EEOC

NOTICE

(Automatically Cancelled in 180 Days)

NUMBER N-915-061

DATE 9/7/90

1. SUBJECT: Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982).

2. PURPOSE: This policy guidance sets forth the Commission's procedure for determining whether arrest records may be considered in employment decisions.

3. EFFECTIVE DATE: Upon receipt.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: Title VII/EPA Division, Office of the Legal Counsel.

6. INSTRUCTIONS: File behind the last Policy Guidance § 604 of Volume II of Compliance Manual.

7. SUBJECT MATTER:

I. Introduction

The question addressed in this policy guidance is "to what extent may arrest records be used in making employment decisions?" The Commission concludes that since the use of arrest records as an absolute bar to employment has a disparate impact on some protected groups, such records alone cannot be used to routinely exclude persons from employment. However, conduct which indicates unsuitability for a particular position is a basis for exclusion. Where it appears that the applicant or employee engaged in the conduct for which he was arrested and that the conduct is job-related and relatively recent, exclusion is justified.

The analysis set forth in this policy guidance is related to two previously issued policy statements regarding the consideration of conviction records in employment decisions: "Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq. (1982)" (hereinafter referred to as the February 4, 1987 Statement) and "Policy Statement on the use of statistics in charges involving the exclusion of individuals with conviction records from employment" (hereinafter referred to as July 29, 1987 Statement). The February 4, 1987 Statement states that nationally, Blacks and Hispanics are convicted in numbers which are disproportionate to Whites and that barring people from employment based on their conviction records

will therefore disproportionately exclude those groups.[1] Due to this adverse impact, an employer may not base an employment decision on the conviction record of an applicant or an employee absent business necessity.[2] Business necessity can be established where the employee or applicant is engaged in conduct which is particularly egregious or related to the position in question.

Conviction records constitute reliable evidence that a person engaged in the conduct alleged since the criminal justice system requires the highest degree of proof ("beyond a reasonable doubt") for a conviction. In contrast, arrests alone are not reliable evidence that a person has actually committed a crime. Schware v. Board of Bar Examiners, 353 U.S. 232, 241 (1957) ("[t]he mere fact that a [person] has been arrested has very little, if any, probative value in showing that he has engaged in misconduct.") Thus, the Commission concludes that to justify the use of arrest records, an additional inquiry must be made. Even where the conduct alleged in the arrest record is related to the job at issue, the employer must evaluate whether the arrest record reflects the applicant's conduct. It should, therefore, examine the surrounding circumstances, offer the applicant or employee an opportunity to explain, and, if he or she denies engaging in the conduct, make the follow-up inquiries necessary to evaluate his/her credibility. Since using arrests as a disqualifying criteria can only be justified where it appears that the applicant actually engaged in the conduct for which he\she was arrested and that conduct is job related, the Commission further concludes that an employer will seldom be able to justify making broad general inquiries about an employee's or applicant's arrests.

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[1] The July 29 Statement notes that despite national statistics showing adverse impact, an employer may refute this prima facie showing by presenting statistics which are specific to its region or applicant pool. If these statistics demonstrate that the policy has no adverse impact against a protected group, the plaintiff's prima facie case has been rebutted and the employer need not show any business necessity to justify the use of the policy. Statistics relating to arrests should be used in the same manner.

[2] The policy statements on convictions use the term "business necessity," as used by courts prior to the Supreme Court's decision in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989). In Atonio, the Supreme Court adopted the term "business justification" in place of business necessity, but noted that "although we have phrased the query differently in different cases ... the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer," citing, inter alia, Griggs v. Duke Power Co., 401 U.S. 424 (1971). 109 S. Ct. at 2125-2126.

The following discussion is offered for guidance in determining the circumstances under which an employer can justify excluding an applicant or an employee on the basis of an arrest record.

II. Discussion

A. Adverse Impact of the Use of Arrest Records

The leading case involving an employer's use of arrest records is Gregory v. Litton Systems, 316 F. Supp. 401, 2 EPD ¶ 10,264 (C.D. Cal. 1970), modified on other grounds, 472 F.2d 631, 5 EPD ¶ 8089 (9th Cir. 1972). Litton held that nationally, Blacks are arrested more often than are Whites. Courts and the Commission have relied on the statistics presented in Litton to establish a prima facie case of discrimination against Blacks where arrest records are used in employment decisions.[3] There are, however, more recent statistics, published by the U.S. Department of Justice, Federal Bureau of Investigation, which are consistent with the Litton finding.[4] It is desirable to use the most current available statistics. In addition, where local statistics are available, it may be helpful to use them, as the court did in Reynolds v. Sheet Metal Workers Local 102, 498 F. Supp. 952, 22 EPD ¶ 30,739 (D.C. 1980), aff'd., 702 F.2d 221, 25 EPD ¶ 31,706 (D.C. Cir. 1981). In Reynolds, the court found that the use of arrest records in employment decisions adversely affected Blacks since the 1978 Annual Report of the Metropolitan Police of Washington, D.C., stated that 85.5% of persons arrested in the District of Columbia were nonwhite while the nonwhite population constituted 72.4% of the total population. 498 F. Supp. at 960. The Commission has determined that Hispanics are also adversely affected by arrest record inquiries. Commission Decisions Nos. 77-23 and 76-03, CCH

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[3] U.S. v. City of Chicago, 385 F. Supp. 543, 556-557 (N.D. Ill. 1974), adopted by reference, 411 F. Supp. 218, aff'd in rel. part, 549 F.2d 415, 432 (7th Cir. 1977); City of Cairo v. Illinois Fair Employment Practice Commission, et al., 8 EPD ¶ 9682 (Ill. App. Ct. 1974); Commission Decision Nos. 78-03, 77-23, 76-138, 76-87, 76-39, 74-92, 74-90, 74-83, 74-02, CCH EEOC Decisions (1983) ¶¶ 6714, 6710, 6700, 6665, 6630, 6424, 6423, 6414, 6386 and Commission Decision Nos. 72-1460, 72-1005, 72-094 and 71-1950, CCH EEOC Decisions (1973) ¶¶ 6341, 6357 and 6274 respectively.

[4] The FBI's Uniform Crime Reporting Program reported that in 1987, 29.5% of all arrests were of Blacks. The U.S. Census reported that Blacks comprised 11.7% of the national population in 1980 and projected that the figure would reach 12.2% in 1987. Since the national percentage of arrests for Blacks is more than twice the percentage of their representation in the population (whether considering the 1980 figures or the 1987 projections), the Litton presumption of adverse impact, at least nationally, is still valid.

EEOC Decisions (1983) ¶¶ 6714 and 6598, respectively.[5] However, the courts have not yet addressed this issue[6] and the FBI's Uniform Crime Reporting Program does not provide information on the arrest rate for Hispanics, nationally or regionally. As with conviction records (see July 29, 1987 Statement), the employer may rebut by presenting statistics which are more current, accurate and/or specific to its region or applicant pool than are the statistics presented in the prima facie case.

B. Business Justification

If adverse impact is established, the burden of producing evidence shifts to the employer to show a business justification for the challenged employment practice. Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115, 2126 (1989).[7] As with conviction records, arrest records may be considered in the employment decision as evidence of conduct which may render an applicant unsuitable for a particular position. However, in the case of arrests, not only must the employer consider the relationship of the charges to the position sought, but also the likelihood that the applicant actually committed the conduct alleged in the charges. Gregory v. Litton Systems, 316 F. Supp. 401; Carter v. Gallagher, 452 F.2d 315, 3 EPD ¶ 8335 (8th Cir. 1971), cert. denied, 406 U.S. 950, 4 EPD ¶ 7818 (1972); Reynolds v. Sheet Metal Workers Local 102, 498 F. Supp. 952; Dozier v. Chupka, 395 F. Supp. 836 (D.C. Ohio 1975); U.S. v. City of Chicago, 411 F. Supp. 218 (N.D. Ill. 1974), aff'd. in rel. part, 549 F.2d 415 (7th Cir. 1977); City of Cairo v. Illinois Fair Employment Practice Commission et al., 8 EPD ¶ 9682 (Ill. App. Ct. 1974); Commission Decisions Nos. 78-03, 77-23, 76-138, 76-87, 76-54, 76-39, 76-17, 74-92, 74-83, 76-03, 74-

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[5] The statistics presented in Decision No. 77-23 pertain only to prison populations in the Southwestern United States. This data would, therefore, probably not constitute a prima facie case of discrimination for other regions of the country. In fact, there is no case law to indicate whether courts would accept this data as evidence of adverse impact for arrest records, even for cases arising in the Southwest, since all arrests do not result in incarceration. Decision No. 76-03 noted that Hispanics are arrested more frequently than are Whites, but no statistics were presented to support this statement.

[6] Cf. EEOC v. Carolina Freight Carriers, 723 F. Supp. 734, 751, 52 EPD ¶ 39,538 (S.D. Fla. 1989) (EEOC failed to provide statistics for the relevant labor market to prove that trucking company's exclusion of drivers with convictions for theft crimes had an adverse impact on Hispanics at a particular job site).

[7] Under Atonio, the burden of producing evidence shifts to the employer, but the burden of persuasion remains with the plaintiff at all stages of a Title VII case. 109 S.Ct. at 2116. Atonio thus modifies Griggs and its progeny.

90, 78-03, 74-25, CCH EEOC Decisions (1983) ¶¶ 6714, 6710, 6700, 6665, 6639, 6630, 6612, 6424, 6414, 6598, 6423, 6400 and Commission Decisions Nos. 72-0947, 72-1005, 72-1460, CCH EEOC Decisions (1973) ¶¶ 6357, 6350 and 6341, respectively.

1. A Business Justification Can Rarely Be Demonstrated for Blanket Exclusions on the Basis of Arrest Records

Since business justification rests on issues of job relatedness and credibility, a blanket exclusion of people with arrest records will almost never withstand scrutiny. Gregory v. Litton Systems, 316 F. Supp. 401. Litton held that an employer's policy of refusing to hire anyone who had been arrested "on a number of occasions" violated Title VII because the policy disproportionately excluded Blacks from consideration and was not justified by business necessity. In Litton, an applicant for a position as a sheet metal worker was disqualified because of his arrest record. The court found no business necessity because the employer had neither examined the particular circumstances surrounding the arrests nor considered the relationship of the charges made against him to the position of sheet metal worker. Since the employer had failed to establish a business necessity for its discriminatory policy, it was enjoined from basing future hiring decisions on arrest records. Accord Carter v. Gallagher, 452 F.2d 315 (firefighter); Dozier v. Chupka, 395 F. Supp. 836 (firefighter); City of Cairo v. Illinois Fair Employment Practice Commission, et al, 8 EPD ¶ 9682 (police officer).

The Commission has consistently invalidated employment policies which create a blanket exclusion of persons with arrest records. Commission Decision Nos. 78-03, 76-87, 76-39, 76-17, 76-03, 74-90, 74-25, 72-0947, 72-1005, CCH EEOC Decisions (1983) ¶¶ 6714 (laborer), 6665 (police officer), 6630 (cashier), 6612 (credit collector), 6598 (catalogue clerk), 6423 (uniformed guard commissioned by police department), 6400 (firefighter), 6357 (line worker) and 6350 (warehouse worker or driver). In several decisions, it appears that the arrest record inquiry was made on a standard company application which was used by the employer to fill various positions and there was no mention of any particular position sought. Commission Decision Nos. 76-138, 76-54, 74-82, 74-83, 74-02 and 72-1460, CCH EEOC Decisions (1983) ¶¶ 6700, 6639, 6424, 6414, 6386 and 6341 and Commission Decision No. 71-1950, CCH EEOC Decisions (1973) ¶ 6274, respectively. An employer may not routinely exclude persons with arrest records based on the assumption that an arrest record will prevent an applicant from obtaining necessary credentials to perform a job without giving the applicant an opportunity to obtain those credentials. For example, in Decision 76-87, the Commission rejected an employer's assertion that employees' arrest records might hinder its ability to maintain fidelity (bond) insurance since it offered no proof to this effect.

