

New Jersey Commissioner of Education

Final Decision

Erskine Barrino,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

Respondent.

Synopsis

Petitioner challenged the determination of the New Jersey Department of Education, Office of Student Protection, to permanently disqualify him from employment in a public school pursuant to *N.J.S.A. 18A:6-7.1* after a criminal history background check revealed that in November of 1990, petitioner entered a plea of guilty to a charge of unlawful possession of a weapon. Petitioner had been conditionally approved to serve as a security guard at a New Jersey public school. The Department filed a motion to dismiss petitioner's appeal.

The ALJ found, *inter alia*, that: in 1990, petitioner was sentenced to two years' probation, which he completed; petitioner did not file a Petition for Expungement of his conviction until August 22, 2023; a hearing on the expungement is scheduled for October 23, 2023 in Superior Court; since the record of the conviction has not been expunged to date, the criminal record still exists and petitioner is therefore disqualified from holding any position in a New Jersey public school.

Upon review, the Commissioner concurred with the ALJ that petitioner's criminal history disqualifies him from working in a public school. Accordingly, the Initial Decision was adopted as the final decision in this matter, and the petition of appeal 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.

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The record of this matter and the decision¹ of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge that petitioner is disqualified from employment in public schools.

Accordingly, the OAL decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.²


ANGELINA ALLEN-McMILLAN, J.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 27, 2023
Date of Mailing: November 1, 2023

¹ The decision is captioned as “Supplemental Order Denying Emergent Relief and Denying the Substantive Petition for Relief.” However, pursuant to *N.J.A.C. 1:1-18.1(b)*, decisions that are fully dispositive of all issues in the case are initial decisions. Accordingly, the Commissioner deems the “Supplemental Order” to be an initial decision. The parties were notified of this determination and given the opportunity to file exceptions in accordance with *N.J.A.C. 1:1-18.4*.

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A. 18A:6-9.1*. Under *N.J.Ct.R. 2:4-1(b)*, a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SUPPLEMENTAL
ORDER DENYING
EMERGENT RELIEF AND
DENYING THE SUBSTANTIVE
PETITION FOR RELIEF

OAL DKT. NO. EDU 07863-23

AGENCY DKT. NO. 224-8/23

ERSKIN BARRINO,

Petitioner,

v.

**NEW JERSEY DEPARTMENT OF EDUCATION,
OFFICE OF STUDENT PROTECTION,**

Respondent.

Erskine Barrino, petitioner, pro se

Sadia Ahsanuddin, Deputy Attorney General, for respondent (Matthew J. Platkin,
Attorney General of New Jersey, attorney)

BEFORE: JOHN P. SCOLLO, ALJ:

STATEMENT OF THE CASE

Erskin Barrino seeks emergent relief from the Department of Education, Office of Student Protection's determination dated August 8, 2023 that he is disqualified from serving as a Security Officer for the West Orange (Essex County) Board of Education.

PROCEDURAL HISTORY

Petitioner, Erskin Barrino, filed a Pro Se Petition of Appeal on August 17, 2023 seeking Emergent Relief from the Commissioner of Education. He challenges the OSP's August 8, 2023 determination, as expressed in its Notice of Disqualification sent to him on August 8, 2023, that he is permanently disqualified from serving in any position with an educational institutional which is under the supervision of the N.J. Department of Education due to a November 14, 1990 guilty plea (Judgment of Conviction) to the charge of Possession of a Weapon (N.J.S.A. 2C:39-5B). On August 23, 2023, the OSP, represented by the New Jersey Attorney General's Office, filed papers (Brief) in Opposition to the Petition for Emergent Relief and a Motion to Dismiss said Petition.

On August 25, 2023, this judge issued his Order. On September 14, 2023, the Acting Commissioner of Education issued her Order concurring with this judge's denial of emergent relief; but directing this Tribunal to continue to the substantive issues presented, (i.e., a decision on the merits of the appeal). Since the parties were afforded the opportunity to address all issues, including both the issue of whether there was a basis

for emergent relief as well as the opportunity to address the merits of their positions, this judge is satisfied that there is no need for further submissions or arguments.

This writing is the Tribunal's Supplemental Order addressing the mandate of the Commissioner's September 14, 2023 Order.

FACTUAL DISCUSSION

Based on the submissions and the testimony elicited at the hearing on August 24, 2023, the Tribunal **FINDS** that the parties are not in disagreement about any of the following facts.

