

Khan v City of New York
2019 NY Slip Op 31035(U)
April 11, 2019
Supreme Court, New York County
Docket Number: 159834/2018
Judge: William Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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MD KHAN,

Petitioner,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF
EDUCATION, RICHARD CARRANZA

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 6, 17, 18, 19, 20

VACATE -

were read on this motion to/for

DECISION/ORDER/JUDGMENT/AWARD

DECISION AND ORDER

Upon the foregoing documents, the application is denied, and the petition is dismissed.

In this action, petitioner commenced this special proceeding pursuant to Article 78 of the CPLR. He challenges the New York City Department of Education’s (NYCDOE) decision not to grant him employment clearance. Petitioner also seeks NYCDOE to remove any problem codes associated with his name.

Petitioner began his employment with NYCDOE in September 2005 as a substitute teacher. He continued to work in that capacity until September 2010. He then secured a probationary teaching position at PS 188X. Although he was hired under his mathematics license, he was asked to teach special education. He taught special education from September 2010 until August 25, 2015, when he was terminated. (NYSCEF Doc. No. 1, ¶¶ 9-15).

In June 2018, he applied for and was accepted into the NYDOE’s DREAM Program, an extracurricular academic program. He attended a two-day orientation and worked there until July 1, 2018. On that day, he received a call from NYCDOE informing him that he was unable to be

paid, due to him having a “problem” code attached to his name. After that date, he was informed that he was unable to continue working for DREAM due to the problem code.

He asserts that he was informed by NYCDOE’s Office of personnel Investigations that “there is nothing from precluding him from being nominated for employment with the NYCDOE or a NYCDOE-contacted vendor. However, prior to any security clearance review, a nomination must be recorded. That the office would take no action unless and until he has a valid job nomination in the system, and then they would complete a background investigation to determine whether security clearance could be granted for the position sought.”

Petitioner now claims that he cannot secure a nomination for employment with respondent due to the “problem code”. He further claims that he has not been paid for the days he worked for the DREAM program.

Petitioner argues that the Office of Personnel Investigations’ refusal to take any action to determine whether he can be granted employment clearance is arbitrary and capricious. He further asserts that the placement of a “flag” or “problem code”, attached to his name, is also arbitrary and capricious.

The standard for judicial review of an administrative determination pursuant to CPLR 780(3), is whether the agency determination was arbitrary, capricious or otherwise unlawful. *Pell v. Board of Education*, 34 NY2d 222 (1974). Administrative decisions of educational institutions involve the exercise of highly specialized professional judgment and these institutions are, for the most part, better suited to make relatively final decisions concerning wholly internal matters.” *Mass v. Cornell Univ.*, 94 NY2d 87 (1999). Thus, a Court may not substitute its judgment for that of the agency and the judicial function is exhausted once a rational basis for the agency determination is found. *Matter of Roberts v. Gavin*, 96 AD3d 669 (1st Dep’t 2012).

It has been held that it is not considered arbitrary or capricious for the NYCDOE to assign a problem code based on the discontinuance of probationary employment. *Pepin v. NYCDOE*, 2015 NY Misc. LEXIS 4932 at 3-4, 2015 NY Slip Op 51989 (U) (NY Co., Nov. 20, 2015) (*Pepin II*), *aff'd*, 148 AD3d 443 (1st Dep't, 2017). "NYCDOE may rationally assign the problem code and deny petitioner's application for future employment based on respondent's prior discontinuance of his probational employment...").

In the case at bar, petitioner was assigned a problem code after respondent denied his Certification of Completion of Probation. The denial was based upon petitioner's failure to improve his pedagogy, his record of lateness and absenteeism. Petitioner's ratings officer and two assistant principals of his former school testified that he consistently failed to plan and implement a coherent lesson plan, to manage student behavior or to engage students in a way that encouraged learning. Additionally, several in-class performance reviews and observances of his teaching established the same facts.

In addition, petitioner had a history of absenteeism and lateness. The time and attendance records revealed that during the 2012-2013 school year, he was absent 11 times and late 27 times. In 2013-2014, he was absent 11 days and late 52 times. In 2014-2015, he was absent 19 days and late 18 times. Although petitioner was represented by his Union Advisor, these facts were undisputed.

A review of the record shows that respondent based petitioner's denial of certification of completion of probationary employment, upon substantiated claims of incompetence, lateness, and absenteeism. There is no evidence that the denial of certification was based on any unsubstantiated claims.

While petitioner claims that he cannot be nominated to a teaching position after his discontinuance due to the problem code, such designation does not preclude him from obtaining employment within a district other than the district from which his services were discontinued. He may be reappointed by another district. See, Chancellor's Regulation C-205.

The petition at bar is dismissed. The record shows that petitioner is not precluded from receiving a nomination for employment because of the problem code and the assignment of the problem code based upon the discontinuance of his probationary employment is neither arbitrary or capricious.

ADJUDGED that the application is denied, and the petition is dismissed, with costs and disbursements to respondent; and it is further

ADJUDGED that respondents, City of New York, New York City Department of Education, Richard Carranza, recover from petitioner, MD Khan, costs and disbursements, as taxed by the Clerk, and that respondent have execution therefor.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

4/11/2019
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE: CASE DISPOSED GRANTED DENIED NON-FINAL DISPOSITION

APPLICATION: SETTLE ORDER SUBMIT ORDER OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE