

MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION©
By Betsy Combier

Respondent submits this motion to dismiss the disciplinary action against Respondent ("Respondent") pursuant to Education Law §3020-a.

Respondent states that the charges proffered against him/her ("charges") are defective as they fail to adhere to Education Law §3020-a (2)(a) as there has been no vote by the employing board on probable cause. The charging paper titled "Notice of Determination of Probable Cause on Education Law §3020-a Charges" has no date for the Executive Session as mandated.

Additionally, the Principal signed the charging papers after he/she, alone, not the school board, "found" probable cause, yet nowhere in Education Law §3020-a is there a provision authorizing a Principal (or any single individual) to make a determination of probable cause.

The Chancellor has no authority to determine probable cause, only to *initiate the charging process* without making any conclusions. Initiating charges is not the same as determining probable cause. Moreover, because the Chancellor has no vote as a member of the Panel for Educational Policy, he/she lacks the authority to grant any individual the authority to make a probable cause determination. Even if the Chancellor was given the duties of the school board, this would still mandate a vote in an Executive Session before any charges were served on Respondent. This did not happen. The charging papers have no date for the Executive Session taking place at any time.

Accordingly, the Hearing Officer has limited, if any, authority to rule or issue any penalty or determine just cause on the charges presented by the Department in this matter. (See the PEP Bylaws).

**EDUCATION LAW §3020-A MANDATES A VOTE ON
PROBABLE CAUSE BY A SCHOOL BOARD**

Education Law §3020 provides, in pertinent 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 section 3020-a." As a tenured teacher, Respondent possesses a constitutionally protected property interest in his/her position of employment which may not be diminished in any manner without being accorded substantive fair hearing and due process rights. Matter of Soucy v. Board of Education of North Colonie Central School Dist No. 5, 41 A.D.2d 984, 343 N.Y.S.2d 624 (3rd Dep't 1973)). See also New York's Court of Appeals in Ricca v. Board of Ed. of the City Sch. Dist, 47 N.Y.2d 385, 418 N.Y.S.2d 345 (1979):

"The tenure system is not an arbitrary mechanism designed to allow a school board to readily evade its mandate by the creation of technical obstacles Rather it is a legislative expression of a firm public policy determination that the interests of the public in the education of our youth can best be served by a system designed to foster academic freedom in our schools and to protect competent teachers from the abuses they might be subjected to if they could be dismissed at the whim of their supervisors. In order to effectuate these convergent purposes, it is necessary to construe the tenure system broadly in favor of the teacher, and to strictly police procedures which might result in the corruption of that system by manipulation of the requirements for tenure."

Additionally, N.Y. Municipal Home Rule Section 11(1)(c) states as follows:

“No local legislative body is empowered to enact laws or regulations which supersede state statutes, particularly with regard to the maintenance, support, or administration of the educational system.”

See also N.Y. Const. Art IX §2(C).

In the Matter of Stephen Rosenblum, Respondent, v New York City Conflicts of Interest Board et al., Appellants, 75 A.D.3d 426; 903 N.Y.S.2d 228; 2010 N.Y. App. Div. LEXIS 5749; 2010 NY Slip Op 5875, the First Department Appellate Division held that the New York State Supreme Court ruling was correct, that “the exclusive avenue to discipline a tenured pedagogue is Education Law § 3020-a (see Education Law § 3020; 53 RCNY 2-02 [a]).

The requirements of NYS Education Law §3020-a, under which tenured personnel may be disciplined for "just cause" are absolute and require that before charges can be brought against a tenured educator, the school board¹ [PEP] must:

- a. Determine that there is "probable cause" for the proceeding with charges by a majority vote by the Board.
- b. Make this determination within 5 days of the charges being filed with the Board.
- c. Ensure that the decision to proceed with the charges is not frivolous, arbitrary, capricious or discriminatory.

This vote by the school board is required under Education Law 3020-a for a proper determination of "probable cause" upon which to bring charges against teachers removed from their schools. (Education Law §3020-a, Article 61). A determination of probable cause by an Independent Executive Session must, according to law, occur after charges are made against a tenured employee in order to mitigate against malicious prosecution, retaliation, and/or sheer vindictiveness (which is precisely what is transpiring here). The legislative intent is to provide pedagogues protection from

¹ In the City of New York, the Panel for Educational Policy (“PEP”) serves as the “school board”.

vindictive principals who may want to remove senior teachers from their positions because they make salaries that could pay for two teachers instead of one, or other unlawful reasons.

Education Law §3020-a ***requires a vote by the school board [PEP] as the basis for deciding to charge a tenured employee.*** (Education Law §3020-a(2)(a)). There has been no such vote in Respondent's case. Since the very statute upon which this hearing is based has been flouted, should the within dismissal motion be denied, it would be a clear violation of Respondent's constitutional right to due process and equal protection under the law. The statutory procedures in this case were completely disregarded and there was no oversight by anyone other than the tenured teacher's principal to initiate the disciplinary process to file charges against him/her or any other educator a principal chooses to remove from the school the principal administers. The employee's tenure rights were not protected, in direct violation of the tenure law, the UFT contract, and Municipal Home Rule §11(1)(C). Because of the open and obvious procedural defects, dismissal of all charges is warranted.

The total lack of independent review and lack of oversight by anyone other than the tenured teacher's principal to initiate discipline is blatantly inconsistent with Education Law §3020-a and the intent of Congress to avoid giving the NYC Chancellor and Mayor total control over every aspect of the charging process. This constitutes a *de facto* denial of equal protection of the §3020-a law and denies tenured employees their constitutional rights to due process.

Arbitrators who sit on the panel to hear 3020-a charges are not permitted by law, collective bargaining agreement, or any other contractual arrangement to make a

decision on charges unless they have been voted on by the New York City Board of Education **before** a tenured teacher is charged, pursuant to Education Law §§ 3020 and 3020-a. Arbitrators who work on NYC cases either under the Administrative Trials Unit ("ATU") or Teacher Performance Unit ("TPU") received these procedures and guidelines at a plenary meeting held at the New York City Department of Education headquarters on February 24, 2015. See documents posted on the blog "NYC Rubber Room Reporter" at:

http://nycrubberroomreporter.blogspot.com/2016/05/the-3020-arbitration-newswire-digging_28.html and,

<http://www.parentadvocates.org/nicemedia/documents/Emails-release-version.pdf>

Respondent requested a hearing pursuant to §3020-a of the Education Law, and his/her charging papers state that "...a meeting in executive session on the above date...has found that there is probable cause...", has no information on where this meeting took place, when, who attended, or who voted probable cause.

Before a tenured teacher can be brought up on disciplinary charges, the Education Law sets a number of procedural hurdles that a Board of Education must comply with. These procedural hurdles are in place to protect the rights of the tenured teacher to fair process, and constitute jurisdictional pre-requisites to a §3020-a disciplinary hearing.

The United States Constitution, the laws of New York State and public policy all recognize and uphold tenure rights - foremost being the right to due process-- and the determination of probable cause cannot be bargained away by any collective bargaining agreement which diminishes these rights, nor by fiat of the Chancellor.

Compliance with this provision is a jurisdictional condition precedent to a §3020-a disciplinary hearing. Without it, the hearing cannot go forward. Prohibition is the

appropriate procedural remedy for the assertion of respondent's claim where prohibition is available "to prevent a body or officer from proceeding or threatening to proceed without or in excess of its jurisdiction." See: Matter of Schumer v. Holtzman, 60 N.Y. 2d 46, 51. In this disciplinary hearing, the Department seeks to terminate Respondent, a tenured teacher, and as such, deprive him/her of a constitutionally protected interest without satisfying the statutory pre-requisites.

Respondent requests either the arbitrator dismiss the charges on the errors of procedure, or make a ruling that the charges may be filed in the future concerning the charged school years contained therein if and when the procedures for charging complies with Education Law 3020-a(2)(a). Respondent hereby reserves his/her right to continue his/her objection to the procedural errors seen and cited herein.