gathered during the scope of the abuse investigation.
- (b) The date of abuse incident and abuse investigation, and the age of the SI at the time of the abuse.
- (c) If there are more than one incident of potentially disqualifying abuse (or there is potentially disqualifying abuse and also potentially disqualifying criminal history as described in OAR 407-007-0041 and 407-007-0050), the timeline, frequency and relation between potentially disqualifying history.
- (d) The quality of the abuse investigation including, if applicable, any exhibits and related documents with consideration

to completeness, objectivity, and sufficiency.

(e) Due process provided to the SI after the abuse investigation.

(f) Required conditions and action resulting from the founded or substantiated abuse that would allow for reinstatement of the SI in the position including but not limited to training, counseling, corrective or disciplinary action, and the SI's compliance.

(g) The impact of cultural or societal forces such as structural racism or poverty and other impacts to marginalized communities, upon the subject individual and whether those forces contributed to the circumstances leading to potentially disqualifying abuse.

(h) Circumstances related to the SI including but not limited to work history, education history, and other personal information provided by the SI.

(i) Changes in circumstances subsequent to the potentially disqualifying abuse.

(j) The relevancy of the abuse to the position the SI is seeking.

(6) Following an abuse check, the Department shall complete the fitness determination.

(a) The Department may approve an SI if:

(A) The SI has no potentially disqualifying abuse; or

(B) The SI has potentially disqualifying abuse but, after a weighing test, the Department determines that more likely than not the SI poses no risk to the Department, its clients, or vulnerable persons; or

(C) The SI is applying for employment, volunteer placement, or contract placement when applicable, with the Department's Child Welfare division and has potentially disqualifying abuse where the victim is a child, when:

(i) After a weighing test, the Department determines that more likely than not the SI poses no risk to the Department, its clients, or vulnerable persons; and

(ii) BCU has consulted with Child Welfare executive staff regarding the child abuse considered in the weighing test and the final fitness determination outcome.

(b) The Department shall deny an SI who has potentially disqualifying abuse and, after a weighing test, the Department determines that more likely than not the SI poses a risk to the Department, its clients, or vulnerable individuals.

(7) When the application is closed without a final fitness determination, the SI does not have a right to contest the closed case. The Department shall close the case if an SI:

(a) Discontinues the abuse check application;

(b) Fails to cooperate with the abuse check process; or

(c) Is subject to OAR 407-007-0445 and is found ineligible.

(8) Upon completion of a fitness determination, the Department shall provide written notice to the SI. The notice shall:

(a) Be in a Department approved format; and

(b) Include an effective date of action.

(c) For an outcome of denied:

(A) Include the reasons for the denial;

(B) Include information regarding appeal rights; and

(C) Include a statement that the notice becomes a final order in the event of a withdrawal during the contested case hearing process or a failure to appear at the contested case hearing.

(9) When an SI is denied or a case is closed, the individual may not work, volunteer, be employed, or otherwise perform in the position that the SI is seeking. If a current Department employee or volunteer is denied, the Office of Human Resources shall determine if the SI may continue in the current position that the SI is seeking to change.

(a) For Department employees, if disciplinary action up to and including dismissal is appropriate, the action shall be taken in accordance with:

(A) Relevant collective bargaining contractual provisions;

(B) Statutory provisions for unrepresented or management services employees; or

(C) Relevant Department or statewide policies or procedures.

(b) For an SI who is a current volunteer or Work Experience client, a denial or closed case shall result in immediate

dismissal.

(10) The Department shall document fitness determinations in writing and include all necessary details including but not limited to the potentially disqualifying abuse, the weighing test, or the reasons for a closed case.

(11) 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.

(12) Only an SI subject to this rule may contest the fitness determination with the following exceptions. The following SIs do not have the right to contest the fitness determination:

(a) SIs offered volunteer placement with the Department; or

(b) SIs offered a change in volunteer placement within the Department.

(13) The appeal process, pursuant to ORS chapter 183 and OAR 407-007-0080, shall proceed if the SI requests a contested case hearing.

(a) SIs must request a hearing within 30 calendar days after the effective date of action listed on the notice of fitness determination.

(b) The SI may not challenge a finding of substantiated abuse that was a basis for the adverse outcome under this rule. The SI has the right to contest the weight the Department has given to:

(A) The evidence;

(B) The factors used in the weighing test; or

(C) Any other information used in making the fitness determination.

(c) The only remedy that may be awarded is a fitness determination that the SI is approved or denied. Under no circumstances shall the Department be required to place an SI in any position, nor shall the Department be required to accept services or enter into a contractual agreement with an SI.

(d) An SI may not have access to confidential information contained in abuse investigation reports or other records collected or developed during the abuse check process without a protective order limiting further disclosure of the information.

(A) A protective order issued pursuant to this section must be issued by an administrative law judge as provided in OAR 137-003-0570(8) or by a court of law.

(B) In conjunction with a protective order issued pursuant to this section, individually identifying information relating to clients, witnesses, and other persons identified in abuse investigation reports or other records collected, or developed during the abuse check process shall be redacted prior to disclosure, except for the information identifying the SI.

(14) An SI in volunteer or Work Experience placements must have a new abuse check every three years from the date of placement.

STATUTORY/OTHER AUTHORITY: 409.027, 413.036, 409.050

STATUTES/OTHER IMPLEMENTED: 409.027, 413.036, 409.010