

O'Flaherty v New York City Dept. of Educ.

2011 NY Slip Op 30535(U)

February 8, 2011

Supreme Court, New York County

Docket Number: 110194/10

Judge: Barbara Jaffe

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

BARBARA JAFFE

PRESENT: _____ J.S.C.

PART 5

Index Number : 110194/2010
 O'FLAHRETY, MICHELE
 vs.
 NYC DEPARTMENT OF EDUCATION
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. _____
 MOTION DATE 1/4/11
 MOTION SEQ. NO. _____
 MOTION CAL. NO. 81

this motion to/for _____

Notice of ~~Motion~~ ^{Petition} / Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>
<u>2,3</u>
<u>4,5</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this ~~motion~~ ^{Petition}

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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 1418).

Dated: 2/8/11
 FEB 09 2011

37
 BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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 5

-----X
MICHELE O'FLAHERTY,

Index No. 110194/10

Petitioner,

Motion Date: 1/4/10

-against-

Motion Seq. No.: 001

Calendar No.: 81

DECISION & JUDGMENT

NEW YORK CITY DEPARTMENT OF EDUCATION

BARBARA JAFFE, JSC:

For petitioner:
John C. Klotz, Esq.
350 Fifth Avenue, Suite 170
New York, NY 10118
212-630-2600

For defendant City:
Devor Deland Perry, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-788-0917

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 141B).

By notice of petition dated August 2, 2010, petitioner moves pursuant to CPLR 7804 for an order transferring this matter to the Appellate Division, or in the alternative, pursuant to CPLR 7803 vacating the unsatisfactory (U) rating from her annual review and replacing it with a satisfactory (S) rating, and reversing the decision of the Commissioner of Education dated April 5, 2010 dismissing her appeal from that rating. Respondent opposes.

I. FACTS

Petitioner has been an English teacher at Bronx Regional High School (Bronx Regional) since 2002. (Pet., dated August 2, 2010; Ans., dated Oct. 7, 2010). It is undisputed that before the events leading to the U rating, there had been no substantiated claims against her of prohibited conduct directed by her at students.

Pursuant to the Regulation of the Chancellor A-421, as amended on June 29, 2009, verbal

abuse of students, consisting of “language that tends to belittle or subject students to ridicule,” is prohibited, even where directed at a disruptive student. (Ans., Exh. 2). Allegations of verbal abuse are initially reviewed by the Office of Special Investigations (OSI), which in turn may instruct the school’s principal to conduct an investigation and an evaluation of the evidence and credibility of the witnesses. (*Id.*). The principal, however, may not conduct an investigation until authorized by OSI. (*Id.*). Although the version of A-421 in effect at the time of petitioner’s offenses is not part of the record, both parties rely on the one provided by respondent. (*Id.*; Pet.; Ans.).

The Panel for Educational Policy of the Department of Education of the City School District of the City of New York (PEP) provides in its by-laws a procedure for reviewing a U rating, whereby the employee may be accompanied by an advisor, appear before the committee reviewing the rating, call witnesses, be confronted by witnesses, examine exhibits, and introduce evidence. (Ans., Exh. 17). Although the review process may proceed if witnesses are unavailable, the committee may consider the absence of a witness in reaching its decision. (*Id.*).

On November 12, 2008, one of petitioner’s students alleged that following an argument over a midterm grade, petitioner said, “I’m glad I’m not your parent” and, “If I were your parent, I would have done things differently and you would not be in an alternative high school.” (*Id.*, Exhs. 1, 3). The student believed that petitioner was insulting her mother. (*Id.*). Petitioner then explained to the student how she had succeeded based on her drive and academic credentials, to which the student replied that she hoped that someday she would be where petitioner was. (*Id.*). Petitioner responded by saying either “keep hoping” or “that’s a lot of hoping.” (*Id.*).

By letter to the investigator dated November 19, 2008, petitioner acknowledged that after

many students had failed an exam, she told the class that “it’s a good thing that I didn’t give birth to any of you.” (Pet., Exh. F). She also wrote that after being asked by a student if she was “saying something about my mother,” she denied it, stating that she had said, “it is a good thing that I didn’t give birth to any of you because I would be able to handle this situation differently.” (*Id.*). She also admitted that when the student replied, “I hope to do better than you one day,” she said, “I hope that you do, but that’s a lot of hope.” (*Id.*).

The investigation of this incident, which included interviews with and written statements from the student, several witnesses, and petitioner, substantiated comments contained in a report dated November 25, 2008. (Ans., Exh. 1, 5). After reviewing the report, principal Colin Thomas agreed with the findings set forth therein and, by letter dated January 8, 2009, concluded that petitioner had used poor judgment in belittling students and had engaged in intolerable verbal abuse. (*Id.*, Exh. 6). She was warned that such misconduct could lead to further disciplinary action, including a U rating and disciplinary charges under the Education Law. (*Id.*).

Soon thereafter, petitioner was scheduled to read aloud a listening portion of an English Regents exam on January 27, 2009 and failed to do so. (*Id.*, Exh. 7). On February 11, 2009, she met with Thomas, the assistant principal, and a representative from the United Federation of Teachers (UFT), to discuss the incident. (*Id.*). Petitioner told Thomas that the administration had erred in giving her that assignment because she had not been informed in writing that she was expected to read. (*Id.*). Thomas responded that, by failing to appear and read the exam, she had created a problem for students and staff. (*Id.*). By letter to petitioner dated February 13, 2009, Thomas concluded that petitioner had “deliberately [taken] advantage” and “inadvertently sabotaged the students’ test taking environment,” and that her “inability to properly read the

proctoring schedule and [her] desire not to communicate effectively with others, as instructed, has placed [her] in this predicament.” (*Id.*). Petitioner was again warned that such misconduct could lead to disciplinary action, including a U rating. (*Id.*).

On February 24, 2009, while a student was reading aloud in class, petitioner asked her in front of the class why she was reading “so slow” and whether she needed “Hooked on Phonics.” (*Id.*, Exh. 9). The student’s guardian reported the incident to the assistant principal who interviewed the student, petitioner, and three witnesses. (*Id.*, Exhs. 9, 10, 11). In a written statement dated March 9, 2009, petitioner denied having made the statement. (*Id.*, Exh. 11). By report dated March 4, 2009, the investigator concluded that the allegation was substantiated, and by letter to petitioner dated April 7, 2009, Thomas concluded that petitioner had made the statement. (*Id.*, Exhs. 8, 13). Once again, Thomas informed petitioner that she had behaved unprofessionally and that the misconduct may lead to disciplinary charges or a U rating. (*Id.*).

On her 2008 to 2009 performance review, signed by Thomas on June 16, 2009, petitioner received a U rating. The three incidents discussed above were recounted in the review. (*Id.*, Exh. 13).

Petitioner requested an appeal of the rating pursuant to the by-laws and on December 11, 2009, the chancellor’s committee conducted a review. (*Id.*). Petitioner was represented by a UFT advisor who asserted that the investigation of the second verbal abuse allegation was improper absent evidence that it was brought to OSI before the principal proceeded. The chancellor denied all objections. (Reply Affid. of Michele O’Flaherty, dated Oct. 19, 2010 [Reply Affid.], Exh. 1).

The instances of misconduct were reiterated to petitioner who was given an opportunity to be heard. (*Id.*). In support of the school’s rating, Thomas submitted the performance review,

the reports of misconduct, and correspondence from the investigator and the principal to petitioner. (Ans.). Upon hearing the testimony and reviewing the evidence, the committee chairperson sustained the rating, finding no evidence that it was inaccurate or unfair. (Reply Affid., Exh. 1).

Petitioner now alleges that Thomas harassed her on numerous occasions, and that she has filed a separate lawsuit against him arising from that conduct. (Pet.).

II. CONTENTIONS

Petitioner argues that this matter should be transferred to the Appellate Division to determine whether the committee's decision was supported by substantial evidence, as it arose from a hearing directed by law, and that although the review process is not specified by statute, it is nonetheless directed by law because it is judicial in nature and involves a right guaranteed by due process. She also maintains that the principal and chancellor failed to meet the requirements of Chancellor's Regulation A-421 as the investigation of the second incident was not initiated by OSI, and that the U rating creates a "stigma plus" that could destroy her career. (Pet.; Petitioner's Reply Memorandum, dated Oct. 21, 2010).

In response, respondent denies that the review process constitutes a hearing mandated by law, and that transfer to the Appellate Division is thus inappropriate. (Memorandum of Law in Support of Respondent's Verified Answer, dated Oct. 7, 2010). Accordingly, respondent argues, the U rating may not be vacated absent a finding that it was arbitrarily and capriciously imposed. (*Id.*).

III. ANALYSIS

A. Article 78 and transfer to the Appellate Division

Pursuant to Article 78, a party aggrieved by an administrative decision may challenge it in court, although the grounds for annulment or vacatur of the decision are limited. (CPLR 7803). Where the petitioner challenges a determination rendered after a “hearing pursuant to direction by law” on the grounds that it was not supported by substantial evidence, the action must be transferred to the Appellate Division. (*Id.*; 7804[g]; Siegel, NY Prac § 568 [4th ed]).

Whether a transfer is required, however, is not easily determined. (*See Alexander*, 2008 Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 7804:8 [“The Supreme Court will inevitably make mistakes as to the need for transfer”]). Petitioner relies on authority that supports the notion that whether a hearing is conducted “pursuant to direction by law” turns on whether the hearing is quasi-judicial and addresses a right guaranteed by the due process clauses of the states and federal constitutions. (*Garafano v U.S. Trotting Ass’n*, 78 Misc 2d 33, 34 [Sup Ct, Nassau County 1974]; *Consolidated Edison Co. of N.Y. v Kretchner*, 68 Misc 2d 545, 547 [Sup Ct, Kings County 1971]; *Testa v Wickham*, 51 Misc 2d 968 [Sup Ct, Albany County 1966]). Thus, administrative decisions reached after hearings have been transferred to the Appellate Division, even where the hearing is not mandated by statute. (*Garofano*, 78 Misc 2d at 34; *cf Atkins v Goord*, 16 AD3d 1011, 1012 [3d Dept 2005] [improper transfer; proceeding not a “true adjudicatory hearing”]).

Recent appellate division decisions, however, suggest that in circumstances similar to those in issue here, the issue may be otherwise resolved in the supreme court. In *Batreyva v New York City Dept. of Educ.*, the First Department held that the committee’s review of petitioner’s unsatisfactory evaluation ratings did not constitute a hearing pursuant to CPLR 7803(4) and that the proceeding brought by the petitioner to vacate the rating was improperly transferred. (50

AD3d 283, 283 [1st Dept 2008]; *see also James v Klein*, 43 AD3d 764 [1st Dept 2007] [remanding challenge of U rating to Supreme Court]). Similarly, in *Matter of Von Gizycki v Levy*, the Second Department held that a review conducted pursuant to the same PEP by-law relied on here was not one held pursuant to direction by law. (3 AD3d 572, 574 [2d Dept 2004]; *Johannesson v New York City Dept. of Educ.*, 2010 NY Slip Op 30066[U] [Sup Ct, New York County 2010] [same]). And in *Duncan v Klein*, the First Department held that a decision rendered after a disciplinary conference under a chancellor's regulation was not conducted pursuant to a constitution or statute and thus no substantial evidence claim could be advanced. (38 AD3d 380 [1st Dept 2007]; *cf Walsh v Kelly*, 79 AD3d 552 [1st Dept 2010] [hearing before Civil Service Commission not mandated by law; proceeding improperly transferred]).

In light of this more recent authority, the review of the chancellor's committee determination of petitioner's unsatisfactory rating pursuant to the PEP by-laws does not invoke a question of substantial evidence and thus, the petition is properly before me.

Moreover, whether the review itself is required by the constitution is relevant to whether the petition must be transferred, not whether a due process right has been invoked. (*Duncan*, 38 AD3d 380; *Von Gizycki*, 3 AD3d at 573). In *Storman*, the plaintiff, a tenured guidance counselor, appealed a U rating based on the conclusion that his inappropriate touching of a student constituted corporal punishment. (*Storman*, 2009 WL 1035964 [SDNY 2009]). Following an Article 78 proceeding in which supreme court held that the plaintiff's U rating was not arbitrarily or capriciously imposed, the plaintiff brought claims in federal court alleging a violation of his due process rights. (*Id.*). On the defendant's motion to dismiss, the court found that the plaintiff had stated a claim that his due process rights were violated in that his U rating

created a “stigma plus” due to accusations of corporal punishment. (*Id.*, *14). The court, however, noted that a “single unsatisfactory rating alone,” one that did not result in termination, “could almost never support a stigma plus,” although an accompanying allegation of corporal punishment could trigger constitutional concerns. (*Id.*; see also *Miller v DeBuono*, 90 NY2d 783 [1997] [addressing constitutionality of termination of nurse aide over charges of physically abusing patient]).

Here, by contrast, petitioner is not charged with corporal punishment, and her claim that the U rating could end her career is fatally conclusory. Moreover, as the court in *Storman* addressed only the face of the complaint, it did not determine whether the plaintiff had a protected liberty interest. (*Storman*, 2009 WL 1035964, * 15). Petitioner here has not suffered a violation of her due process rights given the appellate authority that the appeal of a U rating under the PEP by-laws does not require a hearing, and petitioner’s claim that the U rating alone invokes due process concerns because it creates a “stigma plus” that could damage her career is unsupported by the record or authority.

Nor has petitioner established that she is entitled to greater protection due to her tenured status, as she relies on decisions where hearings were conducted pursuant to Civil Service Law § 75, which distinguishes between tenured and probationary employees and does not apply to teachers. (*Chin Lin Tsao v Kelly*, 28 AD3d 320, 321 [1st Dept 2006]; *Soto v Koehler*, 171 AD2d 567 [1st Dept 1991]), *lv denied*, 78 NY2d 855. By contrast, the First Department has held that no hearing is directed by law for a tenured teacher who received two U ratings. (*Batyreva*, 50 AD3d 283 [1st Dept 2008], *affg* 2006 WL 6240412 [Sup Ct, New York County 2006]).

B. Arbitrary and capricious

Judicial review of an administrative agency's decision is limited to whether the decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." (CPLR § 7803[3]). In reviewing an administrative agency's determination as to whether it is arbitrary and capricious, the test is whether the determination "is without sound basis in reason and is generally taken without regard to the facts." (*Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *E.W. Tompkins Co., Inc. v. State Univ. of New York*, 61 AD3d 1248, 1250 [3d Dept 2009], *lv denied* 13 NY3d 709; *Matter of Mankarios v. New York City Taxi and Limousine Commn.*, 49 AD3d 316, 317 [1st Dept 2008]; *Matter of Soho Alliance v. New York State Liquor Auth.*, 32 AD3d 363, 363 [1st Dept 2006]; *Matter of Kenton Assoc. Ltd. v. Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]). Moreover, courts generally do not second-guess the decisions of educational institutions, as they "involve the exercise of highly specialized professional judgment and these institutions are, for the most part, better suited to make relatively final decisions concerning wholly internal matters." (*Maas v Cornell Univ.*, 94 NY2d 87, 92 [1999]; *see also Matter of Altman v New York City Dept. of Educ.*, 2006 NY Slip Op 30521[U] [Sup Ct, New York County 2006] [applied to termination of Department of Education teacher]).

Petitioner's rating and her appeal of it followed an investigation of the allegations against her, including the victims and witnesses of the abuse and petitioner herself, who admitted to having uttered some of the offending statements. (*Compare Batyreva*, 50 AD3d 283 [record evidence supported U rating], *with Bryant v New York City Dept. of Educ.*, 2010 NY Slip Op

32820[U] [Sup Ct, New York County 2010] [termination shocks conscience; investigator relied primarily on uncertain testimony from non-witness, made no credibility determinations, acted hostile towards petitioner]). The committee properly considered petitioner's failure to administer an examination as instructed, along with her apparent unwillingness to take responsibility for the infraction. It heard and evaluated petitioner's objections to the investigations and the review process, and decided, in its discretion, to overrule them and its credibility determinations are beyond my authority. (*See Flores v New York Univ.*, 79 AD3d 502 [1st Dept 2010] [credibility issue immaterial in Article 78 proceeding that does not arise out of hearing directed by law]).

Even if the committee had determined that the investigation of the second verbal abuse allegation was conducted in violation of the regulations, it was entitled to sustain the rating based on the remaining substantiated claims. To the extent that petitioner argues that she was the victim of the principal's abusive and harassing conduct, the chancellor's committee considered that allegation and apparently determined that it had no impact on the events in issue.

For all these reasons, petitioner has not shown that the decision to give her a U rating was without sound basis in reason.

IV. CONCLUSION

Accordingly, it is hereby

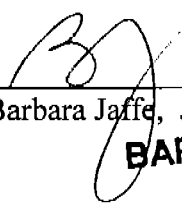
ORDERED, that petitioner's motion for an order directing transfer to the Appellate Division is denied; it is further

ORDERED, that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondents; and it is further

ADJUDGED and ORDERED, that respondents, having an address at 100 Church Street,

New York, NY, 10007, do recover from petitioners, costs and disbursements in the amount of \$ _____, as taxed by the Clerk, and that respondent have execution therefor.

This constitutes the decision and order of the court.


Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: February 8, 2011
New York, New York

~~FEB 08 2011~~
FEB 09 2011
FEB 08 2011

UNFILED JUDGMENT
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