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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____

Justice

Index Number : 100819/2012
HICKS, DEBORAH
vs.
DEPT. OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

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

is decided in accordance with the annexed decision.

RECEIVED
JUN 14 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

FILED
JUN 18 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 6/12/12

CK , **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
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of DEBORAH HICKS,

Petitioner,

Index No. 100819/12

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules and Claims Under the Executive Law and the Administrative Code of the City of New York,

-against-

The Department of Education of the City of New York and the City of New York,

Respondents.

----------x

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Petitioner brings this petition seeking a declaration that respondent the Department of Education of the City of New York (the "DOE")'s designation of petitioner as "resigned or retired with charges pending" was arbitrary and capricious and should be removed and that the charges brought should be declared null and void or, in the alternative, if the court finds that the disciplinary charges were timely commenced and served upon petitioner while she was still employed, a declaration that she is entitled to due process under Education Law §3020-a as well as the applicable collective bargaining agreement and/or a "name-clearing" hearing, and damages

for lost income, pain and suffering and injury to reputation. For the reasons set forth more fully below, the court finds that the charges were timely commenced and the petitioner is entitled to a hearing under Education Law §3020-a.

The relevant facts are as follows. Deborah Hicks was a tenured special education teacher assigned to the Restart program, an alternative education program at St. Luke's -Roosevelt Hospital Center in New York City at the time of the relevant incidents. She had been employed by the DOE for more than 28 years. In mid-March 2011, petitioner allegedly engaged in a number of inappropriate actions with certain students. The Special Commissioner of Investigation for the New York City School District ("SCI") subsequently commenced an investigation and substantiated the alleged incidents. Two more incidents were reported in April and SCI again conducted an investigation. SCI interviewed various witnesses. Petitioner refused to be interviewed about the alleged incidents. Once again, SCI substantiated the allegations and stated so in a letter dated July 8, 2011. The letter recommended unspecified "appropriate disciplinary action." On September 20, 2011, petitioner met with Restart Principal Joan M. Indart-Etienne, who gave petitioner the SCI report and a letter which stated that "You are hereby advised that the above-described conduct may lead to further disciplinary action, including an unsatisfactory rating, and disciplinary charges that could lead to the termination of your employment." There is a place on the letter for petitioner to sign and acknowledge receipt but the copy submitted by the DOE is blank. On September 27th, the DOE attempted to personally serve petitioner with a Notice of Charges that Principal Indart-Etienne had decided to bring against her. Those attempts were unsuccessful so petitioner was served with the Notice of Charges by certified mail, return receipt requested, and by regular mail on September 27, 2011.

Plaintiff apparently submitted her retirement application that same day but the receipt for that application indicates her retirement would not be effective until the next day, September 28, 2011. Petitioner alleges that she had "initially intended on retiring effective July 1, 2011" but was "advised to wait until the completion of an investigation by the SCI." Petitioner does not state who so advised her or whether such advice was given orally or in writing.

As an initial matter, the petition is dismissed as against the City as it is not and was not petitioner's employer and therefore is not a proper party to this action.

Petitioner's claims turn on when she was served with the charges and when she retired. Petitioner alleges that she retired on September 27, 2011, that no charges were pending against her at the time and that therefore the indication on her record that she "resigned or retired with charges pending" is incorrect. Respondents argue that the charges against petitioner were served (although not received) while she was still employed on September 27th, and that her retirement was not effective until the next day and that therefore, the indication on her record is accurate.

The court denies the petition insofar as it seeks a declaration that the DOE's designation of petitioner as having "resigned or retired with charges pending" was arbitrary and capricious and insofar as it seeks removal of that designation. Respondent DOE served petitioner with charges on September 27, 2011. Under CPLR §2103(b) and (c), service by mail is complete upon mailing, not receipt. As a result, the charges were pending against petitioner as of September 27th. In addition, the sole piece of documentary evidence regarding petitioner's retirement date lists the effective date as September 28th, not September 27th. Therefore, charges were pending against respondent at the time of her retirement and the designation that she retired

with charges pending is accurate. Since it is accurate, it cannot be arbitrary and capricious, nor should such designation be removed.

Petitioner's request for a hearing pursuant to Education Law §3020-a is granted. Under §3020-a, an employee who is "enjoying the benefits of tenure" may have charges filed against her. That section then provides for procedures by which that employee can request a hearing and then provides for the conduct of the hearing. Petitioner alleges, and the DOE concedes, that she did request such a hearing and her request was denied. Petitioner was employed and tenured at the time charges were filed against her. Nothing in the statute requires the employee to still be employed or tenured at the time of the hearing. The statute only requires that the employee be "enjoying the benefits of tenure" at the time the charges are filed. Moreover, when petitioner filed her retirement application on September 27th, she did not know that charges were pending against her and might not have voluntarily retired had she known that fact. Although the DOE is correct that when a tenured teacher retires voluntarily, she relinquishes her tenure rights (*see Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 N.Y.2d 446 (1993)), respondent does not city any authority, and the court has found none, for the preposition that those rights include the right to a §3020-a hearing. Therefore, the DOE is ordered to hold a §3020-a hearing.

Finally, the court turns to petitioner's request for a "name-clearing hearing." This request is moot in light of the fact that this court has ordered a §3020-a hearing. Petitioner's request for damages for the allegedly arbitrary and capricious actions of the DOE is also denied as moot as this court has found that the DOE did not act arbitrarily or capriciously.

Accordingly, the petition is granted only to the extent that the DOE is ordered to hold a

§3020-a hearing on the charges pending against petitioner. This constitutes the decision, order and judgment of the court.

Dated: 6/12/12

J.S.C.