

**Matter of Zarinfar v Board of Educ. of the City Sch.  
Dist. of the City of N.Y.**

2009 NY Slip Op 33447(U)

October 14, 2009

Supreme Court, New York County

Docket Number: 100489/09

Judge: Elizabeth J. Goodman

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

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In the Matter of the Application of

Index No.: 100489/09

MAJID ZARINFAR,

Petitioner,

-against-

THE 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 Civil  
Practice Law and Rule

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**Emily Jane Goodman, J.S.C.:**

In a proceeding pursuant to Article 78, petitioner Majid Zarinfar requests that an order and judgment be issued declaring that the hearing and determination by respondents The Board of Education of the City School District of the City of New York (BOE) and Joel I. Klein, in his official capacity as Chancellor of the City School District of the City of New York, to uphold his termination was arbitrary, capricious and contrary to law, and directing respondents to reinstate petitioner with back pay and interest, as well as to rescind and expunge from his file the discontinuance and unsatisfactory rating upon which it was based and restore his certification/license.

Respondents cross-move to dismiss the petition.

## BACKGROUND

Petitioner was appointed by respondent BOE as a probationary teacher in September of 2005. During the 2005-2006 and 2006-2007 school years, petitioner taught Technology at Science Skills High School (the school) in Brooklyn, New York. Petitioner was subject to a three-year probation period which was scheduled to expire in September of 2008.

During the 2006-2007 school year, petitioner had three formal observations and four informal observations. Of the three formal observations, two were rated as unsatisfactory. Of the four informal observations, three were rated as unsatisfactory. Each of the seven observations were conducted while petitioner was teaching Mathematics, which was not his tenure area at the school. In addition, no pre-observation or post-observations conferences were conducted for most of the subject observations.

On June 21, 2007, petitioner received an unsatisfactory rating (U Rating) by his principal, Denise Jennings, on his annual performance review. Petitioner's U Rating was based upon the aforementioned seven observations, as well as two letters.

By letter dated August 24, 2007, Dov Rokcach (Rokcach), Brooklyn's high school superintendent, notified petitioner that his probationary services were terminated effective July 30, 2007. In accordance with the procedures provided by the Regulation of the Chancellor C-31, the By-laws of the Panel for Educational Policy of the New York City BOE (the By-laws) and the collective bargaining agreement between the United Federation of Teachers (UFT), of which petitioner is a member, and respondents, petitioner was entitled to have a hearing to review his "Discontinuance" (First Amended Verified Petition, Exhibit E, Notice to Probationer)

Accordingly, petitioner appealed the termination of his services as a probationary teacher

and the U Rating upon which it was based to the BOE's Office of Appeals and Review (the OAR). On September 25, 2007, petitioner received a notice letter, which was issued by the BOE and signed by Virginia Caputo, director of the OAR, scheduling his hearing at the OAR. The notice letter identified various persons who were required to attend the hearing and advised petitioner to have his union representative notify the OAR office if he planned to call any witnesses at the hearing.

Petitioner then had his union representative send a list of the 10 witness that he planned to call at the hearing to Andree Gilmer, a UFT representative. Gilmer forwarded petitioner's proposed witness list to UFT representative Geof Sorkin (Sorkin), who then forwarded it to JoAnn Rabot (Rabot) at the OAR. On October 29, 2007, Rabot notified Sorkin that the OAR would not allow all 10 of petitioner's proposed witnesses to be presented at the hearing, and that only three witnesses would be allowed. On the same day, petitioner's union representative identified the three witnesses that petitioner intended to call at his hearing. On October 30, 2007, the OAR issued an amended notice to petitioner which listed these three witnesses.

In addition, prior to the hearing, the OAR denied petitioner's request that Lisa Gibbs (Gibbs), the principal at his current school, The Brooklyn School for Global Studies<sup>1</sup>, be permitted to testify on his behalf, based upon the assumption that she had no direct knowledge of the circumstances behind petitioner's U Rating and termination, but her letter was accepted as evidence at the hearing. Petitioner asserts that he intended for Gibbs to testify about a conversation she had with Jennings, whereby Jennings described petitioner as a good teacher and

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<sup>1</sup>Petitioner was terminated under his Technology teaching license as of August 29, 2007. On August 30, 2007, petitioner was re-hired by the BOE and currently teaches under a Mathematics teaching license at the Brooklyn School for Global Studies.

a hard worker who was loved by his students, and, that the real reason for petitioner's termination was that the assistant principal did not get along with him. In addition, Jennings indicated to Gibbs that she wished that she could change what happened to petitioner. In a letter dated December 17, 2007, Gibbs documented her conversation with Jennings (the Gibbs letter), wherein she wrote, in pertinent part:

We interviewed and desired to hire Mr. Zarinfar, and upon learning he was given a U rating in his previous position, at Science Skills High School, I contacted Denise Jennings, the principal. Ms. Jennings shared with me that Mr. Zarinfar had been a good teacher, but like several other teachers at that time, did not get along with [his] assistant principal. She stated that the assistant principal had made an error in judgment and because of abrasiveness there were several other staff members who were leaving. She said the students and parents loved Mr. Zarinfar and that he was a hard worker. She also implied that she was sorry that this had happened to him and wish[ed] she could change it. It was on her recommendation coupled with the interview that I hired Mr. Zarinfar.

(Petitioner's Amended Verified Petition, Exhibit H, Gibbs Letter).

On October 31, 2007 and December 19, 2007, the Chancellor's hearing committee (the hearing committee) held a hearing to review petitioner's termination and U Rating. At the hearing, petitioner presented three eyewitnesses who testified, inter alia, that petitioner was a respected mentor who had been very helpful to other teachers at the school. In addition, petitioner was observed at inappropriate times and while teaching outside of his appointed license area of Technology. The Gibbs letter was also presented for consideration at the hearing. Petitioner's UFT representative noted for the record her objection to the limitation of witnesses.

After considering the testimony and documentary evidence offered at the hearing, the hearing committee unanimously recommended non-concurrence with the prior U Rating and decision to terminate petitioner, noting a "lack of evidence supporting many of the unsatisfactory

categories on the rating sheet" (First Amended Verified Petition, Exhibit K, Hearing Committee Report, at 4). By letter dated September 12, 2008, Rokeach notified petitioner that, after having received the hearing committee's report, he was informing petitioner that he was "reaffirm[ing] the previous action which resulted in Discontinuance of Probation Services effective at close of business July 30, 2007" (First Amended Verified Petition, Exhibit J, Rokeach Letter, dated September 12, 2008).

### DISCUSSION

An Article 78 proceeding against a public body may be commenced only when a matter has been finally determined (*see* CPLR 7801 [1]). CPLR 217 (1) provides that an Article 78 proceeding must be commenced within four months of the date of the final determination (*Matter of Carter v State of New York, Executive Department, Division of Parole*, 95 NY2d 267, 270 [2000]; *Matter of Bonilla v Board of Education of City of New York*, 285 AD2d 548, 548 [2d Dept 2001]). If there is further administrative action that could be taken to prevent or ameliorate the harm, then commencement of an Article 78 proceeding is premature (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 520 [1986]).

### WHETHER PETITIONER'S CHALLENGES TO HIS TERMINATION AND U RATING ARE TIME-BARRED

Petitioner argues that his petition to annul his U Rating and termination is not time-barred, because his application for reconsideration of the administrative determination to terminate him served to toll the running of the statutory four-month statute of limitations. Respondents cross-move to dismiss the petition to the extent that the petition seeks to challenge the August 2007 termination of petitioner's probationary service, on the ground that it is barred

by the four-month statute of limitations. Respondents do not maintain that the petition is untimely to the extent that petitioner challenges his U Rating.

Perhaps based on a misreading of *Matter of Frasier v Board of Education of City School District of City of New York*, 71 NY2d 763, 766-767 [1988]), case law has created an odd and incomprehensible distinction between review of a determination to terminate a probationary employee and a review of a U Rating. As to a review of a determination to terminate, cases have held that a probationary employee must commence an Article 78 proceeding within four months of the date of dismissal, and, any application for reconsideration of the administrative determination will not serve to toll the running of the statute (*Matter of Strong v New York City Department of Education*, 62 AD3d 592, 593-594 [1<sup>st</sup> Dept 2009] [petitioner's time to commence the proceeding to annul the determination of respondent BOE terminating her probationary employment as a per diem substitute teacher was not extended by her administrative appeal]; *Matter of Triana v Board of Education of City School District of City of New York*, 47 AD3d 554, 572-573 [1<sup>st</sup> Dept 2008] [teacher's filing of an administrative appeal challenging her termination did not make respondent's determination to terminate her employment non-final]; *Matter of Bonilla v Board of Education of City of New York*, 285 AD2d at 549 [decision to terminate petitioner's employment barred by the four-month statute of limitations because this determination became final on the effective date of his discharge]). However, an appeal of a U Rating, made with or without an appeal of a discontinuance, will stay the running of the statute of limitations as to the issue of the U Rating (*Matter of Andersen v Klein*, 50 AD3d 296, 296 [1<sup>st</sup> Dept 2008] [while the proceeding was timely to the extent that it challenged the year-end unsatisfactory rating, the proceeding was time-barred to the extent that it challenged the

discontinuance and sought reinstatement]: *Matter of Mateo v Board of Education of City of New York*, 285 AD2d 552, 552 [2d Dept 2001]; *Matter of Bonilla v Board of Education of City of New York*, 285 AD2d at 549 [determination that petitioner's teaching performance was unsatisfactory did not become final and binding until the Chancellor denied his appeal and sustained the rating]). Thus, in cases such as *Andersen*, *Mateo* and *Bonilla*, courts have held that probationary teachers seeking reinstatement and back pay were not time-barred from commencing a petition seeking Article 78 review of the Chancellor's sustaining of a U Rating, although they were time-barred from review of termination. This line of case law was questioned in Justice Alice Schlesinger's recent, thoughtful analysis of this issue, wherein she aptly questioned the distinction, given that the relevant documents governing the appeals of both terminations and U Ratings are substantially the same (*see Kahn v Dept of Ed.*, 2009 WL 3321423 [Sup Ct, New York County]).

This court, however, need not decide whether petitioner's challenge to the decision to terminate his probationary employment is time-barred. Even if the challenge is not time barred, petitioner has not demonstrated that the decision was arbitrary and capricious because it was made in "bad faith" or for "a constitutionally impermissible purpose or in violation of statutory proscription" (*see Matter of Kaufman v Anker*, 42 NY2d 835, 837 [1977]; *Matter of Weintraub v Bd of Ed.*, 298 AD2d 595 [1st Dept 2002]). Assuming that the assistant principal was a cause of petitioner's difficulties, the termination decision was not based on one person's evaluation, and therefore, petitioner cannot demonstrate that the decision was made in bad faith or was made for some constitutionally impermissible purpose.

**WHETHER PETITIONER WAS DEPRIVED OF A SUBSTANTIAL RIGHT BECAUSE THE BOE FAILED TO FOLLOW ITS OWN BY-LAWS**

Petitioner alleges that the BOE violated his due process rights when it failed to follow its own by-laws regarding proper notice, and because he was limited to only three witnesses at his hearing, instead of the 10 witnesses that he requested.

“A probationary teacher’s right to a review of the Chancellor’s decision to discontinue his or her services is neither constitutional nor statutory, but is contained in the collective bargaining agreement to which the respondents have promised to adhere” (*Matter of Swartz v Board of Education of City School District of City of New York*, 146 AD2d 576, 577 [2d Dept 1989]; *Matter of Frasier v Board of Education of City School District of City of New York*, 71 NY2d at 768). The BOE’s rules for hearings contained in its by-laws are binding upon it and may not be waived (*id.*; *Matter of Ambrose v Community School Board No. 30*, 48 AD2d 654, 654 [2d Dept 1975]).

Citing the cases of *Matter of Lehman v Board of Education of City School District of City of New York* (82 AD2d 832, 833 [2d Dept 1981] [regulations promulgated by the board and the Chancellor are binding upon them]; *Matter of Brown v Board of Education of City of New York* (42 AD2d 702, 702 [2d Dept 1973] [the board’s rules contained in its by-laws are binding on it]) and *Matter of Wilks v Board of Education of City of New York* (52 AD2d 886, 886 [2d Dept 1976] [respondent board must comply with its own by-laws]), petitioner asserts that, despite the fact that matters regarding the termination and unsatisfactory rating of a probationary teacher are discretionary, nevertheless, the BOE and the Chancellor were bound to follow the hearing procedures as set forth in their own by-laws and regulations.

Specifically, petitioner maintains that respondents deprived him of a substantial right when it failed to comply with the notice requirements of section 4.3.3 of its By-laws, which expressly states that the notice of hearing issued to the individual seeking appeal must contain the following information:

The notice shall inform the person that he or she is entitled to appear in person, to be accompanied and advised by an employee of the City School District or a representative of the union recognized by the Panel for Educational Policy as the collective bargaining representative for the employee, to be confronted by witnesses, if any, and to call witnesses to examine exhibits and to introduce any relevant evidence.

The purpose of providing notice is “to inform an individual of the specifications and of [his] rights relevant thereto” and “to provide the individual with an adequate opportunity to avail [himself] of those rights” (*Matter of Wilks v Board of Education of City of New York*, 52 AD2d at 886).

Here, a review of the record reveals that petitioner was not deprived of any substantial right. The subject notice letter was in the standard form issued to persons taking advantage of the appeals process. The subject notice letter identified the date, place and time of the hearing, as well as the persons required to attend. Importantly, the notice stated that “[i]n the event the Appellant plans to call witnesses, this office must be notified by the union representative in writing prior to the hearing” (First Amended Verified Petition, Exhibit E, Notice to Probationer).

Moreover, a review of the hearing summary indicates that, unlike the petitioners in the defective notice cases cited by plaintiff, plaintiff adequately availed himself of the entitlements as set forth in section 4.3.3. For example, petitioner was represented by a UFT representative and presented witnesses who testified on his behalf. In addition, the Gibbs letter was also considered

by the hearing committee (see *Matter of Persico v Board of Education, City School District, City of New York*, 250 AD2d 854, 854 [2d Dept 1998] [petitioner failed to demonstrate that she was deprived of any substantial right warranting a new hearing, where she was given numerous opportunities to question witnesses and was instructed on the procedure to call witnesses]; *Matter of Sorell v Board of Education of City School District of City of New York*, 168 AD2d 453, 454 [2d Dept 1990]; *Matter of Swartz v Board of Education of City School District of City of New York*, 146 AD2d at 578 [as there was adequate proof to support the petitioner's unsatisfactory rating and the discontinuance of his probationary period, petitioner was not deprived of his right to confront witnesses and of cross examination where the hearing committee made its best effort to ensure the appearance of a missing witness and considered the witness's absence in making its decision]; compare *Matter of Wilks v Board of Education of City of New York*, 52 AD2d at 886 [where, upon his arrival at his hearing, petitioner was first informed of his rights to cross-examine witnesses and produce evidence, notice defect was not cured without assurances that petitioner was prepared with respect to the newly informed rights]; *Matter of Parris v Board of Education of City of New York*, 48 AD2d 835, 836 [2d Dept 1975] [notice defect was not waived by petitioner's appearance at committee meeting, where, at that review, petitioner was never advised of her right to call witnesses, introduce relevant evidence or be confronted by witnesses against her]; *Matter of Ambrose v Community School Board No. 30*, 48 AD2d at 655 [defective notice not cured by petitioner's appearance before chancellor's committee where, at that review, petitioner was never advised of her rights to call witnesses, introduce relevant evidence or to be confronted by witnesses against her, nor was she afforded the right to exercise said rights]).

Further, petitioner's allegation that he was denied a substantial right because he was not allowed to present 10 witnesses at the hearing is without merit. Petitioner does not cite any by-laws or other rules that prohibit the OAR from limiting the number of witnesses that a probationary employee may present at the hearing. In addition, petitioner does not set forth any argument as to how the testimonies of the additional witnesses would have been non-repetitive and relevant to his case. So long as a teacher is "provided ample opportunity to challenge the discontinuance of [his] probationary service," he is not deprived of a substantial right (*Matter of Persico v Board of Education, City School District, City of New York*, 250 AD2d at 855).

**WHETHER THE DETERMINATION OF THE SUPERINTENDENT TO UPHOLD THE U RATING WAS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW**

Judicial review here is based on whether the determination was arbitrary and capricious, that is, without a rational basis in the administrative record (*see* CPLR 7803 [3]; *Matter of Arrocha v Board of Education of City of New York*, 93 NY2d 361, 363-364 [1999]; *Matter of Scherbyn v Wayne-Finger Lakes Board of Cooperative Educational Services*, 77 NY2d 753, 757-758 [1991]; *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231-232 [1974]; *Matter of Climent v Board of Education of Community School District No. 22*, 288 AD2d 312, 313 [2d Dept 2001]). "[A] court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion" (*Matter of Arrocha*, 93 NY2d at 363, quoting *Matter of Pell*, 34 NY2d at 232. (emphasis in original; citation omitted); *Matter of Partnership 92 LP & Building Management Company v State of New York Division of Housing & Community Renewal*, 46 AD3d 425, 429

(1<sup>st</sup> Dept 2007), *affd* 11 NY3d 859 (2008). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell*, 34 NY2d at 231). "[O]nce it has been determined that an agency's conclusion has a 'sound basis in reason,' the judicial function is at an end" (*Paramount Communications v Gibraltar Casualty Company*, 90 NY2d 507, 514 (1997), quoting *Matter of Pell*, 34 NY2d at 231). Unlike challenges involving the termination of probationary employees, which require a demonstration of bad faith or some other constitutionally impermissible purpose, no such demonstration is needed when challenging a U Rating (*Black v New York City Dept of Ed.*, 62 AD3d 468 [1st Dept 2009]).

Petitioner argues that the superintendent's decision to affirm his U Rating was arbitrary and capricious in light of the testimonial and documentary evidence put forth in his favor, the hearing committee's unanimous non-concurrence with the prior decision, and the fact that his observations were taken outside his tenure area.

The "hearing procedure is advisory rather than determinative," and thus, the superintendent did not have to follow the recommendations of the hearing committee (*see Matter of Kaufman v Anker*, 42 NY2d at 837, *supra*). However, other than the fact that superintendent Rokeach acknowledged receipt of the committee's report, there is no evidence that he considered the committee's recommendation, which found a lack of evidence supporting many of the unsatisfactory categories on the rating sheet. Further, this court is precluded from exercising any meaningful review in instances where the advisory committee finds that the U Rating is unsupported and the superintendent fails to articulate any reasonable basis for rejecting the committee's recommendation. Accordingly, the petition is denied except to the extent that the determination as to the U Rating is vacated and annulled and matter is remanded to the

superintendent for the issuance of a new determination regarding the U Rating, which considers the recommendation of the hearing committee, and, if rejected, articulates the reasons for such rejection. Should petitioner disagree with that determination, he may file a challenge to that determination within four months of its issuance.

**CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ORDERED AND ADJUDGED** that the petition is denied except to the extent that the determination as to the U Rating is vacated and annulled and the matter is remanded to the superintendent for the issuance of a new determination regarding the U Rating, which considers the recommendation of the hearing committee, and, if rejected, articulates the reasons for such rejection; and it is further

**ORDERED** that the cross motion to dismiss is denied, as moot, as to petitioner's termination and is denied as to petitioner's challenge to his U Rating.

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

DATED: October 14, 2009

ENTER:  
*EG*  
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J.S.C.

**EMILY JANE GOODMAN**

**FILED**

JAN 14 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

*Norman Crisman*  
\_\_\_\_\_  
clerk