

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

2011 NY Slip Op 32377(U)

August 8, 2011

Sup Ct, NY County

Docket Number: 109361/10

Judge: Martin Schoenfeld

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

PRESENT: Schoenfeld  
Justice

PART 28

Index Number : 109361/2010  
DUNCAN, NANCY  
vs.  
BOARD OF EDUCATION  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-3  
4-5  
6

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 *is decided in accordance with the accompanying memorandum decision.*

**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).

Dated: 8/8/11 \_\_\_\_\_ 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: IAS PART 28

----- X  
NANCY DUNCAN,

Petitioner,

Index No.  
109361/10

-against-

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

Respondents,

**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).

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

-----X  
**Schoenfeld, J.:**

In this Article 78 proceeding, Petitioner Nancy Duncan ("Duncan") seeks an Order which would: (1) require Respondents Board of Education and Joel I. Klein as the Chancellor of the City School District ("Respondents") to withdraw the unsatisfactory rating ("U-rating") given her for the 2008-2009 school year on the ground that it was arbitrary and capricious or an abuse of discretion; and (2) direct them to issue a satisfactory rating to her for the 2008-2009 school year.

Since 1996, Duncan has been employed as a guidance counselor with the Board of Education of the City School District of the City of New York, also known as the Department of Education (the "DOE") and has worked in that capacity at Middle School 113 (MS 113) since 1997. On February 23, 2009, Khalek Kirkland ("Kirkland"), the principal of MS 113, placed in Duncan's personnel file a disciplinary letter signed by him, alleging that Duncan failed to check her e-mail in a timely fashion. At the bottom of the letter is the typed statement "I have read and received a copy of the

above letter. I understand that a copy of this letter will be placed in my personnel file." Beneath that statement is a line for the employee signature. Duncan signed her name on the employee signature line, and wrote "Rebuttal to follow."

Thereafter, Duncan filed a grievance, pursuant to the terms of the collective bargaining agreement between her union, the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT) and the DOE, asking that the letter be removed from her file. In a March 11, 2009 letter, Kirkland agreed to remove the February 23, 2009 disciplinary letter from her file.

The March 11, 2009 letter states, in part:

As per our conversation yesterday in regards to your Step I Grievance, it has been decided that the letter dated February 23, 2009 will be removed from your personnel file.

This resolution should discontinue the Step I Grievance process due to the amicable agreement we agreed upon. I will expect that from this date forward you will check your [DOE] e-mail at least twice a day and respond by close of business day. I also expect that you would report to me on a weekly basis to update me on guidance, parent and school-wide issues which you have handled.

In a March 12, 2009 letter to Kirkland, Duncan responds that she is "confused as to the contents of your letter dated 3/11/09 as there were no agreements made as to my Step 1 grievance." She further states that "[m]y chapter leader and I do not wish to discontinue our Step 1 grievance. Please be advised that my union representative and I are still pursuing our Step 1 grievance and are in anticipation of a grievance date."

According to Respondents, by indicating that she intended to pursue her grievance, Duncan, in her March 12, 2009 letter, thereby rejected Kirkland's offer to remove the February 23, 2009 letter from her personnel file. Duncan contends, however, that Kirkland did not condition the removal of the February 23, 2009 letter from her personnel file on her withdrawal of the grievance. She argues

that, once he decided to remove the letter, he could not later consider it as part of her annual review.

Thereafter, in a March 26, 2009 letter, Kirkland denied Duncan's Step I Grievance. Duncan received a copy of this letter, understood that a copy of it would be placed in her personnel file and refused to sign the letter. There is a notation on the letter that says "Refused to sign," signed by school secretary N.E. Hayward ("Hayward") and dated March 27, 2009. On April 28, 2009, Duncan's Step II grievance conference took place. Her grievance of the February 23, 2009 letter was denied on May 19, 2009.

On June 24, 2009, Duncan received a U-rating for the 2008-2009 school year. Duncan states that she reviewed her personnel file in the office at MS 113 on June 29, 2009. In July 2009, she appealed her U-rating. Duncan asserts that, on or about August 3, 2009, respondents provided her with the documents that they planned to introduce as evidence at her appeal hearing. Among the documents was a March 27, 2009 disciplinary letter signed by Kirkland, detailing an alleged incident of insubordination by Duncan. Duncan states that she had never seen the letter before she received it on August 3, 2009, that it was not part of her personnel file when she reviewed the file on June 29, 2009 and that she was never made aware that any such letter was being placed in her file. According to Duncan, there were no other signatures on the document, either by Duncan or by a witness indicating that Duncan was presented with the letter but refused to sign it.

Duncan submitted two versions of the March 27, 2009 letter to this court, neither of which is signed by Duncan. The first version, described above, was faxed to Duncan on August 3, 2009. The second version is the same as the first, except that, near the line provided for the employee signature are written the words "Refused to sign," followed by Hayward's undated signature. Duncan states that this version of the March 27, 2009 letter was faxed to her on November 10, 2009,

two days before her appeal hearing.

The hearing of Duncan's appeal of her U-rating was held on November 12, 2009, before the Chancellor's Committee, whose Chairperson for this hearing was Joe Balice. Both Kirkland and Duncan testified as witnesses at the hearing. Duncan was accompanied and advised by UFT Advisor Rochelle Block ("Block"). Over her objection, the Chairperson admitted into evidence the February 23, 2009 disciplinary letter and both versions of the March 27, 2009 disciplinary letter. Duncan, as represented by Block, argued that there was insufficient evidence to support the U-rating, while Kirkland testified in support of the rating.

Although Duncan objected to the March 27, 2009 letter, on the grounds that she never received it, the Chairperson heard arguments from both sides concerning the letter and overruled Duncan's objection because one version of the letter submitted to him indicated that she received it and refused to sign it.

After the hearing, the Chancellor's Committee recommended a denial of Duncan's appeal, sustaining the U-rating. On March 15, 2010, the Interim Acting Deputy Chancellor, as designee for the Chancellor, accepted the Chancellor's Committee recommendation and informed Duncan that her appeal from the U-rating was denied and the rating was sustained "as a consequence of two disciplinary file letters. Specifically, the Appellant failed to comply with [Kirkland's] request to escort students to various activities, and failed to check her email on regular basis so as to follow up on requests and directives."

The procedures for review of professional personnel employed by the DOE are set forth primarily in two handbooks entitled "Rating of Pedagogical Staff Members" ("Rating Handbook") and "The Appeal Process" ("Appeal Handbook"). The Appeal Handbook establishes the procedures

and standards for appeals of annual review ratings. The Rating Handbook states, at section II (I) that "[t]he overall evaluation of the employee's performance requires a careful review of the documents in the file. This thorough analysis is essential since the reasons given for an adverse rating should be reflective of and supported by the written criticisms noted in the file documents."

Section II (I) (2) (a) of the Ratings Handbook provides that "[m]aterial to be placed in a staff member's file must note that it is being placed in the official file and a signature line must be provided for the recipient of the letter; a date line should also be provided." Pursuant to section II (I)(2)(c), "[i]f the employee refuses to sign a document for the file, a witness should sign a dated statement on the document attesting to this refusal." Section II (I) (6) lists certain items that are not admissible at reviews, including unsigned documents, signed documents that were not intended to be included in the personnel file and documents that were removed from the file voluntarily or as the result of a grievance decision. The "Appeals Process," in Section A2, requires that within three weeks of "being made aware . . . that an Appeal has been made" and before the hearing, the rating officer must furnish to the teacher appellant "a complete set of the documentation used by the Rating Officer to support the reason(s) for the adverse rating."

Duncan argues that, applying the criteria from the Rating Handbook, it is clear that neither letter should have been considered as part of her annual rating. She also contends that neither letter was properly part of her personnel file at the time of her appeal, and, thus, they should not have been considered by the Chairperson at her appeal hearing. According to Duncan, if the February 23, 2009 and March 27, 2009 letters had not been improperly considered, at the time of the annual review itself and during the appeal, there would be no basis for her U-rating. Duncan argues that respondents' conduct, in allowing those documents to be part of her evaluation and her appeal, was

arbitrary and capricious.

Duncan asserts that the February 23, 2009 letter was removed from her file by Kirkland on March 11, 2009, and that the March 27, 2009 letter was not part of her personnel file when she reviewed the file on June 29, 2009. Duncan also points out that, as to the version of the March 27, 2009 letter in which Hayward attested to Duncan's alleged refusal to sign the document, that attestation is undated, in contravention of the Rating Handbook's rule that any such attestation must be dated. Duncan thus contends that respondents failed to comply with the Rating Handbook and the Appeal Handbook in basing her U-rating on the two disciplinary letters that were either never in her personnel file or were removed from it prior to the appeal.

