#82-06 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu06088-03_1.html)

JOSEPH V. CIDONI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENTS.	:	

SYNOPSIS

Former school security officer sought nullification of the Department's determination disqualifying him from school employment pursuant to *N.J.S.A.* 18A:6-7.1, as well as reinstatement to his position with the Board of Education, from which he was terminated as a result of the disqualification. Petitioner contended that the criminal history record check conducted on him in 2003 – when it was discovered that no record existed of a prior check – should have been reviewed under the standards in effect in 1991, when petitioner was first employed by the Board and did everything necessary for the Board to initiate the required check. Petitioner further contended that the Department and Board should not be permitted to invoke *N.J.S.A.* 18A:6-7.1 against him now, after not raising any issue as to his qualification during twelve years of employment.

The ALJ found that the Department acted correctly in its application of *N.J.S.A.* 18A:6-7.1, which on its face requires the more stringent standards enacted in 1998 to apply to all record checks conducted thereafter, apart from certain specified exceptions not applicable to petitioner. The ALJ further found that the Board was required to terminate petitioner's employment upon the Department's finding of disqualification. In considering petitioner's equitable claim, the ALJ found that petitioner did not respond truthfully to job application questions regarding prior convictions. The ALJ thus upheld the actions of the Department and Board and dismissed the Petition of Appeal.

The Commissioner adopted the Initial Decision as the final decision in this matter.

February 27, 2006

OAL DKT. NO. EDU 6088-03
AGENCY DKT. NO. 219-6/03

JOSEPH V. CIDONI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have timely exceptions filed by petitioner and replies thereto by the Department of Education (Department) and the Camden Board of Education (Board).

In his exceptions, petitioner objects to the Administrative Law Judge's (ALJ) failure to consider the Exhibits appended to Petitioner's certification—the authenticity of which was not disputed by respondents—as well as other evidence clearly indicating that petitioner did all that was required of him by way of authorizing a criminal history record check at the time he was first employed by the district. Such evidence, petitioner contends, demonstrates that: petitioner completed the requisite State background check form on September 3, 1991, and the document was notarized by a board employee and placed in petitioner's district personnel file; the document was recorded as received by a board employee on the district's internal personnel form; and petitioner completed a second, local district authorization form when asked a few months

later in January 1992. In other words, petitioner asserts, he acted to provide all that was needed for the Board to initiate the criminal history record check required by *N.J.S.A.* 18A:6-7.1 as it then existed, and had the check been conducted as required, petitioner would have been found qualified for employment because the offense for which he was subsequently disqualified was not disqualifying at that time; he should not then – after twelve years of employment during which the issue of his background was never raised by respondents – have been made to undergo a retroactively applicable check in 2003, by which time the law had changed. (Petitioner's Exceptions at 1-6)

Petitioner also contends that the ALJ misapplied case law relating to the issues in this matter, arguing that *Garvin, supra*, is based upon the entirely different premise of an employee claiming that he should be found qualified because his *offense* occurred prior to the law's effective date, notwithstanding that his *check* was timely conducted after the amended law went into effect; and that *Nunez, supra*, supports rather than undermines petitioner's position, since the two petitioners' situations—both disqualified under the amended law when their checks should have been conducted under the prior law but were not through no fault of their own—are identical and Mr. Nunez was afforded relief despite the fact that he was found to have been untruthful in a subsequent authorization form, based upon the special circumstances of his case. (Petitioner's Exceptions at 6-8)

Finally, petitioner argues that, in any event, such inaccuracies as may appear in his local district employment applications cannot thwart a conclusion that he is entitled to reinstatement. Petitioner stresses that the Board's sole proffered reason for terminating his employment was his disqualification as a result of a State criminal history

record check, and that—prior to post-pleading communications arising within the instant proceeding—misrepresentation in his application forms is nowhere mentioned as a reason for his termination, despite the Board having notice and access to his personnel files. Moreover, petitioner contends, the Board has not demonstrated that petitioner would have been terminated on this basis apart from State disqualification, nor could it do so given the length of time since his conviction, the nature and circumstances of his offense, and his good performance record as a Board employee. (Petitioner's Exceptions at 8-10)

