[* 1] SCANNED ON 8/2/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 100557/2013
MASTRONARDI, MARIE
vs
CITY OF NEW YORK
Sequence Number : 001
ARTICLE 78

PART _____

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

is decided in accordance with the annexed decision.

RECEIVED
AUG 02 2013
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

FILED

AUG 02 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 8/1/13

_____, 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: Part 55

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In the Matter of the Application of

MARIE MASTRONARDI,

Petitioner,

Index No. 100557/13

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, DENNIS WALCOTT, Chancellor of the New York City Department of Education,

Respondents.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Petitioner Marie Mastronardi brings the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") challenging respondent the New York City Department of Education's (the "DOE") determination sustaining her Unsatisfactory end-of-year rating ("U-rating") for the 2011-2012 school year as a middle school English and special education teacher and seeks a reversal of that rating to "Satisfactory." For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Petitioner is currently employed by the DOE as a teacher

of English and Language Arts at Jonas Bronck Academy ("JBA"), M.S. 228 in the Bronx, New York and was in such employ during the 2011-2012 school year. On or about September 19, 2011, Principal Donalda Chumney ("Principal Chumney") conducted an informal, walk-through visit of a morning advisory group that petitioner was supervising. During her visit, Principal Chumney observed that petitioner had tasked the eighth-grade students she was advising with coloring and decorating a graphic logo but were not otherwise engaged. Principal Chumney provided petitioner with comments and recommendations for a more academically-focused advisory group. On or about November 15, 2011, Principal Chumney e-mailed petitioner to document her concerns with a vocabulary quiz that petitioner had left to be administered to her students on November 10, 2011. In the letter, Principal Chumney stated that the quiz contained numerous grammatical errors which were confusing to both the students and the faculty. Principal Chumney further remarked that the language used in the quiz was abusive and not acceptable. Petitioner was directed to reply to Principal Chumney's e-mail outlining her plan to respond to her concerns and to submit her next vocabulary quiz for review.

On or about December 7, 2011, Principal Chumney and Assistant Principal Giselle Fortiche-Ocampo ("AP Fortiche-Ocampo") formally observed petitioner's classroom instruction. The administrators reported that during the observation, petitioner was unable to execute her lesson according to plans she previously submitted and that there was a disparity between petitioner's lesson objectives as she described them and the lesson as finally presented to the students. Additionally, Principal Chumney and AP Fortiche-Ocampo noted that petitioner failed to address individual students' level of performance, skill and needs during the lesson and that petitioner failed to collect student homework that had been assigned the previous day and only did so after being reminded by one of her students. In light of their observations, the administrators rated petitioner's

lesson "Unsatisfactory" and reported that they met with petitioner in a post-observation conference on December 8, 2011 to discuss the observations and written recommendations for improvement.

On April 19 and 20, 2012, AP Fortiche-Ocampo conducted a formal observation and examination of petitioner's student instructional portfolios and noted that they failed to meet expectations in nearly every category. AP Fortiche-Ocampo noted that she did not see evidence of petitioner's students playing an "active role in the compilation, management and organization of their portfolios" as required. Additionally, any feedback given to the students in their portfolios was primarily numeric with few instances of written recommendations and commendations as required by school policy. AP Fortiche-Ocampo followed up on her previous observation of petitioner's students' portfolios by conducting a formal observation on May 14, 2012. AP Fortiche-Ocampo noted that the portfolios still failed to meet expectations in three categories despite the feedback and recommendations that had been articulated in her earlier memorandum as there was still no indication that "students have any role in the compilation, management and organization of their own work." Thus, AP Fortiche-Ocampo rated her formal observation of petitioner's classroom management as "Unsatisfactory" in light of her findings that petitioner failed to implement the recommendations and feedback from the previous formal observation.

On or about May 11, 2012, Principal Chumney sent a letter to petitioner documenting an act of professional misconduct that occurred on April 2, 2012 when petitioner sent an e-mail to fourteen teachers and administrators at 9:20 pm advising its recipients that thirty-six of her seventy-two students would be re-taking an assessment test in lieu of their regularly scheduled advisory at 8:25 am during the following two mornings. At no time prior to sending the e-mail did petitioner confer with AP Fortiche-Ocampo who lead her team or any other administrator to obtain permission to change the schedule of a sizeable portion of JBA's eighth grade students the next morning.

Principal Chumney reported that such behavior reflected poorly on petitioner's classroom management that she found herself in a situation where "50% of all of the students [she is] assigned to teach, must be offered the opportunity to retake a 45-minute-long reading assessment that they should have been able to perform, with integrity, in the English Language Arts class that [petitioner is] responsible [for] plan[ning], manag[ing], and instruct[ing]."

On or about June 12, 2012, AP Fortiche-Ocampo met with petitioner to discuss the fourth marking period grades that petitioner had submitted for her students on June 8, 2012 as she was worried that twelve of the seventy-two students petitioner was assigned to teach had received grade point averages below the lowest passing mark and were in danger of not being promoted beyond eighth grade. AP Fortiche-Ocampo accessed petitioner's records at Skedula.com, the JBA's mandatory online grading system, and observed that the grade records for each of petitioner's students demonstrated, on average, eight to ten ungraded items, marked with a "-" in the online grading records. Petitioner responded that those markings indicate work that had not been submitted by the student but that she would update her records in the online grading system with a score of "50" in its place. However, when AP Fortiche-Ocampo revisited petitioner's online grading records, she observed many inconsistencies, notably that some students had been assigned a score of "100" for work that had previously been marked "-," while others received a score of "50." When questioned about these inconsistencies, petitioner replied that she had awarded scores of "100" for initially missing work that had been subsequently turned in but that she was unable to verify that such work had actually been turned in because she had returned the work to the students that morning.

In light of their concerns, AP Fortiche-Ocampo and Principal Chumney conducted an investigation into the accuracy of the grades petitioner had submitted for the fourth marking period,

which included a review of (1) the final grades petitioner submitted to the main office on June 8, 2012; (2) the students' individual grade reports as documented on the online grading system, accessed on June 11, 2012 at 12:00 pm; (3) the students' individual grade reports as documented on the online grading system, accessed on June 11, 2012 at 2:30 pm; (4) individual grade reports for specific students; and (5) student work that had been returned to those students. At the conclusion of the investigation, the administrators found that petitioner had misrepresented the truth in her answers to questions regarding her grading practices. Comparing the student work that petitioner had advised she had returned to those students, AP Fortiche-Ocampo was unable to verify that those assignments represented the pieces of "missing work" for which those students had received marks of "100." Accordingly, AP Fortiche-Ocampo concluded that petitioner failed "to score student work that [had been] turned in to [her]," failed "to record student assignment scores accurately" and further failed "to submit accurate grades for the 72 students [she had been] assigned to teach [that] school year."

At the end of the 2011-2012 school year, in light of the performance problems that she had observed, Principal Chumney rated petitioner's performance as overall "Unsatisfactory" and rated petitioner "Unsatisfactory" in all categories assessed. Petitioner then appealed her "U-rating" to the DOE's Office of Appeals and Reviews (the "OAR"). On October 10, 2012, a review was conducted before a Chancellor's Committee to consider petitioner's appeal at which petitioner was represented by her union representative and Principal Chumney and AP Fortiche-Ocampo were present as witnesses. At the conclusion of the review, the Committee recommended that "the appeal be denied and the 'Unsatisfactory' rating be sustained," finding that

> The Rating Officer's documentation is comprehensive and substantial...The Rating [O]fficer was precise in outlining her observations without making judgment. She identified exactly what she observed and offered specific recommendations for improvement.

> The documentation substantiates that these suggestions were not heeded nor implemented. Consequently, [Principal Chumney] rated [petitioner] "Unsatisfactory."

By letter dated December 6, 2012, petitioner was advised that her appeal of the 2011-2012 "U-rating" had been denied and that such rating was sustained "as a consequence of [petitioner's] failure to incorporate supervisory suggestions for improvement which negatively impacted her pedagogical performance." Petitioner then commenced the instant Article 78 proceeding seeking to challenge the "U-rating" for the 2011-2012 school year and a reversal of that rating to "Satisfactory."

As an initial matter, the City of New York must be dismissed from this case as it is an improper party. It is well-settled that "[the DOE] is not a department of the [C]ity of New York" but rather a separate and distinct entity. *Ragsdale v. Board of Education*, 282 N.Y.323 (1940), citing *Divisich v. Marshall*, 281 N.Y.1 70 (1939); *see also Perez v. City of New York*, 41 A.D.3d 378 (1st Dept 2007)(holding that "the City and the [DOE] remain separate legal entities.") As the City of New York did not make the determination petitioner seeks to challenge and is a separate entity from the DOE, it must be dismissed.

On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v Lewis*, 90 A.D.2d 748, 749 (1st Dep't 1982). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974). In order to challenge a rating issued by the DOE, it is petitioner's burden to show that such rating was "in bad faith, for a constitutionally impermissible purpose or in violation of law." *Smith v. NYC Dept. of Correction*, 292 A.D.2d 198, 199 (1st Dept 2002).

In the instant action, the petition must be dismissed as the "U-rating" assigned to petitioner for the 2011-2012 school year was not arbitrary and capricious or given without regard to the facts. To the contrary, the reasons for the "U-rating" are well-documented. Respondent submitted voluminous records in support of the "U-rating" such as the "Unsatisfactory" formal observation report, two "Unsatisfactory" observations of petitioner's classroom management as well as multiple letters documenting petitioner's repeated performance problems and misconduct including falsifying student grades and evaluations. Petitioner's assertion that the "U-rating" should be annulled because the JBA administrators treated her in a "hostile and unfair manner" is without merit as all that is required for a determination to withstand Article 78 review is that it have some rational basis. Here, it was entirely rational for respondents to sustain the "U-rating" petitioner received for her performance during the 2011-2012 school year based on the thorough, well-documented evidence presented before the Committee during the review.

Petitioner's assertion that the "U-rating" must be annulled because the DOE violated its own regulations and procedures when making its determination is also without merit. Specifically, petitioner alleges that she was not observed in her classroom, either formally or informally, after the December 2011 observation and that she did not receive a C-30 management plan from school administration or any timely warning that she was in danger of an overall "U-rating" as is required by the DOE Chancellor's regulations in Chief Executive Memorandum No. 80 ("Memo No. 80"). In response, respondents point to the fact that petitioner's classroom management was formally observed in an evaluation of her student portfolios on April 19 and 20, 2012 and on May 14, 2012 and that petitioner was aware of her "Unsatisfactory" ratings after each observation and meeting. Additionally, even if petitioner can point to certain policies in Memo No. 80 that were not strictly adhered to, courts have routinely rejected imperfect technical compliance with an internal policy as

a basis to find bad faith, provided respondents still satisfy the policy's purpose. *See Kolmel v. City of New York*, 88 A.D.3d 527 (1st Dept 2011); *see also Matter of Davids v. City of New York*, 72 A.D.3d 557 (1st Dept 2010)(finding that although respondent "technically failed to follow the procedures for conducting and preparing petitioner's performance evaluations," such failure did not evince bad faith as the purpose of the policy respondent was attempted to enforce was still satisfied.) The purpose of Memo No. 80 was to "(1) encourage ongoing professional growth, and (2) take into account various levels of experience and/or expertise that teachers bring to their classrooms. Where appropriate, the performance review must include clear and specific recommendations for professional growth." *Kolmel v. City of New York*, 2010 NY Slip Op 31350 at *14 (Sup. Ct. N.Y. Cty. 2010), citing Memo. No. 80, p. 2, *rev'd.* 88 A.D.3d 527 (1st Dept 2011). Here, Principal Chumney and AP Fortiche-Ocampo formally observed petitioner numerous times, met with her to provide suggestions and instruction and followed up with her to monitor any progress she made. Petitioner was provided with highly detailed written feedback, clearly delineating areas that needed improvement and recommendations for how those areas could be improved. The record before the Committee clearly suggested that petitioner was provided with opportunities to remedy observed deficiencies, as recommended by Memo No. 80. Therefore, any failure to adhere to Memo No. 80 does not establish bad faith as the policies underlying Memo No. 80 were still satisfied.

Accordingly, petitioner's request for relief under Article 78 of the CPLR is denied. The petition is hereby dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 8/1/13

Enter: _____
J.S.C.