

**STATE OF TENNESSEE**

OFFICE OF THE  
**ATTORNEY GENERAL**  
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Opinion No. 04-119

Waivers for Certification of Reserve/Part-time/Full-time Law Enforcement Officers

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**QUESTIONS**

1. Whether a person who has been convicted or pleaded guilty to or entered a plea of nolo contendere to any misdemeanor charge relating to force, violence, theft, dishonesty, gambling, liquor or controlled substances, may be granted a waiver in order to serve as a reserve/part-time/full-time law enforcement officer.

2. Whether a person who has been convicted or pleaded guilty or nolo contendere to any misdemeanor charge relating to force, violence, theft, dishonesty, gambling, liquor or controlled substances, is required to obtain a waiver in order to serve as a reserve/part-time/full-time law enforcement officer where the record of the conviction or plea has been officially removed by a court order stating that the person's guilt be removed, the accusation dismissed, and the person released from all penalties and disabilities resulting from the conviction or plea.

**OPINIONS**

1. Yes. Under POST Commission Rules 1110-2-.03(1)(d)1. and 1110-9-.04(1)(b), a person who has been convicted or pleaded guilty or nolo contendere to a misdemeanor charge relating to force, violence, theft, dishonesty, gambling, liquor or controlled substances, may request and be granted a waiver of the preemployment requirements relating to criminal activity, except in cases of domestic violence and those involving narcotics violations that could have resulted in a felony charge.

2. Yes. Tenn. Code Ann. § 38-8-106(4) makes no distinction between current convictions/pleas and those that have been expunged by order of a court of competent jurisdiction. Although a record of the proceedings related to such convictions or pleas may be expunged, such convictions or pleas nonetheless remain as impediments to a person's service as a police officer and a waiver of preemployment qualifications is required.

## ANALYSIS

### 1. Waiver eligibility

Tenn. Code Ann. § 38-8-106(4) and POST Commission Rule 1110-2-.02(1)(d) bar any person convicted or having pleaded guilty or nolo contendere to “any violation of any federal or state laws or city ordinances relating to force, violence, theft, dishonesty, gambling, liquor or controlled substances,” from employment as a police officer in the State of Tennessee. This provision applies to both full-time police officers and “any person employed/utilized as a part-time/temporary/reserve/auxiliary police officer or as a special deputy.” Tenn. Code Ann. § 38-8-106(4). However, under POST Rules 1110-2-.02(1)(d)1. and 1110-9-.04(1)(b), the Commission may consider a waiver for criminal activity on an individual basis and depending on the circumstances. POST Rule 1110-9-.04(1)(b) specifically sets forth the limits on the Commission’s consideration of waivers:

1. Waivers may be granted if the officer has been convicted of or pleaded guilty to or entered a plea of nolo contendere to any violation of any federal or state law or city ordinance (excluding felony charge and domestic violence) with the following charges:
  - (i) relating to force, violence, theft, dishonesty, gambling, liquor (including driving while intoxicated);
  - (ii) or controlled substances when the offense was classed as a misdemeanor.

The rule thus allows the Commission to grant waivers *except* where the criminal activity in question was charged as a felony or where it was a case of domestic violence. In felony cases and misdemeanor domestic violence cases, a waiver may *not* be granted.

### 2. Effect of expungement on requirement for waiver

In an earlier opinion, this office considered whether the Peace Officers Standards and Training Commission could consider a police officer’s/applicant’s conviction of a crime subsequently expunged or diverted. We opined that “[t]he Commission may consider the fact that an individual has been convicted of one of the crimes enumerated in Tenn. Code Ann. § 38-8-106(4) regardless of whether the conviction has been expunged or whether post-trial (judicial) diversion was granted.” Op. Tenn. Att’y Gen. No. 00-026, 2000 WL 201993, \*1 (Tenn.A.G., Feb. 15, 2000). We reasoned:

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

for police officers, the Commission may consider the conviction despite an expungement of the record of such conviction.

*Id.* at \*2.

POST Rule 1110-2-.02(1)(d)3. provides that “[a] person who has had misdemeanor charges expunged may be considered for certification.” Further, POST Rule 1110-9-.04(1)(c) allows the Commission to consider “a waiver from preemployment requirements relating to expungement of charges on an individual basis and depending on the circumstances.” POST Rule 1110-9-.04(1)(c)1. specifically states that “[a] waiver may be considered for a person who has had misdemeanor charges expunged.” However, POST Rule 1110-9-.04(1)(c)2. specifically prohibits consideration of waivers where expungements were granted for (1) felony convictions; (2) narcotics violations that could have resulted in felony charges; and (3) domestic violence convictions.

Because convictions and pleas for certain offenses, including misdemeanor charges, remain as impediments to a person’s qualification to serve as a police officer even after the record of such matter has been expunged by order of the court, a waiver of preemployment requirements is required.

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