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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR Justice

PART 33

Index Number : 104277/2012
GUMBS, DARLENE
vs.
NYC BOARD OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 28, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-21

Answering Affidavits — Exhibits _____ | No(s). 22-23, 28

Replying Affidavits _____ | No(s). 24-27

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

decided in accordance with annexed memorandum decision and judgment

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

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: 5/15/13

_____, J.S.C.
ALEXANDER W. HUNTER JR

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 33

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In the Matter of the Application of
Darlene Gumbs,

Petitioner,

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

-against-

Board of Education of the City School District of the City of New York, and Dennis M. Walcott, in his official capacity as Chancellor of the City School District of the City of New York,

Respondents.

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Index No.: 104277/12

Decision and Judgment

HON. ALEXANDER W. HUNTER, JR.

The application by petitioner for an order pursuant to Article 78 of the CPLR, declaring that petitioner's unsatisfactory rating for the 2011-2012 school year and termination was arbitrary and capricious and in violation of respondents' established policies, procedures, law, and regulations regarding the rating of pedagogical employees and in breach of contract; reversing petitioner's unsatisfactory rating and changing it to satisfactory, reinstating petitioner retroactively to the date of her termination with full back pay, benefits, seniority, and all other benefits and emoluments of employment, and awarding tenure to petitioner as a guidance counselor, is denied. Respondents' cross-motion to dismiss for failure to state a cause of action pursuant to CPLR 7804 (f) and 3211 (a) (7) is granted with costs and disbursements to respondents.

Petitioner is employed by respondent Board of Education of the City School District of the City of New York ("BOE") as a tenured teacher of physical education. Effective January 3, 2011, petitioner accepted an appointment to a probationary guidance counselor position at the High School for Global Citizenship in Brooklyn, New York. Petitioner's probationary period would have expired on January 3, 2013, but her appointment as a guidance counselor was discontinued on July 27, 2012.

Petitioner received a satisfactory rating on her Annual Professional Performance Review ("APPR") for the 2010-2011 school year, however issues emerged the following school year. During the course of the 2011-2012 school year, petitioner received an official parental complaint and numerous emails from parents and school administrators notifying her of the various issues. By letter dated June 18, 2012, petitioner was notified that a meeting had been scheduled with the principal to discuss multiple issues that might lead to disciplinary action.

Petitioner had not previously been called to a disciplinary meeting during her probationary term. In addition, petitioner did not receive any formal or informal observation during the 2010-2011 or 2011-2012 school years.

On June 20, 2012, with a union representative present, petitioner met with the principal to discuss allegations of parental complaints, lack of record keeping, attendance issues, and college applications/SAT participation rates issues. About half an hour after the meeting, petitioner received four letters, all dated June 20, 2012, which formally laid out each area of these allegations (the "disciplinary letters"). Petitioner also received her APPR for the 2011-2012 school year, which rated her unsatisfactory and included recommendations by the principal and superintendent for discontinuance of petitioner's probationary service. Section 4 of the APPR listed the disciplinary letters as documentation in support of the rating.

By letter dated June 20, 2012, which was annexed to petitioner's APPR, petitioner was informed that the superintendent would review and consider whether her services as a probationer should be discontinued as of the close of business July 27, 2012. The letter stated that petitioner could submit a written response for consideration. Petitioner did submit a written response addressing the allegations in each of the disciplinary letters (the "response"). By letter dated July 27, 2012, upon review of all appropriate documentation, the superintendent affirmed petitioner's discontinuance of probationary service effective immediately (the "discontinuance letter"). Petitioner did not receive a copy of the discontinuance letter until she returned to school on September 4, 2012. Petitioner was returned to a tenured teaching position following her discontinuance as a probationary guidance counselor.

A probationary employee is entitled to have a discontinuance and/or unsatisfactory rating reviewed by a committee at a hearing pursuant to the Regulation of the Chancellor C-31, the By-laws of the Panel for Educational Policy of the New York City Department of Education, and the collective bargaining agreement between the United Federation of Teachers and respondents. On July 9, 2012, petitioner requested an appeal for her discontinuance and unsatisfactory rating. On September 21, 2012, a Chancellor's Committee meeting was held to review the recommendation of discontinuance of petitioner's probationary service as a guidance counselor. By letter dated November 5, 2012, the superintendent reaffirmed petitioner's discontinuance in accordance with the recommendation by the Chancellor's Committee report.

First, petitioner's unsatisfactory rating was rational and did not violate respondents' established policies, procedures, law, and regulations regarding the rating of pedagogical employees or constitute a breach of contract. While the fact that petitioner never received formal or informal observations of her work as a guidance counselor may have contravened the procedures utilized for the rating of pedagogical staff members as detailed in a handbook entitled "New York City Public Schools, Rating Pedagogical Staff Members" (the "Handbook"), this does not give petitioner an entitlement to judicial relief.

It is well settled that a determination is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts." **See Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 (1974)**. "Even though the court might have decided differently were it in the agency's position, the court may not upset the agency's determination in

the absence of a finding, not supported by this record, that the determination had no rational basis." **Matter of Mid-State Mgt. Corp. v. New York City Conciliation & Appeals Bd., 112 AD2d 72, 76 (1st Dept 1985)**. Therefore, the proper standard is whether the administrative determination was rationally based in the record. **Matter of Storman v. New York City Dept. of Educ., 95 AD3d 776, 2012 NY Slip Op 04217 (1st Dept 2012)**; **Batyreva v. New York City Dept. of Educ., 50 AD3d 283, 2008 NY Slip Op 02902 (1st Dept 2008).**

An APPR rating is arbitrary and capricious when it is made in violation of lawful procedure or a substantial right. **See Matter of Cohn v. Board of Educ. of the City Sch. Dist. of the City of NY, 102 AD3d 586, 2013 NY Slip Op 0041831 (1st Dept 2013), *affg* Misc 3d 1241(A), 2011 NY Slip Op 51070(U) (Sup Ct, NY County 2011).** Judicial relief is available to compel an administrative body or officer to comply with its own internal rules and regulations. **See Tedeschi v. Wagner Coll., 49 NY2d 652 (1980)**. This court follows the general rule that judicial relief is not available to compel the BOE to comply with the Handbook because it only provides "a guideline, and not a rule or regulation guaranteeing a substantial right." **Applewhite v. NYC Bd. of Educ., 2012 NY Slip Op 32182(U), *8 (Sup Ct, NY County 2012, Lobis, J.); see Matter of Cohn, 102 AD3d 586; Brown v. City of New York, 2012 NY Slip Op 31472(U) (Sup Ct, NY County 2012); Richards v. Board of Educ. of the City School Dist. of the City of NY, 2012 NY Slip Op 31539(U) (Sup Ct, NY County 2012); Matter of Rodriguez v. Board of Educ. of the City School Dist. of the City of NY, Sup Ct, NY County, Jan. 11, 2013, Hunter, J., index No. 103037/12; contra Matter of Gehlaut v. Board of Educ. of the City Sch. Dist. of the City of NY, 2013 NY Slip Op 30339(U) (Sup Ct, NY County 2013, Lobis, J.).**

In **Matter of Gehlaut**, Justice Lobis declined to follow her holding in **Applewhite**, finding instead that Gehlaut had established that the "Handbook must be equated with administrative rules and regulations that affect a substantial right of the Petitioner." Justice Lobis distinguished **Matter of Gehlaut** from **Applewhite** and the First Department's recent decision in **Matter of Cohn** by pointing to the fact that in those cases petitioners' ratings were supported by documentation whereas section 4 of Gehlaut's APPR, which lists supporting documentation, was left blank. Similarly, in the instant proceeding, petitioner's APPR was supported by documentation. However, this court declines to follow Justice Lobis in reversing itself to the extent that **Matter of Gehlaut** establishes the broader holding that the Handbook, in certain fact specific circumstances, provides rules that the court can compel the BOE to follow.

This court need not determine whether an APPR must be supported by documentation, as petitioner raises only the more narrow issue of whether such documentation must include observations. Speaking to that issue, the Handbook does not clearly mandate observations of high school teachers, let alone guidance counselors. While this court appreciates the importance of pedagogical observations, the Handbook uses conditional language (i.e. "should") rather than mandatory language (i.e. "shall") throughout in reference to observations. In addition, the Handbook makes a distinction between schools and between non-supervisory staff, other than classroom teachers, and teachers. The Handbook "*recommends*" a "minimum number of *required* classroom observations" for teachers under the jurisdiction of the Community School Districts, the Chancellor's District, and the Division of Special Education; a "minimum number of classroom observations" for teachers under the jurisdiction of the high schools; and formal

observations, "*where appropriate*," for probationary non-supervisory staff, other than classroom teachers (emphasis added). (Petitioner's exhibit D at 7-8).

In the instant proceeding, petitioner's unsatisfactory rating was based on the disciplinary letters. Petitioner's substantial rights were not violated by any possible deviation from the guidelines laid out in the Handbook. Petitioner was afforded due process through the opportunity to respond in written form to the disciplinary letters and an appeal of her unsatisfactory rating. Here, petitioner tellingly does not dispute the circumstances detailed in the disciplinary letters which led to her unsatisfactory rating. An overview of petitioner's written response to the disciplinary letters indicates that she only offered superficial explanations, shifted the blame to the administration, and at no point took any responsibility for her actions. Accordingly, this court finds that petitioner's unsatisfactory rating was rational because it was not made in violation of lawful procedure or a substantial right.

Second, contrary to petitioner's assertion, she did not acquire tenure by estoppel as a guidance counselor. "Tenure by estoppel results when a school board fails to take the action required by law to grant or deny tenure and, with full knowledge and consent, permits a teacher to continue to teach beyond the expiration of the probationary term" (internal quotation marks omitted). **Matter of Gould v. Board of Educ. of Sewanhaka Cent. High School Dist., 81 NY2d 446, 451 (1993); see Matter of Andrews v Board of Educ. of the City School Dist. of the City of N.Y., 92 AD3d 465, 2012 NY Slip Op 00845 (1st Dept 2012).**

The probationary period shall not exceed two years for a pedagogue who has already secured another tenured appointment. A probationary employee may be terminated at any time during her probationary period on the recommendation of the superintendent by a majority vote of the BOE. A probationary employee who will not be recommended for tenure shall be so notified in writing by the superintendent no later than sixty days immediately preceding the expiration of her probationary period. **See Education Law §§ 2509 (1) (a), 2573 (1) (a), 3012 (1) (a), and 3014 (1).**

While petitioner alleges that she actually began working as a guidance counselor on or around July 8, 2010, there is no evidence or even an affidavit by petitioner to support that assertion. The parties do not dispute that petitioner was appointed as a probationary guidance counselor on January 3, 2011, received notice in writing from the superintendent that she would not be recommended for tenure on June 20, 2012, was duly terminated on July 27, 2012, received notice of her termination on September 4, 2012, and had her termination reaffirmed after a hearing on November 5, 2012. Petitioner was notified approximately six months in advance of the date her probationary period would have expired that she would not be recommended for tenure as a guidance counselor. Petitioner fell several months short of completing her two year probationary period even when this court views the circumstances leading to her termination in the most favorable light.

Finally, the discontinuance of petitioner's probationary service as a guidance counselor was not in bad faith. "A probationary teacher does not have a property right in his or her position." **Kahn v. New York City Dept. of Educ., 18 NY3d 457, 522-523, 2012 NY Slip Op 01098 (1st Dept 2010).** The BOE "has the right to terminate the employment of a probationary teacher at any time and for any reason, unless the teacher establishes that the termination was for

a constitutionally impermissible purpose, violative of a statute, or done in bad faith." **Matter of Frasier v. Board of Educ. of City School Dist. of City of NY, 71 NY2d 763, 765 (1988).** "Moreover, the burden of raising and proving such bad faith is on the employee and the mere assertion of bad faith without the presentation of evidence demonstrating it does not satisfy the employee's burden" (internal quotation marks omitted). **Matter of Witherspoon v. Horn, 19 AD3d 250, 251, 2005 NY Slip Op 05381 (1st Dept 2005).** A determination terminating petitioner's probationary employment will be sustained where petitioner fails to establish that the termination was done in bad faith. **Matter of Leo v. New York City Dept. of Educ., 100 AD3d 536, 2012 NY Slip Op 07888 (1st Dept 2012).**

While the fact that petitioner was given the disciplinary letters on the same day that she met with the principal raises a concern of bad faith, she was aware of the circumstances giving rise to the disciplinary letters long before they were formally laid out in the disciplinary letters. Petitioner received an official parental complaint and numerous emails notifying her of the various issues which precipitated her termination. In the instant proceeding, petitioner does not dispute that her performance as a probationary guidance counselor was unsatisfactory, rather that her discontinuance was procedurally defective. This court finds that petitioner has not satisfied her burden of proving that she was terminated in bad faith.

As a side note, parties 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. Therefore, respondents' cross-motion to dismiss for failure to state a cause of action is properly granted where the record evidence establishes 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.

The parties' remaining contentions are without merit.

Accordingly, it is hereby,

ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondents.

Dated: May 15, 2013

ENTER:

J.S.C.

ALEXANDER W. HUNTER JR