

EDUARDO NUNEZ, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 NEW JERSEY STATE DEPARTMENT : DECISION ON REMAND
 OF EDUCATION, :
 :
 RESPONDENT, :
 :
 and :
 :
 BOARD OF EDUCATION OF THE :
 CITY OF UNION, HUDSON COUNTY, :
 INTERVENOR. :
 _____ :

SYNOPSIS

In a prior proceeding, petitioner – a former school maintenance man who had been found disqualified by the Department as the result of a criminal history record check and whose employment was subsequently terminated by the local district board of education – sought an order qualifying him for school employment and reinstating him to his prior position. Petitioner contended that the Department should have conducted his check under the standard in effect at the time he submitted his application to the Board (February 1998), not the standard in effect at the time a check was actually conducted upon discovery that no record could be found of the prior check (September 2001); petitioner also claimed he was rehabilitated. The Commissioner held that the Department acted properly – since it had never received the 1998 application, nor was it aware of petitioner or contacted with respect to him at any time prior to 2001 – but that petitioner should be allowed, on equitable grounds, to demonstrate rehabilitation under the standard of the 1998 law. The Commissioner remanded the matter for further proceedings because petitioner had not at that point had a full and fair opportunity for such demonstration; the Commissioner additionally directed that, if petitioner continued to seek reinstatement to his former position and back pay, the Commissioner directed that the employing Board of Education be named as a respondent if petitioner wished to pursue this claim on remand.

On remand, the ALJ found that petitioner had demonstrated rehabilitation and should be granted an opportunity to pursue his claim for reinstatement and back pay against the Board.

The Commissioner rejected the Initial Decision, holding that – because petitioner offered neither witnesses nor documents to corroborate his own testimony and provided little information beyond that already on record in the prior proceeding – he had failed to demonstrate rehabilitation by clear and convincing evidence as required by statute and applicable decisional law. The Commissioner also rejected the ALJ’s order regarding petitioner’s claims for reinstatement and back pay, finding that a disqualified employee could not pursue such claims and that petitioner had failed to name the Board – which was granted Intervenor status by the Commissioner subsequent to issuance of the ALJ’s decision – as a party to this matter. The petition was dismissed.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
--

October 20, 2006

OAL DKT. NO. EDU 7858-05
(EDU 3689-02 ON REMAND)
AGENCY DKT. NO. 57-2/02

EDUARDO NUNEZ,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE DEPARTMENT	:	DECISION ON REMAND
OF EDUCATION,	:	
	:	
RESPONDENT,	:	
	:	
and	:	
	:	
BOARD OF EDUCATION OF THE	:	
CITY OF UNION, HUDSON COUNTY,	:	
INTERVENOR.	:	
_____	:	

The record of this matter and the Initial Decision on Remand issued by the Office of Administrative Law (OAL) have been reviewed. Although neither party filed exceptions, arguments in opposition to the Initial Decision as it pertained to petitioner’s claim for reinstatement and back pay were made by the Union City Board of Education (Board) in support of the Board’s motion to intervene, filed on August 18, 2006 and granted by the Commissioner on September 14, 2006.

Upon careful review, the Commissioner rejects the Initial Decision of the Administrative Law Judge (ALJ) for the reasons that follow.

At the outset, the Commissioner rejects the greater portion of the ALJ’s “Summary of Facts and Testimony” (Initial Decision at 3-7) and “Analysis of Petitioner’s Compliance Under *N.J.S.A. 18A:6-7.1*” (*Id.* at 7-12), since these sections – apart from an

interjected quotation of statute at 7-9 – are reproduced verbatim from the ALJ’s Initial Decision of January 5, 2005, which has already been rejected by the Commissioner in its entirety due to pervasive errors in fact-finding and conclusions of law. (Commissioner’s Decision, May 26, 2005) Moreover, the discussions in these sections substantially pertain to issues fully litigated between the named parties and decided by the Commissioner in the prior proceeding. As such, they have no bearing on the proceeding on remand – the sole purpose of which was to afford petitioner an equitable opportunity to demonstrate rehabilitation *nunc pro tunc* under the law as it existed in February 1998, and possibly to pursue his claim for reemployment and back pay provided he named the Board as a respondent. (*Id.* at 18-19) The Commissioner does, however, consider the summary of petitioner’s testimony on his personal and job history (Initial Decision at 4-5) and the case law (*Wolffbrandt, supra* and *Skwarek, supra*) cited by the ALJ at 11-12, neither of these having been reached in the prior decision because they pertained to petitioner’s actual claim of rehabilitation and not to his equitable entitlement to pursue it. (See Note 14, Commissioner’s Decision of May 26, 2005 at 16.)¹

¹ The Commissioner’s decision of May 26, 2005 established that the Department of Education never received the criminal history record check application purportedly sent by the Union City 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; thus, the Department acted properly in applying *N.J.S.A. 18A:6-7.1* as it existed at that time when a fingerprint check was finally conducted on petitioner, advising him of his right to appeal to the Commissioner for a different result based on equitable considerations. It further determined that petitioner was not to blame for the delay between his initial application to the Board in February 1998 and the actual check in 2001, so that the interests of justice favored according him the opportunity to demonstrate rehabilitation on a *nunc pro tunc* basis. However, because the ALJ erroneously believed that the determination on petitioner’s rehabilitation would be made by the Union City Board of Education, she did not continue with proceedings for this purpose; consequently, although petitioner’s testimony and argument touched on his claimed rehabilitation at certain points in passing, the Commissioner remanded the matter for a full and fair rehabilitation hearing, additionally directing the filing of an amended petition naming the Union City Board of Education as a respondent if petitioner intended to pursue his claim for reinstatement and back pay, assuming he were found qualified for school employment.

The Commissioner further rejects the portion of the Initial Decision actually addressing the threshold question on remand (at 12-15), wherein the ALJ concludes that petitioner has demonstrated rehabilitation on the present record so as to be found qualified for school employment.

The Commissioner so holds substantially because the ALJ based her findings solely on petitioner's own testimony and the assertions of his legal counsel. Indeed, apart from basic information regarding petitioner's age, offense, sentence and absence of further arrests – all available from undisputed official documents already on record in the prior proceeding as part of petitioner's criminal history record check – there is not one scintilla of corroborating testimony or evidence for any of the various claims and statements made by or on behalf of petitioner.² While the Commissioner has no reason to question the ALJ's acceptance of petitioner as a credible witness, the fact remains that where, as here, the statutory standard for prevailing on appeal is *by clear and convincing evidence*, something more than the bare assertions of even the most forthright and believable petitioner is required to make supportable findings of fact. This is particularly so when: 1) the subject of the appeal, and the claims made in conjunction with it, readily lend themselves to production of corroborating evidence or testimony – as demonstrated in numerous prior matters of this type, *infra*; and 2) when the consequence of accepting a petitioner's word without substantiating proof – the potential exposure of school children to an unfit employee – is so serious and contrary to clear legislative intent. In this latter

² Petitioner testified both at the prior proceeding and on remand, the latter during the April 24, 2006 “oral argument” (referenced at page 2 of the Initial Decision) for which no transcript has been provided. (The transcript of the prior proceeding is included in the record; see Note 4 below.) The statements of petitioner's counsel on remand cannot be ascertained conclusively in the absence of a transcript; however, there appears to be no other possible source for certain statements recited by the ALJ as fact, but neither attributed to petitioner (the sole witness on remand) nor ascertainable from any document on record, including the transcript of the prior proceeding.

regard, the Commissioner is additionally concerned that, although the ALJ correctly listed each of the factors set forth in *N.J.S.A. 18A:6-7.1* as it existed prior to amendment in June 1998, her discussion and analysis reflect no meaningful recognition of the heavy responsibility placed upon the Commissioner by the Legislature, nor do they sufficiently consider how this responsibility has been exercised in prior decisional law.

