

Collateral Consequences in New Mexico: *A First Look*

Introduction

The 48th Legislature of New Mexico provided funding to the New Mexico Sentencing Commission to convene a task force to study the collateral consequences of criminal arrest, conviction and extended periods of incarceration and to make recommendations on how to neutralize or eliminate those consequences to the appropriate legislative interim committees before November 1, 2008. This paper represents the first work of the Commission and the task force.

Collateral consequences are generally regarded as the negative effects on a criminal offender that persist after the completion of a court ordered sentence of imprisonment and/or probation and parole. Common examples include forfeiture of the right to vote, disqualification for occupational opportunities and government funding for housing and education, and registry in an offender database, among others (discussed in greater detail later in this document). The issue of collateral consequences of criminal arrest, conviction, and long periods of incarceration strikes at the heart of a fundamental and ongoing debate regarding the role of criminal law and the criminal justice system.

Concerns over collateral consequences highlight the tension between the desire to punish criminal offenders as well as insure public safety, while not isolating and placing unnecessary barriers on offenders attempting re-entry into civilian life. Striking this balance can be a difficult task for policy makers.

A related issue pertaining to collateral consequences is that of proportionality. Some contend that collateral consequences can be so extensive (either because they are so debilitating or because they last for extended periods of time or both) as to be disproportionate to the crime committed.¹ This concern over the proportionality of the punishment and the crime, along with the concept of notice, comprise essential components of the fundamental fairness doctrine of constitutional thinking

(ibid). Notice is the contention that a defendant entering a plea bargain must fully understand the implications of agreeing to the plea. While articulating to the defendant the basic sentence is relatively easy, understanding the full spectrum of collateral consequences for a given offense is much more challenging. Indeed, it took New Mexico Sentencing Commission (NMSC) research staff, in consultation with NMSC legal staff, numerous hours to create a partial listing of the collateral consequences of conviction in New Mexico at the state level.

Understanding, objectively defining, and quantifying the collateral consequences of criminal arrest, conviction, and extended periods of incarceration is a difficult task. While much information concerning the collateral consequences of conviction can be obtained from state, county, and city laws and ordinances, this is not as simple for arrest and incarceration. Furthermore, there are certain immeasurable collateral consequences such as the stigmatization that accompanies an arrest even when there is no conviction, or deficient social skills after long periods of incarceration, to name a few. This report foregoes extensive discussion of these more intangible collateral consequences, yet recognizes the need for their acknowledgement.

State Level Consequences in New Mexico

This document presents preliminary research conducted by NMSC staff regarding the collateral consequences of criminal conviction. The bulk of the document is three tables providing information on collateral consequences relating to (1) general civil disabilities, (2) occupational and enterprise disabilities, and (3) the effects that previous convictions have on a defendant regarding subsequent prosecutions and convictions. While every effort was made to insure this list is as comprehensive as possible, NMSC staff recognizes that additional collateral consequences of criminal arrest, conviction, and extended periods of incarceration exist. Indeed, the following tables are predominantly occupied with statutorily mandated collateral consequences of conviction. Additional areas could be reviewed if time and funding are available. Those areas include: the

¹ Periman, D. , (2007). *The Hidden Impact of a Criminal Conviction: A Brief Overview of Collateral Consequences in Alaska*. Justice Center: University of Alaska Anchorage. Anchorage, AK.

Federal Code, immigration, college applications, student loan process, parental rights, city ordinances, housing, and Medicare. Future investigation may also include a review of the policies of all New Mexico State government agencies.

General Civil Disabilities

The table below collects those provisions of New Mexico law that automatically affect or have the potential to affect adversely an offender’s ability to enjoy the ordinary benefits of American citizenship or residency. It includes both those adverse consequences triggered by any conviction, and those associated only with particular crimes.

Relating to...	Collateral Consequence	Statute
Voting	A felony conviction will result in the cancellation of voting rights until all conditions of sentencing have been completed.	§ 1-4-24 and § 1-4-27.1
Jury Service	A felony conviction will result in the disqualification for serving on a jury until all conditions of sentencing have been completed.	§ 38-5-1
Inclusion of record in state central repository of criminal justice information / disclosure to third parties	There is a central repository of criminal record information. This information is available primarily for Criminal Justice Agencies, but can be accessed by the general public under certain circumstances.	See the Consolidated Offender Query from the New Mexico Sentencing Commission.
Inclusion of information in court system online public records	Basic information related to a conviction is available to the general public through the New Mexico Court System’s online public records system	See Case Lookup, www.nmcourts.com
Loss of parental rights	When the child has been neglected or abused as defined in the Abuse and Neglect Act [32A-4-1 NMSA 1978] and the court finds that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future despite reasonable efforts by the department or other appropriate agency to assist the parent in adjusting the conditions that render the parent unable to properly care for the child. The court may find in some cases that efforts by the department or another agency are unnecessary, when: (a) there is a clear showing that the efforts would be futile; or (b) the parent has subjected the child to aggravated circumstances.	§ 32A-4-28
Ability to adopt a child or serve as guardian	The ability to adopt in New Mexico is partially based upon a criminal records check. A felony conviction may not necessarily limit the ability to adopt, but it will certainly make it harder.	§ 32A-5-11 and § 32A-5-14

Relating to...	Collateral Consequence	Statute
New Mexico Works Act	A person who is a fleeing felon or a probation and parole violator is ineligible to be a member of a benefit group.	§ 27-2B-11
Suspension / denial of admission to public school	Children, Youth, and Families Department (CYFD) and the Public Education Department are working on an agreement to make sure that dangerous students (e.g. those convicted for a violent felony or sexual offense) are suspended or denied admission to public school because the child's attendance will disrupt other students learning opportunities.	
Service in public office	No person convicted of a felonious or infamous crime, unless such person has been pardoned or restored to political rights, shall be qualified to be elected or appointed to any public office in the state of New Mexico.	§ 10-1-2
Inclusion in DNA registration system	All felony offenders will provide a DNA sample before the release from incarceration or before the end of probation or any other type of supervised release.	§ 29-16-6
Sport hunting / fishing license revocation	If a person persistently, flagrantly or knowingly violates or countenances the violation of any of the provisions of Chapter 17 NMSA 1978 or of any regulations referred to in Section 17-2-10 NMSA 1978.	§ 17-3-34
Sex Offences registration	A convicted sex offender must register with the county sheriff within ten days of being released from incarceration or moving into the county.	§ 29-11A-4
Eligibility to carry concealed handgun	A person is not qualified to apply for a concealed handgun permit if: they are a fugitive from justice, have been convicted of a felony anywhere in the United States jurisdiction, is currently under indictment for a felony criminal offense in the jurisdiction of the United States.	§ 29-19-4
Loss of driving privileges	A person's driving privilege or driver's license will be revoked for the conviction of crimes involving a motor vehicle including, but not limited to manslaughter, any felony, and perjury to the Motor Vehicle Division.	§ 66-5-29; § 66-5-49; § 66-5-25; § 66-5-26; § 66-5-27; § 66-5-27.1

Relating to...	Collateral Consequence	Statute
Past convictions as evidence to prove similar conduct in later proceeding		Rules of Evidence; Court Rule / Not a Statute.
Vulnerability to impeachment of testimony in subsequent trial		Rules of Evidence; Court Rule / Not a Statute.
Prior convictions as bar to denial of essential facts in later civil proceeding		Rules of Evidence; Court Rule / Not a Statute.
Water Quality Permits	A person convicted of a felony or other crime involving moral turpitude within the last 10 years may not receive a certification of a federal water quality permit, or receive a permit for the discharge of any water contaminant, or for the disposal or reuse of sewage or sludge.	§ 74-6-5
Solid Waste Facility Permit	A person convicted of a felony or other crime involving moral turpitude within ten years immediately preceding the date of the submission of the permit application may be denied a permit by the director.	§ 74-9-24

Occupational/Enterprise Disabilities

The Criminal Offender Employment Act (COEA) supersedes most laws regarding employment eligibility as it pertains to past criminal behavior. Variation exists regarding when the COEA (§ 28-2-1 to § 28-2-6) takes effect. For many occupations, COEA superseded existing statutes as of July 1, 2006. For others, this will not occur until July 1, 2010, 2012, 2014, or 2016.

The COEA has or will have jurisdiction over “any board or other agency having jurisdiction over employment by the state or any of its political subdivisions or the practice of any trade, business or profession...” (§ 28-2-4). Furthermore, the statute states that any such board or agency “may refuse to grant or renew or may suspend or revoke any public employment or license or other authority to engage in the public employment, trade, business or profession” (§ 28-2-4) “where the applicant, employee or licensee has been convicted of a felony or a misdemeanor involving moral turpitude and the criminal conviction directly relates to the particular employment, trade, business or profession.” (§ 28-2-4.1). Additionally, conviction of a felony even if it does not directly relate to the “particular employment, trade, business or profession” (§ 28-2-4.2) is also grounds for ineligibility. A complete copy of the COEA is included at the end of this paper.

Throughout the next table, it is noted if COEA has already superseded previous statutory provisions and when it will in cases in which it has not yet superseded the existing statute. If COEA has not yet taken effect, the current statutes are summarized and noted.

Relating to...	Collateral Consequence	Statute
Small Business loans	Applicants for licenses to be a small business lender must demonstrate "general fitness and character...to warrant the belief the business will continue to be operated lawfully and efficiently"	§ 58-15-5
State employees generally	No person convicted of a felonious or infamous crime, unless such person has been pardoned or restored to political rights, shall be qualified to be elected or appointed to any public office in the state of New Mexico.	§ 10-1-2
Accountants	CPAs cannot be a felon	"1999 Public Accountability Act" § 61-28B-7 § 61-28B-8 <i>These statutes are to be superseded by the Criminal Offender Employment Act (§ 28-2-1 to § 28-2-6) as of July 1, 2012.</i>
Acupuncturists	See note on COEA above	COEA currently in effect § 28-2-1 to § 28-2-6
Alcohol control board licensees	Felons cannot hold a license to distribute alcohol. The spouses of felons cannot hold a license unless they demonstrate that the convicted spouse will not have any involvement in the operation of the license	§ 60-6B-1
Architects	Conviction of a felony is grounds refusal of access to the board's examination, refusal to issue a certificate, or grounds for revocation of a license.	§ 61-15-11 <i>This will be repealed effective July 1, 2012 and replaced by the COEA (§ 28-2-1 to § 28-2-6)</i>
Engineers	See note on COEA above	§ 61-23-4 <i>This statute states that the COEA (§ 28-2-1 to § 28-2-6) shall govern consideration of criminal records in granting of a license.</i>
Landscape architects	See note on COEA above	§ 61-24B-13 <i>This statute states that the COEA (§ 28-2-1 to § 28-2-6) shall govern consideration of criminal records in granting of a license</i>

Relating to...	Collateral Consequence	Statute
Athletic Trainers	See note on COEA above	COEA currently in effect § 28-2-1 to § 28-2-6.
Attorneys	See note on COEA above	COEA currently in effect § 28-2-1 to § 28-2-6.
Audiologists, speech pathologists	See note on COEA above	COEA currently in effect § 28-2-1 to § 28-2-6.
Land Surveyors	See note on COEA above	§61-23-4 <i>This statute states that the COEA (§ 28-2-1 to § 28-2-6) shall govern consideration of criminal records in granting of a license.</i>
Caregiver (defined in 29-17-4 as a person who provides direct care for or has routine unsupervised physical or financial access to the recipient of care)	Eight felony convictions prevent somebody from becoming a caregiver: 1.) Homicide 2.) Trafficking controlled substance 3.) Kidnapping, false imprisonment, aggravated assault or aggravated battery 4.) Rape, criminal sexual penetration, criminal sexual contact, incest, indecent exposure or other related sexual offenses 5.) Crimes involving adult abuse, neglect or financial exploitation 6.) Crimes involving child abuse or neglect 7.) Robbery, larceny, burglary, fraud, extortion, forgery, embezzlement, credit card fraud or receiving stolen property 8.) An attempt, solicitation or conspiracy involving felonies mentioned above	§ 29-17-5.D <i>Also, Health Department rules for considering employment must be taken into account the COEA (§ 28-2-1 to § 28-2-6).</i>
Chiropractor	See note on COEA Felony conviction is grounds for refusal, suspension or revocation of license	§ 61-4-10-11 <i>States that COEA (§ 28-2-1 to § 28-2-6) shall apply with regard to criminal offender's character evaluation as of July 1, 2010.</i>
Collection Agents	One qualification to hold the license of a manager of a collection agency is to not have been "convicted of a felony or crime involving moral turpitude." Additionally, application for license of manager can be denied if "a partner, officer, director, trustee, stockholder or employee of the applicant has been convicted of a felony or any crime involving moral turpitude."	§ 61-18A-11 § 61-18-13

Relating to...	Collateral Consequence	Statute
Professional mental health counselor, professional clinical mental health counselor, marriage and family therapist, associate marriage and family therapist or counselor, professional art therapist, substance abuse associate, alcohol and drug abuse counselor	Being convicted of a felony or misdemeanor involving moral turpitude is grounds for denial, suspension, or revocation of any of these licenses.	§ 61-9A-26 <i>To be superseded by COEA as of July 1, 2016</i>
Dental hygienist, Dentist	Conviction of any crime punishable by incarceration in a federal prison or state penitentiary is grounds for denial, revocation, suspension, stipulation or other limitation of licensure to be a dental hygienist.	§ 61-5A-21 <i>To be superseded by COEA as of July 1, 2010</i>
Nutritionists and Dietitians	Conviction of a crime other than a misdemeanor is grounds for denial, suspension, and/or revocation of a license	§ 61-7A-14 <i>To be superseded by COEA as of July 1, 2016</i>
Optometry License	Felony conviction is grounds for refusal, suspension, or revocation of licensure.	§ 61-2-12 <i>To be superseded by COEA as of July 1, 2010.</i>
Nursing license	See note on COEA	COEA currently in effect § 28-2-1 to § 28-2-6.
Medical and Surgical License	Conviction of an offense punishable by incarceration in a state penitentiary or federal prison or conviction of a misdemeanor associated with the practice of the licensee is grounds for refusal, revocation, or suspension of license.	§ 61-6-15 <i>To be superseded by COEA as of July 1, 2010.</i>
Podiatry License	Conviction of a crime involving moral turpitude is grounds for suspension, revocation, or refusal of licensure.	§ 61-8-11 <i>To be superseded by COEA as of July 1, 2010.</i>
Psychology License	See not on COEA	COEA currently in effect § 28-2-1 to § 28-2-6
Osteopathic Medicine and Surgery License	Conviction of a felony is grounds for refusal or revocation of licensure.	§ 61-10-15 <i>To be superseded by COEA (§ 28-2-1 to § 28-2-6) as of July 1, 2010</i>
Pharmacy	See note on COEA	§ 28-2-1 to § 28-2-6
Occupational Therapist	See note on COEA	§ 28-2-1 to § 28-2-6

Relating to...	Collateral Consequence	Statute
Respiratory Care License	Conviction of a felony or of a crime that "substantially relates to the qualifications, functions or duties of a respiratory care practitioner" is grounds for denial, suspension, and/or revocation of licensure.	§ 61-12B-12 <i>To be superseded by COEA as of July 1, 2016.</i>
Massage Therapy Licensure	See note on COEA	COEA currently in effect § 28-2-1 to § 28-2-6
Nursing Home Administrators	See note on COEA	COEA currently in effect § 28-2-1 to § 28-2-6
Veterinary License	Conviction of a felony or other crime involving moral turpitude is grounds for denial, suspension or revocation of licensure.	§ 61-14-13 <i>To be superseded by COEA as of July 1, 2012</i>
Lobbyists	Violation of the Lobbyist Regulation Act (2-11-1 to 2-11-9) is grounds for revocation as a registered lobbyist or grounds for enjoinder of lobbying activities for up to three years	§ 2-11-9
Mayor and other elective officers of municipalities	Malfeasance is grounds for removal from office	§ 3-10-7
Morticians	See note on COEA	COEA currently in effect § 28-2-1 to § 28-2-6
Notaries public	The governor may revoke the commission of any notary public that pleads guilty or nolo contendere to a felony or is convicted of a felony or misdemeanor arising out of a notarial act. Additionally malfeasance is grounds for revocation of commission.	§ 14-12A-26
Physical therapists	See note on COEA	COEA currently in effect § 28-2-1 to § 28-2-6
Police	Conviction, guilty plea, or no contest plea of a felony or violation of federal or state law or a local ordinance relating to aggravated assault, theft, driving while under the influence of alcohol or drugs, or any law or ordinance involving moral turpitude is grounds for refusal, suspension, or revocation of certification	§ 29-7-13

Relating to...	Collateral Consequence	Statute
Real estate appraisers	Conviction of a crime "that is substantially related to the qualification, function and duties of the person developing real estate appraisals and communicating real estate appraisals to others"	§ 61-30-15 <i>To be superseded by COEA (§ 28-2-1 to § 28-2-6) July 1, 2012</i>
Real estate brokers, associate brokers, salesperson	Conviction of a felony or any offense involving moral turpitude is grounds for refusal, suspension or revocation of a real estate broker or salesmen license.	§ 61-29-12 <i>To be superseded by COEA July 1, 2012</i>
Securities broker-dealers, sales representatives, investment advisors, and investment adviser representatives	Grounds for denial, revocation, and suspension the license of any that has conviction of, guilty plea to, or nolo contendere plea to a felony or misdemeanor within the last six years which the director of the securities division of the regulation and licensing department finds to 1.) Involves the purchase or sale of a security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, robbery, fraud or conspiracy to commit any of the foregoing offenses 2.) Arises out of the conduct of business as a broker-dealer, sales representative, investment adviser, investment adviser representative, depository institution, insurance company or fiduciary; or 3.) Involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion or misappropriation of funds, property or securities or conspiracy to commit any of the foregoing offenses	§ 58-13B-16
Security guards; Private investigators	Conviction of a felony, an offense involving dishonesty or an offense involving an intentional violent act or the illegal use or possession of a deadly weapon is grounds for refusal of licensure	§ 61-27B-6 <i>To be superseded by COEA (§ 28-2-1 to § 28-2-6) July 1, 2012</i>
Social workers	Conviction of a felony is grounds for denial, suspension, or revocation of licensure.	§ 61-31-16 <i>To be replaced by COEA (§ 28-2-1 to § 28-2-6) July 1, 2016</i>
Teachers and school personnel	Moral turpitude "or any other good and just cause" are grounds for denial, suspension or revocation of licensure.	§ 22-10A-31
County, precinct, district, city, town, or village officer elected by the people	Conviction of a felony or misdemeanor involving moral turpitude is grounds for removal from office	§ 10-4-2

Relating to...	Collateral Consequence	Statute
New Mexico Lottery	No person who has been convicted of a felony or a gambling-related offense under federal law or the law of any state may be a board member, chief executive officer, officer or employee of the authority, lottery vendor or lottery retailer.	§ 6-24-18
CYFD Correctional Officer	"be of good moral character and not have been convicted of a felony offense by a court of this state, any other state or the United States. . ."	§ 9-2A-18
Mounted Patrol	The New Mexico mounted patrol shall perform a criminal history screening on all applicants for mounted patrol. If an applicant has a criminal record, his application for a commission in the mounted patrol may be denied. If an applicant has a felony conviction or a conviction for a misdemeanor involving moral turpitude, his application for a commission in the mounted patrol shall be denied.	§ 29-6-4.2
Bail Bondsman	". . .not have been convicted of a felony, with the exception of a conditional discharge of a felony conviction, or anyone properly licensed as of January 1, 2005. . ."	§ 59A-51-4

Effects on Subsequent Prosecutions/ Sentencings

Relating to...	Collateral Consequence	Statute
Habitual offenders	<p>Any noncapital felony conviction of somebody who has one prior felony conviction shall have their basic sentence increased by one year.</p> <p>If the person has two prior felony convictions, the basic sentence is increased by four years.</p> <p>If the person has three or more prior felony convictions, the basic sentence is increased by eight years.</p> <p>The "instant" (i.e. current) conviction for a felony must occur within ten years of completion of the sentence for the prior felony conviction to apply. Also, the prior convictions must be from separate transactions.</p>	§ 31-18-17

Relating to...	Collateral Consequence	Statute
Life Imprisonment for three violent offenses	Three violent felony convictions in which each conviction is part of a different transaction or occurrence and the third or final conviction occurred in New Mexico results in life imprisonment in addition to the sentence imposed for the third conviction.	§ 31-18-23
Life imprisonment for two violent sexual offenses	Two violent sexual offense convictions in which each conviction is part of a different transaction or occurrence and at least the second conviction occurred in New Mexico results in life imprisonment in addition to the sentence imposed for the third conviction.	§ 31-18-25
Sealing of Juvenile Records	Upon motion the court order sealing of all records and files if the court finds that, the person has not, within the two years immediately prior to filing the motion, been convicted of a felony or of a misdemeanor involving moral turpitude or been found delinquent by a court and no proceeding is pending seeking such a conviction or finding.	§ 32A-2-26
Pre-Prosecution Diversion Program	To be eligible for the pre-prosecution program, the defendant must have no prior felony convictions for a violent crime and no prior felony convictions for any crime for the previous ten years.	§ 31-16A-4

Summary

We found 71 instances of collateral consequences in New Mexico state statutes. We found 19 instances of general civil consequences in the statutes or court rule. In addition to general civil consequences, we found 47 statutes effecting specific occupations. Sixty-four percent (30) of the 47 occupations, are currently or will be controlled by the COEA, 14 occupations are currently subject to the COEA, and 16 will be controlled by the COEA by the year 2016. Additionally, we found 5 statutes which effect subsequent prosecutions or sentencing actions.

As stated in the introduction, this is a partial listing of state statutes containing some degree of extended effects on a criminal offender continuing beyond the completion of a court ordered sentence of imprisonment or probation and parole. This paper represents a beginning point for a larger discussion of the collateral consequences of the law.

ARTICLE 2

Criminal Offender Employment Act

- | | |
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| Sec.
28-2-1. Short title.
28-2-2. Purpose of act.
28-2-3. Employment eligibility determination.
28-2-4. Power to refuse, renew, suspend or revoke public employment or license. | Sec.
28-2-5. Nonapplicability to law enforcement agencies.
28-2-6. Applicability. |
|---|---|

28-2-1. Short title.

Sections 1 through 6 [28-2-1 to 28-2-6 NMSA 1978] of this act may be cited as the "Criminal Offender Employment Act".

History: 1953 Comp., § 41-24-1, enacted by Laws 1974, ch. 78, § 1.

Content of notice of contemplated action. — The "evidence" to be set out in the notice of contemplated action under this statute is the evidence of the ground or grounds to be relied upon in taking the contemplated action under former 61-5-14 NMSA 1978, not the evidence to the adduced by way

of explanation and determination of rehabilitation under Criminal Offender Employment Act. *Weiss v. New Mexico Bd. of Dentistry*, 110 N.M. 574, 798 P.2d 175 (1990).

Law reviews. — For note, "Negligent Hiring and Retention — Availability of Action Limited By Foreseeability Requirement," see 10 N.M.L. Rev. 491 (1980).

28-2-2. Purpose of act.

The legislature finds that the public is best protected when criminal offenders or ex-convicts are given the opportunity to secure employment or to engage in a lawful trade,

occupation or profession and that barriers to such employment should be removed to make rehabilitation feasible.

History: 1953 Comp., § 41-24-2, enacted by Laws 1974, ch. 78, § 2.

Law reviews. — For note, "Negligent Hiring and Retention — Availability of Action Limited By Fore-

seeability Requirement," see 10 N.M.L. Rev. 491 (1980).

28-2-3. Employment eligibility determination.

A. Subject to the provisions of Subsection B of this section and Sections 3 and 4 [Sections 4 and 5 (28-2-4 and 28-2-5 NMSA 1978)] of the Criminal Offender Employment Act, in determining eligibility for employment with the state or any of its political subdivisions or for a license, permit, certificate or other authority to engage in any regulated trade, business or profession, the board or other department or agency having jurisdiction may take into consideration the conviction, but such conviction shall not operate as an automatic bar to obtaining public employment or license or other authority to practice the trade, business or profession.

B. The following criminal records shall not be used, distributed or disseminated in connection with an application for any public employment, license or other authority:

- (1) records of arrest not followed by a valid conviction; and
- (2) misdemeanor convictions not involving moral turpitude.

History: 1953 Comp., § 41-24-3, enacted by Laws 1974, ch. 78, § 3.

Cross references. — For persons convicted of felonious or infamous crime ineligible for public office unless pardoned or restored to political rights, see 10-1-2 NMSA 1978.

Bracketed material. — The apparent reference in Subsection A is to Laws 1974, ch. 78, §§ 4 and 5, as indicated by the brackets in Subsection A. The bracketed material was inserted by the compiler; it was not enacted by the legislature and is not a part of the law.

State board of education subject to article. — The state board of education is subject to the provi-

sions of Criminal Offender Employment Act (COEA), because it is an agency which determines eligibility for employment with the state. *Bertrand v. New Mexico State Bd. of Educ.*, 88 N.M. 611, 544 P.2d 1176 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

Testimony concerning indictment. — Because an agency has wide discretion in receiving and excluding evidence in proceedings under the Uniform Licensing Act, any error in allowing reference to an indictment against a dentist was harmless. *Weiss v. New Mexico Bd. of Dentistry*, 110 N.M. 574, 798 P.2d 175 (1990).

28-2-4. Power to refuse, renew, suspend or revoke public employment or license.

A. Any board or other agency having jurisdiction over employment by the state or any of its political subdivisions or the practice of any trade, business or profession may refuse to grant or renew or may suspend or revoke any public employment or license or other authority to engage in the public employment, trade, business or profession for any one or any combination of the following causes:

(1) where the applicant, employee or licensee has been convicted of a felony or a misdemeanor involving moral turpitude and the criminal conviction directly relates to the particular employment, trade, business or profession;

(2) where the applicant, employee or licensee has been convicted of a felony or a misdemeanor involving moral turpitude and the criminal conviction does not directly relate to the particular employment, trade, business or profession, if the board or other agency determines after investigation that the person so convicted has not been sufficiently rehabilitated to warrant the public trust; or

(3) where the applicant, employee or licensee has been convicted of trafficking in controlled substances, criminal sexual penetration or related sexual offenses or child abuse and the applicant, employee or licensee has applied for reinstatement or issuance of a teaching certificate, a license to operate a child-care facility or employment at a child-care facility, regardless of rehabilitation.

B. The board or other agency shall explicitly state in writing the reasons for a decision which prohibits the person from engaging in the employment, trade, business or profession if the decision is based in whole or in part on conviction of any crime described in Paragraphs (1) and (3) of Subsection A of this section. Completion of probation or parole supervision or expiration of a period of three years after final discharge or release from any term of imprisonment without any subsequent conviction shall create a presumption of sufficient rehabilitation for purposes of Paragraph (2) of Subsection A of this section.

History: 1953 Comp., § 41-24-4, enacted by Laws 1974, ch. 78, § 4; 1985, ch. 234, § 1; 1997, ch. 238, § 5; 1997, ch. 251, § 1.

1997 amendments. — Laws 1997, ch. 238, § 5, amending this section effective June 20, 1997 by, in Paragraph A(3), inserting "homicide, kidnapping" following "convicted of" near the beginning and "renewal" following "reinstatement" near the end, was approved April 11, 1997. However, Laws 1997, ch. 251, § 1, amending this section effective July 1, 1997 by inserting "or employee" in two places and "a license to operate a child-care facility or employment at a child-care facility" in Paragraph A(3), but not giving effect to the changes made by the first 1997 amendment, was also approved April 11, 1997. This section is set out as amended by Laws 1997, ch. 251, § 1. See 12-1-8 NMSA 1978.

The purpose of a license revocation proceeding is not to punish the licensee but to protect the public from practitioners who do not possess the necessary qualifications. *Varoz v. New Mexico Bd. of Podiatry*, 104 N.M. 454, 722 P.2d 1176 (1986).

Jury determination of guilt relevant concern. — For purposes of this article, a jury determination of a teacher's guilt of sexual misconduct with a minor acted as a conviction, despite subsequent dismissal of the case after the teacher completed his deferred sentence. *Garcia v. State Bd. of Educ.*, 102 N.M. 306, 694 P.2d 1371 (Ct. App. 1984).

Decertified teacher has burden of proving rehabilitation. — A teacher who was found guilty of sexual misconduct with a minor was convicted of a crime directly relating to the teaching profession and, therefore, had the burden of showing, upon application for recertification, that he had been sufficiently rehabilitated. *Garcia v. State Bd. of Educ.*, 102 N.M. 306, 694 P.2d 1371 (Ct. App. 1984).

Revocation of dental license. — Where a dentist was convicted of four counts of making or permitting a false claim for reimbursement for public assistance services, a conviction itself, as distinguished from the underlying conduct, is a sufficient basis for revoking a dental license. *Weiss v. New Mexico Bd. of Dentistry*, 110 N.M. 574, 798 P.2d 175 (1990).

Meaning of rehabilitation. — While "rehabilitation" is not defined in this section (although the statute does create a presumption of rehabilitation after completion of parole, or after a certain period has elapsed after release from prison) its dictionary definition is to restore a condition of good health, ability to work or the like. *Bertrand v. New Mexico State Bd. of Educ.*, 88 N.M. 611, 544 P.2d 1176 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

Board must state reasons why applicant has not been rehabilitated and may not rely solely on the fact of conviction to deny an application. *Garcia v. State Bd. of Educ.*, 102 N.M. 306, 694 P.2d 1371 (Ct. App. 1984).

Distinction in treatment of crimes relates to burden of proof. — The distinction in treatment, under this section, between crimes that directly relate to a profession and crimes that do not directly relate to a profession concerns the burden of proof: under Subsection A(1), an applicant for issuance or reinstatement of a license or certificate has the burden of proving that he or she has been sufficiently rehabilitated, while, under Subsection A(2), there is a presumption of rehabilitation and the board or agency has the burden of proving an applicant for issuance or reinstatement of a license or certificate has not been sufficiently rehabilitated. *New Mexico Bd. of Pharmacy v. Reece*, 100 N.M. 339, 670 P.2d 950 (1983).

Where court accepted board rehabilitation decision. — Probative evidence of rehabilitation of a teacher who was on one year's probation for one count of distribution of marijuana included her conscientious and successful performance at her job and the parents' perception of her as a person with whom they would trust their children; but evidence that she had become angry when her probation officer would not let her see her file, made a derogatory comment about the laws and "narcs," told a student who asked her about drugs that he could get in some trouble because of some bad laws, but for him to do what he wanted, was probative of what the board could conclude was a poor attitude towards criminal offenses for one who was a teacher, and since the state board members spoke to her at some length themselves and were able to draw their own impressions of her progress towards rehabilitation, the appellate court would not substitute its judgment for that of the board. *Bertrand v. New Mexico State Bd. of Educ.*, 88 N.M. 611, 544 P.2d 1176 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

Standard for use of conviction to revoke license. — In order for a conviction to be used as a basis for a license revocation, the licensing agency must explicitly state its reasons for a decision prohibiting the licensee from engaging in his or her employment or profession, and the agency must find that the licensee has not been sufficiently rehabilitated to warrant the public trust and must give reasons for this finding. *Weiss v. New Mexico Bd. of Dentistry*, 110 N.M. 574, 798 P.2d 175 (1990).

Writing requirement explained. — When a decision is made on grounds that a criminal conviction directly relates to a person's profession, the reasons for such a decision must be explicitly stated in writing. It is not sufficient to merely recite the language of the statute, but rather the "reasons" for the conclusion that there is a direct relation must be given, especially so that a reviewing body may know the reasons for the administrative body's conclusion; and if the conviction of a crime is to operate as other than an automatic bar to employment, the administrative agencies must explain what they perceive the detrimental effect of employment to be. *Bertrand v.*

New Mexico State Bd. of Educ., 88 N.M. 611, 544 P.2d 1176 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

Scope of writing required under Subsection B. — See New Mexico Bd. of Pharmacy v. Reece, 100 N.M. 339, 670 P.2d 950 (1983).

Knowledge of public record not imputed to estop dismissal. — Where the local school board did not have knowledge of a teacher's conviction until approached by her probation officer, although it was a matter of public record, the court of appeals declined to impute this knowledge to the board so as to estop it from dismissing her. *Bertrand v. New Mexico State Bd. of Educ.*, 88 N.M. 611, 544 P.2d 1176 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

Required procedure for denial, suspension, or revocation of real estate license. — In each instance in which the real estate commission contemplates the denial, suspension or revocation of a license because of a criminal conviction, certain steps should be followed: 1) whether the conviction directly relates or does not directly relate to real estate, notice should be given to the licensee that the basis for the action is warranted by the Criminal Offender Employment Act; 2) evidence should be introduced on behalf of the commission supporting whether the

conviction is directly related or not directly related to the business of a real estate broker or salesperson, and whether sufficient rehabilitation has been made, if required by the Criminal Offender Employment Act; 3) findings should be made after the hearing to uphold the decision of the commission under the Criminal Offender Employment Act as well as under the Real Estate Licensing Act. 1982 Op. Att'y Gen. No. 82-2.

Prejudicial error resulted from failure to follow revocation procedures. — Failure of real estate commission to follow the procedures established by this section in its revocation of a real estate license for conviction of conspiracy to import marijuana was prejudicial error. *McCoy v. New Mexico Real Estate Comm'n*, 94 N.M. 602, 614 P.2d 14 (1980).

Law reviews. — For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51 Am. Jur. 2d Licenses and Permits §§ 56, 58, 106, 142; 63A Public Officers and Employees §§ 48 to 50, 184 to 186, 241 to 243, 291.

53 C.J.S. Licenses §§ 39, 52; 67 C.J.S. Officers and Public Employees §§ 22, 101, 110, 125.

28-2-5. Nonapplicability to law enforcement agencies.

The Criminal Offender Employment Act [28-2-1 to 28-2-6 NMSA 1978] is not applicable to any law enforcement agency; however, nothing herein shall be construed to preclude a law enforcement agency in its discretion from adopting the policy set forth herein.

History: 1953 Comp., § 41-24-5, enacted by Laws 1974, ch. 78, § 5.

28-2-6. Applicability.

The provisions of the Criminal Offender Employment Act [28-2-1 to 28-2-6 NMSA 1978] relating to any board or other agency which has jurisdiction over the practice of any trade, business or profession apply to authorities made subject to its coverage by law, or by any such authorities' rules or regulations if permitted by law.

History: 1953 Comp., § 41-24-6, enacted by Laws 1974, ch. 78, § 6.

Suspension or revocation of real estate license. — The provisions of the Criminal Offender Employment Act must be followed by the real estate

commission in any action by the commission to suspend or revoke a broker's or salesperson's license because of a conviction of a felony or misdemeanor involving moral turpitude. 1982 Op. Att'y Gen. No. 82-2.