

Matter of Leo v New York City Dept. of Educ.

2012 NY Slip Op 30735(U)

March 21, 2012

Supreme Court, New York County

Docket Number: 113955/11

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 113955/2011
LEO, SCOTT
vs.
NYC DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

FILED

MAR 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

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Dated: 3/21/12

OK J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X

In the Matter of the Application of

SCOTT LEO,

Petitioner,

Index No. 113955/11

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

FILED

THE NEW YORK CITY DEPARTMENT OF
EDUCATION,

MAR 26 2012

Respondent.

NEW YORK
COUNTY CLERK'S OFFICE

-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

| Papers | Numbered |
|--|----------|
| Notice of Motion and Affidavits Annexed..... | 1 |
| Notice of Cross Motion and Answering Affidavits..... | 2 |
| Replying Affidavits..... | 3 |
| Exhibits..... | 4 |

Petitioner Scott Leo brought this petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") challenging his termination of employment as a high school English teacher, his Unsatisfactory end-of-year rating ("U-rating") for the 2010-2011 school year, denial of his certification of probation and his placement on the Ineligible/Inquiry List by Respondent, the New York City Department of Education ("DOE"). Petitioner also seeks to challenge the denial of tenure on the last day of petitioner's probation. The DOE cross-moves to dismiss the petition. For the reasons set forth below, the petition is denied and the cross-motion to dismiss

the petition is granted.

The relevant facts are as follows. In 2008, petitioner was appointed as a probationary English teacher at the Information Technology High School (“ITHS”) in Queens, New York. At that time, the principal of ITHS was Nancy Casella. Principal Casella knew petitioner as one of her students while teaching at St. John’s University and recruited him to join her at ITHS. Upon employment at ITHS, petitioner began shadowing Principal Casella to learn more about a school administrator’s responsibilities.

For the 2008-2009 and 2009-2010 school years, Principal Casella issued petitioner overall satisfactory ratings via Annual Professional Performance Reviews (“APPR”) that were signed by her without any additional commentary. In October 2010, the DOE relieved Principal Casella of her position. In November 2010, the principal’s position was filled by Patricia Martin, who continues to serve as the principal of ITHS.

At the conclusion of the 2010-2011 school year, when Principal Martin reviewed petitioner’s probationary service, she issued him an overall unsatisfactory rating. Specifically, in the area of “Personal and Professional Qualities,” principal Martin rated petitioner as unsatisfactory in “Professional attitude and professional growth.” In the area of “Pupil Guidance and Instruction,” petitioner was rated as unsatisfactory in “planning and preparation of work.” Finally, in the area of “Participation in School and Community Activities,” petitioner received an unsatisfactory rating for “maintenance of good relations with other teachers and with supervisors.” Additionally, Principal Martin remarked on how petitioner had failed to demonstrate sufficient professional growth and that he refused to sign an agreement to extend his probationary period. Thus, Principal Martin recommended that the DOE deny certification of

petitioner's completion of probation.

In support of petitioner's 2010-2011 APPR, Principal Martin submitted: (1) an unsatisfactory classroom observation conducted by ITHS Assistant Principal Joe Attilio ("AP Attilio") on November 4, 2010; (2) a letter from AP Attilio dated March 21, 2011, detailing petitioner's inability to follow instructions from supervisors and maintain good relationships with other teachers; (3) a letter from Principal Martin dated April 15, 2011, detailing petitioner's unprofessional attitude toward supervisors; and (4) evidence that petitioner had refused to sign an agreement to extend his probationary period.

The report of AP Attilio's unsatisfactory classroom observation details how petitioner's lesson had students broken into groups and asked to identify stereotypes for different ethnic groups. One group was asked to identify stereotypes for "black people," and the group presented such terms as "lazy" and "liking fried chicken" to the entire class. Another group identified stereotypes for "Arabs," including "smelly," "wearing towels on their heads" and "eating curry." In finding petitioner's lesson to be unsatisfactory, AP Attilio remarked that he felt the "discussion and means of discussion was distasteful and inappropriate" and that he noticed that "several students started to feel uncomfortable." Additionally, when AP Attilio requested to see petitioner's lesson plan for that day, petitioner displayed what appeared to be a "half-finished draft" on his mobile phone. AP Attilio further remarked that the lesson plan showed "nothing alluding to higher-order questioning," "no medial summary," and it did not make "any provisions for an evaluation of how well [petitioner's] students could demonstrate mastery of the [lesson's] aim." Further, the report states that there was "no clear vision or direction for what was expected of the students."

When AP Attilio held a post-observation conference with petitioner, he explained how he found the lesson to be “ill-prepared, non-differentiated and showing no evidence of the use of data in [student] grouping.” Petitioner defended himself by stating, among other things, that former Principal Casella had issued him satisfactory ratings in the past. AP Attilio reminded petitioner that “the purpose of the observation process was to assist [him] in [his] pedagogy.” AP Attilio went on to detail how addressing the pedagogical issues that were raised was “of greater importance than debating [his] findings” and that it would behoove petitioner to “utilize the [observation] process to improve instead of disputing what had taken place in the delivery of instruction.” However, rather than accepting AP Attilio’s report, petitioner signed it “under protest” and stated how he disagreed with its contents. Petitioner demanded that AP Attilio tell him which students were “feeling uncomfortable” with his lesson and he accused AP Attilio of having already made up his mind about giving petitioner an unsatisfactory rating because of his general “tone” and “attitude.”

Petitioner’s abrasiveness toward supervisors and other teachers was further detailed in the March 21, 2011 letter from AP Attilio. The letter states that petitioner proctored a standardized exam for ITHS students, after which it was discovered that a number of the students incorrectly filled out the informational portion of their answer sheets. AP Attilio further noted that after petitioner was asked to correct the students’ information, petitioner took a “hostile attitude” toward the ITHS testing coordinator and began “screaming” at him.

Additionally, the April 15, 2011 letter from Principal Martin further detailed petitioner’s unprofessional attitude toward supervisors. Specifically, the letter demonstrates that Principal Martin was concerned by petitioner directly contacting her supervisors, including the school

district's superintendent, to accuse the ITHS administration of harassment and that petitioner had characterized his opinion of Principal Martin as an individual who was "playing politics" for her own "selfish agenda." Finally, petitioner admits to falsely telling ITHS administrators that he had been discussing his issues with an individual at "Tweed," the DOE's central headquarters, hoping that ITHS administrators "would be scared."

Despite these observations, Principal Martin felt that petitioner could have corrected his deficiencies with more time and offered to extend his probationary period for one year. Petitioner, however, felt that he deserved tenure and that there was "no justification for signing the Extension of Probation Agreement."

As a result of petitioner's overall unsatisfactory rating and Principal Martin's recommendation to discontinue petitioner's probationary service, Superintendent Juan Mendez informed petitioner by notice dated July 8, 2011 of his decision to deny certification of completion of probation and recommend termination of petitioner's DOE teaching license. Petitioner admits to receiving this notice on July 9, 2011. The notice informed petitioner of his right to appeal the Superintendents termination decision to the DOE's Office of Appeals and Reviews ("OAR"). The Superintendent further instructed petitioner that his termination would be effective as of the close of business sixty days from the date of the letter or the probation completion date, whichever occurred first. Petitioner's probation completion date was September 6, 2011. Accordingly, petitioner's termination was effective on September 6, 2011.

Subsequent to receiving the Superintendent's July 8, 2011 letter, petitioner exercised his right to an appeal. By notice dated September 20, 2011, petitioner was informed that an OAR hearing was scheduled for October 18, 2011 to review his overall unsatisfactory rating and termination. The OAR hearing was thereafter held on October 18, 2011.

At the OAR hearing, both Principal Martin and AP Attilio reiterated what was detailed in the evidence supporting petitioner's overall unsatisfactory rating. Principal Martin explained how the effort required to properly prepare petitioner to deliver a lesson was "very expensive," necessitating numerous pre-observation meetings and rewriting of petitioner's lesson plans. Principal Martin also stated that petitioner demonstrated "unprofessional" characteristics, including being "evasive" when supervisors discussed his ability to deliver a lesson. AP Attilio repeated his concerns with the lesson he observed on November 4, 2010, characterizing it as being very offensive. The DOE Chancellor has not yet completed his review of petitioner's OAR appeal.

Petitioner commenced this proceeding on December 13, 2011 alleging that the decisions to terminate his probationary service, to place his name on the DOE's ineligible/inquiry list, to revoke his DOE certification and to give him an overall unsatisfactory rating for the 2010-2011 school year were arbitrary, capricious and made in bad faith.

As an initial matter, there is a four month statute of limitations to bring an Article 78 proceeding to challenge an administrative determination that is measured from the date the determination becomes final and binding upon the petitioner. NY CPLR § 217. Where an individual has been placed on the DOE's Ineligible/Inquiry List or the individual's DOE teaching license or certification has been revoked, the four month period of limitations begins to run from the date of notification that such decisions were made. *See Matter of Hazeltine v. City of New York*, 89 A.D.3d 613 (1st Dept 2011); *see also Strong v. New York City Dept. of Educ.*, 62 A.D.3d 592 (1st Dept 2009).

In the instant case, petitioner's challenge of the decisions to place his name on the DOE's Ineligible/Inquiry List and to revoke his DOE license/certification must be dismissed as time-

barred. Petitioner was informed of the DOE's decision to place his name on the Ineligible/Inquiry List and to revoke his teaching license/certificate by notice dated July 8, 2011, which petitioner admits receiving on July 9, 2011. Thus, the four month statute of limitations during which petitioner could have properly challenged these determinations started to run on July 9, 2011 and expired on November 9, 2011. Petitioner, however, did not commence this Article 78 proceeding until December 13, 2011, more than one month after the statute of limitations expired. Therefore, that portion of the petition challenging the decisions to place petitioner's name on the DOE's Ineligible/Inquiry List and to revoke his DOE license/certification is hereby dismissed as time-barred.

Additionally, that portion of petitioner's petition challenging his U-rating must be dismissed as premature. A judicial challenge to a U-rating can only be commenced after a petitioner exhausts the administrative review process. *See Andersen v. Klein*, 50 A.D.3d 296 (1st Dept 2008). A probationary teacher has the right to an administrative review of a U-rating or the determination to discontinue the teacher's probationary service. *See* DOE Bylaws § 4.3.2. This review is held before the DOE's OAR. A determination that a probationary teacher's performance was unsatisfactory does not become final and binding until the Chancellor of the DOR denies the teacher's appeal sustaining the rating. *See Matter of Hazeltine v. City of New York*, 89 A.D.3d 613 (1st Dept 2011).

In the instant case, petitioner's challenge of his overall U-rating for the 2010-2011 school year must be dismissed as the Chancellor has yet to issue a final decision on petitioner's appeal. Thus, petitioner's attempt to challenge his U-rating for the 2010-2011 school year, prior to the completion of any administrative review, is premature and must be dismissed. Therefore, that portion of petitioner's petition challenging his overall U-rating is hereby dismissed.

The court now turns to petitioner's challenge of the DOE's termination of petitioner's employment as a probationary teacher. The Court of Appeals has held that a probationary employee may be terminated for almost any reason, or for no reason at all, as long as it is not "in bad faith or for an improper or impermissible reason." *Duncan v. Kelly*, 9 N.Y.3d 1024, 1025 (2008); *see also Venes v. Community School Board*, 43 N.Y.2d 520, 525 (1978) ("a probationary employee...has no property rights in his position, and may be dismissed for almost any reason, or for no reason at all.") The burden of proving that such a termination was in bad faith rests solely on the probationary employee and "the mere assertion of bad faith without the presentation of evidence demonstrating it does not satisfy the employee's burden." *Witherspoon v. Horn*, 19 A.D.3d 250, 251 (1st Dept 2005).

In the instant action, petitioner's challenge of the DOE's termination of his employment as a probationary teacher is denied. Petitioner has not satisfied his burden of showing that the termination of his probationary teaching position was in bad faith. While petitioner asserts that he was subject to "harassment" by administrators making "political" moves, he does not provide any factual allegations supporting his speculative reasons behind ITHS's decision to terminate him. The DOE terminated petitioner based on petitioner's overall U-rating for the 2010-2011 school year, the unsatisfactory classroom observation conducted on November 4, 2010, petitioner's strained relationships with other teachers and his supervisors, petitioner's unprofessional attitude toward ITHS administrators, including his refusal to agree to an extension of his probationary period and the supporting testimony of Principal Martin and AP Attilio at petitioner's OAR hearing. As petitioner has not demonstrated that the DOE's actions were taken in bad faith, that portion of petitioner's petition challenging his termination as a probationary

