

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

2014 NY Slip Op 30147(U)

January 16, 2014

Supreme Court, New York County

Docket Number: 400463/2013

Judge: Joan B. Lobis

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

Index Number : 400463/2013
 CLEMENTE, FRANCESCA
 vs
 NYC BOARD OF EDUCATION
 Sequence Number : 001
 ARTICLE 78

PART _____

INDEX NO. _____

MOTION DATE ~~1/10/14~~ 10/18

MOTION SEQ. NO. _____

The following papers, numbered 1 to 7, were read on this motion to/for Art. 78

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 1-3

Answering Affidavits — Exhibits _____ No(s) 4-5

Replying Affidavits _____ No(s) 6-7

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

FILED

JAN 21 2014

NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE
 WITH THE ACCOMPANYING MEMORANDUM DECISION,
ORDER + JUDGMENT

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

Dated: 1/16/14

JOAN B. LOBIO J.S.C.
~~JOAN B. LOBIO~~

- 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
NEW YORK COUNTY: IAS PART 6**

-----X
In the Matter of the Application of

FRANCESCA CLEMENTE,

Petitioner,

Index No. 400463/2013

For a Judgment under Article 78 of the Civil

**Decision, Order, and
Judgment**

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,

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Respondents.

-----X
JOAN B. LOBIS, J.S.C.:

Francesca Clemente moves under Article 78 of the Civil Practice Law and Rules seeking an order and judgment declaring that the discontinuance of her probationary employment, unsatisfactory rating, and the denial of her appeal of her discontinuance and unsatisfactory rating by the New York City Board of Education (the "BOE") were in bad faith, arbitrary, capricious, without any sound basis in fact, without any rational basis, and in violation of the Respondents' established policies, procedures, and regulations. She also seeks an order and judgment directing respondents to reverse her discontinuance, provide her with all salary and benefits of employment that would otherwise have been received, and reinstate her to her probationary employment with the Respondents. For the reasons stated below, this petition is granted.

On February 7, 2011, Petitioner was appointed as a probationary teacher at IS 678, located in Kings County. Ms. Clemente was assigned to teach physical education, and her probationary term was to last for three years. In May 2012, Rose Anne Gonzalez, the principal of IS 678 until July 2012, gave Ms. Clemente an unsatisfactory rating ("U-rating") on her Annual Professional Performance Review ("APPR") for the 2011-2012 year. District 19 Superintendent Rose-Marie Mills recommended the discontinuance of Ms. Clemente's probationary employment.

According to her APPR, Ms. Clemente's U-rating was a result of her behavior in two incidents on April 30, 2012. The first incident occurred during the school's fifth period, when Ms. Clemente tried to confiscate a cellular phone from a student and, in the process, accidentally tapped the student's mouth with her elbow. Respondents allege that Ms. Clemente had lost control of the classroom, and the student had been trying to film the class "going crazy." Though Petitioner's actions did not constitute corporal punishment, Principal Gonzalez concluded that Ms. Clemente had "exercised poor professional judgment which constitutes unacceptable teacher conduct" by not following school policy for confiscating cell phones.

The second incident occurred during physical education class. Respondents allege that Ms. Clemente stated to a particular student that "if she wanted to look good in her prom dress she should do the exercises or her fat would hang out of the prom dress." Following a complaint from the student's mother, Principal Gonzalez conducted an investigation by taking statements from student witnesses and the Petitioner. Principal Gonzalez, concerned that students might have time to discuss the incident with each other, brought the students to the library to have them write their

statements at the same time, first under her own supervision and then under the supervision of Dean Thomas Sacerio. Dean Sacerio collected the statements and handed them to Principal Gonzalez. In a letter dated May 30, 2012, Dean Sacerio claimed that he overheard students discussing how they wanted to have Ms. Clemente fired and stated that "it seemed like the story was fabricated as students spoke amongst one another about Ms. Clemente's actions."

When meeting with Principal Gonzalez, Ms. Clemente admitted to using the word fat but stated that she had no intention of insulting anyone. In a letter dated May 18, 2012, Principal Gonzalez concluded that Petitioner had violated Chancellor's Regulation A-421, which prohibits use of language by employees that tends to ridicule or belittle students. In July 2012, Superintendent Rose-Marie Mills affirmed Petitioner's discontinuance from probationary service.

Petitioner then filed an appeal of both her U-rating and her discontinuance with the BOE's Office of Appeals and Review. An appeal was heard on October 2, 2012, before the Chancellor's Committee. The Chancellor's Committee recommended that the appeal be sustained and the rating of "Unsatisfactory" be overturned. During the appeal, Ms. Clemente again admitted to using the word "fat" but claimed that it was directed to the entire class and not one student. The Chancellor's Committee found that several student statements corroborated this version of the story. The Committee also found that students were not interviewed about the incident separately, as required by the Chancellor's Regulation A-421. The Chancellor's Committee found that there was not enough documentation to sustain an unsatisfactory rating as there were only two unsatisfactory letters to Ms. Clemente's file. Furthermore, one of the letters involved an unsubstantiated corporal

abuse violation.

On November 2, 2012, before a final determination was issued, Petitioner commenced this proceeding in Kings County. A month and a half later, Interim-Acting Superintendent Joyce Stallings-Harte reviewed the Chancellor's Committee's report and issued a determination upholding Petitioner's discontinuance from probationary service. The following day, the parties stipulated to transferring venue to New York County. Petitioner filed an Amended Petition on May 13, 2013, requesting a reversal of her discontinuance and U-rating and reinstatement with full back pay, and other benefits of employment.

Petitioner argues that her U-rating and discontinuance were rendered in bad faith. She asserts that the decision to give her a U-rating and the discontinuance of her probation were arbitrary and capricious and had no rational basis. Petitioner claims that her poor professional judgment stemming from the cell phone incident cannot serve as a rational basis to terminate employment or give a U-rating as Principal Gonzalez did not conclude that Ms. Clemente committed corporal punishment or violated any rule or regulation.

Petitioner also contends that under Chancellor's Regulation A-421, Ms. Clemente's comment during her physical education class was not an example of verbal abuse as it did not belittle or subject students to ridicule. Petitioner also avers that Principal Gonzalez failed to follow the necessary procedures under Chancellor's Regulation A-421 when investigating complaints of verbal abuse. In particular, Petitioner argues that Principal Gonzalez failed to separate victims and

witnesses prior to conducting interviews and taking written statements. Ms. Clemente claims that Principal Gonzalez should have considered this violation when determining Petitioner's U-rating and termination. Lastly, Ms. Clemente states that Principal Gonzalez did not consider the exculpatory statements of several witnesses.

In answering the petition, Respondents claim that the Petitioner failed to state a cause of action. They argue that probationary teachers may be discontinued from service at any time for almost any reason. Respondents contend that unless Petitioner can show bad faith or a violation of a constitutional or statutory provision, the Court must find for Respondents as the BOE's determinations regarding probationary teachers are not subject to a "rational basis" analysis. Respondents claim that Ms. Clemente has failed to show either bad faith or a violation of a constitutional or statutory provision. Respondents also argue that Principal Gonzalez was within her discretion to determine that Petitioner used poor professional judgment during the cell phone incident. In support of their position, Respondents provide, among other things, the affirmation of Principal Gonzalez.¹ Principal Gonzalez claims Petitioner conceded to her poor judgment and violated protocol.

The BOE contends that during the verbal abuse incident, Petitioner's language was clearly meant to belittle, especially when considering she was speaking, in particular, to a heavy-set

¹Principal Gonzalez's affirmation is outside the administrative record. The Court cannot rely on materials outside the administrative record in a decision. The information from the affirmation is being used for the purposes of summarizing the alleged events and arguments put forward by Respondent.

female teenager. Principal Gonzalez states that this was not the first instance where Ms. Clemente used inappropriate language. Principal Gonzalez maintains that, in the past, she had to instruct the Petitioner to not make statements such as "is he retarded?" or "these kids are stupid." There was no formal discipline for these statements as Principal Gonzalez claims to have tried to coach and help the Petitioner keep her job. Additionally, Respondents assert that they did not violate any procedure during the investigation. Respondents assert that the positioning of the students at "long tables" in the library fulfills the regulation's purpose of separating students while they prepare written statements. Specifically, Principal Gonzalez affirms that her reasons for having students write statements simultaneously, under supervision, was to avoid giving the students time to discuss the incident with each other by taking them out of class one by one. Finally, the BOE concludes that the U-rating was not arbitrary or capricious as it was substantiated with facts, interviews with students, and admissions by the Petitioner.

In reply, Petitioner claims that the BOE is making false allegations and arguing issues that were not formally included in the record. Ms. Clemente denies making statements such as "is he retarded?" or "these kids are stupid[.]" She denies that Principal Gonzalez instructed Petitioner to change her language choice and that Principal Gonzalez would have documented this language if it were actually said. Petitioner argues that no record exists, either prior to or during the appeal proceeding, of such language being used. Furthermore, Petitioner denies that during the cell phone incident that she lost control of the class and asserts that this was not reflected in her U-rating. Petitioner maintains that if this information were used as the basis for her U-rating, then it should have been reflected in her disciplinary letter.

Under Section 2573(1)(a) of the Education Law, the BOE can terminate the employment of a probationary teacher at any time and for any reason, unless the teacher establishes that there was a constitutionally impermissible purpose, a violation of a statute, or done in bad faith. Frasier v. Bd. of Educ., 71 N.Y.2d 763, 765 (1988). Mere conclusory allegations are insufficient to meet this burden. Medina v. Sielaff, 182 A.D.2d 424, 427 (1st Dep't 1992).

Ms. Clemente asserts that her termination and U-rating were in bad faith due to the Respondents' reliance on student witness statements, created under faulty procedures, and reliance on a letter with an unsubstantiated corporal abuse allegation. The petitioner bears the burden of presenting competent proof that the dismissal was for an improper reason or in bad faith. Beacham v. Brown, 215 A.D.2d 334 (1st Dep't 1995). The record does not reveal that Ms. Clemente's U-rating and discontinuance were for reasons other than her performance. Nor was the defective procedure when collecting student witness statements so egregious that reliance on the statements would constitute bad faith. Petitioner has not raised any other material fact that would suggest bad faith. The lack of bad faith, however, does not indicate that there were no violations of lawful procedure or that there was a rational basis for Ms. Clemente's discontinuance and U-rating.

Due to violations of lawful procedure, Ms. Clemente argues that the determinations to affirm her discontinuance and her U-Rating were arbitrary and capricious and lacked a rational basis. In challenges under Section 7803(3), the arbitrary or capricious test relates to whether administrative action is justified or without foundation in fact. Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974). Where a petition claims that an agency failed to comply with its own internal

procedures, this Court reviews whether the determination was “made in violation of lawful procedure.” E.g., Blaize v. Klein, 68 A.D.3d 759, 761 (2d Dep’t 2009). “[A]n 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. Bd. of Educ., 82 A.D.2d 832, 834 (2d Dep’t 1981). If a rule or regulation affects an individual’s “substantial rights,” it “may not be waived by the agency.” Id. “An adverse agency determination must be reversed when the relevant agency does not comply with either a mandatory provision, or one that was ‘intended to be strictly enforced.’” 68 A.D.3d at 761 (quoting Syquia v. Bd. of Educ., 80 N.Y.2d 531, 536 (1992)).

Ms. Clemente’s claim that her U-Rating and termination were arbitrary and capricious is based on two separate issues. First, Ms. Clemente claims that the decisions were arbitrary and capricious due to the violation of A-421 when investigating her comments during physical education class. Second, Ms. Clemente claims that her U-rating and decision to discontinue her probationary service had no rational basis as neither unsatisfactory letter in her record could rationally support discontinuance.

Regulation of the Chancellor A-421 defines what constitutes verbal abuse and governs investigations of verbal abuse. A-421(II) defines verbal abuse, in relevant part, as including language that tends to belittle or subject students to ridicule. A-421(VIII) states, in relevant part, that when investigating a complaint of verbal abuse submitted by a parent, the principal must “in general . . . Conduct individual interviews with and take written statements from all victims and witnesses as quickly as practicable” and “separate the victims and witnesses prior to conducting

interviews and taking such statements.” Regulation A-421 also requires that following the investigation, the principal must evaluate the evidence and credibility of all witnesses, including the accused employee, before substantiating the complaint.

The separation of victims and witnesses prior to conducting interviews and taking statements is required by Regulation A-421. The record indicates that the BOE violated this internal regulation. Violations of internal rules that can lead to the termination of a petitioner’s employment undermine the integrity and fairness of the review process. Kolmel v. City, 88 A.D.3d 527, 529 (1st Dep’t 2011). Principal Gonzalez claims to have separated the students but she did not ensure that the students stayed separated. After placing the students at their tables, Principal Gonzalez left the room and asked Dean Sacerio to supervise in her absence. Nothing in the record shows that Principal Gonzalez informed Dean Sacerio of the need to prevent the students from talking or collaborating on statements.

The Chancellor’s Committee found that the U-rating should be reversed and that they unanimously disagreed with the recommendation to discontinue probationary service. While the Chancellor’s Committee only makes a recommendation, ignoring a recommendation when combined with other evidence – such as Dean Sacerio’s statement, violations of internal regulations, exonerating witness statements, letters without substantiated allegations or rule violations, and satisfactory observations of the Petitioner – supports the conclusion that Ms. Clemente’s U-rating and discontinuance were arbitrary and capricious. The unsatisfactory letters on Ms. Clemente’s record are not enough to rationally support a U-rating and discontinuance.

Though two unsatisfactory letters could, in theory, support a U-rating and discontinuance, they need to be properly documented and the investigation cannot suffer from procedural defects. See Kolmel, 88 A.D.3d at 527. One of Ms. Clemente's reports concluded certain conduct occurred that was largely based on student statements collected in a flawed manner. The other report contained an unsubstantiated corporal abuse allegation, an allegation that Principal Gonzalez admits could not be sustained, and had no other rule violations. Ms. Clemente's record prior to these two incidents was without incident. She received a satisfactory Rating Sheet in 2010-2011 and two satisfactory observation reports. It is not possible to see how one unsubstantiated allegation could rationally support a discontinuance and U-rating in the face of two years of good conduct.

The BOE raises concerns about Ms. Clemente's conduct apart from the documented reports, such as an alleged statements disparaging students that are outside the record. Whether such statements were made or not, the arguments based off these incidents are not properly before the Court as the statements are not on record. Without a record and proper documentation, the Court cannot be certain of the veracity of claims made against a teacher. The Court cannot find that a discontinuance or U-rating is rationally supported by undocumented statements or actions.² See Hazeltine v. City, 89 A.D.3d 613 (1st Dep't 2011). Since the U-rating and discontinuance resulted

² Due to the importance of properly documented statements and reports in Article 78 proceedings, Section 7804(e) of the Civil Practice Law and Rules requires the body or officer that is the respondent in an Article 78 proceeding to file a certified transcript of the record of the proceedings under consideration. The purpose of this provision is to require full disclosure. Arnot-Ogden Memorial Hosp. v. Axelrod, 95 A.D.2d 947, 948 (3rd Dep't 1983). This would include, for example, disclosure of an inconvenient recommendation from the Chancellor's Committee.

from a flawed process, they have no rational basis. Accordingly, it is

ORDERED and ADJUDGED that the petition is granted, Ms. Clemente's discontinuance and U-rating are reversed, and the Board of Education is to provide Ms. Clemente with all salary and benefits of employment that would otherwise have been received.

Dated: Jan. 16, 2014

ENTER:



JOAN B. LOBIS, J.S.C.

JOAN B. LOBIS
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