

Matter of Einsohn v New York City Dept. of Educ.

2009 NY Slip Op 30615(U)

March 18, 2009

Supreme Court, New York County

Docket Number: 402027/08

Judge: Marilyn Shafer

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Marilyn Shafer

PART 8

Index Number : 402027/2008
EINSOHN, MARC
vs.
DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *petition is decided in*
accord with the annexed memorandum.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Marilyn Shafer
MARIYAN SHAFER

Dated: 3/18/09

J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

----- X
In the Matter of the Application of

MARC EINSOHN,

Petitioner,

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

Index:
402027/08

-against-

NEW YORK CITY DEPARTMENT
OF EDUCATION,

Respondent.

This judgment has not been entered by the County Clerk and notice of entry cannot be served before the respondent appear in person at the Judgment Clerk's Office (Room 1418).

----- X

Marilyn Shafer, J.

In this Article 78 proceeding, petitioner Marc Einsohn seeks a judgment reversing the actions of the respondent, the New York City Department of Education, which removed him from his position as Assistant Principal of Foreign Language/ESL at Francis Lewis High School (FLHS). In addition to being restored to that position, petitioner seeks to have his unsatisfactory (U) ratings and certain letters in his record removed from his file. He is also requesting reimbursement for sick days, loss of session pay, summer employment pay and fees for counsel. Respondent requests that the petition be dismissed and that any relief is denied in its entirety.

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioner is a tenured Assistant Principal and has been working for the New York City Department of Education (DOE) for twenty years. On or about August 26, 2002, he was appointed to the title of Assistant Principal for Foreign Languages at Francis Lewis High School (FLHS). Petitioner received satisfactory performance reviews for the 2002-2003 and 2003-2004 school years. However, in 2005, petitioner received a mid-year evaluation in which principal Jeffrey Scherr (Scherr) indicated that petitioner needed to make improvements in certain areas, otherwise he would receive a year-end U rating. Consequently, petitioner received U ratings for the 2004-2005 and 2005-2006 school years. Petitioner also received multiple letters written by Scherr which documented Scherr's concerns with petitioner. These letters were placed in petitioner's file.

Pursuant to his collective bargaining agreement, through his union, petitioner filed grievances for the letters placed in his file from 2004-2006, as well as for the mid-year evaluations and the year-end U ratings. Petitioner was also entitled to appeal his year-end reviews with the DOE's Office of Appeals and Reviews (OAR), which he did. OAR does not hear grievances regarding negative letters in an employee's file.

On January 31, 2006, petitioner was notified that the DOE wanted to pursue charges of misconduct against him pursuant to

Education Law § 3020-a, and that he was being temporarily reassigned from his current position pending the disposition of the charges. Petitioner was told to report to the DOE's human resources division and he did so. As a result of the current § 3020-a proceedings, petitioner's grievances before the OAR of the U ratings were held in abeyance. This is because it is DOE's policy that OAR will not hear an appeal of a U rating if the DOE commences proceedings against a petitioner, because proceedings brought by the DOE pursuant to § 3020-a supersede an appeal of an unsatisfactory rating brought to OAR. As such, the issues regarding the U rating were to be addressed at the § 3020-a hearing, because a separate OAR appeal would be duplicative. Subsequently, when the Education Law § 3020-a charges were brought against petitioner, his appeals of the 2004-2005 and 2005-2006 year-end reviews were not heard by the OAR.

On February 15, 2006, petitioner, through his union, filed a Special Complaint of Harassment and Intimidation Conference with the DOE's office of labor relations. It appears that petitioner's concerns indicated in this complaint were addressed during his subsequent § 3020-a hearing.

On June 30, 2006 petitioner received a letter from the DOE superintendent in which she stated for the first time the charges brought against him by the DOE pursuant to § 3020-a. Specifically, the superintendent wrote, "[d]uring the 2003-2004,

2004-2005 and 2005-2006 school years, [r]espondent engaged in insubordination, neglect of duty, rendered incompetent and inefficient service, and engaged in conduct unbecoming of his position" Petitioner Exhibit 2. He was then told that he was to be suspended without pay pending a hearing and determination of the charges in accordance with Education Law § 3020-a. Petitioner was told to continue to report to the human resources division.

On June 14, 2007, petitioner was informed via a letter from Scherr that he was being placed "in excess," meaning that his prior position had been deleted, at the commencement of the 2007-2008 school year, but that he could apply for other DOE vacancies. Respondent Exhibit T.

A Hearing Officer (HO) conducted a hearing on multiple dates pursuant to Education Law § 3020-a, in which he adjudicated a decision regarding seven of the twenty-one charges.¹ On August 15, 2007, HO Howard C. Edelman found petitioner guilty of two of the seven charges, and ordered the penalty of a reprimand. Although the HO did not order that petitioner be terminated from his employment, he did not direct the DOE to return petitioner to his previous position. Specifically, the HO wrote:

In my view, then, the appropriate penalty for Einsohn's actions is reprimand. It reflects the level of his

¹ In order to expedite the matter, the hearing officer only heard seven charges and gave the DOE the option to have the remaining charges decided at a later date.

inappropriate behavior. It also serves as a strong reminder that while Einsohn may disagree professionally with his superiors he may not elevate that disagreement into insubordination, even as he tries to suggest that he is willing to comply.

Respondent Exhibit S.

According to Education Law § 3020 a (5), petitioner could have filed an appeal to this decision within ten days pursuant to Article 7511. He did not do this.

While the § 3020-a charges were pending, petitioner continued to file grievances against the letters placed in his file. Section 3020-a does not apply to these types of grievances. Petitioner contends that the negative letters and evaluations placed in his file were based solely on Scherr's dislike for petitioner, not on petitioner's performance. Petitioner alleges that these letters were written to damage petitioner's career. Petitioner submits e-mails from Scherr in which he believes Scherr was attempting to convince the administration that petitioner should be removed from FLHS. Petitioner Exhibit 4, 5.

In March 2006, two stipulation of settlements were reached between petitioner's union and the DOE in which four letters were removed from petitioner's file.

Pursuant to the collective bargaining agreement, a hearing pursuant to the arbitration regulations was held over the course of four days regarding five of the remaining letters placed in

petitioner's file. Petitioner's union claimed that the letters were unfair and/or inaccurate. On September 16, 2006, Mr. Riegel issued an award in which he determined that four out of the six letters were to be re-typed with certain modifications. The two other grievances were denied. Pursuant to petitioner's collective bargaining agreement, grievances to letters are to be pursued through arbitration, and all arbitration rules are applicable. As such, pursuant to the statutory rules of arbitration, petitioner could have filed a CPLR 7511 proceeding within ninety days of the issuance of the award to vacate or modify this arbitration award. He never did so.

Pursuant to the collective bargaining agreement, a hearing pursuant to the arbitration regulations was held on October 25, 2006 to decide whether four other letters placed in petitioner's file for the year 2005-2006 were unfair or inaccurate. The arbitrator, Mr. Riegel, issued an arbitration award in which one of the letters was removed from petitioner's file and the other three were either sustained or modified. Petitioner never filed an Article 75 proceeding to vacate or modify this arbitration award.

In October 2007, petitioner was assigned to Far Rockaway High School to supervise four teachers, but allegedly stopped reporting in November 2007. Petitioner says that this school was due to close in June 2008, and also had a reputation for being

"one of the worst and most violent schools." Petition, at 5. Petitioner stipulates that he attempted to obtain other teaching positions but has been subverted due to his U ratings. *Id.*

On February 1, 2008 the petitioner's prior position was restored to FLHS. Petitioner argues that he deserves to be returned to this position. Petitioner filed a "notice of claim" with DOE's attorneys around March and, when he was not returned to his former position, he commenced this instant proceeding.

From May 1, 2008 until June 30, 2008, petitioner was on an approved medical leave. Petitioner also claims that he lost money for not being employed at his former position during the summer, that his health has suffered, and that he has been forced to hire counsel.

As of January 8, 2009 petitioner is still at the DOE's reassignment center.

On or about April 14, 2008, petitioner filed this Article 78 proceeding.

DISCUSSION

U Ratings and Letters in Petitioner's File:

With regard to the present Article 78 proceeding, not only did petitioner file the incorrect legal proceeding herein, he missed the statute of limitations for the present proceeding. With regard to the grieved letters placed in petitioner's file, the collective bargaining agreement called for the rules of

arbitration to apply. Pursuant to CPLR 7511, petitioner could have filed a petition to vacate or modify the arbitration awards within ninety days of the awards. The arbitrator executed his awards on September 16, 2006 and October 26, 2006. Not only did petitioner not proceed with a timely Article 75 proceeding, petitioner incorrectly filed this untimely Article 78 proceeding, almost two years after the disposition of the arbitration.

Accordingly, the claims to have the remaining letters in petitioner's file removed will be dismissed.

Applying Education Law § 3020-a (5), petitioner was entitled to appeal the HO's decision concerning the charges leveled against him no later than ten days after its receipt by making an application to vacate or modify pursuant to CPLR 75. The decision delivered on August 15, 2007 did not reinstate petitioner, nor remove the U ratings. Petitioner did not commence a timely challenge. Petitioner could have proceeded to file a CPLR 7511 proceeding on the grounds that the arbitrator did not deliver a "final and definite award upon the subject matter submitted." CPLR 7511 (b) (1) (iii). Accordingly, this appeal of the HO's decision is denied.

Although some of the letters in petitioner's file were modified or remained the same after arbitration or settlement, some of the letters were completely removed from petitioner's file. Respondent correctly argues that a matter becomes moot

when a court is deprived of an actual controversy. The court in *Scott v Kelly* (16 AD3d 109 [1st Dept 2005]), held that the petitioner received the relief requested when incorrect information was already expunged from his records, rendering the proceeding moot. Likewise, the removed letters in petitioner's file are moot.

Failure to Exhaust Other Administrative Remedies:

It is well settled 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." *Ford v Snashall*, 275 AD2d 493, 494 (3d Dept 2000), citing to *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 (1978). Petitioner applied for his old position when it re-opened again on February 1, 2008 and, when he wasn't returned, he filed a "notice of claim" with DOE's counsel. It appears that petitioner failed to contest this lack of reinstatement through his union and the proper administrative channels, and the court will not consider it at this time.

Regardless of petitioner's failure to pursue administrative remedies regarding his reinstatement, he is incorrectly assuming that he is automatically entitled to return to his prior position. Petitioner's e-mail evidence is also insufficient to prove that DOE is purposefully attempting to prevent petitioner from being reinstated. In fact, petitioner was given an

alternative job after his § 3020-a hearing, although petitioner did not think this job was acceptable.

In his argument for why he is entitled to be reinstated to his former position, petitioner cites to *Matter of Adlerstein v Board of Education* (64 NY2d 90 [1984]), and Education Law § 3020-a (4). However, Education Law § 3020-a (4) mandates that, if a school employee is acquitted, he shall be restored to his position with full pay for any period of suspension, and the charges expunged from his record. Here, although two out of the seven charges were dismissed, the hearing officer still found petitioner guilty of two of those charges for which he was to be given a "reprimand." Petitioner was not acquitted of all of the charges and so, could not automatically be returned to his prior position.

Petitioner's other argument that his collective bargaining agreement also entitles him to be reinstated is also flawed. Article VII of the collective bargaining agreement merely states that someone who is excessed may have "priority" to be returned to the position if it is to re-open, not that it is automatic.

Petitioner also states that his attorney sent two letters on August 15, 2005 and December 11, 2007, asking the DOE to remedy his situation, but that they were both ignored. These letters were sent to the regional superintendent and to the chancellor, respectively, and do not appear to be the proper administrative

recourse available to petitioner.

Accordingly, petitioner's claim for reassignment to his old position, including claims for lack of summer employment in this position and for money lost, are barred and will not be addressed by this court.

Petitioner claims that he was not properly paid while he was on approved medical leave. Regardless of the fact that these dates occurred after the instant proceeding was commenced, petitioner also writes in his petition, "[t]he DOE Time Keeping Office is trying to get Mr. Einsohn his money back." Petition, at 6. As petitioner is still pursuing his administrative channels in this claim, it is premature for the court to hear.

Fees for counsel are denied.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

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

Dated: _____

3/18/09

UNFILED JUDGMENT
This judgment has not been returned by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

ENTER
MARILYN S. [Signature]

J.S.C.