[* 1]

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

PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

MICHELLE CLAY,

Plaintiff,

- v -

NYC DEP'T OF EDUCATION,

Defendants.

INDEX NO. 111599/09

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

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

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

Cross-Motion: X Yes No

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

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: March 26, 2010

EILEEN A RAKOWER J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

----------X

In the Matter of the Application of
MICHELLE CLAY,

Petitioner,

-against-

THE NEW YORK CITY DEPARTMENT OF EDUCATION a/k/a THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, and DOLORES ESPOSITO, Community Superintendent, District 9,

Respondents.

----------X

Index No.
111599/09

DECISION
and ORDER

Mot. Seq.
001

HON. EILEEN A. RAKOWER:

Petitioner Michelle Clay ("Petitioner") brings this Article 78 proceeding with respect to Respondent New York City Department of Education's ("DOE") decision to terminate Petitioner on April 20, 2009. At the time of her termination, Petitioner was a probationary Assistant Principal at the Joseph H. Wade School, also known as Intermediate School ("IS") 117.

Prior to becoming an Assistant Principal at IS 117, Petitioner was a School Business Manager at IS 158, under the supervision of Principal Marsha Elliot ("Elliot"). Petitioner's termination was premised upon alleged misconduct while at IS 158. According to its April 30, 2008 report (annexed to the petition as an exhibit), the Special Commissioner of Investigation for the New York City School District ("SCI") found that, from September 2005 through January 2007, Petitioner improperly received $26,662 in "per session" pay. Per session pay is additional paid administrative assignments performed by BOE employees beyond their regular hours and salary. None of Petitioner's per session time reports were approved by a supervisor, as required. Furthermore, SCI found that Petitioner "received extra pay to conduct [her] regular duties and did not perform per session assignments."

The reports were processed without authorization from a supervisor because Elliot had improperly given Petitioner the confidential computer code used to process per session payments of school employees (this resulted in disciplinary action being taken against Elliot as well).

Based on the foregoing, SCI recommended that Petitioner be terminated by DOE. On September 12, 2008, IS 117 Principal Delise Jones recommended that Petitioner should face the lesser sanction of a letter to her file, finding that Petitioner was "not solely responsible for the negligence that occurred," and that "the negligence was on the part of the principal [Elliot]." However, by memorandum dated April 20, 2009, Respondent Superintendent Dolores Esposito decided to terminate Petitioner based upon the SCI's report. In addition, Esposito gave Petitioner an "unsatisfactory", or "U-rating,"on her performance review.

The instant petition ensued. Annexed to the petition as exhibits are the SCI report; Principal Jones' 9/12/08 letter; Esposito's 4/20/09 memorandum terminating Petitioner's employment with DOE; and Petitioner's U-rating. Petitioner states that her termination was improper. Specifically, she claims that she earned the per session pay, and that any fault should be laid squarely at the feet of Elliot, who delegated the additional tasks to Petitioner and directed her to submit her time sheets to the payroll secretary. In addition to claiming that her termination was improper, Petitioner seeks a stay of proceedings pending her administrative appeal of her U-rating (as distinct from the challenge to her termination), and leave to amend her petition when a determination is issued therein.

DOE cross-moves to dismiss the petition, and submits a memorandum of law in support of its motion. DOE argues that dismissal is required because (1) Petitioner failed to timely submit a notice of claim pursuant to Education Law §3813(1); and (2) Petitioner has failed to demonstrate that her termination was the product of bad faith.

Petitioner submits an affirmation and a memorandum of law in opposition to DOE's cross-motion. Annexed to the affirmation as exhibits are copies of the transcript of the testimony of Elliot in the Education Law §3020-a proceeding against DOE employee Florrie Rinehart (involving the same alleged misconduct); an unofficial transcript of proceedings in Petitioner's administrative challenge to

her U-rating; and a letter dated 10/30/09 from Superintendent Esposito reaffirming the Chancellor's Committee's decision to uphold Petitioner's U-rating.[1]

Turning first to DOE's contention that the Petition must be dismissed based upon Petitioner's failure to file a notice of claim, Education Law §3813(1) provides

> No action or special proceeding, for any cause whatsoever... or claim against the district or any such school, or involving the rights or interests of any district or any such school shall be prosecuted or maintained against any school district, board of education... or any officer of a school district, [or] board of education... 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.

This Court has held that "[t]he notice of claim requirement of §3813 is applicable only to claims against a school district's property or to demands for payment of money" (*Montgomery-Costa v. City of New York*, 2009 NY Slip Op 29461, *12 [Sup. Ct. N.Y. Cty. 2009]). Following the 1972 Second Department case of *Ruocco v. Doyle*, 38 A.D.2d 132, this Court has reasoned that §3813's language as to "adjustment or payment" stands for the proposition that "the requirements of *section 3813* are applicable only to claims against a district's property or to demands for payment of money by a district and are not otherwise applicable" (*Montgomery-Costa* at *13; *Kahn v. Dept. of Ed. of the City of New York*, 887 N.Y.S.2d, 435, *3 [Sup. Ct. N.Y. Cty. 2009]). Accordingly, to the extent

---

[1]On February 8, 2010, the Court issued an Interim Order allowing Petitioner to submit an amended petition to include a challenge to her U-rating by February 24, 2010. No papers were received.

that Petitioner merely seeks reinstatement to her position, she was not required to file a notice of claim.

Turning to the merits of Petitioner's termination, it is well settled that judicial review of a decision to terminate a probationary employee is "limited to an inquiry as to whether the termination was made in bad faith" (*Johnson v. Katz*, 68 N.Y.2d 649, 650 [1986]). It is the burden of the employee to prove bad faith, and the mere assertion of bad faith, bereft of evidence in support thereof, is insufficient to overcome this burden (*see Soto v. Koehler*, 171 A.D.2d 567 [1st Dept. 1991]). Furthermore, "[e]vidence in the record supporting the conclusion that performance was unsatisfactory establishes that the discharge was made in good faith" (*Johnson* at 650).

The Court finds that there is sufficient evidence in the record to support the conclusion that DOE's decision to terminate Petitioner was made in good faith. Specifically, the SCI report found that Petitioner had engaged in serious improprieties while at IS 158 which justified her termination as a probationary employee. Despite Petitioner's account of events, there is nothing in the record which would allow this Court to conclude that it was irrational to credit the SCI investigation. Morever, Petitioner has failed to adduce evidence in support of her contention that DOE effected her termination in bad faith.

Wherefore it is hereby

ORDERED and ADJUDGED that DOE's cross-motion is granted, the petition is denied and the proceeding is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: March 26, 2010

EILEEN A. RAKOWER, J.S.C.