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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF O'REILLY

Appellant,

-against-

NO. 77

BOARD OF EDUCATION,

Respondent.

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MATTER OF CLARKE

Appellant,

-against-

NO. 78

BOARD OF EDUCATION,

Respondent.

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20 Eagle Street  
Albany, New York  
September 11, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN  
ASSOCIATE JUSTICE JANICE A. TAYLOR

Appearances:

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1 CHIEF JUDGE WILSON: The last cases on today's  
2 calendar are Matter of O'Reilly v. Board of Education,  
3 Matter of Clarke v. Board of Education. And we are  
4 grateful to be joined by our colleague from the Second  
5 Department, the Honorable Janice Taylor.

6 Counsel?

7 MR. WAGNER: Thank you, Judges. Thank you, Judge  
8 Taylor. Thank you, Chief.

9 My name is Jimmy Wagner. I'm the attorney for  
10 the appellants. With me is my cocounsel, Joseph Aron. I  
11 have two brief requests. Chief Judge, I'd like five  
12 minutes on rebuttal.

13 CHIEF JUDGE WILSON: Yes, sir.

14 MR. WAGNER: And for all the judges, my second  
15 request would be that you vacate the two decisions from the  
16 First Department on the entirety. I'm going to show you a  
17 road map of why the 3020 tenure laws have a long historical  
18 importance in this state - - -

19 JUDGE GARCIA: Counsel, before you start. Just  
20 to be clear, you're not challenging the vaccine mandate  
21 here, right?

22 MR. WAGNER: That is absolutely correct, Your  
23 Honor.

24 JUDGE GARCIA: And so your challenge goes to what  
25 process the petitioners are entitled to under the - - -

1 under the statute. Right?

2 MR. WAGNER: That's correct. Under this Article  
3 78 petition, we were challenging the process that they were  
4 legally entitled to under Education Law.

5 JUDGE GARCIA: Right.

6 MR. WAGNER: And in the Article 75 we were  
7 challenging the arbitration award.

8 JUDGE GARCIA: Arbitration award. Yes.

9 MR. WAGNER: Not challenging the vaccine mandate,  
10 and I want that to be very clear. This case is not about  
11 the vaccine mandate. That's just a variable. We could  
12 have changed that variable with any other work rule. The  
13 work rule could have been we want teachers to wear IDs. We  
14 want teachers to - - -

15 JUDGE GARCIA: Understood.

16 MR. WAGNER: So when we talk about the history of  
17 New York State tenure law, it began in 1897 with New York  
18 City Teacher Tenure Law. Shortly thereafter, less than ten  
19 years, this court heard the first essential tenure law  
20 case, and that was Murphy v. Maxwell. And in that case,  
21 pre women being allowed to vote in the State of New York,  
22 that was a woman teacher who was denied due process because  
23 she had the audacity to be married and work at the same  
24 time.

25 This court said absolutely not. Tenure law says

1 teachers get due process, and that due process is defined  
2 and codified in State Education Law. This court has  
3 continuously, from 1904, all the way up to recently of  
4 2016, maintained that tenured teachers in the State of New  
5 York are entitled to 3020 protections.

6 In Mannix v. Board of Ed., this court - - - 1968  
7 - - - explicitly said no additional requirements for  
8 tenured teachers. In 1979, Ricca v. Board of Ed., this  
9 court explicitly said you cannot increase the probationary  
10 periods for tenured teachers. 1993, this court explicitly  
11 said a tenured teacher cannot even accidentally resign.

12 In the case before us, respondents' management  
13 turned around and involuntarily resigned these tenured  
14 teachers. This court held if - - - if this court held you  
15 can't accidentally resign, how can management involuntarily  
16 resign a teacher?

17 JUDGE TROUTMAN: So with respect to conditions of  
18 employment. If it's a condition of employment, your  
19 argument is it cannot be unilaterally imposed, correct?

20 MR. WAGNER: Correct. It - - - so this court, in  
21 - - - in Beck v. Nichols (sic), laid out an excellent four-  
22 part rule for when a condition of employment does not  
23 entitle a tenured teacher to their due process. That was  
24 not followed here whatsoever.

25 I would further argue, in the condition of



1 employment, this wasn't a condition of employment. This  
2 was a work rule and work rules entitle, not just tenured  
3 teachers, but all municipal workers to their due process.  
4 The goal here was achieved with the work rule. The work  
5 rule stated - - -

6 CHIEF JUDGE WILSON: How - - - what is the test  
7 for determining whether something is a condition of  
8 employment or a work rule?

9 MR. WAGNER: I think that's an excellent question  
10 here, Judge. I think the word itself is implicit:  
11 condition of employment. You could not have been employed,  
12 but for meeting that condition. Whereas a work rule can  
13 unilaterally be enforced by the employer management at any  
14 time. And I think in this case, the - - - the goal here  
15 was to keep children safe. Right? We did not want  
16 unvaccinated teachers within - - - within the - - - in the  
17 school. The goal was accomplished.

18 So the secondary matters of terminating these  
19 tenured teachers, putting them on leave without pay in  
20 violation of State Education Law 3020, telling them - - -  
21 they took away their insurance, took away their paycheck,  
22 told them they couldn't come in the buildings to get their  
23 files, was a complete non - - - nonstarter. The goal was  
24 keeping children safe.

