

Matter of Morell v New York City Dept. of Educ.

2013 NY Slip Op 30554(U)

March 18, 2013

Supreme Court, New York County

Docket Number: 102993/12

Judge: Kathryn E. Freed

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SCANNED ON 3/22/2013

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

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT *Justice*

PART 5

Index Number : 102993/2012
MORRELL, RENEE
vs.
NYC DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78 CAL # 8Y

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

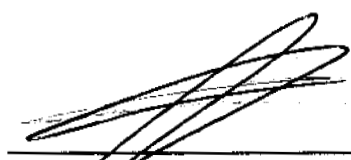
FILED

MAR 22 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3-18-13
MAR 18 2013


_____, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**

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 5

-----X
In The Matter of the Application of
RENEE MORELL,

Petitioner,

-against-

NEW YORK CITY DEPARTMENT OF
EDUCATION,

Respondent.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS

- NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....
- ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
- ANSWERING AFFIDAVITS.....
- REPLYING AFFIDAVITS.....
- EXHIBITS.....
- STIPULATIONS.....
- OTHER.....

FILED
 MAR 22 2013
 COUNTY CLERK'S OFFICE
 NEW YORK

NUMBERS
 1-2.....
 3-9.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Petitioner brings this Article 78 proceeding seeking to reverse respondent's decision to deny her access to her "Fingerprint Clearance Application," and also to order respondent to expunge from her employment record, kept by the New York City Department of Education, any and all references to child abuse and/or corporal punishment.

Respondent cross-moves to dismiss the petition. After a review of the papers presented, all relevant statutes and case law, the Court denies the petition.

Factual and procedural background:

Petitioner brings the instant Article 78 proceeding seeking to expunge her record based on the fact that the New York Police Department and the New York County District Attorney's Office both investigated the claims of child abuse and assault against her and found insufficient evidence to support either claim. Petitioner asserts that the denial of fingerprint clearance has adversely affected her, by preventing her from obtaining employment outside of the DOE, and also by jeopardizing her current employment.

Petitioner is a former teacher employed by the New York City Department of Education (hereinafter, "DOE"), and was terminated on May 2, 2010, by an arbitrator following an Education Law 3020-a hearing. Said hearing concerned an allegation of corporal punishment in that petitioner was accused of striking a student in 2006. After the hearing, petitioner was found guilty of the charges and was terminated. Petitioner then sought re-employment with the DOE, applying for the position of Vendor/Education Director. In preparation for her interview for this position, petitioner was afforded the opportunity to review DOE's files relating to her previous employment in the capacity as teacher. Said files are stored in DOE's Office of Personnel Investigation, (hereinafter, "OPI"). Petitioner was also permitted to provide OPI with information supporting her application for this new position.

However, upon reviewing petitioner's file and also considering the information she submitted during her interview, Andrew Gordon, Chief Executive Officer of the Division of Human Rights and Talent, advised her that her application for employment had been denied, via letter dated May 14, 2012. Said letter stated in pertinent part, "Your application is denied for the following reason(s): your services were terminated by the NYC Department of Education as a teacher by an arbitrator after a

NYS 3020-a hearing was held in May 2010. Additionally, allegations of corporal punishment were substantiated against you while employed as a teacher with the NYC Department of Education in July 2006...”

Petitioner challenged the finding of guilt on the disciplinary charges and the penalty of termination in a separate proceeding, brought in New York County Supreme Court. Said proceeding was ultimately dismissed by Judge Anil Singh in 2010, who concluded in a written decision, that petitioner’s termination was made in accord with due process, and was supported by sufficient evidence. Additionally, Judge Singh also denied petitioner’s motion to reargue his initial determination, via a written decision rendered on May 3, 2011. Petitioner commenced the instant Article 78 proceeding on June 13, 2012.

Respondent asserts that petitioner’s Article 78 proceeding seeking to challenge the DOE’s May 14, 2012 decision denying her application for employment, warrants denial. However, respondent first questions the rationale of petitioner’s allegation that the May 14, 2012 letter denying said application was rather, a letter denying her application for “fingerprint clearance.” Respondent advises the Court that nowhere in petitioner’s history with the DOE is there any reference to fingerprints or their prospective clearance.

Nevertheless, respondent proffers several arguments for its position that said petition warrants dismissal. First, it argues that the instant petition must be dismissed as it is time barred. Respondent argues that statutes mandate that a proceeding seeking review of an agency’s determination must be commenced within four months after the determination to be reviewed becomes binding upon petitioner. Thus, since petitioner was terminated on May 2, 2010 and commenced the instant proceeding on June 13, 2012, she is now time barred from doing so.

Respondent also argues that the instant petition must be dismissed, because the doctrine of collateral estoppel prevents her from re-litigating an issue previously decided against her wherein she was accorded a full and fair opportunity to litigate the point. Respondent asserts that the petition must be dismissed because it fails to state a cause of action. It argues that the petition actually seeks relief in the nature of a writ of mandamus to compel performance of a ministerial act, in the form of a court order compelling the DOE to approve petitioner's application for employment and also directing it to expunge her records relating to the allegations of corporal punishment. Respondent argues that petitioner cannot obtain this "extraordinary relief," because she fails to meet the burden of demonstrating a clear right to the relief requested. Toward this, she cannot demonstrate how the DOE's decision to deny her application for employment was arbitrary and capricious.

In her Reply Affidavit, petitioner alleges that she is not seeking to challenge the DOE's May 14, 2012 decision denying her application for employment, but is only applying for fingerprint clearance. She alleges that her current employer is Bronx Baptist Day Care and Learning Center, and that because its staff works within the Preschool Program, receives their security clearances from both the NYC Department of Health and Mental Hygiene and the NYCDOE, the day care requires fingerprint clearance via the NYCDOE due to the Universal Pre-Kindergarten Grant that it receives from the State (not the NYCDOE), and because it is located within the NYC School District.

Petitioner complains that the "NYCDOE OPI's website lists [her] as 'not cleared' to work with children," presumably because she has not received fingerprint clearance. Petitioner argues that respondent's cross-motion warrants dismissal because respondent has no basis to deny her fingerprint clearance; respondent has purposely misled the Court with false claims concerning her character; and that respondent has failed to provide "proper service delivery" to her. She also requests that she

be granted costs, fees, disbursements, and compensation for lost income due to her involuntary resignation from Bronx Baptist Day Care and Learning Center.

Conclusions of law:

As a preliminary matter, the Court notes that while courts may afford pro se litigants “some latitude” (Duffen v. State of New York, 245 A.D.2d 653, 653[3d Dept.1997], *lv denied* 91 N.Y.2d 810 [1998]), a pro se litigant “acquires no greater right than any other litigant” (Roundtree v. Singh, 143 A.D.2d 995, 996 [2d Dept. 1988], “and will be held to the same standards of proof as those who are represented by counsel (Duffen v. State of New York, 245 A.D.2d at 654; *see also* Limani Realty, LLC v. Zayfert, 2012 WL 2877669 (N.Y. Sup. App. Term); Banushi v. Lambrakos, 305 A.D.2d 524 [2d Dept. 2003], *lv denied* 1 N.Y.3d 504 [2003]; Johnson v. Title North, Inc., 31 A.D.3d 1071 [2006]

It is well settled that where a proceeding is brought seeking review of an agency determination, such a proceeding “must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.....” (CPLR§217(1); DeMilio v. Borghard, 55 N.Y.2d 216 [1982]).

In the instant case, petitioner was terminated by the DOE on May 2, 2010. However, petitioner did not commence the instant proceeding until June 13, 2012, obviously way more than four months after termination. Therefore, the instant petition is clearly barred by the applicable statute of limitations and necessitates dismissal. Moreover, the Court agrees with respondent’s other arguments that the instant petition is also barred by the doctrine of collateral estoppel and that petitioner fails to state a cause of action. In consideration of this, the Court denies the component of the instant petition seeking the expungement of any report of child abuse and/or corporal punishment from petitioner’s DOE file.

However, the Court must address petitioner's contention that she is also specifically seeking relief in the form of finger print clearance, in addition to the expungement of all reports of alleged child abuse and corporal punishment from her employee file with the DOE. Petitioner adamantly denies that she is currently seeking review of the DOE's rejection of her employment application for a position other than that of teacher. However, respondent asserts that allegations of corporal punishment had been proven against her in July 2006, when she was employed as a DOE teacher, and this was also a basis for denial of petitioner's job application.

The Court finds that petitioner has not sufficiently set forth any legitimate reason why she requires fingerprint clearance and why she believes the DOE is responsible for accomplishing this. The Court has reviewed the various documents annexed to petitioners Reply Affidavit, including correspondence with the Bronx Baptist Church. Indeed, the only references to fingerprints is contained in a letter from Donald Sharpe, Senior Board Member of Bronx Baptist Church. Said letter is annexed to petitioner's Reply Affidavit as Exhibit "E," is dated May 8, 2012, and is type written on Bronx Baptist Church letterhead. It is addressed to Gina N. Martinez, Esq., Manager of Investigation, Office of Personnel Investigation at the DOI. The basis of the letter appears to be one of recommendation for the alternate position petition was seeking in the DOE. However, this is merely conjecture, as quite frankly, the intent of the letter remains unclear.

Nevertheless, the Court refers to it simply because it is the only document submitted by petitioner which makes any reference to fingerprints. Said letter states in pertinent part that "[w]e have performed all necessary clearances with the New York State Office of Children and Family Services, and the Department of Investigation (DOI). Her [petitioner Morrell's] State Screening Report was clear, and her DOI fingerprinting reported a misdemeanor that occurred 22 years ago,

subsequent to which, she earned her Masters in Education and her appropriate certifications.....”

There are no other documents specifically pertaining to fingerprints, and/or their negative impact on her employment and life. In fact, one of the documents appended as an Exhibit is petitioner’s letter of resignation from Bronx Baptist Day Care and Learning Center, which is dated July 3, 2012. Contrary to petitioner’s allegation, she has failed to submit any evidence that her resignation was involuntary, or that it was a result of the DOE’s treatment of her. More importantly, she also fails to proffer any evidence that she ever filled out any document entitled “Fingerprint Clearance Application,” or whether such a document exists and/or is related to the procedures promulgated by the DOE.

Therefore, In accordance with the foregoing, it is hereby

ORDERED that the instant Article 78 petition is hereby denied in its entirety, and it is further

ORDERED that the complaint and any cross claims against respondent DOE are dismissed

and it is further

ORDERED that the Clerk is to enter judgement in favor of said defendant and it is further

ORDERED that respondent is to serve petitioner with a copy of this order with notice of entry

within twenty (20) days, and it is further

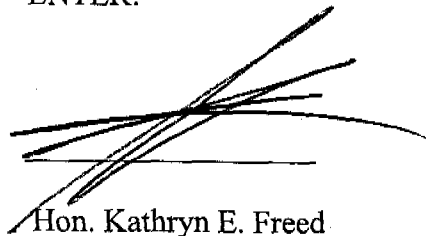
ORDERED that this constitutes the decision and order of the Court.

DATED: March 18, 2013

MAR 18 2013

FILED
MAR 22 2013
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:



Hon. Kathryn E. Freed

^{J.S.C.}
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT