

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

MATTER OF KARRI BECK-NICHOLS,

Respondent,

-against-

No. 20

CYNTHIA A. BIANCO, et al.

Appellants.

MATTER OF ROXANNE ADRIAN,

Appellant,

-against-

No. 21

BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF NIAGARA FALLS, et al.

Respondents.

MATTER OF KELI-KORAN LUCHEY,

Respondent,

-against-

No. 27

BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF NIAGARA FALLS, et al.

Appellants.

20 Eagle Street
Albany, New York 12207
January 08, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Appearances:

MICHAEL F. PERLEY, ESQ.
HURWITZ & FINE, P.C.
Attorneys for Board of Education of the
City School District of Niagara Falls
1300 Liberty Building
Buffalo, NY 14202

ANTHONY J. BROCK, ESQ.
NEW YORK STATE UNITED TEACHERS
Attorneys for Appellant Adrian and Respondent Luchey
800 Troy Schenectady Road
Latham, NY, 12110

TERRY M. SUGRUE, ESQ.
REDEN & O'DONNELL, LLP
Attorneys for Respondent Beck-Nichols
135 Delaware Avenue
Suite 410
Buffalo, New York 14202

1 CHIEF JUDGE LIPPMAN: Matter of Beck-Nichols,
2 matter of Adrian, matter of Luchey.

3 Okay, counselor, so who do you represent in this
4 case? Let's get this straight. Go ahead.

5 MR. PERLEY: Your Honor, I'm the easy one. I
6 represent the school board and its members.

7 CHIEF JUDGE LIPPMAN: So - - -

8 JUDGE GRAFFEO: In all three cases?

9 MR. PERLEY: Niagara Falls. In all three cases.

10 CHIEF JUDGE LIPPMAN: So you're an appellant in
11 two cases and a respondent in the third case?

12 MR. PERLEY: That is correct, Your Honor.

13 CHIEF JUDGE LIPPMAN: In which case are you the
14 respondent?

15 MR. PERLEY: I am a respondent in Adrian.

16 CHIEF JUDGE LIPPMAN: Okay. And the other two
17 you're the appellant.

18 MR. PERLEY: In the other two, I'm the
19 appellant.

20 CHIEF JUDGE LIPPMAN: Okay, go ahead, counselor.

21 MR. PERLEY: May I have two minutes - - -

22 CHIEF JUDGE LIPPMAN: And do you want - - - yes,
23 what's your - - - your time?

24 MR. PERLEY: May I have two minutes for
25 rebuttal, please?

1 CHIEF JUDGE LIPPMAN: Two minutes for - - - for
2 combined, for Beck-Nichols and Luchey?

3 MR. PERLEY: Yes.

4 CHIEF JUDGE LIPPMAN: Okay. Go ahead.

5 MR. PERLEY: My understanding is I have ten-
6 minute argument.

7 CHIEF JUDGE LIPPMAN: You do. You have - - -

8 MR. PERLEY: Then I - - -

9 CHIEF JUDGE LIPPMAN: - - - eight minutes left.

10 MR. PERLEY: Then I better get going. In 2008
11 the school - - - the Niagara Falls City Schools conducted
12 a search or an investigation into numerous employees - - -
13 it amounted to twenty-six - - - where they evaluated
14 compliance with the residency. This residency policy had
15 been in place since 1994. It is our position, and I think
16 when you read the policy, it is very clear what it
17 requires; it requires employees of the school district to
18 reside within the city, and it defines residence as a
19 principal domicile and then it creates - - -

20 CHIEF JUDGE LIPPMAN: You could have more than
21 one domicile, right?

22 MR. PERLEY: Well, my reading of the law is you
23 can't. You can have one domicile - - -

24 CHIEF JUDGE LIPPMAN: You can't have more than
25 one domicile?

1 MR. PERLEY: - - - you could have multiple
2 residences. And I think, in all honesty, Your Honor, that
3 those words might be somewhat inartful, to be quite frank.
4 But in each of these three cases - - -

5 CHIEF JUDGE LIPPMAN: Well, what about, let's
6 take - - - let's take Beck-Nichols to begin with.

7 MR. PERLEY: Okay.

8 CHIEF JUDGE LIPPMAN: Why is it inappropriate if
9 she - - - that she lived - - - during the week she lived
10 in one place and on the weekends she was another place
11 where her husband and her child resided, why - - - why is
12 that not okay, to have the two different, whatever you
13 want to call them, two different domiciles?

14 MR. PERLEY: Can I answer that - - - I want to
15 answer that in two ways, Judge.

16 CHIEF JUDGE LIPPMAN: Yes, please, go ahead.

17 MR. PERLEY: I want to answer it from a policy
18 consideration first.

19 CHIEF JUDGE LIPPMAN: Good. Go.

20 MR. PERLEY: The policy consideration of the
21 district was to invest its employees in the life and the
22 vitality of the City of Niagara Falls, and to be committed
23 to the - - -

24 CHIEF JUDGE LIPPMAN: If you live five days a
25 week in the City of Niagara Falls and two days outside,

1 you're not invested?

2 MR. PERLEY: Well, if in fact, Your Honor, you
3 were committed and made it your principal place to be
4 within the City of Niagara Falls - - -

5 CHIEF JUDGE LIPPMAN: Assume - - - assume that
6 she was there five days a week and two days in the other
7 place - - -

8 MR. PERLEY: Well - - -

9 CHIEF JUDGE LIPPMAN: - - - why is that no good?

10 MR. PERLEY: Well, because in her case, Your
11 Honor, she said in a STAR application, which is an
12 application for a school district exemption, that her
13 principal residence was in Lewiston.

14 JUDGE PIGOTT: What's our standard of review?

15 MR. PERLEY: I believe, Your Honor, the standard
16 of review in this case is rationality. And it's the
17 rationality of the board's decision based upon its
18 evidence. And - - -

19 JUDGE SMITH: Do you concede that she was five
20 days one place, two the other?

21 MR. PERLEY: Not exactly; I won't - - - I won't
22 concede it - - - I won't concede it directly, Your Honor.
23 I know that she - - - she did reside in the City of
24 Niagara Falls, but her children and the rest of her family
25 resided in Lewiston - - -

1 JUDGE GRAFFEO: This is - - -

2 MR. PERLEY: - - - and - - -

3 JUDGE GRAFFEO: This is a closer case, though,
4 because she actually did own this house, correct? She was
5 - - -

6 MR. PERLEY: Your Honor, I agree - - -

7 JUDGE GRAFFEO: They had - - -

8 MR. PERLEY: - - - it is a closer case than - -
9 -

10 JUDGE GRAFFEO: They owned two - - - she owned
11 two homes, so clearly she can have two residences; to get
12 away from the domicile issue, you can have two residences.