25 JUDGE CANNATARO: Counsel, can I ask you to go

1 back and expand on your answer to the Chief Judge's  
2 question? Because it would be very helpful, at least for  
3 me, to understand what is it that distinguishes a work rule  
4 from a condition of employment? What is it about the  
5 nature of those two things?

6 Because when I look at how this requirement came  
7 into being, it seemed - - - it looks like it was negotiated  
8 the way a condition of employment would come into  
9 existence. So tell me why it's not that.

10 MR. WAGNER: Okay. I would say we can use the  
11 framework of Beck-Nichols. The - - - to be a condition of  
12 employment that deprives a tenured teacher of her 3020  
13 statutory protections, number one, it would have to exist  
14 pre-hire. Number two - - -

15 JUDGE GARCIA: I'm sorry. Just to interrupt you  
16 on that point on Beck-Nichols. Didn't the rule in Beck-  
17 Nichols also apply to promotions?

18 MR. WAGNER: In reference - - - if that rule did  
19 apply, the pre-hire rule apply to promotions? I'm not  
20 familiar with that section.

21 JUDGE GARCIA: But it - - - it says it in the  
22 opinion somewhere. It says that this rule applied to hires  
23 and promotions. I would assume tenured teachers are  
24 getting promoted.

25 MR. WAGNER: When you say a - - - a tenured

1 teacher's getting promoted; a tenured teacher, that's their  
2 status given to them by the Board.

3 JUDGE GARCIA: Right. But this was a condition  
4 that was being placed on promotions, so it wasn't pre-hire.  
5 Right?

6 MR. WAGNER: So - - - okay. I - - - I now, I - -  
7 - I follow your logic, Your Honor. What you're saying is  
8 in Beck-Nichols because it also applied to people who  
9 wanted the promotions, it's not necessarily required to be  
10 pre-hire.

11 JUDGE GARCIA: Right.

12 MR. WAGNER: I - - - in following that logic, if  
13 in fact, the teacher had the option - - - the tenured  
14 teacher had the option to say, you know what? I can either  
15 reside outside the district or accept this promotion, and  
16 thereby I would be required to be in - - - within the  
17 district, as was Beck-Nichols' case. I think if we had it  
18 analogous to our fact pattern. If we said to these tenured  
19 teachers, before we're going to promote you to be assistant  
20 principal or promote you to be principal, you need to be  
21 vaccinated for COVID-19, I think we're in the same  
22 situation. Here, this did not exist.

23 JUDGE GARCIA: And what if that teacher then took  
24 the promotion and they had a certain amount of time to  
25 comply and they don't and they had the same repercussions

1 as now, could they put them on leave without pay?

2 MR. WAGNER: So the - - - the fact pattern is,  
3 the teacher, after agreeing - - - the tenured teacher  
4 agrees to take the COVID - - -

5 JUDGE GARCIA: The promotion?

6 MR. WAGNER: - - - and also - - -

7 JUDGE GARCIA: No. They just say, okay, thanks  
8 for the promotion. One of the conditions is, for that  
9 promotion you have to get vaccinated. Tenured teacher.  
10 They take the position and then they say, yeah, you know,  
11 not doing that and I'm not complying with any of this. Can  
12 they put them on leave without pay under this same scenario  
13 we have?

14 MR. WAGNER: I - - - I think if we work down the  
15 four-part Beck-Nichols rule, they could. I - - - I think  
16 if this court, if was to find that it was also - - - there  
17 was a legitimate policy for promoting the teachers with a  
18 vaccine.

19 JUDGE GARCIA: So it's - - - it's not just - - -  
20 it's not pre-hire all the time, then?

21 MR. WAGNER: Oh, fair enough, Your Honor. It - - -  
22 - under that circumstance, absolutely it's not a pre-hire.  
23 It's pre - - - it would be determined - - - predetermined,  
24 absolutely, in the reference to the - - - the case of a  
25 promotion, I - - - I agree. I think Beck-Nichols, when I



1 put together the understanding of this court's four-part  
2 rule, I think it wasn't also just a pre-hire; it's four  
3 parts. Because New York State, our history of protecting  
4 tenured teachers is second to none. We have led the charge  
5 in making sure that teachers could be independent of  
6 management.

7 JUDGE TAYLOR: And what are - - - what are the  
8 other three rules? If you're - - - if you're calling them  
9 rules, which I don't necessarily think they are rules, but  
10 - - -

11 MR. WAGNER: I felt - - - I felt it was four  
12 parts of one rule.

13 JUDGE TAYLOR: Right. You mentioned one which  
14 you believe is pre-hire.

15 MR. WAGNER: Correct. Legitimate policy.

16 JUDGE TAYLOR: And you don't think that this was  
17 a legitimate policy?

18 MR. WAGNER: No. Absolutely not. I think this  
19 was a very legitimate policy.

20 JUDGE TAYLOR: Okay. So we've taken care of  
21 number two. What's number three?

22 MR. WAGNER: Number three is, it would have to be  
23 unambiguous.

24 JUDGE TAYLOR: Okay. And was this not  
25 unambiguous?

1 MR. WAGNER: It - - - it was very - - - it was  
2 very ambiguous. We - - - and we know that from the record  
3 itself. Because we look initially - - - Judge Bluth  
4 initially says this condition of employment exists from the  
5 arbitrator's award. Judge Frank says, the - - - because  
6 the arbitrator redefined discipline, 3020 no longer  
7 applies. Judge Love then turns around and states, wait a  
8 second, the Commissioner of Health's order establishes this  
9 as a condition of employment.

10 JUDGE TAYLOR: Okay. But be that as it may, were  
11 the teachers confused as to whether or not they were  
12 supposed to get a vaccination by a particular date?

13 MR. WAGNER: Well, there was no - - -

14 JUDGE TAYLOR: They - - - I'm sorry. They - - -  
15 they - - - they received emails, correct? And letters.  
16 They were told they had to get this vaccination by a  
17 particular date.

18 MR. WAGNER: I think that's a very excellent  
19 point. I think if we look to the emails that are received  
20 by these tenured teachers, what the email says is you must  
21 upload vaccine - - - a vaccine card to the SOLAS system,  
22 period. It did not say you must be vaccinated. It said  
23 you must upload a card.

24 Going all the way back to the Murphy case when  
25 she had a marriage license, that's a - - - that's very

1 analogous. It's very simple. Show us your marriage  
2 license and we're going to terminate you. Here, the DOE  
3 says upload the card. But if we look at the Commissioner  
4 of Health's actual order, what the order says, to protect  
5 the children, we're not going to let you in the building.  
6 And that's very relevant to this fact pattern because  
7 appellant Loiacono, she was part of a remote teaching  
8 program that pre-COVID, pre any of the remote teaching,  
9 where she taught at-home children who were very ill, and  
10 she taught them on a remote system.

11 She was a tenured teacher who never needed to be  
12 in a building. So therefore this policy, there was no  
13 reason to terminate her. There was no reason for her to be  
14 vaccinated. The goal was achieved. The children were  
15 safe. That teacher was never going in the building. But  
16 management turned around, they browbeat these women and  
17 said, you're going to do what we say. We do not have to  
18 follow State Education Law. That's exactly what this case  
19 is about.

20 This is not about the idea of a condition of  
21 employment or an idea of a work rule. This is about  
22 management doing what they want with these workers in  
23 violation of the law. We could have easily, harmoniously  
24 existed. The unvaccinated teachers could not have been in  
25 the building, and they could have received their statutory

1 due process as 3020.

2 When management turns around and calls this a  
3 condition of employment, their - - - their team of lawyers  
4 is familiar with the case law. Whose team of lawyers - - -  
5 these tenured teachers have no lawyers. They're not - - -  
6 they're not familiar with Beck-Nichols. So management  
7 turns around and says, here's what we're going to do,  
8 everyone. We're going to call this a condition of  
9 employment. Our goal is achieved. The unvaccinated  
10 teachers won't be in - - - in the school. And by the way,  
11 for fiscal reasons, we get to get rid of all of these  
12 tenured teachers and - - -

13 CHIEF JUDGE WILSON: Let me go back a little bit  
14 to the area that Judge Cannataro was at. And let's take  
15 the arbitrator out of this for a minute; pretend that  
16 didn't happen. Is this something that the union and - - -  
17 and Board could have bargained over and reached this  
18 result?

19 MR. WAGNER: I'm - - - I'm going to - - -

20 CHIEF JUDGE WILSON: Hypothetically.

21 MR. WAGNER: Hypothetically, I believe they could  
22 have - - - they could have bargained, except to the extent  
23 for tenured teacher laws. Anything that would have  
24 affected the tenure - - - the - - - a teacher's tenure  
25 could not have been bargained for. I think this court

1 explicitly just recently stated that modifications to the  
2 3020-a discharge procedure, it gives the tenured teacher  
3 the option to select it. So even if we were going to say  
4 it was bargained and we were going to have a leave without  
5 pay or they were going to be terminated immediately - - -  
6 meaning the tenured teacher - - - the tenured teacher  
7 statutorily could have said, okay, I'll agree. Or they can  
8 choose to select their 3020 discharge procedures.

9 This is - - - this is written into 3020. And I  
10 want to say it was 2014, in the Kilduff case - - -

11 CHIEF JUDGE WILSON: And is that - - - did those  
12 procedures apply to disciplinary matters only, or do they -  
13 - - would they apply to conditions?

14 MR. WAGNER: So I'm - - -

15 CHIEF JUDGE WILSON: The statutory protections?

16 MR. WAGNER: So - - - there's - - - right. Two  
17 things. The statute - - - the statute itself, 3020 says  
18 clearly no tenured year teacher shall be disciplined or  
19 removed. Plain meaning of the statute itself says that.  
20 However, in our briefs, and I can tell you now there's  
21 numerous cases where a tenured teacher was entitled to a  
22 3020 discharge hearing that had nothing to do with  
23 discipline.

24 If we look to Winter v. Board of Education, that  
25 was 1992, it was a qualification case. If we look to 1970,

1 the Coriou v. Nyquist case, psychological disorder. It  
2 clearly has nothing to do with discipline. It just has to  
3 do with qualification of that particular tenured teacher.  
4 And this court clearly stated that tenured teachers still  
5 entitled to their 3020 discharge proceeding. Even more - -  
6 - most recently in - - - in the Kilduff case. My - - - my  
7 apologies. In the Springer case, this court, even though  
8 that teacher did resign, this court one hundred percent  
9 reaffirmed that a teacher is entitled to due process of  
10 3020, it's - - - 3020 is protected. In Kilduff this court  
11 said, 3020 protects teachers from the vagrancies of  
12 collective bargaining.

