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

PRESENT: HON. PAUL G. FEINMAN Justice

PART 52

INTERIM DECISION & ORD

Index Number : 110357/2005
ALTMAN, HUI Z.
VS
DEPARTMENT OF EDUCATION
Sequence Number : 001
ARTICLE 78

INDEX NO. 110357/2005
MOTION DATE 12/7/05
MOTION SEQ. NO. 001
MOTION CAL. NO. 2

motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
~~Answering Affidavits~~ — Exhibits Notice of Cross Motion	2, 3
Replying Affidavits	4, 5

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this cross motion is denied. See annexed decision & order.

The petition is restored to the submission calendar for 4/17/06 at 9:30 a.m. in order for the respondent to file an answer.

FILED
APR 04 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/27/06

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X
In the Matter of the Application of
HUI Z. ALTMAN,
Petitioner,

For a Judgment Pursuant to CPLR Article 78

- against -

THE NEW YORK CITY DEPARTMENT OF EDUCATION,
Respondent.
----------X

Index Number	110357/2005
Oral Arg. Date	Dec. 7, 2005
Mot. Seq. No.	001
Mot. Cal. No.	2

DECISION & ORDER ON CROSS MOTION

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Papers considered in review of this petition to annul and cross-petition to dismiss:

Papers	**Numbered**
Notice of Petition and Affidavits Annexed.....	1
Notice of Cross-Motion & Memo of Law.....	2,3
Petitioner's Memo of Law in Opp.....	4
Respondent's Reply Memo.....	5

PAUL GEORGE FEINMAN, J.:

Notwithstanding nine prior satisfactory ratings, in June 2004, the principal of Morris High School gave petitioner, a certified teacher of English as a second language, an unsatisfactory rating. The respondent terminated the petitioner on August 20, 2004, just ten days before granting her tenure. Petitioner seeks various relief, including a reversal of the unsatisfactory rating and reinstatement to her position. Defendant cross-moves to dismiss pursuant to CPLR 3211(a)(2), (5), and (7). For the reasons which follow, the cross motion to

dismiss is denied and the petition is restored to the submission calendar for the City to file an answer. Final determination of the petition is held in abeyance pending receipt of the City's answer.

Factual and Procedural Background

Petitioner was hired by respondent New York City Department of Education in January 1995 as a substitute teacher (Pet. ¶ 1). Subsequently, she received her bachelor's degree in English in 1996 and master's degree in 1999 in TESOL, teaching English to speakers of other languages (Pet. ¶¶ 2, 5, Ex. C) In September 1998, she was appointed as a regular English teacher in Morris High School in the Bronx (Pet. ¶ 4). In December 2003, she received her license from the New York City Department of Education to teach English as a second language, effective May 8, 2002 (Pet. Ex. E) . The State Education Department issued her a public school teacher certificate effective September 1, 2003, showing she was certified to teach English to speakers of other languages. (Pet. Ex. F).

In June 2004, the principal of Morris High School gave petitioner an "unsatisfactory" rating for her 2003-2004 performance, in contrast with her first nine annual ratings which had all been "satisfactory" (Pet. Ex.G).[1] Thereafter by letter dated June 17, 2004, respondent informed petitioner that her certification of completion of probation in Region 2 was being denied, that her service was terminated as of August 20, 2004, and that she was entitled to a review pursuant to Article 4, Section 4.3.2 of the Bylaws of the Department of Education (Pet. Ex. I). Had she not been terminated, petitioner would have been given tenure on August 30, 2004 (Pet. ¶ 13).

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[1]In June 2004, there were 43 students from Morris High School who took the English Regents examinations, 11 of whom were her students (Pet. ¶ 10, Ex. H).

On September 23, 2004, she was sent by the Bronx District Superintendent's office to the High School of World Cultures as an ESL teacher where she taught until November 15, 2004 when her pay was stopped and she was told to go home (Pet. ¶¶ 14-15). However, she had applied for unemployment insurance benefits earlier in September 2004, and her application was rejected based on her former employer stating that she had been "discharged for misconduct in connection with this employment" (Pet. Ex. K).

Petitioner sought review pursuant to the collective bargaining agreement, as she was informed in the June 17, 2004 dismissal letter that she could do. Her review before the three-person chancellors committee occurred on March 2, 2005 (Pet. Ex. L). By letter dated May 2, 2005, petitioner was informed that based upon the report of the chancellor's committee, the Regional Superintendent had decided to reaffirm the "previous action" which led to the denial of certification (Pet. Ex. L).[2] Petitioner commenced the instant proceeding by filing her notice of petition and petition on July 27, 2005. Petitioner argues that the decision of respondent was arbitrary and capricious and not based on substantial evidence. Respondent cross moves to dismiss based on statute of limitations, lack of subject matter jurisdiction, and failure to state a cause of action.

Legal Analysis

1. Lack of Subject Matter Jurisdiction (CPLR 3211[a][2])

Although referenced in the notice of motion, no argument is made in the text of the papers that the court lacks subject matter jurisdiction. Accordingly, the court deems the argument

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[2]The three-member panel reviewing the matter split 2 to 1 (Pet. Ex. L).

abandoned.

2. Statute of Limitations (CPLR 3211 [a][5])

An Article 78 proceeding against a public body may be commenced only when a matter has been finally determined (CPLR 7801[1]). Pursuant to CPLR 217(1), an Article 78 proceeding must be commenced within four months of the date of the final determination (*Carter v State of New York*, 95 NY2d 267, 270 [2000]). An agency determination is deemed final when the petitioner has received notice of the determination and has been aggrieved thereby (*Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]). "In analyzing the Statute of Limitations issue we must first ascertain what is the determination sought to be reviewed" (*Martin v Ronan*, 44 NY2d 374, 380 [1978]). A petitioner will not be found to be aggrieved "by the mere issuance of a determination" where the agency has created an ambiguity as to whether or not the determination was intended to be final (*Biondo*, at 834).

Respondent argues that petitioner was aggrieved at the time she received the notice dated June 17, 2004 that she was denied certification, and certainly no later than August 20, 2004, the date she was considered terminated.[3] Respondent relies on *DeMilio v Borghard*, 55 NY2d 216 (1982), which addressed the issue of whether the four-month limitations period in an Article 78 proceeding, when brought by a probationary employee, begins to run on the termination date of the employment or upon the subsequent denial of a request for reconsideration of the discharge. In *DeMilio*, a probationary governmental employee was notified by letter that his employment was being terminated as of a particular date. In response to the letter, he commenced an

[3]Respondent notes that an argument could be made that she was aggrieved on November 15, 2004, the last day she worked as a teacher in any capacity (Memo in Supp. p. 7).

administrative grievance proceeding in accordance with his union's collective bargaining agreement, which proved unavailing. He also wrote to the commissioner after the date of his termination, asking him to reconsider the decision, which the commissioner declined to do. *DeMilio* held that in the case of a probationary employee, who is not entitled to a hearing in connection with being discharged, the statute of limitations begins to run from the date of the dismissal, and any application for reconsideration of the administrative determination does not serve to toll the running of the statute (55 NY2d at 220). Notably, *DeMilio* apparently grouped the union grievance proceeding with the petitioner's request to the commissioner to reconsider as "applications for reconsideration," and held that neither would extend the time to commence an Article 78 proceeding.

Respondent also relies on *Frasier v Board of Educ. of the City School Dist. of the City of New York*, 71 NY2d 763 (1988). In *Frasier*, the question concerned whether a probationary teacher who was terminated but then reinstated when the chancellor reversed the earlier determination on review, lost his rights as a probationary employee between the time he was terminated and reinstated. The Court analyzed Education Law § 2573(1)(a) which concerns the hiring of teachers. The relevant portion of the statute subsection states

> The service of a person appointed to any of such position s [as teacher] may be discontinued at any time during such probationary period, on the recommendation of the superintendent of schools, by a majority vote of the board of education. Each person who is not to be recommended for appointment on tenure shall be so notified by the superintendent of schools in writing not later than sixty days immediately preceding the expiration of his probationary period.

Educ. L. § 2753(1)(a). *Frasier* explains that "it is evident that a decision not to grant tenure to a probationary teacher, once made, is intended to be final. The statute contains no provision for

reconsideration or review or for reinstatement of a discontinued probationary employee." (71 NY2d at 766). Furthermore, *Frasier* makes clear that probationary teachers do not have a constitutional or statutory right to review of the chancellor's decisions to discontinue their services; their right to a review stems solely from the collective bargaining agreement (71 NY2d at 767). The collective bargaining agreement, section 4.3.2C of Article 4 of the Bylaws of the Department of Education "establish[es] an optional procedure under which a teacher may ask the Chancellor to reconsider and reverse his initial decision, a decision which is final and which, when made, in all respects terminates the employment of a probationer" (*Id.*).[4]

Following the reasoning in *DeMilio* and *Frasier*, is *Schulman v Board of Educ. of the City of New York*, 184 AD2d 643 (2d Dept. 1992), in which a probationary teacher, informed that his employment would be terminated in at the beginning of September 1989, and advised that he was entitled to review under Board of Education By-laws § 5.3.4, undertook the review process and, having been unsuccessful, attempted to bring an Article 78 proceeding within four months of the reaffirmation of the decision to terminate him. *Schulman* held that the petition was untimely, as it should have been brought within four months of the date of his termination; there was "no merit to the petitioner's argument that the review of the administrative determination served to extend the four month limitations period" (184 AD2d at 644).

More recently, in *Mateo v Board of Educ.*, 285 AD2d 552 (2d Dept. 2001), also cited by respondent, the court held that a provisional teacher seeking reinstatement and back pay was not time-barred from her petition seeking Article 78 review of the chancellor's sustaining of her

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[4]*Frasier* was decided before the revision to the Bylaws, and thus refers to Section 5.3.4C rather than Section 4.3.2C, the current section.

unsatisfactory rating, but was barred from commencing a petition seeking review of the termination decision itself because of the running of the statute of limitations (*see also*, *Levine v Board of Educ. of City of New York*, 272 AD2d 328 [2d Dept. 2000]; *McCain v Fernandez*, 226 AD2d 380 [2d Dept.], *lv denied* 88 NY2d 806 [1996]). Similarly, in *Bonilla v Board of Educ. of City of New York,* 285 AD2d 548 (2d Dept. 2001), it was held that the petition was not time-barred to the extent that it sought review of the chancellor's determination sustaining the petitioner's unsatisfactory rating, although it was time-barred as concerned the determination to terminate his employment.

Turning to the case at bar, petitioner seeks reversal of her unsatisfactory rating, a matter which, pursuant to *Mateo* and *Bonilla*, was not ultimately decided until the review process was completed and petitioner informed by letter dated **May 2, 2005** that the chancellor's committee had "reaffirmed the previous action [i.e., the issuance of an unsatisfactory rating] which resulted in Denial of Certification of Completion of Probation." (Ex. L, Letter From Local Instructional Superintendent dated May 2, 2005, emphasis in original). Thus, using the May 2, 2005 date, the filing of the petition on July 27, 2005 seeking reversal of her rating was well within the four-month statute of limitations. It may well be that some of the other causes of action or claimed relief are time-barred, however, the respondent has not parsed through the various relief sought other than reversal of the unsatisfactory rating (i.e., reinstatement, lost wages, etc.) and therefore, neither will the court. When it answers, respondent may raise the issue again as to those claims or requests for relief that are not asking for reversal of the unsatisfactory rating. Accordingly, the branch of respondent's cross-motion to dismiss which is based on the statute of limitation is denied.

3. Failure to State a Cause of Action (3211[a][7])

In an Article 78 proceeding, it is a well-settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept. 1983]). The test of whether a decision is arbitrary or capricious is "'determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609). The court is to dispose of an Article 78 proceeding in the same manner as it would a motion for summary judgment (CPLR 409[b]).

The reviewing court must defer to the administrative fact finder's assessment of the evidence and the credibility of the witnesses (*Lindemann v American Horse Shows Assn.*, 222 AD2d 248, 250 [1st Dept. 1995] citing *Berenhaus v Ward*, 70 NY2d 436, 443 [1987] [holding that it is axiomatic that credibility determinations are best made by the person who actually sees and hears the witness, as the courts are "disadvantaged . . . because their review is confined to a lifeless record."). The scope of review does not include "any discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed by the Authority" and that "the sanction must be upheld unless it shocks the judicial conscience" (*Featherstone v Franco*, 95 NY2d 550, 554 [2000], citing *Matter of Pell v Board of Educ.*, 34 NY2d at 232-234). Once the court has found a rational basis exists for the determination, its review is ended (*Matter of Sullivan County*

Harness Racing Assoc., Inc. v Glasser, 30 NY2d 269, 277-278 [1972]).

Petitioner argues that the chancellor's committee's recommendation, affirmed by the Regional Superintendent, was arbitrary and capricious. She points to the satisfactory ratings she received in all the previous years of her teaching under four other principals, and that 11 of her students were among the 43 from Morris High School who passed the English Regents examinations in 2004. She also points to the rejection of her unemployment application in September 2004 based on respondent having informed the Department of Labor that she was discharged for "misconduct," a charge not previously brought forth.

According to the March 2, 2005 report from the hearing by the chancellor's committee, the principal set forth five specific reasons for the decision to deny certification, namely that petitioner had been given "extensive support and professional development," the assistant principal met with her almost every day, demonstrations were provided to her, the log shows she was unable to follow suggestions for improvement, and in June the Superintendent's designee observed her and found her teaching unsatisfactory (Pet. Ex. L, March 2, 2005 chancellor committee's recommendations pp. 1-2). Petitioner's testimony consisted of noting that the principal was new to the school and had observed her only once; that assistance was given her but only beginning in March; that she was an experienced teacher in Beijing, China before coming to the United States, and believed she was improving; and that she believed the assistant principal did not respect her professionally and that the school administration either disliked her personally or did not like that she spoke with an accent (Pet. Ex. L, pp. 1-2). The committee concluded, by a two-to-one determination, that the school administration provided a substantially documented case, and that there "is not doubt that massive assistance with afforded [petitioner]."

(Pet. Ex. L, p. 2). It also found that petitioner's "disagreement with the . . . evaluation was not backed up by any documentation" (Id.).

The committee member in dissent wrote a dissenting report which questions many of the majority's findings (Pet. Ex. L, March 3, 2005 Moskowitz report). He writes that the evidence showed that petitioner was only observed beginning in March 2004 and that the log books "cover a period of only a few weeks." There was "little indication" that help and support where provided during the school year; only one scheduled modeled lesson was given to her, there was no required program of planned improvement, and monitoring of her lesson plans despite criticism of her lessons. He points to the documentation showing many of petitioner's students passed the regent's examination, which seems to contradict the unsatisfactory finding in the category of "Evidence of pupil growth in knowledge." He noted that "the administration failed to produce any documentation or measurable criteria to support their claim" of her failure to help increase students' knowledge. He queried why she was rated unsatisfactory in the category of "Voice, speech and use of English," when presumably "she used the same voice and language in her previous satisfactory rated nine years."

Although the court must confer great deference to the decision of the fact finder in an Article 78 proceeding, on a motion to dismiss for failure to state a cause of action, the question to be answered is whether a plaintiff or petitioner has a cause of action, not whether the pleading states it. Here, assuming the plaintiff's allegations to be true, as the court must on a motion pursuant to CPLR 3211(a)(7), the decision would indeed appear to be arbitrary and capricious. There is a lacking of sound basis in reason and without regard to the facts (*Matter of Pell*, 34 NY2d at 232). Here, the nature of the differences in the majority and minority reports describing

and evaluating the evidence that was proffered to the committee calls into question whether there may have been an irrational bias. For instance, the committee's report does not address in any fashion the results of the 2004 regent's exams or the nine years of past "satisfactory" annual ratings. It also appears to have magnified how much aid was provided to petitioner, and its quality, during the school year. It is entirely conceivable that a court could decide that the determination was arbitrary and capricious and therefore the motion to dismiss must be denied. Accordingly, the respondent must answer the petition and the matter must be restored to the calendar for this purpose. It is

ORDERED that the cross motion to dismiss is denied; and it is further

ORDERED that the petition is restored to the submission calendar in Room 130, 60 Centre Street for April 17, 2005 in order that the respondent may file an answer to the petition in accordance with the time limits set forth in the CPLR and the Uniform Rules for the submission part.

This is the decision and order of the court on the cross motion.

Dated: March 27, 2006
New York, New York

J.S.C.
HON. PAUL G. FEINMAN

FILED
APR 04 2006
COUNTY CLERK'S OFFICE
NEW YORK