[* 1]
SCANNED ON 5/25/2010

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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 114665/2009
KOLMEL, WILLIAM
VS
CITY OF NEW YORK
Sequence Number : 002
ARTICLE 78

INDEX NO. _____
MOTION DATE 4/20/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED and ADJUDGED that the branch of petitioner's application for an order restoring the instant proceeding to the Court's calendar is granted, and the instant proceeding is hereby restored; and it is further

ORDERED and ADJUDGED that the branches of petitioner's application for an order, pursuant to CPLR Article 78, compelling respondents to file an Answer, and dismissing respondents cross-motion are moot; and it is further

ORDERED and ADJUDGED that the Petition is dismissed against the City of New York on the ground that said respondent is an improper party to this proceeding; and it is further

ORDERED and ADJUDGED that the Petition against the New York City Department of Education and Joel I. Klein, Chancellor of New York City Department of Education, seeking an order (a) declaring as arbitrary, capricious, unreasonable, an abuse of discretion, lacking a rational basis, and in bad faith respondents' termination of petitioner's employment as a probationary teacher and denial of certification of completion of his probation as of August 17, 2009; (b) directing respondents to immediately rescind petitioner's termination, petitioner's unsatisfactory rating for 2008-09, and the denial of petitioner's certification of completion of probation; (c)

Dated: _____

_____ J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

(c) directing respondents to reinstate petitioner to his teaching position *nunc pro tunc* to August 17, 2009, with back pay, interest, and any other benefits or emoluments of employment lost since the date of his termination; and (d) directing respondents to pay petitioner an additional 47 days' pay during the notice period between June 30, 2009 and August 17, 2009, is denied, and the petition is dismissed; and it is further

ORDERED and ADJUDGED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

This constitutes the decision and order of this court.

Dated 5/20/10 ENTER: _____, J.S.C.

HON. CAROL EDMEAD

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

x

In the Matter of the Application of

WILLIAM KOLMEL,

Petitioner,

For judgment under Article 78 of the
Civil Practice Law & Rules

-against-

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, AND JOEL I. KLEIN, CHANCELLOR OF NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

x

Index No. 114665/09

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner William Kolmel ("petitioner") seeks to restore the instant proceeding to the Court's calendar, and for, *inter alia*, a judgment nullifying as arbitrary and capricious the decision by respondents City of New York (the "City"), New York City Department of Education ("DOE"), and Joel I. Klein, Chancellor of New York City Department of Education ("Chancellor Klein") (collectively "respondents") to terminate petitioner as a probationary teacher as of August 17, 2009.[1]

[1]The Court notes that petitioner filed a "Notice of Restoration of Article 78 Proceeding to Calendar After Decision Denying Motion Without Prejudice," wherein he asked the Court to dismiss respondents' "cross-motion," or, alternatively, compel respondents to respond to the merits of petitioner's Amended Verified Petition with a Verified Answer. (In Sequence 001, respondents cross moved to dismiss the instant proceeding on, *inter alia*, procedural grounds, and the Court granted their cross-motion on procedural grounds only.) In a May 11, 2010 conference call with the Court, the parties agreed that, as a cross-motion was not filed herein and as respondents filed an Answer addressing the merits of the Petition, petitioner's requests to dismiss a cross-motion and compel an Answer are moot. Therefore, the Court proceeds to address petitioner's request that the instant action be restored to the Court's calendar as well as the merits of his Petition.

Background

This special proceeding was originally commenced on or about October 19, 2009. At that time, petitioner was still waiting for a final decision on the appeal of his unsatisfactory rating for the 2008-09 school year.[2] By a decision and order dated February 5, 2010, the instant proceeding was dismissed without prejudice to renew for failure to exhaust his administrative remedies. By a letter dated December 18, 2009, the Chancellor denied petitioner's appeal (*see* the "Decision"). Petitioner now moves to restore this proceeding for an adjudication on the merits.

In his Amended Petition, petitioner alleges that in September 2005, he was duly appointed as a probationary high school teacher at Martin Van Buren High School in Queens (the "high school"). At all times, he performed his duties in a satisfactory manner, receiving satisfactory ratings in his 11 teaching evaluations, and a satisfactory end of year rating through the 2007-08 school year (*see* the "Observation Reports"). In June 2008, shortly before petitioner was about to achieve tenure, petitioner received notice through then-Assistant Principal Angelo Marra ("Assistant Principal Marra") that Principal Marilyn Shevell ("Principal Shevell") would not recommend him for tenure, but instead would offer him an additional year of probationary service, or otherwise discontinue his services and recommend the denial of certification of completion of probation. Petitioner contends that Principal Shevell failed to explain her decision to him. Following the advice of his union, petitioner accepted the extension of his probationary period (*see* the "Extension Agreement"), returned to the high school as a social studies teacher for the 2008-09 school year.

In September 2008, Assistant Principal Marra resigned, and the Social Studies

[2]The hearing before the Chancellor's Committee was held on October 22, 2009.

Department (the "Department") was temporarily supervised by Assistant Principals Gus Smaragdas and Rhonda Huegel. Petitioner continued to receive satisfactory observations at the high school through January 2009 (*see* the "End of Year Rating Sheets").

On March 18, 2009, petitioner received his first "unsatisfactory" observation from Assistant Principal Huegel. On June 9, 2009, petitioner received his second unsatisfactory observation from Assistant Principal Smaragdas. Petitioner alleges that he was never given a pre-observation conference prior to these observations, in violation of respondents' Chief Executives' Memorandum #80 (*see* "Memorandum 80," p. 3). Petitioner further alleges that in May 2009, he offered to demonstrate his teaching prowess at a Department meeting before the other teachers and Assistant Principals, but Assistant Principal Huegel canceled his opportunity to do so (*see* the "May 2009 e-mails").

Subsequently, petitioner was given an unsatisfactory end of year rating by Principal Shevell (*see* the "2009 End of Year Rating Sheet"). He also received a letter from Superintendent Doris Unger ("Superintendent Unger"), dated June 17, 2009, indicating that she was denying certification of completion of his probation and effectively terminating his employment as of August 17, 2009 (*see* the "Termination Letter"). Petitioner contends that Principal Shevell fully relied on Assistant Principals Smaragdas and Huegel to determine petitioner's tenure status, even though they had no experience in supervising Social Studies teachers.

Petitioner was told that if he did not secure a new position by his deadline for achieving tenure on September 9, 2009, he would be denied probation and could not be hired again within the DOE system. Petitioner was interviewed for several positions and was told that he would be

hired by the principals at these schools. However, DOE's Office of Labor Relations ("OLR") interfered with petitioner's accepting these positions, and caused the principals to withdraw the offers, petitioner alleges (*see* copies of the e-mails annexed to the Petition as Exhibits G-I).

Petitioner argues that Principal Shevell arbitrarily rated him unsatisfactory in every category on the 2009 End of Year Rating Sheet without even bothering to render independent judgments on the individual categories. Principal Shevell neither observed petitioner's teaching performance during the 2007-08 and 2008-09 school years, nor gave him prior warning that he was in jeopardy of not getting tenure. Further, at no point did respondents create a plan of action to address petitioner's alleged teaching deficiencies, and petitioner was never provided with any log of pedagogical assistance and/or support. Petitioner also alleges that he was advised by Klee Korkotas, a former Assistant Principal of Social Studies ("Assistant Principal Korkotas"), that part of the reason Assistant Principal Korkotas left the school was that he was uncomfortable with Principal Shevell's pressuring him to rate teachers as unsatisfactory without even observing them.

Petitioner argues that he was deprived of notice of the opportunity to put in a response before Superintendent Unger denied his certification of completion of probation, in violation of the statute that requires a Superintendent's review period before denying tenure.[3]

Petitioner further argues that OLR directed principals to prevent probationary teachers from achieving tenure. OLR's director has been recorded on video suggesting the prevention of probationary teachers from obtaining tenure even when their performance has been excellent

[3]The Court notes that petitioner fails to cite a specific statute.

during their probationary period.[4] Petitioner further alleges that Principal Shevell has publicly acknowledged that the Chancellor has ordered principals to "hyper-scrutinize" teachers before giving them tenure.

Finally, petitioner requests an additional 47 days' pay. Petitioner claims that respondents failed to independently pay him for the period of June 30, 2009 though August 17, 2009, during the 60-day notice of discontinuance of his probationary period in accordance with New York State Education Law Section 3012(2).

Accordingly, petitioner seeks an order (a) declaring as arbitrary, capricious, unreasonable, an abuse of discretion, lacking a rational basis, and in bad faith respondents' termination of employment as a probationary teacher and denial of certification of completion of his probation as of August 17,2009; (b) directing respondents to immediately rescind petitioner's termination, petitioner's unsatisfactory rating for 2008-09, and petitioner's denial of certification of completion of probation; (c) directing respondents to reinstate petitioner to his teaching position *nunc pro tunc* to August 17, 2009, with back pay, interest, and any other benefits or emoluments of employment lost since the date of termination of his employment; and (d) directing respondents to pay petitioner an additional 47 days pay during the notice period between June 30, 2009 and August 17, 2009. Petitioner further requests an order compelling respondents to disclose the full report of the Chancellor's Committee, which served as the basis to deny petitioner's appeal of his unsatisfactory rating.

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[4]Petitioner cites the following web sites: https://admin.acrobat.com/_a3444295l/p73659024 and https://admin.acrobat.com/_a34442951/p12487663. Respondents note in their Verified Answer that the link that purports to be the video of OLR's director is not active (see Answer, p. 5, note 1). They also state that upon further inquiry by respondents' attorney, petitioner's attorney provided another link of this video to respondents' attorney, which appears to be active: https://admin.acrobat.com/_a34442951/pl2487663. The court notes that it can only access the video at https://admin.acrobat.com/_a34442951/p12487663.

In opposition, respondents submit a Verified Answer ("Answer"), containing two affirmative defenses: (1) the Petition fails to state a cause of action, and (2) respondents' actions were neither arbitrary nor capricious. Respondents also submit a Memorandum of Law ("MOL") in support of their request that the Petition be denied and dismissed in its entirety.

Respondents first argue that, as the record reflects ample evidence of petitioner's unsatisfactory performance, petitioner fails to demonstrate that DOE's decision to give him an unsatisfactory rating and discontinue his probationary employment was arbitrary, capricious, or in bad faith. Respondents contend that throughout petitioner's employment at the high school, his classroom teaching performance was formally observed on 15 separate occasions (*see* the Observation Reports). They further contend that the Assistant Principal of Social Studies conducts a departmental pre-observation conference for its teachers during the Department meetings, where the teacher receives professional development instruction.

Citing the Observation Reports and the Log of Assistance for the 2008-09 school year (the "Log of Assistance"), respondents argue that ever since petitioner was hired, he has had recurring problems with classroom management and invoking students' critical thinking skills. Respondents further contend that by the end of the 2007-08 school year, petitioner's "lack of commitment to the students became apparent." Petitioner was randomly assigned to teach a course titled "Smaller Learning Community" ("SLC") for students performing below average in English and mathematics. During this course, petitioner failed to set a schedule for his students to complete their community service project, and he spoke negatively about the course's students (*see* the "June 23, 2008 Letter"). Given this record of consistent pedagogical deficiencies, on May 15, 2008, petitioner was offered and accepted the opportunity to extend his probationary

period from September 9, 2008 until September 9, 2009, in an attempt to improve his teaching skills (*see* the Extension Agreement).

Respondents dispute petitioner's allegation that respondents failed to provide him with pre-observation conferences or pedagogical assistance, pursuant to DOE's Division of Human Resources' Rating Pedagogical Staff Members Handbook (the "Rating Handbook"). Citing the Log of Assistance, respondents contend that during the 2008-09 period, petitioner received a pre-observation conference before each of his formal observations, specifically on October 20, November 17, and December 15, 2008, and January 26, February 9, March 26, and April 20, 2009 (*see* the Log of Assistance). Respondents argue that these conferences provided petitioner with critical instruction on such matters as classroom routines and procedures, developing satisfactory teaching lessons, student attendance, and methods for invoking students' critical thinking skills. Despite such comprehensive training, petitioner continued to demonstrate a general inability to provide his students with the level of instruction necessary for success beyond the secondary educational environment, respondents argue, citing the March 18, 2009 Observation Report by Assistant Principal Huegel, and the June 9, 2009 Observation Report by Assistant Principal Smaragdas. Petitioner's teaching performance was rated unsatisfactory because he had significant difficulties keeping his students engaged and on task, organizing a cohesive lesson plan, and eliciting class participation. Petitioner received an unsatisfactory end of year rating for the 2008-09 school year because he received the unsatisfactory observation reports and conducted himself in a manner "unbecoming that of an educational professional" on multiple occasions (*see* the October 6, 2008 and the December 22, 2008 Letters).

Respondents further argue that there is no support for petitioner's claim that the

principals were encouraged to give unsatisfactory ratings to probationary teachers, or deny certification of completion of probation to qualified probationary teachers. During the 2008-09 school year, Principal Shevell gave satisfactory end of year ratings to 30 of the 32 probationary teachers employed at the high school. Further, Principal Shevell recommended that eight out of the 11 probationary teachers up for tenure at the high school receive certification of completion. Accordingly, petitioner's allegation that petitioner was denied tenure due to a blanket order given to Principals by the OLR is false, disingenuous and meritless.

Regarding petitioner's failure to be hired at other schools, respondents explain that, pursuant to Chancellor's Regulation C-205, an individual whose services have been discontinued during the probationary term, or who has been denied completion of probation can be appointed to a new probationary term in a district other than the one that discontinued the services of a probationary teacher or denied him/her completion of probation (*see* Chancellor's Regulation C-205[25] [c]). However, because the schools under the jurisdiction of the Chancellor and Central Board comprise one district, and all of the public high schools in New York City are considered as part of one high school district, a probationer discontinued under a license may not be reappointed to another high school under the same teaching license (*id.* at Note to C-205[25][c]). Therefore, since petitioner had been discontinued under his "social studies" teaching license and was seeking employment under the same license at several high schools, which are considered part of the same school district for purposes of Chancellor's Regulation C-205, he was not eligible for employment for the positions (*see* the affidavits of Daphne Perrini, Assistant Principal of Bedford Stuyvesant Preparatory High School [the "Perrini Affd."], Tamika Matheson, Principal of Frederick Douglass Academy VII [the "Matheson Affd."], and Frederick

C. Wright, Assistant Principal of Intermediate School 93 [the "Wright Affd."]).

Second, respondents argue that the City is not a proper party to this action. Only DOE is statutorily empowered to appoint staff and instructors at its schools. All of petitioner's allegations and claims are directed against DOE and Chancellor Klein. Since DOE exists as a separate and distinct legal entity from the City, the City cannot be held liable for the alleged acts of the DOE. Therefore, petitioner's claims against the City must be dismissed.

Third, respondents argue that, contrary to petitioner's argument, petitioner was provided with 60 days' notice prior to his discontinuance and was, thus, terminated in accordance with the applicable provisions of the Education Law.[5] The record shows that petitioner was notified on June 17, 2009 that he would be discontinued on August 17, 2009, 60 days after he received notification (*see* the Termination Letter). DOE's records show that petitioner was taken off the payroll effective September 9, 2009, approximately two weeks after the day he would have been discontinued (*see* the "Service History Report").[6] Thus, DOE not only complied with the requirements of Education Law §2573(1)(a), but it also gave petitioner two more weeks of notice than he was entitled to under the law. As such, there is no support for petitioner's claim that DOE violated the 60-day notice requirement of the Education Law, or that he should have been paid 60 additional days after September 9, 2009, his last day on DOE's payroll.

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[5]Respondents note that although petitioner cites to Education Law §3019, because petitioner was at the end of his three-year probationary period and was about to complete his probationary period at the time he was discontinued, the applicable section of Education Law in this instance is §2573(1)(a) (respondents' MOL, p. 12, note 3). However, the Court notes that petitioner cites only to Education Law §3012(2), not Education Law §3019 (see petitioner's attorney affirmation, ¶ 3, Petition, ¶ 28, and reply, ¶ 5).

[6]The Court notes that the Service History Report is attached to the Answer as Exhibit 4, not Exhibit 2, as respondents cite.

In reply,[7] petitioner notes that respondents have yet to provide a sworn statement from Principal Shevell, explaining why petitioner was discontinued. Petitioner also disputes specific allegations in respondents' Answer and supporting documents.

In response to respondents' contention that "his classroom teaching performance was formally observed" on 15 occasions,[8] petitioner argues that all of the observations were *informal* because no pre-observation was conducted by an administrator first. As such, DOE violated the Rating Handbook, which provides that "[n]ew and probationary teachers . . . must have formal observations by the principal or designee as part of a prescriptive plan to improve their teaching," petitioner argues.[9] Petitioner contends that his probationary term was extended for no reason, as Principal Shevell failed to observe petitioner during his entire third and fourth years. In fact, Principal Shevell did not even meet with him at the end of his third year to articulate any concerns about his performance. This is in violation of the Rating Handbook, which requires the school rating officer – *i.e.*, Principal Shevell – to make informal and formal classroom visits with the teacher that would allow him to improve, petitioner argues. As respondents failed to give petitioner a fair opportunity to receive tenure and to be evaluated objectively, they did not act in good faith, petitioner argues.

Petitioner further contends that during his appeal hearing before the Chancellor's Committee, Principal Shevell acknowledged that she was told by DOE to give tenure decisions

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[7]Petitioner's reply comprises an attorney affirmation, a Verified Reply, and an affidavit by petitioner.

[8] Answer, ¶ 32.

[9]The Court notes that while petitioner quotes from the Ratings Handbook throughout his affidavit, he only provides the document titled "Memorandum 80." Respondents also do not provide a complete copy of the Rating Handbook for the Court's review.

"hyper-scrutiny." She also acknowledged that her decision not to give tenure to petitioner was primarily based on a "feeling," and that she failed to follow DOE standards and rules regarding observations and principal duties.[10] These ambiguous standards hardly give petitioner any fair opportunity to improve his performance, petitioner contends.

Petitioner describes respondents' allegations about his classroom management skills as "inaccurate and puzzling," because "I have been praised many times for my classroom management through my teaching career" (Petitioner's Affd., ¶ 10). He goes on to highlight the positive comments Assistant Principal Marra made in six separate Observation Reports. Petitioner attests that throughout all of his observations, his classroom management skills "were never noted as problematic in the classroom" (Petitioner's Affd., ¶ 11). Petitioner also disputes respondents' claim that he had recurring problems invoking students' critical thinking skills.

Regarding the June 23, 2008 Letter criticizing his performance teaching the SLC class, petitioner contends that he "did not and would not make any negative comments about students"; he only reported the students' dissatisfaction with the SLC program (Petitioner's Affd., 28). He further contends that the accusation in the June 23, 2008 Letter is not supported by any documentation or evidence.

Petitioner also disputes specific allegations in respondents' Answer regarding the circumstances regarding his interviewing for and being ultimately rejected for the positions at other schools. For example, petitioner argues that nothing in Chancellor's Regulation C-205(25) prevented petitioner from being hired into the middle school position he was offered at

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[10]The Court notes that petitioner fails to provide a copy of transcript of the appeal hearing, from which he quotes. His affidavit provides one alleged excerpt of the hearing in support of petitioner's contention that Principal Shevell does not properly conduct pre-observation conferences for teachers (Petitioner's Affd., ¶ 32).

Intermediate School 93, regardless of whether he was to be discontinued at the high school. In addition, petitioner was offered several high school positions *before* he was effectively discontinued, which he could have secured, had DOE agreed to extend his probationary period for another year at the new school.

Petitioner reiterates his request for an additional 47 days' pay during the 60-day notice period as required by Education Law §3012(2), as he was not paid additional monies after June 30, 2009. Instead, he was paid summer pay that he had already earned and accrued during the 2008-09 school year. He further notes that respondents still have failed to disclose the Chancellor's Committee report that served as the basis for the denial of his appeal.

Discussion

At the outset, petitioner's request that the instant proceeding be restored to the Court's calendar is granted. Petitioner presented conclusive evidence that he has exhausted the administrative review process, *i.e.* the Decision, and respondents do not oppose this branch of the Petition.

As a threshold matter, respondents have demonstrated, and petitioner does not contest, that the City is not a proper party to this matter. It is well settled that the DOE and the City are separate and distinct legal entities (*Perez ex rel. Torres v City of New York*, 41 AD3d 378, 379 [1st Dept 2007]; *Montgomery-Costa v City of New York*, 26 Misc 3d 755, 761, 894 NYS2d 817, 821 [Sup Ct New York County 2009]). Further, only DOE is statutorily empowered to appoint staff and instructors in its schools (Education Law §2554 [2]). Therefore, "the City lacks tangential involvement or responsibility for the determinations at issue herein" (*Montgomery-Costa* at 773). Accordingly, the instant proceeding is dismissed as against the City.

The Court proceeds to address the merits of the Petition as against DOE and Chancellor Klein.

Probationary teachers, such as petitioner herein, are at-will employees whose employment can be terminated at any time and for any reason during the probationary period (*Speichler v Board of Co-op. Educ. Servs.*, 90 NY2d 110, 114 [1997]; Education Law §3014 [1]). "It is well settled that the termination of a probationary teacher may not be disturbed, unless the termination was for a constitutionally impermissible purpose, violative of a statute, or done in bad faith" (*Barandes v New York City Dept. of Educ.*, 2009 WL 530974, 3 [Sup Ct New York County 2009], citing *Frasier v Board of Educ. of the City School Dist. of the City of NY*, 71 NY2d 763 [1988]; *Thomas v Abate*, 213 AD2d 251 [1st Dept 1995]). Further, judicial review is limited to an inquiry as to whether the termination was made in bad faith (*Barandes at* 3; *Witherspoon v Horn*, 19 AD3d 250, 251 [1st Dept 2005]).

It is also well settled that evidence "in the record supporting the conclusion that performance was unsatisfactory establishes that the discharge was made in good faith" (*Matter of Johnson v Katz*, 68 NY2d 649, 650 [1986]; *Barandes* at 4). In the absence of any demonstration that the termination was in bad faith, the Court "will not interfere with the discretion of the appointing officer unless the action complained of was arbitrary and capricious" (*Talamo v Murphy*, 38 NY2d 637, 639 [1976]; *see also Smith v City of New York*, 118 Misc 2d 227, 228, 459 NYS2d 1007, 1008 [Sup Ct, New York County 1983] ["For, with respect to a probationary employee, the appointing officer must only act in good faith in terminating the employment. This is simply another way of stating that the action of the employer must not be arbitrary or capricious"]). Finally, Petitioner bears the burden of "raising and proving" such bad faith, "and

the mere assertion of 'bad faith' without the presentation of evidence demonstrating it does not satisfy the employee's burden" (*Witherspoon* at 251, citing *Soto v Koehler*, 171 AD2d 567, 568 [1991], *lv denied* 78 NY2d 855 [1991]).

