

<b>Joyce v City of New York</b>
2013 NY Slip Op 30987(U)
May 6, 2013
Supreme Court, New York County
Docket Number: 103515/12
Judge: Manuel J. Mendez
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ  
Justice

PART 13

JOHN JOYCE,  
Petitioner(s),

INDEX NO. 103515/12

MOTION DATE 4-3-2013

- v -

MOTION SEQ. NO. 001

CITY OF NEW YORK; NEW YORK CITY DEPARTMENT  
OF EDUCATION; DENNIS WALCOTT, CHANCELLOR  
of NEW YORK CITY DEPARTMENT OF EDUCATION,  
Respondent(s).

MOTION CAL. NO. \_\_\_\_\_

**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 1418).

The following papers, numbered 1 to 4 were read on this petition to/ for Article 78:

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

PAPERS NUMBERED

1

Answering Affidavits — Exhibits \_\_\_\_\_ cross motion \_\_\_\_\_

2 - 3

Replying Affidavits \_\_\_\_\_

4

Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers, it is ordered and adjudged that this Article 78 Petition is denied as to Petitioner's Unsatisfactory annual rating and granted as to Petitioner's resignation letter. Respondent's Cross-Motion is denied as to Petitioner's resignation, granted as to Respondent City of New York's dismissal, and denied as to the other Respondents.

In this Article 78 Proceeding, Petitioner, John Joyce, seeks a judgment reversing Respondent's, New York City Department of Education (DOE), denial of his appeal of an Unsatisfactory rating at the annual performance review for the 2010-11 school year and the DOE's refusal to allow Petitioner to rescind and withdraw his resignation letter and return to his tenured teaching position effective for the school year 2012-13.

Petitioner was hired by the DOE as a Social Studies teacher in 1994. Petitioner received tenure in 1998.

Petitioner was hired at Eleanor Roosevelt High School ("ERHS") starting for the 2007-08 school year.

Dimitri Saliani was the Principal of ERHS during the relevant time period.

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

Petitioner received "Satisfactory" annual end of the year ratings during his first three years at ERHS.

Between September 2010 and April 2011, Petitioner received informal feedback following each of thirteen observations of Petitioner's classes by Principal Saliani. The feedback was received via email and gave no indication that Petitioner was in danger of an "Unsatisfactory" rating for the 2010-11 school year.

On or about April 28, 2011, Principal Saliani observed Petitioner's class. Following the observation, Petitioner met with Principal Saliani for a post-observation conference. This conference was Petitioner's first indication that he was in danger of receiving an "Unsatisfactory" rating for the school year. On or about May 31, 2011, Petitioner received a formal report on the observation and was given an "Unsatisfactory" rating for the lesson.

On or about June 7, 2011, Petitioner received a formal observation by Principal Saliani, which included pre- and post- observation conferences. Petitioner's post-observation conference was held June 12, 2011 and Petitioner received a written report on or about June 27, 2011.

Petitioner received an "Unsatisfactory" annual end of the year rating by way of a letter dated June 16, 2011.

Petitioner filed an appeal of that rating with the DOE. By way of a letter dated April 13, 2012, Petitioner was advised that his appeal had been denied.

In August 2011, Petitioner resigned from ERHS.

Petitioner attempted to, but could not, find a position elsewhere with DOE.

By way of a letter dated July 29, 2012, Petitioner attempted to rescind or withdraw his resignation (the "Recision Letter"). The Recision Letter was sent to Human Resources for the DOE, the Deputy Executive Director of Human Resources for DOE, and Respondent Dennis Walcott, the Chancellor of the DOE.

This Court was not made aware of an official response by the DOE to the Recision Letter in the papers of either party.

Petitioner moves for the Court to order DOE to annul and/or reverse the "Unsatisfactory" rating and for the Court to declare DOE's determination to refuse to allow Petitioner to rescind and withdraw his resignation as arbitrary, capricious, unreasonable, an abuse of discretion, lacking a rational basis, in bad faith, and in violation of lawful procedure.

Respondents cross-move to dismiss Petitioner's Petition on the grounds that the Court does not have subject matter jurisdiction regarding Petitioner's

resignation, that the Petition fails to state a cause of action against Respondent City of New York, and the Petition otherwise fails to state a cause of action against the other Respondents.

An administrative decision will withstand judicial scrutiny if it is supported by substantial evidence, has a rational basis and is not arbitrary and capricious. See *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).

Chief Executive's Memorandum #80 was attached to the Petition (Memo 80). Memo 80 is dated March 31, 1998 and addressed to All Superintendents and All Principals from William P. Casey, Chief Executive for Program Development & Dissemination for the predecessor agency of the DOE. The subject of Memo 80 is titled "Performance Review and Professional Development Plan for Teachers." Memo 80 summarizes the Teacher Performance Review model(s) as agreed upon by contract between the United Federation of Teachers and the DOE. Memo 80 outlines two components under which a teacher can be evaluated.

The second option outlined in Memo 80 is a formal observation model. Memo 80 describes the formal observation model as, "a traditional classroom observation by a principal or supervisor with written feedback and/or comments."

Memo 80 continues the description of the formal observation model as follows, "[t]he formal observation including a pre- and post-observation conference and written feedback is required for...tenured teachers in danger of receiving an unsatisfactory rating." Memo 80 concludes by stating again that, "...tenured teachers who are in danger of receiving an unsatisfactory rating must have formal observations including a pre-observation and post-observation conference by the principal or designee as part of a prescriptive plan to improve their teaching."

"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 31555U, 31 Misc.3d 1241(A) (N.Y. Sup. Ct. 2<sup>nd</sup> 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. 2<sup>nd</sup> 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. See *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).

In the present case, Petitioner, and presumably Principal Saliani, did not consider Petitioner in danger of receiving an "Unsatisfactory" rating until after

the April 28, 2011 observation. Following that observation, the formal observation model was initiated. There was a post-observation conference and Petitioner received a formal written review of the observation.

At the time of the June 7, 2011 observation, all parties were aware that Petitioner was a tenured teacher in danger of receiving an "Unsatisfactory" rating. The formal observation model was followed. Petitioner's argument that this left him only a few school days to attempt to avoid an "Unsatisfactory" rating for the year is beyond the scope of this Court's review. The DOE followed the requirements established by Memo 80 and there is no basis to conclude that the denial of Petitioner's appeal of the "Unsatisfactory" rating was arbitrary, capricious, or lacked a rational basis. That is the extent of the Court's review of Petitioner's "Unsatisfactory" rating.

Regulation of the Chancellor was issued September 5, 2000. Section C-205 concerns the category of Pedagogical Personnel. Both parties refer to sections of the Regulation that they feel are applicable to the present situation.

Respondents quote Section 26 of the Regulation, titled "Resignation", which states that, "[r]esignations shall be submitted in writing and, once submitted by an employee, shall be considered final. However, if there has been no break in actual service, the appointing authority may, in its discretion, permit the employee to rescind the resignation before its effective date."

Respondents then quote Section 28, titled "Withdrawal of Resignation Generally", which states that, "a pedagogical employee who has resigned may, at the discretion of the Executive Director of the Division of Human Resources, be permitted to withdraw such resignation for the purpose of reinstatement to service, regardless of whether the person was tenured or not on the date of his or her resignation."

Respondents argue that Petitioner's resignation was voluntary and there was no determination made by DOE for the Court to review.

Petitioner quotes Section 29 of the Regulation, titled, "Withdrawal of Resignation Within Five Years by Tenured Staff." Section 29 states that, "Except for persons covered by Section 24 or subdivision 26b of this Regulation, a non-supervisory pedagogical employee who had attained permanent tenure prior to the date of resignation shall, remain tenured and, upon written request, be permitted to withdraw such resignation subject only to medical examination and the approval of the Chancellor, provided that reinstatement is made on or before the opening of school in September next following five years after the effective date of resignation." Section 24 concerns teachers who end their service while charges are pending against them and Subsection 26b concerns teachers who are absent without notice for twenty or more consecutive school or work days. There is no indication that either of the exceptions apply to Petitioner.

The Regulation section quoted by Respondents applies to teachers attempting to withdraw their resignation generally. The title of the Section makes that very clear. The Section of the Regulation quoted by Petitioner applies to only those situations where a tenured teacher attempts to withdraw a resignation within five years of resigning. Respondents do not dispute any of the facts stated by Petitioner which establish that he would fall within the more specific situation.

As stated above, the Regulations make a clear distinction between teachers attempting to withdraw their resignation generally and tenured teachers attempting withdrawal soon after their resignation.

In the general situation, a teacher "may" be permitted to withdraw resignation "at the discretion" of human resources of the DOE.

However, the Regulation clearly contemplates a right earned by tenured teachers whereby they "shall...be permitted to withdraw such resignation...subject only to medical examination and the approval of the Chancellor." The plain language makes it clear that unless there is a medical reason or the Chancellor affirmatively opposes withdraw, that rescision is effective if done so within five years.

"[A] corollary of [the principle that rules promulgated by an agency are binding upon it] is that rules of an administrative agency which regulate procedure affecting substantial rights of individuals may not be waived by the agency." *Lehman v. Board of Ed., supra*. The right of a tenured teacher to withdraw a resignation rather than have to ask permission to do so or to re-apply for a position strikes this Court as a substantial right granted to tenured teachers.

The DOE's actions, or lack thereof, in regards to Petitioner's Rescision Letter are arbitrary and capricious and in violation of the DOE's stated procedure. DOE must follow its own stated procedure and accept the Rescision Letter and reinstate Petitioner subject only to medical examination and the approval of the Chancellor.

Respondents' Cross-Motion seeks dismissal of the Petition as to Respondent City of New York, arguing that the City of New York and the DOE are separate legal entities. Respondents are correct that the City of New York and DOE are separate entities. See *Gonzalez v. Esparza*, 2003 WL 21834970 (S.D.N.Y. 2003); *Perez ex rel. Torres v. City of New York*, 41 A.D.3d 378, 837 N.Y.S.2d 571 (N.Y.A.D. 1<sup>st</sup> Dept. 2007).

Accordingly, it is the decision and judgement of this Court that the Petition is denied as to Petitioner's request to annul and/or reverse the Unsatisfactory annual rating and granted as to Petitioner's request for the Court to declare the DOE's determination to refuse to accept the Rescision Letter as arbitrary and capricious and a violation of DOE's rules. Respondents' Cross-Motion is denied as

to Petitioner's resignation, granted as to Respondent City of New York's request to dismiss the Petition, and denied as to the other Respondents' request to dismiss the Petition.

Accordingly, it is ORDERED and ADJUDGED that the Petition is denied as to Petitioner's request to annul and/or reverse the Unsatisfactory annual rating, and it is further

ORDERED that the Petition is granted as to Petitioner's request for the Court to declare the DOE's determination to refuse to accept the Recision Letter as arbitrary and capricious and a violation of DOE's rules, and it is further

ORDERED that the DOE is directed to abide by Chancellor Regulation Section 29 and accept the Recision Letter and reinstate Petitioner subject only to medical examination and the approval of the Chancellor, and it is further

ORDERED that Respondents' Cross-Motion is denied as to Petitioner's resignation, and it is further

ORDERED that Respondents' Cross-Motion is granted as to Respondent City of New York's request to dismiss the Petition, and it is further

ORDERED that the Petition as against Respondent City of New York is dismissed, and it is further

ORDERED that Respondents' Cross-Motion to dismiss as to the remaining Respondents is denied.

Dated: May 6, 2013

  
MANUEL J. MENDEZ  
J.S.C. MANUEL J. MENDEZ  
J.S.C.

Check one: X FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

**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).