September 10, 2007

William R. Neill, Director
South Carolina Criminal Justice Academy
5400 Broad River Road
Columbia, South Carolina 29212-3540

Dear Mr. Neill:

In a letter to this office you referenced that in September, 2005, the Criminal Justice Academy (hereinafter "the Academy"), pursuant to a certification eligibility review, requested and received the complete investigatory file relating to a law enforcement officer's May, 2004 arrest for first degree criminal sexual conduct. The matter had been heard by a grand jury in September, 2004 at which time the charges were dropped and the officer's record ordered expunged. An expungement order was signed in September, 2004 pursuant to S.C. Code Ann. § 17-1-40 and filed with the clerk of court. You indicated that the Academy relied on the documents contained in the investigatory file to produce its own investigation file for use in determining whether the officer should be deemed eligible to continue his career in law enforcement.

Section 17-1-40 states that

> [a]ny person who after being charged with a criminal offense and such charge is discharged or proceedings against such person dismissed or is found to be innocent of such charge the arrest and booking record, files, mug shots, and fingerprints of such person shall be destroyed and no evidence of such record pertaining to such charge shall be retained by any municipal, county or State law enforcement agency.

Referencing such provision, you have questioned what constitutes "files" in a criminal case pursuant to Section 17-1-40 and whether documents contained in an individual's certification file must be destroyed pursuant to Section 17-1-40 and, in particular, the 2004 expungement order.

In a telephone conversation with an individual in your agency, I was informed that in this case, the individual had been fired from one law enforcement agency and was then hired by another law enforcement agency. Because of these circumstances, the individual had lost his original certification and the matter was then before your agency for purposes of a recertification review pursuant to your regulatory authority. See: Regulations of the Department of Public Safety 38-001 et seq.

As to the matter of certification of a law enforcement officer initially, S.C. Code Ann. §§ 23-23-10 et seq. provide for this State's Law Enforcement Training Council. Pursuant to Section 23-23-40,

> [n]o law enforcement officer employed or appointed on or after July 1, 1989, by any public law enforcement agency in this State is authorized to enforce the laws or ordinances of this State or any political subdivision thereof unless he has been certified as qualified by the Law Enforcement Training Council....

Section 23-23-60 states that the Training Council is "...authorized to issue certificates and other appropriate indicia of compliance and qualification to law enforcement officers or other persons trained under the provisions of this chapter." Departments having candidates for certification must submit, in addition to other documentation, evidence of no convictions of any criminal offense that carries a sentence or one year or more or of any offense that involves moral turpitude along with evidence that the candidate is a person of "good character". See: Section 23-23-60(B)(4) and (5). Additionally, Regulation 38-003 states that "[e]very agency who requests certification...shall certify to the..(Department of Public Safety)...that, in the opinion of the employing agency, the candidate is of good character...." This office in a prior opinion dated July 11, 1986 commented upon the fact that "...the moral character of an applicant is the overriding legislative concern with respect to the eligibility of an applicant for admission to the Criminal Justice Academy."

Another opinion of this office dated May 16, 2002 dealt with the question of the effect of a pardon on an individual's eligibility for admission to the Academy for training and certification. Reference was made to the decision of the State Supreme Court in State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000) which dealt with the question of whether a pardoned offense could be used to enhance the sentence for a subsequent driving under the influence offense. The Court concluded that the reference to "any conviction" as used in the statute providing for enhanced punishment for each subsequent DUI conviction did not include pardoned convictions as the pardon statute provided a full pardon for all legal consequences of the crime and conviction. See also: Brunson v. Stewart, 345 S.C. 283, 547 S.E.2d 504 (Ct. App. 2001) (in determining whether a pardoned offense could be used to deny an individual the authority to possess a pistol, the Court determined that to deny the pardoned individual the authority to possess a pistol "...constituted an impermissible collateral legal consequence of his pardoned conviction...in contravention of the pardon statutes." 345 S.C. at 287).

