

Matter of Young v New York City Dept. of Educ.

2012 NY Slip Op 31364(U)

May 15, 2012

Sup Ct, New York County

Docket Number: 110624/11

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

IA PART 16
PART _____

Index Number : 110624/2011
YOUNG, MICHAEL
vs.
NYC DEPT OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

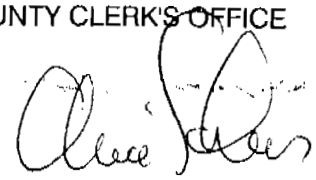
Upon the foregoing papers, it is ordered that this motion is *Article 78 petition*
is denied and the proceeding is dismissed
in accordance with the accompanying
memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

MAY 29 2012

NEW YORK
COUNTY CLERK'S OFFICE



J.S.C.

ALICE SCHLESINGER

Dated: MAY 15 2012

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

In the Matter of the Application of
MICHAEL YOUNG,

Petitioner,

-against-

Index No. 110624/11
Motion Seq No. 001

For a Judgment Pursuant to CPLR Article 78

-against-

THE NEW YORK CITY DEPARTMENT OF
EDUCATION, DENNIS M. WALCOTT, as
Chancellor of the New York City Department
of Education,

Respondents.

-----X

SCHLESINGER, J.:

FILED

MAY 22 2012

NEW YORK
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At the heart of this Article 78 proceeding is the well-founded policy of this State, codified in the Correction Law, that bars discrimination against persons seeking public or private employment based on a prior criminal conviction. Petitioner Michael Young claims here that respondent New York City Department of Education (DOE) violated that law by denying his application to be a substitute teacher based on his guilty plea for making false statements to law enforcement. DOE insists that it fully and fairly considered all the statutorily mandated factors and reached a reasonable decision denying Mr. Young's application based on the entire record before it.

The Law Bars Discrimination

Petitioner's claims in this case rely in large part on Article 23-A of the Correction Law.¹ As reiterated just last year by Chief Judge Lippman in *Matter of Acosta v New York*

¹Petitioner also relies on the New York State Human Rights Law, found in Executive Law §296(15), and the New York City Human Rights Law, found in the Administrative Code at §8-107, both of which bar public employment discrimination based on conviction alone.

City Dept. of Educ., 16 NY3d 309, 314 (2011), Correction Law § 752 expressly bars discrimination based on a criminal conviction, stating in relevant part that:

No application for any license or employment ... shall be denied ... by reason of the individual's having been previously convicted of one or more criminal offenses

There are, however, two exceptions this general rule. Pursuant to Correction Law §752, the potential employer can base its denial on the applicant's criminal history if one or both of the following findings is made:

(1) there is a ***direct relationship*** between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or

2) the issuance or continuation of the license or the granting or continuation of the employment would involve ***an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.***

(Emphasis added). The term "direct relationship" is defined to mean that "the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question." Correction Law § 750(3). The term "unreasonable risk" is not defined in the statute "for the obvious reason that a finding of unreasonable risk depends upon a subjective analysis of a variety of considerations relating to the nature of the license or employment sought and the prior misconduct." *Acosta*, 16 NY3d at 315, quoting *Matter of Bonacorsa v Van Lindt*, 71 NY2d 605, 612 (1988).

Correction Law §753(1) lists eight factors which the potential employer "shall consider" when determining whether either the "direct relationship" or the "unreasonable risk" exception applies. See, *Acosta, supra*; *Arrocha v Board of Education of the City of New York*, 93 NY2d 361, 364 (1999). Those factors include the following:

(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

(b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.

(c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more [of] such duties or responsibilities.

(d) The time which has elapsed since the occurrence of the criminal offense or offenses.

(e) The age of the person at the time of occurrence of the criminal offense or offenses.

(f) The seriousness of the offense or offenses.

(g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

(h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

Background Facts

Michael Young is 44 years old, married and the father of three children. He has 20 years of experience in sales and business and seeks to establish a career in the field of education. To that end, he is presently enrolled in a dual Masters Degree program in Education and Special Education at Touro College with an anticipated completion date in 2012. While studying, Mr. Young is working at S&E Building Materials, where he has been employed since late 2006.

The incident at issue in this case relates back to Mr. Young's prior employment earlier in 2006 as an insurance sales manager at Infinity Planning. Infinity shared office space with another company, US Medsys Corporation, in which Mr. Young's brother-in-law held an ownership interest. Unbeknownst to Mr. Young, US Medsys apparently was at that time the target of an FBI investigation based on a suspected scheme whereby the company staged the theft of machinery and filed an insurance claim for the theft, thereby defrauding the insurance company. According to Young, without any knowledge of any criminal activity or the investigation, he was asked by US Medsys to type an insurance claim form, as he was the only individual with typing skills. However, he both typed the form and signed it. In January 2007 officers and directors of US Medsys were arrested and charged with various crimes. Mr. Young was later charged with wire fraud and conspiracy in a superceding indictment filed in September 2007. He pled guilty in August of 2008 to the crime of "lying to a special agent of the FBI" based on statements he had made about whether he had overheard people at Medsys talking about insurance fraud. The New Jersey District Court sentenced Mr. Young to unsupervised probation for a term of one year (Exh E to Petition).

Less than three years later, on March 7, 2011, Principal Barry Kevorkian nominated Mr. Young for the position of Substitute Teacher in the New York City Public Schools. Mr. Young completed the requisite application and the Introductory Teacher Training, which included a number of courses (Exh A and B). DOE sent Mr. Young an e-mail dated April 25, 2011, advising him that he should proceed to the next step in the application process, which included fingerprinting. Mr. Young indicated on the fingerprinting form that he had a criminal conviction. By e-mail dated May 17, 2011, he was advised to appear the following day for an interview with Patricia Hanks (Exh D). In response, Mr. Young

submitted the requested information, including documentation of the criminal conviction, a personal statement, and various reference letters (Exh E). Following the interview, Mr. Young e-mailed Ms. Hanks additional information about his education and training and additional character references (Exh G). He also asked Ms. Hanks to contact Ms. Howard from the New York State Education Department, which had approved his fingerprint clearance after having conducted an investigation similar to that being conducted by the DOE (Exh H).

DOE advised Mr. Young of its decision denying his application in a May 20, 2011 letter signed by Andrew Gordon, Director of Employee Relations (Exh I). Mr. Gordon began by confirming DOE's receipt of information that Mr. Young had been arrested on September 17, 2007 and that he had pled guilty on March 14, 2008 to the misdemeanor of Making False Statements to Law Enforcement, with one year's probation as a sentence. Directly referencing the eight factors in Correction Law §753(1), Mr. Gordon described the procedure that the DOE had followed and confirmed that it had considered the various factors mandated by law. He then concluded that the facts and circumstances justified a denial of Mr. Young's application:

After consideration of the above, we have determined to deny your application for employment. We are providing you with the reasons for the denial, in accordance with Corrections Law § 754, as follows: your criminal record history includes a recent and serious misdemeanor conviction for making False Statements To Law Enforcement.

Your record bears directly on your ability to satisfactorily perform the duties of the position sought and granting employment would pose an unreasonable risk to the safety and welfare of the school community.

Mr. Young then filed a Notice of Claim and this Article 78 proceeding ensued.

Discussion

Petitioner asserts that the DOE's "pro forma denial" of Mr. Young's application violated the Correction Law (Memo of Law, Point I). Specifically, counsel charges that while the determination mentions the eight statutory factors, it includes no discussion of the particular facts of this case to demonstrate how the various factors — other than the criminal conviction — were evaluated and what weight was given to each. Additionally, counsel disputes that Mr. Young's conviction had a "direct relationship" to his fitness to perform the duties of a teacher or that his employment would pose an "unreasonable risk" to the safety or welfare of the school community (Memo, Points II and III).

The DOE responds with a lengthy affidavit from Mr. Gordon which explains the DOE's reasoning in great detail (Answer, Exh 1). After acknowledging his obligation to consider the eight factors listed in the Correction Law, Mr. Gordon indicates how he applied each one. For example, he states (at ¶12) that "the relevant duty and/or responsibility that was considered by my office was that, as a Substitute Teacher, petitioner would be working with and directly supervising young children in an unsupervised manner. In addition, Substitute Teachers are responsible for ensuring the safety of countless school children and are required to perform their duties often in a stressful environment. Therefore, the DOE deems it essential to provide background clearance to only those Substitute Teacher applicants who exhibit exceptional judgment."

With respect to Mr. Young's 2008 criminal conviction, Mr. Gordon correctly described the nature of the conviction and the sentence and detailed the various letters and documentation that Mr. Young had submitted, demonstrating that the DOE had

carefully considered all the evidence submitted. He then stated (at ¶¶ 17-18):

Petitioner committed a federal misdemeanor of Making False Statements to Law Enforcement at the age of forty-one. His actions, which demonstrate a serious lack of judgment, could not possibly be excused as the result of a youthful mistake given petitioner's age at the time of his arrest. This type of conduct goes directly to petitioner's veracity, ability to exercise sound judgment, and to consider the consequences of his actions. In addition, petitioner's conviction was based on conduct that was committed during the course of his employment.

Working as a Substitute Teacher is a position that requires the utmost trust and credibility. Petitioner's misconduct, which was related to his occupational duties, demonstrated extremely poor judgment and a lack of occupational-related honesty and credibility. As such, the DOE had serious doubts that petitioner could reasonably and responsibly be accountable for the safety and security of New York City school children.

Additionally, Mr. Gordon indicated that comments made by Mr. Young during his interview demonstrated "a lack of accountability and remorse and a failure to appreciate the seriousness of his actions"² (¶19). He discounted Mr. Young's volunteer work at the school because it was supervised and therefore unlike substitute teaching (¶20). He also discounted some of the character references because they were from relatives and not objective (¶20). He then concluded by stating as follows (¶24):

Substitute Teachers must be of good moral character and demonstrate the highest level of reliability and judgment. After careful consideration, it was apparent that there was enough evidence that these qualities were lacking in petitioner to rebut the presumption that petitioner had rehabilitated himself.

The DOE also included with its answer (Exh 8) the internal DOE worksheet contemporaneously completed by the DOE investigator during Mr. Young's investigation

²As an example of this, Young attempts to explain his guilty plea. He says he entered the plea, not because he was in fact guilty, but rather because he had already spent \$65,000 on counsel fees and could not afford to pay more.

that listed the eight statutory factors and a brief analysis of each.

In its Memorandum of Law, the DOE argued that Mr. Gordon had demonstrated in his affidavit that the DOE had considered all the factors mandated by the Correction Law and that it had reached a determination that was rationally based on the record and non-discriminatory. Citing *Arrocha*, 93 NY2d at 367, counsel further asserted that judicial review was limited to determining whether the DOE determination was arbitrary and capricious and did not permit the court to re-weigh the factors or substitute its own judgment for that of the agency.

In reply, petitioner's counsel argued that the DOE's May 2011 decision letter was wholly conclusory and that the DOE improperly submitted for the first time in this proceeding an affidavit from Mr. Gordon that attempted "a retroactive analysis of the statutory factors to justify [the DOE] denial of Petitioner's application." (Memo at p 2).

On that last point, the Court asked both counsel to submit citations on the issue whether an agency could submit an affidavit explaining the reasoning behind its decision for the first time in an Article 78 proceeding. Citing *Central NY Coach Lines, Inc v Larocca*, 120 AD2d 149 (3rd Dep't 1986), petitioner's counsel asserted that an "agency cannot use its answer in a CPLR article 78 proceeding as a substitute for providing a rational reason in its determination." Citing *Acosta v New York City Dept. of Educ.*, 16 NY3d 309 (2011), respondent's counsel asserted that the DOE is not required to "state with specificity its detailed analysis with respect to each of the eight factors in its denial letter to petitioner." Counsel argued as well that a court must uphold an agency determination if it is supported by any rational basis in the record, not just the basis articulated in the letter determination. *Calhoun v Kelly*, 13 AD3d 302 (1st Dep't 2004).

As discussed above, the affidavit of Andrew Gordon submitted in this proceeding offers a detailed explanation of the DOE's analysis and determination of Mr. Young's application. The threshold question, then, is whether this Court may properly consider the affidavit.

The various cases cited by petitioner contain broad language tending to support the assertion that an agency may not supplement its decision with an affidavit explaining its rationale for the first time in the Article 78 proceeding. For example, in *Central NY Coach Lines, Inc v Larocca*, 120 AD2d 149, 152 (3rd Dep't 1986), the court stated that:

An agency cannot use its answer in a CPLR article 78 proceeding as a substitute for providing a rational reason in its determination.

In so stating, the Third Department cited the decision by the Court of Appeals in *Matter of Montauk Improvement v Proccacino*, 41 NY2d 913, 914 (1977), which declared:

Failure of the agency to set forth an adequate statement of the factual basis for the determination forecloses the possibility of fair judicial review and deprives the petitioner of his statutory right to such review.

However, while the legal principle urged by petitioner is sound, the cited cases are readily distinguishable from the case at bar in that the agency in those cases cited no facts or law at all in its determination letter. Here, in contrast, the DOE determination accurately states the facts relating to Mr. Young's criminal conviction and specifically refers to the statutory factors and the exceptions to the rule barring the denial of employment based on a criminal conviction.

More significant, however, is the very recent opinion by Chief Judge Lippman in *Matter of Acosta v New York City Dept. of Educ.*, 16 NY3d 309,(2011). The Court acknowledged in its opinion (pp 318-319) that the DOE had submitted for the first time with

its answer in the Article 78 proceeding an affidavit from the investigator who had interviewed the petitioner, as well as an affidavit from the DOE's Director for Employee Relations for the Division of Human Resources (the same title held by Mr. Gordon here). Rather than eschew the newly submitted affidavits, the Court embraced them and used their statements to support the Court's conclusion that the decision was arbitrary and capricious. Although he disagreed with the DOE's conclusion in *Acosta*, Chief Judge Lippman did not require the agency to set forth its reasoning in full in its denial letter or limit the court's review to the denial letter alone. Instead, he stated as follows (at 318-19):

We first note that this conclusion [that the DOE's denial was arbitrary and capricious] is not mandated by the fact that the DOE did not state with specificity its detailed analysis with respect to each of the eight factors in its denial letter to petitioner, as it was not required to do so in the letter notifying her of its decision (*but see* Correction Law § 754 [providing that, if requested, a public agency or private employer that denies a person's application for a license or employment on the basis of that person's prior criminal conviction "shall provide, within thirty days of a request, a written statement setting forth the reasons for such denial"]). Nor does the DOE's apparent inability to point to any contemporaneously created record that demonstrates that it considered each of the eight factors in reviewing petitioner's application necessarily require a finding that the DOE acted arbitrarily, though, of course, such documentation, if it existed, might tend to show that the DOE had fulfilled its obligation under the Correction Law. Rather, on this record, the DOE's own statements demonstrate that it failed to comply with the statute and acted in an arbitrary manner.

Here, both the investigator's worksheet and Mr. Gordon's affidavit demonstrate that the DOE considered all the evidence submitted by Mr. Young with his application and considered all eight statutory factors before reaching its determination. As the DOE correctly noted, Mr. Young was a mature adult at the time he committed the crime, he had

been sentenced to a serious crime only three years before his application was filed, and the nature of the crime demonstrated untrustworthiness and poor judgment. Based on the facts and circumstances, and mindful of the limits of judicial review, this Court cannot find that it was arbitrary and capricious for the DOE to deny Mr. Young's application based on the direct relationship between the crime and the job duties of a teacher and the conclusion that Mr. Young's employment at this time would pose an unreasonable risk to the safety and welfare of the school community.

Accordingly, it is hereby

ADJUDGED that the petition is denied and this proceeding is dismissed without costs or disbursements to either party. The Clerk is directed to enter judgment in favor of the respondents accordingly.

Dated: May 15, 2012

MAY 15 2012

Alice Schlesinger

J.S.C.

ALICE SCHLESINGER

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