

**Ostrin v City of New York**

2007 NY Slip Op 33819(U)

November 19, 2007

Supreme Court, New York County

Docket Number: 0102386/2007

Judge: Judith J. Gische

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

PART 10

PRESENT.

Index Number : 102386/2007

OSTRIN, STEVEN H.

vs

CITY OF NEW YORK

Sequence Number : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

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

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

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
NOV 28 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: 11/19/07

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----x  
Steven J. Ostrin,

Petitioner

-against-

The City of New York,  
Joel I. Klein, as chancellor of the  
City School District of the  
City of New York and  
The Board of Education of the City  
School District of the City of New York,

Respondents.  
-----x

**DECISION/ORDER**

Index No.: 102386/07  
Seq. #: 001

Present:  
Hon. Judith J. Gische  
J.S.C.

**FILED**  
NOV 28 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Notice of Petition, Verified Petition w/SHO verif, exhs . . . .	1
Verified answer w/JIL verif, exhs . . . . .	2
Verified reply w/EWS verif, exhs . . . . .	3
So-Ordered stip of adj dated 6/4/07 . . . . .	4
Stip of adj 7/2/07 . . . . .	5

Upon the foregoing papers, the decision and order of the court is as follows:

Petitioner is a New York City high school teacher. The respondents are the City of New York, the school Chancellor, and the New York City Board of Education (collectively "the City"). Before the court is a summary proceeding action brought pursuant to General Municipal Law § 50-k (6) and Education Law § 2560 for an order compelling the City to provide petitioner with legal defense in connection with a civil

lawsuit brought against him by one of his former female high school students (G.O.<sup>1</sup> et al v. City of New York, et al., Supreme Court , Queens Co., 022076/05) (the "G.O. action"). Petitioner contends that the City's decision, to deny him legal defense in that action, was *without sound basis in reason, and therefore, arbitrary and capricious*. He seeks review of that decision by this court pursuant to Article 78. CPLR § 7803 et seq.

The City has answered the petition and asks that it be dismissed on the merits without a hearing on the basis of the record before the court. Alternatively, the City argues that certain relief that petitioner seeks is premature, and should be denied without prejudice.

Since this proceeding was commenced timely and is from a final determination by the City, it is ripe for consideration and will be decided on the merits. CPLR § 217 (1). Moreover, for the purposes of deciding whether this petition can be decided on its facial sufficiency, and without a hearing, considers petitioner's factual allegations in the light most favorable to him.

#### **Facts presented and arguments made**

Petitioner, a teacher at a New York City high school was charged in March 2005 with child harassment and endangerment in the 2<sup>nd</sup> degree. The charges were based upon a complaint by one of his female students. They resulted in his being arrested and the commencement of a criminal action against him in Kings County, where the school is located ("the criminal action"). Mr. Ostrin was acquitted of those charges on February 10, 2006.

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<sup>1</sup>Initials of the student are used to protect her identity. Her identity is not germane for the purposes of this decision.

In October 2005, while the criminal action was pending, and before petitioner was acquitted of those charges, G.O.'s father brought the G.O. civil action against the City and Mr. Ostrin. Plaintiff moved for, and obtained, a default judgment against Mr. Ostrin because he failed to answer the complaint. Petitioner claims he was improperly served, and only learned of the G.O. lawsuit after the default judgment was entered, and the City provided him with a copy of the judgment. At that time, the City notified petitioner he could make an application for Corporation Counsel to provide him with legal representation. Petitioner responded by letter dated July 8, 2006 that he did, in fact, want the City to represent him. By letter dated October 26, 2006, the City denied his application. The denial letter the subject of this Article proceeding. It states as follows:

"Pursuant to Section 50-k of the General Municipal Law, our office has reviewed the facts and circumstances relating to the above referenced action in which you are named as an individual defendant. We have concluded after careful consideration that we are unable to represent you at this time. We therefore suggest that you contact private counsel."

Petitioner contends that because the allegations against him arose during the scope of his employment, while he was performing his duties as a New York City school teacher, and he was not in violation of any rule or regulation of his employer, the City or the Board of Education, when these allegations were made, he is entitled, by statute, to legal representation by Corporation Counsel, pursuant to General Municipal Law § 50-k (6) and Education Law § 2560. Petitioner further alleges that because the criminal charges against him had been dismissed by the time he requested legal representation, and no investigation had been commenced by his employer, the Corporation Counsel's decision, to deny him legal representation, was without any rational basis. Petitioner

also contends that because the City gave no reason for why it would not provide him with defense, he does not know why his application for defense was denied.

The City contends that it complied with the statutory provisions of section 50-k et seq of the General Municipal Law in denying petitioner legal representation. In relevant part, General Municipal Law § 50-k (2) requires that the City provide for the defense of an employee of any agency in any state or federal civil action or proceeding "arising out of any alleged act or omission which the corporation counsel finds occurred while the employee was acting within the scope of his public employment and in the discharge of his duties . . ." Section 2560 (1) of the Education Law which applies specifically to New York City school teachers, contains a similar provision.

The City argues that by the time Mr. Ostrin requested legal defense, the City had reason to believe that the accusations against him were based upon (alleged) actions by him that (if true) were wholly outside the scope of his public employment, and not in the discharge of his duties. The City contends further that Corporation Counsel had the right to make this initial determination under the General Municipal Law, and that since its determination had a factual basis, it was not arbitrary and capricious.

Although it is undisputed that the criminal charges against petitioner had been dismissed by the time he asked for legal representation, the City contends it had conducted an examination before trial of G.O., pursuant to General Municipal Law section 50-h ("50-h hearing"). At that hearing, which took place on May 12, 2005, before the criminal charges were dismissed, G.O. testified about the events that she claimed took place in March 2005. She testified that Mr. Ostrin had touched her on the shoulder, asked her to perform a strip tease, and then commented on her smile. He

told her never to come to school in a skimpy outfit because he believed it would sexually arouse him. The student testified that when another female student entered the room, petitioner hinted they should all have "sexual expeditions," and he joked about having an orgasm.

It is also undisputed that in 2005, another one of petitioner's former female students commenced a civil action against Mr. Ostrin and the City (In the Matter of J.H.<sup>2</sup>, Supreme Court, Kings Co., Index No. 9712/05) ("J.H. action"). In connection with that action, the City held a 50-h hearing on July 31, 2006 at which time J.H. was deposed. Though that deposition took place after the criminal charges had been dismissed, it was held before the City denied petitioner's request for legal representation. At that hearing, J.H. testified that Mr. Ostrin had brushed against her breast and then crouched down and put his hand on her knee. J.H. also alleges petitioner touched her on the buttocks.

The City contends that certain events that indisputably took place after it denied petitioner's request for legal representation bear, nonetheless, upon this petition to compel Corporation Counsel to provide him with legal representation, and should be taken into consideration by the when deciding this Article 78 petition. Thus, the City contends that petitioner was deposed in the J.H. action on May 3, 2007. At his deposition he was asked about the allegation against him in the G.O. case. Though he denied them, he admitted he had told G.O. she was a pretty girl with low self esteem, or words to that effect, that she had a nice smile, and that he had noticed she had "done" her hair. Finally, the City contends (and petitioner does not deny) that formal charges

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<sup>2</sup>Again, initials are used to protect the student's privacy. Her identity is not germane to this decision.

were ultimately brought against Mr. Ostrin by the Board of Education in connection with G.O.'s claim on May 16, 2007. Those charges are still pending.

The City contends that the petition should be dismissed with prejudice in its entirety. Alternatively, the City agrees that his claims for indemnification can be dismissed without prejudice because the G.O. action is not yet concluded, and until it is (and he is exonerated) his request for indemnification is premature. General Municipal Law § 50-k (4).

### **Discussion**

Pursuant to General Municipal Law § 50-k(2), the initial determination as to whether an employee was acting within the scope of his or her employment, rests with the Corporation Counsel. Blood v. The Board of Education of the City of New York, et al, 121 AD2d 128, 130 (1<sup>st</sup> Dept 1986). This is to protect "fallible public employees from the potentially ruinous legal consequences" of "unintentional lapses in the daily discharge of their duties." An Article 78 challenge to the Corporation Counsel's refusal to provide a public employee with legal representation will succeed only if the determination is without factual basis and thus, arbitrary and capricious. Blood v. The Board of Education of the City of New York, et al, *supra* at 130.

