

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

2010 NY Slip Op 30889(U)

April 9, 2010

Supreme Court, New York County

Docket Number: 103995/09

Judge: Jane S. Solomon

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4-13-10

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

PRESENT: JANE S. SOLOMON

PART 55

Justice

Index Number : 103995/2009

MELENDEZ, MILDRED

vs.

N. Y. C. DEPARTMENT OF EDUCATION

SEQUENCE NUMBER : # 001

ARTICLE 78

FILED

APR 13 2010

NEW YORK
COUNTY CLERK'S OFFICE

INDEX NO. 103995-09

MOTION DATE 10/19/09

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

Filed on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

13

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that ~~this motion~~

be cross motion to

*dismiss is denied in accordance with
The attached Decision & Order & The
Petition is referred to the
Calendar in Motion support as
motion 002, an administrator
matter I am delegating to my
Print Clerk*

Dated: 4/9/10

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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x

In the Matter of
MILDRED MENDEZ,

DECISION and ORDER

Petitioner,

Index No.: 103995/09

-against-

NEW YORK CITY DEPARTMENT OF
EDUCATION,

Respondent.

-----x

JANE S. SOLOMON, J.:

Pursuant to Article 78 of the Civil Practice Law and Rules, petitioner Mildred Mendez challenges the respondent New York City Department of Education's ("DOE") denial of her application to withdraw a letter of resignation. Mendez seeks an order compelling the DOE to accept her withdrawal, to reinstate her as a teacher, and to provide back pay. The DOE cross-moves to dismiss the petition on the grounds that it is barred under the four month statute of limitations applicable to Article 78 proceedings (CPLR 217[a]).

Mendez was employed by the DOE as a tenured teacher. In April 2008, she believed, based on threats made by her school's principal, that she would receive an unsatisfactory rating and risked losing her teaching license in a disciplinary proceeding under Education Law § 3020-a.

She was advised by her union representative to resign her position to avoid the § 3020-a proceeding. On April 18, 2008, Mendez submitted a letter of resignation to her principal, effective June 26, 2008. On April 28, 2008, the principal informed Mendez that she had received her letter of resignation, but that it needed to be in a different format, and requested that Mendez sign a form resignation letter stating that she "irrevocably" resigned her position. Mendez refused to change the form of her letter and instead, on May 30, 2008, submitted an application to withdraw her resignation (Petitioner's Ex. D). On June 2, 2008, the principal caused disciplinary charges to be filed against Mendez, who was removed from her classroom and reassigned to a different school. The DOE sent a letter to Mendez, dated August 26, 2008, informing her that she would be removed from the payroll on August 28, 2008 (Petitioner's Ex. F). Mendez was indeed removed from the DOE payroll on August 28. On October 9, December 10, and December 24, 2008, Mendez sent letters to the DOE requesting that she be put back on the payroll. The DOE did not respond to any of her letters. Mendez commenced this Article 78 proceeding on March 23, 2009. Mendez seeks mandamus relief compelling the DOE to return her to her teaching position.

Chancellor's Regulation 205(26) states that once a resignation is submitted, it is considered final; "[h]owever, if there is no break in actual service, the appointing authority may, in its discretion, permit the employee to rescind the resignation before its effective date". Chancellor's Regulation 205(29) provides (subject to limitations not present here) that a teacher who attained tenure prior to the resignation shall remain tenured and shall, upon written request, be permitted to withdraw her resignation subject only to the medical examination and the approval of the Chancellor, provided that the reinstatement occurs within the next five years before the opening of school in September. Article 5(E) of the collective bargaining agreement between the DOE and Mendez's union provides for substantially the same terms as Chancellor's Regulation 205(29).

The DOE Chancellor at all times relevant to this proceeding was Joel I. Klein. It is undisputed that the Chancellor did not exercise his discretion to consider whether to permit Mendez to withdraw her resignation, or require her to submit to a physical examination.¹

¹ Mendez's physical condition was not at issue at any point of these events, so it would appear that the

In its cross-motion, the DOE contends that Mendez was aware in August 2008 that her resignation was accepted and acted upon, and that her withdrawal was not accepted. Therefore, it argues, her time to commence this action lapsed four months later, in December 2008, so this action commenced in March 2009 is untimely.

The DOE's argument fails for two reasons. First, Mendez had five years from September 1, 2008 to request to withdraw her resignation and be reinstated as a tenured teacher. Even if the court were to deem her Article 78 petition the first notice of this request, it would have been timely. Second, she in fact sought withdrawal before the effective date of the April 18 resignation. To date, the Chancellor has not responded to the request. Arguably, the petition could be seen as premature with respect to the withdrawal because the Chancellor has yet to approve or disapprove the request, so there is no final determination to challenge. The petition is fairly read as one for mandamus to compel the Chancellor to approve the withdrawal and return her to the payroll. For these reasons, the

Chancellor's opportunity to require a physical examination is irrelevant.

cross-motion to dismiss the petition as untimely under CPLR 217(a) is denied.

In opposition to the cross-motion, Mendez argues (apparently for the first time) that the initial resignation was ineffective because there was no meeting of the minds. She contends that the principal did not accept her resignation as written, and instead proposed alternative language. The DOE argues in reply that, were this argument a basis for the petition, it could be barred by a defense founded on the doctrine of laches (see, *Continental Ins. Co. v Employers Ins. Co. Of Wausau*, 60 AD3d 128 [1st Dept 2008], and *Matter of Rapess v. Ortiz*, 99 AD2d 413, 414 [1st Dep't 1984]). "Whether the doctrine is applicable depends on the facts of each case, and a significant factor is whether the plaintiff has inexcusably delayed in asserting his rights, while to his knowledge the opposing party has changed his position to his irreversible detriment" (*Orange & Rockland Utilities, Inc. v Philwold Estates, Inc.*, 70 AD2d 338, 343 [3d Dept 1979] [citations omitted]). While neither Mendez's lack of agreement argument or the DOE's laches defense are raised in the petition or cross-motion, it is apparent that the DOE does not have a laches defense to any aspect of this petition because, from the very early stages of the

underlying events, Mendes has repeatedly communicated her position that the April 18, 2008 resignation should not be given effect. The DOE has not articulated any change in its position in reliance on her lack of diligence.

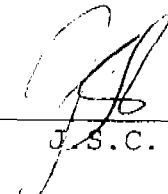
Given the mandatory language of Chancellor's Regulation 205(29) that the withdrawal *shall be granted* subject to approval, however, the Chancellor's failure to approve or disapprove the withdrawal of her resignation for nearly two years is unconscionable. No explanation or excuse for the Chancellor's inaction is proffered. Had there been a reason to refuse to approve Mendez's request to withdraw the resignation, the unreasonable delay in communicating the reason is itself arbitrary, irrational and an abuse of discretion (CPLR 7804[3]). Nevertheless, since respondent is yet to serve an answer, a final determination of this petition would be premature. Accordingly, it hereby is

ORDERED that the cross-motion to dismiss is denied, and respondent shall serve an answer to the petition within twenty days of service of notice of entry hereof; and it further is

ORDERED that this petition is adjourned to Motion Support, Room 130, on June 15, 2010 at 9:30 AM.

Dated: April 9, 2010

ENTER:



J.S.C.
JANE S. SOLOMON

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