New York County Clerk's Index No. 101121/09

Court of Appeals
of the
State of New York

In the Matter of an Article 78 Proceeding

STEPHEN ROSENBLUM,

Petitioner-Respondent,

– against –

THE NEW YORK CITY CONFLICTS OF INTEREST BOARD and THE NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIAL AND HEARINGS,

Respondents-Appellants.

BRIEF OF AMICUS CURIAE NEW YORK CITY BAR ASSOCIATION IN SUPPORT OF RESPONDENTS-APPELLANTS

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Date Completed: November 22, 2011

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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.

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 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] Last year, the Committee on Government Ethics contributed to the Association's report that contributed to comprehensive reform of the State of New York's ethics laws.[3]

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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.

[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.

Through its Committee on Government Ethics, the Association submits this 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 reverse the order of the Appellate Division, First Department.

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 threatens to foreclose COIB's enforcement of the New York City Conflicts of Interest Law 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

[4] The Respondents-Appellants' Brief for Appellants 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 Brief for Appellants at 3-4.

542, 542 (2d Dep't 1987). These cases, however, involve whether an educational 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 does not even structurally permit, disciplinary proceedings against tenured education employees outside of the educational 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 affect the relationship between education employer and tenured education employee, and that does not alter the employee's job security or terms of employment.

The Association limits itself as amicus curiae to arguing that §§ 3020 and 3020-a do not 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 of and opposition to the bill that amended § 3020 and

[5] To the extent that this Court concludes 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)

primarily reformed the disciplinary procedures 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 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 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.

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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.

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 arguably resembles a "disciplinary proceeding." Such a fine, however, is imposed wholly outside of the educational employment context: it does not affect the relationship between, in this case, the New York City Department of Education and Stephen Rosenblum, nor does it alter Mr. Rosenblum's security or terms of employment.[8] It does not implicate the public policy concerns surrounding the regulation of the educational workplace that are addressed by the educational tenure system and § 3020-a.[9]

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.

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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:

> 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.

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 COIB, of course, does not report to the Department of Education, and its members may only be removed by New York City's mayor in very limited circumstances. New York City Charter § 2602(f).

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 addressing "discipline" in the context of disputes 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-a "discipline," simply 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. This Court concluded that "[S]ection 3020-a of the Education Law was not intended by the Legislature to apply to such evaluations and does not require a formal hearing as a prerequisite to the inclusion of such documents in the teachers' personnel file." *Id.* at 632. Analysis of the structure and purpose of § 3020-a – which the court below did not engage in – leads to a similar conclusion that §3020-a was not intended to preempt all apparently "disciplinary" proceedings against tenured educational employees in all contexts – certainly not to preempt proceedings brought by a body such as COIB, which is charged with enforcing a distinct statutory scheme and which does not employ the public servants against whom it brings ethics charges.

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 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.

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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).

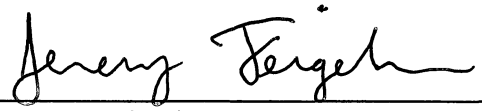
[11] On November 2, 2010, the voters of the City of New York approved an amendment to New York City Charter § 2606(b) increasing from $10,000 to $25,000 the amount of the fines that COIB may impose for violations of the New York City Conflicts of Interest Law. See NEW YORK CITY CONFLICTS OF INTEREST BOARD, AMENDMENTS TO NYC CHARTER CHAPTER 68 (CONFLICTS OF INTEREST) (2010) available at http://www.nyc.gov/html/conflicts/downloads/pdf2/charter_revision/final_adopted_amendments 11_02_2010.pdf.

CONCLUSION

For the foregoing reasons, this Court should reverse the order below of the Appellate Division, First Department.

Dated: New York, New York
November 22, 2011

Respectfully submitted,



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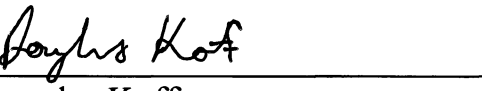

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New York County Clerk's Index No. 101121/09

Court of Appeals
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In the Matter of an Article 78 Proceeding

STEPHEN ROSENBLUM,

Petitioner-Respondent,

– against –

THE NEW YORK CITY CONFLICTS OF INTEREST BOARD and THE NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIAL AND HEARINGS,

Respondents-Appellants.

MOTION FOR LEAVE TO APPEAR AMICUS CURIAE

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COURT OF APPEALS
STATE OF NEW YORK

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

NOTICE OF MOTION FOR LEAVE TO APPEAR AMICUS CURIAE

PLEASE TAKE NOTICE that, pursuant to the attached motion and proposed amicus curiae brief, dated November 22, 2011, 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 December 5, 2011, for an order granting the Association leave, pursuant to Rule of Practice 500.23 of this Court, to file an *amicus curiae* brief in the above-captioned appeal in support of Respondents-Appellants the New York City Conflicts of Interest Board and the New York City Office of Administrative Trials and Hearings.

Dated: New York, New York
November 22, 2011

Respectfully submitted,

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

MOTION FOR LEAVE TO APPEAR AMICUS CURIAE

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 of this Court, to appear as *amicus curiae* in support of Respondents-Appellants the New York City Conflicts of Interest Board and the New York City Office of Administrative Trials and Hearings. The Association's proposed amicus curiae brief is attached as Exhibit A. On February 24, 2011, this Court previously granted the Association's motion for leave to appear as *amicus curiae* in support of Respondents-Appellants' motion for leave to 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* and to file a brief at a time and place designated by the Court, and for such other and further relief as the Court may deem appropriate.

Dated: New York, New York
November 22, 2011

Respectfully submitted,

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