Here, petitioner fails to meet his burden of producing credible evidence that he was terminated in bad faith. Petitioner attempts to demonstrate bad faith on respondents' part by arguing that respondents failed to follow its policies and procedures as set forth in the Rating Handbook, and failed to provide him with adequate remedial help. However, the evidence in the record supports respondents' conclusion that petitioner's performance during his probation was unsatisfactory, thereby establishing that his termination was not made in bad faith, and "petitioner has failed to muster evidence that outweighs that implication" (*Davids v City of New York*, 2009 WL 788982 [Sup Ct, New York County 2009], *affd* 72 AD3d 557 [1st Dept 2010]).

The evidence in the record demonstrates that prior to the one-year extension that petitioner accepted in 2008, petitioner received satisfactory classroom observations and end of year ratings (*see* the Observation Reports and End of Year Rating Sheets for June 2006, 2007 and 2008). However, the Observation Reports also contain comments that demonstrate that petitioner needed to improve or had problems with his teaching skills. For example, in November 2005, Assistant Principal Korkotas observed petitioner's classroom and emphasized that petitioner needed to encourage the students to "think critically about the work that they are accomplishing" by using Bloom's Taxonomy[11] (*see* the November 20, 2005 Observation Report). In the fall of 2006, Principal Shevell observed petitioner's classroom and noted his failure to use

[11]The Court notes that "Bloom's Taxonomy" is a classification of different learning objectives educators set for students that was developed in 1956 by a group of educational psychologists lead by Benjamin Bloom.

"higher levels of Bloom's Taxonomy to ensure academic rigor" (*see* the October 4, 2006 Observation Report). Similarly, in or about November 2006, Assistant Principal Marra criticized petitioner for his propensity to ask "many lower recall questions," and advised that such "questions do not serve to stimulate critical thinking; rather they usually end up coaxing the teacher into a lecture-style format where critical thinking is discouraged" (*see* the November 9, 2006 Observation Report). During the 2007-2008 school year, Assistant Principal Marra observed petitioner's classroom and again noted his concern that petitioner continued to instruct in a teacher-dominated fashion and "accepted responses from only one or two students to each specific question . . . asked" (*see* the February 12, 2008 Observation Report).

The June 23, 2008 Letter signed by Assistant Principal Sheri Meyers and Assistant Principal Marra, as well as petitioner, also demonstrates petitioner's teaching deficiencies:

> [I]t was quite evident to us that you have not made it a priority to have your SLC students complete their community service project in a timely manner. Throughout the spring semester you have failed to follow the time line suggested for introducing and guiding your students through this component of their learning. . . .
>
> At our SLC teachers meeting on Monday, May 12th, all your comments concerning your SLC students were negative. Yes, these are our most "challenging & challenged" students; however, you must remember that "A student is one who comes to us with needs and/or wants." It is our responsibility as educators to fill them." [*sic*]
>
> You shortchanged your SLC students by lacking the 3 C's, "Compassion, Competency & Commitment" to them.
> (June 23, 2008 Letter).

Consequently, petitioner was offered an extension of probation instead of tenure, which petitioner accepted. The Extension Agreement states the following conditions by which petitioner was to be subsequently granted or denied tenure:

> [Petitioner] shall have all the rights of a Teacher in the license area of Social Studies during his extended probationary period. No later than 9/9/2009, [petitioner] shall either

> be granted tenure upon satisfactory completion of the additional probationary period or denied completion of probation and/or discontinued prior thereto.
>
> The parties agree that the decision to either grant tenure to [petitioner] at a date no later than 9/9/2009, shall be based upon an evaluation of Mr. Kolmel's probationary service *during the additional one year of probationary service herein granted and also upon an evaluation of [petitioner's] probationary service rendered prior to 9/9/2008.* (Extension Agreement, ¶¶ 2-3) (emphasis added).

The evidence in the record demonstrates that petitioner continued to have problems during the 2008-09 probationary period. For example, petitioner was given an unsatisfactory rating in the March 18, 2009 Observation Report by Assistant Principal Huegel, who wrote:

> As a result of two previous post observation conferences, November 19, 2008 and January 9, 2009, I made several suggestions to you. . . . Despite my suggestions, you continue to plan a teacher dominated lesson with your students, you have instead, trained your students not to participate actively in their own learning experience. [*sic*] (March 18, 2009 Observation Report).

Assistant Principal Huegel went on to encourage petitioner to use Bloom's Taxonomy in his questioning techniques "to ask students to respond to prompts that elicit comparing and contrasting, analysis, synthesis, and evaluation" (*id.*)

Petitioner also received an unsatisfactory rating after his June 2, 2009 observation by Assistant Principal Smaragdas. Assistant Principal Smaragdas commented that he found petitioner's lesson plan "very confusing." He also noted that the "few questions that [petitioner] did ask during my visit were at the lowest levels of Bloom's Taxonomy" (June 9, 2009 Observation Report).

In addition, petitioner's file contains two letters criticizing his professional conduct during the 2008-09 school year. In the letter dated October 6, 2008, petitioner was criticized for missing the first faculty meeting of the school year:

> Being that this is not your first year at our school, it is disturbing to the Administration

> that you missed this important meeting. . . . Please make sure to mark your calendars accordingly for future meetings.
> (October 6, 2008 Letter).

Petitioner was further informed that the payroll secretary would place a 45-minute deduction in his record. In a letter dated December 22, 2008 and signed by Assistant Principals Smaragdas and Huegel, petitioner was criticized for leaving the school building during the regular work day. The letter states in relevant part:

> On Thursday, December 18, 2008, at approximately 1:40 p.m., I received a call stating that you had left the building and that you were involved in a car accident. You failed to seek permission from either myself or Ms. Huegel, your immediate supervisors of the Social Studies Department. Not only did you fail to request permission to leave the school building, you failed to sign out in the Assistant Principal of Organization's office of the Principal's office as directed in the memo dated September 2008 and you notified no one of your leaving. In addition, it has come to our attention that you exited the building on your prep period, which is the time you should be using for classroom work.
>
> Your behavior on December 18, 2008, was unbecoming that of an educational professional and should you continue not to follow and adhere to school policy and the Chancellor's Regulations of the City of New York it will result in further disciplinary action and an unsatisfactory rating this academic school year.
> (December 22, 2008 Letter).

The Court notes that while petitioner disputes the June 23, 2008 Letter criticizing his performance teaching the SLC class (*see* Petitioner's Affd., ¶¶ 27-28), he does not dispute that he was reprimanded for missing the first faculty meeting of the school year (*see* the October 6, 2008 Letter), and leaving the high school during work hours without informing anyone (*see* the December 22, 2008 Letter). The evidence in the record supports the conclusion that petitioner's job performance was unsatisfactory, which was the basis for his unsatisfactory ratings and ultimate termination. Such evidence further indicates that respondents did not act in bad faith when they terminated petitioner (*Barandes* at 4).

The parties dispute whether petitioner's teaching performance was properly evaluated,

pursuant to the rules of the Rating Handbook. And, Courts have found that the failure to follow procedure "can be used as some evidence of bad faith" in terminating an employee (*Smith v City of New York, supra* at 1009). However, such "a violation or breach of proscribed procedures evinces bad faith *only when such violation is contrary to both the procedural rule's text and its purposes*" (*Davids v City of New York, supra*) (emphasis added). Here, the evidence in the record demonstrates that respondents violated the proscribed procedures for observing probationary teachers in danger of an unsatisfactory rating. However, petitioner has failed to meet his burden in demonstrating that the procedural violation was contrary to the purposes of the procedural rules.

Specifically, petitioner alleges the following:

> The school principal gave Petitioner no formal observations the four years he was at the school, with no pre-observation conferences or any prescriptive plan to improve or modify his teaching style. She only observed Petitioner informally twice his first year, and found both observations to be satisfactory. Petitioner was also never observed by a Deputy Superintendent or anyone outside the school. At no point did Respondents create a plan of action to address Petitioner's alleged deficiencies while teaching. There was no log of pedagogical assistance and/or support on record that was ever provided to Petitioner while teaching. This is hardly good faith in giving Petitioner a fair opportunity at receiving tenure and to be evaluated objectively.
> (Reply, ¶ 12)

Memorandum 80, on which petitioner relies, states in relevant part: "New and probationary teachers new to a school . . . must have formal observations including a pre-observation and post-observation conference by the principal or designee as part of a prescriptive plan to improve their teaching" (Memorandum 80, p. 4). The document also states that for *satisfactory* teachers, such a pre-observation conference could take the form of a *departmental meeting* (*id.* at 3). However, for teachers rated *unsatisfactory* or in danger of an unsatisfactory rating, the pre-observation conference is to be "*a one-to-one conference between supervisor and*

teacher – length of meeting is open ended – discussion focuses on the content of the lesson and areas to be evaluated" (*id.*) (emphasis added).

The Log of Assistance for 2008-09 demonstrates that "Department Meetings" were held on the same dates as petitioner's classroom observations for 2008-09: October 20, November 17, and December 15, 2008, and January 26, February 9, March 26, and April 20, 2009. Respondents contend that "the Assistant Principal of Social Studies conducts a departmental *pre-observation conference* for its teachers *during the department meetings*, and that at such conferences, the teacher receives professional development instruction" (Answer, ¶ 33). However, petitioner attests that prior to filing his Petition, he never saw the Log of Assistance (Petitioner's Affd., ¶ 41). Petitioner further attests that at the Department Meetings, he was not provided with any substantive feedback:

> The [Log of Assistance] only contains references to department meetings which are generic meetings of the department, and scholarship report meetings, which were nothing more than grade data report meetings. The scholarship report meetings was a question and answer session meeting conducted by Ms. Huegel on how to raise my classroom grades. Ms. Huegel would simply ask how could I raise my classroom grades and I would respond with an answer; these answers are listed as discussed in the log of assistance but this is very misleading. These meetings are shown as if we discussed these problems based on Ms. Huegel's personal input. This is not true . . . . Nothing was discussed and taught and the meetings were only five minutes in length.
> (*Id.*).

Further, in her testimony before the appeal hearing, Principal Shevell conceded that she does not follow the Department's rules for teachers rated unsatisfactory or in danger of an unsatisfactory rating. Petitioner provides the following excerpt from the appeal hearing:

> Turascan: Uh here's some questions I have for you. Your telling me that your school policy is that you don't do one on one pre-observation conferences?
> Shevell: Correct uh most of the time I'm not going to say all of the time but for the most part I like my A.P.s [Assistant Principals] to tell teachers we give a generic every faculty meeting every department conference is a pre-observation conference because we focus

> on P.D. we focus on good teaching skills and these are the things we tell them we're going to look for when we come into the room.
> Turascan: Is it appropriate that the school's rules should be contrary to the department's rules?
> Shevell: No the school's rules are not contrary.
> Turascan: If the department's rules are that U-rated teachers are in dangers of a U-rating receive a [one-on-one] pre-observation conference length of time to be undetermined for focus on content of the lesson to be evaluated and that's the language of chief executive memorandum number 80. And as the chief executive memorandum is it appropriate that your school should ignore that rule and follow your own rule?
> Shevell: Our own rules I just want to be sure that teachers are teaching appropriately here that's it.
> Turascan: But that didn't answer my question
> Shevell: Alright I don't always follow our own rules I guess in this case I don't know no we don't follow we follow I don't know what do you want to say.
> (Petitioner's Affd., ¶ 32) (*sic*)

The Court notes that petitioner failed to provide the full transcript of the hearing.

Importantly, petitioner also fails to raise any argument that Principal Shevell's failure to conduct one-on-one pre-observation conferences was contrary to the procedural rule's purpose. As far as the Court can glean from Memorandum 80, the purpose of the rule is as follows:

> Recognizing the importance of effective professional development and teacher evaluation practices to promote quality classroom instruction, the [Board of Education of the City of New York] and the [United Federation of Teachers] have developed a model for teacher performance reviews designed *to: (1) encourage ongoing professional growth, and (2) take into account varied levels of experience and/or expertise that teachers bring to their classrooms. Where appropriate, the performance review must include clear and specific recommendations for professional growth.*
> (Memorandum 80, p. 2) (emphasis added)

The Court in *Davids v City of New York* (*supra*) explains that "when an employer fails to comply with a procedural requirement, but still satisfies its purposes, the procedural breach *rarely* has been found insufficient to support a finding of bad faith" (emphasis added). As an example, the Court cited the case of *Smith v City of New York* (118 Misc 2d 227, 228, 459 NYS2d 1007, 1008 [Sup Ct, New York County 1983]), in which the petitioner, a probationary

employee of the New York Human Resources Administration, argued "that he did not receive an evaluation of his performance every three months during the probationary period and therefore he did not have a fair opportunity to demonstrate his ability." In rejecting the petitioner's argument, the Court in *Smith* explained that the purpose of the section to which the petitioner cited was to "aid the employer in its evaluation of the employee and to aid a probationary employee to demonstrate ability to perform duties by giving a periodic evaluation so he or she might see mistakes and strengths and govern oneself accordingly (*id.* at 228). The Court further determined that when read in conjunction with another section in the Rules and Regulations of the City Personnel Director, "it becomes clear that a failure to comply with Paragraph 7.5.6 of Section 5 does not prevent the respondent from terminating probationary employment" (*id.*). The Court added that "there is no indication that the respondent acted arbitrarily in failing to furnish periodic evaluations to petitioner. The uncontroverted facts are clear that the petitioner on many occasions after December 1981 was counseled, advised, warned, directed and given opportunity to perform his work in a manner which his employer considered to be satisfactory" (*id.* at 229). The Court in *Smith* dismissed the Petition.

In *Davids*, the petitioner, a probationary police captain, similarly argued that the respondents' "failure to follow their own procedures is evidence of bad faith sufficient to warrant annulling the determination to [demote] him." Specifically, the petitioner alleged that his raters emphasized the wrong set of criteria, his evaluations were untimely, and "the failure of his commanding officer to serve as reviewer for either evaluation undermines the 'specific reason' that [the petitioner] believes AG 314-01 requires the commanding officer to review below competent evaluations . . . 'the ratee's direct superior who is most capable [of] determining the

ratee's actual performance" (*id.*). In opposition, respondents argued that such procedural defects did not suffice to demonstrate bad faith.

The Court in *Davids* noted that the petitioner "received below-competent scores on his evaluations, and the Respondents' witnesses . . . provided affidavits that buttress the evaluations' conclusions." Thus, the evidence of poor performance indicated that the respondents acted in good faith when they demoted the petitioner. "Consequently, Petitioner must offset the evidence of good faith with sufficiently persuasive evidence of bad faith," the Court explained.

The petitioner failed to meet his burden. He offered no evidence to substantiate his claim that his raters attached too much weight to inappropriate criteria, and the Court determined that the "remaining asserted procedural defects (the evaluation's timing, the commanding officer's failure to serve as reviewer, and the reviewers' failure to sign the evaluations before the petitioner received his copy) are insufficient to demonstrate bad faith, particularly in light of evidence that Petitioner performed poorly. Indeed, even where Respondents breached the Guidelines' text, they substantially upheld its purposes." The Court in *Davids* went on to deny and dismiss the Petition.

Similarly, here, petitioner fails to meet his burden. Petitioner fails to demonstrate how Principal Shevell's failure to conduct one-on-one pre-observation conferences contravened Memorandum 80's purpose to "(1) encourage ongoing professional growth, and (2) take into account varied levels of experience and/or expertise that teachers bring to their classrooms" and endure that "[w]here appropriate, the performance review [includes] clear and specific recommendations for professional growth" (Memorandum 80, p. 2). Further, the Observation Reports contradict petitioner's contention that respondents failed to create a plan of action to

address his teaching deficiencies, or provided him with pedagogical assistance and/or support (Petition, ¶ 18). For example, Assistant Principal Huegel stated in her March 18, 2009 Observation Report:

> On Tuesday, February 24, 2009, *at [petitioner's] request,* I modeled a lesson for your 7th period class. You specifically asked me to demonstrate how to use group work. I explained to you, after I modeled it, that group work must be "a planned activity, even if it is as simple as think-pair-share." This lesson that I observed asked students to, "work in pairs" and it was obvious to me that it was not part of your lesson. So much time was devoted to note taking that when you did give the handout on the document based questions; you had barely two minutes left in the period.
> (Emphasis added) (*sic*).

In that same report, Assistant Principal Huegel refers to "two previous post observation conferences, November 19, 2008 and January 9, 2009," in which she made suggestions to petitioner. Petitioner's "lesson was unsatisfactory," she concluded.

As petitioner has failed to demonstrate that respondents' procedural violation contravened the purpose of Memorandum 80, petitioner has failed to muster evidence outweighing the implication of good faith on the part of respondents (*Davids v City of New York, supra*).

While petitioner contends that he was deprived of notice of the opportunity to put in a response before Superintendent Unger denied his certification of completion of probation, petitioner fails to demonstrate that he had a right to such a response. Petitioner alleges a "violation of the statute *which requires a Superintendent's review period before denying tenure*" (Petition, ¶ 19) (emphasis added). However, petitioner neither cites a specific statute, nor elaborates as to how a "Superintendent's review period" includes an opportunity for him to respond.

Also lacking merit is petitioner's claim that he was terminated because of pressure from

OLR. The video[12] that purports to show that OLR "has directed principals to prevent probationary teachers from achieving tenure" does nothing of the sort. In a 20-minute segment of the video, which is titled, "The 2008 Tenure Process: Principal Training Session," David Brodsky ("Mr. Brodsky"), director of OLR, explains that legally it is more difficult to terminate a tenured teacher who is ineffective in the classroom than it is to discontinue a probationary teacher who is ineffective in the classroom. Mr. Brodsky states that principals should apply rigorous standards to the decision of whether to grant a teacher tenure, so as to ensure the hiring of good teachers. He goes on to explain in detail the legal standards for terminating a probationary teacher, *i.e.* that the decision not be arbitrary and capricious. Therefore, the video fails to support petitioner's claim that his termination was made in bad faith.

Importantly, it is undisputed that the same year petitioner was terminated, eight out of the 11 probationary teachers at the high school obtained tenure (Answer, ¶ 31, respondents' MOL, p. 10). In addition, 30 of the 32 probationary teachers received satisfactory End of Year Ratings (respondents' MOL at 10). Such evidence flatly contradicts petitioner's allegations of a plan or policy at the school to prevent probationary teachers from achieving tenure.

Petitioner's contention that respondents "interfered" with petitioner's accepting positions at other schools in the district also lack merit. Chancellor's Regulation C-205(25)(c) bars a probationer who has been discontinued under a license from being reappointed to another high school in the district under the same teaching license. The "Note" to Chancellor's Regulation C-205(25)(c) further explains:

Since for this purpose, the schools operated under the jurisdiction of the Chancellor and

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[12]Available at https://admin.acrobat.com/_a34442951/p12487663.

> Central Board comprise one district, persons whose probationary service was discontinued in one school in the City District may not be reappointed under the same license to another school in the City District. *This is true even if the dismissal occurred from one "high school district" and the dismissed employee sought employment in a different "high school district."*
> (Emphasis added).

As petitioner had been discontinued under his social studies teaching licence, and he was seeking employment under the same license at high schools considered part of the same school district, he was not eligible for those positions. Further, the affidavits of Daphne Perrini, Assistant Principal of Bedford Stuyvesant Preparatory High School, Tamika Matheson, Principal of Frederick Douglass Academy VII, and Frederick C. Wright, Assistant Principal of Intermediate School 93, confirm that although petitioner was considered for positions at each of those schools, he ultimately was rejected because of his ineligibility, pursuant to Chancellor's Regulation C-205(25)(c). Petitioner fails to provide credible evidence that respondents interfered with petitioner's efforts to find employment at other schools.

As to petitioner's claim that he is owed an additional 47 days' pay during the 60-day notice period, petitioner fails to submit any evidence to support his claim. Further, there is no indication that this relief was sought or considered by the DOE and the Chancellor's Committee, which heard his appeal. Therefore, this branch of the petition is denied.

Finally, regarding petitioner's request that respondents to disclose the full report of the Chancellor's Committee that served as the basis to deny petitioner's appeal, New York Courts have held that Chancellor's Committee reports "are predecisional material exempt from disclosure under Public Officers Law §87(2)(g)" (*Elentuck v Green*, 202 AD2d 425, 426 [2d Dept 1994]; *see also Kheel v Ravitch*, 93 AD2d 422, 428 [1st Dept 1983] ["The decisions construing New York's Freedom of Information Law, are in accord. They have similarly held that

predecisional memoranda, prepared to assist the agency in its decision-making process and which are not final agency determinations or policy, are exempt from disclosure"]). Accordingly, petitioner's request is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the branch of petitioner's application for an order restoring the instant proceeding to the Court's calendar is granted, and the instant proceeding is hereby restored; and it is further

ORDERED and ADJUDGED that the branches of petitioner's application for an order, pursuant to CPLR Article 78, compelling respondents to file an Answer, and dismissing respondents cross-motion are moot; and it is further

ORDERED and ADJUDGED that the Petition is dismissed against the City of New York on the ground that said respondent is an improper party to this proceeding; and it is further

ORDERED and ADJUDGED that the Petition against the New York City Department of Education and Joel I. Klein, Chancellor of New York City Department of Education, seeking an order (a) declaring as arbitrary, capricious, unreasonable, an abuse of discretion, lacking a rational basis, and in bad faith respondents' termination of petitioner's employment as a probationary teacher and denial of certification of completion of his probation as of August 17, 2009; (b) directing respondents to immediately rescind petitioner's termination, petitioner's unsatisfactory rating for 2008-09, and the denial of petitioner's certification of completion of probation; (c) directing respondents to reinstate petitioner to his teaching position *nunc pro tunc* to August 17, 2009, with back pay, interest, and any other benefits or emoluments of employment

lost since the date of his termination; and (d) directing respondents to pay petitioner an additional 47 days' pay during the notice period between June 30, 2009 and August 17, 2009, is denied, and the petition is dismissed; and it is further

ORDERED and ADJUDGED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

This constitutes the decision and order of this court.

Dated: May 20, 2010

Carol Robinson Edmead, J.S.C

HON. CAROL EDMEAD