COURT OF APPEALS
STATE OF NEW YORK

In the Matter of an Article 78 Proceeding STEPHEN ROSENBLUM, Petitioner, v. THE NEW YORK CITY CONFLICTS OF INTEREST BOARD and THE NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, Respondents.	:	New York County Clerk's Index No. 101121/09

NOTICE OF MOTION FOR LEAVE TO APPEAR AMICUS CURIAE ON RESPONDENTS' MOTION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that, pursuant to the attached motion and proposed amicus curiae brief, dated December 30, 2010, the Association of the Bar of the City of New York (the "Association") will move this Court at 20 Eagle Street, Albany, New York 12207-1095 on January 17, 2010, for an order granting the Association leave, pursuant to Rule of Practice 500.23(a)(3) of this Court, to appear amicus curiae on the motion of Respondents, the New York City Conflicts of Interest Board and the New York City Office of Administrative Trials and Hearings, dated December 8, 2010, for leave to appeal to this Court from the decision and order of the Appellate Division, First Department, entered July 1, 2010.

Dated: New York, New York
December 30, 2010

Respectfully submitted,

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COURT OF APPEALS
STATE OF NEW YORK

In the Matter of an Article 78 Proceeding STEPHEN ROSENBLUM, Petitioner, v. THE NEW YORK CITY CONFLICTS OF INTEREST BOARD and THE NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, Respondents.	:	New York County Clerk's Index No. 101121/09

MOTION FOR LEAVE TO APPEAR AMICUS CURIAE ON RESPONDENTS' MOTION FOR LEAVE TO APPEAL

Proposed amicus curiae the Association of the Bar of the City of New York (the "Association") respectfully moves this Court for an order granting the Association leave, pursuant to Rule of Practice 500.23(a)(3) of this Court, to appear amicus curiae on the motion of Respondents, the New York City Conflicts of Interest Board and the New York City Office of Administrative Trials and Hearings, dated December 8, 2010, for leave to appeal to this Court from the decision and order of the Appellate Division, First Department, entered July 1, 2010. The Association's proposed amicus curiae brief is attached as Exhibit A. In accord with Rule of Practice 500.23(a)(3),

if this Court grants amicus curiae relief on the Respondents' motion for permission to appeal and furthermore grants Respondents' motion for permission to appeal, then the Association requests that this Court also grant it leave to submit an amicus curiae brief on that appeal.

The Association and its proposed amicus curiae brief satisfy the criteria of this Court's Rule of Practice 500.23(a)(4). As detailed in its proposed amicus curiae brief, the Association has long concerned itself with the issue of government ethics in the City and State of New York and drawing on its experience can identify law and arguments arising from public policy that might otherwise escape the Court's consideration. The Association's proposed amicus curiae brief reflects the consideration and deliberation of its Committee on Government Ethics, whose membership is drawn from the more than 23,000 attorneys who are members of the Association, and would be of assistance to the Court.

WHEREFORE, the Association respectfully requests that this Court grant its motion for leave to appear amicus curiae on the Respondents' motion for leave to appeal together with such further relief as this Court deems appropriate and just.

Dated: New York, New York
December 30, 2010

Respectfully submitted,

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EXHIBIT A

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of an Article 78 Proceeding STEPHEN ROSENBLUM, Petitioner, v. THE NEW YORK CITY CONFLICTS OF INTEREST BOARD and THE NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, Respondents.	:	New York County Clerk's Index No. 101121/09

PROPOSED AMICUS CURIAE BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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December 30, 2010

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STATEMENT OF INTEREST

The Association of the Bar of the City of New York (the "Association") was established in 1870 and is today a professional association of more than 23,000 attorneys that seeks among other things to promote ethical government at the local and state level.

The Association has a longstanding interest in ethical government in the City and State of New York that dates to the circumstances of the Association's founding.[1] In more recent years, the Association's Committee on Government Ethics, for example, has provided testimony before the New York City Conflicts of Interest Board on the lobbying of public servants by their former campaign consultants and has proposed use of ethics agreements to address conflicts of interest prior to the appointment of public servants in local and state government.[2] Earlier this year, the Committee on Government Ethics contributed

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[1] See generally GEORGE MARTIN, CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1870-1970 (1970).

[2] See ASSOC. OF THE BAR OF THE CITY OF NEW YORK COMM. ON GOVERNMENT ETHICS, TESTIMONY BEFORE THE NEW YORK CITY CONFLICTS OF INTEREST BOARD (2006) available at http://www.nycbar.org/pdf/report/COIBTestimony2.pdf; ASSOC. OF THE BAR OF THE CITY OF NEW YORK COMM. ON GOVERNMENT ETHICS, A PROPOSAL TO APPLY ETHICS AGREEMENTS ON THE STATE AND LOCAL GOVERNMENTAL LEVEL (2006) available at http://www.nycbar.org/pdf/report/Ethics_Agreements.pdf.

to the Association's report that recommended comprehensive reform of the State of New York's ethics laws.[3]

Through its Committee on Government Ethics, the Association submits this proposed amicus curiae brief because it believes that the order and decision of the Appellate Division, First Department misconstrues the proper scope of "discipline" in Education Law § 3020 and the corresponding breadth of application of Education Law § 3020-a. Because this error will harm the cause of ethical government in the City of New York, the Association urges this Court to grant the motion for leave to appeal filed by the New York City Conflicts of Interest Board ("COIB") and the New York City Office of Administrative Trials and Hearings ("OATH") on December 8, 2010 so that it can review what constitutes "discipline" in § 3020.

PRELIMINARY STATEMENT

The Association encourages this Court to address the breadth that is afforded to "discipline" under Education Law § 3020 because the decision of the Appellate Division, First Department possibly forecloses COIB's enforcement of the New York City Conflicts of Interest Law

[3] See ASSOC. OF THE BAR OF THE CITY OF NEW YORK, REFORMING NEW YORK STATE'S ETHICS LAWS THE RIGHT WAY (2010) available at http://www.nycbar.org/pdf/report/uploads/20071860-ReformingNYSEthicsLawstheRightWay.pdf.

against a wide swath of public servants in the City of New York.[4] Because the Association champions the independent and impartial enforcement of local ethics provisions, it argues against this decision on both legal and public policy grounds.

The decisions of the lower courts in the State of New York often repeat that "Education Law § 3020-a provides the exclusive method of disciplining a tenured teacher." Tebordo v. Cold Spring Harbor Cent. Sch. Dist., 126 A.D.2d 542, 542 (2d Dep't 1987). These cases, however, involve whether an education employer was imposing "discipline" on a tenured education employee. The present case presents the first opportunity for this Court to analyze "discipline" in a different context: COIB is not an education employer and does not employ the public servants against whom it regularly brings ethics charges.

Significantly, §§ 3020 and 3020-a do not contemplate, and in the case of the latter do not even structurally permit, disciplinary proceedings against tenured education employees outside of the educational

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[4] The Respondents' Motion for Leave to Appeal indicates that over 90% of the workforce of the City of New York is entitled to procedural safeguards akin to Education Law § 3020-a in connection with the imposition of any "discipline" or similar formulations of that word. See Resp'ts' Mot. Leave Appeal ¶ 36.

employment context. This structural limitation of § 3020-a, together with the aims that motivated the creation of the educational tenure system itself, strongly suggests that § 3020's conception of "discipline" is rightly limited to the educational employment context. It is not so broad as to encompass a fine that COIB imposes pursuant to a separate statutory scheme that arises from a distinct set of public policy concerns, that does not impact the relationship between education employer and tenured education employee, and that does not alter the employee's security or terms of employment.

The Association limits itself as amicus curiae to arguing that §§ 3020 and 3020-a do not themselves foreclose COIB from imposing a fine on a tenured education employee pursuant to the New York City Conflicts of Interest Law. In addressing what lies within the meaning of "discipline" under § 3020, the Association does not address the issue of whether, pursuant to New York City Charter § 2603(h) and Title 53 of the Rules of the City of New York, COIB is empowered to enforce the New York City Conflicts of Interest Law against public servants who are "subject to the jurisdiction of any state law or collective bargaining

agreement which provides for the conduct of disciplinary proceedings." New York City Charter § 2603(h)(2).[5]

