

**George v Board of Educ. of the City Sch. Dist. of the
City of N.Y.**

2013 NY Slip Op 30615(U)

March 27, 2013

Sup Ct, New York County

Docket Number: 103527/2012

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 103527/2012
GEORGE, MANDY
vs.
NYC BOARD OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78 *CAL # 56*

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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). _____

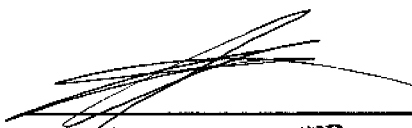
Upon the foregoing papers, it is ordered that this motion is

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
MAR 29 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3-27-13
MAR 27 2013


_____, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 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: Part 5

-----X
MANDY GEORGE,

Petitioner,

-against-

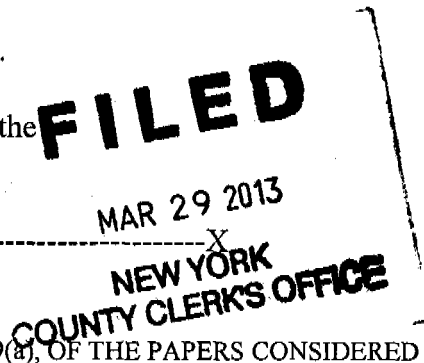
DECISION/ORDER
Index No.: 103527/2012
Seq. No.: 001

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

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

Respondents.

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



-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF PETITION AND AFFIDAVITS ANNEXED.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....3.....
REPLYING AFFIDAVITS.....4.....
EXHIBITS.....
STIPULATIONS.....
OTHER.....(memos of law).....5,6.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Petitioner seeks an Order pursuant to Article 78 of the Civil Practice Law and Rules for an Order nullifying her teaching evaluation rating of Unsatisfactory, as affirmed on administrative appeal, based on the fact that respondents failed to perform a duty enjoined upon them by law and engaged in conduct that was in violation of lawful procedure, was affected by an error of law, was

arbitrary, capricious and an abuse of discretion. Petitioner also seeks to have said rating changed to Satisfactory, forthwith.

Respondents oppose. After a review of the papers presented, all relevant statutes and case law, the Court grants the motion.

Factual and procedural background:

Petitioner is a tenured teacher, employed by respondent Board of Education, since October 2000. During the 2010-2011 school year, she was assigned to Ronald McNair School- PS 147, located in Queens, New York. According to petitioner, during the subject year, "there were no formal observations completed during the entire school year, and thus, there were no observation reports created." On June 16, 2011, at the end of the school year, petitioner was given an "unsatisfactory" rating (hereinafter, "U-rating"), on her Annual Pedagogical Performance Review (hereinafter "APPR"). Said APPR was devoid of any documentary support substantiating this rating.

Consequently, petitioner timely appealed the U-rating, and her appeal was then scheduled for February 14, 2012. Petitioner alleges that from the time she received the subject U-rating on June 16, 2011, until the subsequent appeal, respondent never provided her with any documentation supporting its allegations. However, on the day of the actual review, and for the first time, respondent alleges that respondent provided her with a memorandum prepared by Principal Anne Cohen, which contained some evidentiary support for the U-rating. The date of this letter was June 30, 2011, and therefore, was clearly created after the U-rating was established. Petitioner is adamant that she never received this letter prior to her appeal of the U-rating. The letter does not contain any acknowledgment of receipt by her.

During the review, and despite petitioner's objections, the Chancellor's Chairperson permitted Ms. Cohen to testify concerning the undocumented allegation that petitioner's class room was lacking in organization and cleanliness. Petitioner asserts that she was never previously apprised of this allegation prior to February 14, 2012, and that it was never referenced in the June 16, 2012 APPR. During the review, Ms. Cohen conceded that petitioner was never advised of this allegation, and that no formal written document regarding any observation that was conducted, supporting the U-rating, was ever provided to petitioner.

However, the Chancellor's Designee, Senior Deputy Chancellor Shael Polakow-Suransky, denied the petitioner's appeal of the U-rating for the 2010-2011 school year via letter dated April 13, 2012. The U-rating was sustained "as a consequence of refusing to accept the substantial and ongoing support offered by the administration which prevented the [administration] from evaluating [petitioners] performance on an acceptable level."

According to respondents, "petitioner received her U-rating based on several areas of weakness in her performance that, despite efforts of the administration to provide developmental support throughout the school year, she did not improve on" (Exhibit 2 appended to Verified Answer at 5-11). Respondents also assert that throughout the school year, petitioner was provided with professional support and coaching, which included observations and suggestions emanating from both a literary coach and a math coach, for the purpose of assisting her in her development. However, after working with her, these coaches reported to the Principal that petitioner was reluctant to accept any assistance, and that based on her uncooperative behavior, they would prefer not to work with her in the future. These types of reports were issued frequently throughout the school year.

Respondents also assert that during an informal visit to petitioner's classroom, Principal Cohen personally observed a chart depicting grammatically incorrect writing. Despite the fact that petitioner was advised of this, the same chart was observed during subsequent informal visits, as was also a public bulletin board displaying students' error laden work. When this was brought to petitioner's attention, she responded, "Do you expect me to correct twenty nine papers?"

Additionally, during a quality review in May 2011, the superintendent observed petitioner's class and noted a lack of differentiated instruction and the use of differing avenues to convey similar ideas and concepts. Consequently, the superintendent gave the school a rating of "developing," and noted that the low level of teaching he specifically observed in petitioner's classroom, greatly contributed to this overall rating. The final rating for the 2010-2011 year indicated that 31% of petitioner's students failed to meet the promotional criteria on the Mathematics examination and 34% failed to meet the promotion criteria on the ELA examination.

Respondents further allege that when several members of the instructional cabinet went to petitioner's classroom to help her clean prior to a quality review, she was not present and they observed moldy material, food containers, half eaten food, debris, dust, insects and disorganized desks.

Respondents concede that petitioner did not receive written criticisms of her deficiencies. However, they assert that she did receive verbal feedback consisting of constructive suggestions, and other types of assistance throughout the school year, which they perceive as sufficient notification. Despite this continuous feedback, her performance did not improve, necessitating the subject U-rating. Respondents further assert that during the hearing, neither petitioner nor her advisor refuted Principal Cohen's various allegations.

The Court notes that in her testimony before the Chancellor's Committee, Principal Cohen admitted that she personally did not keep a log indicating what assistance was provided to petitioner, nor did she possess written records of any classroom observations that were made by anyone during the year. Furthermore, she admitted that petitioner was never advised that she would ultimately receive an unsatisfactory rating for the year.

Positions of the parties:

Petitioner alleges that respondents violated several specific formal review procedures promulgated by the Ratings Handbook. She appends as her Exhibit "C," the Chancellor's Special Circular No. 45. Petitioner explains that section 102.2(o)(a) of the New York State Commission of Education Regulations (hereinafter "Regulations"), requires that a school district adopt formal procedures for annual reviews. Thus, respondents issued "Chancellor's Special Circular No. 45," (hereinafter, "Circular 45"), which states that the "formal procedures" which comply with the Regulations and are to be utilized for the rating of pedagogical staff members shall be detailed in a handbook published by respondents' Division of Human Services, entitled "New York City Public Schools, Rating Pedagogical Staff Members," (hereinafter, "Handbook").

Petitioner also asserts that as promulgated by said Handbook, respondents' own procedure for rating pedagogical staff members emphasizes that "due to the serious implications of adverse ratings and the imperative to provide satisfactory pedagogical services to students, the need to document the evaluation of an employee's performance is essential" (see "Foreword," appended as Exhibit "C" in petition). Additionally, the Handbook states that the procedure also requires that, "the overall evaluation of the employee's performance requires a careful review of the documents in the file. This thorough analysis is essential since the reasons for an adverse rating should be

* 7]
reflective of and supported by the written criticisms noted in the file documents” (Exhibit “C,” at pg. 10).

Petitioner now argues that since her U-rating was not predicated on any documentation contained in her personnel file or derived from any other source in clear violation of the Handbook, it was issued without any legitimate reason or basis, and thus, must be changed forthwith.

Respondents argue that the decision to sustain petitioner’s U-rating was neither arbitrary nor capricious, and that petitioner has not been deprived of any substantial right in the affirmance of the U-rating. They also argue that a court may not substitute its own judgment for that of an administrative agency, and must affirm that agency’s decision when a rational basis for it exists in the record to support it. Respondents additionally argue that petitioner’s position that the U-rating has no basis because it was not accompanied by any supporting documentation, lacks merit in that hearsay evidence on its own, can form the basis of an administrative determination.

Conclusions of law:

It is well established that a judicial review of an administrative determination is limited to the grounds invoked by the agency at the time of its determination (Matter of Aronsky v. Board of Educ. Community School Dist. No. 22 of City of NY, 75 N.Y.2d 997, 1000 [1990]). A court must uphold an agency’s exercise of discretion unless it lacks a rational basis (Pell v. Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231 [1974]). “The judicial function is exhausted when there is to be found a rational basis for the conclusions approved by the administrative body” (Sullivan County Harness Racing Ass’n v. Glasser, 30 N.Y.2d 269, 277-278 [1972]).

In reviewing an administrative agency's determination to ascertain whether it is arbitrary and capricious, the test is whether the determination "is without sound basis in reason and is generally taken without regard to the facts" (Pell v. Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d at 231; *see also* Mankarios v. New York City Taxi and Limousine Com'n, 49 A.D.3d 316, 317 [1st Dept. 2008]; Soho Alliance v. New York State Liquor Authority, 32 A.D.3d 363, 363 [1st Dept. 2006]; Kenton Associates, LTD v. Division of Housing & Community Renewal, 225 A.D.2d 349 [1st Dept. 1996]; Peckham v. Calogero, 12 N.Y.3d 424, 431 [2009]).

Where the determination is rational and the administrator has not acted in violation of lawful procedure, arbitrarily, or in abuse of its discretionary power, the courts must confirm the determination (*see* Pell v. Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d at 231; *see also* Budnick v. New York City Dept. of Educ., 25 Misc.3d 1235(A), 2009 N.Y. Slip Op. 42425(U) [Sup. Ct. N.Y. County, 2009]).

Teacher evaluations and appeals of Unsatisfactory Ratings must be conducted in compliance with the formal procedures promulgated pursuant to Section 100.2 (o) of the New York State Commission of Education Regulations. In the City of New York, these procedures are set forth primarily in two Handbooks prepared by the Division of Human Resources. These are "Rating Pedagogical Staff Members" and "The Appeal Process." The Rating Handbook emphasizes the importance of completing evaluations based on documents contained in a teacher's file. The "Appeal Process" requires, *inter alia*, that prior to the hearing, the teacher "be furnished with a complete set of the documentation used by the Rating Officer to support the reason(s) for the adverse rating" (*see* Section A 2).

In the case at bar, the Court has reviewed the aforementioned Ratings Handbook. At page 3, Part II is entitled "Evaluation and Rating." Section A of this Part is entitled "Mandate and Timing." It references, *inter alia*, Section 89, Subdivision 7 and 7a of the New York State Commission of Education's Regulations that addresses evaluations and ratings of personnel. It states in pertinent part as follows: "Within the last ten school days of each school year and not fewer than four school days prior to the close thereof, the principal of each school shall give to each member of his/her staff a signed statement characterizing his/her work as Satisfactory or Unsatisfactory....." It also states that "A Certification of Unsatisfactory or Doubtful work shall be accompanied by appropriate supporting data."

Moreover, the Ratings Handbook Foreword specifically acknowledges the necessity of documenting teacher evaluations. The Foreword states in pertinent part: "Although the responsibility for evaluating pedagogical and supervisory staff may be implemented in accordance with a variety of strategies, the importance of clear, concise documentation is fundamental to the process. Due to the serious implications of adverse ratings and the imperative to provide satisfactory pedagogical services to students, the need to document the evaluation of an employee's performance is essential. The admissibility of documents and written criticisms has been defined by contractual language, grievance/arbitration decisions and rulings adjudicated by both the legal system and the State Commissioner of Education. Hence, the principal must be aware of the type and nature of documents which are germane to the evaluation of staff and the need for clear, objectively written statements..."

Moreover, the Appeals Process component of the Handbook, appended as Exhibit "E," of the petition, promulgates the procedures for an appeal of an adverse rating for all pedagogical

employees. In paragraph 2, underneath the heading "Rating Officer's Response to the Appeal," is subdivision a, which states "[t]he Appellant is to be furnished with a complete set of the documentation used by the Rating Officer to support the reason(s) for the adverse rating." Paragraph 3 states in pertinent part that the appellant "must file a full, written rebuttal to any of the reasons and documents furnished....."

After a complete review of the Handbook, the Court finds that petitioner is correct in her contention that respondents violated the rules contained therein, and that their final determination was indeed arbitrary, capricious, and in gross error when they failed to follow their own regulations. It is well settled that a U- rating may not be based on documents not shown to the petitioner in advance of the hearing (*see* Smith v. Board of Educ. of City School Dist. of City of New York, 18 Misc.3d 192, 196 [sup Ct. N.Y. County 2007]; Budnick v. New York City Dept. of Ed.,supra);

It is a "fundamental administrative law principle that an agency's rules and regulations promulgated pursuant to statutory authority are binding upon it as well as the individuals affected by the rule or regulation" (Lehman v. Board of Ed. of City School Dist. of City of New York, 82 A.D.2d 832, 834 [2d Dept. 1981]; *see also* Syquia v. Board of Ed. of Harpursville Cent. School Dist., 80 N.Y.2d 531, 535-536 [1992]; Frick v. Bahou, 56 N.Y.2d 777 [1982]).

Here, it is crystal clear that respondents were absolutely required to document petitioner's adverse rating, which they failed to do. Indeed, they arrogantly concede that petitioner was never provided with any documentation supporting her U-rating at the time the rating was given, or after any of the alleged individual incidents of her deficient performance. In fact, respondents proffer the circular argument that since no documents were produced, they cannot be in violation of their own requirements to provide petitioner with documents to review and rebut to the U-rating, because there

were no documents to provide to her. It is axiomatic that if petitioner did not receive any documents, she could not refute them. In consideration of this, the Court has no alternative but to find that the U-rating is arbitrary, capricious, in error of their own regulations and devoid of any rational basis.

The Court notes that it particularly finds audacious, respondents' argument that the decision of the Chancellor's Committee to sustain the U-rating was based on the "thorough, convincing testimony of Principal Cohen, and also on the fact that neither petitioner nor her advisor refuted the Principal's assertions that petitioner resisted and or refused support from the administration."

Therefore, in consideration of the foregoing, it is hereby

ORDERED that petitioner's application pursuant to Article 78 of the CPLR, is granted; and it is further

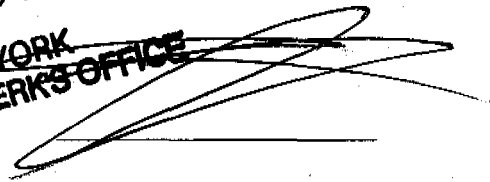
ORDERED that petitioner's teaching evaluation rating of "Unsatisfactory," is annulled; and it is further

ORDERED that petitioner shall serve a copy of this order on all other parties and the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATE: March 27, 2013
MAR 27 2013

FILED
MAR 29 2013
NEW YORK
COUNTY CLERK'S OFFICE


Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT