Matter of Rattray v New York City Dept. of Educ.
2018 NY Slip Op 30346(U)
February 26, 2018
Supreme Court, New York County
Docket Number: 156745/16
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* PART 13

In the Matter of the Application of

ADRIENNE ATKINSON RATTRAY,

Petitioner,

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

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

INDEX NO. 156745/16
MOTION DATE 02-14-2018
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this petition for Art. 78 relief:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits ____cross motion ____	5 - 7
Replying Affidavits ____	8

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered and adjudged that the petition for CPLR Article 78 relief vacating Respondent's determination denying Petitioner tenure as an Assistant Principal and to immediately grant and/or recognize Petitioner, Adrienne Atkinson Rattray, as having tenure as an Assistant Principal and an assignment to perform these duties within her presently assigned school district (District 11), together with all attorneys' fees, disbursements and other costs, alternatively, to have Respondent conduct a hearing on the termination of her position as a tenured Assistant Principal, is denied.

Petitioner was a tenured Grades 7-12 Social Studies teacher initially employed by Respondent from 1999 through 2009. Starting on May 18, 2009 Petitioner was hired as an Assistant Principal at P.S. 112, The Bronxwood School, located in Bronx, New York. By letter dated January 20, 2010 Respondent notified Petitioner that her "Completion of Probation Date" was May 18, 2014, five years after the date she was hired (Ans. Exh. 2).

Petitioner alleges that her probationary period ended after three (3) years effective May, 2012. She relies on a December 12, 2012 Memo sent by e-mail from Superintendent Elizabeth White, advising Principals listed on an e-mail chain, to forward the attached guidance document to "tenure eligible" Assistant Principals. Principal Susan Barnes of P.S. 112 allegedly forwarded the December 12, 2012 e-mail to Petitioner on March 6, 2013 (Pet. Exh. A). Petitioner claims that Respondent, through the Superintendent of Schools, failed to make a written report recommending or denying her permanent appointment as required pursuant to New York Education Law §2573[5][a]. Petitioner alleges that the failure to recommend or deny permanent appointment resulted in her obtaining tenure by estoppel.

Respondent alleges that a January 20, 2010 letter confirming Petitioner's appointment, states the end of the probationary period is May 18, 2014 (Ans. Exh. 2). Superintendent White did not grant Petitioner tenure at the end of the 2013-2014 school year despite a recommendation from Principal Susan Barnes (Pet. Exh. B). Respondent further alleges that Petitioner had a five year probationary period expiring at the end of

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

the 2013-2014 school year as stated in the Collective Bargaining Agreement (CBA) between the Council of Supervisors and Administrators (CSA) and Respondent (Ans. Exh. 3).

The CBA, Article VII, paragraph Q titled "Probationary Periods," on page 68 specifically states:

> "Effective July 1, 2000, properly assigned or appointed principals, and education administrators Level IV, and education administrators Level III that report to a Superintendent or a Deputy Superintendent shall serve a three year probationary period. *All other supervisors properly assigned or appointed shall serve a five year probationary period. A superintendent may propose the completion of probation for a supervisor who has provided exemplary and outstanding service, after a minimum of three years of appointed service in title, by writing to the Chancellor and providing a rationale or justification for the proposal. These matters are to be discussed as part of the annual professional performance review process.* If the Chancellor is satisfied with the proposal and justification, the Chancellor will approve and the superintendent will advise the supervisor in writing of permanent certification of appointment, in accordance with applicable provisions of law... (Emphasis added) (Ans. Exh. 3, pg. 68)

Petitioner alleges that because of the "mutual mistake" by both parties she was still a probationary employee, and Respondent forced her to sign an extension letter for probationary employment through the 2014-2015 school year (Ans. Exh. 4). Petitioner received a disciplinary letter that she signed on May 15, 2015 concerning attendance and punctuality issues (Ans. Exh. 5). Petitioner alleges that at the end of the 2014-2015 school year Principal Barnes once again recommended her for tenure, but Superintendent Maria Lopez denied it. Petitioner signed a second extension letter for the 2015-2016 school year (Ans. Exh. 6). Petitioner alleges that on June 26, 2015 she received a "Satisfactory" rating with a recommendation for tenure for the 2014-2015 school year from Principal Barnes, but tenure was denied.

On March 14, 2016 and March 21, 2016 Petitioner received negative/disciplinary letters for attendance and punctuality issues (Pet. Exhs. E and F). Petitioner alleges she received additional negative/disciplinary letters dated April 2, 2016, April 3, 2016, April 10, 2016 and May 4, 2016, for failing to submit timely reports (Pet. Exhs. H, I, J and K). On March 18, 2016 Petitioner received notifice from Superintendent Miesha Ross-Porter that tenure was denied (Pet. Exh. G). The notice was subsequently rescinded as premature. Petitioner declined to sign a letter dated May 9, 2016 seeking to extend her probationary period through the 2016-2017 school year, resulting in her probationary period ending and tenure being denied (Pet. Exh. P). Petitioner was re-assigned to P.S. 567 as a first grade teacher for the following school year. Petitioner is currently assigned to the Absent Teacher Reserve (ATR) with no assurance of permanent assignment as a teacher.

The petition pursuant to CPLR Article 78, seeks to vacate Respondent's determination denying Petitioner tenure as an Assistant Principal and immediately grant and/or recognize Petitioner as having tenure as an Assistant Principal with an assignment to perform these duties within her presently assigned school district (District 11), together with all attorneys' fees, disbursements and other costs. Alternatively, Petitioner seeks to have Respondent conduct a hearing on the termination of her position as a tenured Assistant Principal.

Respondent answered the petition asserting defenses: (1) that the determination to deny tenure was not arbitrary, capricious, or in bad faith; (2) Petitioner freely, knowingly, and openly after the opportunity to consult with counsel waived her claims for tenure by estoppel, by entering into agreements waiving "any possible rights, claims or causes of action for tenure as an Assistant Principal" arising on or prior to May 18, 2015, the date of the last "Extension of Probation Agreements" ; (3) as a probationary

employee Petitioner is not entitled to a hearing; and (4) Respondent acted reasonably, lawfully, in good faith and without malice in accordance with all applicable laws, by-laws, rules and regulations. Respondent's Answer requests that this Court deny the relief sought in its entirety and that the petition be dismissed.

Petitioner has not established that she obtained tenure by estoppel after three years with the full knowledge and consent of the school board. Tenure by estoppel occurs when there is an intentional failure of the school board to take the action required by law to grant or deny tenure prior to the expiration of the probationary term and an acceptance of the continued full services provided by the administrator (Matter of McManus v. Board of Educ. of Hempstead Union Free School Dist., 87 N.Y. 2d 183, 661 N.E. 2d 984, 638 N.Y.S. 2d 411 [1995] and Gould v. Board of Educ. of Sewanhaka Cent. High School Dist., 81 N.Y. 2d 446, 616 N.E. 2d 142, 599 N.Y.S. 2d 787 [1993]).

Petitioner relies on Education Law §2573 [1][b][i] to establish that she was subject to a three year probationary period. Education Law §2573 [1][b], as part of Article 52, is applicable to New York, Buffalo, Rochester, Syracuse and Yonkers city school districts. A later enacted portion of the Education Law that is part of Article 52-A applicable only to the New York City School District amends and limits the application of §2573 [1][b] and grants Superintendents the authority to appoint and discharge employees (Munoz v. Vega, 303 A.D. 2d 253, 756 N.Y.S. 2d 47 [1st Dept., 2003]). In New York City, determinations pertaining to tenure and probationary employment are governed by the CBA (Frasier v. New York City Dept. of Educ., 71 N.Y. 2d 763, 625 N.E. 2d 725, 530 N.Y.S. 2d 79 [1988] and Kahn v. New York City Dept. Of Educ.,18 N.Y. 3d 457, 963 N.E. 2d 1241, 940 N.E. 2d 1241, 940 N.Y.S. 2d 540 [2012]). Petitioner cites precedent involving school districts that are outside of the City New York and has not shown that the CBA is inapplicable.

Petitioner has not stated or proven that she is a Level III or IV appointed administrator subject to the mandatory three year probationary period in the CBA (Answer Exh. 3, p. 68). A shortened three year probationary period is discretionary, not mandatory under the CBA, "A superintendent *may* propose the completion of probation for a supervisor who has provided exemplary and outstanding service, after a minimum of three years of appointed service in title" (Answer Exh. 3, p. 68). A recommendation by Principal Barnes does not mandate that Superintendent Elizabeth White approve or disapprove tenure after three years.

Petitioner's reliance on the December 12, 2012 Memo sent by e-mail from Superintendent Elizabeth White is unavailing. The email broadly refers to all the principals it was sent to, making no specific reference to Principal Barnes or Petitioner, and explains the process for making recommendations to the Superintendent (Pet. Exh. A). The determination of whether Petitioner provided "exemplary and outstanding service" was not for Principal Barnes to make, and even after the five year probationary period Superintendent White did not find a basis to grant tenure because as plaintiff alleges P.S. 112 was "underdeveloped."

Petitioner has not established that she obtained tenure by estoppel, rendering her argument that the waiver provisions on the "Extension of Probation Agreements" (Ans. Exhs. 4 and 6) were a "mutual mistake" unavailing. Petitioner's reliance on Matter of McManus v. Board of Educ. of Hempstead Union Free School Dist., 87 N.Y. 2d 183, supra and Gould v. Board of Educ. of Sewanhaka Cent. High School Dist., 81 N.Y. 2d 446, supra, is misplaced. In both of those cases the "mutual mistake" involved the parties mistaken belief that the Petitioner was still a probationary employee after tenure was obtained.

Petitioner has not provided proof in support of her claim that the "Extension of Probation Agreements" were signed under duress. Petitioner did not act as an Assistant Principal beyond the expiration of her probationary term and the agreement to forgo any claim to an extension of probationary employment was valid (Wolin v. Walcott, 127 A.D. 3d 648, 8 N.Y.S. 3d 294 [1st Dept., 2015] citing to Juul v. Board pf Educ. of

Hempstead School Dist. No. 1, Hempstead, 76 A.D. 2d 837, 428 N.Y.S. 2d 319 [2nd Dept., 1980] and Ronga v. Klein, 81 A.D. 3d 567, 917 N.Y.S. 2d 568 [1st Dept., 2011]).

Petitioner's argument that Respondent's actions in denying her tenure were arbitrary and capricious because of irregularities in the process-denying her tenure-that amounted to a showing of bad faith, are also unavailing. Petitioner alleges that the numerous letters to her file during the 2015-2016 school year were for the improper pupose of denying tenure. Petitioner claims that she was previously denied tenure for the 2014 and 2015 school years not for attendance or performance issues but for the school's rating as being "underdeveloped," and that her attendance was deemed improved and performance "Satisfactory" by Principal Barnes, which is contradictory to the letters.

An administrative determination will withstand judicial scrutiny if it has a rational basis and is not arbitrary and capricious. An arbitrary decision is one that is taken without regard to the facts (Matter of Pell v. Board of Education, 34 N.Y. 2d 222, 356 N.Y.S. 2d 833, 313 N.E. 2d 321 [1974]). A probationary employee, "may be discharged for any or no reason at all in the absence of a showing that the dismissal was in bad faith, for a constitutionally impermissible purpose or in violation of law." Petitioner is required to provide proof that irregularities in the review process "demonstrated bad faith or deprived her of a substantial right" (Francois v. Walcott, 136 A.D. 3d 434, 23 N.Y.S. 3d 434 [1st Dept., 2016]). The Petitioner as a probationary employee bears the burden of establishing bad faith to challenge dismissal. Multiple unexcused absences show that dismissal was not in bad faith (Pagan v. Board of Education of City School Dist. of City of New York, 56 A.D. 3d 330, 868 N.Y.S. 2d 616 [1st Dept., 2008]). Speculation or conclusory allegations of bad faith are not sufficient to meet the burden of showing bad faith (Brown v. Board of Education of City School District of the City of New York, 156 A.D. 3d 451, 2017 N.Y. Slip Op. 08624 [1st Dept., 2017]).

Respondent's determination denying Petitioner tenure was not in bad faith. Petitioner received a letter dated May 12, 2015 concerning attendance and punctuality issues at the end of the 2014-2015 school year - when she was late 24 times in 143 days - before she signed the agreement to extend her probation for the 2015-2016 school year (Ans. Exh. 5). Petitioner also does not address a parent and teacher's complaint directly involving her performance of duties as Assistant Principal during the 2015-2016 school year (Ans. Exhs. 15 and 16). Petitioner's speculative allegations of bad faith are not enough to show she is entitled to the relief sought. Respondent made efforts to work with Petitioner. Principal Barnes' modified evaluation, stating that performance was "Satisfactory," together with Respondent's willingness to extend Petitioner's probationary period for another year, are proof of good faith.

Accordingly, it is ORDERED AND ADJUDGED that the petition for CPLR Article 78 relief vacating Respondent's determination denying Petitioner tenure as an Assistant Principal and to immediately grant and/or recognize Petitioner, Adrienne Atkinson Rattray, as having tenure as an Assistant Principal and an assignment to perform these duties within her presently assigned school district (District 11), together with all attorneys' fees, disbursements and other costs, alternatively, to have Respondent conduct a hearing on the termination of her position as a tenured Assistant Principal, is denied, and it is further,

ORDERED that this proceeding is dismissed, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: February 26, 2018

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE