SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an Article 78 Proceeding

CAMILLO M. SANTOMERO,

Petitioner,

-against-

BOARD OF EDUCATION of the BEDFORD CENTRAL SCHOOL DISTRICT, SUSAN ELION WOLLIN, as President of the Board of Education of the Bedford Central School District, CAROLE LACOLLA, as District Clerk of the Board of Education of the Bedford Central School District and DR. DEBRA JACKSON,

Respondents.

Index No. 2008-25405

Assigned To:
Hon. Barbara Zambelli, A.J.S.C.

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION TO REARGUE

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MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION TO REARGUE

I. PRELIMINARY STATEMENT

Respondents, the Board of Education of the Bedford Central School District (the "Board of Education"), Susan Elion Wollin, as President of the Board of Education of the Bedford Central School District, Carole LaColla, as District Clerk of the Board of Education, and Dr. Debra Jackson (collectively, the "Respondents"), submit this Memorandum of Law in opposition to Petitioner's motion for an Order, pursuant to CPLR § 2221, granting reargument and/or renewal with respect to the Court's Decision and Order entered on March 31, 2009 (the "Decision and Order"). Specifically, Petitioner seeks to reargue the Decision and Order insofar as it: (i) upheld the Board of Education's decision to deny access to certain draft disciplinary charges involving Dr. Jackson, who formerly served as superintendent of the Bedford Central School District (the "School District"), and (ii) denied Petitioner's request for attorney's fees. In

the alternative, Petitioner moves for renewal on these same two rulings on the ground that the Board of Education was allegedly required to certify, in its Answer to the Petition, "whether additional documents responsive to Petitioner's FOIL request existed." (Sternbach Affirm., ¶ 1). Upon reargument and/or renewal, Petitioner would have the Court vacate the aforementioned portions of the Decision and Order and review the draft disciplinary charges *in camera* to determine whether any portion of the charges might be subject to FOIL disclosure. (Id.). As set forth below, Petitioner's motion lacks merit and should be denied.[1]

Petitioner identifies three (3) grounds for reargument/renewal, each of which is unavailing. First, Petitioner argues that the Court overlooked or misapprehended Public Officers Law § 89(3)(a) and Beechwood Restorative Care Center v. Signor, 5 N.Y.3d 435, 808 N.Y.S.2d 568 (2005), with respect to the requirement that an agency execute a certification in the event it cannot locate requested documents after conducting a diligent search. In the instant matter, however, the Board of Education interpreted Petitioner's FOIL request as seeking disclosure of a document that it did possess, namely, the draft disciplinary charges against Dr. Jackson. The Board of Education denied Petitioner's FOIL request on two grounds: (i) that the record in question constituted intra-agency material, and (ii) that its disclosure would constitute an unwarranted invasion of privacy. (Petition, Exhibit F). Under these circumstances, a certification that the Board of Education had "no responsive documents" was neither required nor appropriate under Beechwood and Public Officers Law § 89(3)(a). An agency is not

[1] At the outset of his motion, Petitioner also asserts that the Court erred insofar as the Decision and Order recited that the Petition was "disposed of." (Sternbach Affirm., ¶ 1(A)(i)). However, Petitioner cites no provision of the CPLR or relevant case law to support this contention. Instead, Petitioner argues that the Court should not have "disposed of" of the Petition before the Board of Education's issuance of a certification, pursuant to Public Officer's Law § 89(3)(a), that it had no documents responsive to his FOIL request. Thus, Petitioner's contentions regarding certification and the procedural disposition of the Petition are actually the same argument. As discussed below, Petitioner's argument concerning certification is meritless.

required to provide a certification under Section 89(3)(a) when it has denied access to a document in its possession. Indeed, Petitioner's argument is illogical and a *non sequitur*.

The second argument raised by Petitioner in support of renewal/reargument posits that the Court overlooked or misapprehended Beechwood in denying his request for attorney's fees pursuant to FOIL's fee-shifting provision. See Public Officers Law § 89(4)(c) (McKinney's 2009). Under Beechwood and Section 89(4)(c), a court may, in its discretion, award reasonable counsel fees and costs to a party that "substantially prevailed" in a proceeding if: (1) "the record involved was, in fact, of clearly significant interest to the general public," and (2) "the agency lacked a reasonable basis in law for withholding the record." Public Officers Law § 89(4)(c). Here, however, the Board of Education clearly had a "reasonable basis in the law" for withholding the draft disciplinary charges. Even now, Petitioner does not argue to the contrary, but merely contends that the Court should have conducted an *in camera* review before determining whether the charges were inaccessible. The additional documents that the Board of Education has now identified pursuant to the Decision and Order have not been withheld, but in fact will be produced to Petitioner in redacted form. Accordingly, there are no factual or legal grounds to disturb the Decision and Order insofar as its denial of Petitioner's request for attorney's fees.

The third argument raised in Petitioner's motion challenges the Court's determination that an *in camera* review of the draft disciplinary charges was unnecessary. Here, Petitioner fails to recognize that the controlling case law, together with advisory opinions issued by the New York State Committee on Open Government, are crystal clear: non-final disciplinary charges against a public employee are exempt from disclosure under FOIL. See Public Officers Law §§ 87(2)(g), 87(2)(b) and 89(2)(b). The issue does not even present a close question, as New

York has a strong public policy of preserving the right to confidentiality with respect to unproven allegations of professional misconduct. This policy, and the inherent nature of such documents, justifies their exemption from the FOIL disclosure. Petitioner offers no cogent reason for vacating the Court's determination as to the need for *in camera* review, particularly in light of this unequivocal body of case law.

The continued *ad hominem* attacks in Petitioner's motion papers do not warrant an extended response. At all times, the Board of Education has sought to comply with its obligations under FOIL, as well as the confidentiality provision set forth in the settlement agreement between itself and Dr. Jackson. (Petition, Exhibit B). The additional documents identified by the Board of Education pursuant to the Decision and Order consist predominantly of intra-agency emails among board members that were not expressly encompassed within Petitioner's initial FOIL demand. The Board of Education's initial presumption that Petitioner was not requesting copies of intra-agency emails, which are wholly exempt from FOIL disclosure to the extent they reflect the opinions and thought processes of board members,[2] was a reasonable one. Although Petitioner's characterization of the number of documents in question is misleading, since many of the emails are duplicates, the volume of responsive documents now identified by the Board of Education reflects the diligent and conscientious nature of its expanded search. While Petitioner contends that the identification of these documents is evidence of "bad faith," quite the opposite is true. In sum, Petitioner's accusations are completely unfounded and should be afforded no weight whatsoever in connection with this motion.

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[2] See Gould v. New York City Police Dept., 89 N.Y.2d 267, 277, 653 N.Y.S.2d 54, 58 (1996) (observing that "objective information" is subject to FOIL disclosure, but not "opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making").

II. ARGUMENT

POINT I

PETITIONER HAS FAILED TO DEMONSTRATE THAT THE COURT OVERLOOKED OR MISAPPREHENDED RELEVANT FACTS OR CONTROLLING CASE LAW

A. Standard of Review

A motion for reargument is addressed to the sound discretion of the Court which decided the prior application. See Ebasco Construction, Inc. v. A.M.S. Construction Co., Inc., 195 A.D.2d 439, 440, 599 N.Y.S.2d 866, 867 (2d Dep't 1993). Pursuant to CPLR § 2221(d)(2), a motion for leave to reargue must be based upon "matters of fact or law allegedly overlooked or misapprehended by the court." (McKinney's 2009). "The motion is not designed to afford an unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." Mayer v. National Arts Club, 192 A.D.2d 863, 596 N.Y.S.2d 537, 539 (3d Dep't 1993).

A motion to renew pursuant to CPLR § 2221 must be "based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." CPLR § 2221(e)(2) (McKinney's 2009). As with a motion to reargue, a motion to renew is addressed to the sound discretion of the Court. See Mi Ja Lee v. Glicksman, 14 A.D.3d 669, 789 N.Y.S.2d 276, 277 (2d Dep't 2005).

Applying these standards here, Petitioner's motion should be denied because the Court did not misapprehend or overlook any matters of fact or law in rendering the Decision and Order, and no new facts have been presented that would justify changing the rulings therein.

B. The Board of Education Was Not Required To Serve A Certification Of "No Records" With Its Answer

Petitioner argues that Respondents should have provided a certification pursuant to Public Officers Law § 89(3)(a) "at the latest, in [their] Answer and supporting Affidavits." (Sternbach Affirm., ¶ 3). However, the plain language of Section 89(3)(a) contains no such requirement. To the contrary, given the Board of Education's denial of Petitioner's FOIL request on intra-agency and privacy grounds, such a certification would have been incorrect and inappropriate under that statute.

Public Officers Law § 89(3)(a) requires that, within five (5) business days of receipt of a written request for records, an agency must either make the records available, deny the request, or acknowledge receipt of the request and state the approximate date when the request will be granted or denied. See Data Tree, LLC v. Romaine, 9 N.Y.3d 454, 849 N.Y.S.2d 489, 496 (2007); Beechwood, 5 N.Y.3d at 440-41, 808 N.Y.S.2d at 571. When an agency is unable to locate documents requested under FOIL, Section 89(3)(a) further requires that the agency "certify that it does not have possession of such record or that such record cannot be found after diligent search." Public Officers Law § 89(3)(a). See also 21 N.Y.C.R.R. §§ 1401.2(b)(7), 1401.5(c)(2), 1401.7(b).

"The statute does not specify the manner in which an agency must certify that documents cannot be located. Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required." Rattley v. New York City Police Department, 96 N.Y.2d 873, 875, 730 N.Y.S.2d 768, 770 (2001).

In the instant matter, the Board of Education interpreted Petitioner's FOIL request as seeking the draft disciplinary charges against Dr. Jackson, and it withheld access to that

document based upon FOIL's intra-agency and privacy exemptions. Thus, the Board of Education's initial response was a denial. The issuance of a certification that responsive documents could not be located after a diligent search would have been inaccurate and unwarranted under Public Officers Law § 89(3)(a). At the time Respondents interposed their Answer to the Petition, they carefully explained (through the Affidavit of Board President, Susan Elion Wollin) how they had interpreted Petitioner's FOIL request. By doing so, Respondents preserved the accuracy and integrity of the administrative record for judicial review.

In sum, the Court did not overlook or misapprehend Beechwood[3] or any other case authority with respect to the certification requirement set forth in Public Officers Law § 89(3)(a). In fact, it is Petitioner who has misapprehended the plain language of the statute in arguing that the Board of Education failed to timely make a "statutorily required certification." (Sternbach Affirm., ¶ 9).

C. The Court Correctly Denied Prevailing Party Attorney's Fees

Because this Court upheld the Board of Education's decision that the draft disciplinary charges against Dr. Jackson are exempt from FOIL disclosure, Petitioner cannot possibly be

[3] Notably, in Beechwood, the petitioner alleged that the agency had failed to adequately respond to certain of its numerous FOIL requests. After the proceeding was commenced, the agency produced 350 pages of additional documents. Thereafter, in a succession of orders, the court directed the agency to provide affidavits attesting to its diligent search efforts. As a result of this directive, the agency produced hundreds of pages of additional documents. See Beechwood, 5 N.Y.3d at 439, 808 N.Y.S.2d at 570. The petitioner Beechwood then moved to compel the agency to provide further affidavits relating to the procedures it had instigated to locate the requested documents. The agency responded by providing affidavits from 20 employees, along with 74 pages of additional documents. The court then directed the agency to search for records pertaining to one final item, which was eventually discovered. After the completion of production of records, the petitioner moved for attorneys' fees under FOIL. Notwithstanding the agency's piecemeal responses to the petitioner's FOIL demand, the court denied its request for attorney's fees. Both the Appellate Division and Court of Appeals affirmed.

deemed a prevailing party under FOIL. Public Officers Law § 89(4)(c) provides, in relevant part, as follows:

> The court . . . may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, when:
>
> i. the agency had no reasonable basis for denying access; or
>
> ii. the agency failed to respond to a request or appeal within the statutory time.

(McKinney's 2009). "[E]ven if all of the statutory requirements are satisfied, an award of counsel fees still lies within the sound discretion of the trial court." Grace v. Chenango County, 256 A.D.2d 890, 681 N.Y.S.2d 695, 697 (3d Dep't 1998). See also Henry Schein, Inc. v. Eristoff, 35 A.D.3d 1124 (3d Dep't 2006); Maddux v. New York State Police, 19 Misc.3d 1137(A), 2008 WL 2169911, at *1 (Sup. Ct. Albany Cty. 2008).

Here, Petitioner cannot establish that the Court misapprehended or overlooked anything in denying prevailing party attorney's fees in the Decision and Order. Petitioner's instant motion does not argue that the Board of Education lacked a reasonable basis to withhold the draft disciplinary charges.[4] Thus, Petitioner was not (and is not) a prevailing party. Because the Petition expressly requested an award of attorney's fees, the denial of said request in the Decision and Order cannot be fairly characterized as "premature."

Contrary to Petitioner's assertion, the fact that the Board of Education has identified additional responsive documents does not constitute grounds for vacating the Decision and Order insofar as it denied his request for attorney's fees. The Board of Education has not denied Petitioner access to any other records, and it anticipates producing additional documents

[4] Petitioner has noticed an appeal from the Decision and Order.

pursuant to the Decision and Order. Petitioner misstates the Decision and Order when he asserts that the Court "found that Respondents had failed to meet the 'statutory prerequisite' of a certification as to whether additional responsive documents existed." (Sternbach Affirm., ¶ 11). As set forth above, no such "statutory prerequisite" was operative when the Board of Education initially denied Petitioner's FOIL request. Whether Petitioner can still claim any entitlement in this proceeding to prevailing party attorney's fee under Public Officers Law § 89(4)(c) is a point that Respondents will vigorously dispute. No such application is presently before the Court, nor is there any basis for Petitioner to make one. At this juncture, it is clear that Petitioner is not a prevailing party, and there are no grounds for disturbing the Decision and Order pursuant to CPLR § 2221.

D. *In Camera* Review

Petitioner appears to argue that the Court misapprehended or overlooked a federal case, Donovan v. F.B.I., 806 F.2d 55 (2d Cir. 1986), in declining to review the draft disciplinary charges *in camera*. However, Petitioner's reliance upon Donovan is misplaced, and its argument that renewal/reargument should be granted on the question of *in camera* review should be rejected.

Donovan involved the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and therefore does not constitute a controlling case authority. The case also is factually inapposite. The plaintiffs in Donovan argued that the court should not have reviewed the requested documents *in camera,* but instead the agency should have provided a more detailed index describing the documents and its claims of exemption. See Donovan, 806 F.2d at 59. Petitioner also mischaracterizes the legal framework for *in camera* review articulated in Donovan. The criteria for *in camera* review set forth in Donovan are advisory, not directory, and the decision

ultimately rests within the sound discretion of the court. The Second Circuit also noted that *in camera* review will be unnecessary where an agency adequately describes the nature and contents of the requested documents. See also Associated Press v. U.S. Department of Justice, 549 F.3d 62, 67 (2d Cir. 2008) ("*In camera* review is appropriate where the government seeks to exempt entire documents but provides only vague or sweeping claims as to why those documents should be withheld. Only if the government's affidavits make it effectively impossible for the court to conduct *de novo* review of the applicability of FOIA exemptions is *in camera* review necessary") (citation omitted). Thus, the Donovan decision is not persuasive authority here, and Petitioner fails to explain how the Court purportedly overlooked or misapprehended it.

It should also be noted that Petitioner did not cite Donovan, or any other case authority regarding the criteria for *in camera* review, in its reply papers submitted in support of its Petition. Nor did Petitioner previously argue that the Court was required to approach the question in the manner described in its instant motion. "A motion for reargument is not an appropriate vehicle for raising new questions." Simpson v. Loehmann, 21 N.Y.2d 990, 290 N.Y.S.2d 914, 915 (1968). For this additional reason, Petitioner's contentions concerning *in camera* review should be rejected.

III. CONCLUSION

For the reasons set forth above, Petitioner's motion for reargument/renewal of the Decision and Order should be denied in its entirety, and Respondents should be awarded such other and further relief as may be just and proper.

Dated: White Plains, New York
May 28, 2009

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