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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 100099/2014
GLENN, O'NEIL
VS
CITY OF NEW YORK
Sequence Number : 001
ARTICLE 78

PART _____

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

is decided in accordance with the annexed decision.

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

Dated: 7/11/14

_____, 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 55

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In the Matter of the Application of

O'NEIL GLENN,

Petitioner,

Index No. 100099/2014

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

DECISION/ORDER

-against-

CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, DENNIS WALCOTT,as Chancellor of the New York City Department of Education,

Respondents.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Petitioner O'Neil Glenn ("Glenn") brings the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking expungement of the unsatisfactory rating he received in his position as an assistant principal, reinstatement to that position and a declaration that terminating his probationary status in the position was arbitrary and capricious. Petitioner also seeks an order pursuant to CPLR § 408 directing respondents to immediately turn over a complete and underacted copy of the Chancellor's Committee's report. Respondents cross-move for an Order

dismissing the petition on the grounds that the petition fails to state a cause of action and that the City of New York is not a proper party to the proceeding. For the reasons set forth below, the petition is denied and respondents' cross-motion is granted to the extent that the petition is dismissed.

The relevant facts are as follows. In or around 1995, petitioner began working with respondent the Board of Education of the City School District of the City of New York ("BOE") as a Crisis Intervention Teacher at P.S. 24 in Bronx, New York. In or around 2002, he started teaching at John F. Kennedy High School ("JFK High"). During this time, petitioner also served as an athletic coach for the girls basketball team. Petitioner continued teaching at JFK High until June 2008 when he voluntarily resigned for personal reasons. In or around 2009, petitioner returned to the BOE to accept an assistant principal position at the Bronx Engineering and Technology Academy ("BETA"), which is a high school located on the JFK High campus. Initially, petitioner was appointed as an interim acting assistant principal and later became a probationary assistant principal subject to a five year probationary period. In addition to his assistant principal duties, petitioner continued to coach the JFK High girls basketball team.

On or about January 7, 2012, petitioner attended a tournament with the JFK High girls basketball team in Paterson, New Jersey. During the tournament, a student was injured and suffered a contusion on her left knee. On or about Monday, January 9, 2012, petitioner allegedly spoke with Alexandra Janceski ("AD Janceski"), the then athletic director at JFK High and informed her that the student had been injured. Additionally, petitioner alleges that he prepared an incident report and gave it to AD Janceski. On or about January 10, 2012, JFK High principal, Lisa Luft, requested that the Special Commissioner of Investigation for the New York City School District ("SCI") investigate petitioner's actions in regards to the tournament and the student's injury. Specifically,

Luft requested that they investigate: (1) petitioner's alleged failure to obtain Luft's permission to take the team to participate in an off-campus basketball game; (2) petitioner's alleged failure to receive parental permission slips prior to the trip; and (3) petitioner's alleged failure to report the student's injury received during the game. SCI referred the matter to the BOE's Office of Special Investigations ("OSI") for investigation. After an investigation, OSI investigator Gerry Danko ("Danko") issued a final report (the "OSI Report"). Pursuant to the OSI Report, Danko noted that petitioner "acknowledges that he failed to notify any school administrator that [the student] was injured during the game in New Jersey [and] conceded that, as the highest ranking school official on the trip, he was required to report the incident involving [the student] into OORS upon his return to school on January 9, 2012." Additionally, Danko reported that petitioner "admitted that he failed to seek permission from Principal Luft prior to taking the team to play in a game in New Jersey." In the end, investigator Danko concluded that: (1) the allegation that petitioner committed employee misconduct by not obtaining permission from the administration to take the team to the tournament was substantiated; (2) the allegation that petitioner failed to receive parental permission slips prior to the trip was unsubstantiated; and (3) the allegation that petitioner failed to report the student's injury was substantiated. Accordingly, Danko recommended the OSI Report be referred to the Administrative Trials Unit and that a Technical Assistance Conference be convened to determine the appropriate disciplinary action to be taken against petitioner.

On May 22, 2013, while petitioner was serving as "acting principal," he was again involved in an incident that led to another allegation of professional misconduct. At the time, petitioner was serving as principal while BETA principal Karalyne Sperling ("Sperling") was at an off-campus meeting. When Sperling returned to work the next day she was allegedly informed that petitioner and BETA Business Manager Anton Pena had played a joke on school aide Davre Brown ("Brown")

by telling him that Sperling was terminating him because he was not at his post and only informed him hours later that it was all a joke. Thereafter, Sperling reported the incident to SCI. The complaint was eventually referred back to Sperling for a School Based Investigation ("SBI"). On June 25, 2013, petitioner, accompanied by his union representative, met with Sperling to discuss the incident. During this time, petitioner maintained that he had met with Brown for verbal counseling only and never informed him that he was being terminated. By letter dated June 25, 2013, Sperling informed petitioner that she had concluded that his "actions constitute professional misconduct." Petitioner was also informed that "this letter will be placed in your file and this could lead to further disciplinary action including an unsatisfactory rating and your termination of your position with the Department of Education."

On or about June 26, 2013, petitoner received an unsatisfactory rating ("U-rating") for the 2012-2013 school year, based on the two incidents of professional misconduct described above and his discontinuance as a probationary assistant principal was recommended. On or about August 30, 2013, petitioner was notified that Superintendent Elaine Lindsey ("Superintendent Lindsey") would be reviewing the discontinuance recommendation and invited petitioner to submit a written statement for her to consider. On or about September 30, 2013, petitioner was notified that, after reviewing petitioner's documents submitted on September 23, 2013, that he would be discontinued as a probationary assistant principal. On or about October 2, 2013, petitioner appealed both the U-rating and the recommendation for discontinuance.

On November 12, 2013, petitioner had an appeal review of his U-rating and the decision to discontinue his probationary employment before a three-member panel (the "Chancellor's Committee") at BOE's Office of Appeals and Reviews ("OAR"). During the appeal, petitioner and his union representative, elicited testimony and cross-examined witnesses, concerning petitioner's

appeal of his U-rating and recommendation for discontinuance. Specifically, the Chancellor's Committee heard testimony from petitioner, AD Janceski, the OSI investigator and principals Luft and Sperling. After the hearing, the Chancellor's Committee issued its report wherein it unanimously concurred with the recommendation to discontinue petitioner's probationary service. Accordingly, the Chancellor's Committee recommended that the appeal of the unsatisfactory rating be denied and the unsatisfactory rating be sustained. On or about December 16, 2013, petitioner was notified that Superintendent Lindsey reviewed the findings and recommendation of the Chancellor's Committee and reaffirmed her previous decision to discontinue petitioner's appointment as a probationary assistant principal.

Petitioner now brings the instant petitioner to challenge the BOE's decision to sustain his U-rating and discontinuance. In his petition, petitioner argues that the BOE's decision was arbitrary, capricious and an abuse of discretion. Specifically, petitioner alleges that the investigations that lead to the two incidents of professional misconduct were motivated by discrimination based on his status as a black man. Petitioner alleges that Luft and Sperling created an "abusive and venomous" work environment and that Luft referred to petitioner in racial epithets ("nigger" and "gorilla"). Moreover, petitioner alleges that once he complained of Luft and Sperling's discriminatory actions, they retaliated against him by launching the baseless investigations. Accordingly, he alleges that his U-rating and the discontinuance of his position as assistant principal were all motivated by discrimination. Petitioner also contends that he acquired tenure by estoppel and was entitled to a hearing prior to his termination. Respondents cross-move to dismiss the petition on the ground that it fails to state a cause of action. Additionally, respondents move to dismiss the petition as to the City of New York as it is an improper party.

The court first turns to a preliminary matter. Initially, the petition is dismissed as against the

City as it is not and was not petitioner's employer and therefore is not a proper party to this action. It is well-settled that "[the BOE] is not a department of the [C]ity of New York" but rather a separate and distinct entity. *Ragsdale v. Board of Education*, 282 N.Y.323 (1940), citing *Divisich v. Marshall*, 281 N.Y.1 70 (1939); *see also Perez v. City of New York*, 41 A.D.3d 378 (1st Dept 2007) (holding that "the City and the [BOE] remain separate legal entities"). Here, as the City of New York did not make the determination petitioner seeks to challenge and is a separate entity from the BOE, it must be dismissed as a party to this action.

The court now turns to the remainder of the petition challenging the U-rating and discontinuance of petitioner's probationary employment. It is well settled that the standard of review for an agency's determination to sustain a unsatisfactory rating and/or to discontinue a probationary teacher's employment is "whether the determination was arbitrary and capricious, and not whether the determination was supported by substantial evidence." *James v. Klein*, 43 A.D.3d 764 (1st Dept 2007) (internal citations omitted). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Pell v Board of Education*, 34 N.Y.2d 222, 231 (1974). The Court of Appeals has recognized that a probationary employee may be terminated for almost any reason, or for no reason at all, as long as it is not "in bad faith or for an improper or impermissible reason." *Duncan v. Kelly*, 9 N.Y.3d 1024, 1025 (2008). Thus, the determination to discontinue a probationary employee may be reversed only where the petitioner establishes that the termination was "in bad faith, for a constitutionally impermissible purpose or in violation of law." *Smith v. NYC Dept. of Correction*, 292 A.D.2d 198, 199 (1st Dept 2002); *see also Frasier v. Board of Educ. of City School Dist. of City of N.Y.*, 71 N.Y.2d 763, 765 (1988).

In the present case, as an initial matter, the court finds that U-rating assigned to petitioner for the 2012-2013 school year was not arbitrary and capricious or given without regard to the facts. To

the contrary, the reasons for the U-rating were based upon two incidents of professional misconduct, which were well-documented. Indeed, both incidents were investigated and the allegations were, at least in part, substantiated. Thus, the U-rating was not without sound basis in reason or taken without regard to the facts.

Moreover, petitioner fails to meet his burden to demonstrate that the U-rating and the discontinuance of his probationary employment were motivated by racial discrimination and taken in bad faith. Even accepting petitioner's allegations that Luft and Sperling were motivated by discriminatory animus when they reported the incidents of misconduct to SCI for investigation as true, this does not support a finding that the ultimate determination to sustain the U-rating and discontinue petitioner's probationary employment were taken in bad faith as there are no allegations of discriminatory animus on the part of the OSI investigator, the Chancellor's Committee or the ultimate decision maker, Superintendent Lindsey. Indeed, the OSI investigator conducted an independent review of the allegations relating to petitioner's actions at the basketball tournament and concluded that the facts substantiated that petitioner failed to follow proper school procedure in informing Luft about attending the tournament and properly reporting the student's injury. Clearly this finding could not have been influenced by Luft or Sperling's alleged racial animus towards petitioner. Thus, petitioner has failed to sustain his burden of demonstrating that the BOE's determination was taken in bad faith.

Additionally, to the extent petitioner argues that he acquired tenure by estoppel and was entitled to a hearing prior to his termination, such contention is without merit. It is well settled that "[a] teacher may, of course, relinquish her tenured rights in her position voluntarily by resigning." *Gould v. Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 N.Y.2d 446 (1993). Tenure by estoppel results "when a school board accepts the continued services of a teacher or administrator,

but fails to take the action required by law to either grant or deny tenure prior to the expiration of the [administrator's] probationary term." *McManus v. Board of Educ. of Hempstead Union Free School Dist.*, 87 N.Y.2d 183 (1995). Here, it is undisputed that petitioner relinquished his tenure rights as a teacher when he voluntarily resigned in 2008. When petitioner returned to work for the BOE, the BOE did not accept his continued services as a teacher after his resignation but offered him the supervisory position as an assistant principal, which was subject to a five year probationary period. Further, petitioner was notified before the expiration of his probationary period that he would not be given tenure. Thus, respondents took the appropriate action to deny petitioner tenure prior to the expiration of his probationary period and petitioner cannot make out a claim for tenure by estoppel. To the extent petitioner presents the court with a paycheck stub showing that he was paid one day as a teacher after he returned to BOE employment in 2008, such evidence is insufficient to establish that he reclaimed his tenure rights in 2008 as petitioner fails to cite to any authority demonstrating that tenure rights can be reacquired by such act.

Finally, petitioner's request for a complete and unredacted copy of the Chancellor's Committee's report is denied. In an Article 78 proceeding, "a petitioner is not entitled to discovery as of right." *Town of Pleasant Valley v. New York State Bd. of Real Prop. Servs.*, 253 A.D.2d 8, 15-16 (2d Dept 1999). In a special proceeding, discovery will be permitted only where a petitioner first "demonstrate[s] that there is need for such relief." *Id.* at 15. In the instant action, petitioner fails to put forth any argument demonstrating his need for the Chancellor's Committee's report. Thus, his request must be denied.

Accordingly, petitioner's request for relief under Article 78 of the CPLR is denied. The petition is hereby dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 7/11/14

FILED

JUL 14 2014

COUNTY CLERK'S OFFICE
NEW YORK

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J.S.C.