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

PRESENT: **HON. CAROL EDMEAD** PART 35

Index Number : 108965/2008

COHN, RACHEL

VS.

BOARD OF EDUCATION

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 12/31/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this 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 the accompanying Memorandum Decision, it is hereby

ORDERED and ADJUDGED that the placement by respondents Board of Education of the City School District of the City of New York and Joel I. Klein, in his official capacity as Chancellor of the City School District of the City of New York of a letter, dated February 29, 2008, in petitioner's personnel file, constituted disciplinary action that was in violation of lawful procedure, arbitrary, capricious and an abuse of discretion; it is further

ORDERED that respondents are directed to expunge said letter from petitioner's personnel file forthwith; and it is further

ORDERED that respondents serve a copy of this order with notice of entry upon all parties within 20 days of entry.

The Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 1/9/09

A. Edmead

J.S.C.

HON. CAROL EDMEAD

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 35

In the Matter of the Application of
RACHEL COHN,

Petitioner,

-against-

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, and JOEL I. KLEIN, in his official capacity as CHANCELLOR of the CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondents.

For a Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules.

Index No. 108965/2008

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Rachel Cohn ("petitioner") moves for an order and judgment, pursuant to Article 78 of the CPLR: (1) declaring that the placement by respondents Board of Education of the City School District of the City of New York ("DOE") and Joel I. Klein, in his official capacity as Chancellor of the City School District of the City of New York (the "Chancellor") (collectively "respondents") of a letter, dated February 29, 2008, in petitioner's personnel file, constituted disciplinary action that was in violation of lawful procedure, arbitrary, capricious and an abuse of discretion; and (2) compelling respondents to expunge the letter from petitioner's personnel file.

Background

Petitioner is currently employed by respondent DOE as a tenured Kindergarten teacher at P.S. 7Q in Queens, New York. On or about September 27, 2007, petitioner and Principal Sara Tucci ("Principal Tucci") engaged in a discussion concerning the duties and responsibilities of paraprofessionals. During the course of this discussion, Principal Tucci allegedly raised her voice at petitioner. Thereafter, petitioner allegedly uttered words to the effect that Principal Tucci should watch her "Latin temper."

On or about November 16, 2007, Principal Tucci filed a complaint with DOE's Office of Equal Opportunity ("OEO"), alleging discrimination based on her ethnicity. Thereafter, the OEO conducted an investigation by interviewing petitioner, who was accompanied by her Union Representative Rosemary Parker, Principal Tucci, and two witnesses to the incident: the principal's secretary Angela Ehrefman and an assistant principal Maria Farazdel.

On or about January 28, 2008, after completing its investigation, the OEO substantiated Principal Tucci's allegations, finding that petitioner's comment was inappropriate and may constitute harassment based on ethnicity in violation of Chancellor's Regulation A-830. By letter dated January 29, 2008, the OEO advised Principal Tucci that as principal, she was responsible for any corrective action to be taken as a result of the complaint.

Principal Tucci then met with petitioner and her UFT representative on February 27, 2008 to discuss the OEO's report and its decision to substantiate the allegations made in Principal Tucci's complaint of discrimination. Principal Tucci then prepared a letter, dated February 29, 2008 (the "letter"), documenting the February 27, 2008 meeting, the OEO findings, and Principal Tucci's conclusions, and placed the letter in petitioner's personnel file.

The letter reads as follows:

On Wednesday, February 27, 2008, I met with you and your UFT representative, Rosemary Parker, to discuss the findings of an OEO investigation. The OEO investigation addressed an incident which occurred in the school in my presence. Specifically, during a conversation early in October you came to my office to discuss duties and responsibilities of paraprofessionals. I informed you that I was in the process of hiring more paraprofessionals and I was also resolving all issues concerning their duties. You informed me that Student A has been going home dirty since legally the paraprofessional could not attend to this student since his IEP did not specify such assistance. Again, I responded that we were contacting the parents of Student A and that as of now we needed to work together until I have more paraprofessionals to attend to all students with special needs. At the end of the conversation you referred to me as having a "Latin temper." Your comment was an insult to my personal character and the character of all Latin people. I referred the matter to the OEO for its action. I also referred statements of witnesses, including the Assistant Principal Maria Farazdel which substantiated your comment to me.

OEO concluded its findings dated January 29, 2008 and substantiated the allegation against you and found you acted in violation of Chancellor's Regulations A-830, which outlines the Department of Education's Equal Opportunity Policy. I was directed by OEO to take corrective action regarding the findings.

At our meeting, I discussed with you the racial ethnic remark you made against me and also I shared with you the conclusion of the investigation conducted by the Office of Equal Opportunity. You responded that you did not mean it in any insulting manner and apologized for your unacceptable and biased comment. You explained that in the French culture and language such comment is not biased or discriminatory. You also said that you felt I was yelling at you. I explained to you that I was not upset with you and moreover, I was not yelling at you.

As per the findings of the OEO, which were substantiated, the witnesses' statements and your explanation, I conclude that you behaved in a discriminatory and unprofessional manner. You violated the Chancellor's regulations A-830.

Please be advised that this matter may lead to further disciplinary action, including an unsatisfactory rating and charges which may lead to your termination.

Petitioner's Contentions

Petitioner maintains that the letter should be expunged because it was a letter of reprimand and placed in her file in violation of Education Law § 3020-a. Prior to this

disciplinary action, no written statement of charges was filed, no written statement of charges and potential penalties was sent to petitioner, no notification of petitioner's rights were ever sent to petitioner, and petitioner was never afforded a hearing as required by Education Law § 3020-a.[1]

According to the factors enunciated by decisions of the Court and the Commissioner of Education, the letter is a letter of reprimand because its entire focus was to chastise petitioner for the remark she made and for behaving in a "discriminatory and unprofessional manner." The letter castigated petitioner for violating Chancellor's Regulation A-830, referenced investigative findings of the OEO and witness statements, and stated that "further disciplinary action" may follow. The purpose of the letter was not to warn petitioner to change her behavior. Also, in correspondence dated March 17, 2008 requesting that petitioner sign the letter, respondents refer to the letter as a "disciplinary letter." Thus, as the letter was issued without the protection of Education Law § 3020-a, it should be expunged.

Respondents' Opposition

Respondents' actions were entirely lawful and proper, as the DOE was entitled to place a letter of this nature in petitioner's personnel file.[2] Education Law § 3020 expressly provides in § 3020(4) that § 3020-a procedures may be modified by negotiated agreements, and here, the elimination of the right to grieve letters placed in files operates as a modification of the statute's procedures. Indeed, UFT has waived the procedures of Education Law § 3020-a in favor of an alternate process with respect to material placed in teachers' files. And, UFT's waiver does not

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[1] On information and belief, no written charges were ever submitted to the community school district superintendent and no probable cause determination was ever made, as required by Education Law § 3020-a.

[2] According to respondents, petitioner did not write a response to the February 29, 2008 letter. Moreover, petitioner does not challenge the veracity of the letter in this proceeding.

violate public policy.

Article 21(A) of the collective bargaining agreement between the DOE and the UFT ("CBA") has governed the due process procedures for letters placed in tenured teachers' files for over 40 years.

According to Robert Waters ("Mr. Waters"), Deputy Director and Supervising Attorney of the Office of Labor Relations and Collective Bargaining ("OLRCB") of DOE,[3] the CBAs between the DOE and the UFT covering teachers and other employees each contain multi-step grievance procedures culminating in final and binding arbitration before a neutral party. These procedures have been used in the CBAs since at least 1963. Throughout the history of the collective negotiating relationship between the DOE and the UFT, dating back to at least 1967, the CBAs have contained provisions governing the placement of written material in the personnel files of teachers and other UFT represented employees. Since the 1975-1977 CBA, these provisions have been set forth in the "Due Process and Review Procedures" article of the CBA. Article 21(A)(1) and its predecessors provided, among other things, that "No material derogatory to a teacher's conduct, service, character or personality shall be placed in the files unless the teacher has had an opportunity to read the material." Further, prior to the CBA covering 2003-2007, Article 21(A)(5) and its predecessors provided, among other things, that "Material will be removed from the files when a teacher's claim that it is inaccurate or unfair is sustained."

According to Daniel Weisberg, Chief Executive for Labor Policy and Implementation for

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[3] According to his affidavit, Mr. Waters oversees all arbitrations and other proceedings before neutral parties that arise under the CBAs between the DOE and the various unions that represent DOE employees.

DOE,[4] in June 2005, a Fact Finding several-day hearing was held before a tripartite panel (the "Panel") regarding the elimination of the right to grieve material placed in teachers' files. The UFT never raised during negotiations the right to a hearing under Education Law § 3020-a before a disciplinary letter could be placed in a teacher's file. The Panel recommended, in part:

> the right to grieve letters to the file be eliminated. In exchange for foregoing this right, a teacher shall have the right to append a response to any letter; and if disciplinary charges do not follow, the letter and response will be removed from the file at the end of three years.

Based on the Panel's recommendation, on October 3, 2005, the DOE and UFT entered into a Memorandum of Agreement (the "MOA"), which extended the parties' CBA to October 12, 2007. The MOA provides that:

> Members may not grieve material in file. However, the teacher shall have the right to append a response to any letter. If disciplinary charges do not follow, the letter and response shall be removed from the file three years from the date the original material is placed in the file.

Thus, the grant of the petition would nullify agreements reached after years of difficult collective bargaining and violate New York's public policy of requiring public employees to abide by collective bargaining agreements. Further, it would result in compelling the DOE to participate in wasteful, time consuming, and duplicative hearings prior to placing letters in teachers' files. And, such a result would be grossly inequitable in that UFT members received valuable consideration (*i.e.*, 1.5% wage increase) in exchange for the elimination of the right to grieve letters placed in their files.

Further, the plain reading of the contract language underscores the UFT's waiver of §

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[4] According to his affidavit, Daniel Weisberg was the lead negotiator for the DOE in the CBA with the UFT for the rounds of bargaining that culminated in the CBA effective from June 1, 2003 to October 12, 2007 and from October 13, 2007 to October 31, 2009.

3020-a procedures, because the only teachers who are subject to "disciplinary charges" are tenured teachers. Article 21(A) governs "derogatory" material and governs the procedure for placing letters that are "disciplinary" in nature. Accordingly, the agreement between the parties and UFT's waiver are explicit, as the CBA permits the placement of disciplinary letters in the files of tenured teachers.

The CBA for 2007-2009 continues the parties' agreement that (1) disciplinary letters to file are not subject to the grievance process; (2) teachers have the right to answer the letters, and (3) the letters are removed from the teacher's file three years from the date of the letter's filing if disciplinary charges are not served.

Finally, according to Virginia Caputo, Director of the Office of Appeals and Reviews ("OAR") for DOE, petitioner's contention that letters of reprimand placed in teachers' files constitute discipline subject to Education Law § 3020-a, is contrary to the position taken by, and the practice of UFT, during her tenure at OAR. In the course of an appeal of an unsatisfactory rating, disciplinary letters and any teacher response appended thereto were routinely reviewed and considered as part of the appeal. At no time does she recall a defense raised by UFT on behalf of an applicant claiming that disciplinary letters to tenured teachers should not be considered in connection with an appeal of an unsatisfactory rating because such letters to the file violate Education Law § 3020-a.

Assuming the court finds that the terms of the CBA are incomplete, the bargaining history and past practices of the parties demonstrate that the CBA governs the due process owed to teachers for all disciplinary letters placed in teachers' files.

Reply

In further support, Howard Solomon, Director of the Grievance Department for the UFT, Local 2, American Federation of Teachers, AFL-CIO, states that the collective bargaining agreements between the DOE and the UFT contain multi-step grievance procedures, which culminate in the final and binding arbitration before a neutral party. These procedures have been a part of collective bargaining agreements since, at least, 1963. The DOE and the UFT entered into a Memorandum of Agreement dated October 3, 2005 ("MOA"), extending the parties' then-existing collective bargaining agreement to October 12, 2007. The MOA provides that Article 21(A)(5) of the collective bargaining agreement would set forth the following: "Members may not grieve material in file. However, the teacher shall have the right to append a response to any letter. If disciplinary charges do not follow, the letter and response shall be removed from the file three years from the date the original material is placed in the file." The language also appears in the current collective bargaining agreement between respondents and the UFT, effective October 13, 2007 - October 31, 2009.

By entering into this MOA, the UFT did not waive, explicitly or implicitly, any rights its members had and continue to enjoy under Education Law § 3020-a. No term or provision contained in the MOA indicates or evidences anything to the contrary. Whether the UFT argued during negotiations that teachers are entitled to a § 3020-a hearing before the a disciplinary letter could be placed in a teacher's file is immaterial.

Although DOE's agent, Mr. Waters, asserts that subjecting letters of reprimand to the Education Law § 3020-a process somehow contradicts the entire history of collective bargaining between the DOE and the UFT, the placement of the letter of reprimand at issue constitutes

"discipline" without resort to § 3020-a. Thus, the contractual grievance mechanism, and the history underlying it, is wholly inapplicable to the instant matter.

Further, the DOE's agent, Mr. Waters, contends that numerous arbitration awards demonstrate that disciplinary letters of reprimand were routinely subject to arbitral review for many years. However, such awards were issued in 1978, 1979, 2000 and 2003. The current collective bargaining agreement governing the terms and conditions of the employment of the member-employees of the UFT spans from October 13, 2007 - October 31, 2009. The incident in the instant proceeding occurred in February 2008. Thus, such awards have no bearing on the merits of the instant proceeding, as the awards were issued pursuant to collective bargaining agreements between the DOE and the UFT that are no longer in effect. As such, the granting of the instant petition would not nullify either the present or any past collective bargaining agreements reached between the DOE and the UFT. Further, if granted, the instant petition would not violate any public policy in New York requiring public employees to abide by the terms of collective bargaining agreements negotiated on their behalf.

The DOE's contention that the Education Law § 3020-a hearing would be a process far more time-consuming and burdensome than simply allowing the DOE to place improper letters in tenured teachers' personnel files for the purpose of disciplining them is inapposite to the instant proceeding.

Further, the existence of procedures in the CBA regarding options a teacher may have when confronted with derogatory material *does not grant the DOE the unbridled right* to place any derogatory material it sees fit into the teacher's file.

Analysis

A Court's determination in a special proceeding brought pursuant to CPLR Article 78 consists of assessing whether an agency's 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, including abuse of discretion as to the measure or mode of penalty imposed (CPLR 7803(3); *see Matter of Pell v Board of Educ.*, 34 NY2d 222, 231 (1974]).

Education Law § 3020-a states, in pertinent part:

> 1. No person enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for just cause and in accordance with the procedures specified in section three thousand twenty-a of this article or in accordance with alternate disciplinary procedures contained in a collective bargaining agreement covering his or her terms and conditions of employment . . ., provided, however, that any such alternate disciplinary procedures contained in a collective bargaining agreement that becomes effective on or after September first, nineteen hundred ninety-four, must provide for the written election by the employee of either the procedures specified in such section three thousand twenty-a or the alternative disciplinary procedures contained in the collective bargaining agreement and must result in a disposition of the disciplinary charge within the amount of time allowed therefor under such section three thousand twenty-a.

The MOA, Article 21(A)(1) states:

> No material derogatory to a teacher's conduct, service, character or personality shall be placed in the files unless the teacher has had an opportunity to read the material. The teacher shall acknowledge that he/she has read such material by affixing his/her signature on the actual copy to be filed, with the understanding that such signature merely signifies that he/she has read the material to be filed and does not necessarily indicate agreement with its content. However, an incident which has not been reduced to writing within three months of its occurrence, exclusive of the summer vacation period, may not later be added to the file.

Article 21 (A)(2) provides that teachers "shall have the right to answer any material filed and his/her answer shall be attached to the file copy."

Article 21(A)(5) states:

> ***Members may not grieve material in file,*** except that if accusations of corporal punishment or verbal abuse against a UFT-represented employee are found to be unsubstantiated, all references to the allegations will be removed from the employee's personnel file. [Emphasis added]
>
> However, the teacher shall have the right to append a response to any letter. If disciplinary charges do not follow, the letter and response shall be removed from the file three years from the date the original material is placed in the file.

A review of the caselaw involving the removal of derogatory letters from teachers' files reveals that whether the letter at issue is governed solely by the MOA or by Education Law § 3020-a turns on whether the letter constitutes is disciplinary reprimand or simply a critical administrative evaluation.

Starting with *Holt v Bd. of Educ. of the Webutuck Central School Dist.* (52 NY2d 625 [1981]), the issue on appeal was whether a written communication from a school administrator to a tenured teacher which criticized the teacher may be made a part of the teacher's personnel file without affording the teacher an opportunity for a hearing pursuant to §3020-a. The Court of Appeals found:

> The documents in issue, critical as they may be of the respective teacher's job performance, amount to nothing more than administrative evaluations which the supervisory personnel of the school district have the right and the duty to make as an adjunct to their responsibility to supervise the faculty of the schools. In our view, section 3020-a . . . was not intended . . . to apply to such evaluations and does not require a formal hearing as a prerequisite to the inclusion of such documents in the teachers' personnel file.
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> . . . . . .
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> The critical evaluations in issue fall within this permissible range of administrative evaluation. While the language of the administrators' letters may appear to some to be in the nature of a "reprimand" within the literal meaning of that word, it falls far short of the sort of formal reprimand contemplated by the statute. Although the sharply critical content of the letters is unmistakable, the purpose of such communications--to call to the

> teacher's attention a relatively minor breach of school policy and to encourage compliance with that policy in the future--is also clear. The purpose is to warn, and hopefully to instruct--not to punish. Further, the documents in question are issued by a single administrator. While the inclusion of such letters in the teacher's permanent file may have some effect on his future advancement or potential employability elsewhere, it is by no means as damaging as a formal reprimand issued by the board of education as the result of a determination of misconduct made by an impartial hearing panel. Each letter represents one administrator's view, not a formal finding of misconduct.
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> *Id.* at 661-663.

Citing *Holt*, the Commissioner of Education has enunciated several factors in determining the character of a letter placed in a teacher's file: (1) whether the letter is from the teacher's immediate supervisor or from the board of education; (2) whether the letter is directed towards an improvement in performance or is a formal reprimand for prior misconduct; (3) whether the letter is in the nature of a performance evaluation or a castigation for misconduct; and (4) the severity of the misconduct and of the admonition or reprimand (*see Darlene Jones-Hardwick v The Bd. of Education of the City School District of the City of New York*, Index No. 105457/07 (J. Acosta, Sup. Ct., New York Co., November 13, 2007) *citing Appeal of Richardson*, 24 Ed. Dept. Rep 104, 106, Decision No. 11,333).

In the case of *Darlene Jones-Hardwick v The Bd. of Education of the City School District of the City of New York*, Index No. 105457/07 (*supra*), the court found that the letter therein was disciplinary. Based on an incident related to another teacher's inappropriate physical contact with female students, petitioner therein, Ms. Hardwick, was found to have ignored, overlooked, or minimized the behavior on the part of the offending teacher. This finding came after an investigation by the Special Commissioner of Investigation ("SCI"). Petitioner therein met with her principal and a letter, with the attached SCI report was placed in Ms. Hardwick's file. The

court in *Hardwick*, found that the letter and the attachment were disciplinary in nature, thus triggering Education Law § 3020-a. The court's reasoning in *Harwick* is applicable herein:

> Here,...the December 22nd letter with the attached SCI report was disciplinary in nature. The letter was written in response to a report of the SCI, an officer charged with the investigation of claim; and the report referred to the investigation, interviews of witnesses and factual determinations. It was also not in the nature of a performance evaluation, but rather a castigation for misconduct in failing to report Michaelides' conduct and leaving the children alone with him notwithstanding petitioner's suspicions....Accordingly, petitioner's rights pursuant to § 3020-a have been denied.

The case of *Krohn v Bd. of Educ. of the City School Dist. of the City of New York*, Index No. 111902/06, slip op. (J. DeGrasse, Sup. Ct., New York Co., April 27, 2007) is also instructive:

> "The Office of Equal Opportunity ("OEO") has completed its investigation into [the complainant's] complaint alleging that you sexually harassed her on June 5th and 12th 2006. After a carefully [sic] review of the statements submitted by you [the complainant] and [a witness], it is OEO's determination that there is probable cause to believe that Chancellor's Regulation A-130 was violated [sic]....

The court in *Krohn* found:

> The subject letter in the instant case was not issued by petitioner's supervisor. It was issued by OEO, the bureau charged under Regulation A-830 with the duty to investigate claims of unlawful discrimination and harassment. The letter refers to an investigation, interviews of witnesses and a factual determination as opposed to an informal review. While no single factor is determinative, the identity of the author, the subject matter of the document and the official investigatory tenor of the material demonstrate that the document is in fact a disciplinary reprimand subject to the due process requirements of § 3020-a.

Likewise, in the instant case, the OEO conducted an investigation of Principal Tucci's complaint by interviewing petitioner, Principal Tucci and two witnesses to the incident and substantiated the allegations, finding that petitioner's comment was inappropriate and may

constitute harassment based on ethnicity in violation of Chancellor's Regulation A-830. In the instant case, although the letter that was ultimately placed in petitioner's file was written by her supervisor, Principal Tucci, it was based on OEO's written report: "Confidential OEO Report Chancellor's Regulation A-830" signed by an DOE Investigator and Reviewer. Said Report summarized Principal Tucci's complaint; detailed the investigation; and made a "Determination" that petitioner "...violated Chancellor's Regulation A-830 . . . " The letter was triggered by OEO's express direction that that Principal Tucci was responsible for any "corrective" action.

The letter herein does not offer constructive criticism, does not address a minor breach of conduct or protocol; and does not offer a suggestion for improvement. Instead, the letter conveys a finding and conclusion by the Principal Tucci that petitioner violated a Chancellor's Regulation by engaging in discriminatory acts. Thus, the letter herein cannot be categorized as an administrative evaluation. The letter rises to the level of a disciplinary reprimand. And, such a reprimand may not be issued to a teacher without a finding of misconduct pursuant to Education Law § 3020-a.

The second issue is whether the UFT waived its right to pursue removal of a disciplinary letter in file pursuant to Education Law § 3020-a, when the UFT negotiated and ultimately agreed to the MOA.

A similar argument was rejected in *Gutman v The Board of Education of the City School District of the City of New York* (18 Misc 3d 609 [Sup. Ct. New York Co. 2007]). In 2007, when the subject MOA was in effect, the court held that identical letters by a principal placed in two tenured teacher's files were disciplinary, and thus, subject to 3020-a. In *Gutman*, the DOE

argued that the letters were "simply statements by the school principal that derogate petitioners' conduct and are intended to warn or instruct." Further, respondents claimed that "Article 21(A) . . .provides for materials to be placed in a tenured teacher's personnel file without a hearing and for such material to be removed in three years if it does not become the subject of disciplinary charges."

In holding that the letters were subject to Education Law § 3020-a, and relying on, *inter alia*, *Holt* and *Appeal of Richardson*, the court noted the following:

> . . . the letters signed by the school principal were issued in response to the SCI's recommendation "that appropriate disciplinary action be taken against . . . [petitioners] Carrillo . . . and Gutman" and both the letter and the SCI's investigatory report were placed in each petitioner's personnel file. . . The principal's letters stated that she agreed with the SCI's findings that petitioners "showed a willful disregard for the welfare of children" by their failure to report any instances of inappropriate conduct that occurred between Michaelides [another teacher] and any students. The letters solely focused on the claimed past misconduct of the petitioners and castigated them for their actions. There is no indication that the letters were intended to encourage Carrillo and Gutman to improve their performance or that they were meant to instruct them as to future matters, as there were no suggestions regarding improvement nor any statements that the purpose of the letters was evaluative rather than disciplinary.
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> * * * * *
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> In addition, the letters cannot be viewed as correcting a "minor breach of school policy." (*Holt*, 52 NY2d at 633.) New York City Board of Education Chancellor's Regulation A-750 (Sept. 5, 2000) concerns reports of suspected child abuse. . . Moreover, section 3.2 of the regulation states: "[u]nder Social Service[s] Law, the willful and knowing failure to report child abuse may result in criminal action or civil liability if the employee has reasonable cause to suspect it. It may also result in Board disciplinary action against the employee." Here, both the principal's and the SCI's accusations that the petitioners endangered the welfare of children by failing to report alleged inappropriate touching could not only be detrimental to their careers, but also expose them to criminal and civil liability. Such serious allegations require that petitioners be afforded the due process protections available under Education Law § 3020-a.

Notwithstanding the respondents' argument that a disciplinary letter was subject to

Article 21(A) and that a hearing was not required, the court in *Gutman* required compliance with Education Law § 3020-a.

The record does not support a finding that the UFT waived its right to grieve and arbitrate a reprimand in the form of a disciplinary letter placed in a teacher's file. The record, instead, indicates that the types of letters contemplated by Article 21-A encompass those which are found to fall under the umbrella of administrative evaluation, even those which contain critical information *(see e.g., Marino v Shoreham-Wading River Central School Dist.*, Slip Copy, 2008 WL 5068639 EDNY 2008, *citing Holt, supra*; *O'Connor v Sobol,* 173 AD2d 74, 77, 577 NYS2d 716 [3d Dept 1991] [finding that a letter commenting on the petitioner's "poor judgment" in the classroom and directing future action on the part of the petitioner amounted to nothing more than an administrative evaluation and was properly included in the petitioner's personnel file without resort to the formal procedures set forth in Section 3020-a since it did not impose a punishment, but merely reminded the petitioner of school rules); *Tebordo v Cold Spring Harbor Central School District*, 126 AD2d 542, 543, 510 NYS2d 665 [2d Dept 1987] [finding that the letters of reprimand placed into the petitioner's personnel file fell within the permissible range of administrative evaluation and fell short of the formal reprimand contemplated by Section 3020-a); *see also Tomaka v Evans-Brant Central School District*, 107 AD2d 1078, 486 NYS2d 546 [4th Dept 1985], *aff'd*, 65 NY2d 1048, 494 NYS2d 697 [1985][holding that the procedural requirements of N.Y. Civil Service Law § 75, which is analogous to the requirements of Section 3020-a, did not apply to a letter admonishing the plaintiff, a senior clerk stenographer, for insubordinate action]).

Thus, as the letter constitutes not only "derogatory" material, but "disciplinary action," it

cannot be said that the UFT waived its right to an Education Law § 3020-a proceeding.[5]

Conclusion

This court finds that the inclusion of the letter in petitioner's file was a disciplinary act which can only be properly accomplished by resort to the statutory procedures set forth in section 3020-a of the Education Law. The letter herein is a reprimand and, because such a reprimand can only be issued through the procedures dictated in Education Law § 3020-a, said letter must be removed from the petitioner's file. Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the placement by respondents Board of Education of the City School District of the City of New York and Joel I. Klein, in his official capacity as Chancellor of the City School District of the City of New York of a letter, dated February 29, 2008, in petitioner's personnel file, constituted disciplinary action that was in violation of lawful procedure, arbitrary, capricious and an abuse of discretion; it is further

ORDERED that respondents are directed to expunge said letter from petitioner's

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[5] Although not dispositive, the Court notes that 3020-a(1) provides that tenured teachers may be disciplined, "in accordance with alternate disciplinary procedures contained in a collective bargaining agreement" as argued by respondents. However, "any such alternate disciplinary procedures contained in a collective bargaining agreement" "*must provide for the written election* by the employee of either the procedures specified in such *section three thousand twenty-a or the alternative disciplinary procedures contained in the collective bargaining agreement* . . . ." (Emphasis added). The record does not indicate that compliance with such written election condition is satisfied.

personnel file forthwith; and it is further

ORDERED that respondents serve a copy of this order with notice of entry upon all parties within 20 days of entry.

The Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: January 9, 2009

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD