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

PRESENT: HON. EILEEN A. RAKOWER PART 5

Justice

Part 5

Index Number : 102678/2009

BROWN, NURCHETT

VS.

BOARD 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 ...	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

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).

Dated: 7/22/09

HON. EILEEN A. RAKOWER

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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In the Matter of the Application of
NURCHETT BROWN

Petitioner,

-against-

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK; JOEL I. KLEIN, as Chancellor of the CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, Department of Education,

Respondents.

HON. EILEEN A. RAKOWER:

Index No.
102678/09

DECISION
and ORDER

Mot. Seq.
001

Petitioner Nurchett Brown ("Petitioner") brings this proceeding pursuant to Article 78 of the CPLR for an order annulling the decision of the New York City Department of Education ("DOE") to terminate Petitioner from her position as a school teacher. Petitioner seeks restoration to her position as a teacher with back pay and interest, as well as compensation for the value of other benefits lost as a result of her termination.

Petitioner began her employment as a probationary common branches teacher with the DOE on September 4, 2001. Petitioner is a Jamaican citizen and was authorized to work in the United States as a recipient of a J-1 exchange visa, which was effective until December 31, 2003. Petitioner was subsequently approved for an H1-B visa. Petitioner's visa was effective from January 30, 2004 through August 3, 2006; and was subsequently renewed for the period from August 4, 2006 through August 3, 2009. On September 1, 2005, Petitioner completed her probationary period and became a tenured teacher with the DOE.

In or around October 2007, disciplinary charges were brought against Petitioner, and a hearing was held before an arbitrator pursuant to Education Law §3020-a beginning on February 25, 2008. By Opinion and Award dated May 23, 2008, the arbitrator found Petitioner guilty of a number of the charges leveled against her, and Petitioner was suspended for three months without pay and

ordered to undergo remedial training before returning to work. Neither the allegations against Petitioner which constituted the basis for those disciplinary proceedings nor the penalties resulting therefrom are a matter of dispute in this proceeding. Petitioner's suspension was to last from August 28, 2008 through November 28, 2008.

Taking the position that Petitioner's continued employment while she was suspended without pay would render it in violation of applicable federal regulations governing the employment of H1-B nonimmigrant workers, the DOE sent Petitioner a letter dated September 25, 2008, advising her that she would be terminated upon the completion of her suspension on November 28, 2008. The letter stated that the DOE would be revoking Petitioner's H-1B status and withdrawing its I-140 petition[1] on behalf of Petitioner. Petitioner was not provided with any kind of hearing to challenge the termination.

The DOE, pursuant to its mandatory notification obligation, sent a letter to the Department of Homeland Security ("DHS") from its immigration counsel dated October 1, 2008, informing them that the DOE was revoking its I-129, H-1B petition on behalf of Petitioner.[2] DOE also withdrew its I-140 petition for permanent residence on behalf of Petitioner on September 25, 2008. DHS subsequently sent the DOE's immigration counsel a Notice of Decision dated October 6, 2008 which states the following:

> In accordance with 8 C.F.R. 214.2, the petition is automatically revoked as of the date of this notice because:
>
> The petitioner/employer has filed a written withdrawal of the petition.

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[1]An I-140 is a form completed by employers seeking to petition the federal government to allow a worker to become a permanent resident in the United States (*see* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=4a5a4154d7b3d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD).

[2]An I-129 is a form which is completed by employers seeking to petition the federal government to permit an alien to work in United States as, *inter alia*, an H1-B non-immigrant worker (*see* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=f56e4154d7b3d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=7d316c0b4c3bf110VgnVCM1000004718190aRCRD).

Accordingly, DHS terminated the action.

Petitioner commenced this Article 78 proceeding on or around February 25, 2009. Petitioner submits a verified petition and memorandum of law in support of the petition. Annexed to the petition as exhibits are copies of the 9/25/08 letter advising Petitioner of her impending termination, and her Notice of Claim upon the DOE.

The DOE has submitted a verified answer and a memorandum of law in support of its answer. Annexed to the answer as exhibits are copies of Petitioner's Certificates of Eligibility for Exchange Visitor Status; approval notices for the H-1B petitions brought on Petitioner's behalf; disciplinary charges brought against Petitioner in or around October 2007; a 9/28/07 letter advising Petitioner of her reassignment; a 10/24/07 letter adiving Petitioner of her suspension with pay; specifications of charges against Petitioner; the arbitrator's 5/23/08 opinion; a 8/4/08 letter advising Petitioner of the effective dates of her suspension without pay; a 10/1/08 letter from DOE's immigration counsel to DHS revoking its visa petition on behalf of Petitioner; DHS's 10/6/08 Notice of Decision reflecting the revocation of Petitioner's visa; a 9/25/08 letter from DOE's immigration counsel withdrawing Petitioner's I-140 petition; DHS's 11/11/08 decision terminating the I-140 petition; and DOE's 9/25/08 letter to Petitioner advising her of her termination.

