

**Files v Department of Educ. of the City of N.Y.**

2012 NY Slip Op 32541(U)

October 4, 2012

Sup Ct, New York County

Docket Number: 100397/2011

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA  
J.S.C.  
Justice

PART 19

BARBARA DENISE FILES

INDEX NO. 100397 / 2011

-v-

THE DEPARTMENT OF EDUCATION  
OF THE CITY OF NEW YORK

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

The following papers, numbered 1 to 4, were read on this motion to/for ARTICLE 78

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is DETERMINED IN  
ACCORDANCE WITH THE ACCOMPANYING DECISION, ORDER,  
AND JUDGMENT.

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

RECEIVED

OCT - 9 2012

CLERK OF THE SUPREME COURT  
NEW YORK COUNTY

Dated: 10/4/12

Saliann Scarpulla  
J.S.C.  
**SALIANN SCARPULLA**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
  - 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
  - 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X

BARBARA DENISE FILES,

Petitioner,  
-against-

Index No.: 100397/2011  
Submission Date: 5/9/2012

THE DEPARTMENT OF EDUCATION OF  
THE CITY OF NEW YORK AND  
THE CITY OF NEW YORK,

**DECISION, ORDER  
AND JUDGMENT**

Respondents.

-----X

For Petitioner:  
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New York, NY 10007

For Respondents:  
Corporation Counsel of the City of New York  
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HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding, petitioner Barbara Denise Files (“Files”) challenges the October 8, 2010 determination of the Department of Education of the City of New York (“DOE”) and the City of New York (the “City”) (collectively “respondents”) to deny her tenure and terminate her employment.

Files was appointed as a probationary teacher on August 30, 2007, with the completion of her probation scheduled for September 7, 2010.<sup>1</sup> Files worked as a probationary teacher at Passages Academy (“Passages”) in Bronx, New York. In the summer of 2010, two misconduct allegations were initiated against Files. The first

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<sup>1</sup> Files claims that the scheduled end date of her probation period, September 7, 2010, is incorrect and that the correct end date is August 30, 2010, the three year anniversary of her appointment. Under either date, the analysis herein remains the same. For purposes of this decision, I will assume the end date of her probationary period was September 7, 2010.

allegation involved a verbal altercation with a staff member on May 21, 2010, and the second allegation involved verbal abuse against a student on June 1, 2010. To address these allegations, Principal Marinacci ("Marinacci") met with Files on June 7, 2010.

Based on his meeting with Files, Marinacci concluded that the allegations were true, as memorialized in his two letters to Files dated June 14, 2010. Thereafter, on June 22, 2010, Marinacci issued an unsatisfactory rating on Files' annual performance review for the 2009-2010 school year and recommended denial of her completion of probation.

The DOE claims that the district superintendent failed to send a letter to Files confirming the denial of her completion of probation due to a clerical error. Thus, at the beginning of the next school year, September 7, 2010, Files reported to work at Passages. On that day, Files was not assigned to teach in a classroom setting, but was assigned other tasks. On September 13, 2010, the new principal at Passages, Principal Wilder ("Wilder") offered a one year probation extension agreement to Files, which she did not sign. Files continued to perform tasks outside the classroom until she received the October 8, 2010 determination letter from the superintendent that denied her certificate of completion of probation and terminated her employment, effective September 7, 2010.

In her petition, Files argues that the respondents acted arbitrarily and capriciously, and in bad faith in terminating her because she was a tenured teacher. Petitioner argues that she obtained tenure either through: (1) the passage of time; or (2) tenure by estoppel. In her first argument, Files claims that she earned tenure because DOE failed to notify her

that she would not be recommended for tenure sixty days prior to the expiration of her probation period as required by Education Law § 2573. Files argues that because her probation expired on September 7, 2010, and she did not receive notice until October 8, 2010, she earned tenure based on DOE's violation of the Education Law § 2573 notice provision.

Files argues, in the alternative, that she obtained tenure by estoppel because DOE accepted her services as a teacher after her probation period expired. In her affidavit, Files stated that, on June 24, 2010, "Principal Marinacci told me that he will not fire me and that he will extend my probation for another year" and he "instructed me to return to school in the Fall." Files argues that, upon her return in September, DOE accepted her services as a teacher because she was assigned to perform traditional teacher functions such as shredding documents, inventorying textbooks, creating forms, curriculum planning, lesson planning, attending teacher meetings, and recommending academic interventions. Files also emphasizes that DOE paid her salary and she received teacher privileges such as a teacher's mailbox. According to Files, there was no indication that DOE did not want to accept her services, and she never negotiated a resignation or an extension of the probation period.

