

**Ayngorn v New York City Dept. of Educ.**

2025 NY Slip Op 31066(U)

March 10, 2025

Supreme Court, New York County

Docket Number: Index No. 157487/2024

Judge: Verna L. Saunders

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

INDEX NO. 157487/2024

DIANA HOFMAN AYNGORN,
Petitioner,

MOTION SEQ. NO. 001

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION and
DAVID BANKS, CHANCELLOR of NEW YORK CITY
DEPARTMENT OF EDUCATION,
Respondents,

DECISION + ORDER ON
MOTION

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

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 9, 10, 11, 12, 13, 14, 15,
16, 17, 18

were read on this motion to/for ARTICLE 78

Petitioner, a speech language pathologist, commenced this proceeding seeking an order from
the court declaring respondents' decision to close petitioner's application for security clearance as
arbitrary and capricious and an abuse of discretion. Petitioner also seeks an order compelling
respondents to grant her security clearance to enable her to work as an independent provider for
educational vendors utilized by the New York City Department of Education ("DOE") to provide
specialized educational services.

Petitioner brought an action against respondents in January 2015 to remove her name from
the DOE's Ineligible Inquiry or problem code list and restore her eligibility to work for the DOE
under her personal license as a speech language pathologist. The January 2015 action was resolved
via Stipulation of Settlement (hereinafter, "Stipulation") wherein the Board of Education of the City
School District of the City of New York ("BOE") agreed to grant petitioner security clearance if she
"is nominated for employment with a BOE vendor provided that: (1) she is not an independent
provider, and (2) she is not a primary stakeholder in the BOE vendor." Petitioner sets forth that the
language in the stipulation was not intended to permanently bar her from working for a vendor
agency utilized by DOE. She further articulates that workers as herself are commonly referred to as
"independent providers," however, they operate under the authority, supervision, and discretion of
the agency that employs them. Petitioner asserts that in March 2024, she received notification that
she was nominated to a Speech Pathologist position with Salveo Healthcare Solutions Inc.
(hereinafter, "Salveo"), an independent agency providing educational services to the DOE students
who require them. After completing the requisite security clearance process, argues petitioner, she
received a letter from the Office of Personnel Investigation (hereinafter, "OPI"), a Division within
the DOE, indicating that as per the terms of the stipulation, petitioner is precluded from working as
an independent provider. Petitioner contends that OPI's interpretation of the stipulation and resulting
determination are at odds with the thrust of the stipulation, which was not to bar petitioner from
working as an independent provider for another vendor agency. She posits that the stipulation

permitted petitioner to obtain security clearance necessary to work as an independent provider for a vendor agency so long as she neither establish and operate a vendor agency herself nor be a primary stakeholder in any such vendor agency hired by the DOE. Hence, OPI's decision to close her security clearance application without denying the application for security clearance outright is arbitrary and capricious, and an abuse of discretion, argues petitioner. She maintains that OPI's interpretation contravenes the stipulation's terms and the motives of the parties upon execution of the stipulation (NYSCEF Doc. No. 1, *petition*). As relevant to this application, petitioner submits a copy of the stipulation; respondents' denial of petitioner's security clearance application; an e-mail exchange discussing proposed stipulation language, among other things (NYSCEF Doc. Nos. 2-6).

Respondents oppose petitioner's application, and cross-move, pursuant to CPLR 3211, for an order dismissing petitioner's application. They assert that to the extent petitioner claims that respondents' interpretation of the stipulation was arbitrary, capricious, and an abuse of discretion or made in bad faith, same is not supported by the record. Contrary to petitioner's contentions, respondents articulate that the stipulation unambiguously states that petitioner would receive security clearance "if she is nominated for employment with a [...] vendor provided that she is not an independent provider." Respondents further assert that if the stipulation was not intended to bar petitioner from all independent provider roles, and that individuals who work for DOE vendors are commonly referred to as "independent providers", she could have made that distinction explicitly clear in the stipulation. Next, respondents posit that the intent of the parties is best demonstrated by the terms of the stipulation itself and hence, the court should not countenance petitioner's attempt to put forth a copy of a 2015 e-mail correspondence between the parties to demonstrate the parties' intention for entering into the stipulation during that time. As such, argues respondents, OPI's interpretation of the stipulation was reasonable, and it was not an abuse of discretion to close petitioner's application. Lastly, respondents contend that the petition should also be dismissed because petitioner has failed to allege any actionable, final agency determination because her application for security clearance was administratively closed with no determination made. Since petitioner's security clearance application has neither been granted nor denied, claim respondents, this Article 78 proceeding is premature and improper (NYSCEF Doc. No. 11, *memo of law in opposition and cross-motion to dismiss*).

In reply and in opposition to the cross-motion, petitioner sets forth that an ambiguity exists as to the term "independent provider" as used in the stipulation. She contends that before the stipulation was executed, respondents wanted to ensure that petitioner did not operate another independent provider agency herself or operate individually as an independent provider hired directly by the DOE, rather than restrict petitioner's ability to work as an independent provider with an agency contracted by an organization that has been hired by the DOE. Next, petitioner asserts that respondents' decision to administratively close her security clearance application operates as a final agency determination because the aforementioned ambiguity of the term "independent provider" will allow respondents to continue denying her application for security clearance in perpetuity (NYSCEF Doc. No. 11, *petitioner's opposition to cross-motion*).

Even though respondents submitted a sur-reply, same will not be considered in the disposition of this application since absent leave of the court, respondents have no right to submit a sur-reply in support of their cross-motion.

The standard of review in this Article 78 proceeding is whether the respondents' determination "was made in violation of lawful procedure, was affected by an error of law or was

arbitrary and capricious or an abuse of discretion” (CPLR 7803[3]). A special proceeding commenced pursuant to Article 78 to challenge an administrative agency’s final determination, such as this one, must be made within four months after the determination becomes final (see CPLR 217[1]). Whether an administrative decision is arbitrary or capricious depends on whether the determination “is without sound basis in reason and is generally taken without regard to the facts” (*Matter of Galaxy Bar & Grill Corp. v New York State Liq. Auth.*, 154 AD3d 476, 482 [1st 2017], quoting *Pell v Board of Education*, 34 NY2d 222, 231 [1974]). A rational or reasonable basis for an administrative agency determination exists if there is evidence in the record to support its conclusion (see *Sewell v New York*, 182 AD2d 469, 473 [1st Dept. 1992]). As such, “[i]f the determination is rational, it must be upheld, even though the court, if viewing the case in the first instance, might have reached a different conclusion” (*Sullivan County Harness Racing Ass’n v Glasser*, 30 NY2d 269, 278 [1972]).

In determining a motion to dismiss pursuant to CPLR 3211, “the pleading is to be afforded a liberal construction. [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal citations omitted].)

“A contract is unambiguous if, on its face, it is reasonably susceptible of only one meaning” (*B.D. v E.D.*, 218 AD3d 9, 14 [1st Dept 2023]). “Ambiguity is determined within the four corners of the document; it cannot be created by extrinsic evidence that the parties intended a meaning different than that expressed in the agreement and, therefore, extrinsic evidence may be considered only if the agreement is ambiguous” (*Brad H. v City of New York*, 17 NY3d 180, 186 [2011]).

As a threshold matter, to the extent respondents contend that the instant motion is premature because petitioner has not exhausted her administrative remedies, respondents fail to articulate the administrative remedies available to petitioner. As such, that argument is unavailing.

Next, applying the above principles, petitioner fails to meet her burden to establish that the term “independent provider” as used in the Stipulation of Settlement is ambiguous. A stipulation of settlement is a contract that is enforceable according to its plain language (see *Matter of Banos v Rhea*, 25 NY3d 266, 276 [2015]). Here, the terms of the Stipulation of Settlement provide that OPI will clear petitioner for employment with defendants if “she is not an independent provider” and “she is not a primary stakeholder in the BOE vendor.” Inasmuch as petitioner acknowledges that she was nominated to work with Salveo Healthcare Solutions Inc. as an independent provider, OPI’s interpretation and determination in regard to petitioner’s security clearance application was neither arbitrary and capricious nor an abuse of discretion. To the extent petitioner argues that the Stipulation of Settlement was not intended to prohibit her from all independent provider roles, and that individuals employed with DOE vendors are commonly referred to as independent providers, petitioner, represented by counsel, could have made such distinction before the Stipulation of Settlement was executed. Since the term independent provider is not ambiguous, extrinsic evidence, in the form of a copy of the parties’ 2015 e-mail correspondence during the Stipulation of Settlement negotiations proffered by petitioner, will not be considered (see *Savoy Mgt. Corp. v Leviev Fulton Club, LLC*, 51 AD3d 520, 521 [1st Dept 2008]).

In light of the foregoing, the cross-motion is rendered moot. Accordingly, it is hereby

**ORDERED** that the petition seeking an order from the court declaring that respondents' decision to deny her application for security clearance as arbitrary and capricious and an abuse of discretion is denied; and it is further

**ORDERED** that the cross-motion seeking to dismiss the petition is denied as moot; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for respondents shall serve a copy of this decision and order, with notice of entry, upon petitioner.

This constitutes the decision and order of this court.

March 10, 2025

  
HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>		<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE