

**Matter of Goewey v Steiner**

2010 NY Slip Op 33242(U)

November 18, 2010

Sup Ct, Albany County

Docket Number: 5974-10

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

DEAN F. GOEWEY,

Petitioner,

For a Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules

**DECISION and ORDER**  
**INDEX NO. 5974-10**  
**RJI NO. 01-10-ST1779**

-against-

HONORABLE DAVID M. STEINER, as Commissioner  
of Education; STATE EDUCATION DEPARTMENT;  
OFFICE OF SCHOOL PERSONNEL AND ACCOUNTABILITY;  
AND DIANE J. EXOO, in her official capacity as Hearing Officer,

Respondents.

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Supreme Court Albany County All Purpose Term, October 22, 2010  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

School Administrators Association of New York State  
Office of General Counsel  
Arthur Schuermann, Esq.  
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Latham, New York 12110

Andrew M. Cuomo, Esq.  
Attorney General of the State of New York  
*Attorney for the Respondents*  
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Albany, New York 12224

**TERESI, J.:**

On July 29, 2009, the then interim Commissioner of Education issued a "Notice of Substantial Question of Moral Character" to Petitioner. Petitioner received the Notice in August

2009, and timely requested a hearing before a “three-member hearing panel” pursuant to 8 NYCRR §83.4(a). On November 7, 2009, respondent David Steiner (hereinafter “Steiner”) designated respondent Exoo as the “hearing officer” and the New York State Department of Education’s ( hereinafter “the Department”) Offices in Albany, New York as “the place where said hearing will be held” (hereinafter “venue designation”). (8 NYCRR §83.4[a]). Petitioner administratively challenged the venue designation, seeking to have venue changed to Oswego County. Steiner, by counsel’s letter dated April 9, 2010, denied Petitioner’s venue challenge, mainly because of the additional costs associated with Petitioner’s proposed change.

Thereafter, upon motion made by the Office of School Personnel and Accountability (hereinafter “OSPRA”), respondent Exoo removed Petitioner’s chosen panelist, Paul Berkheimer, from the three-member hearing panel. Exoo’s removal was based upon the appearance of impropriety stemming from Mr. Berkheimer’s being listed as an “additional lobbyist” for Petitioner’s counsel’s office. Petitioner sought to overturn Exoo’s removal of Mr. Berkheimer, by amending his prior administrative challenge.<sup>1</sup> Steiner, by decision dated August 20, 2010, denied Petitioner’s amended administrative challenge because it was improperly brought under Education Law §310 and 8 NYCRR §83.5 provides the proper appeal procedure after a final determination has been made by the hearing panel.

Petitioner has now commenced this CPLR Article 78 proceeding, seeking to: “1) compel the respondent Commissioner to decide the change of venue issue and whether to reinstate Mr.

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<sup>1</sup> Petitioner re-alleged, in his amended administrative challenge, his venue designation challenge.

Berkheimer to the hearing panel<sup>2</sup>; 2) In the alternative, change venue in the Part 83 Hearing to Oswego County, New York<sup>3</sup>; 2) [sic] Reinstate Petitioner's selected panelist Paul Berkheimer.<sup>4</sup>” Respondents answered, set forth five affirmative defenses and submitted supporting affidavits and the record before the agency below. Because Petitioner is not entitled to any of the relief he seeks, the petition is dismissed.

Considering first Petitioner's First and Third causes of action, they both challenge Steiner's August 20, 2010 decision and assert mandamus to compel claims.

“Mandamus to compel is available only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law.” (Matter of Glenman Indus. & Commercial Contr. Corp. v New York State Off. of the State Comptroller, 75 AD3d 986, 989 [3d Dept. 2010], quoting Matter of Schmitt v. Skovira, 53 AD3d 918 [3d Dept. 2008][internal quotes omitted]). “In other words, [t]he act to be compelled must be ministerial, non-discretionary, non-judgmental, and [must] be premised upon specific statutory authority mandating performance in a specific manner.” (New York Civil Liberties Union v. State of New York, 3 AD3d 811, 814 [3d Dept. 2004], quoting Matter of Brown v. New York State Dept. of Social Servs., 106 AD2d 740 [3d Dept. 1984][internal quotes omitted]).

Although the petition claims Steiner has a “legal dut[y to] decide the change of venue issue” and “to determine whether to reinstate Mr. Berkheimer,” he failed to demonstrate Steiner's ministerial, non-discretionary duty to decide either issue. Such lack of duty is readily apparent in

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<sup>2</sup> Such relief stemming from Petitioner's First and Third causes of action.

<sup>3</sup> Such relief stemming from Petitioner's Second cause of action.

<sup>4</sup> Such relief stemming from Petitioner's Fourth cause of action.

the regulations, 8 NYCRR §83.4(a and b), Petitioner cites as conferring Steiner's duty to decide. While 8 NYCRR §83.4(a) required Steiner "to designate the place where [Petitioner's] hearing will be held," the regulation does not provide Petitioner with the ability to object to, or have any input into, Steiner's decision. Rather, it is Steiner's discretionary decision alone to set venue, a decision he has made. Similarly, 8 NYCRR §83.4(b) allowed Petitioner to preliminarily chose a panel member. Such regulation, however, does not provide an appeal mechanism for the exclusion of such chosen panel member. 8 NYCRR §83.4(b) simply provides no ministerial, non-discretionary duty to review the removal of Petitioner's chosen panelist.

Nor was Steiner required to issue a decision pursuant to Education Law §310. Both Steiner's venue determination and Exoo's panelist removal are decisions of the Department, and therefore not appealable pursuant to Education Law §310. (Board of Educ. of City School Dist. of City of Rome v. Ambach, 118 AD2d 932 [3d Dept. 1986]). As such, Steiner had no ministerial, non-discretionary duty to issue a determination on either challenge.

Turning to Petitioner's Second and Fourth causes of action, both set forth mandamus to review challenges.

It is axiomatic that only "final" agency determinations are subject to an Article 78 mandamus to review challenge. (Agoglia v. Benepe, \_\_ AD3d \_\_ [2d Dept. 2010]). "To determine if agency action is final... consideration must be given to the completeness of the administrative action... a determination will not be deemed final because it stands as the agency's last word on a discrete legal issue that arises during an administrative proceeding. There must additionally be a finding that the injury purportedly inflicted by the agency may not be prevented or significantly ameliorated by further administrative action or by steps available to the

complaining party.” (Essex County v. Zagata, 91 NY2d 447, 453 [1998], quoting Church of St. Paul & St. Andrew v. Barwick, 67 NY2d 510 [1986], cert. denied 479 US 985 [internal quotation marks and citations omitted]).

Here, neither Steiner’s venue determination nor Exoo’s removal of Petitioner’s choice of panelist are “final” determinations. Rather, both are decisions about “discrete legal issue[s] that ar[ose] during [Petitioner’s] administrative proceeding.” (Essex County v. Zagata, supra). As both determinations may be “significantly ameliorated by further administrative action,” i.e. a final hearing determination in Petitioner’s favor, neither determination is final and Petitioner has failed to exhaust his administrative remedies. (Lempesis v. Mills, 300 AD2d 733 [3d Dept. 2002]; see also Simmons v. Daines, 71 AD3d 1322 [3d Dept. 2010]; Guido v. Town of Ulster Town Bd., 74 AD3d 1536 [3 Dept. 2010]).

Moreover, even if the challenged determinations in Petitioner’s Second and Fourth causes of action were final, Petitioner failed to demonstrate that either determination was “arbitrary and capricious.” (Boatman v. New York State Dept. of Educ., 72 AD3d 1467 [3d Dept. 2010]). The record demonstrates that Steiner’s venue determination was based upon cost considerations for the Department; and Exoo’s panelist removal determination was based upon the clear appearance of impropriety arising from Mr. Berkheimer’s being listed as an “additional lobbyist” for Petitioner’s counsel’s office, despite his professed minimal lobbying. Such rationally based determinations are not “arbitrary and capricious.”

Accordingly, the petition is dismissed in its entirety.

This Decision and Order is being returned to the attorneys for the Respondents. A copy of this Decision and Order and all other original papers submitted on this motion are being

delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: November 18, 2010  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Petition, dated August 31, 2010; Verified Petition, dated August 30, 2010, with attached Exhibits "A" - "S(A)"
2. Answer, dated October 18, 2010; Affirmation of Victoria Hay, dated October 18, 2010, with attached Exhibits "A" - "L"; Affirmation of Deborah Marriott, dated October 18, 2010, with attached Exhibits "A" - "O."