

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
J.S.C. Justice

PART 32

Index Number : 158592/2016
WILSON, CHERYL
vs.
DEPT. OF EDUC. OF THE CITY OF NY
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for Article 78

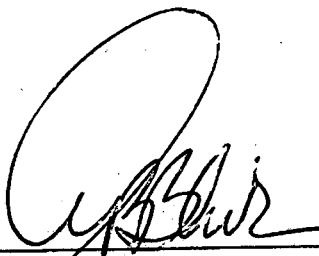
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits <u>+ memo</u>	No(s). <u>2</u>
Replying Affidavits <u>+ memo</u>	No(s). <u>3</u>

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

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

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

Dated: 6/12/17



HON. ARLENE P. BLUTH
J.S.C.

1. CHECK ONE: CASE DISPOSED J.S.C. 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 32

-----X
In the Matter of the Application of CHERYL
WILSON

Petitioner,

Index No. 158592/2017
Motion Seq: 001

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

DECISION, ORDER & JUDGMENT
ARLENE P. BLUTH, JSC

THE DEPARTMENT OF EDUCATION OF THE
CITY OF NEW YORK

Respondent.

-----X

Petitioner's petition to *inter alia* reinstate petitioner to a position as a tenured teacher with back pay is granted in part and denied in part.

Background

Petitioner was a teacher for respondent. Petitioner contends that her most recent assignment was as a special education teacher from 2011 through June 2016 as a probationary employee. Petitioner acknowledges that she was reassigned to a "rubber room" pending an investigation in March 2015 due to an incident involving a group of students; that investigation lasted about a year. Petitioner claims that although some of the allegations against her were substantiated, she was placed back in a teaching position on March 7, 2016. Petitioner argues that she went on leave until the end of the school year in April 2016 and was terminated from employment on June 15, 2016.

Petitioner insists that her employment probationary period was for three years and that the probationary period should have ended on or about September 2, 2014, but that she continued to

be employed until about July 15, 2016. Petitioner maintains that she was asked to sign an extension of probation but does not believe the extension was accepted—petitioner observes that even if it was accepted, the probationary period would have expired on September 2, 2015 (while she was in the rubber room). Petitioner argues that she is entitled to tenure by estoppel and, therefore, is entitled to a hearing before she can be terminated.

In opposition, respondent observes that petitioner received ineffective ratings after supervisors conducted observations of her teaching abilities. Respondent also notes that petitioner violated school policies on March 18, 2015 when she allegedly failed to follow proper protocol during post-lunch student collection, supervision, and escort duty. Respondent claims that as a result of petitioners' failure to collect students and to notify the office that the students were missing, some eighth grade students prompted first grade students to fight each other.

On March 20, 2015, respondent reassigned petitioner from her teaching position to an administrative assignment (the rubber room) where she did not perform any teaching duties.

Respondent claims that petitioner is not entitled to tenure by estoppel. Respondent argues that petitioner's absence from her teaching duties from March 2015 through March 2016 tolls the completion of her probationary period. Respondent also relies on petitioner's medical leave from April 12, 2016 through the end of the year to reduce her probationary period. Respondent argues that petitioner was not performing teaching duties, so she cannot acquire tenure by estoppel.

Discussion

In an article 78 proceeding, "the issue is whether the action taken had a rational basis and was not arbitrary and capricious" (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d 587 [2013] [internal quotations and citation omitted]). "An action is arbitrary and capricious

when it is taken without sound basis in reason or regard to the facts” (*id.*). “If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable” (*id.*). “Arbitrary action is without sound basis in reason and is generally taken without regard to the facts” (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]).

“A board of education has the right to terminate the employment of a probationary teacher or principal at any time and for any reason, unless the teacher or principal ‘establishes that the termination was for a constitutionally impermissible purpose, violative of a statute, or done in bad faith’” (*Palmore v Bd. of Educ. of Hempstead Union Free Sch. Dist.*, 145 AD3d 1072, 1074, 44 NYS3d 509 [2d Dept 2016] quoting *Matter of Frasier v Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 71 NY2d 763, 765 [1988]).

“Tenure by estoppel results when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher’s probationary term” (*Speichler v Brd. of Co-Op Educ. Servs., Second Supervisory Dist.*, 90 NY2d 110, 114, 659 NYS2d 199 [1997] [internal quotations and citation omitted]).

The key issue in this proceeding is whether petitioner acquired tenure by estoppel. If petitioner was probationary, then respondent was entitled to fire respondent for nearly any reason. Therefore, the Court must first look to the extension of petitioner’s probation. Although petitioner denies that her extension was accepted, both petitioner and respondent signed the extension (verified answer, exh-2). The extension states that petitioner’s probationary period was extended for one additional year– to September 8, 2015 (*id.*). Specifically, the extension

provides that "The parties agree that the decision to either grant completion of probation, deny completion of probation, or grant an additional extension of probation to Cheryl Wilson at a date no later than September 8, 2015" (*id.* ¶ 3).

It also provides that "This written agreement contains all the terms and conditions agreed upon by the parties hereto in regard to the extension of probation for Cheryl Wilson. No other agreement, oral or otherwise, regarding this matter shall be deemed to exist or to bind the parties hereto, or to vary any of the terms contained herein" (*id.* ¶ 9).

Respondent does not deny that no action was taken regarding the expiration of petitioner's probationary period. There was no effort to further extend petitioner's probationary period another year (to September 2016) before the deadline or to deny (or grant) petitioner tenure. Instead, respondent attempts to gloss over this failure to act by focusing on petitioner's reassignment to the rubber room from March 2015 to March 2016.

Respondent's argument is that since petitioner was not performing teaching activities during this time period she cannot gain tenure by estoppel. This claim fails. The agreement extending petitioner's probationary period clearly states that respondent had to choose between three options before September 8, 2015— whether to keep her on, fire her, or grant another year of probation. This was not done. Instead, petitioner was permitted to resume her teaching duties and was fired at the end of the 2016 school year. This may have been an oversight but the Court cannot simply ignore the valid agreement entered into between petitioner and respondent.

The Court does not make this decision lightly. The allegations that led to petitioner's reassignment to non-teaching duties are serious and the Court has no interest in help a sub-standard teacher retain her position. But, for some reason, respondent did not fire petitioner for

her alleged transgressions despite the fact that she was a probationary employee. Respondent could have fired petitioner, by all accounts a probationary employee, at any time before September 8, 2015 - it could have fired her due to lousy evaluations, it could have fired her due to the incident which caused her to be sent to the rubber room, it could have fired her during her time in the rubber room. Instead, respondent continued to keep petitioner on, paying her, and then, after the investigation concluded (after a year in the rubber room), respondent saw fit to return her to the classroom. Obviously, her missteps could not have been as serious as respondent now contends because respondent allowed petitioner to start teaching again.

Respondent had multiple opportunities to terminate petitioner for a variety of permissible reasons including, but not limited to, her poor observation reports throughout the 2014- 2015 school year and her ineffective APPR in 2014-2015 and her dereliction of duty regarding the failure to pick up the students. Not only did respondent fail to fire petitioner, it put her back in the classroom. Respondent's actions make its current argument that she was so terrible ring hollow.

Besides, the argument that petitioner's pedagogy failed to meet the minimum standards for obtaining a tenure recommendation misses the point. Respondent entered into an agreement where a specific date was set for a tenure determination for petitioner and respondent did nothing. Petitioner consented to another year of probation in exchange for a determination about her tenure. Respondent failed to fire her during that year (although it had ample opportunity and reasons to do so) and therefore she obtained tenure by estoppel. Accordingly, respondent's decision to terminate petitioner without a hearing (the procedure afforded to a tenured teacher) was arbitrary and capricious.

Attorneys' Fees

The Court finds that petitioner is not entitled to attorneys' fees because respondent has demonstrated that its position was substantially justified (*see* CPLR 8601[a]). "The phrase substantially justified has been interpreted by the [U.S.] Supreme Court as meaning justified to a degree that could satisfy a reasonable person, or having a reasonable basis in both law and fact. . . . The test of whether or not a government action is substantially justified is essentially one of reasonableness. Where the government can show that its case had a reasonable basis both in law and fact, no award will be made" (*New York State Clinical Lab. Assn., Inc. v Kaladjian*, 85 NY2d 346, 356, 625 NYS2d 463 [1995] [internal quotations and citations omitted]).

Although it may seem that because this Court has granted petitioner's application to get her job back, with tenure, respondent's argument cannot be substantially justified. Here, however, the record before respondent prior to this proceeding demonstrated that petitioner did not immediately contend that she was entitled to tenure after she was fired. Although she later raised the tenure by estoppel argument, respondent reasonably opposed the instant petition on the ground that petitioner was a probationary employee who could be fired for any permissible reason. So even though petitioner wins this proceeding, the Court finds that respondent's position was reasonable under the circumstances.

Summary

Petitioner is entitled to a position as a tenured teacher and to back pay starting from the date of her termination (July 15, 2016).

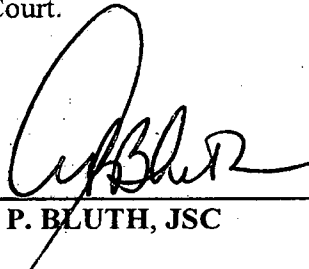
Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is granted to the extent that petitioner Cheryl Wilson is entitled to a position as a tenured teacher and to back pay starting from July 15, 2016 to the present; and it is further

ORDERED and ADJUDGED that petitioner is not entitled to attorneys' fees.

This is the Decision, Order and Judgment of the Court.

Dated: June 12, 2017
New York, New York



ARLENE P. BLUTH, JSC