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CANNED ON 4/11/2007

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

PRESENT: **HON. PAUL G. FEINMAN** PART 52

Justice

Polin

- v -

NYC

INDEX NO. 103515/06

MOTION DATE 1/24/07

MOTION SEQ. NO. 01

MOTION CAL. NO. 15

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 this ~~motion~~ petition and cross motion are decided per annexed decision, order + judgment.

UNFILED JUDGMENT

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).

Dated: 4/6/07

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUBMIT ORDER/JUDGMENT TO JUSTICE FOR THE FOLLOWING REASON(S):

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
DEBORAH POLIN,

Petitioner,

for an Order and Judgment pursuant to
Article 78 of the Civil Practice Law

-against

NEW YORK CITY DEPARTMENT OF
EDUCATION and JOLE L. KLEIN, as Chancellor,

Respondents.

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Index Number	103515/2006
Submission Date	Jan. 24, 2007
Mot. Seq. No.	001
Mot. Cal. No.	15

DECISION, ORDER & JUDGMENT

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

Papers	Numbered
Notice of Petition, Affidavits, & Memo of Law	1,2
Notice of Cross-Motion & Memo of Law	3,4
Petitioner's Memo of Law in Opposition	5
Respondents' Reply Memo of Law	6
Verified Answer & Memo of Law	7,8
Reply	9

PAUL G. FEINMAN, J.:

In this Article 78 proceeding, petitioner seeks to vacate the determination dismissing her as a teacher and denying her Certification of Completion of Probation, and for an order directing that she be reinstated to her position. Respondents cross-move to dismiss. For the reasons which follow, the petition is denied and the cross-motion is granted.

Factual Background

Petitioner was employed by respondent New York City Department of Education (DOE) as a probationary physical education teacher beginning on September 5, 2000 (Ver.Pet. Ex. I). At the end of her first and second years of probationary tenure, petitioner was given "Satisfactory" year-end performance evaluations by her principal (Ver. Pet. ¶¶ 8,9, Ex. I, II). In June 2003, at the end of the third year, she was given an "Unsatisfactory" year-end performance evaluation by the principal (Ver. Pet. Ex. III).[1] She was informed by a letter dated June 18, 2003, from the Supervising Superintendent of the Chancellor's District for the DOE, that pursuant to State Education Law § 2573(1), her Certification of Completion of Probation in District 85 would be denied as of August 18, 2003, and that she had a right to a review of this decision pursuant to the collective bargaining agreement between the DOE and the United Federation of Teachers (Ver. Pet. Ex. III).

Petitioner timely filed for a review of the determination in accord with the collective bargaining agreement (Ver. Pet. ¶ 13). She also filed grievances challenging certain documents placed in her personnel file which had allegedly formed the basis for the unsatisfactory rating and the denial of the Certification of Completion of Probation (Ver. Pet. ¶ 14). Ultimately, by agreement dated May 18, 2004, petitioner and the principal agreed that the rating for the 2002-2003 school year would be changed from Unsatisfactory to Satisfactory and that in exchange, petitioner would never apply again to that same school for a teaching position (Ver. Ans. Ex. 13). The terms of the agreement further stated that the settlement had no precedental value and would

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[1]This performance evaluation sheet shows that on May 18, 2004, the "U" rating was crossed out and changed to an "S" rating, as discussed below. She received "unsatisfactory" ratings for the entire categories of Pupil Guidance and Instruction and Classroom or Shop Management (with the exception of "attention to routine matters").

not be used in any other proceeding or forum except one to enforce its terms.

Two arbitration proceedings were held in February and June 2005 to address additional portions of petitioner's grievance and resulted in the deletion or modification of certain documents from petitioner's personnel file (Ver Pet. ¶ 16; Ver. Ans. ¶ 55; Ex. 14, 15). Both of the decisions by the arbitrators stated explicitly that they did "not represent a determination of the underlying facts. . . [and] shall not be cited by either party as a determination of the underlying facts nor shall [they] preclude either party from relitigating the underlying facts." (Ex. 14, p. 3 ¶ 3; Ex. 15, p. 3 ¶ 3). Neither party brought a special proceeding to challenge the arbitration awards.

The Chancellor's Committee held a hearing on June 21, 2005, concerning petitioner's appeal of the determination to deny her the Certification of Completion of Probation (Ver. Ans. ¶ 58, Ex. 16, Transcript of Hearing [hereinafter "Hearing"]). Attending the hearing were petitioner, her union advisor, the school principal (by telephone), and the Superintendent's representative. After hearing testimony and examining evidence, the Committee issued its recommendation to the Chancellor, dated June 21, 2005, that the denial of certification be reversed (Ver. Ans. Ex. 17). However, by letter dated November 17, 2005, respondents notified petitioner that the Chancellor had determined to reaffirm the previous decision to terminate her probationary service and deny her Certification of Completion of Probation as of August 18, 2003 (Ver. Pet. Ex. V).

Petitioner served a notice of claim on the DOE and the City of New York by Certified Mail on February 21, 2006 (Ver. Pet. Ex. VI). She commenced the instant proceeding by purchasing an index number and filing and then serving her petition on March 15, 2006.

She seeks reinstatement as a teacher with tenure, back pay and benefits, on the ground that the decision to deny her Certification of Completion of Probation and to dismiss her was arbitrary and capricious, illegal and in bad faith. She alleges a denial of due process in that the requirement that the observation report by the Superintendent's designee of a non-tenured teacher prior to his or her dismissal be evaluated by the Chancellor's Committee, did not occur as the report was expunged by the principal (Ver. Pet. ¶¶ 28-30).

Respondents seek to dismiss the petition on the grounds that it fails to state a cause of action, the petition is barred by the statute of limitations and by laches, the actions at issue were in respects proper, and the petition fails to establish that the Chancellor acted in a manner that was arbitrary and capricious or in bad faith.

Legal Analysis

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 will 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).

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]).

The Department of Education and the courts distinguish between a probationary employee who seeks a review of a decision to terminate employment and one who seeks review of a U rating. It is now well established that probationary teachers who seek to challenge their discontinuance must commence an Article 78 proceeding within four months of the effective date of the termination (*see, DeMilio v Borghard*, 55 NY2d 216, 220 [1982]; *McCain v Fernandez*, 226 AD2d 380 [2d Dept.], *lv denied* 88 NY2d 806 [1996]). Contrary to petitioner's argument, there is no toll of the statute should an employee seek review of the discontinuance by the Chancellor's Committee, as such review is purely a product of the collective bargaining agreement (*Frasier v Board of Educ. of the City School Dist. of the City of New York*, 71 NY2d 763, 766, 767 [1988]; *Schulman v Board of Educ. of the City of New York* , 184 AD2d 643, 644 [2d Dept. 1992]). Although the time to commence a judicial proceeding to review the Department of Education's upholding of a "U" rating after appeal does not begin to run until the Chancellor issues a decision denying the appeal and sustaining the rating (*Mateo v Board of Educ.*, 285 AD2d 552, 552 [2d Dept. 2001]; *Bonilla v Board of Educ. of City of New York,* 285 AD2d 548, 548 [2d Dept. 2001]), here petitioner was successful in reversing the rating without seeking review of that issue by the Chancellor's Committee and it is not at issue in this proceeding.

The four month statute of limitations for commencing the Article 78 proceeding began to run as of August 18, 2003, the effective date of petitioner's termination. Her interpretation of various sections of respondent's manual, "The Appeal Process," in an attempt to argue that the four months did not commence to run until receipt of respondent's November 17, 2005, letter reaffirming the previous discontinuance of service and denial of Certification, is unpersuasive (Memo of Law 13-19). It is unpersuasive in the light of case law interpreting the relevant sections addressing finality of the Chancellor's initial decision (*Frasier v Board of Educ.*, 71 NY2d at 766), the "at-will" nature of probationary employment (*Frasier*, at 765), and the distinctions between the rights under the union contract and those of a probationary employee (*Frasier*, at 767). That petitioner ultimately succeeded in reversing her "U" rating, unfortunately for petitioner, has no bearing on the time frame for commencing the instant proceeding.

Were the court to address the merits of the petition, it would not find that petitioner has established that respondents acted in bad faith. As petitioner was a probationary teacher at time of her termination, she could be terminated for any reason (*Speichler v Board of Coop. Educ. Servc.*, 90 NY2d 110, 114 [1997]; Educ. Law § 3014[1]). Judicial review is therefore 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]). It is not the court's function to second guess the administrative determinations (*Johnson v Katz*, 68 NY2d at 650; *Soto v Koehler*, 171 AD2d 567 [1st Dept. 1991]). Here, there is no evidence of bad faith.

Petitioner appears to argue that there was bad faith in the fact that certain of her personnel records were incorrect which led to her receiving a "U" rating. Respondents seem to concede that there were administration errors in petitioner's third year of teaching, some of which caused petitioner to appear to be a less competent professional, such as some observations made of her while she was teaching a health class that she was not licensed to teach, or miscalculating the number of days she was absent due to health related issues. However, the fact that the principal ultimately agreed to reverse the rating for petitioner's third year, does not mean there was bad faith in the initial rating (*see, Thomas v City of New York*, 169 AD2d 496 [1st Dept. 1991] [where probationary employee was fired for filing what was thought to be false report, it is improper to find that the employer acted in bad faith where there was a rational basis for belief that the report was false, and there was nothing arbitrary or capricious in the actions]).

In sort, the proceeding is untimely and even if the proceeding were timely brought, the record would not support a determination that respondents' actions in terminating this probationary employee were either arbitrary or capricious or in bad faith. Accordingly, the petition must be denied and the cross-motion granted. It is therefore,

ORDERED that the petition is denied and the cross-motion to dismiss is granted; and it is

ORDERED and ADJUDGED that the proceeding is dismissed, together with costs and disbursements as taxed by the Clerk.

This shall constitute the decision, order and judgment of this court.

ENTER:

Dated: April 6, 2007
New York, New York

(2007 D&O_103515_2006_001)