In reply, the Department urges that the ALJ was entirely correct in concluding that petitioner's check was required to be assessed under the law as it existed at the time of the check, regardless of the date of petitioner's offense and regardless of any claim, where no record of a check can be found, that a prior check should have been conducted. The Department further argues that its position is supported, not undermined, by *Nunez, supra*, which held that the Department had applied the statute properly under similar circumstances. With respect to the amount of time petitioner remained employed without question of his criminal record, the Department notes the complete absence of any evidence indicating that a State record check had been initiated prior to 2003, so that petitioner cannot possibly meet his burden of proving intentional misrepresentation or concealment of facts, as would be necessary for him to invoke laches and equitable estoppel against the Department. Finally, the Department contends that the central issue herein is whether petitioner is disqualified from school employment, so that any argument on his part that misrepresentations on job applications are not relevant to termination of his employment should be ignored. (Department's Reply at 1-10)

For its part, the Board replies by emphasizing that the ALJ was correct in finding petitioner disqualified from school employment, and that the *Nunez* decision supports her conclusion in this regard. (Board's Reply at 1-3) To the extent that *Nunez* opens the door to equitable relief, the Board contends that Petitioner is precluded from receiving the benefits of equitable remedies because he deceived the Board about his background from the inception of his employment. (*Id*. at 3-4) The Board urges:

> "He who seeks equity must do equity." *Kingsdorf v. Kingsdorf,* 351 *N.J. Super*. 144, 157 (App. Div. 2002) citing *Morsemere Federal Savings and Loan Association v. Nicolaou,* 206 *N.J. Super.* 637, 645 (App. Div. 1986). The doctrine of unclean hands precludes any equitable remedy on Petitioner's behalf. The unclean hands doctrine is "that a suitor in equity must come into court with clean hands and he must keep them clean after his entry and throughout the proceedings." *Id.* at 156 citing *Borough of Princeton v. Board of Chosen Freeholders*, 169 *N.J.* 135 (2001). Unclean hands "gives expression to the equitable principle that a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit." *Id.* citing *Faustin v. Lewis*, 85 *N.J.* 507, 511 (1981). "Consequently, 'where the bad faith, fraud or unconscionable acts' of a party seeking equitable relief form the basis of his contention, equity may deny him its remedies." *Id*. citing *Rolnick v. Rolnick,* 262 *N.J. Super*. 343 (App. Div. 1993). (*Id*. at 3)

Upon careful review and consideration, the Commissioner adopts the Initial Decision of the ALJ, for the reasons expressed therein as further explicated below.

Initially, the Commissioner observes that, although the ALJ does not cast it in exactly this manner, the fundamental issue here is the same as was addressed in *Nunez, supra*: whether an employee who, at the time of initial employment, did all that was necessary for the employing board of education to initiate the criminal history record check required by *N.J.S.A.* 18A:6-7.1, is entitled – when it is later discovered that no check was ever conducted – to have the resulting "corrective action" check conducted

under the terms of the law as it existed at the time the check should have been conducted rather than under the terms currently in effect.

Here, as in *Nunez*, the Commissioner holds clearly and unequivocally that *any* application for criminal history record check received by the Department must be reviewed and effectuated based upon the standards of law then in effect. *N.J.S.A.* 18A:6-7.1 states on its face that the provisions of *P.L.* 1998, *c*. 31 shall apply to criminal history record checks *conducted* on or after the effective date of that act (June 30, 1998), except in the case of an individual employed by a board of education who is required to undergo a check upon employment with another board of education.[1] In petitioner's case, as in *Nunez*, there is no evidence that any record check application on behalf of petitioner was received by the Department, and consequently no check was conducted prior to the remedial check of 2003; because petitioner's application at that time did not fall within the statutory exception provision of being checked in conjunction with changing employment from one school district to another, the Department acted in the only manner permitted to it by law in applying current standards to the results of petitioner's check and declaring him disqualified from school employment on that basis. Similarly, as a consequence of State disqualification, the respondent Board of Education had no alternative but to terminate petitioner's employment.[2]

However, again as in *Nunez*, the Commissioner must recognize the possibility of an equitable entitlement, demonstrable on appeal, for a petitioner to have his or her "corrective action" check re-evaluated by the Department on a *nunc pro tunc*

[1] Although the Commissioner concurs with petitioner that *Garvin, supra*, is not particularly germane to the pivotal issue herein, it does reinforce the general principle that application of *N.J.S.A.* 18A:6-7.1 is triggered by the date on which a record check is actually conducted, and not by the date of any prior event.

[2] It is noted that petitioner neither requested nor obtained a stay of such disqualification pending appeal pursuant to *N.J.A.C.* 6A:3-1.6.

basis, and, assuming a favorable outcome, to make a claim for reinstatement by the employing board of education. The question on which this matter ultimately turns, then, is whether petitioner has demonstrated such an entitlement.

Upon consideration of the record, the Commissioner concludes that petitioner has not. Although petitioner has borne his burden of demonstrating, through the documentation cited in his briefs and on exception, that he did everything necessary to enable the respondent Board to initiate the requisite criminal record check upon his initial employment in the Fall of 1991, his conduct subsequent to that time militates against a finding that he is entitled to equitable relief.

Specifically, the Commissioner notes that while petitioner truthfully swore on his September 3, 1991 State record check application that he had not been convicted of any of the *enumerated* crimes and offenses, he filled out a district form in conjunction with the same application wherein he responded "No" to the question of whether he had ever been convicted of *any* misdemeanor (Stipulation No. 8, Exhibit 6); he further signed a form in January 1992 authorizing release of criminal background information to the respondent Board, which form stated on its face that failure to disclose information about prior convictions could lead to disqualification from the job or dismissal if hired (Petitioner's Certification, Exhibit C). Subsequently, petitioner filled out a district form in conjunction with his 1994 application for the position of school security guard, wherein he indicated that he had never been convicted of any crime (Stipulation No. 10, Exhibit 7); he completed a similar form in conjunction with his 1997 application for the position of school security guard/law enforcement, wherein he again indicated that he had never been convicted of a crime (Stipulation No. 10, Exhibit 8). Both of these forms

included a statement – signed by petitioner – attesting to the truth of the information set forth therein.

Neither is the Commissioner persuaded by petitioner's argument based upon *Nunez, supra*, the facts of which are distinguishable from those herein. In *Nunez*, the sole "misrepresentation" by petitioner – who had been consistently truthful otherwise and was found to be a credible witness at hearing – was to sign what appeared to be, but was not because of the intervening change in the law, the same form he had already signed a few years previously and was told needed to be redone. Under the specific factual circumstances of that matter, the Commissioner declined to find that this incident alone should foreclose the petitioner from the equitable relief to which he had otherwise demonstrated entitlement. Here, in contrast, the Commissioner is confronted with a petitioner who repeatedly denied ever being convicted of *any* crime or misdemeanor, and whose explanation for his misrepresentation – that he didn't think of his conviction as a crime, but as a "minor licensing infraction" (Petitioner's Certification No. 7) – is belied by the documentation surrounding his arrest and conviction, which attests to his carrying of a concealed, fully loaded handgun for which he had neither a license nor legal authority to so carry under the applicable statute, and to his having been fined $500 and placed on two years' probation. (Stipulation Nos. 4, 5, 6; Exhibits 1, 4)

Finally, the Commissioner is not persuaded by petitioner's argument that any "inaccuracies" on his local district employment application forms are of no import in this matter. Given that petitioner is arguing for equity, it is disingenuous in the extreme for him to ignore the fact that truthful responses on those forms – of which there were three spanning several years beginning with his initial employment, one of them for a bus

aide position and two of them for school security positions – would surely have alerted the Board to a need to make further inquiry into his criminal record, or to verify the results of his State record check, before entrusting him with the safety of school children as a bus aide or security officer.

Accordingly, the Initial Decision of the OAL, affirming petitioner's disqualification from school employment and dismissing the Petition of Appeal, is adopted for the reasons expressed therein and above.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 27, 2006
Date of Mailing: February 27, 2006

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*