

Publishers: Frank Kemerer, Jim Walsh and Eric Schulze
Managing Editor: Eric Schulze
Co-Editors: Laurie Maniotis and Scott Stebler

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FROM CRIMINAL HISTORY BACKGROUND CHECKS TO POST EMPLOYMENT REFERENCES: What Do You Know? What Should You Tell?

By Fred Hartmeister
Associate Professor of Education and Law
Texas Tech University
Lubbock, Texas
and
Nan P. Hundere
Attorney at Law
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
San Antonio, Texas

In today's world of increasing litigation and court battles, administrators too often find themselves caught in complex situations involving school personnel. Two prominent areas of concern correspond closely to the beginning and end of the employment cycle: (1) conducting criminal background checks when new personnel are hired, and (2) determining how much information to provide a new prospective employer about an employee's job performance when the employee leaves the school district. This article focuses on these two separate but related issues. First, the article begins with an overview of the statutory requirements involving criminal history records. This section is followed by a summary of relevant Commissioner's decisions that provide examples of employee criminal misconduct that has resulted in adverse employment action or loss of certification. Next, the article outlines the dilemma administrators face when asked to provide references for departing or former employees. This section concludes with several suggestions for appropriate ways to handle requests for employment information.

Imagine the following headlines in your local newspaper:

- TEACHER CHARGED WITH INDECENT EXPOSURE IN PUBLIC RESTROOM AT LOCAL PARK.
- FELONY CHARGES PENDING AGAINST BOOKKEEPER ACCUSED OF EMBEZZLING SCHOOL FUNDS.
- SEVEN SCHOOL DISTRICT EMPLOYEES RECEIVE FEDERAL INDICTMENTS FOR RACKETEERING.
- SCHOOL BUS DRIVER CONVICTED OF CHILD MOLESTATION.

These stories are a journalist's dream and a school district's nightmare. As the prodding and probing begins, those responsible for checking the criminal histories of employees will come under scorching scrutiny. Whether the employees in question are new hires or past employees, the heat will be on to explain why these people work in the public schools. We will begin

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with a look at the basics under Texas law for the first step in the employment cycle, the criminal history record (CHR) check.

CRIMINAL HISTORY CHECKS AND CERTIFICATION REQUIREMENTS

The Texas Education Code (TEC) sets out clear requirements for local and state educational agencies when an individual applies for or holds a teaching certificate. Under TEC § 22.082, the State Board for Educator Certification (SBEC) must obtain all CHR information from any law enforcement or criminal justice agency relating to applicants for or holders of certificates under Subchapter B, Ch. 21 (e.g., teaching certificates). In an apparent effort to more effectively screen and eliminate those individuals with a criminal past from the professional educator workforce, superintendents now carry the responsibility of providing information to SBEC concerning applicants' or employees' criminal records. TEC § 22.083(c) provides that the superintendent must promptly notify SBEC in writing if the superintendent learns that a certificate holder has a reported criminal history. See also Texas Association of School Boards (TASB) Board Policy DC (Legal). Further, Texas Administrative Code § 249.14(d)(1) requires that such report be made within seven calendar days.

Recent legislative changes in Texas contemplate cooperation between law enforcement agencies and school districts in dealing with information that districts need to determine which candidates may not be qualified for a position due to their criminal histories. Pursuant to TEC § 22.083(a) & (b), a district may have access to all CHR information from any law enforcement or criminal justice agency for:

- a. Those it intends to employ in any capacity;
- b. Anyone who has indicated in writing his or her intention to serve as a volunteer;
- c. Anyone already employed or volunteering their time; or
- d. An employee of or applicant for employment by a person that contracts with the school district, if

that employee or applicant has or will have continuing duties related to the contracted services and those duties are or will be performed on school property or a location where students regularly are present.

Access to Records of Bus Drivers, Monitors, and Aides When the District Contracts for Transportation Services

When a school district specially contracts with a person to provide transportation services for the district, the school district must obtain all CHR information from any law enforcement or criminal justice agency for all persons employed or intended to be employed as bus drivers. The person with whom the district contracts shall provide the district with the name and other identifying information necessary to obtain CHR information on persons who will drive the bus. If the district finds that such person has been convicted of a felony or a misdemeanor involving moral turpitude, the district shall notify the chief personnel officer of the person with whom the district has contracted of such fact. ["Moral turpitude" has been defined as "baseness, vileness or depravity in the private or social duties outside the accepted standards of decency and that shocks the conscience of an ordinary person." See *Christian v. Dallas ISD*, Dkt. No. 192-R2-899 (Comm'r Educ. Sept. 24, 1999). However, school board policy may provide another definition of "moral turpitude" that will be controlling.] The person with whom the district contracted may not employ the offender to drive a bus on which students are transported without permission of the board of trustees of the school district.

A commercial transportation company that contracts with a school district to provide transportation services may obtain from any law enforcement or criminal justice agency all CHR information that relates to a person employed or intended to be employed by the company as a bus driver, bus monitor, or bus aide. If the commercial transportation company finds that such person has been convicted of a felony or a misdemeanor involving moral turpitude, the company may not employ that person to serve as a driver, monitor, or aide on a bus on which students are transported without the permission of the board of trustees. If the commercial transportation company obtains the CHR information, the district is not required to obtain that same information on its own. See also TASB Board Policy DBA (Legal).

Failure to Disclose a Criminal History May Be Grounds for Termination

The Education Code provides that a school district may terminate an employee if the district learns that the employee was convicted of a felony or misdemeanor involving moral turpitude and that the employee failed to disclose such information to SBEC or to the district. TEC § 22.085. Such employee is to be considered "discharged for misconduct" under Labor Code § 207.044, if the employee later seeks unemployment benefits. In order to encourage the reporting of criminal history information, TEC § 22.086 ensures that no civil or criminal liability will exist for making a report under this chapter. As a governmental agency, the district may obtain CHR reports on an individual from the Department of Public Safety two times a year. Gov't Code § 411.097. CHR information obtained by a school district may not be released to any person except to

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Editorial Office P. O. Box 2156 Austin, TX 78768 512-454-6864	Business and Conference Office UNT Box 311335 Denton, TX 76203-1335 940-382-7212 FAX 940-383-3809 E-mail info@legaldigest.com Web Site www.legaldigest.com
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the individual who is the subject of the report, the Texas Education Agency, SBEC, or the chief personnel officer of a transportation company under TEC § 22.084.

Criminal Conduct Through the Eyes of the Commissioner

There are times that an employee has been hired and, for unknown reasons, district personnel were not aware of the individual's criminal history. Similarly, the criminal activity of a current employee may remain unreported to the district by law enforcement authorities or the employee. Criminal conduct, or even charges of criminal activity, can be devastating to the career of a public school employee. From both a legal and ethical standpoint, however, such information must be addressed head on by the employing school district.

The following examples demonstrate how the identification of a criminal history, whether only the arrest or the actual conviction, can result in loss of employment, loss of certification, or both. While procedures exist for school employees later to attempt to regain their certification and eligibility for employment, at least initially many suffer unpleasant consequences for their criminal pasts.

Deferred Adjudication Must Be Reported

A teacher in the Dallas ISD was arrested for felony aggravated assault when he struck and injured his wife with a rubber hose. He admitted his own criminal conduct. He received deferred adjudication and probation but failed to report this felony to the district. A periodic check by the administration showed his criminal record. After a hearing, the teacher was recommended for termination by the Independent Hearing Examiner (IHE) for "good cause."

Local policy permitted termination of the teacher for unlawful acts, acts of moral turpitude, immorality, and acts that could cause the public, students, or employees to lose confidence in the administration and integrity of the district. The IHE found the assault here to be a crime of moral turpitude. As such, district policy required that the arrest and deferred adjudication be reported to the district. The IHE held that a sufficient nexus existed in this case between the teacher's unlawful conduct and the standards of conduct expected in the teaching profession. The Commissioner upheld the termination. *Moten v. Dallas ISD*, Dkt. No. 131-R2-399 (Comm'r Educ. May 13, 1999).

