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EDUARDO NUNEZ, :

PETITIONER, :

COMMISSIONER OF EDUCATION

V. :

DECISION

NEW JERSEY STATE DEPARTMENT OF EDUCATION, :

RESPONDENT. :

SYNOPSIS

Petitioning custodian, employed by the Union City Board of Education in March 1998, appealed his disqualification from school employment and termination from his Board position as a result of a 2001 criminal history background check conducted because no record could be found of a prior check upon his initial employment with the district. Petitioner contended that since he did everything required of him and should have been checked at the time of his first employment, the check conducted in 2001 should have been evaluated under the law as it existed prior to June 30, 1998, so as to allow him to demonstrate rehabilitation from his sole disqualifying offense, committed in 1984.

The ALJ found that petitioner should be allowed under the circumstances to demonstrate rehabilitation and ordered the Union City Board of Education to conduct a hearing for this purpose. No order was recommended with respect to petitioner's entitlement to reemployment or back pay.

The Commissioner set aside the Initial Decision, noting numerous errors in the ALJ's fact-finding and conclusions of law, the latter resulting from confusion between the role of the Department and that of the local board of education. Although the Commissioner concurred that petitioner had demonstrated through administrative hearing that he should be afforded an equitable opportunity to demonstrate rehabilitation, he also determined that the ALJ had not made appropriate findings with respect to the Department, which had acted properly in all respects with regard to petitioner's application, and found that the ALJ had ordered relief contrary to law since only the Department and Commissioner, not a local board of education, may deem an applicant qualified for school employment under the criminal history record check statute. The Commissioner remanded the matter for a hearing on petitioner's rehabilitation consistent with the statutory standards in effect prior to June 30, 1998, and directed that, because petitioner had sought reemployment by the Board and back pay notwithstanding that the Board was not named as a party to this matter, if petitioner were found rehabilitated and continued to seek reemployment, the Board must be named as a respondent and further proceedings must be held on the question of petitioner's entitlement, if any, to reemployment and/or back pay under the circumstances.

OAL DKT. NO. EDU 3689-02
AGENCY DKT. NO. 57-2/02

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions to the recommendations of the Administrative Law Judge (ALJ) were filed by the respondent Department of Education (Department) and by the Union City Board of Education (Board);[1] the Department replied to the latter, while petitioner, in a single submission, replied to both.

In its exceptions, the Department contends that the ALJ erred in finding that it should have considered whether petitioner could demonstrate rehabilitation prior to disqualifying him from school employment. According to the Department, the ALJ mischaracterized the nature of the case, which was an appeal of the Department's determination of disqualification, not a challenge to the legality of petitioner's termination from his employment with the Board; in concluding that petitioner should not have been terminated from employment and directing the Board to conduct a plenary hearing on his rehabilitation, the ALJ both decided an issue not before her and ordered relief improper

[1] Although not a party in this matter, the Board was granted permission to submit exceptions in view of the Initial Decision's recommended Order directing it to hold a hearing, for purposes of assessing rehabilitation, on petitioner's disqualification from school employment.

under the law, first because the operative statute does not and never did grant such authority to local district Boards of education and second because the recommended order directs relief from an entity (the Board) not a party to this matter.[2] (Department's Exceptions at 4-6)

The Department further argues that the Initial Decision must be rejected because the controlling statute mandates automatic disqualification from school employment for persons convicted of specified crimes and makes no provision for relaxation of its effective date, which is when the record check is actually conducted, not the date of an applicant's employment. The Department stresses that, in 1998, due to the overriding need to protect New Jersey's school children from potential harm, the Legislature took the affirmative step of making the disqualification statute stricter and removing its prior provision for demonstration of rehabilitation; this purposeful, substantive change in legislative policy cannot simply be ignored, the Department urges, as it was by the ALJ. (Department's Exceptions at 6-9)

The Department also takes issue with the ALJ's finding that petitioner's criminal history record check application was properly forwarded to and received by the Department in 1998, so that the law in effect at that time—rather than the stricter statute in effect when the Department received petitioner's 2001 application—should control petitioner's disqualification determination. The Department contends that the record contains no substantive evidence whatsoever to support this stated factual finding, and

[2] The Department notes: "Several times throughout the hearing, counsel for petitioner attempted to obscure the difference between the Department of Education, a state agency, and the Union City Board of Education, a local board of education. [The manager of the Department's Criminal History Review Unit] clarified this important distinction as did the Department's post-hearing brief and supplemental letter dated November 6, 2004 (*sic*; actually October 22, 2004). Petitioner chose not to join Union City in this action." (Department's Exceptions at 5, citations to hearing transcript omitted)

notes in particular that petitioner's own witness—the Board administrator responsible for the hiring of non-instructional staff—could not say that he had personal knowledge of petitioner's application being forwarded to the Department, and that no witness or documentation was produced to show that such forwarding was, in fact, accomplished as claimed; whereas the Department, in contrast, produced compelling testimony that it never received a 1998 application from petitioner and that the 2001 submission was the first and only application of which it had any knowledge. Therefore, according to the Department, petitioner's criminal history record check was properly conducted in 2001 under the law applicable at that time. (Department's Exceptions at 9-12)

Finally, the Department contends that, even if, *arguendo*, petitioner is eligible for assessment of rehabilitation under the law in effect at the time his 1998 application was purportedly submitted, petitioner did not present clear and convincing evidence sufficient to meet the standard of the statute as it existed prior to legislative amendment, either in the documentary record or at the OAL hearing where he had the obligation to do so; indeed, petitioner did not even acknowledge the factors specified in that statute, notwithstanding the ALJ's recitation of case law where those factors were fully and carefully considered. Under these circumstances, the Department urges, petitioner is not entitled to another opportunity to demonstrate rehabilitation. (Department's Exceptions at 12-15)[3]

[3] The Department also notes certain factual errors in the Initial Decision, such as the ALJ's statement that the hearing in this matter was conducted on June 17-18, 2004, when in actuality the hearing concluded on the first day and no hearing was held on the second; her statement that petitioner was convicted of a "second degree sale of a controlled dangerous substance" when the record is clear and undisputed that the conviction was for "first degree criminal sale of a controlled dangerous substance in the State of New York;" and her various direct and indirect statements that petitioner was employed and/or terminated by the New Jersey Department of Education. (Department's Exceptions at 1, 2, and 5)

In large measure, the Board joins in the Department's exceptions,[4] additionally taking issue with three further aspects of the Initial Decision. First, the Board contends that the evidence does not support the ALJ's conclusion that petitioner was entirely forthcoming about his prior conviction, since there is no indication other than petitioner's own testimony that the papers he completed referred only to convictions within the past seven years, and the 1998 fingerprint authorization form itself, which petitioner undisputedly signed, contains no such limitation. (Board's Exceptions at 3-4, referencing Exhibit P-1) Next, the Board objects to any suggestion that it may have an obligation to rehire petitioner, rejecting the ALJ's apparent assumption that the Board's termination of petitioner was contingent upon, or temporary pending, the result of his appeal to the Commissioner; according to the Board, it made no such representation, nor did it represent that it would hold a position open for petitioner pending the results of an appeal. Indeed, the Board observes, it has no such legal obligation, and being compelled to rehire petitioner now, three years after his termination and with no position presently available, would not only create undue hardship for the district, but also force it to take on an employee who did not disclose his criminal history during the employment application process. (*Id*. at 4-6) Finally, the Board stresses, it is a corporate body separate and distinct from the Department, with the power to sue and be sued pursuant to *N.J.S.A.* 18A:10-1 and 18A:11-1, and it was neither made a party to the present matter nor notified of the potential for an outcome affecting its rights as clearly required by *N.J.A.C.* 1:1-16.4. (*Id*. at 7)[5]

[4] The Board indicates, in a letter dated February 1, 2005, that it joins in the Department's first three exceptions; the letter is silent with respect to the Department's *arguendo* objection to further hearing at OAL.

[5] The Department's Reply to the Board's Exceptions "does not challenge" the Board insofar as it objects to the relief ordered against it by the ALJ. However, the Department does seek to clarify that the Board repeats the ALJ's error of describing petitioner's conviction as second degree (See note 3 above), that the record does not include evidence to support the Board's statement that petitioner submitted a *complete* criminal

In reply to the exceptions of the Department and the Board, petitioner objects to the suggestion that his appeal was for any reason other than to obtain reinstatement to his employment; in essence, he states, his argument from the beginning has been that he should not have been dismissed without an opportunity to demonstrate rehabilitation, since the law in effect at the time he submitted his application clearly granted him that right and he did all that was required of him when submitting the application. (Petitioner's Reply Exceptions at 1-4) He elaborates:

> Petitioner's claim in his petition is quite simple. He claims that he sent the application. He claims that he worked for almost three years before he was terminated. He believed and the Union City Board of Education believed that he was employed and as such he was paid for three years. The date on which the Department received or should have received his criminal background check application was somewhere in 1998. But there is no doubt about the fact that the petitioner was hired in February 1998. Petitioner claimed that he should have been able to demonstrate rehabilitation under the law as written at the time he began his employment. The Department refused to acknowledge such right. This is precisely what this case was about. The ALJ found correctly.***There was a blunder in this case, but it certainly cannot be pinpointed to the petitioner.
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> The Decision of [the ALJ] correctly found that the prior statute should apply under the ex-post facto (*sic*) provisions of the New Jersey Constitution and that the petitioner should be able to demonstrate***that he has been rehabilitated and thus, reinstated as he sought in his appeal. This appeal was not for declaratory purposes. The petitioner has the right to seek back pay since, according to the ALJ's decision, he was wrongfully terminated." (*Id*. at 4-6)

Petitioner reiterates his arguments on brief and at hearing with respect to application of the prior law, but adds in response to the Department's and Board's exceptions:

> ***The Department wishes to blame the petitioner for the blunder of either the Department or the Board of Education in failing to process the criminal

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history review application in 1998 (i.e., prints and a money order in addition to the authorization form), and that any reference to the 2001 application being a *re*submission must be viewed in light of the Department's consistent contention that this submission was the *only* one received on behalf of petitioner. (Department's Reply Exceptions at 1-3)

> background check. Such position is unfair given the facts of this case. The ALJ had a difficult time assessing blame on the petitioner for the failure of the State in running his criminal background check. Either way, despite the fact that in hindsight it is rather clear that the [Board] was negligent in failing to follow up its submission for the criminal background check, the State is ultimately responsible for the blunder. That is the way the law is written. The Department of Education instructed the [Board] to terminate the employment of the petitioner and it also has the right and the power to reinstate him. [The Board's administrator] testified that he received the application and gave it to one of his subordinates to send. [The manager of the Department's Criminal History Review Unit] testified he never received it. If the application was lost in the mails or was never sent, or was lost by the Department Unit of Criminal Background checks (*sic*), it was lost or never sent while already in the hands of the State.***That's why the ALJ decided the matter in the fashion that she did. The ALJ's opinion is pretty clear on the issue of who was responsible for having done the right thing here. If the [Board's] witness stated that the petition was sent, the trial court found that the responsibility lied (*sic*) with either of the educational departments and not with the petitioner. Findings of fact cannot be tried de novo. Despite the embarrassing situation for the [Department and Board] in this case for clearly not having performed their responsibilities and obligations with reasonable care, and despite the ramifications that this case can cause to the public opinion as to the state of the governmental agencies that provide educational services to the children of this State, this case is not about the facts, which have been decided. This case is about the law and whether or not the ALJ applied the law in a fashion that was appropriate. This case presents a legal issue exclusively as to the issue of ex-post facto (*sic*). What is the basis and right of the Department or the [Board] to make arguments regarding the fact finding conclusions of the ALJ? The answer is simple. None other than these exceptions are taken as a matter of right. This case is about a violation of the constitutional protections against ex-post facto (*sic*), not about whether or not the petitioner was not forthcoming with the [Board] or whether the [Board] can be ordered to reinstate the petitioner. It can be ordered to reinstate the petitioner once petitioner demonstrates rehabilitation in the same manner that it ordered the termination of the petitioner and the [Board] had no choice but to terminate.
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> (Petitioner's Reply Exceptions at 8-10)

Following a brief discussion of the constitutionality of retroactive laws, petitioner continues:

> ***In this case, there should be a presumption against retroactivity because the existing law is deemed unjust. The mess up of the Department of Education for not having processed the application pursuant to law and having given rights to the petitioner to demonstrate rehabilitation is quite

> clear in this case. The Department of Education chose to apply the harsh whip to the petitioner in the hope that he would just go away. It did not happen. By the same token, the [Board] is now claiming that petitioner was not forthcoming with information regarding his criminal background and that there are no places available to him. This is also false and in contravention of the statute. A good reading of the application for employment as made by the ALJ will lead to the inevitable conclusion that all the arguments are simply made in the hopes that they will stick, but really have no substance.*** (Petitioner's Reply Exceptions at 11-12)

Petitioner reiterates that he did everything required of him in applying for employment, including being as forthcoming as requested given the wording of the application questionnaire; that he worked for the Board for three years without incident; that he has been an outstanding citizen since his conviction twenty years ago and has had no subsequent convictions; and that it is no fault of his that the Department did not process his application and the Board did not follow up to ascertain the outcome of his background check. While recognizing the State's interest in achieving the legislative goal of the new statute, petitioner urges that its strict application here is clearly inequitable and unconstitutional, an argument which, he contends, the Department has consistently failed to address. (Petitioner's Reply Exceptions at 12-17) Petitioner further objects to the Department's claim that he failed to demonstrate rehabilitation, since "the issue at trial was [not] whether or not he was able to demonstrate rehabilitation, but whether the dismissal, without demonstrating rehabilitation under ex post facto constitutional protections was appropriate." (*Id.* at 17-18)

Finally, petitioner objects to the Board's contention that it is not obliged to rehire him if he is able to demonstrate rehabilitation. He argues:

> ***It is rather clear by law that if an administrative termination occurs as was the case here and an appeal is made to the authority that instructed the [Board] to terminate the petitioner, such appeal is directly made to have the

> petitioner restored.***If the petitioner ultimately prevailed as he did in his trial, the Department of Education needs to first effect an interview or any process available to determine the petitioner's rehabilitation, and once it finds that such rehabilitation existed, it must rehire the petitioner by order of the judicial tribunal that makes the ultimate decision in this case.
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> ***
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> The [Board] argues that it was not part of the action and thus, no relief may be afforded against it. It flows from reason that if the Department of Education instructed the [Board] to terminate petitioner's employment when the [Board] employed the petitioner and the petitioner had been an excellent employee, and as a result the petitioner filed an appeal seeking his reinstatement, now that the petitioner has prevailed in his appeal, the [Board] must reinstate the petitioner once the rehabilitation determination is made by the Department of Education. Petitioner complied with all regulatory and procedural steps to effect his appeal. Furthermore, the [Board] was on notice of this case and its representation here that it had no knowledge is a lame excuse to avoid liability. The fact that the [Board] was never notified of the potential outcome affecting its right in this case does not hold water as far as the directive of the trial court's is concerned because 1) the [Board] was on notice and 2) it should have known that a potential decision such as the one rendered by the trial court here could have been made.***The [Board] knew of this case and also had the right to intervene if it had chosen to. The rules do not state that intervention or participation is mandatory of a party whose rights may be affected.
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> (Petitioner's Reply Exceptions at 20-21)

Upon thorough review and consideration, the Commissioner determines to reject the Initial Decision, since, in substantial part as set forth below, it is incomplete or erroneous with respect to both its factual findings and its analysis and conclusions of law.

With respect to factual findings, based on the documentary record and testimony at hearing, and concurring with the ALJ that all witnesses were fully credible, the Commissioner finds the following as the facts of this matter pursuant to *N.J.S.A.* 52:14F-10(c), *N.J.A.C.* 1:1-18.1(c), and *N.J.A.C.* 1:1-18.6(b) and (d):[6] [7]

[6] Exhibits are referenced by their respective "Petitioner" (P-) or "Respondent" (R-) designations, while the transcript of hearing on June 17, 2004 is indicated by "T" followed by the applicable page number(s).

1. Petitioner was convicted in New York State of First Degree Criminal Sale of a Controlled Dangerous Substance on March 28, 1984. (R-2) (*Cf. Initial Decision at 4, indicating Second Degree offense*) He pled guilty (T27), was sentenced to "supervision or custody" (R-2), spent 4-1/2 years in jail and was released July 1988. (T27). Since that time, he has had no further trouble with the law. (T28)

2. In mid-February 1998, petitioner applied for a maintenance position with the Union City Board of Education. (T26) His employment was recommended by district administrative staff who had no knowledge of his conviction (T12-13), and on February 24, 1998, the Board approved the administration's recommendation. (P-3)

3. On February 26, 1998, upon learning of the Board's approval, petitioner completed the State background check authorization form, indicating that he had not been convicted of the various enumerated crimes and offenses, including "violations of the New Jersey Controlled Dangerous Substance Act." (P-1; T55-57) On the same date, he also completed a local district form indicating that he had not been convicted of "any crime or disorderly persons offense involving sexual offenses, child molestation or endangering the welfare of children or incompetents." (P-5; T55-57) He went to Union City Police Department to be fingerprinted, got a money order, put his package together and gave everything to the board of education. (T26, T29, T60)

4. Petitioner was officially advised of the Board's decision to hire him by letter from the Board Secretary dated February 27, 1998, indicating that on February 24, 1998, the Board took action to employ him effective March 1, 1998, pending completion of a criminal history record check. (P-3; T18, T26) (*Cf. Initial Decision at 5, where this letter is characterized as advising petitioner that his six-month provisional period had ended and his employment was now permanent; there is no such document on record, nor was there any testimony to the effect that petitioner was so advised.*)

5. Petitioner testified that at some point during the initial application/hiring process he filled out a "board form" asking if he had been convicted of any crimes in the past seven years, answering "no" because his conviction predated that period. (T44, T47, T57-58) Asked about his negative response to P-5, petitioner stated that he found the listed sex and child endangerment crimes not applicable in his case (T28-29); he answered all application questions truthfully because there was no need to lie. (T36)

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[7] Petitioner's arguments on exception (at 9-10), to the effect that the fact-finding of the ALJ may not be challenged before or disturbed by the Commissioner, are clearly contrary to the Administrative Procedure Act and its implementing rules.

6. At the time of his initial hiring, petitioner was not aware that the criminal history record check law provided for demonstration of rehabilitation, learning of this from his lawyer only when asked for new prints in 2001. Although he knew his crime would be revealed by the background check, he was unconcerned because he relied on the "7-year" provision purportedly in the Board application. (T36-37) The "board application" referenced by petitioner is not a part of the record in this matter, nor does any document on record contain such a provision. (*Cf. Initial Decision at 4, where the ALJ references P-5 in support of petitioner's "7-year" statement*.)

7. During the period in question, the process for effectuating criminal history background checks was as follows: An applicant would complete the authorization form, fingerprint card and money order and return it to the employing school district, which would then forward it to the Department's Office of Criminal History Review. (T65) There, mail was opened, applicant information was entered into a database, money was deposited, and prints were forwarded to the NJ State Police and the FBI (T65). All steps were accomplished through an elaborate system of manual cross-checks, continuing through receipt of results and billing for the State and federal records, and designed to ensure that everything matched: the number of deposit slips, counts to State Police vs. number of searches, amounts of billings from the State Police and FBI, etc. (T 96-97, T101-03). With this system, complete loss of an application was a virtual impossibility, and there is no known instance of the Department ever having lost an application once received. (T102-03) If an application was lost without a trace, it must have been at the district level or in the mail (T126, T128), since any application received by the Department would at the very least have remained in the office database. (T108-10)

8. Once received and processed, if an applicant's check came back with a disqualifying conviction, both the applicant and school district were notified. (T68, T73) If it came back without disqualifying conviction, a letter was sent to the applicant's home address and the applicant's name was added to a computer printout, generated weekly, listing all the approvals by school district since the prior week. The weekly printouts were sent to local school districts through the offices of the county superintendents, so that there would be "a complete circle" and boards of education could meet their responsibility under the statute to ensure that anyone hired by them had undergone a completed background check. (T66, T104, T111-15, T122, T124-25) On a regular basis, district administrators did not even wait for the printout, instead calling, writing or faxing the Department to confirm receipt or check the status of submitted applications. (T147)

9. At the time of petitioner's initial employment, Mr. Carl Johnson was the administrative supervisor who oversaw Union City's hiring process for

maintenance workers and whose office staff was responsible for processing applicant paperwork. (T12-13) With respect to petitioner's background check materials, Johnson testified that he did not mail them personally, but his staff was responsible for mailing. (T18) Because he had never had a problem with an employee background check package not being sent to Trenton, he assumed all records were mailed. (T18, T21) No documentation of mailing can be produced because the district's practice was to send background check packages by regular mail. (T21) (*Cf. Initial Decision at 4, where Johnson is said specifically to have testified that petitioner's application was complete and that he, Johnson, gave it to his office personnel for mailing; this statement is unsupported by the transcript*.)

10. Johnson testified that the Board got no formal notification from the Department when an employee was approved, only when disapproved; therefore, if he heard nothing, he assumed a person was qualified for indefinite employment. (T14-15) His office did not follow up with the Department in checking on applications, since he believed there were no State procedures or guidelines for doing so and he was never told by the Department that it was necessary to follow up when submitting an applicant for a background check. (T22-23)

11. Petitioner understood that he was hired pending the results of a criminal history record check, but because he heard nothing to the contrary while he continued working for 3-1/2 – 4 years, he assumed everything was fine. (T31, T41-42, T49-50, T58-59) During this time, he never received anything from the Department, either qualifying or disqualifying him with respect to school employment. (T51)

12. The Department never received the application purportedly sent by the Board on petitioner's behalf in February 1998, nor was it aware of petitioner, or contacted with respect to him, at any time prior to 2001.

13. Sometime in 2001, the Department received information from an "outside source" indicating that petitioner was working in a school district without having undergone a background check. This is one of the two ways (the other being a State compliance investigation) that the Department is typically made aware of an unchecked employee. (T74)

14. As it routinely does in such cases, the Department contacted the district Superintendent's office once it ascertained that it had no record of petitioner's fingerprints ever having been submitted for check or any other record of contact with respect to petitioner. (T73, T75, T107-08, T148) The absence of any record could not be simply a question of lost paperwork, because, even if every single paper had been lost, petitioner would still have appeared in the Department's database. (T108-10, T148)

15. Since the district could not produce any evidence that petitioner had, in fact, undergone a completed background check, in accordance with the Department's consistent practice in situations of this type, the district was told to submit a new application on petitioner's behalf. (T128, T147-48).

16. Petitioner was asked for new prints, and he went "again" to the police department to get them. (T40) Petitioner had no idea why the prints were requested; he "figured" they were lost and "didn't question" giving them "again." (T42) On September 9, 2001, petitioner signed a new State background check authorization form, wherein he attested that he had not been convicted of "drug offenses" among other listed crimes and offenses. (R-1) The Board sent the new authorization, prints and payment to the Department (T75), and petitioner was removed from contact with children pending the results of his background check. (T16)

17. Upon its receipt of petitioner's application, the Department conducted the required check, which revealed petitioner's 1984 conviction. (R-5) Because petitioner had not been previously approved for school employment and did not meet the statutory requirement for application of the prior law, the Department applied the current statute rather than the one in effect at the time of petitioner's hiring by the district, reasoning that the plain language of the statute left it no other choice. (T132, T137, T139)

18. By separate letters dated December 7, 2001, the Department notified both petitioner (R-2) and the Board (R-4) that petitioner was disqualified from school employment as a result of a conviction revealed by his criminal history record check.

19. By letter dated December 12, 2001, petitioner was notified by the Board that his employment with the district was terminated effective July 13, 2001 (*sic*); the intended, and actual, effective date of termination was December 13, 2001. (R-3; T53) Petitioner characterized his termination as "fired pending appeal on the case" (T40); however, the Board's letter makes no reference to any such contingency.

20. By letter dated December 21, 2001, counsel for petitioner wrote to the Department seeking to vacate petitioner's disqualification. (Letter not part of record; description based on R-6, *infra*) The Department responded by letter dated January 16, 2002 (R-6), summarizing the provisions of the current statute and noting in particular that showings of rehabilitation were no longer permitted and that employment in the public schools for any person found convicted of an enumerated crime was precluded by law. The Department further advised that petitioner could seek the Commissioner's review of its determination by filing an appeal pursuant to *N.J.A.C.* 6A:3.

21. On February 28, 2002, counsel for petitioner filed the instant appeal, seeking reinstatement to employment and back pay for the period of termination. (Petition of Appeal at 6-7) No request for stay of the Department's determination of disqualification was made, either upon filing of the appeal or subsequently.

Although pled as a single claim against the Department, this matter, in fact, presents two separate and distinct issues: 1) whether, when petitioner's prints were submitted to the Department in 2001, they should have been evaluated under the criminal history record check law as it existed prior to June 1998, so as to accord petitioner the opportunity to demonstrate rehabilitation under the standards then in effect, and 2) whether petitioner is entitled to reinstatement to his employment with the Union City Board of Education and to back pay for the period between his termination and reinstatement.

With respect to the question of the appropriate statute to be applied to petitioner's record check, the Commissioner initially finds that the Department's actions in this matter were in all respects proper and in accordance with law. *N.J.S.A.* 18A:6-7.1 states on its face that the provisions of *P.L.* 1998, *c.* 31 shall apply to criminal history record checks *conducted* on or after the effective date of that act (June 30, 1998), except in the case of an individual employed by a board of education who is required to undergo a check upon employment with another board of education.[8] In petitioner's case, no record check application was received by the Department, and consequently no check was conducted, prior to 2001;[9] petitioner's application at that time did not fall within the

[8] The Initial Decision's summation (at 7-8) of the 1998 criminal history record check statute and its June 1998 legislative amendment is essentially accurate and need not be repeated herein.

[9] The Initial Decision (at 9) states that, "In this instance, there is no indication as to whether or not the 1998 background check [was] completed; however, what is for certain is that all of the facts and the testimony reveal that Petitioner fully completed his responsibilities and turned all documents for the background check over to the Respondent. Respondent acknowledges receipt of all documents and confirms that the documents were turned over for a criminal background check." As the Commissioner's factual findings demonstrate,

statutory exception provision since he was not being checked in conjunction with changing his employment from one school district to another.[10] The Department, therefore, acted correctly—indeed, in the only manner permitted to it by law—in applying current standards to the results of petitioner's 2001 record check, and then advising petitioner, in response to his protest of such application, of his right to present proofs and argument to the Commissioner through the administrative hearing process. The Commissioner rejects as entirely without merit petitioner's contention that the Department did not perform its responsibilities and duties with reasonable care, either in 1998 or in 2001: In the first instance, it could not possibly have acted on an applicant of whom it had no knowledge, and it had general procedures in place to provide local districts with a means of checking on submitted applications; in the latter, it applied the law correctly under the circumstances and diligently followed all established practices and procedures, including directing petitioner's legal counsel to the appropriate process for administrative hearing so that he could fully present his claim for exception to the plain language of the law.[11]

Concluding that the Department's actions were proper, however, does not end the inquiry with respect to petitioner. Through this proceeding—the very purpose of which is to permit development of a factual record and legal argument that may justify

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however, no check was conducted in 1998, and, notwithstanding that petitioner apparently gave the requisite materials to the Board for submission to the Department, the Department did not receive an application or other information on behalf of petitioner until 2001, let alone acknowledge receipt of such documents.

[10] The Commissioner is unpersuaded by petitioner's "grandfathering" argument as raised at hearing (T140-46), which is based on a reading of statute that truncates the critical sentence at midpoint ("except in the case of a person employed by a board of education"), completely ignoring the qualifying clause that follows. (T146) The Commissioner likewise discounts petitioner's inferences at hearing that the Criminal History Review Unit did not have the expertise to make decisions about application of the statute under which it operates. (T80-87, T119-22, T124, T132-37, T142, 144-45)

[11] The Commissioner rejects petitioner's suggestion that the Department is culpable no matter what because the statute places on it the ultimate responsibility for the conduct of background checks and there is no requirement in statute or rule for district boards to check on the results of applications submitted. (T115-24)

under the circumstances a result different from an otherwise appropriate agency determination[12]—petitioner has established that the delay occurring between his initial application to the Board in February 1998 and the actual conduct of his criminal history record check was in no way due to fault, omission or bad faith on his part. Indeed, the record shows that petitioner did all that was asked of him in order to enable the check to be conducted, that he answered the questions asked of him truthfully based on the language of the forms he was given, and that he reasonably relied on the Board's acceptance of his application pending completion of the check and its subsequent continuation of his employment without further comment, as evidence that the check had occurred and that his prior conviction did not disqualify him under the law. In this regard, the Commissioner notes in particular that petitioner accurately completed his State application form (P-1), since he had not, in fact, been convicted of any violation of the New Jersey Controlled Dangerous Substance Act (NJCDSA) and no provision was made on the form at that time for disclosure of other drug offenses, and that he likewise responded truthfully to the additional district form regarding criminal history (P-5), which reflects the law as it was originally enacted in 1986, never having been updated to reflect the Legislature's 1989 amendment adding drug offenses to sexual and child endangerment crimes as disqualifying convictions. Under these circumstances, and where the Board's witness admits that it received petitioner's application materials in February 1998 and believed them to be sufficient for conditional employment in the district and submission to the Department for record check, petitioner did all he was required or could reasonably have been expected to do, so that the interests of justice favor according him the opportunity to demonstrate—as

[12] In this regard, petitioner errs in his contention that his case is "not about the facts;" to the contrary, precisely the type of fact-finding contemplated by the contested case process is a necessary prerequisite for the Commissioner to be able to consider granting of equitable relief.

he would have been able to do in 1998 had his application not in some manner failed to reach the Department for processing—that he is rehabilitated under the standard of the statute so as not to pose a threat to the school children with whom he comes into contact as a custodian.[13] [14]

On the question of petitioner's entitlement to reinstatement to his employment with the Union City Board of Education and to back pay for the period between his termination and reinstatement, however, no determination can be made on the present record or at this juncture in proceedings. First, petitioner cannot even claim such entitlement unless he successfully demonstrates rehabilitation so as to be qualified for school employment pursuant to *N.J.S.A.* 18A:6-7.1, which he has not yet done. Moreover, even if petitioner prevails in his demonstration of rehabilitation so as to be found qualified for school employment, it is not a foregone conclusion, as Petitioner claims, that the Board must then re-employ him and award him back pay; no statutory or decisional authority for such contention is cited by petitioner, nor is any readily apparent. Finally, the entity

[13] The Commissioner rejects the Board's argument that petitioner should not be given an opportunity to demonstrate rehabilitation because he was less than forthright about his criminal history. As indicated, petitioner answered all questions accurately in 1998, and, although the "no convictions" attestation on the State form he completed when asked for reprints in 2001 (R-1) does refer to "drug offenses" and no longer to only violations of the NJCDSA, given the preceding events and petitioner's lack of knowledge as to why he was being asked to fill out a second criminal history form after several years of uneventful employment, the Commissioner cannot find, based on the present record, that this one fact alone should foreclose petitioner from the *opportunity* to demonstrate rehabilitation.

[14] The Commissioner also rejects the Department's argument that, even if the Commissioner finds it appropriate to apply the pre-June 1998 law to petitioner, petitioner failed to demonstrate rehabilitation at hearing and is not entitled to a further opportunity to do so. The Commissioner finds that, while petitioner testified at some length on his work history and current family background and the Initial Decision includes some discussion of decisional law regarding rehabilitation, the issue of rehabilitation is not mentioned in the prehearing order, the ALJ prefaces her discussion of applicable statutory criteria with the qualifying phrase "should petitioner be able to present a rehabilitation argument, he must discuss…" (Initial Decision at 5), and the ALJ's stated belief that all necessary testimony had been taken (T151-52) clearly arises from the (mis)understanding, reflected in the Initial Decision, that a rehabilitation hearing, if ordered, would be conducted by the Board. Under these circumstances, the Commissioner cannot find that petitioner has already had an opportunity to demonstrate rehabilitation on appeal.

against which the relief of reemployment and back pay must be sought, the Union City Board of Education, has not been named as a respondent in this matter and, as such, has had no opportunity to counter petitioner's factual and legal claims or present its own position with respect to pertinent facts and law; indeed, petitioner's claim in this regard should not even have been allowed to proceed without the Board being named as an "indispensable party" pursuant to *N.J.A.C.* 6A:3-1.3;[15] that it did so is primarily the result of petitioner's and the ALJ's continual confusion and conflation of 1) the State Department of Education with the Union City Board of Education, and 2) petitioner's disqualification from school employment with the termination of his employment with the district.

This difficulty pervades the Initial Decision from the outset, as well as petitioner's papers and arguments: The petitioner regularly refers to the Department and Board as one amorphous entity entitled "the State," and both the petitioner and the ALJ confuse the respective roles and authority of the Department versus those of the local board of education. Notwithstanding the Department's repeated efforts to clarify the requisite distinctions,[16] throughout the ALJ's discussion, reference is made to petitioner's employment and/or termination by the Department, when, in fact, the extent of the Department's role and authority in matters of this type is to: conduct the criminal history record checks required by law; determine employee qualification or disqualification based upon the results; and notify the employing school district of the outcome so that it can

[15] While the Board had a right to intervene or participate pursuant to *N.J.A.C.* 1:1-16.1 *et seq*., it did not have the obligation to do so; the obligation to name the Board, as the entity against which the relief of reinstatement/back pay would be ordered if petitioner prevailed in his claim for reemployment, rested with petitioner pursuant to *N.J.A.C.* 6A:3-1.3. Because the Petition of Appeal (at 7-8) clearly identifies reinstatement and back pay as the relief sought by petitioner, and that claim is plainly inferred by Issue 5 in the Prehearing Order, petitioner should have been required to name the Board as a party. Moreover, although the Board was far more than merely "affected" by petitioner's claim, as is the standard for intervention or participation, there is no evidence on record that the Board was notified of even this potential as provided by *N.J.A.C.* 1:1-16.4.

[16] The Department's claims in note 2 above are fully supported by the record.

comply with the law. The Department neither employs nor terminates local district staff members; these functions are expressly reserved to district boards of education subject to compliance with statutes prohibiting employment of disqualified persons. Conversely, the criminal history record check law does not give, and has never given, any authority to district boards to make determinations of qualification for school employment, a function reserved solely to the Commissioner and State Department of Education. Thus, while only the Commissioner or Department can find petitioner qualified for school employment under statute, only the Board can re-employ him, either on its own initiative or by order of the Commissioner. The Commissioner's authority to issue such an order, however, is appropriately exercised only upon the conduct of a contested case hearing with the Board being given a full and fair opportunity to defend against petitioner's claim, and not until petitioner has successfully demonstrated rehabilitation under the criminal history record check law in effect at the time of his application.

The Commissioner, therefore, directs that this matter be remanded to the OAL, initially for a hearing on whether petitioner meets the standard for rehabilitation set forth in *N.J.S.A.* 18A:6-7.1 as it existed prior to amendment effective June 30, 1998, and then, if petitioner is found qualified[17] *and* takes appropriate steps to pursue his claim, for determination as to whether the circumstances of this matter may entitle him to reemployment and/or back pay. Because the disqualification hearing is to be conducted on a *nunc pro tunc* basis, petitioner shall be limited in the evidence he may present to demonstrate rehabilitation to that which would have been available to him at the time of his 1998 application and a few months thereafter, since any disqualification hearing

[17] The parties are reminded that any Order by the ALJ in this regard may be appealed on an interlocutory basis pursuant to *N.J.A.C.* 1:1-14.10.

resulting from a February 1998 application would ordinarily have been concluded before the end of that year. If petitioner wishes to pursue his claim for reemployment and back pay, he must forthwith submit to the ALJ, and serve on the Board, an amended petition naming the Board as a respondent. Moreover, any proceeding on reemployment or back pay must recognize from the outset that the Department properly applied the 2001 law at the time of petitioner's "second" application, and that only through the present proceeding has petitioner established an equitable right to have his qualification re-determined under prior standards; further, it must recognize that the Board had no choice under State statute but to terminate petitioner's employment once he was disqualified from school employment and he neither requested nor obtained a stay of such disqualification pending appeal pursuant to *N.J.A.C.* 6A:3. (*N.J.A.C.* 6A:3-1.6) Finally, if petitioner is found to have any entitlement to back pay, the question of mitigation must also be taken into account.

Accordingly, for the reasons set forth herein, the Initial Decision of the OAL is rejected, and this matter is remanded for further proceedings consistent with the Commissioner's directives above.

IT IS SO ORDERED.[18]

COMMISSIONER OF EDUCATION

Date of Decision: May 26, 2005
Date of Mailing: May 26, 2005

[18] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*