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

PRESENT: HON. PAUL G. FEINMAN Justice PART 12

Index Number : 111381/2006
JOHANNESSON, CHANTAL

INDEX NO. 111381/2006

VS

DEPT. OF EDUCATION

MOTION DATE

Sequence Number : 003

MOTION SEQ. NO. 003

AMEND

MOTION CAL. NO.

...is motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	see attached
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this motion

MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

This judgment ... and notice ... County Clerk obtain copy, ... tion. To appear in person at the Judgment Clerk's Desk (Room 141B). ...ove must

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

Dated: Jan. 8, 2010 1:20 pm

Paul G. Feinman
J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: IAS PART 12

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CHANTAL JOHANNESSON,

Petitioner,

-against-

Index No. 111381/06

Mot. Seq. No. 003

THE NEW YORK CITY DEPARTMENT OF EDUCATION, JOEL KLEIN, as Chancellor of the New York City Department of Education, JOEL DIBARTOLOMEO, as Community Superintendent of Community School District 10, and KEITH OSWALD, as Local Instructional Superintendent in Region 1,

Respondents.

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APPEARANCES:	PETITIONER:	RESPONDENT:
	Shebitz Berman Cohen & Delforte, P.C. By: Julia R. Cohen, Esq. 1325 Avenue of the Americas, 27th Fl. New York NY 10019 (212) 832-2797	Michael A. Cardozo, Esq. Corporation Counsel By: Daniel Chiu, Esq. 100 Church Street New York NY 10007 (212) 788-1158

PAPERS CONSIDERED ON REVIEW OF THIS ARTICLE 78 PROCEEDING:

Amended Notice of Petition, Petition, Affs., Exhibits, Memorandum of Law	1, 2
Verified Answer, Affs., Exhibits, Memorandum of Law	3, 4
Reply Aff., Exhibits	5

PAUL G. FEINMAN, J.:

The petitioner Chantal Johannesson brings this Article 78 proceeding for a judgment: (a) declaring that the respondents' actions were wrongful, violated lawful procedure, lacked a rational basis, were arbitrary and capricious, violated petitioner's due process rights, deprived petitioner of her right to have a meaningful Article 78 review, and were made in bad faith; (b) directing respondents to reverse the U rating, discontinuance and license termination; (c) directing respondents to immediately restore petitioner to the position of Assistant Principal at the appropriate rate of pay for an appointed Assistant Principal, directing respondents to pay petitioner all back pay

which she would have earned but for its improper conduct, crediting petitioner with all leave, including sick and vacation leave, and seniority and credit toward seniority and tenure to which she is entitled but for respondents' wrongful conduct; (d) removing all references from petitioner's personnel files located within the Department, to the Capari allegation and the investigation, removing all references to the U rating and discontinuance, and removing any bar to petitioner's employment within the Department including, but not limited to her name on the ineligible/inquiry list; (e) directing respondents to pay petitioner all damages incidental to its wrongful conduct, including, but not limited to, lost wages/back pay which petitioner should have received, as well as payment of all benefits as though there was no cessation in employment as an Assistant Principal and at the rate to which she should have received such benefits together with statutory interest; (f) directing respondents to enact appropriate procedures for the conduct of appeal hearings in the future to ensure transparency in the process sufficient to permit an employee to know what the appeal panel's recommendation is and the basis upon which the final decision is made; and (g) reasonable attorneys' fees, costs and disbursements related to this proceeding.

After a disciplinary conference, the petitioner was found to have shoved a student, thereby causing four students and a teacher to fall to the ground, and attempting to cover up the incident. The respondents rated the petitioner's work as Assistant Principal unsatisfactory, revoked her administrator's license, and demoted her to teacher. Despite a clear direction in the Education Department's rules, the respondents failed to honor the petitioner's request for a copy of the audio tape made of the disciplinary conference.

The Department of Education lawyer who investigated the underlying shoving incident later retired after he was found to have sexually harassed several Department employees, including the

petitioner.

Although the charges against petitioner included an allegation of corporal punishment, the incident was not investigated in accordance with the Department of Education's rules for conducting an investigation of an allegation of corporal punishment.

In a separate proceeding, conducted pursuant to the collective bargaining agreement then in effect, the petitioner grieved the unsatisfactory rating letter, as unfair or inaccurate. After a three-step grievance process, and an arbitration hearing, the Arbitrator ordered the unsatisfactory rating letter removed from the petitioner's personnel file.

In support of the petition, the petitioner makes the following legal arguments. The respondent's final decision after the mandated hearing is not supported by substantial evidence, the applicable standard articulated in CPLR 7804 (4). Such review, of course, would require transfer of this proceeding to the Appellate Division, First Department. Petitioner contends that even if the respondents' determination is analyzed under the arbitrary and capricious standard, it lacks a rational basis in the record before the Department. The respondents' failure to provide the hearing tape violates lawful procedure and their policy of keeping the hearing panel's report and recommendations secret is irrational and arbitrary and capricious.

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]). Moreover, it is well settled that the interpretation given a statute by the agency charged with its enforcement will be

respected by the courts if not irrational or unreasonable (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98 [1997]; *Matter of Fineway Supermarkets, Inc. v State Liquor Authority*, 48 NY2d 464 [1979]).

The responsibility for selecting probationary teachers and evaluating them for appointment on tenure lies with the Board of Education, upon appropriate recommendation of its professional administrators (*Matter of Frasier v Board of Education of City School Dist. of City of N.Y.*, 71 NY2d 763, 766 [1988]). A probationary employee can be dismissed "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, 761 [1984]). Judicial inquiry is limited to whether the termination was made in bad faith (*Matter of Johnson v Katz*, 68 NY2d 649 [1986]). The burden of proving bad faith is on the petitioner and the mere assertion of bad faith, without evidence demonstrating it, does not satisfy the petitioner's burden (*Matter of Che Lin Tsao v Kelly*, 28 AD3d 320 [1st Dept 2006]).

Initially, as to whether this proceeding should be transferred to the Appellate Division (CPLR 7804 [g]), contrary to the petitioner's assertion, the appropriate standard of review to be applied to the termination of a probationary Assistant Principal is whether the determination was arbitrary and capricious, and not whether the determination is supported by substantial evidence (*Matter of Von Gizycki v Levy*, 3 AD3d 572 [2d Dept 2004]). The disciplinary conference, provided for in both of the New York City Department of Education Regulations of the Chancellor Number C-31, paragraph 3.1, and in the by-laws of the Panel for Educational Policy of the Department of Education of the City School District of the City of New York section 5.3.4, is not a hearing held "pursuant to direction by law" (CPLR 7803 [4]; *Matter of James v Klein*, 43 AD3d 764 [1st Dept

2007]; *Matter of Duncan v Klein*, 38 AD3d 380 [1st Dept 2007]). Therefore, this matter need not be transferred to the Appellate Division, First Department for disposition.

Turning to the merits of the proceeding, the respondents' finding that the petitioner engaged in corporal punishment and a cover-up, and the determinations to terminate petitioner's license, give her an unsatisfactory rating, and place her on the ineligible list, were not arbitrary and capricious (*Black v New York City Dept. of Educ.*, 62 AD3d 468 [1st Dept 2009]; *Matter of Andersen v Klein*, 50 AD3d 296 [1st Dept 2008]; *Matter of Watkins v New York City Dept. of Educ.*, 48 AD3d 339 [1st Dept] *lv denied* 10 NY3d 713 [2008]). The removal of the letter rating the petitioner unsatisfactory from the petitioner's personnel file lacks preclusive effect (*Matter of Strong v New York City Dept. of Educ.*, 62 AD3d 592 [1st Dept 2009]). Furthermore, inasmuch as the petitioner has not denied the truth of the factual assertions against her, she cannot state a due process claim (*Matter of Watkins v New York City Dept. of Educ.*, 48 AD3d 339, *supra*; *Matter of Johnson v Kelly*, 35 AD3d 297 [1st Dept 2006]).

Contrary to petitioner's argument, she was not denied due process because she was not given access to the audiotape of her hearing of her disciplinary conference, as she does not possess a constitutional right to a tape recording of a disciplinary hearing (*Carter v Goord*, 271 AD2d 729, 730 [3d Dept 2000]). The respondents were not required to conduct a hearing (*Matter of Nieves-Diaz v City of New York*, 37 AD3d 356, 357 [1st Dept 2007]; *Matter of Che Lin Tsao v Kelly*, 28 AD3d 320, *supra*).

The evidence, in the form of witness statements, shows that the petitioner shoved a student, who subsequently was propelled into three other students and a teacher, knocking them all to the ground, and that the petitioner subsequently attempted to cover up the incident. This was sufficient

reason to terminate her probationary employment. The petition must be dismissed since the petitioner fails to establish that her 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, *supra*).

Finally, while the conduct of the investigating attorney is not to be condoned, and has the deleterious effect on the perception of the fairness of the investigation of petitioner's conduct, ultimately what is at issue in this proceeding is the petitioner's conduct, and whether there is a basis for the action taken against her. The court concludes that notwithstanding the problematic conduct of the investigating attorney, there is no basis to set aside the instant determination by Department of Education. The penalty of revocation does not shock the conscience (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]). It would be error to substitute the court's discretion for that of the agency charged with the internal discipline and licensing of members of a profession engaged in such a sensitive area of human service (*Matter of Koch v Webster Cent. School Dist. Bd. of Educ.*, 57 NY2d 1028, 1030 [1982]).

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to the respondents.

This constitutes the decision, order and judgment of this court.

Dated: January 8, 2010
New York, New York

ENTER:

J.S.C.

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