SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** IAS MOTION 59EFM

Justice

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BRETT BELSKY,

Petitioner,

For an Order and Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION, and RICHARD CARRANZA, Chancellor of New York City Department of Education,

Respondents.

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INDEX NO. 152024/2019

MOTION DATE 08/13/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

ORDER

Upon the foregoing documents, it is

ORDERED that the cross motion of respondents New York City Department of Education, and Richard Carranza, Chancellor of New York City Department of Education, to dismiss the petition is granted in its entirety; and it is further

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

DECISION

In this Article 78 proceeding, petitioner Brett Belsky seeks a judgment declaring that the actions of respondents New York City Department of Education (DOE), and Richard Carranza, Chancellor of New York City Department of Education

(collectively, DOE), that terminated his probationary employment effective December 30, 2018, and refused to clear him for employment as a teacher for the DOE, were arbitrary, capricious, unreasonable, an abuse of discretion, lacked a rational basis, or were made in bad faith.

Petitioner seeks to be reinstated to his teaching position nunc pro tunc, from December 30, 2018, and to have his name removed from any "problem code" or ineligible inquiry" list. Petitioner also requests an order expunging the October 24, 2018 determination of the Special Commissioner of Investigation for the New York City School District (SCI).

The DOE cross-moves to dismiss the petition, pursuant to CPLR 3211 (a) (7) and 7804 (f).

For the reasons set forth below, the petition shall be denied and the proceeding dismissed.

Background and Factual Allegations

Prior to his discontinuance in December 2018, petitioner was employed by the DOE as a probationary physical education teacher. In September 2017, petitioner was assigned to a middle school in Brooklyn, New York.

Shortly after starting at this position, petitioner received numerous disciplinary letters to his file. By letter dated October 2, 2017, principal Nicholas Frangella (Frangella) memorialized an incident that took place on September 12, 2017,

where Frangella witnessed petitioner "pick up student . . . by the arms and spin her around in circles approximately 5 times", rendering the student dizzy. NYSCEF Doc. No. 18 at 1. The letter summarized that petitioner and his union representative met with Frangella to discuss the incident. Petitioner stated that he intended to show the student how spinning around would affect balance and equilibrium. Frangella concluded that, by his actions, petitioner "committed an act of corporal punishment which is prohibited by Chancellor's Regulation A-420 and New York State Education Law, and which constitutes unacceptable teacher conduct. . . . This incident may lead to further disciplinary action, including termination." Id. at 2.

By letter dated October 10, 2017, Frangella summarized allegations that petitioner called students names such as "grandma," "mom" and "daughter," and mentioned to another student that he wished he could adopt her. Students gave witness statements in support of such allegations. One statement indicated that "sometimes Mr. Belsky will call K his daughter, T, his grandma and me his niece." NYSCEF Doc. No. 10 at 1 (internal quotation marks omitted). Petitioner did not deny calling the students names but denied the comments about adopting a student. After meeting with petitioner and his union representative, Frangella concluded that petitioner made statements in violation of Chancellor's Regulation A-421, which

prohibits verbal abuse of students. The letter informed petitioner that this incident may lead to further disciplinary action, including termination.

Frangella also counseled petitioner on October 23, 2017 with respect to arriving late to school. Petitioner did not dispute being late but stated that he could not get his car out of the driveway as it was blocked by another tenant. Frangella memorialized his concerns in a disciplinary memo and concluded that petitioner's "record of lateness is excessive." NYSCEF Doc. No. 20 at 1. The letter informed petitioner that "poor attendance may lead to further disciplinary action". Id. at 2.

In October 2017, a parent alleged that, while she was waiting at the bus stop, she witnessed petitioner "lift/pick up" a younger sibling of a student. Students who were interviewed stated that they saw petitioner pick up the little girl and then put her down. Petitioner stated that the student ran to him and tried to give him a hug when she saw him at the bus stop. He claimed that he bent down so that she did not hug his waist and used his arm to move her to the side as she approached him. He further stated that he was a family acquaintance. After meeting with petitioner and his union representative, Frangella issued a disciplinary letter dated November 10, 2017. Frangella found that petitioner exercised poor judgment when he picked up the student. The letter further informed petitioner that this

incident may lead to further disciplinary action, including termination.

SCI Investigation

In March 2018, the SCI Office commenced an investigation after Student A's father had complained that petitioner had played live online video games with Student A. During the next seven months, petitioner was reassigned from his duties. By letter dated October 24, 2018, SCI stated that "[a]n investigation conducted by this office has substantiated that [petitioner] . . . engaged in inappropriate internet conduct with an 11-year-old male student ('Student A'), when he played, interacted, and communicated with Student A through a multi-player online gaming platform on numerous occasions." NYSCEF Doc. No. 3 at 1.

The letter described the investigation as follows: Student A's father spoke to Frangella and advised him that petitioner played online video games with his son and offered to give him an autographed hockey puck if he did well in petitioner's class. The father "felt Belsky's actions were inappropriate and reported them to Frangella." Id. at 1. The student's mother stated that she felt Belsky's actions in offering the hockey

puck were "appropriate and motivational."[1] Id. at 2. Petitioner admitted to playing Xbox games online with Student A and at least one other student, but that "he believed this form of engagement with students was incentive based, and that he had no bad intentions." Id. He explained that he used online gaming as a reward for students who performed well in class and completed their homework. Petitioner "conceded that playing online games with students may not have been 'wise,' but denied that he was connected to students by any other social media platform." Id.

SCI concluded that petitioner engaged in inappropriate conduct by his actions and recommended that the DOE take appropriate disciplinary action against petitioner. The letter also states the following, in relevant part:

"In addition, SCI makes the following policy and procedure recommendation: Although the DOE has created and distributed department 'Social Media Guidelines,' it is incumbent upon the DOE to regularly review and update the guidelines to include newly developed social media technology, and to prohibit and enforce unprofessional or inappropriate personal social media usage between teachers and students."
Id. at 3.

On November 13, 2018, after receiving the results of the SCI investigation, Frangella met with petitioner and his union

[1] Evidently, another student, Student B, was also playing the video game at the same time as petitioner and Student A, but SCI was unable to contact Student B for an interview.

representative. Frangella issued a disciplinary letter to petitioner's file shortly after this conversation. The letter summarized the results of the SCI investigation and also petitioner's assertions, including petitioner's argument that he had used the online gaming as a motivational tool and his claim that he had never received a copy of the social media guidelines. Frangella concluded with the following, in relevant part:

> "Fortnite is a multiplayer video game where players arm themselves with weapons . . . . It is also possible to team up with a friend, or group of friends, and compete as a duo or a squad. This adds a social element, and participants are able to chat as they play using headsets and microphones.. . .
> "After evaluating all the investigatory results, including your responses at our November 12, 2018 conference, I conclude that in or around March 2018, you failed to appreciate appropriate teacher/student boundaries when you communicated with D B through an online multiplayer gaming platform. When you failed to appreciate appropriate teacher/student boundaries, you unreasonably interfered with D B's education.
> "You are hereby advised that the above-described conduct may lead to further disciplinary action, including the termination of your employment."

NYSCEF Doc. 24 at 2.

By letter dated November 27, 2018, petitioner was authorized to return to his teaching position. However, one day later, petitioner was advised that he was the "subject of a pending discontinuance" and that he should not report back and must wait reassignment. NYSCEF Doc. No. 7 at 1. Subsequently,

by letter dated November 30, 2018, Julia Bove (Bove), Superintendent, advised petitioner of the following:

> "This is to inform you that on December 30, 2018, I will review and consider whether your services as a probationer be discontinued and your license terminated as of the close of business December 30, 2018.
> "My consideration of your discontinuance and termination is based on the reasons included in the attached documentation and such documents constitute a written statement of the reasons for my consideration of your discontinuance."

NYSCEF Doc. No. 25 at 1.

Petitioner provided rebuttals for the instances where he had been disciplined in October and November 2017. Shortly thereafter, by letter dated January 2, 2019, Bove informed him that, after reviewing his written response, she was reaffirming his "Discontinuance of Probationary Service and Termination of License effective close of business December 30, 2018." NYSCEF Doc. 27 at 1.

Petitioner then commenced this article 78 proceeding. In the first cause of action, petitioner states that "SCI's decision to characterize Mr. Belsky's 'game for grades' reward system as misconduct is arbitrary and capricious, in violation of lawful procedure, and in bad faith, and his discontinuance and termination of license should be reversed." NYSCEF Doc. No. 1, Petition, ¶ 36. He continues that Student A's mother gave consent, the purpose was educational and the DOE's Social Media Guidelines did not provide petitioner with sufficient notice

that this behavior violated any DOE policy. He alleges, "[t]he only support for such a finding [of misconduct] was the reference of outdated 'Social Media Guidelines.'" Id., ¶ 20. He asserts that, furthermore, the Social Media Guidelines set forth that they only serve as recommended practices for the use of social media by DOE staff and that they do not constitute separate bases for potential discipline. As a result, according to petitioner, discipline was unwarranted as there are no allegations that his social media gameplay violated any DOE law. Petitioner is seeking to have the SCI's October 24, 2018 determination reversed, annulled or expunged.

The second cause of action alleges that petitioner's discontinuance and/or assignment of a problem code to petitioner name's in any internal system is arbitrary and capricious, violates lawful procedure and is in bad faith. Petitioner rebuts the allegations that comprised the four disciplinary letters sent to petitioner's file in October and November 2017.

For example, Frangella concluded that petitioner engaged in corporal punishment when he spun a girl around in gym class. However, according to petitioner, this incident could not be considered corporal punishment because there was no discipline involved. He claims that, despite "being rated an effective teacher . . . Respondents looked to build a false narrative

about Mr. Belsky's conduct outside the 'games for grades' investigation." Id., ¶ 31.

DOE's Cross Motion

The DOE argues that the petition must be dismissed for failing to state a cause of action. Petitioner, as a probationary employee, may be terminated at any time, for any reason or no reason at all, as long as the termination was not made in bad faith. According to the DOE, petitioner cannot meet his burden to establish bad faith, as here, although it is not required to justify petitioner's termination, there are several good faith reasons to do so: namely, petitioner had multiple instances of documented misconduct. The DOE further argues that, even though petitioner may disagree with the results of the SCI investigation or with Frangella's determinations, he failed to show that there were any irregularities with the disciplinary process[2].

In addition, according to the DOE, it is irrelevant that the social media guidelines do not independently provide grounds for discipline. Here, the DOE found that petitioner's contact with a student by using the internet was inappropriate, regardless of the fact that it was not physical contact, but

[2] In sur-reply, among other new arguments, DOE asserts that petitioner is barred from challenging the SCI's determination as he missed the statute of limitations by one day.

through social media. "DOE's position remains that its Social Media Guidelines do not somehow immunize inappropriate conduct." NYSCEF Doc. No. 28, DOE's memorandum of law at 15.

Discussion

Upon the DOE's cross motion to dismiss, "the court will accept the facts as alleged in the complaint as true, accord [petitioner] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." Matter of Walton v New York State Dept. of Correctional Servs., 13 NY3d 475, 484 (2009) (internal quotation marks and citation omitted).

Petitioner requests various forms of relief in his petition, including reinstatement to his position, reversal of the results of the SCI investigation and removal of any problem codes associated with his name in the DOE system.

Petitioner's Probationary Status

The DOE advised petitioner that he was terminated as a result of the instances of misconduct leading up to his termination. As noted in the facts, petitioner received disciplinary letters to his file for arriving late to school, for spinning around a student until she became dizzy, for calling students names other than their own, for lifting up a student at a bus stop and for playing video games with a student online. Although, by letter to the DOE, petitioner rebutted

some of the allegations, the superintendent affirmed the determination to discontinue petitioner's employment.

Petitioner believed that Frangella was attempting to remove him from the school, and stated that there were no justifiable reasons for doing so. Petitioner points to the back to back disciplinary letters, the fact that Frangella did not interview the family of the girl that hugged him at the bus stop, and his having documented that with respect to petitioner's fourth and last instance of lateness, such was by only one minute. Furthermore, petitioner alleges that his conduct was unfairly categorized as corporal punishment, since he was not disciplining students when it occurred. Petitioner states, "[i]n actuality, I admit to the facts that took place, most of which are undisputed, but then I argue that they do not rise to the level of misconduct and certainly not to the level of termination of an effectively rated teacher." Petitioner's reply, ¶ 19.

"It is well established that a probationary employee may be discharged for any or no reason at all in the absence of a showing that [the] dismissal was in bad faith, for a constitutionally impermissible purpose or in violation of law." Matter of Francois v Wolcott, 136 AD3d 434, 434 (1st Dept 2016) (internal quotation marks and citations omitted); see also Witherspoon v Horn, 19 AD3d 250, 251 (1st Dept 2005) (internal

quotation marks and citations omitted) ("[t]he burden of raising and proving such bad faith is on the employee and the mere assertion of 'bad faith' without the presentation of evidence demonstrating it does not satisfy the employee's burden").

In sum, petitioner provided justifications for why he engaged in behavior that resulted in disciplinary letters to his file and does not believe that he did anything wrong. He further alleges that respondents "looked to build a false narrative," outside of the gaming incident to support his termination. Petition, ¶ 31. Here, however, petitioner's subjective allegations and belief that discipline was unwarranted do not meet his burden to raise and prove bad faith. See e.g. Matter of Francois v Wolcott, supra, 136 AD3d at 434 ("Although petitioner disputed the principal's account of events and the principal's opinion of petitioner's job performance, petitioner failed to show that certain irregularities in the review process demonstrated bad faith or deprived her of a substantial right").

Petitioner further states that the "crux of this Article 78 petition is the deficiencies involved with this investigation." Petition, ¶ 15. He argues that the investigation was flawed as SCI allegedly did not question the father of Student A, the mother had thought the conduct was motivational and the report did not indicate that anything inappropriate took place between

petitioner and Student A. For instance, he states that, "at no point did anyone speak to Father A, except Principal Frangella- so in reality we do not know what Father A really said to Principal Frangella that sparked this investigation." NYSCEF Doc. 30, Petitioner's reply aff, ¶ 23.

The record indicates that Student A's father complained to Frangella about the incident and thought it was inappropriate. SCI interviewed petitioner, Student A and his mother. Although petitioner disputes the nature of the incident, petitioner does not dispute that he contacted Student A outside of school hours and even concedes that playing online games with students may not have been "wise." Thus, even if petitioner found the investigation to be insufficient or dissatisfactory, he has failed to demonstrate SCI's investigation was made in bad faith or that there was bad faith in deciding to terminate petitioner. See e.g. Matter of Green v New York City Hous. Auth., 25 AD3d 352, 353 (1st Dept 2006), (although the "determination may have been mistaken; she has not raised any factual issue as to whether it was made in bad faith").

As noted, as long as the termination was not made in bad faith, a probationary employee may be terminated for any reason or for no reason at all. Nonetheless, in the present situation, the undisputed incidents of poor performance, such as arriving late to school (on three occasions for more than 10 minutes, and

in one such case by almost one hour and one half), provide ample reason for petitioner's termination. As set forth in Rivers v Board of Educ. of City School Dist. of City of N.Y. (66 AD3d 410, 411 (1st Dept 2009) (internal quotation marks and citations omitted) ("[e]vidence in the record supporting the conclusion that performance was unsatisfactory establishes that the discharge was made in good faith").

SCI's Determination

Petitioner argues, among other things, that SCI's determination was arbitrary and capricious as SCI based petitioner's misconduct on a violation of the Social Media Guidelines, which are not DOE rules or regulations. Petitioner continues that the guidelines do not mention video gaming and that he did not have notice that he was doing anything wrong. Furthermore, he did not think he did anything wrong.

"It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion." Matter of Arrocha v Board of Educ. of City of N.Y., 93 NY2d 361, 363 (1999) (internal quotation marks and citations omitted). In addition, "even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is

supported by the record." Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 425, 429 (1st Dept 2007), affd 11 NY3d 859 (2008).

After interviewing the parties, it was rational for SCI to conclude that petitioner engaged in inappropriate conduct when he played online games with an 11-year-old student, regardless of whether he contacted him through social media or another platform. As petitioner concedes, the determination did not state that SCI substantiated a finding of misconduct based on a violation of the Social Media Guidelines. SCI concluded that petitioner engaged in inappropriate conduct with Student A by playing and communicating with him though a multi-player online gaming platform on numerous occasions. It merely noted that DOE should update its Social Media Guidelines.

Regardless, although the Social Media Guidelines do not specifically mention online gaming, it sets forth that "DOE employees should not communicate with students who are currently enrolled in DOE schools on personal social media sites." NYSCEF Doc. No. 23, Social Media Guidelines at 5-6. Petitioner does not dispute that he engaged in online games with students.

Problem Codes

Petitioner is requesting that the DOE remove the "problem codes" associated with his name as a result of being terminated.

Petitioner does not indicate what "codes" are associated with his name, nor does the DOE address this allegation. In any event, courts have found that it is not arbitrary and capricious for the DOE to assign problem codes to a teacher who has been discontinued from probationary employment. See Matter of Pepin v New York City Dept. of Educ., 51 Misc3d 1201[A], 2015 NY Slip Op 51989[U], *2 (Sup Ct, NY County 2015), affd 148 AD3d 443 (1st Dept 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").

6/24/2020
DATE

DEBRA A. JAMES, 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