

CORRECTION LAW §§ 700(1)(a), 701; TOWN LAW §§ 174, 175, 176-b;
PENAL LAW §§ 110.00, 110.05, 150.05, 150.10, 150.15, 150.20.

A person convicted of arson in any degree is, by statute, ineligible to become a member of a volunteer fire company. However, the issuance to that person of an unrestricted certificate of relief from disabilities prevents automatic statutory disqualification. The certificate does not, however, prevent the fire company or fire district commissioners from exercising discretion to deny membership based upon the facts and circumstances surrounding the arson conviction.

A person convicted of arson in any degree is, by statute, ineligible to hold the office of fire district commissioner. A certificate of relief from disabilities does not apply to a public office, such as fire district commissioner.

November 3, 1998

William F. Glass, Jr., Esq.
Gordon Heights Fire District
611 High Street
Port Jefferson, New York 11777

Informal Opinion
No. 98-50

Dear Mr. Glass:

You have requested an opinion regarding whether a certificate of relief from disabilities, issued pursuant to Correction Law § 701, permits an individual convicted of attempted arson in the third degree to become a member of a volunteer fire company or to serve as a fire commissioner.

Under Town Law § 176-b(16), "[a] person who has been convicted of arson in any degree¹ shall not be eligible to be

¹"Arson in any degree" includes a conviction for attempted arson. "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime." Penal Law § 110.00. The penalty for an attempt to commit a crime is one notch below that of the crime attempted. Penal Law § 110.05. Accordingly, attempted arson in the first degree is a class B felony, one notch below arson in the first degree which is a class A-I; attempted arson in the second degree is a class C felony, one notch below arson in the second degree which is a class B felony; and attempted arson in the third degree is a class D felony, one notch below arson in the third degree which is a class C felony.

elected or appointed as a volunteer member of a fire company. The membership of any volunteer member of a fire company shall immediately terminate if he is convicted of arson in any degree while a member of a fire company." This statutory bar may be removed by obtaining a certificate of relief from disabilities issued pursuant to Correction Law § 701. A certificate of relief from disabilities may be granted "to relieve an eligible offender² of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offense specified therein." Correction Law § 701(1). Accordingly, a person who has been issued a certificate of relief from disabilities is not automatically disqualified by reason of a conviction of arson in any degree from becoming a member of a volunteer fire company.³

While in this instance disqualification is not automatic, it is important to note that both the fire district and the fire company would continue to have broad discretion to determine whether to appoint or elect the person as a volunteer member.⁴ Town Law § 176-b; 1986 Op Atty Gen (Inf) 67; 1977 Op Atty Gen (Inf) 169. While a certificate of relief from disabilities removes all statutory disabilities and bars, it does not "in any way prevent any judicial, administrative, licensing or other body, board or authority from relying upon the conviction

Penal Law §§ 110.05, 150.10, 150.15, 150.20. Attempted arson in the fourth degree is not a crime, in that one cannot intend to commit a reckless act. People v DeJesus, 190 AD2d 1012, 1014 (4th Dept), lv denied, 81 NY2d 969 (1993); Penal Law § 150.05.

²An "eligible offender" is defined as "a person who has been convicted of a crime or of an offense, but who has not been convicted more than once of a felony." Correction Law § 700(1)(a).

³It should be noted that a certificate of relief from disabilities may be limited to one or more enumerated forfeitures, disabilities or bars or may relieve the individual of all forfeitures, disabilities and bars. Correction Law § 701(1).

⁴In newly organized fire companies that are part of the fire department of a fire district, the board of fire commissioners of the fire district appoints residents of the fire district as volunteer members. Thereafter, the fire company elects other eligible persons as volunteer members; membership becomes effective upon approval by the board of fire commissioners.

specified therein as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege." Correction Law § 701(3). In our view, the fire company or fire district commissioners may exercise this discretion regarding proposed or existing volunteer members convicted of arson in any degree. A certificate of relief from disabilities simply prevents the specified conviction from acting as an automatic bar. Op Atty Gen No. 94-F2.

In answer to your question, then, although a certificate of relief from disabilities removes the statutory disability imposed by Town Law § 176-b(16), both the fire district and the fire company may continue to exercise their discretion in determining whether to appoint or elect a person convicted of attempted arson in the third degree as a volunteer member. We note that "[c]ourts have repeatedly upheld a discretionary body's denial or forfeiture of a right, privilege or license after an examination by that body of the facts and circumstances surrounding a felony conviction, despite the issuance of a certificate of relief from civil disabilities by the original sentencing court in each instance." Op Atty Gen No. 91-F10 (citing, Springer v Whalen, 68 AD2d 1011 [3d Dept], lv denied, 47 NY2d 710 [1979]; Belmar v New York City Board of Education, 122 AD2d 478 [3d Dept], app dismissed, 69 NY2d 707 [1986]).⁵

You have also asked whether a person convicted of attempted arson in the third degree would be able to serve as a fire commissioner. "A person who has been convicted of arson in any degree⁶ shall not be eligible for nomination, election or appointment to the office of fire district commissioner or fire district officer." Town Law § 174(5). Additionally, "[a] person who has been convicted of arson in any degree shall not be eligible for election or appointment to the office of fire district commissioner, treasurer or secretary. Any fire district commissioner, treasurer or secretary who is convicted of arson in any degree during his term of office shall be disqualified from completing such term of office." Town Law § 175(3). Therefore, a person who has been convicted of attempted arson in the third degree clearly would be ineligible to serve as a fire

⁵We express no opinion whether, if a person with an arson conviction is accepted as a firefighter, the district or the company could be held liable for actions of the firefighter comparable to behavior underlying the arson conviction.

⁶See, note 1, supra.

commissioner. In this instance, a certificate of relief from disabilities does not remove the statutory bar. Although a certificate of relief from disabilities removes statutory bars to employment, it does not apply to the right of a person to retain or to be eligible for public office. Correction Law § 701(1). Accordingly, because the position of fire commissioner is a public office, see, Town Law § 174; 1980 Op Atty Gen (Inf) 111, a certificate of relief from disabilities does not permit a person convicted of attempted arson in the third degree to serve as a fire commissioner. That person is disqualified.

The Attorney General renders formal opinions only to officers and departments of State government. This perforce is an informal and unofficial expression of the views of this office.

Very truly yours,

YVONNE M. HOVE
Assistant Attorney General