ARGUMENT

This Court should not interpret "discipline" in Education Law § 3020 to encompass the New York City Conflicts of Interest Board's imposition of a fine against a tenured education employee. Education Law § 3020 provides in relevant part that "[n]o person enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for just cause and in accordance with the procedures specified in [Education Law § 3020-a]." The statute's reference to "discipline" only appeared in 1994 when the legislature broadened its focus from only the dismissal of teachers and incorporated a cross-reference to § 3020-a. See L. 1994, c. 691, § 2 (§ 3020's title changed from "Dismissal of teachers" to "Discipline of teachers"). Amidst the letters and memoranda written to Governor Mario Cuomo in support and opposition of the bill that amended § 3020 and primarily reformed the disciplinary procedures

[5] To the extent that this Court finds that the Appellate Division, First Department relied on 53 R.C.N.Y. § 2-02(a) in affirming the holding "that the exclusive avenue to discipline a tenured pedagogue is Education Law § 3020-a," the Association does not articulate a position as amicus curiae. See Rosenblum v. New York City Conflicts of Interest Bd., 75 A.D.3d 426, 427 (1st Dep't 2010).

in § 3020-a, there is no indication that "discipline" was understood to reach beyond the educational employment context.[6] In his memorandum approving the bill's passage, Governor Cuomo indicated that he understood the Assembly and Senate to have addressed, at his urging, issues limited in their application to the educational employment context.[7]

Previously, in summarizing the impetus behind the educational tenure system in the State of New York and the purpose of Education Law § 3020-a, this Court had emphasized the role of that statute in protecting tenured education employees from arbitrary suspension or dismissal --measures that only their education employer may take:

> The Legislature, recognizing a need for permanence and stability in the employment relationship between teachers and the school districts which employ them, enacted a comprehensive statutory tenure system, the purpose of which was to provide some measure of security for competent teachers who had

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[6] For example, Charles D. Cook, Chairman of the Senate Education Committee stated, in his letter urging Governor Cuomo to sign the bill that he sponsored, that aside from § 3020-a, "this legislation [also] permits teachers and school districts to bargain for alternative disciplinary procedures." N.Y. Bill Jacket, 1994 S. 7608-A, 6.

[7] Governor Cuomo wrote, "[t]his bill, part of my 1994 Legislative Program . . . provides tenured teachers with additional due process protection by requiring that they be informed of what penalty the employing board will seek." Id. at 5.

> rendered adequate service for a number of years. One of the bulwarks of that tenure system is section 3020-a of the Education Law which protects tenured teachers from arbitrary suspension or removal.

Holt v. Bd. of Educ. of Webutuck Cent. Sch. Dist., 52 N.Y.2d 625, 632 (1981). As such a bulwark, § 3020-a is not surprisingly addressed to the educational employment context and through a number of its provisions effectively limits the imposition of "discipline" under § 3020 to proceedings within that same context. See, e.g., Education Law § 3020-a(3)(a) ("[u]pon receipt of a request for a hearing . . . the commissioner [of education] shall forthwith notify the American Arbitration Association"); id. (b)(ii) ("the employing board and the employee . . . shall by mutual agreement select a hearing officer . . . and shall notify the commissioner [of education] of their selection"); id. (c)(i) ("[t]he commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section").

The setting of the disciplinary proceedings that § 3020-a contemplates as well as the public policy concerns that underlie the protections it affords should inform the breadth that this Court affords to "discipline." See

People v. Santi, 3 N.Y.3d 234, 243 (2004) (noting in the course of interpreting a provision of the Education Law that "[i]n implementing a statute, the courts must of necessity examine the purpose of the statute and determine the intention of the Legislature"); Sutka v. Conners, 73 N.Y.2d 395, 403 (1989) (stating "inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history") (emphasis added). A fine that COIB imposes for violation of the New York City Conflicts of Interest Law results from what is arguably a disciplinary proceeding. The fine, however, is imposed wholly outside of the educational employment context: it does not impact the relationship between, in this case, the New York City Department of Education and Stephen Rosenblum nor alter Mr. Rosenblum's security or terms of employment.[8] It does not implicate the public policy concerns that the educational tenure system and § 3020-a address.[9]

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[8] To the extent that pursuant to New York City Charter § 2606(b) COIB recommends "suspension or removal from office or employment" to the New York City Department of Education, the protections of § 3020-a would apply to protect a tenured education employee.

[9] In its memorandum to Governor Nelson Rockefeller articulating support for Assembly Bill No. 3499, which in 1970 gave rise to Education Law § 3020-a, the New York State Teacher's Association wrote:

This Court should interpret § 3020-"discipline" to exclude a COIB fine and therefore give effect to the distinct public policy concerns that animate the New York City Conflicts of Interest Law. Cf. Albany Area Builders Ass'n v. Town of Guilderland, 74 N.Y.2d 372, 376 (1989)(noting "[s]o long as local legislation is not inconsistent with . . . any general law, localities may adopt local laws . . . with respect to their 'property, affairs or government'")(quoting N.Y. CONST. art. IX, § 2(c)(i)). In establishing "an independent and effective enforcement mechanism," NEW YORK CITY CHARTER REVISION COMM., THE REPORT 27 (1989), for the New York City Conflicts of Interest Law, the New York City Charter Revision Committee sought over twenty years ago to "preserve the trust placed in the public servants" of the City of New York. New York City Charter § 2600.

> The purpose of tenure is to provide the best possible teaching service for children by protecting the continued employment of staff during good behavior and competent and efficient service. Tenure provides protection against unjust dismissal for arbitrary, personal, political, or other unwarranted reasons.

N.Y. Bill Jacket, 1970 A.B. 3499, 13.

The Appellate Division, First Department did not inform its analysis of what constitutes "discipline" with the public policy concerns that inspired the educational tenure system and § 3020-a. It was content to repeat the refrain of cases that address "discipline" between an education employer and tenured education employee and state that "the exclusive avenue to discipline a tenured pedagogue is Education Law § 3020-a." The Court further equated COIB's imposition of a fine to § 3020-"discipline" because a "fine" is listed among those penalties that § 3020-a permits. Rosenblum v. New York City Conflicts of Interest Bd., 75 A.D.3d 426, 427 (1st Dep't 2010). See Education Law § 3020-a(4)(a) (listing a "written reprimand, a fine, suspension for a fixed time without pay, or dismissal" as the penalties that a hearing officer may impose pursuant to § 3020-a).

This superficial analysis falls short of the approach that this Court set out in Holt v. Board of Education of Webutuck Central School District. After consideration of the public policy concerns that motivated the state legislature, this Court decided in Holt that language that "may appear to some to be in the nature of a 'reprimand' within the literal meaning of that word" as it appears among the penalties that § 3020-a permits "falls

far short of the sort of formal reprimand contemplated by the statute." 52 N.Y.2d at 633.

The Association encourages this Court to grant COIB and OATH's motion for leave to appeal so that it can address the Appellate Division, First Department's interpretation of "discipline" under § 3020 in the novel context of a board that is not an education employer, a tenured education employee, and the enforcement of local ethics provisions. The Association submits that COIB is an unambiguously positive force for ethical government in the City of New York. Brought into existence through overwhelming public support in 1988,[10] COIB has long fought against high-profile corruption. At the same time, the COIB has stood sentinel against those minor infractions that collectively erode the public's faith in the integrity of its government. After twenty-two years, voters remain supportive of COIB and its mandate.[11] To the extent that

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[10] In 1988, 82.3% of voters in the City of New York supported the proposal that created the New York City Conflicts of Interest Law and empowered COIB to enforce it. See NEW YORK CITY CHARTER REVISION COMM., THE REPORT 24 (1989).

[11] On November 2, 2010, the voters of the City of New York approved an amendment to New York City Charter § 2606(b) increasing from $10,000 to $25,000 the amount of the fines that COIB may impose for violations of the New York City Conflicts of Interest Law. See NEW YORK CITY CONFLICTS OF INTEREST BOARD, AMENDMENTS

COIB is empowered to enforce the New York City Conflicts of Interest Law against public servants who are entitled to the statutory protections of § 3020-a, the Association believes that the Education Law does not and also should not constrain COIB.

TO NYC CHARTER CHAPTER 68 (CONFLICTS OF INTEREST) (2010) available at http://www.nyc.gov/html/conflicts/downloads/pdf2/charter_revision/final_adopted_amendments11_02_2010.pdf.

CONCLUSION

For the foregoing reasons, this Court should grant the motion of the New York City Conflicts of Interest Board and the New York City Office of Administrative Trials and Hearings for leave to appeal.

Dated: New York, New York
December 30, 2010

Respectfully submitted,

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