Katz v Carranza
2019 NY Slip Op 31852(U)
June 27, 2019
Supreme Court, New York County
Docket Number: 158539/2018
Judge: William Franc Perry

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

DAVID KATZ

Petitioner,

- v -

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

Respondents.

----------X

INDEX NO. 158539/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

In this special proceeding, petitioner, David Katz, a substitute teacher and bowling coach employed by respondents, the Board of Education of the City School District of the City of New York ("respondents and/or "BOE"), sued herein as Department of Education, seeks a judgment reviewing, annulling, rescinding, and reversing the problem code associated with petitioner's Human Resources profile, and a judgment for back pay and consequential damages resulting from the problem code. Petitioner also seeks an order compelling the BOE to restore petitioner to his position as substitute teacher and bowling coach. Respondents have filed a cross motion seeking an order pursuant to §7804(f) and CPLR 3211(a)(2) and 3211(a)(7), dismissing the Petition based on petitioner's failure to exhaust his contractual remedies as defined in the Collective Bargaining Agreement ("CBA") between the BOE and the United Federation of Teachers ("UFT"), and that the Petition otherwise fails to state a cause of action.

BACKGROUND/CONTENTIONS

Petitioner was employed by the BOE as a teacher until his retirement in 2003. Since his retirement, petitioner has served as a substitute teacher and has been the coach of the bowling team at Bayside High School since 1997. (NYSCEF Doc. No. 1, ¶7). On March 2, 2018, petitioner accepted a substitute teacher assignment at Stuyvesant High School and was involved in a verbal abuse incident with a student. Specifically, it is alleged that petitioner asked the student about her name, stating "'[w]hy do you have a jewish and arabic name?' When the student answered that she was both jewish and muslim, he stated 'wow, I hope you hide the knives. did your parents get counseling when they named you? Did your brother get bar mitzvah?'" (NYSCEF Doc. No. 14). On March 8, 2018, the Assistant Principal reported the incident to the Office of Special Investigations ("OSI"), and thereafter petitioner's investigation was transferred from OSI to the Office of Equal Opportunity ("OEO") for further investigation. (NYSCEF Doc. Nos. 14 and 15).

On June 1, 2018 petitioner was notified by the BOE's Division of Human Resources, that there was a pending investigation regarding the incident at Stuyvesant High School and that there is a problem code associated with petitioner's profile, thereby rendering him inactive and unable to work as a substitute teacher. The letter also advised petitioner that he was required to attend a conference on June 6, 2018 to discuss his employment status, and he was further instructed to bring a UFT representative. (NYSCEF Doc. No. 4). On June 6, 2018, petitioner attended the conference and met with a representative of the BOE to discuss his employment and the verbal abuse allegation made against him. (NYSCEF Doc. No. 1, ¶12). On August 9, 2018, petitioner's attorney sent a letter to Peter Ianniello, Executive Director of Human Resources School Support, requesting that petitioner be restored to active status so that he

may continue to coach the bowling team and teach. (NYSCEF Doc. No. 6).

Petitioner alleges that respondents did not respond to the August 9, 2018 letter, thus prompting his attorney to send a follow-up letter on August 28, 2018. Petitioner commenced this special proceeding on September 14, 2018, alleging that respondents have failed to respond to the August letters and have knowingly deprived petitioner of the privileges of his employment in a way which is arbitrary, capricious, in bad faith and in violation of applicable statutes and regulations. (NYSCEF Doc. No. 1, ¶¶24-26).

Respondents have moved to dismiss the Petition claiming that the issues alleged are not ripe for judicial review as petitioner has failed to exhaust his contractual remedies as set forth in the CBA between BOE and UFT which petitioner is bound by as a member of the UFT and employee of the BOE. (NYSCEF Doc. No. 16). Respondents also maintain that the investigation into the incident is still ongoing and that the Petition fails to state a claim as petitioner has not demonstrated that he is entitled to the extraordinary relief of mandamus. In opposing respondents' motion, petitioner claims that compliance with the CBA was optional and alternatively maintains that he did sufficiently exhaust his contractual remedies because any further pursuit through an administrative appeal would be futile. For the reasons that follow, the cross motion is granted and the Petition is dismissed.

STANDARD OF REVIEW/ANALYSIS

It is well settled that a party objecting to an act of an administrative agency generally "must exhaust available administrative remedies before being permitted to litigate in a court of law." (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57, 385 N.E.2d 560, 412 N.Y.S.2d 821 [1978]; see *Young Men's Christian Assn. v Rochester Pure Waters Dist.*, 37 NY2d 371, 375, 334 N.E.2d 586, 372 N.Y.S.2d 633 [1975]). "The exhaustion rule, however, ... is subject to

important qualifications . . . It need not be followed, for example, when . . . resort to an administrative remedy would be futile . . . ." (*Watergate II Apts.*, 46 NY2d at 57; see e.g. *Lehigh Portland Cement Co. v New York State Dep't of Envtl. Conservation,* 87 NY2d 136, 141, 661 N.E.2d 961, 638 N.Y.S.2d 388 [1995]). Application of exceptions to the exhaustion of remedies doctrine lies in the court's discretion. See (*Community Sch. Bd. Nine v Crew*, 224 AD2d 8, 13, 648 N.Y.S.2d 81 [1st Dept 1996], lv denied 89 NY2d 807, 678 N.E.2d 500, 655 N.Y.S.2d 887 [1997]).

Petitioner is a member of the UFT union, and acknowledges that he was employed by the BOE as a substitute teacher and bowling coach. (NYSCEF Doc. No. 1, ¶7). As such, petitioner's grievance related to the problem code and his suspension is subject to the CBA between the BOE and UFT and the procedures set forth in Article 22. (NYSCEF Doc. No. 16). Petitioner concedes that he appeared at the June 6, 2018 conference and met with a representative of the BOE to discuss his employment and the verbal abuse allegation made against him. (NYSCEF Doc. No. 1, ¶12). Thereafter, on August 9, 2019 his attorney sent a letter to Peter Ianniello, Executive Director of Human Resources School Support, requesting that petitioner be restored to active status so that he may continue to coach the bowling team and teach. (NYSCEF Doc. No. 6).

Petitioner did not, however, comply with the grievance procedures set forth in the CBA which provides that complaints must first be brought to the "head of the school within thirty school days after the employee has knowledge of the act or condition which is the basis of the complaint." (NYSCEF Doc. No. 16, p. 167). Pursuant to the CBA, "if the grievance is not resolved at Step 1, the Union may appeal from a decision at Step 1 to the Chancellor." (NYSCEF Doc. No. 16, p. 168). Here, petitioner contends that the procedures set forth in Chancellor's

Regulation A-421 have not been followed, however, the record indicates that respondents complied with Regulation A-421. It is petitioner who has not complied with the grievance provisions of the CBA having never brought his grievance to the head of school at Stuyvesant High School, nor did he appeal the problem code to the Chancellor. In seeking judicial review of the decision to associate a problem code with petitioner's Human Resources profile, without following the grievance procedures and while the investigation is still ongoing, petitioner has clearly not exhausted his administrative remedies. (NYSCEF Doc. No. 15, ¶4).

An aggrieved union member must first avail himself of the grievance procedures set for in the collective bargaining agreement before he can commence an action in court (see *Plummer v. Klepak*, 48 NY2d 486, 399 N.E.2d 897, 423 NYS2d 866 [1979]; *McLaughlin v. Hankin*, 132 AD3d 675, 17 NYS3d 499 [2d Dept. 2015]; *Hammond v. Village of Elmsford*, 8 AD3d 484, 779 N.Y.S.2d 95 [2d Dept. 2004]; *Brown v. County of Nassau*, 288 AD2d 216, 733 NYS2d 107 [2d Dept. 2001]; *Elliott v. Arlington Central School District*, 143 AD2d 662, 532 NYS2d 876 [2d Dept. 1988]). "[A]bsent extraordinary circumstances, courts are constrained not to interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency" (*Galin v. Chassin*, 217 AD2d 446, 447, 629 NYS2d 247 [1st Dept 1995]; see *Matter of Tahmisyan v. Stony Brook Univ.*, 74 AD3d 829, 831, 902 NYS2d 617 [2d Dept 2010]). An Article 78 proceeding brought prior to the exhaustion of the grievance procedure provided for in a collective bargaining agreement is subject to dismissal (see *Ambrosino v. Village of Bronxville,* 58 AD3d 649, 873 NYS2d 312 [2d Dept. 2009]).

Here, the record demonstrates that petitioner has simply failed to exhaust his administrative remedies with respect to the problem code and the temporary discontinuance of his services as a substitute teacher. In opposition to respondents' motion, petitioner contends

that he did exhaust his administrative remedies as he filed a grievance seeking to be reappointed as the bowling coach and was advised that his union representative would not pursue Step 2 of the grievance process. (NYSCEF Doc. Nos. 20-22). Petitioner's contention is simply incorrect.

Petitioner has simply failed to avail himself of the grievance procedures set forth in Article 22 of the CBA; as noted, he did not pursue his grievance concerning the problem code to the head of school at Stuyvesant High School within the time period prescribed by Article 22, nor did he appeal the problem code to the Chancellor. (NYSCEF Doc. No. 16, p. 168). Petitioner's letter to Peter Ianniello, Executive Director of Human Resources School Support, is not in compliance with the grievance procedures outlined above and as such, petitioner has not demonstrated compliance with the procedures set forth in the CBA.

To the extent petitioner contends that he is not required to exhaust his administrative remedies as pursuing this grievance in accordance with the provisions of the CBA would be futile, the court rejects that claim. Indeed, petitioner does not detail, or explain in any manner how such an appeal would have been futile. Petitioner never grieved, even at the first level, the BOE's decision to associate a problem code with petitioner's Human Resources profile, and as such the claim that pursuit of his administrative remedies would be futile is purely speculative.

Similarly, petitioner's reliance on *Kahn v. NYC Department of Education*, 18 N.Y.3d 457 (2012) and *Nash v. The Board of Education of the City School District of the City of New York*, 82 A.D.3d 470 (2011), to support his contention that compliance with the grievance procedures was optional, is unavailing. As respondents correctly note, petitioner is not a probationary employee and as such, the holdings in *Khan* and *Nash* offer no support for petitioner's claim that compliance with the grievance procedures was optional.

Additionally, as the investigation of this matter is not complete and as of November, 2018 was ongoing, it is obvious that a final determination has not been made as to as to whether the allegations of verbal abuse asserted against petitioner are substantiated or unsubstantiated and whether the problem code associated with petitioner will remain in his personnel file. If no final determination has been made concerning petitioner's problem code and the temporary discontinuation of his services, petitioner cannot demonstrate that he has exhausted his administrative remedies. (see, *Matter of Carter v State of N.Y., Exec. Dept., Div. of Parole*, 95 NY2d 267, 270, 739 NE2d 730, 716 NYS2d 364 [2000]) (holding that an Article 78 proceeding must be commenced within four months after the agency has issued an unambiguously final decision that puts the petitioner on notice that all administrative appeals have been exhausted).

In addition to this matter being premature and not ripe for judicial review, petitioner has failed to present evidence demonstrating that the BOE acted arbitrarily, capriciously, and in bad faith when it placed a problem code in petitioner's file. Notwithstanding petitioner's conclusory allegations, respondents' decision to suspend petitioner and place a problem code in his file while the serious allegations made against him by his student are being investigated, is consistent with the procedural safeguards set forth in Chancellor's Regulation A-421. Pursuant to the "Investigation" provision of A-421 of the Chancellor's Regulation, employees accused of verbal abuse are entitled to certain procedural safeguards and the record demonstrates that petitioner was provided all the required safeguards as outlined in the regulation, once the investigation commenced. (NYSCEF Doc. No. 5).

