Matter of Andre v New York City Dept. of Educ.
2015 NY Slip Op 32490(U)
January 12, 2015
Supreme Court, New York County
Docket Number: 400409/13
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN, *Justice* PART 21

In the Matter of the Application of

DAVID ANDRE,

Petitioner,

- v -

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

INDEX NO. 400409/13

MOTION DATE 10/24/14

MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this Article 78 petition

Notice of Cross Motion to Dismiss; Affirmation in Support— Exhibits 1-3; Respondent's Memorandum of Law	No(s). 1-2
Rebuttal for Notice of Cross Motion to Dismiss; Rebuttal to Respondent's Memorandum of Law — Exhibits	No(s). 3
Respondent's Reply Memorandum of Law	No(s).

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

Upon the foregoing papers, it is ORDERED that respondent's cross motion to dismiss is granted; and it is further

ADJUDGED that this petition is denied and the proceeding is dismissed.

In this Article 78 proceeding, petitioner challenges respondent's decision terminating his employment as a probationary social studies teacher and seeks to reverse his unsatisfactory rating (U rating) for the 2012-2013 school year and be reinstated as a teacher. Petitioner alleges various violations of the collective bargaining agreement (COBA) between petitioner's union, the United Federation of Teachers (UFT) and respondent and argues that the determination by respondent "was (i) [in] contravention of [his] teacher's contract [,] (ii) was arbitrary, capricious, an abuse of discretion, (iii)the decision made was not supported by substantial evidence in the record." [Petition at 1.)

Respondent cross-moves to dismiss the petition for petitioner's failure to exhaust administrative remedies and state a cause of action.

(Continued . . .)

It is well settled that "'one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law.'" (*Ford v Snashall*, 275 AD2d 493, 494 [3d Dept 2000], quoting *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]; *see also Villalba v New York City Dept. of Educ.*, 50 AD3d 279, 279 [1st Dept 2008] ["The 'U' ratings are unreviewable for failure to exhaust the grievance procedures set forth in the collective bargaining agreement."].)

In New York, an employee must first exhaust the grievance procedures set forth in the collective bargaining agreement before proceeding to court. (*See Matter of Plummer v Klepak*, 48 NY2d 486, 489 [1979] ["Since petitioner failed to avail himself of the grievance procedure set forth in the collective bargaining agreement, he is precluded from seeking relief under CPLR Article 78."][internal citations omitted].) An employee must exhaust remedies in the contract even in instances where the union fails to file a grievance. (*See Matter of Ray v New York City Dept. of Correction* 212 AD2d 387 [1st Dept 1995] ["The application was properly denied, respondent's inadvertent default notwithstanding, on the ground that petitioner failed to exhaust the administrative remedies set forth in the collective bargaining agreement. That this was the inexcusable fault of his union does not alter the situation."][internal citations omitted].)

> "Allowing individual employees to circumvent the grievance procedure in favor of other remedies as a general matter would impair those interests, deprive the parties of the opportunity to establish a uniform and exclusive method for orderly settlement of employee grievances, and inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."

(*Matter of Board of Educ., Commack Union Free School Dist. v. Ambach*, 70 NY2d 501 [1987] [internal quotations omitted].)

In the instant case, petitioner has not shown that he has completed the grievance procedure for the alleged violations of the COBA between petitioner's union, UFT, and respondent. Article 22 of the COBA sets forth the grievance procedure available to petitioner, outlining the specific steps to be taken by an aggrieved employee, with the final step being arbitration. (See Lockinger Affirm. Ex. 3.) Petitioner stated, "I by far and beyond exhausted remedies and request for administrative interventions [] [i]n which I was denied or usually ignored." [Petitioner Reply MOL at 3.) However, petitioner has not shown that he initiated any such grievance

(Continued . . .)

procedures or completed them, and petitioner has not alleged that he attended an arbitration hearing addressing any of the alleged grievances.

Petitioner also alleges, "[t]he violation was made when retaliation was made from my freedom of speech to report illegal classroom environment made by [my] supervisor . . . . Moreover, there is a state statute against retaliation of 'whistleblowing'." (Petitioner Reply MOL at 2.) To the extent that petitioner is alleging that he was terminated in violation of New York's "whistleblower" statute (Civil Service Law § 75-b), that claim must also fail for petitioner's failure to exhaust administrative remedies. Civil Service Law § 75-b (3) requires that only employees who lack protection of a COBA may pursue an action in court under this statute. "It is [] well settled that a 'contract provision in a collective bargaining agreement may modify, supplement, or replace the more traditional forms of protection afforded public employees, for example, those in sections 75 and 76 of the Civil Service Law'" (*Matter of Cantres v Board of Educ. of City of N.Y.*, 145 AD2d 359, 360, [1st Dept 1988] [dismissing petition where a petitioner who "participated in [a] step [1] hearing" but failed to appear at his requested step 2 hearing and "never requested that the union initiate a step [3] appeal . . . failed to exhaust his administrative remedies"] [internal citations omitted].) Here, the COBA between petitioner's union and respondent has a grievance procedure to address any alleged violations that may fall under Civil Service Law § 75-b (3). However, as petitioner failed to exhaust administrative remedies this claim must also fail.

Moreover, petitioner has not demonstrated that respondent's actions were arbitrary and capricious. "In reviewing administrative proceedings in general," courts are "limited to considering 'whether a 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.'" (*Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 363 [1986], quoting CPLR 7803 [3]; see also *Richards v Board of Educ.*, 117 AD3d 605 [1st Dept 2014].) "The proper test is whether there is a rational basis for the administrative orders . . . . Rationality is what is reviewed under . . . the arbitrary and capricious standard." (*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].) Here, respondent had a rational basis for petitioner's U rating and termination. The principal, Alexa Sorden, observed petitioner on four different occasions during the 2012-2013 school year, and determined on three of the occasions that petitioner's performance was not satisfactory. During the hearing regarding petitioner's U rating, Sorden testified that petitioner's lessons were ineffectively planned and implemented to stimulate adequate student

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engagement, and to insure "learning at the level of required standards and petitioner "failed to employ the most basic pedagogical skills and routines in his classroom." Furthermore, Sorden presented evidence of petitioner's "poor organization, pacing, transitioning, questioning, grouping, differentiation, summarization, and assessment." (Lockinger Affirm. Ex. 1 at 1-2.) Sorden determined that petitioner's inadequacies as a teacher resulted in his students suffering academically and being placed in an academically unsafe environment as further evidenced by students' parents calling to complain about petitioner's classroom. (*Id.* at 3.) Thus, respondent has a rational basis for petitioner's U rating for the 2012-13 school year. (*See Richards*, 117 AD3d at 605 ["The record shows a rational basis for the conclusion that petitioner's performance was unsatisfactory, as evidenced by the three formal observation reports describing petitioner's poor performance in class management and engagement of students."].)

Therefore, respondent's cross motion to dismiss is granted, the petition is denied, and the proceeding is dismissed.

Copies to petitioner and respondent's counsel.

HON. MICHAEL D. S...

Dated: 1/12/15 ______, J.S.C.

New York, New York

1. Check one:.. ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:............PETITION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:.............................. ☐ SETTLE ORDER ☐ SUBMIT ORDER

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