Kent v Board of Educ. of the City Sch. Dist. of the City of N.Y.
2017 NY Slip Op 32559(U)
December 4, 2017
Supreme Court, New York County
Docket Number: 150102/2017
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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DAVID KENT,

Petitioner,

For Judgment Pursuant to Article 78 of the Civil Practice Law & Rules,

-against-

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK; and CARMEN FARIÑA, in her official capacity as CHANCELLOR of the CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondents.

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Index Number: 150102/2017

Sequence Numbers: 001

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers were used on petitioner's CPLR Article 78 Petition challenging respondent's termination of his probationary employment as a teacher:

	Papers Numbered:
Notice of Petition - Affirmation - Exhibits	1
Answer + Opposition to Petition - Affirmation - Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, the petition is denied and the proceeding is dismissed.

Background

Petitioner, David Kent, began his employment with the Department of Education ("DOE") as a probationary teacher in 2014. During the 2014-2015 and 2015-2016 school years, petitioner was assigned to teach Social Studies to students in Grade 9 at the Bronx Design and Construction Academy ("School"). Respondent the Board of Education of the City School District of the City of New York ("Board") serves as the public employer of all persons, including petitioner, appointed to teach within the City's public schools. Respondent Carmen Fariña functions as the superintendent of the City's public schools and as Chief Executive Officer of the Board.

Education Law §3012-c requires respondents to evaluate DOE teachers in accordance with a May 1, 2014 Memorandum of Agreement ("MOA") entered into between the Board and the United Federation of Teachers. The MOA required, inter alia: (1) that beginning the 2013-2014 school year, DOE teachers were required to be evaluated and rated based on a numerical "annual professional performance review" ("APPR") score, which corresponds with categorical ratings of "Highly Effective," "Effective," "Developing," and "Ineffective"; and (2) that beginning the 2014-2015 school year, respondents were also required to evaluate DOE teachers in accordance with a "measure of teacher practice" ("MOTP") score, which also corresponds with the same categorical ratings. A teacher's APPR rating is based (1) 60% on the MOTP score; (2) 20% on the "state measure of student learning"; and (3) 20% on the local MOSL score. During the 2014-2015 school year, a DOE teacher who scored between 65 and 74 received an overall APPR rating of "Developing." In comparison, a teacher who scored between 75 and 90 received an overall rating of "Effective."

During the 2014-2015 school year, petitioner received an APPR score of 74, resulting in a "Developing" rating. As a result of petitioner's "Developing" rating, Abigal Lovett, the School's principal, placed him on a "teacher improvement plan" ("TIP") for the following school year beginning in September 2015. The TIP identified areas of improvement for petitioner, steps and actions for improvement, and a timeline for completion.

For the 2015-2016 school year, as Education Law § 3012-c requires, petitioner was examined in one formal observation and four informal observations. These observations assessed petitioner's ability, inter alia, to design coherent instructions, to create an environment of respect and rapport, to manage student behavior, to engage students in learning, and to grow and develop professionally. After these observations of petitioner's classes, he was provided with an assessment report, which gives a rating for each component. Lovett and Christina Cannon, the Assistant Principal, respectively, completed these assessment reports ("Assessment Reports") and reflected the following ratings: (1) on October 8, 2015, petitioner received "Effective" ratings in four categories; (2) on January 7, 2016, petitioner received "Effective" ratings in three categories and "Developing" ratings in four categories; (3) on February 23, 2016, petitioner received "Effective" ratings in three categories and "Developing" ratings in three categories; (4) on March 30, 2016, petitioner received "Effective" ratings in six categories and a "Developing" rating in one category; and (5) on April 7, 2016, petitioner received "Developing" ratings in seven categories and an "Ineffective" rating in one category.

