



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK

Office of School Personnel Review and Accountability (OSPRA)
Legal and Investigative Unit
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December 19, 2008

JASON DOUGLAS HOGE, ESQ
MONROE COUNTY LEGAL ASSISTANCE CENTER
1 WEST MAIN STREET 4TH FLOOR
ROCHESTER, NY 14614

Re: [REDACTED]
Position Sought: BUILDING AND GROUNDS SERVICES

Dear JASON DOUGLAS HOGE, ESQ:

Decision Transmittal

Enclosed is a copy of the Decision of the Executive Coordinator of the Office of Teaching on [REDACTED] appeal of a denial of Clearance for Employment, which was received July 1, 2008. Please be advised that the appeal has been **granted**. He will receive a copy of the Clearance for Employment for each of the prospective covered school employers.

Very truly yours,

TINA DUNN

OSPRA Appeal Coordinator

CC:



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

Assistant Commissioner
Office of Teaching Initiatives
89 Washington Avenue, 5th Floor, North Wing
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December 19, 2008

Jason Douglas Hoge, Esq.
Monroe County Legal Assistance Center
1 West Main Street
4th Floor
Rochester, New York 14614

DETERMINATION ON APPEAL

Dear Mr. Hoge:

Your client, [REDACTED], has appealed the denial of his application for clearance for employment by the New York State Education Department's ("Department") Office of School Personnel Review and Accountability ("OSPRA"). This letter is to inform you that [REDACTED] appeal is sustained and his application for clearance for employment is granted.

On March 18, 2008, the City School District of the City of Rochester ("District") requested clearance from OSPRA for [REDACTED] employment to work as a provider of building and grounds services (custodian, janitor, cleaner, maintenance, trades, laborer).¹ OSPRA's criminal history record check revealed the convictions and pending charges described in the attached Criminal History Summary.

The criminal history record check revealed that there were criminal charges pending against [REDACTED] for two counts of DWI 2nd offense and one count of aggravated unlicensed operation of a motor vehicle, both relating to an April 8, 1989 arrest. OSPRA did not receive satisfactory evidence of disposition regarding these charges.

¹ I note that the District applied for [REDACTED] clearance for employment on several prior occasions.

As a result of its review of his criminal history, OSPRA sent Mr. [REDACTED] a Notice of Intent to Deny Clearance for Employment ("Notice") on March 18, 2008. In response, Mr. [REDACTED] submitted reference letters from his parole officer, District co-workers and a District supervisor, a Veterans Affairs addiction therapist and friends. The letter from Mr. [REDACTED] parole officer claims he has been abiding by the conditions of his parole. The District's plant operations supervisor asserts that Mr. [REDACTED] is a good worker and worked for the District prior to his incarceration. The addiction therapist states that Mr. [REDACTED] attends an "Aftercare Substance Abuse" group for alcohol related health and legal issues every Thursday evening. He further states that Mr. [REDACTED] has completed his substance abuse treatment and met many of his goals, including the implementation of strategies to curtail misguided beliefs and patterns of behavior with alcohol. A co-worker claims that in addition to Mr. [REDACTED] positive personal qualities, Mr. [REDACTED] has made great progress with his substance abuse problem. She further claims that Mr. [REDACTED] has completed substance abuse counseling, gained insight into his addiction and has changed. A former District supervisor asserts that Mr. [REDACTED] never appeared at work under the influence of any substance and he should be given the chance to "move forward" with his life.

Mr. [REDACTED] also submitted documents, including updates and evaluations, relating to the Alcohol and Substance Abuse Treatment ("ASAT") program he participated in while incarcerated. These documents show that he successfully completed the program on June 14, 2005.

On June 12, 2008, OSPRA sent Mr. [REDACTED] a Notice of Denial of Clearance for Employment ("Denial") and notified the District of the Denial. OSPRA denied his clearance for employment because it found a direct relationship between his convictions and the position that Mr. [REDACTED] is seeking and/or because the employment he is seeking would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. This appeal ensued.

In response to the Denial, you submitted a letter of representation and a letter from the District's Human Resources Director, [REDACTED]. Mr. [REDACTED] states that he has been given a copy of Mr. [REDACTED] Denial, has spoken to Mr. [REDACTED] parole

officer and substance abuse therapist, and is fully aware of Mr. [REDACTED] criminal history. Mr. [REDACTED] argues that public policy encourages the employment of people like Mr. [REDACTED] by the District and that Mr. [REDACTED] does not have any driving responsibilities for the District. Finally, Mr. [REDACTED] states that he does not believe that Mr. [REDACTED] is a threat to the safety and integrity of District facilities, staff or students and requests Mr. [REDACTED] clearance for employment.

I heard oral argument in this matter on September 11, 2008. At the oral argument you submitted a memorandum of law ("memorandum") on behalf of Mr. [REDACTED]. In essence, you argue that Mr. [REDACTED] convictions were a direct result of his alcohol addiction and you allege that he has been treated for and has recovered from his substance abuse. You assert that despite Mr. [REDACTED] substance abuse, from 1978 until 2008 he was generally able to maintain employment with the District. You further assert that during this time the District was aware of Mr. [REDACTED] substance abuse issue. You also argue that Mr. [REDACTED] conviction bears no "direct relationship" to his employment pursuant to New York State Correction Law §752(1).

You further argue that Mr. [REDACTED] is not an "unreasonable risk" pursuant to Correction Law §752(2) and the factors to be considered pursuant to Correction Law §753 do not disqualify him for the position at issue. You also assert that since Mr. [REDACTED] convictions were the result of his alcohol addiction, pursuant to the Americans' With Disabilities Act ("ADA") and the New York State Human Rights Law ("NYSHRL"), he is considered a member of a "protected class" under these statutes (citing 42 U.S.C.A. §12132 and 9 NYCRR §466.11[h][1]). Therefore, you claim a decision by the Department to withhold Mr. [REDACTED] clearance for employment would constitute an impermissible violation of Article 23-A of the Corrections Law, the ADA and the NYSHRL.

You also submitted a written statement by Mr. [REDACTED]. In this statement he claims that he is an alcoholic, has gone through treatment and has been sober for four years. Furthermore, he argues that his convictions bear no relationship to the type of work he does for the District. You further submitted a copy of Mr. [REDACTED] resume, a reference letter from an acquaintance, a Salvation Army case manager, inmate records for Mr. [REDACTED] time at Midstate Correctional Facility, as well as documents previously submitted.

Additionally, at the oral argument Mr. [REDACTED] claimed to participate in Alcoholics Anonymous multiple times each week and openly seeks help from others. Mr. [REDACTED] stated that since his discharge from the military in 1977, he has only worked for the District.

Applicable Law

Chapter 180 of the Laws of 2000 requires the fingerprinting of prospective employees of a school district, charter school or board of cooperative educational services ("BOCES") and applicants for certification as an administrator, teacher or teaching assistant. Conducting fingerprint supported criminal history background checks for school personnel better ensures that public school employees do not pose an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. It also ensures that instructional personnel serve as good role models and possess good moral character.

Where a criminal history record check reveals that a prospective school employee was convicted of a crime or has a pending criminal charge, "the [D]epartment shall, upon review of the prospective school employee's criminal history record, related information obtained by the [D]epartment pursuant to the review of such criminal history record, and information and written argument provided by the prospective school employee in his or [her] response, make a determination on whether clearance for employment shall be granted or denied" (8 NYCRR §87.5[a][4][viii]). In conducting this review, the Department applies the standards for the granting or denial of a license or employment application set forth in Correction Law §752 and considers the factors specified in Correction Law §753 (*id.*). This review is also conducted in accordance with the requirements of Executive Law §296(16) (*id.*). Additionally, this same standard of review is used for determining an appeal of a denial of clearance for employment (8 NYCRR §87.5[a][5][v]).

Correction Law §752 provides:

No application for any license or employment
... shall be denied by reason of the

applicant's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the applicant has previously been convicted of one or more criminal offenses, unless:

- (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought; or
- (2) the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Correction Law §753 identifies eight factors that must be considered in determining whether to grant a license or employment to an individual with a previous criminal conviction. They are:

The public policy of this [S]tate ... to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

The specific duties and responsibilities necessarily related to the license or employment 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 the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

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.

