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

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 52

Altman, H

- v -

Dept. of E

INDEX NO. 110357/05

MOTION DATE [illegible]

MOTION SEQ. NO. 01

MOTION CAL. NO. /

The following papers, numbered 1 to ______ were read on this motion to/for [illegible]

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	[illegible]
Answering Affidavits — Exhibits	[illegible]
Replying Affidavits	[illegible]

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is determined in accordance with the annexed decision, order & judgment. The above motion ... [illegible] decision & order dated 3/27/06.

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 141B).

UNFILED JUDGMENT

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

Dated: 11/2/06

[signature]
J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

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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.

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Index Number 110357/2005
Mot. Seq. No. 001
Mot. Cal. No. 1
Submission Date Aug.16, 2006

DECISION, ORDER & JUDGMENT

For the Petitioner:
Blau, Kayman & Barrows
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For the Respondent:
Michael A. Cardozo, Esq.
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Papers considered in review of this petition to annul:

Papers	Numbered
Notice of Petition and Affidavits Annexed	1
Verified Answer & Memo of Law in Support	6,7
Petitioner's Memo of Law	8
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.:

In this Article 78 proceeding, the court denied respondent's pre-answer cross-motion to dismiss the petition by interim decision and order dated March 27, 2006. The respondent has now answered the petition, which seeks to reverse the unsatisfactory rating given to petitioner, a certified teacher of English as a second language. Petitioner also seeks reinstatement to her position. For the reasons set forth below, the petition is denied and the proceeding is dismissed.

Factual and Procedural Background

Petitioner was hired by respondent New York City Department of Education in January 1995 as a provisional, regular substitute teacher (Pet. ¶ 1; Ver. Ans. ¶ 1). 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 at Morris High School in the Bronx, subject to the completion of a three-year probationary period (Pet. ¶ 4; Ver. Ans. ¶ 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 permanent state certification effective September 1, 2003, showing she was certified to teach English to speakers of other languages (Pet. Ex. F; Ver. Ans. ¶ 8). From June 1995 through June 2003, petitioner received annual "satisfactory" ratings for her teaching at Morris High School (Pet. Ex. G).

In 2004, petitioner's classroom work came under increasing scrutiny by the Morris High School administration, although she alleges that 11 of the 43 students from Morris High School who passed the English Regents examinations in June 2004 were her students (Pet. ¶ 10, Ex. H). On March 10, 2004, petitioner's performance was observed by the assistant principal (Ver. Ans. ¶ 26; Ex. 6).[1] His more than three-page report detailed his observations and summed up her lesson as "unsatisfactory" based on "very weak" classroom management including that she allowed students to talk to each other throughout the lesson, failed to circulate throughout the

[1]The same assistant principal had observed her classroom work in previous years and twice found it satisfactory (see Pet. Ex. G, Observation Report of Nov. 17, 2003; Observation Report of May 30, 2002) and once "minimally Satisfactory" (Pet. Ex. G, Observation Report of December 12, 2001).

class, and did not require students to sit down prior to the end of class; "very weak" lesson planning including a failure to identify the Standards in writing on the blackboard and in her lesson plan, or to plan out the class reading and writing activity; and in constructing a "web quest" activity that was not related to the theme of the novel being read by the students, lacked a due date, and which was "littered with incorrect spellings, inconsistencies and grammatical errors." The report noted that "many of the items stated above" had been previously discussed with her in "your yearly Individualized Improvement Plan" (Ver. Ans. Ex. 6, unnumbered p. 4). On March 29, 2004, petitioner wrote in response that these observations were the assistant principal's "personal feelings," that she and her class had been "outstanding" on that particular day, and that although she had asked him to teach her classes many times, he had never done any demonstration teaching for her (Ver. Ans. Ex. 6, unnnumbered p. 4).

Beginning March 15, 2004 through April 28, 2004, the assistant principal undertook a series of nearly daily observations and meetings with petitioner in order to improve her classroom instruction, the history of which he recorded as a log (Ver. Ans. Ex. 7). According to the log, initially petitioner was unwilling to fully cooperate until after they met with the principal and a union representative, and it was suggested she visit other teachers and observe other classes and work with the Teacher Center Specialist (Ver. Ans. Ex. 7, 8). The scheduled April observation of her class was postponed twice so that she could prepare for the lesson based on her continuing meetings and discussions with the assistant principal (Ver. Ans. Ex. 7). The observation was conducted by the principal on April 30, 2004 who wrote a four-page report

concluding that the lesson was "unsatisfactory" (Ver. Ans. Ex. 9).[2] Among other observations, the principal noted that petitioner allowed the students to speak in one-word sentences, completed their sentences for them, spoke too much and did not require the students to speak enough, mispronounced four words and made three grammatical errors in her questions to the students, and poorly managed the amount of time for the number of questions to be addressed. On May 18, 2004, the principal wrote petitioner a letter informing her that based on the two unsatisfactory observations, she would be denied completion of probation and rated "unsatisfactory" unless there was improvement in five specific areas (Ver. Ans. Ex. 10).

Petitioner continued to meet with the assistant principal and others on a near daily basis from May 5 through May 21, 2004 (Ver. Ans. Ex. 11). On May 24, 2004, she was again observed by the school's principal whose four-page report concluded that the lesson was "unsatisfactory" (Ver. Ans. Ex. 12). The report noted in part that the students often answered with one-word answers; that petitioner often spoke over them, interrupted them, or repeated what they answered and made "too many mistakes in [her] writing and speech"; that she took too long to arrange the student seating into a semi-circle; and that students were allowed to talk without reprimand while the petitioner was explaining the homework assignment.

On June 15, 2004, an assistant to the superintendent of respondent's Region 2, along with an assistant vice principal at Jane Addams High School, visited petitioner's class and met with her afterward to discuss the fact that the lesson was found "unsatisfactory," as she had "failed to benefit from supervisory assistance by failing to correct the following: failing to have students

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[2]The principal was apparently new to the school in the 2003-2004 school year (see Pet. Ex. G, annual evaluations [signature of principal]).

write responses on the chalkboard, failing to appropriately apply standards or not using them, failing to plan properly, failing to give a clear homework assignment, not modeling correct English" (Ver. Ans. Ex. 13). The report indicated that among other issues, she had not had a lesson plan, had given a "convoluted" assignment, used "poor grammar and incorrect idiomatic English," asked yes/no questions that had not required full sentence responses, and had not provided sufficient feedback on student writing. The assistant superintendent noted that he would recommend supporting the "unsatisfactory" ("U") rating for the calendar year and the denial of completion of probation (Ver. Ans. Ex. 13, unnumbered p. 4).

On June 18, 2004, petitioner received a U rating for her 2003-2004 performance, with all categories except personal appearance rated unsatisfactory (Pet. Ex.G). 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 her union's collective bargaining agreement, Article 4, Section 4.3.2 of the Bylaws of the Department of Education (Pet. Ex. I).[3]

Petitioner immediately completed a form, dated June 1, 2004, which was received by respondent's Office of Appeals & Review on June 17, 2004. Except for personal information, the entirety of the form states:

"I hereby submit an appeal for the following reasons: (check appropriate category)

U-Rating_____
C-31_____

[3]According to the petitioner, had she not been terminated, she would have been given tenure on August 30, 2004 (Pet. ¶ 13). Respondent contends that her probationary period would not have ended until September 2, 2005 (Ver. Ans. ¶ 25).

C-31 & U-rating _____
Discontinuance/Denial___"

(Ver. Ans. Ex. 4). Petitioner checked the last category. [4] Petitioner's review before the three-person Chancellor's Committee occurred on March 2, 2005 (Pet. Ex. L).

From September 23, 2004 to November 15, 2004, she was employed at the High School of World Cultures as a provisional ESL teacher (Pet. ¶¶ 14-15; Ver. Ans. ¶ 14). She had also applied for unemployment insurance benefits earlier in September 2004, but her application was rejected based on respondent's reporting that she had been "discharged for misconduct in connection with this employment," a charge that has not been clarified (Pet. ¶ 19; Ex. K).[5]

By letter dated May 2, 2005, petitioner was informed that based upon the report of the Chancellor's Committee, the Office of the Regional Superintendent had decided to reaffirm the "previous action" which led to the denial of certification (Pet. Ex. L).

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 sufficient evidence. She seeks to have her annual 2004 U rating changed to a "satisfactory" rating and to be reinstated to her tenured teaching position with back pay, benefits, and seniority as of August 20, 2004, as well as reversal of the "misconduct" conclusion in her

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[4]The second category, the C-31, concerns the procedures set forth in the Chancellor's Regulation for termination of non-tenured employees (Ver. Ans. Ex. 15).

[5]In addition, her health insurance was terminated on September 7, 2004, and respondent refused to reinstate her benefits despite her continuing to teach (Pet. ¶¶ 16, 17). Respondent admits herein that petitioner was entitled to health benefits pursuant to her provisional appointment until November 15, 2004 (Ver. Ans. ¶ 17).

unemployment application.[6] Respondent's opposition, in sum, is that as a probationary teacher, petitioner was able to pursue different types of administrative appeals, and chose to appeal her discontinuance, rather than the U rating, and therefore the time to commence an Article 78 petition as concerns the discontinuance has expired, and she is now barred from commencing a proceeding to challenge the U rating.

Legal Analysis

An Article 78 proceeding against a public body may be commenced only when a matter has been finally determined (CPLR 7801[1]). CPLR 217(1) provides that 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 is aggrieved by the determination" (*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]). If there is further administrative action that could be taken to prevent or ameliorate the harm, then commencement of an Article 78 proceeding is premature (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 520, *cert. denied* 479 U.S. 985 [1986]).

Petitioner argues that she timely commenced this proceeding within four months of receipt of the May 2, 2005 affirmation by respondent's Office of the Regional Superintendent reaffirming the discontinuance of service and denial of her certification and completion of probation. Respondent disagrees, pointing to the line of cases establishing that because

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[6]The branch of her petition seeking to have her name removed from the ineligible list has been rendered academic as her name was removed as of June 16, 2006 (Ver. Ans. ¶ 49; Ex. 16).

probationary employees, who are not entitled to a hearing in connection with being discharged, must commence an Article 78 proceeding within four months of the date of the dismissal, any application for reconsideration of the administrative determination will not serve to toll the running of the statute (*see, DeMilio v Borghard*, 55 NY2d 216, 220 [1982]; *McCain v Fernandez*, 226 AD2d 380 [2d Dept.], *lv denied* 88 NY2d 806 [1996]). Following *DeMilio*, the Second Department has held that a probationary teacher seeking review under the Board of Education by-laws of a decision to terminate, may not commence an Article 78 proceeding where the reaffirmation of the decision to terminate was made more than four months after the date of termination (*Schulman v Board of Educ. of the City of New York*, 184 AD2d 643, 644 [2d Dept. 1992]). In addition, *Schulman* found "no merit to the petitioner's argument that the review of the administrative determination served to extend the four month limitations period" (*Schulman* at 644, citing *Frasier v Board of Educ. of the City School Dist. of the City of New York*, 71 NY2d 763 [1988]). In *Frasier,* where a probationary teacher was terminated but reinstated after the Chancellor reversed an earlier determination on review, the Court held that the right of probationary teachers to a review of the Chancellor's decisions stems solely from the collective bargaining agreement which "establish[es] an optional procedure under which a teacher may ask the Chancellor to reconsider and reverse his initial decision," because under the section of the Education Law concerning the hiring of teachers, "a decision not to grant tenure to a probationary teacher, once made, is intended to be final" and "in all respects terminat[es] the employment of a probationer" (71 NY2d at 766, 767).

The Department of Education and the courts distinguish between a probationary employee who seeks a review of a decision to terminate and review of a U rating. As noted

above, probationary teachers must commence an Article 78 proceeding within four months of termination; review by the Chancellor's Committee does not toll the running of the statute of limitations. However, an appeal of a U rating, made with or without an appeal of a discontinuance, will stay the running of the statute of limitations as to the issue of the U rating (Resp. Memo of Law in Supp. of Ver. Ans. p. 11, citing *Mateo v Board of Educ.*, 285 AD2d 552, 552 [2d Dept. 2001] and *Bonilla v Board of Educ. of City of New York,* 285 AD2d 548, 548 [2d Dept. 2001]). In both *Mateo* and *Bonilla*, the Courts held that the provisional teachers seeking reinstatement and back pay were not time-barred from commencing a petition seeking Article 78 review of the Chancellor's sustaining a U rating, although they were time barred from review of the notices of termination. Here, unlike those cases, petitioner specifically chose to appeal her "discontinuance/denial" rather than the U rating (Ver. Ans. Ex. 4).

Petitioner argues that the initial termination letter of June 17, 2004 issued from respondent's Regional Superintendent's office should not be deemed a final termination and that such letters have been found misleading and ambiguous in *Abamont v Cortinez*, 164 Misc.2d 599 (Sup. Ct., Kings County 1995) and *Munoz v Vega,* 2001 NY Slip Op. 40286U (Sup. Ct., Bronx County 2001). She argues that the notice created the impression that the decision was non-final as it was subject to a review process.[7] Nor did it inform her that the time to commence an Article 78 proceeding commenced with her termination. Although *Abamont* and *Munoz* both

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[7]Notably, in *Frasier*, after review by the Chancellor, the terminated probationary teacher was reinstated. However, the Court of Appeals is clear that the initial determination to terminate the probationary teacher's employment was "final," and that there was "nothing tentative or conditional" about the notice's statement that his service was terminated as of a particular date (71 NY2d at 768).

hold that such notices are not sufficiently clear concerning either the avenues of recourse or the finality of the determination, and try to limit the holding of *Schulman*, petitioner fails to note that the First Department has, albeit in a somewhat different context, rejected the argument that these notices are misleading because while mentioning review procedures under the collective bargaining agreement, they do not mention a right to judicial review (*see, Lipton v New York City Bd. of Educ.*, 284 AD2d 140, 140 [1st Dept. 2001]).

In *Lipton*, the petitioner contended that she was tenured but improperly dismissed as a probationary employee. The *Lipton* court was unpersuaded by her argument that the notice of termination had misled her into believing that she should pursue administrative remedies pursuant to the collective bargaining agreement, and held that the notice's clear statement that her probationary service was terminated did not contain any implication that the same review procedures would apply if she believed herself to be tenured. This court is constrained to follow *Lipton*, as well as prior case law, and therefore holds that the June 17, 2004 notice from respondent's regional superintendent's office was not misleading or ambiguous in stating that petitioner was terminated as of August 20, 2004, and in not stating that she had the right to pursue a judicial remedy at that time.

It is not clear why petitioner chose solely to appeal the discontinuance rather than in addition to or instead of another category. The petition is silent and petitioner does not provide an affidavit setting forth her understanding on June 1, 2004 as to the nature of the review she sought.[8] She evidently received a copy of the C-31 regulation prior to her termination hearing,

[8]According to the report of the hearing, petitioner and her union adviser testified about the U rating which she stated she wanted reversed, as well as her past history as a teacher, her

pursuant to section 3.2.2 of the Regulation, but there is no indication when she was made aware of the distinctions in the emphases of the different hearings. Petitioner's attorney argues that choosing the review form's fourth category of discontinuance/denial encompasses the other categories of the C-31 and the U rating (Pet. Memo of Law in Furth. Supp. p. 8). This argument does not comport with the C-31 Regulation which includes separate sections and slightly different procedures for appealing a U rating and for a discontinuance of service (see Ver. Ans. Ex. 15 §§ 4.3.1 and 4.3.2). Furthermore, it would not necessarily follow that an employee seeking an appeal of a termination is also, for example, appealing an improper notice or hearing procedure.[9] In addition, petitioner's characterization of the procedural posture in *Mateo v Board of Educ.*, 285 AD2d 552, 553, and *Bonilla v Board of Educ.*, 285 AD2d 548, is incorrect to the extent that she suggests that those employees had separate hearings before the Chancellor's Committee to address the U ratings and the terminations. In both *Mateo* and *Bonilla,* the petitioners' Chancellor's hearings addressed the U ratings, after which they commenced proceedings seeking to challenge not only the U ratings *but the initial notices of termination*, the latter of which was untimely on statute of limitations grounds.

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relationship with the assistant principal, her belief that the school administration disliked her or did not like her accent; the fact she was only observed once by the principal, and that professional assistance only commenced in March 2004 (Pet. Ex. L, Chancellor's Committee Rep., Committee's Recomm. pp. 1-2).

[9]It is somewhat difficult to understand how the Chancellor's Committee would review a discontinuance without also considering the U rating, but examination of the reports issued by the two-member majority in the instant matter shows that its focus was on the administration's attempts to work with petitioner to improve her skills and on her lack of apparent progress (Pet. Ex. L, Chancellor's Committee Rep., Committee's Recomm. p. 2). The dissenting third member, however, focused on petitioner's history of past satisfactory ratings, on what he deemed to be a lack of sufficient assistance offered during petitioner's last year, and on the contents of the U rating, in particular questioning two categories for which the panel member believed other evidence or logic undermined the school's claim (Pet. Ex. L., March 3, 2005 Minority Report).

Because petitioner did not initially seek a review of the U rating when it was issued in June 2004, her petition must be understood as seeking to compel reversal of the rating and reinstatement pursuant to CPLR 7803(1). Mandamus to compel seeks to compel performance of a ministerial act enjoined by law (*DeMilio v Borghard*, 55 NY2d at 220, citations omitted). A petitioner seeking mandamus to compel must have a clear legal right to the relief and the administrative agency must have a non-discretionary duty to grant the relief (*Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Serv.*, 77 NY2d 753, 757 [1991]). In general, "mandamus will lie against an administrative officer only to compel him to perform a legal duty, and not to direct how he shall perform that duty" (*Klostermann v Cuomo*, 61 NY2d 525, 540 [1984], quoting *People ex rel. Schau v McWilliams*, 185 NY 92, 100 [1906]). A proceeding in mandamus to compel is to be commenced within four months of the agency's unequivocal refusal of a specific demand by a petitioner to perform a duty enjoined by law (*Waterside Assocs. v New York State Dept. of Env. Cons.*, 72 NY2d 1009, 1011 [1988]). However, a petitioner may not delay in making a demand of the agency, as she or he may otherwise be charged with laches (*Austin v Board of Higher Educ. of City of N.Y.*, 5 NY2d 430, 442 [1959]). The Court of Appeals has said that the demand must be made within a "reasonable period of time after actual or constructive knowledge" that one's rights have been adversely affected (*see, Central School Distr. No. 2 v New York State Teachers Retir. Sys.*, 23 NY2d 213, 248 [1968]).

Petitioner never made a formal demand to reverse her U rating prior to the commencement of this proceeding. At best, she made a demand at the Chancellor's hearing on March 2, 2005, as described in the Committee's Recommendation to the Chancellor (Ver. Ans. Ex. L, p. 2). Were this to be considered a formal demand, that she waited nearly nine months

after the U rating was issued to make her demand is fatal to an argument of reasonable timeliness (*cf. Rapess v Ortiz*, 99 AD2d 413 [1st Dept. 1984]). Accordingly, petitioner's application is time-barred and subject to laches.

Were the court to consider the petition's allegations challenging her termination based on the grounds that respondent's actions were arbitrary and capricious and in bad faith pursuant to CPLR 7803(3), the result would be no different. Because petitioner was a probationary teacher, she could be terminated at any time and for any reason (*Speichler v Board of Coop. Educ. Servc.*, 90 NY2d 110, 114 [1997]; Educ. Law § 3014[1]). Judicial review is limited to an inquiry as to whether the termination was made in bad faith (*Johnson v Katz*, 68 NY2d 649 [1986]). Petitioner bears the burden of raising and proving bad faith through the presentation of evidence (*Witherspoon v Horn*, 19 AD3d 250, 251 [1st Dept. 2005], citing *Soto v Koehler*, 171 AD2d 567, 569 [1st Dept.], *lv denied* 78 NY2d 855 [1991]). Here, petitioner contends that certain of the school administrators had a personal dislike of her or her accent and were determined to be rid of her. Her evidence is comprised of the records from her previous years of teaching, in particular her nine satisfactory annual ratings and previous years' observation reports written, with a few exceptions, by different administrators. She includes letters of support from her students, and an exhibit of unverified documents, many of which she apparently created, by which she attempts to establish that 11 out of the 43 students who passed the English Regents examination in 2004 were her students.[10] However, her argument of bias is undercut by the fact that the Superintendent's designee and an assistant principal from another high school, neither of whom

[10]According to the report from the Chancellor's Committee hearing, these arguments and documents were presented to the committee in argument for reversal of her discontinuance but were not found persuasive (Pet. Ex. L).

she claims came with an agenda, observed her class in June 2004 and also found her teaching unsatisfactory for many reasons which include her inability to use the English language correctly, but also the manner in which she prepared for and conducted her classes.

