

**Vargas v Department of Educ. of the City of N.Y.**

2022 NY Slip Op 33281(U)

September 30, 2022

Supreme Court, New York County

Docket Number: Index No. 154432/2022

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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WILFREDO A VARGAS,
Petitioner,

INDEX NO. 154432/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

- v -

THE DEPARTMENT OF EDUCATION OF THE CITY OF
NEW YORK, THE BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF THE CITY OF NEW YORK

DECISION + ORDER ON
MOTION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1- 7, 8, 9, 10, 11, 12,
13, 14

were read on this motion to/for ARTICLE 78.

The petition to inter alia reinstate petitioner as an ESL teacher and with tenure is denied.

Background

Petitioner seeks reinstatement following his termination as a teacher for respondents.
Petitioner believes this termination was arbitrary and capricious. Because he had previously
submitted a complaint against his supervisor for observing him in violation of a collective
bargaining agreement for classroom teachers, he also claims his termination was retaliatory.

Petitioner began his employment in 1997 as a substitute bilingual teacher and ESL
teacher. In 2017, petitioner was appointed as a probationary ESL teacher. Petitioner was
subjected to routine observations from supervisors throughout his employment. On November
13, 2017, the principal conducted an observation of petitioner's Spanish lesson. The principal
found petitioner's questions to his students were "of low cognitive challenge, with single correct
responses, and [were] asked in rapid succession," and rated petitioner's performance as

ineffective (NYSCEF Doc. No. 10 at 18). Petitioner was recommended to work with a teacher-coach. The following year, in October 2018, petitioner was observed by an assistant principal, Ms. Rivera, who rated petitioner as “Needs Improvement,” noting that he used incorrect grammar and needed to model English correctly for his students to replicate (NYSCEF Doc. No. 13 at 6). In March 2019, petitioner received an overall observation rating as “unsatisfactory” (*id.* at 7).

On October 29, 2019, Ms. Rivera observed petitioner. Ms. Rivera rated petitioner’s teaching performance as “Ineffective” and “Developing” but petitioner contended her observation violated various articles of a collective bargaining agreement for classroom teachers. Petitioner filed a complaint and, pursuant to the collective bargaining agreement, the matter went to arbitration on February 28, 2020. An arbitrator subsequently decided in petitioner’s favor and found that Ms. Rivera’s observation was inadequate because she did not include specific evidence for a component of her observation. The Arbitrator found that the passage of time between the observation and his decision meant Ms. Rivera could not remedy the issue and the observation was removed from petitioner’s file.

On December 2, 2019, petitioner was observed by a different assistant principal who found that petitioner “failed to prepare the materials he needed for his classroom ahead of time,” and that “Petitioner’s lesson was unclear resulting in the students being confused about the difference between sides and angles” (NYSCEF Doc. No. 13 at 7). Due to the pandemic, no additional observations occurred during the 2020-2021 school year (NYSCEF Doc. No. 9 at 10). Due to his prior performance evaluations, beginning in December 2020, petitioner was subject to an action plan that had a stated goal that petitioner would “implement guided literacy in his classroom” and that petitioner would meet with his teacher coach and the principal on a weekly

basis (NYSCEF Doc. No 13 at 8). On April 30, 2021, petitioner signed an agreement to extend his probationary period for an additional year (*id.*). Ms. Rivera observed petitioner's class on September 29, 2021, stating petitioner "failed to engage with his students and instead sat in the back of the class while the students at their breakfast in silence" (NYSCEF Doc. No. 13 at 8). Again, on October 13, 2021, Ms. Rivera observed petitioner's science lesson. Ms. Rivera had to remind petitioner to follow a schedule for academic subjects, and Ms. Rivera noted petitioner could not access the online curriculum "despite having been required to utilize online curriculum while remote teaching for at least a year" (*id.*).

