

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

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DAVID POSSNER,

Petitioner,

INDEX NO.

VERIFIED PETITION

-v-

NEW YORK CITY DEPARTMENT
OF EDUCATION,

Respondent.
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Petitioner alleges:

1. Petitioner is an Assistant Principal employed by the New York City Department of Education (D.O.E.) and assigned to Virgil Grissom Junior High School 226 (J.H.S. 226) in South Ozone Park, Queens. This Article 78 proceeding is commenced to annul and vacate an unsatisfactory “U” performance rating given to Petitioner by Queens J.H.S. 226 Principal Rushell White.

BACKGROUND

A. Educational Background

2. Petitioner is a 1996 graduate of the State University of New York, Albany with a Bachelor of Arts (B.A.) degree. Petitioner earned a Master’s Degree from the College of Staten Island (C.S.I.) in 2003, and was subsequently admitted to, and graduated from, the Department of Education Chancellor’s “New York City Leadership Academy” in 2006, where he earned his School Administrator and Supervisor certification in Educational Supervision.

B. Assistant Principal Tenure

3. In 2006 he was appointed to serve as an Assistant Principal at J.H.S. 226.

Serving in that capacity his duties and responsibilities consisted of the following:

- A. over students: (1) 3rd floor supervision, (2) graduation, (3) senior activities, (4) school events coordinator (COSA), (5) Town Hall Academy assemblies, (6) yearbook, (7) immunizations, (8) class trips, (9) A-501 promotion, (10) working tirelessly to provide a safe (and orderly) academic environment in a school denominated as a New York City “persistently dangerous” school
- B. over teachers: (1) staff development, (2) bulletin boards, (3) frequent classroom “cycles” of observations
- C. with other assistant principals/principals: (1) book inventory, (2) busing/transportation coordination (ensuring that the students arrive at school and home safely and serve as liaison to the MTA), (3) data management, (4) compliance deadlines, (5) class coverages, (6) technology
- D. Parents’ Association: (1) liaison (providing workshops with parent coordinator and (2) ensuring that any needed technology was set up for meetings (including (a) laptops, (b) microphones, (c) sound systems, (d) PowerPoint, etc.)
- E. over school property: (1) OSHA, (2) bloodborne pathogens, (3) chemical inventory, (4) recycling coordinator

4. Last year, Ms. White frequently instructed Petitioner to remain in his academy rather than proceeding to the first floor school cafeteria for “lunch duty.” Petitioner’s students were supervised by a dean. On other occasions, Ms. White puzzlingly inquired why Petitioner wasn’t present in the cafeteria to assist in lunchtime supervision of his

students. This inconsistency in assignments was frustrating, and continued throughout the school year.

5. In addition, Petitioner created all the “PowerPoint” presentations which appeared on the school video screens that were displayed throughout the school identifying (a) different school events, (b) student achievements, (c) school information like bell schedules, (d) school rules and regulations, etc. Hundreds of posters were created. Essentially, Petitioner was charged with beautifying the hallways with posters, which he created on the school “poster maker.”

PROFESSIONAL EVALUATION

6. Each year Petitioner was subject to an annual “professional evaluation” by school Principal White. Prior to the 2014 – 2015 academic year Petitioner had consistently earned satisfactory (S) ratings for *eight consecutive years*. On June 26, 2015 Petitioner received an unsatisfactory (U) rating (see ex. “A”).

7. This rating was allegedly predicated upon the following alleged deficiencies:

A. Failing to Meet Assignment Deadlines

B. Ineffective Performance

C. Failure to Meet Annual Goals

8. Ms. White never informed Petitioner that these alleged “deficiencies” would lead to a U-rating, about which he was initially apprised on or about February 9th, 2015. This was never addressed again until June 25th (the day preceding the U-rating) when Petitioner was instructed (on the second to last day of school) to appear in the principal’s office with a CSA representative for “possible disciplinary action.” Ms. White, however, *never provided* Petitioner with any useful assistance or professional support

throughout the school year to (a) address, and (b) appropriately remediate, these alleged existing performance deficiencies.

9.

GOAL	DESCRIPTION OF GOAL	WAS GOAL MET?	EVIDENCE PROVIDED BY WHITE OF FAILURE TO MEET GOAL	DISPUTING EVIDENCE
A	Improving student math test scores by 3 to 5%	No	Possner allegedly provided "falsified" documents showing test scores that were higher than actual scores, overall score only showed an improvement of 2% as opposed to the goal of 3 to 5%.	Final test scores were not available before Possner's year-end review was given. At 2%, test score improvement was still higher than citywide average of 1%. White provided no evidence at the arbitration of the "falsified information" allegation.
B	Raising HEDI ratings of "ineffective" teachers by 1 level	No	Possner's goal allegedly only focused in one specific area of improvement for two of the teachers in question (Pintauro & Durham), which they reportedly did not accomplish. White claimed that, despite her approving the goal, it would not have been fully measurable, as HEDI ratings were not released until September, 2015. White also claimed that during a "walkthrough," she noted that the teachers under Possner's supervision were "not in compliance" with school standards.	Both Pintauro and Durham moved up one HEDI level and were rated "effective." As White herself stated, there would not have been enough data available to determine if this goal had been accomplished by June, 2015, when Possner's year-end review was given. In regards to the "walkthrough" White mentions, she observed four teachers in only a half hour, and never followed through with a promised "followup" observation.
C	Providing ongoing "professional development" for teachers	Yes	White concedes that Possner met this goal. However, being that Goal C would have been a key component of Goal B, it is unclear how Possner could have successfully accomplished one without the other. White could not explain this.	None.

D	Improving the ratings of parent responses in the "Learning Environment" survey, particularly focusing on communication regarding career and college readiness	No	White stated that parental PTA attendance declined, which, in her "estimation," was due to overall insufficient communication between the school and students' families, of which Possner was reportedly in charge. When it was pointed out that there was no specific category on the 2014-2015 "Learning Environment" survey pertaining to career and college readiness communication, meaning Possner could not have been fairly rated on this, White stated that the negative review was given because Possner could not produce evidence either mid-year or by the end of the year that he was working to improve overall communication with parents.	There was no specific category on the 2014-2015 "Learning Environment" survey pertaining to career and college readiness communication, meaning Possner could not have been fairly rated on this. Possner was not in charge of organizing PTA meetings and increasing parental attendance, but would include notifications about PTA meetings in phone messages to the parents, in-school posters, and updates on the school website. At no time did White offer the Assistant Principal suggestions how to improve attendance during one of the coldest, snowiest winters of this century.
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PERFORMANCE RATINGS

10. Reasons 1 – 4 address four file letters dated:

1. 12/9/14 (assessment deadlines)
2. 1/6/15 (compliance assignment updates)
3. 2/24/15 (observation deadlines)
4. 3/16/15 (uncompleted assigned task)

A. Assignments

11. Ms. White often gave the assistant principals tasks and assignments which, of necessity, were not capable of being completed by her unilaterally designated due dates, and mindful of the other assistant principal daily duties responsibilities. When tasks, however, weren't timely completed, "warning letters" (which every assistant principal received) followed. These "warning letters" identified the missing tasks, and provided a revised due date (often the following day).

12. Petitioner consistently met every single task and assignment deadline after the “warning letters” were issued. Other assistant principals, Petitioner submits, failed to meet these revised deadlines, and were issued “for file” disciplinary letters for their files (see pp. 15-17 infra.). Petitioner, however, received no “for file” disciplinary letters in connection with these assignments. Ms. White nonetheless inappropriately utilized these “warning letters” to predicate the U-rating in question. These letters were also utilized at a contractual appeal to a D.O.E. hearing officer, over the timely objection by Petitioner’s representative, Dr. Marlene Lazar.

B. Observations

13. In terms of observations, Petitioner formally observed a significantly larger number of teachers than any other assistant principal (79 observations) and four and a half times as many as Ms. White (she only completed 17). Assistant Principal Randall completed 72 observations, Assistant Principal Cohen completed 56 observations, and Assistant Principal Shirley completed 64 observations. Assistant Principal Adams was told she wasn’t required to observe any teachers due to service as the assistant principal of “organization.”

14. These observations are paramount to teaching success, since they are used to assess and evaluate teacher performance, and provide them with improvement fostering “feedback.” Note that with leading a school of so many “ineffective teachers,” Ms. White completed so few observations. Ms. Patricia Musial (the former secretary) is available to substantiate the quality of my work and assignments which Petitioner submitted to her during his service preceding Ms. White’s principalship and Ms. White’s first year.

