SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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ELIZABETH CHRISTIAN,

Petitioner,

- v -

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK

Respondents.

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INDEX NO. 159994/2020

MOTION DATE N/A[1]

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1- 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for ARTICLE 78.

For the reasons described below, the cross-motion to dismiss the petition is granted; however, petitioner is entitled to 29 days of back pay.

Background

Petitioner started working for respondent the Department of Education ("DOE") in September 2013. She worked as an English as a Second Language teacher and insists she was an exemplary teacher. Petitioner alleges that towards the end of her initial probationary period (three years) in 2016, she signed a one-year probationary extension with DOE. She admits that she subsequently signed two more one-year probationary extensions, one of which would have ended in 2018 and the other in 2019. Petitioner contends that her probationary period ended on October 1, 2019.

[1] The Court recognizes that this proceeding has been pending for years, although it was only assigned to the undersigned a few days ago. The Court apologizes, on behalf of the Court system, for the lengthy delay in the resolution of this proceeding.

Petitioner acknowledges that she went on a leave of absence for the 2019-2020 school year and returned to work in September 2020 before being fired on October 1, 2020. Petitioner alleges her employment was therefore terminated improperly. She contends that respondents incorrectly viewed her as a probationary employee. Petitioner claims that she is entitled to tenure under the 'tenure by estoppel' doctrine; she argues that she obtained tenure while she was out on her leave of absence.

Petitioner contends that under the terms of the last probation extension agreement, the deadline for DOE to make a decision about her probation was October 1, 2019 and respondents' October 1, 2020 termination was not effective. She also insists that respondents failed to give her sixty days notice prior to the termination of her employment. Petitioner demands, in the alternative, that she get a name-clearing hearing in the even that she is not entitled to tenure.

Respondents cross-move to dismiss on the ground that petitioner remained a probationary employee on the date she was fired. They observe that in September 2019, right before the start of the 2019-2020 school year, petitioner requested a leave of absence for the entire year. That request was approved (NYSCEF Doc. No. 16). Respondents contend that petitioner did not return to teaching until September 2020 and that she was then fired on September 30, 2020. They observe that the letter terminating her employment noted an appeal process petitioner could have pursued and insist that she never sought that review.

Respondents maintain that its decision to fire petitioner was not done in bad faith and that her leave of absence extended her probationary period for an additional year. They insist that petitioner was entitled to only 30 days notice prior to her termination and that, at most, she should receive 29 days of back pay as she was provided with a single day's notice concerning her termination. Respondents explain that petitioner is not entitled to a name-clearing hearing as

she did not allege any instance of defamation and simply being terminated as a teacher is not a basis for such a hearing.

In reply, petitioner insists that she resumed her full-time teaching duties on September 8, 2020 and worked until she was fired on October 1, 2020. She maintains that respondents were contractually obligated to grant her tenure under the extension of probation agreement she signed for the 2018-2019 school year. Petitioner argues that this agreement does not contain any exceptions and it could only be modified in writing. She also argues that DOE did not act by October 1, 2019 and so she obtained tenure by estoppel.

In reply, respondents argue that petitioner ignored the effect of her leave of absence on her probationary period. They insist that an absence from actual employment must necessarily affect the calculation of her probationary period.

Discussion

"It is a long-standing, well-established standard that the judicial review of an administrative determination is limited to whether such determination was arbitrary or capricious or without a rational basis in the administrative record and once it has been determined that an agency's conclusion has a sound basis in reason, the judicial function is at an end. Indeed, the determination of an agency, acting pursuant to its authority and within the orbit of its expertise, is entitled to deference and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record" (*Partnership 92 LP v State Div. of Hous. and Community Renewal*, 46 AD3d 425, 428-29 [1st Dept 2007], *affd* 11 NY3d 859 [2008] [internal quotations and citations omitted]).

The central issue in this proceeding is whether or not petitioner is entitled to tenure under the tenure by estoppel doctrine. "Tenure may be acquired by estoppel when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher's probationary term" (*Wilson v Dept. of Educ. of City of New York*, 169 AD3d 513, 514 [1st Dept 2019] [internal quotations and citations omitted]).

Here, the relevant probationary extension agreement extended respondents' deadline to October 1, 2019 (NYSCEF Doc. No. 2). But contrary to petitioner's position, the inquiry does not end there. Petitioner readily admits that she obtained a leave of absence at the last minute for the 2019-2020 school year, which necessarily encompasses that deadline (petitioner's leave of absence began in September 2019, right before the school year began). Moreover, there is no dispute that petitioner was terminated from her employment via a letter dated September 30, 2020 (NYSCEF Doc. No. 3). The question for this Court is whether petitioner's probationary period was automatically extended due to her leave of absence.

This Court finds that petitioner's leave of absence extended her probationary period. In similar circumstances, courts have held that a leave of absence is properly excluded from the computation of a teacher's probationary period (*Matter of Brown v Bd. of Educ. of Mahopac Cent. School Dist.*, 129 AD3d 1067, 1071, 13 NYS3d 131 [2d Dept 2015] [finding that a teacher's unpaid maternity leave was excluded from her probationary period]; *see also Matter of England v Commr. of Educ. of State of N.Y.*, 169 AD2d 868, 870, 564 NYS2d 809 [3d Dept 1991]). Of course, this rationale makes sense. "The purpose of excluding from the probationary term periods during which a probationer is not at work performing his or her duties is not punitive, but rather is the same as that underlying a probationary term in the first instance. It is

designed to enable the appointing officer to ascertain the fitness of the probationer and to give the probationer a reasonable opportunity to demonstrate the ability to perform the duties of the office" (*Tomlinson v Ward*, 110 AD2d 537, 538, 487 NYS2d 779 [1st Dept 1985]).

The Court recognizes that the agreement required respondents to take action regarding petitioner's probation by October 1, 2019. But petitioner requested and was approved for a leave of absence for an entire school year prior to that deadline. This Court finds that the only rational interpretation of these events is that petitioner's probationary period was automatically extended.

Petitioner argues, essentially, that respondents were supposed to act by October 1, 2019. But that would create an untenable situation for respondents. Under petitioner's theory, if respondents wanted to terminate petitioner, then they were required to fire her *while she was on an approved leave of absence.* Or, in the alternative, they would have had to fire her *when she asked for the leave of absence*. Or they would have had to condition a leave of absence on her agreeing to extend her probationary period.

Any of those scenarios makes little sense and this Court has no doubt that had respondents taken any of those actions, it would have resulted in litigation. Petitioner could have possibly claimed that she was improperly fired while she was on an approved leave of absence, or because she asked for an approvable leave of absence, or because she refused to be coerced to agree to extend the probationary period in order to get the leave of absence. That is yet another reason why it makes perfect sense to keep the two issues separate – if she is entitled to a leave of absence, she should get it, and any probationary period stops running while she is on that leave of absence.

The Court finds that petitioner never fulfilled her obligations under the extension of probation agreement, which required her "to serve, an additional one year probationary period

commencing 10/01/2018, and concluding on 10/01/2019" (NYSCEF Doc. No. 3). Petitioner began her approved leave on September 3, 2019 (NYSCEF Doc. No. 16). That means that she was still a probationary employee on September 30, 2020—the date of her termination—when including this extension of the probationary period.

Next, the Court finds that respondents' determination to fire petitioner was not in bad faith. "A court's review of a determination to terminate a probationary employee is limited to consideration of whether the dismissal was in bad faith, in violation of statutory or decisional law, or for unconstitutional or illegal reasons" (*Matter of Cooke v County of Suffolk*, 11 AD3d 610, 611, 783 NYS2d 392 [2d Dept 2004]). As respondents point out, petitioner received mostly "Developing" ratings as well as some "Ineffective" ratings on her performance reviews. This Court is unable to find that her termination was in bad faith given these evaluations.

Petitioner is also not entitled to a "name-clearing" hearing. This "is a remedy for the deprivation of a person's due process right when an employee is terminated along with a contemporaneous public announcement of stigmatizing factors, including illegality, dishonesty, immorality, or a serious denigration of the employee's competence" (*Aquilone v City of New York*, 262 AD2d 13, 13, 690 NYS2d 558 [1st Dept 1999]). Termination from employment as a probationary employee is not "stigmatizing" sufficient to warrant a name-clearing hearing (*see Johnson v Kelly*, 35 AD3d 297, 298 828 NYS2d 10 [1st Dept 2006]).

However, the Court finds that petitioner was not provided with the requisite notice prior to her termination (Education Law § 3019-a [providing a 30-day notice requirement]); both petitioner and respondents agree that this notice was not timely provided. Therefore, petitioner is entitled to receive back pay (as suggested by respondents) for 29 days as she was only provided with one days' notice. However, the Court emphasizes that this belated notice does not constitute

a bad faith termination as respondents rationally relied upon petitioner's poor performance reviews.

Accordingly, it is hereby

ORDERED that respondents' cross-motion to dismiss is granted except as stated below; and it is further

ADJUDGED that the petition granted ONLY to the extent that petitioner is entitled to back pay for 29 days of service (including statutory interest from the date of her termination, September 30, 2020) and denied with respect to the remaining requested relief, without costs or disbursements to any party.

4/17/2024
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE