

Lewandowski v Clyde-Savannah Cent.Sch. Dist. Bd. of Educ.
2015 NY Slip Op 30015(U)
January 6, 2015
Supreme Court, Wayne County
Docket Number: 77253/2014
Judge: Dennis M. Kehoe
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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

APPLICATION OF ANNA V. LEWANDOWSKI,

Petitioner,

FOR A JUDGMENT PURSUANT TO CPLR
ARTICLE 78

-against -

CLYDE-SAVANNAH CENTRAL SCHOOL
DISTRICT BOARD OF EDUCATION, CLYDE-
SAVANNAH CENTRAL SCHOOL DISTRICT,
THERESA L. PULOS, SUPERINTENDENT
OF SCHOOLS OF THE CLYDE-SAVANNAH
CENTRAL SCHOOL DISTRICT and CRAIG
PAWLAK, PRINCIPAL OF THE CLYDE-
SAVANNAH JUNIOR SENIOR HIGH SCHOOL,

Respondents

Jeffrey Wicks, PLLC
Charles Steinman, Esq., of Counsel
Attorney for Petitioner

Harter Secrest & Emery LLP
Erin L. Beatty, Esq., of Counsel
Attorneys for Respondents

DECISION

Index No. 77253

2014

The Petitioner Anna V. Lewandowski has commenced an Article 78 proceeding, seeking a judgment annulling the determination of the Board of Education of the Clyde-Savannah School District which terminated her

probationary employment as a teacher in the Clyde-Savannah Central School District, directing her reinstatement as a teacher and awarding her back pay. The Clyde-Savannah Central School District Board and the Clyde-Savannah Central School District, together with Theresa L. Pulos, Superintendent of Schools of the Clyde-Savannah Central School District, and Craig Pawlak, Principal of the Clyde-Savannah Junior Senior High School (collectively referred to as "the Respondents"), have moved to dismiss the Verified Petition, which was filed on June 10, 2014. The grounds for this motion are: 1) failure to file a notice of claim pursuant to Education Law §3813(1); failure to exhaust administrative and contractual remedies; and 3) failure to state a cause of action upon which relief may be granted.

The Petitioner contends that the Board's decision to terminate her position as a probationary teacher was arbitrary and capricious. The Respondents maintain that the Petitioner's termination was proper, as she had violated the school districts' policy prohibiting teachers from "fraternizing" with students. Specifically, by a memorandum dated November 25, 2013, Respondent Pawlak advised the Petitioner that she had violated District policy by: 1) providing students with her cell phone

number and sending text messages to students; 2) transporting and “hanging out” with students; 3) socializing with students off-campus (including accompanying them on outings to such events as the New York State Fair and Sea Breeze amusement park); and 4) transporting students in her personal vehicle.

Previously, the Petitioner had been summoned to a meeting with Respondent Pawlak on September 4, 2013, regarding complaints allegedly made by some unidentified parents regarding the Petitioner’s actions during the previous summer. This conversation was followed by an email from Respondent Pawlak on October 23, 2013, advising the Petitioner that there had been parental complaints registered relating to her conduct. Following the November memorandum, (which did not refer to termination), the Petitioner was advised by then-Superintendent Pulas on December 20, 2013 that she would recommend to the Board at the February 12, 2014 meeting, that it terminate the Petitioner’s probationary employment, effective March 14, 2014. Subsequently, at the Petitioner’s request, the Superintendent provided the Petitioner with a written statement setting forth the reasons for her recommendation (Parenthetically, the Petitioner then proceeded to file a grievance pursuant to the collective bargaining

agreement on January 10, 2014, which was dismissed as untimely on January 17, 2014). On February 12, 2014, a majority of the Board voted to accept the Superintendent's recommendation, which was communicated to the Petitioner by letter dated February 14, 2014. The Petitioner's last official date of employment was March 14, 2014.

In the first Objection in Point of Law, the Respondents maintain that the Petitioner's claim is barred due to her failure to file a notice of claim. Education Law §3813(1) provides as follows:

"No action or special proceeding, for any cause whatever, except as hereinafter provided, ... involving the rights or interests of any district or any such school shall be prosecuted or maintained against any ... board of education ... unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim..."

Therefore, the filing of a notice of claim within three months after the claim has accrued is a condition precedent to commencement of an action

against a school district or board of education, and the failure to serve such a notice upon the proper parties constitutes “a fatal defect mandating dismissal.” (Parochial Bus System Inc. v Bd of Educ in the City of New York, 60 NY2d 539 (1983)).

It is clear that the Petitioner cannot meet her burden of pleading and proving in her Petition that she served a notice of claim. Her time to file a notice expired on June 14, 2014, three months after the effective date of her termination on March 14, 2014. Moreover, she cannot correct the deficiency, as Education Law §3813(2-a) limits a court’s authority to extend the time in which to file a notice of claim to the time in which the claimant must commence an action, which in this case is four months from the date of accrual.

However, decisional law has established that the filing of a notice of claim is not required in those proceedings in which the sole relief sought is equitable in nature. (See, e.g. McClellan v Alexander Cent. Sch. Bd. of Educ., 201AD2d 898 (4th Dept, 1994)). Therefore, if a claimant does not seek monetary damages, a notice of claim need not be filed. Here, the Petitioner maintains that her request for reinstatement as a teacher constitutes a prayer for equitable relief, and the notice requirements of

§3813 do not apply.

In response, the Respondents correctly maintain that the Petition includes a request in the *ad damnum* clause for an award of back pay, together with “other and further relief”. Therefore, they contend that the filing of a notice of claim is statutorily mandated. The Petitioner argues that the damages she seek are “incidental” to the equitable claim and are not “substantial”. This Court finds that such an argument misinterprets the meaning of the word “incidental” as used in the statute. The Fourth Department held in *McClellan* that a similar demand for money damages in that proceeding, and the subsequent award of back pay by the trial court, clearly indicated that the claimant sought more than equitable relief, and therefore the filing of a notice of claim was required. The situation presented in the instant case is the same.

In the alternative, the Petitioner maintains that she may sever her claim for monetary damages. However, no statutory or decisional law is offered to support this attempt to circumvent §3813. The Petitioner attempts to rely on the First Department's recent decision in *Rose v New York City Health & Hospital Corporations*, 122 AD3d 76 (1st Dept, 2014), in which the Court held that the dismissal of the Plaintiff's monetary claims for

failure to file a notice of claim was preferable to the dismissal of the Plaintiff's entire action. However, Rose was a "whistleblower" case, brought pursuant to the General Municipal Law, which involved public policy considerations inapplicable in this instance.

Finally, the Petitioner maintains that the Respondents were clearly on notice as to her objections to her termination, thereby satisfying the underlying purpose of §3813(1). She contends that the filing of a complaint with the New York State Division of Human Rights on January 1, 2014, a complaint which the Respondents subsequently addressed, makes it "abundantly" clear that the Respondents were fully aware of the Petitioner's claims and that the underlying purpose of the statute had therefore been served. However, the Court of Appeals has held that a claimant cannot evade the statutory filing requirements, even if the Respondents have knowledge of the incident. Compliance with the statute is a prerequisite to the right to sue. (See, e.g. Parochial Bus, supra, at 548).

Given the Court's decision regarding the consequences of the Petitioner's failure to file a notice of claim, the Court need not rule on the Respondents' remaining objections. Nevertheless, the Court believes it

wise to address those issues.

As to the Respondents' contention that the Petitioner's claim is barred by the Petitioner's failure to exhaust her administrative and contractual remedies, the Court rejects this argument. First, Education Law §310 states in part that "any person conceiving himself aggrieved may appeal by petition to the commissioner of education" (emphasis added). The language is permissive, not mandatory, and while the courts favor an administrative approach to resolution of problems in a school district, the decisions also recognize that, where a termination is final and binding, a claimant is not required to pursue such avenues of relief (See, e.g. *Kahn v New York City Dept of Education*, 18 NY3d 457 (2012)). As to the Petitioner's contractual remedies, a copy of the collective bargaining agreement was not submitted with the Respondents' motion papers, so that the Court cannot adequately review the grievance procedures or the Petitioner's alleged failure to follow those procedures. In any event, the Court agrees that the Petitioner's utilization of the grievance process was optional in light of the Board's decision.

Finally, the Respondents allege in the Third Objection that the Petitioner failed to state a cause of action in her Petition, thereby requiring

dismissal pursuant to CPLR §3211(a)(7). In determining such a motion, a court must afford the pleadings “a liberal construction, take the allegations of the complaint as true, and provide the plaintiff the benefit of every possible inference.” (*EBCI, Inc v Goldman Sachs & Co.*, 5 NY3d 11 (2005)). It is well-established that a probationary teacher “does not have a property right in his or her position”. (*Cnty Sch Bd of Dist. 26*, 43 NY2d 520 (1978)). Further, Education Law §2509(1)(a) provides in part that a probationary teacher’s services “may be discontinued at any time during such probationary period, on the recommendation of the superintendent of schools, by a majority of the board of education”.

The Court of Appeals has set forth the appropriate standard for the termination of probationary employees:

“The employment of a probationary appointee may be terminated at the end of the probationary term without a hearing and without reasons being stated and, in the absence of any allegation or demonstration that the termination was because of constitutionally impermissible reasons or prohibited by statute or policies established by decisional law, courts will not interfere with the discretion of the appointing officer unless

the action complained of was arbitrary and capricious.”

(Talamo v Murphy, 38 NY2d 637).

Put another way, a probationary employee may be terminated “at any time and for any reason unless (she) establishes that the termination was for a constitutionally impermissible purpose, violative of statute, or done in bad faith.” *(Frasier v Bd of Educ of City Sch. Dist of City of New York, 71 NY2d 763, 765 (1984)).*

This Court has carefully reviewed the allegations set forth in the Petition. As Petitioner contends, she was rated as an excellent teacher during her first year of service. However, allegations regarding her inappropriate interactions with students during the following summer and into the next school year ultimately led to her termination.

Without setting forth the termination process in detail, it is clear that the Respondents followed the mandated procedures, culminating in the Board’s decision to terminate. The crux of the Petitioner’s argument is that the decision itself was made in bad faith. She maintains that other teachers engaged in the same sort of activities with students and were not disciplined. (However, it appears that those individuals were tenured teachers, for whom the scrutiny process is different).

This Court may have reservations regarding the need for the termination of Ms. Lewandowski, but that is not the point in such a case as this. Courts are not permitted to “second guess” the decisions of educational institutions. “Judicial review of the determination to discharge the probationary employee is limited to an inquiry as to whether the termination was made in bad faith.” (*Johnson v Katz*, 68 NY2d 649 (1986)). It is this Court’s determination that, even affording the benefit of every favorable inference to the Petitioner, her allegations taken as a whole do not rise to the level of bad faith as required by decisional law. Therefore, the Petitioner has failed to meet her burden of proof, in that she has not alleged any conduct on the part of the Respondents which would permit the Court to annul her termination and to direct her reinstatement as probationary teacher.

Counsel for the Respondents is directed to submit a proposed Order and Judgment consistent with this Decision, on notice to counsel for the Petitioner.

Dated: January 6, 2015
Lyons, New York

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SUPREME AND COUNTY COURT



Honorable Dennis M. Kehoe
Acting Supreme Court Justice