

**Matter of Zarinfar v Board of Educ. of the City
School Dist. of the City of N.Y.**

2013 NY Slip Op 32720(U)

September 16, 2013

Supreme Court, New York County

Docket Number: 102371/2012

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

Index Number : 102371/2012
ZARINFAR, MAJID
VS.
NYC BOARD OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to 5, were read on this motion to/for dismiss the petition

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1-2, 3
Answering Affidavits — Exhibits _____ No(s). 4
Replying Affidavits _____ No(s). 5

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

The court denies respondents' motion to dismiss the petition pursuant to the accompanying decision. C.P.L.R. §§ 3211(a)(7), 7804(f).

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

FILED
OCT 31 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/16/13

Lucy Billings, J.S.C.

LUCY BILLINGS

- 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 46

-----X

In the Matter of the Application of

MAJID ZARINFAR,

Index No. 102371/2012

Petitioner

DECISION and ORDER

- 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,

FILED

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

OCT 31 2013

NEW YORK
COUNTY CLERK'S OFFICE

APPEARANCES:

For Petitioner

Richard E. Casagrande Esq. and Lori M. Smith Esq.
52 Broadway, New York, NY 10004

For Respondents

Gail M. Mulligan, Assistant Corporation Counsel
of the City of New York
100 Church Street, New York, NY 10007

LUCY BILLINGS, J.:

In this proceeding pursuant to C.P.L.R. Article 78
petitioner teacher challenges respondents' administrative review
of his unsatisfactory rating for the 2009-2010 school year, their
decision to reaffirm that rating, their denial of certification
of his completion of probationary employment, and their
discontinuance of his probationary employment. He seeks
reinstatement to his position with retroactive pay plus interest,

employment benefits, and seniority to which he would have been entitled had he not been discharged.

I. BACKGROUND

Petitioner began his employment with respondent Board of Education as a probationary teacher under his Technology teaching license in 2005. Petitioner was appointed a probationary teacher under his Mathematics license at Middle School (M.S.) 429 in Kings County from the 2007-2008 to the 2009-2010 school year. Petitioner received an unsatisfactory (U-) rating for his 2009-2010 Annual Professional Performance Review (APPR) and was discharged from his probationary employment.

Petitioner initially received and signed a satisfactory rating for his 2009-2010 APPR report, which respondents claim resulted from a clerical error that they immediately corrected to reflect a U-rating. Petitioner claims that he was not notified of the corrected APPR report and that he refused to accept, sign or acknowledge that he received a U-rating for the 2009-2010 school year. After commencing an earlier proceeding in this court seeking a declaratory judgment annulling respondents' termination of his probationary employment, petitioner sought an administrative hearing to appeal the U-rating and ensuing termination. Petitioner now challenges respondents' administrative determination to uphold the U-rating and termination of his probationary employment as violative of lawful procedure and constitutional due process guarantees and as irrational or arbitrary.

Respondents move to dismiss the petition on the grounds that it fails to state a claim for relief, because respondents' decision after an administrative hearing was lawful and a reasonable exercise of their discretion. C.P.L.R. §§ 3211(a)(7), 7804(f). This decision addresses this motion to dismiss petitioner's challenge to respondents' administrative hearing and determination after the hearing upholding his U-rating and the discontinuance of his probationary employment. This court's separate decision and order have determined petitioner's earlier petition seeking a declaratory judgment to annul the discontinuance of his probationary service on the grounds of tenure by estoppel, unlawful action, or bad faith and seeking judicial review of his U-rating insofar as its infirmities supported annulment of the discontinuance.

II. DISMISSAL OF PETITIONER'S CHALLENGE TO RESPONDENTS' ADMINISTRATIVE REVIEW OF THE U-RATING AND DISCONTINUANCE OF PROBATIONARY EMPLOYMENT

Upon respondents' motion to dismiss the petition under C.P.L.R. § 3211(a)(7), the court must accept the petition's allegations as true, liberally construe them, and draw all reasonable inferences from the pleadings in petitioner's favor. Walton v. New York State Dept. of Correctional Services, 13 N.Y.3d 475, 484 (2009); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Wadiak v. Pond Mgt., LLC, 101 A.D.3d 474, 475 (1st Dep't 2012). The court may dismiss a claim based on C.P.L.R. § 3211(a)(7) only if the allegations completely fail to

state a claim under any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 88 (1994); Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010); Frank v. DaimlerChrysler Corp., 292 A.D.2d 118, 121 (1st Dep't 2002).

Judicial review in a proceeding pursuant to C.P.L.R. Article 78 is confined to whether the administrative determination was arbitrary, an abuse of discretion, or affected by an error of law. 20 Fifth Ave., LLC v. New York State Div. Of Hous. & Community Renewal, ___ A.D.3d ___; 2013 WL 3793503, at *3 (1st Dep't July 23, 2013); Roberts v. Gavin, 96 A.D.3d 669, 671 (1st Dep't 2012). A determination is arbitrary if it is not supported by any rational basis or is in disregard of the facts. Beck-Nichols v. Bianco, 20 N.Y.3d 540, 559 (2013); Lantry v. State, 6 N.Y.3d 49, 58-59 (2005); Roberts v. Gavin, 96 A.D.3d at 671; Metropolitan Movers Assn., Inc. v. Liu, 95 A.D.3d 596, 598 (1st Dep't 2012).

Petitioner claims that he was denied an opportunity to make an oral presentation at the hearing to review his U-rating and the discontinuance of his probationary employment, in violation of respondent Chancellor's Regulations C-31 § 3.2.3. V. Pet. Ex. C, at 3-4. Petitioner further maintains that the hearing committee disregarded his allegation that he never received written notice of his discontinuance and accepted into evidence, in contravention of respondents' administrative appeals procedure, an inadmissible document unsigned by petitioner that fails to support his U-rating. Aff. of Lori Smith Ex. A, at 11.

Similarly, he claims that the committee arbitrarily relied on unverified documentation of the two incidents of alleged verbal abuse and failed to consider or even provide him the opportunity to present his rebuttal before recommending that the U-rating and discontinuance be upheld.

Accepting petitioner's factual allegations as true, and according petitioner every favorable inference, he pleads claims that respondents' administrative determination to uphold the U-rating and discontinuance of probationary employment was arbitrary and in violation of lawful procedure. Whether petitioner will substantiate the truth of these allegations to prevail in this proceeding is irrelevant to the determination of a motion to dismiss the petition for failure to state a claim. Campaign for Fiscal Equity v. State of New York, 86 N.Y.2d 307, 318 (1995); African Diaspora Maritime Corp. v. Golden Gate Yacht Club, ___ A.D.3d ___, 968 N.Y.S.2d 459, 464 (1st Dep't 2013); Eastern Oaks Dev., LLC v. Town of Clinton, 76 A.D.3d 676, 678 (2d Dep't 2010).

III. DISMISSAL OF PETITIONER'S CHALLENGE TO RESPONDENTS' DISCONTINUANCE OF PROBATIONARY EMPLOYMENT

Absent bad faith, a violation of law, or a constitutionally impermissible purpose, respondents, a New York City governmental entity and official, may discontinue petitioner's probationary employment for any reason or none at all. N.Y. Educ. Law §§ 2573(1)(a), 3012(1)(a); Kahn v. New York City Dept. of Educ., 18 N.Y.3d 457, 471 (2012); Kolmel v. City of New York, 88 A.D.3d 527, 528 (1st Dep't 2011); Brown v. City of New York, 280 A.D.2d

368, 370 (1st Dep't 2001). See Talamo v. Murphy, 38 N.Y.2d 637, 639 (1976); Che Lin Tsao v. Kelly, 28 A.D.3d 320, 321 (1st Dep't 2006); Garcia v. New York City Probation Dept., 208 A.D.2d 475, 476 (1st Dep't 1994). To sustain a claim for reversal of respondents' discontinuance of his probationary employment and for reinstatement as a Mathematics teacher, petitioner must demonstrate that his discharge was for a constitutionally impermissible reason, otherwise in violation of law, or in bad faith. Frasier v. Board of Educ. of City School Dist. of City of N.Y., 71 N.Y.2d 763, 765 (1988); Zarinfar v. Board of Educ. of City School Dist. of City of New York, 93 A.D.3d 466, 467 (1st Dep't 2012); Kolmel v. City of New York, 88 A.D.3d at 528.

In his earlier proceeding before this court for a declaratory judgment, Zarinfar v. Board of Educ. of City School Dist. of City of New York, Index No. 116457/10, petitioner claims that he acquired tenure by estoppel and that the discontinuance of his probationary employment resulted from bad faith, a violation of law, or a constitutionally impermissible purpose. Here, petitioner does not make these claims, but instead seeks reinstatement to his position as a teacher based on the claim that respondents' final administrative determination to uphold his U-rating and the discontinuance of probationary employment was arbitrary.

Because petitioner was a probationary employee, respondents were permitted to terminate him for any reason. Therefore petitioner's U-rating, which respondents attributed to two

incidents of verbal abuse, V. Pet. Ex. I, albeit disputed by petitioner, by itself rationally supports respondents' termination of petitioner's employment as a probationary teacher. Brown v. Board of Educ. of City School Dist. of City of New York, 89 A.D.3d 486, 487 (1st Dep't 2011). Any irrationality or arbitrary action in respondents' final administrative determination to uphold the U-rating and discharge due to procedural violations at petitioner's administrative hearing is therefore of no consequence to respondents' initial decision denying petitioner tenure and discontinuing his probationary employment.

In petitioner's earlier proceeding for declaratory relief and annulment of respondents' decision to discharge petitioner, this court ordered a hearing regarding petitioner's claim that respondents' termination of petitioner's probationary employment was in violation of law, due to discrimination based on his national origin or age. There, petitioner also seeks reinstatement of his probationary employment as a teacher of Mathematics at M.S. 429, the same relief petitioner seeks here. Depending on and consistent with the court's decision there, the remaining relief petitioner may be entitled to, if he prevails in this proceeding, would be the reversal of respondents' determination to uphold the termination of his probationary employment. C.P.L.R. § 7806.

IV. DISPOSITION

For the reasons explained above, the court denies respondents' motion to dismiss the petition. C.P.L.R. §§ 3211(a)(7), 7804(f). Therefore respondents shall serve any answer to the petition within 30 days after service of this order with notice of entry, as they requested. See C.P.L.R. §§ 3211(f), 7804(f). Petitioner shall serve any reply within 20 days after service of an answer, see C.P.L.R. § 7804(d) and (f), and may serve a new notice of a further hearing on the petition, by a notice of petition or by an order to show cause, for a determination of the extent of permanent relief to be granted upon a full record. C.P.L.R. § 7804(f).

DATED: September 16, 2013

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED
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