

**Matter of Joyce v New York City Dept. of Educ.**

2017 NY Slip Op 30636(U)

April 3, 2017

Supreme Court, New York County

Docket Number: 158793/16

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice

PART 13

In the Matter of the Application of,

JOHN JOYCE, Petitioner,

INDEX NO. 158793/16
MOTION DATE 02-08-2017
MOTION SEQ. NO. 001
MOTION CAL. NO.

for a Judgment pursuant to Art. 78 of the Civil Practice Laws and Rules

-against -

NEW YORK CITY DEPARTMENT OF EDUCATION; CARMEN FARIÑA, CHANCELLOR OF NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

The following papers numbered 1 to 8 were read on this Article 78 petition and cross-motion to dismiss:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits cross motion
Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, and rows for 1-4, 5-6, 7, 8.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered and Adjudged that this Article 78 petition seeking to vacate the Respondents' June 21, 2016 determination denying Petitioner's request for a rescission of resignation, is granted. The remainder of the relief sought in the petition for back-pay, benefits, costs, and reasonable attorney fees, is denied. Respondent's cross-motion pursuant to CPLR §7804[c] and CPLR §3211[a][7] to dismiss the petition for failure to effectuate proper service and to state a cause of action, is denied.

On or about May 31, 2011, Petitioner a tenured teacher as of 1998, received his first "Unsatisfactory" rating for the 2010-11 school year. Petitioner resigned as of August of 2011. Petitioner appealed the "Unsatisfactory" rating and was notified by letter dated April 13, 2012 that the appeal was denied. By letter dated July 29, 2012 Petitioner sought to withdraw and rescind the resignation, and to be reinstated by the Respondent, New York City Department of Education (hereinafter individually referred to as DOE) to a teaching position, but received no response.

Petitioner previously brought a special proceeding in Supreme Court, New York County filed under Index # 103515/2012, Motion Seq. 001. The petition sought a judgment annulling and reversing DOE's denial of Petitioner's appeal of an Unsatisfactory rating at the annual performance review for the 2010-11 school year, and the DOE's refusal to allow Petitioner to rescind and withdraw his resignation letter and return to his tenured teaching position effective for the school year 2012-13.

The May 6, 2013 Order and Judgment of this Court in the special proceeding brought under Index # 103515/2012, granted the relief sought in the petition only as to rescinding the resignation letter, but denied the remainder of the petition (Pet. Exh. A).

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

Petitioner sent letters dated June 27, 2013 and August 29, 2013, to the Division of Human Resources for the DOE seeking compliance with the May 6, 2013 Decision and Order (Pet. Exh. B and C), and received no response. On September 6, 2013, DOE filed a Notice of Appeal, but never perfected the appeal and it has been abandoned. Petitioner retained his current attorney and on January 22, 2016 he sent an e-mail with a letter attachment in compliance with the May 6, 2013 Decision and Order (Pet. Exh. D). On March 17, 2016, DOE advised Petitioner's counsel that a new application for rescission was required for Petitioner to apply for and be hired into a vacancy in the DOE, and sent an e-mail link for the application.

On June 8, 2016, Petitioner filed Motion Sequence 004, a motion for contempt, in the special proceeding brought under Index # 103515/2012. While the motion for contempt was still pending, Respondents by letter dated June 21, 2016, denied Petitioner's request to withdraw his resignation and obtain tenure. The letter states in relevant part, "The Chancellor is denying your request because you received an unsatisfactory rating on your Annual Professional Performance Review for the 2010-2011 school year" (Pet. Exh. E). The November 30, 2016 Decision and Order of this Court filed under Motion Sequence 004 in the special proceeding brought under Index # 103515/2012, denied the motion for contempt.

This petition pursuant to Article 78 seeks an order and judgment vacating the Respondents' June 21, 2016 determination denying Petitioner's request for a rescission of resignation, on the grounds that it is arbitrary and capricious, made in abuse of discretion, failed to follow applicable procedures and constituted contemptuous disregard for this Court's Order, together with back-pay, benefits, costs, and reasonable attorney fees.

Respondents oppose the petition and cross-move pursuant to CPLR §7804[c] and CPLR §3211[a][7] to dismiss this proceeding for failure to effectuate proper service and to state a cause of action. Respondents argue that pursuant to CPLR §7804[c] the petition was supposed to be served on the Respondents at least twenty days before the petition was noticed to be heard and that Petitioner's failure to do so is a jurisdictional defect warranting dismissal.

The service of a petition less than twenty (20) days before the return date as required under CPLR §7804[c], "are mere irregularities that do not require dismissal of the proceeding" (*Lavin v. Lawrence*, 54 A.D. 3d 412, 862 N.Y.S. 2d 603 [2<sup>nd</sup> Dept., 2008] citing to *Matter of Crawford v. Codd*, 54 A.D.2d 878, 388 N.Y.S. 2d 1007 [1<sup>st</sup> Dept., 1976]).

Respondents have not stated a basis to dismiss this proceeding pursuant to CPLR §7804[c]. Petitioner commenced the special proceeding October 18, 2016 with an initial return date of November 4, 2016. Respondents claim that Petitioner did not serve the papers until October 20, 2016 which is less than twenty days before the initial return date. The early service of the petition was a "mere irregularity." Respondents were not prejudiced by the early service of the petition which was adjourned in submissions.

Respondents also seek to dismiss this proceeding pursuant to CPLR §3211[a][7] for failure to state a cause of action.

