Special Provisions for Computerized Criminal History Checks

by Robert P. Joyce

MOST EMPLOYERS do not have the power to request criminal history checks on applicants and employees from the computerized records of the Federal Bureau of Investigation (FBI) and the State Bureau of Investigation (SBI). North Carolina public school systems, along with a small list of other employers,[1] do have that power.

These searches are authorized by two separate provisions in the North Carolina General Statutes (hereinafter G.S.): a 1991 law[2] that is *not* found in Chapter 115C and a 1995 law[3] that *is* found in Chapter 115C. Searches under these statutes are conducted not by employees of the board of education or by private companies contracted with by the board,[4] but by officials of the state and federal departments of justice. The report received as a result of the search is not a public record but a computer printout of criminal history information. Under federal and state law, use and dissemination of that information is limited.

Differences in the Two Statutes

The two state statutes authorizing computerized criminal history checks—the 1991 statute and the 1995 statute—have several differences.

Different Categories of People

The 1991 statute applies to any school board employee or applicant for employment. The 1995 statute does not apply to current employees at all, but only to applicants for employment (and applicants for independent contractor status) in positions that involve "significant access to students." The statute includes within this category "substitute teachers, driving training teachers, bus drivers, clerical staff, and custodians" and applicants for independent contractor status "if the independent contractor carries out duties customarily performed by school personnel." It also includes employees of independent contractors. Does its scope comprise nonclassroom positions such as superintendents, supervisors, and directors, or maintenance workers? There is no statutory, regulatory, or court guidance on this question.

State Versus National Searches

A search conducted under the 1991 statute is limited to North Carolina records maintained by the Division of Criminal Information of the SBI. Those records include only criminal history information generated in North Carolina. A search conducted under the 1995 statute can cover both those North Carolina records and the national database for criminal history information from all states maintained by the National Criminal Information System of the FBI. Therefore, because of the difference between the two statutes, national searches may not be conducted for current employees. State searches under the 1991 statute may be conducted for individuals not covered by the 1995 statute—such as current employees—but national searches are limited to applicants.

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1. Including day care providers, hospitals, home care providers [see N.C. GEN. STAT. § 114-19.3 (hereinafter G.S.)], and others.

2. G.S. 114-19.2.

3. G.S. 115C-332.

4. For a discussion of criminal records checks conducted by employees of the board of education or by private companies hired by the board, see "Credit Reports and Criminal Records Checks," beginning on page 12 of this issue of *School Law Bulletin*.

Fingerprints

A search request under the 1995 statute requires that the person be fingerprinted and that the fingerprint card be submitted with the request, but a request under the 1991 statute does not. If a request under the 1991 statute is not accompanied by fingerprints, the SBI will not guarantee that the report actually concerns the proper individual. The fingerprinting may be done by a properly trained school board employee or at the police or sheriff's department. If the fingerprinting is done by a school board employee, care must be taken to ensure that the person to be fingerprinted presents a picture identification card. A request for a state and national search under the 1995 statute must be accompanied by *two* fingerprint cards, one each for the SBI and the FBI.

Statutory and Regulatory Requirements

There are several significant statutory and regulatory requirements for obtaining computerized criminal history checks.

Consent to Fingerprinting

The 1995 statute specifies that the person to be checked must sign a form consenting both to the check of the computerized criminal history record and to the use of fingerprints and other identifying information by the SBI and the FBI. If the person refuses, the board may decide not to hire him or her. "The local board shall consider refusal to consent," the statute says, "when making employment decisions and decisions with regard to independent contractors."[5] Boards of education may continue to request searches of North Carolina records under the 1991 statute without fingerprinting the individual.

Policy Requirement

The 1995 statute requires each board to adopt a policy. The policy must state "whether and under what circumstances an applicant's computerized criminal history will be checked."[6] The board might decide to check no one, or it might decide to limit checks to finalists—meaning individuals who will be offered the job if the criminal history check reveals no disqualifying information. The statute requires that the board must "apply its policy uniformly."

The requirement that boards adopt policies applies by its own terms only to checks on applicants under the 1995 statute and does not by its own terms apply to checks of others under the 1991 statute. The simplest procedure, however, might be to adopt a policy that covers both statutes and applies to both applicants and employees.

Paying the Costs

The 1995 statute explicitly provides that the board of education may not require an applicant to pay the costs of fingerprinting or the costs of the search itself. The 1991 statute contains no such explicit provisions, but boards should not charge applicants even under that statute. State-only searches cost approximately fifteen dollars and combined state and national searches cost approximately forty dollars.

Limitations on Use of the Information

There are significant statutory and regulatory limitations on the use of computerized criminal history information received by the board.

Designating Officials Who May See Reports

The SBI is very restrictive in its interpretation of who may see the SBI and FBI reports when they are received. So are the rules adopted by the State Board of Education, found in the Administrative Code.[7] Both statutes provide that the reports are furnished to "the local board of education" and direct that certain actions be taken "by the local board of education." No direction is given in the statute as to which categories of individuals may see the reports, but the State Board of Education's rules provide, "Only those officials who have been designated by the local board of education as having a need to know the results of a criminal history check may obtain access to the records."[8] The access agreements under both statutes provide that "under no circumstances" may information from the report "be released to or reviewed by anyone other than the School and its authorized officials."

5. G.S. 115C-332(c).
6. G.S. 115C-332(b).
7. N.C. ADMIN. CODE tit. 16, ch. 6C § .0313.
8. *Id.* § .0313(c).

Requirement That Applicant or Employee Not See Report

The SBI takes the position that the report may not be shown to the individual who is the subject of the report. The form "Authority for Release of Information" that accompanies the access agreement requires the individual to certify that "I further understand that the School cannot release the results of this criminal history record check to me." In fact, the access agreements under both statutes provide that the school system may not "advis[e] anyone of the existence or non-existence of a criminal record," based on the report.

Using the Information in Employment Decisions

The State Board of Education's rules specifically provide that the board of education "shall not make any employment decision based solely upon the criminal history check" but "shall obtain from the repository of the record a certified copy of an applicant's or employee's conviction prior to making a final employment decision based on the conviction."[9]

Standard for Decision

The 1995 statute specifies that the board "shall determine whether the results of the review [of the SBI and FBI reports] indicate that the employee (i) poses a threat to the physical safety of students or personnel, or (ii) has demonstrated that he or she does not have the integrity or honesty to fulfill his or her duties as public school personnel."[10] The statute says that the "local board" makes the determination. Surely that is a delegable duty, not one that must literally be undertaken by the board itself, any more than any other unfavorable employment decision must be.

Written Findings

The 1995 statute says that the board "shall make written findings with regard to how it used the information [from the report] when making employment decisions."[11] This requirement apparently applies whether the decision is favorable or unfavorable to the applicant.

Conditional Employment

A board may employ an applicant conditionally while it waits for the results of the criminal history check. The statute does not further describe the nature of such conditional employment. Board policy should state whether time spent in conditional employment counts toward tenure under the Teacher Tenure Act.

Suppose that a teacher hired conditionally starts working while waiting for the criminal records check to come in. Suppose that when the report finally comes in it shows no problem, but it comes in so late that there are not 120 workdays remaining in the school year. Does the year count for the teacher as one year toward tenure? The Teacher Tenure Act requires that for a year of employment to count for a probationary teacher as a year toward the four required for achieving tenure, the year must include "120 workdays performed as a probationary teacher in a full-time permanent position."[12] So does the time spent in "conditional" employment before the criminal records check came count as time spent in "a full-time permanent position"? There is no statutory provision, no regulatory guideline, and no case law answering this question. In the absence of such guidance, it seems that the board is free to count the days the teacher worked under the conditional arrangement; that is, the condition would be erased when the clear criminal check comes in and the teacher may be counted as having been a regular teacher from day one.

Suppose, on the other hand, that when the check comes in it indicates that immediate dismissal is appropriate. Is the teacher, working as a "conditional" employee, entitled to the protections of the Teacher Tenure Act, or may the board of education dismiss the teacher from employment without compliance with the dismissal procedures of the Teacher Tenure Act? Again there is no statutory, regulatory, or case law guidance on this question, and it appears that, in the absence of such guidance, a school board is free by policy to determine that a conditional teacher is not entitled to the protections of the Teacher Tenure Act. A board might want to consider having in its policy a statement that a teacher (or other certificated person) hired subject to a criminal records check is subject to dismissal without hearing, etc., upon a bad report, because the employment is conditional. It might also want to have such a statement—or a reference to the policy—in the contract that the teacher signs.

9. *Id.* § .0313(b).
10. G.S. 115C-332(d).
11. *Id.*
12. G.S. 115C-325(a)(8).

Obligations after the Employment Decision

The statutes and regulations impose significant obligations on school boards after the employment decision.

Separate Storage of the Reports

The state board rules specify that the school system "shall maintain data from a criminal history check from Department of Justice in paper format only, in a locked, secure place, separate from the individual's application or personnel file."[13] It is not clear whether this provision means that the criminal history information is not part of the personnel file and therefore is not reviewable by the employee, school board members, and others under G.S. 115C-321. Nor is it clear whether this provision means that the criminal history information is not part of the personnel file and therefore is not subject to release to the public under the provisions of G.S. 115C-321. That statute provides that otherwise confidential information in a personnel file may be released upon a finding by the local board of education that release "is essential to maintaining the integrity of the board or to maintaining the level or quality of services provided by the board."

Report to the State Board of Education

The state board rules require that the school board send to the State Board of Education a certified copy of the record of conviction for any applicant or employee (1) who is certified or licensed by the state board and (2) whose SBI or FBI report shows a "criminal history," or that the school board at least send to the state board "information of where to obtain the record of conviction, including the person's name, criminal case number, and the county of conviction."[14]

Liability and Immunity

Special Immunity Provision

The 1995 statute specifically provides that there "shall be no liability for negligence on the part of a local board of education, or its employees, or the State Board of Education, or its employees, arising from any act taken or omission by any of them in carrying out the provisions of this section," except for gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable.[15] This immunity apparently extends to claims made by the individual whose record is checked and who receives an unfavorable employment decision. Does it also extend to claims made by a person who is subsequently injured by a person who is hired but who would not have been hired had the records check not been negligently done? Apparently so. The immunity can be waived by purchase of insurance.

Board Liability

The failure to adopt a policy calling for criminal history checks, or the failure to conduct the criminal history check as required by the adopted policy, may be an element in a claim of negligent hiring. Such a claim against an employer may take the form that the candidate for employment was unfit at the time of hiring and that the employer was negligent in not conducting the check that would uncover that unfitness.

Recent North Carolina cases are noteworthy for rejection of claims of negligent hiring, however.[16] They assert the legal principle that a presumption exists that an employer has used due care in hiring its employees, a presumption that the person bringing the lawsuit must overcome.[17] It is of special significance for school systems that North Carolina courts have consistently held that an employer has no duty to check the criminal history of an employee, even one who will be employed to go into other people's homes where the chance for theft is great.[18] No cases in North Carolina have discussed whether failure of a school system to check the criminal history of employees who will be in close contact with schoolchildren might constitute negligence. ■

13. N.C. ADMIN. CODE tit. 16, ch. 6C § .0313(c).
14. *Id.* § .0313(d).
15. G.S. 115C-332(g).
16. *See* B. B. Walker v. Burns Int'l Sec. Serv., Inc., 108 N.C. App. 562, 424 S.E.2d 172, *disc. review denied*, 333 N.C. 536, 429 S.E.2d 552 (1993) (nothing in security guards' backgrounds that should have put employer on notice they were unfit for the job); Cook v. Morrison, 105 N.C. App. 509, 413 S.E.2d 922 (1992) (injured employee of independent contractor could not get relief from one who negligently hired the independent contractor); Waddle v. Sparks, 331 N.C. 73, 414 S.E.2d 22 (1992) (where employee commits no tort, employer guilty of negligent hiring not liable); Graham v. Hardee's Food Sys., Inc., 121 N.C. App. 382, 465 S.E.2d 558 (1996) (to the same effect as *Waddle*).
17. *See* Stanley v. Brooks, 112 N.C. App. 609, 612, 436 S.E.2d 272, 274 (1993), *disc. review denied*, 335 N.C. 772, 442 S.E.2d 521 (1994); Moricle v. Pilkington, 120 N.C. App. 383, 387, 462 S.E.2d 531, 534 (1996).
18. *Moricle*, 120 N.C. App. 383, 462 S.E.2d 531. *See also Stanley*, 112 N.C. App. 609, 436 S.E.2d 272.

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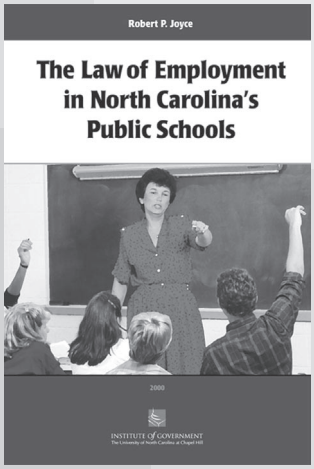

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2000, by Robert P. Joyce

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