

Criminal Record Issues: DHS Background Study Disqualifications and Expungements

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DHS Background Study Disqualifications

DHS Background Study Disqualification

- ▶ Chapter 245C
- ▶ MN DHS conducts “background studies” for individuals working in professional fields licensed and regulated by DHS and MDH
 - ▶ Includes most healthcare or childcare workers. See Minn. Stat. 245C.03 for complete list.
- ▶ If DHS finds that an individual is “disqualified” they are prohibited from working in any position that requires a DHS background study for the duration of the disqualification. Minn. Stat. 245C.014.
- ▶ Duration of DQ depends on the reason for disqualification: Permanent, 15-year, 10-year, 7- year, or 5-year

Impact on Low-Income Individuals

- ▶ Many low-income individuals work in jobs that are subject to the DHS BGS process
- ▶ Most common: Personal care attendant (PCA); certified nursing assistant; childcare worker
- ▶ These are underpaid, less skilled jobs that are extremely high in demand so there are often jobs available
- ▶ Disproportionately women of color working in these fields

What Causes A Disqualification?

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- ▶ You were convicted of a qualifying criminal offense listed under Minn. Stat. 245C.15.
- ▶ DHS finds that there exists a *preponderance of the evidence* that you committed a qualifying criminal offense listed under Minn. Stat. 245C.15. See Minn. Stat. 245C.14 subd. 1(a)(2).
- ▶ Substantiated finding that you committed serious or recurring maltreatment of a minor child or vulnerable adult. See Ch. 260E, 626.5575.

Qualifying Criminal Offenses

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- ▶ Permanent: Violent felonies (murder, assault, criminal sexual conduct). Minn. Stat. 245C.15, subd. 1.
- ▶ 15-year: Felony level drug and financial crimes. Minn. Stat. 245C.15, subd. 2.
- ▶ 10-year: Gross misdemeanor level offenses. Minn. Stat. 245C.15, subd. 3.
- ▶ 7-year: Misdemeanor level offenses and substantiated serious/recurring maltreatment. Minn. Stat. 245C.15, subd. 4.
 - ▶ *Most commonly seen crimes*: theft, credit card fraud, issuance of dishonored checks, misdemeanor-level domestic assault, maltreatment
- ▶ 5-year: Drug-related crimes. Minn. Stat. 245C.15, subd. 4b.

Maltreatment

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- ▶ Substantiated maltreatment of a minor child or vulnerable adult
 - ▶ Minor child: usually the parent/guardian, develops out of CPS report and investigation
 - ▶ Vulnerable adult: usually an employee of a nursing home/healthcare facility, some kind of injury/incident occurs, develops out of DHS report and investigation
- ▶ Only disqualifying if substantiated maltreatment is “serious” or “recurring.” Minn. Stat. 245C.15, subd. 4(b)(2).
- ▶ These are defined terms in the statute
 - ▶ “Recurring maltreatment” means more than one incident of maltreatment for which there is a preponderance of evidence that the maltreatment occurred and that the subject was responsible for the maltreatment. Minn. Stat. 245C.02 subd. 16
 - ▶ “Serious maltreatment” means sexual abuse, maltreatment resulting in death, neglect resulting in serious injury which reasonably requires the care of a physician or advanced practice registered nurse whether or not the care of a physician or advanced practice registered nurse was sought, or abuse resulting in serious injury. Minn. Stat. 245C.02 subd. 18(a)
 - ▶ “Serious injury” is defined very broadly. Any bruising is considered a serious injury. Minn. Stat. 245C.02 Subd. 18(c)

Preponderance of the Evidence

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- ▶ Do not have to be convicted, or even charged, with a disqualifying crime to be DQ'd by DHS
- ▶ Will be DQ'd if DHS finds that there exists a *preponderance of the evidence* that you committed a qualifying crime. Minn. Stat. 245C.15, subd. 1(a)(2).
 - ▶ Usually occurs if there was a charge which was dismissed or plead down
 - ▶ Usually based on arrest records

