SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS Part 20
HON. PATRIA FRIAS-COLÓN, J.S.C.

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In the Matter of the Application of
Vito Vincent Puccio,

PETITIONER,

-against-

Department of Education of the City of New York

RESPONDENT.

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Index # 531051/2022
Cal. # 34 Mot. Seq. # 1

DECISION/ORDER

Recitation as per CPLR §§ 2219(a) and/or 3212(b) of papers considered on review of this motion:
NYSCEF Doc #s 1-5; 34-35 by Petitioner
NYSCEF Doc #s 9-32 by Respondent

Upon the foregoing cited papers and after oral argument on July 19, 2023, pursuant to CPLR § 3211(a)(7) and Article 78, the Decision and Order on Petitioner's Article 78 proceeding is as follows:

Petitioner's Article 78 proceeding (motion sequence # 1) is DISMISSED**.** Petitioner sought an Order: (1) declaring that the actions taken by Respondent Department of Education were arbitrary and capricious; (2) reinstating Petitioner to the position of tenured teacher retroactively; (3) for incidental damages including all past salary and benefits lost retroactively; (4) any reasonable attorney fees plus costs and disbursements of this lawsuit; and (5) such additional relief as this Court may deem just and proper.

Pursuant to CPLR §§ 3211(a)(7) and 7804(f), Respondent's request for an Order dismissing the Article 78 Petition on the grounds that it fails to state a claim is GRANTED**.**

BACKGROUND

Petitioner is a former employee of the New York City Department of Education ("DOE"). Petitioner commenced this Article 78 proceeding on October 26, 2022 seeking an Order (a) declaring Respondent's decision to deny Petitioner to complete his period of probation as arbitrary, capricious and made in bad faith; (b) granting equitable relief, including but not limited to directing Respondent to reinstate Petitioner in a tenured teaching position; (c) for incidental damages including lost wages and retroactive pay, plus costs and attorney fees; and (d) such other relief as this Court deems proper.

Petitioner's employment with the DOE began in August of 2018, when he was assigned to work as a special education teacher at P.S. 811Q in Queens[1]. His responsibilities included, among other things, implementing Individualized Education Plan ("IEP") goals in all areas. Petitioner was

[1] NYSCEF Doc No. 1 at pg. 3 ¶ 8.

also a member of the school wide Data Team[2]. Petitioner also taught classes in the Chapter 683[3] summer program at the school[4]. According to his employment records, Petitioner received Annual Professional Performance Review/Teacher Observation Reports ("annual ratings") during the 2018-2019, 2020-2021 and 2021-2022 school years[5]. As a result of the Covid-19 pandemic, no teacher ratings were issued for the 2019-2020 school year and Petitioner worked in person and remotely during the 2020-2021 school year[6].

Petitioner was also a member of the school crisis team[7]. It was working in this role that he responded to a July 30, 2021 incident at the school where personnel were summoned to a classroom because a student needed to be restrained[8]. Petitioner was observed on the floor seated next to the student, who was observed with scratches on his neck, back, arms and legs[9]. As a result of this incident, an investigation was conducted that substantiated Petitioner "used excessive force to subdue Student A when he 'acted up' in their classroom", and the investigating body recommended termination with a problem code entered in Petitioner's human resources file[10].

DISCUSSION

Petitioner was a probationary teacher employed by the DOE who could be terminated at any time for any reason[11]. Petitioner argues that the facts of his case demonstrate that the reasons used by the DOE to deny tenure and terminate his employment were arbitrary and capricious, necessitating court intervention.

The DOE's termination of Petitioner's employment was not arbitrary or capricious, nor was it made in bad faith.