In another 1999 Dallas ISD case, a teacher who had worked in the district since 1990-91 was arrested for exposing his genitals and masturbating in a public restroom. The teacher pled "guilty; no contest" to a charge of indecent exposure. He was given twelve months deferred adjudication, a fine, and counseling. The teacher never informed the district of the crime. The district's policy required that employees inform the district if they were ever charged with, convicted of, granted deferred adjudication, or entered a "no contest" plea to any felony or misdemeanor involving moral turpitude. Failure to notify the administration was grounds for termination. The district proposed termination and held a hearing before an IHE. The board accepted the IHE's recommendation to terminate the man's employment, especially since the teacher admitted that he had engaged in the misconduct. The Commissioner upheld the

termination on appeal. *Christian v. Dallas ISD*, Dkt. No. 192-R2-899 (Comm'r Educ. Sept. 24, 1999).

In a similar case out of Houston ISD, an employee's failure to report criminal misconduct also resulted in her termination. According to district policy, the teacher was subject to termination if she had been convicted of, received deferred adjudication, or entered a guilty plea to any felony. She pled guilty to charges of forgery and was placed on deferred adjudication. School district policy also required that an employee give notice to the district within 30 days of a charge, conviction, grant of deferred adjudication, or entry of a guilty plea to a felony. The district proposed termination after learning of the criminal proceedings. The woman challenged the termination, claiming she did not know that district policy required her to make such a report. The Commissioner upheld the termination, holding that ignorance of a policy did not bar the district from terminating the employee. *Morgan v. Houston ISD*, Dkt. No. 160-R2-599 (Comm'r Educ. June 25, 1999).

Applications and Police Reports Must Be Closely Scrutinized by the Administration

A teacher, who was also a minister of his church, received numerous Driving While Intoxicated (DWI) convictions over a period of years. The district's criminal history check did not turn up the DWI convictions. Although he was truthful on his application about these convictions, the paperwork was not closely reviewed by the district and he was hired. Eventually, the district learned of the misconduct and the convictions received significant publicity. The teacher was proposed for termination, as he was no longer considered a good role model for the students and was found to have violated the Code of Ethics. The teacher admitted that the arrests were embarrassing and had "scandalized" his name. His teaching contract was terminated, and the termination was upheld on appeal. *Massey v. Paris ISD*, Dkt. No. 137-R2-399 (Comm'r Educ. May 18, 1999).

In another case, a probationary contract teacher disclosed his criminal record, which consisted of three felony charges resulting in convictions, including two counts of aggravated assault on a police officer. Houston ISD policy prohibited hiring anyone with a felony conviction, but an appeal procedure allowed the applicant to appear before a review committee to obtain a waiver. Under the policy, if use or exhibition of a deadly weapon was involved, no appeal process was allowed. In this case, a waiver was granted and the applicant was hired because the committee failed to notice that police reports showed that he had brandished or used two knives, a crow bar, and a shotgun during a fight with police.

The district had provided the employee a Memorandum of Understanding (signed by the employee), which provided that if a further search of CHR checks showed he was ineligible for employment then the district could terminate the employee's contract. A new CHR report showed the previously disclosed convictions, plus two additional charges, one for assault and one for felony assault with a deadly weapon. However, for reasons not clearly stated in the opinion, no action was taken by the district with this employee until he had an altercation with another employee. His employment contract then was terminated and the termination was upheld on appeal. *Beasley v. Houston ISD*, Dkt. No. 079-R2-1298 (Comm'r Educ. Feb. 1, 1999).

The Effect of Acquittal on Back Pay Claims

On a related issue, several El Paso ISD at-will employees were indicted on charges of theft and bribery. They were suspended without pay and were terminated. Later, some of the employees were acquitted of the crimes and reinstated, and they sought back pay. The Attorney General issued an opinion that board policy controls: optional reinstatement with back pay is at the discretion of the superintendent and is permitted, but not required, under TEC § 45.105. Op. Tex. Att’y Gen. No. JC-0115 (1999).

Teacher Certification May Be Revoked Due to Criminal Misconduct

Finally, an individual’s teacher certification also can be placed in jeopardy based on criminal misconduct. In this case, a student alleged that the teacher had offered him a beer, let the student drive the teacher’s car, and offered to perform oral sex on the student. The teacher also allegedly had placed his hand on the student’s penis. The teacher pled guilty to assault by contact. The teacher’s certificate was revoked due to substantial evidence that the teacher had touched a student in a sexual manner, and therefore, had committed a crime. *SBEC v. Alaniz*, Dkt. No. 087-TTC-1194 (Comm’r Educ. Aug. 26, 1999).

The Lesson is to Closely Examine All Criminal History Information Available to the District and Follow up with the Necessary Reports to SBEC

In sum, a school district may have access to all criminal history record information from any law enforcement or criminal justice agency for current and prospective employees and volunteers, as well as for certain employees of or applicants for employment by a person who contracts with the district for work on school property or at a location where students regularly are present. Specific statutes also govern the gathering of CHR information on school bus personnel when the district contracts with other persons or companies for transportation services. Further, SBEC must obtain CHR information from any law enforcement agency concerning applicants for and holders of teaching and other educational certificates. The superintendent must notify SBEC within seven days upon learning that a certificate holder has a reported criminal history. Having a reported criminal history can result in the loss of employment and/or certification, and the Commissioner typically upholds such decisions.

HANDLING REQUESTS FOR POST EMPLOYMENT REFERENCES

In contrast with checking for a criminal background at the start of the employment cycle, near the end of the employment relationship administrators often receive requests for job performance information about departing or former employees. Typically, these requests come from prospective employers — often other school districts — that are trying to make well-informed hiring decisions. Among scholars and various legal authorities, opinions vary as to how much information, if any, should be shared with the prospective employer. However, because of the profound and long-term consequences of hiring ineffective, incompetent, abusive, or unscrupulous teachers and

staff in a K-12 school environment, it is encouraging that former employers have support for adopting a more candid, forthright, and honest approach that helps ensure safety and improves the overall condition of public education in Texas. Several legal doctrines define the parameters surrounding employment reference response strategies. The following provides an overview of these concepts and depicts some of the challenging issues faced when asked to provide an employment reference for a former employee.

Immunity Considerations

During the 1999 legislative session, House Bill 341 was passed to amend the Texas Labor Code regarding an employer’s disclosure of job performance information about current or former employees. The provision became effective on September 1, 1999. Pursuant to a request from a prospective employer, the statute provides the former employer with immunity from civil liability when the employer discloses information that any employer would “reasonably believe to be true.” Tex. Labor Code §§ 103.001, 103.003. The protections enjoyed by the employer also are extended to a “managerial employee or other representative of the employer who is authorized to provide the information” and does so in accordance with the statute. Tex. Labor Code § 103.004(b). To be covered by the statute, disclosures should be based upon a current or former employee’s job performance, which is defined as “the manner in which an employee performs a position of employment and includes an analysis of the employee’s attendance at work, attitudes, effort, knowledge, behaviors and skills.” Tex. Labor Code § 103.002(3).

The immunity protection remains intact unless the employee can prove “by clear and convincing evidence that the information disclosed was known by that employer to be false at the time the disclosure was made or that the disclosure was made with malice or in reckless disregard for the truth or falsity of the information disclosed.” Tex. Labor Code § 103.004(a). In other words, to defeat the immunity defense provided in this statute, a former employee must prove that the employer disclosed the information with total disregard concerning whether the information was true or false. Although ostensibly enacted by the legislature to encourage employers to share job performance information with one another, the statute explicitly states that employers are not required “to provide an employment reference to or about a current or former employee.” Tex. Labor Code § 103.005.

With the adoption of its new statutory immunity provision governing both public and private sector employers, Texas joins the majority of states that enacted similar provisions during the 1990s. Pursuant to additional statutory provisions outlined below, K-12 school districts and school district employees in Texas enjoy even greater immunity protection than employees and school districts in many other states.

The Texas Tort Claims Act provides that a school district is immune from liability for all tort causes of action except those arising from the use or operation of motor driven vehicles. Tex. Civ. Prac. & Rem. Code §§ 101.021 & 101.051. In one case, a school bus driver sued a school district for defamation after it nonrenewed his contract based on charges that he had sexually abused students. In rejecting the claim, the Texas Court of Appeals ruled that “[t]he waiver of governmental immunity provided for in the Texas Tort Claims Act is in the case of school

districts restricted to causes of action arising from the use of motor vehicles.” *Williams v. Conroe ISD*, 809 S.W.2d 954, 957 (Tex. App. — Beaumont 1991, no writ). Thus, the school district and its employees were immune from liability for the bus driver’s state law claims, since the claims did not involve the use or operation of a motor vehicle.

School board members may be sued either in their official capacities or as individuals. If a board member is sued in his or her official capacity, the suit is considered to be one against the school district. Since school districts have absolute immunity from defamation suits under the Texas Tort Claims Act, then board members who are sued in their official capacities and who are engaged in the performance of their governmental functions share the district’s immunity protection. By comparison, if a board member is sued for defamation in his or her individual capacity, the board member will be protected by common law immunity under state law so long as he or she acted (1) in good faith, (2) within the scope of his or her authority, (3) in the performance of discretionary duties. *City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1993). A board member sued for defamation under federal law is protected from personal liability by qualified immunity when performing discretionary acts, unless he or she violated a clearly established statutory or constitutional right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982).

With two noteworthy exceptions, a school district’s “professional employees” (defined to include superintendents, principals, teachers, supervisors, social workers, counselors, nurses, teacher’s aides, student teachers, certified school bus drivers, and other persons “whose employment requires certification and the exercise of discretion”) cannot be held personally liable for “any act incident to or within the scope of the employee’s duties and that involves the exercise of judgment or discretion.” Tex. Educ. Code § 22.051. The two exceptions to statutory immunity protection involve (1) the use, operation, and maintenance of motor vehicles, and (2) the excessive or negligent use of force when disciplining a child. Therefore, school district employees who exercise discretion and act within the scope of their duties while proffering job performance information about former employees should not be held personally liable for defamation or other tort-based claims.

The leading case in this area is *Hammond v. Katy ISD*, 821 S.W.2d 174 (Tex. App. — Houston [14th Dist.], no writ) (decided under former TEC § 21.912(b), now TEC § 22.051). In that case, the court held that a letter of reference by a professional supervisor of a public school expressing his or her professional opinion concerning an employee’s work performance is an act within the scope of the supervisor’s duties with the school district. As such, the statements made in a reference letter are not subject to a libel action, unless the statements are false statements of fact or are libelous per se. Statements are “libelous per se” if the written words are so obviously hurtful that they require no proof of their injurious nature to make them actionable. *Hammond*, 821 S.W.2d at 179. Thus, as long as a supervisor providing a reference merely states his or her opinion concerning the employee’s job performance, the supervisor should be protected from liability for defamation.

Other Related Considerations

Reluctance to provide objective and verifiable job perfor-

mance information about a current or former employee to a prospective employer generally is driven by fear of being sued for defamation. Defamation is defined as the “invasion of the interest in reputation and good name,” and is characterized as a statement that (1) harms a person by lowering his reputation in the eyes of the community, (2) deters others from associating with him, or (3) exposes him to public hatred, contempt, or ridicule. *Marshall v. Mahaffey*, 974 S.W.2d 942, 949 (Tex. App. — Beaumont 1998, writ denied). Defamation comes in two types: (1) libel, which is expressed in written or graphic form (Tex. Civ. Prac. & Rem. Code Ann. § 73.001), and (2) slander, which is orally communicated. *Randall’s Food Markets, Inc. v. Johnson*, 891 S.W.2d 640 (Tex. 1995).

For either slander or libel to result in grounds for legal action, the statement must have been “published.” Publication means to communicate orally, in writing, or in print, to a third party capable of understanding the communication’s defamatory impact, and in such a way that the third person did in fact understand the communicated statement. Pursuant to statutory limitations on civil actions, defamation claims must be brought not later than one year after the day the cause of action accrued. Tex. Civ. Prac. & Rem. Code § 16.002.

Closely aligned with the recently enacted Texas statutory immunity provision governing employment references noted in the prior section is the notion of qualified privilege. Qualified privilege protects communications “which are potentially defamatory if: (a) the statements are made in good faith; (b) about a subject in which the speaker or author has an interest or duty; (c) to another having a corresponding interest or duty; and (d) statements are made in a lawful manner for a lawful purpose.” *Smith v. Holley*, 827 S.W.2d 433, 436 (Tex. App. — San Antonio 1992, writ denied).

Generally, good faith is presumed when a person provides an employment reference to someone who has a significant interest at stake. *Baldwin v. University of Texas*, 945 F. Supp. 1022 (S.D. Tex. 1996). The qualified privilege may be lost if a former employee is able to show that the employment reference was made with actual malice. From a plaintiff’s perspective, proving actual malice is a formidable task since it requires a showing of reckless disregard for the truth of the statement. Showing that the speaker had serious doubts regarding the truth of the statement will suffice, but merely demonstrating evidence of ill will or evil motive is insufficient to constitute actual malice. *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308 (5th Cir. 1995). Thus, to sustain an action for libel or slander, a communication must be false. Since truth is always a defense in a defamation suit, a true factual statement, even if it is negative, is never defamatory. Tex. Civ. Prac. & Rem. Code § 73.005.

Suggestions for Dealing with Reference Requests

- Develop a comprehensive and carefully aligned policy and procedure for handling employment reference requests — and stick to it!
- Require that reference requests be in writing. Verbal references often communicate more or less than is intended, whereas written statements allow the writer to choose language carefully and say exactly what is intended. Although many administrators will find this suggestion hard to accept because they feel comfortable sharing employment information with fellow professionals in a more personal way,

it is important to remember that most courts will not view someone's "off-the-record" or "between friends" comments favorably when balanced against a former employee's interests in privacy and fairness.

- Preserve documentation of all reference information provided.
- Former employees, upon their departure from the district, should be asked to sign an authorization form, giving the district authority to provide more than dates of employment, pay rate, and position held. These forms also should include language releasing the employer and its agents from liability, stating that the consent is signed voluntarily by the employee, and waiving any claims against the district for disclosure of information in the district's records.
- Disseminate the reference policies through the employee handbook or other written memoranda.
- Centralize the handling of reference requests to ensure consistency. All school district personnel should know which administrators have been designated with authority and vested with responsibility for the release of employment information to prospective employers.
- Respond only with that information that is clearly job-related and can be verified as reliable.
- Be consistent in the type of response given in each class of employees.
- Respond only to the questions asked. In other words, avoid volunteering unsolicited information about a former employee, since doing so may subject your motives to close scrutiny. Above all, avoid making comments or statements that might be construed to reflect personal animosity or malice.
- Avoid non-employment related areas that are ripe for claims of discriminatory conduct. In addition to such protected characteristics as race, religion, ethnicity, and disability, respondents should not venture into a discussion of lifestyle choices, sexual practices, health, marital status, and domestic relationships.

CONCLUSION

School districts and school district administrators strive to employ personnel who are well qualified and best suited for

a particular assignment. Essentially situated on opposite sides of the same coin, being meticulous when conducting criminal history checks and responding appropriately to requests for job performance information about departing employees highlight two important facets of this employment relationship. Statutory requirements assume a prominent role, particularly with regard to criminal background checks. A review of recent Commissioner's decisions exemplify the State's desire to provide students with a safe and orderly learning environment. Consequently, school officials who make employment decisions premised on employee criminal misconduct are vested with substantial authority and discretion. Post employment reference requests often present an even greater challenge for school administrators, in part because statutory and regulatory considerations are less prescriptive in terms of how they should be handled. Adopting a formal policy and then implementing and following a systematic and carefully aligned response strategy is the best way to minimize risk while helping ensure that schools provide safe learning environments.