

Pezhman v Department of Educ. of City of N.Y.
2008 NY Slip Op 33058(U)
October 27, 2008
Supreme Court, New York County
Docket Number: 112852/2007
Judge: Paul G. Feinman
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SCANNED ON 10/29/2008
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. PAUL G. FEINMAN PART 5212
J.S.C.

Anna Ryzhman
✓
Department of Education, et al

INDEX NO. 112852/2007
MOTION DATE 9/10/08
MOT. SEQ. NO. 001
MOT. CAL. NO.

The following papers, numbered 1 to 4 were read on this motion to/for

Notice of Motion/Petition/O.S.C, — Affidavits — Exhibits
Answering Affidavits — Exhibits
Replying Affidavits

PAPERS NUMBERED
1-4

Cross-Motion: Yes No

Upon the foregoing papers, it is

- ORDERED that the motion bearing sequence no. 1 is decided in accordance with the annexed decision and order.
- ADJUDGED and ORDERED that the petition bearing sequence no. 001 is decided in accordance with the annexed decision, order and judgment.
- ORDERED that the cross motion bearing sequence no. 01 is decided in accordance with the annexed decision and order.
- ADJUDGED and ORDERED that the cross petition bearing sequence no. 1 is decided in accordance with the annexed decision, order and judgment.
- ORDERED that the motion bearing sequence no. 1 is resolved pursuant to the terms of the parties' stipulation dated 9/10/08 and annexed hereto.
- ADJUDGED and ORDERED that the petition bearing sequence no. 1 is resolved pursuant to the terms of the parties' stipulation dated 9/10/08 and annexed hereto.

UNFILED JUDGMENT
This judgment has not been entered by the Court and notice of entry cannot be served based hereon until entry, counsel or authorized representative appear in person at the Judgment Clerk's Desk (141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO

Dated: October 27, 2008

Paul G. Feinman
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: CIVIL TERM: PART 12

-----X
ANNA PEZHMAN,

Petitioner,

against

Index Number 112852/2007
Submission Date Sept. 10, 2008
Mot. Sq. No. 001

DEPARTMENT OF EDUCATION OF CITY OF
NEW YORK, JACKQUELYN H. YOUNG, JOEL
DIBARTOLOMEO, MARC COLEMEN, JOEL
KLEIN, SONIA MENENDEZ,

Respondents.

**DECISION, ORDER AND
JUDGMENT**

-----X
For the Petitioner:
Anna Pezhman, *pro se*
235 East 87th Street, Apt. 12F
New York NY 10128

For the Respondent:
Michael A. Cardozo, Esq.
Corporation Counsel of the City of New York
By: Ivan A. Mendez, Jr.
100 Church Street, Room 2-184
New York NY 10007

Papers considered in review of this petition to reverse, and cross-move to dismiss:

Papers
Notice of Petition
First Amended Petition
Notice of Cross-Motion & Memo of Law
Reply Affirmation
Answer to First Amended Petition

Number
1
2, 2A
3
4

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
1413).

PAUL G. FEINMAN, J.:

In this Article 78 proceeding, petitioner, who is without legal counsel, seeks pursuant to CPLR 7803 (3), to reverse the unsatisfactory rating ("U rating") issued to her by respondents at the end of the 2003-2004 school year, and to expunge certain documents from her file.

Respondents Department of Education ("DOE") and Joel Klein have answered and cross-move to dismiss the petition. Petitioner has not submitted an affidavit of service to show that service of process was made on proposed respondents Jackquelyn Young, Joel DiBartolomeo, Marc

Coleman, or Sonia Menendez.¹ For the reasons which follow, the petition is denied and the cross-motion of DOE and Klein is granted. The petition is dismissed as to the other individual co-respondents for failure to obtain personal jurisdiction.

Factual and Procedural Background

Petitioner was a New York City Teaching Fellow who began working on March 1, 2004, as a probationary special education teacher in P.S. 246, in the Bronx. The school's principal was co-respondent Jackquelyn Young. Petitioner received a U rating in June 2004, and Young recommended discontinuance of probationary service, a recommendation reiterated by Superintendent David Parker on July 8, 2004 (Ver. Ans. Ex. 11). By letter dated July 9, 2004, petitioner was informed that District 10 Community Superintendent Joel DeBartolomeo would "review and consider whether [her] services as a probationer" should be discontinued and her license terminated as of August 13, 2004; she was invited to submit a written response prior to August 13, 2004 (Ver. Ans. Ex. 12). Neither petitioner nor respondents submit evidence that she chose to respond. In any event, it is clear that the decision was made to discontinue her services and terminate her license as of August 13, 2004 (see Ver. Ans. Ex. 15, at 1).

Petitioner served two notices of claim for various torts naming the City of New York, the Department of Education, and Young as principal of P.S. 246; the first on October 15, 2004, and the second on November 30, 2004 (Ver. Ans. Ex. 13, 14). The notices describe her claims of retaliation, tortious interference with contract, breach of contract, libel, and intentional infliction of emotional distress. They note that on about August 15, 2004, she received a letter from the

¹The Office of the Corporation Counsel has answered only on behalf of DOE and Joel Klein.

community superintendent informing her that her probationary period would cease and her license would be terminated.

Separately, petitioner grieved the placement of four documents that were in her file pursuant to the controlling Collective Bargaining Agreement (Memo of Law in Supp. of Ver. Ans. p 12). According to respondent, the grievances were consolidated and submitted to arbitration. The June 20, 2006 arbitration award addressed the fairness and accuracy of the four documents, and determined that one should be modified, two were not unfair or inaccurate and should remain in the file, and one should be deleted (First Am. Pet. Ex. H).

In addition, petitioner administratively appealed the recommendation to discontinue her employment. She alleges now that she sought to appeal her U rating. Notably, the Chancellor Committee's Recommendation of March 13, 2007, issued by the DOE Office of Appeals and Reviews, concurred with the recommendation to discontinue her probationary service as of August 13, 2004, but did not mention the U rating (Ver. Ans. Ex. 15). However, in its Findings section, the Report concluded that petitioner had not been "able to provide compelling evidence to support [her] claim that the discontinuance should be reversed," and found sufficient evidence to warrant the giving of a U rating and the recommendation to discontinue the probationary service (Ver. Ans. Ex. 15, Chancellor's Committee Report, p. 4). In addition, the Report noted that because of objection to eight documents none of which were signed by petitioner, the documents would be removed from the files (Id. p. 5).²

²Article 21 of the Collective Bargaining Agreement states that materials "derogatory to a teacher's conduct, service, character or personality" shall not be placed in a teacher's official file unless the teacher has had an opportunity to read the materials and acknowledged having read them (First Am. Pct. Ex. D).

By letter dated June 14, 2007, the DOE District 10 Community Superintendent, Sonia Menendez, informed petitioner that based on the Chancellor's Committee Report, she reaffirmed the previous action which resulted in the discontinuance of petitioner's probationary service effective as of August 13, 2004 (First Am. Pet. Ex. C).

Petitioner commenced the instant proceeding by filing her verified petition on September 24, 2007. Her amended petition argues that the June 14, 2007 decision was issued in derogation of the law, because its reasoning was based in part on documents later found to have been improperly placed in her file, and because Principal Young and others engaged in a course of retaliation and harassment against her, such that the decision to terminate her was arbitrary and capricious (First. Am. Pet. ¶¶ 13-28). It seeks a reversal of the U rating, and expungement of her file. Respondents served their verified answer in opposition and cross-move to dismiss the petition based on the running of the statute of limitations.

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]).

When a claimant seeks to commence an action or special proceeding against a school district or other employees or entities of the school district, the New York Education Law provides that,

[N]o action or special proceeding founded upon tort shall be prosecuted or maintained against any of the parties named in this section or against any . . . member of the supervisory or administrative staff . . . unless a notice of claim shall have been made and served in compliance with section fifty-c of the general municipal law. Every such action shall be commenced pursuant to the provisions of section fifty-i of the general municipal law.

(Education Law § 3813 [2]).³ In addition, it further provides that,

No action or special proceeding, for any cause whatever . . . or claim against the district or any such school, . . . shall be prosecuted or maintained against any school district, board of education, . . . or any officer of a school district, . . . 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, and that the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment.

(Education Law § 3813 [1]; see *Matter of Perlin v South Orangetown Cent. Sch. Dist.*, 216 AD2d 397, 398 [2d Dept.], *lv dismissed* 86 NY2d 886 [1995] [requiring notice of claim when seeking review of termination]).

Here, petitioner filed her notices of claim on October 15, 2004, and November 30, 2004. However, she only commenced the instant proceeding by filing her notice of petition in September 2007, clearly beyond the time allowed under the Education Law and General Municipal Law § 50-i. Petitioner argues that she could not commence this special proceeding until there had been a final determination in the administrative proceeding which only occurred when District Superintendent Menendez issued her June 14, 2007 letter confirming the

³General Municipal Law § 50-c requires that a notice of claim must be served on the entity within 90 days after the claim arises (Gen. Mun. L. §50-c[1][a]). Although an application may be made to file a late notice of claim, such must be done in a manner that allows the action or special proceeding to be commenced within a year and 90 days after the happening of the event (Gen. Mun. L. §§ 50-i).

