[*1] In the Matter of the Application of **MAUREEN SHEIL,** Petitioner, for a Judgment pursuant to Article 78 of the Civil Practice Laws and Rules, - against - DR. RANIER W. MELUCCI, Superintendent of Schools, Merrick Union Free School District, BOARD OF EDUCATION OF MERRICK UNION FREE SCHOOL DISTRICT, and MERRICK UNION FREE SCHOOL DISTRICT, Respondents,

20552/10

SUPREME COURT OF NEW YORK, NASSAU COUNTY

2011 NY Slip Op 31242U; 2011 N.Y. Misc. LEXIS 2208

April 28, 2011, Decided
May 2, 2011, Entered
NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

CORE TERMS: classroom, teaching assistant, notice, disclosure, terminated, public employees, appointing authority, retaliation, spoke, respondents contend, district board, fails to state, probationary, unwarranted, appointment, reporting, designee, school district, unsatisfactory, teacher, petitioner asserts, claim requirements, potential danger, money damages, special proceeding, educational services, public health, governmental body, official duties, conversation

JUDGES: [**1] DENISE L. SHER, A.J.S.C.

OPINION BY: DENISE L. SHER

OPINION

Upon the foregoing papers, it is ordered that the applications are decided as follows:

This is an Article 78 proceeding wherein petitioner is seeking, *inter alia*, a judgment reviewing, annulling and rescinding respondents' determination which terminated petitioner from her employment as a Teaching Assistant with respondent Merrick Union Free School District [*2] ("District") prior to the completion of her probationary term; directing respondents to reinstate petitioner to her position as a Teaching Assistant with respondent District; and restoring petitioner with any and all back pay, seniority and other benefits lost as the result of the actions under review herein.

Respondents move for judgment, pursuant to CPLR § 7804(f), dismissing the petition on the grounds that it fails to state a cause of action under Civil Service Law § 75-b and for failure to comply with the notice of claim requirements pursuant to Education Law § 3813.

On a motion to dismiss, the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any [**2] cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994).

The following factual recitation, to which the Court accords deference in assessing respondents' motion to dismiss, is taken from the petition.

Petitioner became employed as a part-time Teacher's Aide at the Birch Elementary School in September 2005. Subsequent thereto, petitioner obtained a Teaching Assistant license in the

State of New York. In September 2007, petitioner started working for respondent District as a fulltime teaching assistant and was assigned to the "Gateway" program, which is a self-contained classroom dealing with autistic children between kindergarten and second grade level.

In April 2009 (the 2008-2009 school year), another teaching assistant employed by the school district, Timothy Holt, was arrested on nine felony counts for possessing sexually explicit images and videos of children on his home computer. *See* Petition at ¶ 20. The classroom in which Mr. Holt worked was across from petitioner's classroom. Mr. Holt shared his classroom with [*3] another teaching assistant, Meredith Gulfman ("M.G."). *See* Petition at ¶ 22.

In September 2009, petitioner began a three-year probationary period. [**3] M.G. and petitioner were assigned to work as a team in the same classroom. *See* Petition at ¶ 23.

Petitioner alleges that, on or about December 6,2009, she and M.G. discussed the arrest of Mr. Holt and M.G. made comments which petitioner "perceived as a condonation and justification of the behavior that Mr. Holt was accused of." Petitioner believed that M.G. continued to be in contact with Mr. Holt. *See* Petition at ¶ 25. Allegedly believing that the comments she heard from M.G. were very disturbing and represented a potential danger to children in the school, as a mandated reporter, petitioner reported what she heard to Interim Principal Cohen and Assistant Principal Schlissel. *See*Petition at ¶¶ 24-27.

Upon petitioner's return to school in January 2010, the classroom teacher and the school administrators allegedly began treating petitioner in a punitive way and unjustly blaming her for things that were not her fault while protecting M.G. M.G. also treated her in a hostile manner, after which petitioner complained to Interim Principal Cohen and Assistant Principal Schlissel. *See* Petition at ¶¶31 -33. Interim Principal Cohen issued a letter to petitioner in February 2010, advising petitioner, [**4] *inter alia*, that she has been involved in conflicts with M.G. which had impacted children. By letter dated February 11, 2010, petitioner notified respondent District that she was concerned about "retaliation in the form of unbiased work reviews" and that she agreed that "the environment was uncomfortable and unsatisfactory" due to incidents with M.G. Petitioner again responded to Interim Principal Cohen by letter dated June 1, 2010, claiming that Ms. Marstellon's allegations against her were in retaliation for her reporting the conversation with M.G. See Petition at ¶ 38.

[*4] On June 3, 2010, petitioner received an evaluation from Interim Principal Cohen, which stated in, pertinent part:

> The classroom teacher, Mrs. Shauna Mastellon, has reported that Ms. Sheil's demeanor and attitude creates tension in the classroom. Furthermore, Mrs. Mastellon is concerned about her unsatisfactory communication and interpersonal skills. She often resists opportunities to converse with colleagues on a daily basis. Her perception of classroom situations is frequently in total contradiction to other professionals in the classroom.

As a teaching assistant, it is Ms. Sheil's responsibility to take direction [**5] from members of our professional staff. On one specific occasion during Ms. Sheil's morning duty, her response to an incident involving a student and Dr. Jill Henriksen, District Psychologist, was unsatisfactory. Dr. Henriksen gave her specific directions and reported that Ms. Sheil was not receptive.

Petitioner was then advised by respondent Dr. Ranier W. Melucci, Superintendent of Schools, Merrick Union Free School District ("Melucci") that he was going to recommend to the respondent Board of Education of Merrick Union Free School District ("Board") that she be terminated, and effective August 1, 2010, respondent Board terminated her employment. *See* Petition at ¶¶ 42-44.

On November 1, 2010, petitioner served a Notice of Claim on respondents, the same day the petition herein was filed. Petition alleges that her termination was in violation of Civil Service Law § 75-b as it had no legitimate purpose and was in retaliation for reporting the details of her conversations with M.G. to Interim Principal Cohen and Assistant Principal Schlissel.

In support of their motion to dismiss, respondents assert that petitioner's failure to comply with the notice of claim requirements of Education Law § 3813 [**6] mandates dismissal of the petition. While respondents concede that petitioner served a Notice of Claim on respondents, as evinced by the affidavit of Clarice Rebentisch, dated January 4, 2011, respondents assert that she did not wait [*5] the required thirty days before she commenced the instant litigation.

Respondents also argue that the petition fails to state a claim under Civil Service Law § 75-b due to insufficient notification and insufficient disclosure.

In opposition, petitioner asserts that a Notice of Claim was not required in this Article 78 proceeding since petitioner seeks equitable relief not money damages. *See* *Kahn v. New York City Dept. of Educ.*, 79 A.D.3d 521,915 N.Y.S.2d 26 (1st Dept. 2010); *Ruocco v. Doyle*, 38 A.D.2d 132, 327 N.Y.S.2d 933 (2d Dept. 1972). Petitioner further asserts that respondents cannot be prejudiced by their claim that petitioner did not wait thirty days because, if the Court were to dismiss the Article 78 proceeding on this ground, petitioner could still file a plenary action under Civil Service Law § 75-b.

Law

Education Law §3813(1) provides:

> No action or special proceeding, for any cause whatever, except as hereinafter provided, relating to district property [**7] or claim against the district, or involving its rights or interests shall be prosecuted or maintained against any school district, board of education, board of cooperative educational services or any officer of a school district, board of education, or board of cooperative educational services, unless it shall appear by and as an allegation in the compliant or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district within three months after the accrual of such claim, and that the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment.

Petitioner's claims, which are equitable in nature, are not barred by her failure to file a Notice of Claim pursuant to Education Law § 3813, which is only required when money damages are sought. *See*Kahn v. New York City Dept. of Educ, supra*;* *Ruocco v. Doyle, supra*. Hence, dismissal on this ground is unwarranted.

[*6] Next, respondents assert that the petition fails to state a claim under Civil Service Law § 75-b due to her failure to satisfy [**8] the pre-disclosure notice requirement.

Pursuant to Civil Service Law § 75-b(2)(a), public employees cannot be fired because the employee discloses to a governmental body information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonable believes to be true and reasonably believes constitutes an improper governmental action. The "appointing authority" is the officer, commission or body having the power of appointment to subordinate positions. *See* Civil Service Law § 2(9); *Brohman v. New York Convention Center Operating Corp.*, 293 A.D.2d 299, 740 N.Y.S.2d 312 (1st Dept. 2002).

Here, respondents contend that the appointment authority is respondent Board which made the probationary appointment of petitioner to the position of full-time teaching assistant and also terminated her employment. *See* Respondents' Notice of Motion Affidavit of Clarice Rebentisch, dated January 4, 2011, and the exhibits annexed thereto. No disclosure was ever made to the respondent Board. *See* *Palmer v. Niagara Frontier Transportation Authority*, 56 A.D.3d 1245, 867 N.Y.S.2d 318 (4th Dept. 2008).

In [**9] opposition, petitioner asserts that her notifications to respondent Melucci, were sufficient. As noted above, Civil Service Law § 75-b(2)(b) states that disclosure could be made to the appointing authority's "designee." Petitioner alleges that she made the disclosure to Interim Principal Cohen and Assistant Principal Schlissel and that notice to respondent Board of Education would have been futile.

Based upon the record submitted, we find that petitioner sufficiently complied with Civil Service Law § 75-b as respondent Melucci, who terminated petitioner's employment, was aware [*7] of petitioner's disclosure. Hence, dismissal on this ground is unwarranted.

Additionally, respondents contend that the substance of petitioner's disclosure, even assuming it was made to the appointing authority, was insufficient as a matter of law because petitioner's complaint concerning M.G.'s statements does not rise to the level of a violation of law, rule or regulation which presents a substantial and specific damage to the public safety or health.

In opposition, petitioner argues that the disclosure was sufficient, *i.e.*, her statements that a co-worker was continuing to associate with a former employee who had been arrested [**10] for child pornography gave her a reasonable belief that there was a violation of some rule or regulation which could have prevented an imminent security concern to the children.

To avail oneself of the protections of Civil Service Law § 75-b, "[p]rior to disclosing information . . . , an employee shall have made a good faith effort to provide the appointing authority or his or her designee the information to be disclosed and shall provide the appointing authority or designee a reasonable time to take appropriate action unless there is imminent and serious danger to public health or safety. For the purposes of this subdivision, an employee who acts pursuant to this paragraph shall be deemed to have disclosed information to a governmental body . . . " Civil Service Law § 75-b(2)(b).

Petitioner has stated a viable claim under Civil Service Law § 75-b. Petitioner alleges that she was given a negative performance evaluation and in retaliation terminated from her employment for reporting evidence of a potential danger to children in the school. *See* *Yan Ping Xu v. New York City Dept. of Health*, 77 A.D.3d 40, 906 N.Y.S.2d 222 (1st Dept. 2010). Hence, dismissal on that ground is unwarranted.

Finally, [**11] respondents assert that, to the extent the petition herein alleges a violation of the [*8] First Amendment, said claim should be dismissed. Specifically, respondents contend that petitioner's speech was made pursuant to her duties as a teaching assistant and not as a citizen. *See* *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); *Weintraub v. Board of Educ. of City School Dist. of City of New York*, 593 F.3d 196 (2d Cir. 2010); *Williams v. County of Nassau*, 2011 U.S. Dist. LEXIS 34190, 2011 WL 1240699 (E.D.N.Y. 2011); *Jackler v. Byrne*, 708 F. Supp.2d 319 (S.D.NY. 2010).

The standard for determining whether the speech of a public employee is protected by the First Amendment "entails two inquiries: (1) whether the employee spoke as a citizen on a matter of public concern and, if so, (2) whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Anemone v. Metro. Transp. Auth.*, 629 F.3d 97, 114 (2d Cir. 2011) (citations and internal quotation marks omitted). "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and the Constitution does not insulate [**12] their communications from employer discipline." *Garcetti v. Ceballos, supra* at 421. "The objective inquiry into whether a public employee spoke 'pursuant to' his or her official duties is 'a practical one.'" *Weintraub v. Board of Education, supra, quoting* *Garcetti v. Ceballos, supra* at 424.

In determining whether a plaintiff spoke as an employee or a citizen, courts must consider factors such as whether the speech was made "in furtherance of the plaintiffs "core [employment] duties" and whether the form of the speech had a "relevant citizen analogue." *See* *id.* at 203, 204. *See also* *Castro v. County of Nassau*, 739 F. Supp.2d 153, 179 (E.D.N. Y. 2010). Indeed, these factors serve as proxies for the controlling question of what "role the speaker occupied when he spoke." *Jackler v. Byrne, supra*; citing *Weintraub v. Board of Educ. of City School Dist. of City of New York, supra* at 204. Accordingly, "under the First Amendment [*9] , speech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a

request by the employer." *Weintraub v. Board of Educ. of City School Dist. of City of New York, supra* [**13] at

Applying these principles to the proceeding at bar, we find that petitioner's disclosure herein was made as a public citizen and not a private citizen. Hence, the First Amendment claim, which is not even set forth in the petition, but only in her attorney's affirmation, is insufficient.

In view of the foregoing, the motion to dismiss the petition is granted to the extent that the First Amendment violation is dismissed.

Respondents are hereby directed to serve an answer to the petition within twenty (20) days after service of a copy of this decision. *See Matter of Bill's Towing Service, Inc. v. County of Nassau,* 920 N.Y.S.2d 377, 2011 WL 1331925 (2d Dept. 2011).

This constitutes the Decision and Order of this Court. 203.

ENTER:

/s/ Denise L. Sher

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York

April 28, 2011