

Miller v New York City Dept. of Educ.

2009 NY Slip Op 31817(U)

August 11, 2009

Supreme Court, New York County

Docket Number: 117204/08

Judge: Jane S. Solomon

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

PRESENT: HON. JANE S. SOLOMON
Justice

PART 55

Adan Miller

INDEX NO. 117204/08

MOTION DATE 5/14/09

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

NYC Dept of Education

The following papers, numbered 1 to 9 were read on this motion to/for Art 78

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

PAPERS NUMBERED

1-3

Answering Affidavits — Exhibits _____

4-6

Replying Affidavits _____

7-9

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that ~~the motion~~ the cross-motion to dismiss is denied in accordance with the enclosed memorandum decision and order.

FILED
AUG 13 2009

COUNTY CLERK'S OFFICE
NEW YORK

N.B. - the petition is rescheduled in ~~motion support~~ the motion submission bank (Room 130) on ~~10/19/09~~ at 9:30 AM. October 19, 2009

Dated: 8/11/09

[Signature]
HON. 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

-----X

ADAM MILLER,

Petitioner,

-against-

Index No. 117204/08

DECISION & ORDER

NEW YORK CITY DEPARTMENT OF EDUCATION;
CITY OF NEW YORK; JOEL KLEIN, as
Chancellor of the NEW YORK CITY
DEPARTMENT OF EDUCATION; and
OLGA LIVANIS, Principal of NEST+M
School of the NEW YORK CITY DEPARTMENT
OF EDUCATION,

Respondents,

For an Order and Judgment Pursuant to
Article 78 of the Civil Practice Law
and Rules.

-----X

JANE S. SOLOMON, J.:

Petitioner Adam Miller ("Miller"), a New York
City teacher who attained tenure status, brings this Article 78
proceeding to challenge the New York City Department of
Education's ("DOE") refusal to allow him to rescind his
resignation letter. He seeks his reinstatement *nunc pro tunc*
with interest, back pay, and benefits. Respondents cross-move to
dismiss. For the reasons set forth below, the cross-motion is
denied.

FACTS

Miller was appointed as a teacher for the DOE at the
New Explorations into Science, Technology, and Math school
("NEST+M") in August 2003. In June 2006, he was granted tenure.

In the 2006-2007 school year, Olga Livanis ("Livanis") became the principal of the school. A dispute arose between Miller and Livanis after she removed Miller from his position as Chairman of the English Department and refused to pay Miller for teaching additional classes and supervising extracurricular activities.

In June 2008, Livanis issued a rating sheet giving Miller an "Unsatisfactory" end-of-the-year rating for the 2007-2008 school year. Miller alleges that Livanis subsequently proposed that, if Miller agreed to resign, effective August 28, 2008, she would change his "Unsatisfactory" rating to "Satisfactory." This would have benefitted Miller because it would have made it easier for him to transfer to another DOE school. Miller claims that Livanis told him that, if he didn't resign and chose to come back to NEST+M for the 2008-2009 school year, she would give him another "Unsatisfactory" rating, which could have led to his dismissal after a disciplinary hearing.

Miller then drafted a written agreement, dated July 24, 2008, which reflected the understanding that Livanis would change the rating sheet if Miller submitted his resignation. However, Livanis refused to sign it, and, in response, Miller informed Livanis, on July 30, 2008, that he would be returning to school in August. At this point, Miller claims that Livanis threatened him by saying that she would "hound [him]" and "make [his] life miserable" if he did so (Verified Petition, ¶ 16).

Miller asserts that Livanis assured him that, although she couldn't put it in writing, she would change the rating if Miller submitted a letter of resignation. According to Miller, Livanis also made that promise to Miller's union representatives and told Miller that he would have to "trust and rely on her representation" to them (E-Mail from Adam Miller to Randi Weingarten [August 4, 2008], attached as Exh. C to Verified Petition). In an e-mail to Miller, a union official named Joseph D'Amico confirmed that Livanis had told him that her policy was that "if she had a signed resignation letter, then she would give the person an S. If they found another job during the summer, then the resignation would not take effect, she would simply release the person" (E-Mail from Joseph D'Amico to Adam Miller [July 22, 2008], attached as Exh. D to Verified Petition).

After consultation with his union representatives, Miller submitted a resignation letter dated July 30, 2008 to Livanis, which states: "I hereby resign my teaching position at NEST+m for the 2008-2009 school year, effective August 29, 2008" (Exh. E to Verified Petition). On August 1, 2008, Livanis wrote to Miller to ask him to amend it to state that he was resigning from the DOE (not just from NEST+M) and to delete his reference to the 2008-2009 school year (Exh. F to Verified Petition). In an e-mail dated August 5, 2008, Miller refused to make the changes and added:

"On a smoother note, the [union] special rep confirmed that you could not be expected to put in writing the agreement to change my "U" to an "S" rating in exchange for my resignation, and that, despite that being the case for principals system-wide, he had never run into or heard of a principal who had reneged on his or her part of the agreement."

(Exh. F to Verified Petition). Livanis did not respond to this e-mail.

After submitting his resignation letter, he received no notice from DOE that his resignation was processed. Miller attempted to obtain a position at another DOE school, but was unsuccessful. He then discovered that Livanis had not changed his "Unsatisfactory" rating and believes that this hampered his job search. On the advice of his union, he sent Livanis an e-mail on August 25, 2008 stating:

"unless I have in hand, by 3 pm Tuesday, August 26, 2008, a hard copy of a rating sheet for the 2007-2008 school year with an "S" rating on it dated one day after the date of the "U" rating sheet you already issued to me, I will be rescinding my July 30, 2008 letter and returning to teach at NEST+M on August 28, 2008."

