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

HON. SHIRLEY WERNER KORNREICH

PRESENT: _____ Justice PART 54

Index Number : 113290/2006
CURCIO, LOUIS
vs
DEPARTMENT OF EDUCATION
Sequence Number : 001
ARTICLE 78

INDEX NO. 113290/2006
MOTION DATE 3/1/07
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on ... s motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits _____	2
Replying Affidavits _____	3

Cross-Motion: ☐ Yes ☐ No

FILED

JUN 20 2007

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 6/13/07

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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LOUIS CURCIO,

Petitioner,

Index No.:113290/2007

-against-

DECISION and ORDER

NEW YORK CITY DEPARTMENT OF EDUCATION, JOEL KLEIN, CHANCELLOR, in his official and individual capacities, DENNIS SANCHEZ, in his official and individual capacities, and DOV ROKEACH, in his official and individual capacities,

Respondents.

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KORNREICH, SHIRLEY WERNER, J.:

Petitioner Louis Curcio ("Curcio"), a teacher employed by the Department of Education ("DOE"), brings this Article 78 proceeding seeking a declaration that respondents' actions, including rating him Unsatisfactory ("U") for the 2005-06 school year and terminating his license as a physical education teacher, violated lawful procedure, were arbitrary and capricious, an abuse of discretion and made in bad faith. Additionally, Curcio requests that respondents: (1) Reverse or remove the "U" rating from his permanent record of employment within the DOE; (2) Reinstate his Physical Education license and his position under that license with all credit toward tenure; (3) Remove from his file all critical documents, including the report by the Special Commissioner of Investigation for the New York City School District ("Commissioner") that alleged his improper leave; (4) Pay damages, including lost wages and benefits; and (5) Award him reasonable attorneys' fees, costs and disbursements relating to this proceeding. Respondents contend that Curcio's violation of the DOE's sick leave policy justifies the termination of his

probationary employment under his Physical Education license and his "U" rating, and, thus, request the dismissal of Curcio's Article 78 proceeding together with costs.

I. Factual and Procedural Background

A. Movant's Pleading

Curcio avers that he has been employed by the DOE since 1984. From 1996 to 2005, he taught physical education at PS 71 under a Common Branch license, which applies to subjects usually taught in kindergarten through the sixth grade, and received a Satisfactory "S" in his annual evaluations. Curcio acquired tenure under his Common Branch license in 1999 and obtained his Physical Education license in 2003. Having a Physical Education license meant Curcio could teach through the twelfth grade and coach high school varsity basketball.

Curcio contends that, pursuant to New York Education Law Section 2573, he was eligible for tenure under his Physical Education license on or about May 17, 2006. On May 3, 2006, Curcio's immediate supervisor, Principal Lance Cooper, awarded him an "S" rating for the 2005-06 school year. As of that date, there was no criticism regarding Curcio's job performance or attendance for the year. In fact, the DOE consistently described Curcio as an "excellent teacher, [an] ... example for his students and a leader among his fellow teachers."

However, on May 11, 2006, the local Instructional Superintendent, Dennis Sanchez, and the Community Superintendent for District 8, Dov Rokeach, presented Curcio with a Commissioner's report, dated May 5, 2006, alleging he violated the DOE's sick leave policy. The Commissioner referred to an anonymous letter, dated February 2006, regarding Curcio's misuse of sick days as the source for its investigation. According to the report, Curcio traveled to Florida on June 14, 2005 and returned on June 18, 2005. However, on May 26, 2005, Curcio

only requested personal leave without pay for June 16 and 17, 2005. Curcio ultimately took June 15, 2005 as a "self-treated sick day" for which he was paid, even though he neither requested that date as a personal day, nor did the DOE grant him the day off. Although he depleted his vacation days, Curcio contends that Principal Cooper allowed him to take June 15, 2005 as a sick day due to his medical condition (severe ulcerative colitis). He claims the Commissioner left this fact out of its report.

Curcio further contends that respondents considered his single day of absence "misconduct." On that basis alone, they recommended he receive a "U" rating for the 2005-06 school year, even though the alleged misconduct occurred the previous year. Despite not finding a pattern of absence or abuse, respondents Sanchez and Rokeach changed Curcio's "S" rating to a "U" on May 15, 2006, overriding Principal Cooper's assessment of Curcio's performance for the 2005-06 school year. Curcio insists respondents "whited out" the "S" and typed in a "U" on an altered form to hide the fact they changed Curcio's original rating. On the same day, respondents notified Curcio in writing that they were denying his Certification of Completion of Probation and tenure under his Physical Education license. Curcio contends that, pursuant to New York Education Law Section 2573(1)(a), respondents were obligated to notify him "in writing not later than sixty days immediately preceding the expiration of his probationary period" that they were not recommending him for tenure. He asserts that their May 15, 2006 letter falls far short of the statutory sixty-day notice period, even though the alleged misconduct occurred nearly a year earlier.

Moreover, Curcio avers that he filed an appeal regarding his "U" rating and denial of Certification of Completion of Probation months ago, yet respondents still have not provided him

a hearing. Within that time, Curcio claims he suffered a loss of job opportunities with the DOE and reputational, emotional and economic injuries. Curcio contends that if he waited to commence this proceeding until he exhausted his administrative remedies, the applicable four-month statute of limitations pursuant to CPLR Section 217 would have expired. Therefore, he filed this petition on September 15, 2006 and sent respondents' counsel an amended petition on or about November 15, 2006.

B. Respondents' Proof

Respondents contend that the sole issue in this case is whether Curcio teaches under his Common Branch or Physical Education license. Curcio, respondents claim, continues to be a tenured Common Branch teacher at PS 71. From May 17, 2004 until May 16, 2006, he acted as a "probationary" teacher under a Physical Education licence. Upon the termination of that license, Curcio resumed service as a tenured teacher under his Common Branch license and did not miss a single day's pay or benefits. Additionally, his salary, promotional opportunities and place of work did not change.

Respondents further assert that Curcio's misconduct amply justifies the termination of his probationary employment and his "U" rating. They maintain that as early as May 26, 2005, Curcio already requested two days off, and on May 27, 2005, Curcio's mother made flight reservations that included June 15, 2005. Therefore, respondents find it "inescapable that Curcio always intended to take June 15, 2005 off from work; Curcio simply decided to use a 'sick day' to do so." Furthermore, they insist Curcio was in school on Tuesday, June 14, 2005 and taught classes before his 3:35 p.m. flight to Florida. Respondents claim that Curcio "comes to Court because he got caught, and now he requests that the Court substitute its judgment for that of the

DOE."

Additionally, respondents insist that Curcio clearly violated DOE's sick day policy. For example, the Chancellor's Regulation C-603 Section 1 states, "The importance of early notification and application for excuse of absence of leave cannot be overemphasized." Section 9 further prohibits a DOE employee "who is seeking approval for an actual absence, on account of illness, to leave New York City without the express, written permission of the Chancellor or School Medical Director, as such employee must be available for examination by the medical bureau." Respondents aver that Curcio violated these specific provisions by failing to give notice of his anticipated absence and taking an alleged self-treated sick day outside the city. Therefore, "Curcio's admitted violation of DOE regulations, which prohibit teachers from calling in sick from outside the state, is more than sufficient to justify the termination of [his] probationary service."

Contrary to Curcio's allegations, respondents maintain their actions were legal, proper, rational and in conformity with the Constitution and all applicable laws, rules and regulations, and were neither arbitrary nor capricious, or made in bad faith. Respondents concede that their probationary termination decision was complete upon Curcio's termination and is ripe for Article 78 review. However, they insist that this part of Curcio's proceeding must be dismissed because he failed to state a cause of action. Additionally, respondents claim Curcio cannot challenge his "U" rating until he exhausts all of his administrative remedies. Therefore, they contend this part of Curcio's proceeding should be dismissed as well.

II. Conclusions of Law

A. Article 78 Proceeding

A court reviewing an Article 78 proceeding must judge the propriety of an administrative action solely on the reasons cited by the agency. *See Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). The administrative action must be upheld unless it "shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." *See Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000). Additionally, a petitioner who seeks an Article 78 review of an administrative action must commence the proceeding "within four months after the determination to be reviewed becomes final and binding upon the petitioner." *See Walton v. New York State Dept. of Corr. Servs.*, 8 N.Y.3d 186, 194 (2007) (quoting CPLR 217). An administrative determination becomes "final and binding" when there is: (1) completeness of the determination, and (2) exhaustion of administrative remedies. *Id.* In deciding the point at which a petitioner's administrative remedies are exhausted, courts must take a "pragmatic approach." *Id.* at 196; *see also Parent Teacher Asso. of P.S. 124M v. Bd. of Educ.*, 138 A.D.2d 108, 112 (1st Dept. 1988) (considering determination "ripe for review" when it impacts the petitioner who is thereby aggrieved). Therefore, the exhaustion rule is not an inflexible one and need not be followed when an agency's action is challenged as unconstitutional or beyond its grant of power, when pursuit of an administrative remedy would cause irreparable injury, or when it would be futile. *Watergate II Apartments v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978); *see also Koultukis v. Phillips*, 285 A.D.2d 433, 435 (1st Dept. 2001).

Here, respondents concede that their probationary termination decision was complete upon Curcio's termination and is ripe for review. On the other hand, respondents claim that Curcio's proceeding regarding his "U" rating is premature, as he "has failed to exhaust his

administrative remedies and the U[nsatisfactory] rating is not yet final." *See Bonilla v. Bd. of Educ.*, 285 A.D.2d 548, 549 (2nd Dept. 2001) ("[T]he determination that the petitioner's teaching performance was unsatisfactory [does] not become final and binding until the Chancellor denie[s] his appeal and sustain[s] his rating."). Because respondents concede that the "U" rating is not yet ripe for review, the statute of limitations on that portion of petitioner's proceeding will not begin to run until the final determination is rendered, *viz.*, a determination after review by the Chancellor's Committee. *Id.* In light of this fact, that portion of Curcio's petition that is not yet ripe (his "U" rating) is dismissed, and Curcio may commence a new proceeding to seek relief on that claim should the Chancellor's review process not provide him with the result he desires.

B. New York Educational Law Section 2573(1)(a)

New York Education Law Section 2573(1)(a) (hereinafter "Section 2573") mandates: "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 probationary period." Although a probationary teacher is subject to termination without a hearing, he or she should not be deprived of notice when the termination is based on allegations of misconduct. *See Tucker v. Bd. of Educ.*, 82 N.Y.2d 274, 279 (1993). Thus, Section 2573 requires sixty days' notice whenever a probationary teacher is denied tenure, irrespective of the reasons for the tenure denial or when those reasons arise. *Id.* (citing Section 2573). Furthermore, there is nothing in the statute or in its legislative history that persuades courts to read in an exception that would be contrary to the statute's broader purpose of providing probationary teachers with minimal notice of tenure denials to enable them to seek other employment. *Id.*

Consequently, Curcio presents evidentiary facts that indicate respondents failed to provide adequate notice pursuant to Section 2573 and violated their own procedures when they terminated his probationary license. The Commissioner and respondents received the anonymous letter regarding Curcio's alleged misbehavior during February 2006 and subsequently began their investigation. Therefore, the respondents had well over sixty days to alert Curcio that he was under investigation and that they were going to deny his probationary license and tenure. Instead, the respondents did not present Curcio with the Commissioner's report until May 11, 2006, at least three months after their investigation began. Moreover, they issued Curcio's denial of Certification of Completion of Probation on May 15, 2006, only two days before his eligibility to receive tenure. Regardless of whether Curcio still maintained tenure under his Common Branch license, respondents were obligated to notify him no later than March 18, 2006, as there is no exception to Section 2573. *See Tucker*, 82 N.Y.2d at 279. Accordingly, respondents' failure to provide Curcio adequate notice constitutes arbitrary and capricious behavior.

Respondents also acted arbitrarily when they violated their *own* policies and procedures. For example, respondents failed to follow the *Rating Pedagogical Staff Members* manual written by the New York City Department of Education's Division of Human Resources. The manual provides that when a school rates its employees as Satisfactory or Unsatisfactory, it should take into account "all events, incidents and staff development activities which occurred during the rating period." This "rating period" is the school year for which the rating is given. The manual also explains that "documents describing events which pre or post-date the period of evaluation," in addition to "unsigned documents" and "illegible or anonymous material," shall be inadmissible at reviews. Curcio's alleged violation occurred in the 2004-05 school year.

According to respondents' own policy, any violation that occurred during that school year should not have been considered in their rating of Curcio for the 2005-06 school year. The anonymous letter which informed respondents of Curcio's alleged misuse of sick days also was inadmissible. Thus, respondents arbitrarily and capriciously violated their own policies.

C. Removal of Critical Documents from Petitioner's File

The Unified Federation of Teachers contract provides a process to review documents in a public school teacher's file. Furthermore, "an aggrieved union member whose employment is subject to terms of a collective bargaining agreement entered into by his union and employer must first avail himself of the grievance procedure set forth in the agreement before he can commence an action." *Cantres v. Bd. of Educ.*, 145 A.D.2d 359, 360 (1st Dept. 1988). Because Curcio entered into a collective bargaining agreement (via the Teachers Union) with New York City, he must avail himself of the agreement's applicable procedure. Curcio seeks the removal of all critical documents from his file, yet he fails to exhaust his contractual remedies. Thus, his requested relief must be denied.

D. Award of Reasonable Attorneys' Fees, Costs and Disbursements

New York CLS CPLR Section 8601 (hereinafter "Section 8601") states:

> [E]xcept as otherwise specifically provided by statute, a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust. Whether the position of the state was substantially justified shall be determined solely on the basis of the record before the agency or official whose act, acts, or failure to act gave rise to the civil action.

The phrase "substantially justified" has been interpreted as justified to a degree that could satisfy a reasonable person or having a "reasonable basis both in law and fact." *See Barnett v. New York*

State Dep't of Social Servs., 212 A.D.2d 696,697 (2nd Dept. 1995) (citing *Pierce v. Underwood*, 487 U.S. 552, 552 (1998)). A determination of whether the government's position is substantially justified and whether counsel fees should be awarded is left to the sound discretion of the trial court and is reviewable as an exercise of judicial discretion. *Id.* Because the majority of Curcio's claim is unsuccessful, his motion to collect attorneys' fees, costs and disbursements is denied. Additionally, Curcio is not entitled to lost wages and benefits, as he did not miss a single day's pay or benefits, and his salary did not change. Accordingly, it is

ORDERED that respondents' motion to dismiss the portion of Curcio's Article 78 proceeding that is not ripe for review (his "U" rating) is dismissed without prejudice and it is further

ORDERED that respondents' motion to dismiss the portion of Curcio's Article 78 proceeding regarding his Physical Education license and his position under that license is denied; and it is further

ORDERED that Curcio's Article 78 proceeding requesting the reinstatement of his Physical Education license is granted, and the license is reinstated, *nunc pro tunc*, to May 15, 2006; and it is further

ORDERED that Curcio's motion demanding the reimbursement of lost wages and benefits is denied; and it is further

ORDERED that Curcio's motion requesting an award of reasonable attorneys' fees, costs and disbursements is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: June 13, 2007
New York, NY

SHIRLEY WERNER KORNREICH