At the end of the 2015-2016 school year, petitioner received an APPR score of 74, identical to that of his 2014-2015 APPR score, again resulting in a "Developing" rating. Petitioner alleges that the School's administration failed to implement the activities included in the TIP, thereby preventing him from demonstrating his progress toward improving his pedagogy. Petitioner alleges, for example, that the TIP required him to participate in monthly meetings with a Board employee, but that the School failed to schedule these meetings, and that the TIP also required him to work with a Data Specialist, but that the School only afforded him one such meeting. Respondents, on the other hand, allege that petitioner received full support from the School's administration and was given multiple opportunities for improvement in accordance with his TIP. Respondents allege that petitioner was asked to meet, and did meet, with Lovett; Crowe, an Assistant Principal; and other members of the School's support team to assist him with implementing his TIP.

On or about May 23, 2016, Superintendent Elaine Lindsey sent petitioner a letter informing him that she would be making a decision with respect to his probationary status as a teacher on or about June 23, 2016. On or about June 22, 2016, Lindsey sent petitioner a letter informing him of her decision to terminate his (probationary) employment, effective June 22, 2016 ("Final Determination"). Petitioner alleges that on or about June 23, 2016, he received an email from Lovett, his direct supervisor, directing him to continue reporting to work through June 28, 2016, the last day that teachers were required to work for the 2015-2016 school year. Petitioner acknowledges that he received his full salary as a teacher based on his employment through September 6, 2016.

The Instant Proceeding

On or about January 4, 2017, petitioner commenced this CPLR Article 78 Proceeding to vacate and reverse the Final Determination, seeking to be reinstated as a DOE teacher. Petitioner argues that the Final Determination was arbitrary, capricious, and made in bad faith because, inter alia, respondents failed to take into account his APPR ratings for the 2014-2016 school years as a significant factor when making the decision to terminate his probationary employment. Petitioner argues that petitioner's APPR ratings for his two years of employment demonstrate a probationary employee on the verge of achieving an "Effective" rating, and that respondents are unable to establish that the discontinuance of petitioner's probationary employment was the result of poor performance. Petitioner further argues that respondents (1) failed to provide him with the assistance and feedback necessary to improve as a teacher in accordance with the TIP, and (2) failed to provide him with adequate notice that his probationary employment could be terminated and, thus, failed to provide him with an opportunity to remediate his job performance.

Petitioner further argues that respondents arbitrarily and capriciously terminated him because of certain student behavior logs he wrote, which are created by teachers to identify disruptive or inappropriate behavior and to work on solutions and/or disciplinary measures. Petitioner alleges that in a March 2016 meeting, Crowe stated words to the effect of "be careful what you write about students because it could come back to hurt the school." Petitioner further alleges that in April 2016, he received his first disciplinary letter from Lovett, which criticized his submission of student behavior logs.

On March 24, 2017, respondents e-filed their answer, arguing that the Final Determination was made in good faith, that it was based on the plentitude of documentary and testimonial evidence, and that the Court should not disturb that decision. Respondents argue that petitioner was never asked to stop writing student behavior logs and was not terminated for doing so. Respondents submit a March 29, 2016 email sent from Crowe to petitioner, in which Crowe states, "We discussed the difference between what is considered objective vs. subjective narrative … be sure that only facts are included [within the student behavior logs] and that there is no ambiguity in the writing."

Discussion

In an Article 78 proceeding, the scope of judicial review is limited to whether the administrative action has a rational basis for its determination. See Matter of Pell v Board of Educ., 34 NY2d 222, 230 (1974). The judicial review of the termination of a probationary employee is limited to an inquiry as to whether the termination was made in bad faith, for an improper or impermissible reason, or in violation of the law. See Swinton v Safir, 93 NY2d 758, 763 (1999) ("As a probationary employee, petitioner had no right to challenge the termination by way of a hearing or otherwise, absent a showing that he was dismissed in bad faith or for an improper or impermissible reason"); Matter of Che Lin Tsao v Kelly, 28 AD3d 320, 321 (1st Dept 2006) ("Petitioner, as a probationary employee, may be discharged without a hearing, or statement of reasons, for any reason or no reason at all, in the absence of a demonstration that the dismissal was in bad faith, for a constitutionally impermissible reason, or in violation of the law").

Contrary to petitioner's claims that respondents' failure to provide him adequate notice that his probationary employment was to be discontinued should result in his reinstatement, the Court finds that reinstatement is not the proper remedy, as petitioner concedes that he was paid his full teacher's salary up until September 6, 2016. As such, Lindsey gave petitioner adequate written notice on June 22, 2016, because it was given more than 60 days preceding the expiration of his probationary period. See Education Law § 2573(1)(a)(i) ("Each person who is not to be recommended for appointment on tenure shall be so notified by the superintendent of schools in writing not later than sixty days immediately preceding the expiration of his or her probationary period").

In the case of Tucker v Board of Educ., Community Sch. Dist. No. 10, pursuant to Education Law § 2573(1)(a)(i)'s 60 days' written notice rule, a teacher who was formally notified of her termination only eight days before her probationary period expired was awarded 52 days' salary, not a reinstatement of her employment, as petitioner here seeks. See 82 NY2d 274, 277-78 (1993) ("The courts and the State Commissioner of Education … have consistently held that teachers are awarded one days' pay for each day the notice was late"); see also id. at 278 ("The purpose of the statute's 60-day notice requirement is to afford probationary teachers a reasonable period of time, before the end of their probationary period, to make plans for the upcoming school year"). Here, petitioner concedes that he was paid his full teacher's salary up until September 6, 2016, which is more than respondents are statutorily required to do. As such, although respondents only gave petitioner less than one month's notice, as petitioner concedes he was given full pay for the following two months, the Court finds that petitioner has already been adequately compensated for respondents' failure to provide him the full 60-days' notice.

Petitioner's consistent "Developing" ratings give respondents ample grounds to discontinue his probationary employment in good faith. See Frasier v Board of Educ. of City School Dist. of City of New York, 71 NY2d 763, 765 (1988) ("Unquestionably, a Board of Education, under Education Law § 2573(1)(a), has the right to terminate the employment of a probationary teacher at any time and for any reason"); see also Venes v Community Sch. Bd. of Dist. 26, 43 NY2d 520, 525 (1978) (probationary employee "has no property rights in his position, and may be dismissed for almost any reason, or for no reason at all"); see generally Matter of Roberts v Community Sch. Bd. of Community Dist. No. 6, 66 NY2d 652, 655-56 (1985) ("The purpose of the probationary period … [is] to permit the Superintendent to ascertain whether the probationer is competent, efficient and satisfactory for permanent appointment") (internal quotations omitted). Petitioner's implied contention that being close to an "Effective" rating is essentially equivalent to that of an "Effective" rating is unavailing. Petitioner offers no authority for his proposition.

Additionally, petitioner's claims that the School failed to provide him the necessary assistance to implement the TIP, and that his discontinuance was based on student behavior logs he submitted, are meritless and do not establish bad faith. To the contrary, respondents provide ample evidence, in the form of Assessment Reports and emails from Lovett and Crowe, that many of the School's support staff met with petitioner to provide feedback on his performance as a teacher. Also,

what petitioner characterizes as "criticism" for reporting students in student behavior logs was in fact feedback from the School's administration to focus his writing appropriately, as well as to gain control over his classroom and to manage the low-level infractions that a teacher is responsible for handling. See Matter of Murnane v Dept. of Educ. of the City of N.Y., 82 AD3d 576, 576 (1st Dept 2011) ("The detailed observation reports by the principal and assistant principal, describing petitioner's poor performance in class management, engagement of students, and lesson planning, provided a rational basis for the rating. Petitioner's contention that the principal was biased against her is speculative and insufficient to establish bad faith"). Thus, petitioner has failed to demonstrate that respondents' decision to discontinue his probation as a teacher was made in bad faith.

The Court has considered petitioner's other arguments and finds them to be unavailing and/or non-dispositive.

Accordingly, the petition is denied and dismissed without costs.

Conclusion

Petition denied. The Court hereby directs the clerk to enter judgment denying the petition and dismissing the proceeding.

Dated: December 4, 2017

Arthur F. Engoron, J.S.C.