

**Volchok v City of N.Y.**

2008 NY Slip Op 32183(U)

August 1, 2008

Supreme Court, New York County

Docket Number: 0105137/2006

Judge: Eileen A. Rakower

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

PRESENT: **EILEEN A. RAKOWER**  
J.S.C.

PART 5

Index Number : 105137/2006  
**VOLCHOK, SUSAN**  
VS.  
**CITY OF NEW YORK**  
SEQUENCE NUMBER : 005  
REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1

2

3, 4, 5, 6

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits \_\_\_\_\_

~~Replying Affidavits~~ prior submissions

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1044).

Dated: August 1, 2008  
[Signature]

[Signature]  
**EILEEN A. RAKOWER** J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
SUSAN VOLCHOK,

Petitioner,

Index No.  
105137/06

- against -

Mot. Seq. 005

THE CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF EDUCATION  
JOEL KLEIN,

Respondents.

Decision  
and Order

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HON. EILEEN A. RAKOWER:

Petitioner was a Teaching Fellow with the New York City Department of Education (City) until December 16, 2005 when she was terminated from her job. Petitioner brought suit against City on April 16, 2006, stating a number of causes of action which, other than her third cause of action, were dismissed by the court on November 26, 2007. The court found that petitioner's third cause of action, sounding in Article 78, should remain. By stipulation dated December 11, 2007, City agreed to permit petitioner to file an Article 78 proceeding in January, 2008, and it was ultimately filed on February 29, 2008. The court dismissed the petition by decision dated May 19, 2008, stating that the four month statute of limitations had expired. Petitioner now files this motion to re-argue stating that the Court erred in failing to apply the "relation back" principal of CPLR § 203(f). City does not oppose the motion to re-argue, stating that the court raised the issue of the statute of limitations *sua sponte*, this notwithstanding City's fourth defense in its original answering papers dated March 7, 2008. (See page 11, paragraph 86, "The petition is barred by the applicable statute of limitations.") City does oppose the petition. Although petitioner has failed to comply with CPLR § 2214 (c), the court has retrieved the prior pleadings in this matter to address the merits of the petitioner's application.

Petitioner was accepted by City in the NYC Teaching Fellows Program in July, 2005. She began teaching in the Fall, 2005 semester and her problems in the program began immediately. By letter dated September, 19, 2005, petitioner wrote to the school principal apologizing for her use of profanity in class. The following day, plaintiff argued, in front of the class, with the Guidance Counselor who was present

in her class as a visiting lecturer, which led the Guidance Counselor to write a memo to the principal regarding the incident. Before the end of the month, on three separate occasions, three different students filed complaints against petitioner involving allegations of profanity, name calling and physical behavior which could lead to the injury of a student. On September 30, 2005, "as a precautionary measure," petitioner was removed from the classroom while these "serious allegations" of improper behavior were investigated.

The principal conducted the investigation and it was determined that the allegations were "substantiated;" plaintiff had engaged in "verbal abuse" and "corporal punishment." Petitioner was advised of these findings by letter dated November 10, 2005. On November 15, 2005, petitioner was evaluated by the principal who rated her work as "unsatisfactory." Petitioner was advised by letter dated the same day that the local superintendent would review the matter to consider whether her service would be discontinued as of December 16, 2005. She was advised that she could submit a written response to her evaluation for his consideration. On November 22, 2005, petitioner formally requested a review of her performance evaluation. She was informed that a review hearing would be held on December 14, 2005 before the Chancellor's committee. Petitioner did not appear for the review and the panel was advised by petitioner's union representative that he had received a phone call from petitioner's attorney who had advised her not to appear. On December 16, 2005 plaintiff was terminated from her job.

Petitioner's third cause of action stated:

In all their dealings with plaintiff herein, including but not limited to terminating plaintiff from their employment and the Teaching Fellows Program, the City and the Department of Education acted irrationally, arbitrarily and contrary to law.

Petitioner's Article 78 proceeding seeks "mandamus to compel" respondents to grant her a hearing regarding the reasons for her removal from the Teaching Fellows Program or, in the alternative, she seeks "mandamus to review" the decision to terminate petitioner's employment and remove her from the Teaching Fellows Program. In addition, petitioner seeks attorney's fees, costs and disbursements.

A court may only interfere with the determination of an administrative agency if there is no rational basis or foundation in fact for the action complained of, and the

exercise of discretion is arbitrary and capricious. Where a reviewing court finds that the administrative body has not acted arbitrarily but within its lawful authority, the court has no alternative but must confirm the determination. (*Matter of Pell v. Board of Educ.*, 34 NY2d 222. (1974)). The determination must be supported by substantial evidence, based on the entire record. (*Purdy v. Kreisberg*, 47 NY2d 354 (1979)). Substantial evidence is “such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.” (*300 Gramatan Ave. Assoc. v. State Div. Of Human Rights*, 45 NY2d 176, (1978)).

A petitioner seeking mandamus to compel “must have a clear legal right to the relief demanded and there must exist a corresponding non-discretionary duty on the part of the administrative agency to grant that relief.” (*Scherbyn v. Wayne-Finger Lakes Bd. Of Coop Ed. Serv.*, 77 N.Y.2d 753, 757 [1991]). In a proceeding seeking mandamus to review, the court examines actions involving the exercise of discretion and the standard of review “is whether the agency determination was arbitrary and capricious or affected by an error of law.” (*Id.* at 758).

Here, as a probationary teacher, petitioner could “be discharged for ‘almost any reason, or for no reason at all’ as long as it is not ‘in bad faith or for an improper or impermissible reason.’ ” (*Duncan v. Kelly*, 9 NY3d 1024 [2008] quoting *Matter of Swinton v. Safir*, 93 NY2d 758 [1999]). “It is well settled that a probationary employee may be discharged without a hearing and without a statement of reasons in the absence of any demonstration that dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional law.” (*Matter of York v. McGuire*, 63 NY2d 760 [1984]). It is petitioner’s burden to show bad faith on behalf of her employer. (*Thomas v. Abate*, 205 AD2d 454 [1<sup>st</sup> Dept. 1994]).

Petitioner’s argument that she was entitled to a pre-termination hearing or that she is now entitled to a hearing on the matter of her termination is meritless. (See, *Matter of York v. McGuire, supra*). Here, a hearing was scheduled, all other parties were present, but petitioner refused to participate, instead sending a message through her union representative that her attorney advised her not to appear.

Similarly, petitioner’s argument that the decision to terminate her employment was arbitrary, capricious and affected by an error of law is unavailing. The school principal’s investigation into the allegations of corporal punishment and verbal abuse substantiated this serious misconduct. Accordingly, there was clearly a rational basis for petitioner’s termination. (*Matter of Pell v. Board of Education, supra*).

Lastly, petitioner's allegations that she was dismissed in bad faith for the Constitutionally impermissible reason of racial discrimination is equally unpersuasive. Petitioner claims that she once "overheard an administrator of the School, who was African-American, say something to the effect of 'these white girls come to our school and try to take over our kids.'" Assuming the truth of petitioner's claim, there is no evidence that petitioner was the subject ("these white girls") of the comment. The other circumstance that petitioner recounts to establish that she was the victim of racial discrimination is based upon her perception of the Guidance Counselor's motivation for a perceived snub during a lesson about racial diversity. As such, rather than competent proof of racial animus, petitioner's explanation and reasoning is bald speculation. (*Che Lin Tsao v. Kelly*, 28 AD3d 320 [1<sup>st</sup> Dept. 2006]).

Petitioner, under the circumstances presented here, has "no clear right" to the hearing that she demands (*Scherbyn v. Wayne-Finger Lakes Bd. Of Coop Ed. Serv.*, *supra*), and there is no evidence that the Department of Education's decision to terminate this probationary employee was arbitrary, capricious, affected by an error of law or based upon bad faith or an impermissible purpose. (*Id.*; *Che Lin Tsao v. Kelly*, *supra*). Wherefore, it is hereby

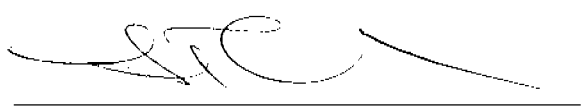
ORDERED that the motion to reargue is granted; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and judgment of the court.

All other relief requested is denied.

Dated: August 1, 2008



EILEEN A. RAKOWER, J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been entered by the court and notice of entry should be given to the parties to obtain entry. It is not to be used as a basis for appeal or enforcement.  
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