| **Matter of Hughes v Department of Educ.** |
| --- |
| 2009 NY Slip Op 30343(U) |
| February 13, 2009 |
| Supreme Court, New York County |
| Docket Number: 113629/08 |
| Judge: Walter B. Tolub |
| Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case. |
| This opinion is uncorrected and not selected for official publication. |

SCANNED ON 2/18/2009
[* 1]

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

PRESENT: WALTER B. TOLUB PART 15

Index Number : 113629/2008

HUGHES, DENISE

VS.

DEPARTMENT OF EDUCATION

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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).

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

Dated: 2/13/09

WALTER B. TOLUB J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2 ]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 15

---

In the matter of the Application of

DENISE HUGHES,

Petitioner,

DECISION and JUDGMENT

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

-against-

Index. No. 113629/08

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

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).

---

**TOLUB, WALTER, J.S.C.**

Petitioner, Denise Hughes, ("Hughes" or "petitioner") moves, pursuant to CPLR Article 78, for a judgment reversing respondent New York City Department of Education's ("DOE" or "respondent") decision to revoke petitioner's school bus escort certification. Respondent cross moves to dismiss the petition.

The petition states that in October, 2001, Hughes was certified as a New York City school bus escort and that she was thereafter hired by a private bus company with a contract with DOE to serve as a school bus escort.

On December 19, 2006, DOE revoked Hughes certification because, following an investigation, the Office of Pupil Transportation ("OPT") determined that there was substantial credible evidence that Hughes "struck a child with a wooden back scratching stick.". (Petition, Ex. A) Upon the revocation of her certification, Hughes's employer suspended her employment.

The record reveals that on November 8, 2006, two days after the alleged incident, OPT

interviewed four students who were on the bus with alleged victim when the incident occurred. The OPT's interviews of those students were conducted in the presence of the school principal and two assistant principals. All four of the students reported seeing Hughes hit the alleged victim with the back scratching stick. The OPT also interviewed the bus driver who stated that Hughes had a back scratching stick on the bus but denied seeing Hughes hit the alleged victim. Hughes was also interviewed by the OPT and she admitted that she kept a back scratching stick on the bus, but denied that she used it to hit anyone. Hughes's union representative and union attorney were present when she and the bus driver were interviewed by OPT. (Petition, Ex. E)

Hughes timely filed an administrative appeal with the Office of Appeals and Review ("OAR") and on May 1, 2007, following a disciplinary conference, DOE's Deputy Chancellor upheld the revocation of petitioner's school bus escort certification (Petition, Ex. C).

Petitioner claims that the DOE did not advise her of her right to challenge the Deputy Chancellor's decision and that, after receiving the decision, she contacted an unidentified person in an unidentified office at the DOE and "she was told she had no appellate rights." (Petition, para. 11).

Petitioner states that in June, 2007, she contacted her councilman for assistance in obtaining relief from the DOE's revocation. In June, 2008, DOE responded to the councilman's inquiry in a letter that stated:

> Ms. Hughes appealed her decertification as a bus escort, and a disciplinary conference was conducted on March 21, 2007 under the guidelines of Chancellor's Regulation C-100. The decision to decertify Ms. Hughes as a bus escort was upheld.

(Petition, Ex. D)

Petitioner commenced this Article 78 proceeding on October 9, 2008.

## Discussion

In support of the petition, Hughes argues that respondent should be equitably estopped from asserting a statute of limitations defense to this action because the DOE actively misled her about the existence of her right to challenge the revocation of her certification. Moreover, Hughes asserts that the DOE's determination was arbitrary and capricious because there was no credible evidence to support the DOE's revocation of her certification. She contends that the students who were interviewed were all disabled and unable to take care of their own needs and that they might have been motivated to fabricate charges against her because she held a disciplinary position over them on the bus.

In opposition to the petition and in support of the motion to dismiss, respondent argues that this action is time barred because it was not instituted within four months after the "determination to be reviewed [became] final and binding upon the petitioner." (CPLR 217; *see also DeLillo v. Borgard,* 55 N.Y.2d 216 [1982]) In addition, DOE contends that the revocation of Hughes certification was neither arbitrary nor capricious.

## Discussion

In *Rocco v. Kelly,* 20 A.D.3d 364, 365-366, (1st Dept. 2005), the First Department stated the well settled principle that, "[a] CPLR article 78 proceeding against a public body must be commenced within four months 'after the determination to be reviewed becomes final and binding on the petitioner.'" (citation omitted). Moreover, it is also well established that a determination becomes final and binding when the petitioner seeking review has been aggrieved by it. (*Yarborough v. Franco,* 95 N.Y.2d 342 [2000]; *Matter of Carter v. State of New York Exec. Dept., Div. of Parole,* 95 N.Y.2d 267 [2000]; *Matter of Edmead v. McGuire,* 67 N.Y.2d 714, 716 [1986])

In this case, on December 19, 2006, petitioner was "aggrieved" by respondent's determination when she received written notification that her certification as a school bus escort had been revoked. (Petition, Ex. A) Thereafter, by letter dated May 1, 2007, the Deputy Chancellor informed Hughes that she concurred with the decision of the OPT and OAR to permanently revoke Hughes's certification as a school bus escort. (Petition, Ex. C) Petitioner does not deny timely receipt of the Deputy Chancellor's letter. Thus, at the latest, the four month statute of limitations began to run no later than May, 2007 when petitioner exhausted her administrative remedies. Accordingly, this action, which was commenced in October, 2008, is time barred.

Petitioner's claim that respondent is equitably estopped from asserting a statute of limitations defense is without merit because Hughes has failed to demonstrate that she was induced by fraud, misrepresentation or deception from filing her claim. (*Kaufman v. Cohen*, 307 A.D.2d 113, 122 [1st Dept 2003]; *Simcuski v. Saeli*, 44 N.Y.2d 442, 448-449 [1978]) Courts have the power, at both law and equity, to bar the assertion of the affirmative defense of statute of limitations, where it is respondent's affirmative wrongdoing, which produces the long delay between the accrual of the action and the institution of legal proceedings. (*General Stencils v. Chiappa,* 18 N.Y.2d 125 [1966]) However, the claim of equitable estoppel will be rejected if the petitioner fails to present evidentiary facts supporting a claim of intentional fraud or fraudulent concealment. (*Powers Mercantile Corp., v. Feinberg,* 109 A.D.2d 117, 122 [1st Dept 1985] *aff'd* 67 N.Y.2d 981 [1986];*Ratner v. York,* 174 A.D.2d 718 [2nd Dept 1991]) Moreover, the doctrine of equitable estoppel may not ordinarily be invoked against a governmental agency. (*Piscitella v. City of Troy,* 229 A.D.2d 775, 776 [3d Dept 1999]) There is a narrow exception to the general rule that equitable estoppel may not ordinarily be invoked against a governmental agency if

unusual circumstances exist (see, *Matter of Daleview Nursing Home v. Axelrod*, 62 N.Y.2d 30,33 [1984]) However, it is well settled that an erroneous opinion given by a member of a governmental body which is engaged in administering the law in question does not raise an estoppel defense. Indeed, "erroneous advice by a governmental employee does not constitute the type of unusual circumstance[s] contemplated by the exception." (*Notaro v. Power Authority of the State of New York*, 41 A.D.3d 1318, 1320 [4th Dept 2007]; *Matter of Schwartz v. McCall, 300 A.D.2d 887* [3rd Dept 2002]; *Grella v. Hevesi,* 10 Misc.3d 519 [Sup. Ct. Albany County 2005]

In her affidavit, petitioner states,

> Shortly after receiving [the Deputy Chancellor's] decision, I recall following up with the Department of Education several times. Unfortunately they were of no help and essentially told me my case was closed, I had no further appeal rights and no avenue to seek legal redress.

(Karasik Aff, Ex. A, para 2)

This statement, without more does not rise to the level of demonstrating that respondent, through fraud, misrepresentation or deception, intentionally caused petitioner to refrain from commencing a timely action. (*See, East Midtown Plaza Housing Co. v. City of New York*, 218 A.D.2d 628 [1st Dept. 1995]) If indeed, the unnamed person(s) in the unidentified department at DOE did tell petitioner that she had no avenue to seek legal redress, the erroneous advice does not rise to the level of an "unusual circumstance" sufficient to invoke equitable estoppel[1]. Moreover, petitioner has not shown that the letter from DOE to her councilman misrepresented any facts. That letter was merely an accurate recitation of petitioner's circumstances. It did not

---

[1] The court notes that, in the petition, petitioner states that when she contacted DOE in mid-May, she was told "she had no appellate rights" (Para. 11). This statement was accurate, because, at that time, plaintiff had exhausted her administrative remedies. Petitioner's assertion that she was also told that she had no legal redress is contained in an affidavit in opposition to the motion.

mention or discuss further review of the Deputy Chancellor's decision.

Accordingly, because this Article 78 proceeding was commenced more than one year after respondent's determination became final and binding on the petitioner, the Petition is dismissed.

Accordingly, it is

ORDERED that respondent's cross motion is granted and the petition is dismissed as time barred.

This decision constitutes the judgment of the court.

DATE 2/11/09

WALTER B. TOLUB J.S.C.

**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).**