

**CHAPTER 407**  
**DEPARTMENT OF HUMAN SERVICES,**  
**ADMINISTRATIVE SERVICES DIVISION AND DIRECTOR'S OFFICE**

**DIVISION 7**  
**CRIMINAL RECORDS AND ABUSE CHECK RULES**

**Criminal Records Checks on Department of Human Services Employees, Volunteers, and Contractors**

**407-007-0000**

**Purpose**

- (1) The purpose of these rules, OAR 407-007-0000 to 407-007-0100, is to provide for the reasonable screening under ORS 181.534 and 181.537 of the Department of Human Services' employees, volunteers, and contractors to determine if they have a history of criminal behavior such that they should not be allowed to work, volunteer, be employed, or otherwise perform in positions covered by these rules.
- (2) These rules apply to evaluating criminal records and potentially disqualifying conditions of a subject individual when conducting fitness determinations based upon such information. The fact that a subject individual is approved does not guarantee employment or placement. These rules do not apply to subject individuals covered under OAR 407-007-0200 to 407-007-0370.
- (3) Although abuse checks may occur concurrently with criminal records checks performed under these rules and may share similar processes, the criminal records check process is separate and distinct from the abuse checks that may be performed under OAR 407-007-0400 to 407-007-0460.

Stat. Auth.: ORS 181.534, 181.537 & 409.050

Stats. Implemented: ORS 181.534, 181.537 & 409.010

**407-007-0010**

**Definitions**

As used in OAR 407-007-0000 to 407-007-0100, unless the context of the rule requires otherwise, the following definitions apply:

- (1) "Approved" means that a subject individual, following a final fitness determination, is fit to work, volunteer, be employed, or otherwise perform in the position listed on the Background Check Request form.
- (2) "Approved with restrictions" means an approval in which some restriction is made including but not limited to the subject individual, the subject individual's environment,

the type or number of clients for whom the subject individual may provide care, or the information to which the subject individual has access.

- (3) “Authorized designee (AD)” means an individual whom the Department of Human Services designates and authorizes to receive and process Background Check Request forms from subject individuals and criminal records information from the Department of Human Services.
- (4) “Background Check Unit” means the Department of Human Services’ Background Check Unit (BCU).
- (5) “Client” means any individual who receives services, care, or funding for care through the Department of Human Services.
- (6) “Closed case” means a criminal records check application that has been closed without a final fitness determination.
- (7) “Criminal records check” means obtaining and reviewing criminal records as required by these rules and includes any or all of the following:
  - (a) An Oregon criminal records check where criminal offender information is obtained from Oregon State Police (OSP) using the Law Enforcement Data System (LEDS). The Oregon criminal records check may also include a review of other criminal information.
  - (b) A national criminal records check where criminal records are obtained from the Federal Bureau of Investigation (FBI) through the use of fingerprint cards sent to OSP and other identifying information.
  - (c) A state-specific criminal records check where criminal records are obtained from law enforcement agencies, courts, or other criminal records information resources located in, or regarding, a state or jurisdiction outside Oregon.
- (8) “Criminal offender information” means records, including fingerprints and photographs, received, compiled, and disseminated by OSP for purposes of identifying criminal offenders and alleged offenders and maintained as part of an individual’s records of arrest, the nature and disposition of criminal charges, sentencing, confinement, but does not include the retention by OSP of records of transfer of inmates between penal institutions or other correctional facilities, and release. It also includes the OSP Computerized Criminal History System (see OAR 257-010-0015).
- (9) “Denied” means that a subject individual, following a fitness determination including a weighing test, is not fit to work, volunteer, be employed, or otherwise perform in the position listed on the Background Check Request form.
- (10) “Department” means the Department of Human Services.

- (11) “Employee” means an individual working in the Department in any position including a new hire, promotion, demotion, direct appointment, re-employment, job rotation, developmental assignment, transfer, an individual impacted by the Department’s lay-off process, or temporary hire.
- (12) “Fitness determination” means the decision in a case that is not closed and includes:
  - (a) The decision regarding a Background Check Request form, an Oregon criminal records check, and preliminary review (a preliminary fitness determination); or
  - (b) The decision regarding a Background Check Request form, completed criminal records check including gathering of other information as necessary, and a final review by an AD (a final fitness determination).
- (13) “Good cause” means a valid and sufficient reason for not complying with time frames set during the criminal records check process or contested case hearing process, including but not limited to an explanation of circumstances beyond a subject individual’s reasonable control.
- (14) “Hearing representative” means a Department employee representing the Department in a contested case hearing.
- (15) “Hired on a preliminary basis” means a condition in which an subject individual may be allowed by the Department to work, volunteer, be trained, or reside in an environment following the submission of a completed Background Check Request form. Hired on a preliminary basis is applicable only during the time frame following a preliminary fitness determination and prior to a final fitness determination.
- (16) “Office of Human Resources” means the Department’s Office of Human Resources.
- (17) “Other criminal records information” means information obtained and used in the criminal records check that is not criminal offender information from OSP. Other criminal records information includes but is not limited to police investigations and records, information from local or regional criminal records information systems, justice records, court records, information from the Oregon Judicial Information Network, sexual offender registration records, warrants, Oregon Department of Corrections records, Oregon Department of Transportation’s Driver and Motor Vehicle Services Division information, information provided on the Background Check forms, disclosures by a subject individual, and any other information from any jurisdiction obtained by or provided to the Department for the purpose of conducting a fitness determination.
- (18) “Position” means the position listed on the Background Check Request form for the subject individual which determines whether the individual is a subject individual under these rules. Covered positions include any type of employment, volunteer placement, or contract placement.

