

2013 N.Y. Misc. LEXIS 5264, *; 2013 NY Slip Op 51868(U), **

In the Matter of the Application of David Deutsch, Petitioner, against New York City Department of Education and DENNIS M. WALCOTT, Chancellor of the New York City Department of Education, Respondents.

103341/2012

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2013 N.Y. Misc. LEXIS 5264; 2013 NY Slip Op 51868(U)

November 7, 2013, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

CORE TERMS: teacher's, rating, protocol, disciplinary, school year, unsatisfactory, arbitrary and capricious, satisfactory, undisputed, letter dated, damn, annual, petitioner received, supervisor, rational basis, petitioner failed, documented, okay, classroom, staff, professional growth, union representative, pertinent part, advance notice, aggressive, lateness, asthma, annulled, failure to follow, announcement

COUNSEL: [*1] For Petitioner (self-represented): David Deutsch, New York, NY.

For Respondents: Daniel J. LaRose, Esq., Michael A. Cardozo, Corporation Counsel for the City of New York, New York, NY.

JUDGES: Michael A. Cardozo, J.S.C.

OPINION BY: Michael A. Cardozo

OPINION

Michael D. Stallman, J.

Petitioner, a tenured teacher at a New York City public school, received an overall unsatisfactory rating (U-rating) for the 2010-2011 school year. Petitioner brings this Article 78 proceeding to annul the U-rating. The issue presented is whether respondents acted arbitrarily and capriciously in determining that petitioner should receive an overall U-rating based on three incidents (and related unsatisfactory comments), even though petitioner received otherwise satisfactory comments in his annual professional performance review and satisfactory ratings in all his formal [**2] classroom observations.

BACKGROUND

Petitioner is a tenured teacher who has been teaching at the Manhattan Center for Science and Mathematics (MCSM), a magnet public high school in East Harlem, for over 20 years. According to petitioner, he has taught Advanced Placement Physics and Regents Physics at the MCSM, and he was a recipient of the Blackboard Award for Outstanding [*2] Science Teaching. (Verified Petition ¶ 9.) It is undisputed that, for the 2010-2011 school year, petitioner served as a union delegate for the United Federation of Teachers (UFT), and also as the UFT representative on the School Leadership Team.¹

¹ Pursuant to Chancellor's Regulation A-655, "[t]he SLT is responsible for developing the school's Comprehensive Education Plan (CEP) and ensuring that it is aligned with the school-based budget." (<http://schools.nyc.gov/NR/rdonlyres/381F4607-7841-4D28-B7D5-0F30DDB77DFA/82007/A655FINAL1.pdf> [accessed October 21, 2013].)

Prior to the 2010-2011 school year, petitioner had never received a U-rating. (*Id.*; Verified Answer ¶ 9.) It is undisputed that the MCSM formally reviewed petitioner's class seven times during the 2010-2011 school year, and

each of these formal observations resulted in satisfactory ratings. (*See* Verified Petition, Ex C; Verified Answer ¶ 16.)

In Section 1 of his annual professional performance review for the 2010-2011 school year, petitioner received satisfactory comments in 19 out of 23 areas (Verified Petition, Ex E.) The four areas where petitioner received unsatisfactory comments were: (1) Voice, speech, and use of English; [*3] (2) Professional attitude and professional growth; (3) Maintenance of good relations with other teachers and with supervisors; (4) Effort to establish and maintain good relationships with parents. (*Id.*) In Section 2 of the annual professional performance review, petitioner received an overall evaluation of unsatisfactory, i.e., a U-rating.² [**3]

² Petitioner submits a copy of a Human Resources Handbook of the Board of Education of the City of New York, entitled "Rating Pedagogical Staff Members." It states, in relevant part:

"Receipt of an Unsatisfactory rating has serious implications. Unsatisfactory performance is a compelling reason for recommending the Discontinuance of Probationary Service or the Denial of Certification of Completion of Probation and for filing charges against tenured employees. It may also impact on an employee's ability to obtain additional licenses."

(Verified Petition, Ex L, at 13.)

Petitioner's overall U-rating was based on three incidents that occurred during the 2010-2011 year. (Verified Petition ¶ 19; Verified Answer ¶ 19.) Section 4 of the annual professional performance review sets forth three documents to substantiate the U-rating, with a brief description of [*4] each document: (1) a disciplinary letter dated January 3, 2011 for "Cursing and aggressive behavior toward supervisor in front of staff and parents"; (2) a disciplinary letter dated February 16, 2011, for "Willful failure to follow school rule. Attempt to misrecord attendance record"; and (3) a disciplinary letter dated June 14, 2011 for "Failure to follow directive when asked to dept. meeting." (*Id.*)

The First Incident: "Cursing and aggressive behavior"

It is undisputed that, on December 21, 2010, petitioner said "Damn you" to the MCSM's principal, J. David Jimenez, after an ad hoc committee meeting of the School Leadership Team. According to petitioner, "Damn you" was uttered in a private conversation, out of frustration.

The disciplinary letter dated January 3, 2011 by Principal Jimenez states, in pertinent part:

"On December 23, 2010, I met with you and your union representative, Eric Cohen, to discuss an allegation against you of misconduct. . . .

I began the meeting by asking you to explain why you said, damn you' to me on December 21, 2010 after we had just finished an ad hoc committee meeting of our SLT. Before you could reply Mr. Cohen said that he did not believe that damn you' [*5] was necessarily a curse. When I asked you if you agreed, you replied, If you were offended by my statement then I apologize.' Although I thank you for your apology, I regret that you failed to provide me with an explanation as to why you said damn you' to me."

(Verified Petition, Ex F.)

The Second Incident: "Willful failure to follow school rule."

It is undisputed that petitioner was not present at work on February 3, 2011. The disciplinary letter dated February 16, 2011 by Denise Winchester, Assistant Principal of Organization, states, in pertinent part:

"On February 7, 2011, we met with your union representative, Mr. Eric Cohen, in my office. The purpose of the meeting was for you to respond to the following: [**4]

Your failure to follow school protocol on February 3, 2011 when taking a Personal Business Day. . . .

I asked you why you failed to request a Personal Day in advance despite being aware of the protocol. . . . You responded that on February 2nd, you informed your subject AP that you might need a Personal Day on February 3rd. However, you neglected to follow the established procedure by not filling out a Personal Business Day Request Form and submitting it to me for approval.

I conclude [*6] that you failed to follow proper protocol regarding Personal Business Days despite having been aware of the possibility of having to take one at least a day in advance."

(Verified Petition, Ex G.)

The Third Incident: "Failure to follow directive when asked to dept. meeting"

It is undisputed that, on June 9, 2011, petitioner was late to a department meeting. According to petitioner, he was late because a union meeting that took place before the department meeting did not end on time. According to petitioner, this was the first and only time he was ever late to a meeting. (Verified Petition ¶ 23.)

The disciplinary letter dated June 14, 2011 by Principal Jimenez states, in pertinent part:

"On June 13, 2011, I met with you and Eric Cohen, your union representative, to discuss your lateness to our last department meeting on June 9, 2011.

At the meeting I told you how I saw you leisurely talking with two of your colleagues outside of the school library. I explained how one of the assistant principals told me that there were still teachers in the library who had not gone to their department meetings. I immediately made a loud speaker announcement, at 1:30 P.M., reminding teachers that their attendance [*7] was required at department meetings. Department meetings had started at 1 P.M., and you were late. . . You, with two other colleagues, remained speaking until I arrived at 1:35 P.M.

When I asked you to explain your lateness, you acknowledged hearing the announcement and knowing that the meetings started at 1 P.M. . . Your union representative argued that it was his fault because he had [*5] held you extra time for a union meeting. I explained that I excused all teachers who were late because of the union meeting, but I took issue with those who lingered after my loud speaker announcement at 1:30 P.M. because they did not respond accordingly and became even excessively late."

(Verified Petition, Ex J.)

Petitioner appealed his U-rating to the Chancellor's Committee, and hearings were held on January 13, 2012. (Verified Petition ¶ 88; Verified Answer ¶ 108.) The Chancellor's Committee recommended that petitioner's U-rating be sustained. The Committee stated,

"It is unfortunate that this Appellant should receive a rating of U' for not complying with established procedures and Protocol. He disrespected the Principal by his use of unbecoming language. The Appellant is a superior teacher with evidence [*8] of students' successes and achievements. However, the Principal has established his school with written procedures for teachers to follow. The Appellant failed to comply.

