

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

2010 NY Slip Op 31210(U)

May 11, 2010

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: JANE S. SOLOMON

PART 55

Justice

Miller

INDEX NO.

117204/08

MOTION DATE

1/25/10

MOTION SEQ. NO.

002

MOTION CAL. NO.

- v -
NYC DOE

The following papers, numbered 1 to 2 were read on this motion to/for Art 78 relief

PAPERS NUMBERED

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

1-3

Answering Affidavits — Exhibits

4-5

Replying Affidavits

6-7, 8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *petition is decided by the annexed Decision, Judgment and 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: 5/11/10

Jane S. Solomon
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: IAS PART 55

----- X
In the Matter of the Application of

ADAM MILLER,

Petitioner,

Index No. 117204/08

For a Judgment under Article 78 of the
Civil Practice Law and Rules,

DECISION, ORDER and
JUDGMENT

-against-

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

Respondents.

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).

----- X
Jane S. Solomon, J.:

Petitioner Adam Miller (Miller), brings this Article 78 proceeding to challenge the refusal of the New York City Department of Education (DOE) to allow him to rescind a letter of resignation. He seeks (i) a declaration that Respondents' refusal to honor his withdrawal of the resignation was arbitrary and capricious, (ii) reinstatement *nunc pro tunc* with interest, back pay and benefits, and (iii) conversion of his annual performance rating for 2007-8 to satisfactory from unsatisfactory. Respondents' cross motion to dismiss was denied by this court on August 11, 2009. Respondents then filed their verified answer.

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. He was granted tenure in June 2006. In the 2006-7 school year, Olga Livanis (Livanis) became the principal of NEST+M. A dispute arose between Miller and Livanis after she removed him from his position as Chairman of the English Department and refused to pay him for teaching additional classes and supervising extracurricular activities.

On June 24, 2008, Livanis issued an "Unsatisfactory" ("U") end-of-the year rating to Miller for the 2007-8 school year, based in part upon a complaint of verbal abuse by a student, which she found had merit. Miller alleges that Livanis subsequently told him that if he did not resign she would issue another "U" rating, which could have led to his loss of tenure. Livanis proposed that, if Miller agreed to resign effective August 28, 2008, she would change his rating to "Satisfactory" ("S"), making it easier for him to transfer to another school. While considering this, Miller appealed the "U" rating to the DOE's Office of Appeals and Reviews (OAR). Not until March 23, 2009, did OAR issue a determination in which it upheld the "U" rating "as a consequence of a hostile demeanor and poor relationships with administration and staff" (Letter from the DOE

Office of Appeals and Reviews, attached to Verified Answer, Ex. 6).

In the meantime, on July 16, 2008, Livanis filed a separate complaint with DOE's Office of Special Investigations (OSI) alleging that, after the school year ended, she discovered "sensitive and confidential" student material in Miller's classroom garbage can, which she had searched in the hallway (Complaint Form, attached to Verified Answer, Ex. 3). Based on this complaint, on July 17, 2008, OSI initiated an investigation which was still ongoing on July 30, 2008. Miller alleges that he was not informed of this investigation, despite the requirement that a hearing be scheduled within five business days of an investigation, and that notice be given regarding the hearing (Education Law § 3020-a). Respondents do not dispute that no such notice was given.

Notably, if a teacher resigns while a misconduct complaint is pending, that teacher is automatically placed on the "Ineligible Inquiry List" maintained by the DOE's Office of Personnel Investigations (OPI) (Affidavit of Candace McLaren, attached to Verified Answer, Ex. 4), which "precludes the employee's reinstatement or transfer within the DOE, before OSI concludes its investigation" (Id, ¶ 8).

Miller asserts that Joseph D'Amico, a union official, confirmed with Livanis that her policy was: "[I]f 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" (Email from Joseph D'Amico to Adam Miller [July 22, 2008], attached as Verified Petition, Ex. D).

Miller drafted a written agreement dated July 24, 2008 to memorialize Livanis's agreement to change the rating if Miller submitted his resignation. Livanis refused to sign it, and, in response, on July 30, 2008, Miller informed Livanis that he would be returning for the 2008-9 school year. Miller claims that Livanis then threatened him by saying that she would "hound [him]" and "make [his] life miserable" if he returned (Verified Petition, ¶16).

Unaware of the OSI investigation and the cloud on his status, Miller submitted a resignation letter dated July 30, 2008 to Livanis, stating "I hereby resign my teaching position at NEST+M for the 2008-2009 school year, effective August 29, 2008" (Verified Petition, Ex. E). On August 1, 2008, Livanis wrote to Miller, asking him to amend his letter to state that he was resigning from the DOE, not just from NEST+M, and to delete his reference to the school year (Verified Petition, Ex. F). By email dated August 5, 2008, Miller refused to make the changes upon his union representatives recommendation (id.).

Miller received no notice from DOE that his resignation was processed. He then attempted to obtain a teaching position at another DOE school, but was unsuccessful. In investigating why he had not received the position, he discovered that Livanis had not changed his "U" rating. He believes this hampered his job search. On the advice of his union, he sent Livanis an email 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" (Verified Petition, Ex. G).

Livanis did not respond and Miller sent her a letter, dated August 26, 2008, rescinding his July 30 resignation letter and advising that he was returning to teach at NEST+M for the 2008-9 school year (Verified Petition, Ex. H). He sent copies of this letter to the DOE and his union.

Later that same day, Livanis responded by email, informing Miller that his resignation had been accepted, that he was on the Ineligible List (Verified Petition, Ex. I), and that if he returned to the school, he would be arrested (Verified Petition, Ex. J).

