

*no action taken
see 1995.*

The Commonwealth of Massachusetts

IN THE YEAR ONE THOUSAND NINE HUNDRED AND NINETY- Four

AN ACT PROHIBITING CONVICTED FELONS FROM HOLDING ELECTIVE
MUNICIPAL OFFICE IN THE CITY OF CAMBRIDGE

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Notwithstanding any general or special law or charter provision to the contrary, no person convicted of a felony under any law of the commonwealth or of the United States committed while holding elected municipal office in the City of Cambridge shall hold any municipal elective office in the City of Cambridge, unless such conviction is reversed or vacated or is the subject of a full pardon.

SECTION 2. The state secretary shall place the following question upon the official ballots for the City of Cambridge at the state election in the current year: "Shall 'An Act Prohibiting Convicted Felons From Holding Elective Municipal Office in the City of Cambridge' Be Accepted?" This act shall take effect upon its acceptance by a majority of the voters of said city voting on such question, but not otherwise.

THE COMMONWEALTH OF MASSACHUSETTS
In the Year One Thousand Nine Hundred and Ninety-Four

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House, No.

BILL

*To the Honorable Senate and House of Representatives of The Commonwealth of Massachusetts
in General Court assembled.*

*The undersigned, citizens ofCambridge....., respectfully
petition for the passage of the accompanying bill or resolve, and /or for legislation.*

**AN ACT PROHIBITING CONVICTED FELONS FROM HOLDING ELECTIVE MUNICIPAL OFFICE
IN THE CITY OF CAMBRIDGE.**

Petitioners are requested to sign names and addresses legibly.



A

CITY OF CAMBRIDGE

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TO: Vice Mayor Sheila Russell
Councillor Michael Sullivan
Mayor Kenneth Reeves
Councillor Francis Duehay
Councillor Katherine Triantafillou

FROM: Donald A. Drisdell, Deputy City Solicitor

DATE: October 4, 1994

RE: *Response to Calendar Item #1 of June 27, 1994*

The City Council requested that a proposed special act entitled An Act Prohibiting Convicted Felons from Holding Elective Municipal Office in the City of Cambridge (the "proposed Act") be referred to the City Solicitor for "...an opinion as to its legality...." In addition the Chairs of the Joint Committee on Rules and Government Operations has asked that the City Solicitor include in his report the legislative history of G.L. c. 279, §30.

This opinion first examines the authority of the City to submit a Home Rule Petition to the legislature requesting a special act prohibiting convicted felons from holding elective office in the City. The opinion then analyzes legal decisions in Massachusetts and other jurisdictions pertaining to the disqualification for, removal from, or vacancy in, public office.

Finally, the opinion makes recommendations regarding the draft of the Act submitted for review.

I. Legislative Authority

Several provisions of the Constitution of Massachusetts are relevant to the proposed Act.

Part 1, Article 18 of the Constitution provides that:

A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choices of their officers and representatives: and they have a right to require of their lawgivers and magistrates, an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the commonwealth.

Part 1, Article 9 of the Constitution provides that:

All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.

The Supreme Judicial Court has interpreted Article 9 on a number of occasions. In a review of the petition that led to the enactment of G.L. c. 268B which requires financial disclosure forms to be filed by candidates for various elected offices the Court stated that "...the right to be elected, preserved in art. 9, is not absolute. It is subject to legislation reasonably necessary to achieve legitimate public objectives." *Opinion of the Justices*, 375 Mass. 795, 811 (1978). See also, *Opinion of the Justices*, 368 Mass. 819, 822 (1975) (barring independent candidates from ballot if they were a member of a political party within twenty-eight days of the last day for filing nomination papers); *LaBarge v. Chief Administrative*

Justice of the Trial Court, 402 Mass. 462 (1988) (judicial branch of the Commonwealth could regulate the conduct of its employees through a collective bargaining agreement that requires judicial branch employees to take leaves of absence if they become candidates for public office).

Reviewing a proposal for term limits for elected state officials, the Supreme Judicial Court noted that none of its previous decisions had reviewed regulations totally barring otherwise qualified inhabitants from seeking a particular public office at a particular time. The Court upheld the term limits proposal based on an analysis of the intent of the framers of the Massachusetts constitution. The Court found "...nothing in the record of the convention to indicate that term limitations for elected offices are inconsistent with the freedom of elections." *Opinion of the Justices*, 413 Mass. 1201, 1214 (1992). It should be noted that the Court read the term limits proposal as a measure that "...causes elected officials to return to private life for two years...." *Id.* at 1215. The case is not, therefore, fully dispositive of a measure that would permanently disqualify an inhabitant from elective office in Cambridge.

Part 2, Clause 6, Art. 2 of the Constitution provides that:

...no person shall ever be admitted to hold a seat in the legislature, or any office of trust or importance under the government of this commonwealth, who shall, in the due course of law, have been convicted of bribery or corruption in obtaining an election or appointment.

This provision indicates that the framers of the constitution did not view a permanent disqualification from elected office based upon conviction of crimes to be impermissible.

While it is possible to anticipate an argument that the specific offenses included in this provision of the Constitution should limit the offenses which may form the basis of a

permanent disqualification, the express language of Article 9 recognizing the right of the inhabitants to have "...such qualifications as they shall establish by their frame of government..." for elected officers supports the validity of c. 279, §30 and of the proposed Act.

With these constitutional provisions as a backdrop, the legislature passed G.L. c. 279, §30 providing that:

If a convict sentenced by a court of the commonwealth or of the United States to imprisonment in the state prison or by a court of the United States to a federal penitentiary for a felony holds an office under the constitution or laws of the commonwealth at the time of sentence, it shall be vacated from the time of sentence. If the judgment against him is reversed upon writ of error, he shall be restored to his office with all its rights and emoluments; but, if pardoned, he shall not by reason thereof be restored, unless it is so expressly ordered by the terms of the pardon.

We checked for any legislative history at the State House in response to the specific request of the Committees and found none beyond that reported in the annotated General Laws. The only amendment to the statute since its original enactment in 1836 occurred in 1951 when the legislature added the provision making the section applicable to persons sentenced by a United States court to a federal penitentiary for a felony.

In G.L. c. 55, §33 (g) the legislature provides that:

If upon the hearing of an election petition a majority of the justices hearing the same shall find that in relation to the election of the candidate in question a corrupt practice, as defined in section thirty-two, was committed by the defendant, a decree shall be entered subject to the limitations and conditions hereinbefore prescribed, declaring void the election of the defendant to the office in question, and ousting and excluding him from such office and declaring the office vacant.

Section thirty-two defines "corrupt practices" to include making false returns under the election laws, fraudulently or wilfully obstructing and delaying a voter, interfering with,

hindering or preventing an election officer from performing his duties, forging an endorsement, altering, destroying or defacing a ballot, tampering with or injuring or attempting to injure any voting machine or ballot box, or preventing or attempting to prevent the correct operation of such machine or box.

Also relevant are the provisions of the Plan E Charter itself, which provides in G.L.

c. 43, §107 that:

Neither the city council nor any of its committees or members shall direct or request the appointment of any person to, or his removal from, office by the city manager or any of his subordinates, or in any manner take part in the appointment or removal of officers and employees in that portion of the service of said city for whose administration the city manager is responsible. Except for the purpose of inquiry, the city council and its members shall deal with that portion of the service of the city as aforesaid solely through the city manager, and neither the city council nor any member thereof shall give orders to any subordinate of the city manager either publicly or privately. Any member of the city council who violates, or participates in the violation of, any provision of this section shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than six months, or both, and upon final conviction thereof his office in the city council shall thereby be vacated and he shall never again be eligible for any office or position, elective or otherwise, in the service of the city.

These constitutional and statutory provisions currently control questions of disqualification from elective municipal office in Cambridge. Other than specifically defined corrupt practices relating to election laws and the provisions in §107 of the Plan E Charter prohibiting interference with the City Manager's executive responsibilities, disqualifications from elective office in Cambridge are governed by G.L. c. 279, §30. As we have advised the Council in an earlier opinion, that statute works a forfeiture of office upon sentencing to a state prison or a federal penitentiary for the conviction of a felony, and the office is only vacated "...from the time of sentence." It is my understanding that the drafters of the

proposed Act desire that the voters of Cambridge should be given the opportunity to decide that the rule in Cambridge should be that upon conviction, and prior to sentencing, the holder of elective office should forfeit that office rendering the office vacant by operation of law.

I find nothing in the constitution or statutes of the Commonwealth or in judicial decisions that would prevent the legislature from passing a special act to accomplish that purpose at the request of the City Council through the Home Rule Procedures Act.

II. Conviction of Crimes as Grounds for Disqualification from Public Office.

An overwhelming majority of states have constitutional or statutory provisions requiring the removal of public officers convicted of certain crimes. *See generally*, Annotation, 10 ALR 5th 139. A number of states provide that a public officer forfeits his position if he or she is convicted of a felony, an infamous crime, or a crime involving moral turpitude. *Id.* at 154. It is important to note that many cases have been decided in various jurisdictions interpreting the term "conviction" in the context of these disqualification statutes. Many courts have ruled that the term "conviction" in statutes providing for the removal of an incumbent from office, or vacating the office, means or implies both a plea or verdict of guilty and a judgment or sentence by the trial court. 10 ALR 5th 139, 163. In a leading case, a California court interpreting a California constitutional provision which authorized legislation to provide for, among other things, the removal of officers convicted of certain crimes, held that a "conviction", as applied to a provision calling for the forfeiture of an existing office, consists of a jury's verdict or a court's finding of guilt followed by a judgment upholding and implementing such verdict or finding. *Helena Rubenstein*

International v. Younger, 71 Cal. App. 3d 406 (1977). The court observed that a survey of decisions interpreting the meaning of "conviction" revealed ambiguity, and concluded that where a civil disability is a consequence of the "conviction", the majority and better rule is to require the entry of judgment.

Many state courts have ruled in a similar manner with regard to the meaning of "conviction" in such disqualification or forfeiture statutes. In the *Matter of Keogh v. Wagner*, 20 AD2d 380, aff'd 15 NY2d 569, a New York court held that "...where disabilities, disqualifications or forfeitures are to follow from a 'conviction' there is no 'conviction' in the eyes of the law unless a sentence is imposed or pronounced and a judgment of conviction entered thereon." *supra* at 384. After the *Keogh* case the New York legislature amended the statute defining "conviction" to mean the entry of a plea of guilty or a verdict of guilty. The statute also separately defines "sentence" and "judgment". In a 1978 case, *Matter of Gunning v. Codd*, 65 AD2d 415 (NY 1978), the court ruled that the amendment to the statute required a different result from the *Keogh* case, concluding that a jury verdict was sufficient for the forfeiture of office to be triggered without the requirement of a judgment or sentence.

While the New York cases are still a bit clouded by concurring votes on differing grounds, the New York courts conclude firmly that the legislature can "...broaden the scope of the term 'conviction' in statutes..." to mean upon a plea or verdict. *Keogh* at 385. An example is given in *Keogh* of New York's Alcoholic Beverage Control Law which defined "conviction" to mean "...a finding of guilt resulting from a plea of guilty, the decision of a court or magistrate or the verdict of a jury, irrespective of the pronouncement of judgment

or the suspension thereof...." It would be advisable to employ similar language in defining "conviction" for the purposes of the proposed Act.

III. Proposed Act

At the first meeting of the Joint Subcommittee I identified several potential problems in the proposed act. As currently drafted the Act may be interpreted such that one who committed a felony a day before taking office who is later convicted would not forfeit the office because the felony must be committed while holding office. A person convicted of committing a felony while holding office in Boston could later run for office in Cambridge, while one convicted of committing a felony while holding an office in Cambridge could not (assuming that the Act is intended to create a permanent disqualification from elective office in Cambridge, and if so it will be important to be more precise in stating so as has been done in §107 which may serve as a model in this regard). I also pointed out at the meeting that the language regarding pardons and vacating of sentences should be clearer and perhaps track more closely the similar provisions in G.L. c. 279, §30.

I would add to those observations a recommendation that an express definition of "conviction", such as the one referenced in the New York cases cited above, should be included in the Act.

In response to the specific request of Councillor Duehay for copies of statutes from some other jurisdictions, I am attaching copies of relevant sections of the New York Public Officers Law, New York's Criminal Procedures Law, and a copy of the *Gunning v. Codd* case referenced in the discussion above. Also attached is a copy of the California constitutional section providing for the exclusion of felons from public office and a copy of

California's disqualification statute and its statute regulating vacancies in public offices. Finally, I am attaching a copy of the Pennsylvania constitutional provision disqualifying persons convicted of certain crimes from eligibility for public office. While I looked at provisions in other states, the attached materials are typical.

New York

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§ 30

- § 31. Resignations
- § 32. Removals by senate
- § 33. Removals by governor
- § 33-a. Removal of heads of departments
- § 34. Proceedings for removal by governor
- § 35. Removals from office
- § 35-a. Removal for treasonable or seditious acts or utterances
- § 36. Removal of town, village, improvement district or fire district officer by court
- § 37. Notice of existence of vacancy
- § 38. Terms of officers chosen to fill vacancies
- § 39. Filling vacancies in office of officer appointed by governor and senate
- § 40. Vacancy occurring in office of legislative appointee, during legislative recess
- § 41. Vacancies filled by legislature
- § 42. Filling vacancies in elective offices
- § 43. Filling other vacancies

HISTORY:

Add, L 1909, ch 51, eff Feb 17, 1909.

VERALEX™: Cases and annotations referred to herein can be further researched through the VERALEX electronic retrieval system's two services, **Auto-Cite®** and **SHOWME™**. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references. Use SHOWME to display the full text of cases and annotations.

RESEARCH REFERENCES AND PRACTICE AIDS:

- 26 NY Jur, Health §§ 14, 51-55.
- 48 NY Jur, Public Officers and Employees §§ 145 et seq., 277 et seq.
- 63A Am Jur 2d, Public Officers and Employees §§ 135 et seq.

§ 30. Creation of vacancies

1. Every office shall be vacant upon the happening of one of the following events before the expiration of the term thereof:

- a. The death of the incumbent;
- b. His resignation;
- c. His removal from office;
- d. His ceasing to be an inhabitant of the state, or if he be a local officer, of the political subdivision, or municipal corporation of which he is required to be a resident when chosen;
- e. His conviction of a felony, or a crime involving a violation of his oath of office;
- f. The entry of a judgment or order of a court of competent jurisdiction declaring him to be incompetent;
- g. The judgment of a court, declaring void his election or appointment, or that his office is forfeited or vacant;
- h. His refusal or neglect to file his official oath or undertaking, if one is required, before or within thirty days after the commencement of the term of office for which he is chosen, if an elective office, or if an appointive office, within thirty days after notice of his appointment, or within thirty days after the commencement of such term; or to file a renewal undertaking within the time required by law, or if no time be so specified, within thirty days

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after notice to him in pursuance of law, that such renewal undertaking is required. The neglect or failure of any state or local officer to execute and file his oath of office and official undertaking within the time limited therefor by law, shall not create a vacancy in the office if such officer was on active duty in the armed forces of the United States and absent from the county of his residence at the time of his election or appointment, and shall take his oath of office and execute his official undertaking within thirty days after receipt of notice of his election or appointment, and provided such oath of office and official undertaking be filed within ninety days following the date it has been taken and subscribed, any inconsistent provision of law, general, special, or local to the contrary, notwithstanding.

2. When a new or an additional office shall be created, such office shall for the purposes of an appointment or election, be vacant from the date of its creation, until it shall be filled by election or appointment.

3. When any member of a board, commission, committee or authority, holding office by appointment of the governor, fails to attend three consecutive regular meetings of such board, commission, committee or authority, unless such absence is for good cause and is excused by the chairman or other presiding officer thereof, or, in the case of such chairman or other presiding officer, by the governor, the office may be deemed vacant for purposes of the nomination and appointment of a successor.

4. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a political subdivision or municipal corporation if the incumbent thereof ceases to be a resident of such political subdivision or municipal corporation, shall apply in the case of a person who is a member of the police force of any political subdivision or municipal corporation of the state and who while a member of such force resides (a) in the county in which such political subdivision or municipal corporation is located; or (b) in a county within the state contiguous to the county in which such political subdivision or municipal corporation is located; or (c) in a county within the state contiguous to such political subdivision or municipal corporation; or (d) in a county within the state contiguous to a county described in item (c) hereof where the former is less than fifteen miles from such political subdivision or municipal corporation, measured from their respective nearest boundary lines; or (e) in a county within the state contiguous to a county described in item (d) hereof where the former is less than thirty miles from such political subdivision or municipal corporation, measured from their respective nearest boundary lines:

- (1) If such person was appointed as a member of such police force prior to July first, nineteen hundred sixty-one, shall reside in any such county on such date and shall continue to reside in any such county after such date, or
- (2) If the police force of which he is a member consists of two hundred or more full-time members or shall have consisted of two hundred or more full-time members when, as a member of

BOSTON, MASS.

municipal corporation, measured from their respective nearest boundary lines.

5-a. Any person who resides in this state and who is currently employed as a member of the police force, a paid member of the uniformed force of a paid fire department, or department of corrections in the correctional service classification of the classified civil service, of a city of over one million population, shall be exempt from the provisions of paragraph (d) of subdivision one and subdivisions four and five of this section upon compliance with the procedure set forth in this subdivision. Any person seeking to benefit from the exemption created by this subdivision shall notify his respective employer in writing of said intention within thirty days from the effective date of this subdivision and shall specify his then current residence address. The exemption created by this subdivision shall be applicable only to said actual designated residence and not to any residence that any subject currently employed member may thereafter establish; provided, however, that any such currently employed member who resides outside this state shall have one year from the effective date of this subdivision within which to establish residence as required pursuant to paragraph (d) of subdivision one, and subdivisions four and five of this section and comply with the notice requirements of this subdivision. Said residence shall constitute a lawful residence for all purposes notwithstanding any provision to the contrary of any general, special or local law, charter, code, ordinance, resolution, rule or regulation.

6. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a political subdivision or municipal corporation if the incumbent thereof ceases to be a resident of such political subdivision or municipal corporation, shall apply in the case of appointed public officers in the city of Troy, except the city manager of such city, who reside in the county of Rensselaer.

7. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a political subdivision or municipal corporation of the state if the incumbent thereof ceases to be a resident of such political subdivision or municipal corporation, shall apply in the case of the city court judge in the city of Hudson, provided that such person resides in the county in which such city is located.

HISTORY:

Add, L 1909, ch 51, eff Feb 17, 1909.

Sub 1, opening par, formerly undesignated, so designated, L 1954, ch 209, eff Mar 24, 1954.

Sub 1, pars a-e, formerly subs 1-5, so designated, L 1954, ch 209, eff Mar 24, 1954.

Sub 1, par f, formerly sub 6, so designated, L 1954, ch 209; amd, L 1978, ch 550, § 39, eff July 24, 1978.

Sub 1, par g, formerly sub 7, so designated, L 1954, ch 209, eff Mar 24, 1954.

Sub 1, par h, formerly sub 8, so designated, L 1954, ch 209, eff Mar 24, 1954.

Subs 2 and 3, add, L 1954, ch 209, eff Mar 24, 1954.

Sub 4, add, L 1960, ch 1084; amd, L 1961, ch 895, eff July 1, 1961.

Sub 4, opening par, amd, L 1962, ch 248, L 1962, ch 969, L 1967, ch 560, eff Apr 24, 1967.

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§ 25. Indorsement upon execution

RESEARCH REFERENCES AND PRACTICE AIDS:

- 54 NY Jur 2d, Enforcement and Execution of Judgments § 149.
- 9 Carmody-Wait 2d (Rev ed), Enforcement of Judgments § 64:142.
- 22 Carmody-Wait 2d (Rev ed), Action on Official Bond or Undertaking § 134:30.

§ 26. Collection of execution; when a defence to subsequent action

RESEARCH REFERENCES AND PRACTICE AIDS:

- 22 Carmody-Wait 2d (Rev ed), Action on Official Bond or Undertaking § 134:24.

§ 27. When claimants entitled to ratable distribution

RESEARCH REFERENCES AND PRACTICE AIDS:

- 22 Carmody-Wait 2d (Rev ed), Action on Official Bond or Undertaking § 134:31.

§ 28. Receivers, assignees and trustees deemed public officers

RESEARCH REFERENCES AND PRACTICE AIDS:

- 22 Carmody-Wait 2d (Rev ed), Action on Official Bond or Undertaking §§ 134:1, 134:3, 134:11, 134:31.
- 23A Carmody-Wait 2d (Rev ed), General Assignment for the Benefit of Creditors § 142:64.

ARTICLE 3

Creation and Filling of Vacancies

§ 30. Creation of vacancies

1. Every office shall be vacant upon the happening of one of the following events before the expiration of the term thereof:

[For sub 1, pars a-d, see parent volume]

e. His conviction of a felony, or a crime involving a violation of his oath of office, *provided, however, that a non-elected official may apply for reinstatement to the appointing authority upon reversal or the vacating of such conviction where the conviction is the sole basis for the vacancy. After receipt of such application, the appointing authority shall afford such applicant a hearing to determine whether reinstatement is warranted. The record of the hearing shall include the final judgment of the court which reversed or vacated such conviction and may also include the entire employment history of the applicant and any other submissions which may form the basis of the grant or denial of reinstatement notwithstanding the reversal or vacating of such conviction. Notwithstanding any law to the contrary, after review of such record, the appointing authority may, in its discretion, reappoint such nonelected official to his former office, or a similar office if his former office is no longer available. In the event of such reinstatement, the appointing authority may, in its discretion, award salary or compensation in full or in part for the period from the date such office became vacant to the date of reinstatement or any part thereof;*

[For sub 1, par f thru sub 7, see parent volume]

HISTORY:

Sub 1, par e, amd, L 1987, ch 454, § 1, eff July 27, 1987 (see 1987 note below).

NOTES:

Laws 1987, ch 454, § 2, eff July 7, 1987, provides as follows:

§ 2. This act shall take effect immediately and shall apply to all convictions reversed or vacated on or after such effective date.

includes all further proceedings through the rendition of a verdict.

12. "Verdict" means the announcement by a jury in the case of a jury trial, or by the court in the case of a non-jury trial, of its decision upon the defendant's guilt or innocence of the charges submitted to or considered by it.
13. "Conviction" means the entry of a plea of guilty to, or a verdict of guilty upon, an accusatory instrument other than a felony complaint, or to one or more counts of such instrument.
14. "Sentence" means the imposition and entry of sentence upon a conviction.
15. "Judgment." A judgment is comprised of a conviction and the sentence imposed thereon and is completed by imposition and entry of the sentence.
16. "Criminal action." A criminal action (a) commences with the filing of an accusatory instrument against a defendant in a criminal court, as specified in subdivision seventeen; (b) includes the filing of all further accusatory instruments directly derived from the initial one, and all proceedings, orders and motions conducted or made by a criminal court in the course of disposing of any such accusatory instrument, or which, regardless of the court in which they occurred or were made, could properly be considered as a part of the record of the case by an appellate court upon an appeal from a judgment of conviction; and (c) terminates with the imposition of sentence or some other final disposition in a criminal court of the last accusatory instrument filed in the case.
17. "Commencement of criminal action." A criminal action is commenced by the filing of an accusatory instrument against a defendant in a criminal court, and, if more than one accusatory instrument is filed in the course of the action, it commences when the first of such instruments is filed.
18. "Criminal proceeding" means any proceeding which (a) constitutes a part of a criminal action or (b) occurs in a criminal court and is related to a prospective, pending or completed criminal action, either of this state or of any other jurisdiction, or involves a criminal investigation.
19. "Criminal court" means any court defined as such by section 10.10.
20. "Superior court" means any court defined as such by subdivision two of section 10.10.
21. "Local criminal court" means any court defined as such by subdivision three of section 10.10.
22. "Intermediate appellate court" means any court possessing appellate jurisdiction, other than the court of appeals.
23. "Judge" means any judicial officer who is a member of or constitutes a court, whether referred to in another provision of law as a justice or by any other title.
24. "Trial jurisdiction." A criminal court has "trial jurisdiction" of

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county and employee organizations representing these sworn officers of such department.

Laws 1983, ch 969, § 10, eff Aug 8, 1983, provides as follows:

§ 10. This act shall take effect immediately; provided however that sections eight and nine of this act shall be retroactive to and deemed to have been in full force and effect on and after July first, nineteen hundred seventy-nine; provided further, however, that such sections of this act shall not be deemed to increase the retirement rights, privileges, immunities and benefits of these sworn officers of the Westchester county department of public safety services as they existed immediately prior to such date, nor shall it be deemed to prohibit an increase in such rights, privileges, immunities and benefits on and after such date if such increase is pursuant to negotiations between the county and employee organizations representing these sworn officers of such department.

Commission Staff Notes:

This section provides a partial lexicography for the Proposed Criminal Procedure Law. Many of the terms are frequently used in the existing Criminal Code but are not defined therein and their meanings are in some instances hazy. Some of the instant definitions are deliberately designed to change the meanings which certain terms have or are construed to have under the Criminal Code.

Subdivision 1 defines a term which is of great utility in that it frequently dispenses with the necessity of expressly mentioning or listing each of the four instruments referred to.

Subdivisions 9 and 10 clarify two terms which sometimes are erroneously used interchangeably. An "arraignment" is a cloudy concept under the Criminal Code. It seems to embrace not only the various formalities attending the defendant's first court appearance in response to an indictment, information or other criminal charge, but also the plea (see, e. g., Crim. C. § 309). In actuality, the "plea" may occur long after the "arraignment." The proposed section attempts to accord precision to these two terms and to distinguish between them.

Subdivision 11 probably changes the meaning of the word "trial," at least with respect to a jury "trial." A jury trial, under the Criminal Code, commences with the people's opening address and concludes with the court's charge (§ 388; see, also, §§ 712 et seq.). Under the proposed section, it encompasses everything from the selection of the jury through the verdict; and a non-jury trial is given comparable dimensions.

Subdivision 12 applies the term "verdict" to both jury and non-jury cases. Traditionally, the court in a non-jury trial is deemed to render a "decision" rather than a "verdict."

Subdivisions 13, 14 and 15 change, and present a new pattern with respect to, the terms "conviction," "sentence" and "judgment." Under the Criminal Code, "conviction" is a word of uncertain meaning and without a fixed legal definition, sometimes being used to denote a "judgment of conviction" and sometimes to indicate merely a verdict or plea of guilty.

The "judgment," under the Criminal Code, is really the "sentence" or the imposition thereof (see §§ 471 et seq.). This leads to certain awkward situations, such as one where a court, on a post-judgment motion, wishes to review the legality of a sentence but not the validity of the verdict or other proceedings leading up to the sentence or judgment, and perhaps to change or nullify the sentence without affecting the verdict.

The proposed definitions (a) accord formal recognition to the word "conviction" as a verdict or plea of guilty (without a sentence); (b) treat a "sentence" as just that, without any reference to a "judgment"; and (c) make the "judgment" the comprehensive term which includes both the conviction and the sentence. This new terminology, among other matters, provides the precision and severability essential to clarification and expansion of appellate and other post-judgment procedure relating to attacks upon judgments and sentences.

Subdivision 16 accords precision to the frequently used term, "criminal action,"

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gment, Supreme Court, New York County, rendered on
6, 1977, reversed, on the law, and the case remanded for
trial.

In the Matter of JAMES J. GUNNING, Appellant, v MICHAEL J. CODD, as Police Commissioner of the Police Department of the City of New York, and as Executive Chairman of the Board of Trustees of the Police Pension Fund, Article II, et al., Respondents.

First Department, December 19, 1978

SUMMARY

APPEAL from a judgment of the Supreme Court at Special Term (SIDNEY H. ASCH, J.), entered March 28, 1978 in New York County, which (1) denied petitioner's application, in a proceeding pursuant to CPLR article 78, to vacate respondents' determination denying him retirement benefits and (2) dismissed the petition.

HEADNOTE

Public Officers — Dismissal upon Conviction of Felony

Petitioner, a veteran police officer, was found guilty by a jury of the felony of bribe receiving in the second degree and, prior to the entry of a judgment of conviction, he applied for service retirement benefits. Before petitioner's intended date of retirement, he was served with an order of dismissal by the Police Commissioner which was declared to be effective as of the date of the jury verdict. The order stated it was issued pursuant to the authority vested in the commissioner (Administrative Code of City of New York, § 434a-14.0) and section 30 of the Public Officers Law. As a result of this order, petitioner's retirement application was not processed because his dismissal preceded the projected effective date of his retirement. Special Term denied petitioner's application to vacate respondents' determination denying him a pension and the Appellate Division affirmed.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES*

48 NY JUR, Public Officers and Employees § 249
CLS, Public Officers Law § 30; CLS, CPLR Art 78
63 AM JUR 2d, Public Officers and Employees §§ 195, 196

ANNOTATION REFERENCES

Conviction of offense under federal law or law of another state or country as vacating accused's holding of state or local office or as ground of removal. 20 ALR2d 732.

What constitutes conviction within statutory or constitutional provision making conviction of crime ground of

disqualification for, removal from, or vacancy in, public office. 71 ALR2d 593.

* By the Publisher's Editorial Staff.

APPEARANCES OF COUNSEL

Ira Leitel of counsel (*Joseph Fallek, P. C.*, attorney), for appellant.

Susan L. Bloom of counsel (*L. Kevin Sheridan* with her on the brief; *Allen G. Schwartz, Corporation Counsel*), for respondents.

OPINION OF THE COURT

BIRNS, J.

We agree with the facts as set forth in the dissenting opinion of Justice SANDLER. We conclude, however, that Special Term properly denied petitioner's application to vacate respondents' determination denying him a pension.

It is not disputed that on April 27, 1977, prior to the date petitioner filed for retirement, he was found guilty by a jury verdict of bribe receiving in the second degree, a class D felony, and official misconduct, a class A misdemeanor. Section 30 of the Public Officers Law, originally enacted in the late 19th century, provides that every office shall be vacant upon the happening of a conviction for a felony or violation of his oath of office.

CPL 1.20 (subd 13), effective September 1, 1971, defines conviction as the entry of a plea of guilty or verdict of guilty. This change in statutory law occurred after the decision in *Matter of Keogh v Wagner* (20 AD2d 380, affd 15 NY2d 569) which held that conviction did not occur until judgment of sentence was imposed.

The *Matter of Keogh* case did indeed adopt a different definition of the term conviction following a line of cases holding that "where disabilities, disqualifications or forfeitures are to follow from a 'conviction' there is no 'conviction' in the eyes of the law unless a sentence is imposed or pronounced and a judgment of conviction entered thereon." (*Matter of Keogh v Wagner, supra*, p 384; see, also, *Helena Rubenstein Int. v Younger*, 71 Cal App 3d 406.) It must surely be noted that the Code of Criminal Procedure, then in effect, contained no definition of the word "conviction" so that the courts were

free in a particular case to adopt a definition which appeared at the time to be appropriate.

In fact, the *Matter of Keogh* majority opinion in the Appellate Division observed (*supra*, p 385) as the dissent acknowledges, that the Legislature could of course "broaden the scope of the term 'conviction' in statutes to give it the meaning urged by appellants" in that case. As an example, the opinion stated (*supra*, p 385) that in the Alcoholic Beverage Control Law "[c]onvicted' and 'conviction' include and mean a finding of guilt resulting from a plea of guilty, the decision of a court or magistrate or the verdict of a jury, irrespective of the pronouncement of judgment or the suspension thereof" (Alcoholic Beverage Control Law, § 3, subd 8).

It does not follow, however, as implied in the dissent, that a legislative intent to give a new meaning to the term "conviction" in the Public Officers Law can only be established by amendment of that statute. The definition in the CPL of conviction (CPL 1.20, subd 13) was adopted to eliminate the amorphous quality which that word previously possessed in our law (see cases cited in *Matter of Keogh v Wagner*, 20 AD2d 380, affd 15 NY2d 569, *supra*). The comments of the Temporary Commission on Revision of the Penal Law and Criminal Code support this view (New York Cons Laws Serv, Commission Staff Comment, CPL 1.20, vol 7, p 25):

"Subdivisions 13, 14 and 15 change, and present a new pattern with respect to, the terms 'conviction,' 'sentence' and 'judgment.' Under the Criminal Code, 'conviction' is a word of uncertain meaning and without a fixed legal definition, sometimes being used to denote a 'judgment of conviction' and sometimes to indicate merely a verdict or plea of guilty.

"The 'judgment,' under the Criminal Code, is really the 'sentence' or the imposition thereof (see §§ 471 et seq.). This leads to certain awkward situations, such as one where a court, on a post-judgment motion, wishes to review the legality of a sentence but not the validity of the verdict or other proceedings leading up to the sentence or judgment, and perhaps to change or nullify the sentence without affecting the verdict.

"The proposed definitions (a) accord formal recognition to the word 'conviction' as a verdict or plea of guilty (without a sentence); (b) treat a 'sentence' as just that, without any reference to 'judgment'; and (c) make the 'judgment' the comprehensive term which includes both the conviction and

the sentence. *This new terminology, among other matters, provides the precision and severability essential to clarification and expansion of appellate and other post-judgment procedure relating to attacks upon judgments and sentences.* (Emphasis added.)

The purpose of section 30 of the Public Officers Law is to declare vacant the office of those found unfit to continue in public service by virtue of conviction for felony or violation of the oath of office. We have recently been instructed that once a public officer is convicted of a felony the office is vacant immediately (*Matter of Toro v Malcolm*, 44 NY2d 146).

We cannot agree that a jury verdict of guilty in a felony case can on one hand label the offender as unfit to hold office and, on the other, say he may continue in public office until sentenced. This may have been a valid conclusion at one time when the law was uncertain. It should not be valid now where the Legislature has provided a definition of the word "conviction". We also conclude that section 30 of the Public Officers Law and the CPL supplement each other. In our view, it is the function of the courts to harmonize statutes, if possible, and not to perpetuate discordant interpretations (cf. McKinney's Cons Laws of NY, Book 1, Statutes, §§ 126 and 223; 82 CJS, Statutes, § 366 *et seq.*).

We hold, therefore, that the operative effect of section 30 of the Public Officers Law was triggered by the jury verdict herein (see *Thaler v State of New York*, 79 Misc 2d 621) and thus petitioner no longer was a New York City police officer at the time he applied for his pension.

In these circumstances, there is no reason for considering the Administrative Code of City of New York provision (§ 434a-14.0, subd a) that the "commissioner shall have power, in his discretion, on conviction * * * by any court * * * of competent jurisdiction, of a member of the force of any criminal offense * * * to punish the offending party by * * * dismissal from the force".

We find no basis for petitioner's claim for veteran's retirement benefits under subdivision 2 of section B3-36.0 of the Administrative Code (cf. *Matter of Rapp v New York City Employees' Retirement System*, 42 NY2d 1). Petitioner, as a member of the New York City Police Department, was not a member of the New York City Employees' Retirement System and hence subdivision 2 of section B3-36.0 of the Administrative Code is inapplicable. Furthermore, we find no validity to

petitioner's contention that his exclusion from veteran's retirement benefits under subdivision 2 of section B3-36.0 was violative of his constitutional rights to equal protection of the laws.

Judgment of the Supreme Court, New York County (ASCH, J.), entered March 28, 1978, which denied petitioner's application to vacate respondents' determination denying him a pension, i.e., service retirement under both section B18-40.0 of the Administrative Code of the City of New York and veterans' retirement benefits pursuant to section B3-36.0 of the said Administrative Code, should be affirmed, without costs and disbursements.

KUPFERMAN, J. P. (concurring). We have two views of a possible approach to the determination in this matter. The dissent takes the position that a jury verdict is insufficient under section 30 (subd 1, par [e]) of the Public Officers Law, for automatic vacatur of office. Two of us who vote to affirm hold that the operative effect of the law was triggered by the jury verdict.

In concurring, I take a third view, which is that the dissent is correct in requiring something more than a jury verdict. (Cf. *Matter of Mitchell*, 40 NY2d 153.) However, I believe that additional aspect comes from the appropriate action of the commissioner pursuant to section 434a-14.0 of the Administrative Code, which authorizes the police commissioner in his discretion to dismiss from the force a member convicted in a court of competent jurisdiction of any criminal offense. The definition of conviction in CPL 1.20 (subd 13), which covers a verdict of guilty, is a sufficient basis for the police commissioner to proceed after a jury verdict, but before the entry of judgment.

Accordingly, I concur in the result.

SANDLER, J. (dissenting in part). On April 27, 1977, petitioner, a veteran police officer, was found guilty by a jury in the Supreme Court, New York County, of official misconduct and bribe receiving in the second degree. The following day, April 28, 1977, petitioner filed an application for service retirement benefits, intending to retire on May 27, 1977.

Petitioner was served with an order of dismissal by the police commissioner on May 24, 1977. The order, dated May 2, 1977 and declared to be effective as of April 27, 1977, was stated to be pursuant to the "authority vested in the Police

Commissioner, pursuant to Section 434a-14.0 of the Administrative Code and Section 30 of the Public Officers Law to dismiss a member of the Police Department convicted of a crime by a court of competent jurisdiction." As a result of this order, the validity of which presents the issue in this proceeding, petitioner's retirement application was not processed because his dismissal preceded May 27, 1977, the projected effective date of his retirement. Accordingly, retirement benefits were denied since he was not in city service on that date (Administrative Code of City of New York, § B18-40.0.)

The principal question presented is whether a "conviction," as the term is used in section 30 (subd 1, par e) of the Public Officers Law, occurs upon a jury verdict of guilty or requires in addition the entry of a judgment of conviction upon sentencing.

Section 30 of the Public Officers Law provides in pertinent part:

"1. Every office shall be vacant upon the happening of one of the following acts before the expiration of the term thereof

* * *

"e. His conviction of a felony".

In *Matter of Keogh v Wagner* (20 AD2d 380, affd 15 NY2d 569) the word "conviction" in the quoted subsection was interpreted to mean (*supra*, p 385): "there must not only be an adjudication of guilt, by plea or verdict, but in addition a judgment whether the judgment imposes a sentence or suspends sentence."

This holding (*supra*, p 384) was firmly grounded on the "guiding principle that emerges from the cases, and that is that where disabilities, disqualifications or forfeitures are to follow from a 'conviction' there is no 'conviction' in the eyes of the law unless a sentence is imposed or pronounced and a judgment of conviction entered thereon." (See, e.g., *Blaufus v People*, 69 NY 107, 109; *People v Marendi*, 213 NY 600, 616; *People v Fabian*, 192 NY 443, 449-450.) The court went on to observe that the Legislature could, of course, broaden the scope of the term "conviction" if it so wished, noting that in the Alcoholic Beverage Control Law it was explicitly defined not to require the pronouncement of judgment.

CPL 1.20 (subd 13) enacted some seven years after *Matter of Keogh* (20 AD2d 380, affd 15 NY2d 569) defines "conviction" as the "entry of a plea of guilty to, or a verdict of guilty upon,

an accusatory instrument other than a felony complaint, or to one or more counts of such instrument."

In *Thaler v State of New York* (79 Misc 2d 621) it was held that this definition effectively superseded the *Keogh* ruling with regard to the interpretation of the Public Officers Law, and in the decision here appealed from Special Term agreed. After careful consideration, I am persuaded that CPL 1.20 (subd 13) was not intended to affect the interpretation of the word "conviction" in the Public Officers Law and that there is no persuasive reason why it should be held to have done so.

