SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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EUGENIE FRANCOIS,

Petitioner,

- v -

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK

Respondents.

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INDEX NO. 157477/2018

MOTION DATE 02/10/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Petitioner, Eugene Francois, moves, pursuant to CPLR 2221, for leave to reargue this court's decision, order and judgment dated October 3, 2019 and renew the Petition, and upon reargument and renewal, vacate the order which denied the Petition to the extent that it upheld Petitioner's rating, grant the Petition in its entirety, and enter judgment in favor of Petitioner. Respondents oppose Petitioner's motion.

BACKGROUND

In denying Petitioner's application to vacate the determination of Respondents the Department of Education of the City of New York ("BOE") and the Board of Education of the City School District of the City of New York ("BOD") (collectively, "Respondents") to assign Petitioner an "Ineffective" rating for the 2016-2017 school year, this court found that Petitioner failed to establish that her Measures of Student Learning ("MOSL") score of "Ineffective", was made in bad faith or in violation of lawful procedure or a substantial right. In seeking to vacate her Ineffective rating and directing that the rating be converted to an Effective rating or non-

rated, Petitioner alleged multiple procedural defects in both the observation based Measures of Teacher Practice ("MOTP") portion and calculation of the growth-rate MOSL portion of her overall Annual Professional Performance Review ("APPR") rating.

In upholding Respondents' determination and denying the Petition, this court noted that while Petitioner alleges that she should have been rated "Highly-Effective" or "Effective" based on the performance of her students on the Living Environment Regents exam, it is uncontested that the administration elected to use a growth based model to calculate teachers' MOSL scores for the 2016-2017 school year that did not weigh heavily the performance of students on the Regents exam. (NYSCEF Doc. No. 37 at p. 7-8). The court specifically found that the model, as applied, focused on the improvement of students over the course of the year, not the performance of students on a particular exam and as such, Respondents' determination to give Petitioner a MOSL rating of "Ineffective", was not arbitrary and capricious or made in bad faith because according to the applied model, Petitioner's students did not show the requisite amount of growth. (*id*.).

Now Petitioner seeks reargument and renewal, claiming that this court did not consider the MOSL rating of Petitioner for 2016-17 school year and how it was improperly calculated. Petitioner seeks renewal on the basis of documentation that she claims was either overlooked by the court or improperly calculated by Respondent DOE. Specifically, Petitioner seeks renewal on the basis of documentation which she claims demonstrates that DOE utilized the wrong Regents scores and attributed those scores to Petitioner when calculating her MOSL student growth score.

STANDARD OF REVIEW/ANALYSIS

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d] [2]). New facts may not be submitted or considered by the court (*see Mazinov v Rella*, 79 AD3d 979, 980 [2d Dept 2010]; *James v Nestor*, 120 AD2d 442 [1st Dept 1986]). While the determination to grant leave to reargue a motion lies within the sound discretion of the court (*see Barnett v Smith*, 64 AD3d 669, 670-671 [2d Dept 2009]; *Loland v City of New York*, 212 AD2d 674 [2d Dept 1995]), a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented (*Kent v 534 E. 11th St.*, 80 AD3d 106, 116 [1st Dept 2010]; *see also Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979] [a motion to reargue does not properly serve as a "vehicle to permit the unsuccessful party to reargue once again the very questions previously decided."]; *McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]).

CPLR 2221 [e] [2] provides that a motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination and set forth a reasonable justification for the failure to present the alleged new facts on the prior motion. In other words, the moving party must demonstrate that their failure to bring the evidence was not caused by their own lack of due diligence in finding it. (*Priant v NYC Transit Authority*, 142 AD3d 491 [2d Dept 2016]). A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation. (*Wade v Giacobbe*, 176 AD3d 641, 641 [1st Dept 2019]). In determining if the moving party exercised due diligence, the court should look to whether the new evidence was available in the prior motion. (*Beiny v Wynard*, 132

AD2d 190 [1st Dept 1987]). If the new material proffered in the motion would not change the prior determination, a motion for leave to renew will be denied. (*Gall v Colon-Sylvain*, 151 AD3d 701 [2d Dept 2017]).

Petitioner's motion to renew is denied as she has failed to demonstrate that the documentation she claims this court overlooked is new evidence in the sense that it was available to her when she filed her Petition and moreover, because the new material does not change this court's prior determination. First, Petitioner states that some of the "new" documentation was found on Skedula and is based on research and the information she found online through the Advance Guide for Educators, with the assistance of her union representative. (NYSCEF Doc. No. 42, ¶¶ 11, 12). The court finds that Petitioner has failed to articulate any justification for failing to submit the documentation in the format annexed to her renewal motion but more importantly, these documents do not change this court's prior determination but rather, reinforce it. Indeed, it appears that the documents were available to Petitioner at the time she filed her August 10, 2018 Petition and review of the documents demonstrates that Petitioner's score was not based on student regent exam scores, but instead based on a growth model that focused on the improvement of students over the course of the year. As such, Petitioner's new exhibits do not demonstrate that Respondents acted arbitrarily, capriciously, or in bad faith, and therefore, would not have changed this court's prior determination.

Similarly, Petitioner fails to identify matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, and as such has not established grounds to reargue the issues previously decided by the court. Petitioner claims that there is a basis to revisit the merits of this Petition "as the Court may not have fully appreciated the significance of the documents initially submitted which showed the errors on the

MOSL calculation as originally presented, even if the DOE used the growth model to calculate Petitioner's MOSL score----*i.e.*, student growth from the beginning of the school year to the end of the school year." (NYSCEF Doc. No. 55, p.3). The court has already rejected this argument in denying Petitioner's motion for renewal. In addition, this court considered the documents originally submitted in support of the Petition, including Petitioner's observation reports on April 28, 2017, March 7, 2017, and October 31, 2016, describing Petitioner's lack of preparation and poor performance in lesson planning, managing student behavior, and using questioning and discussion techniques, and found that the information provided a rational basis for the rating. Indeed, Petitioner is simply repeating the same arguments she previously made relative to the calculation of her MOSL score which have already been rejected by this court.

Reargument is not a vehicle permitting a previously unsuccessful party to once again argue the very questions previously decided or to assert new never previously offered arguments. (*Kent v 534 E. 11th St.* 80 AD3d 106, 116 [1st Dept 2010]). Accordingly, it is hereby

ORDERED that Petitioner's motion sequence number 002 for leave to reargue the court's October 3, 2019 decision, order and judgment is denied in its entirety.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

5/28/2020
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE