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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 100558/2013
FRIDSTROM, DANIELLE
vs
CITY OF NEW YORK
Sequence Number : 001
ARTICLE 78

PART 57

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided per attached

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

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: 1/16/14

HON. PETER H. MOULTON, J.S.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
COUNTY OF NEW YORK: PART 57 [1]

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DANIELLE FRIDSTROM, Index No.: 100558/2013

Petitioner,

-against-

CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF EDUCATION; and DENNIS WALCOTT, CHANCELLOR OF NEW YORK CITY DEPARTMENT OF EDUCATION

Respondents.

For an Order and Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

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PETER H. MOULTON, J.S.C.:

Petitioner commenced this proceeding on April 5, 2013 to vacate the decisions by the New York City Department of Education ("DOE") awarding her an unsatisfactory rating ("U Rating") for the 2011-2012 school year, terminating her probationary employment as a Biology and General Science teacher, and placing her on an Ineligible Inquiry list (the "List"). Petitioner seeks reinstatement with back pay retroactive to July 26, 2012, to annul the U Rating and to remove her name from the List.

Respondents cross-move to dismiss the petition for failure to state a cause of action. Respondents argue that the challenge to the discontinuance is time-barred and that in any event, there is no evidence of bad faith. Respondents also maintain that the petition only sets forth petitioner's disagreements with her supervisors' determinations. Thus, respondents maintain that there is no

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[1]The Part was formerly known as 40 B.

basis to annul the U Rating. Further, they maintain that the City of New York (the "City") is improperly named as a party. Respondents further submit the affidavit of DOE's Executive Director for Field Services in the Office of Human Resources attesting that an administrative tool, used by DOE prior to 2010 and referred to as the "ineligible/inquiry list" is not currently used.[2] Instead, he explains that a set of codes, referred to as "problem codes" are used. Thus, petitioner's challenge to placement on the List is "no longer relevant because the DOE does not maintain such a list . . . and she is eligible to apply for positions with the DOE."

In opposition to the cross motion, petitioner argues that she should not have been placed on the List because the "Principal never recommended her for a C-31 hearing."[3] Additionally, petitioner asserts that the List is reserved for teachers who have committed serious corporal punishment or sexual abuse. Further, whether there is a List or problem codes, petitioner argues that the effect is to bar her from future employment with the DOE. Petitioner explains why the U Ratings were issued in bad faith or were otherwise, undeserved. In any event, petitioner asserts that the court cannot dismiss her challenge to the U Rating based on failure to state a cause of action because her contentions are entitled to every favorable inference. Petitioner does not dispute that her challenge to the termination is time-barred or that the City is an improper party.

The cross motion is granted to the extent of dismissing petitioner's challenge to her

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[2]Ironically the letter dated December 13, 2012 from the Chancellor's designee, informed petitioner "your name was placed on the Invalid/Inquiry List." One would assume that the ultimate decision maker knows the right terms, or if not, that respondents would not fault petitioner for using a term no longer in vogue. The letter also notified petitioner that "[any] and all New York City Department of Education teaching license(s)/certificate(s) held by you are hereby terminated effective July 26, 2012."

[3]A C-31 hearing refers to a hearing under New York City Board of Education Regulation of the Chancellor Number C-31 issued 10/16/02 ("Regulation C-31").

termination as time-barred and, as to dismissal of the City. The petition is held in abeyance pending receipt of respondents' answer (CPLR 7804 [f]) within 20 days from their receipt of a copy of this Decision, Order and Judgment.

BACKGROUND

Petitioner was appointed by DOE in September 7, 2010 to teach at the Academy for Conservation High School in Brooklyn, subject to a three-year probation period. In June 2011, Principal Michelle Ashkin left and Principal Eugene Mazzola (the "Principal") took her place. During the 2010-2011 school year, petitioner received an overall S Rating for the year, comprised of individual S Ratings in 23 of 23 categories. She also received an S Rating in connection with classroom observations on October 27, 2011 (from the Principal and Sybil Girard, the Assistant Principal [the "AP"]), December 22, 2011 (from the Principal and the AP) and January 17, 2012 (from the Principal and the AP). The Principal also issued an Informal Snapshot Feedback dated February 17, 2012 and the AP issued one dated May 8, 2012.[4]

On March 13, 2012, the Principal observed petitioner's Regents Preparatory science class. According to petitioner, she informed the Principal at a pre-observation conference the day before, that she had trouble with this class. The Principal issued an observation report on March 26, 2012 assigning petitioner a U Rating. The bulk of the criticism involved petitioner's classroom management. The Principal noted that two students were late and a number of students were inattentive or disruptive. The Principal found that "[t]his is a symptom that student are disinterested and are not actively engaged in the lesson." The Principal faulted petitioner's attempts to control

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[4]The snapshots give the teacher both positive and negative feedback and recommendations on how to improve, but are not rated.

the class "by remaining silent and waiting for them to be attentive." He faults her for lecturing the students about lateness because it took time away from class. The Principal offered suggestions on how to control the class. He further noted poor student attendance and offered suggestions on how to improve attendance. Petitioner was encouraged to visit with colleagues to improve her skills.

The Principal next observed petitioner on May 23, 2012 and issued an observation report on June 1, 2012 assigning petitioner a U Rating. The Principal listed several areas of "Instructional Deficiencies" attributable to lack of adequate planning. Students were still disruptive and three students were sleeping. The Principal concluded that students were not being challenged. Petitioner was directed to work with the AP to improve skills.

Petitioner was also observed on June 5, 2012 by the Principal and the AP and was assigned a U Rating in a report dated the same day. Deficiencies were found in petitioner's teaching skills, classroom management and poor student attendance. Recommendations were made on how to improve.

By letter dated June 18, 2012 the Principal recounted a meeting with petitioner, the AP and a United Federation of Teachers representative regarding her "failure to follow a directive given to you with respect to your lesson plans in your formal observation dated 6-1-12." The letter continued that the observation "directed you, in the future, to use a specific format and include specific content in your lesson plans in order to achieve effective planning." Additionally, it provided:

> In this unsatisfactory observation you were directed to incorporate specific parts of your lesson into every lesson plan beginning Monday June 4th. (Please see attached observation, page 5.) On Tuesday June 5th Ms. Girard and I entered your 3rd period class for a formal observation, at which time we requested your lesson plan, it still lacked 5 of the 10 points we directed you to include on the June 1st observation. It lacked the following:

* Differentiation
* A script of the questions you intended to ask
* A detailed conclusion

At the meeting you were given the opportunity to review the observation directive, as well as your lesson plan for June 5th's lesson. You were also given a substantial amount of time to debrief with your union representative in private. In response, you indicated that you had these notes but they were not on your lesson plan.

Your actions in not following this directive by school administration are clearly insubordination. You have been placed on notice that you were required to use specific formatting in your lesson plans due to your U-rated observation and you have failed to carry out that duty.

Please be advised that based upon this misconduct, you may be subject to further disciplinary action, including an unsatisfactory rating and your termination.

Petitioner's Annual Review for the 2011-2012 year assigned petitioner 10 individual U Ratings and 13 individual S Ratings. The documents referenced only include the unsatisfactory observations and the 6/8/12 letter referred to as "Disciplinary Letter to File-Insubordination." Two unexplained codes were placed next to the entry for the Disciplinary Letter.

By letter dated July 26, 2012 the superintendent notified petitioner that, after reviewing her written response, the superintendent was affirming discontinuance of petitioner's probationary service effective July 26, 2012. Petitioner appealed the U Rating and discontinuance and a hearing was held on October 17, 2012 by the Chancellor's review committee. By letter dated December 13, 2012 a designee for the Chancellor reaffirmed respondents' decisions.

PETITIONER'S TERMINATION

Respondents maintain petitioner's challenge to her termination is time-barred in light of the July 26, 2012 letter. They argue that petitioner should have commenced this proceeding by

November 26, 2013, not April 5, 2013. Petitioner makes no argument that such a conclusion is incorrect.

Petitioner's challenge to the decision to terminate her is time-barred. An Article 78 proceeding against a public body may be commenced when a matter has been finally determined (*see* CPLR 7801 [1]). CPLR 217 (1) provides that an Article 78 proceeding must be commenced within four months of the final determination (*see Matter of Carter v State of N. Y., Exec. Dept. Div. of Parole*, 95 NY2d 267 [2000]). An agency determination becomes final and binding when petitioner has notice of a decision, which aggrieves the petitioner (*id.*).

As this proceeding was not commenced until April 5, 2013, petitioner's challenge to her termination is time-barred.[5]

PETITIONER'S U RATING

Unlike a probationary teacher's challenge to a termination, which requires a demonstration of bad faith or some other constitutionally impermissible purpose, a challenge to a U Rating requires a showing that the determination was arbitrary and capricious or without a rational basis (*see* CPLR 7803 [3]; *Matter of Hazeltine v City of New York*, 89 AD3d 613 [1st Dept 2011]; *Black v New York City Dept. of Educ.*, 62 AD3d 468 [1st Dept 2009]; *see generally Matter of Arrocha v Board of Education of City of N.Y.*, 93 NY2d 361, 363-364 [1999]). "'[A] court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion'" (*Matter of Arrocha*, 93 NY2d at 363 [emphasis

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[5]The petition is not time-barred to the extent that it seeks review of petitioner's U Rating. A determination that a petitioner's teaching performance was unsatisfactory does not become final and binding until the Chancellor has denied the appeal (*see e.g., Matter of Hazeltine v City of New York*, 89 AD3d 613, *supra*; *Matter of Andersen v Klein*, 50 AD3d 296 [1st Dept 2008]).

in original; internal citations omitted]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

Petitioner complains that it was arbitrary and capricious to assign her a U Rating for the 2011-2012 year, and for the three observations. The first U rating was based on an observation made the day after petitioner told her Principal she had trouble with this class. Petitioner complains that for the second observation, she was penalized for deficiencies in her "World Savvy" lesson, but had no say in that lesson which the Principal had contracted with World Savvy, to provide.[6] She also asserts that the Principal refused to listen to her explanation, at a post observation conference, that she had planning materials for the third observation, where she was cited for insubordination. Petitioner alleges that she did not receive useful feedback and was not given a Mentor even though a Mentored Teaching Agreement was signed. Further, only a few uninterrupted meetings ever took place with the AP. Thus, petitioner argues that the court has the discretion to annul the U Rating.

Respondents point to specifics in the Principal's observation reports to substantiate that petitioner lacked appropriate control over the classroom and lacked the requisite teaching skills. Respondents assert that its decisions are entitled to deference and were not arbitrary or capricious.

Respondents fail to establish that petitioner's challenge to her U Rating fails to state a cause of action. As correctly noted by petitioner, she is given the benefit of favorable inferences, and respondents should answer the petition.

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[6]World Savvy is a non-profit teaching organization. Petitioner attaches a letter from a World Savvy associate, dated July 18, 2012 to the superintendent reflecting that she has known petitioner for two years and indicates many positive things about petitioner's abilities as a teacher.

THE DOE'S USE OF PROBLEM CODES

While the affidavit of DOE's Executive Director attests to the current use of problem codes, and not an "ineligible/inquiry list" the use of the proper terminology has no bearing on the legal issues here. Further, respondents assert that "Petitioner's teaching licenses have not been revoked" (*see e.g*, page 18 of respondents' memorandum of law), but that statement flies in the face of the letter from the Chancellor's designee notifying petitioner that "[any] and all New York City Department of Education teaching license(s)/certificate(s) held by you are hereby terminated effective July 26, 2012." In any event, assuming the proper term is problem codes and that petitioner is not barred from further employment, respondents have not demonstrated that petitioner fails to state a claim in challenging the use of the codes. Even if not barred from future employment, the codes certainly make it more difficult to obtain employment. Further, it appears that respondents made their determination under Regulation C-31. That regulation describes the Precipitating Circumstances as follows:

> The behavior, conduct or services of the non-tenured employee must be such that a community school district or Central Headquarters feels that the employee's license or certificate should be terminated.
>
> Such behavior includes but is not limited to allegations of criminal wrongdoing, drug use, sexual misconduct, other misconduct which would pose a threat to the safety of students and staff, and conduct which brings disrepute to the district, school or school system. Also included is other conduct constituting incompetent and inefficient service, neglect of duty (including but not limited to excessive and/or unauthorized absence and/or lateness), acts of insubordination, conduct unbecoming the teacher's position, and/or substantial cause rendering the teacher unfit to perform his/her duties.

Respondents' cross motion cannot be granted on this issue because they have not substantiated why problem codes apply to petitioner. Nor have they have not demonstrated why it

was not irrational for the Chancellor's designee to suspend petitioner's license. If this was based on acts of insubordination, it is not clear why petitioner's failure to incorporate her supervisors' suggestions is characterized as insubordination, as opposed to being attributable to petitioner's own deficiencies.

DISMISSAL OF RESPONDENT CITY OF NEW YORK

Petitioner makes no argument opposing dismissal of the City. The City is a separate entity from DOE (*see Perez v City of N.Y.*, 41 AD3d 378 [1st Dept 2007]). DOE is petitioner's employer (*see* Education Law § 2590-g [2]). Accordingly, the City is not a proper party.

It is hereby

ORDERED that the cross motion is granted as to dismissal of petitioner's challenge to her termination, and as to dismissal of the City of New York as a party, and is held in abeyance with respect to petitioner's challenge to the U Rating and challenge to DOE's use of problem codes; and it is further

ADJUDGED that the petition is severed, denied and dismissed with respect petitioner's challenge to her termination and as against respondent City of New York; and it is further

ORDERED that the proceeding is held in abeyance with respect to petitioner's challenge to the U Rating and challenge to DOE's use of problem codes pending respondents' answer and oral argument; and it is further

ORDERED that Respondents may answer the petition (CPLR 7804 [f]) within 20 days from receipt of a copy of this Decision and Order; and it is further

ORDERED that after expiration of the above period, the parties shall email afield@courts.state.ny.us and specify a mutually convenient date for oral argument.

[* 11]

This Constitutes the Decision, Order and Judgment of the Court.

DATED: January 16, 2014

ENTER:

J.S.C.

HON. PETER H. MOSKOWITZ
J.S.C.

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).