[* 1]

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

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

Index Number : 103457/2009
HOWARD-DAVIS, JOYCE
VS.
KLEIN, JOEL I.
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~~ 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).

Dated: February 3, 2010

HON. JOAN A. MADDEN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----------X

In the Matter of the Application of
JOYCE HOWARD-DAVIS,

Petitioner, INDEX NO. 103457/09

-against-

JOEL I. KLEIN, AS CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION, THE NEW YORK CITY DEPARTMENT OF EDUCATION and THE CITY OF NEW YORK,

Respondents.

----------X

JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner challenges the determination by respondent New York City Department of Education (DOE) which terminated her from the position as a probationary assistant principal. Specifically, petitioner seeks relief that includes an order and judgment: (1) directing respondents to appoint her to the assistant principal position with back pay, seniority, and benefits; (2) directing respondents to grant her tenure in the assistant principal position by operation of law, or declaring her tenure eligible; and (3) annulling DOE's determination denying her a Certificate of Completion of Probation in the assistant principal title. Respondents have answered, asserting that petition be denied based on the statute of limitations and petitioner's failure to file a notice of claim, and for failure to state a cause of action. Respondents also seek dismissal of the City of New York as an improper party.

Petitioner, a tenured teacher, was appointed as a probationary assistant principal from about August 23, 2003 to August 21, 2008, at P.S. 23K, in Brooklyn, and was supervised and

rated by the school's principal, Sharon Meade. In order to earn a Certificate of the Completion of Probation (the Certificate), and tenure, petitioner was required to successfully complete a five-year probationary term.

It is undisputed that during the first four years of her probation, spanning the school years from 2003 to 2007, petitioner received satisfactory ratings. Petitioner alleges that during the 2007-2008 school year, Principal Meade's demeanor toward her changed. At that time, petitioner alleges, Meade became very aggressive and sought to discredit her as a professional, often engaging in personal attacks, yelling at, and publicly humiliating her, and otherwise making a concerted effort to mar her reputation, and to create documentation in order to deny her the Certificate. Petitioner alleges that Meade, while refusing on numerous occasions to meet with her to discuss important administrative matters, sent staff to follow her around the building to report on her, used the paging system to harass her, and would check around the school to observe her work location in order to find fault. Petitioner avers that Meade tried to create a paper trail, by placing derogatory letters in her file, against which she could only respond.

Petitioner alleges that Meade wrote a series of four letters that she placed in her file in June 2008. Despite the provision in petitioner's collective bargaining agreement (CBA) that an incident which had not been reduced to writing within three months of its occurrence may not be added to the file, petitioner maintains that two of the documented incidents occurred more than three months before the letters about them were written. Petitioner maintains that Meade placed another untimely letter in her file in February 2008, as well as two letters in January and April of 2008, both of which were timely. Petitioner wrote detailed rebuttals to the letters.

By letter dated June 20, 2008, the school superintendent notified petitioner that he was denying her the Certificate, and that her appointment as probationary assistant principal would terminate at the close of business on August 21, 2008 (the Initial Determination). Also on June 20, 2008, petitioner received an unsatisfactory rating on a rating form where a box is checked indicating that the employee is tenured. The superintendent also signed a Pedagogical Supervisory Personnel Report for School Year 2007-2008, dated June 23, 2008, recommending denial of the Certificate,[1] which petitioner signed "under protest." Petitioner maintains that she is unaware of whether, prior to the superintendent's denial of the Certificate, Meade submitted her probationary file to the DOE Office of Appeals and Reviews for its review as to whether sufficient documentation existed to deny the Certificate, which petitioner believes was required for Meade to recommend that the superintendent deny the Certificate.

After receiving the Initial Determination, petitioner timely availed herself of an internal appeals process, provided pursuant to the CBA and section 4.3 of the DOE bylaws (DOE Bylaws), which affords a probationary employee the opportunity for a review by the chancellor, or his designee, of an adverse recommendation concerning probationary service (4.3.2 Review). Petitioner contends that the 4.3.2 Review, held on September 29, 2008 before a three-person committee (the Committee), was delayed by two hours because Meade was late. Petitioner further contends that the Committee chairperson stated that all the letters Meade wrote to petitioner over her five-year probationary period would be accepted to support the

[1]The superintendent signed the report in an area of the form that petitioner maintains is properly for recommendation of tenure, but did not indicate that he was recommending the granting of the Certificate, or that petitioner's probation be continued (Ver. Pet., Exh.13).

recommendation to deny the Certificate, despite the provision in the CBA that letters not followed by disciplinary charges shall be removed from the file three years from the date the material is placed therein. Petitioner avers that the Committee also accepted two letters with derogatory material, which had been placed in her file more than three months after the incidents discussed therein, in violation of the CBA. Petitioner further avers that Meade made false claims about her to the Committee.

Petitioner contends that due to Meade's tardiness, the 4.3.2 Review reconvened on October 6, 2008, but the Committee chairperson allotted less time that day because another meeting was also scheduled. Petitioner claims that she was thereby prejudiced by not having sufficient time to rebut all of Meade's claims and fabrications. Petitioner also claims that Meade was permitted to interrupt her presentation numerous times, and that Meade argued that because she did not read her own letters against petitioner into the record, petitioner should only summarize her responses to those letters. Petitioner further avers that Meade did not release a witness for the October 6, 2008 meeting whom petitioner summoned to appear at the September 29, 2008 meeting. Petitioner also states that Meade, during her closing argument, was allowed to add testimony to the record, thereby using her summation to rebut testimony and add new facts that both petitioner and the Committee were hearing for the first time. Petitioner maintains that all of this conduct prevented her from presenting a full defense, and that the process afforded to her was unfair.

The DOE has submitted a copy of the Committee's report. The Committee members unanimously concurred with the unsatisfactory rating and the recommendation to deny petitioner

the Certificate. The Committee found that the documents submitted and Meade's testimony, "indicate Probationer [petitioner] did render an unacceptable level of supervisory service." The Committee opined that petitioner made "serious errors in judgment," as demonstrated by her inability to make decisions in a crisis situation during a gas leak at the school, identifying the wrong student for a suspension hearing, and failing to supervise the collection of test material until the last possible day, all of which "indicated someone not up to the role of the Assistant to the Principal."

On November 17, 2008, by letter, the school superintendent notified petitioner that he had received the Committee's report and was reaffirming his prior decision to deny the Certificate (the Affirmance).[2] Following the termination of her probationary employment as an assistant principal, petitioner reverted to her prior position as a teacher.

Petitioner argues that the record supports the view that she was an able supervisor, who performed all of her assistant principal duties, and that respondents' denial of the Certificate was arbitrary and capricious, and in bad faith. Petitioner further argues that because the DOE did not comply with the law, the DOE Bylaws, the Chancellor's rules and regulations, and the CBA, respondents' determination was an abuse of discretion, and affected by an error of law, as petitioner was denied, or afforded insufficient, process.

---

[2]Petitioner contends that pursuant to Chancellor's Regulation C-31, she is entitled to be advised in writing of the determination, but the Affirmance did not provide the basis for the determination, and the Committee's report was not attached to or summarized in the Affirmance. The document petitioner provides does not state that the basis of the determination or the Committee's report must be provided.

First, as to the statute of limitations issue, an Article 78 proceeding must be commenced within four months after the administrative determination to be reviewed becomes "final and binding upon the petitioner" (*Matter of Yarbough v Franco*, 95 NY2d 342, 346 [2000], quoting CPLR 217 [1]). The Initial Determination became final, and thus petitioner's time to commence a proceeding to challenge the Initial Determination began to run, at the latest, on August 21, 2008, when her probationary appointment as an assistant principal was discontinued (*see Matter of Andersen v Klein*, 50 AD3d 296, 297 [1st Dept 2008]; *Matter of Triana v Board of Educ. of City School Dist. of City of N.Y.*, 47 AD3d 554 [1st Dept 2008]); *see also Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763 [1988]). The statute of limitations was not postponed or tolled by the 4.3.2 Review (*see Matter of Andersen v Klein*, 50 AD3d 296, *supra*).

As it is not disputed that petitioner did not file her petition within the four-month period commencing August 21, 2008, her challenge of the Initial Determination is time-barred. Petitioner's argument that the statute of limitations issue should be decided in her favor because she was not terminated as an employee of DOE, but reverted back to a teaching position with DOE, is unpersuasive, as it is undisputed that petitioner challenges a determination that affected her status as a probationary assistant principal, not as a teacher, and seeks reinstatement to the assistant principal title. Accordingly, to the extent petitioner challenges the Initial Determination and seeks an order reinstating her as an assistant principal, with tenure or as tenure eligible, and with back pay and benefits, her petition is denied.

Petitioner argues that she is entitled to a new hearing before the Committee, due to what she maintains was DOE's failure to adhere to DOE Bylaws and denial of process at the 4.3.2. Review.[3] DOE concedes this claim is not time-barred, but objects based on petitioner's failure to file a notice of claim pursuant to Education Law § 3813. Petitioner concedes that she has not filed a notice of claim.

Education Law § 3813 (1) requires that a written verified claim be presented to the governing body of the school district within three months of accrual of the claim. The statute provides, in pertinent part as follows:

> No action or special proceeding, for any cause whatever . . . relating to district property or property of schools . . . or involving the rights or interests of any district or any such school shall be prosecuted or maintained against any 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."

The failure to comply with the foregoing notice of claim requirement mandates dismissal of an action (*Parochial Bus Sys., Inc. v Board of Educ. of City of New York*, 60 NY2d 539, 568 [1983]). Exceptions to this requirement are found where a petitioner seeks judicial enforcement of a legal right derived through enactment of positive law (*Matter of Silvernail v Enlarged City School Dist. of Middletown*, 40 AD3d 1004 [2d Dept 2007]), or vindication of a public interest

---

[3]DOE argues that petitioner's only remedy would be for a new hearing before the Committee. The court agrees and notes that in her Notice of Verified Petition petitioner requests an internal appeals process that comports with law, which the court interprets as a request for a new hearing.

(*Union Free School Dist. No. 6 of Towns of Islip & Smithtown v New York State Human Rights Appeal Bd.*, 35 NY2d 371 [1974], *rearg denied* 36 NY2d 807 [1975] [involving rights of pregnant teachers]). In addition, courts have found that Education Law § 3813 notice of claim requirements are not applicable where only equitable relief is sought (*see Kahn v Department of Educ. of City of New York*, __ Misc 3d __, 2009 NY Slip Op 29410 [Sup Ct, NY County 2009]).

Respondents argue that this case concerns petitioner's private rights, and since she points to no law that would guarantee tenure to her in the assistant principal position, in the event she prevails, she may not circumvent well-established law requiring a notice of claim by seeking the relief of a judgment granting tenure by operation of law. Petitioner responds that Education Law § 3813 is inapplicable, as respondents acknowledge that part of her claim is to enforce tenure rights, which is a matter of public interest. In support, petitioner points to cases finding that the tenure rights of teachers are a matter in the public interest.

Tenure rights are "legal rights guaranteed by State law and in the public interest" (*Matter of Cowan v Board of Educ. of Brentwood Union Free School Dist.*, 99 AD2d 831, 833 [2d Dept], *lv granted* 62 NY2d 602, *appeal discontinued* 63 NY2d 702 [1984]), and a tenured teacher or administrator petitioning to enforce tenure rights seeks to require a government agency to perform a legislated duty. The cases petitioner cites, however, involve tenured teachers and tenured administrators seeking to enforce their tenure rights (*see e.g. id.* at 833 [tenured elementary teacher]; *Matter of Pulver v Board of Educ., Farmingdale Union Free School Dist.*, 80 AD2d 833 [2d Dept 1981] [enforcement of tenure rights involving Education Law § 2510

(3)]; *Matter of Weisbarth v Board of Educ. of E. Meadow Union Free School Dist.*, 76 AD2d 841 [2d Dept 1980]) [seeking reinstatement as tenured teacher]; *Matter of Gross v Board of Educ. of Elmsford Union Free School Dist.*, 73 AD2d 949 [2d Dept 1980] [involving reinstatement of tenured teacher and stating that DOE's reliance on case involving probationary teacher was misplaced since the public interest in tenure rights was not involved]; *Matter of Tadken v Board of Educ., Port Washington Union Free School Dist.*, 65 AD2d 820, 820 [2d Dept 1978] [petitioner "never lost the tenure she acquired in 1966"]).[4] Thus, the facts in the cases petitioner cites are not analogous to the facts in the instant proceeding, as here petitioner challenges her termination from the position as a probationary assistant principal and it is undisputed that she was not tenured in that position.

In fact, petitioner identifies no a statute that would guarantee tenure to her as an assistant principal in the event she prevails, and the petition contains no factual allegations to support a claim for tenure by estoppel or operation of law.[5] Petitioner's argument that the notice of claim requirement may be avoided because she requested a particular type of relief, that is, an order granting tenure, is unpersuasive where the petition lacks factual allegations to support the basis for such relief. Respondents' mere acknowledgment or characterization of, or opposition to, the

---

[4] Plaintiff also cites to *Matter of Brunecz v City of Dunkirk Board of Educ.* (23 AD3d 1126 [4th Dept 2005]), which involves a teacher's challenge that he had not received a notice to which he was entitled pursuant to statute.

[5] "Tenure may be acquired by estoppel [or operation of law] when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher's probationary term" (*Matter of McManus v Board of Educ. of Hempstead Union Free School Dist.*, 87 NY2d 183, 187 [1995]). Here, petitioner was denied tenure prior to the expiration of her probationary period.

petition's request for relief does not change this result. This proceeding concerns petitioner's challenge to the DOE's decision to terminate her probationary assistant principal appointment, and the process afforded to her by DOE. Such matters concern petitioner's private rights, thereby requiring her to file a notice of claim (*see Matter of Gross,* 73 AD2d 949, *supra*).

In the alternative, petitioner requests leave to file a late notice of claim that would "relate back" to the time of service of the Article 78 petition. Petitioner argues she is entitled to such relief since respondents have actual notice of the relevant facts through the 4.3.2 Review, and would not be prejudiced by a late notice of claim. Petitioner also states that the Article 78 petition was timely served on counsel for all respondents, and that the DOE had knowledge of the petition's details and facts upon such service.

Although Education Law § 3813 (2-a) permits a court, in its discretion, to extend the time to file a notice of claim, this discretion is limited by the language of the statute stating that "[t]he extension shall not exceed the time limited for the commencement of an action by the claimant against any district or any such school." As it is undisputed that petitioner did not seek leave to file a late notice of claim until afler the Article 78 statute of limitations had expired, she is not entitled to such relief (*see Lopez v Brentwood Union Free School Dist.*, 149 AD2d 474 [2d Dept 1989] [determining that failure to timely seek the requested relief within the statutory period deprived the court of the authority to exercise its discretion to grant the application]; *see also Pierson v City of New York*, 56 NY2d 950, 960 [1982] [determining that language in General Municipal Law § 50-e stating that "'(t)he extension shall not exceed the time limited for the

commencement of an action by the claimant against the public corporation'" permits an application for an extension to be made after the commencement of the action, but not after the statutory time period within which an action must be commenced).[6]

The cases petitioner cites do not change the result. For example, in *Matter of Antine v City of New York* (14 Misc 3d 161 [Sup Ct, NY County 2006]), the court determined that the petitioners sought leave to file a late notice of claim within the applicable statutory period, which tolled the statute of limitations. In *Arvelo v City of New York* (182 Misc 2d 101 [Civ Ct, Richmond County 1999]), also cited by petitioner, the court accepted as against the DOE, a notice of claim that had been timely filed against the City of New York.

In any event, even if petitioner's claim were deemed to be for enforcement of a tenure right, or if petitioner's claim for a new hearing could be separated out and considered standing alone, she would not prevail on the merits. "It is well settled that a . . . probationary employee may be discharged for any or no reason at all in the absence of a showing that his or her dismissal was in bad faith, for a constitutionally impermissible purpose or in violation of law" (*Matter of Brown v City of New York*, 280 AD2d 368, 370 [1st Dept 2001]; *see Matter of Frasier*, 71 NY2d at 765 ["(DOE) . . . 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"]). Concerning

---

[6]Although Education Law § 3813 (2-b) provides for a one-year limitation on the time to commence an action, the statute also provides that this limitation does not modify or supersede an applicable shorter statute of limitations.

alleged bad faith, the petitioner bears the burden of proving its existence through the presentation of evidence (*Matter of Witherspoon v Horn*, 19 AD3d 250, 251 [1st Dept 2005]).

Petitioner offers no more than speculation as to bad faith, which is not competent evidence. Accordingly, petitioner has not met her burden on the petition (*Matter of Thomas v Abate*, 213 AD2d 251, 251 [1st Dept 1995] ["(M)ere conclusory allegations of bad faith based upon speculation (are) insufficient to meet that burden and to require a hearing on the issue of bad faith"]).[7]

Petitioner's assertions that she was not afforded sufficient process in the 4.3.2 Review are also unpersuasive, as she does not allege facts demonstrating the denial of a substantial right or prejudice. For example, while petitioner objects to the Committee chairperson's statement that the Committee would consider all letters in petitioner's file going back five years, no letters are dated prior to 2007. As to petitioner's claims concerning Meade's interruptions and objection to petitioner's reading her rebuttal letters, the rebuttal letters themselves were accepted by the Committee in their entirety, and petitioner was permitted to address Meade's letters. In addition, while petitioner correctly maintains that respondent may not violate its own rules or regulations (*see Matter of Lehman v Board of Educ. of City School Dist. of City of N.Y.*, 82 AD2d 832 [2d Dept 1981]), she provides no support for a determination that the CBA provision she references

[7]Petitioner contends that the record supports that she was an able supervisor who performed all her assistant principal duties. However, in addition to the letters petitioner objects to, the record contains other negative letters concerning her performance. Where the court detects a rational basis for the determination, it "may not substitute its own judgment of the evidence for that of the administrative agency, but should review the whole record to determine whether there exists a rational basis to support the findings upon which the agency's determination is predicated" (*Matter of Nelson v Roberts*, 304 AD2d 20, 23 [1st Dept 2003] [citation and internal quotation marks omitted]).

is a rule or regulation. In addition, the Committee found against petitioner based on the documents and Meade's testimony, and petitioner points to no bar to Meade testifying as to the incidents in the letters.

Furthermore, assuming as true petitioner's contention that Meade did not release a witness for the October 6, 2008 continued hearing, which would have been improper,[8] petitioner contends only that the missing witness's testimony would have been supportive. This contention is conclusory, as petitioner provides no details as to what the witness's testimony would have shown, or how it would have supported her case, refuted her employer's assertions about her performance, or provided evidence of bad faith. Petitioner also does not claim that she objected to the witness's absence, nor does the Committee's report reflect such an objection. Since petitioner did not raise the objection at the hearing, the court cannot properly consider it now for the first time (*see Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756 [1st Dept 1982], *affd* 58 NY2d 952 [1983]). Petitioner also does not dispute DOE's contention that the witness was not working on September 29, 2008, the first day of the 4.3.2 Review, and simply chose not to attend the proceeding. In fact, petitioner does not elaborate as to relevant evidence that was excluded at the 4.3.2 Review, or identify a specific point she was not permitted to make, for any reason. In addition, petitioner does not dispute that the process she was afforded included notice and an opportunity to be heard, as well as representation by a union representative at the proceeding.

---

[8]DOE Bylaws § 4.3.3 provides, 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."

For the reasons stated above, the petition must be denied and dismissed. In light of this determination, the court need not address respondents' contention that the City of New York is an improper party, or petitioner's request for a hearing, or other relief.

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied in its entirety and the proceeding is dismissed.

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

DATED: February 3, 2010

ENTER:

J.S.C.