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

PRESENT: KIBBIE F. PAYNE PART 4
Justice

LUIS RIVERA

INDEX NO. 115537/07

MOTION DATE 04-23-08

- v -

MOTION SEQ. NO. 001

THE DEPARTMENT OF EDUCATION OF THE NEW YORK CITY SCHOOL DISTRICT

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion for Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4-6

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, the petition is decided in accordance with the annexed Judgement/Decision.

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

Dated: July 31, 2008

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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LUIS RIVERA,

Petitioner,

Index No. 115537/07

-against-

Judgment/Decision

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

Respondent.

----------X

KIBBIE F. PAYNE, J.:

In this proceeding, petitioner Luis Rivera, a former probationary teacher employed by respondent New York City Board of Education (the "BOE") (also known as and being sued herein as "The Department of Education of the New York City School District") alleges that he was improperly terminated by the respondent. The termination occurred after Mr. Rivera received a "U" rating for the 2006-2007 school year, and an investigation conducted by the Special Commissioner of Investigation for the New York City School District ("SCI") concluded that he had inappropriate internet contact with a female student.

Petitioner now brings this CPLR Article 78 proceeding seeking to vacate the BOE's determination that discontinued his probationary employment, claiming that the BOE's determination was disproportionate to the factors cited for his "U" rating, and was therefore arbitrary and capricious (*see* CPLR 7803 [3]). Petitioner also claims that the SCI investigation, which

determined that he had had inappropriate contact with a female student, was made in violation of his due process rights, and therefore cannot form the basis of the determination to discontinue his probationary employment and place him on the BOE Ineligible/Inquiry List. Petitioner seeks reinstatement to his probationary status, with an award of back pay and reasonable attorney's fees.

Respondent BOE cross-moves to dismiss the petition on the ground that petitioner failed to file a notice of claim prior to commencing this proceeding, as required by Education Law § 3813 (1), and that the petition otherwise fails to state a cause of action. For the reasons set forth below, petitioner's application for Article 78 relief is denied, and respondent's cross motion is granted.

Petitioner commenced his employment with the BOE in September 2005 as a probationary teacher at Patria Mirabal Middle School 324. In June of 2006, petitioner received his first annual professional performance review. On his second annual performance review, in June of 2007, petitioner received a "U" rating. That June 2007 performance review noted that petitioner had received seven letters over the course of seven months regarding his unsatisfactory behavior, *viz.*, three letters for lateness, one letter for lack of instruction, one letter for endangering the safety of a student, and one letter for his

unprofessional conduct. Petitioner's performance review further reflected that, during the rating period, he was late 20 times, resulting in the loss of three hours and 39 minutes of instructional time, and was absent for 17 days. Petitioner's performance review further noted that there was an outstanding SCI investigation, and other allegations of misconduct regarding petitioner.

On June 15, 2007, Principal Janet Heller recommended discontinuance of petitioner's probationary service. On June 19, 2007, the Community Superintendent of District 6 notified petitioner that she had affirmed the discontinuance of his probationary employment, effective July 23, 2007. On July 19, 2007, the SCI substantiated that petitioner had had inappropriate internet contact with a female student and, on August 2, 2007, petitioner was placed on the BOE's Ineligible/Inquiry List.

On November 20, 2007, petitioner commenced this Article 78 proceeding seeking to vacate the BOE's determination to discontinue his probationary employment and place him on the Ineligible/Inquiry List, alleging that the BOE's decision was arbitrary and capricious.

Education Law § 3813 establishes conditions precedent to the commencement of an action against a Board of Education or any of its employees. Pursuant to Education Law § 3813 (1), a notice of claim must be filed prior to bringing any suit against the BOE,

including a special proceeding pursuant to Article 78 of the CPLR:

> No action or special proceeding, for any cause whatever . . . or claim against the district or any such school, or involving the rights or interests of any district or any such school shall be prosecuted or maintained against any school district, board of education . . . or any officer of a school district [or] board of education . . . unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school ***within three months after the accrual of such claim***[.]
>
> (Education Law § 3813 [1]) (emphasis added).

A timely notice of claim is, therefore, a condition precedent to maintaining an action against the BOE, and petitioner "has the obligation to plead and prove that [his] notice of claim was served within three months after the accrual of [his] claim" (*C.S.A. Contr. Corp. v New York City School Constr. Auth.*, 5 NY3d 189, 192 [2005]; *Stoetzel v Wappingers Cent. School Dist.*, 166 AD2d 643, 644-45 [2d Dept 1990]). Failure to comply with the condition precedent under Education Law § 3813 (1) "is a fatal defect mandating dismissal of this action" (*Parochial Bus Sys., Inc. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 548 [1983]; *see also Spedding v Bowman*, 152 AD2d 971, 972 [4th Dept 1989]).

The only instance where plaintiffs or petitioners are exempt from the notice of claim requirement with respect to their actions or proceedings against the BOE is when they seek to

vindicate a public interest in the enforcement of a public right (*see Union Free School Dist. No. 6 of Towns of Islip & Smithtown v New York State Human Rights Appeal Bd.*, 35 NY2d 371, 379-80 [1974]). Where, as here, petitioner seeks private relief in the form of reinstatement and back pay against a board of education pursuant to CPLR 7803 (3), the filing of a timely notice of claim is a condition precedent to suit (*see Matter of Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v Sweeney*, 89 NY2d 395, 400 [1996] [citation omitted]; *Matter of O'Connor v. Bd. of Educ.*, 11 AD3d 616 [2d Dept 2004]; *Matter of Taylor v Hammondsport Cent. School Dist.*, 267 AD2d 987, 988 [4th Dept 1999]; *Sephton v Board of Educ. of City School Dist. of City of N.Y.*, 99 AD2d 509 [2d Dept], *lv denied* 62 NY2d 605 [1984]).

In the case at bar, it is undisputed that petitioner failed to file a notice of claim in accordance with the procedure set forth in Education Law § 3813 (1). Petitioner therefore failed to comply with the condition precedent to the institution of this action, and his failure to comply is a fatal defect, mandating dismissal of the petition (*see Matter of Silvernail v Enlarged City School Dist. of Middletown*, 40 AD3d 1004 [2d Dept 2007]).

In his opposition to the cross motion, petitioner claims that: (1) the Collective Bargaining Agreement ("CBA") between the BOE and the United Federation of Teachers ("UFT") renders the notice of claim requirement inapplicable to the present matter;

(2) petitioner's reliance on the terms of the CBA estops the BOE from asserting the notice of claim requirement as a bar to petitioner's claims against the BOE; and (3) petitioner's appeal of his "U" rating and the grievance he filed with the UFT with respect to his due process claim gave actual notice of petitioner's claims sufficient to satisfy the notice of claim requirement, and he should thus be allowed to file a late notice of claim. Petitioner's claims, however, are without merit.

Petitioner claims that the CBA between the BOE and the UFT renders the notice of claim requirement inapplicable to the instant matter. However, in order to establish this assertion, petitioner needs to demonstrate that there is some contractual provision contained in the CBA indicative of an intent to waive compliance with the notice of claim requirement, or which affords similar notice (*see Matter of Board of Educ. of Union-Endicott Cent. School Dist. v New York State Pub. Empl. Rels. Bd.*, 197 AD2d 276, 278-79 [3d Dept], *lv denied* 84 NY2d 803 [1994]).

"There are, however, two judicially recognized exceptions to compliance with Educational Law § 3813(1): '[w]here an action or proceeding is brought to vindicate a public interest rather than to seek enforcement of a private right or duty' (cases cited omitted) or where 'there are procedures set forth in separate statute or contractual provision which either afford the school district notice similar to that contained in subdivision a of

section 3813 or which waive compliance with its requirements'" (*Matter of Board of Educ. of Union-Endicott Cent. School Dist. v New York State Pub. Empl. Rels. Bd.*, 197 AD2d 276, 278-279). A waiver may not be presumed; rather, it must affirmatively appear that the parties intended to make the statutory requirement inapplicable (*Matter of Board of Educ. Cent. School Dis. No. 1 [Minstein Constr. Co.]*, 12 AD2d 40 [3d Dept 1960]). In the absence of an agreement to the contrary, compliance with the notice of claim requirement is mandatory, and is a matter for judicial resolution (*Matter of Board of Educ. of Enlarged Ogdensburg City School Dist. [Wager Constr. Corp.]*, 37 NY2d 283, 288 [1975]).

Here, there is no contractual provision contained in the parties' CBA which is either indicative of an intent to waive compliance with the notice of claim requirement, or which affords the BOE notice similar to that contained in section 3813 (1). Thus, petitioner's compliance with the notice of claim requirement is mandatory.

Next, petitioner argues that his reliance on the terms of the CBA estops the BOE from asserting the notice of claim requirement as a bar to petitioner's claims against the BOE. However, the doctrine of equitable estoppel is not applicable here.

Estoppel against a municipal defendant will lie only when

the municipal defendant "acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice" (*Bender v New York City Health and Hospitals Corp.*, 38 NY2d 662, 668 [1976]; *accord Delacruz v Metropolitan Transp. Auth.*, 45 AD3d 482 [1st Dept 2007]), and should be "invoked sparingly and only under exceptional circumstances" (*Luka v New York City Transit Auth.*, 100 AD2d 323, 325 [1st Dept 1984], *affd* 63 NY2d 667 [1984]).

Petitioner fails to demonstrate, or even allege, that the BOE engaged in any wrongful or negligent conduct that would support a finding of equitable estoppel, or that he relied on any purported deception by the BOE that would give rise to an estoppel. Thus, the BOE is not estopped from asserting the notice of claim requirement as a defense (*see e.g. Urena v New York City Health & Hosps. Corp.*, 35 AD3d 446 [2d Dept 2006]; *Wade v New York City Health & Hosps. Corp.*, 16 AD3d 677, 677 [2d Dept 2005]).

Although petitioner also contends that he should be allowed leave to file a late notice of claim to avoid dismissal of the petition, the court rejects this contention, as "statutory requirements conditioning suit [against a governmental entity] must be strictly construed" (*Varsity Tr., Inc. v Board of Educ. of City of N.Y.*, 5 NY3d 532, 536 [2005] [internal quotations and

citations omitted]).

In support of his argument that he should be permitted to file a late notice of claim, petitioner conclusorily asserts that his appeal of his "U" rating and due process grievance gave the BOE actual notice of his claims within 90 days and, thus, the BOE did not suffer any prejudice. This argument is without merit. Even if petitioner could demonstrate that his contentions were true, strict compliance with the notice of claim requirements under Education Law § 3813 is warranted even where the BOE "'had actual knowledge of the claim or failed to demonstrate actual prejudice'" (*id.* at 536, quoting *Parochial Bus Sys., Inc. v Board of Educ. of City of N.Y.*, 60 NY2d at 548; *accord Power Cooling, Inc. v Board of Educ. of City of N.Y.*, 48 AD3d 536 [2d Dept 2008]).

Although petitioner also contends that he has a meritorious excuse for the late filing because it was the BOE's duty to advise him regarding the statutory requirements he needed to comply with before he could commence a proceeding against it, the BOE "was under no obligation to apprise [petitioner] that [his] notice of claim had not been timely served upon it" (*Wade*, 16 AD3d at 677; *see also Matter of Nayyar v Bd. of Educ. of City of N.Y.*, 169 AD2d 628, 629 [1st Dept 1991]). Accordingly, petitioner has failed to comply with a condition precedent to this action, and his petition must be dismissed.

Moreover, even if petitioner had complied with the notice of claim requirements, the petition would also have to be dismissed because petitioner cannot demonstrate that the BOE acted arbitrarily, capriciously or in bad faith by discontinuing his probationary employment. Petitioner was a probationary employee for the BOE and, therefore, could be terminated without a pre-termination hearing and without a statement of reasons, so long as the dismissal was not made in bad faith, i.e., in violation of constitutional or statutory law (*see James v Board of Educ. of Cent. School Dist. No. 1 of Towns of Orangetown & Clarkstown*, 37 NY2d 891, 892 [1975]; *see also Matter of Venes v Community School Bd. of Dist. 26*, 43 NY2d 520, 525 [1978]; *Haviland v Yonkers Public Schools*, 21 AD3d 527, 528 [2d Dept 2005]). Thus, judicial review of such termination is "'limited to an inquiry as to whether it was made in bad faith and was therefore arbitrary and capricious'" (*Matter of Bonney v Dilworth*, 99 AD2d 468, 468 [2d Dept 1984] [citation omitted]; *accord Matter of Guilbe v New York City Bd. of Educ.*, 193 AD2d 604 [2d Dept], *lv denied* 82 NY2d 654 [1993]).

Here, petitioner has failed to adduce any evidence to establish that his termination was made in bad faith, or was arbitrary or capricious. Petitioner alleges that there were two reasons for his termination. First, on June 15, 2007, Principal Heller reviewed his annual professional performance for the

period of September 2006 through June 2007 and gave him a "U" rating. Petitioner's June 22, 2007 performance review states that he received seven letters over the course of seven months regarding his unsatisfactory performance: three letters for lateness, one letter for lack of instruction, one letter for endangering the safety of a student, and one letter for his unprofessional conduct (the "Disciplinary letters"). In addition, petitioner's review notes that during the rating period, he was late 20 times, resulting in the loss of three hours and 39 minutes of instructional time, and was absent for 17 days. Second, petitioner alleges that, on July 19, 2007, an SCI investigation substantiated that he had had inappropriate internet contact with a female student.

These allegations do not establish a basis to disturb the BOE's determination. A "U" rating alone provides a sufficient basis for the BOE to terminate a probationary employee. Petitioner cannot show that the BOE acted in bad faith in terminating his probationary employment after petitioner received seven Disciplinary letters over the course of seven months, was late 20 times, and absent for 17 days. While petitioner attempts to excuse his failures as set forth in his "U" rating, such an attempt is insufficient to establish bad faith. The presence of evidence in the record supporting the conclusion that petitioner's performance as a probationary employee was

unsatisfactory establishes that the discharge was made in good faith (*see Matter of Bynoe v City of New York*, 281 AD2d 340 [1st Dept 2001]; *Matter of Atkinson v Koch*, 161 AD2d 152, 153 [1st Dept 1990]; *Bonney*, 99 AD2d at 468).

Petitioner also attempts to challenge his termination by suggesting that the statements he gave to SCI investigators were obtained in violation of his collective bargaining rights, and that therefore, such illegal action requires his reinstatement. However, the decision to recommend petitioner's termination was made more than one month prior to the SCI report. Further, petitioner's statements were not the sole basis for the SCI's finding that petitioner had had inappropriate internet contact with a female student. In addition to petitioner, SCI investigators spoke with paraprofessional Paula Mota, teacher Crystal Ringer, and Student A, who told investigators that petitioner had engaged in an inappropriate internet contact with her. Thus, even without petitioner's statements, SCI investigators had at least a rational basis sufficient to conclude that he engaged in inappropriate internet contact with a female student. In addition, petitioner's placement on the Ineligible/Inquiry List by the BOE was not arbitrary or capricious since he was the subject of disciplinary charges (*see Matter of Spata v Levy*, 306 AD2d 534, 535 [2d Dept 2003]).

Therefore, petitioner has not shown that respondent acted

arbitrarily by terminating his probationary employment and placing him on the Ineligible/Inquiry List, and the petition must be dismissed. The court has considered petitioner's remaining claims, and finds them to be without merit. Accordingly, it is

ORDERED and ADJUDGED that the petition is denied in its entirety, respondent's cross motion is granted, and the special proceeding is dismissed.

The foregoing constitutes the decision and judgment of this court.

Dated: July 31, 2008

ENTER:

KIBBIE F. PAYNE
J.S.C.