

[2] In the Matter of the Application of PAUL BRIDGWOOD, Petitioner, For a judgment Pursuant to CPLR Article 78 -against- CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, Dennis Walcott, Chancellor of New York City Department of Education, Respondents. Index No. 100033/13**

100033/13

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2013 N.Y. Misc. LEXIS 2327; 2013 NY Slip Op 31172(U)

May 28, 2013, Decided

June 3, 2013, Filed

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

CORE TERMS: unsatisfactory, rating, school year, classroom, annual, teacher, satisfactory, teaching, remediation, bylaws, assigned, agency's determination, capricious, site, planning, designee, verified, monthly, twice, skill

JUDGES: [*1] DONNA M. MILLS, J.S.C.

OPINION BY: DONNA M. MILLS

OPINION

DONNA M. MILLS, J.:

In this special proceeding pursuant to C.P.L.R. Article 78, Petitioner Paul Bridgwood ("Petitioner") challenges a determination by the Respondent New York City Department of Education ("NYCDOE"), which sustained petitioner tenured teacher's Unsatisfactory annual rating for the 2010-11 school year as a mathematics teacher with the GED PLUS program at the Jamaica Learning Center site in Queens, New York, which is a school within the NYCDOE.

Petitioner seeks an annulment and reversal of that rating to Satisfactory, given that this Unsatisfactory annual rating is the first and only in his 34 years of Satisfactory teaching performance with the NYCDOE. The NYCDOE opposes the petition and cross moves for an order dismissing the petition on the ground that it fails to state a cause of action.

Beginning in 2007 and during the 2010-2011 school year, petitioner worked at the Jamaica Learning Center site. The 2010-2011 school year was the first year in which petitioner was assigned a single permanent classroom, as opposed to being an "itinerant teacher," that is one that travels from classroom to classroom. He was also assigned to a reading [*2] class, despite his purported lack of teaching certification and familiarity teaching in that area.

[**3] Soon after the beginning of the 2010-11 school year, petitioner began to be formally observed by his Assistant Principal ("AP"), Dannette Miller. During that year, petitioner was observed four times. Each time, petitioner's lesson was found to be unsatisfactory. As part of a formal observation report issued on November 22, 2010, AP Miller stated that she would continue to meet with petitioner at least twice monthly and provide an opportunity for him to conduct inter-classroom visitation with colleagues within GED PLUS to assist his professional development. This became part of a larger remediation plan. In addition to the meetings with AP Miller and the opportunity to observe another teacher, petitioner was assigned a coach to assist him during his reading class.

At the end of the 2010-11 school year, petitioner received an Unsatisfactory annual rating. The U-rating commented that petitioner's attendance and punctuality, voice, speech and use of English, planning and preparation of work, skill in adapting instruction to individual needs and capacities, effective use of appropriate methods [*3] and techniques, and evidence of pupil growth in knowledge, skills, appreciations and attitude were each unsatisfactory.

Petitioner requested an appeal of his 2010-11 Unsatisfactory annual rating for that school year in June 2011, and a hearing before the Office of Appeals and Review was held and scheduled on his rating for March 16, 2012. At the U-rating appeal hearing, AP Miller did not appear and was not present to justify any rationale for giving petitioner an Unsatisfactory annual rating for the 2010-11 school year. Robert Zweig ("Principal Zweig"), Principal of the Jamaica GED Program and rating officer testified at the U-rating hearing that there was no evidence that the majority of petitioner's students understood the material petitioner was attempting to teach. Principal Zweig also testified that with only six students in petitioner's classroom, every student should have been on point and understanding the work. One of petitioner's unsatisfactory observations, a classroom observation on November 10, 2010, specifically mentioned that only three of the six students seemed to have a grasp of the material. Another unsatisfactory classroom observation noted that petitioner repeatedly [*4] called on only one student to solve problems on the board at the front of the classroom. Principal Zweig testified that petitioner's level of planning and engagement was lacking.

[**4] Petitioner Zweig also testified that AP Miller personally met with petitioner twice monthly to assist him in his professional development. In addition, petitioner was provided with a paraprofessional to support him as well as a tutor for professional development. Principal Zweig testified at the hearing, all of these resources were designed to help petitioner improve his teaching performance and achieve a satisfactory observation and rating. However, based on petitioner's classroom observations, it was reported that he failed to improve.

At the hearing, petitioner was given the opportunity to present his case with argument, testimony, and exhibits, and he was represented by an advocate from his union. The Chancellor's Committee Chairperson created a review report and shared it with the Chancellor's designee, Shael Polakow-Suransky, Chief Academic Officer, Senior Deputy Chancellor. The Chancellor's designee found that the U-rating was sustained. On January 7, 2013, petitioner commenced this Article 78 proceeding [*5] seeking to change his rating form the 2010-11 school year from "unsatisfactory" to "satisfactory."

The role of a court in its examination of an administrative decision, pursuant to CPLR Article 78, is a limited one. The function of judicial review in an Article 78 proceeding is not to weigh the facts and merits de novo and substitute the court's judgment for that of the agency's determination. *Greystone Management Corp. v. Conciliation and Appeals Bd.*, 94 A.D.2d 614, 616, 462 N.Y.S.2d 13 (1st Dept. 1983), *aff'd*, 62 N.Y.2d 763, 477 N.Y.S.2d 315, 465 N.E.2d 1251 (1984). Rather, the standard of review in an Article 78 is whether an administrative determination is arbitrary or capricious, without a rational basis in the administrative record. *Id.*; see also, *Pell v. Board of Education*, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 313 N.E.2d 321 (1974).

"Evidence in the record supporting the conclusion that petitioner's performance was unsatisfactory could establish that the U-rating was made in good faith" (see *Batvrevra v New York City Dept, of Educ.*, 50 AD3d 283, 854 N.Y.S.2d 390 [2008]). Here, the four unsatisfactory classroom observations for the 2010-11 school year plus petitioner's excessive absences could rationally [*6] support a finding to sustain the U-rating of the petitioner.

However, petitioner contends that AP Miller's absence at the Review and an [**5] alleged lack of support and remediation makes the NYCDOE's decision to sustain petitioner's U-rating arbitrary and capricious and in bad faith. This Court will not second guess the sufficiency and quality of support and remediation offered and provided to the petitioner (see *Soto v Koehler*, 171 AD2d 567, 567 N.Y.S.2d 652 [1st Dept 1991]). To the extent, however, that petitioner claims that AP Miller not being present at the Review is grounds for overturning his U-rating, we look to the NYCDOE's bylaws.

NYCDOE Bylaw § 4.3.3 provides: "If a witness who was summoned or requested to appear is unavailable or unwilling to appear despite the best efforts of the committee, this shall not prevent a review from continuing but shall be one of the factors considered by the committee."

Here, this Court is unable to determine what efforts, if any, were made by the NYCDOE to request the appearance of AP Miller at the hearing. Moreover, the NYCDOE failed to annex a copy, as an exhibit for the Court's purview, the Chancellor's Committee's findings. Without such, this Court is unable to [*7] determine whether the NYCDOE complied with its own Bylaws in denying the appeal of the Unsatisfactory rating.

It is a "fundamental administrative law principle that an agency's rules and regulations promulgated pursuant to statutory authority are binding upon it as well as the individuals affected by the rule or regulation" (*Matter of Lehman v Board of Educ. of City School Dist. of City of N.Y.*, 82 AD2d 832, 834, 439 N.Y.S.2d 670 [1981]; see also *Matter of Syquia v Board of Educ. of Harpursville Cent. School Dist.*, 80 NY2d at 535-536). An adverse agency determination must be reversed when the relevant agency does not comply with either a mandatory provision, or one that was "intended to be strictly enforced" (*id.* at 536).

Accordingly, it is hereby

ORDERED that respondent's cross-motion to dismiss this Article 78 proceeding is denied; and it is further

ORDERED that respondents shall serve a verified answer within 30 days of the date of this decision, and petitioner shall serve a verified reply within 20 days thereafter.

This constitutes the decision and order of this Court.

[6]** Dated: 5/28/13

ENTER:

/s/ Donna M. Mills

J.S.C.