

**Matter of Rieser v New York City Dept. of Educ.**

2013 NY Slip Op 31630(U)

July 18, 2013

Sup Ct, New York County

Docket Number: 103424/12

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: JOAN B. LOBIS  
*Justice*

PART 6

Michael Rieser

103424/12

INDEX NO. 103242/12

- v -

MOTION DATE 6/13/13

NYC Dept. of Education

MOTION SEQ. NO. 001

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to (for) petition Art. 78 Petition

Notice of Motion / Order to Show Cause - Affidavits - Exhibits \_\_\_\_\_

No(s). 1-14

Answering Affidavits - Exhibits \_\_\_\_\_

No(s). x-mot: 15

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

No(s). 16-17; x-mot. reply: 18

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

**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).

County Clerk - 34

*Petition*

**THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION**

*Order & Judgment*

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

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: 7/18/13

*[Signature]*  
**JOAN B. LOBIS**, J.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  
NEW YORK COUNTY: IAS PART 6**

-----X

IN THE MATTER OF THE APPLICATION OF  
MICHAEL RIESER,

Petitioner,

Index No. 103424/12

-against-

**Decision, Order and Judgment**

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

-----X

**JOAN B. LOBIS, J.S.C.:**

Michael Rieser petitions pursuant to Article 78 of the Civil Practice Law and Rules challenging his teaching evaluation rating and discontinuance of probationary service as affirmed on administrative appeal. Respondent New York City Department of Education (DOE) previously cross-moved to dismiss the petition, which motion was denied. It now files its answer in opposition. For the following reasons, the petition is granted.

Petitioner Michael Rieser was hired by the DOE in 2009. In 2010, he was a probationary teacher of special education at Urban Assembly Institute for New Technologies. The Urban Assembly Institute is a middle school located in District 5 here in New York City.

On January 4, 2011, the school’s Principal, Travis Brown, signed a document entitled, “Annual Professional Performance Review and Report on Probationary Service of Pedagogical Employee.” The document consisted of four sections. In Section 1, the Principal rated Mr. Rieser as Unsatisfactory in the single area of “Attention to pupil health, safety and general welfare,” within the subsection entitled, “Pupil Guidance and Instruction.” The Principal did not rate Mr. Rieser in

any of the other twenty-two areas of that section. Based on that single rating in Section 1, the Principal marked in Section 2, entitled “Performance Evaluation,” an Overall Evaluation of “U” for Unsatisfactory. No time frame designating the period for which that evaluation applied was completed. Mr. Rieser did not sign the evaluation. Section 3 included the Principal’s recommendation to the Superintendent of District 5, Gale Reeves, in which Principal Brown recommended “discontinuance of probationary service.” That Section also included the Superintendent’s recommendation, “discontinuance of probationary service.” Section 4, describing supporting documentation listed a December 23, 2010, letter “to file for substantiated corporal punishment.”

No letter dated December 23, 2010, appeared in the administrative record before this Court, but, an undated letter to Mr. Rieser from the Principal, which indicated that it would be placed in Mr. Rieser’s file, did appear. That letter, signed by Principal Brown and Mr. Rieser, recounted a conference that had been held between those two individuals on December 17, 2010, regarding a classroom incident that occurred on December 9, 2010. The letter informs Mr. Rieser that the Principal concluded that Mr. Reiser’s behavior toward one of Mr. Reiser’s students violated Chancellor’s Regulation A-420, prohibiting corporal punishment and defined as “the use of physical force to discipline or punish a student.” Mr. Rieser’s service was discontinued on February 7, 2011.

Mr. Rieser grieved the rating and recommendation of discontinuance. A hearing was conducted on the appeal by the Chancellor’s Committee under Section 4.3.3 of the DOE by-laws on April 14, 2011, which members asked questions of the witnesses and documentation presented. Mr.

Rieser was represented at the hearing by his union representative, Michael Grossman. In providing the administrative record, the DOE has attached, among other documents, a copy of the transcript of that hearing and the Chancellor's Committee Report of the hearing. At the hearing, the DOE offered six documents, one of which, Document #4, was excluded as after the rating period at issue. Principal Brown appeared as a witness for the DOE, and Elinor Radzilover, a representative for the Superintendent, also gave a statement. Mr. Rieser also offered six documents. He contended that the investigation into the allegations of corporal punishment was flawed, the Chancellor's Regulation A-420's exclusion for "use of reasonable physical force . . . to protect another pupil or teacher from physical injury" applied to Mr. Rieser's conduct, and the January 4, 2011, performance review and report was incomplete.

Following the hearing the Chancellor's Committee issued its report. That document, dated April 19, 2011, was transmitted on behalf of the Committee by the DOE's Office of Appeals and Reviews to Superintendent Reeves. The Report indicated that none of the three Committee members concurred with Ms. Reeves' recommendation to discontinue Mr. Rieser's probationary service. In their unanimous disagreement with that recommendation, the Committee included their findings. Having considered the documentation and testimony, they found Mr. Reiser "offered compelling testimony and written documentation to support his claim." They concluded following review of Mr. Rieser's testimony and the witnesses' statements that Mr. Reiser's use of force was within the exceptions to Chancellor's Regulation A-420. Citing documentation that DOE counsel's recommended a letter to Mr. Reiser's file rather than termination, they further found that the investigation was flawed. One year after the Report's transmission, on April 18, 2012,

Superintendent Reeves sent Mr. Rieser a letter reaffirming her determination to discontinue his probationary service. That reaffirmance did not include any copy of the Chancellor's Committee Report or discuss its findings.

Mr. Rieser now petitions pro se for judicial review under Article 78 of the Civil Practice Law and Rules. The petition presents two issues before this Court: one, whether the DOE's determination violated lawful procedure under Section 7803(3), in failing to permit Mr. Reiser to select a member of the Chancellor's Committee, which conducted his evidentiary hearing, including questioning of witnesses, and issued its Report on that hearing; and two, whether the DOE's determination was affected by error of law under Section 7803(3), in determining that Mr. Rieser's conduct was corporal punishment under Chancellor's Regulation A-420. These errors, Petitioner contends, render the DOE's determination arbitrary and accordingly he asks this Court to vacate that determination.

Initially, the DOE did not answer the petition. Rather, it cross-moved to dismiss the petition. The cross-motion, however, relied on evidence outside the four corners of the petition, and, accordingly, without being provided an administrative record as a whole, this Court denied the cross-motion. The DOE now answers, opposing the petition, and provides, among other items, the Chancellor's Committee hearing transcript, and Chancellor's Committee Report.

In an Article 78 proceeding, a court reviews an administrative action to determine whether an agency's decision violates lawful procedure, is arbitrary or capricious, or is affected by

an error of law. E.g., Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974); Roberts v. Gavin, 96 A.D.3d 669, 671 (1st Dep’t 2012). Where a petition claims that an agency failed to comply with its own internal procedures, this Court reviews whether the determination was “made in violation of lawful procedure.” E.g., Blaize v. Klein, 68 A.D.3d 759, 761 (2d Dep’t 2009). “[B]y-laws of the board are binding upon it . . . .” Lehman v. Bd. of Educ., 82 A.D.2d 832, 833 (2d Dep’t 1981). “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.’” 68 A.D.3d at 761 (quoting Syquia v. Bd. of Educ., 80 N.Y.2d 531, 536 (1992)).

This Court thus considers whether the DOE’s determination issuing Mr. Rieser an overall evaluation of Unsatisfactory and discontinuing his probationary service violated lawful procedure. Section 4.3.2 of the DOE’s by-laws provides that an employee facing discontinuance of probationary service “shall have a review of the matter . . . .” That mandatory review, moreover, shall be conducted “before a committee which shall be designated in accordance with contractual agreements . . . .” Respondent concedes that the collective bargaining agreement governing these parties’ relationship at Article 21, Section D(1)(a) governs the employee’s selection of a member of the tripartite committee. That Section provides that “[t]he 4.3.2 committee shall be a tripartite committee of professional educators, one selected by the teacher, one by the Board and a third selected by the other two from a list agreed upon by the Board and the Union.” It is further uncontroverted that Mr. Reiser did not select any of the members composing his committee in this case. This Court finds construing the express language of DOE By-law Section 4.3.2 that Petitioner’s committee was not designated in accordance with the parties’ contracting agreement as mandated by

Section 4.3.2, and accordingly a violation of lawful procedure has been shown. Because this matter is disposed of as a violation of lawful procedure, this Court need not consider Petitioner's remaining argument that the determination was affected by an error of law.

Lastly this Court notes that Respondent suggests at the conclusion of its memorandum of law that there was evidentiary support to uphold its determination. That issue, however, as shown by the record in this case, is not raised by the Petitioner. Compare C.P.L.R. § 7803(3) with id. § 7803(4). Article 78 makes plain that the issue of substantial evidence would not be proper for this Court to consider, and this Court routinely transfers those matters to the appellate division. C.P.L.R. § 7804(g); e.g., O'Dette v. N.Y. State Unified Ct. Sys., 2013 WL 3064739 (1st Dep't June 20, 2013). Accordingly, it is


ORDERED and ADJUDGED that the petition is granted; the DOE's determination is vacated, and the Unsatisfactory rating is reversed on all school, district and central headquarters' records; and it is further

ORDERED and ADJUDGED that the matter be remanded for further proceedings consistent with this decision, order and judgment.

Dated: July 18, 2013

**UNFILED JUDGMENT**

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ENTER:  
  
JOAN B. LOBIS, J.S.C.