

Krohn v City of N.Y. Dept. of Educ.

2007 NY Slip Op 30993(U)

April 27, 2007

Supreme Court, New County

Docket Number: 0111902/2006

Judge: Leland G. DeGrasse

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

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MAURICE KROHN,

Petitioner,

-against-

Index No. 111902/06

CITY OF NEW YORK DEPARTMENT OF EDUCATION,

Respondent.

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

DeGrasse, J.:

This is an application for a judgment pursuant to CPLR Article 78 vacating respondent's determination that there is probable cause to believe that petitioner, a tenured teacher, had engaged in sexual harassment in violation of Regulation A-830 of the Department of Education of the City of New York. By letter dated August 3, 2006, respondent's Office of Equal Opportunity (OEO) advised petitioner as follows:

"The Office of Equal Opportunity ("OEO") has completed its investigation into [the complainant's] complaint alleging that you sexually harassed her on June 5th and 12th 2006. After a carefully review of the statements submitted by you, [the complainant] and [a witness], it is OEO's determination that there is probable cause to believe that Chancellor's Regulation A-830 was violated [sic]. In reviewing the statements made by you, OEO found numerous inconsistencies which led to a lack of credibility. Please note that OEO will consult with your principal . . . regarding the corrective actions that will be taken regarding your behavior. In addition, OEO is instructing you not to have contact with [the complainant] unless necessitated by work. OEO is also instructing you to cease and desist making comments or taking actions which would be construed to be sexually harassing or retaliatory."

By a subsequent letter dated September 1, 2006, petitioner was instructed by his principal to limit his contact with the complainant to supervised faculty meetings and to make an appointment for

sexual harassment training at OEO.

By its terms, Regulation A-830 “establishes an internal review process to be followed by employees, parents of students and students within the jurisdiction of the Department of Education of the City of New York who wish to file complaints of alleged discrimination or unlawful harassment.” At the conclusion of an investigation, OEO is required by the regulation to “prepare a written report that describes the complaint, explains the evidence presented during the investigation, concludes whether the evidence submitted supports a violation of this Regulation, and recommends any corrective action, including appropriate disciplinary action.” As a first claim for relief, petitioner asserts that OEO’s letter does suffice as a report required by Regulation A-830. Respondent answers the assertion by stating that the required report was prepared but not disclosed to petitioner because it is confidential. The argument gives no consideration to Regulation A-830’s requirement that the need for confidentiality be balanced against the obligation to provide due process to the accused. Respondent’s refusal to disclose the report to petitioner is a denial of due process given OEO’s disposition of the complaint.

Respondent also argues that the report is confidential because “it is an inter-agency document that is not final because it merely finds probable cause and does not finally determine the facts of the case.”¹ Respondent bases the argument on the erroneous premise that petitioner was not disciplined because he did not lose and salary, position or benefits. As noted above, petitioner was reprimanded and required, among other things, to attend sexual harassment training. Such mandatory sensitivity training is a recognized disciplinary measure utilized by employers (*see e.*

¹This argument is not persuasive because further investigation or proceedings by OEO do not appear to have been contemplated. Finality is also indicated by the fact that the principal’s letter has been made a part of petitioner’s file.

g. Stockley v AT & T Info. Sys., 687 F Supp 764, 766 [EDNY 1988]; *Crowe v S. Adams County Water and Sanitation Dist.*, _____ F Supp 2d _____, 2007 WL 987470 [D Colo]). Similarly, such a reprimand and mandatory continuing education are included among the penalties which may be imposed following a disciplinary hearing under Education Law § 3020-a (4).

On this note, respondent argues that a § 3020-a hearing was not required because OEO's letter constitutes a performance evaluation and improvement directive as opposed to a disciplinary measure. In this regard, respondent cites *Holt v Board of Education of the Webutuck Central School District* (52 NY2d 625 [1981]) where the Court held that critical administrative evaluations or admonitions which are intended to warn or instruct a given employee may be placed in the employee's file without resort to a formal hearing. The subject letter in the instant case was not issued by petitioner's supervisor. It was issued by OEO, the bureau charged under Regulation A-830 with the duty to investigate claims of unlawful discrimination and harassment. The letter refers to an investigation, interviews of witnesses and a factual determination as opposed to an informal review. While no single factor is determinative, the identity of the author, the subject matter of the document and the official investigatory tenor of the material demonstrate that the document is in fact a disciplinary reprimand subject to the due process requirements of § 3020-a (*see e. g. Civ. Serv. Empls. Assn. v Southold Union Free School Dist.*, 204 AD2d 445 [1994]). For the foregoing reasons, the application is granted to the extent that it is adjudged and declared that OEO's letter and the principal's letter constitute a disciplinary measure taken without due process in violation of Education Law § 3020-a. Respondent is directed to expunge the said letters from petitioner's file. This determination does not preclude respondent from taking further administrative proceedings based upon its finding of probable

cause. This constitutes the decision and judgment of the court.



J. S. C.

Dated: April 27, 2007

HON. LELAND DeGRASSE

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