

[\*1] In the Matter of an Article 78 Proceeding TRACEY ELCOCK, Petitioner, -against- JOEL KLEIN, as the Chancellor of the Department of Education of the City of New York, CITY OF NEW YON, and NEW YORK CITY DEPARTMENT OF EDUCATION, Respondents. Index No. 110824/10

110824/10

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2011 NY Slip Op 30537U; 2011 N.Y. Misc. LEXIS 950

February 18, 2011, Decided

**NOTICE:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

**CORE TERMS:** rating, teacher, arbitrary and capricious, school year, retaliation, unsatisfactory, special education, entire class, miserable, verbal abuse, satisfactory, absenteeism, error of law, racial slur, citation omitted, credibility, capricious, rationally, designee, slow, letter dated, complaining, sanctioned, grievance, remainder, excessive, belittle, missed

**JUDGES:** [\*\*1] JOAN B. LOBIS, J.S.C.

**OPINION BY:** JOAN B. LOBIS

## **OPINION**

Decision, Order and Judgment

JOAN B. LOBIS, J.S.C.:

Petitioner Tracey Elcock, a public school teacher, brings this Article 78 proceeding seeking to annul the determination of the Department of Education of the City of New York (the "DOE"), to sustain an "unsatisfactory" overall rating ("U rating") given to Ms. Elcock by the principal of her school for Ms. Elcock's work performance during the 2007-2008 school year. For the reasons set forth below, the petition is denied.

Ms. Elcock has worked in the New York City public school system since 1991. In August 2006, Ms. Elcock became a special education teacher at Felisa Rincon de Gautier Institute for Law and Public Policy in the Bronx (the "Institute"). On or about June 15, 2007, a guidance counselor at the Institute reported Ms. Elcock to the DOE Office of Equal Opportunity (the "OEO") for using a racial slur. According to an e-mail dated November 7, 2007, from the OEO to the Institute's principal, Grismaldy Laboy-Wilson, the OEO performed an investigation; found that Ms. Elcock had made an inappropriate comment; and recommended that Principal Laboy-Wilson inform Ms. Elcock of the findings and "place a letter [\*\*2] in her file indicating" the same. Principal Laboy-Wilson [\*2] met with Ms. Elcock and a representative from the United Federation of Teachers ("UFT") on November 15, 2007, and informed them of the results of the OEO investigation. At the meeting, Ms. Elcock submitted a memorandum indicating that she would not be making any statements. By letter dated November 20, 2007, Principal Laboy-Wilson

notified Ms. Elcock that she had engaged in unprofessional conduct in violation of a DOE regulation. Ms. Elcock maintains that on December 4, 2007, she filed a grievance complaining that the OEO investigation was unfairly performed.

On December 5, 2007, two students in Ms. Elcock's special education humanities class complained that Ms. Elcock had mocked the entire class. In a witness statement dated December 5, 2007, one of the students claimed that Ms. Elcock called the class "miserable," "sad," and "slow." The other student set forth that Ms. Elcock called the student "miserable" and then told the entire class that they did not know what the "word meant or... how to spell it." The student claimed that Ms. Elcock said "[your] mother must not be teaching [you] right at home, unlike her mother who taught [\*\*3] her good [sic]." The same day, Principal Laboy-Wilson requested that Ms. Elcock meet with her on December 11, 2007, to discuss the accusations. According to Ms. Elcock, an accident on December 6 prevented her from attending the meeting and caused her to miss the remainder of the school year.

By letter dated January 23, 2008, Principal Laboy-Wilson informed Ms. Elcock that based on her investigation of the events of December 5, 2007, she had determined that Ms. Elcock had engaged in behavior "that tends to belittle or subject students to ridicule." Principal Laboy-Wilson noted that Ms. Elcock did not confirm or deny the students' allegations. According to the [\*3] letter, Ms. Elcock missed both the December 11 meeting and a rescheduled meeting on January 18, 2008. Principal Laboy-Wilson concluded that Ms. Elcock had acted unprofessionally and in violation of DOE regulations. Thereafter, the DOE granted Ms. Elcock medical leave for the remainder of the school year.

On or about June 21, 2008, Principal Laboy-Wilson issued Ms. Elcock's Annual Professional Performance Review and Report for the school year beginning in August 2007 and ending in June 2008. Principal Laboy-Wilson gave Ms. Elcock [\*\*4] a U rating. Ms. Elcock was given unsatisfactory reviews in eight out of twenty-three categories, including attendance, professional attitude, and control of her class. She had also missed forty-three (43) days of school.

On July 1, 2008, Ms. Elcock appealed the U rating. Marianne Alvarez, chair of the Chancellor's Committee, held a review meeting on November 30, 2009, during which she heard from Ms. Elcock, a UFT advisor, and Principal Laboy-Wilson. Ms. Elcock maintained that she did not belittle her students on December 5, 2007. She indicated that the allegations had been fabricated in retaliation for Ms. Elcock's attempt to dispute the OEO investigation. With regard to the absenteeism, Ms. Elcock argued that before she was granted leave, she was required to exhaust accumulated sick days, thereby inflating the number of days in which she was marked "absent." In response, Principal Laboy-Wilson set forth that Ms. Elcock failed to present her side of the story with regard to the students' allegations, despite being given two opportunities. Principal Laboy-Wilson contended that Ms. Elcock's verbal abuse of the students, combined with her absenteeism, were sufficient grounds for an unsatisfactory [\*\*5] rating. Chairwoman Alvarez sustained the U rating. [\*4] finding that although Ms. Elcock was a "satisfactory teacher with a number of commendations," her behavior in 2007 included "two incidents of verbal abuse." Chairwoman Alvarez noted that Ms. Elcock never presented her side of the story (presumably at the time at which she was first accused of the wrongdoing). Chairwoman Alvarez further found that Ms. Elcock's absenteeism, whether sanctioned or not, was excessive and "disruptive to the school's organization and injurious to the children's education." By letter dated April 16, 2010, a designee of DOE Chancellor Joel Klein sustained the U rating.

In the petition, Ms. Elcock maintains that she received satisfactory ratings for every school year between 2001 and 2007. She argues that the U rating was arbitrary and capricious and sprung from false

allegations and contends that Principal Laboy-Wilson "coaxed students into complaining against [her]" in retaliation for the grievance that Ms. Elcock filed on December 4, 2007. Ms. Elcock further maintains that the OEO investigation was tainted because it was based on an unsubstantiated rumor started by a co-worker who is not credible and is known [\*\*6] for starting trouble. She denies belittling the students. Additionally, Ms. Elcock argues that the January 23, 2008 letter detailing the events of December 5, 2007 was not sent to her until June 2008. She alleges that it cannot be added to her file, since, citing her Collective Bargaining Agreement it was "not reduced to writing within three months of it[s] occurrence." Ms. Elcock sets forth that her absences were due to a medical condition and were sanctioned by Principal Laboy-Wilson.

[\*5] In opposition, respondents argue that the U rating was rationally supported by two complaints of verbal abuse, in apparent reference to the OEO's findings and the events of December 5, 2007, and Ms. Elcock's excessive absences. They maintain that the U rating was not an act of retaliation and was supported by legitimate reasons. Respondents argue that Ms. Elcock has failed to demonstrate that the U rating was arbitrary, capricious, or affected by an error of law. In reply, Ms. Elcock argues that a teacher with consistent satisfactory ratings does not become an "unsatisfactory" teacher absent bias.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination [\*\*7] of whether that administrative decision was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law. [In re Pell v. Board of Educ., 34 N.Y.2d 222, 231, 313 N.E.2d 321, 356 N.Y.S.2d 833 \(1974\)](#). A determination is considered arbitrary when it is made "without sound basis in reason or regard to the facts." [In re Peckham v. Calogero, 12 N.Y.3d 424, 431, 911 N.E.2d 813, 883 N.Y.S.2d 751 \(2009\)](#), citing [Pell, 34 N.Y.2d at 231](#). If the agency's determination is rationally supported, the court must sustain the determination "even if the court concludes that it would have reached a different result than the one reached by the agency." [Peckham, 12 N.Y.3d at 431](#) (citation omitted). The court cannot "weigh the evidence, choose between conflicting proof, or substitute its assessment of the evidence or witness credibility for that of the administrative factfinder." [In re Porter v. New York City Hous. Auth., 42 A.D.3d 314, 837 N.Y.S.2d 875 \(1st Dep't 2007\)](#) (citations omitted).

It was not arbitrary and capricious for Chancellor Klein to sustain the U rating. After investigating the events of December 5, 2007, Principal Laboy-Wilson determined that Ms. Elcock [\*6] had spoken inappropriately to her class. While only two students [\*\*8] out of an entire class made complaints against Ms. Elcock and their statements are not entirely consistent, the court cannot make credibility determinations at this stage. Given the substance of the statements to the students, namely proclamations that the students were "slow" and "miserable," it was not arbitrary and capricious for Principal Laboy-Wilson to give Ms. Elcock a U rating, nor was it arbitrary and capricious for the DOE to uphold said rating. It was not arbitrary and capricious for Principal Laboy-Wilson and the DOE to determine that Ms. Elcock's undisputed absences were detrimental to the Institute's organization and student growth, since special education students no doubt benefit from consistency. It is unclear what role the OEO investigation played in Principal Laboy-Wilson's determination to give Ms. Elcock an U rating, since she did not cite it as a reason for the rating at the November 30, 2009 review and the racial slur was uttered in June 2007. Nevertheless, the U rating as sustained by Chancellor Klein's designee has a rational basis due to Ms. Elcock's absences and the determination by Principal Laboy-Wilson of the inappropriateness of her conduct on December [\*\*9] 5, 2007. Ms. Elcock's claim of retaliation is unsupported by the record. See [Williams v. City of New York, 38 A.D.3d 238, 831 N.Y.S.2d 156 \(1st Dep't 2007\)](#). Accordingly it is hereby

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

Dated: February 18, 2011

/s/ Joan B. Lobis

JOAN B. LOBIS, J.S.C.