

City School District of City of New York v Campbell

2004 NY Slip Op 30211(U)

January 2, 2004

Supreme Court, New York County

Docket Number: 0402601/2003

Judge: Debra A. James

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PRESENT: DEBRA A. JAMES
Justice

PART 59

402601-2003

THE CITY SCHOOL DISTRICT OF THE CITY OF
NEW YORK,

Index No.: 402601/03

Motion Date: 09/23/03

Petitioner,

Motion Seq. No.: 01

- v -

MICHAEL CAMPBELL,

Motion Cal. No.: _____

SCANNED

JAN 11 11:58 AM

Respondent.

The following papers, numbered 1 to 6 were read on this petition to overturn an administrative determination and cross-motion to dismiss on statute of limitations grounds.

| PAPERS NUMBERED | |
|--|-------|
| Notice of Motion/Order to Show Cause -Affidavits -Exhibits | 1 |
| Answering Affidavits - Exhibits | 2, 3 |
| Replying Affidavits - Exhibits | 4 - 6 |

FILED
JAN 15 2004
NEW YORK
COUNTY CLERK'S OFFICE

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

Cross-Motion: Yes No

Upon the foregoing papers,

Petitioner brings this proceeding pursuant to Education Law Section 3020-a (5) and CPLR 7511 seeking to vacate a decision of the hearing officer in a proceeding under Education Law § 3020-a entitled In the Matter of the Charges Preferred by Department of Education of the City of New York v Michael Campbell (SED File No. 4647). Respondent cross-moves pursuant to CPLR 3211 (a) (5) to dismiss the petition as untimely under Education Law § 3020-a (5). In this decision the court only rules upon the threshold issue presented by the respondent's cross-motion.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Pursuant to Education Law § 3020-a (4), the New York State Education Department forwarded the findings and recommendations of the hearing officer to the petitioner and respondent on July 25, 2003. Respondent asserts in its cross-motion that the papers were received by petitioner on July 28, 2003, and respondent submits with its papers a copy of the **USPS** certified mail return receipt in support of its position. That receipt states that the decision was sent to "Christy Cugini, Superintendent Community School District #31, 715 Ocean Terrace, Building A, Staten Island, New York 10301." Respondent argues by way of cross-motion that because the Petition in this matter was filed on August 8, 2003, the Petition was filed **11** days after petitioner's receipt of the hearing officer's determination and is therefore untimely pursuant to Education Law § 3020-a (5) and must be dismissed.

Petitioner in opposition to the cross-motion counters that the Petition was timely filed. The attorney that appeared for the petitioner before the hearing officer submits an affidavit in opposition to the cross motion stating in part that "[m]y office received an incomplete copy of the arbitration hearing decision from the State Education Department on Tuesday, July 29, 2003." Petitioner submits a copy of the hearing officer's determination that is date-stamped July 29, 2003. Counsel's affidavit further states that 'June 30, 2003, was the last day of former Superintendent Christy Cugini's employment contract with

petitioner, and Mr. Cugini no longer worked for petitioner at 715 Ocean Terrace, Staten Island, New York, or any other location, after this date. Thus, the arbitration decision was not received by him on July 28, 2003. Moreover, in accordance with petitioner's reorganization plan, on or about July 1, 2003 Community School District 31 became part of petitioner's new Region 7. The former office of Community School District 31 - 715 Ocean Terrace, Staten Island, New York - became the Regional Operations Center for all of Region 7."

Petitioner apparently does not challenge that the decision was received at its office at 715 Ocean Terrace, Staten Island, New York on July 28, 2003, but rather petitioner argues that its time to file an appeal runs from the date that petitioner's counsel received a copy of the arbitration decision, that is July 29, 2003, and that therefore the Petition is timely.

At issue on this motion is the application of Education Law §§ 3020-a (4) & (5). Education Law § 3020-a (4) provides in pertinent part

Post hearing procedures. (a) The hearing officer shall render a written decision within thirty days of the last day of the final hearing, or in the case of an expedited hearing within ten days of such expedited hearing, and shall forthwith forward a copy thereof to the commissioner of education who shall immediately forward copies of the decision to the employee and to the clerk or secretary of the employing board. (emphasis added)

Education Law § 3020-a (5) provides in pertinent part

Appeal. Not later than ten days after receipt of the hearing officer's decision, the employee or the employing

Appeal. Not later than ten days after receipt of the hearing officer's decision, the employee or the employing board may make an application to the New York state supreme court to vacate or modify the decision of the hearing officer pursuant to section seven thousand five hundred eleven of the civil practice law and rules.

The court is unpersuaded by petitioner's first basis for its argument that the time to bring an appeal under Education Law § 3020-a (5) runs from the date service is made upon a party's attorney. Petitioner cites CPLR 7506 (d), which provides that "[i]f a party is represented by an attorney, papers to be served on the party shall be served upon his attorney." The court agrees with respondent that this statute is not determinative of the present motion because the determination sought to be appealed in this case resulted from a hearing under Education Law § 3020-a and is not an arbitration proceeding generally subject to CPLR Article 75. Education Law § 3020-a is a detailed legislative enactment which provides very specific procedural rules and guidelines as to the manner in which disciplinary procedures and penalties are to be determined. While many of the procedures are similar to those employed in arbitration, there is no indication in the statute that the proceeding itself is to be considered an arbitration. That Education Law § 3020-a (5) specifically makes CPLR 7511 applicable only as to the grounds upon which a decision may be modified or vacated but not as to the time to take such appeal establishes this lack of legislative intent.

Petitioner's alternative argument is that the Court of Appeals holding in Matter of Bianca v Frank (43 NY2d 168 [1977]) stands for the proposition that where a party is represented by counsel in a proceeding, the statute of limitations does not begin to run until service of the determination upon the party's counsel. In Bianca, the Court stated

The sole issue before us is whether petitioner's attorney, who represented petitioner at the disciplinary proceeding, is required to be served with a copy of the determination of the Police Commissioner in order for the 30-day Statute of Limitations provided for in subdivision d of section 8-13.0 of the Nassau County Administrative Code to commence. The section provides: "A petition to review a determination by the commissioner to fine, suspend, dismiss or otherwise discipline a member of the police force shall not be granted after the expiration of thirty days from the service of a notice of such determination upon the member of the force so fined, suspended, dismissed or otherwise disciplined."

The appellants argue that since this section explicitly states that the 30 days is to commence "from the service of a notice of such determination upon the member", no requirement to serve the member's attorney may be implied or imposed as a prerequisite for the running of the time limitation.

This argument contravenes basic procedural dictates and the fundamental policy considerations which require that once counsel has appeared in a matter a Statute of Limitations or time requirement cannot begin to run unless that counsel is served with the determination or the order or judgment sought to be reviewed (Matter of Hammer v Suffolk County Dept. of Labor, 51 AD2d 5491).

Indeed, once a party chooses to be represented by counsel in an action or proceeding, whether administrative or judicial, the attorney is deemed to act as his agent in all respects relevant to the proceeding. Thus any documents, particularly those purporting to have legal effect on the proceeding, should be served on the attorney the party has chosen to handle the matter on his behalf. This is not simply a matter of courtesy and fairness; it is the traditional and accepted practice which has been all but universally codified (see, e.g.,

CPLR 2103, subd [b]; 7506, subd [d]; Executive Law, § 168; Administrative Procedure Act, § 307).

Of course a legislative enactment could specifically exclude the necessity of serving counsel, but any intention to depart from the standard practice must be clearly established and stated in unmistakable terms. Short of that any general requirement that notice must be served upon the party, or as in this case "upon the member of the force" must be read in the accepted sense to require, at least, that notice be served upon the attorney the party has chosen to represent him.

Id. at 173 (emphasis added).

Respondent argues that Bianca is inapplicable to the instant matter because it concerned a service provision in an administrative regulation rather than a statute and that Education Law § 3020-a (5) in any case represents a legislative enactment excluding the necessity of serving counsel. Respondent's attempts to distinguish Bianca are unavailing. There **is** nothing in the above-quoted precedent from the Court of Appeals limiting the application of its precedent to administrative or arbitration proceedings. In fact, the Court based its decision upon "fundamental policy considerations" and "traditional and accepted practice which has been all but universally codified." Id. Nor does Education Law § 3020-a (5) represent a legislative enactment [that] specifically exclude[s] the necessity of serving counsel" as nothing in the statute states in clear and unmistakable terms that counsel need not be served. A statute that sets forth that a particular party is to be served with a determination does not by its terms "exclude"

service upon counsel unless the statute expressly excludes such service.

Therefore, as it is conceded that service upon petitioner's counsel was made on July 29, 2003, and this proceeding was commenced August 8, 2003, the court holds that the petition is timely and the cross-motion must be denied.

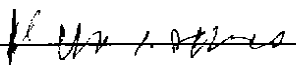
Accordingly, it is

ORDERED that the respondent's cross-motion to dismiss is DENIED; and it is further

ORDERED that pursuant to CPLR 3211 (f), respondent's time to serve an answer to the petition is extended to 10 days after service of a copy of this Order with notice of entry upon respondent.

This is the decision and order of the court.

Dated: January 2, 2004 ENTER:



J.S.C.
DEBRA A. JAMES
J.S.C.