

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

PRESENT: ALICE SCHLESINGER
Justice

PART 1A.16

Index Number : 401571/2008

EL, TALIB

vs

NYC DEPT. OF EDUCATION

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: APR 01 2009

Alice Schlesinger
ALICE SCHLESINGER J.S.G.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

-----X
In the Matter of the Application of TALIB A. EL,

Petitioner,

-against-

Index No. 401571/08
Motion Seq No. 001

For a Judgment Pursuant to CPLR Article 78

-against-

THE NEW YORK CITY DEPARTMENT OF
EDUCATION, JOEL KLEIN, as Chancellor of
the New York City Department of Education, and
LAWRENCE BECKER, as Chief Executive of
the Division of Human Resources of the New
York City Department of Education,

Respondents.

-----X
SCHLESINGER, J.:

Petitioner Talib El commenced this Article 78 proceeding to annul the March 3, 2008 decision by respondent New York City Department of Education (DOE) denying his application for employment as a substitute teacher. Petitioner asserts that the decision is arbitrary and capricious and discriminatory in that it gives undue weight to the fact that he pleaded guilty to various crimes more than 20 years ago and fails to give appropriate consideration to the substantial evidence he presented in his favor, including a Certificate of Relief from Disabilities issued by the Parole Board.

Respondent DOE opposes the petition, asserting that it properly evaluated all the relevant factors outlined in the Correction Law and correctly denied Mr. El's application on the ground that: "In light of [your criminal record history], granting employment will pose an unreasonable risk to the safety and welfare of the school community." DOE also asserts that it did not receive a copy of the Certificate of Disabilities until after its decision had been rendered.

The Governing Law Prohibits Discrimination

Petitioner's claims in this case rely in large part on Article 23-A of the Correction Law.¹ Included in that Article is Correction Law §752 which bars discrimination against persons previously convicted of criminal offenses. Pursuant to that law, employment cannot be denied based on an applicant's criminal history unless one or both of the following exceptions is found to apply:

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

In the case at bar, as noted above, petitioner's employment application was denied because, in light of his criminal history, his employment posed an "unreasonable risk" to the school community within the meaning of the above-quoted exception.

Section 753, subd. (1), provides a list of eight factors which the potential employer "shall consider" when making a determination pursuant to §752 whether the "unreasonable risk" exception applies. *See, Arrocha v Board of Education of the City of New York*, 93 NY2d 361, 364 (1999). Those factors include the following:

- (a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

¹Petitioner also relies on the New York State Human Rights Law, found at Executive Law §296(15), and the New York City Human Rights Law, found in the Administrative Code at §8-107(10), both of which bar public employment discrimination based on conviction alone.

(b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.

(c) 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.

(d) The time which has elapsed since the occurrence of the criminal offense or offenses.

(e) The age of the person at the time of occurrence of the criminal offense or offenses.

(f) The seriousness of the offense or offenses.

(g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

(h) 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.

As particularly relevant here, and in conjunction with factor (g) above, subdivision 2 of that same section requires the potential employer to consider any Certificate of Disabilities issued to the applicant, "which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein."

In the case at bar, the Board of Parole issued petitioner a permanent Certificate of Disabilities on August 29, 2007 pursuant to Correction Law §703. The Certificate refers to petitioner's sentencing on March 31, 1988 for the crime of Burglary in the Second Degree and expressly states that it "removes all legal bars and disabilities to employment, license and privilege except those pertaining to firearms under Sections 265.01(4) and 400.00 of the Penal Law and except the right to be eligible for public office."

Petitioner Presented Substantial Evidence in Support of his Application

As he properly asserts, petitioner presented to the Board of Education substantial evidence in support of his employment application. Admittedly, between 1985 and 1987, petitioner pled guilty to five misdemeanors involving Trespass, Petit Larceny, and Criminal Mischief. Additionally, on July 3, 1987, he pled guilty to Burglary, a Class C felony. During those years, petitioner was 18-20 years old. He is now about 42 years old.

Along with his seven-page employment application, filed in or about February 2007, petitioner demonstrated that he had been rehabilitated since his last conviction some 20 years ago. For example, he had not only obtained a high school diploma through a GED program, but he had also obtained a Bachelor's of Science in Human Resources from Touro College in 2000 and a Master's of Science in Counseling and Education from Long Island University in 2003.

During that time, petitioner obtained various licenses and accreditations. The New York State Education Department issued him a license to practice as a Mental Health Counselor through July 31, 2009. In 2002, he was also accredited by the State as an Alcoholism and Substance Abuse Counselor Trainee. In 2006 the State Education Department certified petitioner as a Teaching Assistant and awarded a provisional certificate valid through 2011 to work as a School Counselor. That same year he was licensed by the State as a Mental Health Counselor. He also received training related to HIV and STD's.

In connection with these certifications, petitioner worked in various capacities. From 1997 through 2002, he held internships providing counseling for mental health patients and community members. From 1999 through 2003, he worked as a Counselor at Creedmor

Psychiatric Center. In 2003, he was employed as a Youth Supervisor for the Oneida County Workforce where he supervised a youth program. From 2004-2006, he worked as a counselor with developmentally disabled adults and youth at a Community Center in Albany. Thereafter, beginning in or about March of 2006, he worked as a substitute teacher at the New Covenant Charter School in Albany and then at Albany High School until he relocated to New York City and applied for the substitute teaching position at issue herein. In support of his application, petitioner also presented numerous references.

On July 11, 2007, petitioner appeared for an interview with respondent Board of Education at which time his background and criminal convictions were explored in detail. The following day, petitioner wrote to the interviewer, Ms. Patricia Hanks, confirming some of the things he had sought to explain at the interview. He reiterated that he had lived in foster care during the ages 11-18 and then was homeless, which had led him to commit theft for survival. He expressed his remorse, detailed his rehabilitation, and explained his reasons for becoming a teacher: "Today my direct goal is to help and prevent children from becoming homeless and living [a] self destructive life. This starts with education and commitment from people like myself who have struggled to learn about who I am and what I can offer someone who needs support." (See Exhibit A to Petitioner's Aff.).

According to the affidavit of Judith Kay, DOE's Deputy Director for Employee Relations (Exh. 15 to Answer), all of the above facts were considered by Ms. Kay as part of her review and determination of petitioner's application. By letter dated March 3, 2008, Ms. Kay notified petitioner that the Board had denied his application. (Exh. 16 to Answer). In that letter, Ms. Kay gave great wight to petitioner's criminal history. Indeed, she began by detailing petitioner's five convictions from the late 1980's. She then listed in general

terms the other factors she had considered, many of which are listed in Correction Law §753(1), quoted above. Ms. Kay expressly acknowledged that the application could not be denied based on a criminal conviction absent a finding, pursuant to §752, of a direct relationship between the employment sought and the prior conviction, or that granting employment would pose an unreasonable risk to the safety or welfare of individuals. She then stated her conclusion as follows:

Your application for a substitute teacher position is denied based on your criminal record history detailed above including a serious felony conviction. In light of this, granting employment will pose an unreasonable risk to the safety and welfare of the school community.

Significantly, the letter then advised petitioner of his right to submit additional information in support of his application, stating as follows:

If you have any additional information that you believe has not yet been considered you may submit it in writing to the Director of Employee Relations, Division of Human Resources at 65 Court Street, Room 200, Brooklyn, New York 11201.

Petitioner did precisely that. He wrote to Director Gordon protesting the decision to deny his application based on the prior offenses in light of the overwhelming evidence of his rehabilitation. (Exh B to Petitioner Aff.). He attached his Teaching Certificate, his School Counselor Certificate, his Mental Health Counselor Certificate, and two exceptional reference letters.

In addition, and quite significantly, he attached the Certificate of Relief from Disabilities issued him by the Board of Parole. The Certificate had been issued on August 29, 2007, after petitioner's interview had been held but before his application had been

denied. While petitioner asserts in his petition (at ¶19) that he submitted the Certificate “in support of his application”, he suggests in his affidavit (at ¶8) that he first submitted it in response to the denial letter, and Ms. Kay unequivocally attests that she did not review it as part of petitioner’s application before she rendered her March 3, 2008 denial (see Kay Aff. at ¶16). In any event, the DOE in its March 3, 2008 denial letter explicitly advised petitioner of his right to submit additional relevant information, and respondent does not dispute that the Certificate of Disabilities falls into that category. However, the BOE never responded to petitioner’s post-denial submission, and it appears that it never considered the Certificate.

The Decision Denying Petitioner’s Application is Arbitrary and Capricious

While the Board of Education has a certain amount of discretion in determining whether to hire a teacher, the decision must be annulled where, as here, it is arbitrary and capricious and fails to properly consider all the factors required by law. *Arrocha*, 93 NY2d at 363. As the Court of Appeals emphasized in *Bonacorsa v Van Lindt*, 71 NY2d 605, 611 (1988), “Article 23-A of the Correction Law was enacted in 1976 in an attempt to eliminate the effect of bias against ex-offenders which prevented them from obtaining employment. ... [The law] sought to remove this obstacle to employment by imposing an obligation on employers and public agencies to deal equitably with ex-offenders while also protecting society’s interest in assuring performance by reliable and trustworthy persons.” To that end, “the statute sets out a broad general rule” barring potential employers from denying employment solely based on the applicant’s status as an ex-offender unless one of the two exceptions noted above applies: a “direct relationship” exists between the crime and the employment, or the applicant’s employment poses an “unreasonable risk” to individuals or the community. 71 NY2d at 611-612.

