Matter of Murray v Board of Educ. of the City Sch. Dist. of the City of N.Y.
2013 NY Slip Op 32292(U)
September 23, 2013
Supreme Court, New York County
Docket Number: 100138/13
Judge: Alexander W. Hunter Jr
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR Justice

PART 33

Murray, Juanita

- v -

NYC Board of Education
Article 78

INDEX NO. 100138/13

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 34 were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-14
Answering Affidavits — Exhibits	15-29
Replying Affidavits	30-34

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Decided in accordance with the attached Decision and 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: 9/23/13

ALEXANDER W. HUNTER JR J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

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In the Matter of Juanita Murray,

Petitioner,

-against-

Board of Education of the City School District of the City of New York, and Dennis M. Walcott, in his official capacity as Chancellor of the City School District of the City of New York,

Respondents.

----------X

Index No.: 100138/13

Decision and Judgment

HON. ALEXANDER W. HUNTER, JR.

Petitioner's application for an order pursuant to CPLR article 78, annulling petitioner's "unsatisfactory" rating ("U-rating") for the 2010-2011 school year, annulling respondents' decision to deny petitioner's appeal and affirm petitioner's U-rating, and directing respondents to reverse the denial of petitioner's U-rating appeal and change petitioner's rating for the 2010-2011 school year from "unsatisfactory" to "satisfactory," is denied and the proceeding is dismissed without costs and disbursements to either party. Respondents' motion to dismiss the proceeding is granted.

Petitioner Juanita Murray was employed as a social worker at Middle School 390 ("M.S. 390") in Community School District 10, in the Bronx, a school maintained and operated by respondent New York City Department of Education ("DOE"), s/h/a Board of Education of the City School District of the City of New York. The principal of M.S. 390 is Robert Mercedes ("Mercedes"). Respondent Dennis M. Walcott is the current chancellor of the DOE.

By letter dated May 10, 2011, Mercedes informed petitioner that in lieu of a formal observation for the 2010-2011 school year, he would review the goals of three students' individualized educational plans and evaluate whether petitioner utilized proper techniques and practices in assisting the students meet their goals. As part of the evaluation, petitioner was required to submit documentation that spoke to the academic progress of petitioner's students.

By letter dated May 31, 2011, Mercedes informed petitioner that she had not complied with his directive and requested a meeting with petitioner and her union representative. By letter dated June 7, 2011, Mercedes acknowledged receipt from petitioner of documentation of services rendered to three students, but he determined that the documentation was "unsatisfactory." On June 10, 2011, Mercedes and petitioner met to discuss the documentation and additional information needed to evaluate petitioner's performance. By letter dated June 15, 2011, Mercedes informed petitioner that the additional documentation provided by petitioner was "unsatisfactory." Mercedes requested that petitioner provide evidence of: (1) strategies used to

assist students with coping in the classroom; (2) proof of collaboration with teachers and documentation measuring the success of students; and (3) interventions utilized by petitioner.

On June 21, 2011, petitioner received a U-rating on her annual professional performance review ("APPR") for the 2010-2011 school year. Petitioner was rated "unsatisfactory" across several categories, including professional attitude and professional growth, resourcefulness and initiative, analysis and interpretation of assessment data, translating assessment findings into educationally relevant goals and objectives, appropriateness and flexibility of counseling approaches, assessment reports, and records and reports being completed in a timely manner. Petitioner was also rated "unsatisfactory" for attendance and punctuality, as she had been absent nine days during the 2010-2011 school year, with several of those absences occurring either before or after holidays or weekends.

Petitioner appealed her U-rating to the DOE's Office of Appeals and Reviews, and a hearing was held on May 29, 2012 before a chancellor's committee (the "Committee"). At the hearing, Mercedes testified that: (1) petitioner's absenteeism occurred around holidays or weekends; (2) petitioner failed to provide student counseling data logs despite being told to do so from the outset of the school year; (3) petitioner neglected to attend grading meetings that caused teachers to complain that they were unable to collaborate with her; and (4) petitioner failed to demonstrate any initiative or present evidence of student growth. Petitioner's union representative testified that Mercedes failed to collaborate with petitioner's in-discipline supervisor before rating petitioner "unsatisfactory."

The Committee determined that: (1) petitioner did not rebut the fact that her absences occurred before and after weekends and holidays; (2) petitioner did not submit evidence of proper techniques and strategies employed to assist students; and (3) petitioner did not submit evidence substantiating her claim that her in-discipline supervisor rated petitioner "satisfactory." The Committee recommended that petitioner's appeal be denied and that the U-rating be sustained due to excessive patterned absences and a lack of impact on student growth. By letter dated September 19, 2012, the chief academic officer and senior deputy chancellor, Shael Polakow-Suransky, denied petitioner's appeal and sustained the U-rating.

Petitioner timely commenced the instant proceeding, averring that: (1) she did not exceed her contractual limit for absences as provided in the CBA under which she is covered; (2) her performance evaluation was to be signed by both Mercedes and the in-discipline supervisor; and (3) she did not receive a formal observation or a pre or post observation conference with Mercedes as set forth in respondents' own rules, regulations, and procedures.

Relevant sections of the collective bargaining agreement ("CBA"), between the DOE and the United Federation of Teachers union, which governs petitioner as a school social worker, are articles nine, ten, and sixteen. Pursuant to article 9D of the CBA, the rating officer for a school social worker is the principal, in consultation with the in-discipline supervisor. Pursuant to article 10 of the CBA, a school social worker is granted absence refunds, without a statement from a physician, for up to ten days in a school year. (Petitioner's exhibit C). Article 16 provides for a grievance procedure with respect to time and leave matters, whereby a school

social worker's union must file any grievances "directly with the Executive Director of Human Resources." (Verified answer, exhibit 12).

Respondents move to dismiss on the grounds that the petition fails to state a cause of action and petitioner failed to exhaust her contractual remedies with respect to time and leave. Respondents aver that petitioner could be disciplined for her absenteeism despite not exceeding her contractual limit, and that in April 2011, Mercedes observed petitioner conduct a group counseling session. During that counseling session, petitioner did not provide Mercedes with a teaching log or plans to follow that contained stated objectives. (Verified answer, exhibit 2, Mercedes Aff. ¶ 5).

In a verified reply, petitioner averred that: (1) she fully exhausted all contractual and administrative remedies prior to commencing the instant action; (2) respondents had no basis to issue a U-rating without complying with petitioner's CBA; and (3) there was no rational basis to give petitioner a U-rating.

It is well settled that "a court may not substitute its judgment for that of a board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion." **Pell v. Bd. of Educ., 34 N.Y.2d 222, 232 (1974) (citation omitted)**. An APPR rating is arbitrary and capricious when it is made in violation of lawful procedure or a substantial right. **Cohn v. Bd. of Educ., 102 A.D.3d 586 (1st Dept. 2013)**. A court may not annul a U-rating as arbitrary and capricious unless it has no rational basis in the record. **Murnane v. Dept. of Educ. of the City of New York, 82 A.D.3d 576 (1st Dept. 2011)**. Moreover, deficiencies in the APPR do not render the U-rating determination arbitrary and capricious when the hearing testimony provides ample grounds for the rating. **See Cohn, 102 A.D.3d 586; Brown v. Bd. of Educ., 89 A.D.3d 486, 487-488 (1st Dept. 2011)**.

Here, petitioner has failed to show that her U-rating was arbitrary and capricious, or without a rational basis. The hearing testimony of Mercedes provided ample grounds for petitioner's U-rating in several categories, including excessive absenteeism, which had the harmful effect of denying students counseling sessions to foster improvement in classroom behaviors. Contrary to petitioner's claim, Mercedes' April 2011 observation, the U-rating form, the various letters referenced in the U-rating form, and Mercedes' hearing testimony provided a rational basis for the DOE to sustain petitioner's U-rating.

This court has consistently ruled that the regulations of the New York State Commissioner of Education pursuant to 8 N.Y.C.R.R. 100.2(o)(2), as set forth in the "New York City Public Schools, Rating Pedagogical Staff Members" (the "handbook") and "Special Circular No. 45"are rules and regulations that do not guarantee a substantial right. **See Cohn, 102 A.D.3d 586; Zakin v. New York City Dept. of Educ., 2013 N.Y. Misc. LEXIS 2445, *13-14 (Sup Ct, New York County 2013); Gumbs v. Board of Educ. N.Y.C. Sch. Dist., 2013 NY Slip Op 31132(U) (Sup Ct, New York County 2013); Applewhite v. N.Y.C. Bd. of Educ., 2012 NY Slip Op 32182(U) (Sup Ct, New York County 2012)**.

While petitioner may not have received a formal observation or a pre or post observation conference, petitioner is not entitled to judicial relief, as violations of the handbook do not equate to violations of rules or regulations guaranteeing a substantial right. Moreover, the fact that Mercedes did not consult with an in-discipline officer, does not demonstrate petitioner was deprived of any substantial right.

"It is [also] well established that an aggrieved union member whose employment is subject to the terms of a collective bargaining agreement entered into by his union and employer must first avail himself of the grievance procedure set forth in the agreement before he can commence an action in court." **Cantres v. Bd. of Educ., 145 A.D.2d 359, 360 (1st Dept. 1988) (citations omitted); see Villalba v. N.Y.C. Dept. of Educ., 50 A.D.3d 279 (1st Dept. 2008).** When a petitioner fails to exhaust the administrative remedies set forth in the CBA, he or she is precluded from seeking relief in an article 78. This is true, even when petitioner's union fails to file a grievance. **Matter of Plummer v. Klepak, 48 N.Y.2d 486 (1979).**

Here, the petition fails to allege whether petitioner's union filed any grievances regarding her U-rating for attendance and punctuality. Therefore, petitioner's claim is also dismissed for failure to exhaust her contractual and administrative remedies.

Accordingly, it is hereby

ADJUDGED that petitioner's application for an order pursuant to CPLR article 78, annulling petitioner's "unsatisfactory" rating ("U-rating") for the 2010-2011 school year, annulling respondents' decision to deny petitioner's appeal and affirm petitioner's U-rating, and directing respondents to reverse the denial of petitioner's U-rating appeal and change petitioner's rating for the 2010-2011 school year from "unsatisfactory" to "satisfactory," is denied and the proceeding is dismissed without costs and disbursements to either party. Respondents' motion to dismiss the proceeding is granted.

Dated: September 23, 2013

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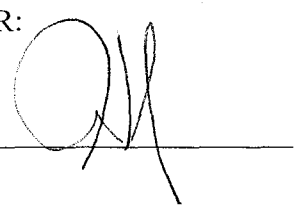

J.S.C.