It is, therefore, recommended that the Rating of Unsatisfactory' be sustained."

(Verified Answer, Ex 8.)

By a letter dated March 28, 2012 from Shael Polakow-Suransky, Chief Academic Officer, Senior Deputy Chancellor (Designee for Dennis M. Walcott, Chancellor), the Chancellor denied petitioner's appeal. The letter states, "Please be advised that the appeal of Mr. David Deutsch's rating of Unsatisfactory' for the period ending June 2011 has been denied and the said rating is sustained as a consequence of failure to demonstrate professional growth." (Verified Petition, Ex A; Verified Answer, Ex 9.)

This Article 78 proceeding followed.

DISCUSSION

"In reviewing an administrative agency determination, courts must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious. An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. If the court finds that the determination is supported by a rational [*6] basis, it must sustain the [*9] determination even if the court concludes that it would have reached a different result than the one reached by the agency. Further, courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise."

(*Matter of Peckham v Calogero*, 12 NY3d 424, 431, 911 N.E.2d 813, 883 N.Y.S.2d 751 [2009] [internal citations, quotation marks, and emendation omitted].)

Petitioner does not dispute that he said "Damn You" to Principal Jimenez on December 21, 2010. Neither does he dispute that he was late to a department meeting. Thus, there is a basis in fact to support the unsatisfactory comments that petitioner received on his annual professional performance review in the areas of "Professional attitude and professional growth" and "Maintenance of good relationships with other teachers and with supervisors."

It is undisputed that petitioner was not present at work on February 3, 2011. However, the determination that petitioner failed to follow school protocol when taking a Personal Business Day was arbitrary and capricious, because it was taken without regard to the facts.

The disciplinary letter dated February 16, 2011 faults petitioner for not having requested and received permission [*10] in advance. The letter states, in pertinent part:

"[H]ad you chosen to follow the rules, you could have chosen to request and receive permission in advance. You responded that on February 2nd, you informed your subject AP [Assistant Principal] that you might need a Personal Day on February 3rd. However, you neglected to follow the established procedure by not filling out a Personal Business Day Request Form and submitting it to me for approval."

(Verified Petition, Ex G.) To the extent that school protocol required petitioner to request a Personal Business Day in advance,³ petitioner points out that the "Personal Business Day(s) Request Form" for the MCSM states that "This form must be submitted at least two days prior to the requested absence" (Verified Petition, Ex O),⁴ which would not have been possible given the circumstances of petitioner's absence. Petitioner's wife testified at the hearing as follows: [**7]

"Samantha Deutsch (Witness): Okay. Well, our daughter has asthma and so I took her to see the pediatrician on that evening [February 1, 2011] and she also had fevers and a cough and so the doctor prescribed her medication and she had a fever that day. She definitely could not go to [*11] school the next day, but were [sic] to monitor her condition and decide if she was able to go to school the following day.

Winston Silvera (UFT Advisor): This is February 3rd.

Samantha Deutsch (Witness): Yes.

Winston Silvera (UFT Advisor): Okay. Got it.

Samantha Deutsch (Witness): And the doctor gave us a note to provide to her school which would excuse her absence for the next few days in case she had to stay home additional days. But the pediatrician explained to me that we had to use our own judgment about when she should go back to school. And after that one day home we thought that she might be able to go back to school but we weren't sure. So, you know, we, we felt like she, possibly, could go back to school the next day, but we weren't sure. So Dave, I believe he left materials for a substitute and told his department supervisor that he might be out for the next day. That he didn't know yet. So, during that night, she had a bad night. She had an asthma attack. She has asthma, so sometimes it happens, you know, in addition to when she's ill. So, in the morning, we knew that she had to stay home again."

(Verified Answer, Ex 7 at 25.)

3 Neither petitioner nor respondents submitted a copy [*12] of the MCSM's protocol on Personal Business Days.

4 Denise Winchester, Assistant Principal of Organization, testified at the hearing that "advance notice" is "at least 2 days advance." (Verified Answer, Ex 7 at 8.)

The Chancellor's Committee found that petitioner failed to follow protocol, but not for the specific reason set forth in the disciplinary letter, i.e., that petitioner did not request a personal day two days in advance. Rather, the Chancellor's Committee found that petitioner did not follow protocol by not reporting to the Assistant Principal of Organization on February 2, 2011 that he might need a Personal Business Day the next day, even though he had informed his immediate supervisor, the Assistant Principal in charge of science, that he might not be able to work on February 3. (Verified Answer, Ex 8.)

However, petitioner asserts that the school protocol did not cover this situation. [**8] The protocol at issue is not part of the record. Denise Winchester, Assistant Principal of Organization, testified at the hearing that "advance notice" for a Personal Business Day required two days' advance notice. Yet, given the uncontroverted testimony that petitioner's daughter suffered an [*13] asthma attack the night before petitioner's absence, petitioner could not have given two days' advance notice. Therefore, the determination that petitioner failed to follow school protocol was taken without regard to the facts, and thus was arbitrary and capricious.⁵

5 The hearing testimony appears to indicate that petitioner was faulted, in essence, for having failed to exercise better judgment under the circumstances as to whom petitioner ought to have notified. Petitioner testified at the hearing as follows:

"David Deutsch (Appellant): Now that protocol really doesn't say what a teacher should do if there's a possibility that they may be absent.

Dr. Beryl Dorsett (Chairperson): Okay but I want to know that you at least had respect for the subject AP to let them know that you might not be in? You might have been in?

David Deutsch (Appellant): That's true.

* * *

Dr. Beryl Dorsett (Chairperson): But I'm just saying--no, I'm just saying that you knew that there was a possibility, not to say that you're not going to be in, but there's a possibility because your daughter was sick and your wife is in charge and so on and so forth that you're not--there's a possibility you could have been in, could [*14] not have been in, but all she is saying is that she's in charge, and she should have been told that if there's a possibility then she could have planned for that possibility.

* * *

David Deutsch (Appellant): [overlapping 41:48] If I made an error in judgment that I am willing to admit that perhaps I should had [sic] popped in and told her--

Dr. Beryl Dorsett (Chairperson): Okay, okay that's all I'm saying."

(Verified Answer, Ex 7 at 15-16.)

Given the Court's ruling that the determination that petitioner failed to follow school protocol was taken without regard to the facts, petitioner's overall U-rating for the 2010-2011 school year must therefore be evaluated based on only two incidents: (1) he said "Damn You" to the principal; and (2) he arrived late once to a meeting. The issue presented is whether these incidents alone constitute a rational basis for an [**9] overall U-rating for the entire school year.

Respondents do not claim that criteria exists for determining whether one or two unsatisfactory comments on a teacher's annual professional performance review may justify an overall U-rating. The Human Resources Handbook, "Rating Pedagogical Staff Members", also contains no criteria on that [*15] issue. (*See* Verified Petition, Ex L.)

Respondents offer no explanation as to why petitioner, who received otherwise satisfactory comments in his annual performance review and satisfactory ratings in all his formal classroom observations, warranted a U-rating for the entire school year. (*Cf. Matter of Kolmel*, 88 AD3d 527, 930 N.Y.S.2d 573 [1st Dept 2011] [two negative classroom observations cited in the year-end report could rationally support a finding that a probationary teacher had not developed into a proficient high school studies teacher, following three years of suggestion and assistance].) The lack of an explanation as to why the MCSM Principal's exercised his discretion to give petitioner an overall U-rating under these circumstances renders the determination arbitrary and capricious. (*cf. Matter of Koch v Sheehan*, NY3d , 2013 N.Y. LEXIS 2913, 2013 WL 5707874 [2013] [determination of the Office of the Medicaid Inspector General to exclude physician from New York's Medicaid Program based on a consent order was arbitrary and capricious, when OMIG did not explain why the consent order caused it to exercise discretion to exclude the physician].)⁶ [**10]

6 Principal Jimenez did testify at the hearing that, in addition to [*16] the "Damn You" incident, there were other undocumented incidents of petitioner's allegedly menacing and aggressive behavior. Principal Jimenez stated,

"It was not the first time he [petitioner] has been menacing and aggressive towards me and I would cite two other occasions very briefly in which he exhibited similar behavior, which was after the reassignment of one of his colleagues I believe who is a witness today. . . And there were other incidents too numerous to mention, even at meetings he would not let me forget. . ."

(Verified Answer, Ex 7, at 3-4.)

However, the BOE Human Resources Handbook, "Rating Pedagogical Staff Members", provides that "The overall evaluation of the employee's performance requires a careful review of the documents in the file [the teacher's personnel file]." (Verified Petition, Ex L, at 14.) To the extent that Principal Jimenez relied upon other undocumented incidents that were not part of petitioner's file to justify the overall U-rating, this was arbitrary and capricious. (*See Friedman v Board of Educ. of City Sch. Dist. of City of NY*, 109 AD3d 413, 414, 970 N.Y.S.2d 521 [1st Dept 2013] [U-rating was not supported by any documents after parties stipulated to the removal [*17] of two disciplinary letters from the teacher's file].)

That is not to say that substantiated misconduct in the workplace, such as a lack of civility in dealings with school personnel and supervisors, or insubordination, may not support an overall U-rating. However, respondents do not argue that the subject incidents themselves were so egregious as to warrant to an overall U-rating.

The Chancellor's letter dated March 28, 2012, which denied petitioner's appeal, is also at odds with the circumstances here. The Chancellor's Office appears to fault petitioner for not having demonstrated "professional

growth." And yet, petitioner's U-rating for the entire year is based on three separate incidents, with no documented recurrences. The absence of further similar, documented incidents would suggest improvement in petitioner's conduct, i.e., "growth."

It might appear that petitioner's U-rating can only be rationally explained as a product of disciplinary action taken against petitioner. Indeed, disciplinary letters placed into petitioner's file similarly warned petitioner that "this may lead to further disciplinary action, including an unsatisfactory rating which may result in your termination." [*18] (See Verified Answer, Exs 2, 6.) However, to the extent that the overall U-rating was imposed as a penalty, based on the documented incidents, the overall U-rating is so disproportionate to petitioner's behavior on three isolated incidents so as to shock the judicial conscience. Principal Jimenez gave petitioner an overall U-rating for the entire 2010-2011 school year because of one absence, one lateness, and two words.

Therefore, this Court holds that the determination of the Chancellor which upheld petitioner's U-rating, based on three incidents that took place on December 21, 2010, February 3, 2011, and June 9, 2011, lacked a rational basis and was arbitrary and capricious. (See *Matter of Hazeltine v City of New York*, 89 AD3d 613, 933 N.Y.S.2d 265 [1st Dept 2011] [reversing dismissal of Article 78 petition challenging U-rating based on two incidents].) Thus, the petition is granted and the U-rating is annulled. The matter is not remanded to respondents. (*Id.*; *Matter of Koch*, NY3d , 2013 N.Y. LEXIS 2913, 2013 WL 5707874.) Remand is not warranted because this is not a situation where the U-rating was annulled due to procedural deficiencies in the review process that are capable of being corrected upon remand. (*Matter of Kolmel v City of New York*, 88 AD3d 527, 930 N.Y.S.2d 573 [1st Dept 2011].)

CONCLUSION

It [*19] is undisputed that petitioner's overall U-rating for the 2010-2011 school year [**11] is based on three documented incidents. It is undisputed that petitioner was absent from work on February 3, 2011, and that petitioner did not request permission two days in advance of being absent. However, the determination that petitioner failed to follow school protocol when taking a Personal Business Day was arbitrary and capricious, because the determination was made without regard to undisputed facts. As to the other two incidents, it is undisputed that petitioner was late to a meeting on one occasion, and said "Damn You" to the principal of the school. Nevertheless, petitioner received satisfactory ratings in all his formal classroom observations, and, for the most part, he received satisfactory comments in his annual professional performance review for the 2010-2011 school year. There was no documented recurrence of lateness or of arguably insubordinate and/or disrespectful behavior. Respondents offered no explanation as to why two incidents in the face of otherwise satisfactory ratings and satisfactory comments are sufficient to warrant an overall U-rating. The lack of an explanation under these [*20] circumstances renders the determination arbitrary and capricious and lacking a rational basis. To the extent that petitioner's overall U-rating was imposed as a disciplinary measure, the overall U-rating was a penalty so disproportionate to the subject incidents that it shocks the judicial conscience.

Accordingly, it is hereby ADJUDGED that the petition is granted, and petitioner's overall U-rating for the 2010-2011 school year is annulled.

Dated: November 7, 2013

New York, New York