

**Matter of Gehlaut v Board of Educ. of the City Sch.
Dist. of the City of N.Y.**

2013 NY Slip Op 30339(U)

February 13, 2013

Sup Ct, New York County

Docket Number: 103366/2012

Judge: Joan B. Lobis

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SCANNED ON 2/15/2013

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

PRESENT: LOBIS
Justice

PART 6

Index Number : 103366/2012
GEHLAUT, DHARMVIR
vs.
NYC BOARD OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 12/6/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to for Art. 78 Petition

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Petition | No(s). 1-13
Answering Affidavits — Exhibits _____ | No(s). X-mot: 14-17
Replying Affidavits _____ | No(s). 18-20

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

FILED
FEB 15 2013
NEW YORK
COUNTY CLERKS OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION & ORDER

Dated: 2/13/13

JB
JOAN B. LOBIS, 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

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

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

-----X
IN THE MATTER OF THE APPLICATION OF
DHARMVIR GEHLAUT,

Petitioner,

Index No. 103366/2012

-against-

Decision and Order

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

Respondents.

FILED

FEB 15 2013

-----X
**NEW YORK
COUNTY CLERK'S OFFICE**

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

Dharmvir Gehlaut petitions under Article 78 of the Civil Practice Law and Rules for an order nullifying Gehlaut's teaching evaluation rating as affirmed on administrative appeal and directing Respondents Board of Education of the City School District of the City of New York and Dennis M. Walcott (collectively "BOE") to issue a different rating. Respondents cross-move under C.P.L.R. Rule 3211(a)(7) to dismiss the petition on the grounds that it fails to state a cause of action. For the following reasons, the cross-motion to dismiss is denied.

The facts set forth are gleaned from the papers filed in this action and construed in the light most favorable to Petitioner as non-moving party to Respondents' cross-motion to dismiss. Petitioner Dharmvir Gehlaut has been employed by Respondents since 2005. In 2010, he was a tenured teacher of math at Emma Lazarus High School for English Language Scholars here in New York City. On June 28, 2011, the school's Principal, Melody Kellogg, signed a teaching evaluation that rated Gehlaut as Unsatisfactory for the 2010-2011 school year. Gehlaut signed the evaluation on September 1, 2011. Section 4 of the evaluation, which lists supporting documentation, is blank.

Petitioner grieved the rating and a hearing was conducted on the appeal on January 27, 2012. Gehlaut was represented by his union representative. At that hearing Respondents attempted to introduce into evidence three observation reports, two prepared by the school's assistant principal, and one by the principal, and a letter dated March 28, 2011, from Principal Kellogg to Gehlaut. Each proffered document contained an acknowledgment stating "I have received a copy of this letter and understand a copy will be placed in my file." There was a signature line and date. None of the acknowledgments had been executed. The hearing officer sustained objections to these items' admissibility. Respondents submitted testimony of one witness, Principal Kellogg, who participated by telephone.

On March 28, 2012, Respondents denied Gehlaut's appeal. Gehlaut filed a notice of claim on June 25, 2012, and now brings this petition. Gehlaut claims that the BOE's determinations issuing him a rating of Unsatisfactory without appropriate supporting documentation and affirming that determination on appeal violated lawful procedures, were affected by error of law, and were arbitrary and capricious or an abuse of discretion. He asks this Court as relief to change his rating to Satisfactory.

Respondents cross-move claiming that Gehlaut has failed to state a cause of action. In their memorandum of law they minimize the import of the documents' preclusion as having been made "for technical reasons." Memorandum of Law at 13. Respondents appeal to "common sense" in urging this Court to overlook those reasons. Id. While Respondents admit that the BOE did not

“fully and strictly comply[] with every scintilla” of its evaluation procedures, Respondents aver that Petitioner’s challenge is “repeatedly made by teachers seeking to evade the consequences of their own poor performance.” Id. at 16. Respondents deny that Gehlaut has been deprived of any substantial right in the affirmance of the rating, and contend that this Court cannot “second guess” the decision of the Chancellor’s Committee. Id.

A motion to dismiss under C.P.L.R. Rule 3211(a)(7) will fail if within the four corners of the pleading there are discernable facts that show a cause of action. E.g., Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977). The Court must accept as true the facts alleged in the pleading and those in the non-moving party’s submission opposing the motion to dismiss, and accord the plaintiff all favorable inferences. E.g., ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 227 (2011).

This Court finds Respondents’ cross-motion to be unpersuasive. Section 7803 of the Civil Practice Law and Rules provides in pertinent part that this Court may consider “whether the body or officer failed to perform a duty enjoined upon it by law;” 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.” Id. § 7803(1); 7803(3). The Court may grant a petitioner relief to which he is entitled including among others annulment of the determination in whole or in part and may direct specified action by the respondent. Id. §7806.

The petition alleges in pertinent part that the Respondents violated lawful procedures in rating Petitioner’s performance as Unsatisfactory and upholding that rating on appeal. Petitioner attaches at Exhibit G the Chancellor’s Special Circular No. 45 and the current version of the ratings handbook promulgated pursuant to that Circular. The Circular, dated April 10, 1988, provides notice

that the New York State Commissioner of Education's Regulation 100.2(o) requires that beginning in September 1987 all school districts must adopt "formal procedures" for annual reviews. Those "formal review procedures," moreover, must be placed on file in the district office and be available for review "by any individual." The BOE's Office of Appeals and Reviews publishes and addresses inquiries relating to the procedures issued in handbook form. The handbooks in their current form are entitled "Rating Pedagogical Staff Members," which also appears at Exhibit G of the petition, and appends Circular No. 45 at Appendix I, (Ratings Handbook) and "The Appeal Process," which appears at Exhibit I of the petition (Appeals Handbook).

Petitioner alleges that Respondents violated several specific formal review procedures in the Ratings Handbook. At page 3 of the Ratings Handbook, Part II addresses evaluations and ratings of personnel. Section A of that Part is entitled "Mandate and Timing." It incorporates in pertinent part Section 89, Subdivision 7 of the New York State Commissioner of Education's Regulations that mandated the timing and evaluation of employees. Quoting that Regulation, the Ratings Handbook states as follows: "Within the last ten school days of each school year . . . the principal . . . shall give to each member of . . . staff a signed statement characterizing . . . work as Satisfactory or Unsatisfactory . . ." The quoted Regulation specifically required documentation: "A Certification of Unsatisfactory . . . shall be accompanied by appropriate supporting data." Gehlaut's rating sheet, which mimics the form provided in the handbook, does not list any documents in the section for documentation. Petitioner's Exh. A, at page 2 of 2.

Respondents recognize the need to document evaluations. The Ratings Handbook Foreword devotes two of its four paragraphs to that need: "concise documentation is fundamental to the process. Due to the serious implications of adverse ratings . . . the need to document the

evaluation of an employee's performance is essential." The Foreword also expressly addresses the importance of documentation for appellate review: "The admissibility of documents and written criticism has been defined by contractual language, grievance/arbitration decisions and rulings adjudicated by both the legal system and the State Commissioner of Education. Hence, the principal must be aware of the type and nature of documents which are germane to the evaluation of staff and the need for clear, objectively written statements."

Respondents also recognize the substantial right implicated by the procedures set forth in the Ratings Handbook. Section G of Part II is entitled, "Implications of an Adverse Rating." That section expressly acknowledges that "[r]eceipt of an Unsatisfactory rating has serious implications." Id. at 9. These can include "filing of charges against tenured employees" and may impact "an employee's ability to obtain additional licenses." Id.

At Section I, entitled Analyzing Documents and Records, the Ratings Handbook provides that evaluator must review the documents in the file. Those documents include observation reports and letters like those attempted to be introduced at the hearing in Petitioner's case. Material to be placed in a staff member's file, however, "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." Id. Part II.I(2)(a) at 10. See also Appendix F of the Ratings Handbook (Sample Observation Report #1). If an employee refuses to sign a document for the file "a witness should sign a dated statement on the document attesting to this refusal." It is uncontroverted that no attestation was done in this case. These unsigned documents are expressly acknowledged as inadmissible at

reviews and appeals. Id. Part II.I(6)(a) at 11. The inadmissible records may, however, be used to refresh recollections in cross-examination. Id.

The right to appeal an adverse rating appears in the BOE's by-laws at Section 4.3.1, which by-laws Petitioner appends at Exh. H. Moreover, those by-laws contemplate the formal procedures promulgated pursuant to the Chancellor's Special Circular No. 45: "Any person . . . in respect to an appeal from a rating of an other than a satisfactory rating . . . shall be afforded the opportunity for review in the manner set forth herein and in procedures established by the Chancellor." The Circular expressly instructs "formal procedures" be developed to include "[t]he procedures for appeal from an adverse rating." Exh. G, Ratings Handbook, Apx. I, p. 1.

The Appeals Handbook, also prepared by the Office of Hearings and Review, and attached as Exhibit I of the Petition, methodically sets out the appellate procedures. The Foreword references the by-laws and the BOE's "guiding principles of fairness and impartiality regarding a pedagogical employee's rights to appeal an adverse rating." Procedural steps regarding . . . documentation . . . are listed and documented."

Section I the Appeals Handbook applies to all pedagogical employees and specifies the right to appeal and the review. The rating officer is required to furnish appellant "with a complete set of the documentation used by the Rating Officer to support the reasons(s) for the adverse rating." Appeals Handbook, Sec. (I)(A)(2). Appellant is then provided an opportunity to respond to documentation. Id. § (I)(A)(3). Appellant is not permitted to be represented by an attorney. Id. §

(I)(B). The rating officer may stand on the written record or make oral statements “with respect to . . . the supporting documents previously submitted. . .” Id. § (I)(B)(2)(e). After the review, the Chancellor’s Committee meets to deliberate and writes a confidential report containing findings and the rationale for the recommendation. If the appeal is granted, the adverse rating is reversed “on all school, district and central headquarters’ records.” Id. § (I)(B)(3). Furthermore, the rating officer is required to issue a new overall evaluation. Id.

In this instance, this Court finds that Petitioner has stated a cause of action because the procedures cited are lawful procedures to which Respondents may be held bound. The language of the relevant provisions are not precatory but rather mandate that Respondents must document an adverse rating, which petitioner plainly alleges was not done in this case. Moreover, to sustain an appeal of an adverse rating the reviewing body must have shown before it all elements of the basis for which to support that rating. Again Petitioner has plainly alleged that essential elements of supporting documents have not been admitted in this case either on appeal or in Petitioner’s personnel file.

A court may compel an administrative body or officer to comply with its own rules and regulations. Frick v. Bahou, 56 N.Y. 2d 777 (1982). The appellate division has long held that by-laws of the Board of Education are binding upon it. Lehman v. Board of Educ., 82 A.D.2d 832, 833 (2d Dep’t 1981). The Lehman Court further held that the same principles apply to regulations promulgated by the Chancellor. Id. By corollary the court further held that rules of administrative agency that regulate procedure affecting substantial rights of individuals may not be waived by the agency. Id. at 834. In In re Blaize v. Klein, 68 A.D.3d 759 (2d Dep’t 2009), the appellate division

reversed the agency's determination upholding the rating officer's determination of unsatisfactory. The court referred to procedural errors made, including the respondents' failure to provide petitioner with the complete set of documents on which the determination was based within three weeks of her challenge to the determination. In that case, the court cited to then extant by-law § 5.3.4A. Notably today the by-laws merely authorize the Chancellor to "establish and publish appropriate rules for the processing of appeals." Section 5.1, p. 14 at Petitioner's Exh. H. Regardless, however, those rules promulgated by delegation are similarly binding. Lehman, 82 A.D.2d at 834; see also Kolmel v. City of New York, 88 A.D.3d 527, 528 (1st Dep't 2011) (failure to observe adversely rated teacher violated DOE's rating rules). In this case procedural errors are alleged. As discussed above, there is no doubt that an adverse rating affects Petitioner's substantial rights. Kolmel, 88 A.D.3d at 529 (deficiencies in the review process leading to adverse employment consequences "are not merely technical, but undermine[] the integrity and fairness of the process"). Accordingly Petitioner's allegations that the BOE failed to follow its own procedures relating to documentation supporting Gehlaut's adverse rating and its affirmance on appeal states a cause of action.


Respondents urge this Court to follow its holding in Applewhite v. Board of Educ., 2012 N.Y. Misc. LEXIS 3995 (Aug. 10, 2012), and reject any procedural requirement outlined in the Ratings Handbook. They refer to this Court's statement in Applewhite that "[v]iolations 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." After consideration of the arguments in this case I decline to adopt the reasoning of Applewhite here. Dismissing the Ratings Handbook as a mere guideline would be

improper in the context of this case. Not only does the hearing officer's ruling excluding any documentation offered at hearing distinguish this case factually from Applewhite, but also Petitioner has established that the Rating Handbook must be equated with administrative rules and regulations that affect a substantial right of the Petitioner. An adverse rating profoundly affects a teacher's professional standing. Various sections of the New York State Commissioner of Education's Regulations and the Chancellor's Special Circular require the existence of procedures outlined in the Handbook and defined nowhere else. Without reference to the Ratings Handbook, Respondents would be in violation of their own regulations. Applewhite can be further distinguished. In that case this Court had six admitted documents before it in sustaining the appeal. See In re Cohn v. Board of Educ., 2013 NY Slip Op 00418 (1st Dep't, Jan. 29, 2013) (affirming adverse rating that was supported by documented observations). Here, in contrast, Petitioner alleges there were none. The Petitioner has stated a cause of action. Accordingly, it is

ORDERED that Respondents' cross-motion to dismiss the petition is denied; and it is further

ORDERED that within thirty days from the date of service of this order with notice of entry the Respondents shall file a verified answer to the Petition.

Dated: February 13, 2013

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FEB 15 2013
ENTER: 
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JOAN B. LOBIS, J.S.C.