COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 37

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In the Matter of the Application of
JEFFREY HORNE,

Index No. 651359/2018

Motion Sequence No. 001

Petitioner,

for Judgment pursuant to Art. 78 of the CPLR,

- against -

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

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ENGORON, J.:

In this article 78 proceeding, petitioner Jeffrey Horne seeks a judgment declaring that respondent the Department of Education of the City of New York (DOE) acted arbitrarily and capriciously by continuing to "code" him as ineligible for per session work, despite a previous court determination annulling an unsatisfactory rating (U-rating) for the 2010-2011 school year. Petitioner also seeks a coding change to reflect his eligibility for per session work, expungement of his unsatisfactory rating, monetary damages, costs and attorney's fees.

Respondent cross-moves, pursuant to CPLR 3211 (a) (5) and (7), to dismiss the petition as barred by the statute of limitations and the doctrines of res judicata and collateral estoppel and for failure to state a claim.

Background

In a prior proceeding, petitioner challenged the U-rating that he received for the 2010-2011 school year. By decision and order dated October 21, 2016 (Prior Order), the court granted the petition, annulled the U-rating as arbitrary and capricious and directed the DOE to expunge the U-rating from petitioner's record (*Matter of Horne v Board of Educ. of the City Sch. Dist. of*

the City of N.Y., 53 Misc 3d 1220[A], 2016 NY Slip Op 51756[U] [Sup Ct, NY County 2016]). Nonetheless, petitioner claims that he "applied in January 2018 for per session work and was advised that he is still ineligible and continues to be ineligible despite the Court ruling" (petition, ¶ 19), because his name is "coded" (*id.*, ¶ 25).

In his affidavit in opposition to the cross motion, petitioner explains that he "ha[s] been prevented from working per session and [has] been denied promotional opportunities because [his] name is coded" (Horne aff, ¶ 2). He states that in December 2017, he contacted the Human Resources Department and, based on the Prior Order, requested to be reinstated as a supervisor. He avers that he was advised "that the Superintendent Rosemary Mills would not accept a supervisor with a previous U rating" (*id*, ¶ 3). In addition, petitioner states that, in January 2018, he attempted to be reinstated as a supervisor for the Evening Teen Center and "was told by the Director Michelle Singer that all supervisors must have a previous satisfactory rating" (*id.*). Petitioner alleges that he also "approached Mark Rampersant, Deputy Director and CEO for Safety about a supervisory position with the Office of Safety, but was never given an opportunity to supervise based on the U rating" (*id.*).

Analysis

Petitioner argues that, even though the 2010-2011 U-rating has been annulled, respondent continues to use it to deny him per session work and promotional opportunities and that its decision to do so was arbitrary and capricious. Respondent argues that the petition should be dismissed, as barred by the doctrines of res judicata and collateral estoppel, because petitioner is attempting to relitigate the 2010-2011 U-rating under the pretense of challenging an alleged decision not to hire him for per session work in January 2018. In addition, respondent contends that petitioner's claims concerning the 2010-2011 school year are barred by the four-month

statute of limitations of CPLR 217. Lastly, respondent argues that the petition must be dismissed, because petitioner's claim, that his name is coded, is vague, conclusory and unsupported by any evidence.

On a motion to dismiss for failure to state a claim, "the [petition] must be construed in the light most favorable to the [petitioner] and all factual allegations must be accepted as true" (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]; *see Matter of Y & O Holdings (NY) v Board of Mgrs. of Exec. Plaza Condominium*, 278 AD2d 173, 173 [1st Dept 2000]). In addition, "affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims" (*Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *see People v Northern Leasing Sys., Inc.*, 60 Misc 3d 867, 875 [Sup Ct, NY County 2017], *affd as mod* 169 AD3d 527 [1st Dept 2019] ["petitioners may rely on admissible affidavits to supplement the petition"]).

Pursuant to the doctrine of res judicata, "once a claim has been finally determined on the merits in a proceeding where the opponent of preclusion has had a full and fair opportunity to litigate the claim," a claim arising out of the same transaction or series of transactions is precluded (*Thomas v City of New York*, 239 AD2d 180, 180 [1st Dept 1997]). Collateral estoppel precludes a party from relitigating an issue when:

> "(1) the issues in both proceedings are identical; (2) the issue in the prior proceeding was actually litigated and decided; (3) there was a full and fair opportunity to litigate in the prior proceeding; and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits"

(*Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 201 [1st Dept 2011]).

Pursuant to CPLR 217 (1), an Article 78 proceeding "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner

. . . ." "'Finality' requires that the petitioner be aggrieved by the determination, and to be considered 'binding', notice must also have been provided" (*Matter of Vadell v City of New York Health & Hosps. Corp.*, 233 AD2d 224, 225 [1st Dept 1996] [internal citations omitted]. "The burden rests on the party seeking to assert the Statute of Limitations as a defense to establish that its decision provided notice more than four months before the proceeding was commenced" (*Matter of Raffaele v Town of Orangetown*, 224 AD2d 430, 431 [2d Dept 1996]; *see Matter of Vadell*, 233 AD2d at 225).

Here, neither the doctrine of res judicata nor collateral estoppel bars petitioner's claim. Petitioner is not seeking to relitigate the validity of the 2010-2011 U-rating. That claim/issue was fully litigated and resolved in petitioner's favor. Rather, petitioner now seeks to have the code indicating that he received a U-rating changed in accordance with the Prior Order. Since petitioner's current claim arises from respondent's alleged refusal to abide by the Prior Order (*i.e.* its use of a code to penalize petitioner for the annulled U-rating [*see* Horne aff, ¶ 3]), "the conduct complained of now could not have been the basis [of the prior proceeding]" (*IDT Corp. v Tyco Group, S.A.R.L.*, 104 AD3d 170, 178 [1st Dept 2012], *revd on other grounds* 23 NY3d 497 [2014] [finding that neither res judicata nor collateral estoppel barred claims, where the "current claims ar[o]se from the alleged actions and omissions of the defendants *after*" the conclusion of the prior action]; *see O'Brien v City of Syracuse*, 54 NY2d 353, 358 [1981] [finding that certain allegations "[were] not barred by *res judicata* to the extent that they describe acts occurring after the [previous] lawsuit"]). Therefore, petitioner's claim is not barred by either res judicata or collateral estoppel.

Nor has respondent met its burden in establishing that the proceeding is time-barred. Again, petitioner is not challenging the 2010-2011 U-rating. He is challenging respondent's

continued use of the annulled rating to deprive him of employment opportunities. Petitioner states that in December 2017/January 2018 he sought various employment opportunities and was denied based on the annulled U-rating (Horne aff, ¶ 3). The four-month statute of limitations began to run when petitioner's requests "[were] unequivocally denied" (*Matter of Eldaghar v New York City Hous. Auth.*, 34 AD3d 326, 327 [1st Dept 2006] [citation omitted]). Therefore, it appears that the instant Article 78 proceeding, commenced on March 21, 2018, is timely.

Lastly, "[a]ssuming the truth of the petition's material allegations and the reasonable inferences therefrom" (*Matter of Y & O Holdings (NY)*, 278 AD2d at 173), the petition sufficiently states a claim that respondent has engaged in arbitrary and capricious conduct in continuing to use the annulled U-rating to code petitioner's name, thus making him ineligible for per session work and promotional opportunities (*see* petition, ¶¶ 19, 25; *see also Matter of Pepin v New York City Dept. of Educ.*, 45 Misc 3d 1221[A], 2014 NY Slip Op 51653[U] [Sup Ct, NY County 2014] [finding that to the extent respondent used a problem code based on an unsupported U-rating, "such basis for the code [was] without regard to the facts and arbitrary"]). Even assuming the petition was not sufficient to withstand respondent's CPLR 3211(a) (7) cross motion, petitioner remedied any deficiencies in the complaint by submitting a detailed affidavit in opposition to the cross motion (*see Rovello,* 40 NY2d at 635; *People*, 60 Misc 3d at 875).

For the foregoing reasons, the cross motion to dismiss the petition is denied.

Accordingly, it is hereby

ORDERED that respondent's cross motion to dismiss is denied; and it is further

ORDERED that respondent is directed to serve an answer to the petition within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a [preliminary] [~~status~~] conference in Room 418, 60 Centre Street, on Jun. 25, 2019, at 10 a.m./p.m.

Dated: 6/5/19

ENTER:

J.S.C.

HON. ARTHUR F. ENGORON