Petitioner was provided a 48-hour written notice as evidenced by the letter, dated June 1, 2018, which advised that he was scheduled to have a conference on June 6, 2018 to discuss his employment status due to the allegations. (NYSCEF Doc. No. 4). In addition, petitioner was

advised that he was required to have his union representative with him as the conference is "intended to emphasize the seriousness of school allegations and inform you of your next steps as a substitute." (id.). Petitioner's contention that the June 6 conference does not comply with the "Investigation" provision of A-421 is devoid of merit.

It is clear from the allegations set forth in the Petition that respondents have complied with A-421 and the fact that petitioner now complains that he was not given an opportunity to review witness statements when he never made any request to review those statements prior to the conference or even at the conference, demonstrates the fallacy of petitioner's contention. Chancellor's Regulation A-421, Section (VI) (B)(4)(a), provides that the employee must be provided with the opportunity to review witness statements "if the accused employee requests an opportunity to review" such statements. (NYSCEF Doc. No. 5).

Petitioner has not demonstrated that he ever requested an opportunity to review the witness statements prior to attending the conference with his union representative. While it is clear that petitioner is frustrated by the length of time that has transpired since the investigation commenced, that frustration is no substitute for compliance with the provisions of A-421 or the CBA grievance procedures. (NYSCEF Doc. No. 19, ¶¶19, 20). Likewise, despite petitioner's conclusory allegations to the contrary, respondents have demonstrated strict compliance with the "Investigation" provisions of A-421. (NYSCEF Doc. Nos. 4, 14 and 15).

A petitioner bears the burden of proving bad faith, and merely asserting it is insufficient to satisfy that burden (*Matter of Witherspoon v Horn*, 19 AD3d 250, 251, 800 NYS2d 377 [1st Dept 2005]; *Pagan v Board of Educ. of City School Dist. of City of N.Y.*, 56 AD3d 330, 330-331, 868 NYS2d 616 [1st Dept 2008]). Speculation or conclusory allegations of bad faith are simply

not sufficient to meet that burden (see *Matter of Che Lin Tsao v Kelly*, 28 AD3d 320, 321, 812 NYS2d 522 [1st Dept 2006]).

Finally, petitioner has not demonstrated that he has a "clear legal right" to compel respondents to reinstate his position as a substitute teacher and a bowling coach. A-421 allows for the removal of an employee who is under investigation, providing in pertinent part; "[d]uring the course of a verbal abuse investigation, the subject employee may be removed from assignment with students . . . ." (NYSCEF Doc. No. 5).

In order for the act to properly be considered one subject to a writ of mandamus to compel, the petitioner must have a "clear legal right" to the relief sought, such that the right to performance of the duty admits of no reasonable doubt or controversy (see *Assoc. Of Surrogates & Supreme Court Reporters v. Bartlett,* 40 N.Y.2d 571, 574, 357 N.E.2d 353, 388 N.Y.S.2d 882 [1976]). In addition, the nature of the performance sought by the petitioner must be purely ministerial in nature, such that the act does not call for the exercise of any discretion on the part of the respondent (see *New York Civil Liberties Union v. State*, 4 N.Y.3d 175, 184, 824 N.E.2d 947, 791 N.Y.S.2d 507 [2005]). An act is discretionary and thus not subject to mandamus relief, if it "involves the exercise of reasoned judgment which could typically produce different acceptable results...." (id.) (citation omitted). Here, it is clear, pursuant to the provisions of A-421, that the removal of an employee who is under investigation is a discretionary matter, and as such, mandamus to compel does not lie to compel issuance of reinstatement while the investigation of the incident involving petitioner and his student has not yet concluded. Accordingly, it is hereby,

ADJUDGED that the application is denied and the cross motion to dismiss the petition is granted and the petition is dismissed, with costs and disbursements to respondents; and it is further

ADJUDGED that respondents do recover from petitioner, costs and disbursements in the amount as taxed by the Clerk, and that respondents 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.

6/27/2019
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE