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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF SPRINGER,

Appellant,

-against-

No. 41

BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondent.

20 Eagle Street
Albany, New York 12207
February 17, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Number 41 on the
2 calendar, Matter of Springer V. Board of Education.
3 Counsel.

4 MS. GONZALEZ: Good afternoon. On behalf
5 of Appellant Grant Springer, Offices of Richard E.
6 Casagrande, I'm Maria Elena Gonzalez, and I would
7 also request to reserve three minutes' time for
8 rebuttal.

9 CHIEF JUDGE DIFIORE: Three?

10 MS. GONZALEZ: Yes.

11 CHIEF JUDGE DIFIORE: You have your three
12 minutes, ma'am.

13 MS. GONZALEZ: This case involves a tenured
14 teacher. Tenured in the specialized tenure area of
15 catering, and this tenured teacher also resigned,
16 while in good standing, no disciplinary charges
17 pending, and he resigned to pursue a career in - - -
18 in another field; shortly thereafter, he returned.

19 This issue before you involves application
20 of a regulation by the Chancellor in - - - of New
21 York, and that is regulation C-205(29), it's page 96
22 of the record.

23 JUDGE ABDUS-SALAAM: Is it your position,
24 counsel, that Mr. Springer did not have to withdraw
25 his resignation before he took the job at the

1 Wadleigh School?

2 MS. GONZALEZ: By virtue - - - yes, in that
3 by virtue of being reinstated, he in fact was no
4 longer resigned. The issue here - - -

5 CHIEF JUDGE DIFIORE: So if we accept - - -
6 if we accept that - - - your argument there, does
7 that just write the language of - - - regarding the
8 written request from the Chancellor's regulation
9 right out of existence?

10 MS. GONZALEZ: No, the written language in
11 Chancellor's 205 refers to not tenure, but rather the
12 reinstatement coming back from resignation. So you
13 have two issues here, one is tenure, and it's
14 unequivocal that a teacher, like Mr. Springer, is in
15 this narrow category and that he shall remain
16 tenured; so his tenured status, he keeps with him.

17 JUDGE GARCIA: Is it your position that - -
18 -

19 CHIEF JUDGE DIFIORE: Must the board accept
20 his - - - his application and rehire him?

21 MS. GONZALEZ: Correct - - - no, they do
22 not have to, but in this case, they did; and as you
23 see in the record, on page 73 and 74, when Mr.
24 Springer applied - - -

25 JUDGE STEIN: What - - -

1 MS. GONZALEZ: - - - for a - - - in the
2 record, pages 73 and 74, it is stated therein that
3 when Mr. Springer, returning from - - - returned and
4 applied for a position under Principal Hall, he made
5 it clear to her that he had been tenured and that he
6 left.

7 JUDGE STEIN: But - - - but - - - getting
8 back to Judge DiFiore's question, even if we accept
9 your - - - your theory here, there is still
10 requirements in order to be re - - - you used the
11 word, I think, reinstated.

12 MS. GONZALEZ: Yes.

13 JUDGE STEIN: Okay - - - to the position.
14 There is still a requirement that you get a approval
15 of the Chancellor, not - - - not of the principal,
16 but approval of the Chancellor, and that you have a
17 medical examination. So if - - - if what you're
18 saying is, is that you can avoid all of that by just
19 simply making an application for a job and accepting
20 the job once it's offered, doesn't that write out
21 that - - - the whole rest of that regulation?

22 MS. GONZALEZ: No.

23 JUDGE STEIN: Why?

24 MS. GONZALEZ: And the reason it doesn't
25 write it out is that the - - - the regulation says,

1 "subject only to medical examination and the approval
2 of the chancellor". When he seeks to be reinstated,
3 at that juncture, the principal doesn't have to
4 rehire him; they could reject him.

5 JUDGE STEIN: But I thought he sought to be
6 reinstated when - - - you're saying he sought to be
7 reinstated when he applied for the job.

8 MS. GONZALEZ: No, what I'm saying is, he
9 has tenure - - -

10 JUDGE STEIN: Right.

11 MS. GONZALEZ: - - - and he applies for a
12 position. He conveys to the principal his file
13 number, his prior employment, so she is aware of his
14 status.

15 JUDGE PIGOTT: Well, you're assuming all of
16 that; I - - -

17 MS. GONZALEZ: That is in the record.

18 JUDGE PIGOTT: I know, what - - - what
19 occurs to me is that if someone leaves a job - - -
20 not your client but a different client, and they say,
21 goodbye, good riddance, we didn't know how to get rid
22 of him, thank God he took a new job; he then knows,
23 or she then knows, that if she reapplies, that
24 Chancellor is not going to approve the - - - their
25 coming back.

1 So to get around that, they go to a school
2 and ask the principal to hire them, and then they say
3 to the Chancellor, too bad, I got - - - I got a job
4 therefore I've written you out of the equation and
5 I'm now tenured over you at this other school.

6 MS. GONZALEZ: Well, in those scenarios,
7 which you bring forth, the chancellor's regulation
8 does, in fact, address exactly those situations. So
9 if you have a tenured teacher who has 3020-a charges
10 pending, who does not - - - who went AWOL, then - - -

11 JUDGE PIGOTT: I'm not suggesting anything
12 like that; I'm simply saying that he was a bad, or
13 she was a bad teacher, and - - -

14 MS. GONZALEZ: Well, one would hope - - -

15 JUDGE PIGOTT: - - - they were willing to
16 suffer that until, you know, the person decided he
17 wanted to go play major league baseball, and then
18 when he doesn't make the team, he comes back and
19 knows that the chancellor is not going to approve
20 him, so what he's going to do is go around that and
21 apply to a school, get a principal to approve it, and
22 then say, I've - - - I've beaten the chancellor.

23 MS. GONZALEZ: Well, that's not as easy as
24 you suggest because in order to apply - - - for
25 example, in this situation he applied for a catering

1 position; he has to have a license, a valid license
2 in catering. That license is valid only because it
3 does have the approval of the chancellor. The
4 principal, doing her due diligence, when this
5 principal hires this person knowing his name, his
6 file number, his -

7 JUDGE PIGOTT: Doesn't that sound like it's
8 everybody's fault but your client's? That, you know,
9 he didn't he - - - didn't make the right application,
10 didn't get the chancellor's approval, didn't get the
11 medical - - - that's - - - that's neither here nor
12 there, and the fact that this principal had
13 everything in front of her, then - - - then all of
14 this doesn't count anymore.

15 MS. GONZALEZ: Well, there is no evidence
16 in the record that he did not get the chancellor's
17 approval.

18 JUDGE FAHEY: Well, you - - - if he did, we
19 wouldn't really be here, I don't think, so - - -

20 MS. GONZALEZ: Correct.

21 JUDGE FAHEY: - - - so what I'm having a
22 hard time with is, it seems to me that there's a
23 distinction between a school principal hiring you for
24 employment as a teacher, and hiring you back as a
25 tenured teacher; those are two different statuses.

1 He was hired as a teacher, he had withdrawn his
2 tenured status and didn't have it when he was
3 retired, or when he was rehired, and I don't see
4 logically how he gets there.

5 The other part I guess I'm struggling with
6 is - - - and I'm going to ask this to both sides - -
7 - is what does the footnote mean to you from the
8 Appellate Division where it says, "We note that
9 neither side has explained why petitioner could not
10 still be restored a tenure if he filed the procedures
11 of the chancellor's regulations."

12 MS. GONZALEZ: Well, I'm going to address
13 the first part of your question.

14 JUDGE FAHEY: Yes.

15 MS. GONZALEZ: And again, in the first part
16 of the question, in this case, it's not - - - when he
17 resigned, he did not lose his tenure; he retained his
18 tenure, and that's clear in subsequent decisions, you
19 have the Folta decision, where you had a teacher who
20 was up on 3020-a charges; while he was waiting for
21 the 3020-a decision to take away his tenure, he
22 resigned.

23 JUDGE PIGOTT: No - - - nobody is
24 challenging the five years - - -

25 MS. GONZALEZ: Okay.

1 JUDGE PIGOTT: - - - are they?

2 MS. GONZALEZ: No.

3 JUDGE PIGOTT: Okay, so you got - - -

4 MS. GONZALEZ: Because it was well within
5 the time period.

6 JUDGE PIGOTT: So you've got tenure.

7 MS. GONZALEZ: Right. So he had his
8 tenure, and by resigning, did not in fact take away
9 his tenure, Folta made - - -

10 JUDGE FAHEY: In the five years, he has a
11 right to reapply.

12 MS. GONZALEZ: No, in - - - in the five
13 year, the statute says that, "A teacher who has
14 attained permanent tenure prior to the date of
15 resignation shall remain tenured." So he - - -

16 JUDGE RIVERA: So your position, whenever
17 he is hired after he resigns, he's always hired as a
18 tenured teacher?

19 MS. GONZALEZ: He retains his tenure, and
20 yes, he is hired, unless if he applies for a
21 different tenure area that he doesn't have a license
22 in, for example; in those cases, he - - - he would be
23 subject to a two-year probationary term.

24 CHIEF JUDGE DIFIORE: So the chancellor
25 would have no authority to review that and decline?

1 MS. GONZALEZ: The chancellor would have
2 authority upon the hiring to stop this person from
3 being hired. The chancellor, at that point, as the
4 statute - - - as the regulation makes clear - - -

5 JUDGE STEIN: How does he get that?

6 MS. GONZALEZ: Well, that - - - that would
7 be the principal - - - and in - - - the principal is
8 a hiring officer, she is the agent of the chancellor,
9 she is the person - - -

10 JUDGE RIVERA: So what are you saying; her
11 burden is to somehow - - - to ask him or - - - or - -
12 - or do what to identify that he's tenured?

