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

PRESENT: Edmead Justice PART 35

Offong

- v -

DOE

INDEX NO. 117032/08

MOTION DATE 4/20/10

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ 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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED and ADJUDGED that petitioner's application for an order, pursuant to CPLR Article 78, vacating DOE's determination to terminate petitioner's teaching services is denied and the Petition is hereby dismissed; and it is further

ORDERED that counsel for DOE shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

This constitutes the decision and order of this court.

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: 6/7/10

HON. CAROL EDMEAD J.S.C.

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

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: PART 35

x

In the Matter of the Application of

HELEN OFFONG,

Petitioner,

For judgment under Article 78 of the Civil Practice Law & Rules

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

x

Index No. 117032/08

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Helen Offong ("petitioner") moves for an order, pursuant to CPLR Article 78, for a judgment vacating the determination of respondent New York City Department of Education ("DOE") to terminate petitioner's services as a teacher, and reinstating petitioner with back pay and benefits.

Background

Petitioner is a former occasional per diem ("OPD") substitute teacher employed by DOE. She worked at various schools from March 2002 until 2008, and as a DOE Home Instruction teacher during the 2006-07 and 2007-08 school years. On November 20, 2007, petitioner began providing Home Instruction services to "Student A."

By letter dated November 29, 2007, Student A's mother ("Mother A") complained that petitioner was disorganized, came late, left early, or did not come at all; she also requested that Student A receive a new teacher (*see* "Mother A's Letter"). Home Instruction Schools Principal

Sandra Ledesma ("Principal Ledesma") notified the Special Commissioner of Investigation for the New York City School District ("SCI") that Mother A lodged a complaint against petitioner, alleging that petitioner had failed to provide the full 2.5 hours of scheduled home instruction (*see* the "Investigator's Report" dated May 21, 2008, "Interview of Principal Ledesma" dated January 15, 2008, and "Interview with Mother A" dated February 28, 2008).[1]

In January 2008, the SCI began investigating petitioner. By letter dated August 8, 2008, SCI First Deputy Commissioner Regina A. Loughran submitted the SCI's investigation findings to DOE Chancellor Joel I. Klein and recommended that petitioner be terminated and placed on the Ineligible/Inquiry List (the "IL") (*see* the August 8, 2008 Letter"). By letter dated August 13, 2008, petitioner was advised that, effective August 13, 2008, she was being placed on the IL due to "Office of Personnel Investigations Disciplinary Charges" (*see* the "August 13, 2008 Letter").

On December 22, 2008, petitioner commenced the instant Article 78 proceeding. In her Petition, petitioner denies that she submitted a falsified time sheet. She further alleges that she was "confronted by the SCI investigator without being told of her right to have a union representative present while she was being questioned" (Petition, ¶ 18). The investigator told petitioner that Mother A claimed that petitioner had arrived late on two days, and that petitioner failed to show up on one occasion. Petitioner contends that she only failed to show up on the day she was first assigned to Student A, and that at that time, she was not required to show up. Petitioner further contends that she told Mother A that she would start working with Student A the next day.

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[1]The SCI also investigated whether petitioner had submitted false time sheets with respect to "Student B." However, neither Student B, nor his mother kept track of the specific dates on which petitioner allegedly called in sick. Accordingly, SCI did not substantiate the allegations with respect to Student B.

As to her first cause of action, petitioner alleges that she has been denied due process. Petitioner contends that she had a right to a hearing, pursuant to Chancellor's Regulations C-31 and DOE's By-Laws. Petitioner further alleges that she was never told that she was terminated, and she was never provided a copy of the Investigator's Report, as required as per Article 21 of the collective bargaining agreement ("CBA"). As to her second cause of action, petitioner alleges that she was denied a property right in her license as an OPD. As her third cause of action, petitioner alleges that DOE's actions were arbitrary and capricious.

