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

----------X

In the Matter of the Application of

[redacted]

Index No. 400637/09
Motion Seq No. 001

Petitioner,

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,

Respondents.

----------X

SCHLESINGER, J.:

Petitioner [redacted] commenced this Article 78 proceeding to annul the December 1, 2008 decision by respondent New York City Department of Education (DOE) denying her application for employment as a part-time School Aide at Public School 7. Petitioner asserts that the decision is arbitrary and capricious and discriminatory in that it gives undue weight to the fact that she pleaded guilty to a single felony conviction and a violation more than 18 years ago and fails to give appropriate consideration to the substantial evidence she presented in her favor, including a Certificate of Relief from Disabilities issued by the Queens County Supreme Court in 2006.

Respondent DOE opposes the petition, claiming that it properly evaluated all the relevant factors dictated by the Correction Law and correctly denied Ms. [redacted] application, explaining that: "Your application is denied due to the serious nature of your criminal convictions and admissions made by you during the background investigation. This record raises a serious concern as to your ability to perform the duties of school aide. In light of this, granting employment will pose an unreasonable risk to the safety and welfare of the school community."

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. Specifically, the statute provides that 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.

Respondent here relies on the "unreasonable risk" exception (i.e., the second exception quoted above). Correction Law §753(1) lists eight factors which the potential employer "shall consider" when determining whether that exception applies. *Arrocha v Board of Education of the City of New York*, 93 NY2d 361, 364 (1999). Those factors include:

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

---

[1]Petitioner 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.

(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, section 753(2) 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" (emphasis added).

In the case at bar, the Queens County Supreme Court, Criminal Term, issued petitioner a permanent Certificate of Disabilities on July 6, 2006. (Petition, Exh. A). The Certificate refers to petitioner's sentencing on December 13, 1990 based on her plea to the felony charge of attempted criminal sale of a controlled substance. The Certificate expressly states that it "shall relieve the holder of all disabilities and bars to employment, excluding the right to be eligible for public office."

Petitioner Presented Substantial Evidence in Support of her Application

As she properly asserts in her papers, petitioner [redacted] presented to the DOE

substantial evidence in support of her employment application. First, she confirmed that her problems with the law had occurred when she was in her early twenties and were largely attributable to an abusive relationship at that time in her life. Thereafter, she voluntarily entered a residential treatment facility which helped her to free herself from drugs and the detrimental relationship and to rehabilitate herself completely, so much so that she was granted early termination of probation and went on to lead a productive life.

Ms. [redacted] has a significant history of relevant volunteer work and employment. Beginning in 1993, she worked in retail. After a few years, she decided to stay home for five years to care for her three children. When her youngest began attending Public School 7 in September 2000, Ms. [redacted] began volunteering there, and she continued to do so as of the date this proceeding was commenced. Her duties included greeting the children in the morning, assisting with the breakfast, lunch, and recess programs, and chaperoning students walking to the after-school program.

Ms. [redacted] was also a member of the School Leadership Team, a board involved with setting the school's budget and curriculum. She is a Learning Leader in a citywide organization that trains parents to tutor and mentor public school students, and she has held various leadership positions in the Parent Teacher Association. Ms. [redacted] also volunteers in after-school and summer programs. She has successfully performed these various duties without pay for over eight years without a single safety incident. Ms. [redacted] is so highly regarded at the school that her application for the part-time paid position at issue here received the full support of the principal at PS 7, Raquel Jones, and others.

Petitioner has amply documented these facts in exhibits attached to her petition, which include numerous letters of recommendation from persons involved with her work at the school, as well as her current employer Memorial Sloan Kettering Cancer Society.

In addition, Ms. [redacted] has established that she received a passing score on the 2008 New York State Assessment for Teaching Assistant Skills and that she has received the necessary certificates and registration as a child care provider.

The Decision Denying Petitioner's Application is Arbitrary and Capricious

Despite these excellent credentials, Ms. [redacted] employment application was denied by letter dated December 1, 2008. The letter did not make a single specific reference to any of Ms. [redacted] many skills and exemplary qualifications. Instead, the letter denied her application, concluding in summary fashion that "granting employment will pose an unreasonable risk to the safety and welfare of the school community." The letter went on to state that the conclusion was based on "the serious nature of [Ms. [redacted]] criminal convictions and admissions made by [her] during the background investigation."[2] In closing, the letter stated: "This record raises a serious concern as to your ability to perform the duties of school aide.".

Conspicuously absent from the December 1 letter is any explanation as to how mistakes made by Ms. [redacted] in her distant past directly affected her ability to perform the duties at hand, particularly in light of the evidence of complete rehabilitation. Also conspicuously absent from the letter is any reference to the Certificate of Relief from Disabilities which Ms. [redacted] had received from the Supreme Court. Indeed, the only fact specifically mentioned in Ms. [redacted]' drug conviction when she was in her early twenties.

In an apparent attempt to justify its decision after the fact, respondent presents an affidavit from Andrew Gordon, the author of the December 1 letter. Mr. Gordon is now, and has been since September 2006, the Director of Employee Relations for the New York City

[2] To her credit, Ms. [redacted] gave straightforward answers to the questions posed during the investigation and made no effort to hide her past.

Department of Education's Division of Human Resources. Mr. Gordon contends in his affidavit (Exh. 2 to Answer) that he considered all the evidence submitted by Ms. [redacted] as part of his review and determination of her application, including the Certificate of Relief from Disabilities, which he purportedly treated as "presumptive evidence" of rehabilitation of the particular offense. Gordon further contends that he considered all the factors dictated by Correction Law §753.

It is not until the end of his nine-page affidavit that Mr. Gordon even attempts to explain his reasoning. There (at ¶21) he states that petitioner's "attempted sale of crack cocaine as a mature adult while caring for her two small children ... manifests a serious error in judgment ... As such, I had serious doubt that petitioner could reasonably and responsibly be accountable for the safety and security of New York City elementary school children." Gordon goes on to explain (at ¶23) that the presumption of rehabilitation created by the Certificate of Relief from Disabilities, the fact that the crime occurred nearly twenty years ago, and the public policy favoring employment of persons previously convicted of crimes "did not and cannot outweigh the seriousness of her offense, the impact of her poor judgment on her own children who were removed from her supervision as a result of her bad judgment and the safety-sensitive nature of the position ... [and] the requirement of good moral character and the need for excellent judgment."

Petitioner asserts that the DOE effectively ignored Ms. [redacted]' substantial favorable record when it concluded that the presumption of rehabilitation mandated by the Certificate of Relief from Disabilities had been rebutted and that Ms. [redacted]' employment would pose an unreasonable risk to the school community. In addition, and quite significantly, petitioner notes that Mr. Gordon relied on numerous incorrect facts when reaching his conclusion. For example, Ms. [redacted] had explained in her interview that she had possessed cocaine

as an addict, not as a dealer, in her early twenties in connection with an abusive relationship.[3]

Further, contrary to Mr. Gordon's statement, Ms. [redacted] children were not removed from her supervision; rather, she asked her sister to care for them temporarily before her arrest so she could participate in a drug treatment program, which she successfully completed. Any allegations of child abuse had been based on confusion regarding her family composition (i.e., the allegations were intended to be directed to her aunt's household) and were expunged for lack of credible evidence. During the nineteen years that followed, the record shows that Ms. [redacted] became a productive and trustworthy member of the school community, and there is no evidence that she ever exercised poor judgment or otherwise put the safety or security of any student at risk.

Respondent was further mistaken in describing petitioner's volunteer service to PS 7 as "sporadic" when the work was, in fact, long-term and consistent. In addition, respondent erred in describing PS 7 as a "middle/High School" when it is an elementary and middle school. In addition, the numerous letters of recommendation submitted by Ms. [redacted] from members of the school community and others attested to her reliability, excellent performance, and good character.

While the Board of Education has some discretion when determining whether to hire a school aide, 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

---

[3] It is debatable whether an individual in her early twenties could properly be characterized as a "mature adult", as Mr. Gordon characterized Ms. [redacted]

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 based solely on the applicant's status as an ex-offender unless one of the two exceptions noted above applies: a "direct relationship" 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. And while *Arrocha* confirms that a finding of "unreasonable risk" involves "a subjective analysis of a variety of considerations," the analysis must be rationally based on a correct understanding of the facts in the record. 93 NY2d at 364, quoting *Bonacorsa,* 71 NY2d at 612.

In this case, the DOE not only relied upon an incorrect set of facts, but it did not fully consider petitioner's Certificate of Relief from Disabilities and the presumption of rehabilitation dictated by Correction Law §753(2) and the Court of Appeals in *Arrocha*. The claim in the Gordon affidavit that the presumption was applied is self-serving and finds no support whatsoever in the December 1 decision. The decision is also deficient in that, while some of the eight factors are mentioned, they are mentioned in conclusory fashion only. 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 when assessing whether the presumption of rehabilitation had been rebutted.

The decision is particularly problematic in that petitioner's criminal history is the only evidence specifically mentioned. Thus, the decision, 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. The after-the-fact explanation in the Gordon affidavit, carefully crafted in an effort to withstand judicial scrutiny, is insufficient, particularly in light of the reliance on incorrect facts. *See Marra v City of White Plains*, 96 AD2d 17 (Third Dep't 1983), cited with approval in *Bonacorsa, supra,* 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).

Although the Court cannot substitute its judgment for that of the DOE, it must find that the law has been 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. The Court cannot make such a finding on the record here.

For all these reasons, this Court finds that respondent's decision denying petitioner's application for employment as a part-time teacher's aide is arbitrary and capricious and must be annulled. The DOE has not adequately demonstrated that it evaluated all eight of the statutorily-required factors in light of the specific evidence presented by petitioner in this case and that it properly applied the presumption of rehabilitation created by petitioner's Certificate of Relief from Disabilities. The Court will remand this matter to the DOE for a new decision that articulates in detail its consideration of all eight factors based on an accurate set of facts in light of the presumption of rehabilitation mandated by the Certificate of Relief from Disabilities. However, the Court denies petitioner's request for attorney's fees, as the Court is not persuaded that such an award is appropriate in this case.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is granted to the extent of annulling respondent's December 1, 2008 denial of petitioner's application, and the matter is remanded for a new determination consistent with the terms of this decision.

This constitutes the decision and judgment of this Court. The Clerk shall enter judgment accordingly.

Dated: December 16, 2009

DEC 16 2009

J.S.C.

ALICE SCHLESINGER