Contesting POE DQs

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- ▶ If the DQ is based on a *preponderance of the evidence* determination:
 - ▶ First, request reconsideration of the determination to DHS. Minn. Stat. 245C.21.
 - ▶ Paper appeal: submit written evidence disputing the POE determination
 - ▶ If that fails, request a fair hearing in front of a DHS administrative law judge. Minn. Stat. 245C.27.
 - ▶ Full evidentiary hearing: direct and cross-examination of witnesses, introduce evidence; need to consider 5th amendments issues
- ▶ Limited appeal options if DQ based on a prior POE determination that was not appealed. Minn. Stat. 245C.29, subd.2.
 - ▶ Can introduce new evidence on reconsideration, but no right to fair hearing

Contesting Maltreatment DQs

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- ▶ If DQ is based on a *new* maltreatment determination:
 - ▶ Follow same procedure as POE appeal
 - ▶ Maltreatment and DQ will be appealed and heard together. Minn. Stat. 256.045, subd. 3(10)
- ▶ If DQ is based on a *previous, already final*, maltreatment determination
 - ▶ Follow same appeal procedures, but limited to arguing whether maltreatment is serious or recurring, not whether maltreatment occurred at all. Minn. Stat. 245C.29, subd.1.

Contesting a DQ Based on Criminal Conviction

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- ▶ If DQ is based on a finalized criminal conviction, the request for reconsideration is the only appeal opportunity
 - ▶ No right to fair hearing
 - ▶ Minn. Stat. 245C.27, subd.1 (c)

Requesting a Set Aside

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- ▶ When cannot appeal the merits of the disqualification, can request a *set aside* of the DQ (not available for permanent DQ)
- ▶ A set aside lets someone work in a specific job with a specific employer despite the DQ because DHS has determined there is no risk of harm to protected individuals
- ▶ Set aside factors from Minn. Stat. 245C.22, subd.4
 - ▶ The commissioner shall consider all relevant information available, including the following factors in determining the immediate risk of harm:
 - ▶ (1) the recency of the disqualifying characteristic;
 - ▶ (2) the recency of discharge from probation for the crimes;
 - ▶ (3) the number of disqualifying characteristics;
 - ▶ (4) the intrusiveness or violence of the disqualifying characteristic;
 - ▶ (5) the vulnerability of the victim involved in the disqualifying characteristic;
 - ▶ (6) the similarity of the victim to the persons served by the program where the individual studied will have direct contact;
 - ▶ (7) whether the individual has a disqualification from a previous background study that has not been set aside;
 - ▶ (8) documentation of successful completion by the individual studied of training or rehabilitation pertinent to the event; and
 - ▶ (9) any other information relevant to reconsideration.

Tips for Requesting a Set-Aside

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- ▶ Tell the client's story, convince DHS the client does not pose a risk of harm to any vulnerable individuals
 - ▶ Affidavit/statement of client
 - ▶ Were there extenuating circumstances when the offense occurred?
 - ▶ Domestic violence, mental illness, chemical dependency, poverty
 - ▶ Explain any rehabilitation efforts
 - ▶ Relevant job history
 - ▶ Include letters/certificates from supervisor, former employers, probation officers, community leaders, etc.
 - ▶ Cover letter laying out the argument for the client's set-aside, go through every factor
- ▶ Set asides are specific to the job
 - ▶ Make specific arguments about why a particular job mitigates any risk of harm
- ▶ No right to request fair hearing on set aside denial

Variance

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- ▶ Disqualified applicant's employer can also request a variance from the disqualification to allow the applicant to work. Minn. Stat. 245C.30.
- ▶ Very similar to a set-aside, except the employer is one who makes the request
- ▶ Variance often comes with conditions – e.g., employer may not allow applicant to work with members of protected population unless supervisor is present

DQ and Expungements

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- ▶ Can get disqualifications rescinded if you expunge the disqualifying offense, or the records the preponderance of the evidence determination is based on
- ▶ Not a quick fix because of expungement timelines, but a permanent one for clients

Efforts to Reform BGS System

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- ▶ Human Services Background Study Eligibility Task Force was established in 2021, issued a report in December 2022
- ▶ Found that Black/African American and Native Minnesotans disqualified at a disproportionate rate
- ▶ Found that large percentage of set-aside and variance requests are granted
- ▶ Proposed several changes to BGS system
 - ▶ Limit use of juvenile delinquency records
 - ▶ Remove many irrelevant financial crimes from list of disqualifying offense
 - ▶ Get rid of POEs
- ▶ Basically none of the changes were adopted in 2023 legislative session

Criminal Record Expungements

Expungement

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- ▶ An expungement is the process of sealing a criminal record
- ▶ Criminal records have numerous collateral consequences for individuals
 - ▶ Can make it difficult to obtain housing or housing subsidies
 - ▶ Can make it difficult to find a job
 - ▶ DHS Background Study Disqualification
 - ▶ Prohibitions on other licensed professions
 - ▶ Negative impact on mental health
- ▶ Getting a criminal record expunged can have a huge impact on someone's life

Types of Expungements

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- ▶ Two types of expungements in Minnesota:
 - ▶ Inherent authority expungement
 - ▶ Relies on the Court's inherent authority to control its own records.
 - ▶ Statutory expungement
 - ▶ Minn. Stat § 609A covers adult expungements.
 - ▶ Juvenile records can be expunged under Minn. Stat § 260B.198. subd. 6.
- ▶ Certain arrest records (that were never charged/convicted) can be destroyed
 - ▶ Under Minn. Stat § 299C.11
 - ▶ This is typically done to avoid a POE disqualification based on the arrest records

Inherent authority expungements

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- ▶ Court orders certain court records to be sealed
- ▶ Can be ordered for any offense
- ▶ Court applies a balancing test
 - ▶ Benefit of sealing the record v. harm to public
- ▶ Only applies to court records
 - ▶ This means that state agencies will still have the records, and they will show up on private background checks
- ▶ Legal aid typically does not do inherent authority expungements because they are of limited use to clients

Statutory expungement

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- ▶ Minn. Stat § 609A.
- ▶ During 2023 legislative session there were major changes to statutory expungements in Minnesota
 - ▶ Addition of automatic expungements – effective Jan 1, 2025
 - ▶ Expansion of petitioned-for expungements – already in effect
 - ▶ Changes to pardon process – already in effect
- ▶ We will explain rules under these new changes

Petitioned-For Expungements

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- ▶ Minn. Stat § 609A.02, subd. 3(a)
- ▶ Eligible for expungement:
 - ▶ All pending actions or proceedings were resolved in favor of the petitioner
 - ▶ Successfully completed the terms of a diversion program or stay of adjudication and has not been charged with a new crime for at least one year
 - ▶ Petty misdemeanor or misdemeanor and has not been convicted of a new crime for at least two years
 - ▶ Gross misdemeanor or GM deemed a misdemeanor and has not been convicted of a new crime for at least three years
 - ▶ Eligible felony and has not been convicted of a new crime for at least four years (listed in 609A.02, subd. 3(b))
 - ▶ Any felony deemed a GM and has not been convicted of a new crime for at least five years

When Is the Client Eligible to File an Expungement Petition?

- ▶ (1) What type of record do they need expunged? (2) What is the applicable waiting period under 609A.02? (3) Has that amount of time passed since discharge from their sentence/probation without a new conviction?
- ▶ What if the client has intervening convictions?
 - ▶ Start counting from the most recent date of discharge from probation.
 - ▶ Client wants a misdemeanor theft expunged. They were discharged from probation on 1/1/2021. They were convicted of a misdemeanor DUI in 12/2022 and will not be discharged from probation until 5/1/2024. When can they petition for the theft to be expunged?
 - ▶ Can considerably delay the expungement timeline.