In New York, it is well settled that in an Article 78 appeal, "neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is 'substantial evidence'"[12]. The scope of judicial review in an Article 78 proceeding is limited to whether a governmental agency's determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law[13]. Where the agency's determination is based on detailed methods derived from legislation,

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[2] NYSCEF Doc No. 1 at pg. 3 ¶ 8.
[3] The Chapter 683 is a program designed to accommodate special education students who required year-round in school instruction.
[4] NYSCEF Doc No. 1 at pg. 3 ¶ 16.
[5] NYSCEF Doc Nos. 13-16.
[6] NYSCEF Doc No. 1 at ¶3.
[7] NYSCEF Doc No. 1 at ¶17. The crisis team is made up of teachers trained to respond to students who pose immediate harm to themselves and other students.
[8] NYSCEF Doc No. 24.
[9] *Id*.
[10] *Id*.
[11] New York Education Law § 2573(1)(a)(ii). *See also Swinton v. Safir*, 93 NY2d 758 (1999).
[12] *Pell v Bd. of Educ*., 34 NY2d 222 (1974).
[13] *See* CPLR § 7803(3); *Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 230 (1974); *Scherbyn v. BOCES*, 77 N.Y.2d

is within an area of the agency's expertise and is amply supported by the record, judicial deference and substantial weight must be accorded to the determination[14]. The Court may not substitute its judgment for that of the decision-making agency, as it must only ascertain whether the agency's determination was rationally based[15].

Additionally, an agency is to be afforded wide deference in the interpretation of its regulations and, to a lesser extent, in its construction of the governing statutory law[16]. However, an agency cannot engraft additional requirements or assume additional powers not contained in the enabling legislation[17]. "The approach is the same when the issue concerns the exercise of discretion by the administrative tribunal[18]." Furthermore, "A probationary employee may be dismissed without specific reasons being given and without a hearing, judicial review of such termination being limited to an inquiry as to whether it was made in bad faith and was therefore arbitrary and capricious[19]." Furthermore, a board of education "has an unfettered right to terminate the employment of a teacher during his probationary period[20]." A Court "may not substitute its judgment" for that of the administrative body responsible for the decision "unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion[21]." Additionally, "if the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency[22]."

Here, Petitioner had difficulties with his teaching performance throughout his probationary period, as demonstrated by the annual ratings. Over the course of Petitioner's employment, these classroom observations were conducted multiple times a year by school supervisors and on two occasions by independent peer evaluators[23]. Of the thirty-two individual categories rated on Petitioner's six observations reports for the 2018-2019 school year, he received two ineffective scores, ten developing scores, seventeen effective scores and three highly effective scores[24]. Of the twenty-three individual categories rated on Petitioner's four observation reports for the 2019-2020 school year, he received six ineffective scores, nine developing scores, and three effective scores[25]. Of the sixteen individual categories rated on Petitioner's two observation reports for the 2020-2021 school year, Petitioner received one ineffective score, eight developing scores, and seven effective scores[26]. Lastly, out of the twenty-six individual categories rated on Petitioner's

753, 757-758 (1991).
[14] *Flacke v. Onondaga Landfill Sys., Inc.*, 69 N.Y.2d 355 (1987); *Halloran v. NYC Employees' Ret. Sys.*, 172 A.D.3d 715 (2d Dept. 2019).
[15] *Flacke* at 363; *Halloran*, 172 A.D.3d at 717.
[16] *Vink v. New York State Div. of Hous. and Community Renewal*, 285 A.D.2d 203, 210 (1st Dept. 2001).
[17] *Id.* at 210; *Matter of Schenkman v. Dole*, 148 A.D.2d 116 (1st Dept. 1989).
[18] *Pell v Board of Education*, 34 NY2d 222, 230 (1974) (quoting *Cohen and Karger, Powers of the New York Court of Appeals*, pp. 460-461; *see also 8 Weinstein-Korn-Miller, N. Y. Civ. Prac.,* par. 7803.04 et seq.; *1 N. Y. Jur., Administrative Law, §§ 177, 184*; *Matter of Colton v. Berman*, 21 N Y 2d 322, 329.
[19] *Bonney v Dilworth*, 99 AD2d 468, 468 2d Dept. (1984).
[20] *James v. Board of Education*, 37 N.Y.2d 891, 892 (1975).
[21] *Arrocha v. Board of Education*, 93 N.Y.2d 361, 363 (1999).
[22] *Matter of Peckham v Calogero*, 12 NY3d 424, 428 (2009).
[23] NYSCEF Doc No. 32 at pg. 3.
[24] NYSCEF Doc No. 10.
[25] NYSCEF Doc No. 11.
[26] NYSCEF Doc No. 12.

four observation reports for the 2021-2022 school year, Petitioner received three ineffective scores, fifteen developing scores, and eight effective scores[27]. Petitioner received more "Developing" and "Ineffective" scores than "Effective" ratings during his probationary employment.

Petitioner was made aware of his shortcomings and was told that his tenure was in jeopardy if there was no improvement[28]. On multiple occasions petitioner was given feedback on ways to improve his teaching abilities[29]. Since a Probationary teacher can be dismissed on any grounds, Petitioners lack of improvement in numerous categories serve as a sufficient, non-arbitrary or capricious basis to terminate Petitioner's employment. The termination was not random and there was no evidence supporting a finding of bad faith or termination for an impermissible reason. The Court declines to substitute its findings in place of the administrative determination by DOE. Consequently, this branch of Petitioner's claim fails.

Petitioner's claim for tenure by estoppel fails.

To prevail on a tenure by estoppel claim, Petitioner must show that he was allowed to continue to teach beyond the expiration of his probationary term[30]. Tenure may be acquired by estoppel when a school board accepts the continued services of a teacher or administrator but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher's probationary term[31]. In New York, teachers employed on or after July 1, 2015 are subject to a four-year probationary period and can be terminated at any time during that period[32].

Here, since Petitioner started his employment with the DOE in 2018 and subject to the four-year probationary period. Petitioner argues that his employment was continuous, and he achieved tenure prior to being terminated because of the additional days he worked in the summer Chapter 683 program. Petitioner urges that said additional workdays must be applied toward his tenure. This argument is unpersuasive. A probationary period is measured by the calendar year and not the school year[33] and the acceptance of a temporary assignment does not add additional time to a tenure-track teacher's period of employment. *Id*. In *Ricca v Board of Education*, 47 NY2d 385, 388 (1979), the Court held that the decision of a probationary teacher to accept a temporary assignment out of position in order to accommodate the needs of the school district does not serve to disrupt that teacher's probationary period, nor may it lead to increase the length of that probationary period. Petitioner's reliance on *Handy v Bd. of Educ. of the Enlarged City Sch. Dist. of Troy,* 30 Misc 3d 1205[A], 2010 NY Slip Op 52285[U], Sup Ct, Rensselaer County (2010) to further his argument that he is entitled to tenure by estoppel is also misplaced. In that case, petitioner was granted an extension of his probationary period and allowed to work past the expiration date with no action taken by the school board to terminate him. Here, there was never an extension of the Petitioner's probationary period and Petitioner never worked beyond the expiration date of an extended time period. Rather than being given an extension, Petitioner was

[27]NYSCEF Doc No. 13.
[28] NYSCEF Doc No. 15 at pg. 17.
[29] NYSCEF Doc No. 15.
[30] *McManus v Board of Education*, 87 NY2d 183 (1995).
[31] *Id* at 185.
[32] New York Education Law § 2573.
[33] N.Y. General Constitutional Law § 58.

in fact notified sixty (60) days in advance of the expiration of his probationary period that his employment was going to be terminated[34].

Petitioner is not entitled to extend his probationary period given his service as a substitute teacher. This branch of Petitioner's claim fails.

Petitioner has not alleged facts demonstrating any entitlement to a name-clearing hearing.

To trigger entitlement to a name-clearing hearing, a claimant must demonstrate "a likelihood of dissemination…[35]." Additionally, there is "no entitlement to a name-clearing hearing where there has been no public disclosure of any allegations affecting the plaintiff's good name or reputation"[36]. Here, Petitioner has not provided evidence of dissemination, nor has Petitioner demonstrated there was public disclosure. Petitioner asserts that there was a problem code entered into his DOE Human Resources file[37]. However, Petitioner does not provide supporting documentation regarding significance of said code that would be damaging to his good name or reputation. Nor does Petitioner provide evidence that the information was shared with a third party outside of the DOE. According to Respondent, such code is placed on a file to ensure that a background check is performed but does not contain any specific information regarding a teacher's prior employment history[38]. Additionally, Respondent asserts that the code does not prevent an employee from seeking DOE employment in a different district[39]. Petitioner argues that as a result of this code in his employment file, he is "unemployable in the education field"[40] but did not provide evidence of damage caused by the attachment of said code to his employment file which has negatively impacted his employment prospects.

Petitioner relies on *Higgins v. La Paglia*, 281 A.D.2d 679, 722 N.Y.S.2d 592. 3rd Dept. (2001) to support his demand for a name-clearing hearing. *Higgins* is distinguishable from the instant matter. There, conflicting performance assessments were at issue. That is not the case here, where Petitioner's classroom annual ratings consistently demonstrated a need for improvement in Petitioner's classroom performance. Petitioner also relies on *Matter of Myrna Brathwaite, v. Manhattan Children's Psychiatric Center et. al.*, 70 A.D.2d 810 1st Dept. (1979), which is also distinguishable from the instant facts. In *Myrna*, the petitioner was falsely accused of wrongdoing.

In addition to Petitioner's pedagogical shortcomings, he was also the subject of an investigation by the Special Commissioner of Investigation for the New York City School District ("SCI")[41] as a result of the July 30, 2021 classroom incident. According to the findings of the SCI investigation memorialized in a November 10, 2022 letter submitted to Schools Chancellor David Banks, Petitioner responded to a classroom where a student was in crises and was observed on the

[34] NYSCEF Doc No. 25.
[35] *Swinton v. Safir*, 93 NY2d 758, 765 (1999).
[36] *Meyers v. City of New York*, 208 AD2d 258, 259 2d Dept (1995).
[37] NYSCEF Doc No. 1 pg. 7 at ¶ 41.
[38] NYSCEF Doc No. 32 at pg. 19.
[39] DOE employment regulations, https://www.schools.nyc.gov/docs/default-source/default-document-library/c-205-9-5-2000-final-remediated-wcag2-0.pdf.
[40] NYSCEF Doc No. 1 at ¶55.
[41] NYSCEF Doc No 24.

floor with the student after the student was restrained[42]. The incident resulted in visible injuries to the student as observed by school personnel, the responding police officers and his mother[43]. The visible injuries included cuts, scrapes and bruises to his neck, back, arm and shoulders[44]. When his mother asked the student about the injuries, he said "Mr. Vinny hit me"[45]. The SCI substantiated that Petitioner used excessive force and recommended that Petitioner be terminated[46]. Petitioner argues that the results of the SCI investigation has had a significant impact on his ability to be hired. The substantiated allegations against Petitioner warranting an SCI investigation were serious and Petitioner was afforded an opportunity to respond to said substantiated allegation. Therefore, Petitioner is not entitled to a name-clearing hearing.

Respondent's determination to deny Petitioner tenure is not arbitrary and capricious. Rather, the decision was supported by competent evidence, including the annual performance ratings[47] and other supporting documentation[48]. The DOE acted in an appropriate manner and there is no appearance of illegality or bad faith. Consequently, the Court will not disturb the DOE's decision to deny tenure to the Petitioner.

Therefore, it is hereby **ORDERED**, that the instant Article 78 petition of Vito Vincent Puccio is dismissed to the extent that the June 27, 2022 denial of Certification of Completion of Probation with the New York City Department of Education is affirmed and Respondent's denial of Petitioner's application for reappointment/reinstatement is hereby annulled.

It is further **ORDERED** that Respondents' cross-motion to dismiss is hereby granted in its entirety.

This constitutes the Decision and Order of the Court.

Date: July 3, 2024
Brooklyn, New York

Hon. Patria Frias-Colón, J.S.C.

[42] NYSCEF Doc No. 24.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] NYSCEF Doc Nos. 10-13, 16-22.
[48] NYSCEF Doc Nos. 14-21.