

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of : Index No.
SE, :
 :
Petitioner, : **VERIFIED PETITION**
 :
For a judgment pursuant to Article 78, C.P.L.R., :
 :
— against — :
 :
THE NEW YORK CITY DEPARTMENT OF :
EDUCATION and JOEL I. KLEIN as Chancellor :
of the New York City Department of Education, :
 :
Respondents. :
-----X

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

INTRODUCTORY STATEMENT

This proceeding is brought to challenge and reverse New York City Department of Education and DOE Chancellor Joel I. Klein’s (together, “DOE,” or “Respondents”) discriminatory determination, dated November 28, 2007, to deny petitioner SE employment as a Substance Abuse Prevention and Intervention Services (“SAPIS”) counselor with XX school and to place his name on the DOE’s “ineligible list” because of his criminal conviction history that ended 23 years ago. Respondents’ determination, communicated to Mr.E in a letter mailed on or about December 7, 2007, was arbitrary and capricious and an abuse of discretion, as was Respondents’ determination, communicated to Mr.E in a letter mailed on or about December 10, 2007, to place him on the DOE’s “Ineligible/Inquiry List” (“Ineligible List”). In denying Mr. E the SAPIS position at XX school and placing his name on the DOE’s “ineligible list,”

Respondents violated Article 23-A of the Correction Law, the New York State and City Human Rights Laws, and the DOE's own regulations.

As was clear in the documentation before the agency at the time it rendered its decision, Mr. E has not been convicted of a crime since 1984, has worked successfully as a drug and alcohol counselor for more than 15 years, has been certified as a New York State Credentialed Alcohol and Substance Abuse Counselor ("CASAC"), has earned an Associates Degree from SUNY's Empire State College, and currently works with young adults in his position as Substance Abuse Counselor and Community Outreach Worker with the XXX Department of XX Program. Mr. E also submitted glowing letters of recommendation from:

- his former probation officer (with whom he has remained in contact for over 25 years and who wrote that "[i]n over the 35 years I have worked in this field, [Mr.E] is the most effective, caring and professional counselor I have had the pleasure of working with," and that "of all the thousands of people I have encountered in my probation career, [Mr.E] stands out as someone who turned his life around through learning, determination, and service to improve the lives of people in need of treatment");
- the Executive Director of XXX, who wrote that "Mr.E has become one of the most respected adolescent treatment professionals in XXXXCounty" and that "[w]e [i.e. the DOE] would be remiss if we do not strongly consider his qualifications," from his current employer (who wrote that "[s]ince 2000 [Mr.E] has performed excellent service . . . [and has] demonstrated a noteworthy ability to master the myriad demands of his position"); and
- two members of the clergy, including Mr.E's pastor.

Respondents' decision violated New York's strict anti-discrimination laws, which were enacted to ensure that persons previously convicted of criminal offenses do not suffer unfair discrimination in employment, and which reflect the state's public policy to encourage employment of qualified individuals with conviction histories. New York's

laws prohibit employers from denying jobs based on a criminal record unless the employer has made a fair and reasoned determination – based on factors enumerated in the law – that the convictions are directly job-related or employment would pose an unreasonable risk to persons or property. *See* New York State Correction Law, Article 23-A, §§ 750-755, New York State Executive Law § 296(15) (the “New York State Human Rights Law”), New York City Administrative Code § 8-107 (the “New York City Human Rights Law”), and the New York City Department of Education Chancellor’s Regulation C-105.

Respondents, however, effectively ignored the factors that both Art. 23-A and the DOE’s own regulations required they consider when analyzing Mr. E’s application, concentrating solely on his conviction history, which ended in 1984. Respondents did not properly consider any of the other required factors, such as his extensive and successful work history, his New York State Certified Alcohol and Drug Addiction Counselor designation, his current employment as Substance Abuse Counselor and Outreach Worker with the XXX, all documented, or his other proof of rehabilitation including glowing letters mentioned above. Had they hewed to the Art. 23-A requirements, Respondents could not but have concluded that employing Mr. E would pose no risk to persons or property. The record before the agency clearly showed that Mr. E had moved far beyond his decades-old convictions and had turned his life around. In failing to adhere to Art. 23-A, New York’s anti-discrimination laws, and the DOE’s own regulations, Respondents made a decision that was arbitrary and capricious and constituted an abuse of discretion.

Mr. E has submitted a motion, made by Order to Show Cause, for an order extending his time to file a notice of claim in this matter or, in the alternative, for an order deeming such notice of claim to be unnecessary. A copy of Mr. E's proposed notice of claim is annexed hereto as Exhibit A.

JURISDICTION, PARTIES AND VENUE

1. Venue is properly set in New York County pursuant to C.P.L.R. §§ 7804(b) and 506(b), because Respondent's principal office is located at 52 Chambers Street, New York, New York, within this judicial district.

2. Petitioner, SE, resides at XXX, New York.

3. Respondent DOE is located at 52 Chambers Street, New York, New York.

4. Respondent Joel I. Klein is Chancellor of the DOE; his office is located at 52 Chambers Street, New York, New York.

LEGAL FRAMEWORK

5. SE is one of thousands of New Yorkers whose employment is subject to an interrelated series of New York State and New York City laws prohibiting unfair discrimination against individuals with past convictions. Mr. E's conviction history of three misdemeanors and one felony stems from an addiction to alcohol and drugs he suffered as a young adult and overcame after participation in residential and outpatient drug rehabilitation in 1984 and 1985. For the felony conviction (in 1983), Mr. E served a term of five years probation and four months of intermittent weekend incarceration at a local jail. His 1984 misdemeanor conviction resulted in a one-year probation sentence run concurrent with his existing sentence. His probation (for the two

convictions) was terminated early for good behavior. Mr. E has not been convicted of a crime in the intervening 23 years, but instead has worked diligently and successfully to change his life and support himself and his family. Indeed, Mr. E remains in close contact with his former probation officer, who now sends him clients and acts as his mentor and reference.

New York's Anti-Discrimination Laws

6. First and chief among New York's anti-discrimination laws is Article 23-A of the Correction Law, §§750-755, enacted in 1976 "to establish reasonable procedures to prevent . . . unfair discrimination against former criminal offenders in regard to licensure and employment," as then Governor Hugh Carey stated in his Memorandum approving Article 23-A. A copy of the Governor's Memorandum, reprinted in McKinney's 1976 Session Laws at p. 2458, is annexed hereto as Exhibit B.

7. Section 752 of the Correction Law prohibits both public agencies and private employers in New York from denying employment to an individual on the basis of prior criminal convictions unless there is a "direct relationship" between the individual's prior offenses and the specific employment sought, or unless granting employment to the individual "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public." N.Y. Correct. Law § 752.

8. Section 753 of the Correction Law further requires that, in determining whether to employ an individual with previous convictions, both public agencies and private employers must consider a series of factors set forth in the statute. These factors include New York State's public policy to encourage the employment of persons with conviction histories, the specific duties and responsibilities of the job

sought, the bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities, the time which has elapsed since the occurrence of the criminal offense or offenses, the age of the person at the time of occurrence of the criminal offense or offenses, the seriousness of the offense or offenses, any information produced by or on behalf of the person in regard to his rehabilitation and good conduct, and the legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public. N.Y. Correct. Law § 753(1).

9. Section 753 of the Correction Law also requires that any public agency or private employer subject to the law “give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.” N.Y. Correct. Law § 753(2).

10. The New York State Human Rights Law (the “HRL”), N.Y. Exec. Law § 290 *et seq.*, incorporates the Article 23-A requirements by making it “an unlawful discriminatory practice for any person, agency, bureau, corporation or association . . . to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses . . . when such denial is in violation of the provisions of article twenty-three-A of the correction law.” N.Y. Exec. Law § 296(15). OMRDD is an “agency” subject to this law.

11. The New York City Human Rights Law (“NYCHRL”), N.Y. City Admin. Code § 8-107 *et seq.*, specifically prohibits employment discrimination against

New York City residents on the basis of a past history of criminal convictions. It states, in pertinent part, that

[i]t shall be unlawful discriminatory practice for any person to deny any license or permit or employment to any person by reason of his or her having been convicted of one or more criminal offenses, or by reason of a finding of a lack of "good moral character" which is based on his or her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of article twenty-three-a of the correction law.

N.Y. City Admin. Code § 8-107(a)(10). Because the term “person” includes government agencies, Respondents are subject to this law.

12. All three anti-discrimination laws referenced above – the New York State Correction Law, the New York State Human Rights Law and the New York City Human Rights Law – impose a duty on employers to use reasonable procedures to ensure that they obtain and consider certain types of information regarding a job applicant. They also require that employers consider this information in light of the relevant standards, i.e., that they not deny employment unless the applicant’s convictions are directly job related or employment would involve an unreasonable risk.

The DOE Chancellor’s Regulation

13. The DOE Chancellor’s Regulation #C-105 (copy attached) requires that any person licensed, certified or employed by the New York City School System must undergo a background investigation, which includes a review of criminal record history, employment history, employment eligibility, military service and “any other information related to an applicant’s character, conduct or background.” C-105(2).

14. The Regulation also states that:

- “[i]f, prior to the conclusion of any background investigation, information of a derogatory nature is obtained which may result in denying the application . . . an applicant will be given an opportunity to review such information with the OPI

[Office of Personnel Investigation] and to include in the investigatory file any written statements or documents which refute or explain such information.” C-105(2); that

- “[a]t the conclusion of the background investigation, the OPI may . . . recommend that . . . employment be denied. A recommendation by the OPI to deny an application shall be referred to the Chief Executive of DHR [Division of Human Resources] . . . [who] shall have the authority to make the final decision to approve or deny the application.” C-105(3); and that
- “[t]he applicant will receive notice of the final decision in writing . . . such written notice will contain the reason(s) for the denial.” C-105(3).

15. The Regulation then discusses factors to be considered when reviewing an application from an individual with a conviction history. It notes that the “New York City Public School System is bound by law to comply with Article 23-A of the New York State Correction Law which is incorporated by reference” into the Regulation. It goes on to note that

- “the New York City Public School System is particularly concerned with the following offenses,” listing a number of conviction categories; and that
- “[w]here the nature of any conviction so warrants, the review will include an investigation of the facts and circumstances related to the conviction. Such information will be sought from law enforcement agencies and prosecutorial agencies.” C-105(4).

16. If, after undergoing the process set forth above, an applicant is denied employment, she or he may reapply “no sooner than 12 months after denial,” although this time period may be shortened “based upon the applicant’s particular circumstances.” C-105(8).

17. Civil Practice Law and Rules Art. 78 provides a vehicle for challenging administrative decisions made by government bodies or officers. The Court is empowered to decide whether a given agency determination “was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an

abuse of discretion” N.Y. C.P.L.R. §§ 7801, 7803(3). It is then permitted to issue judgment “granting petitioner the relief to which he is entitled . . . [or] annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent.” The petitioner may seek damages “incidental to the primary relief sought. . . .” N.Y. C.P.L.R § 7806.

STATEMENT OF FACTS

Mr. E’s Employment History and Credentials

18. SE, who is 46 years old, lives in XX with his wife and son. As is detailed below and as made clear in documents presented to the DOE, Mr. E has worked since 2000 for the XXX as a Substance Abuse Counselor with the XXX Program and as a Community Outreach Worker XXXXX xx program. *See* Mr. E’s resume, which he submitted to the DOE, annexed hereto as Exhibit C. As he noted in his resume and on his application for the DOE SAPIS position, Mr. E has earned an Associate’s Degree from SUNY Empire State College. Mr. E is an active member of the XXX church.

19. Mr. E has also been awarded a Credentialed Alcohol and Substance Abuse Counselor (“CASAC”) certificate by the New York State Office of Alcoholism and Substance Abuse Services (“OASAS”) (first issued in 1996 and renewed to date). In order to obtain an initial CASAC certificate, a counselor must complete 350 hours of education and internship placement, must have been employed in an OASAS-licensed substance abuse program for no less than 3000 hours (this requirement may have been increased since Mr. E applied for his CASAC certificate), and take and pass both written and oral examinations. If the applicant is in recovery from drug or alcohol addiction, the applicant must be able to show proof of at least two years’ sobriety prior to

making the application. The CASAC certification must be renewed every two years, at which time the certificate holder must show proof of having completed 40 hours of continuing education in the field of substance abuse counseling. Mr. E submitted his CASAC certificate, annexed hereto as Exhibit D, to the DOE.

20. Mr. E has a criminal conviction history consisting of three misdemeanor convictions entered from 1979 (when he was 17 years old) to 1984 and one class “C” felony conviction, the latter entered in 1983 for sale of a controlled substance. All four convictions stemmed from Mr. E’s then addiction to alcohol and drugs, which he successfully overcame by completing an 18-month residential treatment program at XXX which he entered in 1987. Following completion of the residential treatment program, Mr. E attended an XXX outpatient program for several months, successfully graduating from XXX in 1989. Mr. E has remained drug free since he entered the residential treatment program, and has had no further contacts with the criminal justice system since his 1984 misdemeanor conviction.

21. Mr. E was trained in electronics, and initially worked for a car dealer and then for a company that contracted with the New York State XXX. Since 1991 he has worked – in positions of increasing responsibility – as a substance abuse counselor with nonprofit agencies, municipal entities and the XXX system. The positions he has held include:

- Senior Alcoholism Counselor and Outreach Worker/Homeless Population
- Assistant Drug Elimination Coordinator
- Assistant Clinical Supervisor
- Counselor
- Outreach Worker

22. Mr. E's current position with the XXX – the position he held at the time he applied to work with the DOE – involves counseling young adults ages 19 to 24 on substance abuse treatment and prevention. He also works with adults . . . helping them coordinate their reentry to the community through access to housing, health care and public benefits if needed. Mr. E has received praise for his work at the XXX, and has never been subject to discipline or reprimand by the XXX or by any group or agency that regulated or funded the program. He detailed his current position in the application form submitted to the DOE.

23. Mr. E has disclosed his conviction history to each of his employers. In some cases – including for his work with the XXX – he has had to undergo (and has passed) formal fingerprint-based background checks in order to obtain necessary clearance approvals.

Mr.E Applies for a Position with the DOE

24. In or about April, 2007, Mr. E learned that the DOE was looking for qualified applicants for SAPIS counselor positions in the New York City schools. He submitted an application to a central DOE Human Resources registry. He submitted a resume along with the application. *See Ex. C.*

25. In late April 2007, XX school contacted Mr. E, having reviewed his resume, to request that he interview for a SAPIS position at the school. XX school interviewed Mr. E in April, and called him in for a followup interview in May, 2007.

26. XX school offered Mr. E a SAPIS position later that month. Mr. E was concerned about when he should give notice to his then employer; the school official with whom he spoke informed him he would be required to complete paperwork at the

DOE's Human Resources headquarters in New York City, but that she did not expect this to pose a problem, and that she expected he would be brought on board at XX school shortly thereafter.

27. Mr. E completed the paperwork, which included questions about applicants' contacts with the criminal justice system. Mr. E answered these questions truthfully. As a result, the DOE required that he be interviewed at its Office of Personnel Investigation.

28. One of the DOE's Chief Investigators, Aderimi Bello, briefly interviewed Mr. E on or about July 12, 2007. Mr. Bello asked questions about Mr. E's conviction history, which ended in 1984, but did not ask any follow up questions or comment on the information Mr. E put forth about his progress and rehabilitation since that time, which included his CASAC certificate (*see* Ex. D), as well as glowing letters from his former probation officer (with whom he has maintained contact since 1984 and who now sends him clients and acts as a mentor), his former supervisor, his current employer and members of the clergy. The letters of recommendation are collectively annexed hereto as Exhibit E.

29. Mr. Bello told Mr. E to contact the DOE three weeks later.

30. Mr. E called the DOE in August, as the DOE had requested, and was told to contact the DOE every two weeks until a decision was made. Mr. E did so. At some point in November, Mr. E was told to await a letter with the DOE's decision, but was not informed of that decision even when he asked.

31. In December, 2007 Mr. E received a letter from the DOE, postmarked December 7, 2007, that told him that his application for employment had

been denied. The letter, a copy of which is annexed hereto as Exhibit F, listed his convictions and then stated that his “application [was] denied due to your drug convictions spanning a four (4) year period. Such a record gives rise to our concern as to your ability to perform the duties of position sought. In light of this, granting employment will pose an unreasonable risk to the safety and welfare of the school community.”

32. The letter went on to inform Mr. E that he could reapply for the SAPIS position “in 12 months from the date of [the] denial.” It then stated that “[i]f you have any additional information that you believe has not been considered, you may submit it in writing within 30 days” to the DOE.

