New York County Clerk's Index No. 400475/07

Court of Appeals

STATE OF NEW YORK

IN THE MATTER OF THE APPLICATION OF

MADELINE ACOSTA

Petitioner-Appellee,

—against—

THE NEW YORK CITY DEPARTMENT OF EDUCATION; JOEL I. KLEIN AS CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION; LAWRENCE BECKER AS CHIEF EXECUTIVE OF THE DIVISION OF HUMAN RESOURCES OF NEW YORK CITY DEPARTMENT OF EDUCATION; AND COOKE CENTER FOR LEARNING AND DEVELOPMENT

Respondents-Appellants

PROPOSED BRIEF OF *AMICUS CURIAE* THE NEW YORK CITY BAR ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Other Authorities

Statutes

INTERESTS OF THE AMICUS CURIAE

The New York City Bar Association (the "Association"), established in 1870, is a professional association of more than 23,000 attorneys that seeks to promote integrity in the justice system. The Association, by its Administrative Law Committee, Corrections Committee, and Criminal Law Committee, submits this amicus brief to address important legal issues raised in this case.[1]

In recent years the Association has been deeply committed to issues relating to former offenders seeking reentry into society and the workplace and has frequently addressed the legal barriers to their employment. In 2009, the Association published a comprehensive guide to former offenders' employment rights in New York, and in November 2009, the Association's Labor and Employment Law Committee and Corrections Committee presented a panel concerning the hiring of people with criminal records. In March 2008, an Association task force published a study that identified barriers that confront former offenders seeking employment in both the legal sector and the broader workplace. One of the conclusions of the report was that "employment barriers

[1] Committee chairs Adrienne Ward (Administrative Law), Judy Whiting (Corrections), and Karen Newirth (Criminal Law), as well as members Denise Quarles (Administrative Law), Nancy Ludmerer and Paul Montuori (Corrections), and Anna Roberts, Todd Parker, and Karena Rahall (Criminal Law) actively participated in the preparation of this brief.

may be heightened by the failure of employers to understand the laws under which they operate."[2]

The Association believes that in the decade since this Court's last ruling on the obligations of employers under Article 23-A of the New York Correction Law, Arrocha v. Board of Educ., 93 N.Y.2d 361 (1999), several public agencies appear to have strayed from the principles and policies underpinning the law, apparently based on a misunderstanding of Arrocha and its import. The Association's interest is to end this apparent confusion, which has become a barrier to reentry for persons with criminal records. Because this Court has issued only two decisions – Bonacorsa v. Van Lindt, 71 N.Y.2d 605 (1988), and Arrocha – that squarely address the statutory requirements of Article 23-A, this case presents the Court with an important opportunity to clarify the duties of employers and agencies and the rights of individuals under these statutory provisions.

The Association's interest also arises from its work concerning the legal obligations of municipalities and other government entities. The Association's Administrative Law Committee works to promote the integrity of the administrative law process at the federal, state and local levels and, in particular, due process and fairness in administrative proceedings. The substantive and

[2] Legal Employers Taking the Lead: Enhancing Employment Opportunities for the Previously Incarcerated (New York City Bar Association Task Force on Employment Opportunities for the Previously Incarcerated), March 2008, at 8.

procedural deficiencies of the agency decision in this case give this Court the opportunity to clarify the obligations of all agencies that make decisions about the legal rights of New Yorkers.

PRELIMINARY STATEMENT

Article 23-A of the New York Correction Law is a landmark statute that articulates a broad and powerful public policy favoring employment opportunities for individuals who have previously been convicted of one or more criminal offenses. One of the law's principal goals is to reduce recidivism by increasing employment opportunities for persons with criminal records. By its terms, an employer may not deny or terminate employment on the basis of prior criminal convictions except in two narrowly defined circumstances. Some employers, licensing entities, and public agencies in New York, however, have adopted impermissibly broad interpretations of Article 23-A's exceptions that have effectively turned this antidiscrimination provision on its head. They have employed procedures that comply neither with New York administrative law nor the requirements of Article 23-A, frustrating the legislature's aim of eliminating employment discrimination against former offenders. As a result, persons with criminal histories, having been denied employment on the basis of convictions from many years before, must commence Article 78 proceedings to secure the rights guaranteed by the statute – an option they may not even know about and

that, given the limited resources of legal services firms, may not realistically be available.

A number of agencies – including Appellant, The New York City Department of Education (the "DOE") – have attempted to justify their actions by relying on this Court's opinion in Arrocha v. Board of Educ., 93 N.Y.2d 361 (1999). In so doing, however, they misread Arrocha as well as this Court's two decades-old decision in Bonacorsa v. Van Lindt, 71 N.Y.2d 605 (1988). Arrocha does not permit administrative decision-making without a sufficient record at the administrative level or permit a mere parroting of the law's requirements without actually applying them to the applicant in question. Properly understood, Arrocha (like Bonacorsa) affirms an agency's obligations under Article 23-A – obligations that have been repeatedly ignored by Appellant and a number of other public agencies.

This case exemplifies the problem. In Acosta, the DOE relied on only one factor in its letter denying security clearance to Appellee, paying lip service to the others by way of a paragraph that merely recited the statutory requirements. There was no contemporaneous record of any reasoned decision-making at the administrative level, nor was there a single note (much less a transcript) of the applicant's interview with a DOE representative. After the applicant challenged the agency's decision by bringing an Article 78 proceeding, DOE submitted an

answer and supporting affidavit to the trial court that purported to discuss the requisite factors. Notably, none of the information or reasoning in the answer or affidavit was contained in the denial letter. The Appellate Division's opinion correctly recognized that the DOE's denial was "without sound basis in reason" and "without regard to the facts," and was therefore "arbitrary and capricious." Acosta v. N.Y. City Dep't of Educ., 62 A.D.3d 455, 456-57 (1st Dep't 2009) .

This Court should affirm that decision. Further, the Association respectfully submits that, in so doing, the Court should clarify the obligations of agencies in making determinations pursuant to Article 23-A. As set forth in greater detail below, the same deficiencies that render the agency decision here arbitrary and capricious appear in numerous recent decisions of the lower courts annulling determinations by the DOE and other agencies. A review of these decisions shows that, as a result of these agencies' failure to follow this Court's precedents, Article 23-A, which was designed to establish a level playing field for persons with criminal records seeking employment, has instead been regularly circumvented. The DOE and a number of other public agencies have repeatedly compelled job applicants to incur the expense and delay of Article 78 proceedings in order to secure rights to which the applicants are entitled without the necessity of litigation. The result is not only the illegal denial of employment to rehabilitated former offenders, but an increased burden on the courts.

Point I briefly addresses the standards for administrative decision-making, including those that apply to Article 23-A, which are well-settled in this Court and the lower appellate courts. In Point II, we discuss the deficiencies in the administrative process as carried out by the DOE in denying Appellee's security clearance. Point III demonstrates that the DOE's approach is not simply an aberration, but instead reflects a failure to follow Bonacorsa and Arrocha by the DOE and other agencies. Amicus curiae respectfully requests that the Court take the opportunity in this case not simply to affirm the Appellate Division but to clarify that the standards set out in Bonacorsa, Arrocha, and other long-standing administrative law cases require a bona fide consideration and application of all of the requisite Article 23-A factors at the administrative level.

ARGUMENT

I. This Court Has Set Out Standards Governing Both Administrative Decisions Generally and Article 23-A Determinations in Particular

A. Administrative Decisions Must Be Annulled If They Lack a Rational Basis or Are Arbitrary and Capricious

When reviewing administrative decisions in an Article 78 proceeding, courts must set aside an agency action if "there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious.'" Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974) (citations omitted). As this Court has explained, agency action "is arbitrary and capricious when it is taken without

sound basis in reason or regard to the facts." Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009).

This Court has established guidelines that agencies must follow to avoid arbitrary and capricious decision-making under New York administrative law. To begin with, agencies are required to conduct a non-conclusory analysis of the particular facts of a proceeding and rationally apply the relevant laws and regulations to those specific facts. See, e.g., Farina v. State Liquor Auth., 20 N.Y.2d 484, 492-93 (1967). Agencies are not permitted to base their decisions "on speculative inferences unsupported by the record." Sled Hill Cafe, Inc. v. Hostetter, 22 N.Y.2d 607, 612-13 (1968).

Further, when considering requisite factors provided by statute, agencies may consider only those factors expressly authorized by the specific statutory provision; they may not refer to or rely on factors outside the scope of the applicable statute. See King v. New York State Div. of Parole, 83 N.Y.2d 788, 791 (1994) (parole decision was improper where "one of Commissioners considered factors outside the scope of the applicable statute").[3]

Moreover, it is long settled that agencies must provide a written record and an explanation for their decisions sufficient to enable intelligent judicial review of

[3] As this Court's decision in King illustrates, even in the highly deferential context of parole board decisions, agencies are required to adhere to statutory requirements.

administrative actions. See, e.g., Perpente v. Moss, 293 N.Y. 325, 329 (1944).[4] Explanations or rationales supplied after the fact, in the context of litigation, are insufficient to justify agency actions retroactively. See Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 N.Y.2d 753, 759 (1991); see also Patrick J. Borchers & David L. Markell, New York State Administrative Procedure & Practice § 8.6 (1998)(noting that an agency is not "free to invent post hoc rationalizations for its decisions"). That is because "judicial review of an agency decision is limited to the reasons given by the agency in its decision. An agency cannot use its answer in a CPLR Article 78 proceeding as a substitute for providing a rational reason in its determination." Central N.Y. Coach Lines, Inc. v. Larocca, 120 A.D.2d 149, 152 (3d Dep't 1986) (internal citation omitted).

Accordingly, this Court and other New York courts have correctly rejected attempts by agencies to validate their decisions through hindsight. See, e.g., Scherbyn, 77 N.Y.2d at 759 (holding that an "alternative ground for" the agency's decision "belatedly raised by the [agency] . . . may not serve to sustain" the action); Odems v. N.Y. City Dep't of Educ., Index No. 400637/09, at *9 (N.Y. Sup. Ct. Dec. 16, 2009), available at

[4] In addition to "affording a basis for intelligent judicial review," the requirement of a contemporaneous record of the agency's findings "tends to assure considered action by the administrative deciding officer" and to reduce the burden on the courts because the parties are then better equipped to decide "whether or not to seek to reverse [a determination] on rehearing or judicial review." Scudder v. O'Connell, 272 A.D. 251, 253-54 (1st Dep't 1947) (reversing denial of application for liquor license) (quotations and citations omitted).

http://iapps.courts.state.ny.us/webcivil/FCASMain; see also Formica Constr., Inc. v. Mintz, 65 A.D.3d 686, 688 (2d Dep't 2009). Administrative decisions must be explained in writing when they are made, otherwise "the rule that agencies cannot invent new rationales could not be enforced." Borchers & Markell, New York State Administrative Procedure & Practice § 8.6.

B. Article 23-A Requires Agencies to Consider and Apply All Eight Factors in § 753 Before Determining That Employment of a Person With a Criminal Record Creates an "Unreasonable Risk"

Agencies making a determination pursuant to Correction Law § 752 must adhere to the specific requirements of the statute and the decisions of the New York courts that have interpreted it.

Correction Law § 752 expressly prohibits consideration of an individual's criminal convictions in employment decisions unless one of two exceptions applies: either that (1) there is a direct relationship between the criminal offense and the specific license or employment sought; or that (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. By allowing employers to consider an individual's criminal record only as an exception to a general prohibition, Correction Law § 752 makes clear that agencies and other employers have the burden of justifying a denial of employment based on a criminal conviction. See,

e.g., Elmsford Transportation Corp. v. Schuler, 63 A.D.2d 1036, 1037 (3d Dep't 1978) ("[I]t is . . . firmly established that the burden of showing entitlement to an exemption from a statute rests on the party claiming its benefit.") (citing Grace v. New York State Tax Comm'n, 37 N.Y.2d 193 (1975)). Further, employers that deny or terminate employment based on one of the two exceptions may do so only after considering and applying all eight factors set forth in Correction Law § 753.[5] See Correction Law § 753 ("In making a determination pursuant to Section [752], the public agency or private employer shall consider the [eight] factors[.]") (emphasis added); Arrocha, 93 N.Y.2d at 364 (agency "must consider" all eight factors) (citing Correction Law § 753); Bonacorsa, 71 N.Y.2d at 613-14.

In Bonacorsa, this Court provided the analytical framework that agencies must use in deciding whether to deny or terminate employment based on one of the

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[5] The eight factors are:

> (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 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.
>
> Correction Law § 753.

exceptions. There, this Court confirmed Article 23-A's mandate that agencies consider and apply all eight factors before finding that the "unreasonable risk" exception applies. Bonacorsa, 71 N.Y.2d at 613. Plainly, in applying the eight factors, agencies must make an individualized determination as to how each factor relates to the applicant. Id. at 613-14; cf. City of New York v. State Division of Human Rights, 70 N.Y.2d 100, 107 (1987) ("Employment may not be denied based on speculation and mere possibilities, especially when such determination is premised solely on the fact of an applicant's inclusion in a class of persons with a particular disability rather than upon an individualized assessment of the specific individual."). Under Bonacorsa, any policy or procedure that permits the denial of employment to a former offender before all eight factors are considered and applied violates the statute. 71 N.Y.2d at 613.

II. By Dispensing With Article 23-A's Requirements, the DOE's Denial of Appellee's Security Clearance Was Arbitrary and Capricious

A. The DOE Failed to Create Any Administrative Record to Demonstrate That It Met Article 23-A's Requirements or Considered Appellee's Evidence

The DOE's October 12, 2006 letter denying Appellee's security clearance stated that the specific reason for the denial was her prior criminal conviction, in 1993, for two crimes of robbery. (R. 130). The DOE added that, in reaching its decision, it "considered" the factors required pursuant to Article 23-A; however, other than stating that the denial was based on the "serious nature" of the

convictions, the DOE did not explain how any of the other mandatory factors related to Appellee in any respect. (R. 130). The denial letter contained a boilerplate recitation of the other seven factors, but no weighing or application of any of them: no reference to Appellee's voluminous evidence of rehabilitation, no discussion of Appellee's age at the time of the convictions (17), the length of time since the conviction (13 years), the circumstances thereof (an abusive boyfriend who forced her to participate), or even the specific duties of her position, which indisputably involved no direct contact with children. (R. 130; R. 128 (circumstances of Appellee's prior offense); R. 72-126 (Appellee's submitted evidence of rehabilitation)).

To compound this deficiency, the DOE failed to produce in response to the Article 78 petition any record at the administrative level that demonstrated that it considered and applied each factor, as both Article 23-A (as interpreted by this Court) and Article 78 require. Indeed, the DOE failed to produce anything indicating that all eight factors were considered and applied at the administrative level. Although the administrative process included a personal appearance before a DOE representative, no notes or transcript of that interview appear to exist. (R. 279-280).[6] Moreover, it is undisputed that, during her interview, Appellee was told

[6] Not only did the DOE fail to produce any such materials in response to the Article 78 petition, but the Record reflects that also none were produced in response to Appellee's FOIL request. (R. 257; R. 258 (Appellee's request)).

that the DOE employees reviewing her case would not have time to review the stack of documents that she submitted because of other pending matters. (R. 256; R. 276-77 (interviewer not challenging this assertion)). This reflects a patent disregard for Correction Law § 753(1)(g), which mandates that an agency "shall[7] consider . . . [a]ny information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct." Correction Law § 753(1)(g) (emphasis added).

As set forth above, in "the absence of a record of the proceedings and a reasoned decision from the fact finders," the administrative determination must be annulled. Mary M. v. Clark, 460 N.Y.S.2d 424, 427, 430 (Sup. Ct. 1983); see also Rodriguez v. Ward, 64 A.D.2d 792, 793-94 (3d Dep't 1978) (annulling disciplinary actions against prisoners where the Department of Correctional Services failed to provide summaries of relevant interviews or the reasons for the actions).

[7] "The use of the verb 'shall' throughout the pertinent provisions illustrates the mandatory nature of the duties contained therein. The clear import of the words used is one of duty, not discretion." Natural Res. Def. Council v. N.Y. City Dep't of Sanitation, 83 N.Y.2d 215, 220 (1994); see also Galapo v. City of New York, 95 N.Y.2d 568, 581 (2000) ("The language of the section in question is mandatory. '[F]irearms shall not be cocked.' The regulation could not be clearer.").

B. The DOE Cannot Cure the Lack of Any Administrative Record With an Affidavit Created in Response to Litigation

Lacking a contemporaneous record of the basis for the administrative decision, the DOE sought to rely on the affidavit of Andrew Gordon (the "Gordon affidavit"), which was dated six months after the denial letter and was submitted with its Answer in the Article 78 proceeding. (R. 152-56). The Gordon affidavit, which purported to discuss the requisite factors, was admittedly based, in significant part, on secondhand knowledge. (R. 154 (statement that Appellee "was not particularly forthcoming" in her interview); R. 155; see R. 151).[8] Indeed, under long-settled precedent (including as to Article 78 itself), the Gordon affidavit should not even be considered. See supra at 7-9, 12-13.

C. The DOE Cannot Cure Its Failure to Consider Article 23-A's Requirements By Imposing Additional Requirements Outside the Scope of the Statute

The Gordon affidavit suffers from at least two other infirmities. First, the affidavit faults Appellee for not presenting references from previous employers, ignoring the fact these were never requested from her in the first instance. (R. 155). The DOE letter to Appellee, notifying her of her interview, stated: "At the time of the interview, if you wish . . . you may also submit the following: current employment verification (on company letterhead) verifying title/dates of service,

[8] The DOE representative who actually interviewed Appellee submitted no testimony or evidence whatsoever as to the substance of that interview, merely asserting (in a surreply affidavit) that based on the sign-in sheet and his past practice, the interview presumably would have lasted "approximately half an hour." (R. 276-277).

references from friends/neighbors/church . . . ." (R. 57) (emphasis added). The notice made no mention of prior employer recommendations, nor did it state that a failure to produce them could be held against her in any way. (R. 57); see Black v. New York State Office of Mental Retardation & Developmental Disabilities, 858 N.Y.S.2d 859, 863-64 (Sup. Ct. 2008) (annulling determination pursuant to Article 23-A based, inter alia, on petitioner's failure to submit documentation that was never requested); Hollingshed v. New York State Office of Mental Retardation and Developmental Disabilities, No. 6848/07, 2008 N.Y. Misc. LEXIS 1173, at *8 (Sup. Ct. Jan. 31, 2008) (same).

Second, the Gordon affidavit states that the DOE, in denying Appellee's security clearance, took into account that

> "this was [Appellee's] first application for security clearance from the DOE. As a general policy, the DOE takes a closer review of first time applicants with criminal histories who have not worked with children in order to emphasize to the applicant that the DOE takes the safety and welfare of its students very seriously."

(R. 155). This factor – that Appellee was a first-time applicant – is not set forth in Article 23-A, and creates an additional hurdle for former offenders. This is impermissible. See King, 83 N.Y.2d at 791 (annulling parole decision where one of the Commissioners considered factors outside the statutory factors). Further, the DOE's policy of imposing heightened scrutiny on first-time applicants (R. 155), in combination with its policy of precluding Article 23-A applicants from re-applying

for a license or employment for at least twelve months (R. 166), undermines the statute's two primary goals of prohibiting discrimination against persons with prior convictions and avoiding the recidivism associated with joblessness. See infra at 21-22.

III. In Light of the Conduct of the DOE and Other Agencies in This and Other Cases, This Court Should Clarify Agency Obligations Under Article 23-A

A. In Recent Years, the DOE and Other Agencies Have Failed to Follow Bonacorsa and Arrocha, Providing Only a Cursory Recitation of the § 753 Factors Instead of a Reasoned Analysis

In Arrocha, 93 N.Y.2d at 365, this Court upheld the DOE's denial of the petitioner's application for a teaching license. It did so after finding, based on the record below, that the DOE had "considered all eight of the factors set forth in section 753 in reaching its conclusion." Id. The Court's finding that the DOE had considered all eight factors was predicated in large part on the fact that the DOE had considered "the positive references submitted on petitioner's behalf" – "his educational achievements and the presumption that he is rehabilitated," as well as the fact that nine years had elapsed since the petitioner's conviction – yet still concluded that his employment as a teacher in the New York City school system

posed an "unreasonable risk" in light of the "serious nature" of his crime (sale of drugs) and three other negative factors. Id. at 364-66.[9]

In recent years, the DOE and other agencies appear to have impermissibly construed this Court's decision in Arrocha as justification to engage in a superficial treatment of the Correction Law § 753 factors. See infra at 18-20 (discussing cases). Yet in Arrocha, this Court reiterated that agencies "must consider" (emphasis added) all eight of the factors enumerated in Correction Law § 753 before rendering a decision. Id. at 365 (citing Bonacorsa, 71 N.Y.2d at 614, and Correction Law § 753). Indeed, the Court in Arrocha relied heavily on Bonacorsa, including its admonition that prior to making a determination that the employment of a former offender creates an "unreasonable risk," the employer must consider and apply all eight statutory factors. See Bonacorsa, 71 N.Y.2d at 613-14 (cited in Arrocha, 93 N.Y.2d at 364).

Equally significant, the DOE and certain other agencies have engaged in the practice of ignoring the need for a contemporaneous administrative record to support a determination, relying instead solely on an affidavit crafted after litigation has commenced. See, e.g., Formica, 65 A.D.3d at 688; Odems, Index No. 400637/09, at *5. Notably, the propriety of such post hoc justifications was

[9] Unlike Appellee, the petitioner in Arrocha was an adult (36) at the time of the conviction, which was applied and weighed against him.

not an issue addressed in any of the Arrocha decisions.[10] It seems apparent that this Court had no intention to overturn sub silentio such a long-standing principle of administrative law as the need for a contemporaneous record of the agency's decision-making, including its consideration and application of a statutorily mandated balancing test.

Yet, in the last four years alone, at least eight decisions rendered against the DOE or the Office of Mental Retardation and Developmental Disabilities ("OMRDD") based on Article 23-A (including Acosta) have resulted in annulment or remand on the grounds that the agencies either treated the statutory factors in a conclusory manner, failed to consider all eight factors, or sought to rely on an affidavit created in response to litigation rather than an administrative record. See Gallo v. New York State Office of Mental Retardation and Developmental Disabilities, 37 A.D.3d 984, 985-86 (3d Dep't 2007) ("checklist" that counsel claimed "mirror[ed] the statutory factors" insufficient where public policy behind Article 23-A and evidence of rehabilitation were not considered); Davis-Elliot v. N.Y. City Dep't of Educ., No. 7825, 2006 N.Y. App. Div. LEXIS 8654 (1st Dep't July 6, 2006) (affirming in part the decision below, including the lower court's denial of the DOE's motion to dismiss where the DOE failed to properly consider

[10] In Arrocha, the agency submitted contemporaneous notes of the interview with the applicant and other contemporaneous records. (Arrocha Record on Appeal at R. 130-136).

all eight factors); Odems, Index No. 400637/09, at *5, 9 (conclusory denial failed to make "a single specific reference" to applicant's "exemplary qualifications"; the DOE's "after-the-fact explanation in the Gordon affidavit" (prepared by Andrew Gordon, as in the instant proceeding) was "insufficient"); El v. N.Y. City Dep't of Educ., No. 401571/08, 2009 N.Y. Misc. LEXIS 1077, at *5 (Sup. Ct. Apr. 1, 2009) (annulling denial of employment as arbitrary and capricious; while some of the eight factors were mentioned, there was no discussion "of the particular facts of [the] case to demonstrate how the various factors were evaluated and what weight each was given"); Black, 858 N.Y.S.2d at 863-4 (determination based on "general catchall statement" that petitioner would have "unsupervised" contact with persons with developmental disabilities, along with agency's failure to take account of rehabilitation evidence and its penalizing of applicant for not providing information that agency never requested, was arbitrary and capricious); Hollingshed, 2008 N.Y. Misc. LEXIS 1173, at *8-9 (annulling denial because agency failed to consider rehabilitation evidence and penalized applicant for not providing information that agency never requested); Boatwright v. New York State Office of Mental Retardation and Developmental Disabilities, No. 100330/07, 2007 N.Y. Misc. LEXIS 3399, at *5, 8-9 (Sup. Ct. Apr. 18, 2007) (vacating agency decision denying employment based on "cavalier denial" with "no analysis of

factors"; one-paragraph "memo to file" that merely "recite[d], totally tracking the statute, the required factors" was insufficient).

Other agencies have made the same errors. See, e.g., Formica Constr., 65 A.D.3d at 688 (annulling the decision of the New York City Department of Consumer Affairs denying petitioner's application to renew his home improvement license because the agency did not set forth its reasoning until after commencement of the proceeding, and did not demonstrate that it considered all eight statutory factors in Correction Law § 753); Islam v. N.Y. City Taxi and Limousine Comm'n, No. 111754/08, 2008 N.Y. Misc. LEXIS 7491, at *4 (Sup. Ct. Dec. 5, 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"). Significantly, in Islam the court held that the commission should have discussed in its denial letter "how the facts [applicable to petitioner] . . . affect the public safety and welfare," rather than merely sending a "rejection letter [that was] conclusory and [did] not discuss" or apply the facts. Id. at *6-7.

Each of the errors made by the agencies in the above cases – failing to take account of rehabilitation or other evidence that favored the petitioner; engaging in a rote "recitation" of the statutory factors with no individualized analysis; relying solely on a "consideration" of the factors after an Article 78 proceeding was

brought; penalizing the applicant for not submitting evidence that was never requested – is present in the instant proceeding. In effect, the DOE and other government agencies have shifted the burden from the agency to the former offender, requiring the latter to seek relief through Article 78.[11]

B. This Court's Clarification of the Obligations of Agencies Under Article 23-A Would Alleviate Burdens on the Lower Courts and Assure That the Goals of Article 23-A Are Met

Article 23-A was designed to be the most progressive law in the nation with respect to prohibiting employment discrimination against former offenders. Moreover, as Governor Hugh Carey recognized in approving the bill in 1976, Article 23-A was intended not only to provide fair treatment to those who had already paid their debt to society, but also as a practical solution to the problem of recidivism, which causes escalating crime rates and imposes concomitant financial burdens. Legislative History-Bill Jacket, L. 1976, C. 931, S.422-C, Memorandum of Hugh L. Carey; see id. ("Providing a former offender a fair opportunity for a job is . . . one of the surest ways to reduce crime."). This Court has acknowledged this

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[11] Of course, many other former offenders, faced with such a denial, may have lacked the support or the resources to pursue litigation. It is difficult for an individual acting pro se to draft and file a successful Article 78 petition, and the few legal services programs that represent claimants in such proceedings are not staffed or funded to handle the sheer volume of petitions sought to be filed.

Moreover, the inherent difficulty in prevailing in an Article 78 proceeding is well-known: "Professor [William] Fox's 'cardinal rule' of administrative law – '[y]ou win your case at the agency or probably not at all' – is as true in New York as it is anywhere else." Borchers & Markell, New York State Administrative Procedure & Practice § 8.2 (citation omitted).

broader purpose of Article 23-A, noting in Bonacorsa that former offenders' "[f]ailure to find employment not only resulted in personal frustration but also injured society as a whole by contributing to a high rate of recidivism." 71 N.Y.2d at 611.

As a result of inconsistent application by agencies, Article 23-A is failing to achieve its promise. Any law, of course, is only as good as its application; as one commentator recently noted, "[w]ithout the regular application of § 753's balancing test, New York's law ceases to be the distinctive model of progressive legislation to which scholars point as the most effective state statute at increasing employment opportunities for ex-offenders."[12]

This Court should clarify the obligations of agencies under Article 23-A to preserve the plain meaning and manifest purpose of the statute: namely, that a bona fide examination of a former offender's employment application must include a weighing of all of the statutorily-required factors (and not mere boilerplate language that they have been considered) before finding that the employment poses an "unreasonable risk." Further, a contemporaneous record reflecting such analysis must be made at the time of the administrative decision, and must be available to the applicant. This is not too high a burden for agencies to shoulder,

[12] Jocelyn Simonson, Rethinking "Rational Discrimination" Against Ex-Offenders, 13 Geo. J. on Poverty L. & Pol'y 283, 305 (2006).

and it is one that the law clearly requires. Such a clarification will have the added benefit of reducing the burden on the lower courts, which are repeatedly compelled to chastise agencies for engaging in arbitrary and capricious decision-making in this area. The ultimate result will be that more former offenders will be gainfully employed, with the opportunity to continue to rebuild their lives, as the drafters and sponsors of Article 23-A intended.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully submits that this Court should affirm the Appellate Division's decision.

Dated: New York, New York
January 11, 2010

Respectfully submitted,

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