Initially, with respect to the nature and responsibility of petitioner's position, the ALJ concluded that, as a maintenance worker, petitioner worked in various school buildings, but had no contact with children. (Initial Decision at 12) However, there is nothing in the record to substantiate this conclusion, and, indeed, the then-supervisor of Union City's maintenance workers testified in the prior proceeding that petitioner was "removed from contact with children" when the district learned in 2001 that there was a problem with his criminal history record check. (T16)³ Additionally, the Commissioner has long held that "although a custodial position is not generally one where the incumbent has direct involvement with students in that he is responsible for their care, supervision or instruction, the Commissioner has been consistently mindful that such a position nevertheless affords an individual significant and otherwise unsupervised access to children, a consideration which must not be minimized when examining rehabilitation pursuant to *N.J.S.A. 18A:6-7.1*." *In the Matter of the Disqualification from School Employment of Gregory Campbell*, 96 *N.J.A.R. 2d* (EDU) 431, affirmed State Board of Education 740; *In the Matter of the Disqualification from School Employment of J.F.C.*, decided by the Commissioner November 7, 1997. (Contrast a position such as teacher's aide, which is "under the direct supervision of a classroom teacher." *In the Matter of the*

³ 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).

Disqualification from School Employment of J.C., decided by the State Board of Education July 2, 1997.) See also, *Larry Hall v. New Jersey State Department of Education*, 91 N.J.A.R. 2d (EDU) 46, 47; *In the Matter of the Disqualification from School Employment of J.F.C.*, *supra*; *In the Matter of the Disqualification from School Employment of D.L.*, decided by the Commissioner March 20, 1998. (“Protection of the public is particularly vital in the school environment, where a custodian has ready access to impressionable young children who are not under the watchful eye of their parents.”)

With respect to the nature and seriousness of petitioner’s offense, the ALJ states that petitioner was convicted of possession and sale of drugs and that he was sentenced to imprisonment for a term of 4 ½ years to life, but qualifies the statement by adding that he was released after successfully serving the minimum term and is now remorseful for having committed what he acknowledges as a very serious offense. (Initial Decision at 13) While the ALJ may be correct in her findings as to petitioner’s remorse and good behavior while incarcerated, these have no bearing on an assessment of the seriousness of the offense itself. In this regard, the Commissioner has previously viewed as paramount “the Commissioner’s responsibility to ensure that students are provided with environments which are free of the influence of alcohol and other drugs,” *In the Matter of the Disqualification from School Employment of D.L.*, *supra*, and has stressed that “New Jersey has an expressed public policy of ridding the schools of the scourge of illegal drug use.” *Larry Hall v. New Jersey State Department of Education*, *supra*; *In the Matter of the Disqualification from School Employment of J.F.C.*, *supra*.

As to the date of petitioner’s offense, his age at the time of its commission, and the circumstances and social conditions that contributed to it, the Commissioner notes

that by 1998 significant time had elapsed since petitioner's March 1984 conviction, and that at the time of the record check conducted in 2001 (Exhibits R-2, R-5), no other convictions appeared on petitioner's record;⁴ the Commissioner further notes petitioner's explanations regarding the difficulties of his upbringing and the opportunity selling drugs afforded him to live the "high life" at age 28 while supporting a wife and a two-year-old son. (Initial Decision at 13) However, in finding rehabilitation where significant time had passed since the offense, the Commissioner has previously distinguished between *possession* and *distribution* of drugs, *In the Matter of the Disqualification from School Employment of H.F.J.*, decided by the Commissioner May 19, 1998, and, in assessing levels of responsibility, has held that offenders in their mid-late twenties are "presumably old enough to understand the consequences" of their action. *In the Matter of the Disqualification from School Employment of M.D.S.*, decided by the Commissioner March 13, 1998 Thus, while the time since his conviction works in petitioner's favor, as does the fact that social conditions and personal circumstances contributed to his decision to sell drugs, the Commissioner must balance against these the fact that petitioner's offense reflected a conscious decision – made at an age of maturity – to violate the law for monetary gain, without regard for the effect of his actions on either his own family or the victims of the "enterprise" in which he was engaging.

Finally and most significantly, with respect to evidence of rehabilitation, the Commissioner cannot agree that petitioner has met his burden on the record presented. (Initial Decision at 13-15) While it is unquestionably true that the Commissioner has in the past found candidates rehabilitated from isolated drug offenses for reasons similar to

⁴ Finding No. 6 in the Initial Decision at 13 erroneously gives the date of petitioner's release from prison as 1998, rather than 1988 as consistently testified by petitioner, unchallenged by the Department, and recited elsewhere in the present and prior decisions.

those proffered by petitioner, in all such cases, this finding was based on an array of supporting evidence including letters of corroboration and character attestation from supervisors, co-workers, teachers, clergy, long-time acquaintances (including in one case a police officer, two attorneys and a former teacher) or persons with whom the candidate shared a relationship of particular trust (including in one case the mother of three children entrusted to the candidate for daily child care); certificates of completion of drug, alcohol or self-help programs; copies of diplomas, transcripts or other indicators of educational attainment; and evidence of involvement in community and volunteer programs. *In the Matter of the Disqualification from School Employment of J.C., supra; In the Matter of the Disqualification from School Employment of C.W.R., Jr.,* decided by the State Board of Education June 4, 1997; *In the Matter of the Disqualification from School Employment of T.R.B.,* decided by the State Board of Education June 4, 1997; *In the Matter of the Disqualification from School Employment of B.D.W.,* decided by the Commissioner July 10, 1997. In a case similar to petitioner's – in circumstances where a candidate disqualified for drug offenses was found to have made a decision to turn his life around, behaved as a “model” prisoner, and remained drug-free and law-abiding for ten years after his conviction – the candidate was found qualified based on no less than 26 exhibits offered in support of his own testimony. *In the Matter of the Disqualification from School Employment of J.H.,* decided by the Commissioner July 10, 1997. In the two cases cited by the ALJ, the respective petitioners offered compelling evidence over and above their own claims, including – in the case of *Wolffbrandt, supra* – detailed statements from the sentencing judge, the petitioner's parole officer and officials of the school district where he proposed to be employed; in the case of *Skwarek, supra*, “several witnesses and letters

attesting to her rehabilitation and present good character,” including compelling statements from friends, counselors, and supervisors (at 2).

In contrast, with respect to petitioner’s conduct subsequent to his release from prison, there is not a single document on record supporting the claim that petitioner was neither fired from nor involved in misconduct at any of the nine jobs he held between 1988 and 1998, when he applied to work at the Union City school district. There is not a single letter or affidavit attesting to his good character and conduct, in the workplace or otherwise, nor is there any documentation of his education, or evidence of the “strong community and family life” attributed to him by the ALJ. (Initial Decision at 15) In sum, apart from his documented (until 2001) lack of further involvement with the law, there is not a shred of corroborating testimony or evidence to support the conclusion that petitioner has led an “exemplary” life at all times since his release from prison. (*Ibid.*)

Thus, while petitioner has presented himself as rehabilitated, when examining the record actually developed at hearing in light of the duty imposed on the Commissioner and prior decisional law, the Commissioner is compelled to find – contrary to the conclusion of the ALJ – that petitioner has failed to demonstrate rehabilitation by clear and convincing evidence in accordance with the standard of *N.J.S.A. 18A:6-7.1*. While this result may seem harsh given petitioner’s testimony and the ALJ’s judgment of his credibility, it cannot be overlooked that the Commissioner remanded this matter to the OAL for the express purpose of providing petitioner with a full and fair opportunity to make a demonstration of rehabilitation sufficient to meet the standard of statute, rather than judging his claim on the sparse record developed up to that point; however, as events have transpired, apart from some additional details regarding petitioner’s employment and pre-

conviction family history – all of them based solely on petitioner’s own testimony – the record on remand offers the Commissioner virtually nothing beyond the record already reviewed in the prior proceeding.

Finally, because petitioner has not been found qualified for school employment, it follows that he can make no claim against the Union City Board of Education for reinstatement of employment and/or back pay. However, the Commissioner also notes petitioner’s failure to name the Board as a respondent in this matter, as he was expressly directed to do in the event he intended to pursue such claim on remand. (Commissioner’s Decision of May 26, 2005 at 19) Consequently, the Commissioner also rejects the ALJ’s order that “petitioner be granted an opportunity to take appropriate steps to pursue further claims related to this matter.” (Initial Decision at 15)⁵

Accordingly, the Initial Decision of the OAL is rejected for the reasons set forth herein and the Petition of Appeal is dismissed.

IT IS SO ORDERED.⁶

COMMISSIONER OF EDUCATION

Date of Decision: October 20, 2006

Date of Mailing: October 20, 2006

⁵ Having so held, the Commissioner finds it unnecessary to reach the Board’s arguments in opposition to this order.

⁶ 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.*