13 If you said that about collective bargaining,  
14 clearly it's going to protect the tenured teachers from the  
15 actions of management. There was no reason, in this  
16 particular case, that we had to forget about the law and  
17 allow these tenured teachers to all be terminated.

18 I see the red light is on. If anyone has a  
19 question, I'm happy to answer.

20 CHIEF JUDGE WILSON: Thank you.

21 MR. TOWNSEND: Afternoon, your - - - good  
22 afternoon, Your Honors. Jesse Townsend, for the  
23 respondents.

24 This court should affirm the Appellate Division  
25 First Department's rulings affirming the dismissal of these

1 eight petitions.

2 Petitioners were not entitled to a hearing on the  
3 simple and uncontested issue of whether they had submitted  
4 evidence of vaccination, which had become a qualification  
5 of employment in fall of 2021, as the school district was  
6 reopening New York City's public schools for full in-person  
7 instruction for the first time since the pandemic. And  
8 this was clearly done through an arbitration award between  
9 the school district and the teachers' union, which  
10 represented the entire teaching workforce.

11 CHIEF JUDGE WILSON: There are two different  
12 pieces to what you just said. One is that the statute  
13 didn't entitle them to a hearing in the first place, and  
14 the second was that it was bargained away. Right?

15 MR. TOWNSEND: What I would say, Your Honor, is  
16 whenever there's a qualification of employment as opposed  
17 to a disciplinary matter - - - and here, because of the  
18 wording of 3020-a, disciplinary includes competence as well  
19 as misconduct - - - any situation where it's a  
20 qualification, as opposed to that disciplinary matter, the  
21 3020-a does not attach. And that is clearly - - - that is  
22 the holding of Beck-Nichols.

23 Then secondly, while we would argue in an  
24 appropriate case that management can unilaterally impose a  
25 qualification of employment, that's not what happened in

1 this case. Because here there was an arbitration as a  
2 result of first, a bargaining process between the union and  
3 the DOE, and then ultimately, an arbitration.

4 CHIEF JUDGE WILSON: Your view is that without  
5 the arbitration and - - - well, without the negotiation,  
6 the arbitration, let's say, outside of the collective  
7 bargaining process, management could impose retroactively a  
8 condition of employment on tenured teachers?

9 MR. TOWNSEND: We would say, yes, Your Honor, but  
10 of course, this court doesn't need to reach that because of  
11 - - - in this situation, we do have the impact award, which  
12 was the process of - - - the process between DOE and UFT.

13 JUDGE HALLIGAN: Does it matter at all that the  
14 vaccine mandate was very broad? My understanding is that  
15 it was applied to a range of city employees and in some  
16 circumstances, private employees. So how should that  
17 factor into our analysis, if at all?

18 MR. TOWNSEND: I do think the breadth of the  
19 requirement and to just to go through the chronology  
20 briefly, Your Honors. First, the Public Health Commission  
21 required it of all DOE employees, and that was resolved in  
22 either arbitration or negotiation through all DOE  
23 employees. Then about a month later, all city employees.  
24 And then months or - - - a few months later, the private  
25 employees with a broader set of exceptions.



1           But I do think it matters, just focusing first on  
2 the DOE employees, because when we're talking about  
3 distinguishing between a qualification of employment and  
4 something that's about individual teacher behavior or  
5 conduct, the fact that it was designed to cover the entire  
6 DOE workforce is something that's indicative of it being a  
7 qualification of employment. This is something that - - -

8           JUDGE HALLIGAN: And eventually a wider group,  
9 unlike, for example, something that might involve a  
10 qualification - - - you know, a - - - a credential - - -

11           MR. TOWNSEND: A certification?

12           JUDGE HALLIGAN: - - - qualification,  
13 certification, whatever.

14           MR. TOWNSEND: Yes. Now, I will say that the  
15 qualification of employment case law does also cover  
16 credentials. So there are examples where it can be more  
17 specific. Lanterman is the case from this court that  
18 addressed specific employees needing specific  
19 certifications. But that wasn't this case. This was  
20 indeed applied to the entire DOE workforce, eventually the  
21 entire municipal workforce.

22           Going back to - - - to just Chief Judge Wilson's  
23 and Chief Judge - - - Judge Cannataro's questions about how  
24 you determine a qualification from a work rule. This is a  
25 status that employees were told they need to have at the

1 threshold, literally, to get in the door. And if you - - -  
2 I'll point to the record in a moment. But if they couldn't  
3 upload the vaccine card through the portal, they needed to  
4 show it at the door.

5 JUDGE CANNATARO: What threshold are you  
6 referring to there? This is a status that employees needed  
7 to show at the threshold. I mean, they've been employed  
8 with DOE. They're tenured. You know, that - - - they've  
9 been around for a long time.

10 MR. TOWNSEND: To even - - - either begin if it's  
11 applied to new employees, or to just continue teaching or  
12 to continue being employed, this is a - - - this is the  
13 threshold. A baseline expected of all employees, shall we  
14 say.

15 CHIEF JUDGE WILSON: So they could have - - -  
16 they could have imposed retroactively on tenured teachers a  
17 requirement they all have PhDs?

18 MR. TOWNSEND: They could have theoretically,  
19 Your Honor, and 3020-a would not have stopped them.  
20 However, that does not mean the teachers did not have - - -  
21 would not have had other remedies were that the case. They  
22 do have a union.

23 So the idea that tenured teachers are not  
24 represented, that's not correct. They are represented by a  
25 union.

1 CHIEF JUDGE WILSON: Well, you're going too fast  
2 for me, I think. So suppose - - - suppose - - - well,  
3 let's take it first as if this is not done through  
4 collective bargaining, this is just the Board of Ed.  
5 saying, you now all have to have PhDs, and this applies  
6 retroactively to tenured teachers. What are their - - -  
7 what's the remedy for that?

8 MR. TOWNSEND: Just to clarify the hypothetical.

9 CHIEF JUDGE WILSON: Yeah.

10 MR. TOWNSEND: Are they still represented by a  
11 union?

12 CHIEF JUDGE WILSON: Sure.

13 MR. TOWNSEND: In that case, the union may say  
14 that this is a violation of an existing CBA and then seek  
15 the remedies under that CBA.

16 CHIEF JUDGE WILSON: Okay.

17 MR. TOWNSEND: They may - - -

18 CHIEF JUDGE WILSON: And then could - - - suppose  
19 that - - - oh, go ahead. Go ahead.

20 MR. TOWNSEND: The - - - if the union doesn't  
21 think the CBA covers this clearly, they could invoke Civil  
22 Service Law 209 and require a negotiation over this impact  
23 and eventually an arbitration; much like what did happen  
24 here. And then after that, they may seek judicial review  
25 of the end of the arbitration or the outcome of the

1 arbitration.

2           There - - - there are some other remedies that I  
3 could think of if a - - - if a teacher is confronted with  
4 this situation. The teacher may also - - - or teachers  
5 individually, may claim that this policy is irrational or  
6 not factually supported or prohibited by some other legal  
7 mandate.

8           So my point is that teachers and employees more  
9 generally, especially unionized ones, especially ones with  
10 a series of legal protections, are not without remedy.  
11 It's that this case, particularly as petitioners sought it,  
12 is not as - - - as counsel's phrased, not about the policy  
13 as a whole, but just about whether they get one particular  
14 procedural tool, which is this 3020-a hearing. And that's  
15 a hearing designed specifically to consider incompetence or  
16 misconduct in on-the-job behavior. And all we're saying is  
17 that they don't get that, because what was being described  
18 is - - - as I was saying to Judge Cannataro this threshold  
19 qualification, not about how they're going to conduct  
20 themselves in the classroom going forward. If there's a  
21 suspicion of misconduct or incompetency as they are  
22 teaching or if they are violating a work rule by habitually  
23 not wearing their lanyards, that is the sort of thing that  
24 in theory, a 3020-a hearing would then be pursued under the  
25 grounds that it shows either misconduct or incompetency,



1           that repeated violation of such a work rule.

2                   CHIEF JUDGE WILSON:  So the remedies that would  
3           be available in my strange hypothetical, would not include  
4           a 3020 hearing?

5                   MR. TOWNSEND:  Correct, Your Honor.  A 3020-a is  
6           meant to, again, provide a procedure for when someone is  
7           suspected of one of those things.  It's not meant as a  
8           substantive backstop to prevent the DOE from ever - - - or  
9           a school district more generally - - - from ever imposing  
10          qualifications.

11                   And I pose, Your Honor, that in that hypothetical  
12          does - - - it wouldn't - - - I would submit it wouldn't  
13          make sense or wouldn't be a sound design to think that a -  
14          - - a massive school district suddenly deciding to impose a  
15          PhD should then have that policy resolved through a series  
16          of individual arbitrations.

17                   JUDGE HALLIGAN:  So is the right way to resolve  
18          that through an Article 78?

19                   MR. TOWNSEND:  I think, Your Honors, first  
20          through a challenge by the union.

21                   JUDGE HALLIGAN:  Um-hum.

22                   MR. TOWNSEND:  And that may lead to an  
23          arbitration, which is, again, sort of a collective process  
24          that is going to address the issue as a whole.  And then I  
25          would also say, as were brought by some individual

1 employees in both the DOE and the City, there could be an  
2 Article 78 where individual employees say, I think this is  
3 irrational. I think it's impractical to me. I - - - I  
4 teach in a field that doesn't have a PhD easily available.  
5 Let me show you - - -

6 JUDGE HALLIGAN: In other words, it's arbitrary.  
7 The - - - the crux of a - - -

8 MR. TOWNSEND: Yes, Your Honor.

9 JUDGE HALLIGAN: - - - of a typical 78  
10 proceeding.

11 MR. TOWNSEND: Yes. And to be clear, Your Honor,  
12 such claims were brought by various employees as well as  
13 unions, both with regard to the DOE - - -

14 JUDGE HALLIGAN: So even if the union did not  
15 have the - - - were not to have the view that the  
16 qualification was irrational or not appropriate, there  
17 would be an avenue for a specific teacher to challenge  
18 that?

19 MR. TOWNSEND: A myriad of avenues, Your Honor.  
20 Yes. An Article 78, a - - - in this case, there are also  
21 federal claims because they're arguing that in this  
22 particular situation also violated federal laws. There are  
23 a myriad of claims, as there are myriad of claims brought  
24 against both the DOE and city workforce vaccination  
25 requirements.

1           This case is just about whether this one  
2 particular tool should be - - - should have been afforded  
3 to these eight petitioners.

4           On the - - - just to the point about clarity,  
5 which Justice Taylor, you raised. This was clearly  
6 communicated multiple times and most specifically to these  
7 specific petitioners. This is on 74 of the record. You  
8 see the example email that - - - that was sent once they  
9 had missed many opportunities to submit their proof of - -  
10 - of vaccination. And this is - - - I think this is  
11 important just because it goes to the other part of this,  
12 which is what a hearing would have accomplished. Whether  
13 there was any disputed fact that a factfinder needed to  
14 consider. Because on appeal in this court, petitioner  
15 suggests maybe there were specific reasons why these  
16 specific petitioners could not have submitted evidence of  
17 vaccination.

18           The DOE email, which is on 74, not only says you  
19 should upload your - - - your proof of vaccination before  
20 school starts Monday morning, but it also said you can  
21 physically bring it in. You can show it to the school  
22 guard - - - school security guard. They will let you in  
23 and you will immediately upload from the school's facility.  
24 Or you can call the help desk if you're having technical  
25 issues, or you can call your principal.

1           So the idea that either this was unclear as a - -  
 2           - as a requirement or that they couldn't accomplish it is  
 3           just - - - not only is it not apparent in the record  
 4           because it's not alleged in any of the petitions, but it is  
 5           completely inconsistent with the very email that  
 6           petitioners attach as the example of when they were told  
 7           that they were going to be placed on leave without pay.

8           And then to complete the due process analysis,  
 9           Your Honor, under Prue v. Hunt, in this court's due process  
 10          case law more generally, there was also post-termination  
 11          remedies. One is an Article 78, as I discussed with Judge  
 12          Halligan. Another was reinstatement. And you can see an  
 13          example of that in page 76. Although the teachers have  
 14          been placed on leave without pay, they had some two months  
 15          to upload proof of vaccination and be placed on - - - be  
 16          reinstated. And you see an example of that on page 76  
 17          where they were told you can still upload your vaccination  
 18          card.

19          So in terms of the - - - the classic  
 20          constitutional requirement for due process of notice,  
 21          opportunity to be heard pre-termination, and post-  
 22          termination remedies, these - - - these teachers had all of  
 23          that.

24                 JUDGE TAYLOR: Just to be clear. This was not  
 25                 getting rid of their tenure, correct?



1 MR. TOWNSEND: It was - - - this was just placing  
2 them on leave without pay.

3 JUDGE TAYLOR: Voluntary resignation in some  
4 instances.

5 MR. TOWNSEND: Right. So for those that stayed  
6 on leave without pay, never - - - never - - - never cured  
7 the issue by submitting the proof of vaccination,  
8 eventually those were terminated. And it is coded in DOE  
9 as resignation as opposed to termination with cause, which  
10 might have more consequences. And that's again the sort of  
11 thing that 3020-a is going to protect.

12 JUDGE TAYLOR: But don't they use the term  
13 voluntary resignation at some point or no?

14 MR. TOWNSEND: They - - - it was a - - - it  
15 definitely was a resignation. It was considered a  
16 resignation, yes, Your Honor.

17 JUDGE TAYLOR: But voluntary resignation?

18 MR. TOWNSEND: I think the voluntary - - -

19 JUDGE TAYLOR: There's - - - there's a difference  
20 between voluntary resignation and just plain - - -  
21 involuntary resignation, I believe. No?

22 MR. TOWNSEND: I think the voluntary is  
23 referenced to these extended separation and leave policies  
24 that some people could have opted into. And in that  
25 circumstance had they opted into it received this more

1 extended leave or this more extended benefit for  
2 separation, than it be a voluntary resignation.

3 JUDGE TAYLOR: And under Springer don't they have  
4 about five years actually to withdraw their voluntary  
5 resignation?

6 MR. TOWNSEND: If they - - - as Springer held, if  
7 they follow those procedures correctly? I am not aware of  
8 whether any of these petitioners or other individuals have  
9 sought to follow that sort of procedure.

10 The - - - the case law that petitioners are - - -  
11 is relying on about the history of tenure, was all cited in  
12 the Beck-Nichols case. This court heard that argument that  
13 those cases: Mannix, Ricca, Gould, meant that the only way  
14 of terminating a teacher was the - - - through the 3020-a  
15 process, and this court rejected it.

16 And although it is true that in Beck-Nichols the  
17 policy was announced as a - - - for new employees or  
18 promoted employees, that was not what this court relied on.  
19 This court relied on this distinction between a status - -  
20 - a qualification of employment being required versus  
21 something related to their job performance that was being  
22 investigated and thus put forward to a - - - a hearing.  
23 And this court was drawing on a longer history of case law  
24 that considered the same thing in other circumstances, but  
25 a - - -



1 CHIEF JUDGE WILSON: That's sort of a different  
2 way of saying that tenure wasn't really at issue in Beck-  
3 Nichols.

4 MR. TOWNSEND: Say it again, Your Honor.

5 CHIEF JUDGE WILSON: That's a different way of  
6 saying that tenure wasn't really at issue in Beck-Nichols.

7 MR. TOWNSEND: Correct, Your Honor. There were  
8 tenured teachers or tenured teacher and tenured counselor,  
9 but nonetheless, this court determined that they could be  
10 terminated for failure to violate the residency policy  
11 without going through the 3020-a process. And this court,  
12 again, heard that exact argument, exactly what petitioners  
13 argue now that this line of cases means 3020-a is  
14 exclusive, and this court necessarily rejected that  
15 argument. We're drawing on a longer history, first with  
16 Felix, which was about the Civil Service Law 75, where - -  
17 - well, this court said this is about a qualification of  
18 employment unrelated to job related delinquencies. Then in  
19 Lanterman - - -

20 CHIEF JUDGE WILSON: Not - - - not a teacher at  
21 all, right? Felix?

22 MR. TOWNSEND: Not a teacher.

23 CHIEF JUDGE WILSON: Yeah.

24 MR. TOWNSEND: But this court drew on Felix in  
25 the Beck-Nichols case. First it was Felix with regard to

1 Civil Service Law 75, then Lanterman with regard to a CBA  
2 process in lieu of a Civil Service 75 hearing. And finally  
3 in Beck-Nichols where 3020-a was squarely implicated. But  
4 in each case, this court applied the same logic, which is  
5 that those hearings are meant to investigate potential  
6 incompetency, misconduct at the job, in the job,  
7 noncompliance with a work rule. But in all these cases  
8 where there was some qualification unrelated to  
9 individual's job performance, this just - - - none of these  
10 things just applied because they were all meant to test  
11 this very particular - - - very particular suspicion that  
12 someone needed to be terminated for cause.

13 Briefly, just on the policy, if I may, Your  
14 Honor, because petitioners do say that the policy's goals  
15 were achieved. They were achieved only because the vast  
16 majority of the workforce submitted proof of vaccination as  
17 - - - as asked, as told. And that those few who did not  
18 were excluded from the classrooms. If they had not been  
19 excluded from the classrooms, the policy's goals wouldn't  
20 have been served. And the idea that this could have been  
21 done harmoniously, I think, is - - - that is to say that  
22 petitioner's view could have been adopted is, I think, just  
23 not accurate, given that what that would have meant is that  
24 teachers would have been placed on leave with pay - - -  
25 some untold number of teachers. And then a series of mini

1 trials held over whether someone submitted proof of  
2 vaccination.

3 JUDGE HALLIGAN: But those are collateral  
4 administrative challenges, right? I don't take that to  
5 mean that the goal of having only vaccinated teachers in  
6 the classroom would have been impinged upon.

7 MR. TOWNSEND: Except, Your Honor, to the extent  
8 that the process involved not constitutional due process,  
9 but the statutory process of 3020-a might have been so  
10 expensive that it may have been difficult to actually  
11 implement. If we're talking about thousands of teachers on  
12 leave, with pay; substitutes being filled for their  
13 positions; and then these mini trials going forward for  
14 some unknown period. That - - - I do think that would  
15 implicate the possibility of this - - -

16 JUDGE HALLIGAN: Well, I take it that would be  
17 because you're saying under those circumstances, perhaps  
18 DOE would have had to reconsider its - - - its mandate,  
19 right?

20 MR. TOWNSEND: It may have made it too expensive  
21 to actually function or, even if it were going forward, you  
22 may have had the labor arbitrators, individual hearing  
23 officers under these 3020-a potentially trying to decide  
24 that actually this particular teacher should be placed back  
25 into the classroom. And then we'd - - - there would be

1 maybe a collateral issue about whether that rule could be  
2 followed, but that may have been the intent - - - intent or  
3 the effort to actually undermine it very directly in that  
4 way.

5 Just to touch on the arbitration, Your Honor, and  
6 the Article 75 claim. As we argued in our briefs, there  
7 are two - - - two clear procedural bars to the - - - to  
8 this Article 75 vacatur claim. The first is a lack of  
9 standing. This court has been very clear since the Soto  
10 case that, generally speaking, a represented employee does  
11 not have the authority or standing to challenge the outcome  
12 of arbitration between his union and the - - - their  
13 employer.

14 The exception is to allege that the union has  
15 committed a breach of its fiduciary duty, which these  
16 petitioners do not do.

17 CHIEF JUDGE WILSON: They do at some point, I  
18 think, say that there's no evidence in the record that  
19 they're union members or did I misread that?

20 MR. TOWNSEND: They do say that on appeal. If  
21 you see in the petition, they - - - each petitioner clearly  
22 states that they - - - they contacted their union  
23 representative and attempted to grieve it. You can see  
24 that in - - -

25 CHIEF JUDGE WILSON: I don't want to - - - don't

1 waste your time finding it. I'll find it.

2 MR. TOWNSEND: It is certainly true that they do  
3 reference contacting their union representatives, seeking  
4 to grieve and being unable to grieve. That is suggestive  
5 of the fact that they are union members and the UFT is a -  
6 - - is the recognized bargaining unit, regardless of  
7 whether they personally are union members or not. After  
8 all, they claim the benefit of the CBA. They are  
9 representative in a collective fashion. As the CBA - - -  
10 CBA itself states that they, the UFT, is the sole  
11 representative of this teaching workforce.

12 So if they thought that the union had failed in  
13 its breach of fiduciary duty or breached its fiduciary  
14 duty, they could have - - - they then should have brought  
15 it into the case. That's the second sort of procedural  
16 bar; that there was a necessary party here, the UFT. Not  
17 only for that point to cure the standing issue, but  
18 secondarily because the UFT, having sought this impact  
19 award would have been - - - would have been affected. Its  
20 - - - its members also would have been affected if this  
21 award were suddenly vacated. And I know that on briefing,  
22 petitioners argue that the Second - - - there was a Second  
23 Circuit decision in a - - - in a particular case. One of  
24 these many cases, Judge Halligan, about the challenging the  
25 DOE mandate, that that decision already had the effect of

1       vacating this award. That's not correct. What happened in  
2       that decision is that the teachers received more process  
3       than what the award already said. It didn't take away  
4       anything from the award. That is whatever they had already  
5       received under the award, including this option for a  
6       voluntary resignation under enhanced benefits still  
7       remained.

8               But even if those procedural bars were cured or  
9       could be gotten past, at the end of the day, the  
10      petitioners would have to show that this award was so wrong  
11      as to violate public policy. And I submit that both under  
12      this case law - - - this court's case law under Beck-  
13      Nichols, going back to Felix, that this qualification  
14      versus work rule rule is quite clear. And certainly, the  
15      arbitrator did not violate public policy by - - - by  
16      instantiating it in this requirement of leave without pay  
17      as a nondisciplinary consequence.

18             If the court has no further questions, I will ask  
19      that you affirm the decisions below.

20             CHIEF JUDGE WILSON: Thank you.

21             MR. WAGNER: Thank you, Judges. I - - - I want  
22      to apologize. I forgot to thank the Lord Jesus Christ for  
23      letting me be here and I meant to do that at the beginning.  
24      So Lord Jesus says, "Woe unto you, lawyers."

25             And Judge - - - Judge Taylor, the point of





1 voluntary resignation versus involuntary resignation one  
2 hundred percent, these tenured teachers were involuntary  
3 resigned (sic). You know what involuntary resignation  
4 means? Fired. Fired without due process, in complete  
5 violation of the law. 3020 says a tenured teacher cannot  
6 be disciplined or removed from a term of teaching. They  
7 had started a term of teaching. They were in the school.  
8 These women have done everything with their careers and  
9 sacrificed themselves to teach our children, and they did  
10 that in exchange for the protections of 3020. And what  
11 we're going to end up here with unfettered Beck-Nichols is  
12 going to be allowing management to impose retroactive  
13 conditions of employment and be able to - - - for fiscal  
14 reasons, not provide women - - - my apologies. Not provide  
15 tenured teachers with the due process they're entitled to.

16 Fiscal reasoning was considered by the  
17 legislature, and it was considered by the governor during  
18 the COVID emergency pandemic. In fact, legislate - - - the  
19 legislation and the governor modified numerous state  
20 education laws. They modified State Education Law 6521,  
21 6902, 49-I, 8602, and 8603. What the legislature and the  
22 governor did not modify was due process for 3020. And they  
23 clearly had the ability. If there were true fiscal  
24 concerns, they - - - the governor had that authority. We  
25 grant it to him. Everyone knows it was a - - - it was a

1 tough time. I believe, Judge Chief, you have said it was -  
2 - - the city was in a comatose, it was. It - - - and no  
3 one's disputing that the goals could be achieved. We could  
4 have maintained the law. We could have followed the law  
5 for our tenured teachers and protected the children. And  
6 that was what was done.

7 There was no unvaccinated teachers in the  
8 building. That goal was accomplished. What's terrible  
9 here is that these teachers have lost their entire careers  
10 on a mandate that has now since been rescinded. What's  
11 still not clear to us is what exactly was that mandate?

12 And that's why the 3020-a hearings would have  
13 been so important. It could have been established at those  
14 hearings, what exactly was the work rule was here.  
15 Pursuant - - - if in their briefs - - - I was actually on  
16 page 32 of their brief. Their - - - their initial position  
17 was that the commissioner's order created this condition of  
18 employment. He stands before the court now and says, no,  
19 no, no, it wasn't the commissioner's order, it was the  
20 arbitration award. However, if we looked at Judge  
21 Friedman's dissent, he explicitly points out that the  
22 arbitrator says in the UFT v. Board of Education case, the  
23 arbitrator explicitly states he did not create a condition  
24 of employment in that arbitration award.

25 I can tell this court on the cited cases in the



1 Second Department and in - - - recently in the Second  
2 Department in Garvey, the city has taken the position that  
3 it was an arbitrator's award that can - - - created a  
4 condition of employment.

5 If we go back to 3020, we can look at 3020 and  
6 see the tenured teacher - - - even if this was a condition  
7 of employment created by this arbitration award, which we  
8 believe should be vacated, the tenured teacher still gets  
9 to select the discharge procedures. Whether the discharge  
10 procedure is going to be obtained through that arbitration  
11 award, or the discharge procedure is going to be obtained  
12 through the 3020 discharge statute. It's - - - it's  
13 undisputed here. These appellants were tenured teachers.  
14 They were entitled to 3020 hearings. Under Beck-Nichols  
15 they would have been entitled to 3020s. In Beck-Nichols,  
16 if you change any of those factors, I do not believe that  
17 this court comes to the same conclusion. The tenured  
18 teacher law has historical importance in New York State  
19 that predates the seven New York states allowing women to  
20 vote, and that is all connected.

21 Susan B. Anthony, the - - - Sarah Garnet, all  
22 were tenured teachers, and they led the Suffrage Movement.  
23 Do not let the city here not follow the law. They're  
24 entitled to their 3020. I would request that the First  
25 Department's decisions be vacated.

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CHIEF JUDGE WILSON: Thank you.

MR. WAGNER: Thank you all.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of O'Reilly v. Board of Education, No. 77, and Clarke v. Board of Education, No. 78 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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