The definition of "conviction" in CPL 1.20 (subd 13) is one of a group of definitions clearly designed by the draftsmen to be used in the interpretation of the CPL. I am aware of no relevant circumstance that suggests any other purpose.

CPL 1.20 is headed "Definitions of terms of general use in this chapter." The introductory paragraph reads as follows: "Except where different meanings are expressly specified in subsequent provisions of this chapter, the term definitions contained in section 10.00 of the penal law are applicable to this chapter, and, in addition, the following terms have the following meanings".

Almost all of the terms thereafter defined unmistakably have reference to the CPL and only the CPL. This is equally true of the comparable definition section in the Penal Law.

The Practice Commentary following CPL 1.20 opens with the following sentences (Denzer, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 1.20, pp 21-22):

"This section epitomizes the unusual emphasis which the Criminal Procedure Law, following the technique of the Revised Penal Law, places upon term definitions.

"Many of the ensuing Articles are introduced by term definition sections, each serving as a small localized dictionary for its Article * * * Similarly, one of the CPL 'Titles' * * * is introduced by an Article (Art. 500; § 500.10) devoted exclusively to term definitions applicable to the other four Articles of the Title (Arts. 510, 520, 530, 540). The instant section containing forty-one definitions of general application, is the giant, overall definitions section which provides a partial lexicography for the entire CPL."

The value of the definition of conviction adopted from the standpoint of the authors of the CPL is immediately apparent from examination of the various sections in which the term is

used. First, this definition enabled the authors of the law to use the single word "conviction" or "convicted" in lieu of the cumbersome phrasing that would otherwise be required to embrace the thought of both a jury verdict of guilty and a plea of guilty. Second, as noted by the Temporary Commission on Revision of the Penal Law and Criminal Code (New York Cons Laws Serv, Commission Staff Comment, CPL 1.20, vol 7, p 25) the definitions of "conviction," "sentence," and "judgment," (CPL 1.20, subds 13, 14, 15) facilitated "clarification and expansion of appellate and other post-judgment procedure relating to attacks upon judgments and sentences."

If, as I think obviously true, "conviction" was defined in CPL 1.20 for use in the CPL, and for that purpose only, the question remains whether it should nonetheless be applied in the interpretation of the same word as it appears in the Public Officers Law. I see nothing in reason or policy to support such an application.

Subdivision 1 of section 30 of the Public Officers Law is concerned with circumstances under which a public office automatically becomes vacant. The decision in *Matter of Keogh v Wagner* (20 AD2d 380, affd 15 NY2d 569, *supra*), consistent with a uniform body of law defining "conviction" to require a judgment of conviction where forfeiture or disqualification follows, held that a public office should not be automatically vacated until there is a judgment of conviction. The conclusion was right then and is right now.

It is not easy to see why a definition to meet drafting exigencies in one statute should be held to overthrow an authoritative interpretation of that term in another statute addressed to an entirely different problem.

The order of dismissal also invoked the authority vested in the police commissioner pursuant to subdivision a of section 434a-14.0 of the Administrative Code. That section provides in pertinent part: "The commissioner shall have power, in his discretion, on conviction by him, or by any court or officer of competent jurisdiction, of a member of the force of any criminal offense * * * to punish the offending party by * * * dismissal from the force".

Although the argument was not pressed by respondent, I have considered whether the word "conviction" as there used might not reasonably be interpreted to apply to a plea of guilty or a jury verdict of guilty, and whether the section as a

whole might not be construed to vest the commissioner with a discretionary power to dismiss following a jury verdict.

However, subdivision 1 of section 75 of the Civil Service Law clearly prohibits dismissal of a civil servant except "for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section." The same requirement is set forth with explicit reference to police officers serving in the competitive class of civil service in chapter 834 of the Laws of 1940. When the Administrative Code section is analyzed in the light of these controlling statutory sections, it seems much more probable that the power of the commissioner to dismiss following a conviction by a court of competent jurisdiction was intended only to acknowledge his power to declare a vacancy where one had occurred, under the provisions of section 30 (subd 1, par e) of the Public Officers Law.

The implication of this analysis for the instant case is not a happy one. It involves an undeserved windfall to a former police officer who had dishonored his trust. This need not have happened if the police commissioner, instead of relying on the *Thaler v State of New York* (79 Misc 2d 621, *supra*) decision, had instituted the mandated disciplinary proceedings following the verdict, and it need never happen again.

The unfortunate nature of the result in this one case does not justify the overturning of an authoritative holding, consistent with prior case law, and representing a fair and balanced response to the legal and policy questions presented.

The judgment appealed from should be reversed and the relief sought in the petition granted.

MARKEWICH, J., concurs with BIRNS, J.; KUPFERMAN, J. P., concurs in an opinion; SILVERMAN and SANDLER, JJ., dissent in part in an opinion by SANDLER, J.

Judgment, Supreme Court, New York County, entered on March 28, 1978, affirmed, without costs and without disbursements.

California

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Art. 7, § 7 Note 6

§ 20 (repealed; see, now, this section), and Art. 4, § 7 (repealed; see, now, Art. 4, §§ 5, 7). 3 Ops.Atty.Gen. 173.

7. Personnel utilization specialist

Acceptance of the position of federal personnel utilization specialist did not disqualify a member of the state personnel board since the position of personnel utilization specialist was an employment and not an office within Art. 4, § 20 (repealed; see, now, this section), it being part time and paid for per diem. 2 Ops.Atty.Gen. 461.

8. Surveyor-general

Federal office of surveyor-general was "lucrative office," within Const.1849, Art. 4, § 21 (see, now, this section), disqualifying for civil office of profit under state any

person holding any lucrative office under United States or any other power. People ex rel. Melony v. Whitman (1858) 10 C. 38.

9. Local officers or postmasters

Under the proviso in Const.1849, Art. 4, § 21 (see, now, this section), that local officers and postmasters, whose "compensation" did not exceed \$500 per annum, shall not be deemed to hold lucrative offices, so as to render them ineligible to any civil office of profit under the state, the word "compensation" did not refer to the net, but to the gross, income of the office. Searcy v. Grow (1860) 15 C. 117.

§ 8. Bribe to procure election or appointment; disqualification; exclusion from office and juries for certain crimes; regulations; corrupt practices

Sec. 8. (a) Every person shall be disqualified from holding any office of profit in this State who shall have been convicted of having given or offered a bribe to procure personal election or appointment.

(b) Laws shall be made to exclude persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes from office or serving on juries. The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice.

(Added June 8, 1976.)

Historical Notes

1976 Legislation.

1976 addition of subsecs. (a), (b) of this section was identical in text to Art. 20, §§ 10, 11, respectively, prior to repeal June 8, 1976.

Derivation: Art. 4, former § 21.

Art. 20, former §§ 10, 11, amended Nov. 5, 1974.

Const.1849, Art. 4, § 22.

Cross References

Disqualification to hold office, see Government Code § 1020 et seq.

Law Review Commentaries

Guilty plea protection and administration. (1975) 63 C.L.R. 197.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

Notes of Decisions

- Arbitrary or discriminatory acts 4
- Compensation 2
- Construction and application 1
- Conviction 3
- Presumptions and burden of proof 5

1. Construction and application

Conviction for racketeering, extortion and conspiracy disqualified member of State Board of Equalization from office under constitutional provision disqualifying persons convicted of bribery, perjury, forgery, malfeasance in office, and other high crimes, together with implementing legislation. Lubin v. Wilson (Fong) (App. 4 Dist.1991) 284 Cal.Rptr. 70, 232 Cal.App.3d 1422.

This section while mandatory, is not self-executing, and contemplates and requires legislation to give it effect. Helena Rubenstein Intern. v. Younger (1977) 139 Cal. Rptr. 473, 71 C.A.3d 406.

Any ambiguity in this section should be resolved in favor of continued eligibility. Id.

Under constitution, legislature is authorized to enact legislation providing that forfeiture and exclusion from public office shall be effective upon entry of a judgment of conviction. Id.

Issue whether lack of uniformity in enforcement of constitutional and statutory provisions denying right of suffrage to persons convicted of crime work a denial of equal protection was rendered moot where following remand by United States supreme court for such determination the constitutional provisions were changed to provide for only temporary disqualification of electors while imprisoned or on parole for conviction of a felony. Ramirez v. Brown (1974) 17 Cal.Rptr. 562, 528 P.2d 378, 12 C.3d 912.

Within the meaning of this section and Gov.C., §§ 1021, 1770(h) and 3000, a conviction consists of a jury verdict or court finding of guilt followed by a judgment upholding

CONSTITUTION

CONSTITUTION

and implementing such verdict or fin of an appeal would not stay or delay conviction. 57 Ops.Atty.Gen. 374, 8-

Although perjury proceedings against Governor were brought and maintained in its courts, such does not preclude this section and Gov.C., §§ 1021, 17

If and when the District Court proffered a judgment upholding and jury's verdict that the Lieutenant Governor, he will thereupon automatically and his rights and powers incident would thereupon become vacant; he the compensation attached to the office not thereafter; and at such time the authorized to fill the vacancy. Id.

Under Art. 4, § 7, declaring that legislative shall judge qualifications assemblyman's tenure is not automatic his conviction of a felony, but any assemblyman must be left to the assembly alone, no conviction of this section and Gov.C. §§ 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 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986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

2. Compensation

For purposes of exclusion from public office, date of entry of judgment of conviction.

§ 9. Subversive persons and organizations

Sec. 9. Notwithstanding any other law, no person shall advocate the overthrow of the government of this State by unlawful means or who advocates the event of hostilities shall:

(a) Hold any office or employ any person in any office, county, city, district, political subdivision, or other public agency, or receive any compensation, commission or other public agency.

(b) Receive any exemption from taxation, district, political subdivision, or other public agency.

The Legislature shall enact such laws as may be necessary to carry out this section. (Added June 8, 1976.)

1976 Legislation.

1976 addition of this section was identical in text to Art. 20, § 19, prior to its repeal June 8, 1976.

Loyalty oaths as condition of obtaining public office. (1958) 10 Stan.L.R. 327.

Loyalty oaths. Reports of Assembly Committee on Judiciary, 1957 to 1959, vol. 1, Appendix to Journal of the Assembly, 1959.

Subversives and members of the Communist Party. Reports of Assembly Interim Committee on Governmental Organization, 1959.

See WESTLAW Electronic Research Guide following the Preface.

Cal

Div. 4

DISQUALIFICATIONS FOR OFFICE

§ 1021

agency, which has as its primary purpose the establishment of a program of prevention of juvenile delinquency and to provide opportunities for young people to function as responsible members of the community.

(Added by Stats.1975, c. 115, p. 2707, § 1, eff. Sept. 27, 1975.)

Cross References

Youth service bureaus, see Welfare and Institutions Code § 1900 et seq.

Library References

Infants ⇐17.

C.J.S. Infants §§ 8, 9.

§ 1021. Conviction of crime

A person is disqualified from holding any office upon conviction of designated crimes as specified in the Constitution and laws of the State.

(Stats.1943, c. 134, p. 954, § 1021.)

Cross References

Disqualifications for office,

Appointment to office for reward, see Penal Code § 74.

Asking or receiving bribes, see Penal Code §§ 68, 88; Const. Art. 7, § 8.

Bribe to procure election, see Const. Art. 7, § 8.

Dueling, see Penal Code §§ 228, 232.

Embezzlement, see Penal Code § 424.

Falsification of accounts, see Penal Code § 424.

Forgery, see Const. Art. 7, § 8.

High crimes, see Const. Art. 7, § 8.

Impeachment, see § 3035; Const. Art. 4, § 18.

Inhumanity to prisoners, see Penal Code §§ 147, 2653.

Legislator in contempt of legislature, see § 9412.

Malfesance in office, see Const. Art. 7, § 8.

Neglect or violation of official duty, see Penal Code § 661.

Perjury, see Const. Art. 7, § 8.

Public contracts and conveyances, illegal participation, see § 1097.

Transportation passes, acceptance, see Const. Art. 12, § 7.

Law Review Commentaries

California's Governmental Conflict of Interests Act: Public interest vs. right to privacy. Burt Pines and Daniel U. Smith (June 1974) 49 Los Angeles Bar Bull. 321.

Library References

Officers ⇐31.

C.J.S. Officers and Public Employees § 22.

Notes of Decisions

- Construction and application 1
- Construction with other laws 2
- Conviction 3
- Federal courts 5
- Retirement benefits 6
- Time of disqualification 4

1. Construction and application

If and when the district court pronounces and there is entered a judgment upholding and implementing the jury's verdict that the lieutenant governor was guilty of perjury, he will thereupon auto-

Cal

ARTICLE 2

VACANCIES

Section		Section	
1770.1.	Disqualification from office not stayed by initiation or successful prosecution of appeal.	1774.2.	Reappointment; computation of time of service prior to confirmation.
1770.2.	No assumption of office or suspension from holding office upon pleas of guilty or nolo contendere or rendering of verdict; exception.	1774.3.	Office defined.
		1774.7.	Application of provisions for appointment or reappointment to office.
		1782.	Notification of vacancy; duty of appointing authority.

§ 1770. Events causing vacancy before expiration of term

An office becomes vacant on the happening of any of the following events before the expiration of the term:

(a) The death of the incumbent.

(b) An adjudication pursuant to a quo warranto proceeding declaring that the incumbent is physically or mentally incapacitated due to disease, illness, or accident and that there is reasonable cause to believe that the incumbent will not be able to perform the duties of his or her office for the remainder of his or her term. This subdivision shall not apply to offices created by the California Constitution nor to federal or state legislators.

(c) His or her resignation.

(d) His or her removal from office.

(e) His or her ceasing to be an inhabitant of the state, or if the office be local and one for which local residence is required by law, of the district, county, or city for which the officer was chosen or appointed, or within which the duties of his or her office are required to be discharged. However, * * * the office of judge of a municipal or justice court shall not become vacant when, as a result of a change in the boundaries of a judicial district during an incumbent's term, the incumbent ceases to be an inhabitant of the district for which he or she was elected or appointed to serve.

(f) His or her absence from the state without the permission required by law beyond the period allowed by law.

(g) His or her ceasing to discharge the duties of his or her office for the period of three consecutive months, except when prevented by sickness, or when absent from the state with the permission required by law.

(h) His or her conviction of a felony or of any offense involving a violation of his or her official duties. An officer shall be deemed to have been convicted under this subdivision when trial court judgment is entered. For the purposes of this subdivision, "trial court judgment" means a judgment by the trial court either sentencing the officer or otherwise upholding and implementing the plea, verdict, or finding.

(i) His or her refusal or neglect to file his or her required oath or bond within the time prescribed.

(j) The decision of a competent tribunal declaring void his or her election or appointment.

(k) The making of an order vacating his or her office or declaring the office vacant when the officer fails to furnish an additional or supplemental bond.

(l) His or her commitment to a hospital or sanitarium by a court of competent jurisdiction as a drug addict, dipsomaniac, inebriate, or stimulant addict; but in that event the office shall not be deemed vacant until the order of commitment has become final.

(Amended by Stats.1988, c. 283, § 1.)

Historical and Statutory Notes

1988 Legislation
Section 4 of Stats.1988, c. 283 provides:

"Sections 1 and 2 of this act do not constitute changes in, but are declaratory of, the existing law."

Cross References

Judicial council, leaves of absence for study, see § 68554.

Additions or changes indicated by underline; deletions by asterisks * * *

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New
Section
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P. 996.340
P. 996.220
P. 996.230
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P. 996.360
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181 Cal.
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of any
on such
council
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mayor.
member to

Pennsylvania

Pa

Art. 2, § 6

Note 1

its pleasure, and exercises no independent functions of government as public or civil officer. *Bromley v. Hadley*, 10 D. & C. 23, 1927.

Under this section and 65 P.S. § 16, the offices of state representative and school district superintendent are incompatible. 1974 Op. Atty. Gen. No. 49.

A member of the present general assembly may not be appointed as a member of the Pennsylvania turnpike commission until his term of office as senator or representative shall have expired, and his resignation as a member of the general assembly does not render him eligible for such appointment. 1953 Op. Atty. Gen. No. 641.

2. Nominations

Candidate was not prohibited from seeking party's nomination for both the

§ 7. Ineligibility by criminal convictions

No person hereafter convicted of embezzlement of public moneys, bribery, perjury or other infamous crime, shall be eligible to the General Assembly, or capable of holding any office of trust or profit in this Commonwealth.

Library References

Convicts ⇨ 1.
Officers and Public Employees ⇨ 18.
States ⇨ 47.
WESTLAW Topic Nos. 98, 283, 360.

C.J.S. States §§ 61, 83.
C.J.S. Convicts §§ 2, 3.
C.J.S. Officers and Public Employees §§ 15, 16.

Notes of Decisions

City council 4
Conviction 1
Infamous crimes 2
Review 5
Salary 3

1. Conviction

As popularly used the word convicted implies nothing more than a finding of guilty by a jury, *York County v. Dalhousen*, 45 Pa. 372, 1863; *Wilmoth v. Hensel*, 25 A. 86, 151 Pa. 200, 31 Am. St. Rep., 738, 1892; as technically understood, it means the ascertainment of the guilt of the accused and judgment thereon by the court, implying not only a verdict but judgment or sentence thereon, *Smith v. Com.*, 14 S. & R. 69, 1826; *Shields v. Westmoreland County*, 98 A. 572, 253 Pa.

LEGISLATURE

office of Attorney General and that of senator in General Assembly, though Constitution would not permit a person to hold both of the offices at the same time. *In re O'Pake*, 422 A.2d 209, 54 Pa. Cmwlth. 462, 1980.

3. Existing office holders

If a member, at the time of his election, hold a disqualifying office, it is sufficient that he qualify himself, by a resignation of it, before he is sworn in. *Com. v. Pyle*, 18 Pa. 519, 1852.

A man may hold one office after he has been chosen to another which is incompatible with it without thereby forfeiting either of them provided he resigns the first before he enters upon the duties of the last. *Com. v. Pyle*, 18 Pa. 519, 1852.

CRIMINAL CONVICTIONS

office of deputy sheriff. *Com. v. McClenachan v. Reading*, 6 A.2d Pa. 165, 1939.

The word "convicted," within conditional provision that no person of an infamous crime should hold office in the commonwealth, means final judgment of sentence and not a verdict of guilty rendered by *Com. ex rel. McClenachan v. Reading*, 6 A.2d 776, 336 Pa. 165, 1939.

The word convicted as used in this section should be given its legal significance. *Com. v. Woods*, 33 Dauph. 45, 19 *Shields v. Westmoreland County*, 98 A. 572, 253 Pa. 271, 1916.

Defendant's contention that he had not yet been "convicted" within this section because the time for requesting certiorari or appeal had not expired without merit. *Com. ex rel. Burns*, 29 D. & C.2d 315, 1964.

Plaintiff's motion for judgment notwithstanding the verdict in an action of quo warranto to remove defendant from office of county commissioner was granted, allowing his election to office of county commissioner was annulled. Defendant was indicted and convicted of a crime by color of office and later was removed from office and convicted on 13 counts of embezzlement by a public officer, these having been committed prior to his removal from office as county commissioner. *Com. ex rel. Bionaz v. Burns*, 29 D. & C. 2d 315, 1964.

2. Infamous crimes

If facts underlying city council's federal conviction for conspiracy to obstruct interstate commerce under the Hobbs Act [18 U.S.C.A. § 1951] support conviction for bribery under Pennsylvania law, then the federal conviction, however it was named under federal law, would be for "infamous crime" within meaning of this section. *Com. v. Hughes*, 532 A.2d 298, 516 Pa. 987.

Facts underlying city council's federal conviction for conspiracy to obstruct interstate commerce under the Hobbs Act [18 U.S.C.A. § 1951] which listed candidate's crime was "infamous crime" disqualifying him from petitioning under this section. *Petition of Hughes*, 532 A.2d 298, 516 Pa. 987.

City of Cambridge

The Joint Rules and Government Operations Committee held a public hearing on Wednesday, October 5, 1994, beginning at 5:45 p.m. in the Sullivan Chamber for the purpose of receiving public comment regarding proposed home rule legislation to prohibit persons convicted of felonies from holding elective municipal office in the City of Cambridge.

Present at the hearing were Councillor Michael A. Sullivan and Vice Mayor Sheila T. Russell, Co-Chairs of the Committee, Councillor Kathleen L. Born, Councillor Francis H. Duehay and City Clerk D. Margaret Drury. Also present was Donald Drisdell, Deputy City Solicitor.

Councillor Sullivan convened the hearing and explained the purpose. He requested that members of the public there to offer testimony do so. There were no members of the public in attendance to testify.

Councillor Sullivan then announced that Deputy City Solicitor Donald Drisdell had submitted a memorandum (Attachment A) on the legal issues presented and requested that he summarize the document. Mr. Drisdell thereupon summarized his research.

Councillor Duehay asked whether there were statutes in other states that contained disqualifications where no prison sentence was imposed. Mr. Drisdell answered in the affirmative. Mr. Drisdell said that the New York statute is an interesting case of a state having changed from a disqualification that occurred at sentencing to one that took effect upon verdict by the jury.

Mr. Drisdell noted that the New York cases also contain a discussion of the usefulness of the statute itself containing a definition of "conviction."

Councillor Sullivan noted in response to a question by Vice Mayor Russell that house arrest would not be deemed to create a vacancy under the present Massachusetts General Laws Ch. 279.

Councillor Duehay asked whether other states' law made distinctions between local, state and county government. Don Drisdell said that some states make such a distinction and some do not.

Mr. Drisdell noted that most jurisdictions do not attempt to define the felonies;

most either say "felony" or cover the crimes related to holding office.

Vice Mayor Russell asked about the length of time. Mr. Drisdell noted that Sec. 107 of the Cambridge Charter contains a permanent disqualification.

Councillor Sullivan asked about the constitutional authority for such an ordinance. Mr. Drisdell cited Part 1 Art. 18 and Part 1 Art. 9 of the Massachusetts Constitution.

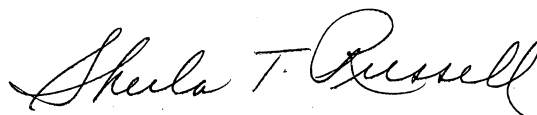
Councillor Duehay asked whether other states provide for permanent disqualification for a time period. Mr. Drisdell said that the statutes either said "permanent" or were silent. Where they were silent, courts interpreted that to mean a disqualification for the present term.

Councillor Duehay asked whether there was a conflict between Charter Sec. 107 and MGL Ch 279. Mr. Drisdell said that while the Charter provides for a stricter disqualification, it is not inconsistent.

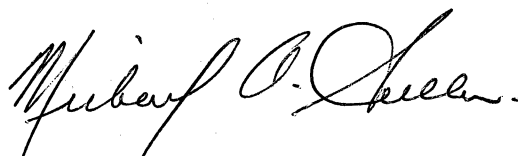
Councillor Sullivan said that the next step could be to have another discussion. It was agreed that the next meeting will take place on November 2, 1994 at 10 a.m. in the Ackermann Room.

The hearing was adjourned at 6:20 p.m.

For the Committee



Vice Mayor Sheila T. Russell
Co-Chair



Councillor Michael A. Sullivan
Co-Chair

1.

COMMITTEE REPORTS

S-422

Report from the joint committee on Rules and Government Operations Committee for a joint hearing held on October 5, 1994 to received public comment regarding proposed home rule legislation to prohibit persons convicted of felonies from holding elective municipal office in the City of Cambridge.

In City Council,

October 17, 1994

*Report accepted
and placed
on file*