

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

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ROSS ROSENFELD, :

Plaintiff, :

- against - :

THE CITY OF NEW YORK, NEW YORK CITY :

DEPARTMENT OF EDUCATION, :

CHANCELLOR JOEL I. KLEIN, individually, :

GLORIA BUCKERY, individually, ANNE :

ORGANISCIAK, individually, JOHN DIRRIGL, :

individually, ANNE TULLY, individually, :

ANTHONY SHEPHERD, individually, KEITH :

KALB, individually, and KELLY DEVERS, :

individually, :

Defendants. :

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MEMORANDUM & ORDER

No. 06-cv-1979 (ERK) (VVP)

KORMAN, District Judge.

In September, 2002, the plaintiff, Ross Rosenfeld, began work for the New York City Department of Education (“DOE”) as a provisional probationary teacher at Shell Bank Intermediate School (“IS 14”). Defs.’ 56.1 Stmt. ¶ 2, ECF No. 241. Rosenfeld taught one inter-disciplinary seventh grade class during the 2002-2003 school year, for which he received a satisfactory year-end performance review from Ilene Agranoff, Principal of IS 14, and John Comer, District Superintendent. Pl.’s Exs. D, E. For the 2003-04 school year, Rosenfeld was promoted to a full-time probationary teacher, Pl.’s Ex. F ¶ 6.

In January, 2004, while proctoring a state-mandated science exam, Rosenfeld allegedly witnessed improper conduct by fellow teachers and Assistant Principals Susan Feeley and Anne Tulley. Pl.’s Mem. Law 3, ECF No. 246; Pl.’s Ex. B at 90-91. Rosenfeld alleges, for example, that during the exam Tulley “was pointing out answers, helping the children to measure things,

telling them what to do.” Pl.’s Ex. B at 91. After the exam, Rosenfeld told fellow teacher Karen Richards that he was concerned with the behavior of the other proctors, to which Richards responded that Assistant Principals Tulley and Feeley had said it was acceptable to give answers to the students. Pl.’s Mem. Law 3, ECF No. 250. Sometime later in January, 2004, Rosenfeld anonymously contacted Carl Campanile, a reporter for the *New York Post*, to describe what he viewed as cheating. Pl.’s Ex. B at 91-94. Rosenfeld did not disclose his own name but did name the specific test during which he observed the alleged cheating. *Id.* at 94.

On February 24, 2004, Feeley and Assistant Principal Shepherd met with Rosenfeld to discuss the performance of students in Rosenfeld’s classes. Defs.’ Ex. O. This meeting was memorialized in a letter from Agranoff to Rosenfeld, dated March 3, 2004. *Id.* A vast majority of students were failing both of Rosenfeld’s eighth grade English classes. *Id.* Rosenfeld attributed this to the students’ poor performance on exams, homework, and classwork. Defs.’ *Id.* Shepherd and Feeley discussed with Rosenfeld ideas to improve his students grades like selecting different novels to read and reviewing the testing material prior to exams. *Id.* Shepherd and Feeley also suggested that Rosenfeld visit other eighth grade English classes to learn successful strategies and techniques and said that they would make future visits to observe Rosenfeld’s changes. *Id.* It is undisputed that Rosenfeld did not follow Shepherd’s and Feeley’s suggestions for how to raise his students’ grades. Defs.’ 56.1 Stmt. ¶ 14; Pl.’s 56.1 Stmt. ¶ 14.

Rosenfeld alleges that at the February 24 meeting Shepherd and Feeley warned that failing students creates the risk that students would have to be held back, in conflict with the DOE’s “promotion policy.” Pl.’s Ex. F ¶ 13. This policy, also known as “social promotion,” is the practice of promoting students with poor or failing grades to the next class year under the theory that keeping students with their social peers is educationally beneficial. Pl.’s Mem. Law 4

n.1, ECF No. 250. Assistant Principal Feeley claims that Rosenfeld's grading violated school policy by giving scores below fifty-five. Defs.' 56.1 Stmt. ¶ 13. Rosenfeld, however, claims that he was free to give grades lower than fifty-five because they would be automatically bumped up by the school administration. Pl.'s Ex. O ¶ 3.

On March 12, 2004, Rosenfeld was warned by Shepherd that Agranoff was still dissatisfied with Rosenfeld's students' grades and with Rosenfeld's resistance to the urgency of promoting students. Pl.'s Ex. F ¶ 15. On the same day, Rosenfeld contacted Carl Campanile again, this time using his real name, and also decided to record future conversations with the administrators of IS 14. Pl.'s Ex. F ¶ 17. Rosenfeld testified that he decided to record conversations because, in part, Agranoff and others were screaming at him and threatening to be in his classroom every day, though Rosenfeld did not clearly state why he thought this was happening. Pl.'s Ex. A at 35-35.

On March 29, 2004, Agranoff recommended to Rosenfeld that he improve his students' grades and that the grades reflected poorly on him. Pl.'s Ex. F ¶¶ 19-21. Rosenfeld replied that it was the responsibility of his students to improve, not his responsibility to raise their grades. *Id.* ¶ 20. Subsequently, on April 14, 2004, in a meeting secretly recorded by Rosenfeld, Agranoff explained that even students who fail and are deemed to have a "minimal understanding" of the subject matter will advance to the next grade. Pl.'s Ex. Q.

The defendants allege that in late April, 2004, all of the students in one of Rosenfeld's English classes walked out to complain to Agranoff that Rosenfeld had used inappropriate language with them. Defs.' 56.1 Stmt. ¶ 19. According to Agranoff, the students said that Rosenfeld was a poor teacher and requested a new one. Defs.' Ex. D at 242-43. Rosenfeld asserts that only four students went to Agranoff to complain after class and only did so because

they were in trouble. Pl.'s Ex. O ¶ 7. Rosenfeld's students wrote five letters between April 29 and May 7, 2004, complaining of inappropriate behavior by Rosenfeld. Defs.' Ex. R. It is undisputed that in late April, Agranoff informed Superintendent Gloria Buckery that she was considering giving Rosenfeld an unsatisfactory rating at the academic-year-end review. Defs.' Ex. D 173-74; Defs.' 56.1 Stmt. ¶ 18; Pl.'s 56.1 Stmt. ¶ 18.

Rosenfeld alleges that Agranoff repeatedly visited his English classes throughout May, 2004, solely to harass him. Pl.'s Ex. F ¶¶ 35, 37. Around the same time, Agranoff requested that Rosenfeld participate in a mentor program, to which Rosenfeld refused. Pl.'s Ex. F ¶¶ 32-33. On May 21, 2004, Rosenfeld gave a speech to his labor union in which he called for a petition to remove Agranoff from her position as Principal of IS 14. Defs.' 56.1 Stmt ¶ 8; Pl.'s 56.1 Stmt. ¶ 8. Rosenfeld stated at deposition that he made this speech because he thought that Agranoff was corrupt for pushing teachers to comply with the social promotion policy, Pl.'s Ex. A at 52-53, although it is unclear from the record what specifically Rosenfeld said during the union speech. Agranoff stated at deposition that she knew that Rosenfeld spoke at the union meeting but did not know any details of his speech or that he called for her resignation. Defs.' Ex. D at 228.

On May 25, 2004, Agranoff again asked Rosenfeld to observe another teacher's class to learn class management skills. Defs.' Ex. B at 254-55. Rosenfeld refused, telling Agranoff that it was not necessary. *Id.* at 256-57. On June 2, 2004, Agranoff wrote to Rosenfeld that "we have tried to help you improve your teaching skills. You continue to be insubordinate. Your continued behavior can lead to further disciplinary action." Defs.' Ex. Q.

Also on June 2, 2004, Rosenfeld witnessed cheating by students while proctoring a state-mandated eighth grade social studies test and reported it to Vice Principal Feeley immediately.

Pl.'s Ex. F ¶ 52. Feeley said that there was nothing that could be done about student cheating and that Rosenfeld should not report it to Agranoff. *Id.* ¶ 53. Despite this suggestion, Rosenfeld reported the cheating to Agranoff, who instructed Rosenfeld to ignore it and refused to accept a list of students who were cheating on the exam. *Id.* ¶ 54. During this meeting, Rosenfeld asked if it was the goal of the school to graduate the students to the next grade, to which Agranoff responded "yes," and Union Representative Offerman said, "[w]e can't keep these kids back. Then the goal is to move these kids ahead to whatever extent we can." *Id.* ¶ 54; Pl.'s Ex. Q. Both the meetings were secretly recorded by Rosenfeld. *See* Pl.'s Ex. Q.

It is undisputed that on June 4, 2004, John Dirrigl, a Regional Instructional Specialist for the DOE, conducted an observatory evaluation of Rosenfeld's English class. Defs.' Ex. S. According to Superintendent Buckery, a school principal usually performs observatory evaluations, but Dirrigl, who is not a direct supervisor of Rosenfeld, was called in to ensure independence because Rosenfeld was at risk of receiving an unsatisfactory rating. Defs.' Ex. F at 28. Deputy Superintendent Organisciak stated that Dirrigl was used to provide an independent observation and an objective viewpoint. Pl.'s Ex. M at 33. Dirrigl's observation summary, signed June 17, 2004, factually detailed the happenings of Rosenfeld's class, concluding that "the lesson . . . presented on June 4 was unsatisfactory." Defs.' Ex. S. Dirrigl concluded his report, which was addressed to Rosenfeld, by stating "I am supporting the recommendation of your principal for an unsatisfactory rating." *Id.*

Since their first interaction on March 12, Rosenfeld had turned over to Campanile, the *Post* reporter, numerous recorded conversations, including ones with Agranoff and Feeley. Pl.'s Ex. F ¶ 60. On June 9, 2004, Campanile called Agranoff for comment on a potential story. *Id.* Agranoff did not take the call and testified that she did not know who the call was from at that

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