SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Lobis Justice

PART 6

Index Number : 101795/2012
GULLOTTA, JOSEPH
vs.
BOARD OF EDUCATION
SEQUENCE NUMBER : 002
RESTORE ACTION TO CALENDAR

INDEX NO. _____
MOTION DATE 9/27/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for restore action to calendar

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-2
Answering Affidavits — Exhibits _____ | No(s). 3-4
Replying Affidavits _____ | No(s). 5

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

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).

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

Dated: 11/25/13

_____, J.S.C.

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
NEW YORK COUNTY: IAS PART 6

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In the Matter of

JOSEPH GULLOTTA,

Petitioner,

Index No. 101795/12

-against-

Decision, Order, and Judgment

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, DENNIS WALCOTT, as Chancellor of the City School District of the City of New York, and the CITY OF NEW YORK,

Respondents,

For a Judgment Pursuant to Article 78 of the *Civil Practice Law and Rules.*

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

In this motion, Motion Sequence 2, Joseph Gullotta moves under Article 78 of the Civil Practice Law and Rules to restore this proceeding to the calendar, to amend the petition to include a copy of complaints from civil actions filed against him, and for an order and judgment on the original petition directing Respondents to reimburse Petitioner his attorney's fees and expenses in those cases. Before addressing the merits of the case, this Court orders that the case is restored to the calendar, as consented to by Respondents, *nunc pro tunc*, and the petition is amended to include a copy of the complaints from Stokel v. New York City Department of Education et. al., Index No.1113/2011; Rivera v. Gullotta, Index No. 24886/2010; and Rivera v. Gullotta, et. al., Index No. 2157/2011. For the reasons stated below, the petition is granted in part and denied in part.

This action arises out of a student altercation during Mr. Gullotta's employment with P.S. 65Q, a Department of Education school located in Queens, New York. On the morning of January 28, 2010, two students, referred to within this decision as Student A and Student B, were attending a fourth-grade class taught by the Petitioner and assisted by Paraprofessional Abe Fox. Towards the end of the class period, Student A and Student B had an argument, which escalated into a fight. Mr. Gullotta claims that the students' fighting was light-hearted "play fighting." When the play fighting became too rough, Mr. Gullotta alleges that he sternly told the boys to stop. Respondents allege that Mr. Gullotta acted improperly and outside the scope of his duty as a teacher by encouraging the students to fight..

The students were injured in the course of their fighting. Student B suffered a minor cut on the inside of his lip. Student A complained of a bump on his head. Mr. Gullotta placed a wet paper towel on the student's lip but saw no reason to send either child to the school nurse as their injuries seemed very minor. Each student then went to his next class.

Student B complained about his lip to his next teacher, who sent him to the school nurse. The school nurse asked Student B to retrieve Student A from class. Student B first went to Mr. Gullotta, who then himself went to Student A's classroom and escorted the student to the school nurse. Mr. Gullotta then instructed Student A to tell the school nurse that the two students were injured when they bumped heads while fooling around. At the time, Mr. Gullotta's leg was set in a full cast following a repair to his Achilles tendon.

The following day, Mr. Gullotta and Mr. Fox were arrested. Mr. Gullotta had been accused of inciting a fight between the students and instructing the students to lie to school employees and their parents about the cause of their injuries. Criminal charges were filed, including misdemeanor charges of child endangerment. Both Mr. Gullotta and Mr. Fox were acquitted. In October 2010, Thomas Rivera, the father of one of the students, began a civil action against Mr. Gullotta, the City of New York, and the Department of Education. Rivera v. Gullotta, Index No. 24886/2010 (Queens Co.) (Kevin Kerrigan, J.S.C.). Mr. Gullotta requested legal representation and indemnification for awards in the civil action, under Education Law Section 3028 and Municipal Law Section 50-k, from Respondents, but that request was denied by letter dated December 22, 2010. In January 2011, Jeanette Stokel, the mother of one of the students, began an action against Mr. Gullotta, the City of New York, and the Department of Education. Stokel v. New York City Department of Education et. al., Index No.1113/2011 (Queens Co.) (Kevin Kerrigan, J.S.C.). Mr. Gullotta again requested representation and indemnification from Respondents, but his request was denied by email and a letter dated February 18, 2011.

Petitioner then initiated a civil action in the New York County Supreme Court. Gullotta v. Bd. of Educ., Index No. 1047102/11. He claimed that Respondents, who are the same parties as in this case, had violated Education Law Sections 2560, 3023, 3028, and General Municipal Law Section 50-k. Justice Huff, citing to her own opinion in Sagal-Cutler v. Board of Education of the City School District of the City of New York, 2010 NY Slip Op 32657U (Sup Ct, NY County 2010), held that Section 3028 of the Education Law controlled in determining whether legal representation should be provided for a teacher in any action arising from a disciplinary action.

As neither party addressed Mr. Gullotta's representation under Section 3028, Justice Huff referred the matter back to Respondents to determine whether Mr. Gullotta was entitled to representation under the section. By letters dated October 25 and 28, 2011, Respondents informed Mr. Gullotta that he was not entitled to representation under Section 3028. In September 2011, Mr. Rivera commenced a second civil action against Mr. Gullotta, the City of New York, and the Department of Education. River v. Gullotta, et al., Index No. 2157/2011 (Queens Co.) (Kevin Kerrigan, J.S.C.), Petitioner requested representation and indemnification for losses in the civil action from Respondents for a third time. By letters dated October 28, 2011, and November 9, 2011, he was informed that he would not be provided with representation or indemnification.

In January 2012, Petitioner initiated this Article 78 proceeding. Petitioner argued that Respondents had violated Education Law Section 3028 by not providing representation, and violated Section 2560 and General Municipal Law Section 50-k by not indemnifying him for all costs and fees incurred in connection with the civil proceedings. Petitioner also argued that Respondents' determination that legal representation should not be provided was arbitrary and capricious. In their answer, Respondents claim that their determination to deny Mr. Gullotta's request for representation was not arbitrary and capricious. They argue that the duty to provide representation does not extend to tortious acts as those acts are not within the scope of employment, and as a result not covered by Education Law Section 3028, and that the facts of the case support their conclusion. Respondents cite to criminal charges and "information from the principal of the Raymond York Elementary School, from the Queens District Attorney's Office, and from the students involved."

By order on May 21, 2012, this Court marked the case off the calendar per stipulation. On March 25, 2013, a stipulation was signed by the parties permitting the case to be restored after the Courts of Appeals issued a decision in Sagal-Cotler v. Board of Education of the City of New York, Index No. 104406/2010 (N.Y. Ct. App.). Parties represent that this stipulation was submitted to the Court. In April 2013, the Court of Appeals issued a ruling in Sagal-Cotler, overturning the Appellate Division and affirming Justice Huff's trial court decision. Sagal-Cotler v. Bd. of Educ., 20 N.Y.3d 671 (2013).

In the interim, Mr. Gullotta was subject to a disciplinary hearing by the Board of Education. On May 5, 2013, Hearing Officer Joshua Javits issued a decision finding that Mr. Gullotta did not encourage or direct any fighting. The hearing officer still fined the Petitioner $20,000 for being "at least negligent or partially at fault for not ending the [fight] earlier than he did." The Hearing Officer also found that Mr. Gullotta had instructed the students to lie to the nurse and parents about the events.

On restoration of this case, Mr. Gullotta is raising the same arguments as he did in Motion Sequence 1. He argues that his actions were within the scope of his employment. He also asserts that due to the decision in Sagal-Cotler, as he was acting within the scope of his employment, he must receive the legal representation granted by Education Law Section 3028.

Respondents argue that Petitioner's actions were outside the scope of employment. They argue that the representation and indemnification of City employees are to be made "in the first

instance by the Corporation Counsel and his determination may be set aside only if it lacks a factual basis, and in that sense, is arbitrary and capricious." Williams v. New York, 64 N.Y.2d 800, 802 (1985) (citation omitted). To show that an action was outside the scope of employment, Respondents claim the City must show that a teacher's conduct was so extreme as to remove itself from any natural connection with a teacher's occupational duties. Blood v. Bd. of Educ., 121 A.D.2d 128, 130 (1st Dep't 1986).

In support of their positions, in both the motion and answer in Motion Sequence 2, both parties rely on statements made by witnesses and Hearing Officer Javits in Petitioner's disciplinary hearing. Respondents rely on the testimony of several witnesses, none of whom agree on a single version of events. The only support for the Respondents' position that Petitioner encouraged or instigated a fight comes from the statements of two fourth grade students, each with significantly different versions of events. Only one student witness describes how Mr. Gullotta closed the door to the classroom, moved the desks to the edges of the classroom, and instructed the students to fight, while other students watched, and Mr. Fox chanted "fight, fight, fight." These versions of events were soundly rejected by Hearing Officer Javits as other students offered much tamer accounts of Mr. Gullotta's actions. The injuries to Students A and B are also attributed to multiple causes including fighting, accidentally bumping into each other, and accidentally bumping into a table when picking pencils up off the ground. At Mr. Gullotta's disciplinary hearing, the Department of Education claimed that Mr. Gullotta told the students to lie. Mr. Gullotta, as discussed above, claims to have told the students to tell the truth, albeit a somewhat redacted version of it.

In an Article 78 proceeding, the Court reviews agency decisions to determine whether an action violates lawful procedures, is arbitrary or capricious, or is affected by an error of law. E.g., Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974); Roberts v. Gavin, 96 A.D.3d 669, 671 (1st Dep't 2012). Where an issue is limited to "pure statutory interpretation," a court is not required to defer to an administrative agency but rather should consider the plain language of the statute. E.g., Dunne v. Kelly, 95 A.D.3d 563, 564 (1st Dep't 2013); see also County of Westchester v. Bd. of Trustees, 9 N.Y.3d 833, 835-36 (2007) (administrative agency's regulations must not conflict with state statute or that statute's underlying purposes).

Legal representation for teachers in the state of New York, as relevant to this case, is controlled by Education Law Section 3028 which states as follows:

> Notwithstanding any inconsistent provision of any general, special, or local law, or the limitations contained in the provisions of any city charter, each board of education, trustee or trustees in the state shall provide an attorney or attorneys for, and pay such attorney's fees and expenses necessarily incurred in the defense of a teacher, member of a supervisory or administrative staff or employee . . . in any civil or criminal action or proceeding arising out of disciplinary action taken against any pupil of the district while in the discharge of his duties within the scope of his employment.

The New York Court of Appeals interpreted Section 3028 in its decision in Sagal-Cotler. 20 N.Y.3d at 671. The Court held:

> "[T]he authors of Education Law § 3028 intended to provide a defense even where an employee's use of corporal punishment violated regulations. Section 3028 requires the City to provide an attorney not just in civil, but also in criminal cases – suggesting that the legislature wanted even employees who engaged in highly questionable conduct to be defended at public expense."

Id. at 676.

The Court stated that an employee is within the scope of his employment "when he is doing something in furtherance of the duties he owes to his employer[.]" Id. Education Law Section 2560 incorporates General Municipal Law Section 50-k(2), which gives power to the Corporation Counsel to determine if the petitioner's conduct violated the Department of Education's rules and regulations. The Court of Appeals, however, found that Education Law Section 3028 was unaffected by General Municipal Law Section 50-k(2), especially as Section 50-k(9) states that Section 50-k(2) "shall not be construed in any way to impair, alter, limit, modify, or abrogate or restrict . . . any right to defense . . . in accordance with, or by reason of, any other provision of state . . . law." When legal representation is not provided, fees and expenses are reimbursed. See Timmerman v. Board of Educ., 50 A.D.3d 592 (1st Dep't 2008).

Indemnification is controlled by General Municipal Law 50-k(3) which states:

> The city shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court . . . while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency . . . the duty to indemnify and save harmless prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee.

There is no question, based on the facts in this case, that Mr. Gullotta was taking disciplinary action "in furtherance of the duties he owes to his employer," in particular, making decisions as to how to manage his fourth grade students. His decision to verbally reprimand his

students, instead of another form of punishment, or his decision to not inform parents is clearly "disciplinary action." Since his actions were disciplinary actions, Respondents' duty to provide representation is determined by whether Mr. Gullotta was acting in the scope of his employment, and not whether his actions were inappropriate. In Sagal-Cotler, the New York Court of Appeals held that even employees engaged in highly questionable conduct, including criminal conduct, were acting within the scope of their employment and were to be provided a defense under Education Law Section 3028. 20 N.Y.3d at 676 (teacher who slapped student in face was entitled to legal representation in civil action by parent). There is no exact definition of "highly questionable conduct," but, it does include actions that could lead to criminal convictions or that are done with disregard of an employer's instructions. Id. In their memorandum of law, Respondents claim that Mr. Gullotta's actions were intentional and unforeseeable and distinguishable from careless, negligent, accidental, and foreseeable conduct. This is not the correct approach. Instead, Respondents must show that there was a factual basis to support the determination that Petitioner's conduct exceeded "highly questionable conduct" by such a degree as to no longer be covered by Section 3028. As they make no attempt to do this, the Court finds that Respondents' determination suffered from an error of law and was arbitrary and capricious.

Furthermore, Respondents' determination is not supported by the facts. Respondents' final determinations were made in October and November 2011. At that time there had not yet been a disciplinary hearing but there had been investigations and interviews with

witnesses.[1] Allegations of misconduct, by a prosecutor or employer, are not enough to show a factual basis since they are, by definition, not fact and as that would defy the purpose of the Education Law, which is to provide representation when there are accusations, even of highly questionable conduct, against Department of Education employees. Sagal-Cotler, 20 N.Y.3d at 676. Mr. Gullotta may have acted inappropriately but Respondents have not shown a factual basis to support the determination that Petitioner's conduct exceeded "highly questionable conduct" by such a degree as to no longer be covered by Section 3028. Indeed, Respondents fail to address the application of the Sagal-Cotler holding, despite the fact that the parties marked the matter off the calendar to await appellate review.

Petitioner's request for a judgment for indemnification is premature. A pre-condition for indemnification is the existence of a judgment or settlement of a claim approved by the Corporation Counsel. See generally McDermott v. N.Y.C., 50 N.Y.2d 211 (1980). No judgment or settlement has yet been made. Accordingly, it is

ORDERED that the motion to restore the case to the calendar is granted; and it is further

ORDERED that the motion to amend the petition to include a copy of all three complaints is granted; and it is further

[1]The Court notes that the Hearing Officer's findings are consistent with the findings here that there was no credible factual support for the Board of Education conclusion's about the events.

ADJUDGED that Respondents must reimburse Petitioner his attorney's fees and expenses in defending Stokel v. New York City Department of Education et. al., Index No.1113/2011 (Queens Co.) (Kevin Kerrigan, J.S.C.); Rivera v. Gullotta, Index No. 24886/2010 (Queens Co.) (Kevin Kerrigan, J.S.C.); and Rivera v. Gullotta, et. al., Index No. 2157/2011 (Queens Co.) (Kevin Kerrigan, J.S.C.); and it is further

ADJUDGED that the request to reimburse expenses related to indemnification is denied without prejudice.

Dated: Nov. 25, 2013

ENTER:

JOAN B. LOBIS, J.S.C.

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).