Due to repeated poor ratings, in October 2021, Petitioner was enrolled in a "Coaching Cycle" program that paired teachers who were not meeting performance standards with consultants to "co-plan support in Math and [English and Language Arts]" (NYSCEF Doc. No. 9 at 12). As part of this program, petitioner agreed to classroom visits and observations for feedback on his performance. Ms. Rivera performed these observations as well as the school principal and additional assistant principals. On October 27, 2021, observers found that petitioner had not completed his "Google Classroom," a teacher's guide project that was due nearly a month earlier (*id.* at 10). The following month, Ms. Rivera and other assistant principals found that petitioner failed to give students adequate instructions for their lessons, that he "failed to have reference charts for his students in his classroom, and that he failed to execute the student activity on his lesson plan" (*id.*). Additionally, on November 30, 2021, Ms. Rivera observed that after a student completed his work and brought it to the petitioner, "petitioner looked at it, but failed to notice numerous 'glaringly' incorrect examples," and Ms. Rivera had to remind petitioner that he was required to check students' work and reteach material that was misunderstood (*id.* at 11). Petitioner continued to receive poor ratings from observers, and on

January 11, 2022, petitioner was observed for a final time. Petitioner was rated “ineffective” and the superintendent subsequently informed petitioner he would review the observations and decide on whether petitioner’s services should be discontinued (*id.*).

Petitioner contends the superintendent’s termination was made in bad faith, is arbitrary and capricious, and is the result of retaliatory conduct on behalf of the assistant principal.

Respondent maintains that these observations were performed in conjunction with the “Coaching Cycle” program. Respondent points to petitioner’s poor performance ratings over a series of months as well as respondent’s attempt to remedy petitioner’s performance weaknesses via the program as an indication of respondent’s good faith decision to terminate petitioner. Furthermore, respondent claims that since petitioner was only a probationary employee, it is allowed to terminate petitioner for any reason without a hearing.

### Discussion

In an article 78 proceeding, “the issue is whether the action taken had a rational basis and was not arbitrary and capricious” (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d 587 [2013] [internal quotations and citation omitted]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*id.*). “If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable” (*id.*). “Arbitrary 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 Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]).

“A board of education has the right to terminate the employment of a probationary teacher or principal at any time and for any reason, unless the teacher or principal ‘establishes that the termination was for a constitutionally impermissible purpose, violative of a statute, or

done in bad faith” (*Palmore v Bd. of Educ. of Hempstead Union Free Sch. Dist.*, 145 AD3d 1072, 1074, 44 NYS3d 509 [2d Dept 2016] quoting *Matter of Frasier v Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 71 NY2d 763, 765 [1988]).

Petitioner offers no evidence that respondents fired him in bad faith or based on a constitutionally impermissible purpose. On the record before this Court, it appears that respondent tried to work with petitioner to improve his performance by enrolling him in, essentially, a remedial program for underperforming teachers. This program required coaching and multiple observations over the course of months to adequately address the issues in petitioner’s teaching performance, yet he still underperformed. There is no indication that respondent acted in bad faith in terminating a probationary employee who did not satisfy the standards of his employment.

Petitioner’s assertion that he was intimidated to sign a continuation of his probationary period even though he should have achieved tenure is without merit. The fact is that petitioner signed a document that extended his probationary period.

Despite stipulating to filing reply papers, petitioner declined to produce any additional documents, exhibits, or affidavits to support his claim of continued harassment and retaliation. Furthermore, the Court also observes that the petition was not verified by the petitioner (it was verified by his attorney), and nothing was submitted from the petitioner himself. And petitioner’s attempt to adjourn the petition two days after the return date is denied.

### **Summary**

In this proceeding, petitioner was undoubtedly a probationary employee, meaning that respondents could fire him for virtually any reason. Here, respondents submitted evidence showing that petitioner received poor performance ratings starting in 2017 and that respondents


provided petitioner with intensive assistance to help petitioner improve but his performance did not improve. That more than justifies terminating a probationary employee.

Accordingly, it is hereby

ORDERED that the petition is denied, this proceeding is dismissed and the Clerk is directed to enter judgment accordingly in favor of respondents and against petitioner along with costs and disbursements upon presentation of proper papers therefor.

9/30/2022

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE