Smith v City of New York
2019 NY Slip Op 31928(U)
July 3, 2019
Supreme Court, New York County
Docket Number: 158004/2018
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**
Justice

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INDEX NO. 158004/2018

PATRICK SMITH,

MOTION DATE 08/28/2018

Petitioner,

MOTION SEQ. NO. 001

- v -

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

DECISION AND ORDER

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 43, 44, 45, 46, 47

were read on this motion for CPLR ARTICLE 78 RELIEF.

In this CPLR Article 78 proceeding, Patrick Smith (Smith or petitioner) challenges a determination of the New York City Department of Education (the DOE), dated April 30, 2018, denying petitioner's appeal of his "ineffective" annual rating for the 2016-2017 school year on the basis that it was arbitrary, capricious, unreasonable, an abuse of discretion, lacking a rational basis, in bath faith, and in violation of lawful procedure.

For the reasons stated below, the petition is granted in part.

I. Factual Background

The following facts are undisputed. Petitioner has been a licensed social studies teacher since 2003. Petitioner was hired in 2003 by the DOE as a social studies teacher at Francis Lewis High School in Queens, New York and obtained tenure effective December 1, 2006 at Martin Van Buren High School. Petitioner transferred to Hillcrest High School in Queens, New York on September 6, 2011.

Petitioner received "satisfactory" ratings on his annual professional performance reviews (APPRs) from 2005 to 2013. Petitioner was on leave without pay in 2013-2014 while working at a charter school and therefore, was not rated for that school year.

On September 2, 2014, petitioner joined the High School for Tourism and Hospitality in the Bronx, New York and received "effective" ratings on his APPRs for the 2014-2015 and 2015-2016 school years under Principal Brian Condon.

Petitioner received an "ineffective" rating on his overall APPR for the 2016-2017 school year. Petitioner alleges that the "ineffective" APPR barred him from summer work and per session work, as well as other positions in other schools (see NYSCEF Doc No. 45).

On October 17, 2017, petitioner filed an appeal to the Chancellor's Committee, pursuant to New York State Education Law (Education Law) § 3012-c (5) (a) and the Collective Bargaining Agreement (CBA), of his "ineffective" APPR rating for the 2016-2017 school year with the Office of Appeals and Review (OAR).

The appeal hearing took place on April 13, 2018 (NYSCEF Doc No. 10).

On April 30, 2018, OAR issued a letter of denial of the appeal "because no substantial errors or defects have been found to set aside the rating" (NYSCEF Doc No. 11 at 1).

This Article 78 proceeding was commenced on or about August 30, 2018.

II. Discussion

In an Article 78 proceeding, the applicable standard of review is "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" (CPLR 7803 [3]).

In the context of a judicial review of a less than "effective" rating, the court shall consider whether it violated a lawful procedure or a substantial right, was arbitrary and capricious or made in bad faith. (*Matter of Richards v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 117 AD3d 605, 606 [1st Dept 2014]).

The arbitrary and capricious standard used to analyze the legality of an administrative determination was defined by the Court of Appeals, as follows: "[a]rbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). The reviewing court is limited to a rationality test involving "whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact" (*id.* [internal quotation marks and citation omitted]).

The court may only inquire into issues of law and cannot substitute its judgment for that of the agency (*Matter of Rudin Mgt. Co. v New York State Div. of Hous. & Community Renewal*, 215 AD2d 243 [1st Dept 1995]; *Matter of Rozmae Realty v State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 160 AD2d 343 [1st Dept 1990]), as issues of fact must be determined by the administrative agency (*Matter of Chelrae Estates v State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 225 AD2d 387, 389 [1st Dept 1996]).

III. Contentions

Classroom teachers employed by the DOE receive APPR ratings, which are based upon measures in the categories of teacher observations and student performance in compliance with Section 3012-d of the New York State (NYS) Education Law and the DOE's APPR plan, entitled "Advance Guide for Educators 2016-2017" (NYSCEF Doc No. 17), which was established by

the NYS Education Department (NYSED) and negotiated by the DOE and the United Federation of Teachers (UFT).

In particular, APPRs are calculated based upon two subcomponents, respectively, the teacher's Measures of Teacher Practice (MOTP) and Measures of Student Learning (MOSL). A teacher's MOTP is based on multiple classroom observations over the course of the school year and the MOSL scores are based upon the assessment of a target population and its degree of academic growth.

The scoring for the MOTP, MOSL and resulting APPR ranges, in decreasing degree of performance, from "highly effective," "effective," "developing" to "ineffective."

The following is undisputed. Petitioner's MOTP rating for the subject year was based on five informal classroom observations adding up to a 2.45 score, corresponding to a "developing" MOTP rating (NYSCEF Doc Nos. 9 and 22). Petitioner received an "ineffective" MOSL rating for the subject school year (NYSCEF Doc No. 21).

The court turns first to the contentions relating to the MOTP rating, then to the allegations pertaining to the MOSL rating.

The observations in connection with the MOTP rating were conducted on September 28, 2016 by Assistant Principal (AP) Jay Langkamp (Langkamp) (first evaluation); on December 6, 2016 by Langkamp (second evaluation); on April 25, 2017 by Principal Condon (Condon) (third evaluation); on May 18, 2017 by Assistant Principal Blayne Gelbman (Gelbman) (fourth evaluation) and on May 31, 2017 by Principal Avis Terrell (Terrell), who replaced Condon during the course of the year, as follows (fifth evaluation).

1. First Evaluation (September 28, 2016) and Report by Langkamp

Petitioner argues that Langkamp's written evaluation report did not accurately reflect his pedagogy or what transpired during the lesson. (NYSCEF Doc No. 3). Petitioner claims that Langkamp issued him less than effectively rated components as retaliation for petitioner's informing Principal Condon in or around March 2015 that Langkamp had been disciplined by the Wisconsin Bar Association for 15 counts of professional misconduct. Petitioner states that the report led to an investigation by the Office of Special Investigations and hindered Langkamp's ability to obtain an AP position for over a year.

In addition, petitioner also points out that he received the report on November 20, 2016, which is more than the 45 days stipulated in the CBA between the Board of Education (BOE) and the UFT (NYSCEF Doc No. 4; Art. 8, Section J [2] [b]).

In their answer, respondents refer the court to petitioner's 2016-2017 Advance Overall Rating Report (AORR) (NYSCEF Doc No. 9). Respondents highlight that the AORR indicates that petitioner received a "developing" rating in the following categories and recites Langkamp's rationale behind it: "managing student behavior;" "using questioning and discussion techniques;" "engaging students in learning;" and "growing and developing professionally" (NYSCEF Doc No. 3). Respondents also cite petitioner's "ineffective" rating in the "using assessment in instruction" category (*id.*). In addition, respondents recount the recommendations made by Langkamp to petitioner and point out that petitioner received and signed the observation report on November 1, 2016.

In his reply affidavit, petitioner reiterates the same arguments made in his petition. (NYSCEF Doc No. 47).

2. Second Evaluation (December 6, 2016) and Report by Langkamp

Petitioner points out that Langkamp revised his second written evaluation report several times based on Principal Terrell's directives before issuing it on April 28, 2017. Petitioner claims that Terrell directed Langkamp to revise the report in January and therefore the delay in issuing the report cannot be justified by this directive and is a violation of the CBA.

In their answer, respondents underscore that petitioner received "developing" ratings in the categories of "demonstrating knowledge of content and pedagogy"; "designing coherent instruction"; "managing student behavior"; "engaging students in learning"; and "using assessment in instruction." In addition, respondents point out that Langkamp observed that petitioner either inconsistently put into effect or failed to implement previous recommendations, including implementing better feedback to his students, better managing student behavior and providing a comprehensive rubric so that students may better understand how to successfully complete their assignments.

Respondents claim that Langkamp made the recommendation that petitioner work with his co-teacher Christian Manoatl (Manoatl), who was a special education teacher that worked with petitioner in his classes, to identify the behaviors in petitioner's classes that petitioner would like to see more often.

Respondents contest petitioner's claim that the second report was issued with delay. Respondents argue that petitioner received the report on January 9, 2017 within the CBA timetable. However, respondents explain that, due to an error in two rating categories, the report was returned to Langkamp for correction and that petitioner received and signed the corrected report on April 28, 2017.

Furthermore, respondents highlight that petitioner did not challenge the corrected report through the regular administrative process.

In reply, petitioner alleges that, in his original report, Langkamp had falsely stated that petitioner favored children of one ethnicity over another and that Condon directed Langkamp to strike that language from the report (Smith reply aff, ¶ 10). In addition, petitioner avers that Langkamp's delay in issuing the revised written report violated the CBA (*id.*).

3. Third Evaluation (April 25, 2017) and Report by Condon

Petitioner alleges that he only received "effective" ratings in connection with his third observation by Condon and that the corresponding report was issued to him the same day as the second report. Therefore, petitioner points out that from September 2016 until April 28, 2017, he was only in possession of one signed report.

In their answer, respondents allege that Condon, although he observed petitioner and issued "effective" ratings, noted that petitioner failed to provide productive feedback and implement a sufficient rubric for his students as was asked of in the two prior reports. Condon also made recommendations for petitioner to put into action.

Petitioner does not dispute the foregoing in his reply.

4. Fourth Evaluation (May 18, 2017) and Report by Gelbman

Petitioner alleges that Gelbman mocked petitioner's accent in the report and stated that petitioner used the word "gimme" (instead of "give me").

Petitioner claims that Gelbman treated him with bias due to an incident dating back to September 2016 where petitioner learned that Gelbman had attempted to block a transfer by

petitioner to a different high school whereupon petitioner "verbally rebuffed" Gelbman and told him to "never attempt to 'assassinate' his integrity again" (petition, ¶ 20).

Respondents point out that petitioner received the following ratings: "ineffective" in the category entitled "using questioning and discussion techniques" and "developing" in the categories entitled "designing coherent instruction"; "managing student behavior"; "engaging students in learning"; "using assessment in instruction"; and "demonstrating knowledge of content and pedagogy."

In addition, Gelbman also noted that petitioner failed to implement the recommendations given to him in the previous three written observation reports.

Furthermore, respondents allege that Gelbman met with petitioner on May 25, 2017 about the May 18, 2017 observation and authored a letter memorializing that meeting (NYSCEF Doc No. 31 or Post-Observation Conference Letter to Petitioner). In his letter, Gelbman reiterated his concerns over petitioner's insufficient feedback given to the students, the lack of rubric for the students giving presentations and the execution of the presentation itself. The letter also took note of petitioner's disagreement with some of the "ineffective" ratings he received in the report and petitioner's opportunity to appeal the contents of the report with Gelbman at a meeting on May 30, 2017. Respondents allege that petitioner declined to have his UFT Chapter Leader attend the meeting. Gelbman issued an appeal letter to petitioner dated May 30, 2017 memorializing that meeting wherein he formally informed petitioner that Terrell would be conducting a class observation at some point during the week of May 29, 2017 to June 2, 2017 (NYSCEF Doc No. 32).

Meanwhile, respondents allege that petitioner received and signed a copy of the report on June 2, 2017.

Respondents aver that Gelbman amended his report as a result of the appeal and that petitioner signed the amended written report on June 7, 2017.

On June 8, 2017, petitioner received and signed Gelbman's letter summarizing petitioner's appeal.

In reply, petitioner characterizes Gelbman's comment as mocking his accent and repeats his allegation of bias by Gelbman against him.

5. Fifth Evaluation (May 31, 2017) and Report by Terrell

In connection with this last evaluation, petitioner received "effective" ratings in six categories and a "developing" rating in the category of "engaging students in learning."

Respondents point out that Terrell noted in his report that he observed that petitioner finally implemented the recommendations given to him in the previous four written reports. However, Terrell noted that petitioner still struggled to implement effective teaching techniques to better challenge the students in the classroom.

Petitioner received and signed the report on June 28, 2017. The reply does not challenge respondents' allegation pertaining to this observation.

6. MOSL Rating of "Ineffective"

In his petition, Smith alleges that he received an "ineffective" rating on his MOSL based on test scores by his 10th grade students. Petitioner points out, however, that Langkamp was the lead teacher in petitioner's 10th grade classes during the second and third trimesters at the school.

In contrast, petitioner asserts that, in prior years, petitioner had been the exclusive lead teacher in his classroom and had only received "effective" MOSL scores.

Respondents explain that petitioner's MOSL rating was based on the High School Social Studies - Global History New York State Regents Exam (NYSCEF Doc Nos. 34 and 35). In particular, respondents allege that petitioner's MOSL target population was "individual" and the growth measurement was calculated using the "growth model" (NYSCEF Doc No. 35). Respondents further relate that the DOE notified petitioner at the end of the school year that he received a MOSL rating score of 12 points, corresponding to "ineffective." Respondents add that 66 of petitioner's students were scored, resulting in a mean growth percentile of 33% (NYSCEF Doc No. 21).

In reply, petitioner points out that Langkamp and Condon mandated that he teach a class entitled "Global Concepts" (Smith aff, ¶ 17). However, petitioner alleges that no curriculum existed for this course, that Langkamp created the first unit for the class; that petitioner had no input into the curriculum; that the curriculum deviated from scope and sequence and that the class was exclusively designed by Langkamp (*id.*). In addition, Smith alleges that Langkamp was the lead teacher in this 10th grade class and that, in prior years, petitioner had been the exclusive lead teacher in petitioner's classrooms where he had only received "effective" MOSL scores (*id.*; *see* NYSCEF Doc No. 44).

7. The Appeal Hearing

Petitioner claims that he sought to have two witnesses appear and provide testimony on behalf of petitioner at the hearing. However, petitioner alleges that, due to a mistake of the hearing officer, petitioner's witnesses were never mandated to attend the hearing and petitioner's

request for an adjournment to allow the production of the witnesses was denied. In addition, petitioner claims that respondents' statement during the hearing that petitioner was assigned Manoatl as "instructional coach" is false. Petitioner alleges that Manoatl, whom he had called as one of his witnesses, could not have held such a position because, at the time, he was an untenured teacher in his first year of teaching.

Respondents allege that petitioner attended the hearing with his union advocate and had the opportunity to offer testimony, present evidence and examine the DOE's witness, Terrell.

Respondents further argue that petitioner alleged that his "ineffective" overall APPR was "erroneously issued" and the consequence of certain procedural violations contrary to the terms of the CBA. However, respondents aver that the Chancellor's Committee determined that petitioner's APPR rating was issued based upon the evidence in the record, in accordance with N. Y. Educ. Law and the DOE's APPR plan (NYSCEF Doc No. 36).

In particular, respondents claim that neither petitioner, nor his UFT advisor, was able to present any convincing evidence to necessitate a reversal of his rating. Based on the foregoing, the rating was sustained.

IV. Discussion

A. Respondent the City of New York

Respondents argue under their third defense in their answer that the City of New York is not a proper party to this proceeding.

It is well established that the DOE is an independent corporate body, which may sue and be sued in its corporate name, and is not a department of city government (*see Matter of Ragsdale v Board of Educ.*, 282 NY 323, 325 [1940], citing *Matter of Divisich v Marshall*, 281

NY 170, 173 [1939]; *Bailey v City of New York*, 55 AD3d 426 [1st Dept 2008] [holding that the City of New York is not a proper party to the action arising out of plaintiff's trip and fall on public school grounds]; *Perez v City of New York*, 41 AD3d 378, 379 [1st Dept 2007] ["the City and the Board [of Education] remain separate legal entities" and "the City cannot be held liable for those torts" . . . "allegedly committed by the Board and its employees"]).

Based on the foregoing, the matter is dismissed as against the City of New York because it was the DOE and not the City of New York who issued the subject determination being challenged.

B. Preservation of the Record

1. Alleged Retaliation

In his petition, Smith alleges evidence of bad faith or bias by Langkamp and Gelbman who allegedly retaliated against him by giving him less than "effective" scores in multiple categories. The court notes, however, that these allegations were not raised at the hearing.

It is well established that courts are precluded from considering allegations not raised during a hearing (*Matter of Rizzo v New York State Div. of Hous. & Community Renewal*, 6 NY3d 104, 110 [2005] ["[j]udicial review of administrative determinations is confined to the facts and record adduced before the agency"(internal quotation marks and citation omitted)]; *Matter of Razor v City of New York*, 147 AD3d 453, 453-454 [1st Dept 2017] ["Petitioner failed to preserve the issue of whether the U-rating should have been annulled based on an alleged procedural deficiency or deviation from the collective bargaining agreement negotiated by his union regarding observation practices, since he never raised the issue at the administrative level"]; *Matter of Rieser v New York City Dept. of Educ.*, 133 AD3d 465, 466 [1st Dept 2015]

["Petitioner failed to preserve his argument regarding the composition of the Chancellor's Committee, as he did not raise it at the administrative hearing"]; *Matter of Bridgwood v City of New York*, 128 AD3d 424, 424 [1st Dept 2015] ["Petitioner's claim that respondents violated . . . Bylaw § 4.3.3 . . . is unpreserved since he did not raise this issue before the agency"].

2. Witnesses

It is well established that a tenured teacher is entitled to a full and fair hearing, pursuant to Education Law § 3020-a, when facing discipline charges imposed by his or her employer, and that courts will only sustain a hearing officer's determination if the teacher was afforded basic due process rights at the hearing (*Harris v Department of Educ. of the City of N.Y.*, 67 AD3d 492, 493 [1st Dept 2009]; *Matter of McAulay Board of Educ. of City of N. Y.*, 46 AD2d 84, 85 [1st Dept 1974] [tenured teacher entitled to new hearing to conform with "rudimentary due process requirements, such as the right to be confronted by witnesses, to call witnesses, and to introduce any relevant evidence"]).

However, where "arguments were not sufficiently brought to the attention of the arbitrator," petitioner's claim is deemed unpreserved for the court's review (*Matter of G.K. Las Vegas Ltd. Partnership v Boies Schiller & Flexner LLP*, 96 AD3d 538, 539 [1st Dept 2012]).

During the hearing, petitioner attributed his inability to produce two witnesses, namely, his UFT Chapter Chair, Allan Richter (Richter), and his colleague, special education teacher, Manoatl, to the actions of administrators (NYSCEF Doc No. 10 at 7-8, 14). Petitioner explained that he had planned to rely on their testimony to "debunk the validity of the statement provided by my administration to DOE central offices that [Manoatl] was an instructional coach" (*id.* at 7). However, at the hearing, petitioner did not expand on when and how he made his request to

call these witnesses; how the request was denied, if it was, and the reasons for the denial. Furthermore, petitioner was afforded the opportunity to cross-examine Principal Terrell, the DOE's sole witness, and was permitted to introduce written testimony by Richter in a letter dated March 29, 2018, which was read into the record at the hearing (*id.* at 8) (*see also Matter of Zarinfar v The Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 2009 NY Slip Op 33447, * 4 [Sup Ct, NY County 2009], *affd* 93 AD3d 466 [2012] [court held that the BOE did not violate petitioner's due process rights, pursuant to its by-laws regarding proper notice, by limiting the number of his witnesses to 3 instead of 10. The court further highlighted that petitioner was represented by a UFT representative; presented witnesses who testified on his behalf and the hearing committee considered a letter by the principal at his new school]).

Based on the foregoing, petitioner's claims of retaliation and violations of substantial rights are unpreserved for the record.

C. The Subject Reviewing and Rating Process

1. Standard

Courts will annul determinations sustaining "unsatisfactory"[1] ratings where there were deficiencies in the DOE's reviewing process that "were not merely technical, but undermined the fairness and integrity of the process" (*Matter of Joyce v City of New York*, 161 AD3d 488, 489 [1st Dept 2018] [internal quotation marks and citations omitted]).

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[1] Petitioner is subject to the newly implemented APPR evaluation system outlined earlier where an "unsatisfactory" rating would purportedly correspond to anything less than "effective," i.e. "developing" or "ineffective."

In *Joyce*, the First Department reversed the lower court and determined that the tenured teacher had not been placed on notice that he was in danger of receiving an unsatisfactory rating until nearly the end of the academic year, in violation of its own procedures outlined in Chief Executives' Memorandum #80 dated March 31, 1998 (*see Matter of Joyce v City of New York*, 2013 NY Slip Op 30987 [U] [Sup Ct, NY County 2013]). Those procedures include pre- and post-observation conferences, as well as formal observations as a part of a required prescriptive plan to improve teaching (Center of New York City Law, *Teacher's Unsatisfactory Rating Annulled*, 24 Cit L. 77 [July/Aug. 2018]). Indeed, Joyce received his first formal observation on April 28, 2011, followed by a post-observation conference alerting him for the first time that he was at risk of receiving an adverse year-end rating. He was formally observed for a second time by the principal on June 7, 2011, only one week before the end of the academic year leaving him only a few school days to attempt to avoid an unsatisfactory rating.

Courts have found that deficiencies in the performance review process are not considered merely technical where a teacher is not given an "adequate opportunity to improve [his or her] performance" (*Matter of Taylor v City of New York*, 139 AD3d 430, 433 [1st Dept 2016]).

In *Taylor*, petitioner, a probationary special education teacher in her third year, was first formally observed by the school's principal on November 21, 2012 for the school year 2012-2013 and received her report reflecting an unsatisfactory rating of her math lesson following a post-observation conference on November 26, 2012. An assistant principal observed her formally on February 21, 2013; however a post-observation conference and furnishing of the report rating her lesson unsatisfactory did not occur until April 16, 2013. In the meantime, petitioner received a "Summons to Disciplinary Conference" on April 10, 2013. Said conference

was held on April 18, 2013 and although petitioner's performance for the academic year was rated satisfactory in 14 of the 22 categories concerned, the principal recommended she be terminated. Petitioner was discontinued from probationary employment on May 29, 2013, a month before the end of the school year. Thus, the court held that "[t]he long delay in providing feedback, together with the absence of any remediation after February 28, 2013 and the rapid sequence of events in April 2013, establishes that petitioner was not given an opportunity to remedy the alleged defects and implement the multiple recommendations" (*id.* at 434).

2. Analysis

On September 14, 2016, petitioner checked off option 4 on his MOTP Observation Option Selection Form, i.e. a minimum of four informal observations for the 2016-2017 school year (NYSCEF Doc No. 20). As indicated on the form, that option was only available to teachers rated "effective" in the prior school year. As previously noted, petitioner's supervisors observed him on five separate occasions and rated him according to the Danielson components three to five times depending on the category.

At the hearing, petitioner averred that the time frame of the observations prevented implementation of the recommendations and that petitioner was unable to make corrections to deficiencies evidenced by the DOE in its observation reports because of the untimeliness of the feedback given (NYSCEF Doc No. 36 at 1 and 2). In response to petitioner's assertion, the Chancellor's Committee commented that:

> "Evaluator's [sic] may conduct observations any time after the Initial Planning Conference and prior to the last Friday in June. In addition, observational feedback was provided to the teacher within the prescribed 15 school day timeframe and at no time did

> the Evaluator conduct more than one additional observation prior to the teacher receiving the written evaluation report"

(*id.* at 3).

The court finds unavailing petitioner's claim that respondents violated lawful procedure because they allegedly provided their report more than 45 days after the December 6, 2016 observation and that petitioner was in possession of only one written report between September 2016 and April 2017. Petitioner received an initial report on January 9, 2017 (NYSCEF Doc No. 26 at 2), which he challenged before getting a revised report on April 28, 2017. (NYSCEF Doc No. 28 at 62; CBA article 8 [J] [2] [b]).

The record shows that about two months separated the first (September 28, 2016) from the second observation (December 6, 2016). However, over four months elapsed before petitioner was observed again on April 25, 2017. Then, the remaining two observations took place in very short order, respectively about 23 days later on May 18, 2017 with the last one taking place 13 days thereafter, on May 31, 2017 about a month before the end of the school year.

Over the course of the academic year, petitioner was evaluated in eight different categories either three, four or five times per category (NYSCEF Doc Nos. 3, 5-8). He showed the most improvement in "1a. Demonstrating knowledge of content and pedagogy," where he was rated three times starting with a "developing" score and earning "effective" ratings the next two times; and in "4e. Growing and developing professionally," where he was rated five times, starting with a "developing" rating, going on to score "effective" the remaining four times.

Petitioner also ameliorated his performance in "2d. Managing student behavior," where he obtained "developing" scores the first two times, then an "effective" score, followed by a "developing" score, and ended with an "effective" score. Similarly, in connection with "3b. Using questioning and discussion techniques," petitioner earned a "developing" score, then an "effective" score, followed by an "ineffective" score, and ended with an "effective" score.

Although petitioner struggled with "3d. Using assessment in instruction," where he was assessed five times and started with an "ineffective" rating, petitioner did show improvement, earning chronologically thereafter a "developing," "effective," "developing" rating and ending with an "effective" score.

While petitioner failed to make demonstrable improvement in "1e. Designing coherent instruction," he was, however, only rated three times in connection with this component, the last evaluation date being on May 18, 2017, with no assessment thereafter.

Respondents first acknowledge that petitioner adopted his evaluators' recommendations during his fifth classroom observation, only to turn around in the next paragraph to state that petitioner's "repeated failure to adopt recommendations to improve his teaching abilities given to him by multiple school administrators" provides the rational basis for his "developing" MOTP rating for the school year (NYSCEF Doc No. 42 at 10).

As a result, respondents' reliance on *Brown v City of New York* is misplaced (54 Misc 3d 1209 [A] [Sup Ct, NY County 2017]). Respondents cite *Brown* for the proposition that the court did not find the DOE's decision to terminate petitioner, a tenured teacher, arbitrary and capricious where petitioner, amongst other things, "failed to follow through with professional

development after being told to do so in the prior four (4) informal observations" (NYSCEF Doc No. 42 at 10). However, *Brown* is distinguishable from our facts.

The court notes that although petitioner was evaluated on May 18, 2017, he only received oral feedback on May 25, 2017, at a post-observation conference with Gelbman, which was memorialized in a letter dated May 26, 2017 (NYSCEF Doc No. 31). At a May 30, 2017 conference, petitioner was given the opportunity to appeal some of the ineffective ratings he received (*id.*). Petitioner was advised that he would get a fifth observation visit from Gelbman along with Principal Terrell that same week (*id.*). Furthermore, petitioner received and signed the aforementioned observation report and letter on June 7 (NYSCEF Doc No. 30) and 8, 2017 (NYSCEF Doc No. 31), respectively.

In addition, in his letter memorializing the May 30, 2017 appeal meeting, where it appears that petitioner was able successfully to challenge some of these ratings, Gelbman wrote that he will "attempt to get the re-write to [Smith] by the end of week (6/2/17)" (NYSCEF Doc. No. 32 at 3). Petitioner acknowledged receipt of this letter on June 8, 2017 (*id.*). In spite of the foregoing, petitioner's next observation took place on May 31, 2017, only a few days after obtaining feedback, and before receiving his written report (*see Matter of Brown v City of New York*, 111 AD3d 426, 427 [1st Dept 2013]:

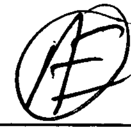
> ["In addition, the principal failed to provide the written evaluation of the March 2nd formal observation for more than three months, and it was received at the end of the school year when there was little time to implement the multiple recommendations. Petitioner's next formal observation came only nine days after receiving the report of the March observation and, not surprisingly, the results indicated that she had not implemented the suggestions"].

Notwithstanding the limited opportunity for remediation based on the timing of this feedback, petitioner vastly improved his performance within a short time frame as demonstrated by his rating in connection with the observation conducted on May 31, 2017 (NYSCEF Doc No. 8). Indeed, not only did petitioner receive "effective" scores in five categories and a "developing" rating in one category, but Principal Terrell also noted that petitioner successfully implemented recommendations from previous observations pressing him to use rubrics and to provide descriptive feedback to students (*see also Matter of Brown*, 111 AD3d at 427 [court annulled probationary teacher's unsatisfactory rating where teacher implemented recommendations and in light of deficiencies in the integrity and fairness of the review process]).

In light of petitioner's record of "satisfactory" and "effective" ratings up until the 2016-2017 school year, his noted improvement despite the limited opportunity to digest feedback, and as there was a rapid sequence of three observations taking place within five weeks, the court finds that the subject reviewing process "undermined the integrity and fairness of the process" (*Matter of Taylor*, 139 AD3d at 433; *Matter of Brown*, 111 AD3d at 427; *see also Matter of Gumbs v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 125 AD3d 484, 485 [1st Dept 2015] [holding that, based on the totality of circumstances, "petitioner received scant notice of respondents' concerns about her performance and had little opportunity to improve her performance").

IV. Conclusion

Thus, the petition is dismissed against respondent the City of New York; the determination of respondents dated April 30, 2018, which upheld an unsatisfactory rating for the 2016-2017 school year is hereby vacated and annulled; and the Clerk is directed to enter judgment accordingly.



7/3/2019
DATE

ARTHUR F. ENGORON, J.S.C.

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