15. Ms. White often required Petitioner to devote time to complete numerous what she categorized as “high priority” assignments (some 30 monthly), many of them

assigned at the last minute, in addition to all his other regular responsibilities. Many of these assignments involved tasks which she was initially directed to complete by her supervisors, and which she then in turn delegated to Petitioner. These assignments were made, and generally had to be completed by the *following day* (i.e. ordering materials, online surveys, etc.). Compliance was made challenging because Ms. White, and her secretary Ms. Dees, often misplaced Petitioner's paperwork. This necessitated everything to be redone (or recopied). Ms. Dees frequently misplaced the paperwork of many of those teachers whom she didn't like.

I discuss each *seriatim*:

- (a) 12/9/14 (warning letter)
- (b) 2/24/15 (warning letter)
- (c) 3/16/15 (PowerPoint demonstration)

C. Performance

16. Reason #5 was based on a single January 21, 2015 performance, and not upon the other 179 instructional year days of work.

This relates to:

Goals

17. Reasons 6 and 7 relate to Principal White's voiced feeling that Petitioner was "not meeting goals." As the annexed February 4, 2015 A.P.P.R. noted (Ex. "G"), Principal White indentified four "goals" which she opined hadn't been met.

18. Goal A relates to "student math performance." The review, Petitioner notes, significantly *preceded* the August 14th, 2015 release of State Education Department standardized test scores. The August, 2015 math test results at J.H.S. 262 essentially increased by about 2% in levels 3 and 4, demonstrating "academic proficiency." Mindful that 5% of the school population were "chronic absentees," and some 16% of the student

population were denominated “special education” students, the increase in scores, we submit, was achieved against daunting pedagogical obstacles. It penalized Petitioner for alleged pupil performance in a single class (705 [Ms. Espinal]), ignoring the fact that Petitioner supervised a total of *20 teachers*.

19. Petitioner both formally, and informally, supervised these 20 math teachers, providing them with information and support to both maintain, and improve, their teacher performance. Petitioner also supervised 14 science teachers, and 20 teachers of “all subject areas” who were assigned to his academy.

20. Petitioner did not have the support of a dean this year. The assistant principals had only one, Jose Battista, whose time, of necessity, had to be shared. Nor was Petitioner provided with the services of a guidance counselor for his 450+ students. Petitioner was obliged to use the two other guidance counselors located in *different academies*, and on different floors. When students approached Petitioner with immediate and pressing issues of a sensitive nature, Petitioner lent a welcome ear, and an outstretched arm, as and when appropriate.

21. Petitioner was also the only assistant principal not having access to a photocopier machine. Accordingly, when photocopies were needed they were made on a school copier located in a *different academy* and on different floors. Petitioner was frequently obliged to make the copies himself. This often involved 450 sets of copies. By contrast, Assistant Principal Shirley used a “pupil accounting secretary” who was assigned to her academy to provide support for, and to complete many of the tasks and assignments which Principal White asked Assistant Principal Shirley to complete.

22. Goal B relates to the ratings of five identified teachers. Petitioner had indicated that he would provide “professional development” to five teachers and

undertake to help 40% of them advance and make progress in one “HEDI” rating (“HEDI” is an acronym for highly effective, effective, developing, and ineffective) in “Danielson’s competencies” of effective teaching. All five of the teachers: (1) Mr. Moses, (2) Ms. Pintauro, (3) Ms. Durham, (4) Ms. Marian, and (5) Mr. Alli were rated “ineffective” during the prior school year. Mr. Alli became ill in the middle of the year. He was never accordingly rated (or observed sufficiently), nor did he return to work. Only four teachers requiring “development skills” were rated.

23. The goal of advancing one “HEDI” rating was, however, *never clearly established*. It was unclear if the goal was for 40% of these teachers to advance one HEDI rating overall, or simply in some of the “Danielson competencies” (i.e. classroom management, classroom engagement).

24. On the final day of school, the DOE computer system, NYC ADVANCE, tabulates the recorded observations made by school administrators. It *confirmed* that both Ms. Pintauro, and Ms. Durham, had, in fact, advanced one “HEDI” rating. At this meeting Ms. White and Petitioner’s CSA representative Phyllis Bullion, which was held to discuss Petitioner’s performance (and possible disciplinary action), Petitioner explained to Ms. White that this goal had been met. Principal White, however, “talked over Petitioner,” and did not appear to be interested in, or focused upon, Petitioner’s version of the documented progress made by the teachers in question. It appears that she was unwilling or unable to acknowledge anything positive, or meaningful, which Petitioner had accomplished, even though a proper “performance rating” is required to include the subject’s strongest assets. After eight straight satisfactory ratings, may by Principal White, this absence is telling.

25. Ms. White concedes that Petitioner met Goal C, which included providing

teachers with “professional development,” and completing his observations (Petitioner had completed 79 of them [this was the largest number of observations completed by any of the assistant principals – Ms. White only completed 17]).

26. Mindful Petitioner met Goal C, Petitioner submits, it is inconsistent for Ms. White to criticize and penalize him for Goal B. Mindful that Petitioner was providing ongoing “professional development,” and consistently observing his teachers to monitor their performance, Petitioner was found not to have met Goal B, even though the evidence suggests he met the goal.

27. Goal D related to the rate of parent responses to “Learning Environment” survey questions. Notwithstanding that the following steps were taken to communicate with parents: (a) communication from the school phone messenger, (b) a school website providing important dates, (c) photos, (d) other information, and (e) professional grade posters for the school which depicted different events. Principal White essentially blamed Petitioner individually for perceived “parental apathy,” notwithstanding his *documented, focused and good faith efforts* to spark their interest and attendance, and the performance of the “Parent Coordinator” Ms. Bethea. In fact, Assistant Principal Adams had this responsibility.

(1) School Messenger

28. In order to communicate with parents and guardians, Petitioner used the “school messenger” to send information pertaining to important school events to parents and guardians on 138 different occasions. Some of these events included information regarding (a) testing, (b) student accomplishments, (c) positive school news, (d) student attendance, and (e) Parent Teacher Association (P.T.A.) meetings. The “phone messengers” were answered by the families of students over 30,327 times, and

28,275 messages were left on the families' voicemail systems. Petitioner often surveyed the effectiveness of the "phone messenger" by taking the attendance at Parent Teacher Association meetings. Petitioner attended many of these meetings; Ms. White attended very few.

(2) Internet Website

29. In addition to the school messenger, Petitioner created and updated the school website to keep families informed with both "user friendly" calendars, and pictorial displays, depicting student achievements. The website features (a) school events, (b) news, and (c) data which spans the school year's duration. Parent Teacher Association meeting dates are recorded, and updated, so that the families remain aware of important school community news. The website Petitioner created was so effective that two years ago Petitioner was requested to provide "professional development" to school leaders in his network so they could replicate a similar website.

(3) Posters

30. In addition, Petitioner created "professional grade" posters, and displayed them around the school for viewing by visiting parents depicting students participating in school events, as well as upcoming school events, to which parents were invited.

31. The survey indicates 90% of parents "somewhat agree, agree, or strongly agree" that the school "appropriately communicated" concerning methods in which they could assist their children to learn. In his original goal, Petitioner sought to increase the amount of parents who "agree or strongly agree" that the school communicates how to prepare their children to be "career and college ready" from 85% to 88%. However, this language was *never employed* in this year's survey (although it was included in the prior

year's survey). Petitioner questions, how many parents were surveyed by Ms. Bethea and Assistant Principal Adams (who were responsible for this D.O.E. survey?).

32. Petitioner was diligent to insure that any time there was a scheduled school event, that parents were appropriately notified with the phone messenger system. Petitioner surveyed parental response by the amount of parents who were *notified* (conduct capable of being quantified), versus the amount of parents who elected to attend (i.e. PTA meetings) (individual scheduling decisions by persons he didn't control).

33. Regarding Ms. White's "walkthrough," Ms. White conducted this "walkthrough" in Petitioner's absence. In a prior week, Principal White conducted a "walkthrough" of another academy with Assistant Principal Randall. Because Petitioner was not included in the walkthrough, he was unable to witness any of the teaching practices which Principal White describes. She does indicate on the "walkthrough template" that she felt Mr. March's teaching was "ineffective" that particular day.

Mr. March

34. Although Mr. March is a teacher in Petitioner's academy, he, in fact, was assigned to and received "professional development" from a different assistant principal, Assistant Principal Shirley, his *social studies supervisor*. Mr. March's observations were also conducted by Assistant Principal Shirley mindful Petitioner conducts the observations for mathematics and science teachers. It is arbitrary and capricious to penalize an Assistant Principal for a teacher concerning whom he does *not* have development responsibility.

Ms. Marian

35. Ms. Marian, a science teacher, who later in the year taught math with Mr. Moses, has been rated “unsatisfactory” and “ineffective” for several years. That she was viewed to be performing below standard, it is unclear why Petitioner is “scapegoated” for a teacher he didn’t hire, but whom he conscientiously tried to help improve.

Mr. Angelou

36. Mr. Angelou, a social studies teacher, was rated “effective” on his bulletin board by Ms. White. However, Ms. White rated Mr. Angelou “ineffective” for the year. Petitioner was directed to give Mr. Angelou a post-walkthrough “disciplinary letter” addressed to his “ineffective” bulletin boards (whatever that means).

37. Ms. White voiced an intent to return in two weeks for a “followup walkthrough.” This followup, however, *never occurred*. The walkthrough template never addressed Petitioner’s performance as an assistant principal, nor does it mention anything concerning disciplinary actions.

38. Ms. White discredited Petitioner’s performance as an assistant principal due to declining pupil enrollment. The J.H.S. 226 budget is, we note, based upon, and a function of, the amount of enrolled J.H.S. 226 students. As other schools were brought into the building (as “co-location schools”) the student population of necessity declined. Although the pupil population steadily declined, Ms. White, however, continued to spend funds to add supervisors. Instead of excessing the assistant principals whom she hired, she attempted, we submit, to act expediently to push Petitioner out, as he had more seniority than the other assistant principals whom she had hired.

39. Prior to Ms. White becoming principal, school enrollment was 1,600 students with 4 assistant principals, 4 full-time deans, and 4 full-time guidance counselors. This

past school year (2014 – 2015), the school had a little over 1,000 students with 5 assistant principals (3 whom Ms. White hired), 1 full-time dean (shared amongst all the school academies), and 2 shared guidance counselors. Roughly 900 students are expected to be enrolled in the 2015 – 2016 school year.

40. Over the years, Principal White was aware of Petitioner’s perceptions regarding her unfair treatment and harassment of him. These became progressively worse over time. It became unbearable in 2014 – 2015. Prior to issuing Petitioner his U-rating the Principal orally agreed with his CSA union representative Ms. Phyllis Bullion (718-687-3338) to allow him to voluntarily “excess” himself in exchange for a “satisfactory rating.” Petitioner was more than willing to leave. However, an “excessing transfer” could not be secured from the D.O.E. While Ms. White issued Petitioner an “unsatisfactory” rating, she informed Petitioner that she would reverse it to a “satisfactory” rating if Petitioner obtained a job as assistant principal in another school.

41. Against this backdrop, Petitioner submits the professional evaluation of unsatisfactory performance was a thinly veiled “pretextual decision” to scapegoat Petitioner to address *staffing issues* at a middle school which the community junior high school serves, has voiced its opinion of Principal White’s stewardship by electing to enroll their children, where possible, in increasing numbers in alternative schools.

42. Other assistant principals who, we note, were late in completing assignments were given “S” ratings. The application of disparate subjective rating systems for different assistant principals, we submit, resulted in Petitioner being held to a different, and higher standard than his similarly situated colleagues. It was conducted contrary to D.O.E. protocols, and was palpably selective in the areas which the Principal elected to evaluate. At the contractual D.O.E. appeal before the arbitrator, she staunchly opined

that Petitioner, from her perspective, contributed “nothing” positive to the school during the year in question. One only has to read her annexed testimony (Ex. “B-5” to “B-12”) to quickly ascertain how dismissive Principal White was of the tasks Petitioner was assigned to complete, and unwilling to acknowledge anything positive in nature.

43. Principal White voiced this view even though standardized state test scores* in math continued to rise above citywide averages, and that the school’s eighth graders were permitted to take math and science Regents exams, with 87% passing math, and 93% science. With over 20% of the school population chronically absent (or designated requiring “special education” services), Principal White’s constant disparagement of Petitioner’s contributions during the school year was an act of “willful blindness” and personal and professional spite.

THE LAW

44. Where as here the D.O.E. administers an unsatisfactory (U) performance rating, a proceeding pursuant to C.P.L.R. Art. 78 is available to review that determination. Where that determination is unsupported by the credible evidence, or a product of an arbitrary or capricious process, it is subject to being annulled (*Matter of Applewhite*, 115 A.D. 3d 427, 981 N.Y.S. 2d 513 [1st Dept. 2014]; *Deutsch v. Department of Education*, 2013 N.Y. Misc. Lexis 5264 [Sup. Ct. 2015]; c.f. *Richards v. Board of Education*, 117 A.D. 3d 605, 985 N.Y.S. 2d 574 [1st Dept. 2014]) (U rating upheld where no violation of lawful procedure or substantial right); *Cohn v. Board of Education*, 102 A.D. 3d 586, 587, 960 N.Y.S. 2d 362 [1st Dept. 2013].

45. Petitioner’s U-rating was based upon his alleged failure to meet “professional goals,” submitting a limited number of assignments briefly beyond the initial deadline

* Education Law Section 3012(c) limits the use of standardized test scores.

established unilaterally by Principal White, and a single observation. Mindful that an assistant principal's annual "performance rating" requires consideration, no known or readily identified objective evaluative criteria have been established by the D.O.E. as constituting an objective evaluative template for assistant principals. As such, and as compared to that for school principals, this creates a subjective *ad hoc* process, which serves as a veritable breeding ground for arbitrary and capricious performance evaluations when conducted by devious evaluators.

46. Here, none of Petitioner's performance involving the dozens of assigned daily tasks ever appeared in, or was, we note, addressed in Petitioner's professional evaluation. We respectfully submit that the absence of anything negative, in both the evaluation and at the D.O.E. internal appeal, can only be interpreted that Petitioner performed these tasks satisfactorily – as he did in earning eight prior satisfactory annual professional evaluations.

47. Here, the evaluating school principal, we submit, "cherry picked" a number of criteria in which her opinion was clearly contradicted by the law and/or the facts.

48. While standardized math test scores continued to rise, the fact is the results were simply not known on the date in late June, 2015 when the Petitioner's evaluation was handed down. State law prohibits negative professional evaluations based on standardized state test scores. "Common Core" curriculum is currently being revisited and revised, and will be changed. Penalizing Petitioner because his students didn't score even higher, we submit, ignores the fact that over 20% of the school population was chronically absent, or designated "Special Ed." Like a baseball manager or football coach, the manager or coach has to work with the team he is given. Petitioner clearly did so, and his principal punished him because she felt they should have scored higher.

49. She accepts no responsibility, and is content to demonize Petitioner, who achieved documented gains exceeding citywide averages. Only an arbitrary, capricious evaluator with an Orwellian mindset can view a rise in the percentage of math exam takers' performance as unsatisfactory. It fails to distinguish between disappointment and failure.

50. When one also considers the significant Regents exam results by eighth grades on the math and science Regents, the students clearly are moving in the "right direction." Demonizing Petitioner is an all too familiar sign of a principal who uses subjective pretext to punish those who she seeks to drive from the school by issuing bogus performance ratings which are unsupported by the facts, and which undermine the heart and courage of all who seek to provide help to those in a learning challenged environment.

PROCEDURAL VIOLATIONS

51. The predicate for the conduct of performance ratings is a product of the collective bargaining agreement. Where, as here, Petitioner had earned satisfactory (S) ratings for eight consecutive years, the decision by Principal Rushell White to denominate Petitioner's performance as "unsatisfactory" requires strict scrutiny, because the criteria which Principal White elected to employ did not focus upon the *cumulative totality* of fairly evaluating *all of the tasks*, and responsibilities, to which Petitioner was assigned. Rather, Principal White was content proctologically parsing if he reached the "performance goals" set forth at the beginning of the 2014 to 2015 school year.

52. At the beginning of the appeal, Petitioner's representative noted a number of procedural objections to the documents which were competent to be

considered in evaluating whether the “U” rating was fairly supported by the credible record. We discuss the objections *seriatim*:

A. Principal’s Release of Ratings to Petitioner

53. D.O.E. requires that performance ratings be served on the rated individual four to ten days before the end of the school year. Here, the “U” performance rating was not distributed to Petitioner until Friday, June 26th, the *final day* of the school year. While it is unclear if Principal White distributed the performance rating of the other assistant principals on another date, it is clear that waiting as she did until the final day of school was violative of this directive.

54. Where the performance of a material obligation is not timely performed, the breach of the requirement vitiates the performance rating.

B. Letters for File

55. The following documents (ex. “E”) from Petitioner’s personnel file were admitted over the objections of Petitioner’s representative that letters which did not meet the contractual requirements of a “letter for file.” The following letters, which did not meet the criteria for a “letter for file,” were admitted over objection:

- (a) December 9, 2014 letter
- (b) February 24, 2015 document
- (c) Document #5
- (d) Document #6
- (e) Document #9

56. When questioned by the hearing officer why the documents to which objections were lodged, the Principal stated:

“I did not intend them to be a part of his file, because

I wanted to give the assistant principals opportunities to correct the behavior...”

57. Thus, where documents placed in an employee’s file are done so contrary to the terms and conditions of a collective bargaining agreement, and, as the Principal conceded, afforded employees additional time to complete assignments, we submit the documents have no place in either the employee file, or as part of the record to be reviewed by the designated arbitrator. Since the Principal had neither complied with making them “for file” letters, nor intended them to be, their inclusion was wrong.

58. Finally, Document #9, dated February 24, 2015, was admitted over objection. However, “notice documents” (which are more than three months old) cannot be subsequently placed in the employee’s file, as here, at the Principal’s mere whim or desire.

59. Courts have held that when year-end performance reports are completed in an arbitrary manner, they cannot be upheld (see *Kolmel v. City of New York*, 88 A.D. 3d 527, 930 N.Y.S. 2d 573, 574 [1st Dept. 2011]). Where the rating is based on conclusions either unsupported by the record, or contradicted by the proof, the rating is subject to vacatur, because they unfairly undermine the very integrity of the process (*Matter of Blaize v. Klein*, 68 A.D. 3d 759, 889 N.Y.S. 2d 665, 667-668 [2nd Dept. 2009]).

The Merits

60. Goal “A” addressed Petitioner’s “expectation” that overall pupil performance on the New York State Mathematics Assessment would increase 3 to 5% according to New York State Education Department data results. Such standardized test results are statutorily limited (see Education Law Sec. 3012(c)).

61. While it is unclear why this goal was selected, mindful that the State Education Department released the test results in August, 2015, we annex a copy of exhibit “C” to this submission reflecting the test results.

62. Following the administration of the standardized state English language and math exams in April, 2015, legislation passed the State Legislature requiring the recalculation of professional evaluations to insure that they not be a “deciding factor” in a professional rating.

63. Principal White’s testimony at the department appeal claimed Petitioner submitted documentation that was “inconclusive and appeared to be falsified.” When pressed, she never, however, produced the allegedly inaccurate data claiming test results had actually declined, much less that data had somehow been “falsified.”

64. Mindful that use of the 2015 test results has been ruled inappropriate, and mindful that they were only released over six weeks *after* the “U rating” was given, we submit that this U rating was contradicted by an increase in math test scores, which were not available on the final school day, when Petitioner was professionally chastised and deemed a “pedagogical failure.”

65. However analyzed, this performance rating in question was both arbitrary, and capricious. Only in “White’s World” can pupil scores increase, Regents test results rise, and the assistant principal is nonetheless characterized as “unsatisfactory”!

66. Goal B related to the ratings of five identified teachers. All five had been previously evaluated as “ineffective” the prior school year. On the *final day* of school, the D.O.E. computer system NYC ADVANCE tabulated, and confirmed, that:

1. Ms. Pintauro
2. Ms. Durham

had advanced one HEDI rating. Ms. Marion left the school, and Mr. Ali left due to medical reasons. At the arbitration, it was Ms. White who claimed the rating wasn't released until September. When asked how the Principal could rate the Petitioner, Ms. White responded:

“That’s why I’m saying specifically that it was not for an overall rating, it was for a specific domain... we could not possibly create a goal to see if this teacher is going to be effective by the end of the school year, because everything goes into creating a rating for that teacher. Not only our feedback on the observations, but also how the students do. So A.P.s are not creating goals predicting that a certain teacher would get a certain HEDI rating, but they would be tracking in the specific domains in which we rate, to see how we’ve been moving teachers in that specific domain. So he couldn’t have created a goal like that, otherwise he would never be able to meet that objective, because it says June 2015, and the ratings don’t actually come out until September.”

67. Beyond the incomprehensible nature of the response, it was, Petitioner submits, *per se* arbitrary and capricious, because it ignored the available evaluations of teachers Pintauro and Durham, and sought to penalize Possner for evaluations she claimed were issued *after* she evaluated Petitioner!

68. Experience teaches that some teachers improve, others leave the D.O.E., and some don't improve. As her testimony at the departmental appeal shockingly revealed, there was no evidence contradicting the progress which Pintauro and Durham made. That others may have volitionally departed is hardly a negative attributable to Petitioner, or demonstrative of a failure to meet Goal “B.”

69. At the “end of the day,” Petitioner submits, Principal White gave testimony more akin to “Alice in Wonderland” than a professional evaluation. Her result-oriented explanations seethe with as much illogic and with an arbitrary evaluation mindset as someone with a “mission” to meet.

70. Principal White conceded Goal “C” was met.

71. Finally, as to Goal “D,” it focused upon *communication* with students’ parents and guardians in the *school survey*. As noted earlier, parents received communications in a variety of proactive forms, and Petitioner worked closely with the parent coordinator Ms. Bethea. Her views appear at Ex. “F.”

72. When questioned at the arbitration, Principal White revealed the basis of her view that Petitioner performed unsatisfactorily as to Goal “D”:

Ms. Lazar: “Then are you aware that there is no ‘career and college ready’ category in the last survey?”

Ms. White: “May I just say that the surveys that came to us, to our building were to be sent to the parents?”

Ms. Lazar: “Okay. And are you aware that there was no ‘career and college ready’ component in that survey?”

Ms. White: “I’m not aware of that. But I do know that the documents we received from the learning environment survey are in alignment with expectations that there should be college and career preparedness.”

73. Petitioner’s review states that one of the reasons Principal White indicated he failed to meet Goal “D” was an alleged “significant decline” in parental PTA meeting attendance, of which Petitioner had been in charge of organizing. When it was pointed out to Principal White that improving parental attendance was *not specified* as one of the categories in Goal “D,” she responded:

“Goal D is a summation of goals that he set for himself, and documents 1.2 to 1.11, will show you how those goals are fleshed out and the action plans he’s put in place, or will put in place to meet those goals, and the decline of the PTA attendance was one of the action plans that he said that he would be monitoring the way in which parents were coming, and how many parents were coming to the PTA conference.”

74. We submit that Principal White arbitrarily found Petitioner’s performance lacking not based upon parental perception of pupil “college readiness,” but rather based it on a different component, *parental attendance* at P.T.A. meetings and conferences.

75. This behavior essentially consists of a cruel professional evaluation “bait and switch,” not unlike moving the goalposts back on a football field when the opposing team is attempting a field goal. Petitioner’s performance goal focused on a parent *survey* which, we note, Principal White could never demonstrate Petitioner failed to accomplish. Accordingly, she simply “made up” a new goal – *parent attendance*, and then blamed Petitioner for perceived parental indifference.

76. The proof here powerfully demonstrates how hard Petitioner undertook to foster positive communication with the parents. Principal White did not dispute the efforts which Petitioner undertook. To hold him professionally responsible for their conduct, which he doesn’t control, is, we submit, the height of arbitrary and capricious behavior.

77. Finally, “performance reviews” require the evaluator to both list, and denominate the subject’s “strongest assets.” This undoubtedly reflects the view that even

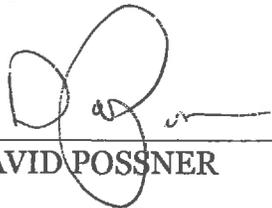
when people are “less than perfect,” they still possess some assets or qualities which contribute, in some manner or degree, to the educational experience.

78. Principal White’s expressed view was “Mr. Possner contributed in no way to the progress of the school...” The purported professional evaluation was, we submit, little more than a thinly veiled “pretextual exercise” in negativity, which had as its goal scarring Petitioner’s career with a tainted and truncated evaluation, which was as arbitrary and capricious as it was procedurally false.

79. This U rating, released on the last day of school, essentially disqualified Petitioner from summertime employment, and resulted in economic loss. It also essentially rendered him unhireable at other schools.

80. This pretextual performance review reeks with bias, and an Orwellian mindset – Principal White treats those she wishes to retain favorably, and unfairly demonizes those whom she doesn’t. Indeed, her voiced willingness to alter his performance grade from U to S if he would leave J.H.S. 226 removes any doubt concerning her rating motivation. A poor performance rating was the price Petitioner paid for not leaving Principal White’s J.H.S. 226 payroll.

WHEREFORE, Petitioner respectfully prays that the Department of Education’s unsatisfactory rating be annulled and expunged.



DAVID POSSNER

Dated: New York, New York
October 20, 2015

INDIVIDUAL VERIFICATION

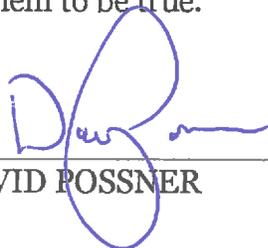
STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

DAVID POSSNER, being duly sworn, deposes and says:

Deponent is the Petitioner in the within action; Deponent has read the foregoing Petition and knows the contents thereof. The same is true to Deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, Deponent believes them to be true.



DAVID POSSNER

Sworn to before me this
20th day of October, 2015.



NOTARY PUBLIC

STUART BRENKER
COMMISSIONER OF DEEDS
CITY OF NEW YORK NO 8-~~577~~ (5827)
CERTIFICATE FILED IN RICHMOND COUNTY
COMMISSION EXPIRES 1-16