

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ

PART 13

Justice

JOHANNA FRANCOIS,

INDEX NO.

103078/11

MOTION DATE

03-11-11

- v -

MOTION SEQ. NO.

001

CITY OF NEW YORK; NEW YORK CITY

DEPARTMENT OF EDUCATION; JOEL I. KLEIN, CHANCELLOR

of NEW YORK CITY DEPARTMENT OF EDUCATION,

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this petition to/for Art. 78

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

UNFILED JUDGMENT

Answering Affidavits — Exhibits _____ cross motion

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered and adjudged that this Article 78 petition is granted, Respondent's denial of Petitioner's appeal of an Unsatisfactory rating at the annual performance review for the 2009-2010 school year is reversed and the Unsatisfactory rating is vacated. The cross-motion is denied.

In this Article 78 proceeding, Petitioner, Johanna Francois, seeks a judgment reversing Respondent's New York City Department of Education (DOE) denial of her appeal of an Unsatisfactory rating at the annual performance review for the 2009-10 school year and reversing the Unsatisfactory rating for the 2009-10 school year. Petitioner also seeks an award making her whole for lost per session work in the amount of \$5,000, plus interest.

Petitioner started as a chemistry teacher with the DOE in September 2002. In 2005, she received tenure. She received "Satisfactory" year end ratings for her first seven years of employment with the DOE. On December 17, 2009, Principal Ivan Cohen observed Petitioner teaching a class and provided a written record of his observations with comments (the December Letter). In the December Letter, Principal Cohen rated the lesson Satisfactory. Principal Cohen made some recommendations, however none of the recommendations had a corrective or disciplinary tone.

On or about May 6, 2010 Petitioner received a letter dated April 21, 2010 regarding one of her classes that had been observed by Principal Cohen (the May Letter). The May Letter states the observed class took place on or about Monday, March 23, 2010, is addressed to Petitioner, but the second sentence states that

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

the observed class "was being co-taught by you and [Petitioner]." The May Letter is critical of both teachers' performance and rated the lesson Unsatisfactory.

On or about May 14, 2010, Petitioner responded to the May Letter by way of a written statement (the May Response). The May Response refuted most of Principal Cohen's comments in the May Letter, and noted that there was no pre-observation conference prior to the March 23, 2010 observation. Petitioner had requested pre-observation conferences in writing on October 9, 2009 and February 1, 2010 and in person for all formal observations.

On or about May 26, 2010, Petitioner received an Action Plan letter (the Action Plan) detailing steps to be implemented as a result of the recommendations from observation reports from the 2009 -2010 school year. The Action Plan consisted of five goals each with specific sub goals, except for the fifth goal, Professional Development, which was blank. The Action Plan was signed on June 1, 2010 by Principal Cohen and Assistant Principal David Liu. Petitioner did not sign the Action Plan. A note is handwritten below the signatures of Principal Cohen and Assistant Principal Liu which states,

"This Action Plan was presented to Ms. Francois on May 26th 2010. On June 1st Ms. Francois stated she would like to speak about the Plan. No meeting has been scheduled. On June 3rd Ms. Barton stated that the Plan will not be signed. The Plan will be implemented immediately. Rebuttal attached and filed."

The handwritten note appears to be signed by Principal Cohen and is dated June 4, 2010.

The rebuttal submitted by Petitioner (the Rebuttal) refutes many of the recommendations in the Action Plan as practices already being implemented by Petitioner and requests that the Action Plan be reviewed since in Petitioner's opinion, the Action Plan appears to be a generic list not tailored to the feedback and recommendations received following her observed classes. Petitioner filed a second Step One grievance with the United Federation of Teachers regarding the Action Plan on or about June 4, 2010.

On June 3, 2010, the same day that Principal Cohen was informed that Petitioner would not sign the Action Plan, one of Petitioner's classes was observed by Assistant Principal David Liu. Sometime after the observation, Petitioner received a letter from Assistant Principal Liu regarding the observation (the June Letter). The June Letter is critical of the observed class in regards to content and interaction with students. The June Letter makes no reference to the Action Plan, and concludes by stating that, "[t]his was an unsatisfactory informal observation."

On or about June 25, 2010 Petitioner received an Unsatisfactory year end rating for the 2009 - 2010 school year from Principal Cohen. Petitioner requested an internal appeal of the Unsatisfactory rating with the DOE's Office of Appeals and Review. A hearing for the appeal was scheduled on October 22, 2010, before Hearing Officer Harris (the Appeal). At the Appeal, Petitioner argued that Principal Cohen did not follow the proper procedure in giving her an Unsatisfactory rating.

Petitioner received a letter dated November 24, 2010 from DOE Deputy Chancellor of the Division of School Support and Instruction, Eric Nadelstern, informing her that her appeal of the Unsatisfactory rating had been denied (the Denial Letter).

Petitioner thereafter commenced this Article 78 proceeding to reverse the decision in the Denial Letter and to annul her Unsatisfactory year end rating for the 2009 -2010 school year.

An administrative decision will withstand judicial scrutiny if it is supported by substantial evidence, has a rational basis and is not arbitrary and capricious. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321 (1974); *Ansonia Residents Ass'n v. New York State Div. of Housing and Community Renewal*, 75 N.Y.2d 206, 551 N.E.2d 72, 551 N.Y.S.2d 871 (1989).

Petitioner's argument goes to the question of whether or not the administrative decision was arbitrary and capricious within the meaning of CPLR Section 7803(3), which questions "whether a determination was made in violation of lawful procedure."

The basis for Petitioner's argument that Principal Cohen did not follow lawful procedure in giving her an Unsatisfactory rating is Chief Executive's Memorandum #80 which was attached to the petition (Memo 80). Memo 80 is dated March 31, 1998 and addressed to All Superintendents and All Principals from William P. Casey, Chief Executive for Program Development & Dissemination for the predecessor agency of the DOE. The subject of Memo 80 is titled "Performance Review and Professional Development Plan for Teachers." Memo 80 summarizes the Teacher Performance Review model(s) as agreed upon by contract between the United Federation of Teachers and the DOE. Memo 80 outlines two components under which a teacher can be evaluated. Tenured teachers, if agreed to by the teacher and the teacher's supervisor, can follow an informal observation model whereby

"[t]eachers, in collaboration with their supervisors, will prepare a brief written statement describing their annual performance option in terms of their own goal(s) and objectives for the school year. At the end of the year, the impact of these teaching activities on their students

should also be summarized and evaluated jointly by teacher and supervisor.”

The second option outlined in Memo 80 is a formal observation model. Memo 80 describes the formal observation model as, “a traditional classroom observation by a principal or supervisor with written feedback and/or comments.” The second sentence describing the formal observation model states, “[p]re-conferences for all formal teacher observations are required.” Memo 80 then describes different forms of conferences based on the specifics of the teacher’s situation.

Memo 80 continues the description of the formal observation model as follows,

“[t]he formal observation including a pre- and post-observation conference and written feedback is required for...tenured teachers in danger of receiving an unsatisfactory rating...In collaboration with their principal, these teachers may also utilize [the Informal observation model] as part of their performance review. This does not replace [the formal observation model].”

Memo 80 concludes by stating again that, “...tenured teachers who are in danger of receiving an unsatisfactory rating must have formal observations including a pre-observation and post-observation conference by the principal or designee as part of a prescriptive plan to improve their teaching.”