Standard – Resolved in Favor Records 24

- ▶ If the case was resolved in favor or the client completed a stay of adjudication or diversion program the court must grant the expungement request unless the agency or jurisdiction whose records would be affected establishes by clear and convincing evidence that the interests of the public and public safety outweigh the disadvantages to the petitioner of not sealing the record
Minn. Stat. 609A.03 subd. 5(b)
- ▶ ***The burden is on the state to show the record should not be expunged!***

Standard – All Other Records

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- ▶ Petitioner must provide clear and convincing evidence that:
 - ▶ Expungement would yield a benefit to the Petitioner commensurate with the disadvantages to the public and public safety of:
 - ▶ sealing the record;
 - ▶ and burdening the court and public authorities to issue, enforce, and monitor an expungement order
- Minn. Stat. 609A.03 subd. 5(a)

Factors the Court Must Consider

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- ▶ From 609A.03 subd. 5(c)
 - ▶ (1) the nature and severity of the underlying crime, the record of which would be sealed;
 - ▶ (2) the risk, if any, the petitioner poses to individuals or society;
 - ▶ (3) the length of time since the crime occurred;
 - ▶ (4) the steps taken by the petitioner toward rehabilitation following the crime;
 - ▶ (5) aggravating or mitigating factors relating to the underlying crime, including the petitioner's level of participation and context and circumstances of the underlying crime;
 - ▶ (6) the reasons for the expungement, including the petitioner's attempts to obtain employment, housing, or other necessities;
 - ▶ (7) the petitioner's criminal record;
 - ▶ (8) the petitioner's record of employment and community involvement;
 - ▶ (9) the recommendations of interested law enforcement, prosecutorial, and corrections officials;
 - ▶ (10) the recommendations of victims or whether victims of the underlying crime were minors;
 - ▶ (11) the amount, if any, of restitution outstanding, past efforts made by the petitioner toward payment, and the measures in place to help ensure completion of restitution payment after expungement of the record if granted; and
 - ▶ (12) Other factors deemed relevant by the court

Petition Requirements

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- ▶ Minn. Stat. 609A.03 subd. 2 contains a list of requirements for the petition:
 - ▶ Names and aliases, addresses, full criminal history
 - ▶ Reasons the expungement is sought
 - ▶ Rehabilitation steps
- ▶ Helpful to include letters of support, certificates showing completion of programs, etc.
- ▶ Very similar to DHS BGS disqualification set aside request, just more formal
- ▶ Can also be helpful to include a memorandum of law laying out the client's case

Service of Petition

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- ▶ Service of petition
 - ▶ Very important that this is done correctly
 - ▶ State agencies that are not served with an expungement petition do not have to abide by expungement orders
 - ▶ If DHS and MDH are not parties to an expungement they can still use records for BGS disqualifications
 - ▶ Need to serve all agencies that may use the records
- ▶ MN Courts has helpful forms online which include a list of all agencies that should be served

Waiting Periods

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- ▶ Expungement petitions require waiting periods before and after a hearing before a record can be sealed
 - ▶ The hearing date must be set at least 60 days from the service of the petition on the parties
 - ▶ If an expungement is granted it is stayed for 60 days so that parties can appeal
 - ▶ **Expungements are a long-term solution and often cannot help clients with immediate needs**
 - ▶ In some situation employers or landlord will accept letters from an attorney stating that they are helping a client with expunging the record

Prosecutorial Agreement Expungements

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- ▶ Minn. Stat. § 609A.025 allows for expungement of a record eligible under 609A.02, subd. 3(a) without a petition if the prosecutor agrees to seal the record
- ▶ We have not seen this utilized too much for most of the records that are impacting our clients
 - ▶ The MN AG office and some county attorney's offices have websites to apply
- ▶ DHS is now required to abide by prosecutorial agreement expungements and cannot use expunged records for BGS (this is new)
- ▶ Hopefully this will expand more in the coming years

