Matter of Chang v Department of Educ. of the City of N.Y.
2014 NY Slip Op 32355(U)
September 4, 2014
Sup Ct, New York County
Docket Number: 100361/14
Judge: Cynthia S. Kern
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EF 9/5/14 E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 100361/2014

CHANG, TZEFANG F.

PART _____

vs

NYC DEPARTMENT OF EDUCATION

Sequence Number : 001

ARTICLE 78

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.

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

Dated: 9/4/14

_____, 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

----------x

In the Matter of the Application of

TZEFANG FRANCES CHANG,

Petitioner,

Index No. 100361/14

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

DECISION/ORDER

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-against-

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK and THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondents.

----------x

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 :

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

Petitioner Tzefang Frances Chang brings the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to challenge a determination made by respondent New York City Department of Education (the "DOE") terminating petitioner's employment. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Petitioner is a bilingual speech pathologist who worked as an independent contractor for the DOE pursuant to numerous services contracts. On or about

November 12, 2013, DOE's administrator, Terence Walsh, received a complaint via e-mail from a mother of A.L., a student who was undergoing speech therapy with petitioner. Specifically, the e-mail stated that on November 7, 2013, "[t]he speech therapist Frances Chang forced my son, who is only four years old to sit by pressing him down violently against the chair, caused a serious bruise on my son's back, which [is] still casuing (sic) pain to his back." In the e-mail, A.L.'s mother further stated that she had witnessed the behavior and that she "feel[s] unsafe and uncomfortable for [her] son to continue to visit therpist (sic) Frances Chang...."

Thereafter, Mr. Walsh investigated the complaint. Specifically, Mr. Walsh has affirmed that he confronted petitioner via telephone about the complaint and that petitioner did not deny that the incident occurred but stated that she used her hands to counteract A.L. standing up during their session and that she did so "in order to facilitate a productive session." Mr. Walsh further affirms that during their conversation, petitioner acknowledged it was wrong to make physical contact with a child but maintained that her actions did not cause harm and that the method of using her hand to keep a child from standing has never given rise to a complaint in the past. As a result of the investigation, DOE terminated its services contracts with petitioner on the ground that she admitted to conduct that violates DOE regulations prohibiting corporal punishment and allegedly paid her for all work she performed up to the date of termination. Petitioner then commenced the instant proceeding seeking to challenge her termination.

On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v. Lewis*, 90 A.D.2d 748, 749 (1st Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had

a rational basis." *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); *see Pell v. Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "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.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell,* 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, the court finds that respondent's decision to terminate petitioner's services contracts was made on a rational basis. Pursuant to each contract petitioner, an independent contractor, maintained with respondent, "[t]he DOE may terminate this Agreement upon 10 days' prior written notice to the Payee for any reason, or immediately for cause." "It is a well-established principle of law that when a contract affords a party the unqualified right to limit its life by notice of termination that right is absolute and will be upheld in accordance with its clear and unambiguous terms." *Red Apple Child Dev. Ctr. v. Cmty. Sch. Dists. Two*, 202 A.D.2d 156, 157 (1st Dept 2003). Indeed, "[a] party has an absolute, unqualified right to terminate a contract on notice pursuant to an unconditional termination clause without court inquiry into whether the termination was activated by an ulterior motive." *Big Apple Car v. City of New York*, 204 A.D.2d 109, 111 (1st Dept 1994). Further, "[a] contract terminable without cause does not give rise to a protected property interest, such as would afford the right to a hearing as to the propriety of the termination." *Red Apple Child Dev. Ctr.*, 202 A.D.2d at 158 (internal citations omitted). Here, respondent rationally terminated petitioner's services contracts for cause based

on petitioner's conduct in her therapy session with A.L., a four year-old student pursuant to their agreement. Indeed, petitioner does not dispute that the conduct complained of occurred, but only states that she does not believe it constitutes corporal punishment.

Petitioner's assertion that the determination was arbitrary and capricious because she "was not given a satisfactory explanation of the allegations that had been made against [her] and never received anything in writing as to what the specific allegations were" and thus, she "never had an opportunity to respond to the complaint, never had an opportunity for a name clearing hearing..." is without merit. As an initial matter, petitioner does not deny discussing the parent complaint with Mr. Walsh in November 2013 and does not deny that she placed her hands on A.L. Further, petitioner has failed to provide a basis for her assertion that she is entitled to anything in writing laying out the specific allegations made against her. Indeed, the contracts she maintained with respondent gave respondent the right to terminate their employment relationship at any time for any reason and does not state that petitioner is entitled to a written complaint of any sort even when the contracts are terminated for cause. Additionally, the fact that petitioner did not have an opportunity to formally respond to the complaint or to clear her name at a hearing is immaterial as petitioner has not established her entitlement to provide a response or have a hearing.

Petitioner's assertion that the determination was arbitrary and capricious because she has been placed on an "Ineligible List" which makes her unemployable is without merit. Katherine G. Rodi, Director of DOE's Office of Employee Relations, has affirmed that petitioner was not placed on any "Ineligible List" but rather that DOE maintains employment records and employee work histories that accurately reflect the reason an employee has separated from DOE service.

Specifically, Ms. Rodi affirmed that "the DOE has codes in its internal electronic systems designed to ensure that if an employee left employment with a performance issue or with substantiated misconduct or subsequently developed an arrest record, that prior to any subsequent employment with the DOE, that employee would be required to undergo further review." While Ms. Rodi has affirmed that codes for petitioner's misconduct were placed in petitioner's file, she has also affirmed that the placement of such codes in DOE's files does not prohibit petitioner from applying for a position with DOE or applying to provide vendor services to DOE. Thus, this court finds that the placement of such codes in petitioner's employment file was rational based on petitioner's conduct and petitioner has failed to provide a basis for the assertion that they should be removed. Moreover, even if petitioner's name was placed on an "Ineligible List," which it was not, such placement would be rational because petitioner was the subject of disciplinary charges. *See Matter of Spata v. Levy*, 206 A.D.2d 534, 535 (2d Dept 2003)("placement of the petitioner's name on the ineligible/inquiry list was not arbitrary or capricious since he was...the subject of...disciplinary action.")

Accordingly, the petition is denied and dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 9/4/14

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J.S.C.

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