33. At a date after December 10, 2007, Mr. E received a second letter from the DOE, which stated that he had “been placed on the New York City Department of Education’s Ineligible/Inquiry List.” A copy of this letter is annexed hereto as Exhibit G.

34. Mr. E submitted a letter to the DOE on or about December 27. The letter was sent by certified mail and was received by the DOE on December 28, 2007. The letter, a copy of which is annexed hereto as Exhibit H, candidly stated Mr. E’s concern that his application had been improperly denied. Mr. E attached the letters of reference he had previously submitted to the DOE (*see* Ex. E), in case the agency had lost or failed to consider them.

35. Mr. E has not heard any response from the DOE to date in reference to the letter he submitted.

VIOLATIONS OF LAW

FIRST CAUSE OF ACTION: RESPONDENTS' EMPLOYMENT DECISION VIOLATED ARTICLE 23-A OF THE CORRECTION LAW

36. Mr. E repeats and realleges each paragraph above as if fully set forth herein.

37. Article 23-A of the Correction Law requires that Respondents make a fair and reasoned decision – based on the required factors set forth in that law – about whether Mr. E's conviction history was directly related to the duties of the SAPIS counselor position or whether his employment posed an unreasonable risk to persons or property.

38. Mr. E's employment history, CASAC certification and evidence of rehabilitation make it clear that his employment would pose *no risk* and that his conviction history was actually an asset for the SAPIS counselor position.

39. In light of Mr. E's employment and rehabilitation history and CASAC certification which were documented to the DOE, Respondents' determination to deny Mr. E the SAPIS position and to place him on the "ineligible list" was arbitrary and capricious, and constituted an abuse of discretion.

40. Respondents' actions violated the anti-discrimination provisions of Article 23-A of the Correction Law, §§ 750-755.

SECOND CAUSE OF ACTION: RESPONDENTS' EMPLOYMENT DECISION VIOLATED THE NEW YORK STATE HUMAN RIGHTS LAW

41. Mr. E repeats and realleges each paragraph above as if fully set forth herein.

42. By violating Article 23-A of the Correction Law, respondent committed an unlawful employment practice in violation of the New York State Human Rights Law, Executive Law § 296(15).

THIRD CAUSE OF ACTION: RESPONDENTS' EMPLOYMENT DECISION VIOLATED THE NEW YORK CITY HUMAN RIGHTS LAW

43. Mr. E repeats and realleges each paragraph above as if fully set forth herein.

44. By violating Article 23-A of the Correction Law, respondent committed an unlawful employment practice in violation of the New York City Human Rights Law, N.Y City Admin. Code §§ 8-107(a) and (b).

FOURTH CAUSE OF ACTION: RESPONDENTS' EMPLOYMENT DECISION WAS ARBITRARY AND CAPRICIOUS, AND CONSTITUTED AN ABUSE OF DISCRETION

45. Mr. E repeats and realleges each paragraph above as if fully set forth herein.

46. This cause of action is brought pursuant to C.P.L.R. § 7803(3).

47. By denying Mr. E the SAPIS counselor position with XX school, Respondents acted arbitrarily and capriciously, and their actions constituted an abuse of discretion.

WHEREFORE, PETITIONER PRAYS FOR JUDGMENT PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES:

1. Adjudging and declaring that Respondents' actions in denying Mr. E employment and placing him on the DOE's "ineligible list":

- (a) were arbitrary and capricious, and an abuse of discretion;
- (b) were in violation of Correction Law §§ 750-755;
- (c) were in violation of Executive Law § 296(15);
- (d) were in violation of New York City Admin. Code Tit. 8, § 8-107(10); and
- (e) are null and void;

2. Directing Respondents to rescind their employment decision, remove his name from the DOE's "ineligible list," and permit Mr. E to be hired by the DOE for a SAPIS position;

3. Entering judgment on behalf of Mr. E and against Respondents in an amount representing back pay and all the other rights, privileges or benefits that Mr. E would have been or become entitled to had he not been denied employment as a SAPIS counselor with XX school;

5. In the alternative, directing a trial of any triable issues raised by the pleadings and proof of the parties;

6. Awarding attorney fees and costs as permitted by the New York Equal Access to Justice Act, C.P.L.R. § 8601; and

7. Granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
April 1, 2008

SE, Petitioner

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