

**Rosenkrantz v Board of Educ. of the City School
Dist. of the City of N.Y.**

2009 NY Slip Op 32076(U)

September 10, 2009

Supreme Court, New York County

Docket Number: 104174/09

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 104174/2009

ROSENKRANTZ, DONALD

vs
BRD OF EDUCATION OF THE

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion petition AND cross motion

be denied as attached

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

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 141B).

Dated: 9/10/09

EMILY JANE GOODMAN
NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

UNFILED JUDGMENT

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Application of DONALD ROSENKRANTZ,

Petitioner,

For a Judgment pursuant to Article 78
of the CPLR

Index No. 104174/09

-against-

THE BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,

Respondent.

-----X
Emily Jane Goodman, J.S.C.:

Petitioner Donald Rosenkrantz, a teacher, brings this proceeding to annul and expunge from his record (1) an "unsatisfactory" review (U rating) of a class presentation dated June 10, 2008, because the observation of that class was not preceded by a "Pre-Observation Conference" (POC); and (2) a U Annual Performance Rating for the 2007-2008 school year, which, petitioner claims, was based unfairly upon the U rating he received for the June 10, 2008 class. Petitioner claims that basing his annual rating on an "improperly conducted observation" of his class (Notice of Petition), was arbitrary and capricious, and an abuse of discretion. The Respondent Board of Education of the City School District of the City of New York (BOE) cross-moves to dismiss the petition.

I. Background

[*3]

Petitioner, a retired attorney, was hired by BOE as a high school teacher in February 2004. He achieved tenure in February 2007. In these years, petitioner regularly received a "satisfactory" (S) yearly performance rating.

In August 2007, petitioner was assigned to teach a GED Plus Program at Bronx Regional High School, teaching history and literacy to pre-GED students. He describes these students as "uniformly low level readers." Petition, at 2.

Petitioner's class was observed twice by one of the school's assistant principals, Janet Declat (Declat), in February and April 2008, respectively. Both observations were preceded by a POC. Petitioner received a U rating for the February class (*id.*, Ex. 3), but received an S rating for the April class, due to, among other things, Declat's approval of the fact that petitioner had adopted several of Declat's recommendations from her first observation. *Id.*, Ex. 4

On June 10, 2008, petitioner's class was observed by another assistant principal, Michelle Guzman (Guzman). This observation had not been preceded by a POC. Petitioner received a U rating from Guzman for that class. *Id.*, Ex. 6. Guzman explained at the hearing that the observation was considered an unannounced observation, not a formal observation, and therefore did not qualify for a POC.

Following these three reports, petitioner received a U

Annual Performance rating for the 2007-2008 year. *Id.*, Ex. 7.

On June 26, 2008, petitioner commenced an grievance of this U rating pursuant to Section 4.3.1 of BOE's By-Laws. A hearing was held pursuant to 4.3.2 of BOE's By Laws on November 20, 2008, attended by Petitioner, his union advocate, the principal and two assistant principals. *Id.*, Ex. 11. The U rating was sustained by the Chancellor's Committee by letter dated December 18, 2008 "as a consequence of poor delivery of instruction and failure to improve, despite support." *Id.*, Ex. 9B.

Petitioner claims that his appeal was unfairly decided because, under Article 8J of the Agreement between BOE and petitioner's union, a POC must precede an in-class observation of the teacher, which did not happen in the case of the June 10, 2008 classroom observation by Guzman. Consequently, petitioner maintains that it was unreasonable for the BOE to base its annual review on the U rating that he received following the June 10, 2008 class.

Petitioner also objects to each of the particular problems that Guzman reported concerning petitioner's handling of the June 10, 2008 class, which were set forth in a report containing "bullet points" separating each of the lesson's purported failures.¹ The list faulted him for such things as having no

¹The BOE sets forth the "bullet points" in its memorandum of law, at 4.

written lesson plan, and having management problems with regard to his deportment and manner of address of his students, and in "creating positive student relationships." BOE Memorandum of Law, at 4. In response to Guzman's U report, petitioner sent a three-page letter to Guzman objecting point-by-point to each of her negative observations. In this proceeding, petitioner also objects to the fact that Guzman waited until the end of the semester to observe his class, and make her comments, which did not allow petitioner enough time to make changes incorporating her recommendations.

Respondent notes that petitioner never made a grievance concerning Guzman's failure to afford petitioner a POC for her June 10, 2008 observation, but waited to grieve the U rating at the same time as he grieved his annual review for the 2007-2008 school year. Thus, BOE claims that petitioner failed to exhaust his contractual remedies before bringing the present proceeding.

II. Discussion

It is well settled that judicial review of administrative determinations is limited to a review as to whether the determination was arbitrary and capricious or unreasonable based on the administrative record. *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222 (1974); see also *Matter of Nelson v Roberts*, 304 AD2d 20 (1st Dept 2003).

Where the court detects a rational basis for the determination, the court "may not substitute its own judgment of the evidence for that of the administrative agency, but should review the whole record to determine whether there exists a rational basis to support the findings upon which the agency's determination is predicated.'" *Matter of Nelson v Roberts*, 304 AD2d at 23, quoting *Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 (1979).

The "arbitrary and capricious" rule, rather than the "substantial evidence" standard, applies in cases, such as this one, where there was no quasi-judicial hearing required by law. See *Matter of 1300 Franklin Avenue Members, LLC v Board of Trustees of Incorporated Village of Garden City*, 62 AD3d 1004 (2d Dept 2009).

Patently, "an employee covered by a[n] ... agreement which provides for a grievance procedure must exhaust administrative remedies prior to seeking judicial remedies." *Spano v Kings Park Central School District*, 61 AD3d 666, 670-671 (2d Dept 2009). In the present case, the petitioner's union's contract with the BOE provided for a grievance of an unsatisfactory rating (Contract, Article Twenty-One and Twenty-Two), if a request for such grievance is made within 30 days.

In the present case, petitioner never filed a grievance of the U rating he received after the June 10, 2008 observation of his class by Guzman. Therefore, under the petitioner's contract, petitioner lost the opportunity to object to this rating,

regardless of whether it was improperly given because it lacked a POC (*Villalba v Board of Education*, 50 AD3d 279 [1st Dept 2008] [U rating unreviewable due to failure to exhaust grievance procedures]).² The question, then, is whether the three ratings petitioner obtained in the 2007-2008 school year, of which two were U, formed a reasonable basis for the annual rating of U which he eventually received.

As noted, a court may not impose its own doubt about the facts in the discretion of the agency, especially because those reviewing Petitioner presumably have expertise in the area and unlike the court, have the opportunity to physically observe ~~Petitioner at work in the classroom.~~ Thus, even though certain of Guzman's observations seem petty in isolation³, in the absence of a display of irrationality, the decision to give petitioner an

²Petitioner's reliance on *Matter of Levine v Board of Education of City of New York* (272 AD2d 328 [2d Dept 2000]), *Matter of Persico v Board of Education, City School District, City of New York* (220 AD2d 512 [2d Dept 1995]), and *Matter of Schulman v Board of Education of City of N.Y.* (184 AD2d 643 [2d Dept 1992]) is misplaced, since each of these cases involve probationary employees, the treatment of whom involves rules that do not comport with procedures available to tenured employees, and none of these cases involved a grievance procedure applicable to evaluations of their performance predating their terminations, from which they could have, and must have, grieved prior to their terminations, as in the present case.

³For instance, Guzman's complaint that Petitioner addressed some new students as Sir or Ms. and her complaint that Petitioner's management skills were lacking because he asked her when school would end, in response to a student's question, does not appear to the court to reflect negatively on Petitioner.

annual U rating, should be upheld.

Accordingly, it is

ADJUDGED that the petition is denied, and the proceeding dismissed; and it is further

ORDERED that the cross motion is denied as moot.

This Constitutes the Decision, Order and Judgment of the Court.

Dated: September 10, 2009

ENTER:



J.S.C.
EMILY JANE GOODMAN

UNFILED JUDGMENT

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