

ORIGINAL

In the
Supreme Court of Ohio

JOHN DOE,	:	Case No. 2009-2104
	:	
Petitioner,	:	On Review of Certified Questions from
	:	the United States District Court for the
v.	:	Southern District of Ohio
	:	
MARY RONAN, et al.,	:	U.S. District Court Case
	:	No. 1:09-cv-243
Respondents.	:	

**MERIT BRIEF OF RESPONDENT
OHIO DEPARTMENT OF EDUCATION**

CHRISTOPHER R. McDOWELL* (0072218)

**Counsel of Record*

KIMBERLY BECK (0080616)

CARLY CHU (0083211)

SARAH SPARKS HERRON (0083803)

Dinsmore & Shohl LLP

1900 Chemed Center

255 East Fifth Street

Cincinnati, Ohio 45202

513-977-8200

513-977-8141 fax

christopher.mcdowell@dinslaw.com

Counsel for Petitioner

John Doe

MARK J. STEPANIAK* (0007758)

**Counsel of Record*

DANIEL J. HOYING (0079689)

Taft Stettinius & Hollister LLP

425 Walnut Street, Suite 1800

Cincinnati, Ohio 45202-3957

513-381-2838

513-381-0205 fax

stepaniak@taftlaw.com

Counsel for Respondents Mary Ronan and

Cincinnati Public Schools

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER* (0083089)
Solicitor General

**Counsel of Record*

DAVID M. LIEBERMAN (*pro hac vice*)
Deputy Solicitor

MIA T. MEUCCI (0083822)

Assistant Solicitor

AMY NASH GOLIAN (0039306)

TODD R. MARTI (0019280)

Assistant Attorneys General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

benjamin.mizer@ohioattorneygeneral.gov

Counsel for Respondent

Ohio Department of Education

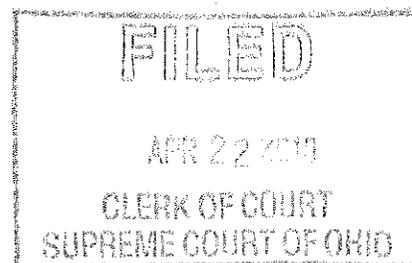


TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
HISTORY OF SCHOOL EMPLOYEE BACKGROUND CHECKS IN OHIO.....	3
A. The General Assembly mandated background checks for schools employees with direct responsibility over children.	3
B. ODE implemented background checks for educational personnel.....	5
C. After media outlets reported significant shortcomings in the existing statute, the General Assembly expanded background checks to all school employees.	6
D. ODE issued new administrative rules in response to the General Assembly’s changes.	8
A. The Cincinnati Public School District terminated Doe after learning of his drug trafficking conviction.....	9
B. Doe filed suit against the Cincinnati Public School District and ODE.	10
ARGUMENT.....	11
Respondent Ohio Department of Education’s Proposition of Law No. I:	
<i>R.C. 3319.391 and Ohio Admin. Code 3301-20-01 do not violate the Retroactivity Clause of Section 28, Article II of the Ohio Constitution.</i>	
A. The Retroactivity Clause does not apply to laws that regulate the employment sector in the public interest under Section 34, Article II.....	12
B. The State’s background check law does not offend the Retroactivity Clause because Doe had no vested right to continued employment, nor did he have a reasonable expectation of finality with respect to the collateral consequences of his conviction.....	15
1. Doe has no vested right to continued employment.....	15
2. Doe has no expectation of finality with respect to his past conviction.	17
Respondent Ohio Department of Education’s Proposition of Law No. II:	
<i>R.C. 3319.391 and Ohio Admin. Code 3301-20-01 do not violate the Contracts Clause of Section 28, Article II of the Ohio Constitution.</i>	
	20

A. The Contracts Clause does not apply to laws that regulate the employment sector in the public interest under Section 34, Article II.....20

B. The school background check law did not impair Doe’s contract with the Cincinnati Public School District because the contract was signed after the law was enacted.....20

CONCLUSION.....24

CERTIFICATE OF SERVICEunnumbered

APPENDIX OF EXHIBITS

Former R.C. 3319.39Exhibit A

Former Ohio Admin. Code 3301-20-01 Exhibit B

R.C. 3319.39 Exhibit C

R.C. 3319.391Exhibit D

Ohio Admin. Code 3301-20-01 Exhibit E

Ohio Admin. Code 3301-20-03Exhibit F

TABLE OF AUTHORITIES

Cases	Page(s)
<i>American Association of University Professors v. Central State University</i> (1999), 87 Ohio St. 3d 55 (“AAUP”).....	2, 13, 14
<i>Butner v. United States</i> (1979), 440 U.S. 48	17
<i>City of Lima v. State</i> (2009), 122 Ohio St. 3d 155, 2009-Ohio-2597	2, 12, 14, 20
<i>City of Rocky River v. State Employment Relations Bd.</i> (1989), 43 Ohio St. 3d. 1 (“Rocky River IV”).....	13, 15
<i>Cleveland Bd. of Educ. v. Loudermill</i> (1985), 470 U.S. 532	17
<i>DeRolph v. State</i> (1997), 78 Ohio St. 3d 193	12, 14, 23
<i>Energy Reserves Group, Inc. v. Kansas Power & Light Co.</i> (1983), 459 U.S. 400	22, 23
<i>Ohio Ass’n of Pub. Sch. Employees v. Lakewood City Sch.</i> (1994), 68 Ohio St. 3d 175	16
<i>Smith v. Parsons</i> (1823), 1 Ohio 236	3, 21
<i>State ex rel. Bd. of Trs. of Pension Fund v. Bd. of Trs. of Relief Fund</i> (1967), 12 Ohio St. 2d 105 (“Pension Fund”)	13, 14
<i>State ex rel. Boggs v. Springfield Local Sch. Dist. Bd. of Educ.</i> (1998), 82 Ohio St. 3d 222	16
<i>State ex rel. Brooks v. Beachwood Bd. of Educ.</i> (8th Dist.), No. 86909, 2006-Ohio-3954,.....	16
<i>State ex rel. Matz v. Brown</i> (1988), 37 Ohio St. 3d 279	18
<i>State ex rel. Mun. Constr. Equip. Operators’ Labor Council v. City of Cleveland</i> , 114 Ohio St. 3d 183, 2007-Ohio-3831	13
<i>State v. Cook</i> (1998), 83 Ohio St. 3d 404	<i>passim</i>

<i>State v. Williams</i> (2000), 88 Ohio St. 3d 513	11
<i>USP, Inc. v. Pub. Util. Comm'n</i> , No. 2008-1507, 2009-Ohio-6764.....	22, 23
<i>Walton v. Montgomery County Welfare Dep't</i> (1982), 69 Ohio St. 2d 58	15
<i>Weil v. State</i> (1889), 46 Ohio St. 450	21
<i>Westfield Ins. Co. v. Galatis</i> , 100 Ohio St. 3d 216, 2003-Ohio-5849	19
Constitutional Provisions and Statutes	
Ohio Const., Art. II, § 28	2, 11, 12, 20
Ohio Const., Art. II, § 34	<i>passim</i>
28 U.S.C. § 1441	10
42 U.S.C. § 5119a.....	4
Ala. Code § 16-22A-6.....	19
Ariz. Rev. Stat. § 15-512	19
Ark. Code § 6-17-415	19
Fla. Stat. § 1012.21	19
Ga. Code § 20-2-211	19
Idaho Code § 33-130.....	19
105 Ill. Comp. State. 5/10-21.9.....	19
Md. Family Law Code § 5-561	19
Mich. Comp. Laws § 380.1230g.....	19
Mo. Rev. Stat. § 168.133	19
National Child Protection Act of 1993, Pub. L. 103-209, 107 Stat. 2490	4
Or. Rev. Stat. § 326.603.....	19

R.C. Chapter 124.....	16, 17, 21, 22
R.C. 124.01	16, 21
R.C. 124.34	17, 22
R.C. 2151.86	2, 13
R.C. 3301.32	2, 13
R.C. 3319.081	16, 21
R.C. 3319.291	7
R.C. 3319.39	<i>passim</i>
R.C. 3319.391	<i>passim</i>
Tex. Educ. Code § 22.083.....	19

Administrative Rules

Former Ohio Admin. Code 3301-20-01 (2005).....	5, 6, 8
Ohio Admin. Code 3301-20-01 (2009).....	<i>passim</i>
Ohio Admin. Code 3301-20-03 (2009).....	9, 10
Ohio Admin. Code 3301-83-23 (2009).....	8

Other Authorities

139 Cong Rec. S10362 (Aug. 4, 1993).....	4
Christina Buschmann, Mandatory Fingerprinting of Public School Teachers (2003), 11 Wm. & Mary Bill of Rts. J. 1273.....	5
William Croyle, Fingerprint Check a Loophole, <i>Cincinnati Enquirer</i> , Jan. 31, 2007	6
Randy Ludlow & Jill Riepenhoff, Fit to Drive?, <i>Columbus Dispatch</i> , Feb. 11, 2007	6
Penny Moore & Joel Chow, 19 Workers at Schools Slipped by Crime Law, <i>Columbus Dispatch</i> , May 22, 2007.....	6, 23
National Child Protection Act, H.R. Rep. No. 103-393 (1993).....	4

Mark Niquette, Teacher Discipline Stiffened, *Columbus Dispatch*,
Nov. 15, 2007.....8

Jennifer Smith Richards & Jill Riepenhoff, Rule Breakers, *Columbus Dispatch*,
Oct. 14, 2007.....6

Teachers Union Has Ideas to Make Schools Safer, *Columbus Dispatch*,
Nov. 10, 2007.....7

INTRODUCTION

In 1993, the General Assembly passed R.C. 3319.39, mandating that all applicants for educational positions involving the care, custody, or control of children undergo a criminal background check. The law also specified that individuals with past convictions for certain violent crimes, drug crimes, and sexually oriented offenses were ineligible for those positions. Finally, the General Assembly directed the Ohio Department of Education (“ODE”) to develop criteria for determining whether or not a convicted felon was sufficiently rehabilitated and, thus, eligible to work in the school setting.

In 2007, an Ohio newspaper documented glaring holes in the State’s background check law. These articles revealed that school districts unwittingly employed many individuals—teachers and non-teachers—with serious criminal records or troubling instances of past misconduct. The General Assembly responded with the passage of H.B. 190. The bill expanded the mandatory background checks to include records from both the Ohio Bureau of Criminal Investigation (“BCI”) and the Federal Bureau of Investigation (“FBI”). It also required background checks on all school employees, not just employees with direct responsibility over children. Finally, the bill inserted a new provision, R.C. 3319.391, that directs school districts to conduct regular background checks on their current employees, not just on initial applicants.

In this case, Petitioner John Doe was convicted of drug trafficking in 1976. In 1997, Doe began employment with the Cincinnati Public School District, first as a drug-free school specialist, and later as a hearing officer. In November 2008, the District learned of Doe’s conviction. It later terminated his employment.

Doe filed suit against the District, its superintendent Mary Ronan, and ODE, alleging numerous state and federal constitutional violations. The federal district court certified two questions to this Court: (1) “Does Ohio Revised Code § 3319.391 and Ohio Administrative

Code § 3301-20-01 violate the Retroactivity Clause of Article II, Section 28 of the Ohio Constitution?” and (2) “Does Ohio Revised Code § 3319.391 and Ohio Administrative Code § 3301-20-01 violate the Contract Clause of Article II, Section 28 of the Ohio Constitution?” The Court should answer “no” to both questions.

Ohio’s school background check law is a permissible exercise of the General Assembly’s authority under Section 34, Article II of the Ohio Constitution. That provision authorizes the legislature to enact statutes “for the comfort, health, safety, and general welfare of all employees.” In *American Association of University Professors v. Central State University* (1999), 87 Ohio St. 3d 55 (“*AAUP*”), this Court confirmed that the General Assembly could use its Section 34 powers to mandate criminal background checks for childcare employees and head-start employees. *Id.* at 61 (citing R.C. 2151.86; R.C. 3301.32). The General Assembly took the same steps here for schools. And because “*no other provision* of the Constitution may impair the legislature’s power under Section 34,” *City of Lima v. State* (2009), 122 Ohio St. 3d 155, 2009-Ohio-2597, ¶ 15, Doe’s Retroactivity Clause and Contracts Clause challenges to H.B. 190 must fail.

But even if Section 34 does not apply, Doe cannot establish that Ohio’s background check law violates the Retroactivity Clause. Doe had no vested right to employment with the Cincinnati Public School District; his employment contract was conditioned upon “confirmation of appropriate state certification.” Supp. at 14. Furthermore, Doe, as a convicted “felon[,] ha[d] no reasonable right to expect that [his] conduct w[ould] never thereafter be made the subject of legislation.” *State v. Cook* (1998), 83 Ohio St. 3d 404, 412 (citation and emphasis omitted). For these reasons, this Court has already announced that laws like R.C. 3319.39 and R.C.

3319.391, which “prohibit[] school districts from employing those previously convicted of various criminal offenses,” do not offend the Retroactivity Clause. *Id.*

Nor can Doe maintain a Contracts Clause claim. This Court has long held that the General Assembly may not pass a law that impairs “contracts made *prior to* its enactment.” *Smith v. Parsons* (1823), 1 Ohio 236, 239 (emphasis added). But “[t]he legislature has a right by law, to regulate contracts” on “all *subsequent* engagements.” *Id.* at 239-40 (emphasis added). In July 2008, the District opted to renew Doe’s employment contract. Doe now argues the new background check law impaired his contract, but this is impossible. The General Assembly enacted H.B. 190 in 2007. Because it was already in force when Doe’s contract was signed, the law does not impair Doe’s contract.

Doe’s constitutional theories have no merit. This Court should therefore confirm what its precedents already acknowledge: that neither the Retroactivity Clause nor the Contracts Clause constrains the General Assembly’s authority to regulate who and who cannot work in the public schoolhouse.

HISTORY OF SCHOOL EMPLOYEE BACKGROUND CHECKS IN OHIO

A. The General Assembly mandated background checks for schools employees with direct responsibility over children.

In 1993, the General Assembly mandated that all school districts, charter schools, and educational service centers perform “a criminal records check with respect to any applicant who has applied . . . for employment in any position as a person responsible for the care, custody, and control of a child.” Former R.C. 3319.39(A)(1). The background check would be performed by BCI. If the applicant had not been a resident of Ohio for at least five years, the records check was to include an FBI background check as well. *Id.* The results of these background checks

were “not a public record”; they could only be reviewed by the applicant, the employer, or a court or hearing officer. Former R.C. 3319.39(D).

The General Assembly also prohibited schools from employing individuals who “ha[d] been convicted of or pleaded guilty to” any of the enumerated crimes in the statute. Former R.C. 3319.39(B)(1). This list included murder, assault, aggravated menacing, kidnapping, abduction, rape, sexual battery, unlawful sexual conduct with a minor, robbery, improper discharge of a firearm in a home or school, drug trafficking, and drug manufacturing. *Id.*

Ohio did not act alone. The 1990s witnessed a nationwide push to mandate criminal background checks for school personnel. At the federal level, President Clinton signed the National Child Protection Act of 1993, Pub. L. 103-209, 107 Stat. 2490, which facilitated efforts by the States to institute “nationwide background check[s] for the purpose of determining whether a provider has been convicted of a crime that bears upon the provider’s fitness to have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities.” 42 U.S.C. § 5119a(a)(1). The Act promulgated uniform standards by which authorized state agencies could, upon submission of an applicant’s information and fingerprints, access the applicant’s state and federal criminal history through a national Department of Justice database. *Id.* § 5119a(B). In passing this legislation, Congress expressed concern that existing “State and national criminal justice databases [were] inadequate to permit effective national background checks” of persons employed in child care. 139 Cong Rec. S10362 (Aug. 4, 1993); see also National Child Protection Act, H.R. Rep. No. 103-393 (1993) (noting that criminal history screenings “vary widely in coverage” across the States and that the Act would “improve the quality of the criminal history records used for the checks”).

Similar engagement occurred on the state level as well. By 1998, forty states had instituted mandatory criminal background checks for school personnel. See Christina Buschmann, *Mandatory Fingerprinting of Public School Teachers* (2003), 11 *Wm. & Mary Bill of Rts. J.* 1273, 1276 n.10.

B. ODE implemented background checks for educational personnel.

The General Assembly charged ODE with the responsibility of implementing its statutory command. Former R.C. 3319.39(E). It directed ODE to adopt administrative rules specifying the circumstances under which a school or educational institution could “hire a person who has been convicted of an offense listed in [the statute] but who meets standards in regard to rehabilitation set by the department.” *Id.* ODE has promulgated those rules in Ohio Admin. Code 3301-20-01 since the original statute’s enactment.

ODE issued updated regulations in 2005. Those rules applied to any person “who [was] under final consideration for appointment or employment in a position with a district as a person responsible for the care, custody, or control of a child.” Former Ohio Admin. Code 3301-20-01(A)(1)(a) (2005). The rules also contained rehabilitation criteria. Applicants with disqualifying felony convictions were eligible for employment in the school setting if they demonstrated that their “hiring or licensure w[ould] not jeopardize the health, safety, or welfare of the persons served by the district.”¹ Former Ohio Admin. Code 3301-20-01(E)(2)(e) (2005). The school district nevertheless “maintain[ed] the discretion whether to employ a teacher who has been deemed rehabilitated.” Former Ohio Admin. Code 3301-20-01(C) (2005).

¹ This inquiry included consideration of eleven factors, including the nature and seriousness of the applicant’s past crime, the applicant’s age when the crime was committed, the amount of time that had elapsed since the criminal activity, the applicant’s efforts at rehabilitation, and how employment of the applicant would impact the local community. See Former Ohio Admin. Code 3301-20-01(E)(2)(e) (2005).

The 2005 rules further specified that schools could not under any circumstances hire applicants convicted of certain serious offenses involving violence, theft, drugs, or sex. Former Ohio Admin. Code 3301-20-01(E)(1) (2005). That list of “non-rehabilitative” offenses included drug trafficking. Former Ohio Admin. Code 3301-20-01(A)(11) (2005).

C. After media outlets reported significant shortcomings in the existing statute, the General Assembly expanded background checks to all school employees.

Media investigations in 2007 uncovered significant gaps in the State’s background check framework. For instance, a *Columbus Dispatch* investigation revealed that, of the 1,722 educators disciplined since 2000 in Ohio for serious or violent misconduct, two-thirds of them had returned to the classroom. See Jennifer Smith Richards & Jill Riepenhoff, Rule Breakers, *Columbus Dispatch*, Oct. 14, 2007, at A1. The *Dispatch* also investigated the records of school-bus drivers in thirty-six Ohio counties, identifying 167 current drivers with histories of DUI or drug-related suspensions. See Randy Ludlow & Jill Riepenhoff, Fit to Drive?, *Columbus Dispatch*, Feb. 11, 2007, at A1. Finally, a Columbus television station reported that Columbus Public Schools employed at least nineteen custodians and food-service workers with convictions for sexual battery, aggravated robbery, carrying a concealed weapon, promoting prostitution, aggravated burglary, or attempted gross sexual imposition. See Penny Moore & Joel Chow, 19 Workers at Schools Slipped by Crime Law, *Columbus Dispatch*, May 22, 2007, at B1. The report pointed to omissions in the State’s database, which failed to record “reportable offenses” whenever a locality neglected to transmit the fingerprints of the defendant. *Id.*; see also William Croyle, Fingerprint Check a Loophole, *Cincinnati Enquirer*, Jan. 31, 2007, at A1.

In 2007, the General Assembly passed H.B. 190 to remedy these shortcomings. With respect to teacher misconduct, the legislature ordered ODE to request a criminal background check from BCI and the FBI on any teacher applying for or seeking renewal of a state license or

certificate. R.C. 3319.291(B). (The previous law had excused the FBI background check for teachers who had lived in Ohio for five years.)

The General Assembly also expanded background checks for non-teachers. School districts and educational centers were to request BCI and FBI background checks for “any applicant who has applied . . . for employment in *any position*.” R.C. 3319.39(A)(1) (emphasis added). (The previous law mandated background checks only for positions involving “the care, custody, or control of a child,” and it excused FBI background checks for applicants who had lived in Ohio for five years.) And for the first time, the legislature directed schools to perform regular background checks on all current employees “in any position that does not require a ‘license’ issued by the state board of education.”² R.C. 3319.391. These checks would be performed every five years. R.C. 3319.391(A).

The General Assembly maintained the same list of disqualifying offenses. Like the prior version of the law, no school would be permitted to “employ a person if the person previously has been convicted of or pleaded guilty” to any of the enumerated criminal offenses in the statute. R.C. 3319.39(B)(1). Again, the list included drug trafficking. *Id.* The General Assembly again authorized ODE to issue rehabilitation standards, thereby allowing applicants and current employees with disqualifying convictions to seek or maintain school employment if they met certain conditions. R.C. 3319.39(E), R.C. 3319.391(C).

H.B. 190 received tremendous bipartisan support. Ohio teachers in particular commended the provision that “requir[ed] all school employees to have an FBI background check.” Teachers Union Has Ideas to Make Schools Safer, *Columbus Dispatch*, Nov. 10, 2007, at A11 (Statement

² The law does not mandate that school districts request regular background checks on its current teachers. Rather, it falls on ODE to request an updated background check whenever a teacher seeks to renew his or her license. See R.C. 3319.291(A).

of Sue Taylor, Ohio Federation of Teachers). H.B. 190 overwhelmingly passed both houses of the General Assembly, and Governor Strickland signed the bill into law, thanking the media “for calling to the attention of me and the legislature, as well as the people of Ohio, some of the glaring weaknesses that existed.”³ Mark Niquette, Teacher Discipline Stiffened, *Columbus Dispatch*, Nov. 15, 2007, at B4.

D. ODE issued new administrative rules in response to the General Assembly’s changes.

After H.B. 190’s passage, ODE initiated a process to revise Ohio Admin. Code 3301-20-01. The agency held a number of open meetings and received extensive comments from stakeholders and interested parties. ODE then presented several iterations of the proposed rule, first to the State Board of Education’s Capacity Committee, and then to the full Board. On August 27, 2009, after receiving JCARR approval, the agency promulgated two new rules; the first applies to positions that require educator licenses, the second applies to all other positions in a school.⁴

Ohio Admin. Code 3301-20-01 (2009) governs those applicants who are “under final consideration for appointment or employment in a position that requires a license issued by the state board of education.” Applicants with certain felony convictions may seek employment if they can demonstrate rehabilitation. Ohio Admin. Code 3301-20-01(E). But even then, the school district “maintains the discretion whether to employ” them. Ohio Admin. Code 3301-20-01(C). Like its predecessors, this rule also deems a list of offenses to be “non-rehabilitative.”

³ In 2008, the General Assembly made two minor modifications to the statutes. The legislature removed adult educators from the debarment provisions in R.C. 3319.39, and it modified the deadlines in R.C. 3319.391 for schools to obtain criminal background checks on their current employees. See Sub. H.B. No. 248 (127th Gen. Assem.), at 40-41, 44. These revisions have no bearing on the certified questions in this case.

⁴ ODE also promulgated a third rule, Ohio Admin. Code 3301-83-23 (2009), to govern the employment of school bus drivers with criminal convictions.

Ohio Admin. Code 3301-20-01(A)(10). If an applicant has a conviction for a “non-rehabilitative” offense, he is ineligible for these positions. *Id.*

Ohio Admin. Code 3301-20-03 (2009) governs applicants who are “under final consideration for appointment or employment in a position with a district that does not require an educator license.” Like its sister provision, this rule establishes rehabilitation criteria for determining whether an ex-felon is fit to work in a school. Ohio Admin. Code 3301-20-01(D) (2009). If the criteria are satisfied, there is no automatic bar to employment; the “district maintains the discretion whether to employ or retain in employment an individual who has been deemed rehabilitated.” *Id.* The rule also contains a list of “non-rehabilitative” offenses, which disqualify an individual from employment. Yet the list of “non-rehabilitative” offenses for these unlicensed positions is shorter. Notably, prior drug trafficking convictions are “non-rehabilitative” only if they have occurred within the past ten years. Ohio Admin. Code 3301-20-03(A)(6)(e) (2009).

STATEMENT OF CASE AND FACTS

A. The Cincinnati Public School District terminated Doe after learning of his drug trafficking conviction.

According to the amended complaint, Doe was convicted of drug trafficking in 1976. Supp. at 20. He served three years in prison. *Id.* After his incarceration, Doe obtained a sociology degree and later became a licensed social worker. Supp. at 21. He has not had any other criminal convictions. *Id.*

In 1997, Doe accepted a position with the Cincinnati Public School District as a drug-free school specialist. Supp. at 18. In 2002, he became a due process hearing specialist. *Id.* In this capacity, Doe’s responsibilities did not include direct contact with students. *Id.*

On July 14, 2008, the District entered a two-year administrative contract with Doe. Supp. at 14. Doe would be employed as a hearing officer at a salary of \$77,389.52. Supp. at 15. The agreement was made “subject to confirmation of appropriate state certification.” Supp. at 14.

On November 24, 2008, the District “became aware that [Doe] had been convicted twice of Unlawful Sale of Narcotic Drugs in June 1976 and November 1976.” Supp. at 16. It then informed Doe that under H.B. 190 and R.C. 3319.39, his drug trafficking conviction “bar[red] [him] from continuing to work with the district.” *Id.* After allowing Doe to exhaust his sick leave, the District terminated his employment in April 2009.

Because ODE had not yet promulgated administrative regulations for H.B. 190 as of April 2009, Doe could not seek reinstatement on grounds of “rehabilitation.” As discussed above, however, ODE issued Ohio Admin. Code 3301-20-03 on August 27, 2009. If Doe’s position as a hearing officer did not require a state license, Doe’s drug trafficking conviction would not automatically disqualify him from working in a school because it occurred over ten years ago. There is nothing in this record indicating that Doe has sought reinstatement with the Cincinnati Public School District under this rule.

B. Doe filed suit against the Cincinnati Public School District and ODE.

Doe filed suit in the Hamilton County Court of Common Pleas, naming the Cincinnati Public School District, Superintendent Mary Ronan, and ODE as defendants. He alleged that the District breached his July 2008 contract, and that the disputed laws (R.C. 3319.39, R.C. 3319.391, and now-former Ohio Admin. Code 3301-20-01) violate the Contracts Clauses of the United States and Ohio Constitutions, the Ex Post Facto Clause of the United States Constitution, the Retroactivity Clause of the Ohio Constitution, due process, and equal protection. Supp. 17-29. The District removed the case to federal district court under 28 U.S.C. § 1441.

