

**Matter of Ferencik v Board of Educ. of the Amityville
Union Free School Dist.**

2010 NY Slip Op 33486(U)

December 8, 2010

Sup Ct, Nassau County

Docket Number: 23339/2009

Judge: Michele M. Woodard

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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

DENISE M. FERENCIK

Petitioner,

-against-

THE BOARD OF EDUCATION OF THE AMITYVILLE
UNION FREE SCHOOL DISTRICT and

THE AMITYVILLE UNION FREE SCHOOL DISTRICT,
Respondents,

FOR AN ORDER AND JUDGMENT PURSUANT TO
ARTICLE 78 OF THE CPLR.

-----X
Papers Read on this Motion:

Petitioner's Notice of Motion	01
Respondents' Notice of Motion	02
Petitioner's Notice of Cross-Motion	03
Petitioner's Affidavit	xx
Respondents' Reply	xx
Respondents' Memorandum of Law	xx
Respondents' Reply Memorandum of Law	xx

In motion sequence number one, the petitioner moves for an order pursuant to CPLR §78 reinstating her to employment with the respondent and awarding her lost wages and all other associated benefits due to the respondents' failure to appoint the petitioner to various teaching vacancies as required by law.

In motion sequence number two, respondents Amityville Union Free School District and the Board of Education of the Amityville School District (the District) move to dismiss the petition pursuant to CPLR §217 and the doctrine of primary jurisdiction.

In motion sequence number three, the petitioner cross moves for an order pursuant to CPLR §2201 for a continuance or stay of this proceeding to permit disclosure pursuant to CPLR §3211(d)

**MICHELE M. WOODARD,
J.S.C**

TRIAL/IAS PART 12

Index No.: ~~002081/04~~ 23339/2009

Motion Seq. Nos.: 01, 02 & 03

DECISION AND ORDER

and/or CPLR §408.

BACKGROUND

Petitioner, who has been employed as an art teacher in respondent District since she was rehired as of October 17, 2001, has been in litigation with the respondent District since 2004 when she commenced her first Article 78 proceeding (index No. 002081/04) wherein she sought redress predicated on the District's alleged violation of her recall and restoration rights as an excessed teacher¹ by respondent District's hiring of an individual, whose primary responsibility was to teach art and art classes during the September 1998-June 1999 school year on a permanent part-time basis. Her second Article 78 proceeding, (index no. 10953/07) wherein she alleged that the respondent District's adoption of a time allotment policy in September 1994 created an art teaching position to which she should have been recalled, was dismissed on the grounds of the doctrine of primary jurisdiction.² Petitioner's appeal to the Commissioner was dismissed both on the merits and on the basis of improper service. The Commissioner concluded that petitioner was not entitled to relief as she:

“presented no proof that a vacancy occurred or that a new art teacher position was created at the District during her seven years on the preferred eligible list.”

¹Petitioner is licensed and certified by the New York State Department of Education to teach art in grades K through 12th. Initially, she was hired by respondent District commencing with the 1988-1989 school year and was granted tenure effective September 1, 1991. Her position, however, was abolished effective July 1, 1992 due to declining enrollment. She was placed on a preferred eligible list in accordance with Education Law § 3013(3). During the seven years petitioner was on the preferred eligible list she was not recalled for a position within the District. She became re-employed as an art teacher in October, 2001.

²The decision, dated January 26, 2010, was affirmed by order of the Appellate Division: Second Department on the grounds that “the Commissioner of Education has the specialized knowledge and expertise to resolve, in the first instance, the factual question of whether a position similar to petitioner's former position became available in 1994”.

In this, her third Article 78 proceeding, petitioner contends that pursuant to Education Law §3013, and the promise contained in the excess letter she received from respondent District dated May 27, 1992, she should have been, but was not, recalled to fill a vacancy which arose in respondent District's art tenure area or art faculty during the 1992-1993 school year for which she was fully qualified. She alleges that she was not notified of the vacancy which was filled by an individual, purportedly hired as a teaching assistant, who equally taught art at Northwest School although she was neither licensed nor certified in the subject.

In relevant part Education Law §3013(3)(a) provides as follows:

If an office or position is abolished or if it is consolidated with another position without creating a new position, the person filling such position at the time of its abolishment or consolidation shall be placed upon a preferred eligible list of candidates for appointment to a vacancy that then exists or that may thereafter occur in an office or position similar to the one which such person filled without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he or she has filled. The persons on such preferred list shall be reinstated or appointed to such vacancies in such corresponding or similar positions in the order of their length of service in the system at any time within seven years from the date of abolition or consolidation of such office or position.

The excess letter states that:

[D]ue to the abolition of positions and consistent with State Education Law, your name will be placed on a "Preferred Eligible List" for a period of seven years during which time you will have the right to be recalled on the basis of seniority as a tenured teacher in the event a permanent vacancy exists within your tenure area. If a permanent vacancy does become available, you will be notified by certified mail according to the last official address on file with the Personnel Office. In the event there is a change in your mailing address, it will be your responsibility to notify the Personnel Office by certified mail.

Although petitioner was rehired in October 2001, petitioner asserts that her reappointment

was independent of any actions initiated by respondent District in discharge of its statutory duties. She further asserts that during an alleged second recall period (July, 1999-July 1, 2006)³, six individuals were hired by respondent District to fill K through 12 art teaching vacancies to which she should have been appointed. In this proceeding, petitioner seeks reappointment and reinstatement as a salaried teacher as of the earliest date possible based on the start date of the first vacancy.

ANALYSIS

“The doctrine of primary jurisdiction provides that where courts and an administrative agency have concurrent jurisdiction over a dispute involving issues beyond the conventional experience of judges . . . the court will stay its hand until the agency has applied its expertise to the salient questions.” *Verdon v Dutchess County Bd. of Co-op Educ. Services*, 47 AD3d 941, 942 [2nd Dept. 2008] (citation and internal quotation marks omitted). The doctrine “ ‘applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body for its views.’ ” *Sastow v Plainview-Old Bethpage Cent. School Dist.*, 44 AD3d 1057, 1058 [2nd Dept. 2007] quoting *Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 156 [1998]. In such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views.

Although there is no fixed formula governing the application of the doctrine of primary jurisdiction to the facts of a particular case (*Langston ex rel. Langston v Irroquois Cent. School*

³According to the petition, petitioner was entitled to a second preferred eligible list statutory recall period commencing upon the expiration of the original recall period because the respondent District failed to recall and rehire her when the opening arose for the 1992-1993 school year. Respondent District contends that no such second recall period exists.

Dist., 291 AD2d 845 [4th Dept. 2002]), the doctrine applies in this matter because resolution of the claims asserted by petitioner including, *inter alia*, the abolition/creation of teaching positions; the existence/filling of vacancies; preferred eligible list status; the extent and duration of the recall period; reinstatement and tenure depends upon the specialized knowledge experience and expertise of the Commissioner of Education whose role is to establish and apply criteria *vis-a-vis* the selection and retention of qualified educators and staff. *Madison-Oneida Bd. of Co-op Educational Services v Mills*, 4 NY3d 51, 59 [2004].

In view of this determination, the merits of the argument raised in the petition on the aforementioned issues have not been addressed.

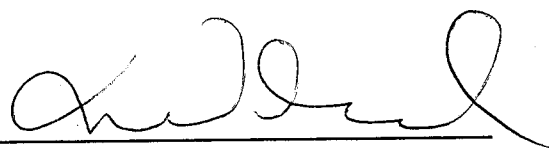
Accordingly, the motion by respondent District to dismiss the petition is **granted** and the petition is hereby **dismissed**.

Petitioner's cross motion pursuant to CPLR §3211(c) to permit her to obtain facts/information necessary to effectively oppose respondent District's motion is **denied** in view of the decision on the motion in chief.

This constitutes the Decision of the Court.

DATED: December 8, 2010
Mineola, N.Y. 11501

ENTER:


HON. MICHELE M. WOODARD
J.S.C.
XXX

ENTERED
DEC 14 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE