Comments Received by the Department of Consumer Affairs

on

Proposed Amendment of License Enforcement Rules

as made available for public inspection

The Community Service Society of New York (CSS) uses a multifaceted approach to attack income inequality in New York. CSS has been at the forefront of this work for 175 years, changing our strategy and focus as the times demand. Today we engage in policy work, legislative advocacy, impactful direct services programs and litigation in order to help create a fairer, stronger New York.

My name is Stephen Dunn. I am a senior staff attorney in CSS's Legal Department, and I thank you for the opportunity to testify concerning DCA's proposed amendments to Chapter 1 of Title 6 of the Rules of the City of New York. We are concerned that, as a consequence of these proposed changes, otherwise eligible applicants with conviction histories will be denied licenses and face steep fines simply due to good faith and harmless errors or omissions in the application process.

CSS comes to this work from many years of advocating on behalf of clients facing steep hurdles due to criminal records. A conviction history can act as an insurmountable barrier to securing living-wage employment and housing, and to full participation in the life of our city and state. Due to discriminatory policing and prosecution practices, these burdens are disproportionally borne by people of color. CSS's Legal Department has focused exclusively on working with and for persons with conviction histories for more than a decade. We litigate on behalf of individuals and groups who have suffered actionable discrimination because of their records, and we engage in policy and legislative advocacy to make systemic change.

CSS also provides direct services to more than 700 New Yorkers each year through our Legal Department's Next Door Project, working with clients from across the city to obtain, review and correct mistakes in their New York State rap sheets. In our confidential one-on-one review sessions provided at our Manhattan headquarters and at partner agencies across the city, we ensure that our clients obtain the firm knowledge of their record that is essential when applying for a job or a license. In many cases we find that our clients have long been mistaken about the contents of their records, sometimes assuming they were convicted on arrest charges when this was not the case, for example, or misunderstanding the difference between a misdemeanor and a noncriminal conviction. In other cases, because years and sometimes decades have passed, clients have forgotten their precise conviction charges.

The proposed amendments put forth by DCA will harm applicants like our clients, and anyone without precise information about their conviction histories who tries to truthfully respond to DCA employment questions but fails in the attempt. Section 1-01.1 would permit the commissioner to deny any license application or refuse to renew a license where an applicant fails to provide "complete and truthful" responses, "conceals" any information, "makes a false statement," or "falsifies" any document associated with the application. Likewise, Section 1-04 would further permit the commissioner to deny any license application or refuse to renew any license, or suspend or revoke a license, if the applicant has made a

"false" representation to the Department. Additionally, Section 6-11 imposes stiff financial penalties on top of the license denial or revocation.

It is our experience, from meeting and working with thousands of clients, that misstatements are quite frequently unintentional, stemming from applicants' misunderstanding of their conviction history or a misunderstanding of the questions asked, or both. DCA's "Basic Individual License Application" contains questions that an applicant might justifiably get wrong. It asks, for example, whether the applicant has "ever pled guilty or been convicted of ANY crime or offense? If YES, please explain." Determining how to answer this legally overbroad question is a conundrum even for experts. And it certainly can stump the average person, causing them to answer incorrectly. It could be that the conviction is from many years ago and the specific details are lost to the passage of time. The applicant many have pled to a charge that was not adequately explained to them by their defense attorney. The applicant could be operating under false information, like so many unfortunately are, that their criminal convictions were automatically expunged after seven years or that their convictions were automatically sealed. Or it could be that the applicant did have his convictions sealed, but now is confused about what he is required to disclose. At the Next Door Project, we review a person's rap sheet and make sure they can comfortably and accurately discuss their record, helping to ensure they can answer questions like these appropriately. Unfortunately, there are more than 6 million New Yorkers who have criminal records and we are not able to provide this resource to everyone. There will be countless people who are denied a license from DCA due an honest and harmless error or omission.

I purposely call the error "harmless" because the ultimate decision to deny or revoke a license application because of a conviction history is not based on this initial application question. DCA fingerprints applicants and obtains the applicant's full rap sheet from the New York State Division of Criminal Justice Services. DCA will then send the applicant a "Request for Explanation of Criminal History" form on which DCA asks about specific, relevant convictions. Once the applicant has provided his explanation, DCA then conducts its analysis of the applicant's conviction history pursuant to Article 23-A of the New York Correction Law. DCA's analysis is in no way dependent on the applicant's responses to its criminal records question. Likewise, the applicant gains no advantage by failing to disclose his record in the initial application, and therefore is not motivated to purposely withhold information. Nonetheless, DCA has the authority, under the proposed amendments, to deny an application based on answers to a question that serves as nothing more than a "gotcha," catching people out in what are assumed to be – but almost never are – intentional misstatements, even where that application would otherwise be approved. The proposed amendment, in conjunction with the initial application form, will amount to gatekeeping with discriminatory impact.

We have encountered discriminatory gatekeeping before. When clients informed us that their employment applications were being tossed in the trash once they revealed a past criminal conviction or – for larger employers – that they were bounced out of the online employment application portal once they checked "yes" next to the question about whether they had ever had a criminal conviction, we understood that systemic change was required. We worked closely with VOCAL/NY, Faith in New York and the National Employment Law Project to draft and

ensure passage of the New York City Fair Chance Act, among the strongest "ban the box" laws in the nation.

A similar approach is needed here. We urge DCA to remove the question about conviction history from the basic application form. The only purpose for this question is to form the basis of a denial for an otherwise eligible applicant. While we very much appreciate the due process language included in the amendments, we can't imagine a process that would adequately protect the applicant who does not have the resources or connections to services that would help them to obtain a sophisticated and detailed knowledge of their own record. If DCA feels compelled to keep the question on the initial application (though we see no reason why it is required), then we urge DCA to change the language of the proposed amendments so that only applicants who *willfully* mislead the agency will have their licenses denied or revoked. Individuals with conviction histories who do not mislead DCA on purpose, but simply get things wrong will otherwise continue to be harmed by their criminal records – here in new and enhanced ways – long after they have served their sentence, completed probation, paid a fine, done community service, or otherwise "paid their dues." We urge you to withdraw these proposed amendments.

Sincerely,
Stephen Dunn
Senior Staff Attorney
Community Service Society of New York

THE LEGAL AID SOCIETY

TESTIMONY

New York City Department of Consumer Affairs

Public Hearing on Proposed Amendments to Chapter 1 of Title 6 of the

Rules of the City of New York

July 18, 2019

New York, New York

Presented by:
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Testimony of The Legal Aid Society

The Legal Aid Society thanks Commissioner Lorelei Salas and the New York City Department of Consumer Affairs ("DCA") for permitting us to testify on DCA's proposed amendments to Chapter 1 of Title 6 of the Rules of the City of New York.

The Legal Aid Society exists for one simple yet powerful reason: to ensure that no New Yorker is denied their right to equal justice because of poverty. For over 140 years, we have protected, defended, and advocated for those who have struggled in silence for far too long, working on the front lines and behind the scenes to offer our clients the exceptional legal services they deserve. Through our Civil, Criminal Defense, and Juvenile Rights Practices, we offer an unmatched depth and breadth of legal expertise to vulnerable New Yorkers in over 300,000 legal matters each and every year. The Worker Justice Project, an initiative of The Legal Aid Society's Criminal Defense Practice, uses litigation, advocacy, and policy reform to combat discrimination faced by workers with arrest or conviction records living in New York City. The Worker Justice Project regularly represents and advises people who hold DCA-issued licenses or seek to obtain DCA-issued licenses.

The Problem

Our testimony today concerns DCA's proposed amendments to Section 1-01.1 of Title 6, the section that permits DCA to disqualify license applicants who do not accurately report their criminal record on their license application. Many times, license applicants' failure to fully disclose their criminal record is unintentional and results from a lack of knowledge about their arrest or conviction record. DCA's policy of disqualifying people who unintentionally fail to accurately report their criminal record has a disparate impact on low-income people of color who

simply seek to support themselves. DCA's proposed amendment to Section 1-01.1, while well-intentioned, does little to substantively improve this policy.

The story of The Legal Aid Society's former client, Mr. H, provides a representative example of the harm caused by Section 1-01.1. Mr. H is an elderly man who has ten convictions and significant evidence of rehabilitation since the time of the offenses. He worked as a ticket seller for five years, and applied for a ticket seller license shortly after New York City began requiring ticket sellers to obtain a license from DCA. On his ticket seller license, Mr. H disclosed eight of his convictions, but did not disclose two convictions that were more than 30 years old. His failure to disclose these 30-year-old convictions was clearly unintentional; he disclosed convictions that were more recent and more serious than the convictions that he did not disclose.

DCA subsequently obtained Mr. H's record of arrests and prosecutions ("RAP sheet") from the New York State Division of Criminal Justice Services ("DCJS"), and denied his application on the ground that he had made a false statement by failing to disclose the two 30-year-old convictions. After The Legal Aid Society requested reconsideration and explained that Mr. H's failure to disclose was unintentional, DCA stated that Mr. H would be unable to obtain a license for at least one year from the date of the failure to disclose. During the year in which Mr. H was disqualified, Mr. H was unable to work in his chosen profession of ticket sales. He applied for jobs in industries he had never worked in before but was unable to find employment in a new industry. At almost 70 years old, he was forced to apply for public assistance.

After Mr. H completed the disqualification period, The Legal Aid Society helped him submit a new application for a ticket seller license. To its credit, DCA thoughtfully considered Mr. H's evidence of rehabilitation and undertook an individualized assessment of his conviction

record. DCA issued Mr. H his ticket seller license fourteen months after his original application, and he was able to find a job as a ticket seller a few months later.

Unfortunately, Mr. H's fourteen-month disqualification period created unnecessary and significant harm, both to Mr. H and to the taxpayers of New York City, who were required to provide public assistance to someone who desperately wanted to work and was qualified for available positions.

Based on our work with thousands of New Yorkers with arrest or conviction records, we are aware that Mr. H's situation is not unique. Many New Yorkers with arrest or conviction records do not understand their criminal record. The criminal legal system is complicated. For example, one of the two convictions that Mr. H did not disclose to DCA was directly related to a conviction that he did disclose; he was sentenced for the two convictions on the same date, and he did not realize that they were in fact separate criminal convictions that must be disclosed separately.

Other times, New Yorkers simply forget about certain convictions, especially when the convictions are old or relatively minor. The second conviction that Mr. H did not disclose was a 31-year-old misdemeanor. Mr. H had no memory of the decades-old misdemeanor, even after DCA told him he had failed to disclose it.

If Mr. H had had access to his RAP sheet, he might have been able to disclose both convictions. However, like many New Yorkers, he had never seen his RAP sheet and had no idea how to obtain it. New Yorkers who learn how to apply for their personal RAP sheet also learn that the application process is expensive and time-intensive; DCJS RAP sheets cost $62 and FBI RAP sheets cost $18, with very limited fee waiver provisions. Those individuals who obtain their RAP sheet often have difficulty reading it; a RAP sheet is a complicated and confusing

document, and understanding it requires a sophisticated level of knowledge about the criminal legal system.

DCA's denial of licenses to people who do not know or understand their arrest or conviction record has a disparate impact on low-income New Yorkers of color. It is well documented that people of color are disproportionately targeted for arrest in New York City.[1] Because the pool of people with arrest or conviction records is disproportionately people of color, DCA's policy of disqualifying people who do not disclose their criminal records with perfect accuracy has a disparate impact on applicants of color. The policy amplifies the already devastating impact that a criminal record has on people of color's employment opportunities. People of color with conviction records are denied employment far more often than white people with comparable conviction records.[2] They face intense stigma and are denied jobs and licenses even when there is no relationship between their conviction record and their ability to perform the duties of the job.[3] These job and license denials have helped create an underclass of New Yorkers of color with conviction records who cannot find stable employment.

The Solution

DCA's proposed amendment to Section 1-01.1 would require that DCA provide notice and an opportunity to be heard before disqualifying an applicant who provides inaccurate information to DCA. Although the proposed amendment is well-intentioned, it is insufficient; under the proposed amendment, DCA will still be permitted to disqualify people like Mr. H, who

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[1] *See, e.g.*, Anna Flag & Ashley Nerbovig, *Subway Policing in New York City Still Has A Race Problem*, MARSHALL PROJECT (Sept. 12, 2018), *available at* https://www.themarshallproject.org/2018/09/12/subway-policing-in-new-york-city-still-has-a-race-problem; Benjamin Mueller et al., *Surest Way to Face Marijuana Charges in New York: Be Black or Hispanic*, N.Y. TIMES (May 13, 2018), *available at* https://www.nytimes.com/2018/05/13/nyregion/marijuana-arrests-nyc-race.html.

[2] *See* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 959 (Mar. 2003), *available at* https://scholar.harvard.edu/pager/publications/mark-criminal-record (noting that the negative effect of a criminal record is 40% larger for black job applicants than white job applicants).

