

**Matter of Rubin v New York City Dept. of Educ.**

2007 NY Slip Op 31015(U)

April 28, 2007

Supreme Court, York New County

Docket Number: 0117216/2006

Judge: Walter B. Tolub

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

WALTER B. TOLUB

PRESENT: \_\_\_\_\_  
Justice

PART 15

Scott Rubin

INDEX NO. 117216/06

MOTION DATE 1/19/07

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -

NYC Dept. of Education

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAY 02 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/21/07

WALTER B. TOLUB J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
In the Matter of the Application of

SCOTT RUBIN,

Petitioner,

Index No. 117216/06  
Mtn Seq. 001

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION

Respondent.

-----x

WALTER B. TOLUB, J.:

By this application, petitioner Scott Rubin seeks a preliminary injunction enjoining respondent, the New York City Department of Education from (1) enforcing the New York City Board of Education Medical Bureau's finding that petitioner was "medically unfit"; (2) enjoining any medical arbitrations concerning petitioner's fitness for duty; and (3) enjoining the continuation of a disciplinary arbitration already in progress in accordance with Education Law §3020-a. Respondent cross-moves for dismissal of this action pursuant to CPLR 3211(a)(2) and (a)(7).

Background

Petitioner is a tenured teacher in the New York City public schools. Respondent, is the New York City Department of Education ("the department" or "Board of Education"). In April 2006, respondent initiated an arbitration of disciplinary

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charges<sup>1</sup> pursuant to Education Law §3020-a (the "arbitration") which resulted in petitioner's reassignment, with pay, to an administrative center pending the outcome of the arbitration. (Affirmation in Opposition, p.2; Petition, p. 2).

On November 7, 2006, respondent directed petitioner to appear for a medical evaluation which was conducted by the Medical Division of the Board of Education (the "Medical Division"). Following a review of petitioner's records and subsequent medical exam, it was determined that petitioner was unfit to perform his duties as a teacher (Affirmation in Opposition, p. 2-3; Petition p. 3-5), and petitioner was thereafter suspended without pay (Affirmation in Opposition, p. 3). On December 5, 2006, petitioner was re-examined by the Medical Division and found "medically fit" (Affirmation in Support of Cross-Motion, p. 3).

In the interim, on November 20, 2006, petitioner commenced this special proceeding, which resulted in petitioner's reinstatement to paid duty status pending this court's resolution of the issues raised within the petition (Affirmation in Support of Cross-Motion p. 3; Order to Show Cause). The first claim advanced alleges that the Medical Division failed to adequately investigate petitioner's case thereby rendering the November 8,

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<sup>1</sup> The charges against petitioner concerned four incidents of corporeal punishment (Id.).

2007 decision that petitioner was unfit to perform his duties arbitrary and capricious. Petitioner next asserts that as applied, Education Law §§ 2568 and 3020-a are unconstitutional. Petitioner's final claim is that respondent's actions constitute discrimination and/or retaliation on the basis of disability, and violates both New York and Federal law.

In opposition, and forming the basis of the cross-motion, respondent contends that this court's reinstatement of petitioner's work and pay status coupled with the December 5, 2006 Medical Division's determination that petitioner was medically fit for duty renders petitioner's entire application moot. Respondent further argues that petitioner's application should be dismissed because petitioner failed to exhaust his administrative remedies prior to making this application.

#### Discussion

As with any motion to dismiss, this court is only concerned with whether petitioner's facts, as alleged, present any cognizable legal theory upon which petitioner may succeed (see, Leon v. Martinez, 84 NY2d 83, 87-88 [1994]; Campaign for Fiscal Equity, Inc. v. State of New York, 86 NY2d 307 at 318 [1995]). See generally, Barr, Altman, Lipshie and Gerstman; New York Civil Practice Before Trial [James Publishing 2006] §36.01 et seq.). Accepting all of petitioner's allegations as true, and affording all reasonable inferences to be drawn from them (see, People v.

[\* 5] 1  
New York City Transit Authority, 59 NY2d 343 at 348 [1983]),  
respondent's motion to dismiss is granted.

As a preliminary matter, contrary to the arguments advanced in this application, petitioner was never faced with a final and binding determination of the Medical Division which would allow for the commencement of this Article 78 application. Pursuant to the terms of the Collective Bargaining Agreement as between the Board of Education and the United Federation of Teachers, petitioner, once presented with respondent's finding that he was not fit for duty, was obligated to arbitrate any dispute with respect to that finding (see, UFT/BOE Collective Bargaining Agreement Article 21 SJ(4), annexed as Exhibit A to Respondent's Affirmation in Support to Cross-Motion). This procedure cannot be disregarded (see, Board of Education, Commack Union Free School District v. Ambach, 70 NY2d 501 [1987]), and cannot be circumvented by claiming that the medical hearing directed pursuant to Education Law 2568, and in accordance with the provisions of Education Law 3020-a, and was unconstitutional (see, Brown v. Board Education, 23 Ad2d 850 [2<sup>nd</sup> Dept 1965]; aff'd 16 NY2d 1021 [1965]; Winter v. Board of Education for Rhinebeck Cent. School District, 79 NY2d 1 [1992]). In any event however, once petitioner was deemed "medically fit" by the second examination held in December, 2006, petitioner's claims were rendered moot.

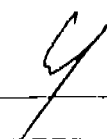
The remaining claims contained within the instant petition are dismissed.

Accordingly, it is

Adjudged that the petition is denied, and the cross-motion to dismiss the proceeding is granted.

This memorandum opinion constitutes the decision and judgment of the Court.

Dated: 4/21/07

  
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HON. WALTER B. TOLUB, J.S.C.

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