

GOVERNMENT OF THE DISTRICT OF COLUMBIA
COMMISSION ON HUMAN RIGHTS

In the Matter of:

COMPLAINANT

Appellant,

v.

Docket Number 2019-CBX-00820 (TSC)

D.C. PUBLIC SCHOOLS

Appellee.

REVERSAL ORDER

I. Statement of the Case

This appeal is before the District of Columbia Commission on Human Rights (“Commission”) pursuant to the Criminal Background Checks for the Protection of Children Act of 2004, D.C. CODE §§ 4-1501.01 through 4-1501.11 (the “Act”). Complainant has appealed the determination that, because of his criminal background, he is ineligible for employment with Middle School (“MIDDLE SCHOOL”),¹ which is part of the District of Columbia Public Schools (“DCPS”). The Act requires that employees of a covered child or youth services provider submit to a criminal background screening for any position that involves direct, unsupervised contact with youth. *See* D.C. CODE § 4-1501.03. MIDDLE SCHOOL is a covered child or youth services provider within the meaning of the Act because it is part of a “District government agency providing direct services to children or youth.” *Id.* at § 4-1501.02(3).

¹ [REDACTED]

Complainant has worked at Dunbar High School, which is also part of DCPS, since the 2015-16 school year. DCPS Position Statement at 1 (July 9, 2019) [“DCPS Position Statement”]. He applied to be a physical education teacher at MIDDLE SCHOOL and received an offer of employment for the 2019-20 school year. Letter from MIDDLE SCHOOL Welcome Committee to Complainant (n.d.). Because Complainant’s new position would also involve direct, unsupervised contact with children, Complainant needed to recertify his eligibility to work for DCPS. DCPS Position Statement Exhibit [“Ex.”] 2. As such, Complainant’s application for the position triggered the District’s duty to review his criminal background. D.C. CODE § 4-1501.03.

On May 6, 2019, Complainant completed his recertification application. DCPS Position Statement Ex. 2. On May 24, 2019, DCPS Investigator Tawanda Bates prepared the DCPS Criminal Background Check Decision Notes, DCPS Position Statement Ex. 3, and Criminal Background Check Score Sheet, DCPS Position Statement Ex. 4, for Complainant. The Score Sheet indicates that Complainant was “rejected.” DCPS Position Statement Ex. 4. On June 18, 2019, DCPS sent Complainant a letter indicating he was ineligible to work at DCPS and notifying him of his appeal rights. Letter from Tawanda Bates to Complainant (June 18, 2019).

Complainant submitted his Appeal Questionnaire on June 24, 2019. On June 26, 2019, Administrative Law Judge Toya Carmichael (“Judge Carmichael”) sent a letter to the parties instructing DCPS to submit a position statement in response to Complainant’s appeal. McKinney Initial Letter (June 26, 2019). The letter also stated that Complainant would be allowed to submit supplemental materials to the Commission after receiving DCPS’ position statement if he wished. Complainant Initial Letter (June 26, 2019).

On July 9, 2019, DCPS submitted its response to the June 26, 2019 Initial Letter. In its position statement, DCPS stated it found Complainant ineligible for employment because he had pleaded guilty to a charge of Driving While Impaired. DCPS Position Statement Ex. 5. He received one year of unsupervised probation and a \$200 fine for the plea. DCPS Position Statement Ex. 6. By pleading guilty, Complainant was found in violation of his supervised probation agreement from a 2009 charge. DCPS Exhibit 7 at 1 (showing that one of the conditions of Complainant’s supervised release was to “Commit no offense against the laws of this State or of any other State or the United States”).

On July 10, 2019, Complainant submitted follow-up materials, including a character reference from [REDACTED] High School teacher A [REDACTED]; a photograph of his OSSE teaching certificate, effective May 6, 2019; an intake form from an alcohol counseling center dated March 12, 2018; and a letter from [REDACTED], Dean of the 11th Grade Academy at Dunbar High School, who had observed one of Complainant’s classes.

II. Jurisdiction

The Criminal Background Checks for the Protection of Children Act confers jurisdiction upon the Commission to review the appeal of an applicant or employee who is denied employment because it has been determined that the applicant presents a present danger to children or youth. *See* D.C. CODE § 4-1501.05a(c).

III. Issue Presented

Whether DCPS’ determination that Complainant is unsuitable for employment in a position covered by the Act due to his criminal background is supported by substantial evidence in the record as a whole and is not erroneous as a matter of law.

IV. Findings of Fact

Based upon the evidence presented in the record, the Commission makes the following findings of fact:

1. Complainant was born September 11, 1969 and is 49 years old. DCPS Position Statement Ex. 2.
2. DCPS is a covered child or youth services provider under the Criminal Background Checks Act because it provides services to children and youth. *See* D.C. CODE § 4-1501.02(3).
3. High School is part of DCPS. Agreement between DCPS and Complainant (Oct. 22, 2015).
4. MIDDLE SCHOOL is part of DCPS. *See infra* at 1 n1.
5. Between August 2000 and November 2018, Complainant was arrested for a DUI seven times. DCPS Position Statement Ex. 3.
6. Of those seven arrests, four resulted in a “guilty” disposition; one resulted in a “deferred adjudication” disposition; one resulted in a “probation before judgment” disposition; and one had an unknown disposition. DCPS Position Statement Ex. 3.
7. On November 28, 2009, Complainant was arrested for “DUI 3rd or more - mid value” in the Fort Worth, Texas area. DCPS Position Statement Ex. 1 at 2-3.
8. On June 28, 2010, as part of the disposition of his November 28, 2009 arrest, Complainant was placed on community supervision for ten years. DCPS Position Statement Ex. 7 at 1.

9. Conditions of Complainant's supervised release included "Commit no offense against the laws of this State [Texas] or of any other State or the United States" and "Avoid... consumption of any alcoholic beverage." DCPS Position Statement Ex. 7 at 1.
10. DCPS generally does not hire individuals who are on supervised release. DCPS Position Statement at 2.
11. In 2015, DCPS made an exception to this rule and hired Complainant to work at High School. DCPS Position Statement at 2; Eligibility Letter from DCPS to Complainant (Oct. 22, 2015); Agreement between DCPS and Complainant (Oct. 22, 2015).
12. On December 30, 2015, Complainant requested a probation transfer from Texas to Maryland. DCPS Position Statement Ex. 8 at 2. His request was granted the next day. DCPS Position Statement Ex. 8 at 2.
13. On January 7, 2016, Complainant reported to Senior Agent Melissa Barton in Dundalk, Maryland. DCPS Position Statement Ex. 8 at 1.
14. Complainant worked at High School until the end of the 2018-19 academic year. Letter from Complainant to the Commission on Human Rights (June 19, 2019).
15. On February 2, 2018, Complainant was arrested for "Driving, Attempting to Drive [a Vehicle], While Impaired by Alcohol" in Prince George's County, Maryland. DCPS Position Statement Ex. 5.
16. On November 2, 2018, Complainant pleaded guilty to "Driving, Attempting to Drive [a Vehicle], While Impaired by Alcohol" in the District Court for Prince George's County. DCPS Position Statement Ex. 5.
17. Complainant received a "Probation Before Judgment" disposition for his February 2, 2018 arrest. DCPS Position Statement Ex. 5.

18. Complainant was sentenced to one year of probation, and further proceedings in Complainant's case were deferred. DCPS Position Statement Ex. 6.
19. On June 18, 2019, Complainant received a letter from DCPS indicating he was ineligible to continue working for DCPS. Letter from Tawanda Bates to Complainant (June 18, 2019).
20. On June 24, 2019, Complainant timely filed his appeal with the Commission.

V. Standard of Review

In considering appeals under the Act, the Commission's standard of review is deferential to the determination made by DCHR. *See* D.C. MUN. REGS. tit. 6B, § 438.8(e) (The Commission "shall not set aside the action of DCHR ... if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law."). The Court of Appeals has analyzed this standard of review and stated that "substantial evidence is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Davis-Dodson v. D.C. Dep't of Emp't Servs.*, 697 A.2d 1214, 1218 (D.C. 1997). "[E]vidence is not substantial if it is so 'highly questionable in the light of common experience and knowledge' that it [i]s unworthy of belief." *Metro. Police Dep't v. Baker*, 564 A.2d 1155, 1159-60 (D.C. 1989).

VI. Statement of Law

The Act requires the District to conduct background checks on applicants, employees, and volunteers for positions that involve direct, unsupervised contact with children and youth in covered child or youth services providers. D.C. CODE §4-1501.03. The information obtained from a criminal background check does not create a disqualification or presumption against employment of an applicant unless the District determines that the applicant poses a present

danger to children or youth. *Id.* at § 4-1501.05a(a).² In making this determination, the District must, by statute, consider seven factors:

1. The specific duties and responsibilities necessarily related to the employment sought;
2. The bearing, if any, the criminal offense for which the person was previously convicted will have on his or her fitness or ability to perform one of more of such duties or responsibilities;
3. The time which has elapsed since the occurrence of the criminal offense;
4. The age of the person at the time of the occurrence of the criminal offense;
5. The frequency and seriousness of the criminal offense;
6. Any information produced by the person, or produced on his or her behalf, regarding his or rehabilitation and good conduct since the occurrence of the criminal offense; and
7. The public policy that it is beneficial generally for ex-offenders to obtain employment.

Id.

The Commission has historically read § 4-1501.05(c)(5) of the Act as requiring a conviction for one of the enumerated felonies or their equivalent as the type of criminal offense that could be the basis of a disqualification under the Criminal Background Checks Act.³ This interpretation is based upon the well-established canon of statutory construction *expressio unius est exclusio alterius*. This canon holds that, when a statute presents a listing of certain specific items, it is implied that the items which are not listed are excluded. *See, e.g., Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) (citing *Cont'l Cas. Co. v. United States*, 314 U.S. 527, 533 (1942)).

VII. Discussion

² The Act, however, does proscribe an employee or volunteer from serving in an unsupervised capacity with children and youth if that person “has been convicted of, has pleaded nolo contendere [sic] to, is on probation before judgment or placement of the case on the stet docket because of, or has been found not guilty by reason of insanity for any sexual offense involving a minor.” *Id.* at § 4-1501.05a (b).

³ D.C. CODE § 4-1501.05 (c) (5) reads:

A signed affirmation stating whether or not the applicant, employee, or volunteer has been convicted of a crime, has pleaded nolo contendere [sic], is on probation before judgment or placement of a case upon a stet docket, or has been found not guilty by reason of insanity, for any sexual offenses or intra-family offenses in the District of Columbia or their equivalent in any state or territory, or for any of the following felony offense or their equivalent in another state or territory.

Id. (emphasis added).

MIDDLE SCHOOL is part of DCPS, which is a “District government agency providing direct services to children or youth.” D.C. CODE § 4-1501.02(3). Therefore, the Commission finds that the physical education teacher position at MIDDLE SCHOOL is covered by the Act.

Here, DCPS disqualified Complainant from employment because of his February 2, 2018 arrest. DCPS Position Statement at 1. Complainant did not submit any evidence of rehabilitation directly to DCPS. DCPS Position Statement at 1. Although the disposition of Complainant’s case is currently “Probation Before Judgment,” DCPS found that Complainant’s guilty plea showed he violated the terms of his supervision and that he “is no longer sufficiently rehabilitated to a level where DCPS can be certain that he is not a present danger to DCPS students.” DCPS Position Statement at 2.

