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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF DEMPSEY,

Appellant,

-against-

No. 59

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

20 Eagle Street
Albany, New York 12207
March 24, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE LESLIE E. STEIN

Appearances:

NICOLE SALK, ESQ.
SOUTH BROOKLYN LEGAL SERVICES
Attorneys for Appellant
105 Court Street
4th Floor
Brooklyn, NY 11201

KAREN M. GRIFFIN, ESQ.
NEW YORK CITY LAW DEPARTMENT
Attorneys for Respondent
100 Church Street
New York, NY 10007

Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 59, Matter of
2 Dempsey v. Department of Education.

3 Counsel, would you like any rebuttal time?

4 MS. SALK: Two minutes, Your Honor.

5 CHIEF JUDGE LIPPMAN: Okay. Go ahead,
6 counselor.

7 MS. SALK: Good afternoon. My name is
8 Nicole Salk from South Brooklyn Legal Services. I
9 represent the appellant, Luther Dempsey, in this
10 case.

11 Your Honors, who is Article 23 supposed to
12 protect from discrimination, if not Mr. Dempsey? As
13 this court decided in Acosta exactly four years ago
14 today, where an agency fails to consider all of the
15 753 factors - - -

16 CHIEF JUDGE LIPPMAN: How do we know they
17 didn't consider all the factors?

18 MS. SALK: I'm sorry?

19 CHIEF JUDGE LIPPMAN: Because they didn't
20 address it specifically?

21 MS. SALK: I'm - - - I'm sorry? What did -
22 - -

23 CHIEF JUDGE LIPPMAN: How do - - - how do
24 we know they did not consider all the factors? Do
25 they have to address each factor and say one through

1 seven, or whatever it is?

2 MS. SALK: They - - - they should address
3 each factor. But - - -

4 CHIEF JUDGE LIPPMAN: Is that required? I
5 know - - -

6 MS. SALK: It's absolutely required that
7 they address each factor.

8 CHIEF JUDGE LIPPMAN: Each factor and they
9 say, well, how they addressed it?

10 MS. SALK: It's - - - the - - - the concern
11 here is not just that in Acosta this court decided
12 that they absolutely must address each factor. The
13 concern in this case is that not just that they can -
14 - - that they address each factor or they give mere
15 lip service to each factor, that they say they've
16 addressed each factor. That they have to have - - -
17 they have to actually have been meaningfully
18 addressed.

19 CHIEF JUDGE LIPPMAN: You think under these
20 circumstances they could have not addressed each
21 factor - - -

22 MS. SALK: I - - -

23 CHIEF JUDGE LIPPMAN: - - - and come to the
24 conclusion that they came to? Is that your position?

25 MS. SALK: Our position is that there has

1 to be meaningful consideration of each factor.

2 CHIEF JUDGE LIPPMAN: Could they have
3 looked at each factor and come to the conclusion that
4 they did?

5 MS. SALK: Not in a rational way, because
6 the conclusion in this case was itself not rational.
7 Mr. Dempsey is sixty-two years old. He's a
8 grandfather. It's been more than twenty-two years
9 since his last conviction. There - - - he has done
10 the same - - -

11 CHIEF JUDGE LIPPMAN: What about these gaps
12 in - - - what about these gaps in time that they're
13 talking about. What's that about?

14 MS. SALK: Well, they - - - this is part of
15 the pretext that they used to say that he shouldn't
16 be certified.

17 JUDGE RIVERA: Counsel, it sounds like
18 you're asking for a reweighing of the factors.

19 MS. SALK: I am not asking for a reweigh -
20 - - reweighing of the factors.

21 JUDGE RIVERA: Why are you getting into the
22 merits of the factors? I thought your position was
23 that Acosta is meaningless, the decision of Acosta is
24 meaningless, if you don't have an appropriate
25 articulation to permit judicial review, even the

1 narrow judicial review that the court permits in
2 these cases, as opposed to well, no agency could
3 possibly come to this conclusion given - - - given
4 your client's record.

5 MS. SALK: Your - - - Your Honor, the - - -
6 the agency has the burden in this case. They have to
7 go through each factor. The ultimate determination
8 here is about whether there's risk. That's really
9 what this is all about. And - - - and the most
10 important determination is whether there's been
11 rehabilitation. If the conclusion in this case and
12 the - - - and the record in this case, which shows
13 that that conclusion isn't rational, if the
14 conclusion is not rational, how could they possibly
15 have looked at each factor in a meaningful and
16 rational way? They haven't done it.

17 JUDGE RIVERA: I thought your argument is
18 because when you read the determination there are
19 some factors that are not addressed. That you jump
20 to the conclusion - - -

21 MS. SALK: Right, well - - -

22 JUDGE RIVERA: - - - that - - - then they
23 didn't address those factors and, therefore, it's not
24 a rational determination.

25 MS. SALK: Part of the prob - - - right.

1 Part of the problem here is which determin - - -
2 where was the determination, right? Because in this
3 record, when we were at the interview, and I was at
4 the interview with Mr. Dempsey, there were no
5 questions asked of Mr. Dempsey in regards to his
6 rehabil - - - rehabilitation. The only questions
7 they asked him, the only thing that they focused on
8 was his criminal record, which was, at that time,
9 twenty years old. And they focused exclusively on
10 that.

11 CHIEF JUDGE LIPPMAN: So you want to
12 basically argue that this is kind of an automatic
13 denial, that they want to deny all these kinds of
14 cases?

15 MS. SALK: That is what it appears to be.
16 That's what happened in this case.

17 JUDGE RIVERA: Well, couldn't they - - -
18 couldn't they have concluded, just on the documents
19 your client presented that they were satisfied with
20 respect to what they considered rehabilitation? They
21 - - - they just weighed it differently than you
22 would?

23 MS. SALK: Well, Your Honor, that - - -
24 what happened in this case, there's a C105 process
25 that's required by their rules. They went through

1 that process aft - - - after having been remanded by
2 Appellate Division to - - - told - - -

3 JUDGE RIVERA: Yes.

4 MS. SALK: - - - that they have to give
5 such a process to Mr. Dempsey. At the interview,
6 they are supposed to - - - they - - - they - - - they
7 must consider any negative information presented to
8 them. They also must consider any rehabilitation.
9 They must go through all of the factors, and they
10 failed to do that in this case.

11 JUDGE RIVERA: They fail - - - but what my
12 question is they failed to do that because they
13 didn't articulate why the rehabilitation didn't
14 outweigh the other factors?

15 MS. SALK: That is one of the - - -

16 JUDGE RIVERA: I thought that was your
17 argument.

18 MS. SALK: That is one of them. Yeah.

19 JUDGE RIVERA: As opposed to it's not
20 possible - - -

21 MS. SALK: Right.

22 JUDGE RIVERA: - - - given this client's
23 record, it's not possible - - - this applicant's
24 record, to come out on the side where the agency came
25 out.

1 MS. SALK: I believe that it is impossible
2 in this case, but I also feel that they - - - they
3 also didn't articulate - - -

4 CHIEF JUDGE LIPPMAN: You're arguing both -
5 - -

6 MS. SALK: They did both things. Both.

7 CHIEF JUDGE LIPPMAN: You're arguing both
8 arguments.

9 MS. SALK: Correct.

10 CHIEF JUDGE LIPPMAN: Okay.

11 MS. SALK: Both.

12 JUDGE ABDUS-SALAAM: Counsel, I - - - I'd
13 just - - - I'd just like to ask you about the
14 standard that you're proposing, meaningful - - - or
15 is it meaningful consideration, meaningful
16 articulation? What exactly should be meaningful?
17 And if the agency disagrees or has a different
18 conclusion based upon its review of all the factors,
19 then are we supposed to assume that their conclusion
20 was a result of not having some sort of meaningful
21 review or consideration of - - - of these factors?

22 MS. SALK: So we're - - - so when we're
23 looking at the standard, it has to be meaningful
24 consideration. That is primarily what needs to
25 happen, but the conclusion itself, meaningful and

1 rational. And so when looking at - - - when courts
2 look at the record of what happens, there should be
3 an articulation. There really must be an
4 articulation of that. But what we're saying the
5 standard, at the very minimum, should be in terms of
6 how courts should review these decisions, is that - -
7 - is that each factor be meaningfully considered.

