SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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In the Matter of the Application of

MAGDALENA SANDERS,

Petitioner,

-against-

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, and CARMEN FARINA, in her official capacity as CHANCELLOR OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondents.

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

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Index No. 153841/2017
Motion Seq: 001

DECISION, ORDER & JUDGMENT

HON. ARLENE P. BLUTH

The petition to annul a determination by respondents upholding an "ineffective" rating given to petitioner for the 2015-2016 school year is denied.

Background

This proceeding arises out of petitioner's employment as a library teacher for respondents. Petitioner claims that she was the only library teacher during the 2015-2016 school year at Queens Gateway, a secondary school with more than 700 and less than 1,000 students. Petitioner complains that she was given an improper schedule for the subject school year–

petitioner says that library teachers at schools with enrollment numbers similar to Queens Gateway must have flexible schedules rather than a fixed weekly schedule. In other words, petitioner asserts that her weekly assigned classes were improper and that she should have had a flexible assignment.

The type of schedule (flexible or fixed) matters because it affects which evaluation scheme a teacher receives. Teachers who spend more than 60 percent of their time in flexible schedules are evaluated under a Satisfactory/Unsatisfactory Rubric while all other teachers are evaluated under the Advance System (also known as the Danielson Framework, which rates teachers as ineffective, developing, effective and highly effective).

For the 2015-2016 school year, petitioner was evaluated under the Advance system and she selected to receive 6 informal observations, which were conducted on October 14, 2015, December 21, 2015, April 20, 2016, May 23, 2016, June 1, 2016 and June 3, 2016. Petitioner insists that the last three observations were done in the last nine days of school year and should be disregarded because petitioner did not have a chance to improve her alleged deficiencies. The principal at petitioner's school issued petitioner an ineffective rating for the 2015-2016 school year and petitioner appealed. The Deputy Chancellor for Teaching and Learning denied petitioner's appeal on February 22, 2017.

In opposition, respondents claim that petitioner was assigned to teach 17 class periods a week for the first term of the 2015-2016 school year and 15 periods during the second term. Respondents claim that petitioner filed a grievance about her schedule for a previous school year (2014-2015) and that her grievance was denied. Respondents stress that petitioner did not file a grievance for the 2015-2016 school year, the subject of this proceeding, but did file a grievance

for the following school year (2016-2017). That second grievance was also denied. Respondents conclude that the Advance system was the proper system with which to evaluate petitioner, that petitioner should have filed a grievance concerning her schedule and that the ineffective rating was neither arbitrary nor capricious.

In reply, petitioner admits that she filed grievances regarding her schedule in the 2014-2015 and 2016-2017 school years. Petitioner also submits an affidavit from her union's ("UFT") Grievance Department who states that demands for arbitration were made with respect to both grievance denials and that these demands are still outstanding. Petitioner also claims that the Deputy Chancellor's decision permitted petitioner to raise the grievance issue (whether or not petitioner could challenge her schedule) by concluding that petitioner was correctly evaluated under the right framework.

Discussion

In an Article 78 proceeding, "the issue is whether the action taken had a rational basis and was no arbitrary or capricious. An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable" (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d 587 [2013] [internal quotations and citations omitted]).

The Purported Improper Schedule

As an initial matter, the Court must decide whether petitioner's claim that she received an improper schedule (and therefore was evaluated under the wrong framework) is properly before

the Court. It is undisputed that petitioner brought grievances in 2014 and 2016 about her schedule (*see* NYSCEF Doc. No. 35, 36). "The Union claims that the assignment of the grievant to a fixed schedule of teaching periods is in violation of the Agreement" (NYSCEF Doc. No. 35 at 1 [2014 Grievance Determination]). Respondents' representative found that the Collective Bargaining Agreement between UFT and the City ("CBA") "currently in effect states librarians may be given teaching assignments. Moreover, there is no evidence to support the Union's contention that 'flexible' should be interpreted to preclude teaching assignments" (*id.* at 2). In 2016, respondents' representative concluded that "this exact claim was raised in 2014 and denied; grievant's course of action is to appeal that denial to arbitration and not refile the same claim" (NYSCEF Doc. No. 36 at 1).

Clearly, petitioner and UFT raised concerns about petitioner's schedule through the grievance process– a procedure which addressed issues pursuant to the CBA. For some reason, petitioner did not file a grievance for the school year that is the subject of this proceeding. "An aggrieved union member whose employment is subject to a collective bargaining agreement between the union and the employer must first avail herself of the grievance procedure set forth in the agreement before she can commence an action seeking relief under CPLR Article 78" (*Matter of Gil v Dept. of Educ. of the City of N.Y.*, 146 AD3d 688, 688, 46 NYS3d 55 [1st Dept 2017]). If a union member does not utilize the grievance procedure, then that constitutes a failure to exhaust contractual remedies (*id.*).

As petitioner admitted in reply, through the affidavit of Ellen Gallin Procida (UFT's Director of the Grievance Department), demands for arbitration relating to those two grievance denials from 2014 and 2016 are still pending (*see* NYSCEF Doc. No. 48). Under these

circumstances, the Court finds that petitioner's claims with respect to her schedule are not properly before the Court because she has not exhausted her administrative remedies. The instant petition may not be used to circumvent a procedure provided for under the CBA. Petitioner and UFT obviously thought that the grievance process was the right way to challenge her schedule since they brought *two grievances* relating to this exact same issue – simply because those grievances were denied by respondents does not mean that petitioner can avoid that process in this proceeding. Petitioner's utilization of the grievance process and the fact that demands for arbitration relating to those grievance denials remain outstanding demonstrate that petitioner did not exhaust her administrative remedies with respect to this issue.

Petitioner's claim that she can challenge her schedule based on the Deputy Chancellor's decision does not compel a different conclusion. The Deputy Chancellor's decision noted that petitioner claimed that she "should not have been rated under APPR plan" (NYSCEF Doc. No. 17 at 1). The Deputy Chancellor found that "Your assignment consisted of teaching responsibilities and library skills; As such you are rated under the APPR plan" (*id*). This conclusion does not foreclose the requirement that petitioner pursue a grievance– nowhere did the Deputy Chancellor discuss the CBA or reference the decisions to deny the grievances. The determination simply rejected an argument raised by petitioner; it did not explicitly create a way around the arbitration required to challenge a grievance denial– a process petitioner already engaged in twice.

Because petitioner has not exhausted her administrative remedies regarding her schedule (and therefore the claim that a satisfactory/unsatisfactory rating should have been used), the Court must analyze whether her ineffective rating under the Danielson Framework was rational.

The Ineffective Rating

Petitioner's central argument with respect to her ineffective rating is that the evaluations were completed too late for her to improve. Petitioner stresses that three of the evaluations were done in the final nine working days. As a general matter, the Court shares petitioner's concern that multiple observations completed late in the school year may contravene the intended purpose of these evaluations. Facially, it makes no sense to do observations and prepare reports– which are supposed to inform a teacher about his or her performance and discuss ways to improve– and leave no opportunity to implement the suggested changes. But the observation reports in this proceeding do not support petitioner's theory that she had no time to improve.

The October observation report noted that "I have serious concerns about what I observed in your class" and recommended that petitioner "adhere to the common core standards in ELA when creating units and lessons and make sure that your lesson plans focus on teaching students the necessary skills for college and career readiness as outlined in the NYS ELA standards" (NYSCEF Doc. No. 38). Petitioner received ineffective ratings for the majority of the components (*id.*). Petitioner acknowledged receiving this observation report in November 2015 (*id.*). Petitioner's next observation (in December 2015) was slightly improved as petitioner received developing ratings for the majority of the components (NYSCEF Doc. No. 39). Petitioner signed this observation report on March 18, 2016 (*id.*).

The April 2016 observation report gave petitioner ineffective and developing ratings and noted that "Learning activities are poorly aligned with the instruction outcomes" and observes that "the teacher accepts all contributions without asking students to explain their reasoning" (NYSCEF Doc. No. 40). Petitioner signed this report on May 13, 2016 (*id.*).

The report for the May 23, 2016 observation (signed by petitioner on May 27, 2016) states that " My concerns continue to be on your ability to create a lesson that is aligned to learning target and outcomes . . . please ensure that you provide time in each lesson for an adequate wrap-up (NYSCEF Doc. No. 41). Petitioner received mainly ineffective and developing ratings in this evaluation (*id.*).

The observation completed on June 1, 2016 (and signed by petitioner on June 2, 2016) gave petitioner ineffective and developing ratings and noted that "In October, we agreed to utilize the Cornell Notes Strategy. As I viewed the students' papers, there was no evidence of mastery. There was also no evidence that this is a daily practice for the students" (NYSCEF Doc. No. 42).

These observation reports, combined with the final report from the observation on June 3, 2016 in which petitioner received mostly ineffective ratings (*see* NYSCEF Doc. No. 43), show that petitioner struggled to meet expectations throughout the year. The decision by the Deputy Chancellor also addressed the time line of the observations and concluded that "Verbal feedback was provided after every observation and it was expected that implementation was immediate" (NYSCEF Doc. No. 17 at 1).

This is *not* a situation where, for instance, a teacher received observation reports with effective or highly effective ratings at the beginning of the school year only to receive multiple observation reports with ineffective ratings at the end of the year without any time to improve. Here, petitioner received constructive criticism beginning from her first observation in October and did not substantially improve her performance by the end of the school year.

Accordingly, the Court declines to find that the timing of these observations requires the Court to vacate petitioner's ineffective rating. While it would be clearly unfair to do all or nearly

all of the observations in the final month of a school year, some observations undoubtedly need to occur towards the end of the year so that progress can be measured. And this Court has no intention of establishing rules about when observations should or must occur– that is something that can be determined between petitioner's union and respondents. The circumstances explored above do not evidence a situation in which petitioner had no chance to improve.

Therefore, the Court finds that the ineffective rating (*see* NYSCEF Doc. No. 44 [APPR Overall Rating Sheet]) was rational and neither arbitrary nor capricious.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied, this proceeding is dismissed and the clerk is directed to enter judgment accordingly.

This is the Decision, Order and Judgment of the Court.

Dated: February 28, 2018
New York, New York

ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH