SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SOLOMON Justice PART 55

FEGGINS, ERIC

-v-

THE DEPT. OF EDUCATION OF THE CITY OF NEW YORK

INDEX NO. 112628/06

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this ~~motion to/for~~ Article 78 petition.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	5-7
Replying Affidavits	8-9

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this [redacted] petition is decided in accordance with the annexed memorandum decision and [redacted] judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 3/20/07

JANE S. SOLOMON J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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In the Matter of the Application of

ERIC FEGGINS

Petitioner,

INDEX NO. 112628/06

-against-

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK,

DECISION and JUDGMENT

Respondent.

For a Judgment Pursuant to CPLR Article 78 Declaring Respondent's Termination of Petitioner's teaching licenses to be Unlawful, Arbitrary and Capricious and Ordering Respondent to Reinstate Petitioner's teaching licenses.

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JANE S. SOLOMON, J.

Petitioner Eric Feggins petitions this court for a judgment pursuant to CPLR Article 78 directing Respondent the New York City Department of Education (1) to annul Petitioner's termination as a tenured teacher, (2) to reinstate him to this position with backpay, and (3) to direct Respondent to grant him a hearing pursuant to Education Law § 3020-a, all on the grounds that he received no notice of the proceedings at issue. For the reasons described herein, the Petition is denied and the proceeding is dismissed.

Petitioner was employed by Respondent as a tenured English teacher at Murray Bergtraum High School in Manhattan from 1986 until July 18, 2006. During the 2005 school year, some of Petitioner's

students made allegations against him, and on April 21, 2005, he was informed that he was being transferred to the regional office pending the outcome of an investigation. On September 7, 2005, Respondent's Office of the Special Commissioner ("OSC") issued a report recommending Petitioner be terminated based on its investigation.

On March 11, 2006, Petitioner was served with a summons and complaint in an action by J.S., one of the students who previously accused him of wrongful conduct, and her mother. On March 27, 2006, Petitioner requested that the Corporation Counsel of the City of New York represent, defend and indemnify him in that action. When Respondent did not respond to the request, in May 2006 Petitioner filed an Article 78 proceeding against Respondent and the City of New York to compel them to provide legal representation to him. In its Verified Answer dated July 21, 2006 in that Article 78 proceeding, Respondent described the steps leading to his termination after the service of charges and notices of his right to request a hearing to defend himself against them (as further described below). Although three service efforts were described, Petitioner claims the Answer was his first notice of the disciplinary events. The Answer also describes OSC's findings that led to Petitioner's termination.

Respondent states that on April 28, 2006, Elaine Gorman, Local Instructional Superintendent for Region #9, determined that probable cause existed on charges against Petitioner based on OSC's investigation. She prepared a "Notice of Disciplinary Charges" ("the

Notice") dated April 28, 2006, which informed Petitioner of the nature of the disciplinary complaint against him. In her affidavit ("Ursini Affidavit") dated September 31, 2006, Lorraine Ursini ("Ursini"), a Data Entry Clerk/Office Assistant for Respondent, states that she attempted to serve Petitioner personally with the Notice on April 28, 2006, on the 8th floor of the building where both she and Petitioner worked. The Ursini Affidavit and an Affidavit of Service of Notice of Charges by Personal Service dated May 1, 2006, provide that Petitioner refused to accept the Notice from Ursini. Ursini then mailed the Notice by first class and certified mail, return receipt requested, to Petitioner to the address Respondent had on file for him: 33 South Willow St. Apt. C2, Montclair, NJ 07042. The first class mail was not returned, but the certified mail envelope was returned marked as "unclaimed". (Petitioner states that his address is 33 South Willow St., Montclair, NJ 07042, a private house.)

On May 1, 2006, Charges against the Petitioner were prepared along with a notice of his right to request a hearing pursuant to Education Law § 3020-a. The letter stated that if Petitioner failed to request a hearing to contest the Charges within ten days of receipt, he would waive his right to a hearing and could face dismissal. The Ursini Affidavit and an Affidavit of Service of Charges by Superintendent by Personal Service dated May 2, 2006, states that Ursini attempted to serve Petitioner with the Charges on

May 1, 2006, but that he refused to accept them. Respondent's time sheet for Petitioner for the month of May 2006 is signed by Petitioner and claims that he was present at work when Ursini attempted to serve him with the Charges. Ursini then mailed the Charges to Petitioner's home by both first class and certified mail, return receipt requested, again to 33 South Willow St. Apt. C2, Montclair, NJ 07042. As with the Notice, the first class envelope was not returned, but the certified mail envelope was returned marked as "unclaimed".

By a "Notice of Failure to Request or to Waive Hearing, Section 3020-a, Education Law" dated May 17, 2006, the State Education Department School District Employer-Employee Relations Unit informed the Commissioner of Education that because Petitioner failed to request or waive a hearing, he was deemed to have waived it, and the Panel for Education Policy for the New York City Department of Education would determine the appropriate penalty (if any). Ursini sent a copy of this Notice to Petitioner on May 18, 2006 by both first class mail and certified mail return receipt. As with the prior two mailings, the first class mailing was not returned and the certified mail was returned marked as "unclaimed".

The Department of Education Office of Legal Services issued a memo dated June 14, 2006 to the Panel for Education Policy. It states that Petitioner had waived his right to a hearing and that based on its review of the charges against Petitioner, it recommended

termination as the "only appropriate penalty." On July 17, 2006, the Panel for Education Policy met and voted to terminate Petitioner's employment with Respondent for his violation of its rules and regulations, including the allegations related to J.S.

On September 19, 2006, Respondent mailed Petitioner a letter detailing the Panel for Education Policy's findings and informing him that his services with the Respondent had been terminated. Slightly before that letter was mailed, on September 8, 2006, Petitioner commenced this Article 78 proceeding seeking reinstatement as a tenured teacher on the grounds that he was not served with, and therefore not given notice, of the disciplinary charges pending against him.

Education Law § 3020-a(2)(a) provides that a school board wishing to bring disciplinary charges against a teacher must send the teacher a written statement that details the charges against him and the maximum penalty that may be imposed if the teacher does not request a hearing or is found guilty after a hearing. It also provides that the written statement must be delivered either by certified or registered mail, return receipt requested, or by personal delivery to the employee.

The content of the Notice and Charges meet the requirements of Education Law § 3020-a. The question is whether Petitioner was appropriately served with the Charges and afforded an opportunity for a hearing to contest them. Petitioner denies having

received the Notice or the Charges prior to receiving Respondent's Answer to his first Article 78 proceeding. However, even if this Court accepts that Petitioner's argument that he did not receive personal delivery from Ursini, Respondent has still adequately served Petitioner by regular and certified mail.

Petitioner does not deny that Respondent sent the Charges by regular and certified mail; he only denies receiving them. The erroneous inclusion of an apartment number on the letters sent to him at his private residence does not violate the service requirements of the Education Law or due process. As described above, the Notice and Charges sent by regular mail were not returned and the number sent by certified mail all were returned as "unclaimed". The New York State Court of Appeals has noted that "unclaimed" means that the addressee abandoned or failed to call for the mail and that such a notation "does not on its face indicate that an address is invalid as the notation 'undeliverable' implies..." Harner v. County of Tioga, 5 N.Y.3d 136, 140-41 (2005). Similarly the First Department Appellate Division has held that the "unclaimed" designation means that the addressee "failed to go to the post office to pick up a certified letter after three attempts had been made to deliver it and obtain his signature." Cadle Co. V. Tir-Angle Assocs., 18 A.D.3d 100, 104-05 (1st Dep't 2005).

Respondent's forwarding of the Notice and Charges to Petitioner's private residence, even with the inclusion of the

extraneous apartment number, was reasonably calculated, under all the circumstances, to apprise Petitioner of the Charges and his obligation to request a hearing. *See* Harner, 5 N.Y.3d at 141; Beckman v. Greentree Sec., 87 N.Y.2d 566 (1996). Even if he did not receive actual notice of the Charges, Petitioner's failure to request a hearing after Respondent attempted to serve him personally, by regular mail and certified mail, constitutes a waiver of his right to a hearing. Thus, Petitioner is not now entitled to a hearing pursuant to Education Law § 3020-a. Moreover, he is not entitled to annulment of his termination or backpay, as he was lawfully terminated pursuant to the Education Law and was given full and fair notice and opportunity to contest the serious disciplinary charges that led to his termination.

Accordingly, it hereby is

ADJUDGED that the Petition is denied and the proceeding is dismissed, with costs and disbursements to Respondent.

This constitutes the decision and judgment of this court.

Dated: March 10, 2007

ENTER:

J.S.C.