



STATE OF KANSAS

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November 8, 1984

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ATTORNEY GENERAL OPINION NO. 84- 115

Larry K. Vardaman
Director, Youth Residence Hall
1900 East Morris
Wichita, Kansas 67211

Re: Public Health -- Homes for Children -- Persons Prohibited from Employment Therein; Effect of Expungement of Offense

Synopsis: K.S.A. 1983 Supp. 65-516, as amended by L. 1984, ch. 225, §1, prohibits persons with felony convictions from working in a boarding home for children which is licensed by the secretary of health and environment. This prohibition includes felony convictions expunged pursuant to K.S.A. 1983 Supp. 21-4619, as amended by L. 1984, ch. 39, §35. The expungement statute requires disclosure of such convictions by persons who apply for employment with a criminal justice agency, which includes a detention home for children which is operated by the city or county. Such detention homes are thus within the exception to the general rule that expungement allows an individual to be treated as if the conviction never occurred. Accordingly, persons who apply for employment at a boarding home for children which is also a criminal justice agency must disclose an expunged felony conviction, and so are precluded from employment at the detention home by the terms of K.S.A. 1983 Supp. 65-516, as amended. Cited herein: K.S.A. 1983 Supp. 21-4619, as amended by L. 1984, ch. 39, §35; 22-4701; 65-503; 65-504, as amended by L. 1984, ch. 313, §93; 65-516, as amended by L. 1984, ch. 225, §1; 76-12a01.

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Dear Mr. Vardaman:

As Director of the Sedgwick County Youth Residence Hall, you request our opinion on a series of questions concerning the employment at the hall of persons who have previously been convicted of felonies, but who have had the convictions expunged from their records. Specifically, you make your request in light of changes which were made by the legislature during the last session, both to the expungement statute (K.S.A. 1983 Supp. 21-4619 as amended by L. 1984, ch. 39, §35), and to statutes concerning boarding homes for children. K.S.A. 1983 Supp. 65-516, as amended by L. 1984, ch. 225. You inquire as to the effect of these changes on the hall, which is operated as a part of the Juvenile Department of the Sedgwick County District Court.

As amended by L. 1984, ch. 225, K.S.A. 1983 Supp. 65-516 states:

"(a) No person shall maintain a boarding home for children or maintain a family day care home if, in such boarding home or family day care home, there resides, works or volunteers any person who:

"(1) Has a felony conviction or has a conviction of any act which is described in articles 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated or has committed an act of physical, mental or emotional abuse or neglect or sexual abuse as validated by the department of social and rehabilitation services pursuant to K.S.A. 1983 Supp. 38-1523 and amendments thereto;

"(2) has had a child declared to be deprived or a child in need of care;

"(3) has had a child removed from the home pursuant to the Kansas juvenile code or the Kansas code for care of children or a similar statute of other states;

"(4) has signed a diversion agreement pursuant to K.S.A. 22-2906 et seq., and amendments thereto, or pursuant to K.S.A. 1983 Supp. 38-1635 and amendments thereto involving a charge of child abuse or a sexual offense;

"(5) has been found to be unfit to have custody of a minor child pursuant to K.S.A. 60-1610 and amendments thereto; or

"(6) has an infectious or contagious disease.

. . . .

"(d) The secretary shall have access to any court orders or adjudications of any court of record or any records of such orders or adjudications and any report of investigations as authorized by subsection (e) of K.S.A. 1983 Supp. 38-1523 and amendments thereto in the possession of the department of social and rehabilitation services concerning persons residing in a boarding home for children or a family day care home in order to determine whether or not the home meets the requirements of K.S.A. 65-516 and 65-519 and amendments thereto." (Emphasis added.)

In the event that a person who falls under one of the prohibited classes of K.S.A. 1983 Supp. 65-516, as amended, is employed therein, the secretary has the authority to revoke the institution's operating certificate. K.S.A. 65-504, as amended by L. 1984, ch. 313, §93.

There can be little question but that the Youth Residence Hall comes under the scope of the above statutes. K.S.A. 1983 Supp. 65-503 defines "boarding home for children" to include, among other institutions, "any receiving or detention home for children under 16 years of age provided or maintained by, or receiving aid from any city or county or the state." The hall is funded by Sedgwick County, and serves as a juvenile detention facility. It is presently licensed as a boarding home for children by the secretary of health and environment, and has been approved by the secretary of social and rehabilitation services, both pursuant to K.S.A. 1983 Supp. 65-604, as amended.

The fact that the hall is a detention facility takes on added significance when the expungement statutes are examined. K.S.A. 1983 Supp. 21-4619, as amended by L. 1984, ch. 39, §35, provides for the expungement of criminal offenses under certain circumstances, thus allowing a person convicted of a crime to remove the stain of the offense from his or her record. Stephens v. Van Arsdale, 227 Kan. 676, 690-91 (1980). Unlike annulment, expungement does not act to eliminate the conviction itself, but rather closes the records of the conviction to public scrutiny.

K.S.A. 1983 Supp. 21-4619(h), as amended. Further, a person whose conviction has been expunged may truthfully state in any application for employment that he or she has never been convicted of the crime. K.S.A. 1983 Supp. 21-4619(g), as amended. However, in some cases the state's concern for public safety outweighs the rehabilitative needs of the offender, with the result that in certain cases the fact of a conviction must still be disclosed. 13 Washburn L.J. 93, 97 (1974).

