

**Matter of Schulman v New York City Dept. Bd. of
Educ.**

2010 NY Slip Op 32415(U)

September 2, 2010

Sup Ct, NY County

Docket Number: 104227/10

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Anne Schulman
- v -
N.Y. Dep. of Education

INDEX NO. 104227/10
MOTION DATE 8/3/11
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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).

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED and ADJUDGED that the Amended Petition is denied and dismissed; and it is further

ORDERED that the cross motion by respondent to dismiss the Amended Petition is granted; and it is further

ORDERED that respondent serve a copy of this order with notice of entry upon petitioner within 20 days of entry.

This constitutes the Decision, Order and Judgement of the Court.

Dated: 9/2/10

[Signature]
HON. CAROL EDMEAD 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: PART 35

-----X
 In the Matter of the Application of
 ANNE SCHULMAN,

Petitioner,

Index No. 104227/10

ORDER and JUDGEMENT

Pursuant to Article 75, 78, et al.

-against-

NEW YORK CITY DEPARTMENT/
 BOARD OF EDUCATION,

Respondent.

-----X
 HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

This Article 75 and 78 proceeding arises out of a post-charge settlement stipulation entered into between petitioner Anne Schulman ("petitioner") and the New York City Department/Board of Education ("respondent"), which settled prior disciplinary charges preferred against her (the "Stipulation"). Respondent determined that as of January 2010, petitioner failed to comply with the Stipulation and on March 24, 2010, preferred "Specification E," supported by eight charges against petitioner pursuant to Education Law § 3020-a.

In her Amended Petition, petitioner seeks an order staying the disciplinary "arbitration" pursuant to Article 75. Petitioner alleges that the Stipulation does not provide for such an arbitration and respondent may not, in the guise of employee discipline, arbitrate its claim misusing Education Law (first cause of action), compelling respondent to withdraw the disciplinary charges pursuant to Article 75, in light of respondent's breach of the Stipulation (second cause of action), prohibiting respondent from prosecuting the arbitration, pursuant to

Article 78 (third cause of action), declaring respondent's actions as arbitrary, capricious pursuant to Article 78 (fourth cause of action), issuing sanctions (fifth cause of action), and declaring that respondent breached the Stipulation (sixth cause of action). Petitioner also assert numerous other allegations sounding in tort.¹

In response, respondent cross moves to dismiss the Amended Petition for lack of subject matter jurisdiction. Respondent argues that to the extent petitioner's Article 78 claim challenges a decision by respondent which has not yet been rendered, the Amended Petition is premature, as no final and binding determination has been rendered. Petitioner can raise her defenses, including her claim that respondent lacks jurisdiction to prefer charges against her at the Section 3020-a hearing. Respondent also maintains that a tenured teacher cannot be disciplined or removed except for just cause pursuant to Section 3020-a and in accordance with the parties' Collective Bargaining Agreement. Petitioner's Section 3020-a hearing has not been held. Any challenge by petitioner to the decision rendered after the Section 3020-a hearing can be challenged in an Article 75 proceeding. Finally, argues respondent, petitioner's request for sanctions lack merit.

In opposition, petitioner argues that any Section 3020-a hearing would be futile, which dispenses with the exhaustion rule. Petitioner contends that she completed three courses offered by respondent and received satisfactory ratings for three years preceding such hearing. Since such a hearing would be a wasteful exercise in futility and there is nothing to arbitrate, argues

¹ Petitioner previously moved by order to show cause for an order (1) staying the disciplinary proceeding, (2) declaring that she satisfied her obligations under the Stipulation, and that respondent's actions and failures are arbitrary, capricious, excessive and shocking, (3) compelling respondent to withdraw the disciplinary charges, (4) and enjoining respondent from pursuing the disciplinary proceeding. The Court denied the request for the relief sought in petitioner's order to show cause.

petitioner, the exhaustion rule does not apply. Petitioner also argues that the exhaustion rule does not apply because respondent's attempt to bring charges pursuant to the Education Law is unconstitutional as applied to petitioner; respondent acknowledged that the courses she took remedied the supposed deficiencies in her performance. Further, argues petitioner, since the Stipulation does not provide for arbitration or any grievance procedure, respondent is acting in excess of its authority. Petitioner further argues that the Court misapprehended Education Law,² and that the respondent, having failed to perform duties enjoined upon it by law, *i.e.*, conducting a formal a formal Section 3020-a hearing prior to issuing a reprimand, acted arbitrarily and capriciously. Petitioner also challenges respondent's ability to place a disciplinary letter in her file.

In reply, respondent adds that the futility qualification does not apply. Petitioner failed to allege or establish that the Hearing Officer yet to be selected to preside over the pending Section 3020-a hearing has predetermined the case. Respondent argues that petitioner failed to establish that such hearing is unconstitutional or which provision of the Constitution would be violated, or offer any basis for her argument that she cannot be brought up on charges for failing to comply with the Stipulation. Finally, argues respondent, a written statement of charges and maximum penalties is required to served upon petitioner and petitioner has not alleged that such statement was placed in her file. Respondent also adds that this Amended Petition is duplicative of petitioner's Amended Complaint filed under Index No. 104248/10 (the "related action"), which respondent also moved to dismiss. Respondent argues that the instant proceeding should be

² To the extent petitioner claims that the Court misapprehended the Education Law, petitioner's remedy was to seek leave to reargue, and plaintiff failed to so move.

dismissed for the reasons outlined in its motion filed in the related action.

