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

PRESENT: HON. PAUL WOOTEN
*Justice*

PART 7

In the Matter of the Application of
NICHOLAS KOUTROS,
Petitioner,

INDEX NO. 104279/12

MOTION SEQ. NO. 001

For a Judgement Pursuant to the Provisions of Article 78 of the New York Civil Practice Law and Rules,

-against-



THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK,
Respondent.

The following papers, numbered 1 to 7 were read on this motion by petitioner for a judgment pursuant to Article 78 and cross-motion by respondent to dismiss.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1, 2, 3 |
| Answering Affidavits — Exhibits (Memo) | 4, 5, 6 |
| Replying Affidavits (Reply Memo) | 7 |

Cross-Motion: ☐ Yes ■ No

Nicholas Koutros (petitioner) a formerly tenured teacher employed by the New York City Department of Education (DOE) commenced this Article 78 proceeding[1], on November 21, 2012, for an order annulling the decision of the DOE to terminate petitioner from his position as a licensed English Language Arts (ELA) teacher in July 2012, for reinstatement to his previous position with the DOE, and for expungement of the wrongful termination from his record. In a letter dated "July 2012" petitioner was informed that since he did not hold a valid New York State teaching certificate in his license area (ELA), his employment with the DOE was

[1] Petitioner's application includes a verified petition, asserting two causes of action, with exhibits A and B and an affidavit in support with Exhibit A, B and C.

terminated effective July 1, 2012, and as such, he was not eligible to resume a full-time teaching position for the school year commencing September of 2012 (*see* Verified Petition, exhibit B). In his affidavit, petitioner proffers that he received the DOE's termination letter on July 28, 2012. Petitioner asserts that he was a properly licensed ELA teacher, prior to the DOE's June 30, 2012 deadline for petitioner to certify his ELA 7-12 teaching certificate with the New York State Department of Education (SED) to remain in his position for the 2012-2013 school year. More specifically, he contends that he was informed by Mr. McCarthy from the Office of Teacher Certification with the State Education Department on July 6, 2012 that he was in fact certified in ELA 7-12 retroactive to February 2012. In support, petitioner submits an SED computer record dated November 15, 2012 as proof SED certified him as an ELA teacher retroactive to February 1, 2012. In his petition, petitioner asserts two causes of actions: (1) that his termination is arbitrary or capricious and in bad faith causing him a loss of income and damage to his reputation and inability to secure other employment; and (2) that his termination is unlawful on due process grounds because it was done without just cause and not in accordance with the procedures set forth in Education Law § 3020. Specifically, petitioner argues that as a tenured teacher, he was entitled to a 3020-a hearing prior to termination.

Respondent cross-moves to dismiss the petition pursuant to CPLR §§ 7804(f), 1001, 3211(a)(7), and 3211(a)(10), and pursuant to Education Law §§ 3001, 3009, 3010, and 3020-a on the grounds that it fails to state cause of action and name a necessary party. Specifically, the DOE maintains that the decision was compelled by law as New York Education Law expressly states that a teacher is unqualified as a matter of law if he or she does not possess a teaching certificate issued by the State of New York, and that even if petitioner did subsequently receive his teaching certificate, he did not possess it by the June 30, 2012 deadline. Respondent further maintains that petitioner is not entitled to a 3020-a hearing, and that the petition fails to name the replacement teacher as a necessary party to this proceeding.

STANDARD

The standard of review in this Article 78 proceeding is whether the DOE's decision to terminate petitioner from his employment as an ELA teacher "was arbitrary or capricious or without a rational basis in the administrative record" (*Matter of Partnership 92 LP & Bldg. Mgt. Co. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007]; *see* CPLR 7803[3]). The Court of Appeals has held "that the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]; *see also Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of West Vil. Assoc. v New York State Div. of Hous. & Community Renewal*, 277 AD2d 111,112 [1st Dept 2000] [a rational and reasonable determination of an agency within its area of expertise is entitled to deference by the courts]). As such, a court "may not overturn an agency's decision merely because it would have reached a contrary conclusion" (*Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 278 [1972]; *see also Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101 [1st Dept 2003]). "Indeed, once it has been determined that an agency's conclusion has a 'sound basis in reason' the judicial function is at an end and a reviewing court may not substitute its judgment for that of the agency" (*Paramount Communications v Gibraltar Cas. Co.*, 90 NY2d 507, 514 [1997], quoting *Matter of Pell v Board of Edu.*, 34 NY2d at 231 [1974]).

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*,

96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank,* 300 AD2d 226 [1st Dept 2002]).

Upon a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v D'Agostino,* 21 AD2d at 65, quoting *Kain v Larkin*, 141 NY 144, 151 [1894]). "[W]e look to the substance [of the pleading] rather than to the form (*id.* at 64).

DISCUSSION

Upon a review of the record, the Court finds that the respondent's decision to terminate petitioner was not arbitrary or capricious or without a rational basis. The DOE's determination was made on all the information that was before it on June 30, 2012, the deadline for certification. In fact, all parties agree that the respondent denied petitioner's request to extend his certification application beyond June 30, 2012. While petitioner asserts that sometime after July 6, 2013, in a telephone conversation the SED changed his status from uncertified to properly certified as a ELA teacher, retroactive back to February 1, 2012, there is no evidence that SED ever communicated such a fact to the DOE before DOE made their determination, nor

is there any proof that if such a notification was made, it would it be considered timely to affect DOE's June 30, 2012 deadline. As a result, petitioner's first cause of action seeking to overturn the DOE's determination terminating petitioner is hereby dismissed.

In addition, petitioner's reliance on Education Law § 3020-a in his second cause of action is misplaced. Education Law § 3020-a, titled "Disciplinary procedures and penalties," exists to protect tenured teachers from the arbitrary imposition of formal discipline or removal (*see Holt v Board* of *Education,* 52 NY2d 625, 632 [1981]; *Sanders v. Board of Education,* 17 AD3d 682, 683 [2nd Dept 2005]). The termination of petitioner did not implicate the procedural protections of Education Law § 3020-a because Petitioner's termination was due to his legal ineligibility to serve as an ELA teacher, rather than any alleged misconduct or incompetence on his part (*see Felix v New York City Dept of Citywide Admin. Servs.*, 3 NY3d 498, 505 [2004]; *see Brown v. Board of Education,* 2009 N.Y. Misc LEXIS 5475, 2009 Slip Op 32687[U] [Sup Ct, NY County, 2009]). Thus, petitioner is not entitled to a hearing, and the second cause of action is dismissed pursuant to CPLR 3211(a)(7).

Finally, given the ambiguous date of the DOE's termination letter "July, 2012", the Court finds that petitioner's application is timely filed (see CPLR §§ 217[1] ,7804[f]) and that the teacher that allegedly replaced the petitioner when he was terminated is not a necessary party to this proceeding pursuant to CPLR §§ 1001, 3211(a)(10).

CONCLUSION

Accordingly, it is

ORDERED that petitioner Nicholas Koutros's Article 78 petition is denied and this proceeding is dismissed without costs or disbursements to the respondent; and it is also further,

ORDERED that respondent New York City Department of Education's cross-motion to dismiss the petition's second cause of action pursuant to CPLR § 3211(a)(7) is granted; it is further,

ORDERED that respondent New York City Department of Education's cross-motion to dismiss the petition pursuant to CPLR §§ 7804(f), 1001, and 3211(a)(10) is denied; and it is further,

ORDERED that the respondent New York City Department of Education is directed to serve a copy of this Order with Notice of Entry upon the petitioner Nicholas Koutros and the Clerk of the Court, who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 10/22/13

PAUL WOOTEN J.S.C.

**Check one:** ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

**Check if appropriate: :** ☐ **DO NOT POST** ☐ **REFERENCE**