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

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In the Matter of the Application of JIANA BOONE, Index No. ____________

Petitioner,

For a Judgment Pursuant to CPLR Article 78

— against —

THE NEW YORK CITY DEPARTMENT OF EDUCATION; CARMEN FARINA, as Chancellor of the New York City Department of Education,

Respondents.

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PETITIONER'S MEMORANDUM OF LAW

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PRELIMINARY STATEMENT

This memorandum of law is submitted in support of Petitioner's Verified Petition against Respondents the New York City Department of Education and Carmen Farina, Chancellor of the New York City Department of Education ("DOE" or Respondents).

This is a special proceeding brought pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") to challenge and reverse Respondents' final decision dated January 9, 2015 denying Petitioner's eligibility for employment as a School Bus Attendant solely because of a single, four-and-a-half year old petit larceny misdemeanor conviction. There is no evidence in the record that Petitioner's conviction has any bearing on her ability to perform her duties as a School Bus Attendant nor that granting her employment would pose an unreasonable risk to the safety and welfare of the school community.

Petitioner challenges Respondents' actions on the grounds that they were arbitrary and capricious, constituted an abuse of discretion, and were taken in violation of Article 23-A of the New York State Corrections Law (Correction Law §§ 750, *et seq*), the New York State Executive Law § 296(15) ("New York State Human Rights Law"), and the New York City Administrative Code § 8-107(10) ("New York City Human Rights Law"). These laws were enacted to ensure that persons previously convicted of criminal offenses are considered fairly for employment and licensure. These law reflect the state's public policy to encourage employment and licensing of individuals previously convicted of criminal offense(s).

Petitioner respectfully requests that the Court vacate Respondents' determination and direct Respondents to certify Petitioner for employment as a School Bus Attendant, or in the alternative, remand the case for appropriate consideration consistent with current law.

LEGAL STANDARD

A job applicant may appeal an adverse employment decision issued by the DOE through commencing an Article 78 proceeding. CPLR § 7801; N.Y. Correction Law § 755(1). Section 7803(3) of the CPLR empowers this Court to review "whether a determination was made in violation of a lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR § 7803(3).

ARGUMENT

Respondents pro forma denial and its failure to properly consider the requisite eight factors under Correction Law § 753 violated Correction Law Article 23-A, was arbitrary and capricious and an abuse of discretion, and violated the New York State and New York City Human Rights Law.

I. RESPONDENTS' PRO FORMA DENAIL OF MS. BOONE'S EMPLOYMENT APPLICATION WAS AFFECTED BY AN ERROR OF LAW BECAUSE IT WAS MADE IN VIOLATION OF CORRECTION LAW ARTICLE 23-A SINCE IT DID NOT PROPERLY CONSIDER THE REQUISITE EIGHT FACTORS UNDER CORRECTIONS LAW SECTION 753.

"Article 23-A of the Correction Law was enacted in 1976 in an attempt to eliminate the effect of bias against ex-offenders which prevented them from obtaining employment." (*Bonacorsa v. Van Lindt*, 71 NY2d 605, 611, 528 NYS2d 519, 521 [Ct App 1988]). "Article 23-A sought to remove this obstacle to employment by imposing an obligation on employers and public agencies to deal equitably with ex-offenders while also protecting society's interest in assuring performance by reliable and trustworthy persons." *Id*.

To that end, Correction Law § 752, part of Article 23-A, prohibits denying employment or licenses on the basis of criminal convictions: "[n]o application for any license or employment . . . shall be denied by reason of the applicant's having been previously convicted of one or more

criminal offenses." "The only exceptions are where: (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought; or (2) the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public." Correction Law § 752 (emphasis added).

Under the first exception of "direct relationship," the Respondents' inappropriately determined that such direct relationship exists. Correction Law § 750 defines "direct relationship" as requiring 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 or employment sought."

No direct relationship exists. Ms. Boone was convicted of petit larceny for a theft occurring at a retail store. The license sought is School Bus Attendant which involves no sales, no cash handling, and no taking of orders or processing returns. (*see Thomas v. DOE*, 2014 NY Slip Op 24338, 46 Misc. 3d 308 [Sup Ct NY County 2014] [finding DOE erroneously concluded that the Felony crime of drunk driving assault bore a direct relationship to paraprofessional position], citing *Dellaporte v. New York City Dept. of Bldgs.*, 106 AD3d 446 [1st Dept 2013] [denial of the renewal of a stationary engineer license was arbitrary and capricious because the conviction for theft of funds bore no direct relationship to the duties of a stationary presumption of rehabilitation attendant to petitioner certificate of relief from disabilities]; *Matter of Gil v. New York City Dept. of Bldgs.*, 107 Ad3d 632 [1st Dept 2013] [respondents arbitrarily concluded that petitioner's convictions of mail fraud and money laundering bore a direct relationship to the duties and responsibilities attendant to a stationary engineer]).

Even if Respondents' were to determine that a "direct relationship" exists in this matter, they must still analyze the eight factors set forth in Correction Law § 753(1) to determine if, "notwithstanding the existence of a direct relationship," it should, in its discretion, approve the employment or license sought. Id. at 614-15.

The eight factors to be considered under Correction Law § 753(1) are as follows:

(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.

(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 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

(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.

The second exception, "unreasonable risk," is not defined. However, when a private employer or public agency relies on the unreasonable risk exception of Correction Law § 752 in determining whether to grant employment or license to an ex-offender, it must also consider and apply the eight factors contained in Correction Law § 753(1) outlined above. *Bonacorsa*, 71 NY2d at 613. An agency cannot simply presume an unreasonable risk exists; instead, it must evaluate the § 753 factors before reaching that conclusion. *Id*. at 613-14. The Court of Appeals

has made clear that Respondents cannot use the “direct relationship” or “unreasonable risk” exceptions under Correction Law Article 23-A if they did not properly consider the eight factors under Correction Law § 753. (*Acosta v. NY City Dep’t of Educ*., 16 NY3d 309, 921 NYS2d 633 [Ct App 2011]). Agencies must consider each statutory factor carefully and cannot ignore evidence favorable to the applicant. (*Gallo v. NY State Office of Mental Retardation and Developmental Disabilities* (“OMRDD”), 37 AD3d 984, 986, 830 NYS2d 796, 798 [App Div 3d Dept 2007]). State agency decisions are therefore arbitrary and capricious under Article 23-A both when the Article 23-A factors are not rationally considered and when they ignore evidence favorable to the applicant. (*Boatwright v. OMRDD*, 100330/07, 2007 NY Slip Op 30911 (u) [Sup Ct NY County 2007])[1] (vacating agency decision denying employment with “no analysis of factors”; one-paragraph “memo to file” that merely “recite[d], total tracking the statute, the required factors” was insufficient); (*Gallo*, 830 NYS2d at 798) (court determined that the agency failed to consider the first statutory factor and the presumption of rehabilitation as the applicant
failed to consider the first statutory factor and the presumption of rehabilitation as the applicant
for a bus driver position was only sentenced to probation for an assault in the second degree conviction and received an early discharge).

Applying the eight Article 23-A factors here, it is clear from the record that Petitioner’s sole conviction, a non-violent, non-drug related misdemeanor does not bear a direct relationship on her fitness or ability to perform the job duties of a School Bus Attendant, nor does it bear an “unreasonable risk.” Ms. Boone has demonstrated that she has learned from her juvenile mistake through her completely clear life of crime. She has maintained numerous jobs of independent responsibility since this conviction over four years ago and have never since been accused of any

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[1] A copy of this decision is available at http://iapps.courts.state.ny.us/lawReporting/Search.

theft. Ms. Boone successfully passed all safety training required to obtain the license (Verified Petition exhibits A-G). The incident that lead to Petitioner's only conviction occurred on May 22, 2010, over four-and-a-half years ago, when Petitioner was only twenty years old. The highest arrest charge and final conviction were the same: a single misdemeanor conviction to petit larceny. While jail time and probation were possible sentencing options for the Judge, Ms. Boone was sentenced merely to ten days of community service and restitution: both of which she completed. Further, Respondents provided no information within the two denial letters as to how they came to this individualized conclusion. In fact, within the denial letter, Respondents state that Petitioner's petit larceny conviction was one in which she abused her "position of authority over a group vulnerable to" her, a fact which not only defies reason, but supports Petitioner's position that no individualized evaluation occurred.

Additionally, after living a life free of criminal involvement, Ms. Boone was granted a permanent Certificate of Relief of Disabilities, creating a presumption of rehabilitation. (Verified Petition exhibit I). Respondents fail to rebut the powerful presumption this Certificate gives Petitioner. Judge Amaker, in granting Ms. Boone a Certificate of Relief of Disabilities, specifically choose to relieve Ms. Boone of "all disabilities and bars to employment, excluding the right to be eligible for public office." *Id*.

Denying Ms. Boone's employment application for a School Bus Attendant position when the "direct relationship" or "unreasonable risk" exceptions do not apply violates not only the spirit but the letter of Correction Law Article 23-A, which was enacted to ensure that persons previously convicted of criminal offenses are considered fairly for employment. For this reason, the Court should annul Respondents' determination and direct Respondents to certify Ms. Boone's employment as a School Bus Attendant.

II. RESPONDENTS DECISION DENYING MS. BOONE'S EMPLOYMENT APPLICATION WAS ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION.

It is well settled that "a court may not substitute its judgment for that of the board of body it reviews unless the decision under review is arbitrary and unreasonable and constitutes and abuse of discretion." (*Pell v. Board of Education*, 34 N.Y.2d 222, 232, 356 NYS2d 833, 840 [Ct App 1974] (emphasis added)). "The arbitrary and capricious test chiefly 'related to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" *Id.* at 231 (citing 1 NY Jur, Administrative Law, § 184, p. 609). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Id.*

As discussed in the previous section, the Respondents' consideration of the eight factors under Correction Law § 753 was affected by an error of law. However, it was also improper and should be overturned because it was arbitrary and capricious and an abuse of discretion. In *Marra v. City of White Planes*, the court reversed the denial of a license to operate a rooming house due to prior convictions[2] because the decision was not supported by the record and was based on speculative inferences. (*Marra v. City of White Planes*, 96 AD2d 17, 19, 456 NYS2d 865, 867 [App Div 2nd Dept 1983]). *Gallo* found the agency's decision arbitrary and capricious when it failed to consider all the factors under Corrections Law § 753, specifically the state's public policy to encourage employment and/or licensure of people with criminal histories, petitioner's Certificate of Relief from Disabilities and his light sentence for assault conviction.

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[2] Peittioner Marra was convicted of disorderly conduct in 1973, burglary in the third degree in 1973 and 1969, attempted extortion and conspiracy in 1961 and other less serious crimes at earlier times. Marra v. City of White Planes, 96 A.D.2d 17, 19, 456 N.Y.S.2d 865, 867 (App. Div. 2nd Dep't 1983).

(*Gallo v. NY State OMRDD*, 38 AD3d 984, 986, 830 N.Y.S. 2d 796, 798 [App Div 3rd Dept 2007]).

Similarly, in *Boatwright*, the court ruled that the agency decision must be vacated as arbitrary and capricious since no analysis of the factors was done. (*Boatwright v. OMRDD*, 10030/07, 2007 NY Slip Op 30911 (u) [Sup Ct NY County 2007]); *see also El v. NY City Dep't of Educ*. No.401571/08, 2009 NY Misc LEXIS 1077, at 5 [Sup Ct NY County 2009] (annulling denial of employment as arbitrary and capricious; while some of the Article 23-A eight factors were mentioned, there was no discussion "of particular facts of [the] case to demonstrate how the various factors were evaluated and what weight each was given")[3]; *Islam v. NY City Taxi and Limousine Comm'n,* No. 111754/08, 2008 NY Slip Op 33326 (u) at 4 [Sup Ct NY County 2008] (annulling agency decision based on commission's "failure to give due consideration and analysis to the factors set out by statute, but instead merely to track and restate their language").[4]

As discussed in the previous section, the Respondents did not properly consider the requisite eight factors under Correction Law § 753. Respondents' determination denying Ms. Boone's employment application is conclusory and provides no factual support or analysis detailing how the decision was reached. The determination mostly tracks the language of the statute with template text, and only briefly mentions specific facts regarding Ms. Boone. Notably, even within those limited facts that allege to be specific to Ms. Boone's Article 23-A determination, some do not actually apply to Ms. Boone. For example, the statement that Ms. Boone's employment in sales at Best Buy was one in which she abused her position of authority over a vulnerable group. (Verified Petition exhibit M). It does not even explain what weight, if any, the fact that the offense was merely a misdemeanor had on the analysis. Other than merely

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[3] A copy of this decision is attached at the back of this memorandum.
[4] A copy of this decision is available at http://iapps.courts.state.ny.us/lawReporting/Search.

stating that it considered the factors, in template language used for DOE employment denials the analysis never reaches the required level of independent analysis.

Because Respondents' decision denying Ms. Boone's employment application has no factual or rational basis, it is arbitrary and capricious and constitutes and abuse of discretion. For this reason, the Court should vacate Respondents' determination and direct Respondents to certify Ms. Boone for employment as a School Bus Attendant.

III. RESPONDENTS DECIISON VIOALTED THE NEW YORK STATE AND NEW YORK CITY HUMAN RIGHTS LAWS.

The New York State Human Rights Law (Executive Law § 296(15)) and New York City Human Rights Law (NYC Admin. Code § 8-107(10)) incorporate the Article 23-A requirements by making it "an unlawful discriminatory practice . . . to deny license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses . . . when such denial is in violation of article twenty-three A of the corrections law." However, the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 of City of New York [2005]) revised and expanded the New York City Human Rights Law ("HRL"). In *Williams v. New York City Housing Authority*, the First Department held that the Restoration Act means that "the City HRL now explicitly requires an independent liberal construction analysis in all circumstances, even where State and federal civil rights laws have comparable language. The independent analysis must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart State or federal civil rights laws." (*William v. New York City Hous. Auth.,* 61 AD3d 62, 66, 872 NYS2d 27, 29 [App Div 1st Dept 2009]).

As discussed above, Respondent's violated Correction Law, Article 23-A by failing to consider all the eight factors under Correction Law § 753 and therefore violated both the New York State and New York City Human Rights laws. Pursuant to *Williams*, the Court must make an independent determination of whether the DOE violated the law and was arbitrary and capricious under the New York City HRL.

CONCLUSION

For the reasons set forth above, the Court should grant Petitioner's requested relief as stated in the Verified Petition and grant any other further relief this Court finds just and proper.

Dated: April 1, 2015
New York, New York

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