

Rosenblum v New York City Conflicts of Interest Bd.

2009 NY Slip Op 31073(U)

April 29, 2009

Supreme Court, New York County

Docket Number: 101121/09

Judge: Jane S. Solomon

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

PRESENT: Solomon
Justice

PART 55

Rosenblum, Stephen

INDEX NO. 101121/09

MOTION DATE 2/27/09

MOTION SEQ. NO. 41

MOTION CAL. NO. _____

- v -

NYC Conflicts of Interest

The following papers, numbered 1 to 6 were read on this motion to/for Art 78

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

PAPERS NUMBERED	
1-4	_____
5-	_____
6	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided in accordance with the enclosed memorandum decision, order and judgment.

FILED
MAY 11 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/29/09

J.S.
JANE S. SOLOMON 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: PART 55

----- X

STEPHEN ROSENBLUM,

Index No. 101121/09

Petitioner,

DECISION, ORDER
and JUDGMENT

- against -

THE NEW YORK CITY CONFLICTS OF
INTEREST BOARD and THE NEW YORK
CITY OFFICE OF ADMINISTRATIVE TRIALS
AND HEARINGS,

Respondents.

----- X

JANE S. SOLOMON, J.:

Petitioner Stephen Rosenblum brings this Article 78 proceeding seeking an order prohibiting respondents New York Conflicts of Interest Board (Board) and New York City Office of Administrative Trials and Hearings (OATH) from proceeding with an administrative trial of petitioner, OATH Index no. 1233/09.

The following facts are undisputed. Petitioner is a tenured Assistant Principal, currently employed as the probationary Principal of I.S. 281 in Brooklyn. He is a member of the bargaining unit represented by the Council of Supervisors and Administrators, Local 1, AFL-CIO (CSA) and is covered by the collective bargaining agreement between CSA and the Board of Education (Contract). On or about May 2, 2008, the Board served petitioner with a Notice of Initial Determination of Probable Cause, which, on the basis of statements by a fellow Principal, charged petitioner with having approached that Principal to seek

[* 3]
his aid in keeping petitioner's son, a teacher in that Principal's school, from losing his job. Charter of City of New York § 2604 (b) (3) provides that

No public servant shall use or attempt to use his or her position as a public servant to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant.

The Board's position is that petitioner's alleged act violated this provision.

On or about October 7, 2008, Theresa Europe, Deputy Counsel to the Chancellor of the Board of Education, informed Board staff that her agency had made a final decision not to proceed with charges against petitioner on the basis of the facts alleged in the Board's initial determination of probable cause. Nonetheless, on or about October 10, 2008, the Board served petitioner with a notice of petition and petition asking OATH to find that petitioner had violated the law and seeking a \$10,000 fine and an order granting "further relief as may be just and proper." The phrase in quotation marks is not surplusage. Charter § 2606 (b) provides that, in certain cases, the Board may recommend to the public servant's appointing authority that the public servant be suspended or terminated. Petitioner moved to dismiss the OATH proceeding, which motion was denied by Administrative Law Judge Faye Lewis in a decision, dated January 21, 2009.

Petitioner contends that Education Law § 3020 provides that a tenured teacher or supervisor may be disciplined solely pursuant to the procedures set forth in Education Law § 3020-a, as modified by any applicable collective bargaining agreement, and that, therefore, the OATH proceeding may not go forward. Respondents, for their part, argue that the petition is premature, because petitioner will have the opportunity to challenge any sanction imposed by OATH, in a subsequent Article 78 proceeding; Charter § 2603 (h) (6) expressly confers upon the Board the power to enforce the conflict of interest rules, regardless of whether an agency chooses to take disciplinary action against the employee; and in any event, the imposition of a fine does not constitute discipline, within the meaning of Education Law § 3020.

Education Law § 3020 (a) provides that:

No person enjoying the benefits of tenure shall be disciplined or removed during the term of employment except for just cause and in accordance with the procedures specified in section three thousand twenty-a of this article or in accordance with alternate disciplinary procedures contained in a collective bargaining agreement covering his or her terms of employment

It is undisputed that OATH proceedings do not conform to the procedural requirements of Education Law § 3020-a, as modified by the Contract. Among other things, § 3020-a, which provides "a detailed scheme for protecting the interests of the tenured employee facing discipline" (*Matter of Syquia v Board of Edu. of*

the *Harpurville Cent. School Dist.*, 80 NY2d 531, 536 [1992]), requires that a finding of probable cause be made by a majority vote of the employing board of education, and that any hearing be held before a labor arbitrator who is a member of the American Arbitration Association.

In addition, it is clear that, notwithstanding respondents' argument to the contrary, a fine constitutes discipline, within the meaning of Education Law § 3020. Section 3020 governs the "discipline[]" and the removal from employment of tenured teachers and supervisors. The forms that such discipline may take are spelled out in the list of "penalties" that is set forth in § 3020-a, to wit, "a written reprimand, a fine, suspension for a fixed time without pay, or dismissal." Education Law § 3020-a (4) (a). Chapter 691 of the Laws of 1994 changed the heading of section 3020-a, from "Hearing procedures and penalties" to "Disciplinary procedures and penalties." L 1994, ch 691 § 3. These "penalties" are the disciplinary measures that may be imposed pursuant to the "disciplinary procedures" set forth in section 3020-a. Section 3020 protects tenured teachers and supervisors from having penalties imposed upon them other than through those procedures.

Citing *Matter of Felix v New York City Dept. of Citywide Admin. Servs.* (3 NY3d 498 [2004]) and *Matter of Moogan v New York State Dept. of Health* (8 AD3d 68 [1st Dept 2004]), respondents argue that not every action that adversely affects an

employee's employment constitutes discipline. In *Matter of Felix*, the Court held that the petitioner was not entitled to a pre-discharge disciplinary hearing, pursuant to Civil Service Law § 75, because he had forfeited his position by failing to prove that he fulfilled the residency requirement set forth in New York City Administrative Code § 12-120. The Court noted that "[f]ailure to maintain residence renders an individual ineligible for continued municipal employment ..., while an act of misconduct invokes Civil Service Law § 75 disciplinary procedures" *Matter of Felix*, 3NY3d at 505. Similarly, in *Matter of Moogan*, the Court held that the petitioner was not entitled to a Civil Service § 75 hearing, because he had been terminated from his position with the Fire Department as the result of the suspension of his certification as an emergency medical technician. In contrast to both of those cases, the Board here seeks to fine petitioner for an alleged act of misconduct, and the fine would constitute discipline within the meaning of Education Law § 3020, as well in ordinary language.

"[A]s a general principle, ... courts are constrained not to interject themselves into ongoing administrative proceedings." *Galín v Chassin*, 217 AD2d 446, 447 (1st Dept 1995). However, where there is a clear legal right to such intervention, and when the agency acts without jurisdiction, or in excess of powers in a proceeding over which it has

jurisdiction, prohibition may lie. *Matter of Garner v New York State Dept. of Correctional Servs.*, 10 NY3d 358 (2008); *Matter of Holtzman v Goldman*, 71 NY2d 564 (1988); *Matter of National Equip. Corp. v Ruiz*, 19 AD3d 5 (1st Dept 2005). Indeed, a court must consider "the gravity of the harm that would result to petitioner, the availability of another adequate remedy to correct that harm, and whether prohibition would provide a more complete and effective remedy." *Matter of Garner*, 10 NY3d at 362, quoting *Weinstein-Korn-Miller*, NY Civ Prac ¶ 7801.02 (2).

Here, petitioner has a clear legal right to judicial intervention to prevent the Board from continuing with its hearing. Charter § 2603 (h) (2) provides:

If ... the board determines there remains probable cause to believe that a violation of the provisions of this chapter has occurred, the board shall hold ... a hearing ... on the record to determine whether such violation occurred, or shall refer the matter to the appropriate agency if the public servant is subject to the jurisdiction of any state law or collective bargaining agreement which provides for the conduct of disciplinary proceedings, provided that when such matter is referred to an agency, the agency shall consult with the board before issuing a final decision.

The Board states that, pursuant to this section, the Board referred petitioner's alleged overture to his fellow principal to the Board of Education. Ms. Europe's October 7, 2008, notice to the Board, that the Board of Education had made a final decision not to proceed with charges against petitioner, was made in

response to that referral.

