

**Matter of Fuentes v Department of Educ. of the City of
N.Y.**

2024 NY Slip Op 34053(U)

November 14, 2024

Supreme Court, Kings County

Docket Number: Index No. 530568/22

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of November, 2024.

P R E S E N T:

HON. FRANCOIS RIVERA,

Justice.

-----X

In the Matter of the Application of

SONIA FUENTES,

Petitioner,

For Judgment pursuant to Art. 78, CPLR.

- against -

Index No. 530568/22

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

1-3
12-33
37-39, 42

Upon the foregoing papers in this Article 78 proceeding, petitioner Sonia Fuentes (Fuentes or Petitioner) seeks a judgment, pursuant to CPLR Article 78 (in motion sequence [mot. seq.] one): (1) declaring that respondent the Board of Education of the City School District of the City of New York, sued herein as the "Department of Education of the City New York" (DOE or Respondent) has taken action against Petitioner that was arbitrary and capricious and in bad faith; (2) granting Petitioner equitable relief, including reinstating

Petitioner “to the position of a tenured teacher retroactively”; (3) awarding Petitioner incidental damages, “including all past salary lost and benefits lost retroactively”; and (4) awarding her reasonable attorneys’ fees, costs and disbursements (NYSCEF Doc No. 1).

Background

The Verified Petition

On October 21, 2022, Petitioner, a teacher employed by DOE,¹ commenced this Article 78 proceeding by filing a notice of petition and a verified petition “challenging the denial of completion of probation and termination of her employment by a letter from Superintendent Jacqueline Rosado sent on June 27, 2022, and effective sixty days later” (NYSCEF Doc No. 1 at ¶ 4). The petition alleges that:

“Petitioner commenced her employment as an ELA [(J)English) teacher with the DOE in September 2018. Ms. Fuentes was subject to a four-year probationary period at CS 211 The Bilingual School, the Bronx, NY, where she taught from September 2018 to the date of her discontinuance on June 27, 2022. . . .” (*id.* at ¶ 8).

The petition includes the June 27, 2022 “Denial of Completion of Probation Letter,” in which Superintendent Rosado informed Fuentes that “in accordance with Section 2573 Subdivision 1 of the State Education Law, I am denying your Certification of Completion of Probation with the New York City Department of Education” (NYSCEF Doc No. 2).

The petition describes the process by which DOE evaluates its teachers as follows:

¹ While this Article 78 Proceeding challenges DOE’s termination of Fuentes’ employment as an English teacher at C.S. 211 in the Bronx in the summer of 2022, Fuentes was admittedly reinstated on October 12, 2022, and is currently assigned as a common branch teacher (grades 1-6) at P.S. X088, the S. Silverstein Little Sparrow School in the Bronx (NYSCEF Doc No. 12 at ¶ 128 and NYSCEF Doc Nos. 37 at ¶ 53 and 39).

“The New York City Department of Education evaluative system is a complicated system that was eventually agreed to by the DOE and the UFT. The overall ratings are ineffective, developing, effective, and highly effective.

“[t]he teacher rating system has two major components. One is the Measure of Teacher Practice (MOTP), which is 60 percent of the teacher’s overall rating for a school year. It consists of subjective observations where a teacher is usually observed approximately four times a year. The evaluator conducts three observations [and is] only required to observe a teacher for fifteen minutes, and for the formal observation, the evaluator is required to observe an entire period.

“The Measure of Student Learning (MOSL) is an objective test that measures Ms. Fuentes’ students’ academic progress from the beginning to the end of the school year. The MOSL scores are forty percent of the teacher’s overall rating” (NYSCEF Doc No. 1 at ¶¶ 17-19).

After Petitioner was rated as an overall “effective” teacher from 2018-2022, she was allegedly observed by Assistant Principal (AP) McDonald on May 9, 2022, and May 26, 2022, and was then rated as an “ineffective” teacher in eight categories (*id.* at ¶¶ 15-16). The petition alleges that “[t]he assistant principal stated in observation that ‘[t]he teacher resists feedback performance from either supervisors or more experienced colleagues[,]’” which is inconsistent with a January 2022 observation made by the Principal (*id.* at ¶ 31).

Fuentes challenges DOE’s rating system of its teacher’s performance, particularly “DOE[’s] policy and practice of using . . . subjective opinions of administrators who observe[d] and then judge[d] Ms. Fuentes after supposedly looking at her teaching for 15-minutes” (*id.* at ¶ 20). The petition alleges that “opinions of an administrator who wants

Petitioner removed from the school cannot be the only determining factor” (*id.* at ¶ 22).

The petition further alleges that:

“[t]he Administrators did not follow evaluative procedures on the final two observations. The DOE did not develop strategies for improvement. The timeframe of the observations prevented the implementation of recommendations because the observations were at the very end of the school year.

“Ms. Fuentes was subjected to microscopic scrutiny. The evidence did not align with components and or component ratings in many observations. The evidence is cut and pasted from the Danielson Rubric. The evidence was not lesson-specific Observable components were not rated, and Petitioner was rated on components not observed. Component ratings at times contradicted each other” (*id.* at ¶¶ 23-24).

The petition alleges that “objective data reflect that [Fuentes’s] students showed remarkable academic progress, which is why she was [rated] an effective teacher from September 2018 to June 2022” (*id.* at ¶ 25).

The petition alleges that “Fuentes was not provided a 30-day notification for a discontinuance and a 60-day notice for a denial of completion of probation,² along with whatever ratings and documentation support the termination” (NYSCEF Doc No. 1 at ¶ 34). The petition alleges that “[t]he decision to deny certification of completion of Petitioner’s probation and terminate her employment was arbitrary and capricious, without rational basis, and in bad faith” (*id.* at ¶ 35). The petition further alleges that DOE “failed to follow its own rules and regulation[s] and the New York State Education Law in denying

² This allegation is contradicted by Superintendent Rosado’s June 27, 2022 “Denial of Completion of Probation Letter” which explicitly provided Fuentes with the requisite 60-day notice for denial of her probation (NYSCEF Doc No. 2).

Petitioner's tenure and terminating her employment" and "[t]here was no rational basis to deny Petitioner tenure and terminate her employment" (*id.* at ¶¶ 40-41).

By the petition, Fuentes seeks: (1) a judgment declaring that the denial of tenure and termination of her employment by DOE was arbitrary, capricious and in bad faith; (2) equitable relief, including Petitioner's retroactive reinstatement to a tenured teaching position; and (3) damages for lost wages, lost benefits and attorneys' fees (*id.* at 10).

DOE's Answer

On January 23, 2024, DOE e-filed its verified answer to the petition, in which it denied the material allegations and admitted that "Petitioner was appointed as probationary teacher assigned to Community School [C.S.] 211, the Bilingual School, in the Bronx in September 2018 subject to a four[-]year probationary period" (NYSCEF Doc No. 12 at ¶¶ 8 and 47). DOE's answer contains a "Statement of Pertinent and Material Facts," which details the DOE's review process during Fuentes' four-year probationary period (*id.* at ¶¶ 55-113), and alleges that:

"[o]ver the course of four school years, and as memorialized in multiple observations by no less than 3 separate evaluators (AP Blanca Torres-Mutt, AP Howard R. Macdonald and Principal Tanya Drummond), Petitioner was not consistently rated 'effective' in Domain 3 – specifically component 3b (Questioning and Discussion) or 3c (Engaging Students in Learning) – which captures classroom observations and [is] thus more heavily weighted.

"As evidenced by the observations reports, Petitioner's ratings failed to improve to an effective level during the relevant school years even with additional support provided by the school through professional development and lesson plan reviews."

* * *

“Even with her overall effective annual ratings, many of Petitioner’s component ratings specific to the heavily weighed instructional domains were not effective and, therefore, justify Respondents’ good faith basis to deny tenure. The observation reports from 2018 through 2022 demonstrate that Petitioner consistently received scores unreflective of the satisfactory teaching instruction required by the school administration (*id.* at ¶¶ 114-115 and 122).

DOE’s answer annexes several Teacher Observation Reports, which reflect Fuentes’ less than “effective” teaching performance during the four-year probationary period, and are dated November 9, 2018, February 25, 2019, March 20, 2019, May 7, 2019, March 11, 2021, November 5, 2021, January 21, 2022, May 9, 2022 and May 26, 2022 (NYSCEF Doc Nos. 14-17 and 20-24).

DOE’s answer also alleges that Fuentes had an “excessive number of school absences” and “[d]uring the 2018-2019 school year, Petitioner missed school 11 times, ‘thereby establishing a pattern of extending [her] weekends’ by skipping several Mondays and Fridays” (NYSCEF Doc No. 12 at ¶¶ 116-117). The answer further alleges that “[o]n March 8, 2022, Principal Drummond sent Petitioner a communication stating that Petitioner had been absent from school 18 times throughout the 2021-2022 academic year[,]” 11 of which were on a Friday or Monday (*id.* at ¶¶ 119-120). Principal Drummond allegedly warned Fuentes twice that her poor attendance may lead to disciplinary action, including discontinuance of her probationary period and termination of her employment (*id.* at ¶¶ 118 and 121). DOE’s answer further alleges that:

“[t]he combination of Petitioner’s overall failure to consistently demonstrate effective classroom pedagogy and her poor absenteeism record led C.S. 211 Principal Drummond to recommend that Petitioner be denied tenure and that she should be discontinued during probation.

“Accordingly, on June 27, 2022, Superintendent Jacqueline Rosado informed Petitioner that Petitioner had been denied completion of her probation, which was scheduled to end on September 6, 2022. . . .” (*id.* at ¶¶ 125-126).

DOE’s answer alleges that it “placed a ‘problem code’ in their database associated with Petitioner’s personnel file following her discontinuance” which “does not prohibit an employee from returning to work at the DOE” in another school district (*id.* at ¶ 127). Notably, DOE’s answer alleges that Fuentes “has been reinstated effective October 12, 2022 and is currently assigned as a common branch teacher (grades 1-6) at P.S. X088, the S. Silverstein Little Sparrow School in the Bronx” (*id.* at ¶ 128).

DOE’s answer asserts the following defenses: (1) “[t]he decision to deny certification of petitioner’s completion of probation was rationally based upon the record of Petitioner’s performance during the probationary period . . .”; (2) the DOE’s “Denial of Completion of Probation Letter to Petitioner was not arbitrary, capricious, an abuse of discretion, affected by error of law, or violative of a duty enjoined upon Respondent by law”; and (3) the DOE “acted reasonably, lawfully, and in good faith, without malice, in accordance with the Constitution and laws of the United States and the State of New York, the Charter and laws of the City of New York, and all applicable laws, by-laws, rules, procedures, and regulations” (*id.* at ¶¶ 129-131).

DOE's answer is supported by a memorandum of law in opposition to the petition, which reiterates the factual allegations in DOE's answer and asserts that "Petitioner has not met her burden of demonstrating that her discontinuance was arbitrary, capricious, unlawful, or made in bad faith" or that "the DOE violated the procedural requirements of Education Law § 2573 (a) (ii)" (NYSCEF Doc No. 34 at 1).

Essentially, DOE relies on the Teacher Observation Reports, as required under the law and its collective bargaining agreement with the United Federation of Teachers (UFT), in order to "keep track of a teacher's progress" (*id.* at 2). DOE asserts that:

"[d]uring Petitioner's time at C.S. 211, for evaluative purposes, administrators observed Petitioner's classroom teaching four times during the 2018-2019 school year, once for 2020-2021 school year, and four times during the 2021-2022 school year and generated classroom observation reports to memorialize their observations about Petitioner's pedagogy and to provide feedback that was evidence-based and aligned to the Danielson Rubric" (*id.* at 3).

Based on the observations of her teaching by the administrators, Fuentes was provided with her overall Measures of Teaching Practice (MOTP) score of only 1.93 (classifying her as "developing") out of a possible score of 4.00 for the 2021-2022 academic year (*id.* at 9).

DOE explains that "[e]ven with her overall effective annual ratings, many of Petitioner's component ratings specific to the heavily weighed instructional domains were either not effective and, therefore, justify [its] good faith basis to deny tenure" (*id.* at 12). DOE asserts that in addition to excessive absenteeism, "[t]he observation reports from 2018 through 2022 demonstrate that Petitioner consistently received scores unreflective of the satisfactory teaching instruction required by the school administration" (*id.*).

