

Sartori v City of New York

2013 NY Slip Op 30163(U)

January 25, 2013

Supreme Court, New York County

Docket Number: 102614/2012

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN B. LOBIS
Justice

PART 6

Index Number : 102614/2012
SARTORI, GINA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE: 10/23/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to 34, were read on this motion to for annual determination

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Petition | No(s) 1-8
Answering Affidavits — Exhibits _____ | No(s) 9-30
Replying Affidavits _____ | No(s) 31-34

Upon the foregoing papers, it is ordered that this motion is

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

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION
Order & Judgment

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: 1/25/13

JB, J.S.C.

1. CHECK ONE: CASE DISPOSED **JOAN B. LOBIS** FOR 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
NEW YORK COUNTY: IAS PART 6

-----X
GINA SARTORI,

Petitioner,

Index No. 102614/12

-against-

Decision, Order, and Judgment

CITY OF NEW YORK; NEW YORK CITY
DEPARTMENT OF EDUCATION; DENNIS
WALCOTT, CHANCELLOR of NEW YORK CITY
DEPARTMENT OF EDUCATION,

Respondents,

For an Order and Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules.

-----X
JOAN B. LOBIS, J.S.C.:

Gina Sartori brings this petition under Article 78 of the Civil Practice Law and Rules seeking an order compelling the New York City Department of Education (the "DOE") to rescind her resignation letter and to remove her from the Ineligible/Inquiry List. She also seeks to annul the DOE's determination refusing to accept the rescission of her resignation, on the grounds that it was arbitrary and capricious, an abuse of discretion, and in violation of lawful procedure. She additionally seeks an order compelling Respondents to reinstate her nunc pro tunc to her date of loss of employment, with back pay and benefits.

Petitioner was hired by the DOE as a probationary history teacher at Dr. Susan McKinney High School for the 2011-2012 academic year. By letter dated January 5, 2012, Petitioner resigned from her position at the school and from the DOE "effective immediately." The parties dispute the facts surrounding Petitioner's resignation. Petitioner contends that she was harassed by

the school's Principal, Paula Holmes, and Assistant Principal, Karen Best, which resulted in a number of negative, exaggerated, and hostile disciplinary letters, and orders and instructions to perform tasks that were not asked of other teachers. Petitioner states that on January 4, 2012, she met with her United Federation of Teachers Chapter Leader, Jerrick Rutherford ("UFT Rep. Rutherford") and Principal Holmes. During this meeting, Principal Holmes threatened her with termination and loss of her license, and she was advised to resign to save her license. Petitioner believed that resignation would save her from losing her license and would enable her to teach again in the DOE schools. According to Petitioner, the next day, Principal Holmes threatened her with disciplinary action, and recommended that she tender her immediate resignation. She was never informed by Principal Holmes or UFT Rep. Rutherford that a resignation without 30 days' notice would bar her from further employment in the DOE. She maintains that while typing her letter of resignation, she was affirmatively told to write that she was resigning from the DOE entirely and that she was doing so "effective immediately." Petitioner avers that it was not until after she resigned that UFT Rep. Mary Wade informed her that a regulation required 30 days' notice prior to the effective resignation date, and that her failure to do so placed Petitioner on an Ineligible/Inquiry List.

According to Respondents, however, Petitioner accumulated a number of unfavorable reviews, violated the Faculty Conference Handbook, failed to implement Professional Development Strategies, and was unprepared for weekly meetings aimed at improving her classroom strategies. Upon hearing that Principal Holmes intended to bring disciplinary actions against her, Petitioner resigned to avoid disciplinary actions.

What occurred after Petitioner resigned is undisputed. On February 2, 2012, by letter addressed to Principal Holmes, Petitioner rescinded her letter of resignation. In the letter, Petitioner stated that she was made aware of the 30-day requirement by UFT Rep. Wade, and that she wished to rescind her resignation dated January 5. Once Principal Holmes accepted her rescission, Ms. Sartori would then submit another resignation letter with the requisite 30-day notice to assure that she would not be placed on the Ineligible/Inquiry List. On February 7, Ms. Holmes responded that she is not permitted to rescind Petitioner's resignation. Petitioner thereafter filed a Step 1 Grievance, which was denied on February 14, 2012.

Ms. Sartori now seeks to compel Respondents to accept the rescission of her resignation letter. She argues that the rescission was submitted before the resignation was formally accepted. She states that the resignation letter was never valid, as it was drafted and signed under duress and coercion and was obtained fraudulently. By failing to correct Petitioner's belief that a resignation effective immediately had no consequences, Principal Holmes deliberately misled her into believing that an immediate resignation would not bar her from teaching in the DOE schools. She further contends that Respondents' refusal to schedule a review hearing to challenge her placement on the Ineligible/Inquiry List was arbitrary.

In answering the petition, Respondents argue that Petitioner fails to establish that she is entitled to the relief requested. Respondents maintain that Petitioner was never placed on an Ineligible/Inquiry List, as the DOE no longer maintains such a list. However, should Petitioner decide to reapply for employment within DOE, she would be flagged for violating Chancellor's

Regulation C-205(26)(b) for resigning without giving 30 days' notice, triggering an investigation into her service history by the Office of Personnel Investigation. The circumstances surrounding her violation of C-205(26)(b) would be considered in determining whether to hire her. Respondents further argue that Petitioner voluntarily resigned from her probationary teaching position with DOE, and that her resignation was not the result of coercion, duress, or fraud by any DOE employee. They state that pursuant to Chancellor's Regulation C-205(28), the Executive Director, not the principal, has the discretion whether to accept the withdrawal of a teacher's resignation and that such an act is not subject to mandamus.

In support, Respondents submit the affidavits of Principal Holmes and UFT Rep. Rutherford. Principal Holmes states that she has been the Principal of the Dr. Susan S. McKinney Secondary School of the Arts since 1997. As Principal, she supervises the pedagogical and non-pedagogical staff of the School, manages the class schedules of the teachers and students and overall curriculum of the school, and acts as a lead educator at the school, who is involved in the formation of the educational mission and goals of the pedagogical staff. Teachers are required to keep student-generated work, including tests, papers, and projects, in a separate folder for each student, and teachers are to assign grades based on the work in the students' folders. During the Fall of 2011, Ms. Sartori failed to keep consistent, complete student records, with missing folders and folders containing little generated student work. Petitioner did not explain the missing work in the students' folders. The folders presented by Petitioner showed inconsistencies, with portions being completely empty, and discrepancies between individual assignment grades and final grades. On January 4, 2012, she met with Petitioner and UFT Rep. Rutherford, and discussed the dearth of work

in Petitioner's students' folders and the grading discrepancies, expressed her concern with Petitioner's conduct, and suggested that Petitioner discuss her rights with UTF Rep. Rutherford. On January 5, 2011, she met again with Petitioner and UTF Rep. Rutherford to discuss Petitioner's conduct, and informed Petitioner that disciplinary charges are being contemplated against her, which may result in her being discontinued as a probationary employee. Principal Holmes states that after consulting in private with UTF Rep. Rutherford, Petitioner submitted her resignation letter stating that she was resigning effective immediately, and that at no time prior to receiving Petitioner's letter was Principal Holmes made aware of Petitioner's intention to resign. Principal Holmes states that she neither advised Petitioner to resign, instructed her on how to write her resignation letter, nor coerced, pressured, or misled Petitioner into resigning. Principal Holmes was unaware of Petitioner's intent to work for the DOE in the future.

In his affidavit, UFT Rep. Rutherford states that he has been the Chapter Leader for the UFT at the school since 2006. As UFT Representative, he represents teachers and other staff members with regard to disciplinary matters. He is responsible for informing member of their rights under the Education Law and the collective bargaining agreements. During the meeting with Principal Holmes on January 4, 2012, where there were incomplete student folders and discrepancies in grading, Petitioner stated that she had falsified records by assigning grades to students that were not based on any of the tests, assignments, or class work completed by the students. In response, Principal Holmes indicated that disciplinary charges would be brought and suggested that Petitioner discuss her rights with him. While consulting with Petitioner in private, UFT Rep. Rutherford informed Petitioner that she could receive an "unsatisfactory" annual rating, could be discontinued

as a probationary employee, or could be brought up on disciplinary charges, and that if she were to be found guilty of the disciplinary charges, she could lose her teaching license. Petitioner then informed him that she desired to resign to avoid disciplinary charges. In response, UFT Rep. Rutherford asked Safety Officer Juanita Briggs, who was on duty in the hallway, to witness the conversation. In Ms. Brigg's presence, Petitioner stated that she was resigning voluntarily and was not coerced or pressured. Upon information that a resignation would result in the loss of her health insurance and benefits, however, Petitioner stated that she needed the night to review her options. The following day, he again met with Petitioner and Principal Holmes, where Principal Holmes informed Petitioner of the possible disciplinary actions. UFT Rep. Rutherford advised Petitioner that to avoid these charges, a resignation "effective immediately" would be best. Petitioner utilized the computer room to draft and print her resignation letter, which she handed to Principal Holmes and which was accepted. UFT Rep. Rutherford states that he did not inform Principal Holmes of Petitioner's intent to resign prior to Petitioner's letter.

In reply, Petitioner disputes having admitted that she fabricated her students' grades. She states, among other things, that respondents provided no explanation as to why her rescission was not accepted and that Principal Holmes could not have commenced disciplinary charges, as Petitioner is not entitled to the protections of Education Law § 3020-a. Petitioner relies on Miller v. NYCDOE, Index No. 117204/08, to argue that a resignation that was obtained fraudulently must be withdrawn. She reiterates her arguments seeking an order compelling Respondents to accept her rescission or granting a fact-finding hearing to determine the truth of Respondents' allegations. Petitioner submits her own affidavit, in which she states that she fabricated no student records and

that she was unaware that the students' folder were to be maintained and the necessary format in which they were to be maintained. She states that both Principal Holmes and UFT Rep. Rutherford urged that she resign immediately, and that she resigned because she faced a hostile environment from the school's administration.

In an Article 78 proceeding, a court may consider whether an administrative determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or was an abuse of discretion. C.P.L.R. § 7803(3). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." In re Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009), citing In re Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974). "[A] mandamus to compel may not force the performance of a discretionary act, but rather only purely ministerial acts to which a clear legal right exists." In re Anonymous v. Comm'r of Health, 21 A.D.3d 841, 842 (1st Dep't 2005); See C.P.L.R. § 7803(1). "A discretionary act 'involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result.'" N.Y. Civ. Liberties Union v. State, 4 N.Y.3d 175, 184 (2005) (quoting Tango v. Tulevech, 61 N.Y.2d 34, 41 (1983)).

Regulation of the Chancellor C-205(26) states, in relevant part, that "the resignation by a member of the teaching and supervising staff shall be deemed to be a resignation from the pedagogical service of the public school system . . . Resignations shall be submitted in writing and, once submitted by an employee, shall be considered final." C-205(26) further requires an employee

who desires to resign to submit written notice to the principal at least thirty calendar days prior to the date on which the resignation is to take effect. If there has been no break in actual service, the appointing authority may, at its discretion, permit the employee to rescind the resignation before its effective date.

Regulation of the Chancellor C-205(28) governs the withdrawal of resignation generally, and states that:

Except for persons covered by Section 24 or subdivision 26b of this Regulation, upon written request, a pedagogical employee who has resigned may, at the discretion of the Executive Director of the Division of Human Resources, be permitted to withdraw such resignation for the purpose of reinstatement to service, regardless of whether the person was tenured or not on the date of his or her resignation, if:

- a. at the time of resignation, the individual had completed at least one year (or two full school terms) of satisfactory, regularly appointed service under the license; and
- b. the license has not been invalidated and is not subject to invalidation or failure to satisfy requirements. If the employee was untenured at the time of resignation, a three year probationary period will be required.

Here, the Court finds that Respondents' decision denying Petitioner's grievance and affirming Principal Holmes' determination that she is not permitted to rescind Petitioner's resignation was not arbitrary, capricious, in violation of lawful procedure, or an abuse of discretion. C-205(26) permits only the Executive Director of the Division of Human Resources to exercise the discretion of whether to accept a rescission. Therefore, as Principal, Holmes lacked lawful permission to perform that act.

The Court also finds that Respondents may not be compelled to rescind Petitioner's resignation. The DOE is not required by any law to accept the rescission of a teacher's resignation. According to C- 205(26), Petitioner's resignation was considered final when submitted and would have been considered a resignation from the DOE, regardless of whether Petitioner indicated that she was only resigning from the Dr. Susan S. McKinney High School. While C-205(26) allows a rescission to occur prior to the effective date of resignation, it is permitted at the discretion of the appointing authority. Petitioner cannot invoke C-205(26), as she is seeks rescission after the date of her effective resignation of January 5, 2012, and there existed no continuity in Petitioner's employment. Additionally, it is unclear whether Petitioner can invoke C-205(28), as Petitioner does not seek "reinstatement to service," but rather seeks to again resign from the school, and only wants to protect her employment prospects within the DOE. Regardless, any rescission of resignation remains at the discretion of Executive Director of the Division of Human Resources, an act that is not ministerial in nature and is improper for a mandamus to compel.

Further, the Court finds that Petitioner's argument that her resignation letter was tendered from duress is insufficient to render it null and compel Respondents to rescind the resignation. Petitioner contends that she was coerced by Principal Holmes and UFT Rep. Rutherford into resigning and that her resignation was not voluntary, relying on Miller. Index No. 117204/08. Miller, however, is not binding authority, and its facts are distinguishable from this case. Here, Petitioner is not tenured and Principal Holmes did not engage in any affirmative dishonest conduct or make any promises to secure Petitioner's employment prospects within the DOE. Petitioner merely states that Respondents did not inform her of the 30-day notice requirement. Petitioner fails

to establish that Principal Holmes had a duty to inform Petitioner of her rights or of the requirements of resignation. According to UFT Rep. Rutherford, the duty to inform Petitioner of her rights lies with him, and he is not a party to this action. In addition, Principal Holmes' intention to commence disciplinary proceedings against Petitioner cannot constitute as duress, as it is an action that she could legally undertake. In re Roman v. Tompkins-Seneca-Tioga Bd. of Coop. Educational Servs., 98 A.D.2d 835 (3d Dep't 1983); lv. denied, 61 N.Y.2d 608 (1984). Contrary to Petitioner's contention, Education Law § 3020-a, which sets forth certain procedural provisions for disciplinary actions against tenured employees, does not preclude Principal Holmes from taking disciplinary action against Petitioner. The DOE may take any disciplinary action necessary against Petitioner, including termination, without cause, as long as it is constitutionally and statutorily permissible, because Petitioner is a non-tenured, probationary employee. See In re Girards v. Bd. of Educ. of Garden City, 40 N.Y.2d 1020 (1976); In re Strax v. Rockland Co. Bd. of Coop. Educ. Servs., 257 A.D.2d 578 (2d Dep't 1999). In light of the above, all remaining requests are denied. Accordingly, it is

ORDERED that the petition is denied and proceeding is dismissed.

Dated: January 25, 2013

ENTER:



JOAN B. LOBIS, J.S.C.