

2013 N.Y. Misc. LEXIS 4251, *; 2013 NY Slip Op 32169(U), **

**In the Matter of the Application of CAROLINA CASTRO, Petitioner, - v - THE
DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK,
Respondents. INDEX NO. 100634/2013**

100634/2013

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2013 N.Y. Misc. LEXIS 4251; 2013 NY Slip Op 32169(U)

September 9, 2013, Decided

September 11, 2013, Filed

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

CORE TERMS: teacher, tenure, probationary period, teaching, appointment, license, school years, tenured teacher, superintendent of schools, probation period, agency's determination, rational basis, expiration, appointed, satisfactory, annual, relief requested, probationary term, recommendation, science teacher, teach, grade

JUDGES: [*1] PRESENT: Hon. EILEEN A. RAKOWER, J.S.C.

OPINION BY: EILEEN A. RAKOWER

OPINION

Carolina Castro ("Petitioner") brings this CPLR Article 78 proceeding for a judgment declaring that she is a tenured teacher "with all rights and privileges of a tenured teacher under the New York State Education Law, Commissioner's Regulations, Collective Bargaining Agreement and other applicable rules and regulations." The New York City Department of Education ("DOE") now cross-moves to dismiss the Petition on the grounds that Petitioner has already received all of the relief requested in the Petition, in that she is "currently a tenured teacher under an Earth Science license (568B)", and thus the Petition is moot.

Petitioner was hired by the DOE on September 3, 2003 through the Conversion program to teach High School Science while working towards a New York State Certificate in that subject area. On this date, Petitioner was offered a full time position teaching Science at DeWitt Clinton High School. From 2003 through 2009, Petitioner received satisfactory annual professional performance [**3] reviews for each of those six school years in which she taught as a science teacher at DeWitt Clinton High School.

Petitioner was issued her [*2] Professional Certification for Earth Science, Grades 5-9, by the New York State Education Department effective September 1, 2009 and continued to teach Science at DeWitt Clinton High School with satisfactory annual performance reviews until the end of the 2010-2011 school year.

In July 2011, Petitioner transferred to Murray Hill Academy High School, and was thereby still employed by the DOE as a High School Science teacher for both the 2011-2012 and 2012-2013 school years and received another satisfactory annual performance review for the 2011-2012 school year.

According to DOE, Petitioner's tenure is effective on September 1, 2013. However, Petitioner asserts that she should have received tenure as of September 3, 2006, three years after she began teaching. The date that her tenure is effective affects her "seniority rights" as a teacher, and if her tenure is effective as of September 1, 2013, "if there is any layoff in her teaching area, she would be the first one in line to be laid off."

New York Education Law Section §2573: Appointment of assistant, district or other superintendents, teachers, states in pertinent part:

(1)(a) Upon the recommendation of the superintendent of schools, [*3] for *a probation period of three years*,... The service of a person appointed to any of such positions may be discontinued at any time during such probationary period, on the recommendation of the superintendent of schools, by a majority vote of the board of education. Each person who is not to be

recommended for appointment on tenure shall be so notified by the superintendent of schools in writing not later than sixty days immediately preceding the expiration of his probationary period. [emphasis added]

Education Law §2573(5) provides:

[**4] At the expiration of the probationary term of any persons appointed for such term,... Such persons, and all other employed in the teaching, service of the schools of a city, who have served the full probationary period, shall hold their respective positions during good behavior and efficient and competent service, and shall not be removable except for cause after a hearing as provided by section three thousand twenty-a of this chapter.

Tenure may be acquired by estoppel when a school board accepts the continued service of a teacher or administrator, but fails to take the action required to grant tenure at the expiration of the teacher's probationary term. [*4] (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 N.Y.2d 175, 184, 436 N.E.2d 1265, 451 N.Y.S.2d 663). Moreover, a school district may not artificially increase the length of the probationary period established by State law, either directly or indirectly by unduly delaying the formal appointment of a teacher to a particular position which the teacher in fact fills. (*Matter of Mannix v. Board of Educ.*, 21 NY2d 455, 235 N.E.2d 892, 288 N.Y.S.2d 881; *see also, Matter of Schlosser v. Board of Educ.*, 47 NY2d 811, 391 N.E.2d 1364, 418 N.Y.S.2d 388)).

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarbough v. Franco*, 95 N.Y.2d 342, 347, 740 N.E.2d 224, 717 N.Y.S.2d 79 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756, 455 N.Y.S.2d 814 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635, 636, 469 N.Y.S.2d 391 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y.2d 269, 277-278, 283 N.E.2d 603, 332 N.Y.S.2d 622 [1972]). [*5] The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y. 2d 222, 231, 313 N.E.2d 321, 356 N.Y.S.2d 833 [1974]).

In the instant action, Petitioner has been employed as a ninth grade science teacher for over nine years and under her Professional (formerly known as Permanent) license for over three years. Petitioner was appointed a full-time teaching position with the DOE, effective September 4, 2003, and earned her Professional license in Earth Science, effective September 1, 2009. State law [*5] requires that a three year probationary period be served by a teacher commencing from the date of appointment to the position. Thus, regardless of whether Petitioner's probation period might be considered by the DOE to begin on either the initial date of employment by the DOE, the date of Petitioner's Professional license in Earth Science, or at some other point in between, the DOE'S conclusion that Petitioner's three-year probation period ends on September 1, 2013 (and therefore would have commenced September 2, 2010) has no rational basis.

Wherefore, it is hereby,

ORDERED that the petition is granted [*6] and the proceeding is remanded to the Department of Education to reconsider the effective date of Petitioner's tenure, based on New York State Law.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: September 9, 2013

/s/ Eileen A. Rakower

J.S.C.