Petitioner requests that (1) she be granted a hearing, (2) that further proceedings in the instant matter be stayed pending the outcome of the hearing, and (3) that the Investigator's Report be provided to petitioner. The Court also notes that in her Notice of Petition, petitioner alleges to have acquired tenure by estoppel.[2]

In opposition, DOE first argues that its actions in placing petitioner on the IL, and denying the renewal of her teaching certificate were not arbitrary or capricious; therefore, petitioner fails to state a claim.[3] DOE contends that petitioner was properly placed on the IL because of the disciplinary charges against her. DOE explains that the IL is a notation in DOE's database that functions as a flag to preclude an individual from active payroll status. Its purpose is to prevent individuals from returning, transferring to a different school, or working in an

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[2]After the petition was filed, on May 8, 2009, the Court stayed the instant proceeding and ordered DOE to provide petitioner with an administrative appeal, pursuant to the Chancellor's Regulations and DOE's by-laws (the "Court Order"). On November 16, 2009, a Chancellor's Committee hearing (the "Hearing") was conducted with respect to the termination of petitioner's teaching certificate and her unsatisfactory rating for the 2007-08 school year (*see* the "Transcript"). On or about December 4, 2009, the Chancellor's Committee recommended that petitioner's appeal be denied and that the recommendation to terminate her teaching certificate be sustained (*see* the "Chancellor's Committee Report"). By letter dated January 21, 2010, DOE sustained the Chancellor's Committee's recommendation to terminate petitioner's teaching certificate (*see* the "Determination").

[3]The Court notes that DOE submitted two Memoranda of Law ("MOL") in opposition to the Petition: the first prior to the Hearing ("DOE's MOL #1) and the second after the Hearing ("DOE's MOL #2").

after-school job, if they have been the subject of disciplinary action, have resigned irrevocably, or have otherwise engaged in conduct that renders the individual unsuitable to work with DOE.

In the instant case, SCI substantiated that petitioner submitted a time sheet for work she did not perform. SCI investigators compared the dates and times Mother A documented with petitioner's Hourly Professional Personnel Time Report (the "Time Report") and found that petitioner claimed to have provided instruction from 3:30 p.m. to 6:00 p.m. on November 20, 26, 27, and 28, 2007. Based on the comparison, SCI investigators concluded that Mother A's allegation was substantiated. Therefore, petitioner's placement on the IL was warranted and does not rise to the level of arbitrary or capricious, DOE argues.

Similarly, plaintiff's allegation regarding the termination of her OPD certificate lacks merit. As an OPD substitute teacher, petitioner was a provisional, temporary employee of DOE. Temporary employees are neither tenured, nor do they enjoy any other permanent status. DOE further contends that it has the right to terminate a non-tenured 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. Although, due to petitioner's status as a provisional employee, DOE does not need a reason to decline to renew petitioner's certificate, here DOE had a reason: the substantiated allegations of her misconduct.

To the extent that petitioner alleges that she acquired tenure by estoppel, this claim must also be dismissed because petitioner did not hold a permanent position, DOE argues. In order to use time taught as a substitute teacher toward tenure, petitioner would have to first receive a permanent appointment as a probationary teacher. Petitioner's employment with DOE was in a provisional position as an OPD substitute teacher only, DOE contends.

Second, DOE argues that petitioner's claims under the CBA,, *i.e.* that she was "improperly confronted by" an SCI investigator and she was not provided with a copy of the Investigator's Report, must be dismissed for failure to exhaust mandatory administrative remedies. Regarding petitioner's allegation that she was improperly confronted by an SCI investigator without being told of her purported right to have her union present while being questioned, petitioner does not have a right to have a union representative present while being questioned by the SCI, DOE argues. Further, petitioner failed to join SCI as a necessary party. A separate and distinct legal entity from the DOE, SCI is a Deputy Commissioner of Investigation appointed by New York City's Commissioner of Investigation, a mayoral agency. Accordingly, any complaint concerning the SCI's conduct of its investigation must be dismissed for failure to join a necessary party.

In reply, petitioner maintains that DOE has frustrated the exercise of her rights and wrongfully terminated her in total disregard of the relevant provisions of the CBA.[4] Petitioner argues that the frustration of petitioner's rights under the CBA and her premature termination call into question the good faith of her termination. The failure to follow procedure has had insidious results, she contends. Without recourse to petitioner's due process rights protected by the provisions of the CBA, petitioner has been prematurely placed on the IL. Accordingly, petitioner has not only been prevented from obtaining work, but also from obtaining renewal and upgrading of her license.

Petitioner further argues that DOE raises arguments that are not reached under this

[4]The Court notes that petitioner submitted a reply MOL prior to the Hearing ("petitioner's MOL #1), and a MOL after the Hearing ("petitioner's MOL #2"). The Court also notes the arguments petitioner makes regarding her inability to file a grievance and the absence of a final determination (*see* MOL #1, pp. 1-4) are rendered moot by the Hearing, after which the Determination was issued.

analysis. The joinder of SCI is unnecessary, as petitioner's right to challenge or respond to the Investigator's Report does not thereafter require any further action on the part of SCI; its investigation is over. An appeal to SCI is not part of this process, petitioner contends.

In petitioner's supplemental brief (MOL#2), petitioner also points out that her Petition does not reflect the events that occurred after the November 16, 2009 Hearing. However, the Petition alleges, *inter alia,* that DOE acted arbitrarily and capriciously in terminating her teaching certificate, and the Petition's *ad damnum* clause requests "other and further relief as to the court may seem just," which gives the Court latitude to set aside the Determination, should there be merit to petitioner's arguments that DOE acted arbitrarily and capriciously. Petitioner now argues that the punishment of termination also shocks the conscience. Should the Court deem it necessary, petitioner seeks leave to amend her Petition to add this allegation.

Petitioner goes on to summarize the testimony at the Hearing. Petitioner argues that while sufficiently relevant and probative hearsay evidence can support an agency's determination, the evidence presented at her Hearing was not probative of the ultimate fact. Petitioner characterizes the allegations against her as "the testimony of a distraught mother, miffed at the choice of teacher for her child who was unable to attend school because of cancer." Such testimony is hardly probative of ultimate facts, petitioner argues. Further, Mother A's allegations are uncorroborated. Petitioner contends that uncorroborated hearsay evidence does not constitute substantial evidence upon which an administrative determination may be based.

Petitioner further argues that her punishment shocks the conscience, because it is so disproportionate to the offense. Petitioner maintains that for six years, she had an unblemished record as a long-term substitute teacher. During that time, she had nearly completed the course

work for an additional master's degree in special education that would have allowed her to become a certified teacher.

In its supplemental brief (MOL#2), DOE points out that it addressed petitioner's arguments regarding any due process or rights violations in its first MOL, and reiterates that petitioner failed to meet her burden of demonstrating evidence of bad faith on DOE's part.

DOE also maintains that its actions in placing petitioner on the IL and in terminating her teaching certificate were not arbitrary or capricious, because the SCI substantiated allegations that petitioner submitted a Time Report for work she did not perform. Further, at the Hearing, petitioner admitted that she left early on at least one day that she provided home instruction to Student A, despite the fact that she signed her Time Report certifying that she "served in the program at the exact time indicated herein" (*see* the Investigator's Report). Although petitioner claims that a payroll secretary told her that if she left a few minutes before 6:00 p.m., she should "round the time off," petitioner offered no corroboration for this contention at the Hearing, and, regardless, petitioner certified on her Time Report that she worked until the "exact time." Thus, DOE's placement of petitioner on the IL was warranted and does not rise to the level of an action that could be considered arbitrary or capricious as a matter of law, DOE argues.

