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

PRESENT: HON. EILEEN A. RAKOWER PART 15

Index Number : 108161/2010

LE MONDA, MARY ANN NICOLE

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits _____	2
Replying Affidavits _____	3

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

JAN 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/23/10

HON. EILEEN A. RAKOWER

Check one: ☒ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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MARY ANN NICOLE LE MONDA,

Petitioner,

-against-

CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF EDUCATION; JOEL I. KLEIN, CHANCELLOR of NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

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Index No. 108161/10

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER:

Petitioner Mary Ann Nicole Le Monda ("Petitioner") brings this Petition pursuant to CPLR Article 78 challenging the February 19, 2010 determination of respondent New York City Department of Education ("DOE"), which denied Petitioner's request to be removed from the DOE's Ineligible Inquiry List.

Petitioner states that she was first employed by DOE in September 1980 as "a teacher of speech and hearing handicapped," and served satisfactorily in that position for 16 years. On or around September 15, 1999, she "voluntarily resigned from her employment, for personal reasons." Petitioner further avers that, although she had been reassigned from her duties pending an investigation at the time of her resignation, "she was not aware of the nature of any allegations against her, no formal disciplinary charges were pending against her, and Petitioner understood that she was not irrevocably resigning but rather was resigning with the opportunity to be eligible for employment [with DOE] in the future."

Petitioner states that she subsequently made inquiries about returning to teach with DOE, and received a commitment to be hired for a position with DOE in September of 2009. However, shortly after beginning in her new position, Petitioner was informed by letter dated October 12, 2009 by DOE's Office of Personnel Investigation ("OPI") that DOE was unable to process her application because she appears on the DOE's invalid list. The letter further advised that

Petitioner was placed on the DOE's Ineligible List on January 4, 2001 "for Corporal Punishment," and that she must be removed from the list before her application can be processed.

By e-mail dated October 14, 2009 OPI provided Petitioner with documents to be completed pursuant to OPI's background investigation, and stated that an interview was scheduled for October 16, 2009. OPI advised Petitioner that she could be accompanied at the interview by a representative of her choice, and that she could provide any written statements or documents which refute or explain the basis of OPI's ineligibility determination.

At her interview, Petitioner submitted a letter to OPI, wherein she explained that, although unaware of what she was being charged with and not guilty of any wrongdoing, she resigned "because [she] felt uncomfortable and frustrated about being falsely accused and maligned." She further stated that the decision to resign was also motivated by her mother's deteriorating mental health, which further added to her stress. Petitioner also alleged that the "false incident was manufactured" in order give Petitioner's teaching position to the daughter of a close friend of the Special Education Supervisor. Petitioner also submitted support letters from Frank Uzzo, Principal of the school where Petitioner worked (Assistant Principal while Petitioner was there); and Elizabeth J. Sheahan, retired Supervisor of Speech. Mr. Uzzo stated that he was able to observe Petitioner during the 1997-1998 academic year, and noted Petitioner's professionalism. Ms. Sheahan stated that in the 22 years that she has known Petitioner, Petitioner has shown herself to be an excellent teacher who possesses good moral character. Ms. Sheahan further stated that Petitioner's termination was a "gross miscarriage of justice," and that Petitioner was "pushed out" of her tenured position "in order to make room for the newly licensed daughter. . . of the Special Education Supervisor's best friend!!!"

Petitioner states that in December 2009, her attorney was advised by counsel for DOE that Petitioner should not have any problem being reinstated for eligibility with DOE.

However, by letter dated February 19, 2010, DOE denied Petitioner's application. DOE explained the basis for its decision as follows:

> Your application is denied due to the underlying facts and circumstances to [sic] an irrevocable retirement

> agreement outlined in the Pre-Charge Stipulation of Settlement from the Office of Legal Services (OLS). In summary the facts include a serious corporal punishment allegation against you while you were a tenured teacher at MS 180X. At the time of your separation from service in 1999, you resigned your position before the Pre-Charge Stipulation of Settlement could be executed. Thus you chose to avoid either a hearing or resolving the facts surrounding those allegations and your retirement was deemed irrevocable. As a result you are not permitted to return to the DOE.

Petitioner subsequently commenced this Article 78 proceeding, claiming that DOE's February 19, 2010 decision is arbitrary and capricious.

DOE cross-moves to dismiss the petition pursuant to CPLR §3211(a)(7). DOE asserts that its decision was rationally based and therefore must be upheld.

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

CPLR §3211 states, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (7) the pleading fails to state a cause of action

The court, on a motion to dismiss an action pursuant to CPLR 3211(a)(7), must accept the factual allegations of the pleading as true, accord the plaintiff all favorable inferences which may be drawn therefrom, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v. Martinez*, 84 NY2d 83[1994]). The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268[1977]).

Here, DOE has failed to demonstrate its entitlement to dismissal pursuant to CPLR §3211. There is nothing in the record presently before the Court that would permit it to conclude, as a matter of law, that Petitioner effected an irrevocable resignation from her teaching position in 1999. Chancellor's Regulation C-205(24) provides that an individual's resignation or retirement is permanent (*i.e.*, irrevocable) where he or she either (1) was dismissed pursuant to Education Law §3020-a; or (2) had charges pending. Neither circumstance exists in the Petition herein. Here, Petitioner was being investigated for alleged misconduct, but no formal charges were pending against her at the time of her resignation. Thus, without any evidence that Petitioner agreed to effect an irrevocable resignation or retirement in the record presently before the Court, Plaintiff has stated a cognizable claim that DOE's outright denial of Petitioner's application based upon an "irrevocable retirement agreement" was improper.

Wherefore it is hereby

ORDERED that DOE's cross-motion to dismiss is denied; and it is further

ORDERED that DOE shall serve its answer upon Petitioner within 30 days of receipt of a copy of this Order with notice of entry thereof; and it is further

ORDERED that reply papers, if any, shall be served by Petitioner within 14 days of service of DOE's answer; and it is further

ORDERED that Petitioner may re-notice this matter in accordance with CPLR §7804(f), returnable to the Motion Support Office, Room 130, 60 Centre Street.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: December 23, 2010

EILEEN A. RAKOWER, J.S.C.