Miller learned that he was placed on DOE's Ineligible Inquiry list on August 27, 2008 (Email from Carmella Cuddy, administrator in the Office of Personnel Investigations, dated

November 3, 2008, to Miller, attached to Reply Affirmation, Ex. C). His official placement on the list occurred on the day after Miller attempted to withdraw his resignation, which also was the day after Livanis erroneously informed him that he was already on the list.¹ On September 12, 2008, DOE terminated Miller and removed him from the payroll.

On November 24, 2008, Miller filed a Notice of Claim based on DOE's refusal to honor his withdrawal of his resignation letter, and demanding compensatory damages. This petition followed on December 24, 2008.

DISCUSSION

A. Statute of Limitations

As they did in their cross motion to dismiss, Respondents argue that the petition is time barred with regard to Petitioner's attempt to withdraw his resignation. This court has already determined that the statute of limitations had not expired on that ground (*Miller v. New York City Department of Education*, Index No. 117204/08, Motion Sequence 001, August 13, 2009), and need not repeat itself.

Respondents also argue that the portion of Miller's petition seeking to change his "U" rating to an "S" rating is time barred because it was issued on June 24, 2008, but this

¹ Miller was removed from the list after a hearing on November 19, 2008, though he alleges that his name still appeared on the list as of December 9, 2009 (Reply Affidavit, ¶ 18).

petition was not brought until December 24, 2008. They claim that Miller's appeal of the rating to OAR does not toll the statute of limitations. In support, Respondents' cite *Queensborough Community College v. State Human Rights Appeal Board*, 41 NY2d 926 (1977), where the Court of Appeals noted that the statute of limitations is not tolled by the invocation of a grievance procedure "which is merely an alternative remedy" to an Article 78 petition. They also cite to *Jones v. McGuire*, 92 AD2d 788 (1st dept, 1988), which held that the statute of limitations was not tolled by "informal grievance machinery contained in the collective bargaining agreement."

Respondents do not establish that Miller's appeal to the OAR was an "alternative remedy" to his petition, nor do they establish that his appeal was "informal grievance machinery," rather than a requirement towards obtaining a final administrative determination, which is a prerequisite to filing an Article 78 petition. As respondents fail to articulate the nature of the OAR appeal, their argument is denied.

B. Conversion of the "U" Rating

The standard of review for an Article 78 proceeding is whether the agency determination was arbitrary or capricious or affected by an error of law (*Matter of Colton v. Berman*, 21 NY2d 322 [1967]). The test is whether a particular action has a sound basis in reason and is taken with regard to the facts. Where the

determination is rational and the administrator has not violated lawful procedure, arbitrarily, or in abuse of discretionary power, the courts must confirm the determination (*Pell v. Board of Education of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

Notwithstanding that the formal administrative decision was issued in March 2009, while this proceeding was pending, making this issue premature when the petition was filed, it has been fully discussed by the parties. A review of the record indicates that DOE's decision to uphold the 2007-8 "U" rating was rationally based (*Pell, supra*, 34 NY2d, at 231). Therefore, Miller's petition is denied to this extent.

B. Reinstatement of Tenure:

Miller argues that Livanis induced him to issue his resignation letter by dishonestly promising to change his "U" rating to an "S" rating. He seeks to enforce the agreement. Respondents do not deny that Livanis made the promise, but contend that Miller was to have resigned before the "U" rating issued, which he did not do.

Notably, Respondents do not submit Livanis's affidavit, nor is the answer verified by her. Thus Livanis is a missing witness (see, *Crowder v. Wells & Wells Equipment, Inc.*, 11 AD3d 360 [1st Dept, 2004]), and the court, as trier of fact, "may draw

the strongest inference that the opposing evidence permits against a witness who fails to testify in a civil matter" (*Matter of Nassau County Dept. of Social Servs. v. Denise J.*, 87 NY2d 73, 79 [1995]). Livanis's actions, as evidenced by Miller--including sending emails; her negotiations with Miller over the resignation withdrawal; and her misconduct complaint about the discarded materials, timed to coincide with Miller's resignation, which resulted in his placement on the Ineligible List--reflect conduct designed solely to harm Miller's career.

A teacher may voluntarily relinquish tenured rights by resigning; however, "a teacher's resignation which has been obtained by fraud or which is the result of coercion or duress . . . does not represent a voluntary act and may be nullified" (*Gould v. Board of Education of the Sewanhaka Central High School District*, 81 NY2d 446, 451 [1993]). Miller's resignation was the result of such coercion and dishonesty. Accordingly, Miller's resignation is deemed involuntary and is nullified. His petition seeking reinstatement to his tenured teaching position is granted.

Where a discharged public employee establishes his right to reinstatement in an Article 78 proceeding, as here, the court may direct that he be awarded back pay (*Austin v Board of Higher Educ.*, 5 NY2d 430 [1959]). Miller has sought back pay, and in light of the foregoing, he is entitled to it.

C. The Withdrawal of the Resignation Letter

Because Miller's resignation is nullified, the issue of the withdrawal of that resignation, of necessity, is decided in his favor.

As a result of the foregoing, it is:

ORDERED AND ADJUDGED that the portion of the petition seeking to revoke and expunge Miller's "U" rating for the 2007-8 school year is denied; and it further is

ORDERED, DECLARED AND ADJUDGED that the petition is granted to the extent that Respondents are ordered to reinstate Petitioner Adam Miller to his teaching position with tenured status, with back pay and all other economic benefits of employment from August 28, 2008; and it further is

ORDERED that the issue of the amount due to petitioner from respondent, and the amount of interest at the statutory rate, is referred to ~~AAA Referee~~ a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it further is

ORDERED that entry of a final judgment is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of

the determination of the Special Referee or the designated referee; and it further is

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Special Referee (Room 119) to arrange a date for the reference to a Special Referee.

Dated: May // , 2010

ENTER:



J.S.C.

JANE S. SOLOMON

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).