According to Duncan, respondents also violated the Appeal Handbook when they failed to provide her with a copy of the witnessed March 27, 2009 letter until two days before the hearing. Thus, she maintains, the Chairperson should have also denied the submission of that letter at the hearing on the basis of that violation. Duncan states that, in denying her appeal of the U-rating, respondents failed to follow their own rules and regulations and acted arbitrarily.

Respondents argue that the February 23, 2009 letter was properly included in Duncan's personnel file and was correctly considered at both her annual review and her appeal hearing, because Kirkland's March 11, 2009 offer to remove the letter was rejected by Duncan on March 12, 2009. Regarding the March 27, 2009 letter of insubordination, respondents maintain that Duncan received a copy of this letter, understood that a copy of it would be placed in her counseling file and refused to sign this letter. They assert that Duncan became aware of the content of the March 27, 2009 letter before it was drafted. The letter states that on March 26, 2009, Duncan and a union representative met with Kirkland to discuss her insubordination in failing to escort her students on

a network-sponsored college fair. Respondents contend that the March 27, 2009 letter merely documents the content of the conversation they had on March 26, 2009.

Moreover, according to respondents, the March 27, 2009 letter clearly indicates that Duncan reviewed and refused to sign the letter, as witnessed by Hayward. Respondents argue that the record establishes that the only version of the March 27, 2009 letter, which is in Duncan's personnel file and was also submitted at her appeal hearing, indicates that she refused to sign the letter. Respondents assert that, absent Duncan's self-serving allegation that there are two different versions of the March 27, 2009 letter, she offers no argument as to how this affects her U-rating.

Respondents state that Duncan received a U-rating for the 2008-2009 school year because her annual performance was deemed unsatisfactory due to her lack of professionalism and her consistent failure to participate in community activities, as documented by the two disciplinary letters in her counseling file, dated February 23, 2009 and March 27, 2009. They argue that the U-rating was properly sustained on appeal, and that the petition fails to state a cause of action upon which relief may be granted.

Respondents further contend that Duncan's procedural objections are unavailing, because she has not shown that her substantial rights were infringed. Respondents further assert that, although she alleges that she was denied the opportunity to review the March 27, 2009 letter, she fails to acknowledge that the letter documents her review and subsequent refusal to sign it. According to respondents, the failure to provide Duncan with the March 27, 2009 letter until November 10, 2009 is harmless error. They argue that the record clearly demonstrates that it was wholly rational for the chancellor to sustain her U-rating, and that the petition should therefore be dismissed.

Duncan asserts, however, that it is her substantial right to be evaluated in accordance with

the rules and regulations to which respondents are bound, and that she has been deprived of that right. Duncan disputes respondents' contention that the failure to provide her with the witnessed March 27, 2009 letter until two days before the appeal hearing is a harmless error. She notes that the letter in question could not have been admitted into evidence at the appeal if it did not contain Hayward's attestation. Duncan argues that this letter was improperly admitted into evidence in violation of the Appeal Handbook, and it formed part of the basis for the decision to deny her appeal of the U-rating.

### Discussion

Pursuant to CPLR 7803 (3), on judicial review of an administrative decision, a court may decide "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." "While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives.'" *Akpan v Koch*, 75 NY2d 561, 570 (1990), quoting *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 (1986). The arbitrary and capricious test involves whether the administrative decision is made with regard to the facts and has a sound basis in reason. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974).

Regulations promulgated by the Chancellor are binding upon the DOE, "in accord with the fundamental administrative law principle that an agency's rules and regulations promulgated pursuant to statutory authority are binding upon it as well as the individuals affected by the rule or regulation." *Matter of Lehman v Board of Educ. of City School Dist. of City of N.Y.*, 82 AD2d 832,

833-34 (2d Dept 1981). Furthermore, "rules of an administrative agency which regulate procedure affecting substantial rights of individuals may not be waived by the agency." *Id.* at 834.

According to the DOE March 15, 2010 letter, the U-rating and the denial of its appeal were based on the February 23, 2009 and the March 27, 2009 disciplinary file letters. Thus, the central issue here is whether those documents were properly considered, at both the original review and the appeal. This court finds that the February 23, 2009 letter was properly considered at both stages. It is undisputed that Duncan was aware of the letter, and aware that it would be placed in her personnel file. While the content of Kirkland's March 11, 2009 letter indicated that the February 23, 2009 letter would be removed, it is reasonable to construe his letter to mean that removal was based on what Kirkland described as an understanding reached between him and Duncan that, among other things, she would withdraw her Step I grievance of the February 23, 2009 letter. Duncan's response on March 12, 2009 indicated that there had, in fact, been a misunderstanding, as she stated that there was no such agreement, and she was confused by his reference thereto.

Thus, the court does not find it arbitrary or capricious, or a violation of any procedure, for Kirkland to have kept the February 23, 2009 letter in Duncan's personnel file rather than removing it. It was, therefore, properly within her file at the time of her annual review on June 24, 2009, and the Chairperson correctly allowed it to be submitted and considered at the appeal hearing.

The Court finds that the testimony concerning the March 27, 2009 letter presents a problem for its admissibility. Duncan states that she did not see the letter before it was faxed to her on August 3, 2009, which was after she appealed her U-rating. She testified that it was not in her personnel file when she examined the file on June 29, 2009. Given that the date of the annual review was June 24, 2009, if Duncan is correct that it was not in her file five days later, then the review

could not have been based on the documents in the file—as required. Furthermore, no explanation was offered at the hearing as to why the March 27, 2009 letter faxed to her on August 3, 2009 did not contain an attestation of Duncan’s refusal to sign, yet the letter faxed to her on November 10, 2009 contained such an attestation, which was undated despite the Rating Handbook’s requirement of dating such a witnesses statement.

Furthermore, if Duncan’s assertion about the two versions of the March 27, 2009 letter is true, and she only received the witnessed version of the letter on November 10, 2009, that would be in violation of the procedures. Kirkland was required to respond to the appeal within three weeks, exclusive of the summer vacation, after being made aware of the appeal, with such response to include a complete set of the documentation used by him in support of the adverse rating. There is no explanation from Kirkland or respondents as to why Duncan allegedly received the witnessed version of the March 27, 2009 letter more than three months after she received the unwitnessed version, and only two days before her appeal hearing. The time on the fax indicates that it was received at 3:51pm on November 10, 2009. The hearing was held on November 12, 2009 at 9am, and the court notes that the intervening day was the holiday of Veterans’ Day.

Where a document is not supplied to the individual appealing his or her adverse rating prior to the appeal, such a document may not be considered at the appeal. *Smith v Board of Educ. of City School Dist. of City of N.Y.*, 18 Misc 3d 192, 196-197 (Sup Ct, NY County 2007); *Mangone v Board of Educ. of City School Dist. of City of N.Y.*, Sup Ct, NY County, Aug. 3, 2007, Stone, J., index No. 117353/06.

This court finds that the action of the Chairperson, in allowing the attested version of the March 27, 2009 letter into evidence at the appeal hearing without acknowledging its infirmities, was

not rationally based. Whether procedures were violated to the extent that the March 27, 2009 letter should not have been considered, can only be resolved upon further examination of these issues. The hearing officer's consideration of the letter simply because it had a witness' signature is not based on rational consideration of the evidence. The fact that the witness's signature is undated is in contravention of the agency's rules. This, together with Duncan's statements that the letter was not in her file on June 24<sup>th</sup> and that she received two versions months apart, is troubling for the Court. Because the letter forms the basis for the U-rating, its consideration had a substantive impact on the outcome of the hearing. Thus, the matter is remanded to the DOE for a further appeal hearing in accordance with this decision. If, upon re-hearing, the Chancellor's Committee determines that the March 27, 2009 letter should not have been considered, then it will also have to decide whether to sustain a U-rating, based on only the February 23, 2009 disciplinary letter.

Accordingly, it is


ADJUDGED that the petition is granted in part, to the extent that the case is remitted to the DOE for a re-hearing of the appeal of petitioner's U-rating.

Dated: August 8, 2011

**UNFILED JUDGMENT**

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ENTER:

  
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J.S.C.