

**Matter of Aspiazu v Department of Educ. of the City
of N.Y.**

2010 NY Slip Op 33664(U)

December 8, 2010

Sup Ct, New York County

Docket Number: 108726/10

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN
J.S.C. Justice

PART 52

Index Number : 108726/2010
ASPIAZU, DORIS
vs.
NYC DEPT. OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 108726/10
MOTION DATE _____
MOTION SEQ. NO. 01
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.*

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

FILED

DEC 09 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/8/10

CK
CYNTHIA S. KERN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
In the Matter of the Application of DORIS ASPIAZU,

Petitioner,

Index No. 108726/10

For a Judgment Pursuant to Article 78 of the
Civil Practice Laws and Rules and Claims
Under the Executive Law and the
Administrative Code of the City of New York,

-against-

The Department of Education of the City of
New York and the City of New York,

Respondents.

-----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 : _____

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner brings this petition seeking expungement of the unsatisfactory ("U") rating she received in her position as an attendance teacher, reinstatement to that position and a declaration that terminating her probationary status in the position was arbitrary and capricious. Defendants the Department of Education of the City of New York(the "DOE") and the City of New York (the "City") now move to dismiss the petition on the grounds that the City is not petitioner's employer and thus not a proper party to this proceeding, that petitioner's claims are, in part, time-

barred and that the DOE acted properly and in a way that was not arbitrary or capricious.

The relevant facts are as follows. Petitioner Doris Aspiazu was appointed by the DOE as a probationary Attendance Teacher at the World Academy for Total Community Health ("WATCH"), Thomas Jefferson High School Campus on or about March 3, 2008, with modified responsibilities. On June 23, 2008, the principal of the school, Kim Wanliss, rated petitioner's performance as satisfactory. In September 2008, petitioner returned to the school as an Attendance Teacher, whose responsibilities included monitoring daily attendance, calling parents of absent students, sending letters to parents and making home visits. On October 14, 2008, Principal Wanliss met with petitioner to discuss her improper recording of student attendance. Petitioner's union representative was present at this meeting. On October 20, 2008, the principal met with petitioner again concerning an attendance report which was not completed properly. As a result, Principal Wanliss required that petitioner complete a daily log of her activities, to be submitted weekly. On several dates throughout the fall of 2008, petitioner allegedly received professional training. On December 4, 2008, Principal Wanliss again met with petitioner regarding incomplete assignments. On December 5, 2008, Principal Wanliss learned that petitioner had not been completing the required number of home visits. By letter dated December 16, 2008, Principal Wanliss informed petitioner that she was scheduling another meeting to discuss petitioner's failure to comply with her responsibilities. Petitioner did not attend the scheduled meeting. It was rescheduled for and held on December 23, 2008. At that meeting, the principal learned that petitioner had not documented any of her home visits or properly "closed out" many of the cases of long term absences. By letter dated January 22, 2009, petitioner wrote a letter to the principal informing her that she had corrected her attendance

reports. By letter dated January 27, 2009, Principal Wanliss informed petitioner that she had not received her daily logs for the past three weeks.

On or about February 6, 2009, Principal Wanliss rated petitioner's performance "unsatisfactory" for the period of August 28, 2008 through February 6, 2009. By letter dated February 6, 2009, Superintendent Waite informed petitioner that on March 10, 2009, she would review and consider whether petitioner's probationary services should be discontinued. On February 12, 2009, petitioner requested an appeal of her U rating. By letter dated March 10, 2009, Superintendent Waite informed petitioner that her probationary service was being discontinued. On January 20, 2010, a Chancellor's Committee reviewed petitioner's U rating and discontinuance. By letter dated February 11, 2010, Andrew Gordon, DOE Director of Investigation, denied petitioner's application for her substitute teaching license due to her poor job performance in 2008-2009. By letter dated March 22, 2010, Superintendent Waite informed petitioner that she had received the report from the Chancellor's Committee and was affirming the discontinuance effective March 11, 2009. Petitioner filed a Notice of Claim on May 11, 2010 and commenced the instant proceeding on or about July 1, 2010.

Petitioner alleges that the principal's request for a daily log was motivated by discrimination based on her ethnicity and/or national origin (she is Hispanic) and her age, that she was denied training for discriminatory reasons, and that she was subject to "demeaning comments and ... screamed at by her supervisors" and her secretary. She also alleges that her U rating, the discontinuance and denial of her substitute teaching license were all motivated by discrimination.

The court first turns to two preliminary matters. Initially, the petition is dismissed as

against the City as it is not and was not petitioner’s employer and therefore is not a proper party to this action. In addition, to the extent petitioner is asserting any claims for discrimination under the Executive Law or NYC Administrative Code, those claims are also dismissed as they may not be asserted in an Article 78 proceeding. However, petitioner may and does assert that discriminatory animus motivated the U rating, discontinuance and denial of her license and that such actions were “arbitrary and capricious.”

The court now turns to petitioner’s claim regarding her discontinuance, which was effective March 11, 2009. That claim is dismissed as it is time-barred. The statute of limitations for an Article 78 proceeding is four months. NY CPLR 217(1). The statute of limitations begins running on the date that the determination became final and binding. *See James v Klein*, 43 A.D.3d 764 (1st Dept 2007) (citing CPLR 217(1); *Mateo v Board of Education of the City of New York*, 285 A.D.2d 552 (2nd Dept 2001); *Schulman v Board of Education fo the City of New York*, 184 A.D.2d 643 (2nd Dept 1992). In the instant case, the discontinuance became final on March 11, 2009, the date of petitioner’s discharge. Therefore, the statute of limitations expired four months later, on August 11, 2009. Petitioner did not commence this action until July 2010, nearly a year after the action became time-barred.

Similarly, petitioner’s claim regarding denial of her substitute teaching license is also time-barred. The same 4-month statute of limitations applies to this claim. Petitioner’s application for a substitute teaching license was denied on February 11, 2010. Therefore, the statute of limitations expired on June 11, 2010. Petitioner did not commence this action until July 1, 2010, after the expiration of the statute of limitations.

As for petitioner’s challenge of her unsatisfactory rating, respondent concedes that claim

is timely. However, it must still be dismissed because that rating was not arbitrary and capricious as a matter of law. "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Pell v Board of Education*, 34 N.Y.2d 222, 231 (1974). It is petitioner's burden to show that her rating was "in bad faith, for a constitutionally impermissible purpose or in violation of law." *Smith v NYC Dept. of Correction*, 292 A.D.2d 198, 199 (1st Dept 2002).

In the instant case, there is no evidence that petitioner's U rating was arbitrary and capricious or was given without regard to the facts. To the contrary, the reasons for the U rating are well-documented. Respondent has submitted 5 letters documenting its dissatisfaction with petitioner's work performance.

Moreover, petitioner fails to meet her burden to show that the rating was motivated by discrimination based on her ethnicity and/or national origin and/or her age. Self-serving assertions of discriminatory motive, without more, are insufficient to meet petitioner's burden. *Thomas v Abate*, 213 A.D.2d 251 (1st Dept 1995); *Soto v Koehler*, 171 A.D.2d 567, 568 (1st Dept 1991). Petitioner submits only such self-serving assertions. She does not cite specific discriminatory comments or actions, she does not attribute the vague "demeaning comments" she complains of to any specific individual(s) other than her secretary and she does not cite any specific dates that such demeaning comments were made.

Accordingly, respondent DOE's motion is granted and the petition is dismissed. This constitutes the decision, judgment and order of the court.

Dated:

12/8/10

FILED

DEC 09 2010

NEW YORK
COUNTY CLERK'S OFFICE

CSK

J.S.C.

CYNTHIA S. KERN
J.S.C.