SHORT FORM ORDER AND JUDGMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 48**

JEFFREY LEIBOWITZ,

INDEX NO.: 2531/08

Petitioner,

MOTION DATE:3-7-08
SUBMIT DATE:3-20-08
SEQ. NUMBER - 001

-against-

BOARD OF EDUCATION OF THE LONG BEACH CITY SCHOOL DISTRICT and ROBERT GREENBERG, as SUPERINTENDENT OF SCHOOLS FOR LONG BEACH CITY SCHOOL DISTRICT,

Respondents.

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The following papers have been read on this motion:

Notice of Petition, dated 2-6-08.....1
Answer to Petition, dated 3-14-08.....2
Memorandum of Law in Opposition, dated 3-14-08.....3
Reply Affirmation, dated 3-19-08.....4
Memorandum of Law in Reply, dated 3-19-08.....5

This petition made pursuant to CPLR Article 78 is denied and the proceeding is dismissed.

The sole issue before the Court is whether the respondents Board of Education of the Long Beach City School District and Robert Greenberg, as Superintendent Of Schools for Long Beach City School District (collectively, "District"), acted improperly in assigning the

petitioner to a facility operated by the Board of Cooperative Educational Services ("BOCES") after he was suspended from his teaching position, pending resolution of disciplinary charges brought against him. This Court answers that question in the negative and accordingly denies the petition seeking, *inter alia,* reassignment to a location within the District.

Petitioner is a tenured Spanish language teacher regularly assigned to Long Beach Senior High School. He has been employed by the District for approximately eight years. In September of 2007 the District preferred disciplinary charges against him pursuant to Education Law § 3020-a. The nature of those charges has not been revealed in the instant proceeding. After the charges were brought the petitioner was suspended with pay, and the District's Assistant Superintendent for Personnel, Randie Berger, sent a letter to him dated October 3, 2007 instructing him to report to a BOCES location on Clinton Road in Garden City, New York. The District is one of the 56 Nassau County school districts which are members of BOCES, a public entity under the Education Law. The letter recited that he was ultimately to report to Jesus Fraga, who was to provide a work assignment, and that petitioner would be provided with a computer, access to the internet and e-mail.

The District's affiant in this proceeding, Helen Cheliotes, Assistant Superintendent for Curriculum and Instruction, defends the placement as proper. She states that the District and BOCES have a long-standing working relationship. In this case, the petitioner was reporting to Mr. Fraga, who is the Director of certain named programs, all of which apparently have to do with bilingual education. Mr. Fraga assigned petitioner a curriculum writing project for Spanish courses aimed at the District's high school. The courses were

at the beginner's, intermediate and AP (presumably, Advanced Placement) level. Ms. Cheliotes states, without contradiction, that at no time was petitioner requested to perform any task or given any assignment outside the scope of his tenure area.

In his petition, the petitioner asserts that during the period of his suspension respondents were authorized to reassign him only to a location within the Long Beach City School District. He relies on two cases and sections of the Education Law indicating that BOCES is a separate entity, notwithstanding services shared with local school districts. The Court finds petitioner's contention to be without merit.

The key case upon which he relies is *Matter of Adlerstein v City of New York Bd. of Educ.,* 64 NY2d 90 (1984). In that case, the Court of Appeals affirmed two orders of the Appellate Division, Second Department, which had upheld discipline against two teachers. In so doing, the Court held that suspended teachers may be assigned non-teaching assignments while disciplinary charges are pending.

> "Bearing in mind the relatively limited period of suspension... that the charges... in some cases will counterindicate assignment of the suspended teacher to... pupil supervision; the financial burden upon the school district...and the fact that the rationale of *Matter of Jerry (supra)* [1] was not his or her release from all service but the protection of a suspended teacher from impoverishment during the period of suspension, we conclude that nonteaching assignment at district headquarters, or in other school or district offices, which bears reasonable relationship to the suspended teacher's competence and training and is consistent with the dignity of the profession, is permissible."

Id., at 100.

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[1] So in original. The *Jerry* rationale cited by the Court had to do with the purposes of suspension, which could be to protect students, the public, and the suspended teacher him or herself. *Matter of Jerry v Board of Educ.,* 35 NY2d 534 (1974).

This Court does not read the foregoing as mandating an assignment that is physically within the suspended teacher's district, but rather emphasizes a school district's ability to reassign a suspended teacher to particular *tasks*, which in the cases before the *Adlerstein* Court were to be performed within the teachers' districts. The *location* of these tasks, however, had nothing to do with the Court's reasoning and ultimate determination, and the petitioner provides no compelling argument to the contrary. The Court's obvious concern was that the assignment bear some acceptable relationship to the teacher's training, and not be offensive to the dignity of the profession, which perforce would involve the dignity of the suspended teacher as well.

It certainly is possible to imagine a situation in which a work location during suspension might offend the dignity of the profession and the teacher – for example, having a suspended teacher sitting at an open desk in a public, non-academic setting such as a gymnasium, or consigning him or her to an unoccupied basement storeroom that is not equipped as a professional workspace. However, such assignments, if found to be offensive, would be offensive irrespective of the work station's address. Given the concerns expressed in *Adlerstein* as set forth above, the undersigned concludes that the Court of Appeals would not countenance placing a teacher in an undignified work environment within a school district any more than it would outside the district, but would permit a placement elsewhere if such placement were dignified and enabled the suspended teacher to perform tasks consistent with his or her training and experience. In the instant case petitioner's assignment met the standard established by the *Adlerstein* Court. It was to an educational facility with

a professional relationship to the District, where the work to be performed concerned curriculum development in the petitioner's subject area and grade levels and where an office and equipment were provided.

Moreover, given the broad discretion enjoyed by school districts regarding personnel transfers (*see* Education Law § 1709[33]; *McEleroy v Board of Educ. of Bellmore-Merrick Cent. High School Dist.*, 5 Misc 3d 321 [Sup Ct. Nassau County 2004]), and his burden here to demonstrate that the District's acts were arbitrary and capricious and in violation of lawful procedure (CPLR 7803[3]), the petitioner must be able to point to clear and binding authority that would bar the assignment describe above. That has not been done.

The one case presented post-*Adlerstein* was a simple affirmance of a hearing officer's determination that the suspended teacher in that case could not be assigned to a local library or to his home, but only to a facility within the school district. However, this Appellate Division determination was based upon a petitioner's failure to meet its burden under the well-established standards applicable to a review of administrative disciplinary proceedings. *Matter of Board of Educ. of the Greenburgh Eleven Union Free School Dist. v Polonio,* 8 AD3d 560 (2d Dept. 2004). The decision contains no commentary about any specific findings or statements made by the hearing officer [2] and the cases cited concerned matters wholly distinct from what is before this Court. Therefore, *Matter of Greenburgh* cannot be viewed as a flat endorsement of petitioner's contention that a suspended teacher may never be assigned outside his or her school district. To the extent that the hearing officer himself

[2] The decision of the hearing officer in that case has been annexed to the petition here.

arguably said just that, this Court is not bound thereby and disagrees for the reasons articulated above.

Accordingly, the Court concludes that the petitioner has not met his burden such that the respondents' determination should be overturned. *See generally, Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County,* 34 NY2d 222 (1974).

This shall constitute the Decision, Order and Judgment of this Court.

ENTER

DATED: April 10, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED
APR 15 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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