“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.” *Cohn v. Board of Education of City School District of City of New York*, 2011 NY Slip Op 31555U, 31 Misc.3d 1241(A) (N.Y. Sup. Ct. 2nd Dept 2011) quoting from *Matter of Lehman v. Board of Education of City School District of City of New York*, 82 A.D.2d 832, 439 N.Y.S.2d 670 (N.Y.A.D. 2nd Dept 1981). “Rules” have been defined by the Courts as norms or procedures promulgated by an agency that establish a fixed pattern or course of conduct for the future. See *People v. Cull*, 10 N.Y.2d 123, 218 N.Y.S.2d 38 (1961); and *Cubas v. Martinez*, 8 N.Y.3d 611, 838 N.Y.S.2d 815 (2007).

Courts distinguish rules from interpretive or advisory instructions by the plain language of the instructions. In the instant case, the plain language of Memo 80 states that the formal observation model including both a pre- and post-observation conference is required for tenured teachers in danger of receiving an unsatisfactory rating, and that the use of the Informal observation model can only supplement, but cannot replace, the formal observation model.

The plain language of Memo 80 makes it clear that, “pre-observation and

post-observation conference[s] by the principal or designee [are a] part of a prescriptive plan to improve [the observed teacher's] teaching." Courts have held that, "a corollary of [the principle that rules promulgated by an agency are binding upon it] is that rules of an administrative agency which regulate procedure affecting substantial rights of individuals may not be waived by the agency." *Lehman v. Board of Ed., supra*. Memo 80 requires that teachers in danger of receiving unsatisfactory ratings and by extension in danger of being fired, be given the opportunity to improve their performance through the pre- and post-observation conferences in order to avoid termination.

It is unclear from the plain language of Memo 80 whether Petitioner should be considered a tenured teacher in danger of receiving an unsatisfactory rating for the purposes of the March 23, 2010 observation. Memo 80 does not explain whether this includes any teacher who could conceivably get an unsatisfactory rating or merely those who are likely to get an unsatisfactory rating.

For the purposes of the June 3, 2010 observation, it is clear that Petitioner would be a tenured teacher in danger of receiving an unsatisfactory rating. She had received an unsatisfactory rating following the March 23, 2010 observation, had been given the Action Plan which listed specific goals that she needed to achieve to improve the overall quality of her performance, had twice submitted written statements refuting the comments and recommendations given to her following observed classes, had requested a meeting with her supervisors to speak about the Action Plan, had explained to her supervisors that she would not sign the Action Plan because she felt she was already implementing many of the practices in the Action Plan, her final observation took place a week after she was given the Action Plan and was still arguing with her supervisors over said Action Plan.

A tenured teacher with seven years of satisfactory ratings in such a situation would have to be considered a tenured teacher in danger of an unsatisfactory rating of the type who has an interest in the requirement for pre- and post-observation conferences to help her improve her performance. This is especially true for a teacher who had already submitted a written request for conferences in connection with formal observations at the beginning of the semester and according to Principal Cohen's handwritten note on the Action Plan, had reiterated that request immediately preceding the June 3, 2010 observed class.

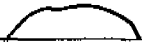
Respondent's reliance on *Cohn* to establish that Memo 80 should not be considered a rule binding upon the DOE is misplaced. *Cohn* can be distinguished from the instant case by the finding in *Cohn* that, "[t]he [performance review process being challenged in *Cohn*] is intended to act as a set of somewhat flexible guidelines rather than as a directive that must be strictly enforced and that guarantees a substantial right." *Cohn, supra*. The plain language of Memo 80, as stated above, makes it clear that it is not flexible, must be strictly enforced, and thus guarantees a substantial right.

Accordingly, it is the decision and judgement that the petition is granted and Respondent's cross motion to dismiss is denied.

Accordingly, it is ORDERED and ADJUDGED that the petition to reverse the November 24, 2010 denial of appeal by the Respondent and Petitioner's 2009-2010 year end Unsatisfactory rating is granted. The Unsatisfactory rating is vacated. The remainder of the petition is denied.

This constitutes the decision and judgment of this court.

Dated: August 22, 2011



MANUEL J. MENDEZ J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

UNFILED JUDGMENT

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