These exceptions are set forth at subsection (e) of the expungement statute, which states:

"(e) When the court has ordered a conviction expunged, the order of expungement shall state the information required to be contained in the petition. The clerk of the court shall send a certified copy of the order of expungement to the federal bureau of investigation, the Kansas bureau of investigation, the secretary of corrections and any other criminal justice agency which may have a record of the conviction. After the order of expungement is entered, the petitioner shall be treated as not having been convicted of the crime, except that:

"(1) Upon conviction for any subsequent crime, the conviction that was expunged may be considered as a prior conviction in determining the sentence to be imposed;

"(2) the petitioner shall disclose that the conviction occurred if asked about previous convictions (A) in any application for employment as a detective with a private detective agency, as defined by K.S.A. 1983 Supp. 75-7b01 and amendments thereto; as security personnel with a private patrol operator, as defined by K.S.A. 1983 Supp. 75-7b01 and amendments thereto; with a criminal justice agency, as defined by K.S.A. 22-4701 and amendments thereto or with an institution as defined in 1983 Supp. 76-12a01 and amendments thereto of the department of social and rehabilitation services; or (B) in any application for admission, or for an order of reinstatement, to the practice of law in this state;

"(3) the court, in the order of expungement, may specify other circumstances under which the conviction is to be disclosed;

"(4) the conviction may be disclosed in a subsequent prosecution for an offense which requires an element of such offense as prior conviction of the type expunged; and

"(5) upon commitment to the custody of the secretary of corrections, any previously expunged record in the possession of the secretary of corrections may be reinstated and the expungement disregarded, and the record continued for the purpose of the new commitment." (Emphasis added.)

Two exceptions of relevance here involve situations where the individual makes application for employment with a "criminal justice agency" or an "institution" of the department of social and rehabilitation services. In either case, the protections of the expungement statute are not extended to the offender, who is required to disclose the existence of the prior conviction.

An examination of the latter exception reveals that it is narrow in scope, and extends only to eight institutions defined at K.S.A. 1983 Supp. 76-12a01 (e.g. Topeka State Hospital, Larned State Hospital, etc.), all of which are operated by the state and none of which are juvenile detention facilities or boarding homes for children. However, the former exception for criminal justice agencies is more broad, and includes any agency or institution defined at K.S.A. 1983 Supp. 22-4701(c), to-wit:

"(c) 'Criminal justice agency' means any government agency or subdivision of any such agency which is authorized by law to exercise the power of arrest, detention, prosecution, adjudication, correctional supervision, rehabilitation or release of persons suspected, charged or convicted of a crime and which allocates a substantial portion of its annual budget to any of these functions. The term includes, but is not limited to, the following agencies, when exercising jurisdiction over criminal matters or criminal history record information:

"(1) State, county, municipal and railroad police departments, sheriffs' offices and countywide law enforcement agencies, correctional facilities, jails and detention centers;" (Emphasis added.)

In our opinion, the reference hereinabove to "detention centers" includes facilities such as the Youth Residence Hall, where

juveniles are placed by order of the district court. It will be remembered that the same phrase is used in the definition of "boarding home for children" at K.S.A. 1983 Supp. 65-503, leading us to the conclusion that the statutes should be read in pari materia, because they deal with the same subject matter, even though they were enacted at different times and appear in different places in the statutes. Claflin v. Walsh, 212 Kan. 1 (1973). Accordingly, the statutes may be summarized as follows:

- (1) K.S.A. 1983 Supp. 21-4619, as amended, requires expunged convictions to be disclosed in certain cases, including the situation where a person makes application for employment at a criminal justice agency.
- (2) Criminal justice agencies are defined at K.S.A. 1983 Supp. 22-4701(c), and include detention, correction and rehabilitation centers.
- (3) Boarding homes for children are defined at K.S.A. 1983 Supp. 65-503 to include detention homes maintained by the county.
- (4) K.S.A. 1983 Supp. 65-516, as amended, prohibits a person with a felony conviction from being employed in a boarding home for children (penalty for violation being loss of license).

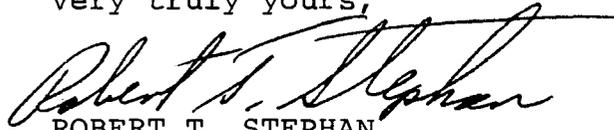
Given the above, it is our opinion that a person who has been convicted of a felony which was later expunged is nonetheless ineligible to work in a juvenile detention facility such as the Sedgwick County Residence Hall. A person with an expunged conviction is required to disclose this fact when making an application for employment at such a facility, and the facility is authorized to check with the district court, Kansas Bureau of Investigation or other agency in conjunction with such an application to determine whether such expunged convictions exist. K.S.A. 1983 Supp. 21-4619(e) and (h), as amended. Licensing by the secretary of health and environment under K.S.A. 65-504, as amended, is contingent upon compliance with K.S.A. 1983 Supp. 65-516, as amended, and the secretary likewise has the power to obtain access to court records for the purpose of insuring compliance. It thereby follows that a person who has a felony conviction, even if expunged, should not knowingly be hired by the hall, and should the hall learn of such an expunged conviction in the record of a current employee, it would face possible loss of state licensure should the employment continue.

In conclusion, K.S.A. 1983 Supp. 65-516, as amended by L. 1984, ch. 225, §1, prohibits persons with felony convictions from

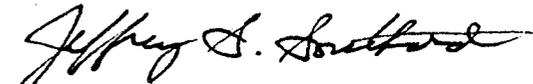
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Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Deputy Attorney General

RTS:JSS:crw