SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON **PART** IAS MOTION 37EFM

Justice

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GERMAN SANCHEZ,

Petitioner,

- v -

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK

Respondent.

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INDEX NO. 154399/2020

MOTION DATE 11/04/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for CPLR ARTICLE 78 RELIEF.

Upon the foregoing documents, the instant CPLR Article 78 petition is denied and dismissed for the reasons stated hereinbelow.

Background

The Players

Petitioner, German Sanchez, is an employee of co-respondent the Department of Education of the City of New York (DOE). DOE is responsible for the operation, management, and control of the New York City public education system (NYSCEF Doc. 1-2).

The Underlying Facts

In 1999, DOE hired petitioner as a physical education teacher; he also coached basketball, softball, and volleyball. Petitioner apparently received satisfactory annual professional performance reviews, and, in summer 2002, he received tenure. (NYSCEF Doc. 1).

During the 2016-2017 academic year, petitioner taught at Marie Curie High School, located at 20 West 231st Street, Bronx, NY 10463. On December 5, 2016, petitioner was apparently compelled to take a leave of absence due to severe migraine or "cluster" headaches. On January 10, 2017, petitioner emailed Marie Curie High School's payroll secretary, Antonella Mattel, to ask if he could request a leave of absence to the end of the academic year (and whether said extension of his leave would require medical documentation) or if he would have to resign. Marie Curie High School's principal, Mr. Rodney Fisher, responded to petitioner's email, informing petitioner that he had consulted with HR and that petitioner needed to resign from DOE via email. On January 10, 2017, petitioner sent an email stating that he was resigning, effective immediately. Petitioner's migraines continued until March 2017. Petitioner discovered

that the medical problem arose from ventilation; his office and the gym were both located in a basement with no ventilation. (NYSCEF Doc. 1, 8, and 9).

In summer 2017 petitioner requested that DOE revoke petitioner's January 2017 resignation and reemploy petitioner. Thus, DOE conducted an investigation, as petitioner's name was "coded" due to his prior failure to provide thirty days' notice of his January 2017 resignation. On September 5, 2017, pursuant to Chancellor's Rule C-205 Items 31 and 26(a), DOE reinstated petitioner as a new hire without tenure. (NYSCEF Doc. 1 and 7).

During the 2017-2018 and 2018-2019 academic years, petitioner worked as a physical education teacher at Ellis Preparatory Academy High School, located at 99 Terrace View Avenue, Bronx, NY 10463. Petitioner received highly effective ratings for both academic years. In summer 2019, petitioner was "excessed" and went into the Absent Teacher Reserve ("ATR"). In September 2019, as a member of the ATR pool, petitioner received an assignment to the Collegiate Institute for Math and Science High School, located at 925 Astor Avenue, Bronx, NY 10469. (NYSCEF Doc. 1).

In fall 2019 petitioner apparently learned that he did not have tenure and was considered a probationary employee. Petitioner thus filed a grievance, which Chancellor's Representative Marcel Kshensky, EdD denied, as untimely and on the merits, by way of a decision (the "Contract Grievance Decision," NYSCEF Doc. 7) dated February 5, 2020 and apparently received on February 10, 2020. To date, petitioner has not appealed this Contract Grievance Decision. As of June 3, 2020, petitioner continues to teach, now remotely. (NYSCEF Doc. 1).

Petitioner now asserts that respondents should be estopped from relying on petitioner's lack of thirty days' notice of his resignation in supporting its position on petitioner's lack of tenure. Petitioner contends that his three-year probationary period ended in 2002. He asserts that he immediately resigned on January 10, 2017, rather than taking a medical leave of absence for thirty days, due to instructions from Principal Rodney Fisher and HR. Petitioner also claims that DOE cannot claim that petitioner forfeited his tenure by resigning in January 2017 because DOE has since rescinded said resignation. According to petitioner, even if DOE understood that petitioner's probationary period commenced in September 2017, pursuant to New York State Education Law § 2573, said probationary period would have ended in September 2019, as his many prior years of tenured teaching entitled him to one year of "Jarema credit." (NYSCEF Doc. 1).

Thus, petitioner (1) alleges that DOE has acted arbitrarily and capriciously in determining that petitioner is a probationary teacher, and (2) asserts that DOE should consider petitioner a tenured teacher or a "tenured teacher by estoppel" (NYSCEF Doc. 1).

The Instant Special Proceeding

On June 3, 2020, petitioner commenced the instant CPLR Article 78 special proceeding against respondents for (1) monetary and equitable relief; (2) a declaration that the actions taken against petitioner were arbitrary and capricious; (3) a declaration that petitioner is a tenured teacher with all rights and privileges thereof pursuant to the New York State Education Law, Commissioner's Regulations, Collective Bargaining Agreement ("CBA"), and all other rules and regulations; (4)

restoration of petitioner's seniority effective to 1999; (5) a judgment for all past salary and benefits lost retroactively; and (6) attorney's fees, costs and disbursements (NYSCEF Doc. 2). Petitioner claims that "recission is the voiding of a contract," and, thus, DOE's recission of petitioner's resignation should have restored petitioner's pre-resignation tenured status (NYSCEF Doc. 17, at 8).

In response, respondents cite to Chancellor's Rule C-205, Item 31 ("Item 31"), which reflects State Education Law Section 3019a and "states that employees who resign without submitting timely notice will not have their tenure restored should they be reinstated" (NYSCEF Doc. 6, at 6). Respondents assert that, pursuant to Chancellor's Rule C-205, Item 29 ("Item 29"), a teacher would have received tenure upon reemployment if that teacher both provided timely notice of his prior resignation and requested reemployment within five years (NYSCEF Doc. 6, at 6).

Respondents note that petitioner did not appeal the subject Contract Grievance Decision, which stated that Item 31 "supersedes Item 29 and indicates that employees who resign without submitting timely notice will not have their tenure restored should they be reinstated" (NYSCEF Doc. 7). Respondents assert that petitioner "did not exhaust the administrative and contractual remedies;" see City Emps. Union Local 237 v City of New York, 28 AD3d 230, 231 (1st Dept. 2006) (NYSCEF Doc. 6, at 7). Respondents further claim that the statute of limitations bars the instant petition; CPLR 217 requires that a CPLR Article 78 petition to challenge an administrative decision be brought within four months of the underlying claims, and petitioner's time to challenge the Contract Grievance Decision expired on June 10, 2020 (NYSCEF Doc. 6, at 10).

Discussion

It is well-settled that in a CPLR Article 78 special proceeding, the scope of judicial review is limited to the issue of whether the administrative action is rational. Pell v Board of Educ., 34 NY2d 222, 230-231 (1974). This Court may not disturb respondents' determination unless there is no rational basis for the exercise of discretion or it was arbitrary and capricious. Id. at 231. "The arbitrary or capricious test chiefly relates to … whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Id. This Court may not simply second-guess respondents.

Chancellor's Rule C-205, Item 28 states the following:

> WITHDRAWAL OF RESIGNATION GENERALLY 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 for failure to satisfy requirements. If the employee was untenured at the time of resignation, a three year probationary period will be required.

Chancellor's Rule C-205, Item 29 states the following:

> WITHDRAWAL OF RESIGNATION WITHIN FIVE YEARS BY TENURED STAFF Except for persons covered by Section 24 or subdivision 26b of this Regulation, a nonsupervisory pedagogical employee who had attained permanent tenure prior to the date of resignation shall, remain tenured and, upon written request, be permitted to withdraw such resignation subject only to medical examination and the approval of the Chancellor, provided that reinstatement is made on or before the opening of school in September next following five years after the effective date of resignation. If reinstatement is made after this date, a two year probationary period will be required. (emphasis supplied)

Chancellor's Rule C-205, Item 31 states the following:

> RETIREMENT AND REINSTATEMENT Except for persons covered by Section 24 of this Regulation, a pedagogical employee who desires to retire shall submit written notice to the principal or equivalent organizational unit head at least thirty calendar days prior to the effective date of retirement. (See Section 3019a of the Education Law.) Failure to submit such timely notice shall preclude subsequent restoration of the license, reinstatement to service or the issuance of a certificate valid for substitute service without the specific written authorization of the Executive Director of the Division of Human Resources.

Courts defer to judgments made by administrators in cases arising from educational administration, as decisions of "educational institutions involve the exercise of 'highly specialized professional judgment,'" Maas v Cornell Univ., 94 NY2d 87, 93 (1999). Respondents have not acted arbitrarily and/or capriciously, as petitioner failed to give thirty days' notice of his resignation, as Chancellor's Rule C-205, Item 31 required.

Furthermore, Cantres v Bd. of Educ., 145 AD2d 359, 360 (1st Dept. 1988), stated the following, in pertinent part: "an aggrieved union member whose employment is subject to the terms of a collective bargaining agreement entered into by his union and employer must first avail himself of the grievance procedure set forth in the agreement." This Court finds that petitioner has not exhausted his administrative and contractual remedies, as he did not appeal the Contract Grievance Decision pursuant to Article 22 of the CBA.

This Court has reviewed petitioner's other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, for the reasons stated herein, German Sanchez's instant CPLR Article 78 special proceeding against respondents, The Department of Education of the City of New York and (to the extent that it still exists) The Board of Education of the City School District of the City of New York, is hereby denied, and the Clerk is hereby directed to enter judgment denying and dismissing the instant petition.

11/24/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE