

Applewhite v NYC Bd. of Educ.
2012 NY Slip Op 32182(U)
August 10, 2012
Supreme Court, New York County
Docket Number: 113474/11
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS
Justice

PART 6

APPLEWHITE, CARMEN

Plaintiff,

- v -

NYC BOARD OF EDUCATION

Defendant.

INDEX NO. 113474/11

MOTION DATE 5/18/12

MOTION SEQ. NO. 001

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

1-20

*not: 21-27

28-30

Cross-Motion: Yes No

reply x-wot: 31-32

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
Order + Judgment

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: 8/10/12

JBL
JOAN B. LOBIS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
In the Matter of

CARMEN APPLEWHITE,

Petitioner,

Index No. 113474/11

-against-

Decision, Order, and Judgment

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK, and
DENNIS WALCOTT, in his official capacity as
CHANCELLOR of the CITY SCHOOL DISTRICT OF
THE CITY OF NEW YORK,

Respondents,

UNFILED JUDGMENT

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

-----X
JOAN B. LOBIS, J.S.C.:

Petitioner Carmen Applewhite brings this proceeding under Article 78 of the C.P.L.R., seeking an order declaring that respondents' denial of her appeal to reverse her unsatisfactory rating ("U-rating") for the 2007-2008 school year was in bad faith, was arbitrary and capricious, and was in contravention of the established policies, procedures, laws, and regulations regarding the rating of pedagogical employees; directing respondents to reverse the denial of her U-rating appeal; and directing respondents to change her rating for the 2007-2008 school year from unsatisfactory to satisfactory. Petitioner also brings a separate motion for leave to file a late notice of claim. Respondents Board of Education of the City School District of the City of New York ("BOE") and Dennis Walcott, as Chancellor of the BOE, cross-move for an order dismissing the petition pursuant to C.P.L.R. § 7804(f) and Rules 3211(a)(2) and (7) on the grounds that the petition fails to state a cause of action and that petitioner failed to comply with statutory notice of claim requirements under Education Law § 3813(1).

At the outset, the court notes that petitioner's claims are equitable in nature. The First Department has held that equitable claims are not barred by a failure to file a notice of claim pursuant to Education Law § 3813(1) (Kahn v. New York City Dep't of Educ., 79 A.D.3d 521 [1st Dep't 2010]), and the Court of Appeals declined to review that branch of the First Department's decision on appeal. Kahn, 18 N.Y.3d 457, 473 n.10 (2012) ("we . . . express no opinion as to whether a plaintiff or petitioner who seeks only equitable relief from DOE must comply with the notice-of-claim provisions in Education Law § 3813 (1) as a precondition to suit"). The court is bound to follow First Department precedent. In light of the case law, petitioner need not have served respondents with a notice of claim prior to bringing this suit. Inasmuch as petitioner seeks leave to file a late notice of claim and respondents seek dismissal of petitioner's action for failure to file a notice of claim, both requests are denied.

Petitioner is a tenured special education teacher employed by respondents. On June 19, 2008, petitioner's supervisor, Principal Lavern Robinson, gave petitioner a U-rating on her Annual Professional Performance Review ("APPR") for her performance during the 2007-2008 school year; on the AAPR, Principal Robinson graded petitioner's performance as "unsatisfactory" for the eighteen (18) of the twenty-three (23) subcategories of performance. It appears that the primary basis for the U-rating was a number of disciplinary letters placed in petitioner's file by Principal Robinson. Petitioner appealed her U-rating, and the appeal hearing was held on May 11, 2011. The disciplinary letters were offered as evidence by respondents at the appeal hearing. Petitioner avers that at the appeal hearing, she objected to the admissibility of these "letters-to-file" on the grounds that they either (1) lacked her signature of receipt or any of the proper documentation

that petitioner refused to sign for the letter, or (2) contained no language that the letter would be placed in her file. By letter dated July 28, 2011, Senior Deputy Chancellor Shael Polakow-Suransky advised petitioner that the appeal of her U-rating was denied and the rating was sustained as a consequence of insubordination, dereliction of duty, professional misconduct, and unprofessional behavior, as evidenced by the disciplinary letters in petitioner's file.

A copy of the Chancellor's Committee Report from the appeal hearing is provided by respondents; it is essentially the written report of what occurred during the appeal hearing on May 11, 2011. The Committee Report sets forth that according to the documentation received and presentations made, petitioner's U-rating resulted from her dereliction of duty (letter dated January 11, 2008), when petitioner failed to follow her scheduled program and service her mandated students; acting in an unprofessional manner (letter dated May 1, 2008), when petitioner shouted obscenities at Principal Robinson and slammed a door in Principal Robinson's face; insubordination (letter dated April 14, 2008), when petitioner spoke in an inappropriate manner to Principal Robinson in front of students; insubordination (letter dated May 8, 2008), when petitioner used inappropriate language and tone in speaking with Principal Robinson; and insubordination (letter dated May 15, 2008), when petitioner refused to follow Principal Robinson's instructions to cover a class. At the hearing, petitioner's advisor, Joanna Hyman, stated that petitioner had a ten-year career and that this was her first U-rating; that petitioner never received a packet containing the documentation in her file nor did she receive a rating sheet; that petitioner never received the letters-to-file; that there was no evidence in the file to substantiate Principal Robinson's rating petitioner as unsatisfactory for instruction; that the May 1 and May 8 letters were inaccurate and

unfair, and that petitioner did not use inappropriate language or tone in speaking with Principal Robinson; and that the May 15 letter had little to no supporting documentation. In summation, the advisor stated that the U-rating was unfair because the Administration failed to provide additional assistance as required by contract; ignored the positive aspects of petitioner's performance and continued a relentless pursuit of demoralizing criticism; and offered inaccurate and unsupported letters-to-file. The Committee's Report sets forth that the Chair considered the documentation and oral presentations, and found that Principal Robinson acted in accordance with the Regulations of the Chancellor and the Department of Education; that there was ample evidence, including statements from the complainants who witnessed the events, to conclude that petitioner acted in an insubordinate manner and refused to adhere to the directives of Principal Robinson; and that when such inappropriate conduct has been demonstrated, a U-rating is appropriate and should be sustained. The Committee's Report noted three objections made by petitioner during the hearing, one of which was petitioner's objection to the unsigned letters (documents numbered 1 through 6 at the hearing) being offered as evidence; the objection was denied on the stated grounds that petitioner "has demonstrated a pattern of refusing to sign documents written to file."

There are copies of six (6) disciplinary letters annexed to the petition, though two of the letters contain the exact same information but are dated approximately one month apart. The letters detail five (5) incidents. The incidents involved insubordination, such as refusing to cover a class or assist with displaced students after being asked to do so by Principal Robinson; unprofessional behavior during interactions with Principal Robinson; and failing to provide instruction during a tutoring period.

The Rating Handbook provides the following, in pertinent part: “[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.” Rating Handbook § I(2)(a). “If 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 I(2)(c). “Some items are not considered to be admissible at Reviews. Therefore, Rating Officers generally should not use them in response to an Appeal. These include, but are not limited to, such items as . . . [u]nsigned documents.” Section I(6)(a).

In her petition, petitioner states that six disciplinary letters were placed in her file by Principal Robinson which lacked her signature of receipt or any proper documentation that she refused to sign for the letter. With respect to one of those letters, petitioner maintains that the letter did not set forth that it would be placed in her file and that it lacked a signature line for her. The six letters annexed to the petition do not contain petitioner’s signature of receipt. Petitioner alleges that the U-rating was not based on admissible evidence. She argues that the Rating Handbook dictates that unsigned letters are inadmissible in an U-rating appeal hearing. She thus argues that respondents’ reliance on the letters during the hearing was in bad faith, arbitrary and capricious, and in contravention of established policies, procedures, laws, and regulations; that the U-rating was issued without supporting documentation; and that the denial of her appeal of the U-rating was in bad faith, arbitrary, capricious, and in gross error. She asks the court to reverse the appeal.

Respondents cross-move to dismiss the petition. They annex to their cross motion copies of five of the six letters that petitioner annexed to the petition. The copies of the disciplinary

letters submitted by respondents contain acknowledgment forms reflecting petitioner's refusal to sign the letters. Respondents argue that the disciplinary letters annexed to the petition demonstrate that petitioner either failed to retain full copies of the letters or is purposefully attempting to deceive the court. They maintain that they substantially complied with the Rating Handbook in issuing petitioner's disciplinary letters, and that any deviation therefrom was de minimus. Regardless, respondents argue that petitioner has failed to state a cause of action because the Rating Handbook is not legally binding; merely contains recommendations; and does not create substantive rights.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974).

On a motion to dismiss a special proceeding, the court must "determine only whether the facts as alleged fit within any cognizable legal theory." Yan Ping Xu v. New York City Dep't of Health, 77 A.D.3d 40, 43 (1st Dep't 2010) (citation omitted); see also, In re Y & O Holdings (NY), Inc. v. Bd. of Mgrs. of Exec. Plaza Condo., 278 A.D.2d 173 (1st Dep't 2000). The pleadings must be afforded a liberal construction. EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 19 (2005). The court may examine the evidence presented to determine if "a material fact as claimed by the [petitioner] . . . is not a fact at all." Rietschel v. Maimonides Med. Ctr., 83 A.D.3d 810 (2d Dep't 2011), citing Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-75 (1977); see also Katebi v. Fink, 51 A.D.3d 424, 425 (1st Dep't 2008).

“[A]n 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.” In re Lehman v. Bd. of Educ., 82 A.D.2d 832, 834 (2d Dep’t 1981) (citations omitted). If a rule or regulation affects an individual’s “substantial rights,” it “may not be waived by the agency.” Id. “An adverse agency determination must be reversed when the relevant agency does not comply with either a mandatory provision, or one that was ‘intended to be strictly enforced.’” In re Blaize v. Klein, 68 A.D.3d 759, 761 (2009), quoting In re Syquia v. Bd. of Educ., 80 N.Y.2d 531, 536 (1992). However, these principals do not apply to guidelines, which are not considered rules or regulations. In re Munoz v. Vega, 303 A.D.2d 253, 254 (1st Dep’t 2003), aff’g, 2001 N.Y. Slip Op. 40286U, 2001 N.Y. Misc. LEXIS 1242 (Sup. Ct. Bronx Co. 2001); In re Cohn v. Bd. of Educ., 31 Misc. 3d 1241A (Sup. Ct. N.Y. Co. 2011). There are a number of cases holding that the Rating Handbook is a guideline, and not a rule or regulation guaranteeing a substantial right. Brown v. City of N.Y., 2012 N.Y. Slip Op. 31472U, 2012 N.Y. Misc. LEXIS 2644, *7 (Sup. Ct. N.Y. Co. 2012) (“The [Rating] Handbook is a guide, not a binding regulation or DOE policy.”). See also Richards v. Board of Educ., 2012 N.Y. Slip Op. 31539U, at **3, 2012 N.Y. Misc. LEXIS 2743 (Sup. Ct. N.Y. Co. 2012); Cohn, 31 Misc. 3d 1241A; Munoz, 2001 N.Y. Slip Op. 40286U, at **7.

Even accepting petitioner’s claim that respondents violated the Rating Handbook as true, the court is constrained to find that the petition fails to state a cause of action. Violations of the Rating Handbook do not equate to violations of rules or regulations guaranteeing a substantial right and, therefore, cannot serve as a basis for a finding that the decision to deny petitioner’s appeal was made in violation of lawful procedures. The court notes that petitioner does not deny, in this

proceeding, that the incidents described in the letters-to-file took place, nor does it appear that petitioner ever grieved the letters that were placed in her file. Accordingly, it is hereby

ORDERED that the cross motion to dismiss the petition is granted; and it is further

ORDERED that petitioner's motion for leave to file a late notice of claim is denied; and it is further

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: *Aug. 10*, 2012

ENTER:

JB

JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT

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