Once in federal court, ODE filed a motion to dismiss, and the District filed a motion for judgment on the pleadings. In response, Doe urged the district court to certify his Retroactivity Clause and Contracts Clause claims to this Court. The court acceded to the request and certified two questions of law: (1) “Does Ohio Revised Code § 3319.391 and Ohio Administrative Code § 3301-20-01 violate the Retroactivity Clause of Article II, Section 28 of the Ohio Constitution?” and (2) “Does Ohio Revised Code § 3319.391 and Ohio Administrative Code § 3301-20-01 violate the Contract Clause of Article II, Section 28 of the Ohio Constitution?” The district court then denied ODE’s motion to dismiss and the District’s motion for judgment without prejudice. This Court thereafter accepted the district court’s two certified questions.⁵

ARGUMENT

Because all “statutes enacted in Ohio are presumed to be constitutional,” Doe has the burden of “prov[ing] beyond that a reasonable doubt that [Ohio’s school background check law] is clearly unconstitutional.” *State v. Williams* (2000), 88 Ohio St. 3d 513, 521. He has not done so here. Doe’s request to invalidate H.B. 190 under the Retroactivity Clause and the Contracts Clause finds no support in this Court’s precedents. It is also troubling. According to Doe, any person “employed by [a] public district district[] when [H.B. 190] became effective” in 2007 cannot be “terminated based on a records check,” no matter how serious his crime or how recently it occurred. (Br. at 12 n.2). This position disregards the State’s paramount obligation to

⁵ Procedural defects exist in the district court’s first certified question. First, Doe’s amended complaint alleges that R.C. 3319.39 and R.C. 3319.391 violate the Retroactivity Clause of the Ohio Constitution. Supp. at 25 (Compl. ¶¶ 64-67). Yet the district court certified only R.C. 3319.391 to this Court. Second, the district court has asked this Court to determine whether now-former Ohio Admin. Code 3301-20-01 violates the Retroactivity Clause of the Ohio Constitution. Yet Doe’s amended complaint does not assert that Ohio Admin. Code 3301-20-01 violates the Retroactivity Clause. Supp. at 25 (Compl. ¶¶ 64-67). It is unclear why the court included the administration regulation in the certification. Nevertheless, ODE does not believe that either defect erects a barrier to the Court’s consideration of the main issue in this case—the constitutionality of H.B. 190’s expansion of Ohio’s school background check program.

provide schoolchildren with “a safe and healthy learning environment,” *DeRolph v. State* (1997), 78 Ohio St. 3d 193, 208, and it ignores this Court’s blessing of similar background check laws for childcare professionals. The Court should therefore reject Doe’s challenges and affirm the State’s authority to mandate background checks for school personnel.

Respondent Ohio Department of Education’s Proposition of Law No. I:

R.C. 3319.391 and Ohio Admin. Code 3301-20-01 do not violate the Retroactivity Clause of Section 28, Article II of the Ohio Constitution.

Ohio’s school background check law does not violate the Retroactivity Clause for two distinct reasons. First, the General Assembly’s decision to require background checks on all current and prospective school employees was a permissible exercise of its authority under Section 34, Article II of the Ohio Constitution. As such, the law is “not subject to limitations” found in any “other provision of the Constitution,” including the Retroactivity Clause. *City of Lima*, 2009-Ohio-2597 at ¶ 15 (emphasis omitted). Second, even if Section 34 does not apply, the background check law does not violate the Retroactivity Clause. Doe did not have a vested right to continued employment with the Cincinnati Public School District, nor did he have a reasonable expectation that his past felony conviction would never be made the subject of legislation. See *Cook*, 83 Ohio St. 3d at 412.

A. The Retroactivity Clause does not apply to laws that regulate the employment sector in the public interest under Section 34, Article II.

Under Section 34, Article II of the Ohio Constitution, the General Assembly may enact laws “providing for the comfort, health, safety and general welfare of all employes [sic]; and no other provision of the constitution shall impair or limit this power.” This Court has “repeatedly interpreted Section 34 as a broad grant of authority to the General Assembly, not as a limitation on its power,” *City of Lima*, 2009-Ohio-2579 at ¶ 11 (citation omitted), upholding an array of state laws regulating the terms and conditions of the employer-employee relationship. See, e.g.,

id. at ¶ 14 (affirming law banning municipal residency restrictions on public employees); *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. City of Cleveland*, 114 Ohio St. 3d 183, 2007-Ohio-3831, ¶ 78 (affirming statute granting sick leave to municipal employees); *AAUP*, 87 Ohio St. 3d at 61 (affirming state law mandating ten percent increase in teaching workloads at state universities); *City of Rocky River v. State Employment Relations Bd.* (1989), 43 Ohio St. 3d. 1, 17-18 (“*Rocky River IV*”) (affirming mandatory arbitration procedures between municipalities and safety forces); *State ex rel. Bd. of Trs. of Pension Fund v. Bd. of Trs. of Relief Fund* (1967), 12 Ohio St. 2d 105, 106-07 (“*Pension Fund*”) (affirming state law mandating transfer of assets and liabilities from local police and firefighters pension funds to state pension fund).

Furthermore, the General Assembly’s Section 34 power to regulate employment is not limited simply to those laws that benefit employees. In *AAUP*, this Court emphasized that “the public’s interest in the regulation of the employment sector often requires legislation that *burdens* rather than benefits employees,” and that “Section 34 should continue to be interpreted as a broad grant of authority to the General Assembly to pass such legislation.” 87 Ohio St. 3d at 61-62 (emphasis added).

The *AAUP* Court then highlighted examples of valid Section 34 enactments that burdened employees. *Id.* at 61. Significantly, the Court cited two criminal background check statutes: R.C. 2151.86 (childcare providers), and R.C. 3301.32 (head start employees). And in all material respects, R.C. 2151.86 operates identically to the school background check program here. The law requires background checks of adoptive parents and foster parents at regular intervals, and it disqualifies individuals with certain felony convictions from serving in such roles. See R.C. 2151.86(A), (C). If the General Assembly can mandate periodic background

checks of current adoptive and foster parents as a condition of eligibility under Section 34, it can also do so for school employees.

AAUP therefore validates the General Assembly authority to enact R.C. 3319.39 and R.C. 3319.391 using its Section 34 powers. In 2007, the legislature identified disturbing gaps in the State’s existing background check program for school employees: a number of teachers and non-teachers with serious criminal records were working in Ohio schools. It “considered this to be a situation where the public interest necessitated legislative intervention,” and it “enacted a law . . . to address and modify the existing concern.” *AAUP*, 87 Ohio St. 3d at 61. Whether or not the General Assembly’s solution—expansion of the background checks to cover all current employees working in a school—was “the best or most effective means of resolving the problem” is of no moment. *Id.* The fact remains that Section 34 grants the General Assembly broad authority “to regulate the employment sector in the public interest.” *Id.* And requiring all current school employees to complete background checks is, in every sense, a regulation of the employment sector in furtherance of the public interest—namely, the safety and security of students in the schoolhouse. *Cf. DeRolph*, 78 Ohio St. 3d at 208 (emphasizing the role of the State in “provid[ing] . . . students a safe and healthy learning environment”).

Finally, because R.C. 3319.39 and R.C. 3319.391 are valid Section 34 laws, they cannot be invalidated under another constitutional provision. This Court has long recognized that Section 34 occupies a privileged position in the Ohio Constitution. In *Pension Fund*, the Court held that a pension statute enacted under Section 34 was immune to challenge under the Home Rule, Uniform Taxation, and Retroactivity Clauses of the Ohio Constitution. 12 Ohio St. 2d at 106-07. And just last year, in *City of Lima*, the Court found that the General Assembly could, consistent with its Section 34 powers, prohibit cities from requiring their employees to live within

municipal boundaries. The Court rejected the cities' claim that the General Assembly had infringed on their constitutional home rule authority, stating that "*no other provision* of the Constitution may impair the legislature's power under Section 34." 2009-Ohio-2597 at ¶ 15; see also *Rocky River IV*, 43 Ohio St. 3d at 13 (same).

The same result holds here. Because R.C. 3319.39 and R.C. 3319.391 are valid Section 34 regulations of the employment sector, the provisions of the Retroactivity Clause do not apply. Hence, there is no reason for "further comment" on Doe's Retroactivity Clause claim. *Rocky River IV*, 43 Ohio St. 3d at 13.

B. The State's background check law does not offend the Retroactivity Clause because Doe had no vested right to continued employment, nor did he have a reasonable expectation of finality with respect to the collateral consequences of his conviction.

Even if Section 34 does not apply, Doe cannot make out a Retroactivity Clause violation. A retroactive law is unconstitutional (1) "if it impairs or takes away vested rights" or "affects an accrued substantive right," or (2) if it "imposes new or additional burdens, duties, obligation or liabilities as to a past transaction." *Cook*, 83 Ohio St. 3d at 411. Ohio's school background check law does neither.

1. Doe has no vested right to continued employment.

Doe argues that he "has a *substantive*, constitutionally-protected, property right to continued employment" with the Cincinnati Public School District. (Br. at 9). His position rests on a fundamentally flawed reading of state law.

As a threshold matter, Doe does not claim that he has a standalone constitutional right to continued employment. Nor could he. "[I]t is virtually axiomatic that there is no constitutionally protected right to public employment." *Walton v. Montgomery County Welfare Dep't* (1982), 69 Ohio St. 2d 58, 64. Doe also does not assert a contractual right to continued employment under his 2008 contract with the District. Nor could he. The terms of that contract

were “subject to confirmation of appropriate state certification.” Supp. at 14. Because Doe failed his state background check, he failed to satisfy an express condition of the contract.

Rather, Doe claims a substantive right to continued employment under R.C. 3319.081. (Br. at 10-11). This statute grants certain statutory protections to nonteaching employees after three years of service with a local school district. See *State ex rel. Boggs v. Springfield Local Sch. Dist. Bd. of Educ.* (1998), 82 Ohio St. 3d 222, 226 (“R.C. 3319.081 gives statutory job security to nonteaching local school district employees, in that it provides for termination of employment contracts *only* for the express enumerated reasons.”). Doe contends that he acquired a “continuing contract” in 2000 pursuant to this code provision, and that the new background checks in H.B. 190 “not only impaired this substantive right, but destroyed it altogether.” (Br. at 10).

Doe’s reliance on R.C. 3319.081 is misplaced. By its terms, R.C. 3319.081 governs only those “school districts wherein the provisions of Chapter 124 of the Revised Code do not apply.” R.C. Chapter 124 in turn regulates the civil service of the State, and it includes “all offices and positions of trust or employment . . . in the service of . . . *city school districts.*” R.C. 124.01(A) (emphasis added). This of course includes the Cincinnati Public School District. R.C. 3319.081 thus applies only to *local* school districts; it has no application to *city* school districts and affords no statutory protections to Doe. See *State ex rel. Brooks v. Beachwood Bd. of Educ.* (8th Dist.), No. 86909, 2006-Ohio-3954, ¶ 12 (noting the lack of “any authority” for the proposition “that R.C. 3319.081 is controlling for a *city* school district”).

Doe next claims a substantive right to continued employment under *Ohio Ass’n of Pub. Sch. Employees v. Lakewood City Sch.* (1994), 68 Ohio St. 3d 175, (Br. at 10), but again he is off base. *Lakewood City* simply restated the unremarkable proposition that classified civil servants

in Ohio have a protected property interest in continued employment by virtue of state law. *Id.* at 176 (citing *Cleveland Bd. of Educ. v. Loudermill* (1985), 470 U.S. 532, 538-39). But that protected property interest extends no farther than the state law. See *Butner v. United States* (1979), 440 U.S. 48, 55 (“Property interests are created and defined by state law.”). Although Ohio’s civil service law constrains a public employer’s authority to terminate a classified civil servant, it expressly authorizes termination for “conviction of a felony.” R.C. 124.34(A). In other words, an employee with a felony record like Doe has no statutory right to continued employment in the civil service; the conviction “forfeits [his] status as a classified employee in any public employment.” *Id.*

Put simply, nothing in the language of R.C. Chapter 3319 or R.C. Chapter 124 supports Doe’s “continuing contract” theory. In light of his felony conviction, Doe had no right to continued employment with the Cincinnati Public School District either by virtue of his 2008 contract or Ohio law. As such, H.B. 190 did not affect any vested or substantive right, and the Retroactivity Clause is not offended.

2. Doe has no expectation of finality with respect to his past conviction.

The second prong of the Retroactivity Clause analysis asks whether the challenged law “imposes new or additional burdens, duties, obligation or liabilities as to a past transaction.” *Cook*, 83 Ohio St. 3d at 411. For his part, Doe “does *not* claim that R.C. 3919.391 attached a new disability to his status as a convicted felon.” (Br. at 11) (emphasis added).

The ACLU, however, does. It argues that H.B. 190 “posed new and additional burdens on Doe by unconstitutionally divesting him of his livelihood without due process.” (ACLU Br. at 11). According to the ACLU, “employment bans that automatically disqualify current or future employees for past acts are unconstitutional.” (ACLU Br. at 11-12).

Cook fully disposes of this argument. When determining whether a challenged law “burden[s] or attach[es] a new disability to a past transaction or consideration,” this Court asks whether “the past transaction or consideration created at least a reasonable expectation of finality.” 83 Ohio St. 3d. at 412 (quoting *State ex rel. Matz v. Brown* (1988), 37 Ohio St. 3d 279, 281). The *Cook* Court then held that ex-felons have no reasonable expectation of finality with respect to their past criminal convictions: “[E]xcept with regard to constitutional protections against ex post facto laws, felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.” *Id.* (quoting *Matz*, 37 Ohio St. 3d at 281-82) (emphasis and alteration omitted).

This holding forecloses the ACLU’s argument here. Because Doe had no reasonable expectation of finality with respect to his prior drug trafficking conviction, the State was free to attach new non-criminal disabilities to it. In this case, the General Assembly reasonably attached a prohibition on employment in schools.

Attempting to distinguish *Cook*, the ACLU asserts that Ohio’s school background check law imposes “far more than *de minimis*” procedural requirements; it is a substantive law that deprives Doe of his economic livelihood. (ACLU Br. at 11). But this assertion disregards the opinion in *Cook*. The Court openly cited the school background check law as an example of a statute that did *not* violate the Retroactivity Clause: A “statute [that] prohibits school districts from employing those previously convicted of various criminal offenses” is a valid remedial law. *Cook*, 83 Ohio St. 3d at 412; see also *Matz*, 37 Ohio St. 3d at 282 (stating that a “person convicted of abusing children could be prevented from school employment by a later law excluding such persons from that employment”).

The ACLU next urges the Court to adopt holdings by a Massachusetts trial court, the Pennsylvania Supreme Court, and the Michigan Department of Community Health. (ALCU Br. at 12-13). None of those cases addressed a school background check law (rather, they reviewed an agency hiring policy and nursing home statutes). Nor did they interpret a state constitutional provision similar to Ohio's Retroactivity Clause. And conspicuously absent from the ACLU's brief is a citation to a state supreme court decision invalidating a school background check law. In fact, a number of Ohio's sister states have adopted laws permitting background checks of current school employees. See, e.g., Ala. Code § 16-22A-6; Ark. Code § 6-17-415; Ariz. Rev. Stat. § 15-512(E),(G); Fla. Stat. § 1012.21(1); Ga. Code § 20-2-211(e); Idaho Code § 33-130; 105 Ill. Comp. State. 5/10-21.9(c),(d); Md. Family Law Code § 5-561(b)(6); Mich. Comp. Laws § 380.1230g; Mo. Rev. Stat. § 168.133; Or. Rev. Stat. § 326.603; Tex. Educ. Code § 22.083.

At bottom, the ACLU's position is at variance with *Cook*. It claims that the State may not "impose an automatic and absolute bar on employment" based on an individual's past acts. (ALCU Br. at 14). But this is correct only if the individual had "at least a reasonable expectation of finality" with respect to those past acts. *Cook*, 83 Ohio St. 3d at 412 (citation omitted). *Cook* settled that question: the State may "attach[] a new disability to [a] felony . . . committed before the law was enacted" because "'felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.'" *Id.* (citation and emphasis omitted). The ACLU has not offered any reason to revisit that holding under the three *Galatis* factors. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, ¶ 48.

In sum, Doe's Retroactivity Clause claim fails on two independent grounds. Ohio's background check law is a valid Section 34 enactment and thus immunized from a retroactivity challenge. And even if that were not the case, the background check law does not impair a

vested right, nor does it attach an impermissible disability to a past transaction. This Court should therefore answer “no” to the district court’s first certified question.

Respondent Ohio Department of Education’s Proposition of Law No. II:

R.C. 3319.391 and Ohio Admin. Code 3301-20-01 do not violate the Contracts Clause of Section 28, Article II of the Ohio Constitution.

Ohio’s school background check law does not violate the Contracts Clause. First, the law is a permissible Section 34 enactment and is therefore immune from attack under other provisions of the Ohio Constitution. Second, the Contracts Clause only prohibits laws that impair *existing* contracts. Because the background check law was already in effect when Doe entered his 2008 contract with the Cincinnati Public School District, the law did not impair that contract.

A. The Contracts Clause does not apply to laws that regulate the employment sector in the public interest under Section 34, Article II.

As discussed above, Ohio’s school background check law is a valid Section 34 regulation. And Section 34 clearly states that “no other provision of the constitution shall impair or limit this power.” “This prohibition, of course, includes the [contracts clause] provision” in Section 28, Article II. *City of Lima*, 2009-Ohio-2597 ¶ 15. Doe therefore cannot invalidate H.B. 190 using the Contracts Clause, and the Court’s analysis should end here.

B. The school background check law did not impair Doe’s contract with the Cincinnati Public School District because the contract was signed after the law was enacted.

Even if Section 34 does not apply, Doe cannot maintain a Contracts Clause action. He cannot demonstrate that H.B. 190’s background check provisions impaired a contract existing at the time of the law’s enactment.

Under Section 28, Article II of the Ohio Constitution, the General Assembly “shall have no power to pass . . . laws impairing the obligation of contract.” This clause protects only those

contracts “which existed *prior to* the effective date of the statute.” *Aetna Life Ins. v. Schilling* (1993), 67 Ohio St. 3d 164, 167 (emphasis added). On the other hand, “contracts entered into *on or after* the effective date of [a statute] are subject to the provisions of the statute.” *Id.* at 168. In this latter scenario, the Contracts Clause is not implicated.

This framework is etched in the Court’s jurisprudence: A law that impairs “contracts made prior to its enactment[] [is] unconstitutional.” *Smith v. Parsons* (1823), 1 Ohio 236, 239. The General Assembly “can not disturb those [contracts] previously made.” *Id.* at 240. Yet “the legislature may regulate contracts to be made in future.” *Id.* In this circumstance, “the contract, in its inception, receives an impress from the law, and the effect of the law being co-existent with the contract, can never be said to alter or impair it.” *Id.*; see also *Weil v. State* (1889), 46 Ohio St. 450, 452-53 (same).

In his amended complaint, Doe alleged that Ohio’s school background check law unconstitutionally impaired his July 14, 2008, contract with the Cincinnati Public School District. Supp. at 18, 23 (Compl. ¶¶ 11, 45). This is impossible. The General Assembly passed H.B. 190 in November 2007. (The administrative regulation then in force, former Ohio Admin. Code 3301-20-01, was promulgated even earlier, in 2005.) Because H.B. 190 preceded Doe’s 2008 contract, it did not “impair” that contract under the Contracts Clause.

In response, Doe first claims that, beginning in the year 2000, “[he] and CPS had a continuing contract as a matter of law.” (Br. at 13). First, he invokes R.C. 3319.081. As explained above, R.C. 3319.081 has no relevance to this case. That statute applies only to school districts that are not governed by R.C. Chapter 124. But the Cincinnati Public School District is governed by that code chapter. See R.C. 124.01(A). R.C. 3319.081 thus has no application, and Doe cannot use the provision to claim a contractual relationship “as a matter of law.”

Second, Doe asserts that he “has a contract pursuant to Chapter 124 of the Ohio Revised Code.” (Br. at 13 n.3). Again, as explained above, R.C. Chapter 124 offers no support for Doe’s theory. Ohio’s civil service law expressly authorizes the termination of any civil servant “for . . . conviction of a felony.” R.C. 124.34(A). It therefore did not grant any protections to Doe against termination on the basis of his prior drug trafficking conviction, and it certainly did not entitle him to a contract as a matter of law with such protections.

Third, Doe briefly claims that H.B. 190 impaired a collective bargaining agreement. (Br. at 13 n.3). There is no allegation of such an agreement in Doe’s amended complaint, no confirmation of such an agreement in the record, and no evidence documenting the provisions of such an agreement. Because Doe has not established that a collective bargaining agreement exists (much less what the agreement’s provisions govern), he cannot maintain that the agreement has been impaired. See *USP, Inc. v. Pub. Util. Comm’n*, No. 2008-1507, 2009-Ohio-6764, ¶ 40 (“[T]he lack of this essential evidence is fatal to USP’s impairment-of-contracts claim.”).

The record confirms the existence of only one contract in this case: the two-year employment contract between Doe and the Cincinnati Public School District, signed in July 2008. Supp. at 14-15. The General Assembly enacted H.B. 190 eight months earlier. Under blackletter law, the Contracts Clause is not triggered because Doe’s contract was “entered into . . . after the effective date of [H.B. 190].” *Aetna Life*, 67 Ohio St. 3d at 168.

Finally, even if Doe could show an impairment of his 2008 contract (and he cannot), the school background check law still does not offend the Contracts Clause under this Court’s precedents. First, the General Assembly had “a significant and legitimate public purpose behind the regulation.” *USP*, 2009-Ohio-6764 at ¶ 37 (quoting *Energy Reserves Group, Inc. v. Kansas*

Power & Light Co. (1983), 459 U.S. 400, 411). It sought to preserve “a safe and healthy learning environment” for Ohio schoolchildren. *DeRolph*, 78 Ohio St. 3d at 208. And second, the background check law “is based upon reasonable conditions and is of a character appropriate to the public purpose.” *USP*, 2009-Ohio-6764 at ¶ 45 (quoting *Energy Reserves*, 459 U.S. at 412) (alteration omitted). H.B. 190 expanded background checks to all school employees for one simple reason: students interact with many nonteaching employees—administrators, cafeteria workers, custodians, maintenance personnel, security guards and the like—on a daily basis. See 19 Workers at Schools Slipped by Crime Law, *Columbus Dispatch*, May 22, 2007, at B1 (“Custodians . . . usually possess building master keys, often work without supervision and regularly interact with students.”). The General Assembly reasonably concluded that the “public health, safety and welfare” of students necessitated an expansion of the background check law to cover these employees, and Doe has not established that this determination was “clearly erroneous.” *USP*, 2009-Ohio-6761 at ¶ 45 (citation omitted). As such, H.B. 190 is valid exercise of the State’s police power, and it does not offend the Contracts Clause.

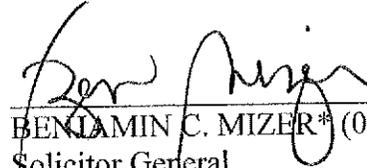
In all, Doe’s Contracts Claim fares no better than his Retroactivity Claim. Section 34 immunizes the school background check law from a Contracts Clause challenge. And even if it did not, any Contracts Clause challenge here is futile because the background check law predates Doe’s employment contract. This Court should therefore answer “no” to the district court’s second certified question.

CONCLUSION

For the above reasons, the Court should answer “no” to both certified questions, stating that R.C. 3319.391 and Ohio Admin. Code 3301-20-01 do not violate the Retroactivity Clause or the Contracts Clause of the Ohio Constitution.

Respectfully submitted,

RICHARD CORDRAY
Attorney General of Ohio



BENJAMIN C. MIZER* (0083089)
Solicitor General

**Counsel of Record*

DAVID M. LIEBERMAN (*pro hac vice*)
Deputy Solicitor

MIA T. MEUCCI (0083822)

Assistant Solicitor

AMY NASH GOLIAN (0039306)

TODD R. MARTI (0019280)

Assistant Attorneys General

30 East Broad Street, 17th Floor

Columbus, OH 43215

614-466-8980

614-466-5087 fax

benjamin.mizer@ohioattorneygeneral.gov

Counsel for Respondent

Ohio Department of Education

CERTIFICATE OF SERVICE

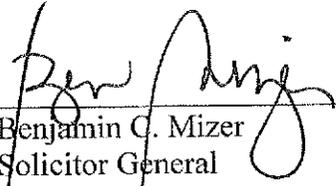
I certify that a copy of the foregoing Merit Brief of Respondent Ohio Department of Education was served by U.S. mail this 22nd day of April, 2010 upon the following counsel:

Christopher R. McDowell
Kimberly Beck
Carly Chu
Sarah Sparks Herron
Dinsmore & Shohl LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202

Counsel for Petitioner
John Doe

Mark J. Stepaniak
Daniel J. Hoying
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957

Counsel for Respondents
Mary Ronan and Cincinnati Public Schools



Benjamin C. Mizer
Solicitor General



54 of 55 DOCUMENTS

PAGE'S OHIO REVISED CODE ANNOTATED;
Copyright (c) 1996, Anderson Publishing Company

*** ARCHIVE MATERIAL ***

*** THIS DOCUMENT IS CURRENT THROUGH OCTOBER 10, 1996 ***

TITLE XXXIII [33] EDUCATION-LIBRARIES
CHAPTER 3319: SCHOOLS--SUPERINTENDENT; TEACHERS; EMPLOYEES
[SCHOOL REPORTS]

ORC Ann. 3319.39 (Anderson 1996)

§ 3319.39 Criminal records check for applicants responsible for children; employment of certain offenders prohibited.

(A)(1) Except as provided in division (F)(2)(b) of section 109.57 of the Revised Code and division (I) of this section, the appointing or hiring officer of the board of education of a school district, the governing board of an educational service center, or of a chartered nonpublic school shall request the superintendent of the bureau of criminal identification and investigation to conduct a criminal records check with respect to any applicant who has applied to the school district, educational service center, or school for employment in any position as a person responsible for the care, custody, or control of a child. If the applicant does not present proof that the applicant has been a resident of this state for the five-year period immediately prior to the date upon which the criminal records check is requested or does not provide evidence that within that five-year period the superintendent has requested information about the applicant from the federal bureau of investigation in a criminal records check, the appointing or hiring officer shall request that the superintendent obtain information from the federal bureau of investigation as a part of the criminal records check for the applicant. If the applicant presents proof that the applicant has been a resident of this state for that five-year period, the appointing or hiring officer may request that the superintendent include information from the federal bureau of investigation in the criminal records check.

(2) A person required by division (A)(1) of this section to request a criminal records check shall provide to each applicant a copy of the form prescribed pursuant to division (C)(2) of section 109.572 [109.57.2] of the Revised Code, provide to each applicant a standard impression sheet to obtain fingerprint impressions prescribed pursuant to division (C)(2) of section 109.572 [109.57.2] of the Revised Code, obtain the completed form and impression sheet from each applicant, and forward the completed form and impression sheet to the superintendent of the bureau of criminal identification and investigation at the time the person requests a criminal records check pursuant to division (A)(1) of this section.

(3) An applicant who receives pursuant to division (A)(2) of this section a copy of the form prescribed pursuant to division (C)(1) of section 109.572 [109.57.2] of the Revised Code and a copy of an impression sheet prescribed pursuant to division (C)(2) of that section and who is requested to complete the form and provide a set of fingerprint impressions shall complete the form or provide all the information necessary to complete the form and shall provide the impression sheet with the impressions of the applicant's fingerprints. If an applicant, upon request, fails to provide the information necessary to complete the form or fails to provide impressions of the applicant's fingerprints, the board of

Apx-1

EXHIBIT A

education of a school district, governing board of an educational service center, or governing authority of a chartered nonpublic school shall not employ that applicant for any position for which a criminal records check is required pursuant to division (A)(1) of this section.

(B)(1) Except as provided in rules adopted by the department of education in accordance with division (E) of this section and as provided in division (B)(3) of this section, no board of education of a school district, no governing board of an educational service center, and no governing authority of a chartered nonpublic school shall employ a person as a person responsible for the care, custody, or control of a child if the person previously has been convicted of or pleaded guilty to any of the following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.16, 2903.21, 2903.34, 2905.01, 2905.02, 2905.05, 2907.02, 2907.03, 2907.04, 2907.05, 2907.06, 2907.07, 2907.08, 2907.09, 2907.21, 2907.22, 2907.23, 2907.25, 2907.31, 2907.32, 2907.321 [2907.32.1], 2907.322 [2907.32.2], 2907.323 [2907.32.3], 2911.01, 2911.02, 2911.11, 2911.12, 2919.12, 2919.22, 2919.24, 2919.25, 2923.12, 2923.13, 2923.161 [2923.16.1], 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, or 3716.11 of the Revised Code, a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, a violation of section 2919.23 of the Revised Code that would have been a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, had the violation been committed prior to that date, a violation of section 2925.11 of the Revised Code that is not a minor drug possession offense or felonious sexual penetration in violation of former section 2907.12 of the Revised Code;

(b) A violation of an existing or former law of this state, another state, or the United States that is substantially equivalent to any of the offenses or violations described in division (B)(1)(a) of this section.

(2) A board, governing board of an educational service center, or a governing authority of a chartered nonpublic school may employ an applicant conditionally until the criminal records check required by this section is completed and the board or governing authority receives the results of the criminal records check. If the results of the criminal records check indicate that, pursuant to division (B)(1) of this section, the applicant does not qualify for employment, the board or governing authority shall release the applicant from employment.

(3) No board and no governing authority of a chartered nonpublic school shall employ a teacher who previously has been convicted of or pleaded guilty to any of the offenses listed in section 3319.31 of the Revised Code.

(C)(1) Each board and each governing authority of a chartered nonpublic school shall pay to the bureau of criminal identification and investigation the fee prescribed pursuant to division (C)(3) of section 109.572 [109.57.2] of the Revised Code for each criminal records check conducted in accordance with that section upon the request pursuant to division (A)(1) of this section of the appointing or hiring officer of the board or governing authority.

(2) A board and the governing authority of a chartered nonpublic school may charge an applicant a fee for the costs it incurs in obtaining a criminal records check under this section. A fee charged under this division shall not exceed the amount of fees the board or governing authority pays under division (C)(1) of this section. If a fee is charged under this division, the board or governing authority shall notify the applicant at the time of the applicant's initial application for employment of the amount of the fee and that, unless the fee is paid, the board or governing authority will not consider the applicant for employment.

(D) The report of any criminal records check conducted by the bureau of criminal identification and investigation in accordance with section 109.572 [109.57.2] of the Revised Code and pursuant to a request under division (A)(1) of this section is not a public record for the purposes of section 149.43 of the Revised Code and shall not be made available to any person other than the applicant who is the subject of the criminal records check or the applicant's representative, the board or governing authority requesting the criminal records check or its representative, and any court, hearing officer, or other necessary individual involved in a case dealing with the denial of employment to the applicant.

(E) The department of education shall adopt rules pursuant to Chapter 119. of the Revised Code to implement this

section, including rules specifying circumstances under which the board or governing authority may hire a person who has been convicted of an offense listed in division (B)(1) of this section but who meets standards in regard to rehabilitation set by the department.

(F) Any person required by division (A)(1) of this section to request a criminal records check shall inform each person, at the time of the person's initial application for employment, of the requirement to provide a set of fingerprint impressions and that a criminal records check is required to be conducted and satisfactorily completed in accordance with section 109.572 [109.57.2] of the Revised Code if the person comes under final consideration for appointment or employment as a precondition to employment for the school district, educational service center, or school for that position.

(G) As used in this section:

(1) "Applicant" means a person who is under final consideration for appointment or employment in a position with a board of education, governing board of an educational service center, or a chartered nonpublic school as a person responsible for the care, custody, or control of a child, except that "applicant" does not include a person already employed by a board or chartered nonpublic school in a position of care, custody, or control of a child who is under consideration for a different position with such board or school.

(2) "Teacher" means a person holding an educator license, internship certificate, or permit issued under section 3319.22, 3319.28, or 3319.301 [3319.30.1] of the Revised Code and teachers in a chartered nonpublic school.

(3) "Criminal records check" has the same meaning as in section 109.572 [109.57.2] of the Revised Code.

(4) "Minor drug possession offense" has the same meaning as in section 2925.01 of the Revised Code.

(H) If the board of education of a local school district adopts a resolution requesting the assistance of the educational service center in which the local district has territory in conducting criminal records checks of substitute teachers under this section, the appointing or hiring officer of such educational service center shall serve for purposes of this section as the appointing or hiring officer of the local board in the case of hiring substitute teachers for employment in the local district.

(I) The requirements of this section shall not apply to a person holding a certificate of the type described in section 3319.281 [3319.28.1] of the Revised Code who applies to a school district or school for employment in an adult instruction position under which that person is not responsible for the care, custody, or control of a child.

HISTORY: 145 v S 38 (Eff 10-29-93); 145 v H 715 (Eff 7-22-94); 145 v H 694 (Eff 11-11-94); 146 v H 117 (Eff 9-29-95); 146 v H 223 (Eff 11-15-95); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 445 (Eff 9-3-96); 146 v S 230, Eff 10-29-96.

See provisions, § 16 of SB 230 (146 v --) following RC § 3317.02.4.

NOTES: CROSS-REFERENCES TO RELATED SECTIONS

Criminal records check and fingerprinting of certain persons having frequent contact with children, RC § 109.57.2.
Duties of the superintendent of the bureau of criminal identification and investigation, RC § 109.57.

OHIO ADMINISTRATIVE CODE

Department of education rule for consideration of employment of individuals with certain criminal convictions.
Baker: OAC 3301-20-01.

Rule for consideration of employment of individuals with certain criminal convictions. Baker: OAC 3301-20-01.



1 of 3 DOCUMENTS

OHIO ADMINISTRATIVE CODE
Copyright (c) 2006 Anderson Publishing Company

*** ARCHIVE DATA ***

*** THIS DOCUMENT IS CURRENT THROUGH DECEMBER 31, 2005 ***

3301 DEPARTMENT OF EDUCATION - ADMINISTRATION AND DIRECTOR
Chapter 3301-20 Standards for Employment of Individuals With Criminal Convictions

OAC Ann. 3301-20-01 (Anderson 2005)

3301-20-01 Employment of individuals with certain criminal convictions.

(A) Definitions - The following terms are defined as they are used in this rule:

(1) "Applicant" means one of the following:

(a) One who is under final consideration for appointment or employment in a position with a district as a person responsible for the care, custody, or control of a child. An "applicant" does not include a person already employed by a district in a position of care, custody, or control of a child who is under consideration for a different position with the same district; or

(b) A person applying for an initial educator license issued under *section 3319.22 or 3319.301 of the Revised Code* or a license to teach in a chartered nonpublic school.

(2) "Teacher" means a person holding any educator license issued under *section 3319.22 or 3319.301 of the Revised Code* or a license to teach in a chartered nonpublic school.

(3) "Criminal records check" has the same meaning as in *section 109.572 of the Revised Code*.

(4) "District" means a school district as described in *section 3311.01 of the Revised Code*, educational service centers, community schools, county MR/DD's, chartered non-public schools and preschool programs.

(5) "State board" means the Ohio state board of education as defined in *section 3301.01 of the Revised Code*.

(6) "Superintendent" means the superintendent of public instruction and his/her designee as defined in *section 3301.13 of the Revised Code*.

(7) "Department" means the Ohio department of education as defined in *section 3301.13 of the Revised Code*.

(8) "License" means the same as the term license as defined in division (A) of *section 3319.31 of the Revised Code*.

(9) An offense of violence means a violation of sections 2903.01 (aggravated murder), 2903.02 (murder), 2903.03

Apx-4

EXHIBIT B

(voluntary manslaughter), 2903.04

(involuntary manslaughter), 2903.041 (reckless homicide), 2903.11

(felonious assault), 2903.12 (aggravated assault), 2903.15 (permitting child abuse), 2905.01 (kidnapping), 2905.02 (abduction), 2905.05 (criminal child enticement), 2905.11 (extortion), 2909.02 (aggravated arson), 2911.01

(aggravated robbery), 2911.02 (robbery), 2911.11 (aggravated burglary), 2917.01 (inciting to violence), 2917.02 (aggravated riot), 2917.03 (riot), 2917.31 (inducing panic), 2921.03 (intimidation), 2921.04 (intimidation of attorney, victim or witness in criminal case), 2921.34 (escape), 2923.161

(improper discharge firearm at or into habitation; school-related offenses), 2923.122 (illegal conveyance or possession of deadly weapon or dangerous ordnance or illegal possession of an object indistinguishable from a firearm in school safety zone), 2923.123 (illegal conveyance of deadly weapon or dangerous ordnance into courthouse, illegal possession or control in a courthouse), 2923.161 (improperly discharging firearm at or into a habitation; school related offenses), 2923.21 (improperly furnishing firearms to minor), 2923.17 (unlawful possession of dangerous ordnance; illegally manufacturing or processing explosives) of the Revised Code; divisions (B)(1), (2), (3), or

(4) of sections 2919.22 (endangering children), 2909.22 (soliciting or providing support for act of terrorism), 2909.23 (making terroristic threat), 2909.24 (terrorism), 2917.33 (unlawful possession or use of a hoax weapon of mass destruction), 2927.24 (contaminating substance for human consumption or use; contamination with hazardous chemical, biological, or radioactive substance; spreading false report), 3716.11 (placing harmful objects in food/confection), 2921.05 (retaliation), 2919.12 (unlawful abortion), 2919.121 (performing or inducing unlawful abortion upon minor), 2919.13 (abortion manslaughter) of the Revised Code or section 2919.23

(interference of custody) of the Revised Code that would have been a violation of section 2905.04 (child stealing) of the Revised Code as it existed prior to July 1, 1996, had the violation been committed prior to that date. A conviction of attempt, complicity or conspiracy to any of these offenses shall be deemed a violent offense for purposes of this rule.

(10) A theft offense means a violation of sections 2911.12 (burglary), 2913.44

(personating an officer), 2921.41 (theft in office), 2921.11 (perjury), or 2921.02 (bribery) of the Revised Code. A conviction of attempt, complicity or conspiracy to any of these offenses shall be deemed a theft offense for purposes of this rule.

(11) A drug abuse offense means a violation of sections 2925.02 (corrupting another with drugs), 2925.03 (trafficking in drugs), 2925.04 (illegal manufacture of drugs or cultivation of marijuana), 2925.041 (illegal assembly or possession of chemicals for the manufacture of drugs), 2925.05

(funding of drug or marijuana trafficking), 2925.06 (illegal administration or distribution of anabolic steroids), 2925.13 (permitting drug abuse), 2925.22

(deception to obtain a dangerous drug), 2925.23 (illegal possession of drug documents), 2925.24 (tampering with drugs), 2925.32 (trafficking in harmful intoxicants; improperly dispensing or distributing nitrous oxide), 2925.36

(illegal dispensing of drug samples), or 2925.37 (possession of counterfeit controlled substances) of the Revised Code. A conviction of attempt, complicity or conspiracy to any of these offenses shall be deemed a drug abuse offense for purposes of this rule.

(12) A sexually-oriented offense means a violation of sections 2907.02 (rape), 2907.03 (sexual battery), 2907.04 (unlawful sexual conduct with a minor), 2907.05 (gross sexual imposition), 2907.06 (sexual imposition), 2907.07

(importuning), 2907.21 (compelling prostitution), 2907.22 (promoting prostitution), 2907.23 (procuring), 2907.24

(soliciting; after positive HIV test), 2907.241 (loitering to engage in solicitation; solicitation after positive HIV test) 2907.25 (prostitution; after positive HIV test), 2907.31

(disseminating matter harmful to juveniles), 2907.311 (displaying harmful to juveniles), 2907.32 (pandering obscenity), 2907.321 (pandering obscenity involving a minor), 2907.322 (pandering sexually oriented matter involving a minor), 2907.33 (deception to obtain matter harmful to juveniles), 2907.34

(compelling acceptance of objectionable materials), 2907.323 (illegal use of a minor in nudity-oriented material or performance) of the Revised Code or a violation of former section 2907.12 (felonious sexual penetration) of the Revised Code. A conviction of attempt, complicity or conspiracy to any of these offenses shall be deemed a sexually-oriented offense for purposes of this rule.

(B) No district shall employ, the state board shall not issue an initial license to, and the superintendent shall not enter into a consent agreement with an applicant if he previously has been convicted of or pled guilty to any violation of any of the offenses listed in division (B)(1) of *section 3319.39 of the Revised Code* and *section 3319.31 of the Revised Code* or any municipal ordinance or law of this state, another state, or the United States that is substantially equivalent to the offenses listed in division (B)(1) of *section 3319.39 of the Revised Code* and *section 3319.31 of the Revised Code* except as provided in paragraph (E) of this rule. If the state board intends to deny a license pursuant to this paragraph, the state board shall act in accordance with *sections 3319.31 and 3319.311 of the Revised Code* and Chapter 3301-73 of the Administrative Code.

