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

PRESENT: GEOFFREY D. WRIGHT PART 62

Justice

In the Matter of the Application of RAMON MOREL,

INDEX NO. 114415/2011

Petitioner

MOTION DATE

- v -

MOTION SEQ. NO. 002

BOARD OR EDUCATION OF THE CITY OF SCHOOL DISTRICT OF THE CITY OF NEW YORK; and DENNIS M. WALCOTT, Chancellor of the CITY DISTRICT of THE CITY OF NEW YORK,

MOTION CAL.

Respondents

The following papers, numbered 1 to 4 were read on this motion to reargue.

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

Upon the foregoing papers, it is ordered that this Motion to reargue is denied in its entirety.

Dated: February 21, 2012

GEOFFREY D. WRIGHT
A.J.S.C.

J.S.C

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

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

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In the matter of the Application of
RAMON MOREL,

Petitioner,

Index # 114415/11

-against-

DECISION

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK; and DENNIS M. WALCOTT, Chancellor of the City School District of The City of New York

Respondents

Present:
Hon. Geoffrey D. Wright

----------x Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the motion for re-argument.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	
Order to Show Cause and Affidavits Annexed	
Answering Affidavits.....	1
Replying Affidavits.....	2
Exhibits.....	
Other.....cross-motion.....	3,4

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Respondents, Board of Education of the City School District of the City of New York, Dennis M. Walcott in his official capacity as Chancellor of The City School District of The City of New York ("DOE") move pursuant to CPLR 2221(d) and 5701(c) for leave to reargue this Court's Decision and Order dated September 5, 2012 and upon reargument, for an order

dismissing the complaint. Petitioner, Ramon Morel ("Morel") opposes the motion.

This action is based on an Article 78 proceeding brought by Petitioner seeking to reverse the U-rating he received for the 2007-2008 school year. Morel argued that the decision to give him the U-rating was arbitrary and capricious and that the rating did not comport with portions of the DOE's handbook concerning annual evaluations.

In the decision, I held in pertinent part:

> The Handbook clearly states that a U-rating must be based on supporting documentation and in this case Petitioner's U-rating was not. Instead, Respondents gloss over this fact and instead argue that the decision to deny Petitioner's appeal of his U-rating is based on the fact that it was proved that Petitioner offered two students a reward for a missing laptop. However, there was no documentation in the file that supported the assertion that Grodsky considered this incident when he gave Petitioner the U-rating.
>
> The OSI investigations had not been completed and there was no documentation containing evidence that Grodsky took into consideration eyewitness accounts of the incident, or that he ever came to a final conclusion as to the validity of the facts surrounding the incident. Notably, Grodsky was not present at the appeal hearing and was unable to provide testimony to support the basis for his decision.

Plaintiffs now contend they are entitled to re-argument because the Court (a) overlooked binding First Department precedent and holding that the Handbook had regulatory effect and set forth regulatory minimus; and (b) substituted its judgment for that of the DOE by deciding that Petitioner's conduct was, in essence, satisfactory.

It is well settled that a motion for re-argument pursuant to CPLR 2221(d)(2) "addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided (internal citations omitted)." *Foley v Roche*, 68 AD2d 558

[1st Dept 1979]; *Ito v 324 East 9th Street Corp.*, 49 AD3d 816, 817 [2d Dept 2008]; *Mangine v Keller*, 182 AD2d 476 [1st Dept 1992]. Thus, when an application for leave to reargue, such as this one, fails to show that the court misapprehended relevant facts or law, leave to appeal must be denied. see, *Hernandez v St Stephen of Hungary School*, 72 AD3d 595 [1st Dept 2010].

In the original decision Respondent relied on *Cohn v. Board of Education of the City School District of the City of New York*, 932 N.Y.2d 759 (Sup. Ct. N.Y. County, June 7, 2011) to support their argument that the Handbook does not establish regulatory minimums. However, this Court distinguished *Cohn* from Respondent's case. In *Cohn*, the court refused to overturn petitioner's U-rating based on the Board's alleged failure to provide petitioner with pre-observation conferences as required by the handbook because it found that before the formal observations the Board had met with petitioner in advance, provided guidance on better teaching performance and informed the Petitioner that she would look for improvement during formal observations. The Court found that this satisfied the Handbook's requirements for pre-observation conferences as required by the Handbook.

Respondents now seek to argue *Brown v. Board of Education of the City School District of the City of New York*, 89 A.D.3d 486 (1st Dept., 2011) in support of their argument that the Handbook is not a binding regulation. However, the facts in that case differ from the instant case. In *Brown*, the Petitioner was a former probationary teacher who challenged his termination as well as his U-rating. The Court held that a probationary employee may be terminated for almost any reason, or for no reason at all, as long as the termination was not made in bad faith Moreover, the Court in that case did not hold that the Handbook is not a binding regulation as Respondent incorrectly asserts. Rather, the Court held, "Under these circumstances, any

deficiencies in the APPR report do not render the determination to discontinue his employment arbitrary and capricious since the hearing testimony provided ample grounds for his termination." *See Brown*, 89 A.D.3d at 488.

An administrative decision will withstand judicial scrutiny if it is supported by substantial evidence, has a rational basis and is not arbitrary and capricious. Matter of Pell V. Board of Education, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321 (1974); Ansonia Residents Ass'n V. New York State Div. Of Housing and Community Renewal, 75 N.Y.2d 206, 551 N.E.2d 72, 551 N.Y.S.2d 871 (1989). "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. 96 A.D.3d 409, 946 N.Y.S2d, 121 N.Y.A.D. [1st Dept., 2012]; quoting Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Township of Scarsdale, 34 NY2d 222, 231, 313 N.E.2d 321, 356 N.Y.S.2d 833 [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, 854 N.Y.S.2d 710 [1stDept.t 2008]: Matter of Hazeltine v City of N.Y., 89 AD3d 613, 615, 933 N.Y.S.2d 265 [1st Dept. 2011]).

To the extent that Respondents argue this Court substituted its judgment for that of the DOE, this argument fails. This Court's decision to vacate Petitioner's U-rating was based on a thorough and proper analysis of the facts and the law. This Court held that there was no evidence to support the DOE's claim that Grodsky's determination to give Petitioner a U-rating for the 2007-2008 school year was based on Petitioner's decision to offer a reward to students for the return of a stolen laptop. This Court found no evidence that Grodsky considered the incident

when he gave Petitioner the U-rating. Moreover, as noted, Grodsky was not present at the appeal hearing and was unable provide testimony to support the basis for his decision. Hence, the decision to deny Petitioner's appeal and uphold the U-rating had no rational basis and was therefore arbitrary and capricious.

Therefore, Respondent's motion for leave to reargue the Court's decision is denied.

This constitutes the decision and order of the court.

Dated: February 21, 2012

GEOFFREY D. WRIGHT
AJSC

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court