

Hazen v New York City Dept. of Educ.

2011 NY Slip Op 32858(U)

October 25, 2011

Supreme Court, New York County

Docket Number: 116643/2010

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT:

PART 10

Index Number : 116643/2010

HAZEN, WENDY

INDEX NO. _____

vs

NYC DEPARTMENT OF EDUCATION

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 001

ARTICLE 78

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

OCT 26 2011

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MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

*and conference scheduled
for January 12, 2012 in Part 10
Rm 232 of 60 Centre Street*

Dated: Oct 25, 2011

J. J. Gische
HON. JUDITH J. GISCHE ^{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 10**

-----X
Wendy Hazen,

Petitioner,

-against-

New York City Department of Education and
Joel J. Klein, as Chancellor of the New
York City Department of Education,

Respondents.

*for a judgment pursuant to Article 78 of
the Civil Practice Laws and Rules*

DECISION/ ORDER
Index No.: 116643-2010
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische

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-----X
Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
Notice of Pet and Pet (Article 78) w/WH verif, exhs	1
Resp's x/m (dismiss)	2
Pet's opp w/exhs	3
Resp's reply	4

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

Petitioner Wendy Hazen ("Hazen") seeks a judgment from the court, annulling the school chancellor's decision, denying her appeal of an unsatisfactory or "U-rating." The respondents, who are the New York City Department of Education and the school chancellor (collectively "respondents"), seek the preanswer dismissal of the petition for failure to state a cause of action (CPLR §§ 3211 [a][7], 7804 [f]) and the denial of petitioner's request for discovery.

Where a motion to dismiss is premised upon CPLR §7804 [f], only the petition and the exhibits attached thereto may be considered and all the allegations contained therein are deemed to be true (Green Harbour Homeowners' Ass'n, Inc. v. Town of Lake George Planning Board, 1 AD3d 744 [3rd Dept 2003]). Similarly, on a motion to dismiss brought pursuant to CPLR § 3211, the court is required to presume the truth of all allegations contained in the challenged pleadings and resolve all inferences which may reasonably flow therefrom in favor of the non-movant (Cron v. Hargro Fabrics, Inc., 91 NY2d 362 [1998]; Sanders v. Winship, 57 NY2d 391 [1982]). Thus, the court's inquiry on the motion to dismiss is whether the petitioner has a cause of action, not whether petitioner has stated one (Guggenheimer v. Ginzberg, 43 NY2d 268 [1977]; DePaoli v. Board of Educ., Somers Cent. School Dist., 92 AD2d 894 [2nd Dept 1983]).

Underlying Facts

Hazen was been a special education teacher for a number of years. Most recently, she has been teaching a "Setss" class at P.S. 34M on the Lower East Side of Manhattan. Hazen became a tenured teacher in 1999 and she received satisfactory ratings until June 20, 2008 ("performance review"), when she received her first and only U-rating for 2007-2008 school year. In her performance review, Hazen was rated unsatisfactory in every category, across the board. The performance review also identifies at least 15 different, documented, disciplinary actions taken against her in that school year alone. Hazen claims the U-rating is a cost-cutting measure by the school, targeted solely at tenured and more highly paid teachers. Hazen contends that only three teachers were U-rated that year and all of them (herself included) were tenured.

Hazen appealed the U-rating and a testimonial hearing was scheduled for June

17, 2010, two years after she was rated unsatisfactory. Hazen, a union advocate appearing on her behalf ("Sarrasin"), the principal of P.S. 34M ("Harte") and, the assistant principal ("Gonzalez") appeared before Sheila Bobo, the hearing officer ("Bobo" or "hearing officer") for the hearing. When the hearing ended, Bobo stated she would prepare a report which she would send to the chancellor's committee and that the chancellor would, in turn, issue its written decision. On November 2, 2010, the chancellor denied Hazen's appeal and found the U-rating "sustained as a consequence of poor delivery of instruction, poor preparation and planning, failure to follow her IEP goals, a substantiated allegation of verbal abuse, and resistance to improvement, despite support." It is this determination that Hazen seeks to have annulled and an order that respondents issue a "satisfactory" rating instead.

Hazen argues that respondents failed to follow the rules and regulations set forth in two of its own handbooks - "Rating Pedagogical Staff Members" ("the handbook") and "The Appeal Process" ("appeals process"). The handbook requires that a teacher be observed by the ratings officer at his or her school (i.e. the principal, assistant principal or supervisor of special education) and that, if the teacher is tenured, such observation be made on an annual basis. Hazen denies anyone ever observed her lessons and challenges how the chancellor could have concluded that she did not deliver her instructions well or that she was poorly prepared for lessons.

Hazen also claims that some of the "charges" against her are not properly documented, but are contained in letters placed in her file. She contends such informal disciplinary action deprived her of due process, because they did not identify the complainant, provide a reason why the complainant was not identified, or adequately

detail the incident allegedly reported to the principal or observed by school officials. Sarrasin and Hazen raised these objections before the hearing officer, also noting that many of the documents delivered to Bobo were misnumbered or improperly identified. In response Bobo stated that "mistakes" were sometimes made by school officials and that "[if] it's properly documented, properly witnessed, we have to accept it. Sometimes people realize after the fact that they didn't send the proper documentation." When Sarrasin responded that "sometimes people realize after the fact that they didn't do it properly and they [sneak] in a piece of paper . . . " and he objected to one of the documents on the ground that "this page was never sent to the appellant in the documentation" and pointed out it was not delivered to Bobo until June 10, 2010 - - two years after the U-rating was issued, Bobo overruled the objection and considered the document anyway.

