

<b>Barth v City of New York</b>
2013 NY Slip Op 31254(U)
June 11, 2013
Supreme Court, New York County
Docket Number: 102677/12
Judge: Alice Schlesinger
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: ALICE SCHLESINGER  
Justice

**IA PART 16**  
PART \_\_\_\_\_

Index Number : 102677/2012  
BARTH, INOCENCIA  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 001  
ARTICLE 78

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 *Article 78 petition*  
*is denied and the proceeding is dismissed*  
*in accordance with the accompanying*  
*memorandum decision.*

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: JUN 11 2013

*Alice Schlesinger*, J.S.C.  
**ALICE SCHLESINGER**

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

-----X  
INOCENCIA BARTH,

Petitioner,

-against-

Index No. 102677/12  
Mot. Seq. Nos. 001 & 002

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

Respondents.

-----X  
SCHLESINGER, J.:

Petitioner Inocencia Barth, a veteran teacher of English as a Second Language (ESL), commenced this Article 78 proceeding to challenge the January 12, 2012 decision by respondent New York City Department of Education (DOE), which denied her appeal of an Unsatisfactory Rating (U-Rating) that she received for the 2010-2011 school year. Respondents have moved to dismiss pursuant to CPLR §3211(a)7 for failure to state a cause of action and because the City, as an entity separate from DOE, is not a proper party. Petitioner does not oppose dismissal as to the City. As to the balance of the motion, this Court at oral argument directed the parties to supplement the papers to provide a copy of the hearing transcript and the documents referenced in the U-Rating. That has been done, allowing the Court to determine the issues on the merits without limiting the inquiry to whether a cause of action has been stated.

Background Facts

At the time of the events in question, petitioner Inocencia Barth was employed by the DOE as an ESL teacher at Margaret S. Douglas Intermediate School 292 (I.S. 292)

in Brooklyn, NY. Until she received the U-Rating challenged here, Ms. Barth allegedly performed well and received satisfactory ratings throughout her 17-year career as a teacher. She claims that all was well until Everett Hughes took over as Principal of I.S. 292; it was then that Ms. Barth began having difficulty with work assignments and received criticism of her performance primarily from two Assistant Principals Gloria Williams-Nandan and Olga Stewart-Nelson. These criticisms led to the issuance of the U-Rating challenged here at the end of the 2010-2011 school year.

According to the DOE, Ms. Barth was presented with a two-page, fully completed form notifying her of the U-Rating on June 24, 2011. A copy of the form, entitled "Annual Professional Performance Review and Report on Probationary Service of Pedagogical Employee," is attached to the DOE's moving papers as Exhibit 1. In addition to indicating an overall evaluation of "U" for the period from September 7, 2010 to June 30, 2011, the form indicates an unsatisfactory rating in five of 23 listed categories. All five are under the heading "Pupil Guidance and Instruction"; there are no unsatisfactory ratings under the headings of "Personal and Professional Qualities," "Classroom or Shop Management," or "Participation in School and Community Activities."

The five unsatisfactory ratings relate to:

- Control of class,
- Planning and preparation of work,
- Skill in adapting instruction to individual needs and capacities,
- Effective use of appropriate methods and techniques, and
- Skill in making class lessons interesting to pupils.

At the bottom of page 1 is the signature of the Principal Everett Hughes, dated June 23, 2011, and that of Ms. Barth dated June 24, 2011 to acknowledge receipt of the form.

Page 2 of the form lists five documents that purportedly substantiate these ratings, and the form indicates that copies are attached. Those five documents are described here and were provided to the Court for the first time in the Supplemental Affirmation directed by the Court at oral argument. The first is a January 13, 2011 letter to Ms. Barth from Assistant Principal Gloria Williams-Nandan. It references a December 3, 2010 meeting at which the two professionals and two other teachers were present and strategies were discussed to improve the teaching of English Language Learners.

According to the letter, the AP instructed Ms. Barth at the conclusion of the meeting to meet with two other teachers weekly to plan for the following week and prepare lesson plans. The letter further indicates that when the AP met with Ms. Barth on January 13, about five weeks after the December meeting, Ms. Barth was unable to provide copies of any recent lesson plans. The copy of the letter provided to the Court by petitioner does not bear the signature of Ms. Barth to confirm receipt. However, the copy provided by the DOE is signed and bears a handwritten note from Ms. Barth that "Rebutted (*sic*) will follow." No documentation of any rebuttal has been provided to the Court, nor is one referenced in the hearing or the papers here.

