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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. Justice

PART 46

Index Number : 102044/2011
PEPIN, MILCIADES
vs.
NYC DEPT. OF EDUCATION
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for a determination of respondent's motion

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s): 1

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

Replying Affidavits _____ | No(s): _____

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

Given the 10/5/12 determination of respondent's motion to dismiss the petition, petitioner's motion for a determination of respondent's motion because settlement negotiations have been unproductive is moot and therefore denied.

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

Dated: 10/5/12

Lucy Billings J.S.C.
LUCY BILLINGS
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: IAS PART 46
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In the Matter of the Application of MILICIADES PEPIN,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

- against -

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent

----------x

Index No. 102044/2011

DECISION AND ORDER

APPEARANCES:

For Petitioner
Miliciades Pepin, Pro Se

For Respondent
Celine Chan, Assistant Corporation Counsel
100 Church Street, New York, NY 10007

LUCY BILLINGS, J.:

I. BACKGROUND

In this proceeding pursuant to C.P.L.R. Article 78, petitioner seeks a judgment annulling (1) respondent's discontinuance of petitioner's probationary employment as an assistant principal, affirmed by respondent's Chancellor; (2) petitioner's unsatisfactory rating (U-rating) for the 2009-2010 school year; and (3) his placement on respondent's Ineligible Inquiry list. C.P.L.R. § 7803(3). Respondent moves to dismiss the petition on the ground that the petition fails to state a claim. C.P.L.R. §§ 3211(a)(7), 7804(f).

II. THE TERMINATION OF PROBATIONARY EMPLOYMENT

A. Applicable Standards

Respondent, an entity controlled by the City of New York, may terminate petitioner's probationary employment as an assistant principal without any statement of reasons or hearing. N.Y. Educ. Law § 2573(1)(a); Kahn v. New York City Dept. of Educ., 18 N.Y.3d 457, 471 (2012); Frasier v. Board of Educ. of City School Dist. of City of N.Y, 71 N.Y.2d 763, 765 (1988); Berrios v. Board of Educ. of Yonkers City School Dist., 87 A.D.3d 329, 331 (2d Dep't 2011); Johnson v. New York City Dept. of Educ., 73 A.D.3d 927 (2d Dep't 2010). See Talamo v. Murphy, 38 N.Y.2d 637, 639 (1976); Che Lin Tsao v. Kelly, 28 A.D.3d 320, 321 (1st Dep't 2006); Garcia v. New York City Probation Dept., 208 A.D.2d 475, 476 (1st Dep't 1994); Nelson v. Abate, 205 A.D.2d 454, 455 (1st Dep't 1994). To sustain a claim for reversal of that decision and for reinstatement, petitioner, as a probationary city employee, must demonstrate that his termination was for a constitutionally impermissible reason, otherwise in violation of law, in bad faith, or arbitrary. Frasier v. Board of Educ. of City School Dist. of City of N.Y., 71 N.Y.2d at 765; Johnson v. Katz, 68 N.Y.2d 649, 650 (1986); Zarinfar v. Board of Educ. of City School Dist. of City of New York, 93 A.D.3d 466 (1st Dep't 2012); Curcio v. New York City Dept. of Educ., 55 A.D.3d 438, 439 (1st Dep't 2008). Absent such a showing, respondent may terminate petitioner's probationary employment for any other reason or for no reason at all. Swindler v. Safir, 93

N.Y.2d 758, 762-63 (1999); Che Lin Tsao v. Kelly, 28 A.D.3d at 321; Cipolla v. Kelly, 26 A.D.3d 171 (1st Dep't 2006).

Petitioner bears the burden to present admissible evidence showing such a deprivation of his rights, bad faith, or arbitrary action. Johnson v. Katz, 68 N.Y.2d at 650; Che Lin Tsao v. Kelly, 28 A.D.3d at 321; Medina v. Sielaff, 182 A.D.2d 424, 427 (1st Dep't 1992); Green v. Board of Educ. of City Dist. of N.Y., 262 A.D.2d 411 (2d Dep't 1999). A conclusory allegation of bad faith or speculation that respondent's underlying motivation was unlawful does not satisfy petitioner's burden. Che Lin Tsao v. Kelly, 28 A.D.3d at 321; Garcia v. New York City Probation Dept., 208 A.D.2d at 476; Medina v. Sielaff, 182 A.D.2d at 427-28; Green v. Board of Educ. of City Dist. of N.Y., 262 A.D.2d at 412. Satisfying his burden entitles him to a hearing on whether his termination was in fact in violation of his rights, in bad faith, or arbitrary, not to an automatic reversal of respondent's decision. Swindler v. Safir, 93 N.Y.2d at 763; Cipolla v. Kelly, 26 A.D.3d 171; Medina v. Sielaff, 182 A.D.2d at 427.

B. Petitioner's Claims

The verified petition alleges that petitioner's immediate supervisors instigated charges against petitioner in retaliation for his refusal to conceal the supervisors' own misconduct. Petitioner attests on personal knowledge to his supervisors' demand for help covering up their wrongdoing.

Petitioner does not, however, allege any bias or retaliatory motive by respondent's Superintendent or the Chancellor's

Committee who conducted petitioner's hearing and ultimately determined to discontinue petitioner's probationary employment. Nor does the determination rely only on evidence gathered from petitioner's allegedly retaliatory supervisors. To the contrary, the determination relies on petitioner's admitted use of respondent's email system to send a prank email to petitioner's supervisors, falsely alleging a love triangle.

Because petitioner was a probationary employee whom respondent was permitted to terminate for any reason, the admitted prank email provides sufficient grounds by itself for discontinuance of petitioner's employment as an assistant principal. Brown v. Board of Educ. of City School Dist. of City of New York, 89 A.D.3d 486, 487 (1st Dep't 2011). The alleged bias of petitioner's immediate supervisors or their delay or procedural error in reporting petitioner's misconduct is therefore of no consequence. For these reasons, the court dismisses the petition insofar as it seeks reinstatement of petitioner's probationary employment as an assistant principal. C.P.L.R. §§ 3211(a)(7), 7804(f).

III. THE U-RATING

The U-Rating of petitioner for the 2009-2010 year relies on the report of an investigation by the Special Commissioner of Investigation (SCI). Nonetheless, the transcript presented by petitioner shows that, during the hearing January 4, 2011, reviewing petitioner's discontinuance and U-Rating, the Chancellor's Committee refused to hear testimony that the SCI

investigation relied on biased or unreliable witnesses. Petitioner thus presents evidence that the U-rating is "without sound basis in reason," "without regard to the facts," and therefore arbitrary. Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). See Goodwin v. Perales, 88 N.Y.2d 383, 392 (1996); Soho Alliance v. New York State Liq. Auth., 32 A.D.3d 363 (1st Dep't 2006).

Petitioner also presents evidence that the U-rating violated lawful procedure. C.P.L.R. § 7803(3). His evidence indicates that petitioner's rating officer may have breached a Memorandum of Agreement between respondent and the Council of Supervisors and Administrators, by failing to develop goals or objectives with petitioner or to conduct a mid-year review.

IV. THE INELIGIBLE INQUIRY LIST

In conjunction with discontinuing petitioner's probationary employment as an assistant principal, respondent placed petitioner on respondent's Ineligible Inquiry list, prohibiting him from future employment with respondent in any capacity. No evidence in the record demonstrates any standards or procedures for determining when discontinuance of probationary employment results in placement on the Ineligible Inquiry list. Absent such standards or procedures, petitioner lacked a meaningful opportunity to contest his placement on the Ineligible Inquiry list. 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). Nor does respondent's decision explain

the reasoning even after the fact.

Because the evidence currently shows respondent placed petitioner on the Ineligible Inquiry list without standards, procedures, or explanation, petitioner again states a claim that "because of the lack of guidelines" respondent's determination is "arbitrary and capricious as a matter of law." Nicholas v. Kahn, 47 N.Y.2d 24, 28 (1979). See Big Apple Food Vendors' Assn. v. Street Vendor Review Panel, 90 N.Y.2d 402, 408 (1997); Goodwin v. Perales, 88 N.Y.2d at 392; Pell v. Board of Educ., 34 N.Y.2d at 231; Soho Alliance v. New York State Liq. Auth., 32 A.D.3d 363. Petitioner also states a claim that his placement on the Ineligible Inquiry list is "without regard to the facts," Pell v. Board of Educ., 34 N.Y.2d at 231, because he presents the hearing transcript showing the Chancellor's Committee refused to hear testimony that the SCI Report relied on biased or unreliable witnesses.

V. CONCLUSIONS

Consequently, the court grants respondent's motion to dismiss the petition insofar as it seeks the reinstatement of petitioner's probationary employment, but otherwise denies the motion. C.P.L.R. §§ 3211(a)(7), 7804(f). Respondent shall serve and deliver to the court at 71 Thomas Street, Room 204, any answer to the petition within 30 days after entry of this order. See C.P.L.R. §§ 3012(a), 3211(f), 7804(c). Petitioner shall serve and likewise deliver any reply within 20 days after service of an answer. See C.P.L.R. §§ 3012(a), 7804(c) and (d). After

expiration of the reply period, the court will schedule a further hearing on the petition to determine the extent of relief to be granted. C.P.L.R. §§ 7803(3), 7806.

DATED: October 5, 2012

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.