#412-08 (OAL Decision not yet available online)

OAL DKT. NO. EDU 8469-08
AGENCY DKT. NO. 255-8/08

DAVID TYSON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	
RESPONDENT.	:	

The record of this matter – including the audio recording of proceedings at the Office of Administrative Law (OAL) – and the recommended order of the Administrative Law Judge (ALJ) denying petitioner's motion for emergent relief have been reviewed. Because the ALJ's recommendation – notwithstanding its issuance in the form of an order – effectively resolves the merits of petitioner's appeal, the Commissioner has determined, with the consent of the parties, to review the Order as an Initial Decision pursuant to *N.J.A.C.* 1:1-18.1 *et seq.*, and to consider the exceptions and replies filed by petitioner and respondent, respectively, pursuant to *N.J.A.C.* 1:1-18.4.

In his exceptions, petitioner contends that the ALJ erred in finding that his disqualification from school employment was permanent, when the clear intent of *P.L.* 2007, *c.* 327 – as evidenced by the comments of its legislative sponsor – was to ensure that reformed offenders are not eternally punished for their past offenses. He further contends that the ALJ erred in concluding that *c.* 327 cannot apply to school employment because it is superseded by a specific education law providing for disqualification of convicted offenders, which was not expressly repealed. Petitioner asserts that such

reasoning renders *c.* 327 a nullity since New Jersey has no general disqualification law, instead establishing disqualification through any number of specific statutory provisions which foreclose convicted offenders from various types of employment or licensure – all of which would, following the ALJ's logic, be exempt from application of the new law. Moreover, according to petitioner, *c.* 327 was not intended to repeal *N.J.S.A.* 18A:6-7.1 or any other specific disqualification statute, but rather to establish a uniform mechanism by which persons meeting certain criteria can obtain relief from the bars they establish. (Petitioner's Exceptions at 1-3)[1]

In reply, the Department counters that the Legislature amended *N.J.S.A.* 18A:6-7.1 expressly to eliminate any possibility of a convicted offender obtaining qualification for school employment through a showing of rehabilitation, framing the law so that as long as the underlying conviction exists – as it continues to do under a Certificate of Rehabilitation, unlike an expungement – the offender's disqualification stands as permanent and irrevocable. Petitioner also errs, the Department asserts, in contending that *c.* 327 as interpreted by the ALJ would be inapplicable in any situation where a specific statute exists; rather, according to the Department, the ALJ's reading is consonant with application of the law in those situations where – unlike here – a showing of rehabilitation is permitted and appropriate. Finally, the Department reiterates that *c.* 327 makes no provision for involvement by – or even notice to – the Commissioner or Department of Education when a disqualified individual applies for a Certificate of Rehabilitation, so that finding the law applicable to school employment would have the

[1] Petitioner also objected (at 1) to two factual errors in the ALJ's order; however, these were corrected by the ALJ through an amended order issued on September 2, 2008.

effect of circumventing the carefully constructed safeguards established by the Legislature to ensure the protection of vulnerable school children. (Department's Reply at 1-7)[2]

Upon review, the Commissioner concurs with the ALJ and the Department that *P.L.* 2007, *c.* 327 should not be applied to remove the bars to school employment set forth at *N.J.S.A.* 18A:6-7.1 *et seq.* and its related enactments.

Initially, nothing in the plain language of *c.* 327 expressly requires that the law be applied – nor does anything in its legislative history suggest that the Legislature intended it to apply – to school employment. Neither the statute itself nor any of its attendant legislative statements[3] make reference – directly or indirectly – to school districts or school employment, and, while it is undeniable that school districts are public employers and instrumentalities of the State, they are not – as noted by the Department at hearing before the ALJ – "State agencies" in the ordinary sense in which *c*. 327 appears to use that term. Indeed, had the Legislature intended the law to apply to school employment, it could easily have chosen to make explicit that "State, county or municipal agency" included a local district board of education, or to have used – instead of a specific listing of separate and distinct governmental entities – the generic term employed throughout the statutes ("State or any of its political subdivisions") to encompass the State, counties, municipalities, and school districts, collectively.

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[2] The Department also objected to petitioner's inclusion of three exhibits not introduced before the ALJ: the final page of two chapter laws (*P.L.* 2007, c. 82 and *P.L.* 2007, c. 327), showing their dates of enactment, and a news release from the primary sponsor of the bill (Assembly Bill 3623) that became c. 327. Since this matter did not proceed to full evidentiary hearing and the documents proffered are public records pursuant to *N.J.S.A.* 47:1A-1 et seq. – two of them reaching to factual errors already corrected by the ALJ (see Note 1 above) and the third consistent with the official sponsor statement appended to Assembly Bill 3623 – the Commissioner finds that the Department's objection, although technically correct pursuant to *N.J.A.C.* 1:1-18.4(c), places form over substance; consequently, she takes notice of petitioner's exhibits herein.

[3] See http://www.njleg.state.nj.us/, 2006-07 Legislative Session, Bill Number A3623.

Moreover, since initial adoption of *N.J.S.A.* 18A:6-7.1 *et seq*. in 1986, the Legislature has, without exception, sought to place progressively tighter restrictions on the type of persons who may be found qualified for school employment. At first confined to sexual offenses and child endangerment, the statute was expanded in 1989 to include drug offenses and crimes of violence – and yet again in 1998 to include a wide-ranging host of additional crimes and offenses – while at the same time categorically eliminating an offender's ability to overcome disqualification by a showing of rehabilitation before the Commissioner. Similarly, the scope of individuals reached by the statute has also expanded – most notably in 2002, when the law was extended to monitor persons with pending offenses so as to ensure their disqualification upon conviction, and as recently as May 2007, when it was extended to apply to unpaid volunteers. Under these circumstances – where the Legislature has historically acted to ensure that an ever-greater range of convicted offenders is foreclosed from contact with school children, and where there is no certain indication that in enacting *c*. 327 the Legislature did, in fact, intend to allow these prohibitions to be overcome, without providing for even the onetime safeguard of review of claims of rehabilitation by the State education agency under standards appropriate to the school environment – the Commissioner cannot in good conscience direct that the new law be applied to school employment. [4]

[4] In so holding, the Commissioner recognizes that there is a substantial degree of overlap between crimes for which a Certificate of Rehabilitation cannot be issued (*c.* 327, Section 2) and those disqualifying an offender from school employment. However, the Commissioner stresses that the scope of the two statutes is by no means identical, and notes, for example, that persons convicted of drug offenses would be eligible for certificates unless they had committed crimes of the first degree, as would persons convicted of crimes or offenses of less than the first or second degree in any number of areas where *N.J.S.A.* 18A:6-7.1 *et seq*. provides for disqualification from school employment for a conviction of *any* grade.

Accordingly, the Initial Decision of the OAL upholding the Department's determination of disqualification is adopted for the reasons expressed therein and above, and the petition of appeal is dismissed.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: October 14, 2008
Date of Mailing: October 15, 2008

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.