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

PRESENT: Madden PART 11

Justice

Garnis, John

-v-

NYC Board / Dep. of Edu.

INDEX NO. 110383/08

MOTION DATE

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 this ~~motion~~ Article 78 petition is determined in accordance with the annexed decision, order and 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).

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

Dated: April 6, 2009

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: IAS PART 11

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In the Matter of JOHN GRININS,

INDEX NO. 110383/08

Petitioner,

- against -

NEW YORK CITY DEPARTMENT/BOARD OF EDUCATION,

Respondent..

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JOAN A. MADDEN, J.:

Petitioner John Grinins, a science teacher at Public School 34 a/k/a Franklin Delano Roosevelt School, brings this proceeding, pursuant to CPLR Article 78 and Sections 3020 and 3020-a of the Education Law, for, *inter alia*, an order of mandamus requiring respondent New York City Department of Education (DOE) to expunge three negative observation reports from petitioner's personnel file and reverse the unsatisfactory rating (U-rating) he was given on June 18, 2008, both in alleged violation of statutory procedures relating to the discipline of tenured teachers.

Respondent DOE opposes the petition on a variety of legal grounds, including petitioner's failure to exhaust applicable administrative remedies to challenge his U-rating, and cross-moves, pursuant to CPLR 3211(a) (2), 3211(a) (7) and 7804 (f), to dismiss the petition on the ground that petitioner has failed to file a notice of claim pursuant to Education Law § 3813(1) prior to commencing this proceeding.[1]

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[1]At oral argument on September 10, 2008, petitioner agreed to withdraw his request for sanctions against the DOE pursuant to CPLR 8303-a(c) and 22 NYCRR 130.1.1, made in his attorney's affirmation in opposition to the DOE's cross motion.

Although hardly a model of clarity, the court derives the following allegations from the Verified Petition dated July 30, 2008. Petitioner has been employed by the DOE since the 1987-1988 school year. He has been employed as a science cluster teacher at his current school since 1996, where he received a satisfactory rating for 10 years and achieved tenure. He contends that, at some unspecified point in time, the DOE "implemented 'cost-cutting' by targeting senior teachers; each of whom could be replaced with 1½ - 2 junior teachers." He asserts that this targeting took the form of trumped up charges or negative observations as a means to oust teachers from a particular school or the system entirely, and that evidence of this alleged "pattern and practice" exists in his own school, where his "comparators" suddenly received negative ratings or were accused of incompetence, insubordination and/or misconduct.

Beginning in the Spring of 2008, petitioner alleges that his principal, "plagued with budgetary dilemmas, was ostensibly 'called onto the carpet' by her supervisors for not directly supervising her staff." He asserts that the principal began to demand formal observations of certain senior teachers, including petitioner, rather than using the "Annual Performance Review" system espoused under Article 8(J) of the applicable Collective Bargaining Agreement (CBA), which petitioner had requested. Petitioner alleges he was targeted by his "ladder-climbing" principal for "making waves" about his right to a particular form of review.

Petitioner alleges that in the Spring of 2008, late in the school year, his principal began submitting negative letters in his file, and he attributes his "fall from grace" to supervisory animus for having asserted his rights. He identifies three letters, dated February 4, April 18 and June 18, 2008, which he characterizes as filled with typographical errors, false statements of fact, unfair accusations of lack of coordination with the classroom teachers, and goals that were vague,

ambiguous, disconnected, disjointed, and could not be reasonably achieved in the time remaining in the school year. Petitioner alleges that the February 4 letter "impugns" his reputation 'by impliedly accusing him of referring to disabled children in a negative light when in point of fact, [he] never did so." He alleges that April 18 letter is disciplinary in nature, because it threatens "further disciplinary action including a U-rating and termination" and was a reprimand rather than a recommendation, and that the June 18 letter is similarly infected with supervisory accusations of insubordination and neglect, but adds the stigmatizing charges of falsification of records and lying to supervisors.

On June 26, 2008, petitioner was given a U-rating for the school year, the support being the principal's three formal classroom observations as reflected in the February 4, April 18 and June 18, 2008 letters. He claims that younger classroom teachers were not similarly treated in contravention of Education Law §3027 which prohibits age discrimination. Petitioner also claims, that as a result of his principal's actions, he has suffered severe professional harm, including, but not limited to, interference with his ability to obtain future employment, as well as physical, mental and emotional harm. According to his attorney's affirmation, "the corrosion of the supervisor-subordinate relationship due to supervisory animus," has "compelled" petitioner to seek employment elsewhere, and the derogatory material in his file impacts his ability to gain employment in another school within the district.

Petitioner commenced this proceeding on July 30, 2008, asserting that he has been disciplined without just cause and in contravention of the procedures set forth in Education Law §3020-a for tenured teachers, which requires written charges be filed with the DOE, a finding of probable cause, and the opportunity to contest those charges at a formal hearing. By way of

relief, he asks that his "personnel file be expunged of the denigrating letters and ratings," for an award of damages for "lost opportunities for per session positions and compensatory time assignments as well as any differences in salary due to merit pay that may have otherwise been available to [him]," and an award of attorneys fees.

In opposing the petition, DOE argues that petitioner has failed to exhaust his administrative remedies, since he appealed his U-rating to the DOE's Office of Appeals and Review (OAR) and a hearing was scheduled on September 24, 2008, but petitioner did not await a final decision before challenging the rating in this court. Second, DOE argues that the three letters in petitioner's file are merely observation reports and do not constitute "discipline" within the meaning of Education Law §3020-a. Third, DOE argues that under the terms of the contract between petitioner's union, the United Federation of Teachers (UFT), and the DOE, written reprimands and observation reports are not subject to the formal and lengthy hearing process outlined in Education Law §3020-a. Fourth, DOE argues that petitioner's vague and conclusory allegations fail to plead a prima facie case of age discrimination, and the statute petitioner relies on, Education Law §3027, by its own terms, does not apply to tenured teachers, but to the examinations and processes of becoming employed in a school district.

At the outset, the court will address DOE's cross motion to dismiss the petition based on petitioner's failure to file a notice of claim within three months after the accrual of his alleged claims. As conceded by DOE, a notice of claim pursuant to Education Law §3813(1) is not a condition precedent to an Article 78 proceeding seeking to vindicate a public interest. *Matter of Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs.*, 89 NY2d 395, 400 (1996); *Kight v Wyandanch Union Free School Dist.*, 84 AD2d 749 (2d Dept 1981), *affd* 56 NY2d 606 (1982).

DOE asserts that petitioner seeks only private relief in the expungement of letters contained in his personnel file and the reversal of his U-rating. Petitioner disagrees and argues that he is primarily seeking to vindicate a public right, to wit, the protection of tenure espoused in Education Law §3020 and the statutory right of tenured teachers to a pre-disciplinary hearing in accordance with the procedures set forth in Education Law §3020-a.

It is well settled that the tenure rights of teachers are a matter of public interest, and therefore, the notice of claim provisions of Education Law §3813 (1) are not applicable to cases seeking to enforce such rights. *Kight v Wyandanch Union Free School Dist.*, *supra*; *Sephton v Board of Educ. of City School Dist. of City of New York*, 99 AD2d 509, 510 (2d Dept), *appeal denied* 62 NY2d 605 (1984); *Pulver v Board of Educ., Farmingdale, Union Free School Dist.*, 80 AD2d 833 (2d Dept 1981); *Matter of Weisbarth v Board of Educ. of East Meadow Union Free School Dist.*, 76 AD2d 841 (2d Dept 1980). Accordingly, DOE's cross motion to dismiss the petition for failure to file a notice of claim is denied.

Turning to the issue of exhaustion of administrative remedies, a petitioner seeking Article 78 review of an administrative action must commence the proceeding "within four months after the determination to be reviewed becomes final and binding upon the petitioner." CPLR 217(1). "An administrative determination becomes 'final and binding' when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies." *Walton v New York State Dept. of Corr. Servs.*, 8 NY3d 186, 194 (2007). "A litigant who seeks to challenge a determination of an administrative agency must exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts." *Frumoff v Wing*, 239 AD2d 216, 217 (1st Dept 1997), citing *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57

(1978). "It is well established that an aggrieved union member whose employment is subject to the terms of a collective bargaining agreement entered into by his union and employer must first avail himself of the grievance procedure set forth in the agreement before he can commence an action in court." *Cantres v Board of Educ. of City of New York*, 145 AD2d 359, 360 (1st Dept 1988).

Article 21(D)(3) of the CBA specifies that teachers who receive unsatisfactory ratings may appeal the rating under the procedures set forth in section 4.3.1 of the Bylaws of the Panel for Educational Policy of the DOE. Those procedures call for a hearing by a committee designated by the DOE Chancellor, who then submit their findings and recommendations to the Chancellor for a final decision. An unsatisfactory rating does not become final and binding until the Chancellor of the DOE denies an internal appeal and sustains the rating. *Bonilla v Board of Educ.*, 285 AD2d 548, 549 (2d Dept 2001); *Mateo v Board of Educ. of City of New York*, 285 AD2d 552, 553 (2d Dept 2001).

Here, petitioner failed to exhaust his administrative remedies, because he appealed his U-rating to the OAR, a hearing was scheduled for September 24, 2008, but he did not await a final decision before challenging the rating in this court on July 30, 2008.[2] *Villalba v New York City Dept. of Educ.*, 50 AD3d 279 (1st Dept), *lv denied* 11 NY3d 710 (2008). Therefore, the petition is denied for failure to exhaust administrative remedies with respect to any challenge to petitioner's U-rating for the 2007-2008 school year.

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[2]There is no indication whether this hearing took place, and what, if any, determination was made regarding the U-rating.

As to the issue of whether DOE violated the statutory disciplinary procedures for tenured teachers, New York Education Law §3020 states that "[n]o person enjoying the benefits of tenure shall be disciplined . . . during a term of employment except for just cause and in accordance with the procedures specified in [section 3020-a] of this article." A disciplinary reprimand may not be issued to a teacher without a finding of misconduct pursuant to §3020-a. Education Law §3020-a (4)(a).

Not every written communication from a school official that may be critical of a teacher's job performance is subject to the protections of Education Law §§ 3020, 3020-a. *Holt v Board of Educ. Of the Webutuck Cent. School Dist.*, 52 NY2d 625, 631-32 (1981); *Tomaka v Evans-Brant Cent. School Dist.*, 107 AD2d 1078, 1079 (4th Dept) ("The statute does not insulate school district personnel from all written critical comments from their supervisors"), *aff'd* 65 NY2d 1048 (1985). In order to determine whether a letter placed in a teacher's file rises to the level of a reprimand requiring the protection afforded by Education Law § 3020-a, the court must consider "'whether the letter is from a teacher's immediate supervisor or from the board of education; whether the letter is directed [to] an improvement in performance or is a formal reprimand for prior misconduct; whether the letter is in the nature of a performance evaluation or a castigation for misconduct; and the severity of the misconduct.'" *Gutman v The Bd. of Educ. of the City School Dist.*, 18 Misc 3d 609, 614 (Sup Ct, NY County 2007), quoting *Appeal of Richards*, 24 Educ Dept Rep 104, 106, Dec No 11,333.

The three letters placed in petitioner's personnel file are clearly critical administrative evaluations, and not disciplinary reprimands. In *Holt v Board of Educ. of the Webutuck Cent. School Dist., supra*, the Court of Appeals held that a letter setting forth several occasions when

one teacher was absent from his assigned duty station in disregard of an oral admonition, and a letter characterizing another teacher's action of disrupting a colleague's class as unbecoming and insubordinate, were both merely administration evaluations not subject to the Education Law's formal hearing procedures. *See also O'Connor v Sobol*, 173 AD2d 74, 77 (3rd Dept 1991) (finding that a letter commenting on the petitioner's "poor judgment" in the classroom and directing future action on his part was nothing more than an administrative evaluation and was properly included in the petitioner's personnel file without resort to the formal procedures set forth in section 3020-a since it did not impose a punishment); *Tebordo v Cold Spring Harbor Cent. School Dist.*, 126 AD2d 542, 543 (2d Dept), *lv denied* 70 NY2d 605 (1987) (letters of reprimand in the petitioner's personnel file fell within the permissible range of administrative evaluation and fell short of the formal reprimand contemplated by section 3020-a); *Grennan v Nassau County*, 2007 WL 952067 (ED NY March 29, 2007) (placement of a critical letter in teacher's file did not entitle her to the procedural safeguards set forth in Section 3020-a).

All of the letters were written by Principal Joyce Stalling-Harte, and purport to summarize her observations of petitioner's science lessons on January 25, April 2, and May 29, 2008. Thus, the letters are from petitioner's immediate supervisor, are addressed only to him, and represent only one administrator's view of plaintiff s performance, not a formal finding of misconduct. The February 4 letter contains no words of reprimand, only recommendations for improved performance. The April 18 and June 18 letters are also performance evaluations wherein Principal Stalling-Harte listed specific reasons why she found both lessons unsatisfactory. Her concluding sentence in the April 18 letter that petitioner's failure to implement these recommendations may result in "further disciplinary action including a U rating

and termination," does not render this letter a disciplinary reprimand within the meaning of the Education Law. *Heslop v Board of Educ., Newfield Cent. School Dist.*, 191 AD2d 875, 877 (3d Dept 1993). Thus, the petition is denied to extent it challenges the placement of the three letters in petitioner's personnel file without resort to the formal procedures set forth in Education Law §3020-a.[3]

Finally, petitioner's reliance on Education Law §3027 is misplaced, as that provision is not addressed to tenured pedagogues, but to the examinations and processes of becoming employed in a school district. This statute states, in full:

> Notwithstanding any provision of law to the contrary, no board of education in any city, union free, common or central school district in this state shall hereafter prohibit, prevent, disqualify or discriminate against any person who is physically and mentally qualified from competing, participating, or registering for an examination for or from qualifying for, a position as teacher, or be penalized in a final rating by reason of his or her age. Any such rule, requirement, resolution, regulation or penalization of such board shall be void.
>
> Nothing herein contained, however, shall prevent such board from adopting reasonable minimum or maximum age requirements for positions which require extraordinary physical effort, except where age limits for such positions are already prescribed by law.

The "final rating" referred to in section 3027 is the rating of the teacher's examination, and not a rating of a classroom observation or school-year performance of a tenured teacher. In any event, petitioner fails to allege facts warranting the inference that he was subject to discriminatory employment action actually motivated by age. Executive Law §296 (1); *Quintas v Pace Univ.*, 23 AD3d 246, 247 (1ST Dept 2005); *see also Carmellino v District 20 of New York*

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[3]In light of this conclusion that the three letters are not disciplinary in nature within the meaning of Education Law §3020-a, the court need not consider DOE's argument that a teacher's right to grieve letters to the file that are disciplinary in nature, was waived by Article 21(A)of the CBA.

City Dept. of Educ., 2006 WL 2583019 (SD NY Sept 6, 2006) (holding that negative evaluations are not actionable as age discrimination, especially where there is no evidence that "any negative consequences resulted from those evaluations").

For the foregoing reasons, it is hereby

ORDERED that respondent's cross motion to dismiss the petition for failure to file a notice of claim is denied; and it is further

ORDERED and ADJUDGED that the petition is denied and the proceeding dismissed.

This constitutes the decision, order and judgment of the court.

DATED: ~~March~~ April 6, 2009

ENTER:

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).