- (19) “Subject individual (SI)” means an individual on whom the Department may conduct a criminal records check and from whom the Department may require fingerprints for the purpose of conducting a national criminal records check. An SI includes any of the following:
- (a) A Department employee.
  - (b) An individual who has been offered employment by the Department.
  - (c) An individual secured by the Department through the services of a temporary employment agency, staffing agency, or personnel services agency who is providing any of the duties or having access as described in OAR 407-007-0060(3).
  - (d) A Department client who is placed in the Work Experience or JOBS Plus program at a Department site.
  - (e) An individual who provides or seeks to provide services to the Department at Department facilities, sites, or offices as a contractor, subcontractor, vendor, volunteer under Department direction and control, or student under Department direction and control who:
    - (A) May have contact with clients;
    - (B) Has access to personal information about employees of the Department, clients, or members of the public, including but not limited to Social Security numbers, dates of birth, driver license numbers, medical information, personal financial information, or criminal background information;
    - (C) Has access to information the disclosure of which is prohibited by state or federal laws, rules, or regulations or information that is defined as confidential under state or federal laws, rules, or regulations;
    - (D) Has access to property held in trust or to private property in the temporary custody of the state;
    - (E) Has payroll or fiscal functions or responsibility for:
      - (i) Receiving, receipting or depositing money or negotiable instruments;
      - (ii) Billing, collections, setting up financial accounts, or other financial transactions; or

- (iii) Purchasing or selling property;
  - (F) Provides security, design or construction services for government buildings, grounds, or facilities;
  - (G) Has access to critical infrastructure or secure facilities information; or
  - (H) Is providing information technology services and has control over or access to information technology systems.
- (f) Any individual applying for employment or a volunteer placement or any employee, volunteer, contractor, or employee of any contractor in any of the following:
- (A) A State-operated or Department-contracted secure residential treatment facility;
  - (B) A State-operated group home within the Department’s State-Operated Community Programs;
  - (C) Blue Mountain Recovery Center; or
  - (D) Oregon State Hospital.
- (20) “Weighing test” means a process carried out by the Department in which available information is considered to make a fitness determination.

Stat. Auth.: ORS 181.534, 181.537 & 409.050  
 Stats. Implemented: ORS 181.534, 181.537 & 409.010

**407-007-0020**  
**Criminal Records Check Required**

- (1) The Department conducts criminal records checks on all SIs through LEDS maintained by OSP pursuant to ORS chapter 181 and the rules adopted pursuant thereto (see OAR chapter 257, division 15).
- (2) If a national criminal records check of an SI is necessary, OSP shall provide the Department the results of criminal records checks conducted pursuant to ORS 181.534, including fingerprint identification, through the FBI.
- (3) SIs must have a criminal records check in the following circumstances:
  - (a) If an individual becomes an SI on or after the effective date of these rules.

- (b) Except as provided in section (3) of this rule, if the individual, whether previously considered an SI or not, changes positions, and the position requires a criminal records check. Change in a position may include but is not limited to promotion, transfer, demotion, re-employment, job rotation, developmental assignment, restoration, layoff, or recall.
  - (c) If the Department has reason to believe that a criminal records check is justified. Examples include but are not limited to any indication of possible criminal behavior by an SI or quality assurance monitoring of a previously conducted criminal records check.
- (4) The Office of Human Resources may determine that conducting a new criminal records check and fitness determination for a Department employee is not required.
- (a) After the completion of the Background Check Request form, the Office of Human Resources may consider ending the criminal records check if:
    - (A) The SI who has been offered a new position has completed a previous criminal records check and fitness determination with an outcome of approved; and
    - (B) There has been no break in employment with the Department.
  - (b) The Office of Human Resources may cease the criminal records check without making a new fitness determination if there is no indication of new potentially disqualifying crimes or conditions, and at least one of the following is true:
    - (A) The previous criminal records check identified no potentially disqualifying crimes or conditions as defined at that time and the Office of Human Resources determines that the previous fitness determination is sufficient for the new position.
    - (B) The Office of Human Resources determines that the new position requires the same or less responsibility or access in the duties as described in OAR 407-007-0060(3).
- (5) All SIs shall notify the Department's Office of Human Resources within five days of being arrested, charged, or convicted of any crime.

Stat. Auth.: ORS 181.534, 181.537 & 409.050  
 Stats. Implemented: ORS 181.534, 181.537 & 409.010

**407-007-0030**  
**Criminal Records Check Process**

- (1) Only Department employees, called ADs, may be authorized and approved pursuant to OAR 407-007-0230 to 407-007-0240 to receive and evaluate criminal offender information and other criminal records information. Only ADs may conduct fitness determinations.
- (2) An SI shall use the Background Check Request form to request the criminal records check and shall include:
  - (a) Name and aliases;
  - (b) Date of birth;
  - (c) Address and recent residency information;
  - (d) Driver license information;
  - (e) Position for which the SI is submitting the Background Check Request form;
  - (f) Disclosure of criminal history;
    - (A) All arrests, charges, and convictions.
    - (B) The disclosed crimes and the dates must reasonably match the SI's criminal offender information and other criminal records information, as determined by the Department.
  - (g) Disclosure of other history required under OAR 407-007-0400 to 407-007-0460; and
  - (h) Disclosure of other information to be considered in the event of a weighing test if the SI discloses any criminal history or other history required under OAR 407-007-0400 to 407-007-0460.
- (3) The Background Check Request form shall include the following notices:
  - (a) A notice regarding disclosure of Social Security number indicating:
    - (A) The SI's disclosure is voluntary; and
    - (B) The Department requests the Social Security number solely for the purpose of positively identifying the SI during the criminal records check process.
  - (b) A notice that the SI may be subject to fingerprinting and a criminal records check.

- (4) The Department shall verify the identity of an SI using methods which include but are not limited to asking the SI for current and valid government-issued photo identification and confirming the information on the photo identification with the SI, the information written on the Background Check Request form, and the information written on the fingerprint card if a national criminal records check is conducted.
- (5) The Department shall conduct an Oregon criminal records check after a completed Background Check Request form is received.
  - (a) Using information submitted on the Background Check Request form, the Department may obtain criminal offender information from the LEDS system and may request other criminal records information as needed.
  - (b) The Department shall handle criminal offender information obtained through LEDS in accordance with applicable OSP requirements in ORS chapter 181 and the rules adopted pursuant thereto (see OAR chapter 257, division 15).
- (6) The Department may conduct a fingerprint-based national criminal records check after an Oregon criminal records check is completed.
  - (a) A fingerprint-based national criminal records check may be completed under any of the following circumstances:
    - (A) The SI has out of state residency evidenced by the SI's possession of an out of state driver license or being outside Oregon for 60 or more consecutive days during the previous five years.
    - (B) The LEDS check, SI disclosures, or any other criminal records information obtained by the Department indicates there may be criminal records outside of Oregon.
    - (C) The Department has reason to question the identity or history of the SI.
    - (D) The SI's position is at Oregon state institutions under OAR 407-007-0010(19)(g).
    - (E) The SI is assigned duties involving any aspect of a criminal records or abuse check process.
    - (F) A fingerprint-based criminal records check is required by federal or state laws or regulations, other rules adopted by the Department, or by contract with the Department.
    - (G) If the Department has reason to believe that fingerprints are needed to make a final fitness determination.

- (b) The Department must receive consent from the parent or guardian to obtain fingerprints from an SI under 18 years of age.
  - (c) The SI shall complete and submit a fingerprint card when requested by the Department.
    - (A) The SI shall use a fingerprint card provided by the Department. The Department shall give the SI notice regarding the Social Security number as set forth in OAR 407-007-0030(3)(a).
    - (B) The SI shall submit the fingerprint card to the BCU within 21 calendar days of the request.
      - (i) The Department shall close the application, making it a closed case, if the fingerprint card is not received within 21 calendar days.
      - (ii) The Department may extend the time allowed for good cause.
    - (C) The Department may require new fingerprint cards if previous cards are rejected by OSP or the FBI.
- (7) The Department may also conduct a state-specific criminal records check in lieu of or in addition to a national criminal records check. Reasons for a state-specific criminal records check include but are not limited to:
- (a) When the Department has reason to believe that out-of-state criminal records may exist.
  - (b) When the Department has been unable to complete a national criminal records check due to illegible fingerprints.
  - (c) When the national criminal records check results show incomplete information about charges or criminal records without final disposition.
  - (d) When there is indication of residency or criminal records in a state that does not submit all criminal records to the FBI.
  - (e) When, based on available information, the Department has reason to believe that a state-specific criminal records check is necessary.
- (8) In order to complete a criminal records check and fitness determination, the Department may require additional information from an SI.
- (a) Additional information includes but is not limited to criminal, judicial, other background information, or proof of identity.

- (b) If an SI who is a represented Department employee is required to provide additional information, the process for obtaining that information through investigatory interviews shall adhere to collective bargaining agreements on investigatory interviews.
- (9) The Department may conduct a criminal records check in situations of imminent danger.
- (a) If the Department determines there is indication of criminal behavior by an SI that could more likely than not pose an immediate risk to the Department, its clients, or vulnerable persons, the Department shall authorize a criminal records check without the completion of a Background Check Request form.
  - (b) If the Department determines that a fitness determination based on the criminal records check would be adverse to the SI, the Department shall provide the SI, if available, the opportunity to disclose criminal records, potentially disqualifying conditions, and other information as indicated in OAR 407-007-0060 before the completion of the fitness determination.
- (10) Criminal records checks conducted under this rule shall be documented in writing.

Stat. Auth.: ORS 181.534, 181.537 & 409.050

Stats. Implemented: ORS 181.534, 181.537 & 409.010

#### **407-007-0040**

##### **Potentially Disqualifying Crimes**

- (1) A conviction of any of the following crimes is potentially disqualifying. Offenses or convictions that are classified as less than a misdemeanor, such as violations or infractions, are not potentially disqualifying (see ORS 161.505 to 161.565).
- (a) Any federal crime.
  - (b) Any U.S. military crime.
  - (c) Any felony or misdemeanor in Oregon Revised Statutes or local codes in Oregon.
  - (d) Any felony or misdemeanor in a jurisdiction outside Oregon (including known crimes outside the United States) that is the substantial equivalent of any crime in Oregon Revised Statutes, or that is serious and demonstrates behavior that poses a threat or jeopardizes the safety of the Department, its clients, or vulnerable individuals as determined by the Department.
  - (e) Any crime that is no longer codified in Oregon or other jurisdiction but that is the substantial equivalent of any crime listed in this section as determined by the Department.

- (2) Regardless of the conviction date, evaluations of crimes may be based on Oregon laws and laws in other jurisdictions in effect at the time of the fitness determination.
- (3) Under no circumstances may an SI be denied under these rules because of a juvenile record that has been expunged or set aside pursuant to ORS 419A.260 to 419A.262.
- (4) Under no circumstances may an SI be denied under these rules because of an adult record that has been set aside pursuant to ORS 137.225.

Stat. Auth.: ORS 181.534, 181.537 & 409.050  
Stats. Implemented: ORS 181.534, 181.537 & 409.010

#### **407-007-0050**

#### **Other Potentially Disqualifying Conditions**

The following are potentially disqualifying conditions:

- (1) The SI makes a false statement to the Department, including the provision of materially false information, false information regarding criminal history, or failure to disclose information regarding criminal history. Nondisclosure of charges classified as less than a misdemeanor such as violations or infractions may not be considered as false statement.
- (2) The SI is a registered sex offender in any jurisdiction. There is a rebuttable presumption that an SI is likely to engage in conduct that would pose a significant risk to the Department, its clients, or vulnerable individuals if the SI has been designated a predatory sex offender under ORS 181.585 or found to be a sexually violent dangerous offender under ORS 144.635 (or similar statutes in other jurisdictions).
- (3) The SI has an outstanding warrant in any jurisdiction.
- (4) The SI has a deferred sentence, conditional discharge, or is participating in a diversion program in any jurisdiction for any potentially disqualifying crime.
- (5) The SI is currently on probation, parole, or post-prison supervision for any crime in any jurisdiction, regardless of the original conviction date or date of guilty or no contest plea if there is no conviction date.
- (6) The SI is found in violation of post-prison supervision, parole, or probation for any crime in any jurisdiction regardless of the original conviction date or date of guilty or no contest plea if there is no conviction date, within five years or less from the date the Background Check Request form was signed or the date the Department conducted a criminal records check due to imminent danger.
- (7) The SI has an unresolved arrest, charge, or a pending indictment for any crime in any jurisdiction.

- (8) The SI has been arrested in any jurisdiction as a fugitive from another state or a fugitive from justice, regardless of the date of arrest.
- (9) An adjudication in a juvenile court in any jurisdiction, finding that the SI was responsible for a potentially disqualifying crime that would result in a conviction if committed by an adult.
- (10) A finding of “guilty except for insanity,” “guilty except by reason of insanity,” “not guilty by reason of insanity,” “responsible except for insanity,” “not responsible by reason of mental disease or defect,” or similarly worded disposition in any jurisdiction regarding a potentially disqualifying crime, unless the local statutes indicate that such an outcome is considered an acquittal.

Stat. Auth.: ORS 181.534, 181.537 & 409.050

Stats. Implemented: ORS 181.534, 181.537 & 409.010

**407-007-0060**  
**Weighing Test**

If the SI has potentially disqualifying crimes or conditions, the Department shall consider any of the following factors disclosed by the SI or otherwise known when making the fitness determination:

- (1) Circumstances regarding the nature of potentially disqualifying crimes and conditions including but not limited to:
  - (a) Age of the SI at time of the potentially disqualifying crime or condition.
  - (b) Details of incidents leading to the charges of potentially disqualifying crimes or resulting in potentially disqualifying conditions.
  - (c) Facts that support the conviction or other potentially disqualifying condition.
  - (d) Passage of time since commission of the crime or potentially disqualifying condition.
  - (e) Consideration of state or federal laws, regulations, or rules covering the position or the Department, regarding the potentially disqualifying crimes or conditions.
- (2) Other factors when available including but not limited to:
  - (a) Other information related to criminal activity including charges, arrests, pending indictments, or convictions. Other behavior involving contact with law enforcement may also be reviewed if information is relevant to other criminal records or shows a pattern relevant to criminal history.

- (b) Periods of incarceration.
  - (c) Status of and compliance with parole, post-prison supervision, or probation.
  - (d) Evidence of drug or alcohol issues directly related to criminal activity or potentially disqualifying conditions.
  - (e) Evidence of other treatment or rehabilitation related to criminal activity or potentially disqualifying conditions.
  - (f) Likelihood of repetition of criminal behavior or behaviors leading to potentially disqualifying conditions, including but not limited to patterns of criminal activity or behavior or whether the SI appears to accept responsibility for past actions, as determined by the Department.
  - (g) Changes in circumstances subsequent to the criminal activity or disqualifying conditions including but not limited to:
    - (A) History of high school, college, or other education related accomplishments.
    - (B) Work history (employee or volunteer).
    - (C) History regarding licensure, certification, or training for licensure or certification.
    - (D) Written recommendations from current or past employers.
  - (h) Indication of the SI's cooperation, honesty, or the making of a false statement during the criminal records check process, including acknowledgment and acceptance of responsibility of criminal activity and potentially disqualifying conditions.
- (3) The relevancy of the SI's criminal history or potentially disqualifying conditions to the position or to the environment of the position, shall be considered. Consideration includes the relation between the SI's potentially disqualifying crimes or conditions and the following tasks or duties in the position:
- (a) Access to or direct contact with Department clients, client property, or client funds.
  - (b) Access to information technology services, or control over or access to information technology systems that would allow an individual holding the position to harm the information technology systems or the information contained in the systems.

- (c) Access to information, the disclosure of which is prohibited by state or federal laws, rules, or regulations, or information that is defined as confidential under state or federal laws, rules, or regulations.
- (d) Access to payroll functions.
- (e) Responsibility for receiving, receipting, or depositing money or negotiable instruments.
- (f) Responsibility for billing, collections, or other financial transactions.
- (g) Access to mail received or sent to the Department, including interagency mail, or access to any mail facilities in the Department.
- (h) Responsibility for auditing the Department or other governmental agencies.
- (i) Responsibility for any personnel or human resources functions.
- (j) Access to personal information about employees, clients, or members of the public including Social Security numbers, dates of birth, driver license numbers, residency information, medical information, personal financial information, criminal offender information, or other criminal records information.
- (k) Access to medications, chemicals, or hazardous materials; access to facilities in which medications, chemicals, and hazardous materials are present; or access to information regarding the transportation of medications, chemicals, or hazardous materials.
- (L) Access to property to which access is restricted in order to protect the health or safety of the public.
- (m) Responsibility for security, design, or construction services. This includes government buildings, grounds, or facilities or buildings, owned, leased, or rented for government purposes.
- (n) Access to critical infrastructure or security-sensitive facilities or information.

Stat. Auth.: ORS 181.534, 181.537 & 409.050  
Stats. Implemented: ORS 181.534, 181.537 & 409.010

**407-007-0065**  
**Hired on a Preliminary Basis**

The Department shall make a preliminary fitness determination to determine if an SI may work, volunteer, be employed, or otherwise perform in the position listed on the Background Check

Request form prior to a final fitness determination. The Department may not hire an SI on a preliminary basis prior to the completion of a preliminary fitness determination.

- (1) The SI shall complete and submit a Background Check Request form.
- (2) The Department shall complete a preliminary fitness determination and send notice to the hiring manager.
- (3) After review of the Background Check Request form, the Department shall make one of the following determinations:
  - (a) An SI may be hired on a preliminary basis, only during the time period prior to a final fitness determination, into the position listed on the Background Check Request form and allowed to participate in training, orientation, and position activities under the one of the following circumstances:
    - (A) If there is no indication of potentially disqualifying crimes or conditions on the Background Check Request form and the Department has no reason to believe the SI has potentially disqualifying crimes or conditions.
    - (B) If an SI discloses potentially disqualifying crimes or conditions, the SI may be hired on a preliminary basis only after the Office of Human Resources completes a weighing test. The Department may hire an SI on a preliminary basis only if, based on information available at the time, the Office of Human Resources determines that more likely than not that the SI poses no potential threat to the Department, its clients, or vulnerable persons.
  - (b) The Department shall not hire an SI on a preliminary basis if the Office of Human Resources determines that:
    - (A) After a weighing test, the SI more likely than not poses a potential threat to the Department, its clients, or vulnerable persons;
    - (B) The SI's most recent criminal records check under these rules or other Department criminal records check rules resulted in a denial; or
    - (C) The SI is currently involved in contesting a criminal records check determination under these or other Department criminal records check or abuse check rules.
- (4) An SI who is hired on a preliminary basis shall be actively supervised at all times by an individual who has been approved without restrictions pursuant to these rules or previous Department criminal records check rules. The individual providing active supervision shall do at all times the following:

- (a) Be in the same building as the SI or, if outdoors of Department buildings or any location off Department property, be within line of sight and hearing of the SI;
  - (b) Know where the SI is and what the SI is doing; and
  - (c) Periodically observe the actions of the SI.
- (5) An SI who was approved without restrictions within the previous 24 months through a documented criminal records check pursuant to these rules may work after being hired on a preliminary basis without active supervision. The 24 month time frame is calculated from the date of previous approval to the date starting the new position. This exemption is not allowed in any of the following situations:
- (a) If the SI cannot provide documented proof that he or she worked continuously under the previous approval for at least one year.
  - (b) If there is evidence of criminal activity within the previous 24 months.
  - (c) If the Department determines the job duties in the new position are so substantially different from the previous position that the previous fitness determination is inadequate for the new position.
- (6) The Department may immediately remove an SI hired on a preliminary basis from the position listed on the Background Check Request form. Removal is not subject to hearing or appeal. Reasons for removal include but are not limited to the following:
- (a) There is any indication of falsification on the Background Check Request form.
  - (b) The SI fails to disclose convictions for any potentially disqualifying crimes, any arrests that did not result in convictions, or any out of state arrests or convictions.
  - (c) The Department determines that allowing the SI to be hired on a preliminary basis is not appropriate, based on the application, criminal records, position duties, or regulations regarding the position.
- (7) Nothing in this rule is intended to require that an SI, who is eligible for being hired on a preliminary basis be allowed to work, volunteer, be employed, or otherwise perform in the position listed on the Background Check Request form prior to a final fitness determination.

Stat. Auth.: ORS 181.534, 181.537 & 409.050  
Stats. Implemented: ORS 181.534, 181.537 & 409.010

**407-007-0070**  
**Final Fitness Determinations**

The Office of Human Resources shall make a final fitness determination after all necessary criminal records checks, and a weighing test if necessary, have been completed. The Office of Human Resources may obtain and consider additional information as necessary to complete the final fitness determination.

- (1) The final fitness determination may result in one of the following outcomes:
  - (a) The Office of Human Resources may approve an SI if:
    - (A) The SI has no potentially disqualifying crimes or potentially disqualifying conditions; or
    - (B) The SI has potentially disqualifying crimes or potentially disqualifying conditions and, after a weighing test with available information, the Department determines that more likely than not the SI poses no risk to the Department, its clients, or vulnerable persons.
  - (b) The Office of Human Resources may approve an SI with restrictions if, after a weighing test with available information, it determines that more likely than not that the SI poses no risk to the Department, its clients, or vulnerable persons, if certain restrictions are placed on the SI, such as but not limited to restrictions to one or more specific clients, position duties, or environments. The Department shall complete a new background check and fitness determination on the SI before removing a restriction. A fitness determination of approved with restrictions shall only be considered for the following SIs:
    - (A) An individual secured by the Department through the services of a temporary employment agency, staffing agency, or personnel services agency who is providing any of the duties or having access as described in OAR 407-007-0060(3).
    - (B) A volunteer or student under Department direction and control.
    - (C) A Department client who is placed in a Work Experience or JOBS Plus program at a Department site.
    - (D) Any individual who is required to complete a criminal records check pursuant to the statutory authority of ORS 181.534 and 181.537 or the authority of these rules pursuant to a contract with the Department.
  - (c) The Office of Human Resources shall deny an SI whom it determines, after a weighing test with available information, more likely than not poses a risk to the Department, its clients, or vulnerable individuals.
- (2) The BCU may assist in or handle final fitness determinations as requested by the Office of Human Resources.

- (3) Upon completion of a final fitness determination, the Office of Human Resources shall provide written notice to the SI. The notice shall:
  - (a) Be in a Department approved format;
  - (b) Include information regarding appeal rights for denied or approved with restrictions outcomes. The notice shall also include a statement that it becomes a final order by default in the event of a withdrawal or a failure to participate during the appeal or hearing; and
  - (c) Be mailed or hand-delivered to the SI no later than 14 calendar days after the decision. The effective date of action shall be recorded on the notice.
  - (d) The Office of Human Resources shall also provide employees with all formal disciplinary documents and letters up to and including a letter of dismissal.
- (4) When an SI is denied, the Department shall not allow the SI to work, volunteer, be employed, or otherwise perform in the position listed on the Background Check Request form. A denial applies only to the position in question.
  - (a) The process for a Department employee's removal from service or dismissal shall adhere to Department-wide Support Services discharge policies, Department of Administrative Services' Human Resource Services Division dismissal policies, and collective bargaining agreements on discharge, as applicable.
  - (b) For all other SIs, a denial shall result in immediate dismissal.
- (5) Final fitness determinations shall be documented in writing, including any other necessary details including but not limited to restrictions in a restricted approval or potentially disqualifying crimes or conditions in a denial.
- (6) The Department shall make new fitness determinations for each application. The outcome of previous fitness determinations does not set a precedent for subsequent fitness determinations.

Stat. Auth.: ORS 181.534, 181.537 & 409.050  
Stats. Implemented: ORS 181.534, 181.537 & 409.010

**407-007-0075**  
**Closed Case**

If an SI discontinues the application or fails to cooperate with the criminal records check or fitness determination process, the application is considered incomplete and shall be closed.

- (1) Discontinuance or failure to cooperate includes but is not limited to the following circumstances:
  - (a) The SI refuses to be fingerprinted when required by these rules.
  - (b) The SI fails to respond within a stated time period to a request for corrections to the application, fingerprints, or provide any other information necessary to conduct a criminal records check and there is not enough information available to make a fitness determination.
  - (c) The SI withdraws the application, leaves the position prior to completion of the criminal records check, or the Department cannot locate or contact the SI.
  - (d) The SI is determined to be ineligible for the position for reasons other than the criminal records check.
- (2) When the application is closed without a final fitness determination, there is no right to contest the closure.
- (3) When a case is closed, the SI shall not be allowed to work, volunteer, be employed, or otherwise perform in the position listed on the Background Check Request form. A closed case applies only to the position in question.
  - (a) The process for a Department employee's removal from service or dismissal shall adhere to Department-wide Support Services discharge policies, Department of Administrative Services' Human Resource Services Division dismissal policies, and collective bargaining agreements on discharge, as applicable.
  - (b) For all other SIs, a closed case shall result in immediate dismissal.
- (4) The Office of Human Resources or the BCU shall document in writing the reasons for a closed case, and shall provide that information to the SI.

Stat. Auth.: ORS 181.534, 181.537 & 409.050

Stats. Implemented: ORS 181.534, 181.537 & 409.010

#### **407-007-0080**

##### **Contesting a Final Fitness Determination**

- (1) A final fitness determination of denied or approved with restrictions is considered an adverse outcome. An SI with an adverse outcome may contest that outcome.
- (2) If an SI is denied, then the SI may not work, volunteer, be employed, or otherwise perform in positions covered by these rules. An SI appealing a restricted approval may only work under the terms of the restriction during the appeal.

- (3) If an adverse outcome is changed at any time during the appeal process, the change does not guarantee employment or placement.
- (4) If an SI wishes to challenge the accuracy or completeness of criminal offender information provided by OSP, the FBI, or other criminal records information from other agencies reporting information to the Department, the SI may appeal to the entity providing the information. These challenges are not subject to the Department's appeal process.
- (5) The SI has the right to represent himself or herself or have legal representation during the appeal process. The SI may not be represented by a lay person. In this rule, the term "SI" shall be considered to include the SI's legal representative.
- (6) An SI who is already employed by the Department at the time of the final fitness determination may appeal through applicable personnel rules, policies, and collective bargaining provisions. The SI's decision to do so is an election of remedies as to the rights of the SI with respect to the fitness determination and constitutes a waiver of the contested case process described in this rule.
- (7) An SI who wishes to challenge an adverse fitness determination may appeal the determination by requesting a contested case hearing. The appeal process is conducted pursuant to ORS 183.411 to 183.497 and the Attorney General's Uniform and Model Rules of Procedure for the Office of Administrative Hearings (OAH), OAR 137-003-0501 to 137-003-0700.
  - (a) To request a contested case hearing the SI shall complete and sign the Hearing Request form.
  - (b) The completed and signed form must be received by the Department within the following time lines:
    - (A) For Department employees and SIs offered employment by the Department, no later than 15 calendar days after the effective date of action listed on the notice of the fitness determination.
    - (B) For all other SIs, no later than 45 calendar days after the effective date of action listed on the notice of the fitness determination.
  - (c) If a request for hearing is not timely, the Department shall determine, based on a written statement from the SI and available information, if there is good cause to proceed with the appeal.
  - (d) The Department may refer an untimely request to OAH for a hearing on the issue of timeliness.

- (8) When an SI requests a contested case hearing, the Department may conduct an administrative review before referring the appeal to OAH.
- (a) The SI must participate in the administrative review. Participation may include but is not limited to providing additional information or additional documents requested by the Department within a specified amount of time.
  - (b) The administrative review is not open to the public.
- (9) The Department may conduct additional criminal records checks during the appeal process to update or verify the SI's criminal records. If needed, the Department shall amend the notice of fitness determination during the appeal process while still maintaining the original hearing rights and deadlines.
- (10) A hearing representative shall represent the Department in contested case hearings, or may use representation through the Department of Justice's Office of the Attorney General.
- (a) The Department shall provide the administrative law judge and the SI a complete copy of available information used during the criminal records checks and fitness determinations. The notice of contested case and prehearing summary and all other documents shall be mailed by regular first class mail.
  - (b) The contested case hearing is not open to the public.
  - (c) The administrative law judge shall make a new fitness determination based on the evidence and the contested case hearing record.
  - (d) The only remedy that may be awarded is a fitness determination that the SI is approved or denied. Under no circumstances shall the Department be required to place an SI in any position, nor shall the Department be required to accept services or enter into a contractual agreement with an SI.
- (11) The result of an appeal is a final order.
- (a) In the following situations, the notice of fitness determination becomes the final order as if the SI never requested a hearing:
    - (A) Failure to request a hearing in the time allotted in this rule. No other document shall be issued after the notice of fitness determination.
    - (B) Withdrawal of the request for hearing at any time during the appeal process.
  - (b) The Department may make an informal disposition based on the administrative review. The Department shall issue a final order and new notice of fitness

determination. If the resulting fitness determination is an adverse outcome, the appeal shall proceed to contested case hearing.

- (c) The Department shall issue a dismissal order in the following circumstances:
  - (A) The SI may withdraw a hearing request verbally or in writing at any time before the issuance of a final order. A dismissal order due to a withdrawal is effective the date the withdrawal is received by the Department or OAH. The SI may cancel the withdrawal in writing within 14 calendar days after the date of withdrawal.
  - (B) The Department shall dismiss a hearing request when the SI fails to participate in the administrative review. Failure to participate in the administrative review shall result in termination of hearing rights. The order is effective on the due date for participation in the administrative review. The Department shall review a good cause request to reinstate hearing rights if received in writing by the Department within 14 calendar days.
  - (C) The Department shall dismiss a hearing request when the SI fails to appear at the time and place specified for the contested case hearing. The order is effective on the date scheduled for the hearing. The Department shall review a good cause request to reinstate hearing rights if received in writing by the Department within 14 calendar days.
- (d) After a hearing, the administrative law judge shall issue a proposed and final order.
  - (A) If no written exceptions are received by the Department within 14 calendar days after the service of the proposed and final order, the proposed and final order shall become the final order.
  - (B) If timely written exceptions to the proposed and final order are received by the Department, the Department's Director or designee shall consider the exceptions and serve a final order, or request a written response or a revised proposed and final order from the administrative law judge.
- (12) Final orders, including dismissal and default orders, are subject to reconsideration or rehearing petitions within 60 calendar days after the final order is served, pursuant to OAR 137-003-0675.

Stat. Auth.: ORS 181.534, 181.537 & 409.050

Stats. Implemented: ORS 181.534, 181.537, 183.341 & 409.010

#### **407-007-0090**

#### **Record Keeping, Confidentiality**

- (1) All LEDS reports are confidential and the Department shall maintain the reports in accordance with applicable OSP requirements in ORS chapter 181 and the rules adopted pursuant thereto (see OAR chapter 257, division 15).
  - (a) LEDS reports may only be shared with approved Department authorized designees if there is a need to know consistent with these rules.
  - (b) The LEDS report and any photocopies may not be shown or given to the SI.
- (2) The results of a national criminal records check provided by the FBI or through OSP are confidential and may not be disseminated by the Department except:
  - (a) If a fingerprint-based criminal records check was conducted on the SI, the SI shall be provided a copy of the results upon request.
  - (b) During the contested case hearing, the Department shall provide state and national criminal offender information as exhibits.
- (3) All completed Background Check Request forms, other criminal records information, and other records collected or developed during the criminal records check process shall be kept confidential and disseminated only on a need-to-know basis.
- (4) The Department shall retain and destroy all criminal records check documents pursuant to federal law and records retention schedules published by Oregon State Archives.

Stat. Auth.: ORS 181.534, 181.537 & 409.050

Stats. Implemented: ORS 181.534, 181.537 & 409.010

#### **407-007-0100**

##### **Variances**

- (1) The outcome of a fitness determination made pursuant to these rules is not subject to variance. Challenges to fitness determinations may only be made through contested case hearing rights set forth in these rules or alternative options available to Department employees.
- (2) The Department may grant a variance based upon a demonstration by the Department program area or work unit that the variance would not pose a significant risk to the Department, its clients, or vulnerable individuals.
- (3) The program office or work unit requesting a variance shall submit, in writing, an application to the BCU that contains the following:
  - (a) The section of the rule from which the variance is sought;

- (b) The reason for the proposed variance;
  - (c) The alternative practice, service, method, concept or procedure proposed;
  - (d) A plan and timetable for compliance with the section of the rule from which the variance is sought; and
  - (e) An explanation on how the safety and well-being of the Department or affected individuals will be ensured during the time the variance period is in effect.
- (4) The Assistant Director or designee for the Department's Administrative Services Division shall approve or deny the request for a variance.
  - (5) The Department shall notify the program office or work unit of the decision. This notice shall be sent within 30 calendar days of the receipt of the request by the Department with a copy to other relevant divisions of the Department.
  - (6) Appeal of the denial of a variance request shall be made in writing to the Department's Director or designee, whose decision shall be final.
  - (7) The duration of the variance shall be determined by the Department's Director or designee.
  - (8) The Department program office or work unit may implement a variance only after receipt of written approval from the Department.
  - (9) Granting a variance does not set a precedent for subsequent requests for variances.

Stat. Auth.: ORS 181.537 & 409.050

Stats. Implemented: ORS 181.537 & 409.010