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

PRESENT: KIBBIE F. PAYNE *Justice* PART 4

In the Matter of the Application of

TRIANA SATANYA,

Petitioner,

For a judgment pursuant to Article 78 of the New York Civil Practice Law and Rules

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, JOEL KLEIN, as Chancellor of the City School District of the City of New York, and ALISON SHEEHAN, as Community Superintendent of Community School District 15 of the City School District of the City of New York,

Respondents.

INDEX NO. 117334/2005

MOTION DATE 3/10/06

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is

ORDERED that the petition is denied and the proceeding is dismissed in accordance with the accompanying memorandum.

The foregoing constitutes the judgment and order of the court.

Dated: 19 May 06

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 4

In the matter of the Application of SATANYA TRIANA,

Petitioner,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK, JOEL I. KLEIN, as Chancellor of the City School District of the City of New York, and ALISON SHEEHAN, as Community Superintendent of Community School District 15 of the City School District of the City of New York,

Respondents.

Index No. 117334/05

Motion Seq. 001

JUDGMENT

KIBBIE F. PAYNE, J.:

Petitioner commenced this CPLR article 78 proceeding, seeking to annul the determination of respondent Chancellor of the City School District of the City of New York (Chancellor) to discontinue her probationary service and terminate her license for unsatisfactory attendance and punctuality.

On September 3, 1986, petitioner began her appointment as a regular substitute teacher of social studies at Intermediate School 391 (I.S. 391). She held that position until September 1989, when she became a probationary teacher in the common

branches subjects area.[1] On September 5, 1992, Community Board of Education of Community District Number 17 issued petitioner a certificate declaring that she completed probation. However, in September 1995, after petitioner failed to meet licensing requirements, she was removed from that status and returned to a substitute teacher title.

Seven years later, petitioner passed the requisite licensing exams, making herself eligible for a tenured appointment. On August 24, 2003, she left her substitute position at I.S. 391 to serve as a probationary teacher at I.S. 136. There, petitioner received the attendance policy. She was informed that faculty absences and latenesses exceeding 10 days of the school calendar are excessive and cause for disciplinary action.

A year into her probationary service, petitioner had trouble with her attendance and punctuality. She was late a total of five times and absent a total of four times in the months of September and October 2004. On October 20, 2004, the principal informed petitioner in writing that her absences and latenesses were "somewhat excessive" and "unacceptable." The letter warned petitioner that failure to improve could lead to an

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[1] "Common branch subjects means any and all of the subjects usually included in the daily program of an elementary school classroom such as arithmetic, civics . . . . history . . . and such other similar subjects" (8 NYCRR § 30.1 [b]) "Core academic subjects means courses of instruction in an related to English, social studies, mathematics, science and foreign language" (8 NYCRR § 30.1 [c]).

unsatisfactory professional rating. The principal met with petitioner to discuss her attendance concerns. However, in the following months of November and December 2004, petitioner missed a total of three days work and arrived late for class a total of four times. The principal wrote petitioner three additional letters addressing her absenteeism and tardiness. Each letter admonished petitioner that failure to ameliorate the problem would lead to a poor rating. In December 2004, the principal, petitioner and a Union representative met to discuss petitioner's record.

Petitioner continued to fall short of the school's attendance requirements. In January, February and March of 2005, she was late a total of ten times. By the end of March 2005, petitioner had been late 22 times and absent 13 times over seven months of the school year. Once again, the principal issued a written warning to petitioner describing her record and expecting her to demonstrate "highest standards of punctuality for [the students] to emulate."

On June 28, 2005, the principal performed petitioner's annual professional review and report on probationary service for the period of August 2004 to June 2005. The principal rated petitioner's professional performance as unsatisfactory and recommended "discontinuance of probationary service." The report noted a total of 28 latenesses and 15 absences over the academic

year. Respondent Community Superintendent of Community School District 15 (Superintendent), endorsed the report and concluded that petitioner's service should be discontinued. Petitioner declined to sign the report.

By letter dated July 1, 2005, the Superintendent notified petitioner that she "w[ould] review and consider" whether to discontinue petitioner's services and terminate her license as of the close of business August 5, 2005. After that letter was returned unclaimed, the Superintendent mailed another informing petitioner that such review would take place on August 25, 2005. Petitioner submitted a response to the second letter, explaining that her lateness was due to problems getting her children to school. Petitioner also expressed surprise at her probationary status.

On September 8, 2005, the Superintendent, "after consideration and review of all appropriate documentation, including [petitioner's] response, . . . affirm[ed petitioner's] Discontinuance of Probationary Service and license termination effective . . . September 9, 2005." The Superintendent informed petitioner that she had a right to appeal with the Office of Appeals and Reviews within 15 school days from the date of the letter. Petitioner submitted an administrative appeal, which remains pending.

Petitioner commenced this article 78 proceeding for an order

declaring the September 8, 2005 determination null and void. Petitioner argues that she obtained tenure by estoppel on June 30, 2004 and, thus, could not be dismissed from employment without a hearing pursuant to Education Law § 2573 (5).[2] Petitioner successfully sought a stay of the administrative appeal pending this court's determination.

It is well-settled that a CPLR article 78 proceeding must be brought "within four months after the determination to be reviewed becomes final and binding upon the petitioner" (CPLR 217 [1]). An agency determination generally becomes "final and binding" where it meets the following criteria; "First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be . . . significantly ameliorated by further administrative action . . ." (Matter of Best Payphones, Inc. v Department of Info. Tech. And Telecommunications of City of New York, 5 NY3d 30, 34 [2005]). As petitioner's administrative appeal of the September 8, 2005 determination remains pending, her application for an order declaring that determination null and void is premature. The court will not entertain it at this time.

However, to the extent that petitioner's papers may be

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[2] Education Law § 2573 (5) provides, in part, that a tenured teacher "shall not be removed except for cause after a hearing as provided by [Education Law § 3020-a] . . . ."

construed as seeking a mandamus to compel respondent Board of Education (Board) to recognize her as a tenured teacher by estoppel and reinstate her to that position, the court's analysis does not end here. CPLR 217 (1) provides, in part, that an application for a writ of mandamus must be brought "within four months . . . after the respondent's refusal, upon the demand of the petitioner . . . to perform its duty." It has long been settled that, in this context, the aggrievement arises "from the refusal of the body or officer to act or to perform a duty enjoined by law" (Austin v Bd. Of Higher Educ. Of the City of New York, 5 NY2d 430, 442 [1959]). "Accordingly, . . . it is necessary to make a demand and await refusal before bringing a proceeding in the nature of mandamus . . ." (id.; see Adams v City of New York, 271 AD2d 341, 342 [1st Dept 2000]).

The record is devoid of proof that petitioner made any demand on the Board for recognition for a disciplinary hearing pursuant to Education Law § 2573 (5) on the basis of her alleged tenure. In her written response to the Superintendent's notice concerning whether to discontinue her "services as a probationer," petitioner answered that "she was unaware of [her] 'probationary status.'" However, she did not demand a hearing, and asked only that she be allowed to keep her job.

The court will neither view this petition as a demand nor view respondent's answer as a denial of a demand for purposes of

CPLR 217 (1). Such a construction would nullify the statute's requirement that a demand be made prior to commencing a proceeding for a writ of mandamus (see CPLR 217 [1]). In this case, where respondents argue that the Statute of Limitations has run, it appears especially inappropriate to combine the two. Petitioner may raise her arguments with regard to her alleged tenure by estoppel once the September 08, 2005 determination becomes final and binding and/or it is established that the proper demands were made on the Board. Accordingly, it is

ORDERED that this petition pursuant to CPLR article 78 is denied and the petition is dismissed.

The foregoing constitutes the decision and judgment of the court.

DATED: 19 May 06

KIBBIE F. PAYNE, J.S.C