

Mingla v City of New York

2014 NY Slip Op 30162(U)

January 15, 2014

Supreme Court, New York County

Docket Number: 101152/2013

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 101152/2013

MINGLA, LUCIE

vs

CITY OF NEW YORK

Sequence Number : 001

ARTICLE 78

PART 21

INDEX NO. _____

MOTION DATE 12/20/14

MOTION SEQ. NO. 001

The following papers, numbered 1 to 8, were read on this motion to/for Art 78

Notice of Motion/Order to Show Cause — Affidavits — Exhibits <u>A-J</u>	No(s). <u>1-4</u>
Answering Affidavits — Exhibits _____	No(s). <u>5-6</u>
Replying Affidavits _____	No(s). <u>7-8</u>

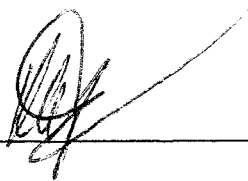
Upon the foregoing papers, it is ordered that this motion is respected as noted
and Article 78 proceedings are determined as per
the court's decision, order and judgment.

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).

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

Dated: 1/15/14


_____, 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: IAS PART 21

----- X

LUCIE MINGLA,

Petitioner,

Index No.:
101152/2013

-against-

DECISION, ORDER
AND JUDGMENT

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

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).

Respondents,

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

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HON. MICHAEL D. STALLMAN, J.:

In this Article 78 proceeding, petitioner Lucie Mingla seeks a judgment declaring that the actions of the respondents City of New York¹, New York City Department of Education (DOE) and Dennis Walcott, Chancellor of New York City Department of Education (collectively, DOE), terminating her probationary

¹ Petitioner incorrectly proceeds against the City of New York, which is not a proper party in this proceeding.

employment, and giving her an unsatisfactory rating were arbitrary, capricious, unreasonable, an abuse of discretion, lacked a rational basis, or were made in bad faith and in violation of lawful procedure.

Petitioner seeks to be reinstated to her teaching position nunc pro tunc to April 15, 2013, and also requests that her unsatisfactory rating be annulled. DOE cross-moves to dismiss the petition, pursuant to CPLR 3211 (a) (7) and 7804 (f).

BACKGROUND AND FACTUAL ALLEGATIONS

Prior to her discontinuance in April 2013, petitioner had been employed by the DOE as a probationary math teacher at a middle school located in Brooklyn, New York. Petitioner has been teaching math for approximately 30 years. In 2007 she started to work with the DOE as a substitute teacher. She began working as a probationary teacher in September 2011. Petitioner received a satisfactory review of a lesson that she conducted in November 2012.

On February 15, 2013, petitioner was informed that she was being investigated for an allegation of

corporal punishment and verbal abuse which allegedly occurred in December 2012. The date and the nature of the alleged incident are in dispute. In its cross motion papers, the DOE contends that the subject incident occurred on December 7, 2012. Jacqueline Rosado (Rosado), the principal at petitioner's school, sent a report to the Office of Special Investigations (OSI) stating that the incident occurred on December 13, 2012. Petitioner alleges that the incident occurred on December 14, 2012.

In any event, Rosado conducted an investigation after the mother of a student identified as T.B. made a complaint about petitioner's conduct towards him. T.B.'s mother provided a statement, dated December 20, 2012, alleging that "[o]n Friday my son came home and told me . . . [petitioner] put her hands on him . . . also told him that she is going to get her son on him . . . I am really upset that this teacher put her hands on my child and I hope that she is not able to do it to any other child . . ." Petitioner's exhibit C at 8.

After conducting the investigation, Rosado sent a

report to the OSI upholding allegations that petitioner engaged in corporal punishment and/or verbal abuse. Rosado's conclusion was that petitioner "pushed [T.B.], grabbing his shirt by the chest area and shoved him to the desk. She also threatened to call her son in retaliation." Petitioner's exhibit C at 3. As part of her investigation, Rosado interviewed T.B. and four other students, and sent their written statements to OSI.

In T.B.'s statement, he indicated that as he was walking in the classroom to pick up a paper ball, petitioner grabbed him. After she grabbed him, T.B. started cursing at petitioner and then petitioner allegedly threatened to get her son. *Id.* at 4.

One of the students' statements, written by S.A., accused petitioner of grabbing a student named Bisto and saying she was going to bring her son to handle Bisto. S.A.'s statement was taken approximately two months after the incident and T.B. is not mentioned in that statement.

A student named J.R. provided an undated statement

where he alleged that "[i]n December a kid in my class named T.B., he was out of his seat and [petitioner] would pull on his shirt and tell him to sit down." *Id.* at 10. J.R. was absent from school on December 13 and 14, 2012.

N.H., also a student in petitioner's class, alleged in a written statement that petitioner grabbed T.B.'s shirt and pulled him to his seat. Additionally, a student named M.L. provided a statement that petitioner grabbed T.B. and shoved him to the desk and said she would get her son on him.

Petitioner denies T.B.'s characterization of what took place in her classroom. She claims that, on the date of the alleged incident, T.B. was running around the class and would not listen to her when she told him to sit down. She continues that he had previously tripped over her feet, and that she put out her hands to prevent him from tripping over her feet again. Petitioner denies threatening T.B. or mentioning her son. She describes the incident as follows, in pertinent part:

[T.B.] came to class in an especially disruptive mood. He was running around the class and throwing paper balls, and at one point even tripped over my feet as he was doing so. I kept telling him to be seated but he would not listen to me . . . At some point, [T.B.] approached me, and because I was worried he would once again trip over my feet, I put my hands in front of me to prevent him from tripping. I did not push him, or grab him, as alleged. When we made contact, [T.B.] started screaming and cursing at me. He kept yelling, and made a comment along the lines of, "I will bring my mother, watch!", to which I replied "OK, go bring your mother because I need to talk to her." This was the extent of my comments. I made no mention of my son, nor did I ever threaten [T.B.]. When this class was over, I did not think much of the incident. To me, this was just another day where my students acted out, and I received no support from my administration. It was not until February 14, 2013, that the Principal's secretary informed me that there would be a meeting the following day and that I should bring my union representative."

Petitioner's exhibit D at 2.

By letter to petitioner's file dated February 26, 2013, Rosado memorialized her meeting with petitioner and her conclusions that petitioner engaged in corporal

punishment and verbal abuse. Rosado wrote that, during the meeting, petitioner maintained that T.B. fell on petitioner's feet two or three times and that petitioner "placed [her] hands in front" to prevent him from falling on her. Petitioner's exhibit B at 1. However, as set forth in the letter, none of the witnesses corroborated petitioner's version of the events and that no one mentioned T.B. falling to the floor.

In the letter, Rosado stated that, after reviewing the complaint, the witness statements as well as petitioner's explanation, she concluded that "you pushed [T.B.] grabbed his shirt by the chest area and shoved him to the desk, and you also threatened to call your son in retaliation on the date of the incident." *Id.* The letter further informed petitioner that these sustained allegations of corporal punishment and verbal abuse might lead to an unsatisfactory rating and/or termination of her probationary service.

On March 13, 2013, petitioner received a U rating for the 2012-2013 school year. This unsatisfactory

rating was based on the petitioner's engagement in corporal punishment and verbal abuse. Petitioner was found to be deficient in "[a]ttention to pupil health, safety and general welfare" and "[e]ffort to establish and maintain good relationships with parents."

Petitioner's exhibit F at 1. Rosado recommended discontinuance of petitioner's probationary service, and this was further recommended by the superintendent, Lillian Druck (Druck). Druck formally informed petitioner on April 15, 2013 that, although she reviewed petitioner's written response, petitioner's services as a probationary teacher were being discontinued, effective April 15, 2013.

Petitioner appealed her U rating and discontinuance with the Office of Appeals and Reviews (OAR). Petitioner was entitled to a hearing which took place on June 20, 2013. On July 10, 2013, Druck informed petitioner that, after reviewing the Chancellor's report regarding the hearing held, Druck was reaffirming her earlier determination to discontinue petitioner's probationary service.

Petitioner then commenced this Article 78 proceeding. She claims that both her U rating and subsequent termination were arbitrary and capricious, wrongful, discriminatory and made in bad faith, in that they were solely based on false, unsubstantiated allegations of corporal punishment and verbal abuse.

According to petitioner, since the start of her probationary employment, students with behavior problems were placed in her class. Petitioner provides letters she wrote to administration seeking advice and documenting discipline problems in her classroom. As such, according to petitioner, Rosado conducted a bad faith investigation in retaliation for petitioner's complaints to administration about the students' misbehavior.

Petitioner further alleges that the investigation was not fair based on the students who were interviewed, as they were either friends with T.B., or were allegedly not even in school on the date of the incident.

DISCUSSION

Petitioner's Probationary Status:

Petitioner alleges that her probationary status was discontinued as a result of an investigation that was full of mistakes and one that was conducted in bad faith. The court notes that, upon the DOE's cross motion to dismiss "the court will accept the facts as alleged in the complaint as true, accord [petitioner] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory [internal quotation marks and citation omitted]." *Matter of Walton v New York State Dept. of Correctional Servs.*, 13 NY3d 475, 484 (2009).

In support of her contentions, petitioner argues that the investigation was flawed for various reasons. For instance, petitioner believes that Rosado should have credited her testimony and not the testimony of the student involved in the incident. She claims that T.B., whom she had reported to the administration several times for behavior problems, had a motive to

lie against her, and that she never had any real opportunity to challenge false allegations. Petitioner further notes that there are discrepancies in the date of the incident and that the students chosen to be witnesses were unreliable and friends of T.B.

Is well settled that "[a]s a probationary employee, petitioner was subject to termination at any time and for any reason, unless [she] establishe[d] that the termination was for a constitutionally impermissible purpose, violative of a statute, or done in bad faith [internal quotation marks and citation omitted]." *Matter of DeVito v Department of Educ. of the City of N.Y.*, 112 AD3d 421, 421 (1st Dept 2013).

Petitioner's mere allegations of an unfair investigation and bias against her do not meet her burden to raise and prove bad faith. *Matter of Witherspoon v Horn*, 19 AD3d 250, 251 (1st Dept 2005); see also *Matter of Murnane v Department of Educ. of the City of N.Y.*, 82 AD3d 576, 576 (1st Dept 2011) ("Petitioner's contention that the principal was biased against her is speculative and insufficient to

establish bad faith [internal citation omitted]").

The record indicates that a student's mother complained to Rosado that petitioner grabbed and threatened the student. Even if T.B. had a prior history of behavior issues, upon learning about an incident, as set forth by the DOE, Rosado is obligated to report it to the OSI. Moreover, as maintained by the DOE, Rosado, as principal, is empowered to conduct the investigation herself, and does not have to rely on the OSI to conduct an investigation.

Rosado then conducted an investigation and concluded, after interviewing students and petitioner, that the allegations of corporal punishment and/or verbal abuse should be sustained. None of the students interviewed corroborated petitioner's version of the events. Although petitioner disputes the nature and the date of the incident, she does not dispute that an incident occurred with T.B., or that she made contact with him. Even assuming, arguendo, that Rosado made mistakes while performing her investigation, petitioner has failed to demonstrate that Rosado's investigation

was made in bad faith or that there was bad faith in deciding to terminate petitioner. As set forth in *Matter of Green v New York City Hous. Auth.* (25 AD3d 352, 353 [1st Dept 2006]), although the "determination may have been mistaken; she has not raised any factual issue as to whether it was made in bad faith." See also *Matter of Shabazz v New York State Dept. of Correctional Servs.*, 63 AD3d 1253, 1254 (3d Dept 2009) (despite petitioner's allegations that witnesses were mistaken or lying, the Court found that "respondent amply demonstrated that petitioner was dismissed due to the belief, supported by the statements of several employees and his supervisor, that there had been a potential violation of the rules of employment . . .").

The court notes that, although Rosado and Druck recommended petitioner's discontinuance, petitioner was still entitled to a hearing with the OAR. The hearing was held. Thereafter, based on the Chancellor's report of the hearing, Druck reaffirmed her decision that petitioner's probationary status be discontinued.

Petitioner's U Rating

Petitioner alleges that since her U rating was based on a bad faith investigation of the allegations of corporal punishment, the rating is arbitrary and capricious. Had Rosado conducted a fair investigation, according to petitioner, she never would have received the U rating.

"It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [internal quotation marks and citations omitted]." *Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 363 (1999). In addition, "even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 (1st Dept 2007), *affd* 11 NY3d 859 (2008).

Petitioner's U rating, which the DOE attributed to corporal punishment and verbal abuse, was supported by a letter to file dated February 26, 2013. This letter memorialized the allegations and Rosado's conclusion, after investigation, that petitioner was found guilty of the allegations. Although petitioner disputes what transpired between her and the student, the letter to the file, rationally, by itself, supports the DOE's decision to give petitioner a U rating. See *Matter of Fahey v New York City Dept. of Educ.*, 16 AD3d 220, 220 (1st Dept 2005) ("[DOE's] determination to sustain the unsatisfactory performance evaluation was rationally based on administrative findings that petitioner twice corporally punished students . . ."); see also *Matter of Murnane v Department of Educ. of the City of N.Y.*, 82 AD3d at 576 (U rating was not annulled as it had a rational basis in the record).

There are no material questions of fact as to whether the DOE's determination had a rational basis; accordingly petitioner's request for a trial is denied. See CPLR 7804 (h). There is no right to oral argument,

and this proceeding and motion are appropriately decided on submission, because both sides had an adequate opportunity to set forth everything by written submission, which would comprise the record on appeal.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

ORDERED that the cross motion of the respondents City of New York, New York City Department of Education and Dennis Walcott, Chancellor of New York City Department of Education to dismiss the petition is granted in its entirety; and it is further


ADJUDGED that the petition and the proceeding are dismissed.

Dated: January 15, 2014
New York, New York

ENTER:

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).



J.S.C.