Matter of Kunjbehari v Wyandanch Union Free School Dist.
2001 NY Slip Op 30074(U)
October 26, 2001
Sup Ct, Suffolk County
Docket Number: 00-26164
Judge: Ralph F. Costello

[* 1]

UPDATE Clerk Notified 10-30

SHORT FORM ORDER

INDEX No. 00-26164

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

(1)

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 11/29/00
ADJ. DATE 8/7/01
Mot. Seq. #001 - MotD

In the Matter of an Application for a Judgment Pursuant to Article 78 CPLR LALTA KUNJBEHARI, Petitioner, - against - WYANDANCH UNION FREE SCHOOL DISTRICT, Respondent.	BRACKEN & MARGOLIN, LLP Attorneys for Petitioner One Suffolk Square, Suite 300 Islandia, New York 11749 VAN NOSTRAND & MARTIN Attorneys for Defendant 53 Broadway P.O. Box 307 Amityville, New York 11701

Upon the following papers numbered 1 to 33 read on this Article 78 proceeding; Notice of Motion/ Order to Show Cause and supporting papers 1-17; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 18-29; Replying Affidavits and supporting papers 32-33; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the petition is granted to the extent that a trial will be held pursuant to CPLR 7804(h) to determine whether petitioner was denied tenure for a constitutionally impermissible reason, and is otherwise denied.

In this article 78 proceeding, petitioner seeks a judgment setting aside a determination by respondent Wyandanch Union Free School District to deny petitioner tenure and directing respondent to grant petitioner tenure status and reinstate him as a District Administrator, effective July 1, 2000, together with all back pay and other benefits.

Petitioner was hired by respondent School District in August 1989 as an Attendance Teacher, a position in which he was granted tenure three years later. In July 1996, petitioner was appointed to the position of Assistant Director of Student Services, a new tenure position for which he was required to serve a three year probationary period. In July 1997, having served one year in the title

of Assistant Director of Student Services, petitioner applied for the position of Director of Testing, Evaluation and Attendance. In April 1999, the then Superintendent of School, Dr. James Lotheridge, recommended that petitioner be granted tenure. Respondent School District's Board of Education rejected that recommendation, but approved petitioner's request that he be permitted to serve another year of probation for the period of July 1, 1999 to June 30, 2000. On or about March 17, 2000, petitioner was notified by Dr. Brian DeSorbe, the Acting Superintendent for the School District, that he was recommending to the Board of Education that petitioner not be granted tenure. Petitioner then requested, in accordance with Education Law § 3031, that he be given a statement setting forth the reasons that Dr. DeSorbe recommended that tenure for petitioner be denied. In a memorandum dated March 27, 2000, Dr. DeSorbe furnished petitioner with a statement of the fifteen reasons which formed the basis for Dr. DeSorbe's recommendation that petitioner be denied tenure. Petitioner's written response to Dr. DeSorbe's statement was forwarded to the Board of Education. At the Board of Education's meeting on April 19, 2000, Dr. DeSorbe's recommendation that petitioner be denied tenure was presented to the Board.[1]

Petitioner commenced the instant proceeding alleging that the determination not to recommend him for tenure was arbitrary and capricious and in bad faith motivated by Dr. DeSorbe's desire to retaliate against petitioner for his union activity.

Petitioner claims that underlying Dr. DeSorbe's decision to deny petitioner tenure was the fact that petitioner served as the President of the Wyandanch Administrators' Association and, in that capacity, that he filed and pursued grievances on behalf of himself and three other district administrators against the School District during the 1998-1999 school year arising out the School District's denial of merit pay increases to these administrators. By his personal affidavit, petitioner asserts that at a retreat held by the School District for its administrators in August 1999, he was approached by Dr. DeSorbe, in private, about the pending grievances and was told by Dr. DeSorbe that administrators who did not have tenure should think carefully about filing grievances if they wanted a future with the School District. Petitioner also contends that Dr. DeSorbe then reminded petitioner that he was in an unenviable position as president of the administrators' association as all grievances had to come through him and that he was up for tenure in June 2000. Petitioner asserts afterwards he filed another grievance against the School District on behalf of another administrator Dr. DeSorbe was attempting to transfer without utilizing the proper procedures.

