

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

2010 NY Slip Op 30754(U)

March 31, 2010

Supreme Court, New York County

Docket Number: 104708/09

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN, J.S.C.

PART 57

*Justice*

Index Number : 104708/2009  
**LOUGHLIN, RITA**  
VS.  
**BOARD OF EDUCATION**  
SEQUENCE NUMBER : # 001  
ARTICLE 78

INDEX NO. 104708-09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. #001  
MOTION CAL. NO. \_\_\_\_\_

were read on this <sup>Petition</sup> motion to/for Art. 78

**PAPERS NUMBERED**

1  
2  
3

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

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

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

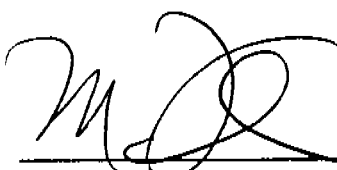
*Memo of Law M1-M2*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~ *petition is decided*  
*in accordance with the accompanying*  
*decision and order.*

**FILED**  
APR 07 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3-31-10

  
\_\_\_\_\_  
MARCY S. FRIEDMAN, 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 – PART 57  
PRESENT: Hon. Marcy S. Friedman, JSC

Application of Rita Loughlin,  
*Petitioner,*

Index No. 104708/09

For a judgment pursuant to Article 78 of the CPLR.

DECISION/ORDER

- against -

The Board of Education of The City School District of  
The City of New York,

*Respondent.*  
NEW YORK  
COUNTY CLERK'S OFFICE  
APR 07 2010

**FILED**

In this Article 78 proceeding, petitioner Rita Loughlin, a tenured elementary school teacher employed by respondent The Board of Education of the City School District of the City of New York ("BOE") seeks to annul unsatisfactory observations dated October 24, 2007 and June 9, 2008, as well as the unsatisfactory Annual Performance Review Rating ("APR") for 2007-2008, and seeks to have them expunged from her file. Petitioner further seeks an order reversing the December 2, 2008 decision of the New York City Department of Education ("DOE") denying her appeal of the unsatisfactory APR, and directing respondent to grant petitioner a satisfactory APR for the 2007-2008 school year. BOE cross-moves for an order confirming the DOE's decision and dismissing the Petition on the grounds that petitioner has failed to exhaust contractual remedies and fails to state a cause of action.

In August 2007, Petitioner was assigned to Bronx Regional High School. Petitioner's classroom was observed three times during the 2007-2008 school year. The first observation on October 24, 2007, which was not preceded by a pre-observation conference, resulted in an

unsatisfactory "U" rating. The second observation, conducted by two assistant principals on May 1, 2008, was preceded by a pre-observation conference and yielded a satisfactory "S" rating. The third observation on June 9, 2008, which was not preceded by a pre-observation conference, resulted in an unsatisfactory "U" rating. On June 25, 2008 petitioner was given an unsatisfactory "U" Annual Performance Review Rating for the 2007-2008 school year. Petitioner also received an unsatisfactory Annual Performance Review Rating for the 2006-2007 school year. These two unsatisfactory APRs are the only unsatisfactory ratings petitioner has received in her career as a teacher since 1968.

Petitioner did not file grievances with respect to the two unsatisfactory observations that were made without a pre-observation conference. However, petitioner filed an appeal of her 2007-2008 Annual Performance Review Rating and a hearing was held on the appeal. Marcia V. Lyles, Deputy Chancellor, denied the appeal by letter dated December 2, 2008. The reasons stated for the denial of the appeal were "poor planning, poor preparation of work, deficiencies in adapting instruction to her students' individual needs and capacities, and failure to improve, despite professional development provided."

Petitioner contends that the classroom observations and subsequent "U" APR were in violation of the Agreement between The Board of Education and United Federation of Teachers ("the Agreement"). Petitioner argues that because she is a tenured teacher who received a "U" rating in the prior year, the Agreement required her Annual Performance Review to be conducted pursuant to the "Formal Observations" model which provides for pre- and post-observation conferences. Petitioner further argues that as two of her three observations took place without a pre-observation conference, her "U" ratings for these observations, and her unsatisfactory 2007-

2008 APR based on these observations, violated the Agreement.

Respondent contends that only formal observations require a pre-observation conference, and that the two observations in question were informal. Respondent further argues that petitioner was required by the Agreement to grieve the informal observations and that her failure to do so amounts to a failure to exhaust administrative remedies which bars her claims in this Article 78 proceeding.

It is well settled that a court may not interfere with an administrative decision unless that determination was arbitrary or capricious or made without a rational basis. (Matter of Pell v. Board of Ed., 34 NY2d 222, 231 [1974]). It is further settled that an aggrieved union member whose employment is subject to the terms of a collective bargaining agreement must avail herself of the grievance procedure set forth in the agreement before she can maintain an Article 78 proceeding. (Matter of Plummer v. Klepak, 48 NY2d 486 [1979], cert denied 445 US 952 [1980]; Cantres v. Board of Educ. Of City of New York, 145 AD2d 359 [1<sup>st</sup> Dept. 1988].)

In applying these standards, the court must consider the procedures in the parties' Agreement. Article 8(J)(1) refers to an "evaluation/observation plan" under which performance reviews must be conducted. Article 8(J)(2)(d) provides that tenured teachers who received an unsatisfactory rating in the prior year must have their annual performance review based on the "Formal Observations" model. Article 8(J)(2)(b) defines this model as "the traditional classroom observation by a principal or supervisor which includes pre- and post-observation conferences and written feedback/comments." Article 8(J)(3) further provides that the evaluation/observation plan (set forth in section 1) "shall be subject to the grievance procedure and to arbitration only for the purpose of determining whether there has been a failure to comply with the procedural

requirements contained in the plan. In the event that a teacher appeals a rating, the appropriate forum for claiming a failure to comply with procedures is the rating appeal process and not the grievance/arbitration procedure.” Article 22(A) sets forth a grievance procedure, independent of the procedure for appealing APRs, for teachers complaining of a “violation, misinterpretation or inequitable application of any of the provisions” of the Agreement.

Here, petitioner correctly argues that she was entitled to have her evaluation plan for 2007-2008 based on the Formal Observations model because she received an unsatisfactory APR for 2006-2007. (Agreement, Article 8[J][2][d].) However, petitioner does not argue that respondent was not also entitled to rely upon informal observations of her classroom performance.

To the extent that petitioner disagreed with the ratings or other findings of the informal observations dated October 24, 2007 and June 9, 2008, she was obligated under the parties’ Agreement to grieve those observations. Contrary to petitioner’s contention, nothing in the language of Article 8(J)(3) permitted her to disregard the grievance procedure and object to the informal observations only after receiving her APR at the end of the year. Petitioner’s challenge in this Article 78 proceeding to the informal observations is therefore barred by her failure to exhaust the grievance procedure in the Agreement.

While respondent was permitted to consider the informal observations in reaching its APR, an issue remains as to whether the APR had a rational basis. Respondent does not dispute that the Agreement required petitioner’s evaluation to be based on the Formal Observations model. Respondent’s conclusion, in the APR, that petitioner’s performance was unsatisfactory was based in part on “poor planning” and “poor preparation of work.” The plain language of the

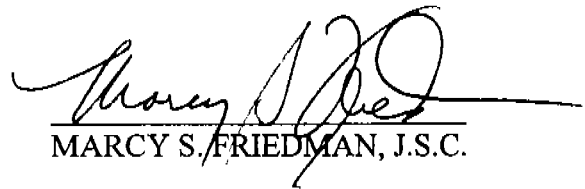
word "plan" is "a method for achieving an end" or "a detailed formulation of a program of action." (Merriam-Webster, <http://www.merriam-webster.com> [accessed Mar. 30, 2010].) Yet, respondent made only one formal observation with a pre-observation conference, and this conference appears to have covered the learning objectives and standards for the particular lesson rather than general or comprehensive pedagogical standards. (See May 15, 2008 Observation Report.) Under these circumstances, the court cannot find that a sole formal observation was sufficient, along with the two informal observations, to provide a rational basis for the unsatisfactory rating in the 2007-2008 APR.<sup>1</sup>

It is accordingly hereby ORDERED that the petition is granted to the extent of annulling respondent's December 2, 2008 denial of petitioner's appeal from respondent's 2007-2008 unsatisfactory Annual Performance Review Rating, and annulling the said Rating; and it is further

ORDERED that the matter is remanded to respondent for proceedings consistent with this opinion.

Dated: New York, New York  
March 31, 2010

**FILED**  
APR 07 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

  
MARCY S. FRIEDMAN, J.S.C.

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<sup>1</sup>In so holding, the court notes that Villalba v New York City Dept. of Educ. (50 AD3d 279 [1<sup>st</sup> Dept 2008], lv denied 11 NY3d 710) is not to be the contrary. This case stated that a "U" performance rating was unreviewable for failure to exhaust the grievance procedures set forth in the collective bargaining agreement. In Villalba, unlike the instant case, however, the petitioner apparently had not filed an appeal from the "U" rating, which is separate from the grievance procedure. (See Villalba Brief for Pet.-Appellant, 2007 WL 6179069 \*9.)