Weber v City of New York

2012 NY Slip Op 31704(U)

June 25, 2012

Supreme Court, New York County

Docket Number: 107840/2011

Judge: Paul G. Feinman

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SCANNED ON 6/27/2012

[* 1]

UNFILED JUDGMENT

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN Justice

PART 12

Index Number : 107840/2011
WEBER, EDWARD
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 107840/11

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

PETITION DENIED IN ACCORDANCE WITH THE ANNEXED DECISION, ORDER AND JUDGMENT.

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).

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

Dated: 6/25/12

_____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

----------X

EDWARD WEBER,

Petitioner,

Index Number: 107840/2011
Mot. Seq. No.: 001

-against-

DECISION, ORDER AND JUDGMENT

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, DENNIS WALCOTT, CHANCELLOR OF NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

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Papers considered in review of this petition:	**Papers Numbered:**
Notice of petition, verified petition and annexed A - D	1 - 2
Respondents verified answer, memorandum of law in support of answer and annexed exhibits A - N	3 - 4
Reply affirmation in further support and verified reply	5 - 6
Transcript of oral argument held January 25, 2012	7
NYC Law Department Operations Department transcript of audio recording of petitioner's appeal hearing	8

PAUL G. FEINMAN, J.:

In this CPLR article 78 proceeding, petitioner, Edward Weber, seeks reversal of a determination denying his appeal of his unsatisfactory rating for the 2009-2010 academic year, and an award of back pay lost on the salary scale and other related benefits as a result of the unsatisfactory rating. Respondent's verified answer asserts that the decision to sustain petitioner's rating was in all respects lawful, proper, reasonable, in conformity with all applicable laws and regulations and was neither arbitrary nor capricious or irrational. For the reasons

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provided below, the petition is denied.

BACKGROUND

Petitioner is employed by respondent, New York City Department of Education ("DOE"), as a chemistry teacher at Brownsville Academy High School (BAHS). Initially hired in 2001, petitioner was tenured in June 2004 and maintained satisfactory annual ratings each year until the 2009-2010 school year, when he was issued an unsatisfactory, or "U-rating" (Doc. 2, Ver. petition at ¶ 9). Petitioner was transferred to BAHS by its former principal for the 2005-2006 school year to create and implement a chemistry curriculum (*id.* at ¶ 10). The petition describes BAHS as part of the DOE's "transfer high school" network, which seeks to provide an opportunity to students on the verge of aging out of the public secondary school system to earn a high-school diploma. Most of the students at BAHS, the petitioner alleges, have a "long histor[y] of interlocking academic and behavioral issues, including homelessness, family dysfunction, truancy, juvenile delinquency, substance abuse, jail time, and teenage parenthood" (*id.* at ¶ 11).

LaShawn Robinson became principal of BAHS starting with the 2008-2009 school year (*id.* at ¶ 12). Prior to becoming principal, Robinson was an assistant principal at BAHS during the 2005-2006 and 2006-2007 school years, and "Aspiring Principal" during the 2007-2008 school year (Doc. 3, Ver. answer at ¶ 56). Lana Phillips and Katwona Warren were the assistant principals at BAHS during the 2007-2008, 2008-2009, and 2009-2010 school years (*id.* at ¶ 57). As principal, Robinson was petitioner's rating officer for purposes of his annual performance review. As he did in each prior year, petitioner received a satisfactory rating from Robinson during the 2008-2009 school year. However, in the 2009-2010 school year, the petition alleges

that petitioner was "suddenly and without any genuine professional basis, targeted for firing by Principal Robinson and her assistant principals, and, in building a bogus paper trail to justify that termination, [the administration] issued an unbroken string of negative observation reports seeking to establish [petitioner's] incompetence"(Doc. 2, Ver. petition at ¶ 14). This allegedly culminated in Robinson issuing petitioner first unsatisfactory rating on his year-end annual performance review ("APPR") for the 2009-2010 school year.

Petitioner challenged the U-rating with the DOE's internal Office of Appeals and Review. A hearing was held on November 12, 2010, before Ron Gerstman, Chancellor's Chairperson, regarding petitioner's challenge. Petitioner appeared along with his advocate from the United Federation of Teachers Union. Principal Robinson and assistant principals Phillips and Warren also participated. At the hearing, the following documents were submitted by Robinson and accepted into evidence: (1) petitioner's APPR appraisal; (2) a report describing a classroom walkthrough dated December 7, 2009; (3) a formal observation report dated February 25, 2010, with attachments; (4) a classroom walkthrough dated April 9, 2010; (5) a formal observation report dated April 19, 2010, with attachments; (6) a letter dated May 3, 2010, which was amended November 5, 2010, with attachments; and (7) an observation report of petitioner's June 1, 2010 lesson, with attachments. Petitioner's union advocate objected to the May 3, 2010 letter being submitted into evidence, claiming the letter and its attachments "had been successfully grieved and should have been removed from Petitioner's file" (Doc. 2, Ver. petition at ¶¶ 32-33). This objection was denied. Petitioner's union advocate also objected to the introduction of a Log of Assistance because it was not signed by petitioner, which was sustained by the Chairperson (Doc. 3, Ver. answer at ¶ 87).

By letter dated March 11, 2011, the DOE informed petitioner that his unsatisfactory annual rating for the 2009-2010 school year had been upheld "and the said rating [was] sustained as a consequence of [petitioner's] failure to align curriculum, instruction and assessment ... [and because his] poor delivery of instruction led to classroom management problems and poor results among his students on the Regents" (Doc. 2, ex. B, March 11, 2011 letter).

Petitioner alleges that his U-rating was the result of "ill-motives and bad faith" stemming from Ms. Robinson's "harassment of and assault on [p]etioner" (Doc. 2, Ver. petition at ¶ 18). Petitioner urges judicial intervention is necessary, claiming that "such dubious conduct is among NYCDOE administrators all too prevalent in recent years" (*id.* at ¶ 19). He claims that "Robinson's desire to damage [p]etitioner with ... an utterly undeserved Unsatisfactory annual rating, as well as her determination to sustain it through the NYCDOE's mock appeal-and-review system, should be annulled as arbitrary, capricious, and in bad faith" (*id.* at ¶ 20). According to the petition, the "resulting internal review, in which the 'hearing officer' is employed and paid by the NYCDOE, is widely acknowledged to be, in this instance like every one, a 'sham'" (*id.* at ¶ 15). Therefore, petitioner seeks to reverse and annul his U-rating for the 2009-2010 school year and to annul the determination sustaining the rating upon petitioner's appeal, dated March 11, 2011, and to restore any pay and benefits lost by petitioner since that date. He also asks the court to grant him attorney's fees and costs.

ANALYSIS

1. Standard of Review

It is well established that "courts may not under the guise of enforcing a vague educational public policy, suggested to it, assume the exercise of educational policy vested by

constitution and statute in school administrative agencies" (*Price v New York City Bd. of Educ.*, 51 AD3d 277, 286 [1st Dept 2008]; quoting *Matter of New York City School Bds. Assn. v Bd. of Educ. of City School Dist. of City of N.Y.*, 39 NY2d 111, 121 [1976]). For this reason, judicial review of a determination of a body or officer is limited to whether the determination was made "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). "Arbitrary and capricious action is that taken 'without sound basis in reason and is generally taken without regard to the facts'" (*In re Sagal-Cotler v Bd. of Educ. of City of N.Y. School Dist. of City of N.Y.*, __AD3d__, 2012 NY Slip Op 04281 [1st Dept 2012]; quoting *Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Township of Scarsdale*, 34 NY2d 222, 231 [1974]). Where there is a "rational basis" for an agency's determination, the court is not permitted to substitute its own judgment for that of an administrative agency (*see Matter of Andersen v Klein*, 50 AD3d 296, 297 [1st Dept 2008]; *Matter of Hazeltine v City of N.Y.*, 89 AD3d 613, 615 [1st Dept 2011]).

