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

PRESENT: O. PETER SHERWOOD PART 61
Justice

In the Matter of an Article 78 Proceeding
ERIC DALEY,

Petitioner,

-v-

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents,

MOTION INDEX NO. 113730/2008

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO. 30

The following papers, numbered 1 to 5 were read on this motion to/for leave to serve a late notice of claim

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, petitioner's motion for leave to file a late notice of claim is decided in accordance with the accompanying decision 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).

Dated: August 4, 2009

O. P. Sherwood

O. PETER SHERWOOD 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 61

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In the Matter of an Article 78 Proceeding
ERIC DALEY,

Petitioner,

-against-

DECISION AND JUDGMENT

Index.: 113730/2008

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

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O. PETER SHERWOOD, J.:

Petitioner was terminated from his position as a probationary Assistant Principal at Middle School 143 ("M.S. 143") in District 13, Brooklyn, New York, effective July 14, 2008. The petition was filed less than three months later, on October 10, 2008.

The petition alleges that a performance evaluation of "U" (Unsatisfactory) petitioner received in May 2008 that lead to petitioner's termination was arbitrary and capricious because it was the result of bias on the basis of age and national origin by his former school principal. The petition names the City of New York ("City") and the School District of the City of New York ("Board of Education" or "BOE") as respondents and seeks a hearing, annulment of the rating, reinstatement to the assistant principal position, back pay and costs.

By separate motion, petitioner also seeks leave to serve and file a late notice of claim. Respondents oppose the motion. By notice of cross-motion, respondents seek a judgment pursuant to CPLR Rules 3211(a)(2) and 3211(a)(7) dismissing the complaint on the grounds (as now limited by the briefs) that (1) petitioner failed to file a timely notice of claim, (2) the petition fails to state a cause of action, and (3) the City is not a proper party[1].

According to the petition, petitioner who was appointed as a teacher in 1992 and promoted to assistant principal assigned to M.S. 143 in 2005, received "S" (Satisfactory) ratings as an assistant

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[1] The BOE and the City are separate and distinct legal entities. As such, the City is not a proper party and shall be dismissed from the case (*see, e.g. Perez v. City of New York,* 41 AD3d 378, 379 [1st Dept 2007]).

principal in 2006 and 2007. The petition alleges (1) that in October 2006, the principal (who was 36 years old) commented with a smirk "So you are about 50 then, Mr. Daley"; (2) that in January 2007, the principal asked petitioner how long he had been in the United States and when petitioner responded "14 years", the principal replied "14 years and your accent is so thick?" and (3) that in October 2007, when petitioner complained to the principal about being marginalized and ignored at meetings, the principal replied "I just don't like your Jamaican ass...you act like you know everything." These alleged remarks are offered as evidence of bias by the principal against petitioner.

The performance evaluation at issue in this case, a copy of which is attached to the petition, was completed by the principal of M.S. 143 and approved by the District 13 Superintendent. In the section designated "End of Year Summary", the principal wrote:

> Mr. Daley has failed to fulfill his duties as an Assistant Principal in regards to his developing class room structures which promote cooperative learning, facilitation of literacy across curriculum areas, meet with school safety agents to discuss safety concerns, and supervise parent teacher conferences.

Petitioner was given a "U" rating as to which three specific incidents were cited:

1. Leaving the building prior to dismissal of students thereby leaving the school without an administrator. Petitioner abandoned his post, despite the express request of the principal that he remain on site until after the students were dismissed.

2. Striking a female student three times with a door; and

3. Failing to provide proper supervision of students in the gymnasium during a regular school period. Specifically, on a day when the regular physical education teacher was absent, petitioner left the students unsupervised by a certified teacher and improperly supervised by three adult paraprofessionals. During petitioner's absence, a student, was injured in the gymnasium.

Petitioner does not dispute that the three incidents of alleged misconduct occurred but challenges respondent's interpretation of them. Petitioner contends that respondent's reasons for the "U" rating was "a sham" and that the principal's bias against his national origin resulted in the "U"

rating and subsequent dismissal from the position. Petitioner has not argued that the administrative failures set forth in the evaluation were arbitrary and capricious or were the result of bias.

DISCUSSION

Pursuant to Education Law § 3813(1), a written notice of claim must be filed with the BOE within three months after accrual of the claim. Petitioner failed to file a timely claim. Pursuant to Education Law § 3813(2)(a) the court, in its discretion, may extend the time to serve a notice of claim under certain circumstances, including whether the BOE had "actual knowledge" of the essential facts constituting the claim within the three-month period (or within a reasonable time thereafter) and whether the delay in serving the notice "substantially" prejudiced the BOE in maintaining its defense on the merits.

The court concludes that the motion for leave to file and serve a late notice of claim should be granted. According to respondent, the time for petitioner to file his notice of claim expired on October 13, 2008, 90 days after his termination became effective on July 14, 2008. Respondent had actual notice of the claim long before that time. Petitioner filed an appeal of the "unsatisfactory rating/discontinuance" with the BOE Office of Appeals and Reviews on June 23, 2008. This Article 78 Proceeding was filed on October 10, 2008. Thus the New York City Law Department had actual and timely notice of the claim. Moreover, an administrating Chancellor's Review of the rating/termination occurred on January 21, 2009 and an order affirming the rating/termination was issued on March 6, 2009, six weeks prior to the filing of the motion. On the facts present here, it cannot be said reasonably, that the failure to file a formal notice of claim has prejudiced respondent. Respondent was not prevented from conducting a prompt investigation of petitioner's allegations (*see, e.g. Johnson v. City of New York*, 280 AD2d 271 [1st Dept 2001] and *Beckerman v. Board of Education of the Comsewogue Union Free School District*, 223 AD2d 702, 703 [2d Dept 1996]).

The law in this State is well settled that a probationary public employee "may be discharged without a hearing, ... for any reason or no reason at all, in the absence of a demonstration that the dismissal was in bad faith, for a constitutionally impermissible reason, or in violation of the law." *Matter of Tsao v. Kelly*, 28 AD3d 320, 321 (1st Dept 2006). Judicial review of a determination to dismiss a probationary employee is limited to an inquiry as to whether the termination was made in bad faith or in violation of law (*see Johnson v. Katz*, 68 NY2d 649, 650 [1986]). The burden of

proving such bad faith or violation of law is on the employee (*see Medina v. Siedaff*, 182 AD2d 424, 427 [1st Dept 1992]). The reasons for the "U" rating- -abandonment of duty and insubordination, corporal punishment visited on a student and failure to supervise children - -establishes that the rating and discharge were made in good faith (*see Jones v. New York City Health and Hospitals Corp.*, 5 AD3d 338 [1st Dept 2004]).

As to the alleged abandonment of duty and insubordination matter, petitioner admits that, despite being advised to remain at his post, he left the building unsupervised prior to dismissal of the students. He now seeks to rationalize his actions by giving his "interpretation" of the principal's instructions. He argues that those instructions were that he should not change his travel plans but instead should delay his departure from the building as late as possible and "be aware that if anything on-toward occurred in [his] absence, [he] would be fully responsible." Petitioner refuses to acknowledge that in the eminently reasonable judgment of his supervisors, his actions constituted abandonment of duty and insubordination. Instead, he sees respondents' assessment of his actions as "unfair, arbitrary and motivated by bias."

As to the corporal punishment incident, petitioner asserts that respondent's investigation of the incident was not properly conducted. Following an investigation, the principal prepared a written report in which he reported that petitioner "became involved in a tussle with [S.S., a female student] when she attempted to exit room 205. [Petitioner] then obstructed S.S. from leaving the classroom by blocking the door. During the tussle between [petitioner] and S.S., it was alleged that you struck S.S. with the door three times. ...After reviewing the complainant's statement, the witness statements, and reading [petitioner's] account of the incident, I conclude that [petitioner] did engage in a tussle with S.S. and ... struck her with the door three times." Petitioner takes issue with the principal's use of the word "tussle" but does not flatly deny that he struck the student three times with the door. He also criticizes the principal for failing to give "appropriate weight" to statements given by adults. Petitioner complains that the "investigation was conducted with one aim in mind, to substantiate an allegation of corporal punishment and place a letter in my file."

Regarding the failure to provide proper supervision incident, petitioner admits that he and three adult para professionals were responsible for supervising a gym class and that a student was injured while he was absent. The failure to have a certified teacher present meant that the class was

left without proper supervision. In his report of the incident, petitioner stated that he was "in and out of the gym", that the injury occurred while he "had gone to the bathroom and that for most of the time he was either in the gym or standing at the door." Petitioner's representations as to his whereabouts are unsubstantiated. One of the para professionals reported that petitioner had left them alone with no licensed teacher during the "whole period." Another stated that "we did not have any licensed person with us." Respondent was fully justified concluding that petitioner failed to provide proper supervision of the third period gym class.

Where a probationary employee shows by competent proof that his dismissal was for reasons that violate the constitution or a statute, he is entitled to a hearing and a remedy but mere conclusive allegations of bad faith are insufficient to meet the burden of establishing bad faith (*see Medina v. Sielaff,* 182 AD2d 424, 427 [1st Dept 1992]). Where petitioner is asserting a statutory claim of employment discrimination, he may establish a *prima facie* case of violation of the New York State Human Rights Law (*see* Executive Law § 296) by showing that (1) he is a member of a protected class; (2) he was qualified to retain the position; (3) he was not retained in the position; and (4) the dismissal occurred under circumstances giving rise to an inference of discrimination (*see Forrest v. Jewish Guild for the Blind,* 3 NY3d 295, 305 [2004]). Once petitioner establishes a *prima facie* case, the burden shifts to respondent to articulate legitimate, independent and non-discriminatory reasons to support the employment decision *(see id).* In order to prevail, petitioner must prove that the reasons proffered by the employer were merely pretexts for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason for the adverse employment action *(see id).*

The stray comments petitioner alleges were uttered by the principal of MS 143 are unconnected with any of the incidents that formed the bases for the "U" rating and that contributed to the decision to dismiss petitioner from the assistant principal position. The alleged comments do not negate the substantial evidence of misconduct that resulted in the dismissal and are insufficient to raise a triable issue of fact (CPLR 7804[h]) to support petitioner's claim of bad faith.

Because petitioner has not shown that the discharge occurred under circumstances giving rise to an inference of discrimination, petitioner has failed to establish a *prima facie* case of discrimination in violation of the Human Rights Law (*see Forrest,* 3 NY3d at 308). Assuming that

petitioner had met the low threshold for establishing *prima facie* case, respondents have given ample justification for the dismissal decision. Petitioner has not shown that the explanations given by respondent were pretexts for discrimination - -that is that the listed reasons for the "U" rating and the reasons for the dismissal were false and that age and national origin motivated discrimination were the real reasons. As discussed, respondent demonstrated a good faith basis for dismissing petitioner. Moreover the alleged discriminatory statements do not form a basis for proving unlawful discrimination (*see Price Waterhouse v. Hopkins,* 490 U.S. 228, 277 [1989][O'Connor, J. Concurring in judgment]["statements by decision makers unrelated to the decisional process itself"are insufficient to establish discriminatory intent]).

Respondents' cross-motion shall be granted. The petition will be dismissed.

Accordingly, it is hereby

ORDERED that the motion for leave to file a late notice of claim is granted; and it is further

ORDERED and ADJUDGED that the petition as against respondent, City of New York is dismissed; and it is further

ORDERED and ADJUDGED that the petition is dismissed.

This constitutes the decision and judgment of the court.

DATED: August 4, 2009

ENTER,

O. PETER SHERWOOD
J.S.C.