

**Matter of Berkowitz v New York City Dept. of
Educ.**

2008 NY Slip Op 33287(U)

December 8, 2008

Supreme Court, New York County

Docket Number: 114731/07

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
WALTER B. TOLUB

PRESENT: _____

PART 15

Index Number : 114731/2007
BERKOWITZ, RONALD
VS.
QUAIL, JAMES
SEQUENCE NUMBER : 002
RESTORE ACTION TO CALENDAR

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

IS DECIDED

*Notations for the County Clerk
and Justice of the Peace should be served by the County Clerk
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1415).*

Dated: 2/8/08


WALTER B. TOLUB 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: IAS PART 15

-----X
In the Matter of an Application Pursuant to
CPLR Article 78

RONALD BERKOWITZ,

Index No. 114731/07

Petitioner,

-against-

NEW YORK CITY DEPARTMENT OF
EDUCATION, COMMUNITY SUPERINTENDENT
JAMES QUAIL, and PRINCIPAL SHARON MADDIE

Respondents.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry of judgment has not been mailed to the
parties. In person at the Judgment Clerk's Desk (Room
141B).

-----X
WALTER B. TOLUB, J.:

Pursuant to an undated stipulation, this matter was restored to this Court's calendar, and the petition was amended to reflect the fact that an administrative appeal was rejected.

The petitioner Ronald Berkowitz (Mr. Berkowitz) brings this Article 78 proceeding for a judgment annulling his unsatisfactory rating and subsequent termination from employment, and reinstating him to his position as a probationary teacher with full back pay and benefits. The proposed amended complaint (*sic* petition) raises the additional claim that Berkowitz should be "compensated" for a line of duty injury. The proposed amended petition does not claim that Mr. Berkowitz is disabled.

Mr. Berkowitz was appointed a New York City public school teacher on September 24, 2006, upon which date his probationary

period of three years commenced (Education Law § 2573 [1] [a]). On April 26, 2007 Mr. Berkowitz was struck in the groin by a student. As a result of the injury, Mr. Berkowitz spent 27 days in the hospital and did not return to work for the remainder of the school year. Prior to April 26, 2007, Mr. Berkowitz was absent a total of 5 days.

Mr. Berkowitz taught a second grade class for a total of 80 days. During that period, he received one satisfactory observation report, and three unsatisfactory observation reports. As a result, the Principal and the Superintendent decided to discontinue Mr. Berkowitz's services. The decision to fire Mr. Berkowitz was also based upon Mr. Berkowitz's excessive absences. After a hearing, the decision terminating Mr. Berkowitz was confirmed by a Committee of the Department of Education's Office of Appeals and Review. The Committee found that more than enough evidence was presented to indicate that Mr. Berkowitz rendered an "unacceptable level of instructional service during the rating period."

In support of the petition, Mr. Berkowitz argues that his termination was made in bad faith, and the rejection of the unrebutted hearing testimony of his expert witness constituted an abuse of discretion. The amended petition also alleges that the respondents failed to process Berkowitz's paper work so that he could be "compensated" for the line-of-duty injury.

Judicial review of the determination of a body or officer is

limited to whether the determination was made "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). Therefore, a court may not substitute its judgment for that of an administrative agency when there is a rational basis for the agency's determination (*Matter of Nehorayoff v Mills*, 95 NY2d 671 [2001]). A judicial review of a determination to discharge a probationary employee is limited to an inquiry as to whether or not the discharge was made in bad faith (*Matter of Johnson v Katz*, 68 NY2d 649 [1986]). A probationary employee is subject to termination for any reason, or for no reason, and without explanation, so long as the termination is not either in bad faith, or for an impermissible reason (*Matter of Swinton v Safir*, 93 NY2d 758 [1999]). The petitioner bears the burden of demonstrating, by competent proof, that a substantial issue of bad faith exists (*Matter of Che Lin Tsao v Kelly*, 28 AD3d 320 [1st Dept 2006]).

Mr. Berkowitz has failed to establish that his termination was "for a constitutionally impermissible purpose, violative of a statute, or done in bad faith" (*Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763, 765 [1988]). The amended petition's admission that he received a total of three unsatisfactory performance reviews while on probation, on its face shows a good faith basis for Mr. Berkowitz's discharge, requiring dismissal of the petition

(*Matter of Jones v New York City Health and Hosps. Corp.*, 5 AD3d 338 [1st Dept 2004]). Respondents had the authority to terminate Mr. Berkowitz's employment based solely upon his series of poor performance reviews. In that light, the court need not consider whether or not there is support for the finding of excessive absences.

Probationary teachers, such as Mr. Berkowitz, who are to be terminated do not have protection of hearing procedure and as general rule are subject to termination at any time for any reason (*Matter of Tucker v Board of Educ., Community School Dist. No. 10*, 82 NY2d 274 [1993]). The fact that Mr. Berkowitz received a single favorable evaluation, as well as unfavorable ones, during the probationary period, is insufficient to raise a triable issue of fact as to whether or not his termination from employment was grounded in bad faith, improper motive, arbitrariness or capriciousness (*Matter of York v McGuire*, 63 NY2d 760 [1984]).

Finally, although a probationary employee may not be discharged in order to frustrate an application for disability retirement (*Matter of Bellman v McGuire*, 176 AD2d 583 [1991]), the amended petition fails to allege that Mr. Berkowitz is disabled. On the contrary, Mr. Berkowitz seeks reinstatement.

