

**Abdur-Rauf v City of New York**

2010 NY Slip Op 32434(U)

August 20, 2010

Sup Ct, NY County

Docket Number: 117502/09

Judge: Cynthia S. Kern

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

CYNTHIA S. KERN

PRESENT: \_\_\_\_\_ J.S.C. Justice

PART 52

Index Number : 117502/2009

ABDUR-RAUF, SIDDIQ

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

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 is decided in accordance with the attached decision.

**FILED**  
SEP. 07 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/20/10

CJK  
CYNTHIA S. KERN J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

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 52

-----X  
SIDDIQ ABDUR-RAUF,

Plaintiff,

Index No. 117502/09

-against-

**DECISION/JUDGMENT**

CITY OF NEW YORK, NEW YORK CITY  
BOARD OF EDUCATION TEACHING FELLOWS  
PROGRAM, OFFICE OF THE COMPTROLLER,

Defendant.

**FILED**

**SEP 07 2010**

**NEW YORK  
COUNTY CLERKS OFFICE**

-----X  
HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	_____ 1 _____
Notice of Cross Motion and Answering Affidavits.....	_____
Affirmations in Opposition to the Cross-Motion.....	_____
Replying Affidavits.....	_____ 2 _____
Exhibits.....	_____ 3 _____

Plaintiff commenced the instant action to recover damages for an alleged breach of his New York City Teaching Fellows Program contract with defendant New York City Board of Education. Defendants moved for summary judgment on the grounds that (1) the action should have been commenced as an Article 78 proceeding and is therefore time-barred and (2) the action is also time-barred pursuant to the statute of limitations set forth in Education Law Section 3813. They also move for costs, fees and disbursement. For the reasons set forth below, defendants' motion is granted.

The relevant facts are as follows. Plaintiff was offered a position in the New York City Teaching Fellows Program on June 7, 2008. He was notified that he could not be appointed to the program due to his criminal record, which he had disclosed during the application process, on September 17, 2008.

In the instant case, plaintiff's action is converted to an Article 78 proceeding. Pursuant to CPLR Section 7803, an Article 78 proceeding is the proper vehicle for judicial review of an administrative decision. Consequently, an administrative agency's decision to terminate a plaintiff's employment is properly challenged through an Article 78 proceeding. *See Foster v. City of New York*, 157 A.D.2d 516, 517 (1<sup>st</sup> Dept 1990); *see also Adams v. City of New York*, 271 A.D.2d 341 (1<sup>st</sup> Dept 2000). Because plaintiff is seeking to challenge an administrative agency's decision about his employment status, his complaint should have been commenced as an Article 78 proceeding.

Plaintiff's argument that his complaint is a breach of contract action and not a challenge of an administrative decision is without merit. Even when an action is pleaded as a breach of contract, when the focus of an action against an administrative agency is the agency's alleged violation of its personnel policies and procedures and not an express contractual right, an Article 78 proceeding is the appropriate vehicle for challenging the agency's decision. *See Adams v. City of New York*, 271 A.D.2d 341, *supra*; *see also Advanced Refractory Technologies, Inc. v. Power Auth. of State of N.Y.*, 81 N.Y.2d 670, 679 (1993). The focus of the instant action is an alleged violation of the terms of employment of the Teaching Fellows Program, not a breach of an express contractual right. Consequently, the action is converted to an Article 78 proceeding.

Because this case is an Article 78 proceeding, defendants' motion to dismiss the

complaint is granted as the complaint is barred by the statute of limitations. Under CPLR Section 217, the statute of limitations for bringing an Article 78 proceeding is four months. The four month statute of limitations applies even when the action was originally brought as a different kind of proceeding. *See Constantakos v. Board of Educ. of City of New York*, 105 A.D.2d 825 (2<sup>nd</sup> Dept 1984) (“where such action could have been brought as a proceeding pursuant to CPLR article 78, a four-month limitations period applies”). The statute of limitations begins to run when the petitioner receives notice of the agency determination that he or she seeks to challenge. *See Matter of Biondo v. New York State Bd. of Parole*, 60 N.Y.2d 832, 834 (1993). In the instant case, plaintiff was notified about his termination from the Teaching Fellows Program on September 17, 2008. However, he did not commence his action until October 13, 2009, almost nine months after the four month statute of limitations expired. As a result, the instant action is time-barred.

Moreover, even if the instant action was not converted into an Article 78 proceeding, it would still be time-barred under Education Law Section 3813(2-b). The statute of limitations for cases brought against school districts or boards of education is one year. *See Education Law § 3813(2-b)*. Pursuant to Education Law § 3813(2-b), the statute of limitations for plaintiff’s action expired one year after his notification about his termination from the Teaching Fellows Program on August 15, 2006. Plaintiff’s argument that the City waived the statute of limitations by sending him a letter from the Office of the Comptroller that stated that any lawsuit against the City must be started within one year and ninety days from the date of the occurrence is without merit. The letter is a nonspecific statement that appears to refer to lawsuits against the City and not against the Board of Education. Furthermore, the letter does not constitute legal advice and

