STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

In the Matter of the Application of

WILLIAM BALL IV,

Petitioner,

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

-against-

DECISION and ORDER
INDEX NO. 10-1534
RJI NO. 19-10-2010

THE CATSKILL CENTRAL SCHOOL DISTRICT,
THE BOARD OF EDUCATION FOR THE CATSKILL
CENTRAL SCHOOL DISTRICT and DR. KATHLEEN FARRELL
in her official capacity as DISTRICT SUPERINTENDENT,

Respondents.

Supreme Court Greene County All Purpose Term, November 18, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
School Administrators Association of New York State
Office of General Counsel, Arthur Scheuermann, Esq.
A. Andre Dalbec, Esq.
Attorneys for Petitioner
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Latham, New York 12110

Shaw, Perelson, May & Lambert, LLP
Molly J. Timko, Esq.
Attorneys for the Respondents
21 Van Wagner Road
Poughkeepsie, New York 12603

TERESI, J.:

By letter dated June 15, 2010, Respondents terminated Petitioner's employment stating that they abolished the "Principal on Special Assignment position" and he was "one of the least

senior person(s) in such tenure area." Petitioner commenced this CPLR Article 78 proceeding, seeking to annul such termination, reinstatement to his former position and back wages. Prior to answering, Respondents move to dismiss the petition pursuant to CPLR §§7804(f) and 3211(a)(2 and 7), claiming Petitioner failed to state a cause of action and this Court lacks subject matter jurisdiction. Petitioner opposes the motion. Because Respondents failed to demonstrate their entitlement to dismissal, their motion is denied.

"In determining a motion to dismiss pursuant to CPLR 3211 (a) (7), the claim is liberally construed, claimant's allegations are assumed to be true and claimant is afforded every favorable inference" (Trump on the Ocean, LLC v State of New York, __AD3d__ [3d Dept. 2010]) to "determine whether the facts alleged fit within any cognizable legal theory." (Upstate Land and Properties, LLC v. Town of Bethel, 74 AD3d 1450 [3d Dept. 2010]).

Accepting the facts alleged in the petition as true for purposes of this motion, Petitioner has been employed by Respondents since 2004 and earned tenure on January 25, 2007. He alleges that he has "performed a stellar work history."

Petitioner claims that his position was abolished due to Respondents' personal ill will towards him. From July 1, 2009 through June 30, 2010, Petitioner was the president of the Catskill Administrators Association (hereinafter "Association"). In performing his duties as president and by filing a grievance for himself and two other Association members, he angered Respondent Farrell. She was also troubled by her wrongful failure to inform Petitioner of an Order of Protection, issued against a parent in the school where Petitioner was principal. This animus, Petitioner alleges, is a part of the real reason Respondents abolished his position.

Petitioner also alleged that Respondents abolished his position to avoid the due process

protections he is afforded in the Education Law §3020-a disciplinary proceeding Respondents commenced against him. It is uncontested that Respondents filed Education Law §3020-a charges against Petitioner, due to his disposing of a malfunctioning public address system on December 8, 2009. After such incident, Petitioner met with Respondents on several occasions; with Respondents demanding his resignation on January 26, 2010. Thereafter, based upon the December 8, 2009 incident, Respondents served Petitioner with disciplinary charges pursuant to Education Law §3020-a. Despite their resignation demand, Respondents did not seek termination within their Education Law §3020-a matter. Rather, they seek only a one year suspension. Since the Education Law §3020-a matter has been pending, Respondents abolished one position in Petitioner's tenure area, the "Principal on Special Assignment" position, and terminated him despite his not being the least senior person in such tenure area. Petitioner avers that this abolishment and termination was made in bad faith, as a pretext, to circumvent the Education Law §3020-a process.

According the Petitioner the benefit of every possible favorable inference and assuming the truth of his allegations, he sufficiently set forth a cause of action for Respondents' bad faith termination of his tenure position. (Lezette v. Board of Ed., Hudson City School Dist., 35 NY2d 272 [1974]; Ryan v. Ambach, 71 AD2d 719 [3d Dept. 1979]; Currier v. Tompkins-Seneca-Tioga Bd. of Co-op. Educational Services, 80 AD2d 979 [3d Dept. 1981]; Gross v. Board of Educ. of Elmsford Union Free School Dist., 78 NY2d 13 [1991]; Verdon v. Dutchess County Bd. of Co-op. Educ. Services, 47 AD3d 941 [2d Dept. 2008][stating "[i]f the Supreme Court ultimately determines that the petitioner's position was abolished in bad faith, he is entitled to reinstatement"]). "Just as under the provisions of the Civil Service Law, a municipality may not

abolish a position by subterfuge... a school board under the provisions of the Education Law may not abolish a position by subterfuge." (Weimer v. Board of Ed., Smithtown Central School Dist., No. 1,74 AD2d 574 [2d Dept. 1980]; Cohen v. Crown Point Cent. School Dist., 306 AD2d 732 [3d Dept. 2003]).

Respondents similarly failed to demonstrate this Court's lack of jurisdiction (CPLR §3211(a)(2). While the doctrine of primary jurisdiction requires "disputes involving the calculation of seniority" to be adjudicated, in the first instance, with the "Commissioner of Education, who possesses the requisite expertise to settle such matters." (deVente v. Board of Educ., 15 AD3d 716, 718 [3d Dept. 2005]; Ferencik v. Board of Educ. of Amityville Union Free School Dist., 69 AD3d 938 [2d Dept. 2010]). Here, Petitioner's seniority challenge is merely a component piece of his larger bad faith and pretext claims. Only if Petitioner ultimately fails in demonstrating that his position was "abolished in bad faith, [will] the subsidiary issues of seniority... become relevant, and [then it] would be proper for referral to the Commissioner under the primary jurisdiction doctrine." (Verdon v. Dutchess County Bd. of Co-op. Educ. Services, 47 AD3d 941, 943 [2d Dept. 2008]). Similarly, because Petitioner's cause of action for Respondents' bad faith termination of his tenure position is not "specifically covered by the Taylor Law... the exclusivity of PERB's jurisdiction does not restrict this proceeding." (Zuckerman v. Board of Ed. of City School Dist. of City of New York, 44 NY2d 336 [1978]).

Accordingly, Respondents' motion to dismiss is denied. Respondents shall file and serve their answer within thirty days of the date this Decision and Order. Petitioner shall file and serve its Reply, if any, within ten days from its receipt of Respondents' answer.

This Decision and Order is being returned to the attorneys for the Petitioner. All original

papers submitted on this motion are being retained by this Court pending further proceedings herein. 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: Albany, New York
December 10, 2010

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Verified Petition, dated September 21, 2010; Verified Petition, dated September 21, 2010, with attached Exhibits A-O.
2. Notice of Motion, dated November 10, 2010; Affirmation of Molly Timko, dated November 10, 2010, with attached Exhibit A.