

DHPBL #313-97  
SB # 60-97

IN THE MATTER OF THE DISQUALIFI- :  
CATION FROM SCHOOL EMPLOYMENT : STATE BOARD OF EDUCATION  
OF J.W. : DECISION

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Decided by the Assistant Commissioner of Education, June 13, 1997

Decided by the State Board of Education, September 3, 1997

For the Petitioner-Appellant, Bucceri & Pincus (Gregory T. Syrek, Esq., of  
Counsel)

For the Commissioner of Education, John K. Worthington, Deputy Attorney  
General (Peter Verniero, Attorney General of New Jersey)

J.W. (hereinafter "petitioner"), who was employed as a school bus driver for the Hudson County Schools of Technology, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools after a criminal history record review conducted pursuant to N.J.S.A. 18A:39-19.1 revealed that she had been convicted of possession of drug paraphernalia in March 1992 following an arrest in February 1992. Petitioner appealed her disqualification to the Commissioner of Education, contending that she was rehabilitated.

The Office of Criminal History Review did not contest petitioner's appeal and, accordingly, the matter was not transmitted to the Office of Administrative Law for hearing. In a letter decision dated June 13, 1997, the Assistant Commissioner of

Education, Executive Services, upheld the disqualification,<sup>1</sup> concluding that petitioner had failed to demonstrate clear and convincing evidence of her rehabilitation under the standard set forth in N.J.S.A. 18A:6-7.1.

Petitioner filed an appeal from that decision to the State Board. In support of her appeal, she argued that her conviction was not for a disqualifying offense and renewed her claim that she had demonstrated rehabilitation.

On September 3, 1997, we reversed the decision of the Assistant Commissioner, concluding that petitioner's conviction for possession of drug paraphernalia was not a "crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a 'controlled dangerous substance' as defined in the 'New Jersey Controlled Dangerous Substances Act'" so as to constitute a disqualifying offense under N.J.S.A. 18A:39-19.1.<sup>2</sup>

In that the Office of Criminal History Review did not respond to petitioner's appeal, our determination was based solely on our review of the language of the statute in light of petitioner's arguments. As expressed in our decision, we reasoned that:

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<sup>1</sup> N.J.S.A. 18A:4-34 authorizes the Commissioner to assign to an assistant commissioner the "hearing and determination of controversies and disputes which may arise under the school laws...."

<sup>2</sup> N.J.S.A. 18A:39-19.1 provides, in pertinent part:

....A school bus driver shall be disqualified from employment or service if the individual's criminal history record reveals a record of conviction of any of the following crimes and offenses:

a. A crime or offense bearing upon or involving a sexual offense or child molestation or endangering the welfare of children or incompetents, as specified in section 1 of P.L.1986, c.116 (C.18A:6-7.1).

b. A crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a "controlled dangerous substance" as defined in the "New Jersey Controlled Dangerous Substances Act," (P.L.1970, c.226 C.24:21-1 et seq.).

The New Jersey Controlled Dangerous Substances Act, N.J.S.A. 24:21-1 et seq., defines controlled dangerous substance as “a drug, substance, or immediate precursor in Schedules I through V of article 2 of this act...” The only conviction revealed by petitioner’s criminal history review in this case was for possession of drug paraphernalia. N.J.S.A. 2C:36-2. Drug paraphernalia, however, as defined in N.J.S.A. 2C:36-1, are not listed in Schedules I through V of the Controlled Dangerous Substances Act, N.J.S.A. 24:21-5 through N.J.S.A. 24:21-8.1, as a controlled dangerous substance.<sup>3</sup> As a result, petitioner’s conviction for possession of drug paraphernalia was not a “crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a ‘controlled dangerous substance’ as defined in the ‘New Jersey Controlled Dangerous Substances Act’” so as to constitute a disqualifying offense under subsection (b) of N.J.S.A. 18A:39-19.1. Nor did such conviction involve a sexual offense within subsection (a) of that statute, or the use or threat of force within subsection (c).

State Board’s Decision, slip op. at 2-3.

On September 15, 1997, a Deputy Attorney General representing the Commissioner of Education filed a motion on behalf of the Commissioner to participate in this matter for the purpose of seeking reconsideration/clarification of our decision of September 3, 1997. Our review of the Commissioner’s submission indicates that he is not seeking to participate as a party litigant, but, rather, because the individual case involves “broad policy issues that go beyond the facts, and affect disqualification cases currently pending before the Commissioner....” Letter brief, at 1-2. See Hasbrouck

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c. A crime or offense involving the use of force or the threat of force to or upon a person or property including: armed robbery, assault, kidnapping, arson, manslaughter and murder.

<sup>3</sup> N.J.S.A. 2C:36-1 defines “drug paraphernalia” as:

...all equipment, products and materials of any kind which are used or intended for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, ingesting, inhaling, or otherwise introducing

Heights v. Division of Tax Appeals, 48 N.J. Super. 328 (App. Div. 1958); Public Service Interstate Transportation Co. v. Board of Public Utility Com'rs., 129 N.J.L. 94 (E. & A. 1942). In this respect, the Commissioner points out that the only issues raised by petitioner when the matter was before him related to rehabilitation. Hence, the Assistant Commissioner who decided this matter on his behalf had not been required to consider questions relating to the proper interpretation of the statute at issue.

In his letter brief, the Commissioner indicates that it has been a long-standing agency practice to disqualify individuals from school employment under N.J.S.A. 18A:39-19.1 and N.J.S.A. 18A:6-7.1 based upon a conviction for possession of drug paraphernalia under N.J.S.A. 2C:36-2.<sup>4</sup> He further indicates that the Office of Criminal History Review and the Commissioner's Office have taken this position based upon a statutory interpretation which focuses on the language of N.J.S.A. 2C:36-2. That statute provides in pertinent part that:

It shall be unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, ingest, inhale, or otherwise introduce into the human body a controlled dangerous substance or controlled substance analog in violation of the provisions of chapter 35 of this title....

The Commissioner argues that because the terms of N.J.S.A. 2C:36-2 predicate a conviction on the individual's use or intent to use the paraphernalia with a controlled dangerous substance, "it must be concluded that a conviction pursuant to this statute

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into the human body a controlled dangerous substance or controlled substance analog in violation of the provisions of chapter 35 of this title....

involves the manufacture, transportation, possession, sale or use of a [controlled dangerous substance].” Letter brief, at 6. (Emphasis added.) Hence, the Commissioner maintains, a conviction for possession of drug paraphernalia is an offense “involving the manufacture, transportation, sale, possession, or habitual use of a ‘controlled dangerous substance’” within the meaning of N.J.S.A. 18A:39-19.1(b).

In response, counsel for petitioner argues that the Commissioner’s motion should be denied because it presents an appearance of a conflict. He also reiterates the statutory interpretation he presented when we first considered this appeal.

After careful consideration, we grant the Commissioner’s request to participate, and we have reconsidered our original decision in this appeal in light of the arguments he has presented. However, for the reasons that follow, and with the requirements set forth herein, we remand this matter to the Commissioner with the direction that he transmit it to the Office of Administrative Law for initial determination.

Initially, we stress that the legal question that has been raised by this appeal is one of first impression. As a result, the State Board has not been called upon previously to evaluate either the practice which the Office of Criminal History Review has followed when confronted with a criminal record reflecting a conviction for possession of drug paraphernalia under N.J.S.A. 2C:36-2 or the rationale upon which such practice has been based. Furthermore, we have been unable to identify any case in which the Commissioner has reviewed this practice and, on the basis of his review, analyzed and determined the issue now being raised. See New Jersey Department of

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<sup>4</sup> We note that N.J.S.A. 18A:6-7.1, which applies to school employees other than bus drivers, includes a provision which is identical to the language of N.J.S.A. 18A:39-19.1(b) disqualifying employees for drug offenses.

Education v. Skwarek, decided by the Commissioner of Education, October 25, 1991 [cursory conclusion by ALJ that individual convicted of possession of drug paraphernalia, in combination with other drug offenses, was disqualified from continued “certification” pursuant to N.J.S.A. 18A:6-7.1(b)].

On the surface, the interpretation being articulated by the Commissioner does not appear to be an unreasonable one. However, because such position has not been formally adopted by this agency and because the issue has not been previously litigated, we find that the proper course is to remand this matter to the Commissioner in accordance with the terms of our decision in order to consider all of the relevant legal arguments and circumstances relating thereto. Specifically, in addition to petitioner’s arguments, the proceedings on remand should consider the effect, if any, of the Legislature’s actions in expressly including drug paraphernalia in N.J.S.A. 2C:35-16.1 and N.J.S.A. 2A:18-61.1.<sup>5</sup>

In addition, we agree with the Commissioner that the issue now being raised is important from a policy perspective. As the Commissioner has presented it to us, the lynchpin of his approach is his interpretation of the word “involving” as it appears in N.J.S.A. 18A:39-19.1. Ordinarily, we would be compelled to give the word “involving” the same meaning when considering whether a conviction was disqualifying under N.J.S.A. 18A:39-19.1(a) and (c) as we do when considering convictions for possession of drug paraphernalia under N.J.S.A. 18A:39-19.1(b). This would appear to bring

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<sup>5</sup> We note that both N.J.S.A. 2C:35-16.1, which provides for notice to a property owner of drug offenses committed by a tenant on his property, and N.J.S.A. 2A:18-61.1, which authorizes the eviction of a tenant following conviction for a drug offense which occurred on the rental premises, include language which is similar to the drug provisions of N.J.S.A. 18A:6-7.1 and N.J.S.A. 18A:39-19.1 except that they expressly include drug paraphernalia.

inchoate crimes such as attempt and conspiracy within the purview of N.J.S.A. 18A:39-19.1 and to require that they also be considered disqualifying offenses. In the absence of express guidance from the Legislature, it is critical that the Commissioner have the opportunity in the first instance to thoroughly examine any implications that may follow from the statutory interpretation he is proposing.

Accordingly, for the reasons expressed herein, we remand this matter to the Commissioner with direction that the matter be transmitted to the Office of Administrative Law for further proceedings and an initial determination in conformity with our decision herein.<sup>6</sup> We retain jurisdiction and therefore direct the Commissioner to transmit this matter back to us once he has rendered his final decision.

Attorney exceptions are noted.

February 4, 1998

Date of mailing \_\_\_\_\_

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<sup>6</sup> Given the procedural posture of this case, both the petitioner and the Office of Criminal History Review should be party to the proceedings on remand.