8 JUDGE ABDUS-SALAAM: So if the agency goes
9 through each factor and articulates a rationale for
10 finding some result in that factor but the conclusion
11 differs with what you think they should arrive at,
12 then are we to say that because their conclusion
13 differs from what you think, then they haven't
14 meaningfully considered - - -

15 MS. SALK: No.

16 JUDGE ABDUS-SALAAM: - - - these factors?

17 MS. SALK: No, actually. That's not
18 actually what I'm saying. I think they have to look
19 at what the purpose of Article 23-A is all about.
20 And that is not what the agency did in this case.
21 The agency didn't look at the purpose. They just
22 looked at his criminal record, and they decided from
23 the get-go that they were going to deny him. If the
24 purpose is to help people reenter into society, but
25 at the same time assess whether there's any concerns

1 to the public, that's what they have to do.

2 JUDGE ABDUS-SALAAM: So would your client -

3 - -

4 MS. SALK: But that's not what they did

5 here, because - - - I'm sorry.

6 JUDGE ABDUS-SALAAM: Your - - - your client

7 is - - - is applying for a school bus driver

8 position.

9 MS. SALK: Yes.

10 JUDGE ABDUS-SALAAM: Transporting children

11 to and from school, and he's the only - - - usually,

12 I guess he would be the only adult on the bus.

13 Perhaps there would be some aides or something like

14 that?

15 MS. SALK: Yes.

16 JUDGE ABDUS-SALAAM: Do we know that that

17 there would be other adults on the bus?

18 MS. SALK: Sometimes there are matrons, bus

19 matrons. Sometimes there are not. But bus matrons,

20 that's actually not part of the record.

21 JUDGE ABDUS-SALAAM: Okay.

22 MS. SALK: But the - - -

23 JUDGE ABDUS-SALAAM: If he were the only

24 adult on the bus - - -

25 MS. SALK: He - - - he may be.

1 JUDGE ABDUS-SALAAM: - - - is - - - is the
2 - - - is the agency allowed to consider that as one
3 of those factors that, you know, his - - - his record
4 - - -

5 MS. SALK: They - - -

6 JUDGE ABDUS-SALAAM: - - - or something
7 that may have some moral turpitude or some other
8 issues?

9 MS. SALK: They're - - - they're absolutely
10 able and should consider what his duties are and what
11 those duties would be in practice. But what's
12 interesting is, here, he's been doing that work,
13 driving a bus, for fifteen years, most of the time
14 driving a school bus.

15 JUDGE RIVERA: But, counsel, this - - -
16 this is my point. It sounds like you're asking for a
17 reweighing, that you would not weigh the factors in
18 the same way and that - - - we've not said that
19 that's permissible for a court to do. So I guess my
20 question then is are you - - - is the essence really
21 boiling down, the essence of - - - of your argument
22 that in their articulation of why they've denied him
23 this certification, it's that they didn't say these
24 factors outweigh the rehabilitation that's on the
25 record. Would that have been enough?

1 MS. SALK: That would not have been enough.

2 JUDGE RIVERA: Because?

3 MS. SALK: Because the ultimate conc - - -
4 conclusion itself must also be rational, and in this
5 - - -

6 JUDGE RIVERA: And why isn't that just a
7 reweighing? You're saying it's just not rational,
8 given his rehabilitation - - -

9 MS. SALK: Right.

10 JUDGE RIVERA: - - - for an agency to
11 decide - - -

12 MS. SALK: That's right.

13 JUDGE RIVERA: - - - that he's not entitled
14 - - -

15 MS. SALK: And the reason why I'm saying -
16 - -

17 JUDGE RIVERA: - - - to be certified as a
18 school bus driver.

19 MS. SALK: And the reason why I'm saying,
20 Judge Rivera, that it's - - - it's not a reweighing
21 is because the purpose of Article 23-A is about
22 rehabilitation. It is about rehabilitation. It's
23 about assessing risk.

24 CHIEF JUDGE LIPPMAN: So your real argument
25 is that it violates the spirit and the - - - the

1 specifics of the statute and what it - - - what it
2 really is supposed to be about in terms of letting
3 people in this situation be employed unless there's a
4 good reason why they shouldn't be, in particular with
5 those two factors, that you're dealing with children,
6 whether it's directly related to the job. But - - -
7 but you're saying that this - - - this finding is so
8 - - - don't let me put words in your mouth, so
9 blatantly in conflict with what the statute is all
10 about that - - - that, therefore, it - - - it can't
11 be - - - it's by its nature arbitrary given that
12 rehabilitation is the heart of this statute?

13 MS. SALK: I think that says it pretty
14 perfectly, Your Honor.

15 CHIEF JUDGE LIPPMAN: Okay. Good answer.
16 Okay. Let's - - - let's go to your adversary. And
17 then you'll have your rebuttal.

18 MS. GRIFFIN: May it please the court,
19 Karen Griffin for the New York City Department of
20 Education.

21 CHIEF JUDGE LIPPMAN: Counsel, why isn't
22 this so in the face of what this statute is all
23 about? What - - - what could be more rehabilitation
24 than - - - than - - - than what happened in this
25 case? And how can you say that a decision along

1 these lines is rational when, first of all, they
2 don't even deal with all the factors. And secondly,
3 it's hard to understand if they had - - - and, again,
4 if - - - you know, in light of what Judge Rivera's
5 saying about re - - - reweighing. Why do we have to
6 even get to reweighing when you look at a decision
7 that seems, certainly on its face, to be arbitrary
8 given this person's background. And even the things
9 that are pointed out like the gaps or whatever, seems
10 to be pretextual, at least on its face. How do you
11 sort of get beyond this kind of visceral look at this
12 thing that just seems so off in terms of what 23-A is
13 all about.

14 MS. GRIFFIN: Well, starting with the
15 purpose of 23-A, 23-A is to prevent unlawful
16 discrimination. However, it recognizes two instances
17 - - -

18 CHIEF JUDGE LIPPMAN: I - - - we get it.

19 MS. GRIFFIN: - - - right, where you can
20 consider it. So here we're saying we have - - - we
21 fall into both. The record demonstrates that there's
22 both a direct relationship and an unreasonable risk.
23 And at that point then once an employer - - - the
24 case law is clear. Once an employer weighs the
25 correction law factors, the ultimate decision - - -

1 CHIEF JUDGE LIPPMAN: If this guy can't get
2 through with his record of rehabilitation, aren't you
3 getting to the point where you're doing, just, we
4 deny all these kinds of applications?

5 MS. GRIFFIN: No, Your Honor.

6 CHIEF JUDGE LIPPMAN: Who could get
7 through? What could be - - - should you have forty
8 years of rehabilitation instead of twenty-two years?
9 What's - - - what's the test? How do we get to the
10 point where we say, gee, this really appears to be
11 arbitrary?

12 MS. GRIFFIN: I think where we - - - we
13 have to consider the record as a whole. So here we
14 had - - -

15 CHIEF JUDGE LIPPMAN: So what - - - what's
16 the record here that could possibly lead to the
17 conclusion that he should not have this job? What's
18 in the record?

19 MS. GRIFFIN: What's in the record?

20 CHIEF JUDGE LIPPMAN: Yeah.

21 MS. GRIFFIN: Here, we have an - - - an
22 extensive history of criminal conduct that is of
23 particular concern, the Department's - - -

24 CHIEF JUDGE LIPPMAN: How many years ago
25 was that, though?

1 MS. GRIFFIN: It - - - it was twenty years
2 ago. But it went - - -

3 CHIEF JUDGE LIPPMAN: So what does he need,
4 forty years? That's what I'm asking you.

5 MS. GRIFFIN: It - - - it's not so much
6 what he needs. And - - - and - - - and I can't
7 answer the question as to whether he would eligib - -
8 - ever be eligible for certification. What I can
9 tell you is - - -

10 CHIEF JUDGE LIPPMAN: Could - - - you could
11 answer is anybody ever eligible?

12 MS. GRIFFIN: Under these facts or under
13 different facts?

14 CHIEF JUDGE LIPPMAN: And what would be the
15 prototypical person who would be eligible? Given the
16 criminal record twenty-two years ago, could anyone be
17 rehabilitated enough to be able to get this job as a
18 bus driver?

19 MS. GRIFFIN: Again, I - - - I can't answer
20 that in the abstract. What I can say is what the
21 corrections law requires.

22 CHIEF JUDGE LIPPMAN: You mean your - - -
23 your answer is you - - - when it's rational, you know
24 it, and you know it? I mean what - - - there's got
25 to be something more than that.

1 MS. GRIFFIN: It ultimately comes down to
2 the risk tolerance of the employer. And - - - and
3 the - - - the correction of the legislature left it
4 to an employer to make that determination.

5 JUDGE STEIN: But if - - - but if an
6 employer says I could never hire somebody with a
7 criminal background, isn't that directly in
8 opposition to - - -

9 MS. GRIFFIN: Absolutely.

10 JUDGE STEIN: - - - what the statute
11 provides?

12 MS. GRIFFIN: Absolutely, Your Honor. But
13 here it's not just a criminal background - - -
14 ground. It's a criminal background in an area of
15 particular conc - - - concern. There was - - - this
16 is drug sale, drug possession, and - - - and this - -
17 -

18 JUDGE READ: So it might have been
19 different if he'd been a robber? Had been a robbery?

20 MS. GRIFFIN: It may have been different if
21 he had been a robber. Ultimately, here we're looking
22 at drug use and possession, and the Chancellor's
23 Regulation specifically states that that is an area
24 of major concern.

25 CHIEF JUDGE LIPPMAN: So, but in answer to

1 Judge Stein's question, so a person with a drug
2 background, albeit twenty-some-odd years ago, can
3 never drive a bus when you're dealing with children?
4 Even if the - - - the guy got the Nobel Prize for
5 dealing with buses and children and everything else,
6 he can't possibly, under any circumstance, never be
7 rehabilitated enough to get this job?

8 MS. GRIFFIN: That is not accurate, Your
9 Honor. That's not the Department's position.

10 CHIEF JUDGE LIPPMAN: So what are you
11 saying? What are you saying?

12 MS. GRIFFIN: Here, it's because of the
13 extensive background. Let me give you another
14 example.

15 CHIEF JUDGE LIPPMAN: Sure.

16 JUDGE RIVERA: There were also breaks. I
17 thought there was also breaks. That there were
18 periods of time where there was no problem and then -
19 - - and then he went off the wagon, let me put it
20 that way.

21 MS. GRIFFIN: Correct, Your Honor. So I'll
22 address that one, too. If - - - if he was seventeen
23 at the time that the - - - the criminal conduct and
24 since then he had a completely clean record, that's a
25 different factor. We'd weigh that differently. Here

1 it went from seventeen to forty-one, well, into mid -
2 - - adulthood. And well into the point where your
3 morals and values are established.

4 So now Mr. Dempsey says that all of his
5 criminal conduct was a result of his drug addiction,
6 but we have no way - - - no employer, public or
7 private, has any way to - - - to - - - to - - - to
8 ver - - - verify that. You'd have to accept him at
9 his word. What we know is there was a long history
10 of criminal conduct.

11 CHIEF JUDGE LIPPMAN: Wouldn't it be good
12 to ask him about his rehabilitation if you - - - if
13 you wanted to make that judgment?

14 MS. GRIFFIN: Your Honor, the
15 rehabilitation is in the record. But, again, it's
16 one of eight factors and then - - -

17 JUDGE STEIN: How did you know it was
18 considered here? That was the problem in Acosta,
19 right? That - - - that there was all of this
20 information that wasn't considered. How do we know
21 it was considered in this case?

22 MS. GRIFFIN: Well, I believe the
23 difference in Acosta is the cou - - - this court
24 pointed out that there were specific references.
25 They said there was no references in the record,

1 when, in fact, one of the letters in the record said,
2 in fact, they had hired Ms. Acosta based on her - - -
3 her stellar employment record. So that was an
4 indication that they did not consider the references
5 or didn't seek additional information. In add - - -
6 in addition, the court pointed out - - - the court
7 pointed out that two of the investigators never even
8 looked at the submission.

9 JUDGE PIGOTT: What - - - what section of
10 the correction law were you -- - were you making
11 this decision under, 752 or 753?