Harte testified at the hearing that the predominant reason Hazen was rated unsatisfactory was her "instruction, not planning, not properly following the IP goals and objective. When she was with students [she left] the class unattended..." Gonzalez, the assistant principal, concurred that it was "mostly...not planning and instructing in the classroom." Both officials were, however, vague about when Hazen's classroom instruction was observed.

When asked about the allegations of corporal punishment by Hazen and asked how the incident(s) were reported, Harte first testified that the students (3rd graders) wrote their own statements after meeting with her and the guidance counselors. When pressed about why none of the students' written statements were part of the documents available at the hearing, Harte retreated and stated the students were "traumatized" and

the allegations were orally made. When pressed further by Sassin, Harte could recall no further details.

Hazen points out that some recorded incidents are palpably incorrect, for example, an incident is alleged to have occurred on March 21, 2008, but that was Good Friday and a day on which school was not in session. Another document refers to a lesson being "not acceptable" but does not indicate what the lesson was, or what was wrong, indicating (or so Hazen claims) that the principal did not read the lesson and wrote that disciplinary note simply to buttress her fabricated claims, that Hazen is an unsatisfactory teacher.

Hazen argues that the only way she can fully prosecute her claims in this article 78 proceeding is with discovery. She contends the principal alluded to documents (which Harte testified) exist, but were not provided to petitioner or before the hearing officer. Hazen filed a FOIL request and it was denied.

Respondents state that their decision to uphold the U-rating is not arbitrary and capricious, considering all the evidence and testimony at the hearing. They argue that Hazen simply disagrees with the chancellor's decision, which is not a reason for the court to engage in a judicial review of their determination. Respondents contend that Hazen is not entitled to discovery because the hearing officer resolved any inconsistencies in Harte's testimony and, therefore, the court cannot look behind the decision that was made.

Discussion

Although ultimately, to prevail on her petition, Hazen will need to prove that the respondents' 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 (CPLR § 7803; Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]), on this motion to dismiss pursuant to CPLR 3211 [a][7], the respondents have the burden of showing the petition should be dismissed because Hazen has failed to state a cause of action. On such a motion, the burden never shifts to the party who is opposed to rebut a defense asserted by the moving party (Sokol v. Leader, 74 AD3d 1180, 1181 [2nd Dept 2010]). Rather the motion should be denied and the moving party ordered to answer the pleadings.

Although respondents have raised number of arguments about why the petition has no merit, on a preanswer motion the court can only consider the petition and its exhibits (Green Harbour Homeowners' Ass'n, Inc. v. Town of Lake George Planning Board, 1 AD3d 744 [3rd Dept 2003]). The court cannot examine the merits of the petition or decide whether the petitioner has asserted a viable claim. In fact, whether the petitioner has a "good" case or can ultimately establish her claims is not part of the calculus in determining a motion to dismiss (EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 19 [2005]). Thus, the court only decides whether, accepting the facts alleged in the pleading as true and affording the petitioner the benefit of every possible favorable inference, she has stated a cause of action (Cron v. Hargro Fabrics, Inc., 91 NY2d 362 [1998]; Sanders v. Winship, 57 NY2d 391 [1982]). Applying these legal principles, respondents' motion to dismiss must be denied.

Hazen has stated facts which support her claims. Such facts include statements by her that the respondents did not observe her lessons and then meet and discuss

them with her, as they were supposed to. She also claims the letters in her file are informal and do not follow the strict requirements for disciplinary actions. She describes the jumbled documentary production by the respondents and how the hearing officer gave respondents an extraordinary amount of latitude in this regard. The allegations of corporal punishment were raised at the hearing and credited despite the absence of documentary evidence and equivocal statements by Harte. The court also notes that the report prepared by Bobo is not a part of this record nor is it clear who was on the committee deciding appeal. Therefore, the motion to dismiss the petition must be denied and the respondents are directed to answer the petition no later than ten (10) days after this decision and order is entered.

There are two remaining issues that need to be addressed: one is discovery and the other is whether this case still belongs in the Supreme Court.

Hazen contends that the principal testified at the hearing about events based on documents not in the record and she seeks production of those documents. Hazen also contends that the chancellor's denial of her U-rating appeal is not supported by the record developed at the hearing.

By law, the Supreme Court is prohibited from reaching the issue of whether an agency determination is supported by substantial evidence (Verdell v. Lincoln Amsterdam House, Inc., supra at 390 [*internal citations omitted*]). Where there is a substantial evidence issue, the proceeding must be transferred to the Appellate Division, First Department in accordance with CPLR §§ 7803 (4) and 7804 (g) (Al Turi Landfill v. N.Y. State Dep't of Env. Conserv., 98 NY2d 758, 760 [2002]; Carson v. New York City Housing Authority, 25 A.D.3d 462 [1st Dept 2006]; Matter of Porter v New York

City Hous. Auth., 42 AD3d 314 [1st Dept 2007]).

Given these open issues, the court directs that the parties appear for a **Conference on January 12, 2012 at 9:30 a.m. in Part 10** and that they be prepared to address them. At that time, the court will determine what (if any) discovery the parties are entitled to and also decide whether this proceeding should remain in this court or be transferred to the Appellate Division.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that the respondents' preanswer motion to dismiss is denied in all respects and the respondents shall answer the petition no later than ten (10) days after this decision and order is entered; and it is further

ORDERED that the parties appear for a **Conference on January 12, 2012 at 9:30 a.m. in Part 10** and that they come prepared to address the issues of discovery and whether this proceeding should remain in this court or be transferred to the Appellate Division; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
October 25, 2011

So Ordered:

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OCT 26 2011

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Hon. Judith J. Gische, JSC