

**Matter of Amankwah v Department of Educ. of the
City of N.Y.**

2019 NY Slip Op 31033(U)

April 10, 2019

Supreme Court, New York County

Docket Number: 159310/2017

Judge: John J. Kelley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

INDEX NO. 159310/2017
MOTION DATE 10/19/2017
MOTION SEQ. NO. 001
In the Matter of
LUCKISHA AMANKWAH,
Petitioner,

- v -

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

DECISION AND ORDER

Respondent.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 6, 7, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77

were read on this motion to/for CPLR ARTICLE 78 REVIEW

I. INTRODUCTION

In this CPLR article 78 proceeding, the petitioner seeks judicial review of a New York City Department of Education (DOE) determination finding that she performed unsatisfactorily as an assistant principal, resulting in the termination of her appointment as a probationary assistant principal and returning her to her previous position as a teacher with the DOE. The DOE answered the petition and filed the administrative record, which includes letters, warnings, prior disciplinary memos, and other relevant documentation. The petition is denied and the proceeding is dismissed.

II. BACKGROUND

The petitioner alleges that she has worked for the DOE since 1997, beginning as a teacher, becoming a teacher mentor in 2004, and being promoted to a tenured Education

Administrator in 2010. In November 2012, the petitioner was promoted to Assistant Principal in the central support office of the DOE's Office of Adult and Continuing Education (OACE). This position was subject to a five-year probation period.

The petitioner avers that, in or about May 2015, Superintendent Rose-Marie Mills asked her to visit classrooms to provide support for and to evaluate two teachers. The petitioner notes that it was highly unusual to provide support for teachers during the last two months of the school year, and she suspected that Mills wished her to report negatively so as to retaliate against those teachers for their frequent filing of grievances. The petitioner evaluated those teachers' performance as acceptable. Although her report did not explicitly employ the word "satisfactory" to describe their performance, she nonetheless provided a positive narrative of her observations.

The petitioner contends that, in retaliation for refusing to submit a negative review of the two teachers who were under scrutiny, Mills immediately removed her from the OACE central support office and reassigned her to an Adult and Continuing Education program at P.S. 13 in Brooklyn. She further asserts that her assessment of the two teachers ultimately was rejected by the relevant principal, who resubmitted the evaluation as a negative review. The petitioner alleges that, on or about November 1, 2016, Superintendent Mills warned her that "this is not a battle that you are going to win," and threatened to have her principal write several negative reviews of her own performance for inclusion in her personnel file.

The petitioner received two disciplinary letters, dated December 21, 2016, and March 17, 2017, respectively. The first letter, written by her principal, Tiffany Taylor-Oates, after a disciplinary meeting on December 16, 2016, criticized the petitioner for openly stating at the meeting that the maintenance of the computerized student intake tracker program was "too much work for the staff" and that, if the Average Daily Attendance was low, it would wrongly "be assumed by Central that the teacher's lesson is not engaging or that the teacher is not teaching." Taylor-Oates opined that these statements were unprofessional, in that they

demonstrated that the petitioner could not keep up with her assignments and cast aspersions on the integrity of DOE's teacher evaluation process. Taylor-Oates also informed the petitioner that,

“as the Assistant Principal supporting sites, it is imperative that your visits focus on improving the quality of instruction at the sites you are responsible for. When students do not show improvement, it is our responsibility to determine the barriers and address them. I urge you to provide specific guidance to teachers and also utilize the coach in ensuring that our students receive high quality instruction.”

She further advised the petitioner that “the above misconduct may lead to further disciplinary action including an unsatisfactory rating and charges under the Education Law, which may lead to your termination.”

In the letter dated March 17, 2017, Taylor-Oates criticized the petitioner for failing to update and maintain the Average Daily Attendance tracker computer program and receiving 17 separate notices from DOE headquarters over a two-month period that the data had not been updated. Taylor-Oates also asserted that the petitioner failed to adhere to certain Leadership Protocols concerning the improvement in the classroom environments for the 11 classes that she supervised, and that the expected improvement in the classroom environment had not materialized. As with the December 21, 2016, letter, the March 17, 2017, letter warned the petitioner that her “above failure to perform your duties and responsibilities may lead to further disciplinary action including an unsatisfactory rating and charges under the Education Law, which may lead to your termination.”

On June 21, 2017, the petitioner was given a rating of “unsatisfactory” (hereinafter a “U-rating”), her probationary status as an Assistant Principal was discontinued effective July 31, 2017, and she was returned to her prior status as an Education Administrator.

The petitioner contends that all of the DOE's disciplinary actions were undertaken in retaliation for her favorable assessment of the two teachers she was asked to evaluate. She argues that the comments criticized by Taylor-Oates were taken out of context, and falsely

suggested that she was unable to complete the tasks assigned to her. She claims that, contrary to the DOE's findings, she complied with its request to facilitate a presentation on attendance and student engagement. She further claims that any missing computer entries for which she was blamed were not under her purview, and that there was a conflict between her assigned responsibilities and the deadlines for the computer entry of attendance counts. The petitioner further asserts that she was unable to fulfill her duties in maintaining an attendance data base and generating required reports because of problems with internet connectivity, and that no one from the information technology staff responded to her requests for assistance. She thus argues that all of the negative reviews were explainable, and that these reviews, as well as her ultimate rating of unsatisfactory for the 2016-2017 school year, were mere pretexts for disciplining her in connection with her refusal to falsely give negative reviews to the two teachers whom she had evaluated in May 2015.

In its answer, the DOE asserts that, even before the May 2015 incident, the petitioner had received disciplinary letters dated December 9, 2013, March 2, 2015, and May 6, 2015, regarding her punctuality, attendance, judgment, and failure to comply with directives or achieve stated goals. These letters explicitly advised her that her misconduct "may lead to further disciplinary action including an unsatisfactory rating and charges under the Education Law, which may lead to [her] termination." Although the petitioner received a satisfactory rating for her 2014 annual review, a letter placed in her file that year criticized her for failing to be proactive, failing to meet important project deadlines, and failing to notify the superintendent that she could not meet those deadlines. She was also criticized for her attendance record. Her 2015 review indicated that she had not improved her performance. The DOE asserts that it reassigned the petitioner to the Region 6 Adult Learning Center at P.S. 13 in Brooklyn for 2016 and 2017, not in retaliation for the May 2015 incident, but because she had not fully met all of the performance goals associated with her position as Assistant Principal at the OACE's central support office.

In addition to the December 21, 2016, and March 17, 2017, letters, the DOE relies on a letter dated January 13, 2017, in which Taylor-Oates informed the petitioner of her concerns about the quality of instruction and feedback that the petitioner provided to teachers as part of her duties; Taylor-Oates also articulated specific directives and protocols to which the petitioner was required to adhere. The letter also refers to a June 19, 2017, determination, in which Taylor-Oates reviewed the petitioner's performance and gave her U-rating for her 2017 annual review, listing, as reasons, her "[a]bsence of supervisory impact on the performance of classes," "[f]ailure to meet the expectations in improving the Classroom environment," "[f]ailure to consistently maintain the Average Daily Attendance," "[f]ailure to provide consistent weekly reports detailing your meeting with the coach," and "[f]ailure to review the coach tracker and monitor the coach support-Leadership Protocol." According to the DOE, on June 21, 2017, after receiving the U-rating, the petitioner became loud, aggressive, and disrespectful to her principal, which culminated in a June 27, 2017, disciplinary meeting regarding the outburst. Mills thereafter informed the petitioner that she was affirming her probationary discontinuance, effective July 31, 2017.

The petitioner filed an internal appeal of her rating and her probationary discontinuance with DOE's Office of Appeals and Review (OAR), but the OAR hearing has not yet taken place. For the 2017-2018 school year, the petitioner was reassigned to OACE's Adult Learning Center-School One, where she is supervised by a different principal who, in a disciplinary letter dated October 30, 2017, criticized the petitioner's unprofessional conduct.

The DOE argues, among other things, that the disciplinary measures claimed by the petitioner to be retaliatory were too remote in time from the May 2015 incident to be related thereto. When this matter first appeared on the calendar before Justice Shlomo Hagler, he directed the parties to file supplemental affidavits addressing the question of the temporal nexus between the May 2015 incident and the disciplinary measures alleged to be retaliatory. In this regard, the petitioner submitted the affidavit of Ryntha Henderson-Amare, who stated that she

was a principal who reported to Mills and had supervised the petitioner between August 2015 and October 2016. She averred that she intended to give the petitioner a satisfactory rating for 2015-2016, but that Mills insisted she give the petitioner an unsatisfactory rating, and that when she did rate the petitioner as satisfactory, neither Henderson-Amare nor the petitioner received copies of any evaluation form that was countersigned by Mills. The petitioner also submitted the affidavit of Sushma Malhotra, an Assistant Principal, who asserted that Principal Iris Fareeda-Garcia frequently pressured Malhotra to give unsatisfactory ratings to various teachers.

III. DISCUSSION

A. Failure To Exhaust Administrative Remedies

In the first instance, the court may review the July 31, 2017, determination discontinuing the petitioner's probationary employment as an Assistant Principal, despite the fact that she is pursuing an administrative appeal of the determination. "A petition to challenge the termination of probationary employment on substantive grounds must be brought within four months of the effective date of termination. The time to commence such a proceeding is not extended by the petitioner's pursuit of administrative remedies" (*Matter of Kahn v New York City Dept. of Educ.*, 79 AD3d 521, 522 [1st Dept 2010], *affd* 18 NY3d 457 [2012] [citations omitted]). The Court of Appeals, in affirming the Appellate Division's order in *Kahn*, noted that the

"[p]etitioners understandably insist that the internal review created by the CBA and DOE's bylaws must be exhausted before suit may be brought under CPLR article 78 to challenge a determination made pursuant to Education Law § 2573 (1) (a) to discontinue a probationary employee's service. After all, otherwise their actions are untimely. But this position is not consistent with our decision in [*Matter of*] *Frasier* [*v Board of Educ.*, 71 NY2d 763 (1988)], as explained in this writing and as the First and Second Departments have repeatedly held"

(18 NY3d at 472; *see Matter of Murnane v Department of Educ. of the City of New York*, 82 AD3d 576 [1st Dept 2011]). Therefore, the petitioner was required to commence this proceeding within four months of July 31, 2017, whether or not she exhausted all administrative

remedies available to her; the failure to exhaust her administrative remedies does not preclude this court from reviewing the challenged determination.

B. Merits of the Petition

“A special proceeding under CPLR article 78 is available to challenge the actions or inaction of agencies and officers of state and local government” (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]). Since “[j]udicial review of administrative determinations is confined to the facts and record adduced before the agency” (*Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000], quoting *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757 [1st Dept 1982], *affd* 58 NY2d 952 [1983]; see *Matter of Van Antwerp v Board of Educ. for Liverpool Cent. Sch. Dist.*, 247 AD2d 676, 678 [3d Dept 1998]), the court may not conduct its own investigation into the facts, thereby going outside the administrative record (see *Matter of Evans v New York City*, 94 AD3d 885, 887 [2d Dept 2012]; *Matter of 72A Realty Assocs. v New York City Env'tl. Control Bd.*, 275 AD2d 284). Nonetheless, a party to a CPLR article 78 proceeding may submit affidavits and other written proof to explain or shed light on the contents of the administrative record (see *Matter of Yarde v Roberts*, 60 Misc 3d 686, 694 n 3 [Sup Ct, Albany County 2017]).

Where, as here, an administrative determination is made, and there is no statutory requirement of a trial-type hearing, that determination must be confirmed unless it is arbitrary and capricious, affected by an error of law, or made in violation of lawful procedure (see CPLR 7803[3]; *Matter of Lemma v Nassau County Police Officer Indem. Bd.*, 31 NY3d 523 [2018]; *Matter of McClave v Port Auth. of N.Y. & N.J.*, 134 AD3d 435, 435 [1st Dept 2015]; *Matter of Batyreva v New York City Dept. of Educ.*, 50 AD3d 283 [1st Dept. 2008]). Thus, a determination upholding a U-rating may be annulled only if it is arbitrary and capricious (see *Matter of Kolmel v City of New York*, 88 AD3d 527 [1st Dept 2011]) or where the determination

was made in violation of proper procedure (see *Matter of Murray v Board of Educ. of City School Dist. of City of N.Y.*, 131 AD3d 861 [1st Dept 2015]).

A determination is arbitrary and capricious where is not rationally based or has no support in the record (see *Matter of Pell*, 34 NY2d at 230; *Matter of Gorelik v New York City Dept. of Bldgs.*, 128 AD3d 624 [1st Dept 2015]), or where the decision-making agency fails to consider all of the factors it is required by statute to consider and weigh (see *Matter of Kaufman v Incorporated Vil. of Kings Point*, 52 AD3d 604 [2d Dept 2008]). “A court may not substitute its judgment for that of the board or body it reviews” (*Matter of Pell*, 34 NY2d at 232). The court’s “function . . . should not be to ‘second guess’ administrative determinations made by various agencies and departments” (*Matter of Soto v Koehler*, 171 AD2d 567, 569 [1st Dept 1991]). “The judicial function is exhausted when there is to be found a rational basis for the conclusions approved by the administrative body” (*Matter of Hughes v Doherty*, 5 NY3d 100, 107 [2005] [internal quotation marks and citation omitted]).

Inasmuch as the petitioner was a probationary employee, to succeed in this proceeding, she is obligated to establish that “the termination of her probationary employment was for a constitutionally impermissible purpose, violative of a statute, or done in bad faith” (*Matter of Mendez v New York City Dept. of Educ.*, 28 NY3d 993, 994 [2016], quoting *Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763, 765 [1988]; *Matter of Vyas v City of New York*, 133 AD3d 505, 505-506 [1st Dept 2015]). Bad faith includes retaliation for the exercise of protected conduct (see generally *Matter of Parris v New York City Dept. of Educ.*, 111 AD3d 528 [1st Dept 2013]).

To establish retaliation, “a causal connection cannot be established by the timing of [relevant] events unless the temporal proximity is very close” (*Clark County School Dist. v Breeden*, 532 US 268, 273 [2001] [applying rule to employment discrimination claim]; see *Matter of Abram v New York State Div. of Human Rights*, 71 AD3d 1471, 1475 [4th Dept 2010] [same]). Moreover, a petitioner may not rely solely on temporal proximity between the protected activity

and the challenged adverse administrative determination to establish the bad faith necessary to support a claim of retaliation; rather, there must be additional evidence in the record supporting the claim (see *Matter of Parris v New York City Dept. of Educ.*, 111 AD3d 528, 529 [1st Dept 2013]). These rules apply to claims that a school district retaliated against an employee by abolishing his or her position (see *Matter of Lally v Johnson City Cent. Sch. Dist.*, 105 AD3d 1129, 1131 [3d Dept 2013]), and the petitioner advances no argument as to why they should not apply to her challenge to a U-rating.

The New York City Public School Rating Pedagogical Staff Members Handbook (Rating Handbook) provides that “[t]he characterization of an employee’s service as Satisfactory indicates that he/she has demonstrated sufficient competence or improvement and a willingness to learn. If such has not been the case, ratings of unsatisfactory or doubtful should be used.” There is no merit to the petitioner’s contention that the DOE lacked a rational basis to conclude that her performance was unsatisfactory, or that the only reason that it did so was to retaliate against her for the positive evaluations she gave to the two teachers in 2015. Even if the court were to consider the Henderson-Amare affidavit to shed light on the administrative record, the earliest that any retaliatory conduct occurred was almost 18 months after the petitioner’s alleged refusal to give negative evaluations to those two teachers. The alleged retaliatory action was thus too remote in time from the purported initiatory event to permit an inference of causation (see *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 967 [1st Dept 2009]). In any event, “the specific facts alleged do not give rise to a fair inference that the U-rating was improperly motivated” (*Matter of Vyas v City of New York*, 133 AD3d at 506).

IV. CONCLUSION

Accordingly, it is

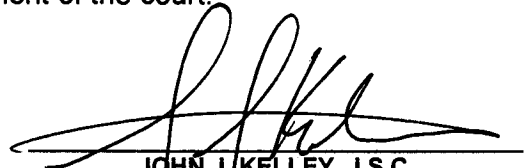
ORDERED that the petition is denied; and it is,

ADJUDGED that the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the court.

4/10/2019

DATE



JOHN J. KELLEY, J.S.C.
HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: