

Palmese v New York City Dept. of Educ.

2025 NY Slip Op 33356(U)

September 8, 2025

Supreme Court, New York County

Docket Number: Index No. 159015/2027

Judge: Lynn R. Kotler

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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. LYNN R. KOTLER PART 08

Justice

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KIMBERLY PALMESE,

Petitioner,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION, DAVID
C. BANKS

Respondent.

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INDEX NO. 159015/2024

MOTION DATE 09/27/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 22, 23, 24, 25 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, this motion is decided as follows.

Petitioner Kimberly Palmese (“Palmese”) seeks an Order to annul and reverse the determination by respondents The New York City Department of Education (“DOE”) and David C. Banks, the former Chancellor of the New York City Department of Education, (“DOE”, “Banks” or “respondents”) that sustained petitioner’s annual performance review unsatisfactory rating (“U-Rating”) for the 2021-2022 school year and to expunge the U-Rating from her record pursuant to Article 78 of the CPLR. DOE submitted its Answer in this special proceeding and contends that the determination was supported by a rational basis.

Facts

Palmese has been an employee of the DOE for 22 years. Since 2015, Palmese has been employed as an Assistant Principal in District 22 Joan Snow Pre-K Center in Brooklyn, New York. Palmese received satisfactory annual ratings (“S-Ratings”) for the school years 2015-2016, 2016-17, 2017-18 and 2018-19 and 2020-2021. There was no rating due to Covid in 2019-20.

In 2019, Palmese's supervisor became Director Rosalie Favuzza ("Favuzza"). Favuzza's title changed to Principal in 2021. During the 2021-2022 school year, Favuzza issued Palmese nine disciplinary letters and three negative feedback letters.

On October 13, 2021, Favuzza emailed Palmese at 6:45 a.m. instructing her to adjust her schedule and go to the Coney Island Avenue location. Palmese responded at 6:47 a.m. "No, unfortunately I don't have a car." Favuzza did not reply to Palmese's message.

On October 26, 2021, Favuzza, Palmese and her union representative Roberta Flores ("Flores") met regarding the instruction to go to the Coney Island Avenue location. Favuzza informed Palmese that she was responsible for arriving at her assigned location and that "[i]f you require clarification or support, then you are to articulate that to me, and I will decide how you should proceed." Flores told Favuzza that "something may come up that [Palmese] may not be able to follow your directive, allow her that opportunity." Favuzza replied "Yes, [] just articulate that to me, let me know and I will decide how to proceed." On October 28, 2021, Favuzza sent a disciplinary letter to Palmese's file regarding the incident.

On January 20, 2022, Favuzza sent a disciplinary letter to Palmese's file for allegedly failing to comply with Chancellor's Regulation A-420 to collect and submit witness statements in the DOE Online Occurrence Reporting System ("OORS") after an allegation of corporal punishment by a parent of a child which was filed on November 4, 2021. Palmese submitted an email from Terrance Peele, Senior Systems Analyst Office of Safety and Youth Development, explaining that Palmese did not have access to OORS and is not "required to upload/attach written statements to corporal punishment reports in OORS."

That same day, on January 20, 2022, Favuzza wrote a second letter alleging that Palmese failed to notify her of the corporal punishment allegation. In an email dated November 4, 2021,

Palmese provided Favuzza the complaint confirmation number for the corporal punishment incident.

On February 15, 2022, Favuzza wrote another disciplinary letter for insubordination alleging that Palmese ignored Favuzza's directive to stop copying the central office on emails regarding issues at school.

Less than one month later, on March 11, 2022, Palmese received three disciplinary letters from Favuzza for 1) allegedly ignoring three requests from her to send her teacher observations; 2) failing to provide teachers with their observations within a 30-day timespan per the UFT-DOE contract; and 3) failing to submit AP reflection and mid-year goals.

On April 5, 2022, Palmese received a written professional performance review from Favuzza notifying her that she was at risk of getting a U-Rating for the school year due to "alleged unprofessional behavior and lack of professional growth."

On May 10, 2022, Palmese's union filed a special complaint grievance against Favuzza for harassment and intimidation. A hearing was scheduled for June 15, 2022.

Approximately one week after filing her complaint grievance, on May 19, 2022, Palmese received two additional disciplinary letters from Favuzza that alleged Palmese failed to notify her of any scheduled new teacher support sessions, failed to provide a recap of these sessions, and that Palmese failed to create and send weekly paraprofessional newsletters to the staff.

On the morning of the hearing, June 15, 2022, and prior to petitioner's withdrawal of the special harassment complaint, Palmese's performance evaluation rating with NYCDOE showed a Satisfactory Rating for the 2021-2022 school year (NY St Cts Elec Filing [NYSCEF] Doc No. 5). That day, Palmese withdrew her complaint against Favuzza, and later that day on June 15, 2022, Palmese's rating for the 2021- 2022 school year was changed to a U-Rating.

On June 29, 2022, Palmese appealed her U-Rating for the 2021-2022 school year.

On March 28, 2024, the appeal hearing was held and the Chancellor's Committee Report dated March 28, 2024 (the "Committee Report") concluded the following:

"The documentation and testimony provided by the Rating Officer was thorough and comprehensive. The Appellant failed to provide immediate written feedback in the form of the observation report to teachers so that teachers may improve in their pedagogical craft. The Appellant refused to report to an alternate site upon the directive of the Rating Officer. The Appellant reported an incident to OSI without notifying the Rating Officer. Which caused the Rating Officer confusion when the SBI (School Based Investigation) was turned over to the school administration. The Appellant failed to submit her midyear goals as directed, stating that her September annual goals were not discussed."

Two months later, Palmese received a one-sentence letter that denied her appeal on May 28, 2024. The one sentence letter stated that the "rating is sustained because of poor pedagogical performance evidenced by you for the 2021-2022 School Year."

Discussion

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision was made in violation of lawful procedure; affected by an error of law; or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). "[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974] [emphasis removed]; see also *Matter of Colton v. Berman*, 21 NY2d 322, 329 [1967]).

"Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell*, 34 NY2d at 231; see also *Matter of Wooley v New York State Dept. of Correctional Servs.*, 15 NY3d 275, 280 [2010]; *Matter of Ferrelli v State of New York*, 226

AD3d 504, 504 [1st Dept 2024]). If the agency determination is supported by a rational basis, it must be upheld even if a different conclusion could have been reached by the court (*Matter of Ferrelli*, 226 AD3d at 504; *see also Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]).

The First Department has “consistently held that a U-rating must be upheld where there is evidence in the record that rationally supports that determination (*Matter of Brown v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 156 AD3d 451, 451 [1st Dept 2017]; *see also 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]). “A petitioner bears the burden of proving bad faith, and merely asserting it is insufficient to satisfy that burden.” (*Matter of Brown*, 156 AD3d at 452; *see also Matter of Witherspoon v Horn*, 19 AD3d 250, 251 [1st Dept 2005]). Speculation and conclusory allegations are insufficient to meet this burden (*Matter of Che Lin Tsao v Kelly*, 28 AD3d 320, 321 [1st Dept 2006]).

Where the “issuing and sustaining of the U rating... was done without sound basis in reason or regard to the undisputed facts” it is arbitrary and capricious (*see Matter of Hazeltine v City of New York*, 89 AD3d 613, 615 [1st Dept 2011]; *see also Matter of Horne v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 53 Misc 3d 1220[A], 2016 NY Slip Op 51756[U], *8 [Sup Ct, NY County 2016]).

Palmese argues that the determination sustaining the U rating was arbitrary and capricious and lacked a rational basis because neither the appeal letter nor the Committee Report provided any factual basis or rationale and failed to consider her credible evidence to rebut the disciplinary letters.

Respondents contend that the determination was based on a rational basis in issuing petitioner a U-Rating due to her “poor pedagogical performance. This determination was based on documentation and testimony that was both thorough and comprehensive”.

The court disagrees with respondents.

Here, Palmese has met her burden by establishing by the credible evidence that the determination was not based on a rational basis. Both the determination and Committee Report are conclusory and provide no rationale or reasoning for the U-Rating. The determination itself relies on conclusory testimony that is unsupported by the record and seemingly disregards the evidence provided by petitioner. Moreover, Favuzza’s End-Of-Year Summary for 2021 - 2022 stated that “Palmese’s strongest assets lie in her punctuality. She was responsible for observation cycles with timely feedback...”, in direct contrast to the disciplinary letters alleging Palmese failed to provide those observation reports on time. For each of the allegations made against Palmese, she provided credible evidence that she complied with the directives provided, or was being accused of failing to adhere to timelines or rules that did not apply.

Respondents also argue that the instant action is similar to *Kuks v Bd. of Educ. of the City School Dist. of the City of New York* 2024 NY Slip Op 32166[U], *3 [Sup Ct, NY County 2024]) and *Saunds v The Dept. of Educ. of the City of New York* (2021 NY Slip Op 31065[U], *3 [Sup Ct, NY County 2021], affd 209 AD3d 599 [1st Dept 2022]).

The court disagrees. Both *Saunds* and *Kuks* are factually distinguishable from the instant case. In *Saunds*, the petitioner had a history of alcohol abuse, lacked leadership and covered for students rather than reporting them, failed to properly vet the assistant coaches hired, and submitted no evidence at the hearing to rebut the allegations against him. In *Kuks*, petitioner left a classroom unattended and was found to have clearly violated the rules.

In petitioner's 20 plus year career, she has only received Satisfactory Ratings before receiving a total of nine disciplinary letters and three negative feedback letters in a single school year, which just so happened to be the same year she filed a special complaint against Favuzza (*see Matter of Horne*, 2016 NY Slip Op 51756(U), *11 [finding that the unsubstantiated incidents and "self-serving letters" against petitioner were not sufficient to warrant a U-rating, especially in light of the petitioner's "prior unblemished record of S-Ratings"]).

Furthermore, the court finds that respondents' decision to change petitioner's S-Rating she received prior to the scheduled hearing on June 15, 2022 to a U-Rating on the same day after petitioner withdrew her complaint against Favuzza was done arbitrarily, lacked any rationale basis and clearly was done in bad faith. Despite the numerous disciplinary letters, Palmese was originally assigned an S-Rating for the 2021-2022 school year that was randomly changed to a U-Rating the same day that Palmese withdrew her complaint against Favuzza.

Based on the foregoing, respondent's determination to uphold the U-Rating for the 2021-2022 school year lacked a rational basis, was arbitrary and capricious, and is thereby annulled.

Conclusion


ADJUDGED that the petition is granted; and it is further

ORDERED that the determination sustaining the U-Rating for the 2021-2022 school year is deemed annulled and respondents are directed to expunge such U-Rating from petitioner's record; and it is further

ORDERED that respondents are to convert the rating for the 2021-2022 school year to a S-Rating; and it is further

ORDERED that respondents are to award petitioner any lost compensation due to the U-Rating.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

<p><u>9/8/25</u> 07/16/2025</p> <hr/> <p>DATE</p>		 <hr/> <p>LYNN R. KOTLER, J.S.C.</p>																														
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