

**Tulun v Board of Educ. of the City Sch. Dist. of the  
City of N.Y.**

2019 NY Slip Op 32854(U)

September 23, 2019

Supreme Court, New York County

Docket Number: 157900/2017

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X

DOMINIQUE TULUN,

Plaintiff,

- v -

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK, CARMEN
FARINA

Defendant.

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INDEX NO. 157900/2017
MOTION DATE 08/10/2018
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34

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

Petitioner Dominique Tulun (the Petitioner) brings this Article 78 proceeding against Respondent Board of Education of the City School District of the City of New York (the Board) and Carmen Farina in her official capacity as Chancellor of the City School District of the City of New York (the Chancellor) (collectively the Respondents) challenging an Ineffective Rating issued to the Petitioner by the Respondents at the end of the 2015-16 school year. Petitioner appealed the initial Ineffective Rating to the Chancellor's Committee on April 19, 2017, with the Committee ultimately declining to change the rating. Petitioner now brings the instant action alleging that Respondents' actions were "arbitrary, in bad faith, capricious, and in violation of the established policies, procedures, laws, rules, and regulations in connection with the rating of pedagogical employees" in giving the initial Ineffective Rating and subsequently upholding the Ineffective Rating, and requests that the court order and direct the Respondents to reverse the Petitioner's Ineffective Rating to Effective, and grant a judgment for any further relief as deemed necessary, including attorneys' fees, costs, interest, and expenses.

Respondents claim that the Petitioner has failed to state a cause of action by which relief may be granted, as neither the initial rating nor the subsequent upholding of the rating were arbitrary, in bad faith, capricious, or in violation of the established policies, procedures, laws, rules, and regulations in connection with the rating of pedagogical employees, and that the Respondents, at all times, have acted reasonably, lawfully, in good faith, without malice, and were neither arbitrary nor capricious.

Petitioner was employed by the DOE as a Spanish 7-12 teacher at M422 Quest to Learn from October 13, 2015 to January 17, 2017. As required by New York State Education Law §

3012-c and the DOE's Annual Professional Performance Review (APPR) plan, classroom teachers employed by the DOE receive an overall APPR rating based upon measures in teacher observations and student performance. N.Y. Educ. Law § 3012-c(2)(a)(1). The overall APPR rating is calculated based upon the teacher's combined Measure of Teacher Practice score (MOTP) (60% of the APPR score), State Measures of Student Learning score (State MOSL) (20% of the APPR score), and Local Measures of Student Learning score (Local MOSL) (20% of the APPR score). Each different score has minimum and maximum scoring ranges that correspond with rating categories on the "HEDI" Scale (Highly Effective, Effective, Developing, Ineffective).

The MOTP rating is based upon classroom observations. The State MOSL rating is based upon assessments of students either pre-determined by the state or selected by the principal from a list of state-approved assessments. State MOSL assessments may either rely on the extent that a targeted population of the students grow academically over the course of the school year, or on the extent to which students within a targeted population progress in relation to goals set at the beginning of the school year (goal setting). The Local MOSL rating is selected by the School Local Measures Committee and submitted to the principal who may accept the Committee's recommendation or opt for a default school-wide measure. The default measure includes all applicable State MOSL assessments and growth measurements and uses the lowest third of the performing students as a subgroup of the State MOSL target population. For language-other-than-English (LOTE) classes the State MOSL must rely on goal setting as an assessment metric, "due to small sample size or a lack of applicable historical achievement data." See Advance Guide Frequently Asked Questions (FAQs) 2015- 2016 (hereinafter the Advanced Guide). The Local MOSL committee and principal, in this case, selected the same assessment metric for the Local MOSL.

On or before November 6, 2015, Petitioner was made aware, via circulated Google document, that her State and Local MOSL assessments would be measured by goal setting. The Local MOSL Committee developed performance targets based upon students' historical achievement and demographic characteristics, and the Petitioner did not contest the MOSL selections prior to the deadline for feedback.

The Petitioner's MOSL scores were based upon an end-of-year Spanish assessment. Fourteen students were used as the target population for the State MOSL, of which only three met the goals set for them. For the Local MOSL, the bottom third of the State MOSL was used as the target population (the five lowest-scoring students within the State MOSL population) of which none of the students were found to have met the goals set for them.

Petitioner received an effective rating (51 out of 60) on the MOTP portion of the APPR based upon classroom observations conducted by Principal Rygalski. Petitioner received an ineffective rating (10 out of 20) on the State MOSL, and an ineffective rating (0 out of 20) on the Local MOSL. Collectively these scores resulted in the Petitioner receiving a 61% on the APPR for an Ineffective Rating.

On April 19, 2017 the Chancellor's Committee held a hearing in connection with the Petitioner's appeal of her APPR rating and determined that the rating was issued in accordance with § 3012-c and upheld the Ineffective Rating. At the hearing, Petitioner testified that she was not informed that goal setting was to be used to evaluate her Local MSOL until March 30, 2016, and that she never had a meeting with administrators at her school to review or discuss the goals set for her students. Petitioner further claimed that she was not allowed to review the students' goals or allowed to test the students to ensure that their set goals were accurate and obtainable, and that the created goals were not based on prior academic achievement, and thus likely unobtainable from the outset.

Generally, a court may not modify an administrative determination unless there is "no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious.'" Pell v Bd. of Educ., 34 NY2d 222, 231 (1974); see also Hushes v Doherty, 5 NY3d 100, 107 (2005). The deference implicit in the rational basis review allows for administrative agencies to make decisions based upon their specialized knowledge of the given subject matter, such as education standards in this case. Mass v Cornell Univ., 94 NY2d 87, 92 (1999) ("[A]dministrative 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.") (citing Olsson v Bd. of Higher Educ., 49 NY2d 408, 413 (1980)). Therefore, if the court finds that the determination is supported by a rational basis, it "may not substitute its judgment for that of the board or body it reviews," but must sustain the determination. Matter of Arrocha v Board of Educ. of City of N.Y., 93 NY2d 361, 363 (1999).

At the crux of this issue is how the goals for the end of the school year were determined for the Petitioner's students, as the Petitioner's MOTP score resulted in an Effective Rating, and thus is not disputed by the Petitioner, and the State and Local MSOL assessment metrics were selected in accordance with the Advanced Guide and all other New York Education laws, as the State MOSL score for LOTE classes must be determined by goal setting, and the Local MOSL assessment was what § 3012-c(2)(a)(1) would have provided as a default assessment metric.

According to the OAR Hearing Transcript from a previous hearing on the Petitioner's appeal, the year-end goals for students were determined by the DOE. Teachers could review and make suggestions, but their supervisors were to have the ultimate say as to the year-end goals, and the DOE had communicated that the standards were not to be changed absent irregular circumstances such as illness. Petitioner was not afforded a chance to review the year-end goals set by the DOE, and at the hearing, Principal Rygalski noted that she was unable to access any records relating to the DOE's suggestions, as she was no longer the acting principal at the school. The Petitioner maintains that the goals set for her students were unobtainable.

The court finds that the Respondents' actions were not arbitrary, in bad faith, capricious, or in violation of the established policies, procedures, laws, rules, and regulations in connection with the rating of pedagogical employees, in giving the initial Ineffective Rating or their subsequent upholding of the rating. In giving the initial rating, the Respondents relied on the

Petitioner's low scores on the State/Local MSOL, which were based on assessment metrics consistent with New York State Education laws. Although the Petitioner claims to have not known that she was to be assessed based upon goal-setting until March 2016, testimony from Principal Rygalski shows that the Petitioner had notice as early as November 2015, as the assessment metrics were circulated via Google Document, and the Advanced Guidelines state that the Petitioner, as a LOTE teacher, would have been subject to a goal-setting assessment metric regardless. Therefore, the court finds that there was nothing arbitrary, capricious, or unlawful about the initial Ineffective Rating given by the Respondents.

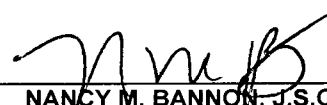
Turning to the Respondents' subsequent upholding of the Petitioners' Ineffective Rating, the Petitioner argues that the goals set for her students were unobtainable, and therefore her score should be changed. The Petitioner notes that she was never afforded any opportunity to look over the goals set for her students, or to test and see if the goals were realistic. However, as noted in the OAR Hearing Transcript, the goals are set by the DOE, and although they are subject to review and suggestion, it requires irregular circumstances, such as sickness, to justify changes to the set goals. The Petitioner failed to submit any evidence that the DOE goals were inconsistent with student ability, or deserving of change due to student circumstances, and therefore, the court finds that the Respondents' upholding of the Ineffective Rating has a rational basis, and modification of the underlying administrative decision is not warranted.

Accordingly, it is

ORDERED AND ADJUDGED that the petition is denied, and the proceeding is dismissed; and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

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

<u>9/23/2019</u> DATE					 NANCY M. BANNON, J.S.C. <del>NANCY M. BANNON</del>
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED		<input type="checkbox"/> NON-FINAL DISPOSITION		
SEQ 001	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER	
SEQ 001 X-MOT	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	