13 MR. PERLEY: Yes, you can, Judge. And I would -
14 - -

15 JUDGE GRAFFEO: So - - -

16 MR. PERLEY: - - - absolutely agree with you
17 that this is a closer case.

18 JUDGE GRAFFEO: - - - how are you deciding which
19 is the principal place - - -

20 MR. PERLEY: Well - - -

21 JUDGE GRAFFEO: - - - if it's not by days of the
22 week or hours of the week; it's where the spouse and
23 children are? That's always going to be the person's
24 principal - - -

25 MR. PERLEY: Well - - -

1 JUDGE GRAFFEO: - - - residence?

2 MR. PERLEY: And it's also where you say your
3 principal residence is, and in this case - - - and if I
4 misstate these records, because I'm working with three, if
5 I misstate them - - -

6 JUDGE GRAFFEO: I understand - - -

7 MR. PERLEY: - - - I apologize.

8 JUDGE GRAFFEO: - - - the problem - - -

9 MR. PERLEY: But - - -

10 JUDGE GRAFFEO: - - - that's why I'm trying - -
11 -

12 MR. PERLEY: - - - in this case - - -

13 JUDGE GRAFFEO: - - - to keep it straight as
14 well.

15 MR. PERLEY: - - - Ms. Beck-Nichols said, no,
16 Lewiston is my principal residence. She signed a
17 document, a legal document to get a tax exemption.

18 JUDGE SMITH: Was there also evidence that she
19 was - - - that she was aware of the surveillance and was
20 trying to evade it or manipulate it in some way?

21 MR. PERLEY: When you look at the - - - not only
22 is there evidence, she admits it. In her second residency
23 hearing she admitted that she knew she was under
24 surveillance and - - -

25 JUDGE SMITH: What inference do you say the

1 school board could rationally have drawn from that?

2 MR. PERLEY: Your Honor, the best evidence of
3 people - - - of decisions that people make is what they do
4 in an unguarded moment. And based upon the fact that she
5 - - -

6 CHIEF JUDGE LIPPMAN: Yeah, but you're having an
7 investigation - - - an investigation of her, there's got
8 to be some objective way, and the way you did it, quite
9 properly, is to have some kind of investigative agency - -
10 -

11 MR. PERLEY: Right.

12 CHIEF JUDGE LIPPMAN: - - - look at it, and
13 whether she knew it or not, that's what they found.

14 MR. PERLEY: Yes, but at the point when she - -
15 -

16 CHIEF JUDGE LIPPMAN: Your decision has to
17 assume that what they found is where she's living. Is it
18 a question of where your - - - we all agree or you agree
19 that it's five and two, but you draw different
20 conclusions, or are you saying that's not really where it
21 is, it's only because they were watching her, and she
22 really did seven there or whatever your - - - you might
23 think?

24 MR. PERLEY: My point is this, Your Honor. Once
25 she admits that she knows she's under surveillance, there

1 is every reason for the board to conclude that she will
2 modify her activity.

3 CHIEF JUDGE LIPPMAN: So it's rational for the
4 board to say because she's under surveillance we know that
5 that's not really where she lives?

6 MR. PERLEY: It is rational for the board - - -

7 CHIEF JUDGE LIPPMAN: That she's only doing it
8 to get around the surveillance; is that - - -

9 MR. PERLEY: It is rational for the - - -

10 CHIEF JUDGE LIPPMAN: - - - is that a rational
11 conclusion to draw? I can understand you're saying it
12 casts, gee, she knew she'd do it, I suspect maybe that,
13 but - - -

14 MR. PERLEY: In - - -

15 CHIEF JUDGE LIPPMAN: - - - could you draw the
16 conclusion that - - -

17 MR. PERLEY: In and of itself, Your Honor, I
18 understand your concern. However, there were other
19 factors, okay?

20 CHIEF JUDGE LIPPMAN: Well, go ahead; what are
21 the other factors?

22 MR. PERLEY: One of the factors is she maintains
23 in a legal document that Lewiston is her residence.

24 JUDGE READ: That's the STAR exemption?

25 MR. PERLEY: That's the STAR exemption. In

1 order to get a STAR exemption, you have to say this is my
2 principal residence, and she does that.

3 JUDGE READ: And - - -

4 JUDGE PIGOTT: What - - -

5 MR. PERLEY: So when you - - -

6 JUDGE PIGOTT: What - - -

7 CHIEF JUDGE LIPPMAN: What else - - - what else?

8 MR. PERLEY: Well, that's really the main one.

9 CHIEF JUDGE LIPPMAN: So that's the main counter
10 - - -

11 MR. PERLEY: Plus - - -

12 CHIEF JUDGE LIPPMAN: - - - argument that she
13 said it's the - - -

14 MR. PERLEY: Plus her - - - yes, I apologize,
15 Your Honor.

16 JUDGE GRAFFEO: You mentioned our stand - - - we
17 talked about our standard of review, which may be
18 arbitrary and capricious, but don't you have a clear and
19 convincing evidence standard?

20 MR. PERLEY: That's - - - that's been the
21 holding in this case, Judge, based upon the concept - - -

22 JUDGE GRAFFEO: So - - -

23 MR. PERLEY: - - - of domicile.

24 JUDGE GRAFFEO: So was the STAR document alone
25 enough to meet your standard of proof?

1 MR. PERLEY: Your Honor, the STAR document, her
2 questionable activity when she's under surveillance, the
3 other information that was developed - - -

4 CHIEF JUDGE LIPPMAN: Wait, wait, wait, wait - -
5 - her questionable activity, meaning what you found?

6 MR. PERLEY: Yeah, meaning what we found, that
7 she admitted she was under surveillance - - -

8 CHIEF JUDGE LIPPMAN: Okay. So you have two
9 things; you have that she says that's her principal
10 residence, and what you found was while she was under
11 surveillance.

12 MR. PERLEY: Yes.

13 CHIEF JUDGE LIPPMAN: So that's the basis for
14 your conclusion?

15 MR. PERLEY: Well, plus - - - plus other - - -
16 you know, other evidence that - - - that she - - - that
17 she was - - - that - - - well, her family lived in
18 Lewiston.

19 JUDGE SMITH: Yeah, I mean - - -

20 MR. PERLEY: Her children lived in Lewiston.

21 JUDGE SMITH: - - - is the rational inference
22 that most people don't have the - - - most people do live
23 with their husband and children?

24 MR. PERLEY: That's always been - - - that's
25 been my understanding, Judge, and my experience. And

1 remember that you're talking about individuals who are
2 basing their decision on their experience and their
3 evaluation of - - -

4 CHIEF JUDGE LIPPMAN: Could - - -

5 MR. PERLEY: - - - the material before them.

6 CHIEF JUDGE LIPPMAN: Could - - - but - - -
7 again, I don't mean to cut you off, but talk a little bit
8 about the difference in Luchey and in Adrian from this
9 situation we're talking about. Are they different
10 situations?

11 MR. PERLEY: They're - - -

12 CHIEF JUDGE LIPPMAN: Weaker? Stronger? In a
13 nutshell, what are your arguments in relation to those
14 two?

15 MR. PERLEY: Okay. In both cases the alleged
16 residence was rented. Luchey's residence was a so-called
17 in-law apartment in a basement in a dwelling that was
18 listed as a single-family dwelling. She had to walk
19 through a laundry room to get there, if and when she got
20 there. The surveillance indicated that she lived - - -
21 that she went to her home. She had sole custody of her
22 child. The sole custody agreement indicated that the
23 child was - - - that they were not to live in Niagara
24 Falls. The child was a school-aged child, and in order to
25 live in - - - I think she was in Amherst or Williamsville;

1 it's one of the two - - - ostensibly she had to have a
2 babysitter. But the surveillance confirmed that that's
3 where she went.

4 JUDGE GRAFFEO: But to get - - -

5 MR. PERLEY: Okay.

6 JUDGE GRAFFEO: To get to the Chief's point,
7 you're saying the other two cases were rental situations?

8 MR. PERLEY: Both. And - - -

9 JUDGE GRAFFEO: And they acknow - - - I thought,
10 also, if I remember these records in the proper order,
11 that they did indicate they didn't live in the district
12 when they were hired, but they said that - - -

13 MR. PERLEY: Yeah.

14 JUDGE GRAFFEO: - - - they would move, and then
15 you gave them two extensions.

16 MR. PERLEY: And we gave them extensions to
17 move, yes.

18 JUDGE GRAFFEO: In this case, in Beck-Nichols,
19 that's not the case?

20 MR. PERLEY: Her residence - - -

21 JUDGE GRAFFEO: She - - -

22 MR. PERLEY: - - - that she - - -

23 JUDGE GRAFFEO: She claimed a residence in
24 Niagara Falls from the time of employment, right?

25 MR. PERLEY: Living with her parents; that's

1 correct.

2 JUDGE GRAFFEO: So that's another difference
3 between this case and the other two.

4 MR. PERLEY: Without question, Judge.

5 JUDGE GRAFFEO: Are there any other - - -

6 MR. PERLEY: Well, in - - -

7 JUDGE GRAFFEO: - - - major differences between
8 the proof here and the other two?

9 MR. PERLEY: Well, in Adrian's case, the
10 residence that she gave, they sent a letter; it was
11 returned as undeliverable in the beginning part of the
12 investigation. So that was a place that she didn't even
13 live, the place that she represented - - -

14 JUDGE PIGOTT: Before you go - - -

15 MR. PERLEY: - - - in the first instance.

16 JUDGE PIGOTT: How many teachers and employees
17 of the Niagara Falls School District does this residency
18 requirement apply to?

19 MR. PERLEY: All of them.

20 JUDGE PIGOTT: And how many is that?

21 MR. PERLEY: About 350, if recollection serves.
22 I would like an opportunity, Judge, just to talk about the
23 3020-a issue.

24 CHIEF JUDGE LIPPMAN: Very, very quick, because
25 you are going to have a little rebuttal time.

1 MR. PERLEY: All right. Well, I can - - - maybe
2 I should address it then, and the due process argument.

3 CHIEF JUDGE LIPPMAN: Okay. Do it all at the
4 end; it'll be better. Go ahead.

5 MR. PERLEY: All right.

6 CHIEF JUDGE LIPPMAN: Okay.

7 MR. PERLEY: Thank you, Judge.

8 CHIEF JUDGE LIPPMAN: Mr. Brock?

9 MR. BROCK: Good afternoon, Your Honor.

10 CHIEF JUDGE LIPPMAN: All right. So you're also
11 - - - you're an appellant in one case and a respondent in
12 the other case.

13 MR. BROCK: I am.

14 CHIEF JUDGE LIPPMAN: And you represent - - -

15 MR. BROCK: I represent Ms. Adrian and Ms.
16 Luchey. And prior to coming here today, we received a
17 letter from the clerk of the court asking us to discuss
18 potential overlapping issues, and I've discussed that with
19 Mr. Sugrue. He's going to deal with the burden of proof
20 issues in which it's - - -

21 CHIEF JUDGE LIPPMAN: Okay.

22 MR. BROCK: - - - particular to his client.

23 CHIEF JUDGE LIPPMAN: Good.

24 MR. BROCK: I'm going to deal with Ms. Luchey
25 and Ms. Adrian.

1 CHIEF JUDGE LIPPMAN: Okay. You want rebuttal
2 time on the Adrian case?

3 MR. BROCK: Two minutes, please.

4 CHIEF JUDGE LIPPMAN: Two minutes out of - - -
5 okay, out of your ten. Go ahead.

6 MR. BROCK: All right. Thank you, Your Honor.

7 JUDGE GRAFFEO: And the district gave both of
8 these individuals six months and then an extension,
9 correct?

10 MR. BROCK: At the time of initial hire?

11 JUDGE GRAFFEO: Yes.

12 MR. BROCK: Yes, I believe so, Your Honor. And
13 they established residence, and I submit to you that how
14 the district handled the residency investigation and how
15 it implemented its policy, the Supreme Court got it
16 absolutely correct that it was arbitrary and capricious to
17 both not provide procedures and guidelines, as
18 specifically directed by the policy, but that the
19 implementation, the failure to use procedures and
20 guidelines has led to arbitrary and inconsistent results.
21 And the proof of that is - - -

22 CHIEF JUDGE LIPPMAN: What kind of procedures
23 and guidelines are you interested in? Like what?

24 MR. BROCK: Like allowing the people accused of
25 not being residents - - - giving them notice of what's

1 going to be appropriate proof and then actually following
2 that. Due process requires the ability - - -

3 CHIEF JUDGE LIPPMAN: You have an Article 78
4 proceeding, though, right, gives you the right to contest
5 and to raise your issues, doesn't it?

6 MR. BROCK: No, it does not.

7 CHIEF JUDGE LIPPMAN: It doesn't. Go ahead,
8 why?

9 MR. BROCK: Not the way it's here. All of the
10 cases cited by the district deal with federal issues.
11 Here the questions limited in Article 78 proceedings in
12 New York doesn't allow meaningful review here. There was
13 no hearing held.

14 JUDGE PIGOTT: Well, there was that - - - was it
15 an affirmation hearing or - - -

16 MR. BROCK: It wasn't a hearing; it was a
17 meeting.

18 JUDGE PIGOTT: Right.

19 MR. BROCK: And the essential elements of due
20 process - - -

21 JUDGE PIGOTT: Let me - - - I just - - - broadly
22 speaking - - - and the reason I asked Mr. Perley about how
23 many, you've got 350 people, apparently, who followed this
24 and they live in the to - - - they live in Niagara Falls.
25 So you've got three people here who were straddling fences

1 of one sort or another. And to say that oh, well - - -
2 and I'm not picking on your clients, but let's take some
3 separate client not in this case who says, you know, if
4 they - - - you know, I can play this game as long as they
5 keep telling me what - - - you know, what I'm up to, and
6 so I'll make sure I have my voter registration but I'm
7 going to live in Williamsville. And if I want to send my
8 kid to school there, something's going to have to happen,
9 so what I'll do is my husband will buy a house there but
10 I'll rent the basement somewhere else. I mean, it seems
11 like there's a gamesmanship going on here, and I'm not
12 picking on the teachers, I mean, they want to teach and
13 they want the job, but, you know, at what point does it
14 stop being this - - - as you say, a procedure and a
15 technicality, when all Niagara Falls is saying is, you're
16 supposed to live here; do it.

17 MR. BROCK: Well, it's okay to have the policy,
18 but when you look at the strict language used by the
19 legislature when describing tenured educators and how you
20 remove them, there's only one way to do it, and that's
21 through Education Law Section 3020-a.

22 JUDGE READ: But that's disciplinary, isn't it?

23 MR. BROCK: It's disciplinary and it's
24 employment qualifications. As this court noted in Matter
25 of Felix - - -

1 JUDGE GRAFFEO: We've made pretty clear that if
2 it's a - - - if it's a condition precedent - - -

3 JUDGE READ: Yeah.

4 JUDGE GRAFFEO: - - - the qualification for
5 employment, we don't view it as disciplinary.

6 MR. BROCK: No, it's not disciplinary, but
7 parsing the bylaws to call it a qualification of
8 employment - - -

9 CHIEF JUDGE LIPPMAN: It's a violation of a
10 condition of employment, right?

11 MR. BROCK: It is, and you get a 3020-a hearing,
12 according to this court.

13 JUDGE READ: Where did we say that?

14 MR. BROCK: You said it in Lynch v. Nyquist.
15 Teacher certification is a qualification of employment,
16 and when this court looked at the Lanterman case, that
17 teacher did not have teacher certification but she was a
18 civil servant. And you said she doesn't get her just
19 cause proceeding in her contract because it's a condition
20 of employment. But that same teacher - - - if Lanterman
21 had been employed by a public school district and given
22 tenure, you would have said she gets the 3020-a hearing,
23 as you did in Lynch v. Nyquist.

24 JUDGE GRAFFEO: Well, let me ask you a simple
25 question. What types of things would Ms. - - - Ms. Luchey

1 have wanted to say that she wasn't given an opportunity to
2 say - - -

3 MR. BROCK: She would like - - -

4 JUDGE GRAFFEO: - - - at this meeting, because
5 she certainly wasn't forthcoming with much information.

6 MR. BROCK: Well, she had - - -

7 JUDGE GRAFFEO: I think she was the individual
8 who - - - I know one of - - - one of the women didn't
9 answer the question as to where their child lived or went
10 to school, something of that nature.

11 MR. BROCK: Well, it - - - very good question.
12 To answer why didn't she respond at the time, I'm not
13 sure; she had counsel. But what they had just done was
14 provided pages and pages of documents indicating residency
15 in Niagara Falls over a couple of years, and it's the
16 precise documentation they asked for: driver's license,
17 voter registration, utilities - - -

18 JUDGE SMITH: But doesn't that raise - - -

19 MR. BROCK: - - - rental receipts.

20 JUDGE SMITH: - - - Judge Pigott's problem? If
21 you say as long as we provide the documentation you ask
22 for we're okay, well, anyone can provide the documentation
23 and never set foot in Niagara Falls.

24 MR. BROCK: Well, it - - -

25 JUDGE PIGOTT: That's why it gets down to

1 rational basis. I mean, she said I rotate my son. And
2 then they said - - - you know, they said, well, do you
3 live in Lynwood, and she wouldn't answer.

4 MR. BROCK: Well, these are confusing times, and
5 with custody issues, she works something out with her
6 husband and you can maintain two residences with a
7 principal domicile for employment purposes. And if the
8 son went to school where the husband lives, that's fine.
9 But I'd like to go back to Judge Graffeo's question, what
10 would she have liked to have said? What she would like to
11 have done was cross-examine the surveillance evidence that
12 described her as a white female when she's African-
13 American. Due process - - - when the administrative
14 agency - - -

15 JUDGE SMITH: But did the - - - she doesn't - -
16 - she doesn't say that the detectives were looking at a
17 different person, though, does she?

18 MR. BROCK: Well, I - - -

19 JUDGE SMITH: I mean, if they - - - if they
20 were, she had a great opportunity to blow this case
21 completely out of the water.

22 MR. BROCK: 3020-a would have given her that
23 right; due process requires that right.

24 JUDGE SMITH: Well, if you - - -

25 MR. BROCK: And strategically - - -

1 JUDGE SMITH: If I were in that situation and
2 they had been looking, you know, and the detectives had
3 followed my sister-in-law or my neighbor instead of me, I
4 think I wouldn't have needed a hearing. I might have
5 written a letter saying, hey, I've got some news for you.

6 MR. BROCK: But Judge, I'm not sure that she had
7 that information at the time of that meeting. In these
8 meetings, how can you call it due process when the letter
9 you get says show up and you're limited to twenty minutes?
10 Their letter says you will get no more than twenty
11 minutes; that's not due process.

12 CHIEF JUDGE LIPPMAN: But why doesn't the
13 Article 78 cure all of that? You've got a - - - you have
14 a post-deprivation hearing; why isn't that - - - you know,
15 fulfill the necessary holes in the process of the - - - of
16 Niagara Falls?

17 MR. BROCK: As this court said in the Montauk
18 Improvement case, the board has to give reasons and
19 findings of fact to provide for meaningful judicial
20 review. Here, the board didn't make any findings of fact
21 or provide any information for us to look at. Mr. Perley
22 - - -

23 JUDGE PIGOTT: I guess - - -

24 MR. BROCK: - - - has put it in - - -

25 JUDGE PIGOTT: I guess I get your argument but -

1 - - if you want to stick with 3020-a or that type of a
2 thing, but it seems to me that any public educational
3 system, Niagara Falls or, you know, whatever - - -
4 Shenendehowa is down here; they got better things to do
5 than chase teachers. You know, all they're trying to
6 educate is a bunch of kids. They get word that somebody's
7 not doing what all the rest of the teachers are supposed
8 to be doing and that they're somehow doing something else,
9 I mean, they - - - they check it out, they do these
10 Westlaw searches, they find out that, you know, as Mr.
11 Perley says, you get a STAR - - - you know, you're telling
12 the state of New York give me a tax break because I live
13 in Lewiston, but I don't really live in Lewiston, I'm
14 fooling them, but I'm not fooling you. At what point, you
15 know, do you just say they asked for information, they got
16 information, the decision's either irrational or rational,
17 and then you're done.

18 MR. BROCK: Well, in - - - with Ms. Beck-
19 Nichols, she's not a tenured teacher so I think it's a
20 slightly different situation. But the answer to that
21 question is that by using Education Law Section 3020-a,
22 you're doing everyone a favor, including the district,
23 including the taxpayers. Now that the statute's been
24 changed, these Education Law Section 3020-a hearings are
25 done in 125 days; they have to be.

1 JUDGE READ: Well - - -

2 MR. BROCK: So it's a very efficient process,
3 and - - -

4 JUDGE READ: - - - stop there. We've had peo -
5 - - we have reason to know otherwise because of some of
6 our other cases. They're supposed to be, by statute, but
7 that doesn't mean they are.

8 MR. BROCK: Well, my experience, since the
9 statute became effective in April 1st, is that they are,
10 and look what we get when we don't use 3020-a. We have to
11 go to Supreme Court, then we go to the Appellate Division,
12 and then we may end up here. That's no more efficient - -
13 -

14 JUDGE READ: You may do that - - -

15 MR. BROCK: - - - that's no more cost-effective
16 - - -

17 JUDGE READ: You may do that anyway, though,
18 right?

19 MR. BROCK: I'm sorry?

20 JUDGE READ: You may do that anyway, even after
21 a 3020-a hearing.

22 MR. BROCK: No, I don't think so.

23 JUDGE READ: That's the - - -

24 MR. BROCK: Your grounds for appeal are
25 significantly more limited. The results of a 3020-a

1 hearing almost never get to the - - -

2 CHIEF JUDGE LIPPMAN: Okay, counselor.

3 MR. BROCK: - - - Appellate Division.

4 CHIEF JUDGE LIPPMAN: Counselor, you'll have
5 your rebuttal.

6 MR. BROCK: Thank you very much.

7 CHIEF JUDGE LIPPMAN: Thanks, counselor.

8 Counselor? Counselor, you're the respondent in
9 Beck-Nichols, right?

10 MR. SUGRUE: That's correct.

11 CHIEF JUDGE LIPPMAN: And what's your subject
12 area? You're going to deal, now, with what?

13 MR. SUGRUE: You know, basically what we're
14 talking about the standard of review, as I understand it,
15 with the basis of the appeal.

16 CHIEF JUDGE LIPPMAN: Okay.

17 MR. SUGRUE: Our contention in this case is,
18 basically, that it was not rational for the district to
19 conclude that Ms. Beck-Nichols changed her domicile,
20 because each piece of evidence that they relied upon - - -

21 CHIEF JUDGE LIPPMAN: What about the declaring
22 the - - -

23 MR. SUGRUE: - - - was - - -

24 CHIEF JUDGE LIPPMAN: - - - the principal
25 residence that - - -

1 MR. SUGRUE: Each - - -

2 CHIEF JUDGE LIPPMAN: - - - under the STAR
3 program?

4 MR. SUGRUE: Each piece, including the STAR
5 application, was loose, equivocal or contradictory. Now,
6 the - - -

7 CHIEF JUDGE LIPPMAN: But what about that - - -

8 MR. SUGRUE: The STAR application - - -

9 CHIEF JUDGE LIPPMAN: Yeah.

10 MR. SUGRUE: The STAR application talks about
11 residence; it says primary residence. Now, as the school
12 district had noted, their policy talks about domicile.
13 Well, they're two different things, and as they've pointed
14 out in their - - -

15 CHIEF JUDGE LIPPMAN: Is your argument that you
16 can have - - -

17 MR. SUGRUE: - - - papers to this court - - -

18 CHIEF JUDGE LIPPMAN: - - - more than one
19 domicile, basically your argument?

20 MR. SUGRUE: No, our position, and I think it's
21 the general state of the law, is that a person can have
22 more than one residence but only one domicile. And in
23 this case, the STAR application - - -

24 CHIEF JUDGE LIPPMAN: So her dominant - - - her
25 domicile was in Niagara Falls, but she has another

1 residence?

2 MR. SUGRUE: That's correct.

3 CHIEF JUDGE LIPPMAN: And what's on your side of
4 the equation that tells us that?

5 MR. SUGRUE: That her residence is in - - -

6 CHIEF JUDGE LIPPMAN: Yeah.

7 MR. SUGRUE: Niagara Falls? Well, first of all

8 - - -

9 CHIEF JUDGE LIPPMAN: Yeah.

10 MR. SUGRUE: - - - as probably all of Your
11 Honors noted, she started in Niagara Falls. She owned a
12 home in Niagara Falls. That's where she was living when
13 she was hired.

14 JUDGE PIGOTT: But the family bought a house in
15 Lewiston.

16 MR. SUGRUE: Say that again?

17 JUDGE PIGOTT: The family - - - she and her
18 husband bought the house in Lewiston where the kids were.

19 MR. SUGRUE: They bought a house in Lewiston
20 several years after she started working for the district;
21 that's correct.

22 JUDGE PIGOTT: She claims she moved with her
23 parents to Champlain in Niagara Falls, saying she only
24 spent weekends and one day a week in Lewiston.

25 MR. SUGRUE: Correct.

1 JUDGE PIGOTT: She had rent receipts from her
2 parents.

3 MR. SUGRUE: Right.

4 JUDGE PIGOTT: But her license and credit cards
5 were for Joliette, which was not where the parents lived;
6 it's where they used to live. And her voter ID was in
7 Champlain. So I mean, there was not a consistent story
8 here as to exactly, you know, where she was living.

9 MR. SUGRUE: No, it's - - - that's not the case,
10 Your Honor. And the - - -

11 JUDGE PIGOTT: We have a record.

12 MR. SUGRUE: - - - the record reflects that she
13 was living in Joliette when she started working for the
14 school district. They owned that home. That's the home
15 that they've owned continuously. At some point, somewhere
16 around 2001, possibly, based upon the STAR application,
17 purchased a home in Lewiston. At that point, she
18 disclosed to the school district, in September of 2001,
19 that she had two residences: one in Lewiston and one in
20 Niagara Falls. And at that time, they rented out - - - or
21 she - - -

22 JUDGE GRAFFEO: Does this say - - - at some
23 point didn't she - - -

24 MR. SUGRUE: - - - they rented out - - -

25 JUDGE GRAFFEO: - - - didn't she rent the house

1 that's in Niagara Falls?

2 MR. SUGRUE: They rented - - - they rented the
3 Niagara Falls house out and she moved in with her parents.

4 JUDGE GRAFFEO: So how was that still her
5 residence when she's renting that out?

6 MR. SUGRUE: Well, she moved in with her
7 parents, who also live in Niagara Falls. This case isn't
8 - - - isn't really any different - - -

9 CHIEF JUDGE LIPPMAN: But your point - - - what
10 she said on STAR is not inconsistent with what she's
11 telling them, is that your point?

12 MR. SUGRUE: It is not inconsistent.

13 JUDGE PIGOTT: Then why in '09 did only the
14 husband sign it?

15 MR. SUGRUE: Say that - - -

16 JUDGE PIGOTT: I mean, after it came to light
17 that she had signed this STAR application in '08, when she
18 claims to have moved back to Champlain, in '09 she doesn't
19 sign the STAR application; only the husband does.

20 MR. SUGRUE: Well, the reason for that is - - -
21 and first of all, the STAR application actually came to
22 light in the 2004 residency investigation.

23 JUDGE PIGOTT: But isn't that kind of larcenous
24 - - -

25 MR. SUGRUE: The district was aware of it then.

1 JUDGE PIGOTT: - - - if you - - - I mean, if you
2 - - - if you say, you know, I'm entitled to a tax
3 deduction because this is my - - - this is my domicile and
4 it's not?

5 MR. SUGRUE: But it doesn't say it's your
6 domicile; it says it's your residence.

7 JUDGE PIGOTT: Well, that's where you claimed it
8 so you can - - -

9 MR. SUGRUE: In - - -

10 JUDGE PIGOTT: - - - deduct taxes.

11 MR. SUGRUE: As far as I know, no court - - -
12 maybe this'll be the first - - - has ever interpreted the
13 STAR application's primary domicile as meaning the same
14 thing as a - - -

15 JUDGE PIGOTT: Well, no - - -

16 MR. SUGRUE: - - - a primary residence as
17 meaning the same thing as a domicile.

18 JUDGE PIGOTT: Can you get two STARS? I
19 honestly don't know that.

20 MR. SUGRUE: Well, if you - - - if you're
21 separated.

22 JUDGE PIGOTT: No, no, if you're not separated.
23 I mean, can you say - - -

24 MR. SUGRUE: If you could - - -

25 JUDGE PIGOTT: - - - could they have gotten a

1 STAR tax discount for both Joliette and Lewiston?

2 MR. SUGRUE: At present, no. But - - -

3 JUDGE SMITH: Why can't you look at this whole
4 picture and say - - - couldn't a rational person look at
5 this and say, this doesn't look to me like someone who's
6 really living in Niagara Falls; this looks to me like
7 someone who's trying to keep up appearances and has a
8 Niagara Falls address and is really living in wherever she
9 is.

10 MR. SUGRUE: Well, the fact of the matter is she
11 was living in Niagara Falls, and their own investigators -
12 - -

13 JUDGE READ: Yeah, but - - -

14 MR. SUGRUE: - - - know that she was living - -
15 -

16 JUDGE READ: But Judge - - -

17 JUDGE SMITH: But couldn't a rational person
18 disagree with you?

19 JUDGE READ: But Judge Smith's question is can't
20 you look at this whole bunch of different facts; what's
21 irrational about looking at the whole - - - whole of it
22 and deciding otherwise?

23 MR. SUGRUE: Well, you have to look at each
24 fact, and each fact that they relied upon.

25 JUDGE SMITH: I mean, you say that they're

1 equivocal and contradictory, but isn't that a way of
2 saying you can read them in one of two ways?

3 MR. SUGRUE: If it is loose, equivocal or
4 contradictory and it cannot meet the standard of clear and
5 convincing evidence, which is the first standard that they
6 have to meet - - -

7 JUDGE SMITH: Why is it - - - why is it a clear
8 - - - I mean, I understand we have a case - - - there are
9 some court cases that say that. How clear is it that an
10 administrative agency is bound by that clear and
11 convincing standard?

12 MR. SUGRUE: This court has said it numerous
13 times; it's been the standing precedent for more than a
14 century that a party alleging that an individual has
15 changed their domicile has the burden of proof to prove it
16 by clear and convincing evidence.

17 JUDGE SMITH: But what do you understand to be
18 the rationale for that?

19 MR. SUGRUE: What's the rationale for that? You
20 know, I can't - - - I'm not going to - - - I don't know -
21 - - you know - - -

22 CHIEF JUDGE LIPPMAN: Counselor - - -

23 MR. SUGRUE: - - - it's best if I - - -

24 CHIEF JUDGE LIPPMAN: - - - let's get to your
25 argument in a nutshell. So you're saying that it's clear

1 and convincing - - - and don't let me put words in your
2 mouth - - - and if the overwhelming number of indicia are
3 that she resides in Niagara Falls, that's enough, even
4 though there obviously are family relationships and all
5 these complicated issues that might be raised. Is that
6 your argument, that if most of the indicia shows she's
7 here, then she's okay, regardless of whether in fact she
8 is maintaining that residence in Niagara Falls 'cause she
9 wants to keep her job?

10 MR. SUGRUE: No, not necessarily.

11 CHIEF JUDGE LIPPMAN: Okay. So tell me how I
12 misspoke.

13 MR. SUGRUE: The - - - it isn't about weighing
14 the evidence to see, you know - - -

15 CHIEF JUDGE LIPPMAN: So what is it? How do you
16 determine.

17 MR. SUGRUE: - - - which - - - which group is
18 more probable as to where she's living.

19 CHIEF JUDGE LIPPMAN: What would make it
20 rational or irrational?

21 MR. SUGRUE: If you look at each piece of
22 evidence that they relied upon. And if each piece of
23 evidence is loose, equivocal or contradictory, then
24 whether it's viewed separately or together, it isn't clear
25 and convincing.

1 JUDGE READ: Well, how - - -

2 MR. SUGRUE: And if - - -

3 JUDGE READ: How is the STAR - - - how is that
4 equivocal? I mean, that - - -

5 MR. SUGRUE: How is it equivocal?

6 JUDGE READ: Yeah, I mean it's a fact that at
7 one point in time that she - - - I mean, how is that
8 equivocal?

9 MR. SUGRUE: Well, there's two things with
10 respect to the STAR application. First of all, the STAR
11 application, as I had begun to mention - - - the school
12 district was aware of this in 2004, and as I had already
13 mentioned, no court or anyone else authoritatively has
14 declared that the primary residence on the STAR
15 application means domicile.

16 JUDGE READ: Maybe that means it's not
17 dispositive, but how is it equivocal? I mean - - -

18 MR. SUGRUE: Well, the - - - it's - - -

19 CHIEF JUDGE LIPPMAN: Are you saying that all of
20 the evidence is equivocal - - -

21 MR. SUGRUE: That's correct.

22 CHIEF JUDGE LIPPMAN: - - - and that it could go
23 either way, rather than that - - - let me understand your
24 argument - - - rather than that most of the evidence goes
25 your way and that's why it's irrational to say she doesn't

1 live there, or are you saying it's all fuzzy and therefore
2 in order to be - - - that's not enough to be clear and
3 convincing; if everything's fuzzy they can't say she
4 doesn't live there. Which is it? Do you follow the
5 distinction?

6 MR. SUGRUE: No, I understand.

7 CHIEF JUDGE LIPPMAN: So which is your argument?

8 MR. SUGRUE: It's kind of both. As the - - -
9 you know, we contend that the information that was
10 submitted that's not loose, equivocal or contradictory,
11 like her driver's license, her voter registration - - -
12 those are indicia that she lives in the City of Niagara
13 Falls. They don't really dispute that.

14 JUDGE SMITH: Can they - - - were they entitled
15 to rely on the report of the - - - the surveillance person
16 that she was - - - that she tried to avoid them, that she
17 - - - that she tried to conceal what she was doing? Isn't
18 that in itself some evidence from which you could draw an
19 inference that she had something to hide?

20 MR. SUGRUE: It's not, and this is why. The
21 record discloses that Probe Services, who investigated
22 these individuals, they tailed them. They followed them
23 around to see what they were doing. And they reached a
24 conclusion that, after initially looking at it, she was
25 living in Lewiston and that towards the end of her

1 investigation that she was living in Niagara Falls. And
2 they surmised that she became aware of the investigation
3 so that she moved and changed her behavior. It's equally
4 plausible, and this is what we put in our papers, that
5 they didn't come across a changed behavior but they came
6 across changed circumstances. And each of the days that -
7 - - that the employee was found to be in Lewiston, she
8 didn't work that day. And - - -

9 JUDGE SMITH: If this were a jury trial, you'd
10 say a question like that's for the jury. Why - - - well,
11 why isn't this question for the agency?

12 MR. SUGRUE: Because it goes either way.

13 JUDGE PIGOTT: Well, that means they get to
14 choose.

15 MR. SUGRUE: Well, doesn't it - - - no, if the
16 evidence is - - - is equivocal, they can't declare it
17 unequivocal and not let the court look at it.

18 JUDGE PIGOTT: Well, I don't want to - - - I
19 don't want to repeat what Judge Read said, but I mean, you
20 get seven pieces of evidence and four of them go one way,
21 three of them go another, and if they decide that the
22 three are stronger than the four, who are we to say you
23 did it the wrong way? I mean, that's not our job.

24 MR. SUGRUE: Because each piece that they said
25 was stronger than the other pieces is equivocal.

1 JUDGE PIGOTT: But - - -

2 MR. SUGRUE: And that's really the point.

3 JUDGE PIGOTT: Okay.

4 MR. SUGRUE: And if it could go either way, it
5 means it's not clear and convincing, whether you add it up
6 - - -

7 CHIEF JUDGE LIPPMAN: Okay.

8 MR. SUGRUE: - - - or separate it apart.

9 CHIEF JUDGE LIPPMAN: Okay. Thanks, counselor.

10 MR. SUGRUE: Can I add just one last thing - - -

11 CHIEF JUDGE LIPPMAN: One quick one.

12 MR. SUGRUE: Okay.

13 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

14 MR. SUGRUE: You know, with respect to the
15 surveillance footage, the counsel has indicated that well,
16 she admitted that she was aware that they were being
17 surveilled. And she did that and she mentioned that the
18 situation that she became aware of, it was noted in the
19 record. Well, it's noted in the record on the last day of
20 the surveillance. And the circumstances were she pulls
21 into a driveway at 11:30 at night, and there's a car
22 parked in front of her driveway with a camera running. I
23 suspect all of us would have noticed if there was a car
24 parked in front of our house with a camera pointing
25 towards our house. We might call the cops. I don't know

1 whether she did or didn't, but I think we would all
2 probably notice that.

3 CHIEF JUDGE LIPPMAN: Okay, counselor. Thanks,
4 counselor.

5 MR. SUGRUE: Thank you, Your Honors.

6 CHIEF JUDGE LIPPMAN: Okay. Rebuttal, Mr.
7 Perley?

8 MR. PERLEY: Thank you, Your Honor.

9 JUDGE GRAFFEO: Can you address the 3020-a issue
10 that you didn't get to discuss in your - - -

11 MR. PERLEY: I would love to.

12 JUDGE GRAFFEO: - - - last time you were up?

13 MR. PERLEY: This court in Felix characterized
14 disciplinary versus nondisciplinary with what I think is a
15 very prescient word, and that's eligibility. And this is
16 an eligibility issue. I am a licensed attorney. I could
17 be the city attorney in the City of Buffalo if I lived
18 there. I could be the best possible attorney in the City
19 of Buffalo if I lived there. I could be competent and
20 everything else. But the eligibility requirement remains
21 that I must live there. And that's what this court
22 addressed in Felix. 3020-a talks about - - -

23 JUDGE GRAFFEO: If we have - - -

24 MR. PERLEY: - - - misconduct - - -

25 JUDGE GRAFFEO: If we have a 3020-a hearing in

1 all these cases, would it avoid the situation we're in?

2 MR. PERLEY: Oh, Your Honor, anybody can say
3 that, but I find it highly doubtful.

4 JUDGE GRAFFEO: Would the proof be substantially
5 different, do you think?

6 MR. PERLEY: The proof would be substantially
7 the same. It might have a little bit more formality, but
8 it would be substantially the same.

9 CHIEF JUDGE LIPPMAN: Counselor, do you - - - on
10 Beck-Nichols, do you view the evidence as equivocal?

11 MR. PERLEY: No, not at all. We can arg - - - I
12 can argue this case - - -

13 CHIEF JUDGE LIPPMAN: Do you think it's in your
14 favor?

15 MR. PERLEY: Your Honor, it goes to this. You
16 know, Mr. - - -

17 CHIEF JUDGE LIPPMAN: If it's equivocal, who
18 wins?

19 MR. PERLEY: If it's equivocal, the party
20 bearing the burden of proof loses. That's the standard.
21 But - - -

22 CHIEF JUDGE LIPPMAN: So you would lose, in that
23 case?

24 MR. PERLEY: Yes, but let's not talk - - -

25 CHIEF JUDGE LIPPMAN: Okay. Why is it not, at

1 the very least, equivocal?

2 MR. PERLEY: Well, it's - - - first of all,
3 you've got quantity of evidence versus quality of
4 evidence. All right?

5 CHIEF JUDGE LIPPMAN: We all acknowledge that
6 most of the indicia is their way, it's not rational to
7 say, right, that - - -

8 MR. PERLEY: Well - - -

9 CHIEF JUDGE LIPPMAN: But - - -

10 MR. PERLEY: Let's - - -

11 CHIEF JUDGE LIPPMAN: - - - it's equivocal - - -

12 MR. PERLEY: Let's talk about their equivocal
13 evidence to begin with.

14 CHIEF JUDGE LIPPMAN: Yeah, but you're
15 acknowledging if it's equivocal - - - you're acknowledging
16 it's equivocal?

17 MR. PERLEY: No, I'm not.

18 CHIEF JUDGE LIPPMAN: Oh, you're saying it's all
19 in your favor? Go ahead.

20 MR. PERLEY: What I'm saying is, if it's
21 equivocal, I lose.

22 CHIEF JUDGE LIPPMAN: Okay.

23 MR. PERLEY: But I'm not going that - - -

24 CHIEF JUDGE LIPPMAN: Why is it not equivocal?

25 MR. PERLEY: All right.

1 CHIEF JUDGE LIPPMAN: Go ahead.

2 MR. PERLEY: Number one, let's talk about what
3 we talked about in the beginning, what people do in their
4 unguarded moments. Juries are absolutely the finders of
5 facts. This agency has every right to weigh that evidence
6 more strongly. What did Beck-Nichols do in an unguarded
7 moment? She said this is my primary residence. Whether
8 or not we quibble if - - - if this is - - -

9 JUDGE SMITH: But that's - - - she could have
10 been motivated to do that by her self-interest, just as
11 she's motivated now to say the opposite. How do you know
12 which one is the correct one?

13 MR. PERLEY: Well, isn't that the exact type of
14 thing that the Agency is allowed to consider rationally
15 and reach a conclusion? And - - -

16 CHIEF JUDGE LIPPMAN: Or is that just - - -
17 pursuant to what Judge Smith is saying, does that just
18 mean it's equivocal?

19 MR. PERLEY: No, it doesn't. It means that you
20 can weigh the motivation and you can weigh the intent of
21 the party by what they have just said, what they have
22 said, in writing, in an unguarded moment.

23 And let's talk about the surveillance. She
24 admitted that she knew she was being surveilled. My
25 associate, thank God, found some of my notes. She went

1 home four times out of six, stayed - - - stayed two times
2 in Niagara Falls, according to our view of the record.

3 And the last two times - - -

4 JUDGE SMITH: So was there any significance to
5 the fact that a couple of times she goes, when she
6 apparently knows she's being surveilled, she goes for
7 about ten minutes to the Niagara Falls home and goes away?

8 MR. PERLEY: I think you can read a lot into
9 that, and I can make a lot of arguments, one being that
10 she - - -

11 CHIEF JUDGE LIPPMAN: Or is it equivocal?

12 MR. PERLEY: No, it's not. What - - - what she
13 could have been trying to do, Judge, is try to ditch the
14 tail, okay? And if I go here now, maybe they'll be gone,
15 maybe they'll leave, and maybe - - -

16 CHIEF JUDGE LIPPMAN: Or maybe - - - again, just
17 to play the devil's advocate, or maybe she had something
18 to do in the place at that time and then she left when she
19 finished it. Why isn't it - - - why is it in your favor
20 rather than equivocal?

21 MR. PERLEY: It's in our favor, Judge, because -
22 - -

23 CHIEF JUDGE LIPPMAN: Because you have the right
24 to draw whatever inference you want?

25 MR. PERLEY: We have a right to draw these

1 inferences based upon her motivation. And there's not an
2 in - - - correct me if I'm wrong, but I suggest to you I'm
3 not drawing one improper inference from her actions. And
4 the evidence that Mr. Sugrue relies upon is equivocal as
5 well.

6 CHIEF JUDGE LIPPMAN: But even if it's - - - to
7 go back where we started from, even if the evidence is - -
8 - from your perspective, even if the evidence is that she
9 stays - - - let's assume for the sake of argument that she
10 stays five days a week in Niagara Falls and two days on
11 the weekend with the husband and the child, assuming
12 that's the evidence, is that equivocal or in their side of
13 the equation? If that's the principal evidence and it's -
14 - - assume - - -

15 MR. PERLEY: If it's - - -

16 CHIEF JUDGE LIPPMAN: - - - that it's five days
17 in Niagara Falls, two in the other place; that's in their
18 favor, right?

19 MR. PERLEY: That's - - - that's an uphill
20 battle for me, there is no question about it. That would
21 be an - - -

22 CHIEF JUDGE LIPPMAN: So why isn't this an
23 uphill battle for you?

24 MR. PERLEY: Well, because as I recall the
25 surveillance, Your Honor, she stayed more at her residence

1 in Lewiston. That's where her family is. That's where
2 her family moved to. She's on the mortgage.

3 CHIEF JUDGE LIPPMAN: Well, putting that aside,
4 where she stayed, you're saying that it doesn't lend to
5 the conclusion that - - - that she stayed five and two?

6 MR. PERLEY: No, it doesn't. And Your Honor,
7 essentially remember this, and we talked about - - - when
8 we talk about this, what - - - we have contested issue.
9 Voter registration - - - the only requirement for voter
10 registration is I don't register in two places. All
11 right. I can get a driver's license, probably, at my old
12 address, and you know, if I had it in my old address I
13 could keep it. DMV doesn't check where you live.

14 CHIEF JUDGE LIPPMAN: Yeah, well, you look at
15 the various indicia to see - - -

16 MR. PERLEY: So that evidence, which they want
17 this court to consider to be strong and dispositive, is
18 equally - - - is more equivocal than what they suggest is
19 equivocal on our side. And it was perfectly within the
20 right of this board to make these decisions based upon - -
21 -

22 CHIEF JUDGE LIPPMAN: Okay, counselor.

23 MR. PERLEY: - - - a thorough investigation.

24 CHIEF JUDGE LIPPMAN: Thanks, counselor.

25 Okay, rebuttal, counselor.

1 MR. BROCK: Thank you, Your Honor. Your Honor,
2 there's two pages in the record that I think if you take a
3 close look at them you'll agree that even the District
4 agrees that Education Law Section 3020 - - - 3020 applies
5 to Ms. Luchey and Ms. Adrian. The first is that portion
6 of the policy - - - if you read through what the policy
7 does say and what they did, it ends at a point where after
8 the seven-day letter is issued, you notify the person that
9 you think they're no longer a resident and they - - - they
10 have this meeting that they've had. But then the policy
11 specifically says if the board believes that the person is
12 not a resident, the superintendant shall initiate the
13 appropriate proceedings. It doesn't say 3020-a, and it
14 shouldn't. It says "appropriate proceedings to
15 terminate". In Luchey and Adrian, the appropriate
16 proceeding is 3020-a, and they parrot the language in
17 3020-a, "disciplinary proceeding". Initiating a
18 disciplinary proceeding under 3020-a has somebody draw up
19 charges, the superintendent, give it to the clerk of the
20 board - - -

21 JUDGE PIGOTT: What's the disci - - - what - - -
22 why is there discipline? They didn't do anything wrong.

23 MR. BROCK: Oh, you did. You didn't comply with
24 the board policy. You were insubordinate to the board
25 policy. You could characterize it as misconduct - - -

1 JUDGE PIGOTT: You can - - -

2 MR. BROCK: - - - if you're not following the
3 board policy.

4 JUDGE PIGOTT: But I mean, Mr. Perley's saying
5 that it's eligibility.

6 MR. BROCK: If it's eligibility, you still get a
7 3020-a with certifications eligibility.

8 JUDGE PIGOTT: Wouldn't that lead to a situation
9 where - - - let's suppose you get a super teacher, you
10 know, one everybody loves, Teacher of the Year fifteen
11 years in a row; you find out they live in Lewiston. You
12 have to terminate them; they're not eligible.

13 MR. BROCK: Correct.

14 JUDGE PIGOTT: All right. Well, you're saying
15 no, you're going to have a hearing and then somebody comes
16 in and says Teacher of the Year, you don't want to can him
17 or her, you know, let's not do that, and so an arbitrator
18 says, yeah, I agree, you're living in the wrong town but
19 you're Teacher of the Year, therefore I think it's okay
20 for you to do that.

21 MR. BROCK: Well, two things. First, contrary
22 to Felix, Felix had a mandatory forfeiture provision in
23 its policy; this doesn't have it. They make exceptions;
24 we've seen that. And that's what bothered Supreme Courts.
25 Some people are treated differently; they're allowed to

1 come into compliance while others are not.

2 JUDGE GRAFFEO: Well, they gave - - - they gave
3 your clients additional time to move into the district
4 when they asked for it. They were - - -

5 MR. BROCK: Initially - - -

6 JUDGE GRAFFEO: - - - given two extensions,
7 initially.

8 MR. BROCK: - - - yes, upon being employed,
9 correct.

10 JUDGE PIGOTT: Well, how many times are you
11 going to do it?

12 MR. BROCK: But what's the difference with the
13 other person? We don't know. We're left to guess.

14 JUDGE PIGOTT: Wait, wait, wait. I mean, they
15 say come into compliance and we'll give you the time to do
16 it, and one of them wanted even more and they said, okay,
17 fine. But that doesn't mean you can run out the back door
18 the minute they're not looking and say, well, you should
19 have given me time again. I mean, how many times are you
20 - - -

21 MR. BROCK: Offer a hearing also to his side.

22 JUDGE PIGOTT: We're not dealing with the kids
23 here; we're dealing with the teachers.

24 CHIEF JUDGE LIPPMAN: Okay. Your argument is
25 about process, right?

1 MR. BROCK: It is, Judge, and there's just one
2 more point in the record I'd call your attention to.

3 CHIEF JUDGE LIPPMAN: Very quickly; we'll hear
4 your point. Go ahead.

5 MR. BROCK: If you look at - - - in the Luchey
6 record at page 360, and in Adrian it's at 291, you'll see
7 that on July 28, 2009, there's a residency status report
8 that's presented to the board, and it views twenty-six
9 cases of these residency investigations. And when you
10 look at that page, you're going to see that they divide
11 the twenty-six cases into five categories: nonresident,
12 they get a thirty-day letter; dual resident, they get a
13 thirty-day letter; residents; then a category that's
14 called hold, and we don't know what that means; and then
15 there's one who gets a 3020-a hearing, somebody who's out
16 of compliance with the policy, where they say termination,
17 they have 3020-a hearing listed - - - in both records, a
18 couple of times in each. It's 360 and 364 with Luchey and
19 291 and 296 in the Adrian record.

20 JUDGE PIGOTT: Well, why - - -

21 MR. BROCK: And why -- Judge --

22 JUDGE PIGOTT: Why is that?

23 MR. BROCK: -- why do they get a 3020-a hearing
24 and my clients don't?

25 JUDGE PIGOTT: Well, maybe - - - maybe they were

1 drunk on the job. Maybe they struck a kid. Maybe - - - I
2 mean, you don't know - - -

3 MR. BROCK: It's a residency case.

4 JUDGE PIGOTT: You don't know and we don't know.

5 MR. BROCK: No, but Judge, it's under their
6 residency investigation. It's the report on residency
7 cases.

8 CHIEF JUDGE LIPPMAN: Okay.

9 JUDGE PIGOTT: It could be - - - it could be
10 both.

11 CHIEF JUDGE LIPPMAN: Okay, counselor, thanks.

12 MR. BROCK: Thank you very much.

13 CHIEF JUDGE LIPPMAN: Thank you all. Appreciate
14 it.

15 (Court is adjourned)

16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of MATTER OF BECK-NICHOLS v. BIANCO, No. 20, MATTER OF ADRIAN v. BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NIAGARA FALLS, No. 21, and MATTER OF LUCHEY v. BOARD OF EDUCATION OF CITY SCHOOL DISTRICT OF NIAGARA FALLS, No. 27, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: January 16, 2013