13 MS. GONZALEZ: Well, as in this case, he
14 was tenured.

15 JUDGE RIVERA: It was the burden on him to
16 tell her this?

17 MS. GONZALEZ: And he did tell her; that is
18 in the record.

19 JUDGE RIVERA: So he does not have to put
20 it in writing, but he has to tell her?

21 MS. GONZALEZ: He may have put it in
22 writing; the record doesn't have his application for
23 employment, that is not in the record, and that was
24 not rebutted by the Department.

25 JUDGE RIVERA: So really, your - - - your

1 position is she shouldn't even have to do that, she
2 should just assume he's tenured because he is
3 tenured.

4 MS. GONZALEZ: My - - -

5 JUDGE RIVERA: And whenever he's hired,
6 he's tenured.

7 MS. GONZALEZ: My position is if he is
8 hired in the tenure area as it sets forth in the
9 regulation, and he applies for a position, and - - -
10 he retains his tenure. And tenure is - - - you can't
11 just extinguish tenure rights because he failed to
12 fill out a form; which, by the - - -

13 JUDGE PIGOTT: Why did the - - - why did
14 they have this record - - - this form in this
15 procedure, in any event?

16 MS. GONZALEZ: That's - - - that form, if
17 it - - - if we're talking about a specific form;
18 that's not in the regulation.

19 JUDGE PIGOTT: No, no, I'm just - - - why
20 do this at all? In other words, what you're saying
21 is, this is a total waste of time for people to have
22 to go to the chancellor and get a medical exam before
23 going - - - getting rehired, it's superfluous, I can
24 - - - I can just go - - -

25 MS. GONZALEZ: I - - - I am - - -

1 JUDGE PIGOTT: I can just go to a school,
2 get a job, and I'm done, right?

3 MS. GONZALEZ: I am not saying that; I am
4 saying that there is a provision for rehiring or
5 reinstating a teacher.

6 JUDGE PIGOTT: Uh-huh.

7 MS. GONZALEZ: That - - - that happened
8 here; he was, in fact, reinstated and rehired. He
9 wasn't reinstated into a probationary position; he
10 was - - -

11 JUDGE GARCIA: Can ask that another way?
12 Just, I think, what everyone is asking another way:
13 Can you be reinstated without withdrawing your
14 resignation?

15 MS. GONZALEZ: If you're reinstated to a
16 position outside of your tenure area. But the answer
17 - - - I - - - I would say, no. You - - - I mean, can
18 you be reinstating - - - no, you can't.

19 JUDGE GARCIA: Can't.

20 JUDGE FAHEY: See, the problem - - - the
21 problem is, is that the way I see it, I'm not a
22 teacher but, you have to go through a series of steps
23 to become tenured.

24 MS. GONZALEZ: Yes.

25 JUDGE FAHEY: That person is then tenured,

1 the way I read this - - - this reg is saying, you
2 maintain that status as a - - - you don't have to go
3 through the tenure process again, you know, if you're
4 a university publisher, you don't have to go through
5 that again, you're still a tenured teacher; but, you
6 withdrew your tenure - - - you withdrew your - - -
7 your tenure and you resigned at a particular
8 institution, you have to withdraw your resignation of
9 that tenure, nonetheless.

10 You don't have to go through the tenure
11 process again, I agree with you, they don't have to
12 do that, that's - - - you're totally right about
13 that; the question is, is do you have to go through a
14 reg 205(29) process again. And it seems that's a
15 much more difficult question for you then, do you
16 have to go through the process of tenured again,
17 because those are two separate things.

18 MS. GONZALEZ: Well, in - - - and in this
19 case, the - - - the Board of Education and the
20 principal did not have to rehire Mr. Springer, but
21 when she did rehire him, under the same file number,
22 under the same salary, she had before her all of the
23 information, because we submit that given all this
24 information, any applicant would require due
25 diligence on behalf of the principal - - - whether

1 they're tenured or not, whether they worked before -
2 - - and any principal would endeavor to find out as
3 much as possible about a candidate. And in this
4 case, she had that before her.

5 JUDGE ABDUS-SALAAM: Counsel, I'm still
6 confused about why then the regulation requires a
7 written request to the chancellor to withdraw. Is it
8 - - -

9 MS. GONZALEZ: It - - - it doesn't say to
10 the chancellor, it says, "upon written request."

11 JUDGE ABDUS-SALAAM: Right.

12 MS. GONZALEZ: Now, that doesn't specify
13 that it has to be in a particular form that the
14 Department created; that's not here. It says, "Upon
15 written request, he is permitted to withdraw such
16 resignation, subject" - - - not - - - it's not an
17 express requirement; and there's a distinction
18 because if you look at subsection 24, that does
19 require the express approval of the chancellor for
20 teachers who fall under that category. Here, it's
21 "subject only to medical examination and approval of
22 the chancellor."

23 JUDGE RIVERA: Yeah, but he didn't request
24 it to withdraw the resignation, he requested to get
25 hired.

1 MS. GONZALEZ: He applied for a position,
2 so, right.

3 JUDGE RIVERA: Right, he requested to get
4 hired.

5 MS. GONZALEZ: Correct.

6 JUDGE RIVERA: The question is whether or
7 not, along your analysis, when he does that, the only
8 way he can get hired is a tenured faculty member.

9 MS. GONZALEZ: Well, I think that the
10 language addresses situations unlike this as well,
11 which that's why - - - for example, if Mr. Springer
12 had attempted to return to the same school that he
13 had resigned from, so then he wouldn't - - - several
14 months after he had initially resigned, he would
15 submit something in writing to that teacher and say,
16 I want to withdraw the resignation I did two months
17 ago.

18 In this case, we have him, in October,
19 applying for a new permanent position with a new
20 principal. And in this case, with that application,
21 it is, in effect, a withdrawal of his resignation, in
22 the way these regulations are written. Because the
23 regulations don't require that it be done in a
24 specific form, in a specific way.

25 JUDGE STEIN: Well, why wouldn't it say

1 then, instead of just upon written request, upon
2 written request or application for employment.

3 MS. GONZALEZ: Well, it was written this
4 way, and clearly there is - - - you know, it could've
5 been written in - - - in a better way, or maybe more
6 clear, with less run-on sentences, but nonetheless,
7 it is unequivocal by the language, "shall remain
8 tenured"; so the lower court - - - it's not a
9 question of - - -

10 JUDGE GARCIA: But isn't that "shall
11 remain" - - -

12 CHIEF JUDGE DIFIORE: What impact does the
13 companion clause in the collective bargaining
14 agreement have on your argument?

15 MS. GONZALEZ: The collective bargaining
16 agreement refers to the form; it - - - it does refer
17 to the form, but if the form was not used when he was
18 reinstated, the Board of Education didn't file a
19 grievance under the collective bargaining agreement
20 either. So for whatever reason, this principal did
21 not employ their form, and rehired him.

22 CHIEF JUDGE DIFIORE: So are you saying,
23 along to the continuum of being hired, with Mr.
24 Springer at the beginning and the chancellor at the
25 end, the intervening decision and act of the

1 principal trumps the chancellor's authority to - - -
2 an authority to make these the determinations?

3 MS. GONZALEZ: No, I'm not saying that the
4 chancellor's authority was trumped; I'm saying that
5 the principal acted in her capacity as a chancellor's
6 agent when she hired him. The chancellor did not
7 disapprove of this hiring, the chancellor did not say
8 he shouldn't be hired because of any medical reasons,
9 the chancellor - - - he was in fact hired as a
10 catering teacher; he wasn't hired for any other
11 purpose, so - - -

12 JUDGE GARCIA: But isn't the clear language
13 of this provision - - - and you keep pointing to the
14 extent it's clear - - - "Shall remain tenured
15 provided that you are reinstated within five years."

16 MS. GONZALEZ: I don't see the word
17 provided, oh, I mean, yes, he was reinstated - - -
18 correct.

19 JUDGE GARCIA: But you said he couldn't be
20 reinstated unless he withdrew his resignation. I
21 asked before, in order to be reinstated, you have to
22 withdraw your resignation; you said, yes. So how
23 could he have been - - - met the provided-for clause?

24 MS. GONZALEZ: Well, you asked if - - -
25 isn't it - - - must - - - shouldn't he - - - doesn't

1 he have to withdraw his resignation if he's
2 reinstated.

3 JUDGE GARCIA: In order to be reinstated.
4 I- - - I said, is - - - do you have to withdraw your
5 resignation in order to be reinstated, and you said,
6 yes.

7 MS. GONZALEZ: Well, I was unclear on that.
8 By virtue of the fact that you're reinstated, of
9 course you're no longer in a resigned position;
10 you're not - - - you're no longer a resigned (sic)
11 teacher because you're working as a teacher; you're
12 not retired - - -

13 JUDGE GARCIA: So your answer would have
14 been, no; you're saying your answer is no.

15 MS. GONZALEZ: Okay.

16 JUDGE GARCIA: In order to be reinstated,
17 you do not have to formally withdraw your - - - you
18 don't have to withdraw your resignation under the
19 provisions here.

20 MS. GONZALEZ: What I'm saying is - - -

21 JUDGE GARCIA: You can be reinstated.

22 MS. GONZALEZ: - - - you don't have to
23 formally withdraw it on the form that the Department
24 of Education is saying is required. You have - - -
25 withdrawal of resignation could take many forms, and

1 in our position is, when he applied for this same
2 tenure-area position, by virtue of applying as a
3 full-time teacher in the same exact position, with
4 the same file number, and salary from what, months
5 earlier, he had just resigned, that, in effect, is a
6 withdrawal of a resignation.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.
8 Counsel.

9 MR. SLACK: May it please the court, Devon
10 Slack on behalf of respondents.

11 JUDGE STEIN: Can you clear up for us what
12 "shall remain tenured" means?

13 MR. SLACK: The chancellor's regulation,
14 like the CBA, provides a benefit that allows teachers
15 who attain tenure to remain tenured and, provided
16 they comply with a simple procedure, to go back in a
17 position with the benefits of tenure. Mr. Springer
18 seeks the benefit of that regulation having never
19 complied with that procedure.

20 And it's not a procedure that was
21 arbitrarily imposed by the regulation - - - by the
22 chancellor's regulation, it was bargained for by the
23 teacher's union - - -

24 JUDGE ABDUS-SALAAM: And what's the
25 procedure? What - - - your opponent says that you

1 don't have to use a particular form, all you have to
2 do is apply for - - - or a job at a school in the
3 same tenure area that you had previously taught, and
4 if you get hired, that automatically vitiates the
5 resignation.

6 MR. SLACK: The Department of Education
7 does provide a specific form, this isn't a case where
8 the - - - or a teacher made any kind of request in a
9 different form; this is just an application for
10 hiring, as the court, I think, has noted, that
11 there's - - - are different tracks, there are
12 different decisions made by different parties in the
13 decentralized hiring system of the school system; it
14 is the principals of the 1,800 schools that hire
15 teachers. Under the regulation and under the CBA, it
16 is the chancellor who has the authority to approve or
17 disapprove requests to withdraw the resignation of
18 tenure, and - - -

19 JUDGE ABDUS-SALAAM: Well, when this
20 teacher was rehired, or - - - as a licensed, I guess,
21 caterer - - -

22 MR. SLACK: Right.

23 JUDGE ABDUS-SALAAM: - - - or caterer
24 teacher, does that information get transmitted to the
25 chancellor's office? You have a new position here,

1 that's what - - -

2 MR. SLACK: The - - - yeah, eventually
3 hirings are transmitted to the HR department, I
4 believe, but being hired in a position, even if it's
5 in the same tenure area, even if it's in the same
6 license - - - everyone needs a license to teach - - -
7 all these things are just as consistent with being a
8 probationary employee as being a tenured employee.
9 The important notice that the teacher must provide -
10 - -

11 JUDGE RIVERA: So what - - - what's the
12 status he's hired in? If - - - if he's tenured when
13 he walks out the door, and your argument is, okay;
14 short time later, he walked back in the door, he's
15 still wearing - - - he's still got the status, and
16 he's doing the same job, and it's on the same type of
17 line, and it's the same salary, and that means he's
18 come in and he's requested to remain tenured, which
19 she's arguing is constructively a withdrawal of the
20 resignation.

21 Why - - - so what - - - what is the status
22 he comes in on - - - that's her argument; what is
23 your argument; what's the status he's coming in on?

24 MR. SLACK: He came in as a probationary
25 employee because he applied like any other teacher

1 and did not - - -

2 JUDGE RIVERA: How was he alerted to that?

3 MR. SLACK: I'm sorry.

4 JUDGE RIVERA: How was he alerted to the
5 fact that he's on probation?

6 MR. SLACK: By the bargained-for terms by
7 his union, at the - - -

8 JUDGE RIVERA: So you mean it's in the CBA.

9 MR. SLACK: It is in the CBA. It's quoted
10 on, I believe, on page 74 of the record.

11 JUDGE RIVERA: Is there any document that
12 he's filled out when he comes in that indicates that?

13 MR. SLACK: I'm not - - - I'm not aware of
14 any; there's certainly not one in the record.

15 JUDGE RIVERA: But he's got the CBA.

16 MR. SLACK: Correct. He has the advice of
17 his union; the union's Website advises teachers to
18 fill out the Department's form before they seek
19 hiring, and that it must be filled out completely.

20 JUDGE RIVERA: Is the principal the agent
21 of the chancellor for this purpose, which she's
22 argued, that this is the chancellor's agent, so when
23 he - - - when he comes in and he tells her, I want to
24 be hired, and she hires him, that that should be
25 treated as constructive - - - a constructive request

1 to withdraw, and she's the agent for the chancellor
2 on the ground?

3 MR. SLACK: Absolutely not. The principal
4 is the agent only for purposes of hiring, is not
5 authorized to approve or disapprove requests to
6 withdraw a resignation. And there - - -

7 JUDGE ABDUS-SALAAM: Going back to the
8 question I asked a little earlier, counsel, if the
9 information that this teacher has been rehired, and
10 his position is that he's tenured, that information
11 gets transmitted to the chancellor, can the
12 chancellor veto that hiring, and wouldn't that be
13 some indication that he doesn't - - - he hasn't
14 withdrawn his resignation?

15 MR. SLACK: The critical information that
16 would never be transmitted unless there is some clear
17 request, such as in the form that the DOE uses, is
18 that the teacher is seeking to be reinstated to the
19 tenured position.

20 There are situations where teachers leave a
21 position then come back - - - I think Your Honor was
22 describing some of these; short of - - - short of
23 residing under the cloud of formal disciplinary
24 charges, there are teachers who have performance
25 problems, there are teachers who have disciplinary

1 issues that don't go to a hearing, and they resign,
2 they disappear for a while, and then they go to a
3 different school, and then they try and come in.

4 Unless you're putting the chancellor and
5 the central administration on notice that you are
6 seeking to be restored to that position, there is no
7 reason for them to think that you are anything other
8 than a probationary employee.

9 JUDGE GARCIA: Counsel, I'm sorry, I - - -

10 JUDGE RIVERA: So the application to be
11 rehired, there is an application to be rehired?

12 MR. SLACK: There is.

13 JUDGE RIVERA: Okay. So nothing - - -
14 there's nothing on that application that asks whether
15 you were previously employed, whether you had tenure
16 in the past; none of those questions exist?

17 MR. SLACK: I don't - - - I don't believe
18 it says tenured, it does have employment history. But
19 again, it's conceded that teachers previously tenured
20 can come back in nontenured positions.

21 JUDGE RIVERA: Okay.

22 MR. SLACK: You need an unequivocal - - -

23 JUDGE RIVERA: But in any event, let me - - -
24 - let me have - - - lets - - - let's go for the
25 moment with - - - with the request to the principal

1 satisfies the written - - - just for one moment, bear
2 with me. Did he - - - did he ever satisfy the
3 medical examination requirement?

4 MR. SLACK: My understanding is that - - -
5 that's not something that's enforced.

6 JUDGE RIVERA: It's not enforced.

7 MR. SLACK: I don't believe it's - - - it's
8 been used regularly; I think it has its origins in
9 concerns about tuberculosis.

10 JUDGE RIVERA: Okay.

11 MR. SLACK: But I'm not - - - but I'm not
12 positive.

13 JUDGE RIVERA: Uh-huh.

14 MR. SLACK: But there's no issue here
15 whether or not he complied with the medical
16 examination.

17 JUDGE GARCIA: Counsel, the way I read the
18 provision, you know, it's not, "Shall remain tenured
19 provided that upon written request", it's, "Shall
20 remain tenured provided that you are reinstated
21 within five years." So my question is - - - and
22 that's the way it's written, I think pretty clearly;
23 my question is, can you be reinstated without
24 following that procedure, about getting the sign-off
25 and then applying that (indiscernible)?

1 MR. SLACK: No, you can be - - - you can be
2 hired - - -

3 JUDGE GARCIA: Right.

4 MR. SLACK: And you can be hired by the
5 same employer.

6 JUDGE GARCIA: "Hired" different then
7 "reinstated".

8 MR. SLACK: It is.

9 JUDGE GARCIA: And where do you find
10 support for that?

11 MR. SLACK: There is - - - there is a
12 procedure prescribed in that rule that says, to be
13 reinstated you must - - - well, you must withdraw
14 your resignation in those years.

15 Absent that, there's absolutely no meaning
16 to the written request and central approval
17 requirement; it would just be rehiring, there would
18 be no need for the regulation at all; there would be
19 no need for there to be a bargained-for term
20 negotiated between the teacher's union and the DOE.

21 JUDGE GARCIA: But you - - - originally, I
22 had some concern that really what you're asking for
23 us is to switch the "provided for" up to the "and";
24 so after, "Shall remain tenured", it would say,
25 "Provided that upon written request" - - - that would

1 make it clearer, right - - - and then you would have
2 the "and" after where you have the provided-for
3 clause, now, so it would be getting this and getting
4 this and then, you know, you - - -

5 MR. SLACK: They - - - Your Honor, if I was
6 writing this from scratch, I probably would not write
7 it this way.

8 JUDGE GARCIA: You and me both, but - - -

9 MR. SLACK: But the only way it has any
10 meaning is the way the DOE has described it. Under
11 petitioner's theory, it has no meaning.

12 JUDGE GARCIA: But I think then you have to
13 read "reinstatement" as something other than
14 "hiring".

15 MR. SLACK: Correct.

16 JUDGE GARCIA: You have to be reading
17 "reinstatement" as "withdrawing your resignation"
18 under this procedure.

19 MR. SLACK: Correct. And - - - and since
20 it is - - - there's no dispute that there are
21 teachers who were previously tenured that are hired,
22 but not reinstated, because they can either go in a
23 different tenure area, or some might make their
24 application more favorable by not seeking to be
25 immediately tenured. If that's possible, then the

1 only way this makes any sense is to construe it that
2 way.

3 JUDGE RIVERA: So what - - - what's the
4 benefit of carrying this status; the possibility that
5 you might get hired tenured? I mean, what's - - -
6 what's the incentive on the Board of Ed's side to
7 hire you tenured?

8 MR. SLACK: The - - - well - - - well, I
9 mean, tenure is a reflection in general.

10 JUDGE RIVERA: I mean, I assume - - - I
11 assume part - - - well, maybe I'm wrong, that - - -
12 that this is purely discretionary; the chancellor
13 doesn't need a clause, although maybe that is what
14 the chancellor relies on, or does the CBA explain the
15 basis for a chancellor's denial?

16 MR. SLACK: I don't - - - I would not - - -
17 I would not go as far as to say it's purely
18 discretionary; if you look at 28, which applies to
19 all teachers, it does use the word discretion. Here,
20 it says subject to - - -

21 JUDGE RIVERA: Uh-huh.

22 MR. SLACK: It's - - - it was conceded by
23 petitioner below that there is some discretion there;
24 I don't - - - I don't know what the limits are, but
25 you must have an opportunity to exercise it.

1 JUDGE PIGOTT: What are the odds - - -

2 JUDGE RIVERA: Well - - - I'm sorry, so
3 let's get back to what's the value to the tenure
4 then.

5 MR. SLACK: To the - - - to the teacher?

6 JUDGE RIVERA: If it's subject to - - -
7 it's subject - - - if we read this the way you
8 suggest, what's the value?

9 MR. SLACK: The value to the DOE?

10 JUDGE RIVERA: If what you're saying, when
11 you're hired, that doesn't mean you're hired with
12 that tenure, you have to get - - - you have to - - -

13 MR. SLACK: Right.

14 JUDGE RIVERA: - - - request the
15 withdrawal, it has to be accepted.

16 MR. SLACK: Sure.

17 JUDGE RIVERA: And then - - - then you can
18 come in as tenured.

19 MR. SLACK: Okay. Well, let me address it
20 by the benefit of teacher and - - - and to the DOE.

21 JUDGE RIVERA: Yes, yes.

22 MR. SLACK: So for the teacher, you get the
23 benefit of coming back tenured. There's no - - -
24 there is no requirement that the DOE give this
25 benefit to teachers; they could say, once you

1 resigned, you're done. But they - - -

2 JUDGE RIVERA: Yeah, but that was my
3 question about whether or not you need cause to deny.

4 MR. SLACK: To deny?

5 JUDGE RIVERA: Right?

6 MR. SLACK: Right.

7 JUDGE RIVERA: Is that right?

8 MR. SLACK: Yeah, and then they bargain for
9 it, so that's - - - that's the benefit to them, they
10 come back - - -

11 JUDGE RIVERA: You're bargaining for the
12 possibility that the chancellor will permit you to
13 come in.

14 MR. SLACK: At the - - - at a minimum, I
15 don't know what the extent of the det - - - the
16 discretion is.

17 JUDGE PIGOTT: One - - - one of the
18 allegations is that - - - that he did fill out the
19 form and he submitted to - - - submitted it to you in
20 April of 2012, and you said it was too late.

21 MR. SLACK: That's correct, Your Honor.

22 JUDGE PIGOTT: I thought he had five years.

23 MR. SLACK: So the DOE's reading of the - -
24 - of the - - - both the CBA and the chancellor's
25 regulation, also incidentally, the union's reading of

1 this on their Web site, is that you must apply the
2 September before the school year in which you are
3 seeking to be reinstated to that tenured position.

4 Mr. Springer applied in April 2012, it was
5 denied as an untimely, he didn't grieve it, he had to
6 grieve it, he also didn't preserve it because he
7 didn't raise that argument at the Supreme Court, and
8 in fact he disclaimed it, and he didn't present it to
9 the Appellate Division.

10 JUDGE RIVERA: How - - - how do you get
11 that interpretation from this language; where does it
12 say that? "The opening of - - - of school in
13 September" - - -

14 MR. SLACK: "Before the opening of schools,
15 September next."

16 JUDGE RIVERA: - - - "next following five
17 years."

18 MR. SLACK: That - - - that - - - that is
19 the language - - -

20 JUDGE RIVERA: I said - - - I'm sorry.

21 MR. SLACK: That's the language that the
22 DOE really relies on is that the - - -

23 JUDGE RIVERA: Uh-huh.

24 MR. SLACK: That the application must come,
25 or the written request of reinstatement has to come

1 before September next, within five years.

2 JUDGE RIVERA: So it's the word next that
3 makes all the difference; is that what you're saying?

4 MR. SLACK: I - - - I believe so. Now, had
5 Mr. Springer grieved his request, he would have had
6 an opportunity to litigate that, had he brought it
7 between before - - -

8 JUDGE RIVERA: So what does "following five
9 years", what is that - - - I'm still not following,
10 and I know your light has gone ~~up~~out, so we'll just
11 make it quick. "Opening of school year in September
12 next following five years after". Because you've
13 kind of taken "next" out of the sentence.

14 MR. SLACK: So the - - - yeah, the way - -
15 - the way the DOE has read it, the way we read it is
16 that you can do it throughout the five years, just
17 each time, your request has to come before that
18 September.

19 JUDGE RIVERA: So if you do it in - - -
20 okay, so if you do it in April, that's not good, so
21 you'd have to do it again or can you treat it as good
22 for the following year?

23 MR. SLACK: I think - - - I actually think
24 this is the question that the Appellate Division was
25 asking in its footnote, was why couldn't Mr. Springer

1 do a new request, and - - -

2 JUDGE FAHEY: Well it goes to - - - and
3 also - - - well, I'm going to ask the other side
4 about the timeliness issue, so - - - but was that
5 issue, to your knowledge, raised in - - - before the
6 Appellate Division, the timeliness issue that Judge
7 Pigott just raised? In other words, if I - - -

8 MR. SLACK: No, the April 2012 request was
9 not raised in the Appellate Division until the motion
10 for reargument.

11 JUDGE FAHEY: I see.

12 MR. SLACK: It was not raised in the
13 merits; it was affirmably disclaimed in the Supreme
14 Court.

15 JUDGE FAHEY: Okay. Thank you.

16 MR. SLACK: I - - - I would just mention
17 briefly that we are now outside the five years so we
18 don't have the benefit about knowing what would
19 happen had he submitted a request that time.

20 Thank you, Your Honors.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MS. GONZALEZ: He resigned in January of
23 2011, so our reading is that according to
24 chancellor's regulation, clearly it says, "As long as
25 the reinstatement is made on or before the opening of

1 school in September next following five years after
2 the effect of" - - -

3 JUDGE FAHEY: That's - - - that's the
4 timeliness issue; the problem is - - - and I thought
5 about that, and I looked at your original petition,
6 and it's mentioned in paragraph 26 of the petition,
7 but it isn't - - - it wasn't argued below in your
8 brief before us, you seemed to totally abandon that
9 argument, and you're really arguing that he had
10 tenure when he got employment, not that he's entitled
11 to go and apply for tenure, or for reinstatement of
12 tenure, or to withdraw as a resignation, would be the
13 right language.

14 MS. GONZALEZ: Well - - -

15 JUDGE FAHEY: That's not what you're
16 arguing; what you're arguing instead is that he is
17 tenured all the way through, once he was hired. So
18 this timeliness argument, you seem to have not have
19 raised this; do you agree with me or disagree with me
20 on that?

21 MS. GONZALEZ: I don't agree in that - - -

22 JUDGE FAHEY: Okay. Then, let - - - just
23 let me ask you this, for our purposes because you
24 don't have much time; tell me where in your brief you
25 raised that argument.

1 MS. GONZALEZ: The - - - in the brief, in
2 point 1 - - -

3 JUDGE FAHEY: Uh-huh.

4 MS. GONZALEZ: - - - we raise the argument
5 that Mr. Springer remains - - - he falls into this
6 narrow exception; he remains tenured for the period
7 of up to five years. If he is - - - if he is
8 reinstated to a position by September of 2016, he
9 remains tenured; that has been the position
10 consistently. It wasn't an issue of abandoning the
11 timeliness issue - - - yes, he did fill out the form
12 when he realized that this principal, not the one
13 that hired him, was confused.

14 JUDGE FAHEY: Let me just stop you. He
15 filled out the form within the five years to withdraw
16 his resig - - - his resignation of his tenure, right?
17 So he should be under this rule.

18 MS. GONZALEZ: Yes.

19 JUDGE FAHEY: Right, but that would be
20 admitting that he didn't have tenure from employment
21 when he was rehired to begin with, right?

22 MS. GONZALEZ: Well, he was just covering
23 his bases.

24 JUDGE RIVERA: It was your default position
25 in case you lose on the merits.

1 MS. GONZALEZ: It was - - - since - - -
2 since they - - - not so much that, but since the new
3 principal - - - because the principal who claimed he
4 was probationary was not the one who hired him. And
5 since this new principal had a bee in her bonnet that
6 he didn't do the form, he then said, fine, and he did
7 the form. But our position remains that if you read
8 this chancellor's regulation - - -

9 JUDGE RIVERA: You didn't grieve it, right;
10 you didn't grieve this - - - this decision of
11 untimeliness?

12 MS. GONZALEZ: Well, we - - - no, he didn't
13 grieve the fact that the Department of Education
14 ignored the withdrawal. What he grieved was his
15 termination without a 3020-a hearing because the
16 collective bargaining agreement does not extinguish
17 tenure rights. Tenure is individual - - - is his
18 individual right, and he was a tenured teacher.

19 JUDGE RIVERA: Does - - - does the CBA
20 require you to grieve a determination that your
21 written request to withdraw the resignation is
22 untimely?

23 MS. GONZALEZ: It is something under the
24 CBA, yes, but again, we are griev - - - we are here
25 because of the tenure issue with the collective

1 bargaining agreement, which is not in the record, and
2 neither is the form, does not involve Mr. Springer's
3 tenure rights.

4 CHIEF JUDGE DIFIORE: Thank you.

5 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Springer v. Board of Education of the City School District of the city of New York, No. 41 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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