However, Driving or Attempting to Drive While Impaired by Alcohol, the offense DCPS cited as the reason Complainant is no longer qualified for employment, is not one of the offenses listed in D.C. CODE § 4-1501.05(c)(5)(A)-(I). In fact, none of the entries in Complainant’s offense history reflect one of the enumerated offenses under the Act. *Id.* Accordingly, based on the Commission’s reading of D.C. CODE § 4-1501.05(c)(5), Complainant remains eligible to work for DCPS. *See* Statement of Law, *infra* at 7.

In applying the seven-factor test outlined in D.C. CODE § 4-1501.02(3), the Commission still finds that Complainant remains eligible to work for DCPS. First, there is no indication that Complainant’s position as a physical education teacher requires him to transport youth in a motor vehicle. Thus, his criminal offenses, while recent, frequent, and very serious, have no bearing on his fitness or ability to perform the duties of his job based on the parties’ filings.⁴ With regards

⁴ For example, Complainant signed an agreement that he would not transport High School students in any personal vehicle. Agreement between DCPS and Complainant (Oct. 22, 2015). However, he did not submit a similar agreement with MS. In addition, Complainant’s welcome letter from MS made no mention of a need to or

to his rehabilitation, Complainant submitted an alcohol/drug intake/evaluation summary form completed by a licensed Clinical Professional Counselor who, after evaluating Complainant, found that he “is a social drinker who does not seem to have significant alcohol use disorder problems which could interfere with his normal life.” Alcohol/Drug Intake/Evaluation Summary (Mar. 12, 2018). From a public policy standpoint, there is no question the District of Columbia strongly supports the creation and availability of employment opportunities for ex-offenders.⁵ Additionally, letters from colleagues and former students indicate that Complainant is a qualified, effective, and well-liked educator who, despite his criminal offenses, has had a positive impact on his students. *See, e.g.*, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In its position statement, DCPS states that Complainant was subject to an internal investigation due to allegations of sexual harassment against him. DCPS Position Statement at 2. Those allegations were found to be substantiated. DCPS Position Statement at 2. The record indicates that no disciplinary action has been taken against Complainant with regards to these findings. DCPS Position Statement at 2 (“... DCPS *is initiating* administrative discipline against Complainant) (emphasis added). Furthermore, on May 23, 2019, Complainant, represented by the Washington Teachers’ Union, filed a grievance against DCPS regarding the handling and findings of the internal investigation. Letter from Jacqueline Pogue Lyons, General Vice

prohibition from transporting students, in a school vehicle or personal vehicle. Letter from Kelly Miller Welcome Committee to Complainant (n.d.) Nor did DCPS submit any evidence that Complainant had signed or would need to sign such an agreement for his new position as a physical education teacher at KMMS.

⁵ *E.g.*, the Mayor’s Office on Returning Citizen Affairs provides guidance and resources on obtaining education, employment, housing, public benefits, and other services. *Mayor’s Office on Returning Citizen Affairs*, D.C. GOV’T, <https://orca.dc.gov/> (last visited Aug. 7, 2019).

President, Washington Teachers' Union, to Kaitlyn Girard, Deputy Chief of Labor Management and Employee Relations, DCPS (May 23, 2019). DCPS acknowledged that this internal case is not grounds to disqualify Complainant under the Criminal Background Check Act. DCPS Position Statement at 2.

DCPS may have strong grounds to take disciplinary action against Complainant, including termination of his employment, based on the sexual harassment claim. However, that determination is outside of the Commission's purview: the offense is not enumerated in the Act, and the case is not yet final. Thus, automatic disqualification of individuals with a case of sexual offenses involving a minor does not apply.

VIII. Conclusions of Law

Based on the foregoing, DCPS' determination that Complainant is unsuitable for employment for the physical education teacher position at MIDDLE SCHOOL is **REVERSED**.

IX. ORDER

For the reasons set forth above, the appeal of Complainant is hereby **GRANTED**.

/s/ Motoko Aizawa
Motoko Aizawa
Commissioner

/s/ Eleanor Collinson
Eleanor Collinson
Commissioner

/s/ Karen Mulhauser
Karen Mulhauser
Commissioner