It is well established that a board of education has an unfettered right to terminate the employment of a teacher or administrator during his or her probationary period, without a hearing,

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[1] It is uncontroverted that the Board of Education lacks the authority to reject the Superintendent's recommendation that tenure be denied (*see*, ***Matter of Anderson v Board of Educ.***, 46 AD2d 360, 362 NYS2d 536 [1974], *affd* 38 NY2d 897, 382 NYS2d 750 [1976]).

unless that person establishes that his or her employment was terminated for a constitutionally impermissible purpose or in violation of a statutory proscription (***Matter of Strax v Rockland County Bd. of Coop. Educ. Servs.***, 257 AD2d 578, 683 NYS2d 588 [1999]). The purpose of this rule is to afford the school board discretion in determining whether or not to grant tenure to a probationary teacher or administrator. As broad as the board's discretion may be, however, it is also the rule that a school board may not deny tenure to retaliate for a teacher's or administrator's exercise of his or her constitutional rights of free speech and association. Thus, in alleging that tenure was denied because he exercised certain rights guaranteed him by the Constitution, petitioner has framed a viable cause of action (***Matter of Bergstein v Board of Educ.***, 34 NY2d 318, 357 NYS2d 465 [1974]). Moreover, the legislatively declared right of a public employee to participate in an employee organization (Civil Service Law § 202) is consonant with the right which the Fourteenth Amendment affords as a protection to all persons by limiting the power of states to interfere with the First Amendment right of freedom of speech and association, and any public employment, including academic employment, may not be subject to the surrender of the right to association. If the dismissal of a teacher amounts to an interference with this right, then the action of a board of education cannot stand unless it is shown with clarity that the board's regulation of the teacher's or administrator's conduct is motivated not by a desire to interfere with any constitutional right but, within such bounds, to legally benefit the school system (***Board of Educ. v Helsby,*** 37 AD2d 493, 326 NYS2d 452 [1971], *affd* 32 NY2d 660, 343 NYS2d 131 [1973]). Thus, it is the clear public policy of this State, as set forth in the Taylor Law (Civil Service Law art 14), that a school board may not discriminate against teachers or administrators for exercising their right to belong to or participate in an employees' union. Union activity will not, however, provide a shelter for a teacher or administrator whom the school district decides not to retain for bona fide legitimate reasons (*see*, ***Matter of Tischler v Board of Educ.***, 37 AD2d 261, 323 NYS2d 508 [1971]).

Where, as here, petitioner sets forth a good cause of action, he is required to come forward at a hearing and establish his allegations, by more than mere averments in the petition, that the decision to deny him tenure was in fact based upon his exercise of his constitutionally protected rights (***Matter of Bergstein v Board of Educ.***, *supra*).

Accordingly, the petition herein is granted to the limited extent that a trial pursuant to CPLR 7804(h) will be held for the purpose of determining whether petitioner was denied tenure for a constitutionally impermissible reason. At the trial, petitioner must seek to prove the two requisite factors, to wit, that he engaged in constitutionally protected behavior and that such behavior played a substantial part in the tenure decision. If petitioner so proves, but not before, respondent's superintendent will have to come forward to show that he would have reached the same determination even in the absence of the exercise by petitioner of constitutionally protected conduct (***Matter of Wilson v Macchiarola,*** 79 AD2d 638, 433 NYS2d 814 [1980]). It will be for the trial court to decide whether to give credence to the respondent's claim that in recommending that petitioner be denied tenure, respondent's superintendent was not motivated by a desire to punish

petitioner for his union activities, but rather, because petitioner was found wanting for legitimate reasons (*see, **Matter of Tischler v Board of Educ.***, *supra*).

Petitioner is directed to file a note of issue within 20 days of the date of this order. In view of the fact that petitioner is seeking article 78 relief in the nature of mandamus to review, he is entitled, upon proper request in his note of issue, to a trial by jury (*see, **Matter of Conglio v Falasco,*** 168 AD2d 680, 563 NYS2d 507 [1990], *lv denied* 78 NYS2d 907, 573 NYS2d 463 [1991]; ***Matter of Preddice v Callanan,*** 96 AD2d 613, 464 NYS2d 598 [1983]; ***Matter of Green v Commissioner of Envtl. Conservation of State of N.Y.***, 105 AD2d 1037, 483 NYS2d 474 [1984]).

Dated: Oct 26, 2001

RALPH F. COSTELLO

J.S.C.