When a teacher challenges a U-rating, if there is "[e]vidence in the record supporting the conclusion that performance was unsatisfactory [then respondent] establishes [the rating] was made in good faith" (*Matter of Kolmel*, 88 AD3d at 528; citing *Batreva v New York City Dept. of Education*, 50 AD3d 283, 283 [1st Dept 2008] [record evidence, including seven unsatisfactory classroom observations for the 2003-2004 school year, and four unsatisfactory observation reports for the 2004-2005 school year, established administrative decision to uphold petitioner's unsatisfactory reviews was not arbitrary, capricious or irrational]; *Matter of Andersen v Klein*, 50 AD3d 296, 297 [1st Dept 2008] [unsatisfactory year-end rating was "rationally supported by evidence that petitioner was unable to control his classroom, namely, the principal's reports of

his observations of petitioner's classroom"]).

An administrative determination is not inherently "arbitrary and capricious" simply because there were technical deficiencies in the process employed. However, where a departure is "not merely technical" and can be said to have "undermined the integrity and fairness of the process," the procedural irregularities may support the conclusion that the administration determination was arbitrary and capricious, and not made in good faith (*Matter of Kolmel v City of N.Y.*, 88 AD3d 527, 528 [1st Dept 2011]). In *Kolmel*, the Appellate Division, First Department, held there was no rational basis for petitioner's U-rating where the principal that issued the rating had not observed petitioner's teaching during either of his last two years at the school, in violation of the DOE's rules concerning teacher ratings which required at least one observation by the principal and pre-observation meetings with probationary teachers in danger of receiving a U-rating (*id.* at 528). The Court based its decision, at least in part, on its determination that petitioner's year-end report, which gave petitioner a U-rating, was on its face "completed by the principal in an arbitrary manner including unsatisfactory rankings in every category, even where unsupported by evidence or contradicted by evidence in the report itself," and upon consideration of a statement submitted by petitioner from a "current DOE employee who formerly worked at the high school, that the principal pressured assistant principals to give negative U-ratings without observing teachers" (*id.* at 528-529). In contrast, deficiencies in the Annual Professional Performance Review ("APPR") process will not render a determination approving the issuance of a U-rating arbitrary and capricious where hearing testimony provides "ample grounds" for such determination (*Matter of Brown v Bd. of Educ. of the City School Dist. of the City of N.Y.*, 89 AD3d 486, 487-488 [1st Dept 2011]; citing *Matter of Sorell v Bd. of Educ.*

of City School Dist. of City of N.Y., 168 AD2d 453 [2d Dept 1990] [form completed which recommended discontinuance of petitioner's probationary employment did not contain authorized signature did not deprive petitioner of "any substantial right," where superintendent testimony showed that he supported the principal's rating]).

As this is an Article 78 proceeding, judicial review of respondent's determination is confined to the "facts and record adduced before the agency" (*Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]).

2. Application of Standards to this Case

As an initial matter, it should be noted that petitioner did not submit a complete copy of the documents entered on the record at his administrative internal appeals hearing. Nonetheless, these materials have been offered by respondent. Upon their review, the court concludes that petitioner has failed to show that the U-rating was arbitrary and capricious or made in bad faith. The rating was supported by detailed observation reports by Principal Robinson and Assistant Principals Phillips and Warren. These reports show that two observation reports drafted by Assistant Principal Phillips, based on her observations of petitioner's classroom on February 25, 2010, and April 19, 2010, rated petitioner's lesson and teaching as "unsatisfactory" (Doc. 3, exs. B, D). Although Assistant Principal Warren twice rated petitioner's performance as satisfactory based on two different classroom walkthroughs conducted December 7, 2009, and April 9, 2010, respectively, each time she also indicated in her subsequent report that petitioner needed improvement in four or five assessment areas (Doc. 3, exs. A, C). The record also contained a detailed observation report written by Principal Robinson based on her assessment of petitioner's June 1, 2010 chemistry class, in which she rated petitioner's lesson and teaching performance as

"unsatisfactory" (Doc. 3, ex. G). In connection with each of the three formal observations conducted of petitioner's classroom, pre- and post-observation conferences were held with petitioner. The hearing record also included several letter srelating to a grievance filed by petitioner in April of 2010, and an unrelated incident where it had been alleged that petitioner had allowed students from other classes into a classroom he was covering for an absent teacher (Doc. 3, exs. E, F, H and I).

Taken together, these documents and the testimony presented at the hearing were sufficient to support the Chancellor's Committee's determination to deny petitioner's internal appeal of his U-rating from the 2009-2010 school year. The detailed observation reports of the principal and assistant principal, describe petitioner's poor performance in lesson planning, deficiencies in his teaching methods, and his lack of receptiveness to constructive criticism and his administrator's efforts to address observed deficiencies in his performance (*see Matter of Murane v Dept. of Educ. of City of N.Y.*, 82 AD3d 576, 577 [1st Dept 2011] [detailed observation reports by principal and assistant principal describing petitioner's poor performance provided a rational basis for U-rating]; *see also Matter of Andersen v Klein*, 50 AD3d 296, 297 [1st Dept 2008][unsatisfactory rating rationally supported by evidence, namely, the principal's reports of his observations of petitioner's classroom]).

Petitioner's argues that the Chancellor's Committee improperly overruled his union advocate's objections to the admission of certain evidence claimed to be "ineligible for inclusion or consideration in any way" because they concerned allegations which petitioner claims have been "successfully grieved by [p]etitioner and [therefore] should have been contractually removed from [p]etitioner's personnel file, as part of a settlement in which [p]etitioner had

agreed to drop a grievance ... if all references in [respondent's] letter ... were completely removed from his file" (Doc. 2, Ver. petition at ¶¶ 32-33). However, it is well established that compliance with the technical rules of evidence is not required in proceedings before an administrative body (*see Matter of Sander v New York City Dept. of Transportation*, 23 AD3d 156, 157 [1st Dept 2005]; *Matter of Toolasprashad v Kelly*, 80 AD3d 530, 531 [1st Dept 2011]; *Austin v Bd. of Education of the City School Dist. of the City of New York*, 280 AD2d 365, 365 [1st Dept 2001]). To the extent petitioner claims there was a settlement requiring complete removal of these materials from petitioner's personnel record, there is nothing to suggest that any evidence of this purported settlement was submitted at petitioner's review hearing. No support is offered for petitioner's contention that the Chancellor's Committee "callously disregarded and showed no willingness to hear or understand a full explanation from UFT Advocate Gilmore or from [p]etitioner, nor did [he] investigate the matter in any meaningful way, merely taking the expeditious and biased route of siding with Principal Robinson ..." (Doc. 2, Ver. petition at ¶ 35). In fact, the transcript of the hearing before the Chancellor's Committee shows these objections were given full consideration, and the parties agreed that an amended version of the grievance letter would be substituted for the original version and considered by the Chancellor's Committee (Doc. 8, Hearing transcript at 4-5). Thus, consideration of this evidence was not arbitrary or capricious.

Petitioner also contends that respondent's determination to sustain petitioner's U-rating was in "violation of lawful procedure because it is violative of several of the DOE's own rules and regulations ...," and respondent "repeatedly failed to abide by" the Rating Pedagogical Staff Members Handbook (Doc. 2, Ver. petition at ¶¶ 37-38). In support, petitioner first alleges that

the Rating Officer, i.e., Principal Robinson, failed to take into account all events, incidents and developments in the teacher's career during the rating period, as required by Section 11.C of the Handbook. Specifically, Principal Robinson allegedly failed to properly document or take into account that petitioner had received a "satisfactory" rating after his first formal observation of the current school, plus petitioner's eight prior years of "satisfactory" ratings. Petitioner next claims that Principal Robinson failed to write up a formal observation report for an observation made in October of 2010, in purported violation of the DOE's Chief Executives' Memorandum #80 (*id.* at ¶ 43). However, these claimed violations each pertain to matters other than the 2009-2010 review at issue, and thus cannot form the basis for disturbing the Chancellor's Committee's determination.

Petitioner further alleges that Principal Robinson violated the DOE's Chief Executive's Memorandum # 80 by failing to conduct a proper "one-to-one" pre-observation conference in February of 2010, since the pre-observation conference was attended not by one administrator, but by Principal Robinson, Assistant Principal Philips and a visiting aspiring principal who petitioner had never before met (*id.* at ¶¶ 43-44). Next, the petition alleges that respondent violated the Rating Pedagogical Staff Members Handbook because Principal Robinson failed to complete the entire APPR U-Rating Form (*id.* at ¶ 48). Petitioner submits a copy of the Annual Professional Performance Review and Report, acknowledged by petitioner and Robinson on June 25, 2010, which shows that Robinson marked a "U" next to 14 separate categories, leaving comments next to 13 of these categories, but otherwise left the 9 remaining fields blank (Doc. 2, ex. A, APPR Form).

These purported procedural deficiencies, even if true, does not render the Chancellor

Committee's denial of petitioner's internal administrative appeal arbitrary and capricious, since the evidence and hearing testimony "provided ample grounds" for petitioner's U-rating (*see Brown*, 89 AD3d at 488 [reversing Supreme Court's grant of petition on ground that the APPR was not in strict compliance with the procedures set forth in the rating handbook]). Nor can it be said that the alleged procedural deficiencies "undermined the integrity and fairness of the process" (*compare Matter of Kolmel*, 88 AD3d at 529). Even if the categories left blank are areas where petitioner would have rated "satisfactory," there was nonetheless a rational basis in the record for supporting his overall U-rating.

Finally, petitioner's contention that the principal and assistant principals are biased against him is "speculative and insufficient to establish bad faith" (*Matter of Murnane*, 82 AD3d at 577). To establish bad faith, "the burden falls squarely on the petitioner to demonstrate, by competent proof, that a substantial issue of bad faith exists ..., and mere speculation, or bald, conclusory allegations are insufficient to should this burden" (*Matter of Tsao v Kelly*, 28 AD3d 320, 321 [1st Dept 2006]; citing *Matter of Green v. Board of Educ. of City Dist. of N.Y.*, 262 AD2d 411, 412 [2d Dept 1999]; *Matter of Garcia v New York City Probation Dept.*, 208 AD2d 475, 476 [1st Dept 1994]; *Matter of Cortijo v. Ward*, 158 AD2d 345 [1st Dept 1990]). As stated by the Court of Appeals, "mere personality conflicts must not be mistaken for unlawful discrimination" (*Matter of Tsao*, 28 AD3d at 321; quoting *Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 309 [2004]). Petitioner's reference to a section 3020 disciplinary proceeding commenced against him in October of 2011, without further explanation, is not competent proof of bad faith in connection with petitioner's 2009-2010 school year U-rating. Furthermore, although petitioner repeatedly alleges that Principal Robinson stated at petitioner's appeal

hearing that petitioner would never again receive a satisfactory rating (Doc. 5, Reply affirm. at ¶ 13), the court does not find a statement of this nature in the audio recording of the hearing or its written transcription. The remaining allegations of bad faith are purely speculative, and unsupported by competent proof (*see Matter of Tsao*, 28 AD3d at 321). To the extent petitioner argues that he was the victim of the principal's abusive and harassing conduct, to be considered by this court, such allegation would have needed to be raised before the Chancellor's Committee. Assuming that it was, implicit in the Committee's approval of the U-rating is the determination that petitioner's allegations on this point were not credible or that it had no impact on petitioner's performance (*see O'Flaherty v New York City Dept. of Educ.*, 2011 NY Slip Op 30535 [U] [Sup Ct, NY County 2011]). In either case, petitioner had failed to sufficiently demonstrate that the Chancellor's Committee's determination to uphold his U-rating was arbitrary and capricious or in bad faith.

CONCLUSION

According it is

ORDERED and ADJUDGED that the petitioner's application pursuant to CPLR article 78 seeking an annulment of respondent's March 11, 2011 determination is denied and the petition is hereby dismissed.

This constitutes the decision, order and judgment of the court.

Dated: June 25, 2012
New York, New York

J.S.C.

(2012 Pt 12 D&O_107840_2011_001_daz[art78_Urating])

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