This office in the May 16, 2002 opinion determined that regardless of the decisions in Baucom and Brunson, a pardoned conviction could continue to be used to determine whether an applicant was suitable for admission to the Academy and is of the appropriate character to be certified as a law enforcement officer. Reference was made to the decision in Brezizecki v. Gregorio, 588 A.2d 453 (N.J. 1990) where the court commented that "[w]hen there is a requirement that the offender show good moral character, the pardon will not preclude use of the underlying crime, because then it is not the conviction but one's character that is relevant." The 2002 opinion stated that by statutorily distinguishing that evidence that an individual is of "good character", "...the

legislature has shown a clear intention that all facts relevant to a candidate's character be considered, even those facts related to a pardoned conviction." Reference was made to another opinion of this office dated August 9, 1985 which had concluded that "...the moral character of the applicant, and not simply the existence of certain convictions, is the overriding legislative concern with respect to admission to the Criminal Justice Academy." These conclusions, therefore, recognize that the character qualifications of an individual are of primary concern to the Academy in the certification process.

As to the expungement statute itself, a prior opinion of this office dated July 8, 1996 reaffirmed another opinion of this office, Op. Atty. Gen. dated February 26, 1979, which stated that as to Section 17-1-40, it was the opinion of this office that such provision was applicable

> ...only to bookkeeping entries which serve as the recording of the arrest and ensuing charge in question. Thus, the arrest and booking record, files, mug shots and fingerprints pertaining to the charge in question may be obliterated or purged under Section 17-1-40...Any other material or evidence not serving as an entry made in the usual course of business for recording the arrest and ensuing charge will not be subject to the expungement statutes...Furthermore, it is the opinion of this office that the work product of law enforcement agencies pertaining to the investigation of criminal activity, and the evidence of criminal activity, do not constitute bookkeeping entries for recording of an arrest and the ensuing charge, and are not covered by the aforesaid statute. (emphasis added).

This office in an opinion dated December 13, 2000 determined that a statute, S.C. Code Ann. § 17-22-150, which provides for expungement of records relating to an individual who successfully completes a pretrial intervention program, would not reach additional records compiled as part of an internal personnel action conducted by a state agency as an employer. The referenced December 13, 2000 opinion noted the decision in State v. Zemack, 700 A.2d 1237 (N.J. 1997) which examined the scope of the state's expungement statutes with reference to a police officer's personnel file as opposed to his criminal record. The statute being construed provided that "[e]xpunged records shall include complaints, warrants, arrests, commitments, processing records, fingerprints, photographs, index cards, rap sheets, and judicial docket records...[and]...refers to all records on file within any court, detention or correctional facility, law enforcement or criminal justice agency concerning a person's detention, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system." The opinion stated that the court in Zemack

> ...refused to "expand the coverage promulgated by the Legislature" and held that the...expungement statute "does not...call for the removal of personnel records from any employment files." In so holding, the Zemack court stated that "[t]he statute governing the expungement of records does not subject the Police Department as employer to the same restrictions as it does the Police Department as law enforcement entity."

The opinion concludes that the expungement order on review "...would not require...(the agency)...'to destroy the personnel records pertaining to the incident including our internal investigation.'"

An opinion dated August 27, 1986 recognized that "the destruction of public records is a matter regulated by statute." In that opinion, this office concluded that "...unless the circumstances of a particular case would fall within the provisions of Section 17-1-40 or any other state statute providing for expungement, an expungement would not be authorized." Reference was made to the decision in State v. Salmon, 279 S.C. 344, 306 S.E.2d 620 (1983) where the State Supreme Court determined that inasmuch as Section 17-1-40 did not include the verdict of not guilty by reason of insanity as a disposition which merited the expungement of a police record, such a verdict would not require the destruction of criminal records. The 1986 opinion stated that "...for a criminal record to be expunged, there must be statutory authority for such an expungement." See also: Op. Atty. Gen. dated September 18, 1980 (notations by a magistrate in a criminal docket book are not required to be deleted pursuant to Section 17-1-40).

Consistent with these authorities and opinions, it appears that the complete investigatory file relating to a law enforcement officer's prior arrest for criminal sexual misconduct-first degree would be relevant as part of a certification review by the Academy in reviewing an individual's "good character". As a result, in the opinion of this office, when such documents are contained in an individual's certification file as maintained by the Academy, such would not be subject to destruction pursuant to Section 17-1-40 and the 2004 expungement order.

If there are any questions, please advise.

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Assistant Deputy Attorney General