

DAVID KELLY, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 NEW JERSEY STATE DEPARTMENT : DECISION
 OF EDUCATION, CRIMINAL HISTORY :
 REVIEW UNIT and BOARD OF EDUCATION :
 OF THE TOWNSHIP OF LAWRENCE, :
 MERCER COUNTY, :
 :
 RESPONDENTS. :

SYNOPSIS

Petitioner – formerly employed as teacher in Lawrence Township schools -- challenged respondents’ determination, pursuant to *N.J.S.A. 18A:6-7.1*, that he is permanently disqualified from school employment in New Jersey due to his criminal convictions in Pennsylvania. Petitioner contended that he was convicted of neither a disqualifying offense, nor its substantial equivalent. Petitioner was found guilty by a jury verdict in Bucks County, Pennsylvania, Court of Common Pleas on two counts of recklessly endangering another person (REAP), one count of possessing instruments of crime, one count of disorderly conduct, and two counts of simple assault. These convictions stemmed from a criminal complaint that petitioner fired a rifle toward two teenagers on his property; petitioner contended that the teens were trespassing on his property. Petitioner filed a motion for summary decision. Respondent Criminal History Review Unit (CHRU) opposed the motion, and filed a cross motion to compel discovery. Oral argument was held on the motions.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; CHRU cited petitioner’s Pennsylvania convictions for REAP and for possessing an instrument of crime as disqualifying offenses under *N.J.S.A. 18A:6-7.1*; the instant case is limited to determining whether these Pennsylvania convictions are substantially similar to those enumerated in *N.J.S.A. 18A:6-7.1*; New Jersey does not have a reckless endangerment statute consisting of the exact elements of the Pennsylvania law under which petitioner was convicted; New Jersey also does not have a statute with language precisely parallel to the Pennsylvania law under which petitioner was convicted for possessing an instrument of crime. The ALJ concluded that petitioner’s Pennsylvania convictions for reckless endangerment and possessing an instrument of crime are not substantially equivalent to New Jersey disqualifying offenses. Accordingly, the ALJ granted petitioner’s motion for summary decision.

Upon careful review, the Commissioner determined to reject the Initial Decision of the OAL, finding, *inter alia*, that he cannot adopt such a restrictive interpretation of *N.J.S.A. 18A:6-7*. Rather, the Commissioner found that, given the facts and circumstances, petitioner’s Pennsylvania conviction for REAP constitutes a crime involving the use of force or threat of force to or upon a person as contemplated in *N.J.S.A. 18A:6-7.1(c)(1)*. Accordingly, 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.

August 21, 2014

OAL DKT. NO. EDU 5753-12
AGENCY DKT. NO. 51-3/12

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties' exceptions and reply exceptions – filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

In this matter, petitioner challenges the determination of the New Jersey State Department of Education, Criminal History Review Unit (CHRU), that he is statutorily disqualified from school employment as a result of his having been convicted of certain crimes in the state of Pennsylvania. Petitioner contends that the criminal convictions on which CHRU based its disqualification determination, namely, recklessly endangering another person (REAP) in violation of 18 *Pa.C.S.A.* § 2705 and possessing instruments of crime in violation of 18 *Pa.C.S.A.* § 907,¹ do not constitute disqualifying convictions under the disqualification statute.

¹ Petitioner's criminal history record check also revealed convictions for disorderly conduct in violation of 18 *Pa.C.S.A.* § 5503 and simple assault in violation of 18 *Pa.C.S.A.* § 2701; however, neither of those convictions is cited by CHRU as a basis for disqualification.

Pursuant to *N.J.S.A. 18A:6-7.1*, an individual is permanently disqualified from employment with any facility under the supervision of the Department of Education if that individual's criminal history record check reveals a record of conviction for any of the crimes or offenses specified therein, including convictions for:

[A]ny crime of the first or second degree; or

- a. An offense set forth in chapter 14 of Title 2C of the New Jersey Statutes, or as set forth in N.J.S. 2C:24-4 and 2C:24-7, or as set forth in R.S.9:6-1 et seq., or as set forth in N.J.S. 2C:29-2; or
- b. An offense involving the manufacture, transportation, sale, possession, distribution or habitual use of a "controlled dangerous substance" as defined in the "Comprehensive Drug Reform Act of 1987," N.J.S. 2C:35-1 et al. or "drug paraphernalia" as defined pursuant to N.J.S. 2C:36-1 et seq.; or
- c. (1) A crime involving the use of force or the threat of force to or upon a person or property including, but not limited to, robbery, aggravated assault, stalking, kidnapping, arson, manslaughter and murder; or

(2) A crime as set forth in chapter 39 of Title 2C of the New Jersey Statutes, a third degree crime as set forth in chapter 20 of Title 2C of the New Jersey Statutes, or a crime as listed below:

Recklessly endangering another person	N.J.S.2C:12-2
Terroristic Threats	N.J.S.2C:12-3
Criminal restraint	N.J.S.2C:13-2
Luring, enticing child into motor vehicle, structure or isolated area	P.L.1993, c.291
Causing or risking widespread injury or damage	N.J.S.2C:17-2
Criminal Mischief	N.J.S.2C:17-3
Burglary	N.J.S.2C:18-2
Usury	N.J.S.2C:21-19
Threats and other improper influence	N.J.S.2C:27-3
Perjury and false swearing	N.J.S.2C:28-3
Resisting arrest	N.J.S.2C:29-2
Escape	N.J.S.2C:29-5
Bias intimidation	N.J.S.2C:16-1
or,	

(3) Conspiracy to commit or an attempt to commit any of the crimes described in this act.

For purposes of the disqualification statute, “a conviction exists if the individual has been convicted under the laws of this State or under any similar statutes of the United States or any other state for a substantially equivalent crime or other offense.” *N.J.S.A.* 18A:6-7.1(d). Thus, petitioner is disqualified from public school employment in New Jersey if any one of his Pennsylvania convictions is for a crime or offense that is “substantially equivalent” to those referenced in the disqualification statute.

The central issue in this matter is whether petitioner’s conviction for recklessly endangering another person, in violation of 18 *Pa.C.S.A.* § 2705, is the substantial equivalent of a “crime involving the use of force or the threat of force to or upon a person or property,” as contemplated by *N.J.S.A.* 18A:6-7.1(c)(1). In analyzing that issue, the Administrative Law Judge (ALJ) concluded that the Pennsylvania REAP conviction could not be considered disqualifying unless its statutory elements and required *mens rea* were identical to those of a specific New Jersey criminal statute.

The Commissioner cannot adopt such a restrictive interpretation of *N.J.S.A.* 18A:6-7.1(c)(1). The disqualification statute was first enacted in 1986. Over the years, the Legislature has repeatedly amended that statute, broadening the scope of disqualifying offenses and precluding evidence of rehabilitation, to provide greater protection for children from those it deemed a danger to them. In 1989, the statute was amended to include crimes “involving the use of force or the threat of force to or upon a person or property including, but not limited to, robbery, aggravated assault, stalking, kidnapping, arson, manslaughter and murder.” Notably, although it did so in other sections of the disqualification statute, the Legislature did not specify an exhaustive list of individual criminal statutes in this section. Instead, it elected to use broad language describing a *category* of crimes, the nature of which

evidences the type of “behavior that could pose a threat to the safety of public school pupils.” (Senate Education Committee Statement to S3513, May 22, 1989).

In light of the foregoing, the Commissioner finds that the appropriate analysis is not whether one can identify a New Jersey criminal statute with elements that are in every respect identical to those of Pennsylvania’s REAP statute, but rather whether petitioner’s conviction for REAP is a conviction for a crime that falls within that category of crimes described in *N.J.S.A. 18A:6-7.1(c)(1)*, i.e., those crimes “involving the use of force or the threat of force to or upon a person or property.” The Commissioner finds that it does.

Pennsylvania law states that, “[a] person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.” 18 *Pa.C.S.* § 2705. In *Commonwealth v. Trowbridge*, 395 A.2d 1337, 1340 (1978), the Pennsylvania Supreme Court divided the offense of recklessly endangering another person into the following four elements: "(1) a *mens rea* – recklessness, (2) an *actus reus* – some 'conduct', (3) causation – 'which places', and (4) the achievement of a particular result – 'danger', to another person of death or serious bodily injury." Thus, the REAP statute may be violated in any number of ways. Since the *actus reus* underlying a conviction for REAP may or may not involve the “use of force or the threat of force to or upon a person or property,” a review of the police reports comprising the foundation for the conviction is essential to determining whether the offense is disqualifying under *N.J.S.A. 18A:6-7.1(c)(1)*. *Rixford v. New Jersey Department of Education*, 97 *N.J.A.R.2d* (EDU) 320, 321 (1997).

Here, the police report indicates that the officers responded to a dispatch call of an armed suspect. The victims, both minors, reported that while they walked along a property to go fishing at an adjacent creek, a white male screamed at them, told them he had a gun and told

them where to walk. The victims reported that the man appeared intoxicated. As the victims exited the property, they heard a gunshot and saw that the man held a rifle. Both victims positively identified petitioner as the person who shot at them. Officers located a .22mm rifle with scope, with one round in the chamber and one round in the magazine, in the basement of petitioner's home.

Petitioner was charged with, *inter alia*, "recklessly engag[ing] in conduct which placed or may have placed [the minor victims] in danger of death or serious bodily injury by firing a .22mm rifle at victims." In short, petitioner's conviction for REAP arose when he threatened two children with a rifle, which he eventually fired. In convicting petitioner of two counts of REAP, a jury determined that petitioner consciously disregarded a substantial and unjustifiable risk that his actions might place the minor victims in danger of death or serious bodily injury. 18 *Pa.C.S.* § 302(b)(3). Further, under Pennsylvania law, petitioner's conduct in disregarding the risk to the minor victims represents "a gross deviation from the standard of conduct that a reasonable person would observe" in the situation. *Id.*

Given these facts and circumstances, there can be no doubt that, in this case, petitioner's conviction for REAP is a crime "involving the use of force or threat of force to or upon a person or property," as contemplated by *N.J.S.A.* 18A:6-7.1(c)(1). It is equally clear that petitioner's conviction for REAP evidences the type of behavior that could pose a threat to the safety of public school pupils, and from which the Legislature sought to insulate the children of this State. Thus, CHRU properly disqualified petitioner from public school employment in the state of New Jersey based upon his Pennsylvania conviction for REAP.²

² In light of the Commissioner's determination on this issue, it is unnecessary to reach petitioner's conviction for possessing instruments of crime or petitioner's claim for backpay.

Accordingly, the Initial Decision of the OAL is rejected and the petition of appeal is hereby dismissed for the reasons set forth herein.

IT IS SO ORDERED.³

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 21, 2014

Date of Mailing: August 22, 2014

³ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*.