

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

CORINE LIVERPOOL,
Petitioner,

INDEX NO. 100392/13
MOTION SEQ. NO. 001

-against-

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK, et al.,
Respondents.

The following papers, numbered 1 - 5 were considered on this motion to dismiss by respondent:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>5</u>
Replying Affidavits _____	<u>3, 4,</u>
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	

FILED

MAR 06 2014

Upon the foregoing papers, it is ordered that respondents' cross-motion to dismiss this Article 78 proceeding is denied, as indicated below.

COUNTY CLERK'S OFFICE
NEW YORK

Respondents jointly filed a pre-answer cross-motion to dismiss the petition on the grounds that petitioner failed to exhaust her contractual remedies and for failure to state a cause of action. Petitioner, a tenured teacher, commenced this Art. 78 proceeding challenging respondents' determination, which sustained her overall U-Rating for the 2011-2012 school year.

Respondents' argument that petitioner has failed to exhaust her contractual remedies is misplaced. While respondents argue that petitioner must avail herself of the grievance procedure set forth in the Teacher's Contract, such contract specifically states that "[i]n the event that a teacher appeals a rating, the appropriate forum for claiming a

failure to comply with procedures is the rating appeal process and not the grievance/arbitration procedure.” Verified Petition, Exh. H, Teacher’s Contract, Art. 8(J)(4). Thus, by the plain language of the Teacher’s Contract, petitioner, in appealing her U-Rating, was not required to file a grievance. As such, respondents’ cross-motion to dismiss the petition, on the ground that petitioner failed to exhaust her contractual remedies, is denied.

Further, pursuant to CPLR 3211(a)(7), on a motion to dismiss for failure to state a cause of action, the movant has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *See Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Here, it is clear that petitioner is challenging respondents’ determination, dated November 2, 2012, which denied petitioner’s appeal and sustained her U-Rating. The petitioner clearly states that “[i]n rating petitioner’s performance...[the] Principal...failed to conduct any formal observations. ...As a teacher in danger of receiving a U-Rating, the [respondents were] required to conduct formal observations of petitioner’s performance.” Petition, ¶ 32 and 33. The petitioner further states that “[t]he close temporal proximity between the observations underlying petitioner’s ‘Unsatisfactory’ annual rating...illustrates that her annual rating was the result of bad faith on the part of [respondents, and that] during the appeal hearing, [respondents] failed to offer any evidence of remediation, professional development or formal observations of petitioner’s lessons during the 2011-2012 school year.” *Id.* at ¶ 39 and 45. Thus, the petition, liberally

construed in favor of the petitioner, has clearly stated a cause of action, and respondents' cross-motion to dismiss, for failure to state a cause of action, is denied.

Accordingly, it is

ORDERED that respondents' cross-motion to dismiss is denied; and it is further

ORDERED that respondents shall serve and file their answer to the petition, within 20 days of service upon them of a copy of this order with notice of entry; failure to timely serve/file an answer may result in the granting of the requested relief upon default; and it is further

ORDERED that petitioner shall re-notice this matter in accordance with CPLR § 7804(f), returnable to the Motion Support Office, Room 130, 60 Centre Street, within 30 days of service of the answer (or move for a default upon expiration of the time to answer); and it is further

ORDERED that within 30 days of entry of this order, petitioner shall serve a copy upon respondents with notice of entry.

Dated: _____



DORIS LING-COHAN, J.S.C.



Check one: FINAL DISPOSITION
Check if Appropriate: DO NOT POST

NON-FINAL DISPOSITION

J:\Article 78\liverpool v Bd of Ed - Art. 78, U-Rating, pre-answer.wpd

FILED

MAR 06 2014

COUNTY CLERK'S OFFICE
NEW YORK