Petitioner also argues that respondent evidenced bad faith in only undertaking to assist her teaching beginning in March 2004, noting that the dissenting member of the Chancellor's Committee questioned both the length of time in which she received assistance and the quality of assistance, and suggested that respondent had not produced "measurable criteria to support [its] claim" that she failed to help increase students' knowledge. As noted above, however, she began receiving *nearly daily help* in March 2004, and the documents in evidence do not bear out a conclusion that she had not received prior comments and feedback personally and in meetings during the course of that year, nor that the school administrators had not raised certain of the same pedagogical weaknesses with her in prior years. For instance, the same assistant principal observed her on October 29, 2002, and while the conclusion page is inadvertently missing, it is noteworthy that he twice suggests that petitioner see him for further assistance in two areas, notes several errors of English language usage, notes the poor seating arrangement, and refers to handouts provided at staff development meetings that can assist her (Pet. Ex. G, Observation Report of December 12, 2001). Similarly, on October 23, 2000, a different assistant principal observed that, among other issues, petitioner made "a few"errors in English in writing on the blackboard, while on March 5, 1999, a third assistant principal included in her observation that petitioner needed to arrange the seating for the students (Pet. Ex. G).

In Article 78 proceedings, reviewing courts are "not empowered to substitute their own judgment or discretion for that of an administrative agency merely because they are of the

opinion that a better solution could thereby be obtained." (*Peconic Bay Broadcasting Corp. v Board of App.*, 99 AD2d 773, 774 [2d Dept. 1984]). Administrative decisions of educational institutions involve the exercise of "highly specialized professional judgment," and in general, courts hold that the institutions are better suited to make relatively final decisions concerning wholly internal matters (*Maas v Cornell Univ.*, 94 NY2d 87, 93 [1999]). In particular, personnel decisions are internal matters (*Wagner v New York City Trans. Auth.*, 266 AD2d 304, 304 [2d Dept.1999] [by statute, government agencies have discretionary appointive power]). Although petitioner claims that the assistant principal does not respect her and that the principal does not like her accent, these are claims which she has not substantiated, given the overall characterization of her teaching as set forth in the observation reports, the logs, and the report by the superintendent's representative. In this light, petitioner's subjective assessment of her own abilities and her improvement carries little persuasive authority.

The record makes evident to the court that petitioner, herself an immigrant to the United States from a non-English speaking country, has made her very best efforts on behalf of her students to whom she has been extremely devoted. It is also clear that many of her students have been assisted by her in their own transition into American society. There is much for which petitioner should be commended. However, as already alluded to, it is not the province of the court to substitute its own standards of what is to be required of a teacher of English as a second language. Certainly, it cannot be said by this court that the documented record, weighing the positive and negative aspects of petitioner's teaching performance, does not rationally support the conclusion by respondent that petitioner's teaching was unsatisfactory. This is particularly true given that petitioner had been a teacher for nine years on the verge of receiving tenure, but

apparently had not mastered certain basic principles. Thus there is no basis to conclude that the petitioner's discharge was made other than in good faith.

The branches of the petition seeking reversal of the "misconduct" conclusion in her unemployment application, and reinstatement of her medical benefits are simply not properly before this court in this Article 78 proceeding. This is not a proceeding arising out of the proceedings before Department of Labor regarding petitioner's application for unemployment benefits. Nor is this proceeding the mechanism by which to address the medical benefits claim. Therefore, it is

ORDERED and ADJUDGED that the petition is denied in its entirety and the proceeding is dismissed with costs and disbursements as taxed by the Clerk.

This is the decision, order and judgment of the court.

ENTER:

Dated: November 2, 2006
New York, New York

J.S.C.