Matter of Nash v Board of Educ. of the City School Dist. of the City of N.Y.
2009 NY Slip Op 32531(U)
October 21, 2009
Supreme Court, New York County
Docket Number: 112365/08
Judge: Marilyn Shafer
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SCANNED ON 10/30/2009

[* 1]

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

PRESENT: SHAFER PART 8

Justice

Index Number : 112365/2008

NASH, DOREEN

vs.

BOARD OF EDUCATION

SEQUENCE NUMBER : # 001

REARGUMENT / RECONSIDERATION

INDEX NO. 112365-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

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 denied pursuant to attached Decn.

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

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: 10/21/09

MARILYN SHAFER J.S.C.

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 8

---X

In the Matter of the Application of

DOREEN NASH,

Petitioner,

-against-

Index No. 112365/08

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and JOEL I. KLEIN, in his official capacity as CHANCELLOR OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondents,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules.

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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).

Shafer, J.:

In this CPLR article 78 proceeding, petitioner Doreen Nash (Nash) petitions for an order and judgment declaring that respondents' determination terminating Nash's probationary employment was arbitrary, capricious, and contrary to law, annulling the determination, and directing respondents to reinstate Nash with back pay and interest. Respondents the Board of Education of the City School District of the City of New York and Joel I. Klein, in his official capacity as Chancellor of the City School District of the City of New York, (collectively, the BOE) cross-move for an order and judgment dismissing the first amended petition as barred by Nash's failure to timely commence this proceeding and failure to exhaust the mandatory administrative and contractual remedies, pursuant to CPLR 217 (1), 3211 (a) (5), 3211 (a) (7),

and 7804 (f).

On September 3, 2002, Nash was appointed by the BOE to the position of probationary school secretary. During the 2004-2005 school year, Nash was employed as a probationary secretary at Brooklyn Technical High School (Brooklyn Tech). On June 15, 2005, Nash received an unsatisfactory rating (U-rating) on her year-end performance review from the school principal, Lee D. McCaskill, now retired. McCaskill also recommended discontinuance of her probationary service.

By letter dated June 15, 2005, the BOE local instructional superintendent for region 8 notified Nash that he would review and consider whether to discontinue her services as a probationer and that she may submit a written response to the year-end rating sheet and accompanying documentation.

By letter dated July 15, 2005, the superintendent notified Nash that, after review and consideration of all appropriate documentation, he affirmed the decision to discontinue her probationary service, effective at that day's close of business. The superintendent also advised Nash of her right to appeal the decision to the BOE Office of Appeals and Reviews, pursuant to Regulation of the Chancellor C-31 (Regulation C-31) and the applicable collective bargaining agreement (CBA).

Meanwhile, by letter dated June 16, 2005, Nash requested a hearing to review the discontinuance determination, pursuant to Regulation C-31, section 4.3.2[1] (formerly, section

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[1]Section 4.3.2 of the Bylaws provides that:

> [a]ny person in the employ of the City School District who appears before the Chancellor, or a committee designated by the Chancellor, concerning the discontinuance of service during the probationary term, or at the expiration thereof, shall have a review of the matter before a

5.3.4) of the By-Laws of the Panel for Educational Policy of the City School District of the City of New York (the Bylaws), and Article 21C of the 2003-2007 CBA between the School Secretaries Chapter of the United Federation of Teachers (UFT) and the BOE.

In response, by notice to appellant dated April 20, 2006, the director of the Office of Appeals and Reviews advised Nash that a review hearing had been scheduled. In the notice, the director advised Nash of the date, time, and location of the hearing, and identified the BOE employees required to attend, either in person or by telephone. The employees identified included Randy Asher, McCaskill's successor as the Brooklyn Tech principal, Crystal Bond, the Brooklyn Tech assistant principal, and Geraldine Schowerer, the schools' superintendent representative. McCaskill, the rating officer who had given Nash the U-rating, was not listed because he had previously retired.

The hearing was held May 10, 2006 before the BOE reviewing committee. At the hearing, Nash was represented by a UFT advisor, gave testimony, and submitted evidence, including four testimonial letters, on her own behalf. Also testifying were Asher and Bonds, who had been Nash's immediate supervisor and who had authored several letters in support of the discontinuance of Nash's employment.

The committee issued an advisory opinion, later obtained by Nash, in which the three members unanimously concluded that they did not agree with McCaskill's recommendation to discontinue Nash's probationary employment. In the opinion, the committee noted that the initial recommendation of discontinuance was based on complaints that Nash had failed to properly ring

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committee which shall be designated in accordance with the contractual agreements covering employees or by regulations of the Chancellor, as appropriate.

the school passing bells, and had failed to properly document student immunization records. The committee found that the record supported a finding of only one instance of failing to ring the bells correctly, and a finding of 99% compliance with the appropriate procedures for keeping immunization records. The committee noted that the 99% compliance rating exceeded the minimum regional requirement of 97% compliance. The committee also noted that McCaskill had previously retired and that Asher, the current principal, repeatedly "stood on the record," and was not able to provide the clarification deemed necessary by the committee members.

The committee forwarded its advisory opinion to the BOE Office of Labor Relations and to the BOE Office of the Chancellor for final determination, pursuant to Bylaws § 4.3.2.

By letter dated May 14, 2008, the BOE superintendent of Brooklyn high schools notified Nash that she had reaffirmed the previous actions that had resulted in the discontinuance of Nash's probationary service.

On September 10, 2009, Nash commenced this special proceeding for an order and judgment declaring that the BOE determination reaffirming the discontinuance of her probationary employment was arbitrary, capricious, and contrary to law, annulling the determination, and directing the BOE to reinstate her to her former position, with back pay and interest.

In opposition, the BOE cross-moves to dismiss this proceeding, contending that, to the extent that Nash seeks reinstatement to her former position as a probationary secretary and recovery of back pay, the petition is untimely on the ground that Nash failed to commence this proceeding within four months after the effective date of the discontinuance of that employment, on July 15, 2005.

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In opposition to the cross motion, Nash contends that she timely commenced this proceeding within four months after receipt of the May 14, 2008 determination reaffirming the discontinuance, and that she is not seeking to annul the July 15, 2005 determination.

Nash's application to annul the discontinuance of her probationary employment and to reinstate that employment, with back pay and interest, is time-barred.[2] A petitioner in an article 78 proceeding challenging the termination of probationary employment must commence the proceeding within four months after the date on which the administrative determination becomes final and binding upon the petitioner (*Matter of De Milio v Borghard*, 55 NY2d 216, 220 [1982]; *see* CPLR 217). A determination becomes final and binding on the date that "the petitioner has received notice of the determination and is aggrieved by it" (*Matter of Robertson v Board of Educ. of City of N.Y.*, 175 AD2d 836, 837 [2d Dept 1991]).

Here, the BOE notified Nash by letter dated July 15, 2005 that her probationary employment was discontinued as of the close of business on July 15, 2005. "The law is well established that a decision to terminate the employment of a probationary [employee] is final and binding on the date the termination becomes effective" (*Matter of Triana v Board of Educ. of City School Dist. of City of N.Y.*, 47 AD3d 554, 557 [1st Dept 2008]; *Matter of Persico v Board of Educ., City School Dist., City of N.Y.*, 220 AD2d 512, 513 [2d Dept 1995]). The undisputed record conclusively establishes that July 15, 2005 is the date on which Nash learned of the discontinuance and the effective date of the discontinuance, and, therefore, the day that she

[2]The court notes that, throughout their motion papers, both sides tacitly agree that, as a probationary school secretary employed by the BOE, Nash is subject to many of the same rules, regulations, and protections, as is a probationary teacher employed by the BOE, and frequently cite to case law concerning the discontinuance of a teacher's probationary employment.

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suffered actual harm. Nash commenced this proceeding on September 10, 2008, more than three years later, and well outside the expiration of the four-month period.

Nash's pursuit of a review hearing and reconsideration of the discontinuance by the Chancellor's committee does not extend or toll the four-month statutory limitations period (*see Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763, 766-767 [1988]; *Matter of Triana v Board of Educ. of City School Dist. of City of N.Y.*, 47 AD3d at 557). The request for review, pursuant to Bylaws § 4.3.2, is nothing more than a request for reconsideration of the original determination to discontinue Nash's probationary employment, which was effective at the close of business on June 15, 2005 (*see id.* at 767).

For these reasons, and contrary to Nash's strenuous argument, characterizing this proceeding as solely a challenge to the 2008 Chancellor's reaffirmation of the 2005 decision does not render timely the demands for reinstatement and back pay.

Next, the BOE contends that, to the extent that Nash seeks review of the U-rating given by McCaskill, the petition is barred by Nash's failure to exhaust mandatory administrative and contractual appeals procedures to review the rating, prior to commencement of this action, and by the doctrine of laches. The BOE bases this contention on Nash's failure, while selecting appeals categories in her June 15, 2005 letter to the Office of Appeals and Reviews, to select the U-rating appeals category, in addition to selecting the Regulation "C-31 and **Discontinuance**/Denial of Completion of Probation" category (*see* Nash June 16, 2005 review request letter [emphasis so in original]).

In opposition to this branch of the cross motion, Nash contends that the review hearing necessarily encompassed a review of the U-rating and the discontinuance determination based

upon that rating, and that, therefore, she has exhausted all available administrative remedies.

The undisputed record demonstrates that Nash's request for a hearing to review a discontinuance based on a U-rating necessarily encompassed a review of that rating.

In support, Nash has submitted an affidavit by Stuart Rothstein, a UFT coordinator for U-ratings for New York City, since 2003 (*see* Stuart Rothstein Jan. 28, 2009 Aff., ¶ 1). From 2000 to 2003, Rothstein worked as the coordinator of U-ratings for the UFT Brooklyn Borough Office (*see id.*, ¶ 2). Prior to that, from 1978 to 2000, Rothstein was a UFT representative for bargaining unit members at their discontinuance hearings (*see id.*, ¶ 3). Rothstein attests that he is familiar with Nash's case, the rating and discontinuance appeals procedures, and the UFT Brooklyn Borough Office appeals request form letter completed by Nash upon which the BOE relies in making its argument (*id.*, ¶¶ 4, 8).

Rothstein attests that probationary employees cannot be discontinued from probationary service, if they receive a satisfactory rating on their year-end performance reviews (*id.*, ¶ 5). He further attests that, when probationary employees receive a U-rating, they are generally discontinued from probationary service, based upon the U-rating (*id.*).

Significantly, Rothstein attests that the appeals category box selected by Nash "was routinely checked to request a hearing concerning an employee's discontinuance of probationary service, and the U-Rating upon which it was based" (*id.*, ¶ 8). He also attests that, "[a]t each hearing concerning an employee's discontinuance, the U-rating upon which that discontinuance is based is also being appealed . . . I have acted as the UFT representative in hundreds of appeal proceedings and routinely the discontinuance and the U-[r]ating upon which it was based are reviewed at the same hearing" (*id.*, ¶ 9). He further attests that, "after such proceedings, when a

discontinuance is reviewed, it automatically reverses the U-rating" (*id.*).

Rothstein's observations are amply supported by the review committee's advisory opinion. In the opinion, the committee noted that McCaskill recommended discontinuance of Nash's probationary service "based on an unsatisfactory rating" in various areas of service. The committee then discussed and analyzed the reasons that the U-ratings were given, and concluded that the ratings were undeserved, and that, therefore, Nash's employment should not be discontinued.

Turning to the merits of the petition, and to the extent that the proceeding is not time-barred, Nash contends that the BOE determination is arbitrary, capricious, and an abuse of discretion on grounds that the hearing notice and the hearing itself were procedurally defective, as the result of the BOE's failure to follow its own rules concerning notice, and failure to provide Nash with the opportunity to confront McCaskill, the rating officer.

In opposition, the BOE contends that its decision was procedurally and substantively proper, in all respects.

The decision to terminate the employment of a probationary employee by a board of education is subject to review in an article 78 special proceeding under the "arbitrary and capricious" standard (*Matter of Kaufman v Anker*, 42 NY2d 835, 836 [1977]; *Matter of Climent v Board of Educ. of Community School Dist. No. 22*, 288 AD2d 312, 313 [2d Dept 2001]; *see* CPLR 7803).

A probationary employee whose service has been discontinued may ask the board of education to review the decision at a hearing at which the probationer may appear and present evidence (*Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d at

765-766; *Matter of Kaufman v Anker*, 42 NY2d at 836-837). This right is neither constitutional nor statutory, but is contained within the CBA to which the BOE has promised to adhere, Bylaws § 4.3.2 (formerly, § 5.3.2C), and Regulation C-31 (*Matter of Swartz v Board of Educ. of City School Dist. of City of N.Y.*, 146 AD2d 576, 577 [2d Dept 1989]).

Regarding the hearing notice requirements, Regulation C-31 § 3.2.1 provides, in relevant part, that "[t]he Office of Appeals and Reviews will notify the employee, the Rating Officer, the Superintendent/Executive Director and all other concerned parties of the time, date and place of the review three weeks prior to the date set for the review. This will provide time for the employee to prepare testimony/documentation to support his/her position."

The Bylaws require, in relevant part, that:

> [t]he notice shall inform the person that he or she is entitled to appear in person, to be accompanied and advised by an employee of the City School District or a representative of the union recognized by the Panel for Educational Policy as the collective bargaining representative for the employee, to be confronted by witnesses, if any, to call witnesses, to examine exhibits and to introduce any relevant evidence

(Bylaws § 4.3.3).

Here, in the hearing notice, the BOE timely identified the Bylaws section pursuant to which the hearing was being held, listed the date, time, and location of the hearing, and identified, by name and title, the BOE employees required to attend the hearing. The BOE also listed the UFT Brooklyn as Nash's advisor, and advised Nash that, if she intended to call witnesses, her UFT representative must notify the BOE in writing prior to the hearing.

During the hearing, Nash demonstrated that, despite deficiencies, if any, in the hearing notice, she was fully aware of, understood, and utilized all the rights granted by Regulation C-31

and the Bylaws. The BOE provided Nash with ample opportunity to challenge the discontinuance. Nash was represented by a UFT representative, who was permitted to cross-examine the BOE witnesses, presented procedural objections, and gave a final summation of the evidence. Nash testified at length regarding her approximately three years of service as a probationary employee, and submitted evidence, consisting of documentation demonstrating the methods that she used to record student immunization information, the forms she developed, the follow-up procedures that she employed, and a document indicating 99% compliance with the regional guidelines regarding the recording of student immunizations, and testimonial letters on her behalf.

Although Nash contends that, had the BOE defined her rights more clearly and in more detail in the hearing notice, she would have called witnesses and introduced additional testimony and evidence, she does not indicate who she would have called to testify, the subject of the testimony, or the evidence that she would have introduced. Further, the committee's unanimous recommendation that the discontinuance be rescinded demonstrates that Nash properly and fully presented her case to the committee and that no additional witnesses or evidence were necessary. Therefore, Nash has failed to demonstrate that any deficiencies in the hearing notice deprived her of a substantial right warranting a new review hearing (*see Matter of Persico v Board of Educ., City School Dist., City of N.Y.*, 250 AD2d at 855; *Matter of Sorell v Board of Educ. of City School Dist. of City of N.Y.*, 168 AD2d 453, 454 [2d Dept 1990]).

Next, Nash's contention that the BOE failed to follow its own rules and deprived her of a substantial right when it denied her the opportunity to confront McCaskill, the rating officer who recommended termination, is without merit.

The BOE did not list McCaskill as an employee required to attend the hearing, but instead listed Asher, his successor as Brooklyn Tech principal. Regulation C-31 requires that the Office of Appeals and Reviews notify the rating officer, among others, at least three weeks prior to the hearing. There is no dispute that McCaskill retired prior to issuance of the hearing notice and never received the hearing notice.

However, the committee fully complied with Bylaws § 4.3.3 which provides, in relevant part, that "[i]f a witness who was summoned or requested to appear is unavailable or unwilling to appear despite the best efforts of the committee, this shall not prevent a review from continuing but shall be one of the factors considered by the committee." In its advisory opinion, the committee noted that McCaskill, the rating officer, had retired and "is no longer at the school and the current Principal, consequently, is not able to clarify any questions that may need clarification." The committee also noted in the opinion that Asher, McCaskill's successor as principal and the "current Rating Officer," was questioned by Nash's UFT representative and the committee and opted to "'stand on the record' of his predecessor." Thus, the committee properly considered McCaskill's absence from the hearing, and the inability of McCaskill's successor to testify to events that he did not witness, and concluded in favor of Nash. Given the committee's actions and final opinion, Nash cannot demonstrate that she was deprived of a substantial right.

Similarly without merit is Nash's contention that the Chancellor's decision to not follow the committee's recommendation of reinstatement is arbitrary and capricious. The "hearing procedure is advisory rather than determinative; the proof is heard by the hearing committee rather than by the chancellor; and . . . the chancellor does not have to follow the recommendations of the hearing committee. It is the chancellor, not the hearing committee, who

makes the determination" (*Matter of Kaufman v Anker*, 42 NY2d at 837 [where school principal recommended termination of petitioner's probationary employment and district superintendent concurred, chancellor's reaffirming of the termination determination was not arbitrary or capricious, even though chancellor's committee unanimously recommended that employment not be discontinued]; *Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d at 766, citing Bylaws § 5.3.4C [now, section 4.3.2]; *Matter of Von Gizycki v Levy*, 3 AD3d 572, 573-574 [2d Dept 2004]; *see* Regulation C-31).

"Unquestionably, a Board of Education . . . has the right to terminate the employment of a probationary teacher at any time and for any reason, unless the teacher establishes that the termination was for a constitutionally impermissible purpose, violative of a statute, or done in bad faith" (*Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d at 765; *Matter of Thomas v Abate*, 213 AD2d 251, 251 [1st Dept 1995]; *Matter of Dillard v Alvarado*, 118 AD2d 644, 644-645 [2d Dept 1986]). The petitioner bears the burden of raising and proving the existence of bad faith (*Matter of Thomas v Abate*, 213 AD2d at 251).

For the foregoing reasons, Nash has failed to demonstrate the existence of an impermissible reason for the BOE's discontinuance of her probationary service.

Accordingly, it is

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

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

Dated: October 21, 2009

ENTER:

MARILYN SHAFER

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).