

2013 N.Y. Misc. LEXIS 5170, \*; 2013 NY Slip Op 32842(U), \*\*

**] In the Matter of the Application of FRANCESCO PORTELOS, Petitioner, For an Order Pursuant to Article 78 of the Civil Practice Law and Rules, -against- BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and DENNIS M. WALCOTT, as Chancellor of the CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, Respondents. Index No. 100813/13**

**100813/13**

**SUPREME COURT OF NEW YORK, NEW YORK COUNTY**

**2013 N.Y. Misc. LEXIS 5170; 2013 NY Slip Op 32842(U)**

**November 4, 2013, Decided**

**November 7, 2013, Filed**

**NOTICE:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

**PRIOR HISTORY:** Portelos v. City of New York, 2013 U.S. Dist. LEXIS 30125 (E.D.N.Y., Feb. 28, 2013)

**CORE TERMS:** public body, attending, public business, recommendations, misconduct, teacher, attend, entity, school activities, school's principal, rational basis, arbitrary and capricious, participating, educational, mandatory, designee, advisory, budget, staff, petitioner's request, statute of limitations, staff member, formal charges, superintendent, reassignment, reassigned, website, expired, session

**JUDGES:** [\*1] HON. CYNTHIA S. KERN, J.S.C.

**OPINION BY:** CYNTHIA S. KERN

**OPINION**

**DECISION/ORDER**

**HON. CYNTHIA S. KERN, J.S.C.**

Petitioner Francesco Portelos brings the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to challenge respondents Board of Education of the City School District of the City of New York (the "DOE") and Dennis M. Walcott, as Chancellor of the City School District of the City of New York's ("Mr. Walcott") (hereinafter referred to collectively as "respondents") decision prohibiting petitioner from attending and participating in the monthly School Leadership Team ("SLT") meetings held at Intermediate School 49 ("IS 49"). For the reasons set forth below, the petition is denied.

[\*\*3] The relevant facts are as follows. Petitioner is employed as a tenured science teacher at IS 49, a school maintained and operated by the DOE, which is located at 101 Warren Street, Staten Island, New York. Additionally, petitioner has served as the elected United Federation of Teachers ("UFT") Chapter Leader of IS 49 since mid-2012. In April 2012, petitioner was reassigned from his position on the ground that he was the subject of investigations into misconduct conducted by the Special [\*2] Commissioner of Investigation ("SCI") for the New York City School District. Petitioner was informed of his reassignment by letter dated April 26, 2012, which explicitly stated that he was not to return to IS 49 without prior written permission and that any school activities he had participated in would remain suspended until the resolution of the matter.

Petitioner alleges that on or about February 5, 2013, Linda Hill, the principal of IS 49, directed members of the SLT to refrain from providing petitioner with any information regarding the SLT meetings and instructed members not to provide petitioner with minutes or other information regarding the discussions that transpired during the meetings. Additionally, petitioner alleges that on or about February 13, 2013, the UFT was advised of the DOE's official position

that petitioner could not serve as UFT Chapter Leader on the SLT, that he must appoint a designee in his stead and that he could not be present in any capacity, including by telephone.

On April 25, 2013, the SCI issued a report "confirm[ing] most of the allegations" against petitioner, including allegations that petitioner conducted a personal real estate business during DOE [\*3] working hours and subverted a school website to his personal website, which chronicled his on-going issues with the principal of IS 49 and the DOE. On May 17, 2013, the DOE served petitioner with Charges and Specifications pursuant to Education Law § 3020-a alleging that he had engaged in various acts of misconduct. A hearing before an arbitrator on the charges was scheduled for September 12, 2013.

[\*\*4] As an initial matter, the petition must be denied on the ground that it is time-barred. There is a four month statute of limitations to bring an Article 78 proceeding. *See* CPLR § 217. "The Statute of Limitations runs from the date the administrative determination becomes final and binding." *Matter of De Milio v. Borghard*, 55 N.Y.2d 216, 219, 433 N.E.2d 506, 448 N.Y.S.2d 441 (1982). The DOE's determination prohibiting petitioner from attending SLT meetings was made on April 26, 2012. Therefore, petitioner's time to bring an Article 78 proceeding challenging such decision expired four months later, in August 2012. However, petitioner did not commence this proceeding until June 4, 2013, more than nine months after his time to do so had already expired. Petitioner's assertion that the petition is timely because the statute of [\*4] limitations began to run from February 13, 2013, the date the UFT was advised that petitioner would be prohibited from attending SLT meetings, is without merit. The DOE prohibited petitioner from attending any school activities, which included SLT meetings, in April 2012. The fact that UFT was only notified of the DOE's position regarding petitioner's attendance at SLT meetings in February 2013 is irrelevant to a determination as to whether the instant petition is timely.

However, even if the petition was timely, it must be denied as the DOE's determination had a rational basis. On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v. Lewis*, 90 A.D.2d 748, 749, 455 N.Y.S.2d 810 (1st Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770, 809 N.Y.S.2d 98 (2d Dep't 2005); *see Pell v. Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231, 313 N.E.2d 321, 356 N.Y.S.2d 833 (1974)("[r]ationality [\*5] is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or capricious [\*5] test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, respondents' decision prohibiting petitioner from attending or participating in SLT meetings was rational as it was in accordance with respondents' policies and procedures. According to respondents, SLTs are advisory bodies that consult and advise the principal of a DOE school, make recommendations concerning educational matters and provide a plan concerning the curricular/academic goals of the particular school and are comprised of representatives of groups within the school community such as administrators, teachers, staff and parents. Pursuant to the DOE's Chancellor's Regulation A-655, which was promulgated pursuant to Education Law § 2590-h, to ensure the formation of SLTs in New York City public schools, "[t]he [\*6] only three mandatory members of the SLT are the school's principal, the Parent Association/Parent-Teacher Association (PA/PTA) President and the United Federation of Teachers (UFT) Chapter Leader, or their designees." Chancellor's Regulation A-655(III)(B). While mandatory members are expected to attend the SLT meetings, Chancellor's Regulation A-655 does not give SLT members the right to attend the meetings if they are prohibited from entering the school or participating in school activities due to administrative reassignment and/or pending charges of misconduct. Rather, pursuant to Chancellor's Regulation A-655, if a mandatory member is unable to attend an SLT meeting, a designee may serve in his/her place. Furthermore, respondents have affirmed that "[i]t is DOE policy, practice, and procedure that when a staff member is either under investigation awaiting formal charges to be served, or reassigned from a particular school due to allegations of misconduct and formal charges having [\*6] been served against the staff member, the staff member is not permitted to attend school events, meetings, or activities, whether they be during school hours or after hours."

Additionally, the petition [\*7] must be denied as respondents' decision does not violate Public Officer's Law ("POL") § 103(a) (the "Open Meetings Law"). Pursuant to the Open Meetings Law, except for executive sessions, "[e]very meeting of a public body shall be open to the general public." POL § 103(a). A "public body" is defined as

an entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body.

POL § 102(2). "The Open Meetings Law is designed to ensure that public business is conducted in an observable manner." *Matter of Smith v. City Univ. of N.Y.*, 92 N.Y.2d 707, 713, 708 N.E.2d 983, 685 N.Y.S.2d 910 (1999). To determine whether an entity is a "public body," courts must look to

the authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties [\*8] and constituencies.

*Id.* The Court of Appeals has held that an entity is a "public body" if

[i]t is invested with decision-making authority to implement its own initiatives and, as a practical matter, operates under protocols and practices where its recommendations and actions are executed unilaterally and finally, or receive merely prefatory review or approval.

*Id.* at 713-14.

In the instant action, respondents' decision prohibiting petitioner from attending the SLT meetings does not violate the Open Meetings Law as the SLT is not a "public body." As an initial matter, the authority of the SLT is limited and circumscribed as the SLT's primary purpose is an [\*7] advisory one - it makes recommendations concerning educational policy and establishes education goals for the school, which are consolidated into a Comprehensive Educational Plan ("CEP"). *See* Chancellor's Regulation A-655(II)(A)(1). The school principal, and not the SLT itself, develops the school-based budget and the community or school superintendent, and not the SLT itself, approves the budget and certifies that it is aligned with the CEP. *See id.* at (2) & (5). Moreover, if the SLT does not reach a consensus on the CEP or if the [\*9] SLT disagrees with the school principal on the alignment of the CEP with the budget, the superintendent makes the final determination on these issues. *See id.* at (4). Therefore, the role of the SLT is only advisory and is thus not one of conducting public business. *See Matter of Daily Gazette Co. v. North Colonie Bd. of Educ.*, 67 A.D.2d 803, 412 N.Y.S.2d 494 (3d Dept 1979)("[s]ince the...committees of the respondent are not given any authority to make final decisions on any matters but merely make recommendations on various subjects to the entire board, they are not transacting public business.")

Additionally, petitioner's request for an Order requiring respondents to participate in a training session concerning the obligations imposed by POL § 107 conducted by the staff of the Committee on Open Government is denied as petitioner has not provided a sufficient basis for such relief. Finally, petitioner's request for costs and attorney's fees pursuant to POL § 107(2) is denied as the petition has been dismissed and petitioner is therefore not the successful party.

Accordingly, the petition is denied and dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 11/4/13

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Enter: [\*10] /s/ Cynthia S. Kern

J.S.C