Petitioner's Reply

Fuentes, in reply, submits an affirmation in which she reiterates her credentials and the allegedly “subjective” process by which she was unfairly reviewed by administrators (NYSCEF Doc No. 37 at ¶¶ 1-20). Fuentes asserts that “[t]he Administrators did not follow evaluative procedures on the final two observations” of her job performance in 2022 and “did not develop strategies for improvement” (*id.* at ¶¶ 21 and 22). Fuentes argues that “[t]he timeframe of the observations prevented the implementation of recommendations because the observations were at the very end of the school year” (*id.* at ¶ 23). While Fuentes argues that “the evidence did not align with components and or component ratings in many observations” and “observable components were not rated, and I was rated on components not observed[,]” she fails to substantiate these alleged discrepancies (*id.* at ¶¶ 32 and 35).

Fuentes further claims that “[t]he Principal also targeted me because she was aware that I have a son with a disability (chronic asthma, severe food allergies, and eczema)” and claims that she was absent “because I needed to take care of my son when he was ill” during the Covid pandemic (*id.* at ¶¶ 44 and 47). Notably, Fuentes admits that she was eventually “able to secure another employment” (*id.* at ¶ 53). Fuentes also submits a reply memorandum of law in further support of her Article 78 petition (NYSCEF Doc No. 36).

Discussion

In a CPLR article 78 proceeding to review a determination made by an administrative agency such as the DOE, “the court’s inquiry is limited to whether the

determination is arbitrary and capricious, or without a rational basis in the record and a reasonable basis in law” (*Matter of ATM One, LLC v New York State Div. of Hous. & Community Renewal*, 37 AD3d 714, 714 [2d Dept 2007]; see CPLR 7803 [3]; *Matter of Velasquez v New York State Div. of Hous. & Community Renewal*, 130 AD3d 1045, 1046 [2d Dept 2015]; *Matter of Gomez v New York State Div. of Hous. & Community Renewal*, 79 AD3d 878, 878-879 [2d Dept 2010]). In reviewing an administrative agency’s determination, a Court “may not substitute its own judgment of the evidence for that of the administrative agency” if the agency’s determination is rational (*Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 652 [2013] [internal quotation marks omitted]; see *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of 9215 Realty, LLC v State of N.Y. Div. of Hous. & Community Renewal*, 136 AD3d 925 [2d Dept 2016]).

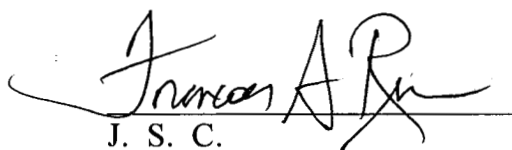
Notably, the Court of Appeals has long held that “a Board of Education, under Education Law § 2573 (1) (a), has the right to terminate the employment of a probationary teacher at any time and for any reason, unless the teacher establishes that the termination was for a constitutionally impermissible purpose, violative of a statute, or done in bad faith” (*Frasier v Bd. of Educ. of City Sch. Dist. of City of New York*, 71 NY2d 763, 765 [1988]).

Here, Petitioner failed to satisfy her burden of demonstrating that the DOE's denial of her tenure and termination from her teaching position in 2022 was arbitrary and capricious, lacked a rational basis or was made in bad faith. The Teacher Observation Reports submitted by DOE reflect that many of Fuentes' component ratings specific to instructional domains were rated "not effective" or "developing" during her probationary period, and thus, supported the DOE Superintendent's denial of her tenure and termination. The record also reflects that Fuentes was reprimanded at least twice about her excessive absenteeism and warned that it may result in the discontinuance of her probationary period, denial of her tenure and termination. In short, the record reflects that the DOE had a rational and good faith basis to deny Fuentes tenure and terminate her based on her observed job performance and record of excessive absences during her probationary period. Accordingly, it is hereby

ORDERED that the petition (mot. seq. one) is denied and this matter dismissed.

This constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.

HON. FRANCOISA A. RIVERA