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Re: Automatic termination of teachers with a felony conviction

Dear Chancellor Walcott:

On behalf of the Committee on Corrections of the New York City Bar Association, I write to express the Committee's concerns regarding your May 23, 2011 statement on the removal of teachers who have been convicted of a felony.¹ In the Committee's view, your statement is at odds with the due-process rights afforded teachers under the Regulations of the Commissioner of Education, Chancellor's Regulation C-105 and the public-policy aims of New York Correction Law Article 23-A².

Currently, if a certified teacher is found to have been convicted of a crime, Part 83 of the Regulations of the Commissioner of Education prescribes the steps that must be taken before any teacher is subject to revocation or suspension of his or her teaching certificate. When a teacher's criminal conviction is brought to the attention of the Professional Conduct Officer of the Department of Education, that officer must conduct an investigation to determine whether that conviction evidences a lack of good moral character. It will then issue a report and recommendation to the State Professional Standards and Practices Board for teaching, or to a subcommittee of such board with its determination. If the Board or a subcommittee finds, based on the report and recommendation, that the conviction creates a question as to the teacher's good moral character, the teacher is given the right to a hearing before a hearing officer or, in the alternative, before a hearing officer and a three-member hearing panel. In determining whether a

¹ In testimony before the state Senate Education Committee in Albany on May 23, 2011, you stated, "Any felonies, quite frankly, Senator, should be an agreement for removal . . . plain and simple. We do not want any teacher convicted of a felony in front of our classroom. The rights of adults should never trump the rights of our children. If you've committed a felony, then you should not be in front of the classroom, plain and simple." See <http://www.nysenate.gov/event/2011/may/23/due-process-teacher-discipline-without-delay-reforming-section-3020-education-law->, at 22:38.

² See Correction Law §§ 750-755.

certificate should be revoked or suspended or an application for certification should be denied based on a previous criminal conviction, the hearing officer or panel performs an individualized assessment, applying standards and considering factors set forth in Correction Law Article 23-A. After hearing evidence, the officer or panel issues recommendations. If the recommendation includes a penalty, including suspension or revocation of the teacher's certification, the teacher has the right to take an appeal to the Commissioner of Education.

Importantly, in the above-described process, no conviction in and of itself may create a conclusive presumption that the teacher lacks good moral character. Your statement seems to imply a departure from the process now in place, which ensures that any adverse employment action taken in connection with a teacher's criminal conviction is based on individual circumstances. The existing process minimizes the chance that a teacher will be removed from the classroom arbitrarily.

Further, as you are aware, Chancellor's Regulation C-105 refers to procedures in cases of arrest of employees, persons holding NYC licenses or certificates, or persons providing services to the Department of Education, requiring the employee to inform DOE of the final disposition of the criminal charges. Paragraph 9b states that "it [DOE] is particularly concerned with conduct which indicates that an individual may pose a threat to children or affects job performance." Existing protocol therefore requires consideration of whether the conduct at issue is relevant to safety and job performance.

The Commissioner's Regulations, and Chancellor's Regulation C-105 are consistent with the public policy aims of Article 23-A of the Correction Law. That law was enacted in 1976 with the intent to eliminate the effect of bias against individuals who have been previously convicted of a criminal offense, which prevented them from obtaining employment.³ In 2007, Article 23-A was amended to expand its coverage to protect from unfair discrimination individuals who are employed and whose prior criminal conviction record predates their current employment. Article 23-A requires public agencies and private employers to make an individualized assessment regarding the employment of such individuals: employers must consider eight enumerated factors⁴ to determine whether there is a direct relationship between the employment held and the employee's prior criminal conviction record, or if continuation of the employment would involve an unreasonable risk to property or to safety or welfare of specific individuals or the general public.

Your statement seems to imply that an employee's criminal conviction would be used as a dispositive ground for termination without affording any individualized assessment or due process rights. This undercuts the public-policy purpose of Correction Law Article 23-A, which

³ See Bonacorsa v. Van Lindt, 71 N.Y.2d 605, 611 (1988).

⁴ See Correction Law § 753. These 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/her 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/her behalf, in regard to his/her rehabilitation and good conduct; and (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.

is to protect individuals with prior criminal convictions from such blanket discrimination. Moreover, while such a policy may be facially neutral with regard to race and ethnicity, it may have a disparate impact on African-Americans and Latinos, potentially in violation of Title VII of the Civil Rights Act of 1964.⁵ Such an approach would not serve the purpose of retaining quality teachers because it provides for no meaningful, individualized assessment of whether a criminal conviction has any bearing on the teacher's performance and effectiveness.

For these reasons, should your statement indicate a willingness to explore a new policy regarding teacher convictions, we urge you to provide a meaningful process under which proper consideration may be given in order to retain effective and excellent professionals in the classroom and stay true to the public-policy aims of Correction Law Article 23-A.

Respectfully,



Sara Manaugh
Chair, Corrections Committee

⁵ See EEOC, "Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et. seq.* (1982)" Feb. 4, 1987), *available at* <http://eeoc.gov/policy/docs/convict1.html>.