CPLR §3211[a][7], applies to dismissal of a special proceeding for failure to state a cause of action and requires a reading of the pleadings to determine whether a legally cognizable cause of action can be identified (*Leon v. Martinez*, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994] and *Lally v. Johnson City Cent. School Dist.*, 105 A.D. 3d 1129, 962 N.Y.S. 2d 508 [3<sup>rd</sup> Dept., 2013]). Pleadings that consist of bare legal conclusions and factual assertions which are clearly contradicted by documentary evidence will not be presumed to be true and are susceptible to dismissal (*Godfrey v.*

Spano, 13 N.Y. 3d 358, 920 N.E. 2d 328, 892 N.Y.S. 2d 272 [2009] and Gottlieb v. City of New York, 129 A.D. 3d 724, 10 N.Y.S. 3d 542 [2<sup>nd</sup> Dept., 2015]).

Respondents argue that the petition fails to state a cause of action and the denial of Petitioner's request to withdraw his resignation is rationally based on the "Unsatisfactory" rating received during the 2010-2011 school year, his final year before retirement. It is argued by Respondents that the decision to deny Petitioner's withdrawal of resignation is within the Chancellor's discretion pursuant to Chancellor's Regulation 205(29), which specifically states that resignation is "subject only to a medical examination and the approval of the Chancellor." Respondents also argue that there was no waiver of the right to deny Petitioner's withdrawal of resignation because the May 6, 2013 Decision and Order filed under Index # 103515/2012, did not provide any specific time period for Respondents to initiate review procedures.

In support of the petition and opposition to the cross-motion Petitioner argues that the Respondents' delay of three years, one month and fifteen days in rendering a determination after the May 6, 2013 Order and Judgment of this Court in the special proceeding, together with refusing to respond to requests for compliance, was arbitrary and capricious and warrants the relief sought in this petition. Petitioner relies on Education Law §2590-j as requiring review and determination from Respondents within 30 days, and the over three year delay (with failure to take any action during that period) results in waiver, warranting the relief sought in the petition. Petitioner argues that the DOE should not be empowered to disregard Court Orders until compelled to do so.

An administrative determination will withstand judicial scrutiny if it has a rational basis and is not arbitrary and capricious. The burden is on the Petitioner to demonstrate by evidentiary facts that the agency determination is arbitrary and capricious or an abuse of discretion " (Matter of Pell v. Board of Education, 34 N.Y. 2d 222, 356 N.Y.S. 2d 833, 313 N.E. 2d 321 [1974]). "An arbitrary determination is one that is without sound basis in reason, and is made without regard to the facts (Gottlieb v. City of New York, 129 A.D. 3d 724, supra at page 725).

Chancellor's Regulations No. C-205(9) govern procedure for the restoration to tenure and withdrawal of resignation, and must be strictly complied with (Matter of Vaccaro v. Board of Educ. Of the City Sch. Dist. Of the City of N.Y., 139 N.Y. 3d 612, 30 N.Y.S. 3d 824 [1<sup>st</sup> Dept., 2016]). Public policy interests require that the Court, "construe the tenure system broadly in favor of the teacher and to strictly police procedures which might result in the corruption of that system"(Springer v. Board of Educ. Of the City Sch. Dist. of the City of N.Y., 27 N.Y. 3d 102, 49 N.E. 3d 1189, 29 N.Y.S. 3d 897[2016]). Pursuant to Education Law §2590-j failure to initiate timely review procedures results in waiver and the unconditional reinstatement of the employee (Schacter v. Community School Bd. Dist. No. 24, 88 A.D. 2d 588, 449 N.Y.S. 2d 781 [2<sup>nd</sup> Dept., 1982]).

Respondents procedural arguments under Chancellor's Regulations No. C-205(9) have not addressed their waiver resulting from their delay of over three years in acting on Petitioner's application. This waives their challenge to the relief sought in this petition. The failure of the May 6, 2013 Order and Judgment to state a specific time period for the Chancellor to act does not mean that Respondents were provided the discretion to take an indefinite time period to review the application and render a determination. Respondents failure to act, forcing an applicant to wait years for a determination and then have him re-apply, only to deny the application because of an "Unsatisfactory" rating, results in corruption of the system warranting a finding that the determination was arbitrary and capricious, that Respondents waived opposition to Petitioner's rescission of his resignation, warranting the unconditional reinstatement of Petitioner. Petitioner fails to state arguments that support the claims for back-pay, benefits, costs and reasonable attorney fees, and that relief is denied.

Accordingly, it is ORDERED and ADJUDGED that the Article 78 petition seeking to vacate the Respondents' June 21, 2016 determination denying Petitioner's request for a rescission of resignation, together with back-pay, benefits, costs, and reasonable attorney fees, is granted, and it is further,

ORDERED and ADJUDGED that Respondents' June 21, 2016 determination denying Petitioner's rescission of resignation, is vacated, and the Department of Education is directed to accept Petitioner's rescission of resignation within thirty (30) days of receipt of a copy of this Order with Notice of Entry, and it is further,

ORDERED and ADJUDGED that the remainder of the relief sought in the petition for back-pay, benefits, costs, and reasonable attorney fees, is denied, and it is further,

ORDERED that the cross-motion pursuant to CPLR §7804[c] and CPLR §3211[a][7] to dismiss the petition for failure to effectuate proper service and to state a cause of action, is denied, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly.

ENTER :

  
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MANUEL J. MENDEZ

J.S.C.

MANUEL J. MENDEZ  
J.S.C.

Dated: April 3, 2017

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
Check if appropriate:     DO NOT POST                       REFERENCE