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

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In the Matter of the Application of
DIANE MENDEZ

Petitioner,

Index # 159047/2012

-against-

DECISION

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

-against-

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

Respondents.

Present:
Hon. Geoffrey D. Wright

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

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits.....	3,4
Replying Affidavits.....	5
Cross Motion	2
Other.....	

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

Petitioner, Diane Mendez ("Petitioner") a former probationary teacher with the New York City Department of Education (DOE) seeks a judgment (1) annulling her probationary termination; (2) annulling two unsatisfactory ratings ("U-rating") for the summer 2011 and 2011-2012 school year; (3) ordering petitioner's reinstatement to her probationary teaching position. The DOE cross-moves to dismiss for failure to state a cause of action. For the reasons discussed below, the Petition is denied and the cross-motion to dismiss is granted.

Petitioner was appointed as a probationary common branches teacher for the DOE at

Public School X017 in the Bronx New York. While working the summer 2011 period Petitioner was suspended for four days without pay for engaging in professional misconduct which resulted in a U-rating for the Summer 2011. She was later restored pay for those days as the DOE admitted it was not permitted to suspend her. Petitioner was accused of engaging in a verbal confrontation with another teacher which escalated into a shouting match that took place in front of students. When confronted by the assistant principal and in response to an accusation that Petitioner was acting insubordinate, Petitioner allegedly stated "I don't care if you're the president of the United States." She appealed the U-rating at a hearing before a Chancellor's Committee on June 7, 2012 which was later denied on September 19, 2012.

Petitioner also received a U-rating for the 2011-2012 as a result of being rated unsatisfactory in eleven pedagogical categories. The U-rating was apparently supported by one informal observation and a letter of misconduct.

In the matter of Petitioner's termination, it is well settled, and The Court of Appeals has held, that a probationary employee may be terminated for almost any reason, or for no reason at all, as long as it is not "in bad faith or for an improper or impermissible reason." See Duncan v. Kelly, 9 N.Y.3d 1024, 1025, 882 N.E.2d 872, 853 N.Y.S.2d 260 (2008); see also Venes v. Community School Board, 43 N.Y.2d 520, 525, 373 N.E.2d 987, 402 N.Y.S.2d 807 (1978) ("a probationary employee...has no property rights in his position, and may be dismissed for almost any reason, or for no reason at all.") The burden of proving that such a termination was in bad faith rests solely on the probationary employee and "the mere assertion of bad faith without the presentation of evidence demonstrating it does not satisfy the employee's burden." See Witherspoon v. Horn, 19 A.D.3d 250, 251, 800 N.Y.S.2d 377 (1st Dept 2005).

The evidence does not demonstrate that the DOE acted in bad faith when it terminated Petitioner, a probationary employee. Indeed, the record establishes the contrary. Petitioner received two unsatisfactory ratings for two separate rating periods, summer 2011 and 2011-12 school years. As previously discussed, Petitioner appealed the U-rating for the Summer 2011. She was allowed to present her evidence, exhibits, witnesses and to cross examines the witnesses of the DOE. She was afforded a fair opportunity to present her case. Petitioner argues that the hearing officer gave more credibility to the hearsay testimony of the DOE witnesses than to her notarized statements from eyewitnesses. This argument is unavailing. That Petitioner does not agree with the final decision is not evidence of bad faith.

Moreover, in order for this Court to annul the U-ratings, Petitioner would have to show she was denied a substantial right during the appeal, that the DOE had no rational basis for the U-ratings and that their decision was arbitrary and capricious. None of these appear to be the case here. An administrative decision will withstand judicial scrutiny if it is supported by substantial evidence, has a rational basis and is not arbitrary and capricious. See Matter of Pell V. Board of Education, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321 (1974); See 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'" See 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]: See Matter of Hazeltine v City of N.Y., 89 AD3d 613, 615, 933 N.Y.S.2d 265 [1st Dept. 2011]). Moreover, courts generally do not second-guess the decisions of educational institutions, as they "involve the exercise of highly specialized professional judgment and these institutions are, for the most part, better suited to make relatively final decisions concerning wholly internal matters." See Maas v Cornell Univ., 94 NY2d 87, 92, 721 N.E.2d 966, 699 N.Y.S.2d 716 [1999]; See also Matter of Altman v New York City Dept. of Educ., 2006 NY Slip Op 30521 [U] [Sup Ct, New York County 2006] [applied to termination of Department of Education teacher).

That portion of petitioner's petition challenging his U-rating for the 2011-2012 academic year must be dismissed as premature. A judicial challenge to a U-rating can only be commenced after a petitioner exhausts the administrative review process. See Andersen v. Klein, 50 A.D.3d 296, 854 N.Y.S.2d 710 (1st Dept 2008). A probationary teacher has the right to an administrative review of a U-rating or the determination to discontinue the teacher's probationary service. See DOE Bylaws § 4.3.2. A determination that a probationary teacher's performance was unsatisfactory does not become final and binding until the Chancellor of the DOR denies the teacher's appeal sustaining the rating. See Matter of Hazeltine v. City of New York, 89 A.D.3d 613, 933 N.Y.S.2d 265 (1st Dept 2011).

To the extent Petitioner seeks to argue her U-rating should be annulled because the DOE did not comply with two rating handbooks this argument is meritless.

As a side note, Petitioner must be careful not to confuse the distinct standards applicable to challenging an APPR rating versus that for challenging a termination of probationary employment. The former is an 'arbitrary and capricious' standard while the latter is a 'bad faith' standard. Th record established that the administrative decision to uphold petitioner's unsatisfactory review was not arbitrary or capricious and the discontinuance of petitioner's probationary employment was not in bad faith. See .Matter of Gumbs v Board of Educ. NYC Sch. Dist., 2013 NY Slip Op 31132(U)

Accordingly, it is

ORDERED that the motion which seeks a judgment annulling her probationary termination, annulling two unsatisfactory ratings and ordering Petitioner's reinstatement to her probationary teaching position is denied.

ORDERED that the cross motion to dismiss for failure to state a cause of action is granted.

Dated: December 4, 2013

GEOFFREY D. WRIGHT
AJSC

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court