

Matter of Sam v City of New York

2013 NY Slip Op 30108(U)

January 17, 2013

Supreme Court, New York County

Docket Number: 401205/2012

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER
Justice

PART **IA** PART 16

Index Number : 401205/2012
SAM, CELESTINE
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

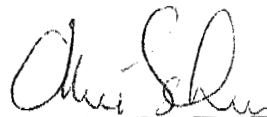
Upon the foregoing papers, it is ordered that this ^{Cross} motion is granted, the Article 78 petition is denied, and the proceeding is dismissed in accordance with the accompanying memorandum decision.

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: JAN 17 2013


_____, J.S.C.
ALICE SCHLESINGER

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

-----X

In the Matter of the Application of

CELESTINE SAM,

Petitioner,

Index No. 401205/12
Motion Seq. No. 001

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

-against-

CITY OF NEW YORK, NEW YORK CITY,
DEPARTMENT OF EDUCATION, Dennis Walcott,
Chancellor of New York City Department of Education,

Respondents.

-----X

SCHLESINGER, J.:

Petitioner Celestine Sam commenced this Article 78 proceeding representing herself to annul the decision by respondent New York City Department of Education (DOE) that placed her on the Department's "Ineligible/Inquiry List" due to "inappropriate conduct" and thereby rendered her ineligible to substitute teach. The "inappropriate conduct" was a single incident in which Ms. Sam engaged her fourth grade class in a "therapeutic massage activity" that involved Ms. Sam's partnering with a nine-year old boy and engaging in physical contact that included touching one another's backs from the head down to the buttocks. The DOE has moved to dismiss the proceeding against the City as an improper party; more significantly, though, it seeks dismissal of the entire proceeding pursuant to CPLR § 3211(a)(5) on the ground that it is time-barred. Although Ms. Sam did not oppose the motion on papers because she states she did not understand the procedure, she vigorously pursued her petition at oral argument before this Court.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418).

Background Facts

Petitioner Celestine Sam began working with the DOE as a non-tenured per diem substitute teacher in March of 2008. About a year later, on February 23, 2009, the Principal at P.S. 17K contacted the City's Special Commissioner of Investigation (SCI) to investigate a report that Ms. Sam had engaged a fourth-grade class in an activity involving massage therapy and that Student A and Ms. Sam had had physical contact with one another's buttocks during that activity. Ms. Sam acknowledged that the touching had occurred but attempted to explain that the activity was a legitimate one, which she had learned in an outside training (not involving the schools), and that it was intended as a reward for good behavior and was not intended to be sexual in any way. By letter dated March 13, 2009, the DOE advised Ms. Sam that she had received an "Unsatisfactory Rating" (U Rating) and that she would not be offered further assignments while the investigation was pending. (Exh J).

Following an investigation that included various interviews, First Deputy Commissioner Regina A. Loughran issued a four-page report on August 11, 2009, detailing the investigation and her recommendation. The investigation had been commenced when the regular teacher had returned to the classroom and was told about the massage therapy activity by various students. Student A, who was nine at the time, had reportedly said that he had been "embarrassed and upset during the massage." (Petition, Exh F). Other students confirmed the account that Student A had given explaining the technique of using a closed fist or the edge of the hand to hit the back of the other person down to and including the buttocks using a chopping motion.

The SCI investigator also spoke with Pastor Terry Henderson of Good News Corp., the organization that had sponsored a training attended by Ms. Sam regarding massage therapy. The Pastor explained that the activity was Korean and meant to “wake up” the body and was not sexual in nature. (Exh F., n 6). However, according to Ms. Sam, the Pastor was not permitted into the hearing room while the investigation was proceeding; nor were her parents or sister allowed to enter to attest to her good character (Petition, ¶15). According to the August 11 report, the NYPD Child Abuse Squad had also investigated the incident and had advised SCI that “there had been no criminality” and that the matter would not be pursued. (Exh F, n 3). At the conclusion of the report, the Deputy Commissioner stated as follows:

It is the recommendation of this office that Celestine Sam be made ineligible for future work, and that this matter be considered should she apply for any type of position with the New York City public school system.

The same day that the SCI report was issued, the DOE sent Ms. Sam a letter advising her that as of that date, August 11, 2009, Ms. Sam had “been placed on The New York City Department of Education’s Ineligible/Inquiry List.” The stated reason was “INAPPROPRIATE CONDUCT.” (Exh L). On October 30, 2009, Ms. Sam completed a DOE form requesting an appeal, and for the reason she checked the box “C-31 and ‘U’ Rating” (Exh L). Ms. Sam’s UFT union representative sent a letter to the DOE on June 24, 2010 confirming that Ms. Sam was appealing “an unsatisfactory rating and her subsequent placement on the Chancellor’s citywide ineligible list (Chancellor’s Regulation C-31).” (Exh L).

On December 7, 2010 the Chancellor’s Committee met to review the decision to rate Ms. Sam’s performance as “Unsatisfactory” and the recommendation to terminate

her eligibility to teach. The school Principal, the SCI Investigator, and the Superintendent's Representative all appeared by telephone or in person; Ms. Sam also appeared along with a union representative (DOE Motion, Exh 1). Both sides were given an opportunity to be heard on their respective positions. Ms. Sam's UFT representative urged that, at best, Ms. Sam had displayed "poor judgment" and was entitled to a second chance, since no force was used and the activity was not intended to be sexual in nature. The Committee rejected Ms. Sam's position, finding as follows:

The Chair took into consideration all documentation and oral presentations given at this Review. It is the finding of the Chair that neither the Appellant [Ms. Sam] nor the UFT Advisor was able to provide any evidence to prove that the Administration acted unfairly in the decision affecting the Appellant. Special Investigator, Jeffrey Anderson, in the instant case undertook an investigation and reached his conclusion based on corroborated statements received from witnesses. Additionally, neither the Advisor nor the Appellant denied that the Appellant engaged students in massage therapy where she used Student A, a male student, as her partner and had physical contact with Student A that included punches to Student A's back and buttocks with Student A in turn being required to engage in similar physical contact with the Appellant. It is, therefore, not the responsibility of the Chair to retry the investigation undertaken by the Special Investigator but rather to determine whether the findings of the investigation warranted the recommendation made by the Office of the Special Commissioner of Investigation and the decision reached by the DOE. The Chair after careful review concurs that the Appellant engaged in an egregious act involving students entrusted into her care. The Chair therefore recommends that the Administration's decision to rate the Appellant "Unsatisfactory" for the 2008-2009 School Year and terminate all licenses and certificates held by the Appellant effective 8/11/2009 be respected and left undisturbed.

By letter from DOE Senior Deputy Chancellor Shael Polakow-Suransky to Ms. Sam dated March 11, 2011, the Chancellor sustained the recommendation to terminate

Ms. Sam's license and maintain her name on the Ineligible/Inquiry List (Petition, Exh O). However, the letter undeniably included an incorrect mailing address. According to Ms. Sam, despite her attempts to follow up, she did not receive the March 11, 2011 letter until she picked up a copy from the UFT office on January 30, 2012. (Exh O).

Ms. Sam commenced this Article 78 proceeding by filing a handwritten petition with the County Clerk on May 31, 2012. On June 8, she served respondents with a more complete typewritten petition with numerous exhibits attached. As indicated earlier, respondents then moved to dismiss the proceeding as time-barred, and this Court held extensive oral argument as to all issues raised.

Discussion

Pursuant to CPLR §217(1), an Article 78 proceeding challenging a determination by the Department of Education "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." A teacher seeking to challenge the placement of her name on the Ineligible/Inquiry List must commence the proceeding within four months of being informed of that determination by the DOE. *Matter of Strong v New York City Dept. Educ.*, 62 AD3d 592 (1st Dep't 2009), *lv denied* 14 NY3d 704 (2010), *rearg denied* 14 NY3d 936.. Similarly, the termination of non-tenured probationary or per diem employment must be challenged within four months of notice. *Matter of Hazeltine v City of New York*, 89 AD3d 613 (1st Dep't 2011). The teacher's time to commence an Article 78 proceeding is not extended by the filing of an administrative appeal. *See Strong and Hazeltine, supra; see also Matter of Frasier v Board of Educ. Of city School Dist. of City of N.Y.*, 71 NY2d 763, 767 (1988).

Here, Ms. Sam was notified of the DOE's determination to place her on the Ineligible/Inquiry List by letter dated August 11, 2009. (Petition, Exh L). That determination terminated Ms. Sam's eligibility for continued employment. She undeniably received that letter in a timely fashion, as she filed an appeal on October 30, 2009 (Exh L). Since the four-month period for Ms. Sam to challenge that determination ran from the August 11, 2009 notice through December 11, 2009, the May 31, 2012 commencement of this proceeding was untimely.

However, challenges to U-Ratings are treated differently in that such a determination does not become final and binding until the Chancellor denies the appeal and sustains the rating. *Hazeltine*, 89 AD3d at 614, citing *Matter of Johnson v Board of Educ. of City of N.Y.*, 291 AD2d 450 (2002). It is unclear whether the DOE treated Ms. Sam's challenge as a challenge to a U-Rating, as any U-Rating was subsumed in the determination to place Ms. Sam on the Ineligible/Inquiry List; U-Ratings have an independent significance for tenured teachers, as multiple unsatisfactory ratings can lead to the termination of employment. If Ms. Sam's challenge were treated as a challenge to a U-Rating, the four-month period would run from the Chancellor's final determination, dated March 11, 2011, through July 11, 2011, and this proceeding commenced in 2012 would be time-barred. Even if the time were calculated from Ms. Sam's acknowledged receipt of that determination on January 30, 2012 (Exh O), this proceeding commenced on May 31, 2012 would still be untimely, albeit by one day.

Moreover, on the merits, Ms. Sam has not established a basis to annul the DOE's determination. While she has made various complaints about the procedures followed, such as the decision not to permit the Pastor in the room to explain the non-

sexual nature of the massage therapy activity, the Investigator did interview the Pastor and other relevant witnesses. Ms. Sam has not proven that she was deprived of due process or that the DOE violated a specific rule or regulation. Further, the DOE's decision was not arbitrary and capricious as a matter of law; it was not unreasonable for the DOE to conclude that Ms. Sam had exhibited poor judgment by engaging in an activity involving physical contact with a male student's buttocks, sufficient to justify placing her name on the Ineligible/Inquiry List.

Accordingly, it is hereby

ORDERED that the cross-motion by respondents to dismiss this proceeding is granted in its entirety; and it is further

ADJUDGED that the petition is denied and this Article 78 proceeding is dismissed without costs or disbursements. The Clerk may enter judgment accordingly in favor of the respondents.

Dated: January 17, 2013

JAN 17 2013



J.S.C.
ALICE SCHLESINGER

UNFILED JUDGMENT
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