By way of background, on May 1, 1989, Petitioner Erskin Barrino was arrested in Bergen County on a charge of Possession (N.J.S.A. 2C:39-5B) of a Weapon.

On November 14, 1990, Barrino entered a plea of guilty to said charge. He was sentenced to two years' probation, which he completed. He did not file a Petition for Expungement of said conviction until August 22, 2023. There will be a hearing on the Expungement Petition on October 23, 2023 in the Superior Court of New Jersey, Criminal Part, Bergen County.

Erskine Barrino applied for the position of Security Officer with the Board of Education of West Orange, Essex County, New Jersey. On July 26, 2023, the Superintendent of School for West Orange sent a letter notifying Barrino that his appointment as a Security Officer was approved at the West Orange Board of Education's meeting of July 25, 2023 for the period from September 1, 2023 through June 30, 2024. However, on August 8, 2023, the State Department of Education, Office of Student Protection (OSP) sent a letter to Barrino notifying him of its determination that he is permanently disqualified from serving in any position with an educational institutional which is under the supervision of the N.J Department of Education. The OSP explained that Barrino's criminal history shows that on November 14, 1990 he entered a plea of guilty (a Judgment of Conviction) to the charge of Possession of a Weapon (N.J.S.A.

2C:39-5B). Since the record of the conviction has never been expunged, said criminal record still exists and he is therefore disqualified from holding said position.

ANALYSIS OF THE RESPECTIVE POSITIONS OF THE PARTIES

Arguments Presented by the Petitioner

Erskin Barrino's August 17, 2023 Pro Se Petition of Appeal admits that on November 14, 1990 he entered a guilty plea to the charge of Possession of a Weapon N.J.S.A. 2C:39-5B; that he was sentenced to two years of probation; and that he successfully completed probation. In his testimony, he admitted that he did not apply for an expungement until August 23, 2023. His Petition of Appeal seeks emergent relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982). The argument upon which he seeks emergent relief is that he needs to work to support his family, which includes a child who has medical issues. He was appointed to the Security Officer position by the WOBOE, admittedly subject to the results of a background check. If he does not get the job with the WOBOE he will be jobless and unable to support himself and his family. He stated that he left his last employment during the week before the hearing because he had to give two weeks' notice to his employer, Mancon, Inc., where he worked for wages as a Parts Specialist and from whom he received health insurance coverage for himself and his family members. During the hearing, he stated that there was a possibility that he could regain his job with Mancon, Inc, unless it has been filled in the interim. He argued that since his guilty plea in 1990, he has not been involved in any criminal activity and that he learned from his mistake. He is a family man and wants to serve the interests of his own children and those of other schoolchildren and their parents.

The Tribunal explained the requirements of the four prongs of Crowe. The Tribunal emphasized that it is the burden of the person seeking emergent relief to persuade the Tribunal that he meets the requirements of each of the four prongs of Crowe. Barrino acknowledged that he understood this and addressed each of the four prongs.

When asked to explain how he met the requirements of demonstrating that he would suffer irreparable harm (the first Crowe factor) if the requested relief were not

granted, he explained that needed both the wages and the health insurance coverage that was part of the prospective job, especially since he has a child who has medical issues. He admitted that the health insurance coverage, like wages, was an economic benefit. Of course, Crowe held that a harm is not irreparable if it can be redressed by money. Barrino had no response to this. When asked to present whether he had any other arguments that demonstrated irreparable harm that were not based on economic harm, Barrino basically had no response.

Given that opportunity to address the second, third and fourth Crowe factors, Barrino was not able to demonstrate that the law supported his claim for relief. In regard to the second Crowe factor, he could not overcome the OSP's argument that the law imposed a mandatory disqualification to people convicted of the type of offense that he had on his record. In regard to the third Crowe factor, he was unable to demonstrate why, that under the circumstances of the matter, he would have a likelihood of success on the merits. Finally, on the fourth Crowe factor, he could not demonstrate how, when the equities of the matter were compared, that he would suffer greater harm than the Respondent, if the relief he sought was not granted. Moreover, he was not able to refute the Respondent's argument that the interest of the students required that there be no exceptions to the disqualification of applicants who have a record of offenses proscribed by the applicable statutes.

Arguments Presented by the Respondent

DAG Ahsahuddin stated that she would rely on the arguments presented in her Opposition papers (Brief) to demonstrate that Barrino could not demonstrate that he would suffer irreparable harm (the first Crowe factor). As such, he could not meet all four of the Crowe factors and his Petition must fail. Moreover, since Barrino could not

demonstrate that he was entitled to relief under any of the other three Crowe factors, it was clear that he was not entitled to the emergent relief he sought.

Since Barrino could not demonstrate entitlement to emergent relief, the motion to dismiss Barrino's Petition must be granted.

DISCUSSION AND FINDINGS OF FACT

Having reviewed the documents, testimony, and arguments presented, I make the following findings of **FACT**.

I **FIND** that Barrino's arguments on the issue of irreparable harm were based only on the economic effects of the Respondent's determination that he was disqualified from the position he seeks. Moreover, Barrino did not demonstrate that he was not capable of finding alternate employment. He even stated that he might be able to become re-employed with Mancon, Inc., a job where he received both wages and health insurance coverage.

I **FIND** that Barrino did present a sympathetic argument concerning the need for him to maintain health insurance coverage, but I further **FIND** that this is an argument based on the economic effects of the Respondent's determination.

I **FIND** that Barrino did not present cogent arguments that would meet the requirements of the second, third, and fourth prongs of Crowe.

I **FIND** that Barrino did not present sufficient facts or sufficient arguments that would satisfy any of the four Crowe factors.

I **FIND** that the disqualification is set forth in N.J.S.A. 18A:6-7.1(c) (2) where it states:

"[a]n individual ... shall be permanently disqualified from employment or service under this act if the individual's criminal history check reveals a record of conviction for any

crime of the first or second degree; or [a] crime as set forth in chapter 39 of Title 2C of the New Jersey Statutes.”

I **FIND** that the use of the word “shall” in N.J.S.A. 18A:7.1 (c) (2) means that the disqualification is permanent and non-discretionary. I **FIND** that Barrino was not able to refute the Respondent’s argument that the interest of the students required that there be no exceptions to the disqualification of applicants who have a record of offenses proscribed by the applicable statutes.

APPLICABLE LAW

Jurisdiction of the Commissioner of Education

N.J.S.A. 18A:6-9 provides

The commissioner shall have jurisdiction to hear and determine, without costs to the parties, all controversies and disputes arising under the school laws

Law Governing the Granting of Injunctions Seeking Emergent Relief

N.J.A.C. 6A:3-1.6(a) provides:

Where the subject matter of the controversy is a particular course of action by a district board of education ... the petitioner may include with the petition of appeal, a separate motion for emergent relief ... pending the Commissioner’s final decision in the contested case.”

N.J.A.C. 6A:3-1.6(b) provides:

A motion for stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia , 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner’s claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The Crowe Factors

Crowe v. DeGioia, 90 N.J. 126 (1982) arose out of a set of circumstances regarding support and palimony matters. Nonetheless, the case has been the polestar decision in New Jersey for cases wherein injunctive relief is sought. The case stands for the proposition that an injunction cannot be granted unless and until the party seeking relief presents clear and convincing evidence that: (1) the injunction is “necessary to prevent irreparable harm”; (2) that “the legal right underlying the claim is settled”; (3) that the party seeking relief has made “a preliminary showing of a reasonable probability of ultimate success on the merits”; and (4) that “the relative hardship to the parties in granting or denying [injunctive] relief”, on a balancing of the equities, weighs in his favor. Crowe, 90 N.J. at 132-34. In order to prevail, the party seeking injunctive relief must demonstrate by clear and convincing evidence that he meets all four Crowe factors. Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012).

“[A] party who seeks mandatory preliminary injunctive relief must satisfy a ‘particularly heavy’ burden.” Guaman v. Velez, 421 N.J. Super. 239, 247 (App. Div. 2011), Rinaldo v. RLB Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006).

Also, “[w]hen a case presents an issue of ‘significant public importance’, a court must [also] consider the public interest in addition to the traditional Crowe factors.” Garden State Equal. v. Dow, 216 N.J. 314, 321 (2013).

Appellate courts are bound by the trial court’s factual findings if they are supported by “substantial, credible evidence” in the record. Triffin v. Automatic Data Processing, Inc., 411 N.J. Super. 292,315 (App. Div. 2010).

Under the first Crowe factor, a party who seeks injunctive relief must establish that injunctive relief is necessary to prevent irreparable harm and to preserve the status quo.

Citizens Coach Co. v. Camden Horse R.R. Co. , 29 N.J. Eq. 299, 303 (E.&A. 1878). Irreparable harm is an “injury to be suffered in the absence of injunctive relief [that] is *substantial* and *imminent*.” Waste Mgmt. of N.J., Inc. v. Union City Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Under the second Crowe factor, injunctive relief will be withheld when the legal right underlying the claim is unsettled. Citizens Coach, at ps. 304-05.

Under the third Crowe factor, the party seeking relief is obligated to present clear and convincing evidence that he / she has a reasonable probability of ultimate success on the merits. Therefore, injunctive relief will not be granted where there are material facts in controversy. Citizens Coach at ps. 305-06. The party who seeks injunctive relief must be prepared to demonstrate facts which support his case and “must make a preliminary showing of reasonable probability of success on the merits.” Crowe, at p. 133.

The second and third Crowe factors involve fact-sensitive analysis that “requires a determination of whether the material facts are in dispute, and whether the applicable law is settled.” Waste Mgmt., at p. 528.

Under the fourth Crowe factor, the party who seeks injunctive relief must address the issue of relative hardship to the parties and he must establish that, on balance, the equities favor the grant of temporary relief to maintain the *status quo* pending the outcome of a final hearing.” Crowe at p. 134. The party seeking injunctive relief must prove his case by clear and convincing evidence. Brown at p. 183 and thus his burden is ‘particularly heavy’. Guaman at p. 247.

LEGAL ANALYSIS AND CONCLUSIONS

The First Crowe Factor

Regarding the first Crowe factor, the Respondent convincingly argued that the Petitioner did not demonstrate that he would suffer irreparable harm if emergent relief were not granted. The Respondent convincingly argued that the Petitioner’s failure to

prevail on the first Crowe factor means that he cannot meet his burden of proving that he satisfied all of the Crowe factors, and it therefore follows that the Petition must be dismissed.

The Second Crowe Factor

Regarding the second Crowe factor, the Petitioner did not meet his burden of demonstrating that the law is settled in his favor.

The Third Crowe Factor

Regarding the third Crowe factor, the Petitioner did not meet his burden of demonstrating that under the circumstances of this matter he would be likely to prevail on the merits at trial.

The Fourth Crowe Factor

Regarding the fourth Crowe factor, the Petitioner did not demonstrate that on balance, the equities favor the grant of the temporary relief which the Petitioner seeks.

I **CONCLUDE** that the Petitioner failed to meet the requirements of any of the Crowe factors.

The Substantive Issues

I have found that N.J.S.A. 18A:6-7.1(c) (2) imposes a mandatory, permanent disqualification for anyone who has a criminal record of an offense listed under N.J.S.A. 18A:6-7.1 (here, a conviction for illegal possession of a weapon). I have found that Barrino was not able to refute the Respondent's argument that the interest of the students required that there be no exceptions to the disqualification of applicants who have a record of an offense enumerated under N.J.S.A. 18A: 6-7.1. I note that the language of N.J.S.A. 18A: 6-7.1 (c) (2) allows no discretion regarding the imposition of the disqualification. I therefore **CONCLUDE** that since Barrino has a criminal record that

includes a conviction for an offense listed under N.J.S.A. 18A:6-7.1 (illegal possession of a weapon), he is disqualified from serving as a school security guard.

ORDER

It is hereby **ORDERED** that Barrino's Petition seeking Emergent Relief in the form of an Order overturning the OSP's determination dated August 8, 2023 must be and hereby is **DENIED**; and

it is further **ORDERED** that Petitioner's Petition, having not met the requirements of Crowe, must be and hereby is **DISMISSED**; and

it is further **ORDERED** that Petitioner, having failed to demonstrate that he is not disqualified from applying for the position of school security guard or from serving as a school security guard, his petition must be dismissed; and

it is further **ORDERED** that a copy of this **ORDER** shall be transmitted by email from the OAL to the Pro Se Petitioner, Erskin Barrino and to the Respondent's counsel, Sadia Ahsahuddin, DAG.

This order on application for emergency relief may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who is authorized by law to make the final decision in this case. The final decision shall be issued without delay but no later than forty-five days from the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify, or reject this order within those forty-five days, this recommended order shall become the final decision on the issue of emergency relief under N.J.S.A. 52:14B-10.



September 20, 2023

DATE
db

JOHN P. SCOLLO, ALJ