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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF O'REILLY

Appellant,

-against-

NO. 77

BOARD OF EDUCATION,

Respondent.

MATTER OF CLARKE

Appellant,

-against-

NO. 78

BOARD OF EDUCATION,

Respondent.

20 Eagle Street
Albany, New York
September 11, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN
ASSOCIATE JUSTICE JANICE A. TAYLOR

Appearances:

JIMMY WAGNER, ESQ.
Attorney for Appellants
2055 Flatbush Avenue
Brooklyn, NY 11234

JESSE A. TOWNSEND, ESQ.
Attorney for Respondent
100 Church Street
New York, NY 14202

Chrishanda Sassman-Reynolds
Official Court Transcriber



1 CHIEF JUDGE WILSON: The last cases on today's
2 calendar are Matter of O'Reilly v. Board of Education,
3 Matter of Clarke v. Board of Education. And we are
4 grateful to be joined by our colleague from the Second
5 Department, the Honorable Janice Taylor.

6 Counsel?

7 MR. WAGNER: Thank you, Judges. Thank you, Judge
8 Taylor. Thank you, Chief.

9 My name is Jimmy Wagner. I'm the attorney for
10 the appellants. With me is my cocounsel, Joseph Aron. I
11 have two brief requests. Chief Judge, I'd like five
12 minutes on rebuttal.

13 CHIEF JUDGE WILSON: Yes, sir.

14 MR. WAGNER: And for all the judges, my second
15 request would be that you vacate the two decisions from the
16 First Department on the entirety. I'm going to show you a
17 road map of why the 3020 tenure laws have a long historical
18 importance in this state - - -

19 JUDGE GARCIA: Counsel, before you start. Just
20 to be clear, you're not challenging the vaccine mandate
21 here, right?

22 MR. WAGNER: That is absolutely correct, Your
23 Honor.

24 JUDGE GARCIA: And so your challenge goes to what
25 process the petitioners are entitled to under the - - -



1 under the statute. Right?

2 MR. WAGNER: That's correct. Under this Article
3 78 petition, we were challenging the process that they were
4 legally entitled to under Education Law.

5 JUDGE GARCIA: Right.

6 MR. WAGNER: And in the Article 75 we were
7 challenging the arbitration award.

8 JUDGE GARCIA: Arbitration award. Yes.

9 MR. WAGNER: Not challenging the vaccine mandate,
10 and I want that to be very clear. This case is not about
11 the vaccine mandate. That's just a variable. We could
12 have changed that variable with any other work rule. The
13 work rule could have been we want teachers to wear IDs. We
14 want teachers to - - -

15 JUDGE GARCIA: Understood.

16 MR. WAGNER: So when we talk about the history of
17 New York State tenure law, it began in 1897 with New York
18 City Teacher Tenure Law. Shortly thereafter, less than ten
19 years, this court heard the first essential tenure law
20 case, and that was Murphy v. Maxwell. And in that case,
21 pre women being allowed to vote in the State of New York,
22 that was a woman teacher who was denied due process because
23 she had the audacity to be married and work at the same
24 time.

25 This court said absolutely not. Tenure law says



1 teachers get due process, and that due process is defined
2 and codified in State Education Law. This court has
3 continuously, from 1904, all the way up to recently of
4 2016, maintained that tenured teachers in the State of New
5 York are entitled to 3020 protections.

6 In Mannix v. Board of Ed., this court - - - 1968
7 - - - explicitly said no additional requirements for
8 tenured teachers. In 1979, Ricca v. Board of Ed., this
9 court explicitly said you cannot increase the probationary
10 periods for tenured teachers. 1993, this court explicitly
11 said a tenured teacher cannot even accidentally resign.

12 In the case before us, respondents' management
13 turned around and involuntarily resigned these tenured
14 teachers. This court held if - - - if this court held you
15 can't accidentally resign, how can management involuntarily
16 resign a teacher?

17 JUDGE TROUTMAN: So with respect to conditions of
18 employment. If it's a condition of employment, your
19 argument is it cannot be unilaterally imposed, correct?

20 MR. WAGNER: Correct. It - - - so this court, in
21 - - - in Beck v. Nichols (sic), laid out an excellent four-
22 part rule for when a condition of employment does not
23 entitle a tenured teacher to their due process. That was
24 not followed here whatsoever.

25 I would further argue, in the condition of

1 employment, this wasn't a condition of employment. This
2 was a work rule and work rules entitle, not just tenured
3 teachers, but all municipal workers to their due process.
4 The goal here was achieved with the work rule. The work
5 rule stated - - -

6 CHIEF JUDGE WILSON: How - - - what is the test
7 for determining whether something is a condition of
8 employment or a work rule?

9 MR. WAGNER: I think that's an excellent question
10 here, Judge. I think the word itself is implicit:
11 condition of employment. You could not have been employed,
12 but for meeting that condition. Whereas a work rule can
13 unilaterally be enforced by the employer management at any
14 time. And I think in this case, the - - - the goal here
15 was to keep children safe. Right? We did not want
16 unvaccinated teachers within - - - within the - - - in the
17 school. The goal was accomplished.

18 So the secondary matters of terminating these
19 tenured teachers, putting them on leave without pay in
20 violation of State Education Law 3020, telling them - - -
21 they took away their insurance, took away their paycheck,
22 told them they couldn't come in the buildings to get their
23 files, was a complete non - - - nonstarter. The goal was
24 keeping children safe.

25 JUDGE CANNATARO: Counsel, can I ask you to go

1 back and expand on your answer to the Chief Judge's
2 question? Because it would be very helpful, at least for
3 me, to understand what is it that distinguishes a work rule
4 from a condition of employment? What is it about the
5 nature of those two things?

6 Because when I look at how this requirement came
7 into being, it seemed - - - it looks like it was negotiated
8 the way a condition of employment would come into
9 existence. So tell me why it's not that.

10 MR. WAGNER: Okay. I would say we can use the
11 framework of Beck-Nichols. The - - - to be a condition of
12 employment that deprives a tenured teacher of her 3020
13 statutory protections, number one, it would have to exist
14 pre-hire. Number two - - -

15 JUDGE GARCIA: I'm sorry. Just to interrupt you
16 on that point on Beck-Nichols. Didn't the rule in Beck-
17 Nichols also apply to promotions?

18 MR. WAGNER: In reference - - - if that rule did
19 apply, the pre-hire rule apply to promotions? I'm not
20 familiar with that section.

21 JUDGE GARCIA: But it - - - it says it in the
22 opinion somewhere. It says that this rule applied to hires
23 and promotions. I would assume tenured teachers are
24 getting promoted.

25 MR. WAGNER: When you say a - - - a tenured

1 teacher's getting promoted; a tenured teacher, that's their
2 status given to them by the Board.

3 JUDGE GARCIA: Right. But this was a condition
4 that was being placed on promotions, so it wasn't pre-hire.
5 Right?

6 MR. WAGNER: So - - - okay. I - - - I now, I - -
7 - I follow your logic, Your Honor. What you're saying is
8 in Beck-Nichols because it also applied to people who
9 wanted the promotions, it's not necessarily required to be
10 pre-hire.

11 JUDGE GARCIA: Right.

12 MR. WAGNER: I - - - in following that logic, if
13 in fact, the teacher had the option - - - the tenured
14 teacher had the option to say, you know what? I can either
15 reside outside the district or accept this promotion, and
16 thereby I would be required to be in - - - within the
17 district, as was Beck-Nichols' case. I think if we had it
18 analogous to our fact pattern. If we said to these tenured
19 teachers, before we're going to promote you to be assistant
20 principal or promote you to be principal, you need to be
21 vaccinated for COVID-19, I think we're in the same
22 situation. Here, this did not exist.

23 JUDGE GARCIA: And what if that teacher then took
24 the promotion and they had a certain amount of time to
25 comply and they don't and they had the same repercussions

1 as now, could they put them on leave without pay?

2 MR. WAGNER: So the - - - the fact pattern is,
3 the teacher, after agreeing - - - the tenured teacher
4 agrees to take the COVID - - -

5 JUDGE GARCIA: The promotion?

6 MR. WAGNER: - - - and also - - -

7 JUDGE GARCIA: No. They just say, okay, thanks
8 for the promotion. One of the conditions is, for that
9 promotion you have to get vaccinated. Tenured teacher.
10 They take the position and then they say, yeah, you know,
11 not doing that and I'm not complying with any of this. Can
12 they put them on leave without pay under this same scenario
13 we have?

14 MR. WAGNER: I - - - I think if we work down the
15 four-part Beck-Nichols rule, they could. I - - - I think
16 if this court, if was to find that it was also - - - there
17 was a legitimate policy for promoting the teachers with a
18 vaccine.

19 JUDGE GARCIA: So it's - - - it's not just - - -
20 it's not pre-hire all the time, then?

21 MR. WAGNER: Oh, fair enough, Your Honor. It - - -
22 - under that circumstance, absolutely it's not a pre-hire.
23 It's pre - - - it would be determined - - - predetermined,
24 absolutely, in the reference to the - - - the case of a
25 promotion, I - - - I agree. I think Beck-Nichols, when I

1 put together the understanding of this court's four-part
2 rule, I think it wasn't also just a pre-hire; it's four
3 parts. Because New York State, our history of protecting
4 tenured teachers is second to none. We have led the charge
5 in making sure that teachers could be independent of
6 management.

7 JUDGE TAYLOR: And what are - - - what are the
8 other three rules? If you're - - - if you're calling them
9 rules, which I don't necessarily think they are rules, but
10 - - -

11 MR. WAGNER: I felt - - - I felt it was four
12 parts of one rule.

13 JUDGE TAYLOR: Right. You mentioned one which
14 you believe is pre-hire.

15 MR. WAGNER: Correct. Legitimate policy.

16 JUDGE TAYLOR: And you don't think that this was
17 a legitimate policy?

18 MR. WAGNER: No. Absolutely not. I think this
19 was a very legitimate policy.

20 JUDGE TAYLOR: Okay. So we've taken care of
21 number two. What's number three?

22 MR. WAGNER: Number three is, it would have to be
23 unambiguous.

24 JUDGE TAYLOR: Okay. And was this not
25 unambiguous?

1 MR. WAGNER: It - - - it was very - - - it was
2 very ambiguous. We - - - and we know that from the record
3 itself. Because we look initially - - - Judge Bluth
4 initially says this condition of employment exists from the
5 arbitrator's award. Judge Frank says, the - - - because
6 the arbitrator redefined discipline, 3020 no longer
7 applies. Judge Love then turns around and states, wait a
8 second, the Commissioner of Health's order establishes this
9 as a condition of employment.

10 JUDGE TAYLOR: Okay. But be that as it may, were
11 the teachers confused as to whether or not they were
12 supposed to get a vaccination by a particular date?

13 MR. WAGNER: Well, there was no - - -

14 JUDGE TAYLOR: They - - - I'm sorry. They - - -
15 they - - - they received emails, correct? And letters.
16 They were told they had to get this vaccination by a
17 particular date.

18 MR. WAGNER: I think that's a very excellent
19 point. I think if we look to the emails that are received
20 by these tenured teachers, what the email says is you must
21 upload vaccine - - - a vaccine card to the SOLAS system,
22 period. It did not say you must be vaccinated. It said
23 you must upload a card.

24 Going all the way back to the Murphy case when
25 she had a marriage license, that's a - - - that's very

1 analogous. It's very simple. Show us your marriage
2 license and we're going to terminate you. Here, the DOE
3 says upload the card. But if we look at the Commissioner
4 of Health's actual order, what the order says, to protect
5 the children, we're not going to let you in the building.
6 And that's very relevant to this fact pattern because
7 appellant Loiacono, she was part of a remote teaching
8 program that pre-COVID, pre any of the remote teaching,
9 where she taught at-home children who were very ill, and
10 she taught them on a remote system.

11 She was a tenured teacher who never needed to be
12 in a building. So therefore this policy, there was no
13 reason to terminate her. There was no reason for her to be
14 vaccinated. The goal was achieved. The children were
15 safe. That teacher was never going in the building. But
16 management turned around, they browbeat these women and
17 said, you're going to do what we say. We do not have to
18 follow State Education Law. That's exactly what this case
19 is about.

20 This is not about the idea of a condition of
21 employment or an idea of a work rule. This is about
22 management doing what they want with these workers in
23 violation of the law. We could have easily, harmoniously
24 existed. The unvaccinated teachers could not have been in
25 the building, and they could have received their statutory

1 due process as 3020.

2 When management turns around and calls this a
3 condition of employment, their - - - their team of lawyers
4 is familiar with the case law. Whose team of lawyers - - -
5 these tenured teachers have no lawyers. They're not - - -
6 they're not familiar with Beck-Nichols. So management
7 turns around and says, here's what we're going to do,
8 everyone. We're going to call this a condition of
9 employment. Our goal is achieved. The unvaccinated
10 teachers won't be in - - - in the school. And by the way,
11 for fiscal reasons, we get to get rid of all of these
12 tenured teachers and - - -

13 CHIEF JUDGE WILSON: Let me go back a little bit
14 to the area that Judge Cannataro was at. And let's take
15 the arbitrator out of this for a minute; pretend that
16 didn't happen. Is this something that the union and - - -
17 and Board could have bargained over and reached this
18 result?

19 MR. WAGNER: I'm - - - I'm going to - - -

20 CHIEF JUDGE WILSON: Hypothetically.

21 MR. WAGNER: Hypothetically, I believe they could
22 have - - - they could have bargained, except to the extent
23 for tenured teacher laws. Anything that would have
24 affected the tenure - - - the - - - a teacher's tenure
25 could not have been bargained for. I think this court

1 explicitly just recently stated that modifications to the
2 3020-a discharge procedure, it gives the tenured teacher
3 the option to select it. So even if we were going to say
4 it was bargained and we were going to have a leave without
5 pay or they were going to be terminated immediately - - -
6 meaning the tenured teacher - - - the tenured teacher
7 statutorily could have said, okay, I'll agree. Or they can
8 choose to select their 3020 discharge procedures.

9 This is - - - this is written into 3020. And I
10 want to say it was 2014, in the Kilduff case - - -

11 CHIEF JUDGE WILSON: And is that - - - did those
12 procedures apply to disciplinary matters only, or do they -
13 - - would they apply to conditions?

14 MR. WAGNER: So I'm - - -

15 CHIEF JUDGE WILSON: The statutory protections?

16 MR. WAGNER: So - - - there's - - - right. Two
17 things. The statute - - - the statute itself, 3020 says
18 clearly no tenured year teacher shall be disciplined or
19 removed. Plain meaning of the statute itself says that.
20 However, in our briefs, and I can tell you now there's
21 numerous cases where a tenured teacher was entitled to a
22 3020 discharge hearing that had nothing to do with
23 discipline.

24 If we look to Winter v. Board of Education, that
25 was 1992, it was a qualification case. If we look to 1970,

1 the Coriou v. Nyquist case, psychological disorder. It
2 clearly has nothing to do with discipline. It just has to
3 do with qualification of that particular tenured teacher.
4 And this court clearly stated that tenured teachers still
5 entitled to their 3020 discharge proceeding. Even more - -
6 - most recently in - - - in the Kilduff case. My - - - my
7 apologies. In the Springer case, this court, even though
8 that teacher did resign, this court one hundred percent
9 reaffirmed that a teacher is entitled to due process of
10 3020, it's - - - 3020 is protected. In Kilduff this court
11 said, 3020 protects teachers from the vagrancies of
12 collective bargaining.

13 If you said that about collective bargaining,
14 clearly it's going to protect the tenured teachers from the
15 actions of management. There was no reason, in this
16 particular case, that we had to forget about the law and
17 allow these tenured teachers to all be terminated.

18 I see the red light is on. If anyone has a
19 question, I'm happy to answer.

20 CHIEF JUDGE WILSON: Thank you.

21 MR. TOWNSEND: Afternoon, your - - - good
22 afternoon, Your Honors. Jesse Townsend, for the
23 respondents.

24 This court should affirm the Appellate Division
25 First Department's rulings affirming the dismissal of these

1 eight petitions.

2 Petitioners were not entitled to a hearing on the
3 simple and uncontested issue of whether they had submitted
4 evidence of vaccination, which had become a qualification
5 of employment in fall of 2021, as the school district was
6 reopening New York City's public schools for full in-person
7 instruction for the first time since the pandemic. And
8 this was clearly done through an arbitration award between
9 the school district and the teachers' union, which
10 represented the entire teaching workforce.

11 CHIEF JUDGE WILSON: There are two different
12 pieces to what you just said. One is that the statute
13 didn't entitle them to a hearing in the first place, and
14 the second was that it was bargained away. Right?

15 MR. TOWNSEND: What I would say, Your Honor, is
16 whenever there's a qualification of employment as opposed
17 to a disciplinary matter - - - and here, because of the
18 wording of 3020-a, disciplinary includes competence as well
19 as misconduct - - - any situation where it's a
20 qualification, as opposed to that disciplinary matter, the
21 3020-a does not attach. And that is clearly - - - that is
22 the holding of Beck-Nichols.

23 Then secondly, while we would argue in an
24 appropriate case that management can unilaterally impose a
25 qualification of employment, that's not what happened in

1 this case. Because here there was an arbitration as a
2 result of first, a bargaining process between the union and
3 the DOE, and then ultimately, an arbitration.

4 CHIEF JUDGE WILSON: Your view is that without
5 the arbitration and - - - well, without the negotiation,
6 the arbitration, let's say, outside of the collective
7 bargaining process, management could impose retroactively a
8 condition of employment on tenured teachers?

9 MR. TOWNSEND: We would say, yes, Your Honor, but
10 of course, this court doesn't need to reach that because of
11 - - - in this situation, we do have the impact award, which
12 was the process of - - - the process between DOE and UFT.

13 JUDGE HALLIGAN: Does it matter at all that the
14 vaccine mandate was very broad? My understanding is that
15 it was applied to a range of city employees and in some
16 circumstances, private employees. So how should that
17 factor into our analysis, if at all?

18 MR. TOWNSEND: I do think the breadth of the
19 requirement and to just to go through the chronology
20 briefly, Your Honors. First, the Public Health Commission
21 required it of all DOE employees, and that was resolved in
22 either arbitration or negotiation through all DOE
23 employees. Then about a month later, all city employees.
24 And then months or - - - a few months later, the private
25 employees with a broader set of exceptions.

1 But I do think it matters, just focusing first on
2 the DOE employees, because when we're talking about
3 distinguishing between a qualification of employment and
4 something that's about individual teacher behavior or
5 conduct, the fact that it was designed to cover the entire
6 DOE workforce is something that's indicative of it being a
7 qualification of employment. This is something that - - -

8 JUDGE HALLIGAN: And eventually a wider group,
9 unlike, for example, something that might involve a
10 qualification - - - you know, a - - - a credential - - -

11 MR. TOWNSEND: A certification?

12 JUDGE HALLIGAN: - - - qualification,
13 certification, whatever.

14 MR. TOWNSEND: Yes. Now, I will say that the
15 qualification of employment case law does also cover
16 credentials. So there are examples where it can be more
17 specific. Lanterman is the case from this court that
18 addressed specific employees needing specific
19 certifications. But that wasn't this case. This was
20 indeed applied to the entire DOE workforce, eventually the
21 entire municipal workforce.

22 Going back to - - - to just Chief Judge Wilson's
23 and Chief Judge - - - Judge Cannataro's questions about how
24 you determine a qualification from a work rule. This is a
25 status that employees were told they need to have at the

1 threshold, literally, to get in the door. And if you - - -
2 I'll point to the record in a moment. But if they couldn't
3 upload the vaccine card through the portal, they needed to
4 show it at the door.

5 JUDGE CANNATARO: What threshold are you
6 referring to there? This is a status that employees needed
7 to show at the threshold. I mean, they've been employed
8 with DOE. They're tenured. You know, that - - - they've
9 been around for a long time.

10 MR. TOWNSEND: To even - - - either begin if it's
11 applied to new employees, or to just continue teaching or
12 to continue being employed, this is a - - - this is the
13 threshold. A baseline expected of all employees, shall we
14 say.

15 CHIEF JUDGE WILSON: So they could have - - -
16 they could have imposed retroactively on tenured teachers a
17 requirement they all have PhDs?

18 MR. TOWNSEND: They could have theoretically,
19 Your Honor, and 3020-a would not have stopped them.
20 However, that does not mean the teachers did not have - - -
21 would not have had other remedies were that the case. They
22 do have a union.

23 So the idea that tenured teachers are not
24 represented, that's not correct. They are represented by a
25 union.

1 CHIEF JUDGE WILSON: Well, you're going too fast
2 for me, I think. So suppose - - - suppose - - - well,
3 let's take it first as if this is not done through
4 collective bargaining, this is just the Board of Ed.
5 saying, you now all have to have PhDs, and this applies
6 retroactively to tenured teachers. What are their - - -
7 what's the remedy for that?

8 MR. TOWNSEND: Just to clarify the hypothetical.

9 CHIEF JUDGE WILSON: Yeah.

10 MR. TOWNSEND: Are they still represented by a
11 union?

12 CHIEF JUDGE WILSON: Sure.

13 MR. TOWNSEND: In that case, the union may say
14 that this is a violation of an existing CBA and then seek
15 the remedies under that CBA.

16 CHIEF JUDGE WILSON: Okay.

17 MR. TOWNSEND: They may - - -

18 CHIEF JUDGE WILSON: And then could - - - suppose
19 that - - - oh, go ahead. Go ahead.

20 MR. TOWNSEND: The - - - if the union doesn't
21 think the CBA covers this clearly, they could invoke Civil
22 Service Law 209 and require a negotiation over this impact
23 and eventually an arbitration; much like what did happen
24 here. And then after that, they may seek judicial review
25 of the end of the arbitration or the outcome of the

1 arbitration.

2 There - - - there are some other remedies that I
3 could think of if a - - - if a teacher is confronted with
4 this situation. The teacher may also - - - or teachers
5 individually, may claim that this policy is irrational or
6 not factually supported or prohibited by some other legal
7 mandate.

8 So my point is that teachers and employees more
9 generally, especially unionized ones, especially ones with
10 a series of legal protections, are not without remedy.
11 It's that this case, particularly as petitioners sought it,
12 is not as - - - as counsel's phrased, not about the policy
13 as a whole, but just about whether they get one particular
14 procedural tool, which is this 3020-a hearing. And that's
15 a hearing designed specifically to consider incompetence or
16 misconduct in on-the-job behavior. And all we're saying is
17 that they don't get that, because what was being described
18 is - - - as I was saying to Judge Cannataro this threshold
19 qualification, not about how they're going to conduct
20 themselves in the classroom going forward. If there's a
21 suspicion of misconduct or incompetency as they are
22 teaching or if they are violating a work rule by habitually
23 not wearing their lanyards, that is the sort of thing that
24 in theory, a 3020-a hearing would then be pursued under the
25 grounds that it shows either misconduct or incompetency,



1 that repeated violation of such a work rule.

2 CHIEF JUDGE WILSON: So the remedies that would
3 be available in my strange hypothetical, would not include
4 a 3020 hearing?

5 MR. TOWNSEND: Correct, Your Honor. A 3020-a is
6 meant to, again, provide a procedure for when someone is
7 suspected of one of those things. It's not meant as a
8 substantive backstop to prevent the DOE from ever - - - or
9 a school district more generally - - - from ever imposing
10 qualifications.

11 And I pose, Your Honor, that in that hypothetical
12 does - - - it wouldn't - - - I would submit it wouldn't
13 make sense or wouldn't be a sound design to think that a -
14 - - a massive school district suddenly deciding to impose a
15 PhD should then have that policy resolved through a series
16 of individual arbitrations.

17 JUDGE HALLIGAN: So is the right way to resolve
18 that through an Article 78?

19 MR. TOWNSEND: I think, Your Honors, first
20 through a challenge by the union.

21 JUDGE HALLIGAN: Um-hum.

22 MR. TOWNSEND: And that may lead to an
23 arbitration, which is, again, sort of a collective process
24 that is going to address the issue as a whole. And then I
25 would also say, as were brought by some individual

1 employees in both the DOE and the City, there could be an
2 Article 78 where individual employees say, I think this is
3 irrational. I think it's impractical to me. I - - - I
4 teach in a field that doesn't have a PhD easily available.
5 Let me show you - - -

6 JUDGE HALLIGAN: In other words, it's arbitrary.
7 The - - - the crux of a - - -

8 MR. TOWNSEND: Yes, Your Honor.

9 JUDGE HALLIGAN: - - - of a typical 78
10 proceeding.

11 MR. TOWNSEND: Yes. And to be clear, Your Honor,
12 such claims were brought by various employees as well as
13 unions, both with regard to the DOE - - -

14 JUDGE HALLIGAN: So even if the union did not
15 have the - - - were not to have the view that the
16 qualification was irrational or not appropriate, there
17 would be an avenue for a specific teacher to challenge
18 that?

19 MR. TOWNSEND: A myriad of avenues, Your Honor.
20 Yes. An Article 78, a - - - in this case, there are also
21 federal claims because they're arguing that in this
22 particular situation also violated federal laws. There are
23 a myriad of claims, as there are myriad of claims brought
24 against both the DOE and city workforce vaccination
25 requirements.

1 This case is just about whether this one
2 particular tool should be - - - should have been afforded
3 to these eight petitioners.

4 On the - - - just to the point about clarity,
5 which Justice Taylor, you raised. This was clearly
6 communicated multiple times and most specifically to these
7 specific petitioners. This is on 74 of the record. You
8 see the example email that - - - that was sent once they
9 had missed many opportunities to submit their proof of - -
10 - of vaccination. And this is - - - I think this is
11 important just because it goes to the other part of this,
12 which is what a hearing would have accomplished. Whether
13 there was any disputed fact that a factfinder needed to
14 consider. Because on appeal in this court, petitioner
15 suggests maybe there were specific reasons why these
16 specific petitioners could not have submitted evidence of
17 vaccination.

18 The DOE email, which is on 74, not only says you
19 should upload your - - - your proof of vaccination before
20 school starts Monday morning, but it also said you can
21 physically bring it in. You can show it to the school
22 guard - - - school security guard. They will let you in
23 and you will immediately upload from the school's facility.
24 Or you can call the help desk if you're having technical
25 issues, or you can call your principal.

1 So the idea that either this was unclear as a - -
 2 - as a requirement or that they couldn't accomplish it is
 3 just - - - not only is it not apparent in the record
 4 because it's not alleged in any of the petitions, but it is
 5 completely inconsistent with the very email that
 6 petitioners attach as the example of when they were told
 7 that they were going to be placed on leave without pay.

8 And then to complete the due process analysis,
 9 Your Honor, under Prue v. Hunt, in this court's due process
 10 case law more generally, there was also post-termination
 11 remedies. One is an Article 78, as I discussed with Judge
 12 Halligan. Another was reinstatement. And you can see an
 13 example of that in page 76. Although the teachers have
 14 been placed on leave without pay, they had some two months
 15 to upload proof of vaccination and be placed on - - - be
 16 reinstated. And you see an example of that on page 76
 17 where they were told you can still upload your vaccination
 18 card.

19 So in terms of the - - - the classic
 20 constitutional requirement for due process of notice,
 21 opportunity to be heard pre-termination, and post-
 22 termination remedies, these - - - these teachers had all of
 23 that.

24 JUDGE TAYLOR: Just to be clear. This was not
 25 getting rid of their tenure, correct?

1 MR. TOWNSEND: It was - - - this was just placing
2 them on leave without pay.

3 JUDGE TAYLOR: Voluntary resignation in some
4 instances.

5 MR. TOWNSEND: Right. So for those that stayed
6 on leave without pay, never - - - never - - - never cured
7 the issue by submitting the proof of vaccination,
8 eventually those were terminated. And it is coded in DOE
9 as resignation as opposed to termination with cause, which
10 might have more consequences. And that's again the sort of
11 thing that 3020-a is going to protect.

12 JUDGE TAYLOR: But don't they use the term
13 voluntary resignation at some point or no?

14 MR. TOWNSEND: They - - - it was a - - - it
15 definitely was a resignation. It was considered a
16 resignation, yes, Your Honor.

17 JUDGE TAYLOR: But voluntary resignation?

18 MR. TOWNSEND: I think the voluntary - - -

19 JUDGE TAYLOR: There's - - - there's a difference
20 between voluntary resignation and just plain - - -
21 involuntary resignation, I believe. No?

22 MR. TOWNSEND: I think the voluntary is
23 referenced to these extended separation and leave policies
24 that some people could have opted into. And in that
25 circumstance had they opted into it received this more

1 extended leave or this more extended benefit for
2 separation, than it be a voluntary resignation.

3 JUDGE TAYLOR: And under Springer don't they have
4 about five years actually to withdraw their voluntary
5 resignation?

6 MR. TOWNSEND: If they - - - as Springer held, if
7 they follow those procedures correctly? I am not aware of
8 whether any of these petitioners or other individuals have
9 sought to follow that sort of procedure.

10 The - - - the case law that petitioners are - - -
11 is relying on about the history of tenure, was all cited in
12 the Beck-Nichols case. This court heard that argument that
13 those cases: Mannix, Ricca, Gould, meant that the only way
14 of terminating a teacher was the - - - through the 3020-a
15 process, and this court rejected it.

16 And although it is true that in Beck-Nichols the
17 policy was announced as a - - - for new employees or
18 promoted employees, that was not what this court relied on.
19 This court relied on this distinction between a status - -
20 - a qualification of employment being required versus
21 something related to their job performance that was being
22 investigated and thus put forward to a - - - a hearing.
23 And this court was drawing on a longer history of case law
24 that considered the same thing in other circumstances, but
25 a - - -



1 CHIEF JUDGE WILSON: That's sort of a different
2 way of saying that tenure wasn't really at issue in Beck-
3 Nichols.

4 MR. TOWNSEND: Say it again, Your Honor.

5 CHIEF JUDGE WILSON: That's a different way of
6 saying that tenure wasn't really at issue in Beck-Nichols.

7 MR. TOWNSEND: Correct, Your Honor. There were
8 tenured teachers or tenured teacher and tenured counselor,
9 but nonetheless, this court determined that they could be
10 terminated for failure to violate the residency policy
11 without going through the 3020-a process. And this court,
12 again, heard that exact argument, exactly what petitioners
13 argue now that this line of cases means 3020-a is
14 exclusive, and this court necessarily rejected that
15 argument. We're drawing on a longer history, first with
16 Felix, which was about the Civil Service Law 75, where - -
17 - well, this court said this is about a qualification of
18 employment unrelated to job related delinquencies. Then in
19 Lanterman - - -

20 CHIEF JUDGE WILSON: Not - - - not a teacher at
21 all, right? Felix?

22 MR. TOWNSEND: Not a teacher.

23 CHIEF JUDGE WILSON: Yeah.

24 MR. TOWNSEND: But this court drew on Felix in
25 the Beck-Nichols case. First it was Felix with regard to

1 Civil Service Law 75, then Lanterman with regard to a CBA
2 process in lieu of a Civil Service 75 hearing. And finally
3 in Beck-Nichols where 3020-a was squarely implicated. But
4 in each case, this court applied the same logic, which is
5 that those hearings are meant to investigate potential
6 incompetency, misconduct at the job, in the job,
7 noncompliance with a work rule. But in all these cases
8 where there was some qualification unrelated to
9 individual's job performance, this just - - - none of these
10 things just applied because they were all meant to test
11 this very particular - - - very particular suspicion that
12 someone needed to be terminated for cause.

13 Briefly, just on the policy, if I may, Your
14 Honor, because petitioners do say that the policy's goals
15 were achieved. They were achieved only because the vast
16 majority of the workforce submitted proof of vaccination as
17 - - - as asked, as told. And that those few who did not
18 were excluded from the classrooms. If they had not been
19 excluded from the classrooms, the policy's goals wouldn't
20 have been served. And the idea that this could have been
21 done harmoniously, I think, is - - - that is to say that
22 petitioner's view could have been adopted is, I think, just
23 not accurate, given that what that would have meant is that
24 teachers would have been placed on leave with pay - - -
25 some untold number of teachers. And then a series of mini

1 trials held over whether someone submitted proof of
2 vaccination.

3 JUDGE HALLIGAN: But those are collateral
4 administrative challenges, right? I don't take that to
5 mean that the goal of having only vaccinated teachers in
6 the classroom would have been impinged upon.

7 MR. TOWNSEND: Except, Your Honor, to the extent
8 that the process involved not constitutional due process,
9 but the statutory process of 3020-a might have been so
10 expensive that it may have been difficult to actually
11 implement. If we're talking about thousands of teachers on
12 leave, with pay; substitutes being filled for their
13 positions; and then these mini trials going forward for
14 some unknown period. That - - - I do think that would
15 implicate the possibility of this - - -

16 JUDGE HALLIGAN: Well, I take it that would be
17 because you're saying under those circumstances, perhaps
18 DOE would have had to reconsider its - - - its mandate,
19 right?

20 MR. TOWNSEND: It may have made it too expensive
21 to actually function or, even if it were going forward, you
22 may have had the labor arbitrators, individual hearing
23 officers under these 3020-a potentially trying to decide
24 that actually this particular teacher should be placed back
25 into the classroom. And then we'd - - - there would be

1 maybe a collateral issue about whether that rule could be
2 followed, but that may have been the intent - - - intent or
3 the effort to actually undermine it very directly in that
4 way.

5 Just to touch on the arbitration, Your Honor, and
6 the Article 75 claim. As we argued in our briefs, there
7 are two - - - two clear procedural bars to the - - - to
8 this Article 75 vacatur claim. The first is a lack of
9 standing. This court has been very clear since the Soto
10 case that, generally speaking, a represented employee does
11 not have the authority or standing to challenge the outcome
12 of arbitration between his union and the - - - their
13 employer.

14 The exception is to allege that the union has
15 committed a breach of its fiduciary duty, which these
16 petitioners do not do.

17 CHIEF JUDGE WILSON: They do at some point, I
18 think, say that there's no evidence in the record that
19 they're union members or did I misread that?

20 MR. TOWNSEND: They do say that on appeal. If
21 you see in the petition, they - - - each petitioner clearly
22 states that they - - - they contacted their union
23 representative and attempted to grieve it. You can see
24 that in - - -

25 CHIEF JUDGE WILSON: I don't want to - - - don't

1 waste your time finding it. I'll find it.

2 MR. TOWNSEND: It is certainly true that they do
3 reference contacting their union representatives, seeking
4 to grieve and being unable to grieve. That is suggestive
5 of the fact that they are union members and the UFT is a -
6 - - is the recognized bargaining unit, regardless of
7 whether they personally are union members or not. After
8 all, they claim the benefit of the CBA. They are
9 representative in a collective fashion. As the CBA - - -
10 CBA itself states that they, the UFT, is the sole
11 representative of this teaching workforce.

12 So if they thought that the union had failed in
13 its breach of fiduciary duty or breached its fiduciary
14 duty, they could have - - - they then should have brought
15 it into the case. That's the second sort of procedural
16 bar; that there was a necessary party here, the UFT. Not
17 only for that point to cure the standing issue, but
18 secondarily because the UFT, having sought this impact
19 award would have been - - - would have been affected. Its
20 - - - its members also would have been affected if this
21 award were suddenly vacated. And I know that on briefing,
22 petitioners argue that the Second - - - there was a Second
23 Circuit decision in a - - - in a particular case. One of
24 these many cases, Judge Halligan, about the challenging the
25 DOE mandate, that that decision already had the effect of



1 vacating this award. That's not correct. What happened in
2 that decision is that the teachers received more process
3 than what the award already said. It didn't take away
4 anything from the award. That is whatever they had already
5 received under the award, including this option for a
6 voluntary resignation under enhanced benefits still
7 remained.

8 But even if those procedural bars were cured or
9 could be gotten past, at the end of the day, the
10 petitioners would have to show that this award was so wrong
11 as to violate public policy. And I submit that both under
12 this case law - - - this court's case law under Beck-
13 Nichols, going back to Felix, that this qualification
14 versus work rule rule is quite clear. And certainly, the
15 arbitrator did not violate public policy by - - - by
16 instantiating it in this requirement of leave without pay
17 as a nondisciplinary consequence.

18 If the court has no further questions, I will ask
19 that you affirm the decisions below.

20 CHIEF JUDGE WILSON: Thank you.

21 MR. WAGNER: Thank you, Judges. I - - - I want
22 to apologize. I forgot to thank the Lord Jesus Christ for
23 letting me be here and I meant to do that at the beginning.
24 So Lord Jesus says, "Woe unto you, lawyers."

25 And Judge - - - Judge Taylor, the point of

1 voluntary resignation versus involuntary resignation one
2 hundred percent, these tenured teachers were involuntary
3 resigned (sic). You know what involuntary resignation
4 means? Fired. Fired without due process, in complete
5 violation of the law. 3020 says a tenured teacher cannot
6 be disciplined or removed from a term of teaching. They
7 had started a term of teaching. They were in the school.
8 These women have done everything with their careers and
9 sacrificed themselves to teach our children, and they did
10 that in exchange for the protections of 3020. And what
11 we're going to end up here with unfettered Beck-Nichols is
12 going to be allowing management to impose retroactive
13 conditions of employment and be able to - - - for fiscal
14 reasons, not provide women - - - my apologies. Not provide
15 tenured teachers with the due process they're entitled to.

16 Fiscal reasoning was considered by the
17 legislature, and it was considered by the governor during
18 the COVID emergency pandemic. In fact, legislate - - - the
19 legislation and the governor modified numerous state
20 education laws. They modified State Education Law 6521,
21 6902, 49-I, 8602, and 8603. What the legislature and the
22 governor did not modify was due process for 3020. And they
23 clearly had the ability. If there were true fiscal
24 concerns, they - - - the governor had that authority. We
25 grant it to him. Everyone knows it was a - - - it was a

1 tough time. I believe, Judge Chief, you have said it was -
2 - - the city was in a comatose, it was. It - - - and no
3 one's disputing that the goals could be achieved. We could
4 have maintained the law. We could have followed the law
5 for our tenured teachers and protected the children. And
6 that was what was done.

7 There was no unvaccinated teachers in the
8 building. That goal was accomplished. What's terrible
9 here is that these teachers have lost their entire careers
10 on a mandate that has now since been rescinded. What's
11 still not clear to us is what exactly was that mandate?

12 And that's why the 3020-a hearings would have
13 been so important. It could have been established at those
14 hearings, what exactly was the work rule was here.
15 Pursuant - - - if in their briefs - - - I was actually on
16 page 32 of their brief. Their - - - their initial position
17 was that the commissioner's order created this condition of
18 employment. He stands before the court now and says, no,
19 no, no, it wasn't the commissioner's order, it was the
20 arbitration award. However, if we looked at Judge
21 Friedman's dissent, he explicitly points out that the
22 arbitrator says in the UFT v. Board of Education case, the
23 arbitrator explicitly states he did not create a condition
24 of employment in that arbitration award.

25 I can tell this court on the cited cases in the

1 Second Department and in - - - recently in the Second
2 Department in Garvey, the city has taken the position that
3 it was an arbitrator's award that can - - - created a
4 condition of employment.

5 If we go back to 3020, we can look at 3020 and
6 see the tenured teacher - - - even if this was a condition
7 of employment created by this arbitration award, which we
8 believe should be vacated, the tenured teacher still gets
9 to select the discharge procedures. Whether the discharge
10 procedure is going to be obtained through that arbitration
11 award, or the discharge procedure is going to be obtained
12 through the 3020 discharge statute. It's - - - it's
13 undisputed here. These appellants were tenured teachers.
14 They were entitled to 3020 hearings. Under Beck-Nichols
15 they would have been entitled to 3020s. In Beck-Nichols,
16 if you change any of those factors, I do not believe that
17 this court comes to the same conclusion. The tenured
18 teacher law has historical importance in New York State
19 that predates the seven New York states allowing women to
20 vote, and that is all connected.

21 Susan B. Anthony, the - - - Sarah Garnet, all
22 were tenured teachers, and they led the Suffrage Movement.
23 Do not let the city here not follow the law. They're
24 entitled to their 3020. I would request that the First
25 Department's decisions be vacated.

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CHIEF JUDGE WILSON: Thank you.

MR. WAGNER: Thank you all.

(Court is adjourned)



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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of O'Reilly v. Board of Education, No. 77, and Clarke v. Board of Education, No. 78 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: September 14, 2024