Automatic Expungements

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- ▶ Minn. Stat. § 609A.015 allows for automatic expungements in some instances
- ▶ This is brand new – will not go into effect until January 2025
- ▶ Bureau of Criminal Apprehension (BCA) is required to identify eligible records and make an initial determination of eligibility within 30 days
 - ▶ If a record is not eligible, BCA is required to review eligibility annually
- ▶ BCA shall grant relief and seal its own records without petition application or motion to eligible persons.
- ▶ BCA shall inform the judicial branch and law enforcement agencies of the expungement grant, and they shall comply.
- ▶ **DHS can still use an automatically expunged record to disqualify an individual. Minn. Stat. 609A.015 subd. 4(c)(1).**
 - ▶ **Will still need to file a petition served on DHS or get prosecutorial agreement expungement to get relief from BGS issues**

Eligible Records

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- ▶ When charges are dismissed (excepting if the dismissal was based on incompetency) or if all pending actions were resolved in favor of the person
- ▶ When a person has completed a diversion program and stay of adjudication; and
 - ▶ has not been charged with a new offense
 - ▶ For one year immediately following completion of diversion or stay; OR
 - ▶ For one year preceding a subsequent BCA review
- ▶ When a person was convicted of a qualifying offense; and
 - ▶ Has not been convicted of a new offense during the applicable waiting period either following discharge or preceding review

Qualifying Offenses

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- ▶ Qualifying offenses and waiting periods:
 - ▶ All petty misdemeanors
 - ▶ Most misdemeanors and gross misdemeanors
 - ▶ Excludes violent crimes, domestic violence and sex crimes, DUIs
 - ▶ Most of the felonies eligible for petitioned-for expungements under 609A.02, subd.3

Waiting Periods

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Petty or misdemeanor, 2 years from discharge



Gross misdemeanor 3 years from discharge



Felony violation of 152.025(fifth degree crim sub), 4 years from discharge.



Other Felonies, 5 years

Juvenile Delinquency Expungements

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- ▶ Filed under the Juvenile Delinquency statute, 260B.198 subd. 6.
- ▶ Juvenile delinquency records are only publicly available if it was a felony level offense, so these records usually do not cause as many issues for clients (but occasionally come up)
- ▶ Any juvenile delinquencies are expungable by petition
- ▶ Can request expungement at any time
 - ▶ “The court may expunge all records relating to delinquency at any time if the court determines that expungement of the record would yield a benefit to the subject of the record that outweighs the detriment to the public and public safety in sealing the record and the burden on the court and public agencies or jurisdictions in issuing, enforcing, and monitoring the order.” 260B.198 subd. 6.
- ▶ The juvenile statute does not contain 60 day waiting periods, but courts typically treat them the same way as adult expungements

Destruction of Arrest Records

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- ▶ Uncharged arrests can be destroyed without the filing of an expungement petition in certain circumstances under 299C.11 subd. 1
 - ▶ Destroyed not sealed. A much stronger remedy than expungement.
- ▶ Available if
 - ▶ 1) individual has not had any felony or gross misdemeanor convictions within the 10 years prior to the resolving of the arrest in their favor
 - ▶ 2) all charges were dismissed prior to a probable cause determination
 - ▶ 3) the prosecutor declined to file charges
- ▶ Much easier than an expungement.
 - ▶ Send a letter to the BCA, the arresting agency, and the prosecuting office – that's it!
 - ▶ Does not apply to arrest records that have already been obtained by other agencies though (e.g., DHS)

Clemency/Pardons

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- ▶ Minn. Stat. Chapter 638
- ▶ An option for records that are ineligible for expungement (usually ineligible felonies)
- ▶ Must submit a written application to the Clemency Review Commission. Minn. Stat. 638.10
 - ▶ Forms available on Department of Corrections website
- ▶ Can apply five years after discharge of sentence unless granted a waiver. Minn. Stat. 638.12 subd. 2
- ▶ Commission reviews applications and makes recommendations to the Board of Pardons. Must meet at least four times per year. Minn. Stat. 638.14
- ▶ Board of Pardons = Governor, Chief Justice, Attorney General. Minn. Stat. 638.01
- ▶ Board must meet two times per year and vote on applications, granted with majority vote. Minn. Stat. 638.16
- ▶ If a Pardon is granted, it will also be expunged. Minn. Stat. 638.18

Factors Considered by Commission

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- ▶ Complete list in Minn. Stat. 638.15
 - ▶ Circumstances surrounding the commission of the crime
 - ▶ Completion of sentence/probation
 - ▶ Criminal history
 - ▶ Rehabilitation and acceptance of responsibility
 - ▶ Proportionality of sentence
 - ▶ Why clemency is needed
 - ▶ Health, family, housing, employment
 - ▶ Time served and time since crime
 - ▶ Availability of other relief
 - ▶ Applicant's demographics

Hypos

Scenario 1:

Arya calls legal aid because she just received a letter from DHS stating that she has been disqualified from working as her sister Sansa's Personal Care Attendant ("PCA") due to a misdemeanor theft conviction from 2019.

Sansa has a developmental disability and needs help with all aspects of daily living. It has been impossible for her family to find a PCA from a private company that will stay on to work with Sansa, so Arya has already been helping care for Sansa everyday.

Arya really needs a paying job soon because she is having trouble paying for her rent and is worried she will lose her housing. Arya is also going to graduate from a child development program in six months and would like to start her own daycare program in the next two years.

Based on the information you have so far, what legal solutions might Arya have to address these problems?

What additional information do you need from Arya to determine if you should move forward with the case?

Two possible solutions: Set aside request and record expungement

- ▶ Set aside will help with immediate problem of being Sansa's PCA
- ▶ Expungement will prevent record from causing issues down the line, especially since Arya wants to go into a career that will require BGS

Other information you need:

- ▶ When was Arya discharged from probation?
- ▶ Other criminal convictions?
- ▶ Story behind the theft. What happened? Any mitigating circumstances?
- ▶ What has changed in Arya's life since the theft?

Additional Facts:

Arya has no other criminal convictions. Arya was discharged from probation in June 2020.

The theft conviction is from when Arya was 20 years old.

Arya was in an abusive relationship and her partner asked her to steal a pair of shoes from Target. She did it because she was afraid her partner would hurt her if she did not.

Arya accepted blame and plead guilty to the theft.

After the theft Arya left her abusive partner and enrolled in school.

Is the record eligible for a set aside request and/or expungement?

How would you address the set aside factors from Minn. Stat. 245C.22, subd.4 in the set aside request?

Scenario 2:

In 2018 Rob was arrested for first degree arson under 609.561 but never charged with a crime. In 2022 Rob successfully had his arrest records destroyed under 299C.11 subd. 1.

Rob recently got a job as a Certified Nursing Assistant in a nursing home. He calls legal aid because he just received a letter from DHS saying he is disqualified from working in this job because DHS has determined by a preponderance of the evidence that he committed first degree arson and is subject to a permanent disqualification.

After doing some initial investigation, you also learn that Rob previously received a DHS BGS disqualification for this same reason in 2019, when he tried to be a PCA. He did not request a fair hearing on the POE determination in 2018.

What solutions (if any) does Rob to address his criminal records issues?

- ▶ DHS is not subject to the 299C.11 subd. 1 arrest record destruction because they obtained copies of Rob's arrest records in 2019, prior to their destruction in 2022.
- ▶ Rob was previously DQ'd on this basis and did not request a fair hearing, so his appeal options are limited. Rob could request reconsideration of the POE disqualification, but this appeal will only be limited to written submissions.
- ▶ Rob cannot request a set aside because he has a permanent DQ. Minn. Stat. 245C.24, subd. 2(a).
- ▶ Rob will likely need to petition for expungement of his arrest records that are in the possession of DHS and MDH to get this resolved.