(Correction Law §753[1][a] - [h]).

Findings of Facts and Conclusions of Law

I recognize that the underlying policy of Correction Law Article 23-A is to encourage the employment of persons previously convicted of criminal offenses. I have considered the substance abuse counseling and treatment Mr. [REDACTED] has received since his most recent DWI conviction, the fact he has maintained long-term District employment, the statements made at the oral argument and other documentation submitted in support of his application for clearance for employment, and his claims of rehabilitation. I must, however, also consider the multiple DWI convictions on Mr. [REDACTED] criminal record over an approximately 22 year time-span, as well as, his assault conviction. In addition, I must take into account the Department's legitimate interest in protecting both the property of the District as well as the safety and welfare of the children and staff in the State's educational system.

I recognize that, when a government agency relies on the unreasonable risk exception, the eight factors contained in Correction Law §753 must be considered and applied to determine if in fact an unreasonable risk exists. Having considered the eight factors and determining that an unreasonable risk exists, the employer or agency need not go further and consider the same factors to determine whether the license or employment opportunity should be granted (see Bonacorsa v. Van Lindt, et al., 71 NY2d 605, 615).

As a provider of building and grounds services for the District, Mr. [REDACTED] will most likely have limited direct contact with children and District staff. Moreover, none of Mr. [REDACTED] convictions specifically involves crimes against a child. Further, there is no indication that Mr. [REDACTED] will be required to operate a motor vehicle as part of his job duties.

After considering the record before me, I find that the employment of Mr. [REDACTED] by a public school district would not constitute an "unreasonable risk to property or to the safety or welfare of specific individuals or the general public" (Corrections Law §752[2]). Specifically, four factors weigh in favor of granting Mr. [REDACTED] clearance for employment. First, the record indicates that Mr. [REDACTED] has previously worked, long-term, for the District apparently without incident. Second, even with knowledge of Mr. [REDACTED] criminal history and substance abuse issues, the District consistently allowed him to return to work, even attempting to rehire him after a long period of incarceration. Third, the District's Human Resources Director believes that employing Mr. [REDACTED] would not create a threat to the safety and integrity of District facilities, staff or students and he requests Mr. [REDACTED] clearance for employment. Finally, and significantly, Mr. [REDACTED] has successfully completed an ASAT program, continues to attend an after care program and has apparently developed and put into place successful strategies for dealing with his alcoholism.

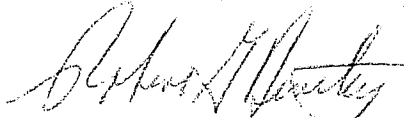
Therefore, I find that the record demonstrates that Mr. [REDACTED] has made substantial progress toward achieving rehabilitation. Thus, based upon the record before me, I find that the employment he is seeking as a provider of building and grounds services for the District would not involve an unreasonable risk to District property and to the safety and welfare of the children and staff in its schools. Accordingly, Mr. [REDACTED] appeal is sustained and his application for clearance for employment is granted.

OSPRA has been advised of this determination and instructed to issue Mr. [REDACTED] a clearance for employment. The District will also be notified that Mr. [REDACTED] has been granted clearance for employment.

In light of this disposition I need not address your alleged violations of the ADA and the NYSHRL. I note, however,

that a Part 87 appeal is not the proper forum for such complaints. Jurisdiction over claims raised under the ADA is with the Federal Courts, the U.S. Department of Justice and the U.S. Department of Education (28 CFR §35.170-35.190). Alleged violations of the NYSHRL should be made to the New York State Division of Human Rights. I further note, that the State Division of Human Rights has no jurisdiction to entertain complaints made by applicants for clearance for employment since OSPRA is neither an employer nor an employment agency as those terms are defined under the NYSHRL (see NYSHRL §292; State Division of Human Rights v. Monroe County, et al., 65 AD2d 947 4th Dept. 1978, affd 49 NY2d 937).

Sincerely,



Robert G. Bentley
Assistant Commissioner
Office of Teaching Initiatives