Matter of Brower v New York City Dept. of Educ.
2012 NY Slip Op 30597(U)
February 21, 2012
Supreme Court, New York County
Docket Number: 113843/2010
Judge: Lucy Billings
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SCANNED ON 3/12/2012

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: [illegible] Justice

PART 46

Index Number : 113843/2010

BROWER, BARU A.

VS.

NYC DEPT OF EDUCATION

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3-4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered ~~that this motion~~ and adjudged that:

The court grants the petition to the extent set forth and otherwise denies the petition and dismisses this proceeding, pursuant to the accompanying decision. C.P.L.R. §§ 7803(3), 7806.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 2/21/12

Lucy Billings, J.S.C.

LUCY BILLINGS J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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In the Matter of the Application of
BARI A. BROWER,

Index No. 113843/2010

Petitioner

- against -

DECISION AND ORDER

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent

-------------------------------------x

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

APPEARANCES:

For Petitioner
Noah Kinigstein Esq.
315 Broadway, New York, NY 10007

For Respondent
Jeremy Huntone, Assistant Corporation Counsel
100 Church Street, New York, NY 10007

LUCY BILLINGS, J.S.C.:

This proceeding seeks to reverse respondent's unsatisfactory rating of petitioner's performance as a teacher, its termination of her probationary employment as a teacher, and its revocation of her license to teach first through sixth grades.

I. THE PETITION TO REVIEW THE TERMINATION OF PROBATIONARY EMPLOYMENT IS TIME-BARRED.

This court may not review respondent's termination of petitioner's probationary employment because more than four months elapsed between her receipt of respondent's notice dated July 16, 2007, terminating that employment, and her commencement of this proceeding. Kahn v. New York City Dept. of Educ., __ N.Y.3d __, N.Y.L.J. 1202542278544, at *2, 18-19 (Feb. 14, 2012);

Anderson v. Klein, 50 A.D.3d 296 (1st Dep't 2008); Friedland v. New York City Dept. of Educ., 39 A.D.3d 395, 396 (1st Dep't 2007); Lipton v. New York City Bd. of Educ., 284 A.D.2d 140, 141 (1st Dep't 2001). Therefore the court proceeds to review respondent's further actions that petitioner challenges: an unsatisfactory rating for the 2006-2007 school year and the revocation of her teaching license. Kahn v. New York City Dept. of Educ., __ N.Y.3d __, N.Y.L.J. 1202542278544, at *9 n.3, 16.

II. RESPONDENT'S FAILURE TO PRODUCE A COMPLETE RECORD OF THE ADMINISTRATIVE PROCEEDINGS REQUIRES A REMAND.

Respondent's failure to preserve and provide a complete record of its administrative hearing on the unsatisfactory rating and revocation violated its own regulatory procedures. C.P.L.R. § 7803(3); N.Y.C. Dept. of Educ. Chancellor's Regulation C-31 § 3.2.4. Respondent's inability to produce a hearing transcript, in violation of lawful procedures, requires the court to annul respondent's determination and remand the proceeding for a new hearing to be conducted in compliance with those procedures. C.P.L.R. § 7804(e). E.g., Costantino v. Goord, 38 A.D.3d 657, 658 (2d Dep't 2007).

This result is especially warranted because the Interim Acting Deputy Chancellor, who made the final decision that both terminated petitioner's probation and rated her performance unsatisfactory, precipitating revocation of her license, did not attend the hearing. Based solely on the incomplete transcript, he nonetheless reversed the unanimous recommendation of the Chancellor's Committee, who heard the evidence, not to terminate

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petitioner's license. Thus the incomplete record not only precludes the court's adequate review, but also precluded the Interim Acting Deputy Chancellor from making a decision upon consideration of the full record. Lacking that adequate and necessary basis, his final administrative decision was arbitrary as well as in violation of the Chancellor's Regulations. C.P.L.R. § 7803(3); Goodwin v. Perales, 88 N.Y.2d 383, 392 (1996); Purdy v. Kreisberg, 47 N.Y.2d 354, 358 (1979); Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974); Soho Alliance v. New York State Liq. Auth., 32 A.D.3d 363 (1st Dep't 2006).

III. REVOCATION OF PETITIONER'S TEACHING LICENSE IS AN EXCESSIVE PENALTY.

Respondent imposed the severe penalty, beyond termination of petitioner's probation, of revoking her teaching license. The Interim Acting Deputy Chancellor imposed this penalty against the hearing committee's unanimous recommendation, after a single official observation following petitioner's mid-year transfer into a new grade and more difficult class, which had lacked a permanent teacher and been covered by various substitute teachers. Petitioner received a satisfactory rating after her only prior official observation, with her prior class.

Neither the determination July 16, 2007, by the Community Superintendent for petitioner's school district, nor the June 15, 2007, notice of the review and consideration of discontinuance, specified absenteeism as a basis for petitioner's unsatisfactory rating or for revoking her license or discontinuing her employment. Nor do the determinations by the Chancellor's

Committee and the Interim Acting Deputy Chancellor refer to absenteeism. Insofar as the Interim Acting Deputy Chancellor based his decision on "file documents and testimony," which may refer to absenteeism, such a belated and obscure reference hardly constitutes timely or adequate notice to petitioner of the charges against her. V. Answer Ex. 14.

Due process requires that petitioner "be given notice of the charges and evidence against [her] and an opportunity to appear to rebut the charges," Strom v. Erie County Pistol Permit Dept., 6 A.D.3d 1110, 1111 (4th Dep't 2004); to prepare adequately to defend the charges; and "to submit proof in response." Pacicca v. Allesandro, 19 A.D.3d 500, 501 (2d Dep't 2005). See Wolfe v. Kelly, 79 A.D.3d 406, 410 (1st Dep't 2010); Mayo v. Personnel Review Bd. of Health & Hosps. Corp., 65 A.D.3d 470, 472-73 (1st Dep't 2009); Gordon v. LaCava, 203 A.D.2d 290, 291 (2d Dep't 1994); Benson v. Board of Educ. of Washingtonville Cent. School Dist., 183 A.D.2d 996, 997 (3d Dep't 1992). In particular:

> In the context of an administrative hearing, the charges need to be "reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against him . . . and to allow for the preparation of an adequate defense" . . . .

Wolfe v. Kelly, 79 A.D.3d at 410 (quoting Block v. Ambach, 73 N.Y.2d 323, 333 (1989)). Even if wrongdoing is shown by the evidence, if that wrongdoing was not charged, it may not furnish a reason for revoking petitioner's license or for related adverse action. Mayo v. Personnel Review Bd. of Health & Hosps. Corp., 65 A.D.3d at 472; Rice v. Hilton Cent. School Dist. Bd. of Educ.,

245 A.D.2d 1106 (4th Dep't 1997).

Respondent's reliance in this proceeding on petitioner's absenteeism or failure to report her absenteeism timely, as a justification for her rating and license revocation, similarly constitutes an impermissible post hoc rationalization. New York State Ch., Inc., Associated Gen. Contrs. of Am. v. New York State Thruway Auth., 88 N.Y.2d 56, 75 (1996); L&M Bus Corp. v. New York City Dept. of Educ., 71 A.D.3d 127, 135 (1st Dep't 2009), aff'd as modified on other grounds, 17 N.Y.3d 149, 159 (2011); Missionary Sisters of Sacred Heart, Ill. v. New York State Div. of Hous. & Community Renewal, 283 A.D.2d 284, 287-88 (1st Dep't 2001); 72A Realty Assocs. v. New York City Envtl. Control Bd., 275 A.D.2d 284, 286 (1st Dep't 2000). "It is impermissible for respondents to raise issues in a court proceeding that were not raised on the record at the time" of the administrative determination. AAA Carting and Rubbish Removal, Inc. v. Town of Southeast, 17 N.Y.3d 136, 143 n.4 (2011).

Based on the notices to petitioner, respondent both assessed petitioner's performance and revoked her license to teach first through sixth grades upon one observation after she had taught the first grade for three months, following her prior kindergarten class. Her competence to teach the second, third, fourth, fifth, and sixth grades has never been assessed. Respondent's penalty is thus grossly disproportionate to three months of unsatisfactory performance teaching the first grade, even if respondent upon remand redetermines to rate her

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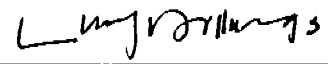
performance unsatisfactory. Featherstone v. Franco, 95 N.Y.2d 540, 554 (2000). See Duryea v. New York City Housing Authority, 85 A.D.3d 653 (1st Dep't 2011); Wong v. McGrath-McKechnie, 271 A.D.2d 321-22 (1st Dep't 2000).

IV. CONCLUSION

For the foregoing reasons, the court grants the petition to the extent of vacating the Interim Acting Deputy Chancellor's decision dated June 22, 2010, and remands this proceeding to respondent for a new hearing on petitioner's unsatisfactory rating and the imposition of a penalty, if any, short of revoking her teaching license. If upon remand respondent determines to rate her performance satisfactory, respondent also may redetermine the termination of her probation, insofar as the termination flowed from the prior unsatisfactory rating. Kahn v. New York City Dept. of Educ., __ N.Y.3d __, N.Y.L.J. 1202542278544, at *19; Frasier v. Board of Educ., 71 N.Y.2d 763, 765, 767-68 (1988). See Kahn v. New York City Dept. of Educ., __ N.Y.3d __, N.Y.L.J. 1202542278544, at *5, 12. The court denies the remaining relief sought in the petition. This decision constitutes the court's order and judgment on the petition. C.P.L.R. §§ 7803(3), 7806.

DATED: February 21, 2012



LUCY BILLINGS, J.S.C.

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