Finally, DOE points out that petitioner concedes that hearsay evidence is admissible in administrative proceedings and may, alone, be used as the basis for findings of fact. Further, at the Hearing, both sides were entitled to call and cross-examine witnesses. Thus, if petitioner truly believed that the hearsay testimony was unreliable, she could have presented evidence to impeach such evidence, DOE argues. Similarly, petitioner did not object to the admissibility of the so-called hearsay evidence, which "speaks volumes" and should demonstrate that petitioner's

hearsay argument is nothing more than a red herring. Accordingly, petitioner's argument that the termination of her license is based on uncorroborated hearsay testimony and, as such, DOE acted in an arbitrary and capricious manner is meritless, and the Petition must be dismissed.

Discussion

The Court notes that petitioner's requests (1) that she be granted a hearing, (2) for a stay of the proceedings pending the outcome of the hearing, and (3) for a copy of the Investigator's Report, were granted by the May 8, 2009 Court Order. Further, petitioner's first cause of action – that she has been denied due process because she had not been given a hearing or a copy of the Investigator's Report – has been rendered moot by the Court-ordered Hearing conducted on November 16, 2009 (*see infra,* p. 15).[5]

Upon review of the parties' supplemental briefs, the Court determines that the following issues survive: (1) petitioner's allegation that she acquired tenure by estoppel, (2) petitioner's second cause of action that she was denied a property right in her license as an OPD substitute teacher, and (3) petitioner's third cause of action that DOE' actions were arbitrary and capricious. Petitioner also requests leave to amend her Petition to add that the termination of her license shocks the conscience.

It is well settled that a proposed pleading that is plainly lacking in merit will not be permitted (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp. et al.,* 60 AD3d 404 [1st Dept 2009]; *Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York,* 280 AD2d 374 [1st Dept 2001]). Here, petitioner's allegation that her

[5] Regarding petitioner's claim that she was never notified of her termination (Petition, ¶ 25), in the first paragraph of petitioner's MOL #2, petitioner acknowledges that the Determination "terminated her services as a teacher for [DOE]" (MOL #2, p. 2).

punishment shocks the conscience is unavailing. Generally, a "sanction must be upheld unless it shocks the judicial conscience" (*Yan Ping Xu v New York City Dept. of Health*, 2009 WL 222096, 2 [Sup Ct New York County 2009], citing *Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 232-234 [1974]). However, this standard of review does not apply to sanctions against non-tenured employees, such as petitioner herein. The inquiry here is limited to only to whether the termination of petitioner's certificate of teaching was made in bad faith (*Soto v Koehler*, 171 AD2d 567, 567-568 [1st Dept 1991], *lv denied* 78 NY2d 855 [1991]; *Sills v Kerik*, 2003 WL 25668182 [Sup Ct New York County 2003]). Accordingly, leave to amend is denied.

The Court proceeds to determine the merits of the Petition.

Petitioner's claim of tenure by estoppel lacks merit. "Tenure by estoppel results '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*'" (emphasis added) (*Speichler v Board of Co-op. Educational Services, Second Supervisory Dist.*, 90 NY2d 110, 114 [1997], quoting *Matter of McManus v Board of Educ.*, 87 NY2d 183, 187 [1995]). Pursuant to Education Law §2509(1)(a), the usual three-year period for a probationary teacher can be reduced to one year for a teacher who has served as a regular substitute for two years prior to her *appointment* (*Speichler* at 114).[6] Here, it is uncontested that petitioner, an OPD substitute teacher, was a *temporary*, provisional employee. It is also uncontested that even though petitioner served as an OPD substitute teacher for six

[6]This is known as the "Jarema credit," which is named for Assemblyman Stephen J. Jarema, who sponsored the bill.

years, she had never received a permanent appointment as a probationary teacher. Accordingly, petitioner is not entitled to tenure by estoppel pursuant to Education Law §2509(1)(a).

Petitioner's second cause of action that she was denied a property right in her license as an OPD substitute teacher, also lacks merit. Under New York law, service as a non-tenured provisional teacher does not confer a property right (*Cohen v Litt*, 906 F Supp 957, 966 [1995]; *see also Pinder v City of New York*, 49 AD3d 280, 281 [1st Dept 2008]). Therefore, petitioner had no property right in her license.

Regarding DOE's actions in placing petitioner on the IL list and terminating her teaching certificate, it is well settled that provisional employees, such as petitioner herein, "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" (*McDonnell v Lancaster*, 2007 WL 2756955, 2 [Sup Ct New York County 2007] quoting *Brown v City of New York*, 280 AD2d 368, 370 [1st Dept 2001]). Further, judicial review is limited to an inquiry as to whether the termination was made in bad faith (*Barandes v New York City Dept. of Educ.*, 2009 WL 530974, 3 [Sup Ct New York County 2009]; *Witherspoon v Horn*, 19 AD3d 250, 251 [1st Dept 2005]). It is also well settled that evidence "in the record supporting the conclusion that performance was unsatisfactory establishes that the discharge was made in good faith" (*Matter of Johnson v Katz*, 68 NY2d 649, 650 [1986]; *Barandes* at 4). In the absence of any demonstration that the termination was in bad faith, the Court "will not interfere with the discretion of the appointing officer unless the action complained of was arbitrary and capricious" (*Talamo v Murphy*, 38 NY2d 637, 639 [1976]; *see also Smith v City of New York*, 118 Misc 2d 227, 228, 459 NYS2d 1007, 1008 [Sup Ct, New York County 1983] ["For, with respect to a probationary

employee, the appointing officer must only act in good faith in terminating the employment. This is simply another way of stating that the action of the employer must not be arbitrary or capricious"]). Finally, Petitioner bears the burden of "raising and proving" such bad faith, "and the mere assertion of 'bad faith' without the presentation of evidence demonstrating it does not satisfy the employee's burden" (*Witherspoon* at 251, citing *Soto v Koehler*, 171 AD2d 567, 568 [1991], *lv denied* 78 NY2d 855 [1991]).

Here, the evidence in the record demonstrates that petitioner was not terminated in bad faith, and DOE's actions were not arbitrary and capricious. According to the Investigator's Report, in response to Mother A's complaints, SCI substantiated that petitioner submitted a Time Report for work that she did not perform. Mother A's Letter states in relevant part:

> The teacher . . . came in not organized not knowing what to teach [Student A] or how to teach her. She came on 11/20/2007 at 3:45 and left at 5 p.m. She then was supposed to come on 11/26/2007 and didn't call until 4:35 p.m. to say she couldn't make it. 11/27/2007 she came at 3:40 and left at 5:30. 11/28/2007 she came at 3:30 and left at 5:10. [*sic*]

Petitioner's Time Report indicates that on each of these days, petitioner worked from 3:30 p.m. to 6:00 p.m. When SCI Investigator Gary Delgado ("Investigator Delgado") questioned petitioner about her attendance on the disputed dates, petitioner denied that she ever left early, or called in on November 26 to inform Mother A that she was not coming in. Petitioner further told Investigator Delgado that "on her last day [November 29, 2007], she left Student A's residence after 5:00 PM but she did not know the specific time" (Investigator's Report, p. 3). Investigator Delgado noted that petitioner indicated on her Time Report that on November 29, 2007, she worked from 3:30 p.m. to 6:00 p.m. (*id.*). Based on the comparison of "the dates and times Mother A documented with petitioner's [Time Report]," the SCI Investigator concluded that

Mother A's allegation was substantiated (DOEs MOL #1, p. 7).

At the Hearing, DOE representative Susan Holtzman ("Ms. Holtzman") testified that the Investigator's Report substantiated that petitioner did not actually work the time petitioner stated on her Time Report for home instruction:

> SCI investigated and came up with essentially theft of service, that she did [not] work the hours she had submitted to be paid and the recommendation was to terminate her. She was given the "U" rating and terminated and was placed on the ineligible list. We feel that was appropriate given what was determined by SCI. We accepted that. (Transcript, p. 9).

Ms. Holtzman later testified that even though petitioner was never paid for the time she falsely claimed, the submission of the time sheets still constituted theft of services (*id.* at 18-19). Relying on the Investigator's Report, Principal Ledesma recommended petitioner's termination.

CSI Senior Investigator James J. McCabe, ("Investigator McCabe")[7] testified that the conclusion that petitioner was guilty of theft of services was reached solely on the word of Mother A (*id.* at 12). He further testified that he did not know why Investigator Delgado, his predecessor in the investigation, believed the parent over petitioner (*id.* at 13). Upon further questioning, Investigator McCabe stated that he was not aware that petitioner sensed that Mother A did not like her from the first day she started working with Student A, nor was he aware that Student A was seriously ill and that petitioner believed that Mother A was in a "highly agitated state" (*id.* at 14). However, Investigator McCabe was aware of Mother A's Letter and that Mother A had requested a different teacher (*id.* at 15). When asked whether it was "conceivable

[7]In her supplemental brief, petitioner points out that Investigator McCabe was not the lead investigator who conducted the original investigation and did not write any of the memoranda or reports (petitioner's MOL #2, p. 6). At the Hearing, Investigator McCabe testified that Investigator Delgado was no longer "with our office" and that he was assigned to represent SCI because he was present at four of Investigator Delgado's interviews (Transcript, pp. 5-6).

that [Mother A] was fabricating times to get [petitioner] removed and get a different teacher more to her liking," Investigator McCabe responded: "I have no idea" (*id.* at 17).

In her testimony, petitioner denied Mother A's allegations, maintaining that she never missed a session with Student A, and that each of her time sheets reflects that she worked from 3:30 p.m. to 6:00 p.m. Petitioner further testified that upon being assigned to Student A on or before, November 20, 2007, Mother A was immediately hostile to her as soon as she heard that petitioner spoke with an accent,[8] and Mother A requested another teacher who could be understood. On the sixth and last day, November 28, 2007, Mother A stopped her from teaching and asked petitioner to call her office. After calling the office, petitioner was instructed to leave. When petitioner asked why, she was told only that another student would be assigned to her. Nevertheless, petitioner completed the session with Student A and left "a few minutes to six" (*id.* at 22). Thereafter, petitioner was assigned to a new student. A few weeks later, petitioner was told that she should stop working with her new student because of the allegation against her.

Petitioner testified that during her interview with Investigator Delgado, he questioned what petitioner meant when she said that on her last day with Student A, she left a few minutes before 6:00 p.m.; petitioner's Time Report indicated that she had left at 6:00 p.m. Petitioner said that she explained that the payroll secretary told her that if it is a few minutes to six, then she should round it off to six because it makes it easier for the payroll secretary to process (*id.* at 24). By a few minutes, she meant five minutes or less (*id.* at 26). When told that Mother A had alleged that petitioner had left at 5:10 p.m., 50 minutes early (Investigator's Report, p. 2; Transcript, p. 28), petitioner insisted that Mother A was not accurate (*id.* at 29). Petitioner went

[8]Petitioner, the daughter of a British mother and a Nigerian father, was born and educated in England.

on to explain that during the day she worked at a school very close to Student A's home and that she always arrived at the home early (*id.* at 34-35).

Petitioner then was asked about November 26, 2007, the day Mother A alleged that petitioner called at 4:35 p.m. to inform her that petitioner was not coming. Petitioner's Time Report indicated that she had worked her regular schedule on that day. Petitioner testified that she did not call Mother A at all on November 26, and insisted that Mother A's allegation was "a fabrication" (*id.* at 37-38). "I don't even have a cellular phone," petitioner testified (*id.* at 38).

At the close of the hearing, Ms. Holtzman stated the SCI investigators are independent and had no reason to falsify the investigation (*id.* at 38-39). Further, because the SCI investigators, who interviewed all of the parties, had come to the conclusion that petitioner was guilty, the Chancellor's Committee would rely their conclusion, Ms. Holtzman said. She went on to recommend that petitioner's termination be upheld (*id* at 39).

The Chancellor's Committee Report issued after the Hearing states in relevant part:

> The Rating Officer, the Superintendent's Representative, and the Office of the Special Commissioner of Investigation, *provided strong written evidence and verbal testimony demonstrating that the [petitioner] knowingly submitted false documentation of a per session teaching, with the intent of receiving payment for work scheduled but not performed.* The testimony provided to the Committee by the [petitioner] was consistent with her reported statements to investigators; *and it was equally illogical and unbelievable.* [Petitioner] submitted for payment a time sheet certified by her signature as "the exact time indicated herein," and she claimed that services for Student A had been performed from 3:30 to 6:00 PM every day . . . She testified that she could not have been late because her daytime and per session activities were so close to each other, and that she could not have made a call to Parent A because she did not have a cell phone. Proximity of assignments does not demonstrate actual arrival time at the second site, and lack of a cell phone does not demonstrate not having made a phone call.
>
> It is, therefore, recommended by the Committee that the appeal be denied and the recommendation to terminate any and all licenses (C-31) be sustained.
> (Chancellor's Committee Report, p. 3) (emphasis added)

Upon review, DOE followed the Chancellor's Committee's recommendation and sustained the termination of petitioner's teaching certificate (*see* the Determination).

Thus, the evidence in the record supports DOE's conclusion that petitioner's performance was unsatisfactory, thereby establishing that her termination was neither made in bad faith, nor arbitrary and capricious. Meanwhile, petitioner "has failed to muster evidence that outweighs that implication" (*Davids v City of New York*, 2009 WL 788982 [Sup Ct New York County 2009], *affd* 72 AD3d 557 [1st Dept 2010]).

Petitioner first attempts to demonstrate bad faith on DOE's part by arguing that DOE failed to follow proper procedures under the CBA. The Courts have found that the failure to follow procedure "can be used as some evidence of bad faith" in terminating an employee (*Smith v City of New York*, 118 Misc 2d 227, 228, 459 NYS2d 1007, 1009 [1983]). However, such "a violation or breach of proscribed procedures evinces bad faith only when such violation is contrary to both the procedural rule's text and its purposes" (*Davids v City of New York*, 2009 WL 788982 [Sup Ct, New York County 2009], *affd* 72 AD3d 557 [1st Dept 2010]). Here the evidence in the record fails to demonstrate that DOE failed to follow procedure.

Petitioner alleges that prior to the Hearing, she was improperly questioned by Investigator Delgado without being given a chance to have a union representative present. However, according to caselaw, petitioner did not have a right to have a union representative present. The First Department explains:

> While SCI is not a classic law enforcement agency, it was created for the express purpose of conducting a broad range of investigations, independent of the Board of Education. To require SCI to have union representatives at its interviews would invariably create conflict and frustrate SCI's purposes. Unlike the right to counsel, which is required for classic law enforcement interrogations, having a union representative present at all SCI interviews creates potential conflict, because the interests of the union and its

> representatives are not necessarily aligned with the interests of the subject of the investigation. For these reasons, the clause in the collective bargaining agreement between the Board of Education and the United Federation of Teachers, which requires the presence of union representatives at any interview which could lead to employee discipline, should not have been invoked to exclude inculpatory oral and written statements made by the respondent before the SCI.
> (*Board of Educ. of City of New York v Hershkowitz*, 308 AD2d 334, 338 [1st Dept 2003]).

Further, as a result of the Court Order, a Hearing was conducted, enabling petitioner to appeal the termination of her teaching certificate, and petitioner has seen a copy of the Investigator's Report. Although petitioner argues that "the frustration of [her] rights under the CBA and her premature termination call into question the good faith of her termination" (petitioner's MOL #1, p. 4), the evidence in the record does not demonstrate that DOE failed to follow procedure, so as to demonstrate bad faith on its part, as a matter of law.

Petitioner's argument that the hearsay evidence presented against her at the Hearing was not probative also lacks merit. Hearsay evidence alone can be the basis of an administrative determination, as long as it is "sufficiently relevant and probative to support the findings of the Administrative Law Judge" (*Gray v Adduci*, 73 NY2d 741, 742 [1988] [defining substantial evidence as that which 'a reasonable mind could accept the report as "adequate to support a conclusion or ultimate fact'"]; *see also Austin v Board of Educ. of City School Dist. of City of New York*, 280 AD2d 365, 366 [1st Dept 2001] ["Pursuant to Education Law §3020-a (3)(c), the rules governing hearing procedures do not require compliance with technical rules of evidence; therefore, a Hearing Officer may accept hearsay testimony"]). In addition, "[t]o the extent that petitioner's arguments rest on conflicting testimony . . . the Administrative Law Judge's factual findings, *which turn on the issue of credibility*, are entitled to great weight" (emphasis added) (*Café La China Corp. v New York State Liquor Auth.*, 43 AD3d 280, 281 [1st Dept 2007]; *see*

also 47 Ave. B East Inc. v New York State Liquor Auth., 72 AD3d 465, 468 [1st Dept 2010] ["The findings of an Administrative Law Judge (ALJ) involve the assessment of credibility and the drawing of reasonable inferences, 'and the courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists'"]). For example, the First Department in *Austin v Board of Educ.*, *supra*, noted that "the Hearing Officer credited the testimony of the Principal and Assistant Principal and found petitioner's testimony to be inconsistent and incredible" (*id.* at 366). The First Department went on to unanimously reverse the Supreme Court and grant the respondents' cross-motion to dismiss the petition.

Here, the hearsay evidence presented at the Hearing, *i.e.*, Mother A's Letter and the Investigator's Report, were sufficiently relevant and probative as to whether petitioner falsified her Time Report. The allegations in Mother A's Letter and the conclusions of the SCI investigators following interviews with Mother A and petitioner were such that "a reasonable mind" could accept such evidence as adequate to support the conclusion or ultimate fact that petitioner submitted a falsified Time Report. Further, the Chancellor's Committee considered the conflicting testimony of petitioner and Mother A, and determined that petitioner's testimony "was equally illogical and unbelievable" (Chancellor's Committee Report, p. 3). In considering the evidence in the record, and according the Chancellor's Committee's credibility findings great weight, the Court finds no basis to disturb the Chancellor's Committee's findings or reject the Determination.

Finally, petitioner's argument that Mother A's allegations were uncorroborated is unavailing. Petitioner cites early Second Department caselaw in support of the proposition that

uncorroborated hearsay evidence does not constitute substantial evidence upon which an administrative determination may be based (*see e.g., Fore v Toia,* 60 AD2d 913, 913 [2d Dept 1978]; *Matter of Mandy v Blum*, 67 AD2d 1002 [2d Dept 1979]). However, Second Department cases are not controlling on this Court. Further, more recent Second Department cases hold that hearsay alone, if sufficiently relevant and probative, can constitute substantial evidence (*see e.g., Saporito v Carrion*, 66 AD3d 912, 912 [2d Dept 2009]; *Bullock v State Dept. of Social Services*, 248 AD2d 380 [2d Dept 1998]; *Hutchinson v Coughlin*, 220 AD2d 419, 420 [2d Dept 1995]). Here, as discussed above, Mother A's Letter and the Investigator's Report were sufficiently relevant and probative as to whether petitioner falsified her Time Report.

As the evidence in the record fails to support petitioner's allegation that her termination was made in bad faith, or arbitrary and capricious, the Court is constrained to deny her Petition.

Conclusion

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that petitioner's application for an order, pursuant to CPLR Article 78, vacating DOE's determination to terminate petitioner's teaching services is denied and the Petition is hereby dismissed; and it is further

ORDERED that counsel for DOE shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

This constitutes the decision and order of this court.

Dated: June 7, 2010

Carol Robinson Edmead, J.S.C

HON. CAROL EDMEAD