Even where there is no direct evidence that an employer used an arrest record in an employment decision, a pre-employment inquiry regarding arrest records may violate Title VII. It is

generally presumed that an employer only asks questions which he/she deems relevant to the employment decision. Gregory v. Litton Systems, 316 F. Supp. at 403-404. Noting that information which is obtained is likely to be used, the court in Litton enjoined the employer from making any pre-employment inquiries regarding arrests which did not result in convictions. Id.[8] But see EEOC v. Local 638, 532 F.2d 821 (2d Cir. 1976) (inquiry not invalidated where there was no evidence that union actually rejected applicants who had been arrested but not convicted); Jimerson v. Kisco, 404 F. Supp. 338 (E.D. Mo. 1975) (court upheld discharge for falsifying information regarding arrest record on a pre-employment application without considering the inquiry itself violated Title VII).[9] Numerous states have specifically prohibited or advised against pre-employment inquiries in their fair employment laws due to the possible misuse of this information.[10]

2. The Alleged Conduct Must Be Related to the Position Sought

As discussed above, an arrest record may be used as evidence of conduct upon which an employer makes an employment decision. An employer may deny employment opportunities to persons based on any prior conduct which indicates that they would be unfit for the position in question, whether that conduct is evidenced by an arrest, conviction or other information provided to the employer. It is the conduct, not the arrest or conviction per se, which the employer may consider in relation to the position sought. The considerations relevant to the determination of whether the alleged

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[8] Furthermore, potential applicants who have arrest records may be discouraged from applying for positions which require them to supply this information, thus creating a "chilling effect" on the Black applicant pool. Carter v. Gallagher, 452 F.2d at 330-331; Reynolds v. Sheet Metal Workers, Local 102, 498 F. Supp. at 964 n.12, 966 n.13, 967, 973; Commission Decision Nos. 76-138, 76-87, 76-17, 74-90, 74-25 and 74-02, CCH EEOC Decisions (1983) ¶¶ 6700, 6665, 6612, 6423, 6400, 6386 and Commission Decision Nos. 74-1005 and 71-1950, CCH EEOC Decisions (1973) ¶¶ 6350 and 6274, respectively.

[9] Note also that in Walls v. City of Petersburg, 895 F.2d 188, 52 EPD ¶ 39,602 (4th Cir. 1990), the court upheld an employer's policy of making an employment inquiry regarding the arrest records of employees' immediate family members. The court determined that under Atonio, the plaintiff was obligated to show not only that Blacks were more likely to have "negative" responses to this question, but also that the employer made adverse employment decisions based on such responses.

[10] New York, Hawaii, Oregon, Wisconsin, New Jersey, Ohio, Virginia, District of Columbia, California, Maryland, Minnesota, Utah, Washington, West Virginia, Arizona, Colorado, Idaho, Massachusetts, Michigan, Mississippi.

conduct demonstrates unfitness for the particular job were set forth in Green v. Missouri Pacific Railroad Co., 549 F.2d 1158, 1160, 13 EPD ¶ 11, 579 (8th Cir. 1977) and reiterated in the February 4, 1987 Statement on Convictions, page 2:

1. the nature and gravity of the offense or offenses;
2. the time that has passed since the conviction [11] (or in this case, arrest)...; and
3. the nature of the job held or sought.

See also Carter v. Maloney Trucking and Storage Inc., 631 F.2d 40, 43, 24 EPD ¶ 31,348 (5th Cir. 1980) (employer refused to rehire an ex-employee who had murdered a co-worker, not solely because of his conviction, but because he was a dangerous person and friends of the murdered man might try to retaliate against him while he was on the job); Osborne v. Cleland, 620 F.2d 195, 22 EPD ¶ 30,882 (8th Cir. 1980) (employee who had forfeited collateral on a charge of "sexual procurement" was unfit to be a nursing assistant in a psychiatric ward); Lane v. Inman, 509 F.2d 184 (5th Cir. 1975) (city ordinance which prohibited the issuance of taxicab driver permits to persons convicted of smuggling marijuana was "so obviously job related" that "it could not be held to be unlawful race discrimination," irrespective of any adverse impact); EEOC v. Carolina Freight, 723 F. Supp. 734, 52 EPD ¶ (S.D. Fla. 1989) (criminal history was related to position of truck driver who transported valuable property); McCray v. Alexander, 30 EPD ¶ 33,219 (D. Colo. 1982), aff'd 38 EPD ¶ 35,509 (10th Cir. 1985) (supervisory guard was discharged for killing a motorist, while off-duty, in a traffic dispute because employer concluded that, despite his acquittal, the conduct showed poor judgment on the use of deadly force).

Where the position sought is "security sensitive," particularly where it involves enforcing the law or preventing crime, courts tend to closely scrutinize evidence of prior criminal conduct of applicants. U.S. v. City of Chicago, 411 F. Supp. 218, 11 EPD ¶ 10,597 (N.D. Ill. 1976), aff'd in rel. part, 549 F.2d 415, 13 EPD ¶ 11,380 (7th Cir. 1977), on remand, 437 F. Supp. 256 (N.D. Ill. 1977) (applicants for the police department were disqualified for prior convictions for "serious" offenses); Richardson v. Hotel Corporation of America, 332 F. Supp. 519, 4 EPD ¶ 7666 (E.D. La. 1971), aff'd mem., 468 F.2d 951, 4 EPD ¶ 7666 (5th Cir. 1972) (bellman was discharged after his conviction for theft and receipt of stolen goods was discovered since bellmen had

[11] But see EEOC v. Carolina Freight Carriers, 723 F. Supp. at 753 (court upheld trucking company's lifetime bar to employment of drivers who had been incarcerated for theft crimes since EEOC did not produce evidence that a 5-10 year bar would be an equally effective alternative). Note also that the court in Carolina Freight specifically rejected the Eighth Circuit's reasoning in Green, cautioning that Green could be construed too broadly. 723 F. Supp. at 752.

access to guests' rooms and was not subject to inspection when carrying packages); Haynie v. Chupka, 17 FEP Cases 267, 271 (S.D. Ohio 1976) (police department permissibly made inquires regarding arrest records and other evidence of prior criminal conduct).[12] (See Examples 3 and 4.)

Even where the employment at issue is not a law enforcement position or one which gives the employee easy access to the possessions of others, close scrutiny of an applicant's character and prior conduct is appropriate where an employer is responsible for the safety and/or well being of other persons. Osborne v. Cleland, 620 F.2d 195 (8th Cir. 1975) (psychiatric nursing assistant); Lane v. Inman, 509 F.2d 184 (taxi driver). In these instances, the facts would have to be examined closely in order to determine the probability that an applicant would pose a threat to the safety and well being of others. (See Examples 5 and 6).

3. Evaluating the Likelihood that the Applicant Engaged in the Conduct Alleged

The cases cited above illustrate the job-relatedness of certain conduct to specific positions. In cases alleging race discrimination based on the use of arrest records as opposed to convictions, courts have generally required not only job-relatedness, but also a showing that the alleged conduct was actually committed. In City of Cairo v. Illinois Fair Employment Practice Commission, et al., 8 EPD ¶ 9682, the court held that where applicants sought to become police officers, they could not be absolutely barred from appointment solely because they had been arrested, as distinguished from convicted. See also Commission Decision No. 76-87, CCH EEOC Decisions (1983) ¶ 6665 (potential police officer could not be rejected based on one arrest five years earlier for riding in a stolen car since there was no conviction and the applicant asserted that he did not know that the car was stolen). Similarly, in Decision No. 74-83, CCH EEOC Decision (1983) ¶ 6424, the Commission found no business justification for an employer's unconditional termination of all employees with arrest records (all five employees terminated were Black), purportedly to cut down on thefts in the workplace. The employer could produce no evidence that the employees had been involved in any of the thefts or that persons who are arrested, but not convicted, are prone toward crime. Commission Decision No. 74-92, CCH EEOC Decisions (1983) ¶ 6424.

[12] See also Quarrels v. Brown, 48 EPD ¶ 38,641 (D.C. Mich. 1988) (recent conviction was related to position of corrections officer). Note however, that this action was brought under 42 U.S.C. § 1983, rather than Title VII, and plaintiff alleged that he was discriminated against because he was an ex-offender, not because the policy adversely affected a protected group.

An arrest record does no more than raise a suspicion that an applicant may have engaged in a particular type of conduct.[13] Thus, the investigator must determine whether the applicant is likely to have committed the conduct alleged. This is the most difficult step because it requires the employer either to accept the employee's denial or to attempt to obtain additional information and evaluate his/her credibility. An employer need not conduct an informal "trial" or an extensive investigation to determine an applicant's or employee's guilt or innocence. However, the employer may not perfunctorily "allow the person an opportunity to explain" and ignore the explanation where the person's claims could easily be verified by a phone call, i.e., to a previous employer or a police department. The employer is required to allow the person a meaningful opportunity to explain the circumstances of the arrest(s) and to make a reasonable effort to determine whether the explanation is credible before eliminating him/her from employment opportunities.[14] (See Examples 1, 4, 5 and 6.)

III. Examples

The following examples are provided to illustrate the process by which arrest record charges should be evaluated.

> Example 1: Wilma, a Black female, applies to Bus Inc. in Highway City for a position as a bus driver. In response to a pre-employment inquiry, Wilma states that she was arrested two years earlier for driving while intoxicated. Bus Inc. rejects Wilma, despite her acquittal after trial. Bus Inc. does not accept her denial of the conduct alleged and concludes that Wilma was acquitted only because the breatholizer test which was administered to her at the time of her arrest was not administered in accordance with proper police procedures and was therefore inadmissible at trial. Witnesses at Wilma's trial testified that after being stopped for reckless driving, Wilma staggered from the car and had alcohol on her breath. Wilma's rejection is justified because the conduct underlying the arrest, driving while intoxicated, is clearly related to the safe performance of the duties of a bus driver; it occurred fairly recently; and there was no indication of subsequent rehabilitation.

Contrast Example Number 1 with the facts below.

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[13] The employer's suspicion may be raised by an arrest record just as it would by negative comments about an applicant's conduct made by a previous employer or a personal reference.

[14] Although the number of arrests is not determinative (see Litton), it may be relevant in making a credibility determination.

Example 2: Lola, a Black female, applies to Bus Inc. for a position as a bus driver. In response to an inquiry whether she had ever been arrested, Lola states that she was arrested five years earlier for fraud in unemployment benefits. Lola admits that she committed the crime alleged. She explains that she received unemployment benefits shortly after her husband died and her expenses increased. During this period, she worked part-time for minimum wage because her unemployment check amounted to slightly less than the monthly rent for her meager apartment. She did not report the income to the State Unemployment Board for fear that her payments would be reduced and that she would not be able to feed her three young children. After her arrest, she agreed to, and did, repay the state. Bus Inc. rejected Lola. Lola's rejection violated Title VII. The commission of fraud in the unemployment system does not constitute a business justification for the rejection of an applicant for the position of bus driver. The type of crime which Lola committed is totally unrelated to her ability to safely, efficiently and/or courteously drive a bus. Furthermore, the arrest is not recent.

