[* 1] SCANNED ON 4/14/2010

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

PRESENT: O. PETER SHERWOOD Justice — PART 61

In the Matter of the Application of,
ANNE M. LENNON,

Petitioner,

-against-

JOEL KLEIN, as Chancellor of the Department of Education of the City of New York, *et al.*,

Respondents.

INDEX NO. 114238/2009

MOTION DATE Jan. 12, 2010

MOTION SEQ. NO. 001

MOTION CAL. NO. 83

The following papers, numbered 1 to 8 were read on this petition pursuant to CPLR Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-7
Replying Affidavits	8

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, the petition in this CPLR Article 78 proceeding is decided in accordance with the accompanying 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: 4/7/10

O. PETER SHERWOOD, 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: IAS PART 61

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In the Matter of an Article 78 Proceeding
Anne M. Lennon,

Petitioner,

DECISION, ORDER AND JUDGMENT

-against-

Index.: 114238/2009

Joel Klein, as the Chancellor of the Department of Education of the City of New York, NEW YORK CITY DEPARTMENT OF EDUCATION and THE CITY OF NEW YORK,

Respondents.

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O. PETER SHERWOOD, J.:

Petitioner Anne M. Lennon, a former probationary teacher with the Board of Education of the City School District of the City of New York ("petitioner") brings this CPLR Article 78 proceeding for a judgment: (1) seeking a hearing as to her claim that the actions of respondents Joel Klein, Chancellor of Department of Education of the City of New York, and the New York City Department of Education ("DOE") (collectively "respondents") giving her a "Doubtful (D)" rating for the 2007-2008 school year, an "Unsatisfactory (U)" rating for the 2008-2009 school year and her placement on the ineligible/inquiry list are arbitrary and capricious; and (2) directing respondents to reverse such actions, with or without a hearing, reinstate petitioner to the Teachers of Tomorrow Grant position, and complete her Superintendent Verification Statement.

Although respondents have not cross moved to dismiss the petition, their answer raises the defenses on which their request for dismissal of the petition is based, namely failure to state a cause of action, petitioner's failure to file a Notice of Claim prior to commencing this proceeding, the City of New York is not a proper party to this proceeding, failure to exhaust administrative and contractual remedies, the petition is time barred by the applicable statute of limitations, and petitioner's challenge to her placement on the ineligible list is moot as she was removed from the list on December 22, 2009.

Backround

The predicate facts are as follows: Petitioner commenced employment with DOE on or about August 8, 2007, which appointment was subject to a three-year probationary period due to expire

on August 30, 2010 (Pet. ¶ 7, Ex. "5"). Her DOE commitment letter indicated that her initial New York State certificate under which she was hired was for English Language Arts ("ELA") grades 7-12 and that her appointment was to a position teaching Junior High School English (*id.*, Ex. "2"). Instead, when petitioner reported for work at P.S. 75Q, the Robert E. Peary School ("Q75"), on August 29,2007, petitioner was assigned to a fourth grade class comprised of special education students, apparently due to the lack of an available ELA class (*id.* at ¶ 8).

During the course of the school year, petitioner received one formal class observation for which she received a satisfactory rating (Pet. ¶ 12; Answer ¶ 12). At the end of the 2007-2008 school year, petitioner was given a "D" rating. The rating form contains no commentary nor are any of the various preprinted categories for judging her performance checked. The form simply contains the rating, bears the signature of the principal Brenda Gallashaw, and has a check mark next to a box stating "I recommend approval for continued probationary service" (*id.*). Upon petitioner's refusal to sign the rating form, the principal simply mailed the unsigned copy of the rating form to petitioner (Answer, ¶ 13).

By letter to Bonnie Brown, Superintendent of District 75, dated August 13, 2008 (a copy of which she sent to Ms. Gallashaw among others), petitioner complained about her assignment during the 2007-2008 school year, characterizing it as "fraudulent", her "D" rating, and various other actions by Ms. Gallashaw, and demanded that she be "excessed" from Q75, the school where she had been assigned (Pet. Ex. "5"). Petitioner contends that this was an attempt to appeal the "D" rating, but Superintendent Brown never responded (*id.* ¶¶ 13-14).

Petitioner returned to Q75 for the 2008-2009 school year. She contends that she was assigned to the position of Literacy Teacher which was still outside the scope of her State certification (Pet. ¶ 15). Respondents deny that contention and aver in their answer that Ms. Gallashaw created a ELA position for petitioner for the 2008-2009 school year (Answer ¶ 15). Thereafter, on May 15, 2009, petitioner received a "U" rating for the 2008-2009 school year based upon her poor attendance and punctuality record, lack of a professional attitude and failure to maintain good relationships with other teachers, supervisors and parents. In this evaluation, Ms. Gallashaw recommended that petitioner's probationary service be discontinued (Answer Ex. "V").

Petitioner was placed on DOE's ineligible/inquiry list ("ineligible list") (Pet. ¶ 17, Ex. "7"; Answer ¶ 17). She was advised of such action by letter dated May 18, 2009 (Pet. Ex. "7") and

reassigned to the Queens reassignment center effective that same date (Answer ¶ 61, Ex. "X"). Petitioner's probationary period was discontinued on June 15, 2009, and her services were terminated (Pet. ¶ 18; Answer ¶ 63, Ex. "Z"). Petitioner was removed from the ineligible list on December 22, 2009 (Answer ¶ 64; Gordon Aff. ¶ 6).

Petitioner *pro se* filed this Article 78 proceeding on October 9, 2009 challenging as arbitrary and capricious, *inter alia*, her "D" and "U" ratings and her placement on the ineligible list. Petitioner contends that she signed the commitment letter to accept a teaching position at Q75 based upon Ms. Gallashaw's misrepresentation that there was a position within petitioner's license area even though Ms. Gallashaw knew when she hired petitioner that there was no available ELA teaching position. Petitioner claims that all of her complaints to Gallashaw and other Q75 administrators and to District 75 leaders were ignored and, despite her requests, she was given no professional training or curriculum and was denied a mentor. She labels as fraudulent the contract under which she was functioning. Petitioner contends that the fact she was assigned to a position for which she was not contracted renders her evaluation for the 2007-2008 school year null and void.

Petitioner further contends that in the 2008-2009 school year she was again assigned to a position outside her license area because Gallashaw refused to release her from the position she was deceived into accepting. Petitioner claims ignorance of the basis upon which she was placed on the ineligible list and then terminated and contends that her placement on the ineligible list was punitive and without a rational basis. Petitioner also faults respondents for failing to provide the New York State Department of Education with a completed Superintendent Verification Statement which has prevented her from obtaining certification in her license area.

Respondents seek dismissal of the petition claiming that petitioner, as a probationary employee, could be terminated for any reason or no reason at all so long as the determination was not made in "bad faith". Dismissal is also sought on the grounds that: (1) petitioner failed to comply with a condition precedent to bringing this proceeding by failing to file a Notice of Claim as required by Education Law § 3813 (1); (2) the proceeding is barred by the statute of limitations under CPLR § 217 applicable to Article 78 proceedings as it was not commenced within four months of May 15, 2009 (*i.e.* by September 15, 2009), when petitioner was placed on the ineligible list; and (3) petitioner has failed to exhaust her administrative and contractual remedies prior to bringing this

proceeding. Respondents also seek dismissal of the petition as against the City of New York ("the City") on the ground that DOE and the City are distinct legal entities and all of petitioner's allegations are directed against DOE and its employees. As such, the City is not a proper party[1]. Lastly, respondents argue that the petition fails to state a cause of action as the record establishes that respondents' actions in rating petitioner's performance, placing her on the ineligible list and terminating her services were rational and made in good faith.

Discussion

New York Education Law § 3813(1) requires any party bringing an action or special proceeding against a school district or its officers to file a written notice of claim within three months of the accrual of the claim. Although a standard exception to this filing rule has been held to exist solely for claims seeking to vindicate a public interest rather than a private right (*see, Cayuga-Onandaga Counties Bd. of Coop. Educational Servs. v Sweeney,* 89 NY2d 395, 400 [1996]), there is some authority in the decisional law that a separate exception also exists for claims seeking equitable relief only (*see, Ruocco v Doyle,* 38 AD2d 132 [2d Dept 1972]; *Knox v New York City Dept. of Educ.*, 2010 WL 887336 [Sup Ct., N.Y. Co. 2010] [Schlesinger, J.]; *Howard-Davis v Klein,* 2010 WL 516023 [Sup. Ct., N.Y. Co. 2010] [Madden, J.]; *Kahn v Department of Educ. of City of New York,* 26 Misc3d 366, 307-371 [Sup. Ct., N.Y. Co. 2009] [Schlesinger, J.]). The Court of Appeals has cited with approval the *Ruocco* decision (*see, Union Free School Dist. No. 6 v New York Human Rights Appeal Bd.,* 35 NY2d 371 [1974]). Here petitioner does not make a claim for monetary damages, but seeks equitable relief only, namely, reinstatement to her position with the DOE and completion of the Superintendent Verification Statement. Accordingly, the respondents' request to dismiss for failure to file a notice of claim is denied.

Turning then 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 (*see,* CPLR § 217 [1]; *Matter of Yarbough v Franco,* 95 NY2d 342, 346 [2000]). Although

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[1] Respondents correctly aver that the DOE 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]).

petitioner seeks review of respondents' determination placing her on the ineligible list, which action was made on May 15, 2009, the final action which is challenged in this proceeding is respondents' decision to discontinue petitioner's probationary period and terminate her employment with DOE. The latter determination was not made until June 15, 2009. Therefore, this proceeding commenced by filing on October 9, 2009, was within the four-month statute of limitations and, therefore, timely (*see, Matter of Andersen v Klein,* 50 AD3d 296, 297 [1st Dept 2008]; *Triana v Board of Education,* 47 AD3d 554 [1st Dept 2008]).

Nevertheless, this proceeding must be dismissed for petitioner's failure to exhaust her administrative remedies with respect to the "U"rating, the discontinuance of her probationary period, and her termination and also for failure to pursue available contractual remedies concerning her claims that she was denied a mentor and access to her personnel files. Under the Collective Bargaining Agreement between the DOE and the United Federation of Teachers ("UFT"), petitioner's bargaining representative, petitioner was entitled to review of the "U" rating as prescribed in Article 4, section 4.3.1 of DOE's Bylaws and of the discontinuance of her probationary period and termination under Article 4, section 4.3.2 of such Bylaws (Answer, Ex. "AA"). In addition, with respect to petitioner's complaints concerning DOE's failure to provide a mentor or to have access to her personnel file, the UFT contract provides for grievance procedures which must be followed before commencing an action or proceeding. Having failed to exhaust these administrative remedies, petitioner's petition must be dismissed (*see, Villalba v New York City Dept. Of Educ.,* 50 AD3d 279 [1st Dept 2008]; *Matter of Cantres v Board of Educ. of City of N.Y.,* 145 AD2d 359 [1st Dept 1988]).

If this proceeding were not being dismissed on procedural grounds, it would be dismissed on the merits. 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]; *Matter of Brown v City of New York,* 280 AD2d 368, 370 [1st Dept 2001]). 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]). 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 conclusory 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]). Petitioner's allegations are insufficient to raise a triable issue of fact (CPLR 7804[h]) to support her claim of bad faith. Respondents submit evidence that when petitioner was hired she held a teaching certificate not only to teach ELA for grades 7-12, but also had a provisional certificate to teach pre-kindergarten and grades 1-6 (Answer, Ex. "B"). In February 2008, petitioner also obtained an initial certificate to teach students with disabilities (*id.*).

Respondents submit an affidavit from Catherine Amarati, the Human Resources Deputy of DOE's Queens Integrated Service Center, stating that she met with petitioner after her credentials to teach students with disabilities had been reviewed and advised her that if she were interested in teaching at PS 75, a self-contained special education school, she would be hired with the understanding that she would continue the process of obtaining her teaching certification for students with disabilities (Amarati Aff. ¶¶ 2-4). Ms. Amarati stated further that petitioner assured her that she would obtain her special education certification in a few months and indicated that she knew she was being hired for a special education assignment. Petitioner's knowledge that she would be assigned to teaching special education students is further confirmed by the affidavit of Ms. Gallashaw who states that she advised petitioner during the interview process that she would be teaching a variety of subjects to special education students and that she assigned petitioner to a fourth grade class due to petitioner's lack of actual experience teaching special education as she believed it would be less challenging than teaching older students (Gallashaw Aff. ¶¶ 3-5).

Respondents also submit substantial evidence documenting petitioner's chronic pattern from the beginning her employment of absences and tardiness, failure to take advantage of available support and resources, refusal to attend pre-class observation meetings, to allow Assistant Principals into her classroom to conduct observations, and repeated failures to report to Ms. Gallashaw's Office when requested. Although petitioner was cautioned on several occasions that if her attendance and lateness pattern did not improve she would be subjected to disciplinary action and possible termination, she continued her pattern of lateness and excessive absences which negatively affected the continuity of instruction of her students. This evidence provides sufficient reason to terminate petitioner's probationary employment and petitioner has failed to establish that any of respondents'

determinations, including her termination, were for a constitutionally impermissible purpose, violative of a statute, or done in bad faith (*see, Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763, 766 [1988]).

Conclusion

For the reasons stated above, the petition must be denied and the proceeding dismissed. In light of this determination, petitioner's remaining arguments and requests for relief need not be addressed.

Accordingly, it is hereby

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 denied in its entirety and the proceeding is dismissed and the Clerk is directed to enter judgment accordingly.

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

DATED: 4/7/10

ENTER,

O. P. Sherwood

O. PETER SHERWOOD
J.S.C.