Petitioner has submitted a reply affirmation and memorandum of law in reply. Annexed to the affirmation as exhibits are Article 21G of the collective bargaining agreement between the United Federation of Teachers and the DOE; a certificate of completion for remedial training pursuant to the terms of the arbitrator's decision; and a 12/1/08 letter from the DOE advising Petitioner of her removal from the DOE's "Ineligible/Inquiry List." Annexed to the reply memorandum as appendices are a printout of 20 C.F.R. §655.731; as well as the three exhibits which were annexed to Petitioner's reply affirmation.

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on

any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

Petitioner alleges that, as a tenured DOE employee, her termination was arbitrary and capricious in that it was effectuated in violation of Education Law §3020-a, which requires a pre-termination hearing for tenured teachers. The DOE asserts that Petitioner's termination without a hearing was proper and in accordance with the law, since the pre-termination hearing required by Education Law §3020-a applies only to disciplinary matters such as alleged misconduct or incompetence, while Petitioner's termination was based upon the fact that she was no longer legally qualified to work in the United States due to the revocation of her visa. The DOE further argues that Petitioner's three-month suspension without pay required it to notify DHS of its legal obligation to revoke Petitioner's visa pursuant to 20 C.F.R. §655.731.

> 20 C.F.R. §655.731 states, in pertinent part,
> (c) *Satisfaction of required wage obligation*
> (7) *Wage obligation(s) for H-1B nonimmigrant in nonproductive status*
> (i) *Circumstances where wages must be paid.* If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (*e.g.*, because of lack of assigned work), lack of a permit or license, or any other reason except as specified in paragraph (c)(7)(ii) of this section [inapplicable here], the employer is required to pay the salaried employee the full pro-rata amount due....

The DOE argues that, in light of the arbitrator's decision to suspend Petitioner for three months without pay, the continued employment of Petitioner would violate 20 C.F.R. §655.731, since the DOE would be retaining Petitioner under its employ despite the fact that Petitioner is neither performing any work, nor receiving compensation due to a decision by the DOE (*i.e.*, Petitioner's

suspension). Petitioner accuses the DOE of improperly effectuating the revocation of Petitioner's visa in an effort to "summarily terminate" her.

Based upon the record before it, the court concludes that the DOE's decision to terminate Petitioner was supported by a rational basis. As noted above, under 20 C.F.R. §655.731, it is impermissible for an employer to retain a nonimmigrant on an H-1B visa without paying wages to the employee where that employee "is not performing work and is in a nonproductive status due to a decision by the employer...." Given the arbitrator's decision to suspend Petitioner for three months without pay, were the DOE not to revoke its I-129 petition on behalf of Petitioner, it would either place itself in potential violation of federal regulations governing the employment of non-immigrant workers, or it would be relaxing its disciplinary standards to make an exception for Petitioner based upon her status as an H-1B non-immigrant worker - itself a violation of Education Law §3020-a.[3]

Having found that the DOE's withdrawal of its I-129 petition on behalf of Petitioner to be neither arbitrary or capricious, the only issue remaining is whether the Petitioner's termination on the grounds of her inability to work in the United States was void for lack of a pre-termination hearing pursuant to Education Law §3020-a.

Education Law §3020-a, titled "Disciplinary procedures and penalties," exists to protect tenured teachers from the arbitrary imposition of formal discipline or removal (*see Holt v. Board of Education*, 52 N.Y.2d 625, 632 [1981]; *Sanders v. Board of Education*, 17 A.D.3d 682, 683 [2nd Dept. 2005]). The termination of Petitioner did not implicate the procedural protections of Education Law §3020-a because Petitioner's termination was due to her legal ineligibility to serve as a teacher, rather than any alleged misconduct or incompetence on her part (*see Felix v. New York City Dep't of Citywide Admin. Servs.*, 3 N.Y.3d 498, 505 [2004] (finding that petitioner's termination based upon his failure to maintain residency within the City of New York as required was "separate and distinct" from allegations of misconduct which trigger the procedural protections of Civil Service Law §75); *see also O'Connor v. Board of Education*, 2008 NY Slip Op 1218 [4th

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[3]Education Law §3020-a(4)(b) provides: "Within fifteen days of receipt of the hearing officer's decision the employing board *shall* implement the decision" (emphasis added). *See also Watkins v. Board of Education*, 26 A.D.3d 336, 337 [2nd Dept. 2006] ("The Board's role under *Education Law § 3020-a (4) (b)* is only to "implement" the decision of the hearing officer.").

Dept. 2008] (finding Education Law §3020-a inapplicable to termination of tenured teacher for failure to comply with residency requirements, which are unrelated to job performance, incompetence, or misconduct)).

The Court notes that the August 28, 2008 suspension is not the subject of this petition. Indeed, such a challenge would not have been timely. However, it is inescapable that the ultimate termination flowed from that suspension. Petitioner refers to the suspension as a veiled termination. Whether she was entitled to notice, in the May 2008 Opinion and Award, that the suspension would trigger DOE's actions regarding her immigration status, is not before this Court.

Wherefore, it is hereby

ORDERED and ADJUDGED that the Petition is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: July 22, 2009

EILEEN A. RAKOWER, J.S.C.