Relying on *Arrocha, supra*, respondent Board of Education argues in the case at bar that it properly denied petitioner's substitute teacher application based on its finding that, in light of petitioner's criminal history, he posed an "unreasonable risk" to the students. It correctly notes that a finding of unreasonable risk "depends upon a subjective analysis of a variety of considerations relating to the nature of the license or employment sought and the prior misconduct." *Arrocha*, quoting *Bonacorsa*, 71 NY2d at 612. It further argues that it considered the statutory factors listed above which it was required to consider under Correction Law §753.

However, as petitioner correctly notes, *Arrocha* is readily distinguishable from the case at bar when one considers the various factors. For example, the applicant in *Arrocha* was a mature adult when he committed the crime at issue, which was the sale of a controlled substance, a crime of particular concern due to the Board's duty to protect school children from drugs. In this case, petitioner had just been released from foster care onto the streets at the age of 18 when he committed the crimes at issue, and the crimes involved crimes of property. Some twenty years have passed since petitioner's last conviction, and he has proven himself during that time by obtaining relevant training and employment, including significant employment in positions involving youth as well as teaching. His letters of recommendation were numerous and outstanding.

Perhaps the most significant factor which distinguishes this case from *Arrocha* is the fact that the BOE here did not consider petitioner's Certificate of Relief from Disabilities. As made clear by Correction Law §753(2) and by the Court of Appeals in *Arrocha* and *Bonacorsa*, the Certificate creates a presumption of rehabilitation. While the Certificate

does not establish a *prima facie* entitlement to the employment, the presumption of rehabilitation constitutes significant evidence in petitioner's favor and is one of the eight factors which the Board must consider when determining whether the "unreasonable risk" exception applies. [See Correction Law §753(1)(g), quoted above at p. 3].

The Board's decision in this case is also deficient in that, while some of the eight factors are mentioned in the March 3, 2008 denial letter, they are mentioned in conclusory fashion only, and no discussion is included of the particular facts of this case to demonstrate how the various factors were evaluated and what weight each was given. Absent a more detailed application of the factors to the evidence presented in this case, the Court cannot assess whether the Board truly considered all the record evidence and applied the eight factors in a manner that was consistent with the letter and spirit of the law. See *Marra v City of White Plains*, 96 AD2d 17 (Third Dep't 1983), cited with approval in *Bonacorsa* and *Davis-Elliott v New York City Department of Education*, 31 AD2d 266 (First Dep't 2006)(decision denying employment application properly annulled where the rejection was unlawful in the manner in which respondents considered the factors set forth in Correction Law §753); see also *Black v New York State Office of Mental Retardation and Development Disabilities*, 20 Misc.3d 581, 586 (Sup. Ct., Monroe Co. 2008)(rejecting as arbitrary "general catchall statements" with no attempt to address the specifics).

Although the Court cannot substitute its judgment for that of the agency, it has a duty to insure that the law is properly applied and that the decision is not based upon "speculative inferences unsupported by the record." *Matter of Sled Hill Café v Hostetter*, 22 NY2d 607, 612-613. Respondent's March 3, 2008 denial letter is particularly

problematic here in that petitioner's criminal history is the only evidence detailed in any meaningful respect. Thus, the decision on the whole, as drafted, suggests that it was based primarily, if not entirely, on petitioner's criminal history, with little consideration of the other evidence and statutory factors.

For all these reasons, this Court finds that respondent's decision denying petitioner's substitute teacher application is arbitrary and capricious and must be annulled. The Board of Education failed to consider petitioner's Certificate of Relief from Disabilities and has not adequately demonstrated that it considered all eight of the statutorily-required factors in light of the specific evidence presented by petitioner in this case. The appropriate remedy is a remand to the Board for a detailed consideration of all eight factors, including a determination whether the Certificate of Relief from Disabilities would benefit this applicant in light of the public policy encouraging the employment of ex-offenders so that petitioner's positive factors outweigh the negative ones and warrant the granting of his application.


Accordingly, it is hereby

ADJUDGED that the petition is granted, respondent's March 3, 2008 denial of petitioner's application is annulled, and the matter is remanded for a new determination which applies the statutory presumption related to the Certificate of Relief from Disabilities and otherwise evaluates the relevant factors in accordance with the terms of this decision.

This constitutes the decision and judgment of this Court.

Dated: April 1, 2009

APR 01 2009



J.S.C.
ALICE SCHLESINGER