SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS ~~J.S.C.~~ Justice

PART 46

MILCIADES PEPIN

INDEX NO. 102044/2011

-v-

MOTION DATE

NEW YORK CITY DEPARTMENT OF EDUCATION

MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this ~~motion to/for~~ petition annul respondent's determinations

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

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

The court grants the petition to the extent set forth and otherwise dismisses this proceeding, pursuant to the accompanying decision. C.P.L.R. §§ 7803(3), 7806.

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: 1/27/14

Lucy Billings, J.S.C.
LUCY BILLINGS 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 46

----------x

In the Matter of the Application of
MILCIADES PEPIN,

Index No. 102044/2011

Petitioner,

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

DECISION AND ORDER

- against -

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent

----------x

APPEARANCES:

For Petitioner
Milciades Pepin, Pro Se

For Respondent
Daniel J. LaRose, Assistant Corporation Counsel
100 Church Street, New York, NY 10007

LUCY BILLINGS, J:

I. BACKGROUND

This proceeding pursuant to C.P.L.R. Article 78 sought a judgment annulling (1) respondent's discontinuance of petitioner's probationary employment as an assistant principal; (2) petitioner's unsatisfactory rating (U-rating) for the 2009-2010 school year; and (3) his placement on respondent's "Ineligible Inquiry" list, as described by petitioner. C.P.L.R. § 7803(3). The court granted respondent's motion to dismiss the petition insofar as it sought to annul the discontinuance of petitioner's probationary employment and to reinstate him in that employment, based on the petition's failure to state a claim for

that relief. C.P.L.R. §§ 3211(a)(7), 7804(f). Pepin v. New York City Dept. of Educ., 39 Misc. 3d 1214 (Sup. Ct. N.Y. Co. 2012). This decision addresses the merits of petitioner's challenge to his U-rating and his alleged placement on respondent's Ineligible Inquiry list preventing him from securing future employment with respondent.

II. THE U-RATING

As support for petitioner's U-rating for the 2009-2010 school year, respondent's annual report of his performance dated December 3, 2010, relied on a Special Commissioner of Investigations (SCI) report finding misconduct by petitioner and on the Superintendent's concurrence with that finding after reviewing the report and his responses to it. Petitioner claims that both procedural and substantive irregularities and omissions render the U-rating arbitrary. In particular, he claims the rating is deficient because respondent failed to conduct a mid-year performance review and develop goals and objectives for him.

Insofar as petitioner claims his discontinuance must be annulled absent a supporting annual rating, the court already has decided that his admission of misconduct in sending a prank email to his supervisors through respondent's email system, falsely alleging a love triangle, rationally supports respondent's discontinuance of his probationary employment. Pepin v. New York City Dept. of Educ., 39 Misc. 3d 1214, 2012 WL 7984685, at *2. The alleged deficiencies in the U-rating are inconsequential to the discontinuance and may not provide a basis to vacate the

discontinuance and reinstate petitioner as an assistant principal. Brown v. Board of Educ. of City School Dist. of City of N.Y., 89 A.D.3d 486, 488 (1st Dep't 2011). See Cipollaro v. New York City Dept. of Educ., 83 A.D.3d 543, 544 (1st Dep't 2011).

Nevertheless, respondent fails to address petitioner's claimed irregularities or deficiencies and provides no reason besides the SCI report and the Superintendent's concurrence with its finding of misconduct to justify petitioner's U-rating. A procedural infirmity in petitioner's 2009-2010 school year performance rating, far from being inconsequential, would render his U-rating arbitrary. See Davids v. City of New York, 72 A.D.3d 557, 558 (1st Dep't 2010). His 2009-2010 rating report makes no reference to any observation of his work, development plan, or evidence that respondent undertook any process to evaluate or review his performance of his duties as an assistant principal. Brown v. City of New York, 111 A.D.3d 426 (1st Dep't 2013); Kormel v. City of New York, 88 A.D.3d 527, 528-29 (1st Dep't 2011).

Contrary to respondent's claim, the SCI report does not substantiate petitioner's use of spying software to gain unauthorized access to the email accounts of respondent's employees. The record shows that the only substantiated misconduct is petitioner's admission of using respondent's email system to transmit one prank email, not his use of spying software, nor his transmission of several emails as respondent

maintains.

Although petitioner points to respondent's own Division of Human Resources Handbook, "Rating Pedagogical Staff Members," which requires that documentation in the employee's personnel file support any adverse performance evaluation, V. Reply Ex. 2, the court may not vacate respondent's evaluation of petitioner based on a violation of the Handbook, even assuming it applied to an assistant principal. Brown v. Board of Educ. of the City School Dist. of the City of N.Y., 89 A.D.3d at 488. Cf. Blaize v. Klein, 32 A.D.3d 363 (2d Dep't 2009). While this Handbook may not bind respondent with respect to petitioner, he also presents evidence of respondent's binding contractual obligations: its Memorandum of Agreement with the Council of Supervisors and Administrators, petitioner's collective bargaining unit. Id. Ex. 1, at 44-45. Respondent does not controvert this cited document and admits it is a complete and accurate of the agreement's contents. V. Answer ¶ 35. This contract requires respondent to refrain from adding to petitioner's file any incident not reduced to writing within three months of the occurrence.

Even if this prohibition does not take the next step that the Handbook takes and, by extension, prohibit adding any incident not reduced to writing within three months of the occurrence to respondent's grounds for its adverse evaluation of petitioner, respondent's evaluation still must find "sound basis in reason," and actual "facts" to support its determination. Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). See Goodwin

v. Perales, 88 N.Y.2d 383, 392 (1996); Friedman v. Board of Educ. of the City Sch. Dist. of the City of N.Y., 109 A.D.3d 413, 415 (1st Dep't 2013); Mayo v. Personnel Review Bd. of Health & Hosps. Corp., 65 A.D.3d 470, 472-73 (1st Dep't 2009). Without documentation in petitioner's personnel file or other substantiation of any other incident, respondent is limited to petitioner's use of respondent's email system to transmit one prank email, as the only incident respondent may rely on to support the U-rating. Since this admitted misconduct is unrelated to petitioner's job performance, or at least respondent's 2009-2010 rating report makes no attempt to relate this misconduct to his job performance, the record does not rationally support respondent's unsatisfactory rating of petitioner's performance in that rating report. Friedman v. Board of Educ. of the City Sch. Dist. of the City of N.Y., 109 A.D.3d at 415.

III. THE INELIGIBILITY LIST

Respondent disclaims its maintenance of any list of persons ineligible for employment with respondent, but recounts its use of internal codes based on a past employee's employment record to reflect the reason the employee left respondent's service. V. Answer Ex. L ¶ 4. Where the reason for discharge involves substantiated misconduct or unsatisfactory performance, the code does not automatically prevent a discharged employee from seeking re-employment with respondent, but triggers further review of the past employee's application for re-employment. Id.

According to respondent, it has implemented this procedure in reviewing and rejecting petitioner's applications for re-employment. Respondent points out that, since all applicants must undergo a background investigation and therefore must provide their prior employment history, petitioner must disclose his discontinuance in his application. Respondent nonetheless insists that the problem code assigned to that history does not automatically disqualify him from all employment with respondent. Id. ¶¶ 8-10.

Respondent's explanation of its use of problem codes may resolve petitioner's claim that he has been placed on an Ineligible Inquiry list, to the extent of negating the use of such a list per se. Respondent's admitted use of its problem codes, however, still produces categories of persons who are more likely to be rejected for employment based on their employment history and thus is a procedure that may appear to the public as a list of persons ineligible for or disqualified from employment based on their history.

Petitioner's challenge to respondent's grounds for considering him ineligible for future employment and his request to be considered eligible applies equally to the problem code respondent has assigned to petitioner. Respondent's explanation of its procedure provides neither the reason for its assignment of a problem code to petitioner, nor how he may eliminate it, nor how he may obtain future employment despite the code. See D'Ambrosio v. Department of Health of State of N.Y., 4 N.Y.3d

133, 140 (2005); Facey v. New York City Dept. of Educ., 105 A.D.3d 547, 547 (1st Dep't 2013); Wolfe v. Kelly, 79 A.D.3d 406, 410 (1st Dep't 2010).

Respondent quite rationally may review petitioner's applications for employment more carefully than other applications, conduct investigations of his suitability for the positions he applies for, and deny him employment based on prior performance or conduct detailed in his record of employment with respondent. Nevertheless, as set forth above, petitioner's employment file does not support a U-rating for his performance during the 2009-2010 school year, nor does the SCI investigation substantiate allegations of misconduct other than his admission of one prank email in violation of respondent's email usage policy. Therefore, insofar as the problem code respondent has assigned to petitioner shows termination for misconduct, V. Answer Ex. L ¶ 7, that code may not be based on the unsatisfactory performance rating for the 2009-2010 school year or the unsubstantiated charges in the SCI report. Any such basis for the code is without regard to the facts and arbitrary. Pell v. Board of Educ., 34 N.Y.2d at 231; Mayo v. Personnel Review Bd. of Health & Hosps. Corp., 65 A.D.3d at 472-73. See Haas v. New York City Dept. of Educ., 106 A.D.3d 620, 621 (1st Dep't 2013).

IV. DISPOSITION

For the reasons explained above, the court grants the petition insofar as it seeks to annul respondent's unsatisfactory rating of petitioner for the 2009-2010 school year. C.P.L.R. §

7803(3). The court also grants the petition insofar as it seeks to annul respondent's assignment of a problem code to petitioner, to the extent that the problem code is supported by the annulled unsatisfactory rating, unsubstantiated misconduct recited in a Special Commissioner of Investigations report, or misconduct not documented in petitioner's employment file. Id. The court otherwise denies the petition and dismisses this proceeding. This decision constitutes the court's order and judgment granting the petition to the extent set forth and otherwise dismissing the proceeding. C.P.L.R. § 7806.

DATED: January 27, 2014

LUCY BILLINGS, J.S.C.