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Employment & Government Affairs Law Update

Acosta v. New York City Department of Education

Article 78 Review of Agency Determination Denying Employee Security Clearance for Prior Convictions

Last March, the Court of Appeals rendered an important employment law decision when it affirmed that the New York City Department of Education had acted arbitrarily and capriciously when it denied security clearance for a Not-For-Profit's part-time clerical employee of an entity contracted with the New York City Department of Education, based solely on her criminal record. The employee, a young mother, college graduate, and evidently a model of rehabilitation despite her record, not only lost her job when the City found that she posed an "unreasonable risk," but had to petition the City under Article 78 and was forced to appeal the trial court's decision against her to find relief and win back her job.

This case involved a fact pattern increasingly common in New York. In 1993, when the Petitioner was 17 years old, she was arrested, convicted, and served over three years in prison for first degree robbery. Living up to the rehabilitation model, she then attended, and eventually graduated The City University of New York in 2001, while volunteering with an organization that provided assistance to inmates to develop skills that help them reintegrate to society upon being released. In 2006, she successfully applied for part-time clerical work at the Cooke Center for Learning and Development, a Not-For-Profit that provides pre-school education services in New York City under contract with the Department of Education (DOE), during which application she disclosed her record.

Three months later, the employee's fingerprints were routinely processed for security clearance, triggering a DOE interview for which she submitted a written statement and two letters of references and achievements. One of Petitioner's letters, from the Cooke Center itself, referred to her "model references from past employers" as well as documents evidencing her education, rehabilitation and volunteer work since her conviction, including her diploma and various letters of appreciation. The DOE then informed the Petitioner by mail that it had denied her security clearance as an "unreasonable risk" based on her past criminal conviction, forcing the Cooke Center to terminate her employment.



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The key issue behind the Court of Appeals' decision was the DOE's analysis of why it believed the Petitioner posed such an unreasonable risk. The public policy as codified under the state Corrections Law generally prohibits any public or private employer from denying a license or employment application "by reason of the individual's having been previously convicted of one or more criminal offenses" except where "there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought" or where the applicant poses "an unreasonable risk to property or to the safety of specific individuals or the general public". While the statute sets forth eight factors to assess whether those exceptions apply, the Court of Appeals agreed that the DOE need not issue a written opinion specifically considering those eight factors. However, the Court pointed out that the DOE's basis was entirely divorced from the statutory factors and therefore arbitrary and capricious. For example, while the DOE allowed her to submit references, the DOE "cited" her failure to submit references from prior employers. In fact, the Court explained, the reference from her current employer summarized such references. Because the statutory factors include "[a]ny information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct", which the DOE disregarded, the Court concluded that the DOE had acted arbitrarily.

Ohrenstein & Brown, LLP is ranked among the nation's best law firms and is approximately 30 minutes from Manhattan located in the heart of Long Island. We are a boutique law firm specializing in litigation, insurance, and governmental affairs. As seen in *Forbes* on March 28, 2011, the core of our practice is providing business solutions to businesses of all sizes and types. If you have questions about employment law, or any other question concerning any kind of dispute, insurance issue or interaction with government, please call Michael D. Brown or Matt Bryant to schedule an appointment for a consultation.

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