

To: New Jersey Law Revision Commission
From: Staff
Date: April 18, 2011
Re: Effect of expungement on the collateral consequences of a conviction

MEMORANDUM

Staff monitors New Jersey case law for decisions requiring legislative action or clarification. One such case, *In re D.H.*, 204 *N.J.* 7, 10 (2010), struggles to harmonize the statute delimiting the effect of an order of expungement, *N.J.S.* 2C:52-27, with the statute mandating the forfeiture of public office upon conviction, *N.J.S.* 2C:51-2.

D.H., a detective at the Monmouth County Prosecutor's Office, performed an unauthorized criminal background check using a restricted law enforcement database—an offense involving or touching on her public office. She later petitioned for an expungement. *D.H.*, 204 *N.J.* at 9-10. In relevant part, *N.J.S.* 2C:51-2d. provides:
any person convicted of an offense involving or touching on his public office, position or employment shall forever be disqualified from holding any office or position of honor, trust, or profit under this State or any of its administrative or political subdivisions.

Had D.H. been convicted of a *crime* touching on her office (rather than a disorderly persons offense, *see N.J.S.* 2C:1-4), the conviction would not have been eligible for expungement. *N.J.S.* 2C:52-2b.

Relying on a 2006 Appellate Division decision, both the trial court and Appellate Division held that the permanent bar to holding public office was, as a collateral consequence of D.H.'s conviction, effectively erased by an order expunging that conviction. *D.H.*, 204 *N.J.* at 13. *See In re Forfeiture of Public Office of Nunez*, 384 *N.J.Super.* 345, 349 (App. Div. 2006). They reasoned that an expungement operates to make “the arrest, conviction and any proceedings related thereto . . . deemed not to have occurred”—“[u]nless otherwise provided by law”. *N.J.S.* 2C:52-27.

However, overturning both *Nunez* and lower courts' decisions, the *D.H.* court held that the phrase, “Unless otherwise provided by law”, encapsulates all other statutes, including the language of *N.J.S.* 2C:51-2d. *D.H.*, 204 *N.J.* at 24. In other words, an applicable public employee, even if entitled to certain advantages of expungement (e.g., being able to deny the existence of a conviction to private employers), shall, as “otherwise provided by law,” never again hold public office.

Justice Long, in dissent, read the phrase, “Unless otherwise provided by law”, as referring only to exceptions stated within the same chapter of Title 2C, including, for instance, the mandatory disclosure of expunged records to a parole board, *N.J.S.* 2C:52-22, or to a judge in conjunction with setting bail or sentencing, *N.J.S.* 2C:52-21. *D.H.* 204 *N.J.* at 29.

Staff seeks Commission direction. Whether it chooses to ratify or reject the majority's decision, the Commission may wish to clarify *N.J.S. 2C:52-27* (see next page) in order to explicitly define the reach of expungement and delineate its exceptions.

As to divining the Legislature's intent, the history of *N.J.S. 2C:52-27* partially supports the dissent's argument. The Senate Judiciary Committee's June 18, 1979 statement to S3203 explained that the statute requires isolation of expunged [records] but not obliteration of same. Certain uses of expunged records, such as use by the Parole Board and the Department of Corrections, would be specifically authorized.

Although not purporting to be an exhaustive list, the statement only mentions authorized uses of expunged records found elsewhere within Chapter 52, all enacted as parts of L. 1979, c. 178.

The Assembly Judiciary Committee's statement to A3279, the parallel bill, does not, however, contain equivalent language, failing to cite specific examples of exceptions. Moreover, later legislation involving the interplay between Chapter 51, Loss and Restoration of Rights Incident to Conviction of an Offense, and Chapter 52, Expungement of Records, supports the majority's view. Enacted as parts of L.1997, c. 353, *N.J.S. 2C:51-5* and *2C:52-27.1* concern a practitioner's loss of license collateral to a conviction for health care claims fraud. Under the latter statute, the practitioner is not entitled to an automatic reinstatement of his license upon expungement of the underlying conviction. Rather, he must petition the court "to rescind the court's order of debarment". *Id.*

2C:52-27. Effect of expungement.

Unless otherwise provided by law, if an order of expungement is granted, the arrest, conviction and any proceedings related thereto shall be deemed not to have occurred, and the petitioner may answer any questions relating to their occurrence accordingly, except as follows:

- a. The fact of an expungement, sealing or similar relief shall be disclosed as provided in section 2C:52-8b.
- b. The fact of an expungement of prior charges which were dismissed because of the person's acceptance into and successful completion of a supervisory treatment or other diversion program shall be disclosed by said person to any judge who is determining the propriety of accepting said person into a supervisory treatment or other diversion program for subsequent criminal charges; and
- c. Information divulged on expunged records shall be revealed by a petitioner seeking employment within the judicial branch or with a law enforcement or corrections agency and such information shall continue to provide a disability as otherwise provided by law.