In her original petition, Files also alleged gender and age discrimination claims under the New York State Human Rights Law (Executive Law § 296) and New York City Human Rights Law (N.Y.C. Admin. Code § 8-107). However, Files withdrew these

claims and withdrew her claim against the City of New York. Thus, Files now seeks only (1) retroactive reinstatement to the position of tenured teacher; (2) damages for lost salary and benefits; (3) pain and suffering damages and other damages to her professional reputation; and (4) reasonable attorney's fees. In the alternative, Files requests an Education Law Section 3020-a hearing with back pay and wages until the hearing is completed.

In opposition, the DOE argues that Files is not entitled to tenure because the DOE never accepted Files' teaching services after the expiration of her probationary period. Rather, Files only performed administrative duties in September, 2010. In his affidavit, Wilder states that Files performed clerical duties such as "updating documents with the new letterhead, photocopying student work and materials for teachers, photocopying readings for professional development, and creating forms." The DOE emphasizes that Files was not placed in a classroom because DOE did not want to accept her services as a teacher.

DOE also argues that Files was informed of her pending discontinuance on June 22, 2010 and that the DOE did not act in bad faith in denying Files tenure and had good cause to terminate Files based on her two disciplinary letters and unsatisfactory performance review. Finally, the DOE argues that the proper remedy for DOE's failure to give adequate notice is for the teacher to be paid for the period that the notice is late.

## Discussion

It is well settled that judicial review of an administrative determination pursuant to CPLR Article 78 is limited to whether the determination was arbitrary and capricious or rationally based on the record. See CPLR §7803(3); *Gilman v. N.Y. State Div. of Hous. & Cmty. Renewal*, 99 N.Y.2d 144, 149 (2002); *Nestor v. N.Y. State Div. of Hous. & Cmty. Renewal*, 257 A.D.2d 395, 396 (1st Dep't 1999). An action is arbitrary and capricious when it is taken "without sound basis in reason and without regard to the facts." *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009); *Matter of Pell v. Bd. of Educ.*, 23 N.Y.2d 222, 231 (1974).

Education Law § 2573 provides that a teacher must complete a three year probationary term of service. During the probationary period, a teacher may be terminated at any time without a hearing. N.Y. Educ. Law § 2573; *Speichler v. Board of Co-op. Educ. Servs., Second Supervisory Dist.*, 90 N.Y.2d 110, 114 (1997). At the expiration of the probationary period, the superintendent of schools must make a written report "recommending for appointment on tenure those persons who have been found competent, efficient and satisfactory." N.Y. Educ. Law § 3012. Under Section 2573, "each person who is not to be recommended for appointment on tenure shall be so notified by the superintendent of schools in writing not later than sixty days immediately preceding the expiration of his probationary period."

Files argues that she acquired tenure based on the DOE's failure to provide her with the sixty days written notice required under Education Law § 2573. Files has established that the DOE failed to provide her with the requisite sixty day notice prior to the expiration of her probationary period on September 7, 2010, and that she received actual written notice of her denial of tenure from the superintendent on October 8, 2010. However, the DOE's failure to provide Files with the requisite notice does not result in an automatic grant of tenure. The remedy for a violation of the sixty day notice requirement is "one day's pay for each day the notice was late." *Matter of Tucker v. Bd. of Educ., Cmty. School Dist. No. 10*, 82 N.Y.2d 274, 278 (1993).

Files also argues that she acquired tenure by estoppel. A probationary teacher can acquire tenure by estoppel "when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher's probationary term." *Matter of McManus v. Bd. of Educ. of Hempstead Union Free School Dist.*, 87 N.Y.2d 183, 187 (1995). In particular, the court must find that the DOE permitted the probationary teacher to continue to teach after expiration of the probationary period with full knowledge and consent. *Andrews v. Bd. of Educ. of the City School Dist. of the City of New York*, 92 A.D.3d 465, 465 (1<sup>st</sup> Dep't 2012); *Matter of Gould v. Bd. of Educ. of Sewanhaka Cent. High School Dist.*, 81 N.Y.2d 446, 451 (1993).

Here, Files worked for the DOE after the expiration of her probationary period on September 7, 2010, until her termination on October 8, 2010. The parties agree that Files performed tasks such as updating documents, creating forms, and photocopying. Files also claims that she performed additional duties such as curriculum planning, lesson planning, attending teacher meetings, and recommending academic interventions.

Even assuming that Files performed the tasks she claims, I find that Files did not acquire tenure by estoppel. Although Files may have performed some functions incidental to a teacher's position, it is undisputed that Files did not perform any classroom instruction from the end of her probationary period, September 7, 2010, to the date of her termination on October 8, 2010. The New York State Department of Education regulations provide that a teacher must "devote a substantial portion of his [or her] time to instruction in one or more of the core academic subjects." N.Y. Comp. Codes R. & Regs. tit. 8, § 30-1.7; *Putnam N. Westchester Bd. of Coop. Educ. Servs. v. Mills*, 46 A.D.3d 1062, 1064 (3rd Dep't 2007).

Tenure by estoppel is found when teachers continue to teach beyond the end of their probationary period. See *Speichler*, 90 N.Y.2d at 119 (finding that petitioner was entitled to tenure by estoppel because she "taught class continuously—every school day, Monday through Friday" and continued teaching after the probationary period ended); *Ricca v. Board of Education of the City School District of the City of New York*, 47 N.Y.2d 385, 392 (1979) (finding that petitioner's teaching service prior to formal

appointment counted toward probationary service because “petitioner was indeed serving as a full-time teacher of woodworking”); *Gould*, 81 N.Y.2d at 451 (finding tenure by estoppel based on “petitioner’s continuing service as a teacher in the District’s employ”). Files’ utter lack of classroom instruction – actual teaching – precludes a finding that the DOE accepted her services as a teacher and permitted her to continue to teach with full knowledge and consent.

Moreover, the DOE’s actions showed that it did not intend to offer Files tenure, and any belief or reliance by Files to the contrary was not reasonable. *Matter of Richard Ronga v. Klein*, 23 Misc.3d 1103(A) (Sup. Ct., New York County 2009); *aff’d*, *Ronga v. Klein*, 81 A.D.3d 567, 568 (1<sup>st</sup> Dep’t 2011). In general, “estoppel is a bar which precludes a party from denying a certain fact or state of facts exists to the detriment of another party who was entitled to rely on such facts and had acted accordingly.” *McManus v. Bd. of Educ. of the Hempstead Union Free School Dist.*, 87 N.Y.2d 183, 186 (1995) (quotations omitted).

Here, Marinacci informed Files that he was not recommending her for tenure and that he planned to extend her probation for one year. Then, when Files returned to school in the fall, she was not assigned to teach, but to perform tasks outside the classroom. On September 13, 2010, Wilder offered Files a one year probation extension agreement, which she refused to sign. In light of these circumstances, the mere fact that Files continued performing tasks outside the classroom after she was informed that she would

not be recommended for tenure could not have led her to reasonably expect to be offered tenure.

Accordingly, I find that because Files never acquired tenure the DOE's determination was not arbitrary and capricious. I also find that the DOE did not act in bad faith in denying Files tenure and terminating her employment. "Evidence in the record supporting the conclusion that performance was unsatisfactory establishes that the discharge was made in good faith." *Matter of Johnson v. Katz*, 68 N.Y.2d 649, 650 (1986). The DOE's determination to deny tenure to Files and discontinue her employment was made in good faith because it was based on her two misconduct letters and unsatisfactory performance rating.

In accordance with the foregoing, it is hereby

ORDERED and ADJUDGED that the petition of Barbara Denise Files is granted only to the extent that the Clerk of the Court is directed to enter judgment on behalf of petitioner Barbara Denise Files against the Department of Education of the City of New York and the City of New York for 91 days of salary for failure to provide timely notice

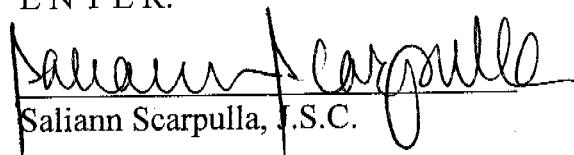
in accordance with Education Law § 2573, and the petition is otherwise denied and the proceeding is dismissed; and it is further

ORDERED that the petitioner Barbara Denise Files is directed to settle judgment.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York  
October 4, 2012

ENTER:

  
Saliann Scarpulla, J.S.C.