Matter of Pacheco-Alicia v Board of Educ. of City School Dist. of N.Y.
2008 NY Slip Op 32421(U)
August 29, 2008
Supreme Court, New York County
Docket Number: 0102968/2008
Judge: Eileen A. Rakower
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SCANNED ON 9/4/2008

[* 1]

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

PRESENT: EILEEN A. RAKOWER J.S.C.

PART 5

Index Number : 102968/2008

PACHECO-ALICEA, APOLONIA

VS.

BD OF EDUCATION OF THE CITY

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. ________

MOTION DATE ________

MOTION SEQ. NO. ________

MOTION CAL. NO. ________

on this motion to/for ________

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5, 6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

SEP 04 2008

COUNTY CLERK'S OFFICE NEW YORK

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

Dated: August 29, 2008

EILEEN A. RAKOWER 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 5

---X

In the Mater of the Application of
APPOLONIA PACHECO-ALICIA,

Petitioner

Index No. 102968/08

- against -

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT of NEW YORK and JOEL KLEIN, as Chancellor of the City School District of the City of New York,

Respondents.

Decision and Order

For a judgment pursuant to Article 78 of the CPLR.

---X

FILED
SEP 04 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. EILEEN A. RAKOWER,

Petitioner was a tenured school secretary for respondent Board of Education of the City of New York (a/k/a the Department of Education, hereinafter DOE,) at the Bronx High School for Medical Science for approximately eighteen years. In September, 2006, due to a pending investigation by DOE's Special Commissioner of Investigation (SCI), petitioner was reassigned to DOE's Reassignment Center for Regions 9 and 10. The SCI's investigation was substantiated, finding that petitioner had presented false time reports and "submitted fraudulent documents to receive pay for work she had not been authorized to perform." The SCI recommended that petitioner be terminated from her employment and barred from any future work for DOE. Education Law §3020-a requires that, before filing charges against an employee, DOE must inform the accused and the community board of the nature of the charges and specifications. Education Law §3020-a(2)(a) requires that DOE send the accused:

> [A] written statement specifying the charges in detail, the maximum penalty which will be imposed by the board if the employee does not request a hearing or that will be sought by the board if the employee is found guilty of the charges after a hearing and outlining the employee's rights under this section, shall be immediately forwarded to the accused employee by certified or registered mail, return receipt requested or by personal delivery to the employee.

On October 4, 2006, petitioner was served with Education Law §3020-a "Notice of Charges," by both certified mail, return receipt requested and regular mail, sent to her address on Schley Avenue, apartment 1B, in the Bronx, New York. The United States Postal Service (USPS) attempted delivery and re-delivery of this mailing and left notices for petitioner with directions on how to retrieve the mail on October 7th, 10th and 22nd. The certified letter was returned to DOE stamped "unclaimed;" the Notice of Charges sent by regular mail was not returned.

The Notice of Charges letter stated:

> In view of your unprofessional conduct while a secretary at Bronx High School for Medical Science located in the Bronx and within Region No. 1 during the 2005-2006 school year, the following charges are preferred:
>
> 1. Just Cause for disciplinary action under Education Law §3020-a;
> 2. Conduct unbecoming Respondent's position, or conduct prejudicial to the good order, efficiency or discipline of the service;
> 3. Substantial cause rendering Respondent unfit to perform her obligations properly to the service;
> 4. Neglect of duty;
> 5. Unauthorized transactions;
> 6. Theft;
> 7. Criminal conduct; and
> 8. Just Cause for termination.
>
> By this notice, you are hereby informed of the nature of the complaint. I will be preferring and filing the above charges. You will be informed of the procedures involved in the trial of Charges.

On October 5, 2006, pursuant to Education Law § 3020-a(2)(a), DOE also sent petitioner a "Notice of Determination of Probable Cause on Charges Brought Against Tenured School District Employee," which included another copy of the charges and other documentation, both by certified mail, return receipt requested, and regular mail, to her address on Schley Avenue, apartment 1B, in the Bronx, New York. The USPS attempted delivery and re-delivery of this mailing and left notices for petitioner with directions on how to retrieve the mail on October 10th, 14th and 25th. The certified letter was returned to DOE stamped "unclaimed;" the Notice of Determination sent

by regular mail was not returned. This mailing included the notice mandated by Education Law from the New York State Education Department (SED) which advised petitioner:

> Within ten days of receipt of these charges, you must elect to request a hearing before an impartial hearing officer, or you will waive your right to such hearing. Should you fail to request or waive within the specified ten days, the Local Instructional Superintendent's clerk will notify both you and the Commissioner of Education that a waiver has been deemed to have occurred and that the Panel for Educational Policy will determine the case and fix the penalty or punishment, if one is to be imposed.
>
> If you do not request a hearing to contest these charges, the maximum penalty that will be imposed will be termination. If you do not contest the allegations in a hearing and are found guilty, the Local Instructional Superintendent will seek your dismissal. (Emphasis in the original.)

The Notice of Determination sent to petitioner on October 5, 2006 also included a list of five specifications or charges, alleging that 1) petitioner "created and/or submitted a false and/or incorrect Per Session Hourly Professional Time Report" on ten separate occasions between September 20, 2005 and October 20, 2005for work that she did not perform and/or was not authorized to perform and 2) on three separate occasions, petitioner called in sick for the regular school work day but then worked between two and seven hours after three p.m. on each of those three days.

Sometime around October 15, 2006, petitioner states that she moved to 3400 Paul Avenue, Apartment 3T, Bronx, New York. Petitioner provides a letter from this new apartment complex stating that she "became a shareholder of apartment 3T . . . as of October, 2006." Petitioner filed a change of address form with DOE sometime in November, 2006.

On February 27, 2007, DOE sent petitioner a "Notice of Failure to Request or Waive a Hearing" by certified mail, return receipt requested, and by regular mail to the Schley Avenue address. The USPS attempted to deliver and re-deliver this mailing and left notices for petitioner with directions on how to retrieve the mail on March 1st, 10th and a third date which appears to be March 17th. The certified letter was

returned to DOE stamped "unclaimed;" the Notice of Failure to Request or Waive a Hearing sent by regular mail was not returned. Petitioner does not allege that service of this notification is mandated by Education Law.

By letter dated May 7, 2007, DOE wrote to petitioner at the Schley Avenue address, "for informational purposes only," to inform her that because she failed to request a hearing within the ten days permitted by statute, the charges against her were being forwarded to PEP for disposition.

By memorandum dated May 8, 2007, three attorneys of the Inquest Panel of the Office of Legal Services sent PEP a report that detailed the parameters of the SCI's investigation and the charges that were brought against petitioner as the result of it. Petitioner had been the payroll secretary in her school and, at a time when she was re-assigned within the school, it came to the attention of the Principal that petitioner had falsified her own payroll records. Specifically, the memorandum states that petitioner worked extra hours which were not authorized by either the Principal or Assistant Principal and then submitted payment requests; on two separate occasions petitioner took full sick days but only deducted one hour for one day and ten minutes for the other from her sick time accruals and; petitioner worked extra "per session" hours on days that she was absent for her regular work hours. During the investigation, the Principal also discovered that his signature stamp had been used to authorize "per session" hours for petitioner but he had not stamped the authorizations nor had he given permission to anyone to use his stamp. The Deputy Director of Finance who had ultimate responsibility for approval of such hours told the investigators that he approved hours "based of good faith" and, if necessary, would make adjustments later. Additionally, petitioner had given herself one day, three hours and twenty minutes compensation in annual leave accruals which reflected working more than twenty extra "per session" during July and August, 2005 when, in fact, petitioner had only worked two sessions during the relevant time period. The report notes that petitioner was given an opportunity to be interviewed by SCI investigators but, on the advice of counsel, she declined. Both the Special Commissioner of Investigation and the members of the Inquest Panel recommended that petitioner's employment be terminated.

Based on the Inquest Memorandum and the supporting documentation from the Office of Legal Services, the Panel for Educational Policy recommended to respondent DOE Chancellor Joel I. Klein (Klein) that petitioner's employment should be terminated.

By letter dated May 29, 2007, Klein wrote to petitioner outlining the charges that were preferred against her and the statutorily required procedures of Education Law §§ 3020-a and 3020-a(2)(c) that were followed by DOE throughout the investigation and Inquest. The letter noted that Education Law 3020-a(2)(d) states that "the unexcused failure of the employee to notify the clerk or secretary of his or her desire for a hearing within ten days of the receipt of charges shall be deemed a waiver of the right to a hearing." Klein's letter included PEP's conclusions that petitioner's actions constituted:

1. Just cause for disciplinary action under Education Law Section 3020-a;
2. Criminal conduct;
3. Misconduct;
4. Conduct unbecoming your position or conduct prejudicial to the good order, efficiency or discipline of the service;
5. Substantial cause that renders you unfit to perform your obligation properly to the service;
6. Just cause for termination."

The letter concludes, "[t]herfore, effective immediately, your services with the New York City Department of Education are terminated." This May 29th letter was addressed to the Schley Avenue address.

At the beginning of the 2007-2008 school year, petitioner was transferred to another Re-assignment Center at 501 Courtland Avenue. Around October, 2007, she was transferred again, this time to the 4111 Broadway Re-assignment Center. Around November 5, 2007, the funds from petitioner's October 31, 2007 direct deposit DOE payroll check were frozen. Petitioner attempted to contact her Union regarding the issue but was unsuccessful. Petitioner was directed to report back to the Courtland Avenue Re-assignment Center and, upon her arrival there, was personally served with a letter dated November 1, 2007 which stated that her employment had been terminated on May 29, 2007.

During the time between petitioner's September, 2006 transfer to the Re-assignment Centers and her November, 2007 termination, petitioner occasionally received mail at the Re-assignment Centers. Petitioner states that she never received the charges, the notice of inquest or the notice of her termination. Petitioner notes that the letter that she was personally served with in November, 2007, terminating her employment lists her former address on Schley Avenue as her address.

Upon further review of its payroll records, DOE discovered that it had continued to pay petitioner from May 29, 2007 through October 15, 2007. Thereafter, DOE sent petitioner an invoice seeking re-payment of $13,928.21 for "payroll overpayment" that it made to her. The invoice was sent to petitioner's Paul Avenue address.

Petitioner now files this Article 78 proceeding seeking an order from the court declaring that respondent's termination of her employment was arbitrary, capricious, an abuse of discretion, in violation of lawful procedure, and a violation of her rights under the due process clause of the New York State Constitution, the United States Constitution and under the applicable provisions of the New York State Education Law. Petitioner also seeks reinstatement to her former position, retroactive to May 29, 2007, with full back pay, benefits, restoration of seniority, retirement contributions and all other benefits and emoluments of employment.

A court may only interfere with the determination of an administrative agency if there is no rational basis or foundation in fact for the action complained of, and the exercise of discretion is arbitrary and capricious. Where a reviewing court finds that the administrative body has not acted arbitrarily but within its lawful authority, the court has no alternative but must confirm the determination. (*Matter of Pell v.Board of Educ.,* 34 NY2d 222. (1974)). The determination must be supported by substantial evidence, based on the entire record. (*Purdy v. Kreisberg,* 47 NY2d 354 (1979)). Substantial evidence is "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." (*300 Gramatan Ave. Assoc. v. State Div. Of Human Rights,* 45 NY2d 176, (1978)).

Petitioner argues that Education Law §3020-a(2)(d) states that petitioner's right to a hearing is waived only in the event of an "unexcused failure of the employee to notify the clerk or secretary of his or her desire for a hearing within ten days of the receipt of the charges . . .." (Emphasis supplied by petitioner.) Petitioner argues that she has a valid excuse for failing to request a hearing because she never received the charges, either personally or by certified mail as they were sent to the wrong address. She states that DOE's decision to terminate her employment was not preceded by the hearing process guaranteed to all tenured employees. Petitioner argues that she was entitled to an impartial hearing officer, a written copy of the charges against her, that the charges needed to be supported by probable cause, that she was entitled to be represented by counsel at the hearing, call witnesses and receive a decision from that impartial hearing officer.

Petitioner argues that since her termination, DOE has sent her mail to her correct address on Paul Avenue. She states that because she never had notice of her termination, DOE should be barred from seeking to recover those monies paid to petitioner through October 15, 2007. Petitioner argues that because her rights were violated by DOE, she should have the right to continue in her employment and stay on payroll until such time as she receives a decision from an impartial hearing officer.

Respondents state that petitioner's arguments pertaining to her notice of termination and DOE's overpayments to her are now moot because they no longer seek to have those monies reimbursed to DOE. Therefore, the issue of proper service of the notice of termination is irrelevant. Accordingly, the only issue before the court is the validity of the Education Law §3020-a notification and petitioner's due process claims.

Respondents argue that they complied with the law by sending the Notice of Charges and the Notice of Determination that informed petitioner about the right to a hearing by certified mail, return receipt requested to the address that petitioner had on file with DOE as being her home address. Respondents argue that the notification was delivered and re-delivered to petitioner's Schley Avenue address on dates before petitioner claims that she moved. They state that petitioner's subsequent move does not support her allegation that she never received the charges and the fact that the copy sent by regular mail was not returned to DOE supports the presumption that petitioner received them. Thus, respondents argue, petitioner was properly served but failed to timely request a hearing. They state that DOE'S determination to terminate petitioner's employment was done in accordance with Education Law §3020-a and fully complied with the principles of due process. Respondents argue that their determinations and action were neither unlawful, arbitrary, or capricious and the petition should be denied.

Petitioner cites to *Healy v. Board of Education of the Clifton-Fine Central School District* (Index No. 0846/94, Sup. Ct. Schen. Co. 1994) as support for her contention that the mere mailing of charges is insufficient to satisfy the mandates of the Education Law. Rather, she argues, that as the *Healy* court required, the accused must actually receive the charges pending against her for the ten day period within which to request a hearing begins to run. Petitioner argues that DOE was fully aware that she did not receive the charges as the certified mail was returned to it marked "unclaimed." Petitioner states that there is no evidence that she deliberately avoided

receiving the certified mail from DOE.

Denial of the receipt of mail is insufficient to rebut the presumption of receipt that attaches to the presumption of regularity. (*Nassau Ins. Co. v. Murray,* 46 NY2d 828 [1978]; *Matter of Tax Foreclosure Action No. 33*, 141 AD2d 437 [1st Dept. 1988]). A properly executed affidavit of service further supports the presumption of regularity. (*Kahoud v. Rundell,* 128 AD2d 531 [2nd Dept. 2987]). Certified mailings that are returned as "unclaimed" means, according to the USPS, that "the addressee abandoned or failed to call for [the] mail." Whereas the notation "undeliverable" implies that the address is invalid. (*Harner v. County of Tioga,* 5 NY3d 136 [2005]). "Due process does not require actual receipt of notice before a person's liberty or property interests may be adjudicated . . .." (*Beckman v. Greentree Securities, Inc.* 87 NY2d 566 [1996]). "It is well settled that the requirements of due process are satisfied where 'notice is reasonably calculated, under all the circumstances to apprise the parties of the pendency of the action and afford them an opportunity to present their objections.'" (*Harner v. County of Tioga,* 5 NY3d 136 [2005]internal citations omitted).

Here, the statutorily required notices were sent to the Schley Avenue address at a time when petitioner does not dispute that she lived there. Re-delivery was attempted a second time when petitioner still lived at Schley Avenue. The third attempts occurred after October 15, 2006, the date that petitioner claims that she moved to Paul Avenue. The letter from the Paul Avenue complex provided by petitioner states that she "became a shareholder of apartment 3T . . . as of October, 2006" but does provide verification of when she actually moved to that address. Petitioner did not file a change of address with DOE until November, 2006, after all attempts to serve her and after the mailings were returned to DOE marked "unclaimed." DOE also provides copies of two properly executed affidavits of service verifying that the notices required by Education Law were properly mailed, by certified mail, return receipt requested and by regular mail. Petitioner's arguments that DOE's additional mailings of the required Notices were sent to the Schley Avenue address after DOE received petitioner's change of address are unavailing as the statute does not require repeated notification.

Certified mail that is returned as "unclaimed" . . . demonstrates no more than that the addressee failed to go to the post office to pick up a certified letter after three attempts had been made to deliver it and obtain [her] signature. (*Cadle Co. V. Tri-Angle Associates,* 18 AD3d 100 [1st Dept. 2005]). This manner of service required by

Education Law § 3020-a(2)(a), and the procedures followed by respondents here, are "reasonably calculated, under all the circumstances to apprise the parties of the pendency of the action and afford them an opportunity to present their objections.'" (*Harner v. County of Tioga, supra*). As such it cannot be said that petitioner was not afforded due process.

Additionally, DOE's Special Commissioner of Investigation conducted a thorough investigation with respect to the very serious allegations against petitioner. DOE interviewed witnesses, and reviewed documentary evidence that substantiated the allegations and verified petitioner's criminal conduct. Petitioner, upon the advice of counsel, declined to participate in the investigation process. Therefore, under the circumstances presented here, respondents decision to terminate petitioner's employment was neither arbitrary, capricious, an abuse of discretion, or in violation of lawful procedure. Rather, respondents' decision to terminate petitioner's employment was a rational determination that was supported by substantial evidence. (*Purdy v. Kreisberg, supra*). Accordingly, this petition must be denied. Wherefore, it is hereby

ORDERED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and order of the court.

Dated: August 29, 2008

EILEEN A. RAKOWER, J.S.C.

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