12 MS. GRIFFIN: Well, here, it's 752 is for
13 direct - - - the - - - the exceptions, and we believe
14 both exceptions apply.

15 JUDGE PIGOTT: Which one were you using
16 here? Which one in - - - in dismissing him or in
17 denying him a job were you relying on?

18 MS. GRIFFIN: The - - - Mr. Berlin's letter
19 both says there's a direct - - - a direct
20 relationship - - -

21 JUDGE PIGOTT: Well, it says - - - it - - -
22 it states in this May 4th letter that it was relying
23 on the direct relationship factor.

24 MS. GRIFFIN: The direct relationship
25 factor. The original - - - the orig - - -

1 JUDGE PIGOTT: The standards for a direct
2 relationship factor that I'm wondering if they were
3 complied with here because he then goes on to 753 and
4 says, you know, here are these eight factors. Well,
5 they're - - - they're - - - they're not the same.

6 MS. GRIFFIN: Which is true, Your Honor.
7 But first you must make - - - this court in Bonacorsa
8 - - - corsa did state that you have to make a direct
9 relationship analysis without considering the Section
10 753 factors. Is there a direct bearing - - - does
11 the nature of the criminal conduct have a direct
12 bearing on the duties and responsibilities
13 necessarily related to the employment. That's a
14 determination that's made, and then you look to the
15 753 factors to see whether or not the - - - the
16 criminal conduct was sufficiently attenuated.

17 JUDGE PIGOTT: I see. So you could have a
18 753 violation or - - - or something within the record
19 that would indicate that - - - that this is not a - -
20 - a person that fits. But if it doesn't directly
21 related to the duties, you would hire them anyway?

22 MS. GRIFFIN: You could - - - I mean, 753
23 is, again, a weighing factor. So under the
24 unreasonable risk, you'd have to weigh the factors
25 and determine there's an unreasonable risk.

1 JUDGE FAHEY: But, for instance, if you
2 were going to be a stationary engineer it might be a
3 different situation then if you were going to be a
4 bus driver, right?

5 MS. GRIFFIN: Certainly, Your Honor.

6 JUDGE FAHEY: Right. When he originally
7 applied, did - - - did he disclose the criminal
8 convictions? Were they disclosed?

9 MS. GRIFFIN: What he did, Your Honor, is
10 when he originally - - - he -- - he disclosed that
11 he - - - he checked the box saying he had pri - - -
12 prior criminal convictions.

13 JUDGE FAHEY: Okay.

14 MS. GRIFFIN: But he didn't list them, and
15 the application specifically directs that you list
16 them. And in his affidavit, on remand, when he was
17 given another opportunity to - - - to develop the
18 record on his past criminal conduct, he again didn't
19 discuss them at any length. He stated that they
20 existed and he attributed them all to his - - - his -
21 - - his past heroin addiction. But he didn't discuss
22 the conduct. He didn't give any details of - - - of
23 what happened at that time.

24 JUDGE FAHEY: Yeah. But what's the effect
25 then? All right, so let's - - - let's assume you

1 were wrong on the gaps of employment. That seems to
2 be clear.

3 MS. GRIFFIN: That's correct.

4 JUDGE FAHEY: And he didn't disclose
5 everything he should have, but he didn't - - - he
6 didn't lie. He just didn't disclose everything. Not
7 exactly the same thing. What's the effect of the
8 certificate of release of disabilities or - - - go
9 ahead. Go ahead.

10 MS. GRIFFIN: That gives a presumption of
11 rehabilitation.

12 JUDGE FAHEY: Right.

13 MS. GRIFFIN: And - - - and this court has
14 - - - has determined that that presumption of
15 rehabilitation can be overcome by the employer
16 weighing the other factors more heavily. And - - -
17 and here the - - - the record demonstrates that the
18 Department of Education weighed the direct bearing
19 more heavily, weighed the - - - the seriousness of
20 the criminal offenses, again, drug use, heroin use,
21 for an extended period of time well into adulthood.

22 JUDGE RIVERA: Why - - - why not put in the
23 determination exactly what you said, that the - - -
24 that - - - that despite the rehabilitation and
25 whatever limits there are in the rehabilitation,

1 because it strikes me the two sides view the
2 rehabilitation very differently, but that it - - -
3 it's not outweighed. Or - - - or rather the - - -
4 the other factors outweigh that rehabilitation.

5 MS. GRIFFIN: So - - -

6 JUDGE RIVERA: Why didn't you just say that
7 and explain why.

8 MS. GRIFFIN: Now in the - - -

9 JUDGE RIVERA: Isn't that what Acosta
10 requires?

11 MS. GRIFFIN: Acosta doesn't require
12 specific - - - you do not have to specifically
13 address every single factor. That's been clear
14 through all of - - - all of your past decisions. You
15 have to state what you relied on. I see my time is
16 up. Can I finish here?

17 CHIEF JUDGE LIPPMAN: Go ahead, finish,
18 counsel. Sure.

19 MS. GRIFFIN: You have to state what you
20 relied on, and the record demonstrates that we did
21 over and over and over state exactly what we relied
22 on. We didn't go through what we didn't rely on.

23 JUDGE RIVERA: Yes, but giv - - - given the
24 - - - given the history and the record of this
25 particular individual and it is clear that this

1 particular individual was arguing, and his counsel
2 was arguing, that this particular applicant is
3 rehabilitated. Given that presentation of the
4 applicant's profile, why would you not explain why
5 the one thing that they are relying on is not good
6 enough, so that there could be appropriate judicial
7 review, even now a judicial review?

8 MS. GRIFFIN: I - - - I think there can be
9 approp - - - appropriate jud - - - judicial review
10 based on what's in the record right now. Ostrager
11 (ph.) in his initial affidavit did say that all of
12 these other factors we rely on, we brought the
13 presumption of rehabilitation on remand. Berlin
14 again addressed the factors that we rely on. Did he
15 say - - - state those magic words? No. But - - -
16 but clearly he ack - - - acknowledged there was a
17 certificate of relief, so there is a presumption. He
18 said, nevertheless, these are what we rely on and we
19 should have - - -

20 CHIEF JUDGE LIPPMAN: Okay, counsel.
21 Thanks.

22 MS. GRIFFIN: Thank you.

23 CHIEF JUDGE LIPPMAN: Let's - - - let's
24 hear rebuttal.

25 MS. SALK: Thank you, Your Honor.

1 CHIEF JUDGE LIPPMAN: Counselor.

2 MS. SALK: Acosta actually does indicate
3 that if they don't state - - - if the agency doesn't
4 state in - - - with specifics what they relied on,
5 that that may be - - - could possibly be arbitrary.
6 It doesn't say that that's absolutely required, but
7 that is something that the court can look on - - -
8 can look at in terms of reviewing it.

9 I think it's very interesting that - - -
10 that respondent's counsel keeps on pointing to the
11 criminal record in this case. I think that's
12 interesting, because that's exactly what the
13 Department of Education looked at exclusively. And
14 it's again what they're saying is okay. It's not
15 okay under Article 23.

16 JUDGE STEIN: Well, the direct relationship
17 test, doesn't that allow that to happen in
18 appropriate circumstances?

19 MS. SALK: What - - - what you can do if -
20 - - first of all, in this case it's clear that this
21 was based on a reasonable risk. That is what the
22 agency said. If you look at 210 of the record,
23 Matthew Berlin said that it was about unreasonable
24 risk and that's why. But even if it's about a direct
25 relationship, you still must, under Bonacorsa, look

1 at each and every - - - every factor. Each and every
2 753 factor is absolutely required to see - - -

3 JUDGE STEIN: Well, that's true. But - - -

4 MS. SALK: - - - if those mitigate a direct
5 relationship.

6 JUDGE STEIN: - - - getting back to the
7 weighing, the - - - the particular crime, the extent
8 of the crimes, the - - - the duration of the crimes,
9 the age of the person at the crime, couldn't that
10 outweigh the other factors?

11 MS. SALK: It - - - it - - - it might in
12 certain circumstances. What we're saying in this - -
13 - and so we're not saying it never does. What we're
14 saying in this case, because this agency didn't do a
15 rational consideration of those factors, that they
16 didn't outweigh. And we're not asking this court or
17 any court to reweigh the factors. We're just, once
18 again, asking there to be a rational decision and
19 that the conclusion itself cannot be arbitrary,
20 cannot be irrational. And - - -

21 JUDGE PIGOTT: You're saying it's
22 irrational because you - - - you don't think that
23 drugs by itself eliminates you from being a bus
24 driver?

25 MS. SALK: No.

1 JUDGE PIGOTT: All right. So if it's - - -

2 MS. SALK: Because - - -

3 JUDGE PIGOTT: If it's - - - if it's a
4 child sex abuse charge and - - - and conviction, do
5 you - - - do you say well, you know, it was thirty
6 years ago and he's older now and they - - - they were
7 unfair - - -

8 MS. SALK: Yeah.

9 JUDGE PIGOTT: - - - in that?

10 MS. SALK: I'm not saying that. The
11 legislature has said that, actually. The legislature
12 has specifically said that sex crimes do not allow -
13 - - that - - - that bus drivers are not allowed to
14 have such a - - - a - - - a criminal offense.

15 JUDGE PIGOTT: Well, I'm - - - I'm not
16 picking - - -

17 MS. SALK: That is not the case in this
18 situation.

19 JUDGE PIGOTT: I'm picking on a particular
20 - - - what I'm suggesting is that somehow they make
21 these determinations, and I don't know how judges,
22 you know, sitting a long way away know the bus, the
23 route, the - - - you know, the - - - the hours and
24 everything else, and we want to say well, you failed
25 to take into consideration number seven. I - - - I

1 don't think they make these decisions in anticipation
2 of going to Albany. And - - - and so shouldn't we
3 look at the record and - - - and if it's direct, as -
4 - - as you point out in Bonacorsa, that they should
5 look at them. It doesn't say they must.

6 MS. SALK: No. They actually have to.

7 JUDGE PIGOTT: Well, I'm - - -

8 MS. SALK: They have to look at each and
9 every factor.

10 JUDGE PIGOTT: "The eight factors contained
11 in 753 should be considered and applied."

12 MS. SALK: Well, I believe that Bonacorsa
13 would say that all the factors must be considered.

14 JUDGE PIGOTT: Well, I'm reading - - -

15 MS. SALK: And I think Acosta has affirmed
16 that.

17 JUDGE PIGOTT: Should be and - - - and
18 applied to determine if, in fact, if there's
19 unreasonable risk. You - - - you take that as
20 mandatory?

21 MS. SALK: I - - - I would say that not
22 only Bonacorsa says that but I would say that your
23 decision in Acosta also says that, that each and
24 every factor must be considered.

25 JUDGE RIVERA: So - - - so let - - - let's

1 go back. So you take the position that there's
2 enough rehabilitation here and it - - - it's
3 irrational, because this person is truly
4 rehabilitated. That's a - - - this is the poster
5 child for this statute.

6 They take the position that there's some
7 rehabilitation, but we think there are limits to this
8 rehabilitation because we have concerns, not just
9 because of the drug crime, but because of really
10 looking at the full criminal history and the full
11 history of rehabilitation. We've really looked at
12 that and we've decided the rehabilitation cannot
13 outweigh the - - - the - - - the criminal history.
14 If they articulated that, is that good enough?

15 MS. SALK: I would have to say it depends
16 on how they articulate it. But I would say, again,
17 once again in this record, I don't think there's any
18 way that you could look at this record and find that
19 this person - - - again, I'm going to bring it back
20 to risk, because I think it's very important.

21 And I think also, as the amicus has stated,
22 the studies in this area overwhelmingly say that
23 after seven years there's no difference between
24 someone who hasn't had any kind of criminal record or
25 any arrest record and someone like Mr. Dempsey.

1 been doing that and everything else on the record
2 indicates that he's been - - -

3 CHIEF JUDGE LIPPMAN: Okay, counsel.
4 Thanks.

5 MS. SALK: Thank you.

6 CHIEF JUDGE LIPPMAN: Thank you both so
7 much. Appreciate it.

8 (Court is adjourned)

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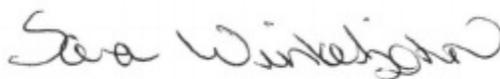
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14

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17 New York, NY 10040
18

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