Matter of Wolin v Walcott
2014 NY Slip Op 30136(U)
January 16, 2014
Supreme Court, New York County
Docket Number: 104090/12
Judge: Doris Ling-Cohan
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[* 1] SCANNED ON 1/22/2014

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice **Part 36**

IN THE MATTER OF THE APPLICATION OF ROBYN WOLIN,

Petitioner,

-against-

DENNIS M. WALCOTT, Chancellor, New York City Department of Education, and the NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

INDEX NO. 104090/12

MOTION SEQ. NO. 001

FILED

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The following papers, numbered 1-5 were considered on this Article 78 proceeding:

PAPERS	NUMBERED
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits	1, 2, 3
Answering Affidavits — Exhibits	4
Replying Affidavits	5
Cross-Motion: [ ] Yes [X] No	

Upon the foregoing papers, it is ordered that this motion is decided as indicated below.

Petitioner commenced this Article 78 proceeding against respondents' Dennis M. Walcott and New York City Department of Education (Department of Education) (jointly Respondents), for an order: (1) declaring Respondents' decision to terminate petitioner's employment and deny her certification of completion of probation arbitrary, capricious, unreasonable, an abuse of discretion, lacking a rational basis, and in bad faith; (2) ordering Respondents to rescind petitioner's termination, unsatisfactory rating for the 2011-2012 school year, and the denial of her certification of completion of probation; (3) ordering Respondents to reinstate petitioner to her teaching position, *nunc pro tunc*, to July 26, 2012 with back pay, interest and other benefits; (4) ordering that petitioner receive tenure by estoppel as of September 2, 2011; (5) ordering that petitioner was entitled to due process rights before her termination could become effective and, as a result, the termination effective July 26, 2012 must be rescinded; and

(6) ordering that the termination of petitioner was in violation of an agreement to extend the probationary period of petitioner.

BACKGROUND

Petitioner, taught biology at the Bronx High School of Science from September 2005 to June 2008. Petitioner then resigned to take a position as a biology teacher at Hunter College High School, a school which is not part of respondent Department of Education. Thereafter, petitioner was re-hired by respondent Department of Education on September 2, 2011, to teach biology at the High School for Math Science and Engineering.

One of petitioner's classes was observed on October 19, 2011, by the Assistant Principal, Andy Podell (Assistant Principal Podell), and petitioner received a satisfactory rating in the observation report. In November 2011, a new principal for the High School for Math Science and Engineering, Crystal Bonds (Principal Bonds), was hired. Principal Bonds observed petitioner's class on March 29, 2012, and rated petitioner unsatisfactory in the observation report. At a post-observation meeting in April 2012, petitioner met with Principal Bonds, and it was agreed that petitioner's probationary period would be extended. Such agreement was memorialized in an "Extension of Probation Agreement" signed by petitioner and the superintendent, Anthony R. Lodico (Superintendent Lodico).

Petitioner was subsequently observed by Principal Bonds on June 7, 2012. Petitioner learned that she received another unsatisfactory rating in the observation report at the post-observation meeting on June 15, 2012. Thereafter, petitioner submitted a rebuttal to the observation report. Petitioner and Principal Bonds met again on June 22, 2012, and petitioner was given her annual review, which was unsatisfactory (U-Rating). Principal Bonds also recommended that petitioner's probationary service be discontinued. On July 12, 2012, petitioner submitted a rebuttal to the notice of discontinuance, which she received on June 22, 2012, to Superintendent Lodico. By letter dated July 26, 2012, Superintendent

Lodico affirmed the discontinuance of petitioner's probationary service, as of July 26, 2012, the date of petitioner's termination.

Thereafter, petitioner commenced this Article 78 proceeding seeking to rescind her termination and U-Rating for the 2011-2012 school year. Respondents joined issue in January 2013.

DISCUSSION

In deciding whether an agency's determination was arbitrary, capricious or an abuse of discretion, courts are limited to an assessment of whether a rational basis exists for the administrative determination and their review ends when a rational basis has been found. *See Heintz v Brown*, 80 NY2d 998, 1001 (1992); *Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 277-278 (1972). Judicial review of an administrative determination is limited to whether the 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..." CPLR 7803 (3). The Court of Appeals explained the "arbitrary and capricious" standard in *Matter of Pell v Board of Ed.*, 34 NY2d 222, 231 (1974) as follows:

> "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.' (1 N.Y. Jur., Administrative Law, § 184, p. 609). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts."

Thus, a court may not substitute its judgment for that of an administrative agency, if there is a rational basis for the agency's determination. S*ee Matter of Nehorayoff v Mills*, 95 NY2d 671, 675 (2001). The court may not overturn the determination of an administrative agency merely because it would have reached a contrary result. S*ee Matter of Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 278 (1972); *Matter of Kaplan v Bratton*, 249 AD2d 199, 201 (1st Dep't 1998).

Moreover, it is well settled "that the interpretation given a statute by the agency charged with its enforcement will be respected by the courts if not irrational or unreasonable." *See Matter of Fineway Supermarkets, Inc. v State Liq. Auth.*, 48 NY2d 464, 468 (1979). *See also Matter of Howard v Wyman*,

28 NY2d 434, 438 (1971); *Matter of Lower Manhattan Loft Tenants v New York City Loft Bd.*, 104 AD2d 223, 224 (1st Dep't 1984), *aff'd* 66 NY2d 298 (1985). "It is a basic policy underlying Education Law § 2573(1)(a) that the responsibility for selecting probationary teachers and evaluating them for appointment on tenure should lie with the Board of Education upon appropriate recommendation of its professional administrators." *Frasier v Board of Ed.*, 71 NY2d 763, 766 (1988).

Premature

Preliminarily, Respondents argue that this Article 78 proceeding is premature, since no final determination has been rendered concerning petitioner's administrative challenge, as petitioner has appealed her U-Rating and termination, but the Chancellor's designee has not made a final determination. The Court of Appeals has held, in *Kahn v New York City Dep't of Ed., Nash v Board of Ed. of the City School District of the City of New York*, 18 NY3d 457, 462 (2012), that the "DOE's decisions were 'final and binding' within the meaning of CPLR 217(1) as of the dates when [the teachers'] probationary service ended", and, thus, in *Kahn* and *Nash*, the "lawsuits, brought more than four months after the dates when their probationary service ended, [were] time-barred." *Id.* It is undisputed that petitioner's employment as a probationary teacher was terminated on July 26, 2012, and, thus, this Article 78 proceeding is not premature, to the extent that it seeks review of petitioner's termination, as Respondents' decision was final and binding as of such date.

However, respondents' argument is correct as it relates to petitioner's U-Rating. CPLR 7801(1) clearly states that "a proceeding under [Article 78] shall not be used to challenge a determination: (1) which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application". The Appellate Division, First Department, has held that "[t]he determination that petitioner's teaching performance was unsatisfactory did not become final and

binding until the Chancellor denied his appeal sustaining the rating". *Hazeltine v City of New York*, 89 AD3d 613, 614 (1st Dep't 2011). *See also Leo v New York City Dep't of Ed.*, 100 AD3d 536, 537 (1st Dep't 2012); *Anderson v Klein*, 50 AD3d 296 (1st Dep't 2008). As such, this Article 78 proceeding was prematurely commenced as to petitioner's U-Rating. "The policy underlying the dismissal for prematurity of article 78 proceedings before a final and binding determination is to preclude the initiation of litigation that may thereafter become academic." *Committee to Save the Beacon Theater v City of New York, et al.*, 146 AD2d 397, 404 (1st Dep't 1989). Here, as it is uncontested that the Chancellor has yet to issue a determination on petitioner's appeal, which challenges, *inter alia*, her U-Rating, this Article 78 proceeding is premature, and must be dismissed as to such U-Rating. However, the court notes that although petitioner filed the administrative appeal of the U-Rating, and the Chancellor's Committee issued a recommendation, dated September 25, 2012, to sustain the U-Rating, the Chancellor has yet to make a final determination. Thus, petitioner has been waiting over one (1) year for such final determination, and the Chancellor is directed to review petitioner's appeal and expeditiously make a determination as to such.

Tenure By Estoppel

Petitioner contends that Respondents breached the Extension of Probation Agreement, by terminating her employment prior to the end of the 2012-2013 school year. According to petitioner, she was entitled to tenure by estoppel at the time she started working for the High School for Math Science and Engineering, as she was entering her fourth year of teaching, as a licensed biology teacher, for respondent Department of Education, without any determination made as to tenure, and her probation was not extended. *See* Verified Petition, ¶¶ 13 and 62. As such, petitioner argues that she was also entitled to all due process rights consistent with tenure. However, Respondents argue that, before petitioner completed her third year of probationary employment at the Bronx High School of Science,

petitioner signed an extension of probation agreement dated April 18, 2008, in which petitioner agreed to serve an additional year of probation. In support, Respondents proffer the Extension of Probation Agreement, signed by petitioner and the High School Superintendent of District 10, Joel DiBartolomeo. *See* Verified Answer, Exh. G. Thus, according to Respondents, petitioner was a probationary teacher when she resigned, and was still a probationary teacher when petitioner withdrew her resignation and returned to work for respondent Department of Education in September 2011. In further support, Respondents proffer the Commencement of Service upon Withdrawal of Resignation or Restoration from Retirement Agreement, dated September 2, 2011.

Respondents are correct in arguing that petitioner did not obtain tenure by estoppel. In reply, petitioner states that she did not have a copy of the Extension of Probation Agreement signed on April 18, 2008, and did not recall signing the agreement. However, petitioner does not dispute that she entered into such agreement. Thus, petitioner was clearly a probationary teacher when she resigned in 2008. Moreover, in withdrawing her resignation, petitioner signed an application to withdraw her resignation which specifically, and unambiguously, states that "[e]mployees who were not tenured prior to resignation must serve a three year probationary period following withdrawal of resignation." *See* Verified Answer, Exh. H, Application For Withdrawal of Resignation/Retirement, p. 2. As such, petitioner did not obtain tenure by estoppel, and was a probationary teacher at the time she started her employment at the High School for Math Science and Engineering, as well as when her employment was terminated. Thus, as discussed below, as a probationary teacher, petitioner could be terminated at any time, unless there was a showing of bad faith.

Bad Faith

As petitioner is a probationary teacher, New York courts have consistently held that "[u]nquestionably, a Board of Education, under Education Law § 2573(1)(a), has the right to terminate

the employment of a probationary teacher at any time and for any reason, unless the teacher establishes that the termination was for a constitutionally impermissible purpose, violative of a statute, or done in bad faith". *Frasier v Board of Ed.*, 71 NY2d 763, 765 (1988). The Appellate Division, First Department has held that "[j]udicial review of such a determination is limited to an inquiry as to whether the termination was made in bad faith. The burden of raising and proving such bad faith is on the employee and the mere assertion of bad faith without the presentation of evidence demonstrating it does not satisfy the employee's burden". *Soto v Koehler*, 171 AD2d 567, 568 (1st Dep't 1991) (internal quotations and citations omitted). Further, "[n]o issue of bad faith is raised by respondents' failure to give petitioner all of the formal written performance evaluations called for in their rules". *Chow v City of New York Dep't of Health*, 303 AD2d 237, 237 (1st Dep't 2003).

Here, petitioner argues that discontinuance of her probationary service was without basis in fact or law, an abuse of discretion, irrational, retaliatory, in bad faith, unlawful, and violates appropriate procedure. According to petitioner, Respondents failed to follow their own policies and procedures, as petitioner was not provided with pre-observation conferences prior to the observations of her classes, as required by respondent Department of Education's Chief Executives' Memorandum # 80 and the Teachers Union Contract. Petitioner further argues that Principal Bonds never reviewed her lesson plans, never provided her with counseling memos, never met with her, and never informed her that she was in danger of a U-Rating or being terminated.

Respondents answer the petition, and argue that petitioner was a probationary employee at the time her employment was terminated, and, thus, could be terminated at any time, unless bad faith is shown by petitioner. According to Respondents, petitioner failed to show such bad faith. Further, Respondents contend that its decisions to discontinue petitioner's probationary service and to give petitioner a U-Rating were rationally based, were neither arbitrary, capricious, nor made in bad faith, and

were lawful, reasonable, and a proper exercise of discretion.

Applying the above principles here, plaintiff failed to meet her burden to establish that Respondents' determination was arbitrary and capricious, or made in bad faith. Although petitioner argues that she was not provided with any support, she concedes that she was teamed with another teacher in the biology department, Dr. Mark Keegan, for the purposes of co-teaching. It is further undisputed that another teacher in the science department, Dr. Robert Kruckeburg, sat in on one of petitioner's classes on a weekly basis for over four months. Moreover, a careful reading of the Teachers Union Contract establish that "[s]upervisors *may* issue counseling memos . . . [to] provide the opportunity for supervisors, in a non-disciplinary setting, to point out to employees areas of work that the supervisor believes need improvement." Verified Petition, Exh. 7, Teachers Union Contract, Art. 21 (B), emphasis added. Thus, contrary to petitioner's argument, counseling memos are not required by the Teachers Union Contract, and the failure to provide such memos do not necessarily evidence bad faith.

Petitioner also argues that Respondents' decision was arbitrary and capricious, and made in bad faith, as petitioner's performance improved, yet she still received a U-Rating and was terminated. However, Respondents argue that petitioner failed to fulfill her professional responsibilities to her students, failed to abide by school policies, prepared inadequate lessons for classes, and performed unsatisfactory work during classes. After two observations, Principal Bonds found and rated petitioner unsatisfactory, and gave petitioner a U-Rating in her annual review. While petitioner's first observation, made by Assistant Principal Podell, resulted in a satisfactory observation report, petitioner's second and third observations, made by Principal Bonds, were both rated unsatisfactory.

In an Appellate Division, First Department case, the court stated that "[t]hese deficiencies in the review process leading to the recommendation to deny tenure and terminate petitioner's employment are not merely technical, but undermined the integrity and fairness of the process." *Kolmel v City of New*

York, 88 AD3d 527, 528 (1st Dep't 2011); *see also Brown v City of New York*, 111 AD3d 426 (1st Dep't 2013). Specifically, the court in *Brown v City of New York* noted that the principal failed to provide written evaluation for over three months after the formal observation, and such observation was received by the probationary teacher only nine days before her second observation; thus, "there was little time to implement the multiple recommendations." *Id.* In contrast, here, Principal Bonds first observed petitioner's class on March 29, 2012. The observation report for such observation was provided to petitioner on April 4, 2012, only a few days after the observation. Principal Bonds' second observation of petitioner's class took place on June 7, 2012, just over two (2) months after petitioner received the March 29, 2012 observation report. Thus, here, petitioner was provided with an opportunity to meet with Principal Bonds, as well as an opportunity to implement the recommendations. However, in the June 7, 2012 observation report, which was provided to petitioner on June 15, 2012, several of the same deficiencies noted in the May 29, 2012 observation report were repeated. *Cf. id.* ("The report listed a litany of criticisms, none of which centered on the deficiencies noted in the [prior] informal observation.").

Furthermore, Respondents rely on two disciplinary letters, as well as the observation reports, which undisputedly detail some improvements by petitioner, but also list numerous areas of unsatisfactory work, which did not improve, and an overall unsatisfactory rating, to support its decision to terminate petitioner's employment. The Appellate Division, First Department has upheld the termination of a probationary teacher, even where the allegations of bad faith were not conclusory, when the record contained evidence of good faith on respondent's part. *See Leo v New York City Dep't of Ed.*, 100 AD3d 536, 537 (1st Dep't 2012). Thus, Respondents' decision to terminate petitioner was not arbitrary and capricious. Respondents demonstrated a rational basis, through the observation reports and disciplinary letters, for its decision. Moreover, aside from petitioner's conclusory allegations,

significantly, she has failed to allege any facts or provide any evidence that Respondents acted in bad faith. As such, the petition must be denied.

Accordingly, it is

ORDERED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that within 30 days of entry, Respondents shall serve a copy of this order upon petitioner with notice of entry.

This constitutes the decision and order of this Court.

Dated: 1/16/14

JUSTICE DORIS LING-COHAN

DORIS LING-COHAN, J.S.C.

Check one: **[X] FINAL DISPOSITION** **[ ] NON-FINAL DISPOSITION**

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