

**Lizardo v City of New York**

2012 NY Slip Op 31321(U)

May 17, 2012

Supreme Court, New York County

Docket Number: 104162/11

Judge: Shlomo S. Hagler

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

SHLOMO HAGLER  
J.S.C.

PART 17

PI Index Number : 104162/2011

— LIZARDO, MARILYN

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

ARTICLE 78

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INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

is motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
<del>Cross-Motion to Dismiss Petition w/</del> <i>Article 78 petition w/</i> <del>Memo of Law</del>	2
<del>Supporting Affidavits</del> <i>Affirmations in Opp. to Cross-Motion w/ Exhibits</i>	3

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion + cross-motion are

~~REDACTED~~

**DECIDED IN ACCORDANCE  
WITH THE ATTACHED  
SEPARATE WRITTEN  
DECISION & ORDER**

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: 5/17/12

*Shlomo Hagler*  
Shlomo Hagler  
J.S.C.

\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

**UNFILED JUDGMENT**

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 17

-----X  
MARILYN LIZARDO,

Petitioner,

INDEX NO.: 104162/11

-against-

DECISION/ORDER

CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF EDUCATION,  
CATHLEEN BLACK, CHANCELLOR OF  
NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

-----X  
HON. SHLOMO S. HAGLER, J.S.C.:

Petitioner Marilyn LizarDO ("LizarDO" or "petitioner") moves by notice of petition and verified petition seeking to annul the respondents' determination to terminate petitioner's employment as a probationary teacher pursuant to CPLR § 78, *et seq.* Respondents City of New York, New York City Department of Education, and Cathleen Black, Chancellor of New York City Department of Education ("DOE" or "respondents") oppose the petition and cross-move to dismiss the petition on the ground that the petition fails to state a cause of action pursuant to CPLR § 3211(a)(7). Petitioner opposes the cross-motion.

**Background**

On or about February 1, 2008, the DOE appointed petitioner as a probationary special education teacher and assigned her to P.S. 304 in Brooklyn, New York. For school year 2007-2008, the principal at P.S. 304 completed the requisite "Annual Professional Performance Review and Report on Probationary Service" ("Annual Review") and petitioner received an overall satisfactory evaluation. See Exhibit "A" to the Verified Petition. When P.S. 304 later closed in 2008, petitioner transferred to P.S. 40 in Brooklyn, New York. At P.S. 40, petitioner obtained an overall satisfactory

evaluation on her Annual Review for school year 2008-2009. See Exhibit "B" to the Verified Petition.

After the completion of the school year, petitioner transferred from P.S. 40 to P.S. 157 in Brooklyn, New York. Although petitioner received an overall satisfactory evaluation on her Annual Review dated June 18, 2010, from her new principal, Maribel Torres ("Principal Torres") for school year 2009-2010, the principal cautioned petitioner that she needed to be "mindful to students who aren't making a sufficient amount of progress, and refer if necessary for additional support." See Exhibit "C" to the Verified Petition. About a week later, on June 24, 2010 and again on June 28, 2010, Principal Torres wrote a letter to petitioner informing her of the unsatisfactory results of her students' assessments relating to certain critical testing. Principal Torres emphasized that those results indicated that "only three (3) students benchmarked and eight (8) students were 'intensive', showing no improvement at all and a significant decrease in the number of students that were performing satisfactorily." Principal Torres also highlighted that the assessments showed that "more than half of your students are not ready to proceed to a second grade curriculum." Based on her students' lackluster performance and lack of progress, Principal Torres warned petitioner that "failure of academic improvement of your students without explanation in the upcoming year may lead to further disciplinary action." Petitioner responded by letters dated June 25, 2010 and June 28, 2010, challenging Principal Torres' assertion that her students failed to demonstrate sufficient growth. See Exhibit "D" to the Verified Petition.

Petitioner alleges that Principal Torres "retaliated" against her in the following school year of 2010-2011 by "including baseless disciplinary letters to her file." See Verified Petition at ¶17. In addition, petitioner also alleges that Principal Torres retaliated against her because petitioner "reported an allegation of misconduct against the principal [Torres] in November 2010,

relating to the principal's failure to make a mandated report of child abuse regarding another teacher."<sup>1</sup> *Id.* On December 7, 2010, Principal Torres gave petitioner an overall unsatisfactory Annual Review for school year 2010-2011. On the same date, Principal Torres delivered to petitioner a "Denial of Completion of Probation Letter" signed by Superintendent James Quail, which terminated petitioner's probationary employment effective sixty days later but no later than the completion of petitioner's probation date.<sup>2</sup> See Exhibit "E" to the Verified Petition.

### **Standard of Review for Article 78 Proceedings**

The standard to review an administrative determination is set forth in CPLR § 7803. The scope is limited to "whether a 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, including abuse of discretion as to the measure or mode of penalty or discipline imposed." CPLR § 7803.3 (Emphasis added). A court may not disturb an administrative determination unless there is no rational basis for it in the record or the action is arbitrary or capricious. Matter of Pell v Board of Educ. of Union Free School Dist. No.1 of the Towns of Scarsdale and Mamaroneck, Westchester County, 34 NY2d 222 (1974). The arbitrary and capricious test relates to whether the administrative action should have been taken or is justified; or conversely, the action is without sound basis in

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1. While petitioner failed to allege any details of this claim in the Verified Petition, petitioner attempted to submit a "Supplemental Affidavit [of Petitioner] in Support of Petition" sworn to on December 6, 2011, which was received several months after submission of petitioner's initial opposition papers. These new papers contain Exhibit "O," which is a letter from petitioner dated November 22, 2010 and copied to several individuals including Principal Torres and a "UFT Representative," advising them that on Halloween, October 29, 2010, a fellow teacher ran into her classroom during instructional time wearing "a Werewolf mask and gloves" to scare her students.
  2. Counsel for the parties stipulated on the record that petitioner is entitled to be paid through the termination date of February 7, 2011.

reason and is generally taken without regard to the facts. *Id.* at 231. However, judicial review of a probationary employee is limited because such employee may be terminated from employment without either a hearing or setting forth the reasons for termination except where the termination was made for an improper reason or in bad faith. Matter of Johnson v Katz, 68 NY2d 649, 650 (1986); Matter of Cortijo v Ward, 158 AD2d 345 (1st Dept 1990). The burden of proving such bad faith rests on the employee and the “mere assertion of ‘bad faith’ without the presentation of evidence demonstrating it does not satisfy the employees’s burden.” Matter of Soto v Koehler, 171 AD2d 567, 568 (1st Dept 1991), *lv denied*, 78 NY2d 855 (1991).

In this case, petitioner alleges that she was terminated from employment based on bad faith retaliation due to her challenging the Principal Torres’ 2009-2010 Annual Review and June 2010 letters and petitioner’s charge of misconduct against Principal Torres for the principal’s actions relating to the Halloween incident. However, the time line of events demonstrates that the DOE had sufficient grounds to terminate petitioner’s employment prior to the alleged retaliatory actions. Specifically, in the 2009-2010 Annual Review, Principal Torres pointed out a weakness in the petitioner’s teaching methods to concentrate on ensuring sufficient progress of her students. Then in June, 2010, Principal Torres wrote to petitioner informing her that her students greatly declined from the beginning of the year to the year end assessments. These poor results showed that after a year of instruction, petitioner’s students were not “adequately or effectively prepared for improvement and/or advancement to the next grade level.” See Exhibit “D” to the Verified Petition.

While petitioner disputed Principal Torres’ conclusions, the results of petitioner’s student’s assessments demonstrate that the DOE had a rational basis for its determination. Furthermore, the DOE is permitted to set higher goals of progress and improvement to ensure that students are appropriately prepared to advance to the next grade level. Therefore, the respondents

had ample grounds to terminate petitioner's probationary employment prior to any alleged subsequent acts of bad faith. Petitioner's "mere assertions" of bad faith are insufficient to meet her burden of proof to overcome respondents' rational basis for termination of petitioner's probationary employment. Matter of Soto v Koehler, 171 AD2d at 568.

**Conclusion**

Accordingly, it is

ORDERED and ADJUDGED, that the petition is denied and the proceeding is dismissed with prejudice; and it is further

ORDERED and ADJUDGED, that the cross-motion is granted.

The foregoing constitutes the decision and order of this Court. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: May 17, 2012  
New York, New York

  
Hon. Shlomo S. Hagler, J.S.C.

**UNFILED JUDGMENT**

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