Example 3: Tom, a Black male, applies to Lodge City for a position as a police officer. The arrest rate for Blacks is substantially disproportionate to that of Whites in Lodge City. In response to an arrest record inquiry, Tom states that he was arrested three years earlier for burglary. Tom is interviewed and asked to explain the circumstances surrounding his arrest. Tom admits that although the burglary charge was dismissed for lack of sufficient evidence, he did commit the crime. He claims, however, that he is a changed man, having matured since then. Lodge City rejects Tom. Police officers are: 1) entrusted with protecting the public; 2) authorized to enter nearly any dwelling under the appropriate circumstances; and 3) often responsible for transporting valuables which are confiscated as evidence. The department is, therefore, justified in declining to take the chance that Tom has reformed. Even if the department is completely satisfied that Tom has reformed, it may reject him because his credibility as a witness in court could be severely damaged if he were asked about his own arrest and the surrounding circumstances while testifying against a person whom he had arrested. Since an essential element of police work is the ability to effect an arrest and to credibly testify against the defendant in court, the department would have two separate business justifications for rejecting Tom.

The above example is contrasted with circumstances under which an arrest record would not constitute grounds for rejection.

> Example 4: John, a Black male, applies to Lodge City for the same position as does Tom. John was arrested three years earlier for burglary. The charges were dismissed. Lodge City eliminates John from consideration without further investigation and will not consider the surrounding circumstances of the arrest. If allowed to explain, John could establish that his arrest was a case of mistaken identity and that someone else, who superficially fit John's description, was convicted of the crime for which John was initially charged. Since the facts indicate that John did not commit the conduct alleged in the arrest record, Lodge City has not carried its burden of proving a business justification for John's rejection.

> Example 5: David, a Black male, applies for a teaching position in West High School. In response to a pre-employment inquiry, David states that he was arrested two years earlier for statutory rape, having been accused of seducing a seventeen-year old student in his class when he taught at another high school. The charges were dismissed. West High rejects David. David relies on Litton to establish a prima facie case of race discrimination, and West High is unable to rebut the case with more current, accurate or specific statistics. David denies that there is any truth to the charge. West High decides to conduct a further investigation and learns that David was arrested after another teacher found him engaged in sexual activity with Ann, one of his students, in the school's locker room. This event occurred on Ann's eighteenth birthday, but in the confusion of the arrest, no one realized that Ann had just reached the age of majority. Ann's parents and other teachers believed that David had seduced Ann, who had a schoolgirl "crush" on him, prior to her eighteenth birthday. However, since Ann would not testify against David, the charges had been dismissed. West High may reject David. Irrespective of Ann's age, West High is justified in attempting to protect its students from teachers who may make sexual advances toward them. Although he might not have been guilty of statutory rape, his conduct was unbefitting a teacher.

The above example is contrasted to the following circumstances.

Example 6: Paul, a Black male, applies for the same position as does David. Paul was arrested two years earlier for statutory rape, having been accused of seducing a seventeen year old student in his class at another high school. West High eliminates Paul from consideration without further investigation and refuses to consider the surrounding circumstances of the arrest. When filing his complaint, Paul states that when he taught at the other high school, he befriended a troubled student in his class, Alice, who was terrified of her disciplinarian parents. Paul insists that he never touched Alice in any improper manner and that on the day before his arrest, Alice confided in him that she had become pregnant by her seventeen-year old boyfriend, Peter, and was afraid to tell her parents for fear that her father would kill him. Paul states that the charges were dismissed because the district attorney did not believe Alice's statements. The district attorney and the principal of the high school, Ms. P., confirm Paul's assessment of Alice. Ms. P. states that Peter confided in her that he was the father of Alice's baby and that Alice had assured him that nothing sexual had ever happened between her and Paul. Ms. P. states that there were indications that Alice's father was abusive, that he had beaten her into giving him the name of someone to blame for her pregnancy and that Alice thought that Paul could handle her father better than could Peter. Since Paul denied committing the conduct alleged and his explanation was well supported by the district attorney and his former employer, West High has not demonstrated a business justification for rejecting Paul.

The examples discussed above demonstrate that whereas an employer may consider a conviction as conclusive evidence that a person has committed the crime alleged, arrests can only be considered as a means of "triggering" further inquiry into that person's character or prior conduct. After considering all of the circumstances, if the employer reasonably concludes that the applicant's or employee's conduct is evidence that he or she cannot be trusted to perform the duties of the position in question, the employer may reject or terminate that person.

9-7-90
Date

Approved:
Evan J. Kemp, Jr.
Chairman