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

PRESENT: GEOFFREY D. WRIGHT PART 62

Justice

In the Matter of the Application of RAMON MOREL,

Petitioner

INDEX NO. 114415/2011

For a Judgment pursuant to Article 78 of the C.P.L.R.

MOTION DATE

- v -

MOTION SEQ. NO. 1

BOARD OR EDUCATION OF THE CITY OF SCHOOL DISTRICT OF THE CITY OF NEW YORK; and DENNIS M. WALCOTT, Chancellor of the CITY DISTRICT of THE CITY OF NEW YORK,

MOTION CAL.

The following papers, numbered 1 to 5 were read on this motion to/for Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3
Other	4,5

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this Article 78 is decided in accordance with the annexed hereto decision.

GEOFFREY D. WRIGHT
A.J.S.C.

Dated: August 7, 2012

J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST 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).

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

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In the matter of the Application of
RAMON MOREL,

Petitioner,

Index # 114415/11

-against-

DECISION

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK; and DENNIS M. WALCOTT, Chancellor of the City School District of The City of New York

Respondents

Present:

For a Judgment pursuant to Article 78 of The C.P.L.R.

Hon. Geoffrey D. Wright

----------x Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Article 78.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	
Other.....cross-motion.....	4,5

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Upon the foregoing papers, it is ordered and adjudged that this Court confirms the Award of Arbitrator Joyce M. Klein. It is further ordered that this Article 78 petition is granted, Respondent's denial of Petitioner's appeal of an Unsatisfactory rating ("U-rating") at the annual performance review for the 2007-2008 school year is reversed and the U-rating is vacated.

In this Article 78 proceeding, Petitioner, Ramon Morel, seeks a judgment reversing

Respondents Board of Education ("Respondents") denial of his appeal of an U-rating at the annual performance review for 2007-2008 school year and a reversal of the U-rating for the 2007-2008 school year. In addition, Petitioner seeks confirmation of the Award of Arbitrator Joyce M. Klein

Petitioner is a tenured teacher assigned to M635, the Academy of Environmental Sciences. In addition to his full-time assignment as a special education teacher, Petitioners coached both wrestling, track and field and was the athletic director for high school sports.

On February 15, 2008, an investigation was initiated by the Board's Office of Special Investigations ("OSI"), at the request of then principal David Grodsky ("Grodsky") against the Petitioner and another faculty member, Eva Hernandez ("Hernandez") because they had allegedly begun an investigation into the theft of Hernandez's laptop from a classroom. It was alleged that Petitioner offered two students money in exchange for the return or for information leading to the return of the laptop. Shortly thereafter, Petitioner was involved in a physical altercation with several eight grade students in the gym during an after-school basketball game on March 6, 2008. Petitioner was accused of punching and/or pushing a student and another OSI investigation was initiated.

On March 7, 2008, Petitioner was reassigned from his teaching duties pending the outcome of the investigations, and was directed to report to another location called a Temporary Reassignment Center.

On June 19, 2008, Petitioner was given an U-rating on his Annual Professional Performance Review ("APPR") for the 2007-2008 school year. On the APPR, Grodsky wrote that Petitioner had been reassigned pending the results of an OSI investigation of employee misconduct and Grodsky attached the Reassignment letter that was given to the Petitioner. Petitioner filed an appeal of his U-rating, but the appeal was held in abeyance pending the outcome of the OSI investigations.

On March 11, 2010, more than two years after his reassignment, Petitioner was served with disciplinary charges pursuant to *Education Law* §3020-1 which contained two specifications. Specification one alleged that in February 2008, Petitioner offered two students money in exchange for the return of Hernandez's missing laptop computer. Specification two alleged that on March 6, 2008 Petitioner engaged in corporal punishment when he pushed and/or punched a student.

A 3020-a disciplinary hearing was held on November 15, 16, 23, 29, and 30, 2011

before Arbitrator Joyce M. Klein ("Klein"). Klein dismissed the charges against the Petitioner. Specifically, Klein found that Petitioner was not guilty of specification one, employee misconduct. However, she found that the Department had proved that Petitioner offered a monetary reward for the return of Hernandez's laptop computer, but Klein did not find this just cause for disciplinary action. In addition, Klein found that the Department did not prove Specification two, that Petitioner had engaged in corporal punishment by a preponderance of the evidence and she ordered all references to this charge expunged from Petitioner's personnel file.

On April 7, 2011, a hearing was held regarding the appeal of Petitioner's 2007-2008 U-rating. Petitioner was represented by an advocate provided by his Union, the United Federation of Teachers (UFT). On September 7, 2011, Petitioner received notice that his appeal had been denied and the U-rating was upheld as a consequence of unprofessional behavior. Petitioner thereafter commenced this Article 78 proceeding.

Petitioners' arguments go to the question of whether or not the administrative decision was arbitrary and capricious or an abuse of discretion within the meaning of CPLR Section 7803(3), which questions whether a determination was made in violation of lawful procedure.

An administrative decision will withstand judicial scrutiny if it is supported by substantial evidence, has a rational basis and is not arbitrary and capricious. Matter of Pell V. Board of Education, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321 (1974); Ansonia Residents Ass'n V. New York State Div. Of Housing and Community Renewal, 75 N.Y.2d 206, 551 N.E.2d 72, 551 N.Y.S.2d 871 (1989).
"Arbitrary and capricious action is that taken 'without sound basis in reason and is generally taken without regard to the facts'" (In re Sagal-Cotler v Bd. of Educ. of City of N.Y. School Dist. Of City of N.Y. 96 A.D.3d 409, 946 N.Y.S2d, 121 N.Y.A.D. [1st Dept., 2012]; quoting Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Township of Scarsdale, 34 NY2d 222, 231, 313 N.E.2d 321, 356 N.Y.S.2d 833 [1974]). Where there is a "rational basis" for an agency's determination, the court is not permitted to substitute its own judgment for that of an administrative agency (see Matter of Andersen V Klein, 50 AD3d 296, 297, 854 N.Y.S.2d 710 [1stDept.t 2008]: Matter of Hazeltine v City of N.Y., 89 AD3d 613, 615, 933 N.Y.S.2d 265 [1st Dept. 2011]).

The Petitioner argues that by issuing the U-rating for the 2007-2008 school year, Respondents violated the guidelines set forth in the Rating Handbook in that they failed to perform a duty enjoined upon them by law, engaged in conduct that was in violation of lawful procedure, was arbitrary and capricious or an abuse of discretion. In particular, Petitioner argues that the U-rating was based on disciplinary letters which were not

included in the Petitioner's personnel file in violation of the Handbook. Thus, by denying Petitioner's appeal of his U-rating, Respondents failed to follow their own rules and regulations.

The basis for this argument is that Section 102.2(o)(a) of the regulations of the Commissioner of Education requires that a school district adopt "formal procedures" for annual reviews. Chancellor's Special Circular No. 45 incorporates the New York City Public Schools Division of Human Resources handbook titled Rating of Pedagogical Staff Members ("Handbook") and prescribes these procedures shall be utilized when evaluating employees.

The handbook states that:

> "*The overall evaluation of the employees 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 criticism noted in the file documents.*"
>
> "*The admissibility of documents has been clearly delineated by contractual language, grievance and arbitration decisions and rulings handed down by the State commissioner of Education and the Courts.*"

The Handbook outlines the procedures for placing documents in a staff member's file. In particular:

> "*Material 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;*
> *The rating Officer should remove, replace or amend documents or parts of documents which have successfully been demonstrated to be either unfair or inaccurate through the grievance procedure.*"

Petitioner argues that at the time the U-rating was given, the only document in his file that could have supported the U-rating was the reassignment letter which referenced the allegation of employee misconduct. All other documents which referenced the corporal punishment allegation and were used during Petitioner's U-rating appeal hearing were created after Petitioner was already given the U-rating and were ordered expunged in December 2010. Hence, these documents could not have formed the basis for Grodsky's decision to give Petitioner the U-rating and thus, Respondents acted arbitrary by failing to follow their own rules and regulations.

The Handbook clearly states that a U-rating must be based on supporting documentation and in this case Petitioner's U-rating was not. Instead, Respondents gloss over this fact and instead argue that the decision to deny Petitioner's appeal of his U-rating is based on the fact that it was proved that Petitioner offered two students a reward for a missing laptop. However, there was no documentation in the file that supported the assertion that Grodsky considered this incident when he gave Petitioner the U-rating. The Handbook states:

> *"Where incidents or particular events have not been witnessed personally by either the Rating officer or a member of the supervisory administrative staff, the written record should contain evidence that an investigation was conducted and that the versions of the involved persons concerning the incident or event were taken into account before the Rating Officer drew a final conclusion as to the validity of the alleged facts."*

The OSI investigations had not been completed and there was no documentation containing evidence that Grodsky took into consideration eyewitness accounts of the incident, or that he ever came to a final conclusion as to the validity of the facts surrounding the incident. Notably, Grodsky was not present at the appeal hearing and was unable to provide testimony to support the basis for his decision.

The documents used in the appeal hearing to uphold Petitioner's U-rating were the APPR, the two OSI reports and the Klein Opinion and Award. However, the Handbook states:

> *"Material to be placed in the Petitioner's file must note 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. The employee may append a letter or note of explanation or rebuttal to documents placed in the file. This appended material is considered part of the original document and should be attached permanently thereto."*

The OSI report alleging corporal punishment should not have been part of Petitioner's personnel file as Arbitrator Klein ordered all references to the corporal punishment allegation expunged from Petitioner's file. Accordingly, the OSI report should not have been considered during the appeal hearing. In order for the second OSI report to become part of Petitioner's personnel file, Grodsky or another supervisor would have been required to write a disciplinary letter to be placed in the file and include the report as an attachment to that letter. This would have allowed Petitioner to append a response or a rebuttal to the disciplinary letter. However, it appears this did not happen. Respondents argue that the OSI reports are legal-document and were thus properly considered. However, assuming for a

moment that this is the case, the Handbook does not provide for an exception from the rules and regulations regarding the admission of legal documents for a review.

"It is a 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." Cohn V. Board of Education of city School District of City of New York, 2011 NY Slip Op 3155U, 31 Misc.3d 1241(a) (N.Y. Sup. Ct. 2nd Dept. 2011) quoting from matter of Lehman V. board of Education of City School District of City of New York, 82 A.D.2d 832, 439 N.Y.S.2d 670 (N.Y.A.D.2nd Dept. 1981). "Rules" have been defined by the Courts as norms or procedures promulgated by an agency that establish a fixed pattern or course of conduct for the future. People V. Cull, 10 N.Y.2d 123, 218 N.Y.S.2d 38 (1961); and Cubas V. Martinez, 8 N.Y.3D 611, 838 N.Y.S.2d 815 (2007).

Courts look at the plain language to distinguish rules from interpretive or advisory instructions. In the instant case, the plain language of the Handbook establishes the formal procedures to be utilized when evaluating employees for their performance evaluations and contains such information as the mandate for annual ratings and timing of such ratings, the identification of personnel who are subject to ratings, the personnel responsible for evaluating and procedures for appeal from an adverse rating. It is clear that the Handbook provides the formal procedures promulgated pursuant to §102.2(o)(a) of the Regulations, by which teacher evaluations and appeals of U-ratings must be conducted. The plain language of the section and the Handbook make it clear that it must be strictly enforced, guarantees a substantial right and is not flexible, Francois V. Board of Education, 2011 Slip Op 32312(U), (Sup. St., N.Y. County 2011). Further, the Handbook provides formal procedures which are meant to be followed regarding documentary evidence to be considered when performing an APPR and an appeal. To imply otherwise is disingenuous.

Respondents rely on Cohn V. Board of Educ. Of the City School Dist. Of the City of New York, 932 N.Y.S.2d 759 (Sup. Ct. N.Y. county, July 7, 2011) to support their argument that the Handbook does not establish regulatory minimums. This argument and their reliance on *Cohn* are misplaced. *Cohn* can be distinguished from the instant case. In *Cohn*, the court refused to overturn petitioner's U-rating based on the Board's alleged failure to provide petitioner with pre-observation conferences as required by the handbook because it found that before the formal observations the Board had met with petitioner in advance, provided guidance on better teaching performance and informed the Petitioner that she would look for improvement during formal observations. The Court found that this satisfied the Handbook's requirements for pre-observation conferences as required by the Handbook.

Lastly, Respondents argue that the decision to give Petitioner the U-rating and the decision to sustain the U-rating was neither arbitrary capricious, irrational, nor made in bad faith, but was instead founded on reason, facts, and supporting evidence. To support this argument Respondents point to the fact that Petitioner admitted, and Arbitrator Klein found that Petitioner offered two students money in exchange for the return of a missing laptop and as such Petitioner's conduct was unsatisfactory, unprofessional and warranted sustaining the U-rating. This argument fails. It is a common practice for law enforcement to offer monetary rewards as an incentive to aid in solving crimes. In this case a teacher that offers money to students for the return of a missing laptop may not exhibit the highest level of wisdom or judgment but does not rise to the level of misconduct and certainly does not warrant a U-rating on an APPR. At best, Petitioner was overzealous and exercised poor judgment. Indeed, Arbitrator Klein stated in her Opinion and Award that "the offer of a monetary reward in this context is not misconduct" Notably, Respondents were unable to identify any rule or regulation that was violated by this offer of a monetary reward.

Accordingly, it is ORDERED AND ADJUDGED that the petition to reverse the September 7, 2011 denial of the appeal by the Respondent and Petitioner's 2007-2008 year end Unsatisfactory rating is granted. The unsatisfactory rating is vacated.

Accordingly, it is ORDERED and ADJUDGED that this Court confirms the Award of Arbitrator Joyce M. Klein.

Dated: August 7, 2012

GEOFFREY D. WRIGHT
A.J.S.C.

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court