

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 106290/2008

JENKINS, ANTONIO

vs
NYS PUBLIC EMPLOYMENT

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 9/10/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-6

7

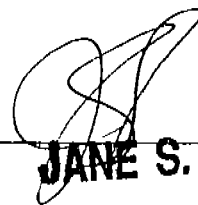
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~

petition is decided in accordance with the enclosed memorandum decision, order and judgment

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be entered based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).

Dated: 12-18-08



JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; IAS PART 55

-----X
In the Matter of the Application of
ANTONIO JENKINS,

Petitioner,

Index No. 106290/08

-against-

STATE OF NEW YORK PUBLIC EMPLOYMENT
RELATIONS BOARD and UNITED FEDERATION
OF TEACHERS, LOCAL 2, AMERICAN
FEDERATION OF TEACHERS, AFL-CIO

DECISION, ORDER and
JUDGMENT

Respondent

14 (S)

SOLOMON, J:

Respondent United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT),¹ is the exclusive bargaining representative of a unit of employees of the Board of Education of the City of New York (BOE), which includes teachers, such as petitioner Antonio Jenkins herein. The UFT and BOE were respondents in the underlying proceeding before respondent New York State Public Employment Relations Board (PERB) commenced by Jenkins, which resulted in an administrative order on April 3, 2008 (the Determination). Jenkins now seeks to annul the Determination in this Article 78 proceeding.

BACKGROUND

Jenkins was a teacher at P.S. 194, located in northern Manhattan. For the 2004-2005 school year, Jenkins was assigned to a non-music cluster teaching position, notwithstanding the fact that he was previously assigned to a music cluster position. According to the BOE, Jenkins was not assigned to a music cluster position because he did not hold a New York State Certification in Music. The individual who was assigned this position did have such

¹ By order of this court, dated July 23, 2008, the UFT was granted permission to intervene in this proceeding and to be added as a party-respondent.

certification.

In September 2004, Jenkins filed a grievance regarding the BOE's failure to assign him to the music cluster teaching position. In September 2006, the UFT represented Jenkins at an arbitration regarding his 2004 grievance. After reviewing the arguments presented by the parties and the contractual articles cited in the grievance, the arbitrator decided against Jenkins, holding that he was not entitled to assignment as a music cluster teacher.

In September 2005, Jenkins was again assigned to a non-music cluster teaching position. He filed another grievance protesting the BOE's failure to assign him the position. Jenkins' 2005 grievance was heard at the first and second steps of the grievance process. The UFT provided representation to Jenkins during each of these grievance steps. Jenkins was again unsuccessful at the first and second steps of the grievance process. Respondents advise the court that, at no time during this process, did Jenkins take the necessary steps to obtain a certification in music.

By letter, dated December 6, 2005, the UFT notified Jenkins that the UFT would not pursue his 2005 grievance to the third step of the process because, in the UFT's opinion, the grievance did not have sufficient substance. In the letter, the UFT also informed Jenkins of his right to appeal this decision to the UFT Grievance Department, in writing, within 10 days of receipt of the letter. Jenkins did file such an appeal. The UFT Grievance Department, by letter, dated April 26, 2006, informed Jenkins that it would not pursue his September 2005 grievance any further, and advised him of his right to appeal these findings to the UFT Administrative Committee. Jenkins requested such review, and the UFT Administrative Committee conducted a meeting on June 19, 2006. Jenkins attended the meeting, and presented his arguments and

explained why he felt that his position was meritorious. The UFT Administrative Committee, however, did not agree with Jenkins. By letter, dated June 27, 2006, the UFT Administrative Committee ruled against Jenkins, concluding that “there is no further action that the [UFT] can take on your behalf regarding this grievance.

In the interim, Jenkins filed an Improper Practice complaint with PERB in which he alleged that: (a) his employer, the BOE, retaliated against him for pursuing various contract grievances, by assigning him as a substitute for a special education teacher, and that the principal at his school acted in a hostile, abusive and threatening manner towards him; and (b) the UFT breached its duty of fair representation to him when it refused to pursue his 2005 grievance past the second step of the contractual grievance process.

Hearings were conducted by an administrative law judge, who, by decision, dated August 14, 2007, dismissed Jenkins’ charges against the UFT and the BOE. Jenkins filed exceptions to the decision of the ALJ, claiming that the ALJ’s ruling was erroneous.

PERB reviewed the record and, on April 3, 2008, issued the Determination ruling that the UFT did not act arbitrarily, discriminatorily, or in bad faith. With respect to Jenkins’s claims against the BOE, PERB held that Jenkins had established a prima facie case of improper motivation by the BOE as part of his direct case. However, PERB went on to accept the ALJ’s finding that the principal’s account of the relevant events was more credible than Jenkins’s account, and therefore PERB did not disturb the ALJ’s credibility determinations.

In this Article 78 proceeding, Jenkins now challenges the Determination.

DISCUSSION

The standard of review in an Article 78 proceeding is whether the administrative

determination was arbitrary and capricious. The court must confirm it if it is rationally based on the facts in the record (*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 31171 Owners Corp. v New York City Dept. of Hous. Preserv. & Dev.*, 190 AD2d 441, 445 [1st Dept 1993]; *Matter of Montgomery v New York City Hous. Auth.*, 56 AD2d 778 [1st Dept 1977]; *Matter of Figueroa v Hernandez*, 194 Misc 2d 413 [Sup Ct, NY County 2002]).

Where an agency's determination is founded on a rational basis, it should be affirmed (*Matter of Colton v Berman*, 21 NY2d 322 [1967]), even if the court would have come to a different conclusion (*Matter of Mid-State Mgmt. Corp. v New York City Conciliation and Appeals Bd.*, 112 AD2d 72 [1st Dept], *affd* 66 NY2d 1032 [1985]). The court's function is accomplished upon finding that a rational basis supports the agency's determination (*Matter of Howard v Wyman*, 28 NY2d 434 [1971]). Furthermore, the court may not substitute its judgment for that of the respondent where its decision is rationally based in the record (*Fresh Meadows Assoc. v Conciliation and Appeals Bd.*, 88 Misc 2d 1003 [Sup Ct, NY County], *affd* 55 AD2d 559 [1st Dept 1976], *affd* 42 NY2d 925 [1977]; *Matter of Pell, supra*; *Matter of Howard-Carol Tenants' Assn. v New York City Conciliation and Appeals Bd.*, 64 AD2d 546 [1st Dept 1978], *affd* 48 NY2d 768 [1979]).

The scope of review that is applied to PERB's interpretation of the applicable statutory law is very limited, and should not be interfered with unless such interpretation was "affected by an error of law, or was arbitrary and capricious, or an abuse of discretion" (*see Matter of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd.*, 48 NY2d 398, 404 [1979] [internal quotation marks omitted]). PERB "[a]s the agency charged with

implementing the fundamental policies of the Taylor Law . . . is presumed to have developed an expertise and judgment that requires [the courts] to accept its construction if not unreasonable” (*id.*). It is not the function of the reviewing court to weigh the evidence, reject testimony or substitute its judgment on matters of credibility - that function is for the administrative agency, i.e., PERB (*see e.g. Matter of De Vito v Kinsella*, 234 AD2d 640, 642 [3d Dept 1996]; *Matter of New York City Tr. Auth. [New York State Pub. Empl. Relations Bd.]*, 154 AD2d 680 [2d Dept 1989]).

PERB contends that the Determination adequately sets forth the basis upon which it was made, that it was made under express statutory authority, and that it is supported by substantial evidence, has a reasonable basis in law, and is neither arbitrary, capricious, nor an abuse of discretion. The UFT additionally argues that it did not breach any duty of fair representation to Jenkins, and that its decisions were made in conformity with all applicable contracts, laws and rules.

Upon review, the court concludes that PERB’s determination that the UFT did not breach its duty of fair representation was reasonable and grounded on precedent. The court therefore will not disturb that aspect of the Determination. Jenkins fares no better with respect to his claim that PERB erred in crediting the principal’s account of the events over his, and that the principal was not improperly motivated in assigning him to a special education class and/or that the principal’s behavior during certain meetings was not intended to interfere with his right to file grievances. PERB already considered and weighed the evidence on these issues, and Jenkins presents no basis why this court should reach a different conclusion and substitute its judgment for PERB on such matters of credibility.

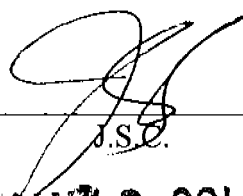
Based on the foregoing, the court holds that the Determination was rationally based, and was neither arbitrary nor capricious.

CONCLUSION

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed. This constitutes the decision, order and judgment of this court.

Dated: December/8, 2008


J.S.C.
JANE S. SOLOMON

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 14-100).