The court decides that the City's determination, that it could not provide petitioner with legal representation in connection with the G.O. civil action, was rationally based upon the record before the City at that time that included the G.O.'s charges against Mr. Ostrin and her testimony at the 50-h hearing. Although the denial that the City sent to petitioner on October 26, 2006 did not elaborate about why it could not represent him ("our office has reviewed the facts and circumstances relating to the above referenced

action in which you are named as an individual defendant . . .”), the denial is not so obtuse or facially deficient that petitioner was deprived of a meaningful response to his application for legal representation. Petitioner knew of G.O.’s allegations and of the pending civil court action against him. Since the claims were made against him in his capacity as a school teacher, and he is employed by the City, this put the Board and petitioner in a potentially adversarial stance. General Municipal Law § 50-k; Banks v. Yokemick, 144 F.Supp.2d 272 (S.D.N.Y.,2001) (police officer’s alleged use of excessive force). Therefore, the Corporation Counsel, as the City’s attorney, had the right to make an initial determination of whether petitioner had violated the Board’s rules, based upon the facts and circumstances that existed at the time.

Unlike a situation where the allegations against the public employee arise from his or her imperfect performance of their duties, the allegations by G.O. were that petitioner, her teacher, had acted in a sexually charged manner towards her while they were at school. If proved, by no stretch of the imagination could this be conduct in the furtherance or in the course of petitioner’s employment as a teacher. *Compare: Blood v. The Board of Education of the City of New York, et al*, supra (student accidentally hit in the eye with a book bag by his teacher during class); Washio v. The City of New York, 237 AD2d 200 (1<sup>st</sup> Dept 1997) (City not required to indemnify officer where behavior alleged arose out of personal dispute and not a natural and foreseeable aspect of his work duties). Therefore, the Corporation Counsel acted in accordance with General Municipal Law § 50-k, by making an initial determination of whether petitioner was entitled to defense, and then responding to his application. Nothing in the statute indicates exactly what the denial must contain. The court finds that while the denial was

broadly worded it passes legal muster. The denial provided petitioner with a meaningful response to his application. The court also decides that the petition, to the extent it seeks an order compelling the City to provide legal defense in the G.O. action, must be, and hereby is, denied without the need for a hearing.

This does not mean, however, that petitioner is not without recourse. Under Section 50-k (5) of the General Municipal Law, the City can withhold defense and indemnification of an employee until the charges and disciplinary actions against him are finally resolved. Bolusi v. City of New York, 249 A.D.2d 134 (1<sup>st</sup> Dept., 1998); Bank v. Yokemick, 214 F. Supp 401 (S.D.N.Y. 2002). Therefore, while there is no basis to compel the City to provide him with legal defense at this time, petitioner's claims for indemnification, and to recover the legal fees he has incurred in obtaining private legal counsel, are premature. The G.O. action is not yet resolved, and petitioner has not been exonerated. Once a judgment is entered in the civil action, and if he is exonerated, petitioner can proceed under General Municipal Law § 50-k (3).

Petitioner's separate claim, that because the criminal charges against were dropped, there was no rational basis for the City to deny him defense, is unavailing. The standards of proof in a criminal action differ from those applicable to civil actions and disciplinary actions by the Board. This is not a legal basis to find that the City's decision was arbitrary and capricious, and therefore without a rational basis.

Based upon the foregoing, the petition to compel the City to provide petitioner with legal defense in the G.O. action is denied. Viewing the facts in the light most favorable to petitioner, the City's decision was not arbitrary or capricious. The decision had a factual basis, even though petitioner denies all of G.O.'s allegations against him.

Since the Corporation Counsel is vested with the right to make an initial determination about whether to provide legal defense to a public employee, which it did, and the facts and circumstances at that time support the decision it made, the determination by the City will not be disturbed.

That branch, however, of the petition seeking indemnification and to recover the legal fees petitioner claims to have expended on private counsel, is denied without prejudice because it is premature, for the reasons already stated.

**Conclusion**

*It is hereby*

**ORDERED** that the petition is dismissed for the reasons stated; and it is further

**ORDERED** that the petition, insofar as Mr. Ostrin seeks indemnification and recovery of legal fees extended for private counsel [General Municipal Law § 50-k (3)] is denied, without prejudice, for the reasons stated; and it is further

**ORDERED** that the Clerk shall enter judgment in favor of respondents The City of New York, Joel I. Klein, as chancellor of the City School District of the City of New York and The Board of Education of the City School District of the City of New York, against petitioner Steven H. Ostrin; and it is further

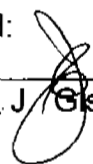
**ORDERED** that any relief requested that has not been expressly addressed is hereby denied; and it is further

**ORDERED** that this shall constitute the decision, order and Judgment of the court.

Dated: New York, New York  
November 19, 2007

So Ordered:

Hon. Judith J. Gische, JSC



**FILED**  
NOV 28 2007  
NEW YORK  
COUNTY CLERK'S OFFICE