

Jensen v Klein

2010 NY Slip Op 30175(U)

January 20, 2010

Supreme Court, New York County

Docket Number: 110950/09

Judge: Joan M. Kenney

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

PRESENT: JOAN M. KENNEY

PART 8

Index Number : 110950/2009
JENSEN, DAVID
 VS.
KLEIN, DAVID
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. 110950/09
 MOTION DATE 1/13/10
 MOTION SEQ. NO. 001
 MOTION CAL. NO. 001

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

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

UNFILED JUDGMENT
 This judgment has been entered by the County Clerk and is not subject to appeal. To appeal, the appellant's representative must appear in person at the Judgment Clerk's Desk (Room 1411).

Dated: 1/20/10

Joan M. Kenney
 J.S.C.

Check one: FINAL DISPOSITION

JOAN M. KENNEY
NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

-----X

In the Matter of the Application of

DAVID JENSEN,

Petitioner,

-against-

JOEL KLEIN, as Chancellor of the Department of
Education of the City of New York, NEW YORK CITY
DEPARTMENT OF EDUCATION, AND THE CITY
OF NEW YORK,

Respondents.

For A Judgment Pursuant to CPLR Article 78.

-----X

KENNEY, JOAN, M., J.

For Petitioner:
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For Respondent:
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Papers considered in review of this petition to reverse, and pre-answer cross-motion seeking to dismiss:

Papers	Numbered
Notice of Petition	1
Notice of Cross-Motion with Exhibits and Memorandum of Law	2-5
Affirmation and Affidavits with Exhibits in Opposition to Cross-Motion	6-14
Reply Memorandum of Law in Support of Cross-Motion	15

Petitioner, David Jensen (Jensen), has commenced the instant special proceeding pursuant to CPLR 7803(3), seeking, *inter alia*, a Judgment and Order (1) annulling and reversing an Unsatisfactory (U) rating, and (2) causing the documentation, relative the U rating, to be removed from his employment record and/or file.

Respondents, have cross moved, seeking a pre-Answer Order, dismissing the pleadings.

Index # 110950/09
Motion Date: 1/13/10
Mot. Seq. No: 001

**DECISION, ORDER AND
JUDGMENT**

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry has not been based hereon. To obtain entry, counsel for the party whose representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Factual Background

Jensen is a tenured Social Studies teacher in the Department of Education's (DOE) Norman Thomas High School (NT). Jensen began his employment with the DOE in 1986. Jensen was appointed a teacher for the 2002-2003 school year and then assigned to NT. From 2002-2007, Jensen was consistently given Satisfactory (S) ratings. On June 17, 2008, Jensen was given a U rating for the first time, by the principal Steven Satin (Satin). The observation reports all made significant suggestions to Jensen regarding his lack of organized lesson plans, student assignments, and classroom management. Additionally, professional education and peer support was offered to petitioner in the post observation meetings and the reports.

After Jensen was given the U rating, he did not seek to grieve the rating through the process proscribed by Article 22(A) of the collective bargaining agreement (CBA), that binds both the United Federation of Teachers Union and the DOE. In lieu of filing a grievance, Jensen appealed the U rating by requesting a "Chancellor's Hearing," pursuant to Section 4.3.1 of DOE's Bylaws. The decision of the Chancellor's Committee dated April 2, 2009, denied Jensen's application, and the U rating was sustained.

Petitioner alleges that he received the U rating because: (a) NT had received "D" ratings from the DOE, which resulted in Satin attempting to make Jensen a scapegoat, (b) Satin engaged in discrimination against him because he was over the age of 50, and (c) it was retaliation for having successfully filed a grievance against the DOE in the past.

Respondent alleges that Jensen received a U rating for the 2007-2008 school year because he delivered four unsatisfactory classroom lessons, and received a U rating for each of the four observations. The observations were made by three different individuals, including two assistant

principals and Satin.

Arguments

Petitioner argues, (1) that his employment with the DOE is governed by the Executive Law § 296¹, (2) the DOE has acted in bad faith and was arbitrary and capricious in its decision to support a U rating for Jensen, (3) Satin discriminated against him pursuant to both Article 15 of the New York State Human Rights Law and the New York State Executive Law § 296; (4) that his collective bargaining agreement (CBA), has been breached because Satin did not offer him a “pre-observation” conference, which is required by the CBA, and (5) he was given a U rating as retaliation for successfully grieving his right to choose his “Circular 6 (professional period)” assignment.

Respondents argue, (1) that Jensen failed to exhaust his administrative remedies by not filing a grievance after he received his U rating, (2) the petition fails to state a cause of action, (3) the U rating was not arbitrary or capricious, because Jensen had three pre-observation conferences prior to the first three observations; and the fourth observation was done by Satin, and Jensen refused to participate in a pre-observation conference with Satin, prior to the fourth observation, (4) that Jensen’s age discrimination claim is defective because he did not file a notice of claim pursuant to Education Law § 3813, and (5) Jensen received a U rating prior to his filing of the grievance, therefore, a retaliation claim cannot lie.

Discussion

CPLR Rule 409(b) states that “the court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. The court may

¹Notably, the petition alleges that Jensen’s employment as a teacher was terminated with the DOE. Respondent’s papers indicate that Jensen is currently still employed as a teacher with DOE at NT.

make any orders permitted on a motion for summary judgment.” Further, an Article 78 proceeding against a public body may be commenced only when a matter has been finally determined (CPLR 7801[1]). This is the threshold defense proffered by respondents.

It is undisputed that Jensen did not file a grievance after he received his U rating. Jensen’s pleading states that he did not avail himself of the grievance procedure proscribed in the CBA (see, Article 22 of the CBA) because he believed that by requesting the Chancellor’s hearing he was properly “grieving” his U rating. Moreover, petitioner contends that appeals of the U rating are governed by DOE By-Laws § 4.3.1, which is incorporated by reference in Article 21(D)(3) of the CBA which states in its entirety as follows: “Teachers who receive doubtful or unsatisfactory ratings *may* (emphasis added) appeal under Section 4.3.1 of the by-laws of the [DOE].” Just because Jensen took an appeal of the rating, this did not abrogate his responsibility to bring a grievance pursuant to the CBA. Article 22(A) of the CBA, defines a grievance as “a complaint by an employee in the bargaining unit ... (1) that there has been as to him/her a violation, misrepresentation or inequitable application of any of the provisions of this [CBA].”

It is well established that an aggrieved union member whose employment is subject to the terms of a collective bargaining agreement entered into by his union and employer, must first avail himself of the grievance procedure set forth in the agreement before he can commence an action in court (*Cantres v. Board of Educ. of City of New York*, 145 AD2d 359 [1st Dept 1988]; citing *Matter of Plummer v. Klepak*, 48 NY2d 486 [1979]; see also, *Matter of Taylor v. Libous*, 87 AD2d 947 [3rd Dept 1982]). Additionally, where, as in this case, a petitioner fails to exhaust the administrative remedies outlined in a collective bargaining agreement, the petitioner lacks standing to bring an Article 78 proceeding (*Hosp v. Seniuk*, 86 AD2d 667, 668-669 [2d Dept 1982]).

In *Featherstone v. Franco*, 95 NY2d 550 (2000), the Court of Appeals re-stated the standard for review “... the acts of an administrative agency under article 78 is limited to questions expressly identified by statute (*see*, CPLR 7803). Insofar as applicable here, judicial review is limited to the question whether ‘the measure or mode of penalty or discipline imposed’ constitutes an ‘abuse of discretion’ (CPLR 7803 [3]).” Although this Court’s power to review administrative sanctions has always been limited to questions of law, the scope of judicial review conferred by CPLR 7803(3) was “unclear initially” *Matter of Pell v. Board of Educ.*, 34 NY2d 222, 232 (1974). The sanction must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law (citations omitted).

Since *Pell*, *supra*, the law has been more refined. Reviewing courts are not empowered to substitute their own judgment or discretion for that of an administrative agency merely because they are of the opinion that a better solution could thereby be obtained (*Peconic Bay Broadcasting Corp. v. Board of App.*, 99 AD2d 773, 774 [2d Dept 1984]). Administrative decisions of educational institutions involve the exercise of “highly specialized professional judgment” and in general courts hold that the institutions are better suited to make relatively final decisions concerning wholly internal matters (*Maas v. Cornell University*, 94 NY2d 87, 93 [1999]). Although, petitioner alleges that Satin discriminated against him and sought to use him as a scapegoat for the “D” rating received by NT, these claims are unsubstantiated. Given the overall characterization of Jensen’s teaching skills, as set forth in the observation reports, the memoranda and the negative outcome of the Chancellor’s Hearing, petitioner’s subjective assessment of his own abilities and his improvement carries little persuasive weight.

Finally, the First Department has most recently in *Villalba v. New York City Department of*

Education, 50 AD3d 279 (2008) established a bright-line rule regarding an individual's right to challenge a U rating. The court stated in pertinent part, "[t]he 'U' ratings are unreviewable for failure to exhaust the grievance procedures set forth in the collective bargaining agreement." Consequently and for the reasons set forth above, the petition is dismissed. In light of the foregoing, petitioner's additional allegations and arguments need not be addressed herein.


Accordingly it is,

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

This constitutes the decision and judgment of this court.

Dated: January 20, 2010

ENTER:



HON. JOAN M. KENNEY
J.S.C.

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 1415).