Discussion

Petitioner's first cause of action for an order staying the Section 3020-a disciplinary hearing pursuant to Article 75, as the Stipulation does not provide for arbitration (first cause of action) and compelling respondent to withdraw the disciplinary charges pursuant to Article 75 (second cause of action) lacks merit.

As a tenured teacher, petitioner cannot be suspended, as respondent seeks, without first being subject to formal disciplinary proceedings (*Triana v Board of Educ. of City School Dist. of City of New York*, 47 A.D.3d 554, 849 N.Y.S.2d 569 [1st Dept 2008] citing Education Law § 3020-a; see also Education Law § 2573[5]). Education Law § 3020 recognizes that a tenured teacher has a constitutionally protected property interest in his or her right to continued employment which cannot be deprived without due process (*Norgrove v. Board of Educ. of City School Dist. of City of New York*, 23 Misc. 3d 684, 881 N.Y.S.2d 802 [Sup Ct New York County 2009] citing *Holt v. Board of Education of Webutuck Central School District*, 52 N.Y.2d 625, 439 N.Y.S.2d 839, 422 N.E.2d 499 (1981); *Abramovich v. Board of Education of Central School District No. 1 of the Towns of Brookhaven and Smithtown*, 46 N.Y.2d 450, 414 N.Y.S.2d 109, 386 N.E.2d 1077, cert. den. 444 U.S. 845, 100 S.Ct. 89, 62 L.Ed.2d 58 [1979]). Section 3020-a(2)(a) provides that if disciplinary charges are to be preferred

[a] written statement specifying the charges in detail, the maximum penalty which will be imposed by the board if the employee does not request a hearing or that will be sought by the board if the employee is found guilty of the charges after a hearing and outlining the employee's rights under this section, shall be immediately forwarded to the employee by certified or registered mail, return receipt requested or by personal delivery to the employee.

Here, charges against petitioner and a request that petitioner's teaching duties be suspended, were submitted in writing and filed with respondent, and respondent determined that probable cause for the charges existed. Thus, respondent was required by statute to forward to petitioner immediately, via certified or registered mail, or personal delivery, a written statement specifying the charges in detail and outlining petitioner's rights, including her right to a hearing and the maximum penalty if she did not request a hearing within 10 days (*Norgrove v. Board of Educ. of City School Dist. of City of New York*, supra citing Education Law § 3020-a(2)(a)). The Stipulation is silent as to respondent's statutory obligation to comply with Section 3020-a(2)(a) and plaintiff fails to allege any facts or law indicating that the parties effectively dispensed with respondent's statutory obligation. As the Stipulation does not obviate respondent's statutory duty in any manner, the first and second causes of action to stay the Section 3020-a hearing premised upon said Stipulation are dismissed.

As to petitioner's third and fourth causes of action prohibiting respondent from prosecuting the arbitration, pursuant to Article 78, and declaring respondent's actions as arbitrary, capricious pursuant to Article 78, are premature. A CPLR article 78 proceeding must be commenced within four months after the determination to be reviewed becomes final and binding (see, CPLR 217; *New York State Assn. of Counties v. Axelrod*, 78 N.Y.2d 158, 573 N.Y.S.2d 25). Such finality has been determined as of the time "when it definitively impacts and aggrieves the party seeking judicial review" (*Feldman v. New York State Teachers' Retirement System*, 14 A.D.3d 769, 788 N.Y.S.2d 230 [3d Dept 2005]). A determination to suspend a teacher becomes final and binding on the date the suspension becomes effective (see *Persico v. Board of Educ.*, 220 A.D.2d 512, 632 N.Y.S.2d 198 [2d Dept 1995]). Here, the Section 3020-a

hearing to determine whether petitioner should be suspended pursuant to the specification and eight charges recently alleged is pending, and no final or binding determination of petitioner's employment has been rendered. Therefore, petitioner's third and fourth causes of action brought pursuant to Article 78 are dismissed.

Petitioner's claim of the alleged unconstitutionality of respondent's actions lack merit.

In light of the above, there is no merit to petitioner's cause of action for sanctions. Thus, the fifth cause of action is also dismissed.

Finally, the request in the Amended Petition for a declaration that respondent breached the Stipulation and remaining claims sounding in tort, can be raised in the Section 3020-a hearing brought pursuant to Education Law § 3020 (and are also made in petitioner's related action). Therefore, the sixth and remaining causes of action sounding in tort are dismissed.

Conclusion

Based on the foregoing, it is hereby

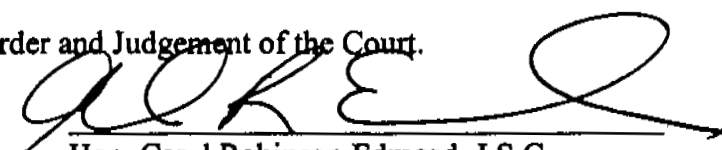
ORDERED and ADJUDGED that the Amended Petition is denied and dismissed; and it is further

ORDERED that the cross motion by respondent to dismiss the Amended Petition is granted; and it is further

ORDERED that respondent serve a copy of this order with notice of entry upon petitioner within 20 days of entry.

This constitutes the Decision, Order and Judgement of the Court.

September 2, 2010


Hon. Carol Robinson Edmead, J.S.C.

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