The next letter from the same AP is dated March 8, 2011. It references a "Mid-Year Interview" that had been held on February 7, 2011 at which Ms. Barth had been asked to discuss some of her teaching strategies. According to the letter, Ms. Barth had been unable to explain the different levels of student competency and how she would design her instruction to assist each group. Further, she purportedly acknowledged that

her students had not progressed in any way so she had set no new goals for them. The AP directed Ms. Barth in the letter to review student data and prepare a binder with appropriate goals, which would be reviewed the following week, March 14. The copy of the letter that petitioner provided to the Court was not signed by Ms. Barth to acknowledge receipt, but that provided by the City bears a signature dated March 11.

In the next letter, dated March 29, the AP indicated that the requested binder had not been submitted until March 25, approximately ten days late. A review indicated various deficiencies, including that the data was limited to a small group of students and the goals were outdated. The AP attached to the letter the Language Arts Item Skills Analysis to provide Ms. Barth with some guidance for future work. Again, the copy of the letter provided to the Court by petitioner was not signed by Ms. Barth to acknowledge receipt, but that provided by the DOE was signed on March 29.

The next letter, dated May 31, 2011, was from Assistant Principal Olga Stewart-Nelson. The AP referenced an incident earlier that day when she had repeatedly asked Ms. Barth to cover class 806, and Ms. Barth had purportedly refused those repeated requests. Ms. Barth also allegedly became angry, raised her voice, and used inappropriate language to complain that she had other work to finish and that all the AP did was write letters to her file criticizing her. Ms. Barth's signature does appear at the bottom of this letter to acknowledge receipt on May 31.

The last document is a four-page document entitled "Literacy/Social Studies Supervisory Observation Form." The noted supervisor is AP Williams-Nandan. The four-page form is dated June 8, 2011, but it was not signed by the AP or Ms. Barth until June 28; it appears that the observation was conducted on June 8, but the form was not

given to Ms. Barth until June 28, which is four days after the U-Rating form was presented to her. The form contains an in-depth analysis of the instruction observed, a rating of the lesson as "unsatisfactory," one favorable comment on Ms. Barth's "attempt to differentiate instruction" and nine specific criticisms regarding issues such as failure to control the classroom, lack of clarity in instruction, and failure to present a sufficiently challenging lesson. Although Ms. Barth claims in her petition (§ 10) that she was "told to sign a document detailing a post-observation conference that never in fact occurred," the form says nothing about a post-observation conference, and petitioner has not provided a copy of the document that she purportedly signed against her will. It is nevertheless undisputed that Ms. Barth was not given the observation form until the last day of school, a few days after she had received her U-Rating form.

Ms. Barth timely filed an administrative appeal of the U-Rating, and a hearing was held on October 7, 2011. According to the transcript provided by the DOE in its supplemental papers, the hearing was conducted by the Chair of the Chancellor's Committee, whose name is not stated. On behalf of the DOE appeared the former Principal Everett Hughes and the present Principal and former AP Gloria Williams-Nandan. Ms. Barth appeared, along with UFT advocate Ondre Gilmer.

Before the hearing began, the Chairperson inquired about procedural objections. Ms. Gilmer objected that the rating sheet presented by the DOE differed significantly from that received by Ms. Barth. According to Ms. Gilmer, the rating sheet received by Ms. Barth (presumably the one attached to the Petition here) did not have any boxes checked to indicate any specific deficiency in performance, nor did it list the documents (discussed above) on which the U-Rating had been based. The Chairperson indicated

that she would accept the DOE's U-Rating in evidence and indicated to Ms. Gilmer that she could "present that as [Ms. Barth's] document later." (TR 2). Ms. Gilmer also objected to the Chair's consideration of a letter to Ms. Gilmer as there was no indication that the letter had been included in Ms. Barth's file or whether she had ever seen it, as Ms. Barth had not signed the letter. The Chair indicated that she would consider the lack of a signature. At no point is the content of the letter discussed.

The hearing then began. Principal Hughes declined to make a statement and stood on the record. Ms. Gilmer then cross-examined him on the issue of when it was appropriate to pull a teacher from her regular assignment to cover a class for another teacher. While the questions and colloquy suggested that Ms. Barth was often asked to cover classes during her prep period, the Principal's answers were unclear. Significantly, Ms. Gilmer did not ask a single question about the U-Rating form offered by the DOE on which the signature of Principal Hughes appeared to further her objection that the completed form had not, in fact, been given to Ms. Barth. Nor did Ms. Gilmer question the Principal as to whether he had any personal knowledge of Ms. Barth's performance.

Testimony was then given by Ms. Williams-Nanden, the AP who had written most of the letters listed on page 2 of the U-Rating form relied upon by the DOE. Though the transcript often indicates that the testimony was "inaudible," the questioning initially focused on whether Ms. Barth had been deprived of her prep periods and whether efforts had been made to assist her with teaching deficiencies. The answers are unclear, though it appears that school-wide professional development was discussed. Also, Ms. Gilmer asked whether Ms. Barth had been asked to use her car to



make deliveries for the DOE, but the answer was inaudible. Again, no questions were posed about any of the letters on which the U-Rating was based or any of the claimed deficiencies in Ms. Barth's performance in an attempt to refute the DOE's claims.

Ms. Barth then testified. She explained that she had often been asked to leave the school to deliver tests to a DOE office, implying but not stating that these assignments interfered with her ability to plan and prepare for classes. Also, responding to testimony by Ms. Williams-Nandan about a professional development plan, Ms. Barth did confirm that AP Williams had conducted a meeting with Ms. Barth and two other teachers to encourage common planning, but Ms. Barth stated that she was often unable to achieve that goal because the other teachers were not available. However, her testimony on all these points was extremely brief and general and lacking in evidentiary detail. At no point did she deny receipt of the completed U-Rating form or the letters.

Rather than continue to elicit testimony from Ms. Barth on the relevant issues, such as the content of the evaluation letters and the U-Rating and the meetings at which her performance was criticized, Ms. Gilmer injected herself and made her own statement. She said (at p 9) that Ms. Barth had told her that four different administrators would contact her at various times during the day with different instructions. This practice, according to Gilmer, confused Ms. Barth, caused her frustration, and interrupted her own efforts to prepare for her classes and teach.

In response to a question from the Chair, Ms. Barth jumped back in and confirmed that AP Williams had told her to use some of her ESL tutoring time to serve three gifted students and that she was unable to attend the ESL monthly meeting on a regular basis because she was often asked to cover a class during that time. Ms.

Gilmer argued that since the only evaluation done was completed at the end of the year, Ms. Barth was not given an opportunity to improve. Ms. Barth added that no post-observation conference was held; she was simply given the form and asked to sign. There was then some back and forth between Principal Hughes and Ms. Barth on the issue of whether Ms. Barth had been inappropriately pulled to cover classes for absent teachers; the two sides disagreed on that point.

The Chair then heard closing statements. Principal Hughes simply stated that he relied on the record. Ms. Gilmer argued that the constant disruptions deprived Ms. Barth of an opportunity to plan and teach effectively. She further argued that the DOE had failed to make a meaningful effort to assist Ms. Barth or address any deficiencies in her performance. The hearing then concluded.

In a one-line letter dated January 12, 2012 from Senior Deputy Chancellor Shael Polakow-Suransky, Ms. Barth was advised that her appeal of the U-Rating had been denied, and "the said rating is sustained as a consequence of failure to plan, prepare and execute lessons appropriately and lack of respectful and professional cooperation with the Principal." The decision suggests that the information in the various letters referenced in the U-Rating was accepted as true and that Ms. Barth had failed to rebut the claims or persuasively demonstrate her defense that she had been deprived of the time or guidance to improve her performance. (Petition, Exh D). Since that time, Ms. Barth has obtained a position at another school.

### Discussion

In her petition, Ms. Barth seeks extensive relief: the annulment of the U-Rating; compensation for lost per session work; and a transfer to another school. Both parties agree that the request for a transfer is moot, as Ms. Barth is now teaching at another

school. The request for compensation for lost per session work is denied. Although Ms. Barth did state at the hearing that she was sometimes unable to complete her own assignments because she was oftentimes asked to cover other classes, and while mention of this complaint is also included in the petition (§ 13), the record is not developed on that point in any meaningful way. Therefore, that request for relief is denied.

For similar reasons, the Court rejects petitioner's claim that she was subjected to "continued harassment, discrimination and verbal abuse throughout the 2010-11 school year, often in front of her students." (Petition, § 14). Ms. Barth failed to substantiate this claim at the hearing with proof of specific incidents. To the extent Ms. Barth may wish to point to the incident referenced in the May 31 letter, she did not testify about the incident at the hearing and the letter alone does not prove her claim. Nor have any details been provided in the bare-bones petition.

The claim that does merit consideration by this Court is the claim that the U-Rating is arbitrary and capricious and in violation of law. Judicial review, however, is limited; a court may not annul a U-Rating as arbitrary and capricious unless it has no rational basis in the record. *Murane v Dept. of Educ. of the City of New York*, 82 AD3d 576 (1<sup>st</sup> Dep't 2011). The burden is on the petitioner to make that showing.

The Court finds that the petitioner here has failed to meet that burden. Contrary to petitioner's claim, the U-Rating form and the various referenced letters provide a rational basis for the DOE's determination that Ms. Barth's teaching suffered from various deficiencies which were discussed with Ms. Barth at various times. Although the results of the year-end observation were not provided until after the U-Rating had been

issued, the four letters discussed above, as well as the actual observation, all preceded the U-Rating and formed a rational basis for the conclusion stated there.

In addition to noting specific performance deficiencies, the letters indicated that the DOE provided guidance to Ms. Barth in the form of written materials and access to other experienced teachers. Some of the letters describe meetings that were held with Mr. Barth to evaluate her performance and make suggestions for improvement. For example, the first letter discusses a December 3 meeting with Ms. Barth, the Assistant Principal, and two other teachers present to discuss lesson planning and goals for student performance. The second letter discusses a January 13 meeting between the Assistant Principal and Ms. Barth. The third letter discusses a "Mid-Year Interview" that the Assistant Principal held with Ms. Barth on February 7.

As noted above, these letters not only confirm that Ms. Barth had notice of claimed deficiencies in her performance, they also undermine any claim that no effort was made to assist her. Ms. Barth made no effort at the hearing to demonstrate through her own testimony or through the cross-examination of DOE witnesses that the letters were somehow inaccurate and were motivated by bad faith. To the extent she suggested that any deficiencies should be excused because she was consistently compelled to forego prep periods to cover other classes or perform duties such as the delivery of tests, or that she was subjected to discrimination, the hearing officer implicitly rejected those defenses. Considering the extremely general nature of the testimony, the conclusion was not unreasonable.

What is more, petitioner was assisted at the hearing by a UFT representative and makes no claim that the hearing was unfair or that she was somehow denied a full

and fair opportunity to be heard on the merits consistent with due process of law. To the extent that certain issues were raised on behalf of Ms. Barth, they were not sufficiently pursued. For example, counsel objected to the admission of the U-Rating form offered by the DOE because the version Ms. Barth had in her possession did not contain the details of the rating as appeared on the DOE form. However, Ms. Barth at no point testified that she had never received a fully completed copy of the U-Rating or the various letters referenced on page 2 on which the rating was based. The DOE has submitted copies of all the documents bearing the signature of Ms. Barth to acknowledge receipt, and Ms. Barth has not offered evidence to challenge the authenticity of any of those documents. This Court is bound by the evidence in the record, including the lack of affirmative evidence on issues that petitioner raises here.

Turning to petitioner's claim of a violation of law, the essence of that claim appears to be that the DOE failed to comply with the rules regarding observations set forth in Chief Executives' Memorandum #80, a copy of which is attached to the petition. However, other than stating that no post-observation conference was held, the claim is not sufficiently explained so as to justify annulling the U-Rating. For example, although this Court has reviewed the Memorandum, no section was found mandating a post-observation conference as a prerequisite to a U-Rating, and petitioner has not cited to any provision to that effect.

The Memorandum does discuss performance reviews and provides two options: Component A is a more informal procedure that provides for the setting of specific goals by the teacher and a plan to complete them, and Component B provides for a formal observation. The Memorandum states that "Satisfactory, tenured teachers

[presumably, including Ms. Barth] may choose Component A or B, or both, with the concurrence of the principal."

The letters attached to the U-Rating suggest that the informal approach described in Component A was the approach used. The first letter references a meeting at which teaching strategies, lesson planning, and goals were discussed. The second letter references a meeting at which those lesson plans and goals were reviewed. The third letter, about the Mid-Year Interview, also is an evaluation of goals and the extent to which Ms. Barth and her students had achieved them. Petitioner's papers ignore these events completely. To the extent that petitioner may be suggesting that only Component B, the formal observation approach, was the one utilized, she has failed to establish that point.

In sum, while Ms. Barth may well disagree with the assessment of her supervisors, she has failed to establish that the U-Rating was arbitrary and capricious or in violation of law.

Accordingly, it is hereby

ORDERED that respondent's cross-motion to dismiss this Article 78 proceeding is granted; and it is further

ADJUDGED that the Article 78 petition is denied and the proceeding is dismissed. The Clerk is directed to enter judgment in favor of the respondents without costs or disbursements.

Dated: June 11, 2013

**JUN 11 2013 FILED 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).

*[Handwritten Signature]*  
\_\_\_\_\_  
J.S.C.

**ALICE SCHLESINGER**