

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

2010 NY Slip Op 30673(U)

March 24, 2010

Supreme Court, New York County

Docket Number: 113658/08

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Justice

Brown, Emerald

INDEX NO. 113658/08

MOTION DATE 1/29/10

MOTION SEQ. NO. 03

MOTION CAL. NO. \_\_\_\_\_

Bd of Ed

The following papers, numbered 1 to 7 were read on this motion to/for Art 7B

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-3

4-6

7

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*See annexed Decision  
Order - Judgment.*

**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 1019).

Dated: 3/25/10

  
**JANE S. SOLOMON** J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 55

----- X  
In the Matter of the Application of

EVERARD BROWN,

DECISION, ORDER and  
JUDGMENT

Petitioner, INDEX NO. 113658/08

-against-

BOARD OF EDUCATION OF THE CITY  
SCHOOL DISTRICT OF THE CITY OF NEW  
YORK; and JOEL I. KLEIN as Chancellor of the  
City School District of the City of New York,

Respondents,

For an Order and Judgment Pursuant to  
Article 78 of the Civil Practice Law and Rules

**FILED JUDGMENT**

This judgment has not been entered by the County Clerk  
and notice of entry cannot be served hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
1419).

HON. JANE SOLOMON, J.:

In this Article 78 proceeding, petitioner seeks an  
order and judgment: (i) declaring that respondents'  
unsatisfactory annual performance rating of petitioner for the  
2007-2008 school year and petitioner's subsequent discontinuance  
were in bad faith, arbitrary, capricious, and committed in gross  
error; (ii) declaring that respondents acted in bad faith, were  
arbitrary and capricious and committed gross error when they  
rated petitioner unsatisfactory in contravention of the  
established policies, procedures, laws, and regulations regarding  
the rating of pedagogical employees; (iii) declaring that  
respondents acted in bad faith, were arbitrary and capricious and  
committed gross error when they discontinued petitioner's  
employment as a result of the aforementioned unsatisfactory

rating; and, (iv) directing respondents to reverse the unsatisfactory rating and change petitioner's rating for the 2007-2008 school year from 'unsatisfactory' to 'satisfactory' and to reinstate petitioner to his former position, together with back pay, reasonable attorneys' fees, costs, and disbursements.

Petitioner was formerly employed by the New York City Department of Education ("DOE") as a mathematics teacher at Middle School 326 ("MS 326") in Manhattan. He entered his third year of probationary service at the start of the 2007-2008 school year. On October 24, 2007 his math class was observed by MS 326 Principal Sharon Weissbrot. By detailed letter dated October 29, 2007 (Answer, Ex. 1), Principal Weissbrot advised petitioner that she found his lesson to be unsatisfactory and stated the reasons for her finding. On June 6, 2008 petitioner's class was observed by Assistant Principal Marcos Bausch. By detailed letter dated June 10, 2008 (Answer, Ex. 4), Assistant Principal Bausch advised petitioner that he found the lesson to be unsatisfactory and stated the reasons for his finding. Both letters were countersigned and responded to by petitioner.

On or about June 13, 2008 he received an unsatisfactory ("U") rating on his Annual Professional Performance Review and Report ("APPR") for the period August 30, 2007 to June 26, 2008. Section 1 of the APPR was left entirely blank (see, petition, Ex. A), and no documentation was attached to section 4 of the APPR

(Id.). The "Additional Remarks" section of the APPR contained the following handwritten comments: "One out of every four children in your classes were Level 1. An analysis of the sixth grade Level 1's revealed that about 73% of the sixth graders with Level 1's were in your math classes" (Id.).

By letter dated June 13, 2008 Community Board District 6 Superintendent Martha Madera and Principal Weissbrot informed petitioner that they denied his Certificate of Completion of Probation ("certification") and that he had a right to appeal their determination pursuant to the review procedures set forth in the DOE by-laws. On or about June 24, 2008 petitioner appealed his U rating and discontinuance to the DOE Office of Appeals and Reviews.

A Chancellor's Committee hearing was thereafter conducted pursuant to the DOE by-laws. On September 16, 2009 the Chancellor's Committee issued its report and unanimously agreed with the recommendation to deny petitioner certification. By letter dated September 22, 2009, Superintendent Madera informed petitioner that she had received the Chancellor's Committee Report and reaffirmed petitioner's discontinuance. This proceeding, which had been prematurely commenced in October 2008 (prior to a final administrative determination) and thereafter stayed by a "so-ordered" stipulation dated November 26, 2008, was then restored to the court's motion calendar.

Petitioner contends that respondents' determination to issue a U rating to him and to terminate his services was arbitrary, capricious, erroneous, made in bad faith and in violation of respondents' rules and regulations because the determination was unsupported by documentation in his personnel file as required by the DOE Division of Human Resources "Rating Pedagogical Staff Members" Handbook (the "Rating Handbook") and Section 4 of his APPR, and improperly based entirely on student test scores.

Petitioner cites the eight "Characteristics of Good Teaching" set forth in the Ratings Handbook (Petition, Ex. C at 2-3) and notes that no mention is made of student test scores. According to petitioner, test scores are an impermissible consideration in rating a teacher.

In opposition, respondents first contend that petitioner was a probationary employee, and could rightfully be terminated at any time and for any reason absent a constitutionally impermissible purpose, violation of a statute, or bad faith (see, e.g., *Frasier v Board of Education of City School District of City of New York*, 71 NY2d 763, 765 [1998]). They then argue that their determination was rational because it was based on two unsatisfactory lesson reports which were received, and responded to, by petitioner.

Respondents also argue that the Rating Handbook is not

a regulation, but rather serves as an aspirational guide to rating officers; one of the "Characteristics of Good Teaching" in the Ratings Handbook is "Promotes Positive Student Learning Outcomes" which allows test scores to be considered, as a measure of those "outcomes;" and, the fact that Sections 1 and 4 of petitioner's APPR were left blank "because Principal Weissbrot did not realize she had to complete those sections of the form ... exalts form over substance and does not impact a substantial right" (respondents' memorandum of law, p 11).

While it appears that the determination to discontinue petitioner's services was rationally based, Respondents have failed to follow their own mandated procedures. Notwithstanding their current position, respondents have previously acknowledged that teacher evaluations must be conducted in strict compliance with the procedures set forth in the Rating Handbook (see *Smith v Board of Education of the City School District the City of New York*, 18 Misc 3d 192, 195 [Sup Ct, NY Co, 2007]; *Budnick v New York City Department of Education*, 25 Misc3d 1235(A) [Sup Ct, NY Co, 2009]). Furthermore, the Chancellor is empowered to promulgate such rules and regulations as he may determine are necessary or convenient (see Education Law § 2590-h, subd 16). Those rules and regulations, including special circulars issued by the Chancellor, are binding upon the DOE (see *Lehman v Board of Education of the City School District of the City of New York*,

82 AD2d 832, 833 [2d Dept 1981]).

The Chancellor's Special Circular No. 45, attached to the Rating Handbook, provides in pertinent part that "Section 1 [of the APPR] **must** be completed for all probationary employees" (see respondents' exhibit 12, Appendix I § 1[C][1], emphasis added). Section 1 contains 23 categories on which a probationary pedagogical employee is to be rated satisfactory or unsatisfactory by a principal or other appropriate supervisor (see petition, exhibit A). It is undisputed that Section 1 of petitioner's APPR was left blank (see *id.*). Section 4 of the APPR states that "[a]ll recommendations for discontinuance or denial of certification **must** be accompanied by copies of substantiating documentation attached hereto" (see petition, exhibit A, emphasis added). It is undisputed that no documentation was attached to petitioner's APPR.

Respondents have disregarded their own regulations. Accordingly, their determination to issue a U rating to petitioner and to terminate his services was in violation of a lawful procedure (see CPLR 7803[3]), and Petitioner's APPR must be remitted to the DOE to be properly completed in its entirety and resubmitted for review pursuant to the rules and regulations of the DOE, and it hereby is

ADJUDGED and DECLARED that respondents' determination to issue an unsatisfactory annual performance rating to

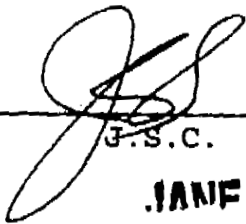
petitioner for the 2007-2008 school year and to discontinue his services was in violation of a lawful procedure; and it further is

ORDERED that this matter is remitted to the DOE for further proceedings in accordance with this decision.

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

DATED: March 24, 2010

ENTER:

  
\_\_\_\_\_  
J.S.C.

JANE S. SOLOMON

**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 147B).