Commission on Peace Officer Standards and Training
1601 Alhambra Blvd
Sacramento, CA 95816-7083
www.post.ca.gov

Date: December 30, 2008

Bulletin: No. 2008-22-A

Subject: **Addendum to Bulletin No. 2008-22 – Questions and Answers on Government Code Section 1031.2 and the Sequencing of Peace Officer Background Investigations**

On December 1, 2008, POST issued Bulletin: No. 2008-22, "**Government Code Section 1031.2 Provides Law Enforcement Agencies Greater Latitude in Sequencing the Peace Officer Background Investigation."** The bulletin describes the purpose and impact of Government Code 1031.2 which was signed into law by the Governor on September 27, 2008, and will take effect on January 1, 2009. In response to questions received since the issuance of the bulletin, the attached questions and answers have been developed to further explain the impact and application of the new law.

Please direct questions to Supervising Personnel Selection Consultant, Shelley Spilberg, Ph.D., Commission on POST, 1601 Alhambra Boulevard, Sacramento, CA 95816-7083, by email at SSpilberg@post.ca.gov, or by telephone at (916) 227-4824, or by FAX at (916) 227-0476.

PAUL A. CAPPITELLI
Executive Director

Attachment: Government Code 1031.2 Questions and Answers

Government Code 1031.2
Questions and Answers

- ***Simply put, exactly what does GC 1031.2 do?***

It makes explicit a law enforcement agency's right to conduct a sizeable part of the peace officer background investigation *after* a conditional offer of employment has been extended to the candidate.

- ***So which parts of the background investigation can be conducted post-offer?***

First, any inquiry that touches on medical, psychological or other disability-based issues MUST wait until the post-offer stage. This includes the obvious (that is, direct questions about medical or psychological conditions). It also includes questions about history of illegal drug dependence or addiction, and current or past alcoholism, all of which are protected disabilities.

GC 1031.2 also allows non-medical and non-psychological inquiries and investigations to be deferred to the post-offer phase as well, if it can be demonstrated that this information could not have reasonably been collected prior to the offer.

- ***Why can't we just extend a conditional offer of employment at the beginning of the background investigation process – like at the same time we direct the candidate to complete the Personal History Statement?***

Because the legitimacy of the conditional job offer itself would be called into question (by the EEOC and/or the California Department of Fair Employment & Housing) if the entire background investigation was conducted post-offer. To be considered legitimate (i.e., "bona fide") the conditional offer must only be extended after an employer has screened the candidate as much as possible (without venturing into medical/psychological territory). It's very difficult to argue that the completion of the PHS, or the request and in most cases the collection of birth certificates, transcripts, credit reports and other such documents can't be done prior to the offer, since they're not medical and they generally don't take much time to acquire.

- ***So what parts of the background investigation can be lawfully conducted post-offer, and what does an agency have to do to demonstrate that this information could not have reasonably been collected pre-offer?***

POST has tried to do a lot of that leg work for you. Earlier this year, POST sent a letter to the EEOC (who regulates the employment provisions of the ADA) asking if peace officer background investigations can lawfully be conducted post-offer. Included in that letter was a description of the California peace officer background investigation process as required by POST regulations. The letter explained that while, in theory, background investigations focus primarily on nonmedical and nonpsychological issues, to comply with POST requirements, there are many instances where the investigation can and should venture into areas that are prohibited pre-offer.

In their response, EEOC agreed with POST regarding the difficulty of untangling medical/psychological from non-medical/non-psychological information in the background investigation. The EEOC therefore determined that it is lawful for the conditional job offer to be extended before: (1) obtaining documents that take time to receive; and (2) contacting and interviewing references and others (i.e., the "physical investigation").

Both of these letters, which include the arguments made by POST and agreed to by the EEOC, can be downloaded athttp://www.post.ca.gov/Data/Sites/1/post_docs/bulletin/2008-22-AB2028.pdf. Although they are eight pages each, they should be read in order to get a full understanding of the underlying legal issues.

- ***How long must an agency wait for documents to be received before being able to extend a conditional offer of employment and continue with the background investigation?***

There's no exact answer to this question, but in their letter to POST, the EEOC stated, "*An unreasonable delay may exist where a responding agency routinely takes several weeks or months to provide documents and waiting for these official documents will significantly increase the length of the entire hiring process"* (p. 4). Therefore, it would be lawful to extend a conditional offer of employment if documents such as a DD-214, an official transcripts, or returns back from DOJ or FBI fingerprint checks take in excess of a few weeks to receive back.

- ***What are the advantages of conducting the better part of the background investigation post-offer?***

First and foremost, when interviewing people post-offer, the background investigator is free to ask any questions – or follow-up on any volunteered information – as necessary, even if the topics turn to medical, psychological, or other disability-related issues (as long as the questions are job-related and consistent with business necessity). On the other hand, if the interview is being conducted pre-offer, the background investigator cannot continue or pursue this line of questioning. While this questioning can be resumed when/if the candidate reaches the post-offer stage, splitting the background investigation in this way can prove to be burdensome and inefficient.

For example, during the background interview, a candidate could reveal that he has a medical condition and could ask the investigator about his chances of passing the medical examination. If the interview is being conducted ***pre-offer***, the investigator must defer any further discussion about the topic until the post-offer stage, no matter how relevant to the candidate's suitability for the job.

However, if this same conversation occurred at the ***post-offer*** stage, the investigator could pursue this line of questioning. Furthermore, the investigator could decide to answer the candidate's very good question by contacting the doctor directly, or even arranging for the candidate's medical evaluation ahead of schedule – and before the continuation of the background investigation.

- ***Are there any risks or disadvantages of conducting the better part of the background investigation post-offer?***

Since medical and other related topics cannot be addressed until after a conditional offer is extended, it would be difficult for a candidate to argue that s/he was discriminated against on the basis of his/her disability if the background investigation was conducted pre-offer. If the candidate is disqualified on the basis of a background investigation that was conducted post-offer, the agency should be prepared to defend the decision against assertions of disability discrimination.

- ***Does GC 1031.2 now require that part of the background investigation be conducted post-offer?***

No. The new law is permissive; agencies are free to revise or retain their current background investigation process. The sequencing of the background investigation is not a POST issue, either.

- ***Does GC 1031.2 permit the medical and psychological evaluation to be conducted pre-offer?***

No. The medical and psychological evaluations conducted in compliance with GC 1031(f) and POST regulations must be conducted post-offer.