

**Matter of Parise v New York City Dept. of  
Educ.**

2008 NY Slip Op 32835(U)

October 14, 2008

Supreme Court, New York County

Docket Number: 103208/08

Judge: Marilyn Shafer

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

PRESENT: SHAFER  
Justice

PART 8

CHRISTINE PAUSE  
- v -  
NYC DEPT OF EDUCATION

INDEX NO. 103208/08  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 0021  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion to/for \_\_\_\_\_

~~Notice of Motion/ Order to Show Cause~~ — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits Memo. of law  
Replying Affidavits Affirmation

PAPERS NUMBERED
<u>1, 2</u>
<u>3</u>
<u>4</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion granted in part and denied in part in accord with the annexed memorandum.

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

**FILED**  
OCT 17 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10/14/08

MARILYN SHAFER  
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 — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER  
Justice

PART 8

In the Matter of the Application of,

INDEX NO. \_\_\_\_\_  
103208/08

CHRISTINE PARISE,

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

Petitioner,

MOTION SEQ. NO. 002

For a Judgment Under Article 78 of the Civil Practice Law and Rules

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

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

The following papers, numbered 1 to 4, were read on this motion to reargue:

	<u>PAPERS NUMBERED</u>
Order to Show Cause – Affirmation – Affidavit – Exhibits	1,2
Memorandum of Law in Opposition	3
Reply Affirmation	4
<b>Cross-Motion:</b> <input type="checkbox"/> Yes <input type="checkbox"/> No	

**FILED**

OCT 17 2008

COUNTY CLERK'S OFFICE  
NEW YORK COUNTY

Upon the foregoing papers, it is ordered that petitioner's motion for re-argument is denied and

Petitioner moves (1) to re-argue this Court's decision dismissing her Article 78 petition, which sought review of respondent's decision to terminate her employment; and (2) for a name-clearing hearing.

### Background

Petitioner was a probationary teacher whose employment was terminated by the respondent. Under Education Law § 2573 (1) (b), respondent has the right to terminate the employment of a probationary teacher at any time and for any reason, unless the teacher establishes that the termination was (1) For a constitutionally impermissible purpose; (2) violative of a statute; or (3) in bad faith. Probationary teachers have no constitutional or statutory right to a review of the Chancellor's decisions to discontinue their services and to deny tenure.

Petitioner challenged her termination on the ground that she had been discriminated against based upon her age and disability. This Court found that, not only were the accusations of verbal abuse and other wrong-doing substantiated in hearings in which petitioner was assisted by a union representative, they were irrelevant since respondent has the right to terminate a probationary teacher without cause.

Petitioner's employment file contains letters reflecting the charges made against her and the unsatisfactory evaluations of her observed lessons. Petitioner requested a name-clearing hearing to prove the stigmatizing material in her personnel file was false. This Court found that it could not say, on the record, whether petitioner demonstrated her entitlement to a name-clearing hearing and left open the possibility that petitioner could request, on notice to respondent, a name-clearing hearing.

Continuing to challenge the veracity of the charges against her and the accuracy

of the evaluations, petitioner moves, in accord with this Court's direction, for a name-clearing hearing. Respondent opposes her request on the grounds that (1) her request is untimely;<sup>1</sup> and (2) she does not meet the "stigma plus" standard. Following oral argument, respondent agreed that if petitioner would have her Union file the request for her, which is customary procedure, the request would not be denied on the basis of untimeliness.

Petitioner rejected respondent's offer and requests the hearing be conducted by the Court, arguing that respondent has already prejudged the outcome and, at any rate, the process will take a long time.

#### Discussion

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." (*William P. Pahl Equip Corp v Kassis*, 182 A.D.2d 22 [1<sup>st</sup> Dept 1992], quoting *Schneider v. Solowey*, 141 A.D.2d 813 [2d Dept 1988]) Reargument should not be used as a vehicle for relitigating issues previously decided by the court, nor is it a means by which parties can present new arguments not previously asserted. (*Id*)

It is well settled that judicial review in an Article 78 proceeding is limited to a determination of whether the administrative action complained of is arbitrary and

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<sup>1</sup> The relevant Chancellor's Regulation provide 30 days in which to appeal respondent's decision, which was dated May 27, 2008.

capricious or lacks a rational basis. (*In re Application of Chelrae Estates, Inc v State Division of Housing and Community Renewal, Office of Rent Administration*, 255 AD2d 387, 389 [1<sup>st</sup> Dept. 1996] citing *Matter of Pell v Board of Education*, 34 NY2d 222, 230-231 [1974]). This Court finds no reason to disturb the decision below.

Insofar as petitioner's request for a name-clearing hearing is concerned, the sole purpose of a name-clearing hearing is to afford the employee an opportunity to prove the stigmatizing material in the personnel file is false. (*Codd v Velger*, 429 US 624, 627-628 [1977]). The appropriate remedy is only expungement, not reinstatement. (*Board of Regents of State Colls v Roth*, 408 US 564, 573 [1972]) The right to a name-clearing hearing is triggered when personnel file contains allegations which denigrate the employee's competence as a professional and impugn his professional reputation in such a fashion as to effectively put a significant roadblock in that employee's continued ability to practice his profession. (*Donato v Plainview-Old Bethpage Cent School Dist*, 96 F3d 623, 630 [2d Cir 1996])

A probationary employee can invoke the protection of the "Due Process Clause" where that employee has suffered a loss of reputation (the stigma) coupled with the deprivation of a more tangible interest, such as government employment (the plus). (*Patterson v City of Utica*, 370 F3d 322 [2d Cir 2004]) Statements that denigrate the employee's competence as a professional and impugn the employee's professional reputation in such a fashion as to effectively put a significant roadblock in that

employee's continued ability to practice his or her profession will satisfy the stigma requirement. (*Segal v City of New York*, 459 F3d 207, 212 [CANY 2006]) In addition, the statements must be made public and must have been made concurrently with or in close temporal relationship with the employee's dismissal from government employment. (*Id*)

This Court finds that petitioner has demonstrated her entitlement to a "reasonably prompt post-termination name-clearing hearing." (*Id* @ 216) The statements which she challenges relate directly to her competence and suitability for her profession.<sup>2</sup> They will be viewed by any prospective employer.

However, it is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law. (*Watergate II Apartments v Buffalo Sewer Authority*, 46 NY2d 52 [1978]):

This doctrine furthers the salutary goals of relieving the courts of the burden of deciding questions entrusted to an agency, preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its "expertise and judgment." (*Watergate II* @ 57)

It is true that the exhaustion rule is not an inflexible one. It need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly

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<sup>2</sup> A plaintiff is generally required only to raise the falsity of these stigmatizing statements as an issue, prove they are false. (*Segal* @ 212)

beyond its grant of power, or when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury. (*Id*) This Court finds that petitioner has failed to demonstrate that this case falls within any of these exceptions.

We have considered the other arguments of the parties and find them to be without merit.

Conclusion

Accordingly, it is

ORDERED that the motion to reargue is denied; and it is further

ORDERED that the request for a name-clearing hearing is granted; and it is further

ORDERED that the request that the hearing be conducted by the Court is denied.

This reflects the decision and order of the court.

Dated: 10/14/08

**MARILYN SHAFER**  
J.S.C.

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