(Exh. G to Verified Petition).

When Livanis did not respond, Miller sent her a letter, dated August 26, 2008, rescinding his July 30th resignation letter and advising Livanis that he was returning to teach at NEST+M for the 2008-2009 school year (Exh. H to Verified Petition). Miller sent copies of the letter to the DOE and his

union. In an e-mail authored later that day, Livanis responded to Miller by informing him that he was on an "ineligible list" maintained by DOE's Office of Special Investigations (Exh. I to Verified Petition). Miller was prevented from returning to school by Livanis, who threatened to call the police and have him removed from the building (Exh. J to Verified Petition). DOE then terminated Miller's position and removed him from the payroll.

Miller eventually learned that he was placed on the DOE's Ineligible Inquiry list on August 27, 2008 at the request of Livanis. Miller was removed from the list after a hearing on November 19, 2008. On November 24, 2008, Miller filed a Notice of Claim referring to DOE's refusal to honor his withdrawal of his resignation letter, and demanding compensation for damages. This hybrid Article 78 petition followed, seeking Miller's reinstatement, back pay and benefits.

DISCUSSION

Miller argues that he should have been able to withdraw his post dated resignation letter before its effective date. He reasons that the refusal to do so in light of Livanis's breach of her agreement to change his rating made his resignation involuntary.

Respondents contend that the proceeding is time barred

because the four month statute of limitations began to run on July 30, 2008, the date of the resignation letter. On the merits, respondents assert that the resignation became effective upon submission, making it impossible for him to rescind it.

"A tenured teacher has a protected property interest in her position and a right to retain it subject to being discharged for cause in accordance with the provisions of Education Law § 3020-a." (*Gould v. Board of Educ. Of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 451 [1993]). A teacher can "relinquish her tenured rights in her position voluntarily by resigning" (*Id.*). However, a resignation that is not a voluntary act is ineffective and can be rescinded. (*Id.* at 451-52).

Respondents' statute of limitations argument is without merit. The statute of limitations period began to run after Miller's attempt to withdraw his resignation letter, not when the letter was originally submitted. At the time he submitted the resignation, Miller believed that his dispute with Livanis was resolved in accordance with their agreement. It was only after Livanis allegedly reneged on the agreement that Miller's claim arose. Livanis clearly stated her refusal to accept that Miller rescinded his resignation on August 26, 2008, when she threatened to have him arrested if he attempted to teach on August 28. Up to that date, it could not be said that the determination to

prevent Miller from teaching at NEST+M in the 2008-2009 school year was final and binding on him (CPLR 217[1]). The proceeding was commenced on December 24, 2008, which is within the applicable four month statute of limitations (*id.*).

Respondents also contend that the court lacks subject matter jurisdiction because there has been no administrative action here to review. This argument finds support in the Chancellor's regulations governing DOE procedure. Chancellor's regulation C-205(26) states that a resignation by a teacher is considered final when submitted in writing. Chancellor's regulation C-205(28) states that, upon written request, a teacher may be permitted to withdraw a resignation at the discretion of DOE Executive Director of Human Resources. Under Chancellor's regulation C-205(29), a teacher is permitted to withdraw a resignation subject only to medical examination and approval of the Chancellor. At this stage, Respondents submit nothing to suggest that Livanis treated the purported resignation or withdrawal in compliance with the Chancellor's regulations.

Where no determination has been made by a government agency with respect to an employee's resignation, the court lacks subject matter jurisdiction to review that resignation under Article 78 (*Stefendel v Sielaff*, 176 AD2d 651 [1st Dept 1994]). In *Stefendel*, the petitioner tested positive in a random drug test while he was a probationary corrections officer, and was

offered the opportunity to resign rather than be terminated. He subsequently challenged whether his resignation was effective on the grounds that it was coerced. The court found that the Article 78 petition was properly dismissed because there was no determination for the court to review.

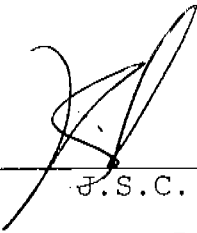
Respondents argue that there was no determination by DOE with respect to Miller's resignation. However, Miller is not challenging his July 30 resignation letter. Rather, he challenges the rejection of his written withdrawal made before the resignation was to take effect. Unlike *Stefandel* and the other cases respondents cite, the DOE rejected petitioner's withdrawal, which constitutes an agency action. If respondents' argument is credited, Livanis lacked authority to act under the Chancellor's rules, so his withdrawal may never have been formally rejected. Respondents do not state what the proper procedure is, if any, to obtain administrative review for a teacher seeking to withdraw his resignation, or what notice of said procedure was provided to Miller. Based on the foregoing, it hereby is

ORDERED that Respondents' cross-motion is denied, and Respondent shall serve an answer by September 30, 2009, and Petitioner may serve a reply thereto by October 16, 2009, for which purpose notice is given by mailing an un-entered copy hereof to counsel by the court; and it further is

ORDERED that this petition is restored to the calendar in the Submissions Part, 60 Centre Street, Room 130, New York, NY on October 19, 2009 at 9:30 AM.

Dated: August 11, 2009

ENTER:



J.S.C.
HON. JANE S. SOLOMON

FILED
AUG 13 2009
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NEW YORK