

396-18R

DAVID KELLY, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 NEW JERSEY STATE DEPARTMENT : DECISION
 OF EDUCATION, CRIMINAL HISTORY :
 REVIEW UNIT and BOARD OF EDUCATION :
 OF THE TOWNSHIP OF LAWRENCE, :
 MERCER COUNTY, :
 :
 RESPONDENTS. :

SYNOPSIS

This matter comes before the Commissioner on remand from the Appellate Division. Petitioner – formerly employed as a teacher in Lawrence Township schools – was disqualified from employment in any New Jersey school or educational facility under the supervision of the Department following his criminal conviction in 2012 in the Bucks County, Pennsylvania, Court of Common Pleas. Petitioner’s conviction stemmed from a criminal complaint that petitioner had fired a rifle toward two teenagers on his property; petitioner contended that the teens were trespassing. The Criminal History Review Unit (CHRU) – in determining that petitioner’s crimes were disqualifying under *N.J.S.A.* 18A:6-7.1 – relied upon two of petitioner’s convictions under Pennsylvania law, one for possession of instruments of a crime and one for recklessly endangering another person. By decision dated August 21, 2014, the Commissioner determined that one of petitioner’s convictions in Pennsylvania was for a crime involving the use or threat of force upon another person, and – since that conviction was for an offense enumerated in *N.J.S.A.* 18A:6-7.1 – petitioner was properly disqualified from teaching. On appeal, the Appellate Division disagreed with the Commissioner’s decision, and remanded the matter for further proceedings. The Commissioner, determining that additional fact-finding was required, transferred the case back to the Office of Administrative Law (OAL).

On remand, the ALJ found, *inter alia*, that: there are no genuine issues of material fact in this case, and the matter is ripe for summary decision; petitioner was convicted in Pennsylvania of possessing instruments of a crime, in violation of 18 Pa.C.S.A. §907(a), which is a crime “substantially equivalent” to *N.J.S.A.* 2C:39-4(a); further, petitioner is also disqualified by *N.J.S.A.* 18A:6-7(1) due to his conviction for recklessly endangering another person. Accordingly, the ALJ granted summary decision to the respondents, and dismissed the petition.

Upon comprehensive review of the record, the Commissioner concurred with the ALJ – for the reasons set forth in the Initial Decision – that the petitioner’s conviction for possessing instruments of crime, in violation of 18 Pa.C.S.A. §907, is an offense substantially equivalent to *N.J.S.A.* 2C:39-4(a); further, the Commissioner also concurred with the ALJ that the petitioner is also disqualified from employment under *N.J.S.A.* 18A:6-7.1 as the result of his conviction for recklessly endangering another person. Accordingly, the Initial Decision of the ALJ was adopted as the final decision in this matter.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
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December 18, 2018

OAL DKT. NO. EDU 12761-16
(ON REMAND EDU 5753-12)
AGENCY DKT. NO. 51-3/12

DAVID KELLY, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 NEW JERSEY STATE DEPARTMENT : DECISION
 OF EDUCATION, CRIMINAL HISTORY :
 REVIEW UNIT and BOARD OF EDUCATION :
 OF THE TOWNSHIP OF LAWRENCE, :
 MERCER COUNTY, :
 :
 RESPONDENTS. :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.¹ Petitioner herein is challenging the determination of the New Jersey State Department of Education, Criminal History Review Unit (CHRU), that he is statutorily disqualified from school employment based upon convictions for certain crimes in the state of Pennsylvania. Petitioner contends that the criminal convictions on which CHRU based its determination – namely, recklessly endangering another person in violation of 18 *Pa.C.S.A.* § 2705 and possessing instruments of crime in violation of 18 *Pa.C.S.A.* § 907 – do not constitute disqualifying convictions under *N.J.S.A.* 18A:6-7.1.

Upon a comprehensive review of the record, the Commissioner concurs with the Administrative Law Judge – for the reasons stated in the Initial Decision – that the petitioner’s conviction for possessing instruments of crime, in violation of *Pa.C.S.A.* § 907, is an offense substantially equivalent to *N.J.S.A.* 2C:39-4(a). As a result, the petitioner is disqualified from

¹ The parties did not file exceptions to the Initial Decision.

employment or service as a teacher in New Jersey. The Commissioner is likewise in accord with the ALJ's determination that the petitioner is also disqualified for employment under *N.J.S.A.* 18A:6-7.1 due to his conviction for recklessly endangering another person. Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: December 18, 2018

Date of Mailing: December 18, 2018

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12761-16
AGENCY DKT. NO. 51-3/12
(ON REMAND OAL DKT. NO. EDU
5753-12)

DAVID KELLY,

Petitioner,

v.

**NEW JERSEY STATE DEPARTMENT
OF EDUCATION, CRIMINAL HISTORY
REVIEW UNIT, AND BOARD OF
EDUCATION OF THE TOWNSHIP OF
LAWRENCE, MERCER COUNTY,**

Respondents.

Edward Cridge, Esq., for petitioner (Mellk O'Neill, attorneys)

Joan Scatton, Deputy Attorney General, for respondent New Jersey Department
of Education (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Casey P. Acker, Esq., for respondent Board of Education of the Township of
Lawrence (Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Casey,
attorneys)

Record Closed: October 26, 2018

Decided: November 16, 2018

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

David Kelly was employed by the Lawrence Township School District as a tenured music teacher. On February 3, 2012, the Criminal History Review Unit (CHRU) of the New Jersey Department of Education notified the superintendent of the Lawrence Township Board of Education that Mr. Kelly had been convicted of a “disqualifying crime or offense” for which he had been arrested on August 22, 2011, and convicted on January 24, 2012, in Bucks County [Pennsylvania] Court of Common Pleas after a trial by jury. As such, Kelly was “permanently disqualified or ineligible for employment . . . with any school or educational facility under the supervision of the Department of Education.” The letter did not identify the statutory basis for the disqualification arising from this conviction: that provision is N.J.S.A. 18A:6-7.1. The letter does not specify the statutory violations of Pennsylvania law of which Mr. Kelly was convicted. Following its receipt of the letter, the Board’s director of personnel notified Kelly by letter dated February 9, 2012, that he was to be terminated as of February 3, 2012. Kelly ultimately filed an appeal of his disqualification with the Department of Education, Bureau of Controversies and Disputes. Following the CHRU’s filing of an answer, the contested case was transferred to the Office of Administrative Law.

While Mr. Kelly was also convicted of other offenses, the CHRU identified the convictions which it relied upon for the decision that Mr. Kelly was disqualified from employment as his convictions for possession of instruments of crime, in violation of 18 Pa. Con. Stat. §907(a) and for recklessly endangering another person, in violation of 18 Pa. Con. Stat. §2705.

After a motion for summary decision was filed, Administrative Law Judge Pat Kerins issued a decision, Kelly v. New Jersey State Department of Education, Criminal History Review Unit and Board of Education of Lawrence, EDU 5753-12, Initial Decision (May 23, 2014), <http://njlaw.rutgers.edu/collections/oal/>, determining that the statutory disqualification did not apply, finding that the convictions of Pennsylvania law were not for offenses “substantially similar” to offenses identified as disqualifying under N.J.S.A. 18A:6-7.1. The Commissioner of Education reviewed the judge’s decision and disagreed, determining that Mr. Kelly’s conviction in violation of 18 Pa. Con. Stat. §2705

was for a crime involving the use or threat of force upon another person, and since that conviction was for an offense enumerated in N.J.S.A. 18A:6-7.1, Kelly was properly disqualified from teaching. The Commissioner declined to determine if Kelly was also disqualified from teaching as a result of his conviction for possessing an instrument of crime. Kelly's appeal was dismissed. Kelly, EDU 5753-12, Comm'r (August 21, 2014), <http://njlaw.rutgers.edu/collections/oal/>.

Both the judge and commissioner's decisions were based upon information gathered from the Affidavit of Probable Cause that was filed in connection with the Pennsylvania investigation. On appeal, the Appellate Division did not agree with the Commissioner's decision, instead remanding the case to the Commissioner for further proceedings. Kelly v. N.J. Dep't of Educ., Criminal History Review Unit and Bd of Educ. of _____ Lawrence, No. A-0679-14T4 (June 29, 2016), <https://njlaw.rutgers.edu/collections/courts/>. As will be discussed, Mr. Kelly contends that the remand was limited to one issue, while the respondents disagree with that assessment. Thus, it is necessary to examine the court's decision.

Based upon the Appellate Division's discussion, the Affidavit of Probable Cause described an incident in which it had been reported that one of two teenaged victims alleged shots had been fired at them as they walked through property later determined to be that of Mr. Kelly. The victims claimed that a white male who appeared to be intoxicated screamed at them, told them that he had guns, and told them where they were allowed to walk. While exiting the property, they heard gunshots and noticed that the man had a rifle. According to the officer reporting to the affiant, the victims later identified Kelly as the person who had "shot at them." The Appellate Division, for reasons to be discussed further below, determined that the Affidavit did not provide the basis for concluding that Kelly had used or threatened to use force when he committed the crime of recklessly endangering another person. The court found the record before the Commissioner could not justify disqualification from teaching under the New Jersey prohibition for this conviction. Additionally, the court noted that the Commissioner had not considered the judge's decision that Kelly's conviction for possessing instruments of crime was not substantially equivalent to one of the enumerated offenses in N.J.S.A. 18A:6-7.1.

The Commissioner, determining that additional fact-finding was required, transferred the case back to the Office of Administrative Law. Following that transfer, in early September 2018, both the CHRU and the Lawrence Board of Education moved for summary decision, as permitted by N.J.A.C. 1:1-12.5. On September 21, 2018, due to Judge Kerins' voluminous calendar, the case was transferred to this administrative law judge, retired on recall. Mr. Kelly responded to the motions on October 10, 2018. Replies were then submitted by the Board and the CHRU and the motion record closed on October 26, 2018.

The Scope of the Remand

In its decision, the Appellate Division, citing N.J.A.C. 1:1-15.5(b), determined that while hearsay evidence is generally admissible in administrative proceedings, nevertheless, "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." The court found that the contents of the affidavit were not supported by legally competent evidence in the proceeding before the ALJ." Kelly, No. A-0679-14T4, <https://njlaw.rutgers.edu/collections/courts/> (citations omitted). More importantly in the court's view, neither the ALJ nor the Commissioner considered the evidence that was actually presented to the jury in the four-day trial that Mr. Kelly underwent in Pennsylvania in January 2012. That evidence, which may or may not have included the "alleged facts in the affidavit", was not part of the record.

Consequently, based on this record, Kelly cannot be disqualified from teaching under N.J.S.A. 18A:6-7.1(c)(1) because of this particular conviction.

As the commissioner did not consider the ALJ's decision that Kelly's conviction for possessing instruments of crime was not substantially equivalent to one of the enumerated offenses in N.J.S.A. 18A:6.7.1, we remand this matter to the commissioner for consideration of this remaining issue.

Mr. Kelly understands the Appellate Division to have only remanded to the Commissioner the issue of his possible disqualification based upon the conviction for

possessing instruments of crime, described in the court's opinion as the "remaining issue." However, while surely it was the manifest intention of the court that the remand address that issue, it is also quite reasonable to understand the decision as not precluding the Commissioner's consideration of a more complete record regarding the issue of possible disqualification due to the conviction for recklessly endangering another. The court identified the flaw in the Commissioner's analysis as regards that question to have been that the Commissioner did not "ascertain if the jury had found Kelly used or threatened to use force", a question for which the court said the Affidavit, with its double hearsay and factual inconsistencies, did not "provide a basis to conclude" whether "Kelly used or threatened to use . . . when he committed the crime of recklessly endangering another." However, the present record on remand, upon which these motions are to be decided, includes the transcript of the Pennsylvania proceedings, including the charge to the jury by Honorable Diane E. Gibbons, Judge of the Court of Common Pleas, Seventh Judicial District, Bucks County, who presided at the trial and sentenced Kelly after the jury returned its verdict on January 27, 2012, as well as the Bucks County Criminal Court Sheets and Bill of Information, part of the Bucks County Criminal Case File for Commonwealth of Pennsylvania v. David Kelly, Case No.: CP-09CR-0006418-2011. Thus, the information that the court determined to be missing from the record when the ALJ and Commissioner first considered the case is now before me. As for the reference to the "remaining issue," that may be understood to address the fact that while the ALJ had ruled on the disqualification for the conviction of possessing instruments of crime, the Commissioner had not, and thus, the question of a disqualification on that ground still awaited a final decision by the Commissioner, one that, once issued, if unfavorable to Kelly, might then be the subject of a further appeal from that final agency action. Considering that the court's criticism on the first issue, the only one the Commissioner ruled on, was aimed at the lack of a sufficient record to properly decide the question, and given the important public interest involved in regard to the authorization of the certificated individual to teach in the public schools, I **CONCLUDE** that the Appellate decision did not intend to foreclose consideration of a more complete record as to both potential grounds for disqualification.

Summary Decision

Summary decision motions are permitted by N.J.A.C. 1:1-12.5. The standard for determining such motions was established by the New Jersey Supreme Court, first in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954), and later refined in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). Under the Brill standard, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." Here, the record of the criminal trial in Pennsylvania, including the testimony, jury charge and verdict, establish the factual grounds for the contention that, as a result of the convictions, Mr. Kelly is statutorily disqualified. The jury's verdict in a trial held before a competent court of a sister state must of course be accepted. I **CONCLUDE** that determination of the legal arguments surrounding the issue of substantial equivalency between New Jersey and Pennsylvania criminal statutes does not require any additional fact finding, except as to the determinations which the jury reached and the directions that were provided to them as the law that they had to apply in determining the issues before them. These facts are spelled out in the trial record and are not in dispute, except as to their legal consequences. Summary decision is the appropriate means for resolving this case

Are the Convictions for Crimes "substantially equivalent" to New Jersey Crimes?

N.J.S.A. 18A:6-7.1 provides

An individual, except as provided in subsection g. of this section, shall be permanently disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction for any crime of the first or second degree; or . . .

c.

(1) A crime involving the use of force or the threat of force to or upon a person or property including, but not limited to, robbery, aggravated assault, stalking, kidnapping, arson, manslaughter and murder; or

(2) A crime as set forth in chapter 39 of Title 2C of the New Jersey Statutes, a third degree crime as set forth in chapter 20 of Title 2C of the New Jersey Statutes, or a crime as listed below:

. . . .

Recklessly endangering another person [N.J.S. 2C:12-2](#)

d. For the purposes of this section, a conviction exists if the individual has at any time been convicted under the laws of this State or under any similar statutes of the United States or any other state for a substantially equivalent crime or other offense.

As the convictions at issue here occurred in Pennsylvania, any disqualification that Mr. Kelly may suffer must result from a determination that one or both of the crimes of which he was convicted of is “substantially equivalent” to those referred to in N.J.S.A. 18A:6-7.1. Mr. Kelly was convicted on two counts of simple assault, 18 Pa. Con. Stat. §2701(a)(3); one count of possessing an instrument of crime, 18 Pa. Con. Stat. §907(a); two counts of recklessly endangering another person, 18 Pa. Con. Stat. §2705; and one count of disorderly conduct, 18 Pa. Con. Stat. §5503(a)(4). As has been noted, the convictions upon which the CHRU determined Mr. Kelly’s disqualification were for reckless endangering another person and possessing an instrument of crime. The convictions for simple assault and disorderly conduct were not deemed disqualifying.

18 Pa. Con Stat. §907(a) provides, “A person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally.” And 18 Pa. Con. Stat. §2705, reads, “A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.”

During his trial in Pennsylvania, Mr. Kelly was confronted with evidence from the two teenagers that he had yelled and cursed at them for being on his property and screamed that he had “guns.” Shortly after this, one of the boys saw him with a gun and a shot was fired. Kelly later admitted to a police officer that he did possess a .22 rifle and that he had fired it after being advised that two individuals, referred by Kelly as teenagers, were on his property. Kelly told the officer that the teenagers said that they were going to fish (they testified that they had fishing poles with them) and he had directed them to a path that was apparently not on his property. However, they crossed

back on to his property and, at that time, he fired the rifle, hitting a saw horse that was about fifteen to twenty feet from the house.³

Judge Gibbons instructed the jury on the elements of simple assault under Pennsylvania law. While the CHRU did not identify conviction for assault as grounds for disqualification, nevertheless, as will be seen, the jury's verdict on this charge provides some context for understanding the import of other charges of which Kelly was convicted. Judge Gibbons stated,

Simple assault. It's actually called simple assault by physical menace. A defendant is guilty of simple assault by physical menace when he attempts, tries, to put another in fear of imminent serious bodily injury by engaging in conduct that is physically menacing or frightening . . . The defendant attempts, meaning he has the specific intent, and takes a substantial step towards putting another person in fear of imminent serious bodily injury . . . The defendant is guilty of simple assault would have to attempt, which means he has a specific intent to put another person in fear, takes a substantial step towards causing that or trying to cause that fear, and the fear he is attempting to cause is put them in fear of imminent serious bodily injury. Serious bodily injury is defined as an injury which would create a substantial risk of death or an injury which could cause serious permanent disfigurement, or an injury which would cause a protracted loss of a bodily member or organ. And the Commonwealth's evidence—what the Commonwealth argued to you was that the defendant created a risk—wanted to put them in fear of serious bodily injury, meaning that they would be shot. That's what their argument was. . . . You could find that the defendant attempted to put another person in fear of imminent serious bodily injury by engaging in conduct, specifically he shot—he intentionally shot the weapon in the direction of the two teenagers. If you find that the defendant did not engage in that conduct, there could be a second mechanism or means by which you could find him guilty of simple assault; And that would be that he handled the weapon, displayed the weapons, brandished the weapon in such a fashion, specifically showing teenagers the weapon in such a manner that was the physically-menacing behavior that he utilized in order to frighten the teenagers. So it could

³ According to the police witness, he first denied having fired the rifle, but then admitted to having done so after the officer explained to him that Kelly's wife had said that she heard the weapon fired. According to the witness, she heard a loud bang.

be either one or both. You may find that he did both, or you may find that he did neither.

[Tr., January 27, 2012, at 575:5 to 577:15.]

On the charge of simple assault, the jury found the defendant guilty. However, the jury did not “find that the defendant intentionally discharged his rifle in the direction of the victims.” Id. at 586:3-9. Judge Gibbons had specifically tailored the jury sheet to obtain the jury’s position on this issue, as she felt that if there was conviction for any of the charges, the answer would be a factor in determining the sentence.

Possessing Instruments of Crime

The CHRU argues that Mr. Kelly’s conviction for possessing instruments of crime, 18 Pa. Con. Stat. §907(a) is similar to N.J.S.A. 2C:39-4, which reads

a. Firearms.

(1) Any person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree.

In State v. Banko, 182 N.J. 44, 56–57 (2004), Justice LaVecchia speaking for the Court, defined the “four elements to this offense”

(1) the object possessed was a firearm; (2) defendant possessed it; (3) the purpose of the possession was to use the firearm against another’s property or person; and (4) defendant intended to use it in a manner that was unlawful.

In State v. Williams, 168 N.J. 323 (2001), the Court explained that the fourth element “is pivotal.” It requires a finding that a defendant armed himself “with the actual purpose of using the weapon in a criminal manner . . . The focus is on the subjective attitude of the accused. The State must prove that the accused intended to use the weapon unlawfully.”

Judge Gibbons charged the Pennsylvania jury regarding the elements of the crime of possessing an instrument of crime, 18 Pa. Con Stat. §907(a).

In order to find the defendant guilty of that crime, you must find that the defendant possessed an instrument of crime with the intent, purpose, to employ it criminally. And in this case to employ it criminally means to commit the crimes of simple assault, terroristic threats, disorderly conduct. So in order to find the defendant guilty of possessing an instrument of crime, you must find they possessed the weapon with the intent to employ it criminally, meaning he intended to commit one of the crimes that commonwealth has argued: Terroristic threats, and simple assault, or disorderly conduct. In this case the possession—The Commonwealth has argued that he was actually in physical possession of the weapon. An instrument of crime is anything made—specifically made for criminal use or any ordinary item that is used for criminal purposes that—so it's being used for a crime, and it's not being used for something that would normally, manifestly be appropriate in terms of its lawful uses. In this particular case the Commonwealth has argued that the criminal instrument was a gun.

[Emphasis added.]

Noting that the defendant had claimed justification, the judge advised the jury that

If you find the defendant shot at the two victims, intentionally discharging his rifle in the direction of the victims there can be no defensive justification. The law does not allow the use of deadly force to prevent an individual from a mere trespass or—onto land. So if you find that the defendant intentionally discharged his rifle in the direction of the victims, that is the use of deadly force; and there—and deadly force cannot be used in order to prevent or terminate a mere trespass onto land.

[Id. at 547:3-548:20.]

As noted, the jury did not find that Kelly had intentionally discharged the weapon in the direction of the victims. That said, the jury found that Kelly was guilty of “possessing instruments of crime.” Id. at 586:17-19. They thus found that he did possess a gun, in this case a .22 rifle, that is, an instrument of crime, that is, at minimum an “ordinary item that is used for criminal purposes.” However, as the Pennsylvania Supreme Court

explained, in Commonwealth v. Hardick, 380 A.2d 1235 (1977), a case in which Hardick was found in a commercial district at night, in possession in his automobile of a suction device, known as a tin-plate, known especially as a tool used for safe cracking, as well as other items useful for such purpose, mere possession of such instruments is not enough to sustain a conviction.

Section 907 of the Crimes Code provides in relevant part:

(a) Criminal instruments generally. -- A person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally.

(c) Definitions. -- As used in this section the following words and phrases shall have the meanings given to them in this subsection:

“Instrument of crime.”

(1) Anything specially made or specially adapted for criminal use; or

(2) anything commonly used for criminal purposes and possessed by the actor under circumstances not manifestly appropriate for lawful uses it may have.

It is clear from this statutory language that two requirements must be met before one can be convicted under this section: (1) possession of criminal instruments by the defendant; and (2) an intent to use the tools for some criminal purpose. The Crimes Code provision is simply a recodification in general terms of the former crime of possessing burglary tools, defined in some detail by the Penal Code of 1939. Thus as appellant correctly asserts, intent to use the instruments in a criminal manner is an independent element of the offense which the Commonwealth must prove. As in any criminal offense, however, intent need not be directly proved, but may be inferred from the circumstances surrounding the incident out of which the charges arise. See e.g., . . . Commonwealth v. Dionisio, 178 Pa.Super. 330, 116 A.2d 109 (1955). In Commonwealth v. Dionisio, supra, the Superior Court stated:

The third element, possession with the intent to use the tools for any of the felonious purposes set forth in the act, cannot be inferred from the mere possession of the tools. The Legislature, in enacting section 904 of the Act of June 24,

1939, P.L. 872, [18 P.S. § 4904](#), omitted that part of the Act of March 14, 1905, P.L. 38, § 1, which provided that the jury could infer such intent from the mere possession of the tools. Such omission by the Legislature is significant and must be construed to indicate that proof of intent requires more than possession. Statutory Construction Act of May 28, 1937, P.L. 1019, Art. IV, § 51, 46 P.S. § 551. However, proof of a general intent is sufficient. It is not necessary to allege or prove an intent to use the tools in a particular place, for a special purpose or in any particular manner. Such general intent need not be proved by direct evidence, but may be indicated by the circumstances surrounding the possession.

[[Commonwealth v. Hardick](#), 380 A.2d at (citations omitted)].⁴

In Kelly's case, in determining to convict Kelly on this charge, the jury not only determined that he possessed the instrument of crime, but also that he did so with the "intent, purpose, to employ it criminally." According to the instructions provided by the Judge, using the weapon criminally meant "to commit one of the crimes that the Commonwealth has argued: 'terroristic threats, and simple assault, or disorderly conduct.'" And the jury did convict Kelly of simple assault and of disorderly conduct. Thus, as the jury necessarily found, Mr. Kelly possessed a firearm and intended, purposely, to employ it in a manner that involved the commission of a crime under Pennsylvania law. And, while the conviction for simple assault is not itself disqualifying, it can hardly be argued that a simple assault is an action that is not directed "against the person." Thus, while, as Kelly emphasizes in his arguments, conviction under the New Jersey offense requires, as [Williams](#) explained, not only possession but that the possession be for an unlawful purpose, the act of which Kelly was convicted under Pennsylvania law was, in the language of the New Jersey statute, possession "of any firearm with a purpose to use it unlawfully against the person . . . of another." Although the jury found that Kelly had not discharged the weapon "in the direction" of the victims, this finding does not lessen the fact that the weapon was possessed and that it was possessed for an "unlawful purpose" or, as the Pennsylvania statute terms it, "unlawfully," that is, to commit crimes, and that it was, as an essential element of the

⁴ Hardick was convicted based upon the totality of circumstances surrounding the possession, for as the Court observed, the tools were all of the type used for breaking safes, they were in a car rather than a home or a shop, the area was commercial, the time of evening was when the businesses were for the most part closed, and the particular nature of one of the tools, that the specialized nature of the tin-plate that was well-known as an uniquely designed tool for such illegal activity.

Pennsylvania as well as the New Jersey offense, used with intent and purpose and that it was so used, “against the person of another,” for as Judge Gibbons explained to the jury, even if they found that he did not discharge it in the direction of the teenagers,

there could be a second mechanism or means by which you could find him guilty of simple assault; and that would be that he handled the weapon, displayed the weapons, brandished the weapon in such a fashion, specifically showing teenagers the weapon in such a manner that was the physically-menacing behavior that he utilized in order to frighten the teenagers.

Counsel for Mr. Kelly argues that Hardick requires only a “general intent” for conviction of §907. In contrast, he claims that the New Jersey statute requires “purpose.” This alleged distinction does not shelter Mr. Kelly. In Hardick, the Pennsylvania Supreme Court explained that if the defendant was alleged to have possessed the tools “with the intent to use the tools for any of the felonious purposes set forth in the act,” that intent could not be inferred merely by possession alone. Hardick, at 475 Pa. 479. The proof of such intent did not have to be specific as to the place, time, exact purpose or manner of that intended use. But the “circumstances surrounding the possession” could themselves provide the evidence that the possession was accompanied by the intent for felonious use. In Kelly’s case, the verbal statements made by Kelly, the presence of the boys on his property without permission, his order for them to get off of the property and his eventual firing of the weapon, albeit not directly at the teenagers, demonstrated the felonious use for which the jury found Kelly possessed the gun. There can be no valid claim that the jury verdict did not determine that Kelly’s possession was, in the words of the New Jersey statute, “with a purpose to use it unlawfully.”

I **CONCLUDE** that Mr. Kelly was convicted of a crime in Pennsylvania, possessing instruments of crime, in violation of 18 Pa. Con Stat. §907(a), which is a crime “substantially equivalent” to N.J.S.A. 2C:39-4(a)(a). As a result, by the terms of N.J.S.A. 18A:6-7.1(d), he is disqualified from employment or service as a teacher in New Jersey.

Recklessly Endangering Another Person

Mr. Kelly's disqualification from employment is established by his conviction for possessing an instrument of crime. Thus, this decision could end at this point. However, N.J.S.A. 18A:6-7.1(c)2 also specifically requires disqualification if one has been convicted of a violation of N.J.S.A. 2C:12-2. The original decisions by Judge Kerins and the Commissioner addressed this possible basis for disqualification as well. As the Appellate decision noted that that decision was made without the benefit of the trial record, examination of that record, now available, allows a determination as to whether the conduct for which Kelly was convicted of "recklessly endangering another person" matches "substantially" with the conduct addressed in N.J.S.A. 2C:12-2. While that statutory provision was repealed effective January 1, 2016, L.2015, c. 186, it was effective at the time of Mr. Kelly's conviction and thus if he was convicted in 2012 of a Pennsylvania crime "substantially equivalent" to the then existing New Jersey offense disqualification would be required. At the time, N.J.S.A. 2C:12-2 addressed acts performed "knowingly or purposely" that resulted in loss or destruction of a vessel; or the manufacture of golf balls containing acid or a corrosive fluid substance, or other actions that, I **FIND**, are positively not of the sort that the evidence demonstrated to the jury Mr. Kelly performed. I **CONCLUDE** that the Pennsylvania crime of "recklessly endangering another person" is not "substantially equivalent" to the then effective N.J.S.A. 2C:12-2. However, there is another portion of N.J.S.A. 18A:6-7.1 that the conduct of which Kelly was convicted of "recklessly endangering another person" might match.

Judge Gibbons charged the jury on the elements of "recklessly endangering another person."

Recklessly endangering another person is committed when you recklessly engage in conduct that places or may place another person in danger of death or serious bodily injury. Again, recklessly endangering another person is you engage in—you recklessly engage in conduct that places—actually places somebody in danger of death or serious bodily injury, or that may place somebody in danger of death or serious

bodily injury . . . Reckless conduct, what it means to act recklessly is that you consciously disregard a substantial and unjustifiable risk that you could cause that injury. Doesn't have to be caused; but there's a risk that somebody could be seriously injured as a result of your conduct; and you consciously disregard that risk, and you engage in that conduct anyway. That's what recklessness means. And the recklessness can't be merely negligence. It's got to be something that shows you that the person that—it was a gross deviation from the conduct a reasonable person would engage under the circumstances.

[Id. at 577:16 to 578:15.]

The jury found that Kelly had recklessly endangered another person. Id. at 586:10–13. Thus, the jury necessarily found that Mr. Kelly's conduct, involving, as the evidence offered at trial demonstrated, the discharge of his weapon out towards the portion of his property away from his house and at least generally towards where the teenagers were or had been, as opposed to firing more directly in the actual direction of the teenagers at the moment he shot, did "consciously disregard a substantial and unjustifiable risk that [he] could cause," "death or serious bodily injury." While such conduct clearly does not match up with the language of N.J.S.A. 2C:12-2, nevertheless, the conduct does fit within the description of conduct in N.J.S.A. 18A:6-7.1 "(1) A crime involving the use of force or the threat of force to or upon a person or property including, but not limited to, robbery, aggravated assault." The conduct, as established by testimony at the trial, involved the threat of force towards the teenagers, a threat that, in a context involving the teenagers apparently encroaching upon Mr. Kelly's property, was first at least implied by the shouted reference to having guns, but more directly in regard to this provision, was then backed up by the discharge of a rifle, a discharge that was not merely up into the air or into the ground, but directed out away from the house and which sent a .22 bullet at least 15–20 feet away from the spot where Kelly stood. At that point the implied threat, not in and of itself a crime, turned into one. While the conduct did not involve such dire matters as robbery or an assault of such severity as to rise to the level of aggravated assault, nevertheless, the discharge of the weapon after the threat was voiced so vigorously, a discharge involving an action that involved "a gross deviation from the conduct a reasonable person would engage under the circumstances," does bring his conduct within the scope of this provision. As for the fact

that the jury acquitted Kelly of Terroristic Threats with Intent to Terrorize Another, 18 Pa. Con. St. §2706, which Kelly notes in quoting Judge Gibbons' comments about continuing bail after the verdict, clearly the judge did not think immediate incarceration was necessary given that Kelly had not shot "at the two children." She certainly felt that had the jury found that he had shot directly at them, that bail would not have been appropriate following conviction. However, that she did not deem it necessary to place him in jail immediately does not detract from the fact that he was convicted of crimes that were, as analyzed above "substantially similar" to New Jersey crimes.

I **CONCLUDE** that Mr. Kelly is also disqualified by N.J.S.A. 18A:6-7(1) due to his conviction for recklessly endangering another person.⁵

ORDER

Based upon the above analysis, summary decision is **GRANTED** to the moving parties. As Mr. Kelly is disqualified, it is hereby **ORDERED** that his appeal from disqualification is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

⁵ Counsel for Kelly contends that "a show of force is not concomitant with a threat of force," and refers to naval exercises in the South China Sea that do not "mean that the Navy is actually threatening to attack China." Without attempting to analyze either the military or diplomatic aspects of such exercises, suffice it to say that such an attempted analogy with the circumstances herein, involving the presence of the teenagers on or just off of Kelly's property, his shouting and announcement that he had "guns", his orders and commands and his eventual discharge of the .22 is completely unpersuasive. The fact that the weapon was not fired directly at the teenagers did not negate his guilt of the Pennsylvania crime and it does not demonstrate any grounds for determining that the Pennsylvania statute under which he was convicted and the New Jersey statute are not "substantially equivalent."

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



November 16, 2018
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency:

Date Mailed to Parties:

mph

EXHIBITS:

For petitioner David Kelly:

None

For respondent N.J. Department of Education, CHRU:

- CHRU-1 Certification of Joan M. Scatton, Deputy Attorney General, dated September 7, 2018 with attachments as follows:
- Exhibit A Letter dated July 13, 2016, from Jennifer Kilough Herrera, Acting Director, Bureau of Controversies and Disputes
- Exhibit B Letter dated August 19, 2016, from Jennifer Kilough Herrera
- Exhibit C Letter dated November 15, 2016, from Kelly Pierce, Deputy Clerk of Courts-Criminal, Court of Common Pleas of Bucks County, with attached Bucks County Criminal Court Sheet (4 pages); Information Commonwealth of Pennsylvania v. David M. Kelly, Docket No: CP-09-CR-0006418-2011.
- Exhibit D Transcripts of proceedings in the case of Commonwealth v. David Kelly, January 24, 25, 26 and 27, 2012, Court of Common Pleas of the Seventh Judicial District, Bucks County, Pennsylvania.

For respondent Board of Education of Lawrence Township:

- BOE-1 Certification of Casey P. Acker, Esq., dated September 10, 2018, with attachments as follows:
- Exhibit A Letter from Jennifer Kilough Herrera, dated August 19, 2016
- Exhibit B Appellate decision in David v. Kelly v. New Jersey Department of Education, Criminal History Review Unit and Board of Education of the Township of Lawrence, Mercer

County, June 29, 2016

Exhibit C Transcript of trial proceedings in Commonwealth v. David Kelly, January 27, 2012, pages 514, 547, 586, 593

Exhibit D Letter from Rebecca Gold, Director of Personnel, to David Kelly, dated February 9, 2012 and Letter from Carl H. Carabelli, Manager, CHRU to Dr. Crystal Lovell, Lawrence Township Board of Education