

**Matter of Argueta v Board of Educ. of the  
William Floyd Union Free School Dist.**

2007 NY Slip Op 31293(U)

May 14, 2007

Supreme Court, Suffolk County

Docket Number: 0008510/2006

Judge: Denise F. Molia

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**SUPREME COURT - STATE OF NEW YORK  
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:  
Hon. **DENISE F. MOLIA,**  
Justice

\_\_\_\_\_  
In the Matter of BARBARA ARGUETA,  
  
Petitioner,  
  
- against -

CASE DISPOSED: YES  
MOTION R/D: 3/30/06  
SUBMISSION DATE: 3/23/07  
MOTION SEQUENCE No.: 001 MD  
002 XMG

BOARD OF EDUCATION OF THE WILLIAM  
FLOYD UNION FREE SCHOOL DISTRICT,  
  
Respondent.

ATTORNEY FOR PETITIONER  
John Ray and Associates  
122 North Country Road  
Miller Place, New York 11764

ATTORNEY FOR RESPONDENT  
Bond Schoeneck & King, PLLC  
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Garden City, New York 11530

Upon the following papers filed and considered relative to this matter:

Order to Show Cause dated March 17, 2006; Affidavit in Support dated March 15, 2006; Affirmation in Support dated March 16, 2006; Verified Petition dated March 15, 2006; Notice of Motion dated May 11, 2006; Affidavit in Support dated May 11, 2006; Exhibits A through H annexed thereto; Rely Affidavit dated August 11, 2006; Exhibit A annexed thereto; Affidavit dated July 17, 2006; Exhibit A annexed thereto; Reply Affidavit dated September 14, 2006; Affidavit dated October 20, 2006; Exhibits A through F annexed thereto; Respondents Memorandum of Law; Petitioner's Memorandum of Law; Respondents' Reply Memorandum of Law; and upon due deliberation; it is

**ORDERED**, that the motion by petitioner, pursuant to CPLR Article 78, for an Order (1) compelling respondent to re-instate petitioner in employment with the William Floyd Union Free School District, as tenured School Psychologist; (2) compelling the William Floyd Union Free School District to pay petitioner back pay and benefits; (3) compelling William Floyd Union Free School District to restore petitioner to pension rights and seniority rights, from January 2, 2006 to the date of employment restoration of petitioner; (4) determining that the period of 90 days for the filing of a Notice of Claim under Education Law §3813 has not yet expired or alternatively granting petitioner leave to file a late Notice of Claim under Education Law §3813; and (5) waiving the Notice of Claim filing requirement of Education Law §3813 or deeming it timely filed or alternatively setting aside the thirty day period after service of the Notice of Claim in this matter, during which respondent may determine whether to resolve, and to in fact resolve or not petitioner's claim, or alternatively granting leave for petitioner to re-file the within petition after 30 days from service of the said Notice of Claim, or alternatively by compelling respondent to reveal whether they intend to remedy petitioner's claim, and if not, then waiving the 30 day requirement, is denied; and it is further

**ORDERED**, that the motion by respondents, pursuant to CPLR 7804(f), for an Order dismissing the petition, is granted.

The undisputed facts of the case are as follows:

During the Fall Semester 2002, the petitioner was employed by the respondent school district. She was paid at a per diem rate only for those days she worked, with no pay for sick or holiday leave. She did not receive any of the benefits paid to full-time employees. The District maintained time sheets for her attendance. There is no record of a Board of Education appointment of the petitioner to a probationary or other full-time position within the district during the Fall 2002 semester.

One of the school psychologists, Tara Rosner, began child care leave on January 27, 2003, subsequently resigning her position on or about April 1, 2003. On February 10, 2003 the petitioner was appointed by the Board of Education to the position of interim full-time leave replacement for the departing psychologist, effective January 27, 2003 through June 30, 2003. The temporary appointment was subsequently continued from September 1, 2004 through June 30, 2005. District payroll records reflect that union deductions, which are only required of full-time employees, were not deducted from the petitioner's paychecks until after she had been appointed to the full-time leave replacement position.

On December 14, 2004 the petitioner signed off on receipt of a "Notice of Intent, Probationary Appointment Recommendation" from the District, which identified a probationary period of three years commencing on December 13, 2004 and terminating on January 26, 2006. Said Notice advised petitioner that her probationary period would provide her credit for her previous full-time service period of January 27, 2003 through December 10, 2004.

On or about November 1, 2005 the District suspended the petitioner with pay, alleging that the petitioner misrepresented information on a student's psychological evaluation report. By letter dated November 28, 2005 the Superintendent of Schools notified the State Education Department of the suspension. Argueta's employment with the District was subsequently terminated effective January 2, 2005.

The petitioner now seeks reinstatement to her prior position, maintaining that at the time of her termination, she was a tenured employee who was not afforded due process, having acquired tenure by estoppel on September 9, 2005. However, the part-time position that petitioner was appointed to during the Fall 2002 semester was not vacant at the time of her appointment. Rather, the incumbent school psychologist, Tara Rosner, was not on leave and remained an employee of the District. Accordingly, the Rosner position was not vacant and unencumbered during Fall 2002 and could not therefore constitute a probationary position to which petitioner could be appointed. See, Eisenstadt v. Ambach, 79 A.D.2d 839, 435 N.Y.S.2d 132.

Argueta contends that the District's Director of Special Education represented to petitioner that her Fall 2002 appointment was to a tenure track position. However, even if such representation were made to the petitioner, estoppel "is not available against a local governmental unit for the purpose of ratifying an administrative error...made without compliance with formally adopted...procedures." See, Morley v. Arricale, 66 N.Y.2d 665, 495 N.Y.S.2d 966, 486 N.E.2d 824. "The doctrine of estoppel should only be applied when the failure to do so would operate to defeat a right legally and rightfully obtained. It cannot operate to create a right." Dell v. Regan, 186 A.D.2d 336, 587 N.Y.S.2d 800, *aff'd*, 51 N.Y.2d 917, 434 N.Y.S.2d 994, 415 N.E.2d 982. Further, estoppel cannot "operate to relieve one from the mandatory operation of a statute." Scheurer v. NYC Employees' Retirement System, 223 A.D.2d 379, 636 N.Y.S.2d 291. Consequently, the Director of Special Education's alleged misrepresentations could not override the provisions of the Education Law regarding tenure track appointment. Since there was no recommendation by the Superintendent of Schools, and no probationary appointment of petitioner by the Board of Education, the petitioner cannot claim that she

received a probationary appointment prior to January 27, 2003.

In her application, the petitioner cites to Matter of Gould v. Board of Education, 81 N.Y.2d 446 for the proposition that: “Tenure by estoppel results when a School Board fails to take action required by law to grant or deny tenure, and with full knowledge and consent, permits a teacher to continue to teach beyond the expiration of her probationary term.” Under the circumstances presented, the documentary evidence shows that petitioner accepted a leave replacement position for Tara Rosner in January 2003, and then accepted a probationary appointment in December 2004. The petitioner does not maintain that she informed the District that she was promised a probationary appointment in 2002, or that she believed that her part-time service in the Fall 2002 would count towards her tenure. To the contrary, the District payroll records for the period September 2002 through December 2002 demonstrated that the petitioner was treated as a per diem substitute. Consequently, the District did not permit the petitioner to work past her probationary period with knowledge and consent. Instead the Board of Education terminated Argueta’s employment prior to the expiration of her probationary period on January 26, 2006. Therefore, the petitioner is not entitled to the relief sought in the petition.

The foregoing constitutes the Order of this Court.

Dated: May 14, 2007

**DENISE F. MOLIA**  
HON. DENISE F. MOLIA J.S.C.