

**Moshkovski v Board of Educ. of the City Sch. Dist.
of the City of N.Y.**

2014 NY Slip Op 31421(U)

May 29, 2014

Sup Ct, New York County

Docket Number: 101516/13

Judge: Joan B. Lobis

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

Index Number : 101516/2013
 MOSHKOVSKI, DROR
 vs
 NYC BOARD OF EDUCATION
 Sequence Number : 001
 ARTICLE 78

PART _____

INDEX NO. _____

MOTION DATE 3/14

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) <u>1-3</u>
Answering Affidavits — Exhibits _____	■ No(s) <u>4-5</u>
Replying Affidavits _____	■ No(s) <u>6</u>

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

**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):

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: 5/29/14

JBL, J.S.C.
JOAN B. LOBI

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
DROR MOSHKOVSKI,

Petitioner,

Index No. 101516/13

-against-

**Decision, Order, and
Judgment**

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

Dror Moshkovski petitions pursuant to Article 78 of the Civil Practice Law and Rules challenging his teaching evaluation and rating from the 2011-2012 school year. Respondents 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 (collectively "BOE") oppose the petition. For the reasons stated below, the petition is granted.

During the 2011-2012 school year, Petitioner Dror Moshkovski was a tenured science teacher at Excelsior Preparatory High School. On June 22, 2012, he received an unsatisfactory ("U-rating") Annual Performance Review and Report ("APR"). The section of the APR titled "Documentation" was left blank. The United Federation of Teachers ("UFT") appealed the rating on June 25, 2012.

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).

One year later, a hearing was conducted on the appeal, at which Mr. Moshkovski was represented by his union representative. At the hearing, the Petitioner objected to almost every document offered as evidence by the BOE. The hearing officer sustained objections on approximately half of the documents, none of which Petitioner had previously seen. With the exception of the APR, none of the documents entered into evidence had a signature line, were signed, were dated when Petitioner allegedly received them, or were in his personnel file.

The BOE presented Principal Lilly Lucas as its only witness, who participated by telephone. Principal Lucas averred that Mr. Moshkovski received a U-rating because a 100% of Mr. Moshkovski's students passed his Earth Science class but less than 7% passed the Earth Science Regents Examination ("Regents"). Principal Lucas claimed that Mr. Moshkovski was provided with professional development, including the scheduling of meetings between Petitioner and his supervisor, Assistant Principal Boma Jack.

Petitioner testified that he never had a formal observation. He also stated that the only reason his class grades were higher than the Regents passage rate was because he was asked to change the class grades by an assistant principal. The Chancellor's Committee denied the appeal and sustained the U-rating due to ineffective teaching. In the findings, the Committee stated that the significant disparity between the grades and the Regents' results was the basis of the U-rating. Petitioner was notified by letter on July 17, 2013.

Mr. Moshkovski now brings this petition. He argues that the BOE's determination issuing him a U-rating was not based on any documentation, and denying his appeal violated lawful

procedures, was affected by error of law, and was arbitrary and capricious or an abuse of discretion. He claims that the BOE should not have relied upon documents not included in his personnel file, student performance on the Regents, and upon documents not presented until the day of the appeal. He argues that there was a failure to conduct formal observations during the 2011-2012 school year, and a failure to provide him with an opportunity to improve his performance. Mr. Moshkovski claims that BOE violated its own internal procedures and rules, including the Collective Bargaining Agreement, the Rating Pedagogical Staff Members Handbooks, and the BOE's "Teaching for the 21st Century: Guidelines for Annual Performance Reviews including School-Based Professional Development for the New York City Public School Teachers," and Chief Executive's Memorandum #80.

In answering the petition, the BOE argues that the U-rating was based "on the increasing failure of students in petitioner's Earth Science Labs, who were still passing the Earth Science Course." It claims all procedures were followed. In the memorandum of law, it contends that a rational basis for a U-rating exists where observation reports of a petitioner's ratings officer provide evidence of the petitioner's deficient performance. Among the documents entered as exhibits during the hearing were letters to the Petitioner, which were unsigned and not in the personnel file. The BOE also affirms that beyond the documentary evidence admitted at the hearing, the committee relied on Principal Lucas' hearing testimony, including testimony regarding the Regents passage rates.

The BOE maintains that alleged deficiencies in the review process do not serve as grounds for reversal of a U-rating or determination to discontinue a probationary employee. It

contends that the issue is whether Petitioner has established that he was deprived of a substantial right during the review of his performance. It claims he was not deprived of any substantial right as the internal rules and procedures are not statutes but mere guidelines. The BOE asserts that the rating guidelines highlighted by Mr. Moshkovski are “full of language that indicate their non-binding nature.” It claims that there are a sufficient number of letters to justify a U-rating.

In reply,¹ Mr. Moshkovski claims that no documents other than the APR were signed by him or contained a witness statement attesting to his refusal to sign. He argues that the BOE’s consideration of the documents set forth in the answer was a violation of its own procedures and guidelines contained in the “Rating Pedagogical Staff Members” handbook. He maintains that Respondents’ purported rational basis for the U-rating is itself in violation of lawful procedure, irrational, and arbitrary and capricious.

In challenges under Section 7803(3), the arbitrary or capricious test relates to whether administrative action is justified or without foundation in fact. Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974). 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). “[A]n agency’s rules and regulations promulgated pursuant to statutory authority are binding upon it as well as the individuals affected by the rule or regulation.” Lehman v. Bd. of Educ., 82 A.D.2d 832, 834 (2d

¹ In reply, Petitioner for the first time raises an argument concerning the improper consideration of the Regents scores under Education Law 3012-c, as in 2011-2012 the UFT and BOE had not reached an agreement as to the evaluation of teachers. This argument is not properly before the Court and has not been considered in this decision, order, and judgment. See Ritt by Ritt v. Lenox Hill Hosp., 182 A.D.2d 560, 562 (1st Dep’t 1992).

* 6]

Dep't 1981). If a rule or regulation affects an individual's "substantial rights," it "may not be waived by the agency." Id. "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)).

The record shows that the BOE has violated the formal review procedures from the BOE's "Rating Pedagogical Staff Members." Respondents urge the Court to follow its reasoning in Applewhite v. Board of Education, No. 113474/11, 2012 N.Y. Misc. LEXIS 3995, at *10, 2012 N.Y. Slip. Op. 32182(U), at **8 (Sup. Ct. N.Y. Cnty. 2012), where I held that violations of the handbook are not equivalent with violations of rules or regulations guaranteeing a substantial right. Respondents, however, ignore the First Department's holding in Applewhite v. Board of Education, 115 A.D.3d 427 (1st Dep't 2014), which overturned the decision, and my decision in Gehlaut v. Board of Education, No. 103366/12, 2013 N.Y. Misc. LEXIS 662 at *13, 2013 N.Y. Slip. Op. 30339(U) at **10 (Sup. Ct., N.Y. Cnty. 2013) where I reached the same conclusion as the Appellate Division prior to their reversal of Applewhite. In Gehlaut v. Board of Education, I held that the guidelines in the "Rating Pedagogical Staff Members" handbook "must be equated with administrative rules and regulations that affect the substantial rights of a teacher." Id.

The letters Petitioner allegedly received did not contain signatures acknowledging receipt or a witness's statement attesting to the refusal to sign, in violation of "Rating Pedagogical Staff Members." These letters are not a rational basis for a U-rating. See Applewhite, 115 A.D.3d at 427. Multiple unsatisfactory letters could support a U-rating, but, unlike in this matter, they need to be properly documented. Kolmel v. New York, 88 A.D.3d 527, 527 (1st Dep't 2011).

None of the evidence presented at Mr. Moshkovski's appeal was properly documented. His APR did not list any documentation. The consideration of informal observations and letters not in the personnel file violates the formal review procedures of the BOE. The U-rating and appeal violate lawful procedures and are arbitrary and capricious. Accordingly, it is

ORDERED and ADJUDGED that the Petition is granted, the BOE's determination denying Petitioner's appeal is vacated, and the unsatisfactory rating is reversed; and it is further

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

Dated: *May 29*, 2014

ENTER:



JOAN B. LOBIS, 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).