[3] *See* Bruce Western & Catherine Sirois, *Racialized Re-entry: Labor Market Inequality After Incarceration*, SOC. FORCES (Oct. 2018), *available at* https://doi.org/10.1093/sf/soy096.

unintentionally provide incorrect information about their criminal record. We strongly urge DCA to amend Chapter 1 of Title 6 of the Rules of the City of New York in the following ways, in order to allow people who do not have a sophisticated understanding of the criminal legal system to obtain a license and stable employment.

First: DCA should remove all questions about criminal history from its application forms for licenses that require fingerprinting, and should amend its rules to require the removal of such questions. DCA gets a clear understanding of an applicant's criminal record from the applicant's RAP sheet. If, after DCA reviews the applicant's RAP sheet, the agency decides that it needs more information about the applicant's criminal record, DCA can send the applicant a "Request for Explanation of Criminal History" letter, a letter that DCA already sends certain applicants after reviewing their RAP sheet. The only applicants who should be required to self-disclose their criminal record on an application form are applicants for licenses that do not require fingerprinting.[4] Since DCA has access to RAP sheets and can send the Request for Explanation of Criminal History letter, there is simply no need to include any criminal history-related questions on the license application forms.

Second: DCA should amend Section 1-01.1 to make clear that DCA may only take adverse action against a license applicant or licensee who misrepresented their criminal record if the misrepresentation was intentional or willful. Applicants and licensees should have the opportunity to prove at a hearing that their misrepresentation was unintentional.

Thank you for your consideration.

[4] It is our understanding that DCA does not require fingerprinting of people who currently hold or have held in the past three years a DCA license that required fingerprinting. Presumably, DCA does not require these applicants to be re-fingerprinted because DCA would have learned of any post-fingerprinting arrests through DCJS's subsequent arrest notification procedure. These individuals should not have to self-disclose their criminal history on a new application for the same reason that DCA does not require them to be re-fingerprinted: DCA already has access to their post-fingerprinting arrest record. Of course, if DCA needs further information from the applicant, such as the disposition of certain arrests, DCA can send the applicant a Request for Explanation of Criminal History letter.

GNYADA

Greater New York
Automobile Dealers
Association

Via Email (cortiz@dca.nyc.gov)
Carlos Ortiz
Director of Legislative Affairs
New York City Department of Consumer Affairs
42 Broadway, 5th Floor
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Dear Mr. Ortiz,

I am writing on behalf of the Greater New York Automobile Dealers Association (GNYADA) to comment on the Proposed Amendment to Chapter 1 of Title 6 of the Rules of the City of New York, relating to the Department of Consumer Affairs' licensing authority and enforcement.

GNYADA is a not-for-profit trade association representing nearly 400 franchised new vehicle dealers in the downstate region of New York. GNYADA members are engaged in the retail sale and leasing of new and used vehicles, as well as their service and repair.

New York metropolitan dealers generate over 68,000 jobs, which is 7.2% of total retail employment in the region, with over 10,600 of these jobs in New York City. Annual payroll compensation from these businesses adds up to $4.08 billion. Dealers also invest in their communities in the form of $265 million in capital improvement to facilities and $20.7 million in charitable contributions.

We respectfully request clarification of the amendment to §§ 1-03. We would like to confirm that after § 1-03 is amended, dealers will not be required to post a separate complaint sign but need to post only the DCA license sign.

We would also like to request the following revisions:

- § 1-14(b) requires a response to documents or interrogatories within 30 days of being mailed or served. The mail in dealerships is usually received by a receptionist who may not realize the importance of such a document and fail to deliver it to the dealer in a timely manner. We ask that this be changed to have such documents sent in a way that requires signature upon receipt.
- §§1-01.1, 1-04, and 1-19, all relate to providing false information or making false representations. These should be revised to penalize false information/representations given *knowingly*.

Greater New York
Serving Our Members Since 1910!
Automobile Dealers Association

Finally, GNYADA opposes the proposed amendment to § 1-05 and § 1-13. The amendment to § 1-05 requires inclusion of the dealership's DCA license number in email signature blocks. Many dealerships do not use email providers that allow them to set the signature block for employees, or use a signature block at all. We ask that email signature block be removed from this section.

§ 1-13 allows DCA to rely on resolved complaints when deciding to deny, suspend, or revoke an application or license. First, "resolved complaint" is not defined so may include, for example, a complaint that has been withdrawn after being resolved to the consumer's satisfaction, one that resulted in a fine to the dealership, or one for which the dealer was found not to have engaged in any wrongdoing. Furthermore, if a complaint has been resolved, it should not be used in future actions that may jeopardize a dealership's ability to do business, especially if the complaint was a singular occurrence and not part of a pattern. However, if it must be, dealers should be given an opportunity to respond to any contemplated decision regarding their application or license if such decision has been made based on an issue they knew to be resolved.

Thank you for taking the time to work with us to address this issue. Please let me know if we can provide any further information.

Very truly yours,

Julie L. Mercer
In-House General Counsel

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July 18, 2019

VIA EMAIL

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Re: DCA's Proposed Amendments to Chapter 1 of Title 6 of the Rules of the City of New York

OATH submits this comment to DCA's proposed amendments to Chapter 1 of Title 6 of the Rules of the City of New York, relating to DCA's licensing authority and enforcement. The amendments to sections 1-14 and 1-19, as proposed, will interfere with the New York City Charter authority granted to OATH to establish rules for the conduct of hearings, to rule upon offers of proof, receive evidence, and oversee and regulate discovery procedures, and to properly dispose of procedural requests. See Charter §§ 1049(2)(a) & (3)(b) & (e).[1] OATH has long established rules for discovery in the Trials and Hearings Divisions that address the proposed procedures at Title 48 of the Rules of the City of New York sections 1-33 and 6-07, respectively. Further, the proposal will diminish the due process provided to these respondents versus that provided to other respondents in an OATH adjudication for no rational reason.

(1) Proposed Discovery Rules

The proposed amendment to section 1-14 sets out new discovery rules requiring that respondents participate in discovery methods that are extraordinary for administrative adjudications (e.g., interrogatories and depositions) and that require prior approval of the Administrative Law Judge (ALJ) or

[1] Inasmuch as the title of section 1-14 is "Notices of Hearing, Requests for Documents, Interrogatories, and Notices of Deposition," we have presumed that this rule applies to adjudications (even if it may also apply to DCA investigations procedures). We have inquired of DCA and were not advised otherwise. The title ("Notices of Hearing"), list of discovery methods that apply to the adjudication stage, and chronology of subdivisions are all consistent with this presumption.

Hearing Officer under OATH's rules. For example, Trials Division rule 1-33 provides that "[d]epositions must only be taken upon motion for good cause shown" and interrogatories are "not permitted except upon agreement among the parties or upon motion for good cause shown." 48 RCNY § 1-33(b). Such motions must be in writing and are subject to the procedures set forth in subdivision 1-33(d), which also provide for a sanction for failure to comply with the ALJ's order to compel. Under the rule proposal, DCA grants itself the exclusive authority to serve interrogatories and notices of depositions and to do so without having to present good cause to an ALJ or Hearing Officer. §§ 1-14 (b) and (c). There is no reciprocal right granted to respondents to seek discovery from DCA, creating a serious violation of due process.

The use of discovery devices such as depositions and interrogatories in OATH's Hearings Division is even more extraordinary and, due to the extraordinary volume of summons-based adjudications and increased likelihood that the respondent will be unrepresented, should remain rare and subject to the Hearings Division rules. The Hearings Division limits pre-hearing discovery to a request for a list of witnesses and copies of documents intended to be submitted into evidence. 48 RCNY § 6-07(a). All other discovery motions must be made to a Hearing Officer at the commencement of the hearing. 48 RCNY § 6-07(b). Service of a discovery request prior to the hearing date is indeed rare. Issuing such orders is intrinsic to conduct of a trial or hearing and without this authority, it would be difficult for a judge to exercise control over or ensure fairness of the process.

Additionally, the proposed rules set out a 30-day deadline to respond to discovery and give DCA the authority to extend the deadline to respond. § 1-14(f). This, again, appropriates the authority of the ALJ or Hearing Officer to grant discovery extensions; it also conflicts with the Trials Division rule which establishes a 15 day-deadline to respond that may be extended by consent of the parties or upon motion to the ALJ. The varying rules will create confusion for respondents who will not know which deadline applies.

The effect of this rule proposal is that it directly conflicts with OATH's discovery rules and appropriates the authority of the neutral adjudicators at OATH, ALJs and Hearing Officers, to regulate discovery during the OATH proceeding by determining the sufficiency of a discovery response and exercising the authority to sanction the respondent, while also denying due process to likely-unrepresented respondents. It is rightfully the neutral trier of fact who must retain the discretion to determine the scope of evidence presented at trial, as is characteristic of sound adjudication. See Charter § 1046 (establishing uniform minimum standards for city adjudication).

An even harsher provision in the rule proposal authorizes DCA to issue a summons for <u>each day</u> the respondent does not respond to a document or interrogatories request, or to revoke the respondent's license for failing to appear at a noticed deposition. §§ 1-14(b)(1), (c). There is no indication of how, where or when the adjudication of this additional summons would occur, or whether it would occur before the presiding ALJ or Hearing Officer who will have a basis for assessing the reasonableness for the lateness in production. This particular proposal goes beyond contravening OATH's authority over the adjudication and additionally creates an imprimatur that transforms the adjudications process itself into a revenue-generating gambit, which surely will soil OATH's reputation as a neutral adjudicator, independent of the agencies that commence proceedings here. Allowing DCA to penalize a respondent financially for failing to respond to discovery not only forces the ALJ to relinquish control over the proceeding, but also demonstrates to the respondent that the scales are tipped against them -- and in the city's favor.

(2) Evidence to Rebut the Presumption of Continued Unlicensed Activity

The proposed amendment to section 1-19(e) eliminating uncorroborated testimony from being considered on the question of whether unlicensed activity ceased circumscribes what credible evidence may be considered in an administrative proceeding, even though that evidence could constitute substantial evidence. This in essence takes away the discretion given to the finder of fact to make a credibility determination and finding that the evidence meets the preponderance standard. Requiring additional corroborating evidence creates a stricter evidentiary standard for administrative determinations in contravention of CPLR section 7803(4) and of OATH's evidentiary rules.

Under New York's Civil Practice Law and Rules, and as upheld decades ago by the state's Court of Appeals, administrative determinations must be supported by substantial evidence, which is "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." CPLR § 7803(4); see also *Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y. 2d 176, 180 (1978). Even hearsay statements, if credible and sufficiently relevant and probative, alone may constitute substantial evidence. *People ex rel. Vega v. Smith*, 66 N.Y. 2d 130, 138 (1985). Following the substantial evidence standard set forth in CPLR section 7803(4), the Trials and Hearings Divisions permit the admission of relevant and reliable evidence without regard to technical or formal rules or laws of evidence. 48 RCNY §§ 1-46(a) & 6-12(c). DCA offers no governmental necessity for treating this particular type of evidence differently than all others.

The consideration of evidence is not an agency function in an adjudication of the agency's summons or petition; it is the purview of the neutral finder of fact. In an adjudication, a party is not permitted to decide how the evidence may be considered. Uncorroborated witness testimony is routinely the only evidence presented at an OATH hearing besides the summons. This rule proposal undermines the ALJ or Hearing Officer's authority to determine witness credibility, weigh the evidence presented, and make findings of fact. By presuming that a respondent's testimony can never be credible on its own, DCA will unfairly penalize respondents who may not possess any corroborating documents and or be able to bring in additional witnesses.

Thank you for your attention to this matter.

Very truly yours,

Tynia D. Richard
Deputy Commissioner/General Counsel

TESTIMONY OF:

Shelle Shimizu, Staff Attorney, Employment Law Unit
BROOKLYN DEFENDER SERVICES

Presented before
The New York City Department of Consumer Affairs
Public Hearing on Proposed Amendments to Chapter 1 of Title 6 of the Rules of the City of New York

My name is Shelle Shimizu and I am a Staff Attorney at Brooklyn Defender Services.[1] BDS provides innovative, multi-disciplinary, and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support, and advocacy for nearly 35,000 people in Brooklyn each year. I thank the Department of Consumer Affairs for holding this hearing and for providing us with the opportunity to testify.

BDS's employment practice provides legal representation and informal advocacy to clients facing employment discrimination due to current or prior contact with the criminal justice system. With the enactment of anti-discrimination policies, New York has recognized that people should not be subjected to perpetual punishment and denied consideration for meaningful opportunities because of mistakes they made in the past.[2] However, many of our clients still face significant barriers to obtaining work due to prior interactions with the criminal system. BDS submits this testimony to address proposed amendments to Section 1-01.1 of the Department of Consumer Affair's (DCA) licensing rules, which permit the denial of license applicants based on failure to fully disclose their criminal conviction histories.

DCA's proposal, which would require notice and opportunity to be heard before disqualifying an applicant who provides inaccurate information about their conviction history, is well-intentioned. However, we believe these added protections do not account for the experiences of our clients and would be insufficient to prevent unfair discrimination and needless barriers to employment. BDS believes that DCA should remove questions about criminal history from its applications that require fingerprinting, as DCA already obtains that information on its own. If additional information beyond what DCA can access on a RAP sheet is needed, the agency already has a process for requesting it from applicants. Even with the proposed amendment, DCA's continued use of this policy unintentionally subverts the protections New York has provided for applicants with criminal records. Today I would like to highlight the following concerns:

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[1] These comments were prepared and written by Annie Gaurau, Employment Law Intern at Brooklyn Defender Services.

[2] New York City has adopted the view that "job seekers must be judged on their merits before their mistakes." *See NYC Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act, Local Law No. 63*, (May 24, 2019), *available at* https://www1.nyc.gov/assets/cchr/downloads/pdf/FCA-InterpretiveGuide-052419.pdf.

Penalizing applicants for failing to disclose convictions will have a disproportionately harmful effect on people of color and people who come from low-income communities.

Any policy that affects people with a conviction history will inevitably have a disproportionate impact on Black and brown people. These populations are targeted by racially biased policing practices, and thus have far higher rates of arrests and incarceration than white people in New York City.[3]

These populations also have far higher rates of poverty, and requiring job applicants to know the contents of their RAP sheets is markedly unfair to people in poverty seeking employment. It costs $62 to obtain a copy of a Division of Criminal Justice Services (DCJS) RAP sheet and $18 to obtain a copy of an FBI RAP sheet. This is a high and unnecessary cost for an applicant to undertake when the DCA will also be obtaining its own copy of the applicant's background checks.

Even applicants who can afford to obtain their RAP sheets may not recognize the need for them or understand their contents. To understand one's own conviction history, an applicant must submit fingerprints, wait four weeks for them to be processed, and then interpret a document filled with legal jargon, confusing formatting, and, in many cases, errors. This is why BDS has a policy of reviewing RAP sheets with people we represent to explain their contents and check for errors. Our staff finds that clients often forget about old convictions, think they had additional convictions, or do not realize that certain convictions have been sealed.

By requiring applicants to undergo this costly and complicated process prior to applying for a license, the DCA may be limiting the employment opportunities afforded to people with conviction histories. And because the criminal system disproportionately targets people of color and people from low-income communities, this pre-background check disclosure policy makes obtaining work more difficult for a population that already faces severe discrimination when seeking employment.[4]

Penalizing applicants for failing to disclose their criminal histories has a disproportionately harmful impact on people who have suffered from substance use disorder or mental illness.

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[3] In 2018, 57% of those targeted by NYPD's "stop and frisk" policy were black, 31% were Latino, and 10% were white, despite the fact that these groups constitute 25%, 28% and 45% of the New York City population, respectively. See James O'Neill, Police Commissioner, Crime and Enforcement Activity in New York City (Jan 1 – Dec. 31, 2018), available at https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/year-end-2018-enforcement-report.pdf.

[4] The rate of black unemployment in America was nearly double the rate of white unemployment in June 2019. See Data obtained through the United States Department of Labor, available at https://www.bls.gov/home.htm.. Additionally, a study found that resumes with "white-sounding" names received 50 percent more callbacks than identical resumes with "black-sounding" names, indicating considerable racial discrimination in the American labor market. See Marianne Bertrand and Sendhil Mullainathan, Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, The American Economic Review 94(4), 991-1013 (2004), available at https://www.nber.org/papers/w9873.

The experience of Ms. S, a former BDS client, illustrates the unintended consequences of not accounting for applicants' lack of intent when failing to disclose criminal histories. Ms. S suffered from an addiction to crack cocaine that began long ago when she was a teenager. To support her addiction, she engaged in prostitution. She was frequently arrested and charged with crimes. Some of these charges were dismissed, some resulted in convictions for non-criminal violations that were later sealed, and several resulted in convictions that remain on her RAP sheet today.

In 2018, decades after her last conviction, Ms. S applied for a job. She was forthcoming about her history, disclosing that she had a criminal record and reporting that she could not remember the details of her convictions. Ms. S did not intend to deceive anyone, and she assumed that she would have an opportunity to explain the charges when her potential employer reviewed her RAP sheet.

Unfortunately, this employer had a policy of withdrawing offers of employment based on an applicant's "failure to disclose prior convictions." Ms. S was never permitted to explain why she could not remember her convictions, nor share the incredible progress she has made since her recovery. Despite years of model citizenship, she was denied the protections afforded her by Article 23-A.[5]

In New York, 80 percent of the people incarcerated in state prisons are in need of alcoholism or substance abuse treatment.[6]

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[5] Article 23-A requires the following factors to be considered when withdrawing offers of employment:

> 1. That New York public policy encourages the licensure and employment of people with criminal records;
>
> 2. The specific duties and responsibilities of the prospective job;
>
> 3. The bearing, if any, of the person's conviction history on her or his fitness or ability to perform one or more of the job's duties or responsibilities;
>
> 4. The time that has elapsed since the occurrence of the events that led to the applicant's criminal conviction, not the time since arrest or conviction;
>
> 5. The age of the applicant when the events that led to her or his conviction occurred, not the time since arrest or conviction;
>
> 6.The seriousness of the applicant's conviction history;
>
> 7. Any information produced by the applicant, or produced on the applicant's behalf, regarding her or his rehabilitation or good conduct;
>
> 8. The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public.
>
> 9. Employers must also consider a certificate of relief from disabilities or a certificate of good conduct, which shall create a presumption of rehabilitation regarding the relevant conviction.

[6] 2007 data obtained through the Department of Correctional Services, *available at* http://www.doccs.ny.gov/Research/Reports/2008/Identified_Substance_Abusers_2007.pdf.

Because of the nature of addiction and mental health disorders, and because of a longstanding tendency to punish rather than treat people with these illnesses,[7] people affected by these conditions often have frequent interactions with police and high rates of recidivism after release.[8] Addiction typically lasts years,[9] and these years are characterized by trauma, debilitating confusion, and memory loss.[10]

Based on this information, it is easy to see how, upon recovery, people are unable to recall the details of their conviction histories. Enforcing penalties for applicants who forget or misstate information regarding their criminal records, therefore, harms people who are already among New York's most vulnerable constituents.

Recommendations

The DCA should remove the question regarding an applicant's criminal history from its application form.

The DCA requires applicants to submit to a DCJS background check regardless of whether or not they disclose a criminal conviction on their application. There is, therefore, no practical purpose served by the pre-background check disclosure requirement. In fact, it is only likely to have a negative impact on improving access to employment for individuals with criminal histories.

The question "Has individual ever pled guilty or been convicted of ANY crime or offense?" on the DCA license form unintentionally penalizes applicants who do not pay to obtain a copy of their RAP sheet, do not remember their convictions, or do not understand which interactions with the system they are being asked to disclose.

If the question is removed, the DCA would still have the opportunity to ask the applicant about his or her history and engage in the legally authorized analysis of whether that history should influence hiring decisions. A policy of post-background check questioning would simply remove one barrier to employment without altering the DCA's standards for granting licenses.

Conclusion

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[7] More people with substance use disorders are incarcerated (6 million) than in treatment (2.3 million). *See* Tracie Gardner, T.M., Samuels, P.N., Nikolic, S., Woodworth, A.M., Fleshler, D., *Heatlh and Justice: Bridging the Gap. Lessons from New York State Initiatives to Provide Access to Care After Incarceration*, Legal Action Center (2018), *available at* https://www.lachealthandjustice.org/resources.

[8] More than 25% of people released from prison return within three years for technical violations that include testing positive for drug use. *See* Redonna K. Chandler, Bennett W. Fletcher, and Nora D. Volkow, *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, JAMA, 301.2, 183-190 (2009), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2681083/.

[9] Alcohol addictions last an average of 15 years and opioid addictions last an average of five years. *See* Gene M. Heyman, *Addiction and choice: theory and new data*, Frontiers in Psychiatry (May 6, 2013), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3644798/pdf/fpsyt-04-00031.pdf.

[10] *See* Megan Tipps, Jonathan Raybuck, and Matthew Lattal, *Substance abuse, memory, and post-traumatic stress disorder*, Neurobiology of learning and memory vol. 112, 87-100 (2014), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4051833/.

Thank you for your consideration or our comments. If you have any questions, please feel free to reach out to me at sshimizu@bds.org.

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