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

PRESENT: _____ Justice PART 15

Index Number : 101380/2009

PHILLIP, CASEY

VS.

BOARD OF EDUCATION

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 101380-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on 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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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).

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

Dated: 10/29/09

J.S.C.

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: IAS PART 15

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In the Matter of the Application of
CASEY PHILLIP,

Petitioner,

-against-

Index No. 101380/09
Motion Seq. 001

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, and JOEL I. KLEIN, in his official capacity as CHANCELLOR of the CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondents.

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WALTER B. TOLUB, J.S.C.:

Petitioner Casey Phillip, a citizen of Antigua, brings this Article 78 proceeding to annul the October 7, 2008 termination of his employment as a tenured elementary school teacher in the New York City public school system. The relevant facts underlying this proceeding are undisputed.

Petitioner commenced his employment for defendant Department of Education of the City of New York (DOE), a/k/a Board of Education of the City School District of the City of New York in January 2003, and completed all of the requirements for tenure by September 2006. By letter dated October 15, 2007, petitioner was informed that disciplinary charges had been preferred against him on the ground that he had received an "unsatisfactory" rating for the preceding school year. Accordingly, by letter dated October 23, 2007, Theresa Europe, Deputy Counsel to defendant Chancellor, notified petitioner that he was suspended with pay, as of the close

of business October 26, 2007. Ms. Europe's letter expressly stated that the suspension was "in accordance with Education Law section 3020-a." Verified Answer, Exh. 10. A disciplinary hearing was duly scheduled, pursuant to Education Law § 3020-a (3); pre-hearing conferences were held on January 4, 2008 and January 8, 2008; and hearings were conducted before Arbitrator Randi E. Lowith, Esq., on 13 days, commencing on January 28, 2008, and ending on April 3, 2008. The record was due to be closed on or about December 5, 2008, with the Arbitrator's receipt of written closing arguments from the parties.

However, by letter dated October 7, 2008, that is, approximately one year after petitioner was suspended, Lucille Ameduri, a member of DOE's International Teacher Support Unit, notified petitioner that "[s]ince [he had] been suspended since October 27, 2007 ... [his] H-1B visa [had] been revoked." *Id.*, Exh. 8. The following day, Ms. Ameduri advised petitioner verbally that his employment had been terminated. By e-mail dated October 24, 2008, an attorney in the office of the General Counsel to the Chancellor advised the Arbitrator that petitioner's employment had been terminated effective on or about September 25, 2008. Petitioner's last payment from DOE was made on October 31, 2008. In her November 17, 2008 "Arbitrator's Opinion and Ruling," the Arbitrator noted that petitioner had been discharged "for reasons external to the 3020-a process," and she concluded that, as a result of the revocation of petitioner's visa, and the consequent termination of his employment, she lacked jurisdiction to decide

the disciplinary matter that had been litigated before her. She expressly stated that, accordingly, "I will not render a decision on this matter." *Id.*, Exh. 11, at 4-5.

Here, our narrative turns to a complementary set of facts. As a nonimmigrant alien, petitioner, who was authorized to work in the United States until May 31, 2003, by virtue of an F-1 student visa, was thereafter authorized to continue his employment by virtue of two approvals by the United States Immigration and Naturalization Service (INS) of DOE's petitions that petitioner be granted an H-1B visa. The "H-1B' program takes its name from 8 USC § 1101 (a) (15) (H) (I) (B), which describes the eligibility requirements for certain "special occupation" visas. These requirements pertain both to the characteristics of the job, for the holder of which an H-1B visa is sought, and to the qualifications of the intended job-holder. *See generally Royal Siam Corp. v Chertoff*, 484 F3d 139 (1st Cir 2007). Each H-1B visa authorizes its recipient to work in the United States for up to three years, and such visas may be obtained for no more than six consecutive years. *See* 8 CFR § 214.2 (h) (13) (iii) (A). The first of petitioner's H-1B visas was valid from June 1, 2003 to February 28, 2006; the second, from March 1, 2006 to January 31, 2009.

At a time which respondents fail to specify, but which, obviously, preceded Ms. Ameduri's October 7, 2008 letter to petitioner, DOE notified the United States Department of Homeland Security (DHS), which, on March 1, 2003, had succeeded to the functions of INS (*see* 6 USC § 291), that petitioner's visa should

be revoked. It is undisputed that that notification was not required by any federal statute or regulation, but was occasioned solely by a DOE policy that those of its employees who hold an H-1B visa need to maintain a "satisfactory" rating in order to retain that visa. The court notes that while respondents attach to their verified answer all communications between DOE and INS concerning the granting of H-1B visas to petitioner, they attach neither DOE's request that DHS revoke petitioner's visa, nor DHS's reply. In any event, DHS duly revoked the visa, and Ms. Ameduri duly notified petitioner of that action and then informed him that his employment was terminated. Respondents now take the position that DOE's action in having petitioner's visa revoked was rational, and that, inasmuch as petitioner is now not authorized to work in the United States, he is not entitled to any relief.

This court disagrees. Although petitioner's employment was due to terminate on January 31, 2009, with the expiration of his second H-1B visa, and thus differed from the usual tenured position, DOE consistently recognized that, but for that limitation, petitioner's employment was governed by those provisions of the Education Law that are applicable to teachers and administrators who are tenured. Thus, as noted above, DOE suspended petitioner expressly in accordance with Education Law § 3020-a, and it participated in the 3020-a hearing until after the last hearing date, that is, April 3, 2008. However, it then aborted the 3020-a proceeding in reliance on nothing more than its policy. The court notes, parenthetically, that neither Exhibit 6

to the verified answer, which is headed "POLICIES REGARDING EMPLOYED INTERNATIONAL TEACHERS," nor any of respondents' papers, indicates when, or by whom, or by what authority, those policies were adopted. In any event, a DOE policy cannot justify a violation of the Education Law. Accordingly, DOE's termination of petitioner's employment was "affected by an error of law." CPLR 7803 (3).

In this particular action, DOE recognized that petitioner was entitled to the protections of Education Law §§ 3020 and 3020-a, and it participated in the 3020-a proceeding through the final hearing date. The analysis would be no different, however, had DOE acted to have petitioner's visa revoked immediately after he received the "unsatisfactory" rating. Education Law §§ 3020 and 3020-a provide substantive and procedural protections to teachers and administrators with tenure. Petitioner indisputably had tenure, by virtue of having satisfactorily completed his probationary period. While, pursuant to the applicable immigration laws, petitioner's consecutive employment with DOE was due to end on January 31, 2009, once petitioner acquired tenure, DOE was statutorily barred from terminating his employment at any earlier time, other than through the procedures set forth in Education Law § 3020-a, or as otherwise required by federal law or regulations. Defendants rely upon *Felix v New York City Dept. of Citywide Admin. Services* (3 NY3d 498 [2004]), and on other cases that hold that statutory protections from termination, other than through Education Law § 3020-a procedures, are inapplicable, where the

employee fails to meet a qualification for employment such as residency. Those cases are plainly irrelevant here, where it is the respondents who directly brought about the condition that disqualified petitioner from further employment. Nor is respondents' reliance on *Brown v Board of Education of City School District of City of New York* (Sup Ct, NY County Index No. 102678, July 22, 2009 [Rakower, J.]) well-placed. In that case, the arbitrator presiding over the nonimmigrant alien petitioner's Education Law § 3020-a hearing had issued an award suspending the petitioner for three months without pay. DOE had, then, contacted DHS, revoking, among other things, its petition for the petitioner's H-1B visa, and subsequently it terminated the petitioner's employment. The *Brown* court noted that, pursuant to 20 CFR § 655.731, DOE was barred from employing the petitioner without paying him wages, and that, accordingly, had DOE not revoked its petition for the petitioner's H-1B visa, DOE would either have violated federal regulations governing the employment of nonimmigrant workers, or it would have had to continue paying the petitioner, thereby creating an exception that would, itself, violate Education Law § 3020-a, which requires the employing board of education to implement a hearing officer's decision. The court then held that the termination of the petitioner's employment did not implicate the procedural protections of Education Law § 3020-a, because the termination was due to the petitioner's legal ineligibility to serve as a teacher. Here, by contrast, no applicable federal regulation was implicated by petitioner's

suspension with pay, and DOE revoked its petition for petitioner's visa solely on the basis of its own policy.

Respondents' further argument, that petitioner's claim is barred by collateral estoppel, because the Arbitrator ruled that she had lost jurisdiction over the 3020-a proceeding once she was apprised that petitioner's visa had expired, brings to mind the storied defendant who, after killing his parents, throws himself on the mercy of the court, as an orphan. It is DOE, after all, that brought about the condition that mooted the disciplinary hearing. Moreover respondents' statement that petitioner is collaterally estopped from challenging the Arbitrator's "award" (Resp. Mem. of Law, at 7), is singularly misleading. As noted above, the Arbitrator issued no award. To the contrary, she ruled that she lacked jurisdiction to do so.

That said, this court cannot grant judgment reinstating petitioner as a teacher employed by DOE, because, even had DOE not arranged to have petitioner's second H-1B visa revoked, that visa would have expired by its own terms on January 31, 2009. However, petitioner is entitled to the pay, and any other emoluments of employment, that he would have received between September 25, 2008, and January 31, 2009. To be sure, there is no way of knowing what the Arbitrator would have held, had respondents not aborted the 3020-a proceeding. Having done so, however, respondents should not be permitted to profit from that uncertainty.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is granted to the

extent that respondent Board of Education of the City School District of the City of New York is directed to pay to petitioner the pay, and any other emoluments of employment, that he would have received between September 25, 2008 and January 31, 2009.

Dated: 10/29/09

ENTER:

Hon. Walter B. Tolub, J.S.C.