The Board argues that, notwithstanding the final decision of the Board of Education, Charter § 2603 (h) (6) authorizes the Board to proceed with the hearing, to impose a fine, and to recommend that petitioner be suspended or dismissed. Charter § 2603 (h) (6) provides:

Nothing contained in this section shall prohibit the appointing officer of a public servant from terminating or otherwise disciplining such public servant, where such appointing officer is otherwise authorized to do so; provided, however, that such action by the appointing officer shall not preclude the board from exercising its powers and duties with respect to the actions of any such public servant.

While an agency's interpretation of the statute that it administers is entitled to deference, so long as it is reasonable (*Matter of Salvati v Eimicke*, 72 NY2d 784 [1988]), the Board's interpretation here does not meet that standard. The phrase "such action," in this subsection, refers unambiguously to an appointing officer's "terminating or otherwise disciplining" a public servant. Nothing in this subsection authorizes the Board to sanction a public servant whose appointing officer has made a final decision not to discipline him or her.¹

¹ Because the Board of Education decided not to discipline petitioner, I do not need to decide whether, in a case in which the Board of Education disciplines a tenured supervisor, Charter § 2603 (h) (6), which appears to authorize the Board also to impose a fine on that supervisor, can be squared with the requirement in Charter § 2603 (h) (2), that, upon a finding of probable cause, the Board hold a hearing, unless the public servant is "subject to the jurisdiction of any state law or collective bargaining agreement

New York State Constitution Article IX § 2 (c) provides that "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of ... any general law relating to its property, affairs or government." Even if Charter § 2603 (h) (6) could be read as authorizing the Board to hold a hearing and to impose a fine against petitioner, any proceeding by the Board would necessarily fail to comply with Education Law § 3020-a, and any imposition of a fine, as the result of such a hearing, would violate Education Law § 3020. See *Matter of Board of Edu. of the City School Dist. of the City of New York v Mills*, 250 AD2d 122 (3d Dept 1998) (Charter provision, that school district employees who refuse to answer questions of Special Commissioner of Investigation are subject to dismissal, conflicts with Education Law § 3020-a (3) (c) (i), which protects employees from testifying against themselves in proceedings where job rights are in jeopardy). Thus, by virtue of Education Law § 3020, as well as Charter § 2603 (h) (6), the Board is barred from litigating the underlying proceeding.

Prohibition is available here because the "legality of the [underlying] proceeding itself" is implicated, *Matter of Johnson v Price*, 28 AD3d 79, 82 (1st Dept 2006) quoting *Matter of Hirschfeld v Friedman*, 307 AD2d 856, 858 (1st Dept 2003), and

which provides for the conduct of disciplinary proceedings," in which case, rather than holding a hearing, the Board is required to refer the matter to the public servant's agency.

because petitioner has no adequate alternative remedy. To be sure, petitioner would be free to contest any sanction imposed upon him in a subsequent Article 78 proceeding. However, the categorical bar that Education Law § 3020 raises to any discipline of tenured teachers and supervisors, other than through the procedures set forth in Education Law § 3020-a, as modified by any applicable collective bargaining agreement, should be read to protect such public servants from having to defend themselves in non-complying proceedings, where such non-compliance is necessarily conceded from the start. Contrast *Matter of DiBlasio v Novello*, 28 AD3d 339 (1st Dept 2006) (mandamus to compel production of a document unavailable during conduct of proceeding). The harm to petitioner, absent judicial intervention at this stage, would be a holding in abeyance of his statutory rights during the pendency of a futile hearing, at the conclusion of which, pursuant to those rights, any sanction imposed would have to be reversed. The principle that a court will not, generally, intervene in an ongoing administrative proceeding does not require petitioner to engage in such an exercise.

Accordingly, it is hereby

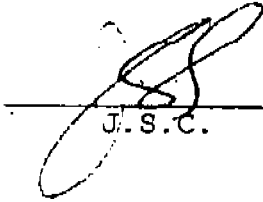
ORDERED and ADJUDGED that the petition is granted, and respondents New York Conflicts of Interest Board and New York City Office of Administrative Trials and Hearings are prohibited

from proceeding any further with the administrative trial of
petitioner, OATH Index no. 1233/09.

This constitutes the decision and judgment of the
court.

Dated: April 29, 2009

ENTER:



J.S.C.

JANE S. SOLOMON

FILED
MAY 11 2009
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