

**Matter of Ferencik v Board of Educ. of
Amityville Union Free School Dist.**

2008 NY Slip Op 31595(U)

May 29, 2008

Supreme Court, Nassau County

Docket Number: 0953-07/

Judge: Michele M. Woodard

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

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In the Matter of the Application of DENISE M. FERENCIK,

Petitioner,

FOR A JUDGMENT PURSUANT TO ARTICLE 78
OF THE CPLR

-against-

THE BOARD OF EDUCATION OF THE AMITYVILLE
UNION FREE SCHOOL DISTRICT and THE
AMITYVILLE UNION FREE SCHOOL DISTRICT,

Respondents.

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Papers Read on this Motion:

Petitioner's Notice of Petition	01
Respondents' Notice of Motion	02
Petitioner's Answering Affidavit	xx
Petitioner's Memorandum of Law	xx
Petitioner's Reply Affidavit	xx
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Respondents' Memorandum of Law	xx

In Motion Sequence number one (1), the Petitioner moves to be reinstated to her former employment, and grant lost wages and all other associated benefits based on Respondents failing to appoint the Petitioner to an available position during her call back period as required by law.

In Motion Sequence number two (2), the Respondent moves by Notice of Motion to dismiss the petition based upon the statute of limitations or laches.

This is an Article 78 petition in the nature of mandamus to compel the Board of Education of the Amityville Union Free School District hereinafter referred to as District, to recompute Petitioner's salary, seniority, pension, and other benefits based upon its failure to honor her recall

**MICHELE M. WOODARD
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rights and appoint her to a position for which she was eligible.

Petitioner Denise Ferencik is an art teacher who is licensed by the State Department of Education. Ferencik was hired by the District as an art teacher for grades kindergarten through 12th grade, commencing September 1, 1988. Although Ferencik's employment was subject to a three year probationary period, she was subsequently granted tenure effective September 1, 1991.

Because of declining enrollment, the District abolished Ferencik's position effective June 30, 1992. Since her position was abolished, Ferencik was placed on a preferred eligible list of candidates for appointment to a vacancy in a position similar to the one which she had filled (See Education Law § 3013). Ferencik was entitled to remain on this recall list for a period of seven years (Id). Although Ferencik was not reinstated to a similar position during the seven year period, she was rehired by the District commencing October 17, 2001.

On October 14, 2003, Ferencik served a notice of claim on the District based on its failure to appoint her to a part-time position which had been given to Roxanne Tanenbaum during the 1998-1999 school year. On February 17, 2004, Ferencik commenced an Article 78 proceeding in this Court under Index No. 2081/04, seeking to compel Respondent to recompute her salary, seniority, pension and other benefits based upon its failure to appoint her to six positions which had become vacant before she was rehired. All of the positions referred to in the petition became vacant after Ferencik's 7-year period on the recall list had expired. Although the petition referred to two part-time positions which had been given to Tanenbaum during the 1999-2000 and 2000-2001 school years, it did not refer to the 1998-1999 position which had been referenced in the notice of claim. Ferencik alleged that she first learned in July 2003 that her recall rights had been violated.

By order dated January 4, 2006, the court denied the District's motion to dismiss the petition based on the statute of limitations. The court determined that because the proceeding was in the nature of mandamus to compel, it was required to be commenced within four months after the District's refusal, upon the demand of Ferencik, to perform its duty with respect to the recomputation of her salary and benefits (CPLR § 217(1); *Piaggone v Bd of Education*, 92 AD2d 106 [2d Dept 1983]). The court further determined that the Notice of Claim constituted a demand that the District recompute Ferencik's benefits, although Ferencik was not required to file a Notice of Claim (*Id.*). Although Ferencik had learned in 2001 that Tannenbaum taught art on a part-time basis, she did not learn until July 2003 that Tannenbaum had been appointed to a position for which Ferencik was eligible. The court determined that the demand was timely because it was made within four months from July 2003, when Ferencik learned that her recall rights had been violated and her right to demand that her benefits be recomputed arose. Thus, the four month period began to run on October 14, 2003, the date that the notice of claim was filed. Since February 14, 2004 was a Saturday and February 16, 2004 was Washington's Birthday, the court determined that the first Article 78 proceeding was timely commenced on February 17, 2004 (General Construction Law § 25(a)[1]).

The present Article 78 proceeding, seeking the identical relief as the first proceeding, was commenced by Ferencik on June 22, 2007. In this petition, Ferencik does not base her claim to recomputation of her salary and benefits on the District's failure to appoint her to any specific position. Rather, Ferencik bases her claim on the District's failure to appoint her to any position involving the "art program" which the District allegedly reestablished at the Northwest Elementary School in September 1994. Petitioner alleges that she first learned of her recall rights with regard

to the Northwest Elementary art program in December 2006. Petitioner served a notice of claim based upon the Northwest art program on February 24, 2007.

The District moves to dismiss the petition based upon laches or the statute of limitations. The District notes that in March 2004 Ferencik served a request pursuant to the Freedom of Information Law (“FOIL”), requesting inspection of various documents, including all “teaching vacancy announcements” from school year 1990-1991 to the date of the request. In response to the FOIL request, the District produced Ferencik’s personnel file on June 29, 2004. On August 10, 2004, the District produced the master class schedules for several school years, but not for the 1994-1995 school year when the Northwest art program was allegedly reestablished. The District also produced “teacher staffing documents” and “information concerning vacancies,” without specifying the school years to which they pertained. Nonetheless, the District argues that Ferencik should have been aware that there may have been other positions for which she had recall rights based upon the discovery which was provided in the first Article 78 proceeding. Thus, the District argues that the present Article 78 proceeding is untimely because it was not commenced within four months from August 10, 2004, the date on which Petitioner’s right to demand recalculation of her benefits based upon all other positions for which she was eligible arose.

CPLR § 203(f) provides that a claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading. This “relation back doctrine” applies to amended petitions which are served in Article 78 proceedings (See *Greater New York Health Care Facilities Ass’n v DeBuono*, 91 NY2d 716, 721 [1998]).

Petitioner commenced this new Article 78 proceeding rather than amending the petition in the original proceeding. However, Petitioner could have applied for leave to serve an amended petition, adding a claim based on recall rights to the art program positions, pursuant to CPLR §402. (See *Chamber of Commerce v Bd. of Standards & Appeals*, 853 NYS2d 644 [2d Dept 2008]). Nevertheless, the court need not determine whether Ferencik's original petition, asserting a right to recalculation of benefits based upon positions which became vacant after her recall period expired, gave the District notice as to her claim based upon positions which became vacant during the recall period.

Pursuant to the doctrine of primary jurisdiction, a court should dismiss a claim which, although cognizable in the courts, requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body (*Markow-Brown v Bd of Education*, 301 AD2d 653 [2d Dept 2003]). "The doctrine is intended to coordinate the relationship between courts and administrative agencies so that the agency's views on factual and technical issues are made available where the matter before the court is within the agency's specialized field" (Id). Where an Article 78 petition is dismissed pursuant to this doctrine, the court retains primary jurisdiction but allows the agency to determine the issue in the first instance based upon its technical expertise (*BOCES v Mills*, 4 NY3d 51, 55 [2004]). Once the agency has ruled, a party who is aggrieved by its decision may bring an Article 78 proceeding to annul the agency's determination (Id).

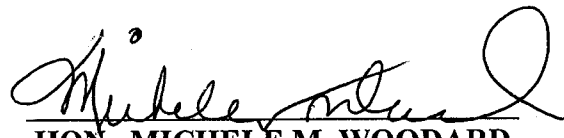
It is for the Commissioner of Education in the first instance, and not for the courts, "to establish and apply criteria to govern the selection and retention of qualified educators and staff" (Id at 59). It is also for the Commissioner to determine, in the first instance, whether two teaching

positions are similar so as to entitle a teacher to recall rights pursuant to Education Law §3013 (*Markow-Brown v Bd of Education*, supra). The court concludes that the Commissioner of Education should determine in the first instance whether Ferencik's position as an art teacher at Amityville Memorial High School was similar to the positions which were subsequently created at Northwest Elementary. The petition is **denied** pursuant to the doctrine of primary jurisdiction. The Respondents' motion to dismiss the petition based upon the statute of limitations or laches is **denied** as moot.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: May 29, 2008
Mineola, N.Y.

ENTER



HON. MICHELE M. WOODARD
J. S. C.

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