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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Index Number : 113932/2010

CODY, MERCY

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

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

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).

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION, ORDER + JUDGMENT

Dated: JUL 18 2011

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: IAS PART 10

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Mercy Cody,

Petitioner

-against-

City of New York, New York City Department of Education, Joel I. Klein, Chancellor of the New York City Department of Education,

Respondents.

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DECISION ORDER AND JUDGMENT
Index No.: 113932/10
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

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).

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Amended n/p and verif pet (MC), exhs	1
Defs' verif answer w/LQ affid, exhs	2
Pet's reply w/BDG reply, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is a special proceeding brought pursuant to Article 78 of the CPLR. Petitioner Mercy Cody ("petitioner") is a former school teacher who is challenging respondents' decision denying her a certificate of completion of probation and terminating her employment with the New York City Department of Education. Respondents have answered the petition and seek to have it denied without the need for a trial. Petitioner is opposed.

Facts and Arguments Presented

Petitioner was offered a position as a special ed teacher effective September 6,

2006. In the commitment letter dated July 13, 2006 extending its employment offer, respondents guaranteed petitioner a full time teaching position for the upcoming 2006 - 2007 school year on a probationary basis. The probationary period was through August 31, 2009.

Petitioner was assigned to teach a bi-lingual special education class at P.S. 4 in Astoria. At the end of the school year, on June 27, 2007, petitioner received her annual review from the principal indicating her overall performance was "satisfactory" overall and in each individual category. She continued to work during the 2007 - 2008 and 2008 - 2009 school years. On June 18, 2008 she received an overall "satisfactory" rating, although none of the individual categories are marked. On June 23, 2009, petitioner's overall performance evaluation was "satisfactory" once again, however, none of the individual categories were marked.

Shortly before that third evaluation, however, Jacek Polubiec, an Assistant Principal ("AP Polubiec") formally observed a lesson given petitioner on April 6, 2009. After he met with petitioner at a post-observation conference, held on April 22, 2009, AP Polubiec prepared a Classroom Observation Report ("COR") dated April 29, 2009. In this COR, he set forth his observations and ratings and the recommendations for improvements, which he had earlier discussed with petitioner in person. He rated petitioner "below standard" in 4 of 8 categories, "approaching standard" in two of the categories, "meeting standard" in one category and "above standard" in only one category. In the above standard category he praised petitioner for using a variety of customized assignments, ranging from journal work to games. In the below standard categories, however, AP Polubiec found that petitioner failed to use instructional

strategies responsive to students' diverse needs, she did not attempt to create a challenging learning experience, she did not encourage students to apply concepts and skills in real life and the students could not articulate in detail nor evaluate what they learned. One example cited by AP Polubiec was when petitioner asked a student to identify a fraction equivalent to 6/15. The student wrote several incorrect answers on the board and then, after several guesses, petitioner wrote the correct answer for him and praised him getting the "correct answer." AP Polubiec asked the students to tell him the basic rule of multiplying and dividing fractions but none of them were able to articulate that whatever is done to the numerator also has to be done to the denominator. AP Polubiec observed that the students were unable to use the multiplication and division tables to create equivalent fractions.

Following the COR, the school superintendent, the principal and petitioner signed an agreement extending petitioner's probationary period by one year, from August 30, 2009 to August 30, 2010 ("probation agreement"). In relevant part, the parties agreed that the decision to grant or deny petitioner tenure "shall be based upon an evaluation of Ms. Cody's probationary service during the additional one year of probationary service herein granted and also upon an evaluation of Ms. Cody's probationary service rendered prior to 08/30/09." They also agreed that no late than August 30, 2010, petitioner would either be granted tenure or denied completion of probation and/or discontinued prior thereto. In the probation agreement, petitioner waived the following:

> 4. ...any possible rights, claims or causes of action for tenure as a Teacher, in the license area of Special Education arising on or prior to 08/30/2009.

> 5. ...any rights, claims or causes of action and agrees not to commence any claims, motions, actions or proceedings or whatever kind against the Chancellor, the Superintendent, the Principal, or the Department of Education of the City of New York...for any actions taken or not taken, or statements made or not made by them prior to the date of this agreement.

Petitioner also acknowledged in the agreement that she had signed it "freely, knowingly and openly without coercion or duress" and that she "had an opportunity to seek legal counsel throughout these proceedings."

On May 25, 2010, petitioner was observed by Luisa Martin, another Assistant Principal ("AP Martin") who prepared an undated COR. In her report, AP Martin wrote that petitioner "mispronounced some of the words" in her lessons, students were asked to make sentences but without any context, reference materials such as dictionaries were not available, the class was cluttered, students were engaged in private conversations, students who could not read were not seated with paraprofessional who could help them, and petitioner did not have a written study plan. AP Martin met and discussed her recommendations with petitioner on May 26, 2010. Overall, AP Martin gave petitioner an "unsatisfactory" rating. Petitioner refused to sign the COR after the post observation conference although she was asked and required to do so.

On May 26, 2010, petitioner was observed for a third time. In his COR, AP Polubiec reported that the students seemed confused by the lesson and that petitioner did not check to see whether the students understood what she meant. The students were confused when it came time to work on worksheets that were handed out with some students apparently frozen blankly staring at the worksheets before them. Once

again AP Polubiec noted the students obviously did not understand the mathematical principles being used in the lesson. AP Polubiec rated petitioner's lesson as "unsatisfactory" and made several recommendations which included taking full advantage of the paraprofessional staff assigned to her class, taking time to determine why the students were confused and by using proper and grammatical English to provide a proper role model to the students who were, themselves, using improper grammar. Petitioner also refused to sign this COR after it was provided.

In her 2009-2010 annual performance review dated June 23, 2010, petitioner was graded as "unsatisfactory" with detailed comments in each rating category and the principal recommended denial of certification of completion of probation based upon the three reports. Of the 12 students in her class, only one "passed" a standardized exam that was given that school year. The other 11 students did not meet the criteria to promote them, based upon the scores on that test. Some of those students had no score at all. The June 23rd performance rating was signed by the principal and the school superintendent.

On June 25, 2010, petitioner filed an appeal of her "u-rating" and "discontinuance" with Department of Education's Office of Appeals and Reviews and, following a testimonial hearing held on November 5, 2010 before the school chancellor's three person committee, the majority (2 of 3) concurred with the principal's recommendation to deny petitioner certification of completion of probationary service and the "u-rating" was sustained. The principal and both assistant principals testified at the hearing. The principal (referred to as the "ratings officer") stated that although pre-observation conferences are admittedly not held at this particular school, but that the

expectations for class observations are discussed by the teachers at each week's team meeting and that petitioner had been informally observed on other occasions. The principal also stated that petitioner had been verbally warned that she was in danger of not receiving tenure because of her poor performance before that actually happened.

In its recommendation to deny tenure, the majority noted that petitioner was provided with professional development support throughout the year and that there wsa "convincing evidence that, after four years of probationary service and ongoing professional support, the Petitioner demonstrated major deficiencies in preparing and planning well organized lessons, implementing best practices, effectively utilizing paraprofessional to assist students and using clear and concise language." The committee also took into account that petitioner's husband had become ill sometime in 2008, apparently increasing the pressure petitioner was under. Among the procedural objections raised during the hearing was that petitioner had not been formally notified that she had been denied certification of completion of probationary service. Although the committee noted this was "against NYS law" requiring that the teacher be notified sixty (60) days prior to the denial, its response was only that "the objection has been noted."

Following the committee's report with recommendations, the Community Superintendent notified petitioner of is decision in correspondence dated December 16, 2010 . It is this decision, which affirmed her termination of employment, that petitioner seeks to have annulled on the basis it was made in violation of respondents' own procedures and the New York State Education Law.

Petitioner contends the following rules, regulations and procedures were violated

by the respondents:

*respondents did not comply with the rating pedagogical staff handbook requiring that a principal observe a teacher's lessons, etc., during the school year.

*respondents did not provide her with pre- and post-observation conferences

*the principals who observed her did not have any special educational background nor were they licensed in special education

*she did not receive "feed back" on her performance for the first 8 months of the school year

Petitioner claims she is entitled to:

*reversal of the denial of a certificate of completion of probation and reinstatement

*pay through December 16, 2010 based upon NYS Education Law § 2573 because respondents failed to give her sixty (60) days notice of her termination

*tenure by estoppel

Petitioner also claims that her termination was due to a poorly concealed mandate coming from respondents' Office of Labor Relations to deny probationary teachers - - even exemplary ones - - tenure as a cost cutting measure.

Finally, petitioner claims she applied for a teaching job at other schools but offers were withdrawn by the principals at those schools because of interference by the respondent's Office of Labor Relations .

Discussion

Since an Article 78 proceeding is a special proceeding, it may be summarily determined upon the pleadings, papers, and admissions to the extent that no triable

issues of fact are raised (CPLR § 409 [b]; CPLR §§ 7801, 7804 [h]). Thus, much like a motion for summary judgment, the court should decide the issues raised on the papers presented and grant judgment for the prevailing party, unless there is an issue of fact requiring a trial (CPLR § 7804 [h]; York v. McGuire 1984, 99 A.D.2d 1023 aff'd 63 N.Y.2d 760 [1984]; Battaglia v. Schumer, 60 A.D.2d 759 [4th Dept 1977]).

A probationary teacher may be terminated "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" (Frazier v. Board of Education, 71 NY2d 763, 765 [1988]). The only evidence of "bad faith" petitioner presented at her hearing was the satisfactory ratings she received in school years 2006-2007, 2007-2008 and 2008-2009 and the fact that she received the "satisfactory" rating despite the unsatisfactory performance review by AP Polubiec in April 6, 2009. Petitioner acknowledges, however, AP Polubiec's class observation in April 2009 was the first time she was formally observed by anyone from the principal's office. Consequently the satisfactory ratings she received before April 2009 were, apparently, perfunctory.

Though petitioner claims she was surprised to learn her probationary period had to be extended when the end of the 2008-2009 came about, and states that she had "no choice" but to sign the agreement extending her probation by one year, this is of no consequence. She voluntarily signed the agreement and in doing so, expressly waived her right to make any claim based upon "actions taken or not taken, or statements made or not made" by respondents prior to May 2009. Thus, any argument by petitioner, that her good performance reviews in 2006-2007, 2007-2008 and 2008-2009

were not considered by the committee in deciding to terminate her, are unavailing. Not only did the committee in its report specifically note her satisfactory performance in those previous years, it also observed that despite "four years of probationary service...the Probationer demonstrated major deficiencies..."

Petitioner's argument, that she acquired tenure by estoppel also fails. Tenure by estoppel results when a school board fails to take the action required by law to grant or deny tenure and, with full knowledge and consent, permits a teacher to continue to teach beyond the expiration of her probationary term (McManus v. Board of Educ. of Hempstead Union Free School Dist., 87 N.Y.2d 183, 187 [1995]).

Here, petitioner was notified in writing on June 23, 2010 that the principal was recommending her denial of certification of completion of probation. Petitioner acknowledged receipt of the report with this recommendation by signing it "under protest." The second page of the report instructs that an aggrieved teacher of "the right to submit written comments concerning each of these evaluation reports..." and that the teacher can also appeal an adverse evaluation by filing an Appeal in writing with the Director, Office of Appeals & Reviews within three (3) weeks of receiving the adverse evaluation. Since petitioner immediately filed an appeal with the Office of Appeals & Reviews only two (2) days later, this resolves her claims that she was improperly notified of her termination or that she served beyond her probationary term or that she should be paid a salary for any period of time beyond August 31, 2010.

Education Law § 2573 requires that the services of a teacher "may be discontinued at any time during such probationary period, on the recommendation of the superintendent of schools, by a majority vote of the board of education. Each

person who is not to be recommended for appointment on tenure shall be so notified by the superintendent of schools in writing not later than sixty days immediately preceding the expiration of his probationary period." The June 23, 2010 recommending denial of tenure is signed by the principal and the superintendent. Thus, petitioner had more than 60 days notice that she was not being recommended for tenure, she did not acquire tenure by estoppel and she is not entitled to pay beyond August 31, 2010 which has already been paid to her.

Other claims by petitioner, that she was entitled to, but did not receive, pre- or post-observation conferences were already decided by the committee and affirmed by the Community Superintendent. Although the principal acknowledged that she did not routinely hold individualized pre-observation conferences, she explained to the committee that it was customary for teachers to be prepared at weekly meetings for class observations and that the "expectations for class observations are discussed at each week's team meeting." Petitioner has failed to raise triable issues of fact that the recommendations in each negative report were not discussed with her or that these group meetings were not held or that she requested any kind of individualized meeting that was denied.

In order for the court to find that an agency's determination is arbitrary and capricious, it would have to find that the action taken was without sound basis in reason and taken without regard to the facts. The question for the court is generally whether the agency determination has a rational basis (Pell v. Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222 [1974]). While pure issues of law should be determined by the court, issues concerning the

interpretation of a statute or regulation by the agency responsible for its administration should be upheld, if they are not irrational or unreasonable (Madison-Oneide Board of Compaartive Educational Services v. Mills, 4 NY3d 51 [2004]); Allstate Ins. Co. v. Libow, 106 AD2d 110 [2nd Dept. 1984] aff'd 65 NY2d 807 [1985]).

The committee's recommendation, as affirmed by the Community Superintendent, has ample support in the record developed before at the November 5, 2010 hearing. Contrary to petitioner's allegations, her termination was preceded by unsatisfactory reports which not only identified her deficits as a teacher, but also offered construction recommendations which she apparently could not successfully implement. Some of the same criticisms appear on successive reports, including her apparent inability to make the lessons more comprehensible to her students, confusing presentations, not using trained paraprofessionals available to her and repeated grammatical errors. Thus, petitioner has failed to prove that the decision to deny her certification and make her a tenured teacher was arbitrary and capricious or without a rational basis.

Petitioner has also failed to show that the Office of Labor Relations played any role in her not securing a teaching position at any other school. This argument is entirely speculative and offered to deflect attention from her own documented deficiencies. Similar arguments have been made before other judges in other summary proceedings against these same respondents. Those judges have found these arguments lacking merit and petitioner has not offered any facts that distinguish her petition or have this court reach a different conclusion (see, Matter of Kolmel v City of New York, 2010 NY Slip Op 31350(U) [Sup Ct., N.Y. Co. May 20, 2010] *n.o.r.).*

Since petitioner has failed to show that the determination made June 23, 2009 which was affirmed by the committee on December 16, 2010 is arbitrary and capricious and without a rational basis, the petition must be and hereby is denied.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED, DECLARED AND ADJUDGED that the petition is denied and this summary proceeding is dismissed; and it is further

ORDERED that this constitutes the decision, order and Judgment of the court.

Dated: New York, New York
July 18, 2011

So Ordered:

Ho. Judith J. Gische, JSC

UNFILED JUDGMENT

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