

SCANNED ON 6/8/2011
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

IA PART 10

PRESENT: ALICE SCHLESINGER
Justice

PART _____

Index Number : 110409/2010
COHN, MITCHELL
VS.
BRD OF EDUCATION OF THE CITY
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78
petition is denied and the proceeding
is dismissed in accordance with the
accompanying memorandum decision.
The Clerk shall enter judgment accordingly.

UNFILED JUDGMENT

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).

JUN 07 2011

Dated: June 7, 2011

Alice Schlesinger

ALICE SCHLESINGER *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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

-----X
In the Matter of the Application of

MITCHELL COHN,

Petitioner,

Index No. 110409/10
Motion Seq. No. 001

-against-

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK; and
JOEL I. KLEIN as Chancellor of the City School
District of the City of New York,

Respondents,

UNFILED JUDGMENT

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).

For An Order and Judgment Pursuant to Article 78 of
the Civil Practice Law and Rules.

-----X
SCHLESINGER, J.:

Petitioner Mitchell Cohn, a tenured teacher, commenced this Article 78 proceeding against the New York City Board of Education (now known as the Department of Education or DOE) to annul the unsatisfactory annual performance rating he received for the 2006-2007 academic year. Petitioner primarily asserts that the DOE failed to comply with the Formal Observation model in place for rating tenured teachers. DOE opposes, pointing to various discussions, conferences, observations, and reports to confirm their compliance and asserting that any deviation from the Formal Observation model did not violate any rule or regulation nor deprive petitioner of any substantial right.

Background Facts

Petitioner Mitchell Cohn is a tenured teacher assigned to teach Language Arts at Middle School 50 K, also known as The Williamsburg Middle School Academy, in the City of New York. On his Annual Professional Performance Rating Sheet (APPR) for the academic year 2005-2006, Cohn received an unsatisfactory rating (U-rating). As a result

of this rating, Cohn was entitled to be rated pursuant to the Formal Observation model in the next year. In that next academic year, 2006-2007, Cohn again received a U-rating. The rating, dated June 11, 2007, was based on deficiencies found in seven different categories and was documented by the September 6, 2006 Professional Development Plan and five separate classroom observation reports written during the Spring 2007 semester (Exh A to Petition).

The September 2006 Professional Development Plan was prepared as a result of the U-rating in the 2005-2006 academic year to help Mr. Cohn improve his performance in 2006-2007 (Exh 4 to Answer). That prior U-rating had noted deficiencies in six categories, two of which are also noted in the U-rating at issue here; i.e., "Control of class" and "Planning and preparation of work." In response, the Professional Development Plan was designed to provide support in two categories: "Classroom Management" and "Delivery of Instruction."

For each category, the Plan specified who was to provide the support, the nature of the support, and how often each type of support would be provided. So, for example, with respect to Classroom Management, Mr. Cohn was to meet with his Peer Mentor Mr. Gallaher "on a weekly basis" for "Assistance with classroom management, lesson planning, and inter-class visitations," in addition to meeting periodically with the Literacy Coach Ms. Chabin regarding "Modeling/demonstrations." With respect to Delivery of Instruction, Mr. Cohn was to meet weekly with his Supervisor Ms. Jones to review "Lesson plans" and obtain feedback, in addition to meeting periodically with the Literacy Coach for "Review of teaching strategies to be used in lessons." Mr. Cohn signed the Professional Development Plan to acknowledge receipt and review of the written plan.

As both sides confirm here, Mr. Cohn's performance was reviewed periodically during the Fall 2006 semester with positive results. However, that situation changed in the Spring 2007 semester of that same academic year. Beginning in March 2007 and continuing through May 2007, Mr. Cohn received five separate written reports following classroom observations, all of which rated Mr. Cohn's performance as unsatisfactory (Exh B to Petition). As noted above, those observation reports, dated March 8, 2007, March 19, 2007, March 26, 2007, May 15, 2007 and May 31, 2007, formed the basis for the U-rating at issue here, along with the Professional Development Plan discussed above.

