

Miller v Department of Educ. of the City of N.Y.

2020 NY Slip Op 31998(U)

June 26, 2020

Supreme Court, New York County

Docket Number: 156340/2018

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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|-----------------|----------------------------|------------------------|-------------------------|
| PRESENT: | <u>HON. DEBRA A. JAMES</u> | PART | IAS MOTION 59EFM |
| | <i>Justice</i> | | |
| -----X | | INDEX NO. | <u>156340/2018</u> |
| KARIN MILLER, | | MOTION DATE | <u>08/12/2019</u> |
| Petitioner, | | MOTION SEQ. NO. | <u>001</u> |

- v -

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

**DECISION + ORDER ON
MOTION**

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39
were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

ORDER

Upon the foregoing documents,

ADJUDGED that the petition is granted as follows:

The determination of respondent New York City Department of Education, dated March 20, 2018, issuing an unsatisfactory performing rating (U-rating) to the petitioner for the 2016-2017 school year is vacated and annulled.

DECISION

Petitioner, currently an assistant principal, has been an employee of the respondent for over 25 years and brings this proceeding to challenge the respondent's determination to uphold a "U" (unsatisfactory) performance rating given to petitioner for the 2016-2017 year.

As a threshold matter, respondent argues that the petition was not timely served. Respondent's denial of petitioner's appeal was dated March 20, 2018. Petitioner timely commenced this proceeding on July 9, 2018. See CPLR 217. Pursuant to CPLR 306-b, service of the petition was required to "be made not later than fifteen days after the date on which the applicable statute of limitations expires." For the purposes of challenging a "U" rating, the right to seek relief accrues upon receipt of the respondent's decision by petitioner. Andersen v Klein, 50 AD3d 296, 297 (1st Dept 2008). Although respondent's decision was dated March 20, 2018, petitioner's uncontroverted affidavit states that the decision was not received until March 28, 2018. As the affidavit of service sets forth service of the petition upon respondent on August 10, 2018, the petition was timely served under CPLR 306-b.

With respect to the merits of the petition, the standard to be applied is whether petitioner is able to demonstrate that "the respondents' determination was made in violation of lawful procedure or was arbitrary and capricious or an abuse of discretion." Matter of Kunik v New York City Dept. of Educ., 142 AD3d 616, 618 (2d Dept 2016). Petitioner can meet this burden by showing "the year-end report . . . was completed by the principal in an arbitrary manner, including unsatisfactory rankings in every category, even where unsupported by any

evidence or contradicted by evidence in the report itself.”

Kolmel v City of New York, 88 AD3d 527, 528 (1st Dept 2011).

Petitioner here has met this burden.

The only information supporting the challenged rating consists of four undated letters to file by petitioner's then principal as well as the reasons provided in the evaluation itself. The principal who issued the rating was not present at the petitioner's hearing and instead the petitioner's new supervising principal who took over subsequent to the period in question appeared. The challenged performance evaluation stated that petitioner "(1) failed to complete given supervisory tasks that include organizing arrival and dismissal/teach assessments [] that resulted in students leaving building unsupervised (2) failed to directly supervise school aide which resulted in essential items not being marked and items missing (3) given directive and not completed or followed up on, and (4) compliance items incomplete ex. Compliance, attendance [] teacher assessments, etc." However, even viewing the evidence in the light most favorable to petitioners, the four undated file letters fail to provide sufficient evidentiary support to these conclusions. For example, the December 13, 2016 letter to file by the former principal stated that petitioner failed to supervise the school lunchroom. However, that same letter acknowledged that such supervision was not within the

petitioner's contractual duties. Furthermore, the respondent's representative, the current principal, testified at the hearing that upon making a visit to the school before taking over it was observed that petitioner was provided with insufficient staff support to supervise the lunchroom. The three other file letters submitted in support of respondent's decision also fail to support respondent's determination. First, these letters to file by the principal are signed but undated, merely represent alleged notes of meetings with petitioner, and were only presented to petitioner at the end of the school year at the same time as the "U" rating. One letter criticized the petitioner's failure on a single day to supervise the discharge of students. However, at the hearing respondent's representative again stated that the day the representative observed the petitioner, the petitioner was attempting to manage the discharge of students by herself which was difficult given the total lack of security and cameras at the school and the over 17 exits to the school.

Respondent's determination suffers from a more fundamental procedural infirmity causing it to be arbitrary and capricious. As cited by petitioner, nowhere in the record is there evidence that any goals or standards were set for the petitioner at the beginning of the review period. In the absence of such evidence it is fundamentally unfair to evaluate the petitioner's

performance as unsatisfactory when petition was given no notice of the expectations for performance. Murray v Bd. of Educ. of City School Dist., 131 AD3d 861, 863 (1st Dept 2015) (respondents non-adherence to their procedures for evaluating petitioner was arbitrary and capricious). Furthermore, even assuming arguendo that the undated file letters constitute a form of interim warning, the former principal's observations were not shared in writing with the petitioner until the end of the school year depriving the petitioner of any opportunity to make improvements and thus undermining the review process. See Brown v City of New York, 111 AD3d 426, 427 (1st Dept 2013) ("deficiencies in the rating of petitioner were not merely technical but undermined the integrity and fairness of the entire review process"). As there was insufficient evidence in the record before the respondent to support its determination, the court shall annul the respondent's rating of the petitioner.

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| <u>6/26/2020</u> DATE | | | | | <u><i>Debra A. James</i></u> DEBRA A. JAMES, J.S.C. | | | | | |
| CHECK ONE: | <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | DENIED | <input type="checkbox"/> | NON-FINAL DISPOSITION | | | | |
| APPLICATION: | <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> | OTHER | | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |