

Lamphere v City of New York
2013 NY Slip Op 33932(U)
June 10, 2013
Supreme Court, New York County
Docket Number: 114249/10
Judge: Geoffrey D. Wright
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

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PETER LAMPHERE,

Petitioner,

-against-

Index No.
114249/10

CITY OF NEW YORK; NEW YORK CITY DEPARTMENT
OF EDUCATION; JOEL I. KLEIN, CHANCELLOR OF NEW
YORK CITY DEPARTMENT OF EDUCATION; VALERIE
REIDY, PRINCIPAL OF BRONX HIGH SCHOOL OF
SCIENCE; ROSEMARY JAHODA, ASSISTANT
PRINCIPAL OF BRONX HIGH SCHOOL OF SCIENCE,

Respondents,

For and Order and Judgement Pursuant to Article 78 of the
Civil Practice Laws and Rules.

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Recitation as required by CPLR 2219 (a), of the papers considered on this order and judgment
pursuant to CPLR Article 78:

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	_____ 1 _____
Amended Verified Petition.....	_____ 2 _____
Answering Affidavits.....	_____ 3 _____
Replying Affidavits.....	_____ 4,5 _____
Exhibits.....	_____ _____
Memorandum.....	_____ 6 _____

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

In this special proceeding petitioner Peter Lamphere, a resident of the State of New York,
and a tenured mathematics teacher employed by respondent New York City Department of
Education (DOE) seeks to challenge, reverse, and annul a June 29, 2010, determination by the
DOE to Lamphere's "Unsatisfactory" annual rating for the 2007-2008 school year at Bronx High
School of Science (BHSS) in the City of New York.

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Respondent Joel I. Klein is the Chancellor of DOE, Valerie Reidy is the principal of the BHSS, and one of the original evaluators leading to of Lamphere's Unsatisfactory rating, and Rosemarie¹ Jahoda is the assistant principal for mathematics at BHSS, and was the other evaluator of Lamphere's performance leading to the challenged rating.

BACKGROUND

Lamphere was first employed by DOE in September 2002. In the 2007-2008 school year, after assuming a post as a United Federation of Teachers (UFT) chapter delegate post at BHSS, he became a member of the UFT chapter steering committee. That same year he received his first Unsatisfactory rating.

On October 16, 2007, the UFT steering committee held a meeting with the BHSS administration at which Lamphere allegedly raised issues about how the administration was mentoring young teachers at the school. Apparently, the day after the meeting, he was removed as a mentor teacher on the basis that he was "not a satisfactory teacher." He would subsequently receive two disciplinary letters from BHSS administrators, one of which was later included in his file.

On or about November 16, 2007, Lamphere then published and circulated minutes of the October 16 meeting held with the administrators. On or about November 26, 2010, Lamphere received his first negative teaching observation at the school from Jahoda. In February 2008, shortly after the distribution of a UFT leaflet, Jahoda again gave Lamphere a negative teaching observation at the school.

It then ensued that 20 of the 22 mathematics teachers at BHSS, including Lamphere, initiated a special complaint against the school administration for anti-union harassment in May 2008. The special complaint included, *inter alia*, allegations of "creation of a hostile work environment through the harassment and intimidation of teachers", unjust "U" (Unsatisfactory) ratings, and unfair "issuance of letters of insubordination."

¹Assistant principal Rosemarie Jahoda's name is, apparently, misspelled in the caption.

Some days after the special complaint was filed, on or about June 6, 2008, Lamphere received a letter to the file for insubordination for refusal to appear at a meeting with administration without another colleague present.

In finality, at the end of the 2007-2008 school year, Reidy rated Lamphere's performance Unsatisfactory for the year. Lamphere requested an internal administrative appeal of this Unsatisfactory rating through the DOE's Office of Appeals and Reviews. A hearing for the appeal was finally scheduled on June 1, 2010, before DOE Hearing Officer Lester McDowell.

The Bylaws of the Panel for Education Policy of the DOE indicates that "[a]ny person in the employ of the City School District who appears before the Chancellor, or a committee designated by the Chancellor, the size and composition of which the Chancellor is to determine, in respect to an appeal from a rating of an other than a satisfactory rating . . . shall be afforded the opportunity for review . . ."

A review was commenced under the auspices of the Chancellor on June 1, 2010 (the Appeal), and, by letter of June 29, 2010, Lamphere was informed that the appeal of the Unsatisfactory rating for the 2007-08 school year was denied. More specifically, the Committee stated that:

[i]n order to ensure, that fairness and justice for all parties had been properly served, the Chairperson carefully considered the facts and various arguments presented. The administration's documentation was convincing. The documentation and testimony offered by the administration reveals that the Appellant was provided with ongoing professional development and support throughout the rating period. However, the appellant failed to elevate his performance to a "Satisfactory" level . . . Upon examination of the disciplinary letters and the observation report, the supervisors' comments reflect the Appellant's unsatisfactory performance in the areas highlighted on his rating sheet . . . Neither the Appellant nor his Advisor proffered any credible evidence to validate a reversal of the "Unsatisfactory" rating. It is, therefore, recommended that the appeal be denied and the rating of "Unsatisfactory" be sustained.

Prior to the Appeal, during the 2009-2010 school year, Arbitrator Carol Wittenberg was jointly designated by the UFT and the DOE to hear the special complaint filed in May 2008 (*see* Report and Recommendations, American Arbitration Association, Voluntary Labor Tribunal, No. 13 390 01347 09 [the Arbitration]) over eight days in 2009 and 2010.

The decision in the Arbitration, dated April 15, 2010, issued a scathing indictment of the actions of Jahoda with regard to the complainants. In conclusion, the Arbitrator noted that

there is substantiation for complaints of harassment and intimidation by Assistant Principal Rosemary Jahoda with regard to certain teachers . . . In addition to specific acts of intimidation . . . the totality of Jahoda's treatment of teachers also constitutes harassment . . . It would be difficult to have heard the testimony of seven of the complainants, to have read the statements of the 13 others and to have listened to the June 10, 2008 audio recording of the meeting in Jahoda's office and not conclude that Jahoda has a confrontational style that is intimidating and demeaning and that the Assistant Principal is inclined to confront rather than to listen and reflect. [There is] little doubt that Jahoda's manner is a reflection of her frustration with teachers she perceived to resist her leadership and her concerns over complaints she believed were engineered by Chapter Leader Lamphere. Nevertheless, this does not undercut the legitimacy of the numerous complaints by teachers concerning the tone and manner in which Jahoda communicated with teachers.

Wittenberg went on to recommend that BHSS "remove all 'letters to the file' issued to the Special Complainants during Jahoda's tenure[, and t]hat all actions affecting teachers who transferred from the school be rescinded."

As a result, Lamphere seeks: (i) a declaration that the DOE determination to sustain the Unsatisfactory rating was an arbitrary, capricious, and unreasonable abuse of discretion, that lacks a rational basis, and is in violation of lawful procedure, and/or bad faith; (ii) an order reversing the Unsatisfactory end-of-year rating for the 2007-2008 school year; and (iii) an award in excess of \$7,600 to make him whole for back pay, due to his frozen salary on the salary scale as a result of the Unsatisfactory rating, plus interest, and any other lost emoluments and benefits related thereto.

DISCUSSION

A judicial review of an administrative determination is circumscribed by the grounds invoked by the agency at the time of its determination. *Matter of Aronsky v Board of Educ. Community School Dist. No. 22 of City of N.Y.*, 75 NY2d 997, 1000 (1990). Under CPLR 7803 (3), the pertinent inquiry is "[w]hether a determination was made in violation of lawful procedure, was affected by error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." As

such, judicial review of the DOE's determination is restricted to an evaluation of whether the DOE's determination is consistent with its own lawful procedures, whether the determination was arbitrary or capricious, and whether the DOE unreasonably exercised its discretion. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 230 (1974).

Here, the court is stricken by the stark terms of the Arbitrator's conclusions. There seems to be a significant possibility that Jahoda's observations and evaluations of Lamphere were flavored with retaliation. However, this court cannot substitute its judgment in place of the DOE, even if this court believes, that a better determination or outcome could be made. *See Matter of Clancy-Cullen Stor. Co. v Board of Elections of City of NY*, 98 AD2d 635, 636 (1st Dept 1983); *Peconic Bay Broadcasting Corp. v Board of Appeals, Town of Southampton*, 99 AD2d 773, 774 (2nd Dept 1984).

This is because the decision of the DOE appears to have, at least some, rational basis. *Matter of Pell*, 34 NY2d at 231. The letters issued by Jahoda had specific pedagogic content, whether or not affected by disagreeable policy formulations, and the DOE in making its determination, demonstrated that it made specific reference to the detailed and actual content of the letters. *Sewell v New York*, 182 AD2d 469, 473 (1st Dept 1992) (rational or reasonable basis for an agency's determination exists if evidence is adduced in the record to supports its conclusion); *Matter of Andersen v Klein*, 50 AD3d 296, 297 (1st Dept 2008) (detailed observation reports describing petitioner's poor performance in class management and engagement of students provided a rational basis for rating), *accord Matter of Murnane v Department of Educ. of City of N.Y.*, 82 AD3d 576 (1st Dept 2011).

Finally, to disturb the finding of the DOE Chancellor would be to circumvent the established axiom that the court should "not weigh the evidence, choose between conflicting proof[s, and] substitute its assessment of the evidence" or "the credibility of witnesses" for that of the finder of fact. *Matter of Deitch v Dole*, 159 AD2d 311, 311 (1st Dept 1990); *Sewell*, 182 AD2d at 473.

Lamphere's reliance on the trial court order in *Johanna Francois v City of New York* (2011 NY Slip Op 32312[U] [Sup Ct, NY County 2011]) is misplaced. In that matter, the

administrators did not follow established procedures for performance evaluations. Here, there is no allegation that the procedures followed by the BHSS administration were in violation of any laws or memoranda. Indeed, there is no mention of any procedural irregularities at all in this petition.

As the administrative determination of the DOE was arguably rational (*see Matter of Howard v Wyman*, 28 NY2d 434, 438 [1971]), and it cannot be said that sustaining the performance evaluations shock the conscience of the court (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of Pell*, 34 NY2d at 232-234), the petition is denied.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.


GEOFFREY D. WRIGHT
AJSC

Dated: June 10, 2013

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court