The Governing Documents

The determination of Mr. Cohn's challenge here requires a detailed analysis of each of the observation reports because in each case Mr. Cohn objected to the unsatisfactory evaluation on the ground that the observation had been conducted in violation of his rights without a "**pre-observation conference**." That same objection is at the heart of Mr. Cohn's Article 78 challenge here to the June 11, 2007 U-rating he received.

The basis for Mr. Cohn's objection is found in various documents attached to the petition. The first document is Article 8, Section J, of the collective bargaining agreement (CBA), entitled "Evaluation and Observation System" (Exh C). That provision discusses two models for a teacher's annual performance review. Both sides agree here that Mr. Cohn was entitled to be evaluated during the 2006-2007 academic year under the second model known as "Formal Observations" because he had received a U-rating for the previous academic year. As relevant here, the Formal Observation model is defined in the CBA as "the traditional classroom observation by a principal or supervisor which includes **pre- and post-observation conferences** and written feedback/comments" (emphasis added).

The Formal Observation model is also referenced in the handbook prepared by the DOE's Division of Human Resources entitled "Rating Pedagogical Staff Members" (Exh D, the "Handbook"). Like the CBA, the Handbook discusses the two models available for annual performance reviews. The Formal Observation model is described as follows (at p 7):

An observation may be conducted as a single full-period classroom visit or a series of short visits by the principal or supervisor. **Discussion between a teacher or supervisor before and after an observation must be built into a school's formal classroom observation process, along with a post-observation conference and written report** by the principal or supervisor including prescriptive recommendations for professional growth, where appropriate. (Emphasis added).

Attached to the Handbook is a series of rating forms and Special Circular No. 45 entitled "Annual Professional Performance Review" and prepared by the Chancellor on April 10, 1988. The Circular refers to the aforementioned Handbook as the document that governs review and rating procedures and it specifies various forms to be used. The Chancellor's Circular does not refer to the Formal Observation model nor make any explicit reference to pre-observation discussions or conferences.

The third relevant document, but apparently the first of the three documents to be drafted, is entitled "Teaching for the 21st Century: Guidelines for Annual Performance Reviews including School-Based Professional Development for New York City Public School Teachers" (Exh E, the "Guidelines"). The above-mentioned sections of the CBA and the Handbook both indicate that they were drafted in accordance with the Guidelines. The description of the Formal Observation Model in the Handbook is identical to that in the Guidelines, referring to **discussion before and after an observation and a post-**

observation conference. The wording in the CBA differs slightly, referring to a pre-observation "conference" rather than a pre-observation "discussion".

The Court turns now to the various unsatisfactory observation reports written for Mr. Cohn during the Spring 2007 semester that formed the basis for the June 2007 U-rating at issue here. The first report, prepared by Principal Denise Jamison on March 8, 2007, begins by describing an observation on February 27. The Principal criticized Mr. Cohn's performance primarily on three grounds: the work on the blackboard was the same as before the February recess, no learning objective was on the board, and independent reading had been assigned without any evidence that a mini-lesson had preceded the reading. The report indicates that the Principal told Mr. Cohn that he "should be conferring with students or doing reading assessments while the students were engaged with independent reading."

The March 8 report also discusses the March 7 observation and compares it to the February 27 one. While the material on the board had changed, the Principal again criticized Mr. Cohn for not conferring with students or doing reading assessments while the students were reading on their own. A post-observation conference was arranged for that afternoon. According to the report, the two discussed the criticisms made during both observations; that is, Mr. Cohn's failure to engage individual students while the class was reading independently and the failure to teach a mini-lesson before independent reading to highlight specific skills or a strategy or to give focus to the reading. Specific suggestions for improvement were made. The Principal concluded by stating that in future observations she would be rating Mr. Cohn as to whether he was "consistently engaging [the] students in a productive cycle of teaching and learning." In the U-rating, the three deficiencies noted

with respect to the March 8 report were “Skill in adapting instruction to individual needs and capacities; Effective use of appropriate methods and techniques; and Skill in making class lessons interesting to pupils.”

The March 19, 2007 report was written by Assistant Principal Marlene Jones based on an observation performed that day of a lesson on symbolism in literature. According to the report, Mr. Cohn did conduct individual reading assessments while the students were reading independently. However, in the post-observation conference Ms. Jones criticized the lesson as “low level” and because no context had been given to connect the lesson to past or future learning. Further, after reviewing student work she stated that the objective of the lesson (to identify a symbol in the book) had not been met. The U-rating referenced the same three deficiencies that had been referenced with respect to the prior evaluation.

The March 26, 2007 report was written by Assistant Principal William Lemos based on an observation of a March 23 lesson on editing. The report indicated that Lemos had observed several students drawing or sleeping, rather than editing, as Mr. Cohn walked around to provide individual assistance. In the post-observation conference, Lemos noted that a mini-lesson on editing should have been provided along with a model. In addition, the lesson should have had an assessment component with student sharing. Further, the objective had not been met as few of the students had actually engaged in the editing process. The U-rating referenced the same three deficiencies that had been referenced with respect to the earlier observations.

The next report, dated May 15, 2007, was written by Principal Jamison. She began by describing the April 23 poetry lesson she had observed. In the April 30 post-observation conference she criticized the lesson because Mr. Cohn had not demonstrated or instructed

the students how to write a poem. The April 30 lesson plan was then reviewed and discussed, and Principal Jamison indicated that she would observe another class later that day. According to the report, the learning objective on the blackboard differed from the one in the lesson plan discussed by the Principal and Mr. Cohn before the observation. Nevertheless, the Principal praised some aspects of the lesson in the post-observation conference. However, overall the lesson was rated as unsatisfactory because the students had spent too much time copying the assignment on the board rather than on learning, and time management was poor. The Principal suggested in the post-observation conference that Mr. Cohn observe another teacher's class and meet with the Literary Coach. She noted as well that Mr. Cohn's performance had declined, rather than improved, since the beginning of the year. On the U-rating, the deficiencies noted for this evaluation were "effective use of appropriate methods and techniques" (a problem noted earlier) as well as a new item, "Control of class."

The May 31, 2007 report was written by Assistant Principal Lemos based on a May 23 observation. In the post-observation conference Lemos criticized the lesson because Mr. Cohn had spent too much time reading aloud without including an evaluative piece, and time management was poor because some students had not had time to complete certain tasks. Reference was made to a previous meeting between Mr. Cohn and the Literary Coach, and the Principal found that Cohn had failed to incorporate any of the Coach's instructional tools into the lesson. A suggestion was made to attend a training on Differentiated Instruction. The U-rating referenced the same three deficiencies that had been referenced with respect to the first three reports.

After the DOE notified Mr. Cohn of the U-rating based on these reports as part of its Annual Professional Performance Review (APPR), Mr. Cohn filed an administrative

appeal (Exh 12). Based on a hearing held in connection with the appeal on January 7, 2010 (Exh 14), the Chancellor's Committee recommended that the U-rating be sustained (Exh 13), finding that:

The testimony and the documentation submitted by the Administration were convincing. In her testimony, Principal Jamison indicated that she had numerous conversations with the Appellant regarding his teaching. The Principal's main concern was that the Appellant's performance was inconsistent as demonstrated by the informal observations conducted. The Appellant failed to maintain a constant level of satisfactory performance. The unsatisfactory rating was warranted. Therefore, it is recommended that the appeal be denied and the rating of Unsatisfactory be sustained.

The Chancellor's designee accepted that recommendation by letter dated April 5, 2010 (Exh 15), and this Article 78 proceeding ensued.

Discussion

Oftentimes judicial review of an administrative determination turns on the question whether the determination was "arbitrary and capricious" within the meaning of CPLR §7803 (3). While petitioner here makes that argument and relies on that section of law, he focuses on a different aspect of §7803 (3), arguing primarily that the U-rating "was made in violation of lawful procedure" in that the DOE failed to provide him with a "pre-observation conference" as required by the Formal Observation model before issuing the five negative evaluation reports. Therefore, petitioner argues, the U-rating must be annulled.

The Second Department recently summarized the standard of review quite aptly in *Blaize v Klein*, 68 AD3d 759, 761 (2009):

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 [1981]; see also *Matter of Syquia v Board of Educ. of Harpursville Cent. School Dist.*, 80 NY2d 531, 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).

Thus in *Blaize*, the Second Department reversed the lower court and annulled the U-rating based on a finding that petitioner had not been timely provided with the complete set of documents on which the U-rating had been based "as mandated by the appeals process regulations promulgated pursuant to the Board of Education Bylaw §5.3.4A." *Id.*

As indicated above, the quoted administrative law principle finds its genesis in the Second Department's decision in *Lehman, supra*. In *Lehman*, the court granted the petition of a probationary special education teacher to expunge a U-rating from her record and reinstate her teaching license. The teacher had relied on Special Circular No. 65 promulgated by the Chancellor pursuant to Education Law §2590-h. The Circular set forth a specific procedure for the determination whether the services of a special education teacher would be continued, and it expressly provided that only the Executive Director of the Division of Special Education and Pupil Personnel Services was empowered to make the final recommendation on that issue. The Appellate Division held that the provision in the Circular expressly entitling the teacher to be evaluated by a specific person constituted "a substantial right" that "may not be waived." 82 AD2d at 834, citing *People ex rel. Jordan v Martin*, 152 NY 311; *Matter of Lake Placid Club v Abrams*, 6 AD2d 469, *aff'd* 6 NY2d 857.

The "substantial right" test articulated by the *Lehman* court was adopted by the First Department in *Munoz v Vega*, 2001 WL 1491330 (Sup. Ct., Bronx Co. 2001), *aff'd* 303 AD2d 253 (2003), a case similar in many ways to the case at bar. In *Munoz*, five public

school principals challenged the discontinuance of their probationary employment by their respective community school district superintendents claiming, among other things, that the terminations were unlawful because the superintendents had not complied with the requirements of the Principal Performance Review (PPR). The PPR, a format for evaluating principals' performance and providing for professional growth, was developed by a joint committee of representatives from the Council of Supervisors and Administrators (which includes superintendents) and the Department of Education. In May 1998 the Chancellor prepared a memorandum encouraging principals to participate in the process and providing them with an overview of the process and forms to be used. The overview explained a three-step evaluation process that included consultations between the superintendent and the principal to develop and review goals and objectives and to evaluate the principal's performance in achieving those goals and objectives. A further description of the PPR process was published by the DOE's Division of Human Resources, which also identified additional resources available to the principal.

The lower court rejected the principals' claim that the negative evaluations were unlawful in that they did not strictly comply with the PPR. While the Education Law did entitle the principals to annual performance reviews, the statute did not include the PPR process. That process was set forth only in the Chancellor's memorandum, the handbook and various forms, all of which served as interpretive statements and statements of general policy that were primarily explanatory in nature and served as flexible guidelines, rather than as specific regulatory mandates. More importantly, however, the court specifically found that the PPR did "not create substantive rights." *Id.* at p 4.

The Appellate Division agreed, holding (at p 254) that:

We also reject petitioners' claims that their terminations were unlawful because the superintendents did not comply with the requirements of the Principal Performance Review (PPR). The pertinent statute (Education Law §2590-f[1][f]) requires that superintendents evaluate the performance of principals at least annually. In addition, the New York City Board of Educations' Rules and Regulations require that all employees be made aware of their deficiencies and given assistance and opportunity to improve their performance. Petitioners do not claim that they were not evaluated at least annually or that they were not given notice of their deficiencies, but only that respondents failed to comply with the PPR's multistep evaluation and reporting requirements.

The court concluded by citing *Lehman, supra*, the decision that espouses the substantial rights tests

The application here of the "substantial rights" test leads to the same result as in *Lehman* and *Munoz*. The review process that petitioner claims was violated is not found in a statute or regulation, but rather in the CBA and various handbooks. The document where the review process first appears is entitled "Guidelines" and reads as such. Further, that the pre-observation aspect of the Formal Observation model is described slightly differently in the various documents further reinforces the fact that the APPR 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.

In this regard, *Blaize* is distinguishable from the case at bar. At issue in that case was the teacher's right to receive before the hearing the complete set of documents on which the U-rating was based. That right was explicitly mandated by the appeals process regulations promulgated pursuant to DOE Bylaws. What is more, the failure to provide the documents deprived the teacher of a substantial right, that is, the right to a meaningful opportunity to know and contest the charges against her.

Lehman is similarly distinguishable from the case at bar. At issue was a Chancellor's Circular promulgated pursuant to statute that specifically designated a particular person as the only one empowered to make the final recommendation whether to terminate the services of a special education teacher. That person was trained in the field of special education and qualified to make the determination. By putting the decision in the hands of another individual, the DOE violated the direct mandate of the Circular and empowered an individual not contemplated by law or regulation to act.

Even though the provisions at issue in this case do not necessarily carry the same direct mandate as those in *Blaize* and *Lehman*, the DOE is nevertheless obligated to comply with the provisions of the Annual Professional Performance Rating process. The question here is whether the rating process followed by the DOE here so deviated from the guidelines as to deprive petitioner of substantial rights. The answer, in the opinion of this Court, is no.

Even accepting that the petitioner is entitled to a "pre-observation conference" before an unsatisfactory evaluation can be given, petitioner has failed to prove here that the pre-observation procedures followed in his case deprived him of substantial rights. As indicated in the March 8 report, before conducting the March 7 observation Principal Jamison met with Mr. Cohn on February 27 following an informal observation of his class. At that time, she instructed him how to engage individual students while the class was involved in independent reading, and she told him that she would look for improvement on that point in future observations. In the formal observation conducted the following week, the Principal looked for specific improvement on that point and did not find it.

The May 15, 2007 report confirms that a similar pre-observation procedure was followed. An April 23 poetry lesson was informally observed. On April 30 the Principal met

with Mr. Cohn to discuss that observation and specifically review his lesson plan for that day. The principal indicated that should would observe a class later that day to evaluate Mr. Cohn's performance. Following that observation, the Principal met with Mr. Cohn and explained why his performance had been unsatisfactory. Thus, as with her March 7 observation, Principal Jamison met with Mr. Cohn before her observation and discussed the need for his improvement in specific areas and then conducted a post-observation conference later on.

While Assistant Principals Jones and Lemos may not have immediately preceded their observations with a conference or discussion with Mr. Cohn to the same extent that the Principal did, the performance criteria they used were the same as those used by the Principal. In addition, Mr. Cohn had been engaged in weekly discussions with the Literary Coach and other school personnel as part of his Professional Development Plan. The same or similar deficiencies were found in each evaluation, despite the ongoing discussions and professional development meetings. Under these circumstances, this Court finds that petitioner Cohn has failed to prove that the DOE so deviated from the rating procedures to the extent that it deprived him of a substantial right and violated the law.

Accordingly, it is hereby

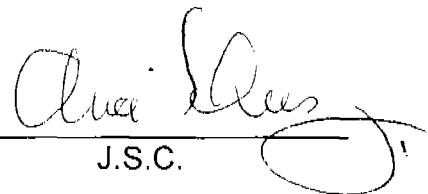
ADJUDGED that the petition is denied and this Article 78 proceeding is dismissed without costs or disbursements to either party. The Clerk may enter judgment accordingly.

Dated: June 7, 2011

JUN 07 2011

UNFILED JUDGMENT

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).


J.S.C.

ALICE SCHLESINGER