(C) If a teacher has been convicted of or pled guilty to any offense referred to in paragraph (B) of this rule, the state board shall act in accordance with *sections 3319.31 and 3319.311 of the Revised Code* and Chapter 3301-73 of the Administrative Code. If the teacher satisfies all terms and conditions of a consent agreement or state board adopted resolution pertaining to the applicant, he/she shall be deemed rehabilitated with regard to the specific offense addressed in the consent agreement or resolution for purposes of future employment or licensure. A district maintains the discretion whether to employ a teacher who has been deemed rehabilitated under this paragraph.

(D) Pursuant to division (B)(2) of *section 3319.39 of the Revised Code*, a district may employ an applicant conditionally until the criminal records check required by *sections 3301.541 and 3319.39 of the Revised Code* is completed and the district receives the results of the criminal records check. If the results of the criminal records check indicate that, pursuant to this rule, the applicant does not qualify for employment, the district shall release the applicant from employment.

(E) A district may employ, the state board may issue a license to and the superintendent may enter into a consent agreement with an applicant that has been previously convicted of or pled guilty to an offense if all of the following conditions are met:

(1) The conviction was not one of the following:

- (a) An offense of violence as defined in paragraph (A)(9) of this rule;
- (b) A theft offense as defined in paragraph (A)(10) of this rule;
- (c) A drug abuse offense as defined in paragraph (A)(11) of this rule; or
- (d) A sexually-oriented offense as defined in paragraph (A)(12) of this rule.

(2) If the conviction is not one listed in paragraph (E)(1) of this rule, the following rehabilitation criteria shall apply:

- (a) At the time of the offense, the victim of the offense was not a person under eighteen years of age or enrolled as

a student in a district.

(b) If the offense was a felony, at least five years have elapsed since the applicant was fully discharged from imprisonment, probation, or parole or the applicant has had the record of his conviction sealed or expunged pursuant to *section 2953.32 of the Revised Code*. If the offense was a misdemeanor, at least five years have elapsed since the date of conviction or the applicant has had the record of his conviction sealed or expunged pursuant to *section 2953.32 of the Revised Code*.

(c) The applicant has not been convicted of or pled guilty to the commission of any of the offenses listed in division (B)(1) of *section 3319.39 of the Revised Code* and *section 3319.31 of the Revised Code* two or more times in separate criminal actions. Convictions or guilty pleas resulting from or connected with the same act, or resulting from offenses committed at the same time, shall be counted as one conviction or guilty plea for purposes of this rule. A sealed or expunged conviction shall not be counted.

(d) The applicant provides written confirmation of his/her efforts at rehabilitation and the results of those efforts. Written confirmation may include a statement by a court, parole officer, probation officer and/or counselor that the applicant has been rehabilitated.

(e) A reasonable person would conclude that the applicant's hiring or licensure will not jeopardize the health, safety, or welfare of the persons served by the district. Evidence that the applicant's hiring or licensure will not jeopardize the health, safety, or welfare of the persons served by the district shall include, but not be limited to the following factors:

- (i) The nature and seriousness of the crime;
- (ii) The extent of the applicant's past criminal activity;
- (iii) The age of the applicant when the crime was committed;
- (iv) The amount of time that has elapsed since the applicant's last criminal activity;
- (v) The conduct and work activity of the applicant before and after the criminal activity;
- (vi) Whether the applicant has completed the terms of his probation or deferred adjudication;
- (vii) Evidence of rehabilitation;
- (viii) Whether the applicant fully disclosed the crime to the state board, the department and the district;
- (ix) Whether employment or licensure will have a negative impact on the local education community;
- (x) Whether employment or licensure will have a negative impact on the state-wide education community; and
- (xi) Any other factors the state board, district, or superintendent considers relevant.

(F) It is the applicant's duty to provide written evidence upon application for employment or licensure that the conditions specified in paragraph (E) of this rule are met. If the applicant fails to provide such evidence or if the district or the state board determines that the proof offered by the applicant is inconclusive or does not establish proof of rehabilitation, the applicant shall not be hired and the license shall not be issued. Any doubt shall be resolved in favor of protecting the persons served by the district. If licensure is denied, the state board, through the superintendent, shall notify the applicant and afford the applicant the opportunity to request an administrative hearing under *section 3319.31 and Chapter 119. of the Revised Code*.

(G) This rule is applicable to records of convictions that have been sealed pursuant to *section 2953.32 of the Revised Code* when the information contained in those sealed records bears a direct and substantial relationship to the position for which the applicant is being considered.

(H) A conviction of or a plea of guilty to an offense listed in division (B)(1) of *section 3319.39 of the Revised Code* and *3319.31 of the Revised Code* shall not prevent an applicant's hiring if the applicant has been granted an unconditional pardon for the offense pursuant to Chapter 2967. of the Revised Code or the conviction or guilty plea has been set aside pursuant to law. For purposes of this rule, "unconditional pardon" includes a conditional pardon with respect to which all conditions have been performed or have transpired.

(I) This rule is promulgated under the state board and department of education's rule-making authority under sections 3319.31, division (E) of *section 3319.311* and *section 3319.39 of the Revised Code*.

History: Prior Effective Dates: 10/1/94; 2/9/04; Replaces: 3301-20-01; Effective: 09/23/2005

R.C. 119.032 review dates: 09/23/2010

Promulgated Under: 119.03

Statutory Authority: 3301.07; 3319.39; 3319.31

Rule Amplifies: 3319.39; 3319.291; 3319.31; 3319.311



LEXSTAT ORC. 3319.39

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2010 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND
FILED WITH THE SECRETARY OF STATE THROUGH MARCH 30, 2010 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 3, 2010 ***

TITLE 33. EDUCATION -- LIBRARIES
CHAPTER 3319. SCHOOLS -- SUPERINTENDENT; TEACHERS; EMPLOYEES
SCHOOL REPORTS

Go to the Ohio Code Archive Directory

ORC Ann. 3319.39 (2010)

§ 3319.39. Criminal records check of applicants for employment; employment of certain offenders prohibited

(A) (1) Except as provided in division (F)(2)(b) of *section 109.57 of the Revised Code*, the appointing or hiring officer of the board of education of a school district, the governing board of an educational service center, or of a chartered nonpublic school shall request the superintendent of the bureau of criminal identification and investigation to conduct a criminal records check with respect to any applicant who has applied to the school district, educational service center, or school for employment in any position. The appointing or hiring officer shall request that the superintendent include information from the federal bureau of investigation in the criminal records check, unless all of the following apply to the applicant:

(a) The applicant is applying to be an instructor of adult education.

(b) The duties of the position for which the applicant is applying do not involve routine interaction with a child or regular responsibility for the care, custody, or control of a child or, if the duties do involve such interaction or responsibility, during any period of time in which the applicant, if hired, has such interaction or responsibility, another employee of the school district, educational service center, or chartered nonpublic school will be present in the same room with the child or, if outdoors, will be within a thirty-yard radius of the child or have visual contact with the child.

(c) The applicant presents proof that the applicant has been a resident of this state for the five-year period immediately prior to the date upon which the criminal records check is requested or provides evidence that within that five-year period the superintendent has requested information about the applicant from the federal bureau of investigation in a criminal records check.

(2) A person required by division (A)(1) of this section to request a criminal records check shall provide to each

Apx-9

EXHIBIT C

applicant a copy of the form prescribed pursuant to division (C)(1) of *section 109.572 [109.57.2] of the Revised Code*, provide to each applicant a standard impression sheet to obtain fingerprint impressions prescribed pursuant to division (C)(2) of *section 109.572 [109.57.2] of the Revised Code*, obtain the completed form and impression sheet from each applicant, and forward the completed form and impression sheet to the superintendent of the bureau of criminal identification and investigation at the time the person requests a criminal records check pursuant to division (A)(1) of this section.

(3) An applicant who receives pursuant to division (A)(2) of this section a copy of the form prescribed pursuant to division (C)(1) of *section 109.572 [109.57.2] of the Revised Code* and a copy of an impression sheet prescribed pursuant to division (C)(2) of that section and who is requested to complete the form and provide a set of fingerprint impressions shall complete the form or provide all the information necessary to complete the form and shall provide the impression sheet with the impressions of the applicant's fingerprints. If an applicant, upon request, fails to provide the information necessary to complete the form or fails to provide impressions of the applicant's fingerprints, the board of education of a school district, governing board of an educational service center, or governing authority of a chartered nonpublic school shall not employ that applicant for any position.

(B) (1) Except as provided in rules adopted by the department of education in accordance with division (E) of this section and as provided in division (B)(3) of this section, no board of education of a school district, no governing board of an educational service center, and no governing authority of a chartered nonpublic school shall employ a person if the person previously has been convicted of or pleaded guilty to any of the following:

(a) A violation of *section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.16, 2903.21, 2903.34, 2905.01, 2905.02, 2905.05, 2907.02, 2907.03, 2907.04, 2907.05, 2907.06, 2907.07, 2907.08, 2907.09, 2907.21, 2907.22, 2907.23, 2907.25, 2907.31, 2907.32, 2907.321 [2907.32.1], 2907.322 [2907.32.2], 2907.323 [2907.32.3], 2911.01, 2911.02, 2911.11, 2911.12, 2919.12, 2919.22, 2919.24, 2919.25, 2923.12, 2923.13, 2923.161 [2923.16.1], 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, or 3716.11 of the Revised Code*, a violation of *section 2905.04 of the Revised Code* as it existed prior to July 1, 1996, a violation of *section 2919.23 of the Revised Code* that would have been a violation of *section 2905.04 of the Revised Code* as it existed prior to July 1, 1996, had the violation been committed prior to that date, a violation of *section 2925.11 of the Revised Code* that is not a minor drug possession offense or felonious sexual penetration in violation of former *section 2907.12 of the Revised Code*;

(b) A violation of an existing or former law of this state, another state, or the United States that is substantially equivalent to any of the offenses or violations described in division (B)(1)(a) of this section.

(2) A board, governing board of an educational service center, or a governing authority of a chartered nonpublic school may employ an applicant conditionally until the criminal records check required by this section is completed and the board or governing authority receives the results of the criminal records check. If the results of the criminal records check indicate that, pursuant to division (B)(1) of this section, the applicant does not qualify for employment, the board or governing authority shall release the applicant from employment.

(3) No board and no governing authority of a chartered nonpublic school shall employ a teacher who previously has been convicted of or pleaded guilty to any of the offenses listed in *section 3319.31 of the Revised Code*.

(C) (1) Each board and each governing authority of a chartered nonpublic school shall pay to the bureau of criminal identification and investigation the fee prescribed pursuant to division (C)(3) of *section 109.572 [109.57.2] of the Revised Code* for each criminal records check conducted in accordance with that section upon the request pursuant to division (A)(1) of this section of the appointing or hiring officer of the board or governing authority.

(2) A board and the governing authority of a chartered nonpublic school may charge an applicant a fee for the costs it incurs in obtaining a criminal records check under this section. A fee charged under this division shall not exceed the amount of fees the board or governing authority pays under division (C)(1) of this section. If a fee is charged

under this division, the board or governing authority shall notify the applicant at the time of the applicant's initial application for employment of the amount of the fee and that, unless the fee is paid, the board or governing authority will not consider the applicant for employment.

(D) The report of any criminal records check conducted by the bureau of criminal identification and investigation in accordance with *section 109.572 [109.57.2] of the Revised Code* and pursuant to a request under division (A)(1) of this section is not a public record for the purposes of *section 149.43 of the Revised Code* and shall not be made available to any person other than the applicant who is the subject of the criminal records check or the applicant's representative, the board or governing authority requesting the criminal records check or its representative, and any court, hearing officer, or other necessary individual involved in a case dealing with the denial of employment to the applicant.

(E) The department of education shall adopt rules pursuant to Chapter 119. of the Revised Code to implement this section, including rules specifying circumstances under which the board or governing authority may hire a person who has been convicted of an offense listed in division (B)(1) or (3) of this section but who meets standards in regard to rehabilitation set by the department.

The department shall amend rule 3301-83-23 of the Ohio Administrative Code that took effect August 27, 2009, and that specifies the offenses that disqualify a person for employment as a school bus or school van driver and establishes rehabilitation standards for school bus and school van drivers.

(F) Any person required by division (A)(1) of this section to request a criminal records check shall inform each person, at the time of the person's initial application for employment, of the requirement to provide a set of fingerprint impressions and that a criminal records check is required to be conducted and satisfactorily completed in accordance with *section 109.572 [109.57.2] of the Revised Code* if the person comes under final consideration for appointment or employment as a precondition to employment for the school district, educational service center, or school for that position.

(G) As used in this section:

(1) "Applicant" means a person who is under final consideration for appointment or employment in a position with a board of education, governing board of an educational service center, or a chartered nonpublic school, except that "applicant" does not include a person already employed by a board or chartered nonpublic school who is under consideration for a different position with such board or school.

(2) "Teacher" means a person holding an educator license or permit issued under *section 3319.22 or 3319.301 [3319.30.1] of the Revised Code* and teachers in a chartered nonpublic school.

(3) "Criminal records check" has the same meaning as in *section 109.572 [109.57.2] of the Revised Code*.

(4) "Minor drug possession offense" has the same meaning as in *section 2925.01 of the Revised Code*.

(H) If the board of education of a local school district adopts a resolution requesting the assistance of the educational service center in which the local district has territory in conducting criminal records checks of substitute teachers and substitutes for other district employees under this section, the appointing or hiring officer of such educational service center shall serve for purposes of this section as the appointing or hiring officer of the local board in the case of hiring substitute teachers and other substitute employees for the local district.

HISTORY:

145 v S 38 (Eff 10-29-93); 145 v H 715 (Eff 7-22-94); 145 v H 694 (Eff 11-11-94); 146 v H 117 (Eff 9-29-95); 146 v H 223 (Eff 11-15-95); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 445 (Eff 9-3-96); 146 v S 230. Eff 10-29-96; 150 v S 2, § 1, eff. 6-9-04; 152 v S 97, § 1, eff. 7-1-07; 152 v H 190, § 1, eff. 11-14-07; 152 v H 428, § 1, eff.



LEXSTAT ORC ANN. 3319.391

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2010 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND
FILED WITH THE SECRETARY OF STATE THROUGH MARCH 30, 2010 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 3, 2010 ***

TITLE 33. EDUCATION -- LIBRARIES
CHAPTER 3319. SCHOOLS -- SUPERINTENDENT; TEACHERS; EMPLOYEES
SCHOOL REPORTS

Go to the Ohio Code Archive Directory

ORC Ann. 3319.391 (2010)

§ 3319.391. Criminal records checks of hirees for positions not requiring license and not involving operation of pupil transportation vehicle

This section applies to any person hired by a school district, educational service center, or chartered nonpublic school in any position that does not require a "license" issued by the state board of education, as defined in *section 3319.31 of the Revised Code*, and is not for the operation of a vehicle for pupil transportation.

(A) For each person to whom this section applies who is hired on or after November 14, 2007, the employer shall request a criminal records check in accordance with *section 3319.39 of the Revised Code* and shall request a subsequent criminal records check by the fifth day of September every fifth year thereafter. For each person to whom this division applies who is hired prior to November 14, 2007, the employer shall request a criminal records check by a date prescribed by the department of education and shall request a subsequent criminal records check by the fifth day of September every fifth year thereafter.

(B) (1) Each request for a criminal records check under this section shall be made to the superintendent of the bureau of criminal identification and investigation in the manner prescribed in *section 3319.39 of the Revised Code*, except that if both of the following conditions apply to the person subject to the records check, the employer shall request the superintendent only to obtain any criminal records that the federal bureau of investigation has on the person:

(a) The employer previously requested the superintendent to determine whether the bureau of criminal identification and investigation has any information, gathered pursuant to division (A) of *section 109.57 of the Revised Code*, on the person in conjunction with a criminal records check requested under *section 3319.39 of the Revised Code* or under this section.

(b) The person presents proof that the person has been a resident of this state for the five-year period immediately prior to the date upon which the person becomes subject to a criminal records check under this section.

(2) Upon receipt of a request under division (B)(1) of this section, the superintendent shall conduct the criminal records check in accordance with *section 109.572 [109.57.2] of the Revised Code* as if the request had been made under *section 3319.39 of the Revised Code*. However, as specified in division (B)(2) of *section 109.572 [109.57.2] of the Revised Code*, if the employer requests the superintendent only to obtain any criminal records that the federal bureau of investigation has on the person for whom the request is made, the superintendent shall not conduct the review prescribed by division (B)(1) of that section.

(C) Any person who is the subject of a criminal records check under this section and has been convicted of or pleaded guilty to any offense described in division (B)(1) of *section 3319.39 of the Revised Code* shall not be hired or shall be released from employment, as applicable, unless the person meets the rehabilitation standards adopted by the department under division (E) of that section.

HISTORY:

152 v H 190, § 1, eff. 11-14-07; 152 v H 428, § 1, eff. 9-12-08; 153 v H 1, § 101.01, eff. 1-1-10.

NOTES:

Section Notes

The effective date is set by § 812.10 of 153 v H 1.

EFFECT OF AMENDMENTS

153 v H 1, effective January 1, 2010, rewrote (B).

152 v H 428, effective September 12, 2008, rewrote (A).



LEXSTAT OAC ANN. 3301-20-01

OHIO ADMINISTRATIVE CODE
Copyright (c) 2010 Anderson Publishing Company

*** THIS DOCUMENT IS CURRENT THROUGH OHIO REGISTER FOR THE WEEK OF October 25-November 1,
2009 ***

3301 Department of Education - Administration and Director
Chapter 3301-20 Standards for Employment of Individuals With Criminal Convictions

OAC Ann. 3301-20-01 (2009)

3301-20-01. Employment of individuals with certain criminal convictions.

(A) Definitions - The following terms are defined as they are used in this rule:

(1) "Applicant" means one of the following:

(a) One who is under final consideration for appointment or employment in a position with a district as a person responsible for the care, custody, or control of a child. An "applicant" does not include a person already employed by a district in a position of care, custody, or control of a child who is under consideration for a different position with the same district; or

(b) A person applying for an initial educator license issued under *section 3319.22* or *3319.301* of the *Revised Code* or a license to teach in a chartered nonpublic school.

(2) "Teacher" means a person holding any educator license issued under *section 3319.22* or *3319.301* of the *Revised Code* or a license to teach in a chartered nonpublic school.

(3) "Criminal records check" has the same meaning as in *section 109.572* of the *Revised Code*.

(4) "District" means a school district as described in *section 3311.01* of the *Revised Code*, educational service centers, community schools, county MR/DD's, chartered non-public schools and preschool programs.

(5) "State board" means the Ohio state board of education as defined in *section 3301.01* of the *Revised Code*.

(6) "Superintendent" means the superintendent of public instruction and his/her designee as defined in *section 3301.13* of the *Revised Code*.

(7) "Department" means the Ohio department of education as defined in *section 3301.13* of the *Revised Code*.

(8) "License" means the same as the term license as defined in division (A) of *section 3319.31* of the *Revised Code*.

(9) An offense of violence means a violation of sections 2903.01 (aggravated murder), 2903.02 (murder), 2903.03

(voluntary manslaughter), 2903.04

(involuntary manslaughter), 2903.041 (reckless homicide), 2903.11

(felonious assault), 2903.12 (aggravated assault), 2903.15 (permitting child abuse), 2905.01 (kidnapping), 2905.02 (abduction), 2905.05 (criminal child enticement), 2905.11 (extortion), 2909.02 (aggravated arson), 2911.01

(aggravated robbery), 2911.02 (robbery), 2911.11 (aggravated burglary), 2917.01 (inciting to violence), 2917.02 (aggravated riot), 2917.03 (riot), 2917.31 (inducing panic), 2921.03 (intimidation), 2921.04 (intimidation of attorney, victim or witness in criminal case), 2921.34 (escape), 2923.161

(improper discharge firearm at or into habitation; school-related offenses), 2923.122 (illegal conveyance or possession of deadly weapon or dangerous ordnance or illegal possession of an object indistinguishable from a firearm in school safety zone), 2923.123 (illegal conveyance of deadly weapon or dangerous ordnance into courthouse, illegal possession or control in a courthouse), 2923.161 (improperly discharging firearm at or into a habitation; school related offenses), 2923.21 (improperly furnishing firearms to minor), 2923.17 (unlawful possession of dangerous ordnance; illegally manufacturing or processing explosives) of the Revised Code; divisions (B)(1), (2), (3), or (4) of sections 2919.22 (endangering children), 2909.22 (soliciting or providing support for act of terrorism), 2909.23 (making terroristic threat), 2909.24 (terrorism), 2917.33 (unlawful possession or use of a hoax weapon of mass destruction), 2927.24 (contaminating substance for human consumption or use; contamination with hazardous chemical, biological, or radioactive substance; spreading false report), 3716.11 (placing harmful objects in food/confection), 2921.05 (retaliation), 2919.12 (unlawful abortion), 2919.121 (performing or inducing unlawful abortion upon minor), 2919.13 (abortion manslaughter) of the Revised Code or section 2919.23

(interference of custody) of the Revised Code that would have been a violation of section 2905.04 (child stealing) of the Revised Code as it existed prior to July 1, 1996, had the violation been committed prior to that date. A conviction of attempt, complicity or conspiracy to any of these offenses shall be deemed a violent offense for purposes of this rule.

(10) A theft offense means a violation of sections 2911.12 (burglary), 2913.44

(personating an officer), 2921.41 (theft in office), 2921.11 (perjury), or 2921.02 (bribery) of the Revised Code. A conviction of attempt, complicity or conspiracy to any of these offenses shall be deemed a theft offense for purposes of this rule.

(11) A drug abuse offense means a violation of sections 2925.02 (corrupting another with drugs), 2925.03 (trafficking in drugs), 2925.04 (illegal manufacture of drugs or cultivation of marihuana), 2925.041 (illegal assembly or possession of chemicals for the manufacture of drugs), 2925.05

(funding of drug or marijuana trafficking), 2925.06 (illegal administration or distribution of anabolic steroids), 2925.13 (permitting drug abuse), 2925.22

(deception to obtain a dangerous drug), 2925.23 (illegal possession of drug documents), 2925.24 (tampering with drugs), 2925.32 (trafficking in harmful intoxicants; improperly dispensing or distributing nitrous oxide), 2925.36

(illegal dispensing of drug samples), or 2925.37 (possession of counterfeit controlled substances) of the Revised Code. A conviction of attempt, complicity or conspiracy to any of these offenses shall be deemed a drug abuse offense for purposes of this rule.

(12) A sexually-oriented offense means a violation of sections 2907.02 (rape), 2907.03 (sexual battery), 2907.04 (unlawful sexual conduct with a minor), 2907.05 (gross sexual imposition), 2907.06 (sexual imposition), 2907.07

(importuning), 2907.21 (compelling prostitution), 2907.22 (promoting prostitution), 2907.23 (procuring), 2907.24 (soliciting; after positive HIV test), 2907.241 (loitering to engage in solicitation; solicitation after positive HIV test) 2907.25 (prostitution; after positive HIV test), 2907.31

(disseminating matter harmful to juveniles), 2907.311 (displaying harmful to juveniles), 2907.32 (pandering obscenity), 2907.321 (pandering obscenity involving a minor), 2907.322 (pandering sexually oriented matter involving a minor), 2907.33 (deception to obtain matter harmful to juveniles), 2907.34

(compelling acceptance of objectionable materials), 2907.323 (illegal use of a minor in nudity-oriented material or performance) of the Revised Code or a violation of former section 2907.12 (felonious sexual penetration) of the Revised Code. A conviction of attempt, complicity or conspiracy to any of these offenses shall be deemed a sexually-oriented offense for purposes of this rule.

(B) No district shall employ, the state board shall not issue an initial license to, and the superintendent shall not enter into a consent agreement with an applicant if he previously has been convicted of or pled guilty to any violation of any of the offenses listed in division (B)(1) of *section 3319.39 of the Revised Code* and *section 3319.31 of the Revised Code* or any municipal ordinance or law of this state, another state, or the United States that is substantially equivalent to the offenses listed in division (B)(1) of *section 3319.39 of the Revised Code* and *section 3319.31 of the Revised Code* except as provided in paragraph (E) of this rule. If the state board intends to deny a license pursuant to this paragraph, the state board shall act in accordance with *sections 3319.31 and 3319.311 of the Revised Code* and *Chapter 3301-73 of the Administrative Code*.

(C) If a teacher has been convicted of or pled guilty to any offense referred to in paragraph (B) of this rule, the state board shall act in accordance with *sections 3319.31 and 3319.311 of the Revised Code* and *Chapter 3301-73 of the Administrative Code*. If the teacher satisfies all terms and conditions of a consent agreement or state board adopted resolution pertaining to the applicant, he/she shall be deemed rehabilitated with regard to the specific offense addressed in the consent agreement or resolution for purposes of future employment or licensure. A district maintains the discretion whether to employ a teacher who has been deemed rehabilitated under this paragraph.

(D) Pursuant to division (B)(2) of *section 3319.39 of the Revised Code*, a district may employ an applicant conditionally until the criminal records check required by *sections 3301.541 and 3319.39 of the Revised Code* is completed and the district receives the results of the criminal records check. If the results of the criminal records check indicate that, pursuant to this rule, the applicant does not qualify for employment, the district shall release the applicant from employment.

(E) A district may employ, the state board may issue a license to and the superintendent may enter into a consent agreement with an applicant that has been previously convicted of or pled guilty to an offense if all of the following conditions are met:

(1) The conviction was not one of the following:

- (a) An offense of violence as defined in paragraph (A)(9) of this rule;
- (b) A theft offense as defined in paragraph (A)(10) of this rule;
- (c) A drug abuse offense as defined in paragraph (A)(11) of this rule; or
- (d) A sexually-oriented offense as defined in paragraph (A)(12) of this rule.

(2) If the conviction is not one listed in paragraph (E)(1) of this rule, the following rehabilitation criteria shall apply:

OAC Ann. 3301-20-01

(a) At the time of the offense, the victim of the offense was not a person under eighteen years of age or enrolled as a student in a district.

(b) If the offense was a felony, at least five years have elapsed since the applicant was fully discharged from imprisonment, probation, or parole or the applicant has had the record of his conviction sealed or expunged pursuant to *section 2953.32 of the Revised Code*. If the offense was a misdemeanor, at least five years have elapsed since the date of conviction or the applicant has had the record of his conviction sealed or expunged pursuant to *section 2953.32 of the Revised Code*.

(c) The applicant has not been convicted of or pled guilty to the commission of any of the offenses listed in division (B)(1) of *section 3319.39 of the Revised Code* and *section 3319.31 of the Revised Code* two or more times in separate criminal actions. Convictions or guilty pleas resulting from or connected with the same act, or resulting from offenses committed at the same time, shall be counted as one conviction or guilty plea for purposes of this rule. A sealed or expunged conviction shall not be counted.

(d) The applicant provides written confirmation of his/her efforts at rehabilitation and the results of those efforts. Written confirmation may include a statement by a court, parole officer, probation officer and/or counselor that the applicant has been rehabilitated.

(e) A reasonable person would conclude that the applicant's hiring or licensure will not jeopardize the health, safety, or welfare of the persons served by the district. Evidence that the applicant's hiring or licensure will not jeopardize the health, safety, or welfare of the persons served by the district shall include, but not be limited to the following factors:

- (i) The nature and seriousness of the crime;
 - (ii) The extent of the applicant's past criminal activity;
 - (iii) The age of the applicant when the crime was committed;
 - (iv) The amount of time that has elapsed since the applicant's last criminal activity;
 - (v) The conduct and work activity of the applicant before and after the criminal activity;
 - (vi) Whether the applicant has completed the terms of his probation or deferred adjudication;
 - (vii) Evidence of rehabilitation;
 - (viii) Whether the applicant fully disclosed the crime to the state board, the department and the district;
 - (ix) Whether employment or licensure will have a negative impact on the local education community;
 - (x) Whether employment or licensure will have a negative impact on the state-wide education community;
- and
- (xi) Any other factors the state board, district, or superintendent considers relevant.

(f) It is the applicant's duty to provide written evidence upon application for employment or licensure that the conditions specified in paragraph (E) of this rule are met. If the applicant fails to provide such evidence or if the district or the state board determines that the proof offered by the applicant is inconclusive or does not establish proof of rehabilitation, the applicant shall not be hired and the license shall not be issued. Any doubt shall be resolved in favor of protecting the persons served by the district. If licensure is denied, the state board, through the superintendent, shall notify the applicant and afford the applicant the opportunity to request an administrative hearing under *section 3319.31*

and Chapter 119. of the Revised Code.

(G) This rule is applicable to records of convictions that have been sealed pursuant to *section 2953.32 of the Revised Code* when the information contained in those sealed records bears a direct and substantial relationship to the position for which the applicant is being considered.

(H) A conviction of or a plea of guilty to an offense listed in division (B)(1) of *section 3319.39 of the Revised Code* and *3319.31 of the Revised Code* shall not prevent an applicant's hiring if the applicant has been granted an unconditional pardon for the offense pursuant to Chapter 2967. of the Revised Code or the conviction or guilty plea has been set aside pursuant to law. For purposes of this rule, "unconditional pardon" includes a conditional pardon with respect to which all conditions have been performed or have transpired.

(I) This rule is promulgated under the state board and department of education's rule-making authority under sections 3319.31, division (E) of *section 3319.311* and *section 3319.39 of the Revised Code*.

History: Prior Effective Dates: 10/1/94; 2/9/04; Replaces: 3301-20-01; Effective: 09/23/2005.

R.C. 119.032 review dates: 09/23/2010 Promulgated Under: 119.03 Statutory Authority: 3301.07; 3319.39; 3319.31 Rule Amplifies: 3319.39; 3319.291; 3319.31; 3319.311.



LEXSTAT OAC ANN. 3301-20-03

OHIO ADMINISTRATIVE CODE
Copyright (c) 2010 Anderson Publishing Company

*** THIS DOCUMENT IS CURRENT THROUGH OHIO REGISTER FOR THE WEEK OF October 25-November 1, 2009 ***

3301 Department of Education - Administration and Director
Chapter 3301-20 Standards for Employment of Individuals With Criminal Convictions

OAC Ann. 3301-20-03 (2009)

3301-20-03. Employment of non-licensed individuals with certain criminal convictions.

The purpose of this rule is to provide for the safety and well-being of students, and, pursuant to *sections 3319.39 and 3319.391 of the Revised Code*, set rehabilitation standards for those individuals with certain criminal convictions seeking employment with a district for a position that does not require a license and those individuals currently employed by a district in a position that does not require a license but who are subject to the requirements of a criminal records check pursuant to *section 3319.391 of the Revised Code*. (The provisions of this rule do not apply to school bus or school van drivers.)

The rule establishes offenses for which employment and a determination of rehabilitation of a non-licensed individual for a position within a school are expressly forbidden and sets forth conditions under which a determination of rehabilitation is possible.

(A) Definitions:

(1) "Applicant" means one who is under final consideration for appointment or employment in a position with a district that does not require an educator license.

(2) "Criminal records check" has the same meaning as in *section 109.572 of the Revised Code*. For the purposes of this rule, "date of criminal records check" shall mean the date of receipt of the results of a background check requested by a district, which shall be time-stamped by the district on the date of receipt by the district.

(3) "District" means a school district as described in *section 3311.01 of the Revised Code*, a municipal school district as described in *section 3311.71 of the Revised Code*, an educational service center, a community school, a county MR/DD, a chartered non-public school, or a preschool program.

(4) "Employee" means a current employee of a school district who is not required to be licensed or certificated, but who is subject to the requirements of a background check pursuant to *section 3319.391 of the Revised Code*.

(5) "Offense" for the purposes of this rule means an offense in division (B)(1) of *section 3319.39* and of the *Revised Code* and includes any municipal ordinance, law of this state, another state, or the United States that is substantially equivalent to one of the offenses referred to in division (B)(1) of *section 3319.39 of the Revised Code*.

(6) "Non-rehabilitative offense" means a criminal offense that would prohibit a district from hiring or continuing employment of such an individual, and are the following:

(a) Sexually-oriented offenses: sections 2907.02 (rape), 2907.03 (sexual battery), 2907.04 (unlawful sexual conduct with a minor), 2907.05 (gross sexual imposition), 2907.06 (sexual imposition), 2907.07 (importuning), 2907.21 (compelling prostitution), 2907.22 (promoting prostitution), 2907.23 (procuring), 2907.25 (prostitution; after positive HIV test), 2907.31 (disseminating matter harmful to juveniles), 2907.32 (pandering obscenity), 2907.321 (pandering obscenity involving a minor), 2907.322 (pandering sexually oriented matter involving a minor), or 2907.323 (illegal use of a minor in nudity-oriented material or performance) of the Revised Code or a violation of former section 2907.12 (felonious sexual penetration) of the Revised Code.

(b) Child-related violent offenses: sections 2905.01 (kidnapping), 2905.02 (abduction), 2905.05 (criminal child enticement), 2919.23 (interference of custody) of the Revised Code that would have been a violation of section 2905.04 (child stealing) of the Revised Code as it existed prior to July 1, 1996, had the violation been committed prior to that date, divisions (1), (2), (3), or (4) of section 2919.22 (endangering children) of the Revised Code.

(c) Violent offenses: sections 2903.01 (aggravated murder), 2903.02 (murder), 2903.03 (voluntary manslaughter), 2903.04 (involuntary manslaughter) of the Revised Code.

(d) "Other violence-related offenses," which mean a violation of the following sections that occurred either within twenty years prior to the date of the current application for a position with the district or, for a current employee of a district, within twenty years prior to the date of the current criminal records check: 2903.11 (felonious assault), 2903.12 (aggravated assault), 2911.01 (aggravated robbery), 2911.02 (robbery), 2911.11 (aggravated burglary), or 2923.161 (improper discharge firearm at or into habitation; school-related offenses) of the Revised Code; 3716.11 (placing harmful objects in food/confection), 2919.12 (unlawful abortion) of the Revised Code.

(e) "Drug offenses," which mean a violation of the following sections that occurred either within ten years prior to the date of the current application for a position with the district or, for a current employee of a district, within ten years prior to the date of the current criminal records check: sections 2925.02 (corrupting another with drugs), 2925.03 (trafficking in drugs), 2925.04 (illegal manufacture of drugs or cultivation of marihuana), 2925.05 (funding of drug or marihuana trafficking), 2925.06 (illegal administration or distribution of anabolic steroids) of the Revised Code.

(f) "Theft offense," which means a violation of section 2911.12 (burglary) of the Revised Code that occurred either within ten years prior to the date of the current application for a position with the district or, for a current employee of a district, within ten years prior to the date of the current criminal records check.

(g) "Other offenses," which mean a violation of the following sections that occurred either within five years prior to the date of the current application for a position with the district, or for a current employee of a district, within five years prior to the date of the current criminal records check: 2903.13 (assault), 2903.16 (failing to provide for a functionally impaired person), 2903.21 (aggravated menacing), 2903.34 (patient use or neglect), 2907.08 (voyeurism), 2907.09 (public indecency), division (A) of section 2919.22 (endangering children), 2919.24 (contributing to unruliness or delinquency of a child), 2919.25 (domestic violence), 2923.12 (carrying concealed weapons), 2923.13 (having weapons while under disability), 2925.11 (possession of a controlled substance that is not a minor drug possession offense) of the Revised Code.

(B) No district shall employ an applicant upon learning that he/she has pled guilty to, been found guilty by a jury or court of, or convicted of any violation of a non-rehabilitative offense as listed in paragraph (A)(6) of this rule. In addition, the district shall release an employee from employment upon learning that he/she has pled guilty to, been found guilty by a jury or court of, or convicted of any violation of a non-rehabilitative offense as listed in paragraph (A)(6) of this rule. Likewise, a district shall release from employment an individual if the results of a criminal records check indicate that, pursuant to this rule, the applicant does not qualify for employment.

(C) Pursuant to division (B)(2) of *section 3319.39 of the Revised Code*, a district may employ an applicant conditionally until the criminal records check required by *section 3319.39 of the Revised Code* is completed and the district receives the results of the criminal records check. If the results of the criminal records check indicate that, pursuant to this rule, the applicant does not qualify for employment, the district shall release the applicant from employment.

(D) A district maintains the discretion whether to employ or retain in employment an individual who has been deemed rehabilitated pursuant to this rule. A district may employ an applicant or continue to employ an individual that has previously pled guilty to, been found guilty by a jury or court of, or convicted of an offense listed in division (B)(1) of *section 3319.39 of the Revised Code*, if all of the following conditions for rehabilitation are met:

- (1) The offense is not a non-rehabilitative offense as listed in paragraph (A)(6) of this rule;
- (2) At the time of the offense, the victim of the offense was not a person under eighteen years of age or enrolled as a student in a district.
- (3) The applicant or employee provides written confirmation of his/her efforts at rehabilitation and the results of those efforts. Written confirmation may include a statement by a court, parole officer, probation officer and/or counselor, or another source as approved by the district that the applicant or employee has been rehabilitated.
- (4) A reasonable person would conclude that the applicant's hiring or the retention of the employee would not jeopardize the health, safety, or welfare of the persons served by the district, based upon information pertinent to the following factors:

- (a) The nature and seriousness of the crime;
- (b) The extent of the applicant or employee's past criminal activity;
- (c) The age of the applicant or employee when the crime was committed;
- (d) The amount of time elapsed since the applicant or employee's last criminal activity;
- (e) The conduct and work activity of the applicant or employee before and after the criminal activity;
- (f) Whether the applicant or employee has completed the terms of his probation or deferred adjudication;
- (g) Evidence of rehabilitation;
- (h) Whether the applicant fully disclosed the crime to the district;
- (i) Whether employment could have a negative impact on the local education community;
- (j) Whether employment could have a negative impact on the state-wide education community;
- (k) Any other factor the district considers relevant.

(E) It is the applicant or employee's duty to provide written evidence that the conditions specified in paragraph (D) of this rule are met. If the applicant or employee fails to provide such evidence or if the district determines that the proof offered by the applicant or employee is inconclusive or does not establish proof of rehabilitation, the applicant shall not be hired or the employee shall be released from employment. Any doubt shall be resolved in favor of protecting the persons served by the district.

(F) Except as otherwise specified in this rule, the provisions of this rule are also applicable to records of

convictions that have been sealed pursuant to *section 2953.32 of the Revised Code* or any municipal ordinance or law of this state, another state, or the United States that is substantially equivalent to *section 2953.32 of the Revised Code*.

(G) A plea of guilty to, a finding of guilt by a jury or court of, or a conviction of an offense listed in division (B)(1) of *section 3319.39 of the Revised Code* shall not prevent an applicant's hiring or the retention of an employee if the applicant or employee has been granted an unconditional pardon for the offense pursuant to Chapter 2967. of the Revised Code or the conviction or guilty plea has been set aside pursuant to law. For purposes of this rule, "unconditional pardon" includes a conditional pardon with respect to which all conditions have been performed or have transpired.

(H) As a condition of initial or continued employment pursuant to the requirements of this rule, the district may request the applicant or employee to be evaluated by a licensed provider (e.g. physician, psychologist, psychiatrist, independent social worker, professional counselor, chemical dependency counselor, etc.) and/or successfully complete a recognized and/or certified treatment program relevant to the nature of the conviction. (Unless otherwise specified in an employee contract, labor agreement, or other similar agreement, the employee or applicant shall bear all direct and associated costs of the evaluation and treatment program.) Failure on the part of an applicant or employee to comply with the district's request pursuant to this paragraph may be considered by the district as a factor against initial or continued employment.

(I) Prior to rendering a decision on employment, the district shall provide an opportunity for a meeting to an employee, if requested by the individual, so that he/she may provide evidence of rehabilitation pursuant to the requirements of this rule.

(J) The decision of the district on whether to employ or continue to employ an individual pursuant to the requirements of this rule can not be appealed to the Ohio department of education or state board of education.

(K) This rule is promulgated under the state board and department of education's rule-making authority under division (E) of *section 3319.39 of the Revised Code*.

HistoryEffective: 08/27/2009

R.C. 119.032 review dates: 08/27/2014

Promulgated Under: 119.03

Statutory Authority: 3301.07, 3319.39, 3319.391

Rule Amplifies: 3319.31, 3319.311, 3319.39, 3319.391