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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

MEJIA, YVETTE

- v -

NYC DEPT OF EDUCATION

INDEX NO. 105184/11

MOTION DATE

MOTION SEQ. NO. 01

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

FILED
OCT 24 2011
COUNTY CLERK'S OFFICE
NEW YORK

is decided in accordance with the annexed decision.

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

Dated: 10/20/11

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.

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

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In the Matter of the Application of YVETTE MEJIA,

Petitioner,

Index No. 105184/11

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 NEW YORK CITY DEPARTMENT OF EDUCATION, DENNIS WALCOTT, as Chancellor of the New York City Department of Education, LUZ CORTAZZO, as Superintendent of Community School District 4 and THE CITY OF NEW YORK

Respondents.

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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
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Petitioner brings this petition seeking expungement of the unsatisfactory ("U") rating she received in her probationary position as an assistant principal and reinstatement to that position with full back pay and retroactive benefits. Respondents the Department of Education of the City of New York (the "DOE") and the City of New York (the "City") now request that the petition be

dismissed on the grounds that the City is not petitioner's employer and thus not a proper party to this proceeding, petitioner's claims are, in part, time-barred and that the DOE acted properly and in a way that was not arbitrary or capricious. As an initial matter, 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. For the reasons set forth more fully below, the petition is dismissed only in part against the remaining respondents and the matter is remanded for a hearing by the DOE.

The relevant facts are as follows. Petitioner Yvette Mejia was first hired as a classroom teacher by the DOE in September 1995 at P.S. 101 in Manhattan. She was a classroom teacher until June 2002. The following school year until January 2006, she was the literary staff developer for grades K-6. In January 2006, she was employed as a probationary assistant principal at the same school, P.S. 101, that she had taught at since her employment with the DOE began. The probationary period was 5 years. When P.S. 101 closed, petitioner was hired as a probationary assistant principal at P.S. 155 in Manhattan. She began working at P.S. 155 in September 2008. Her probationary period was to end at the end of 2010.

During the last two weeks of the 2009-2010 year, petitioner and her union representative were called into the principal's office, where the principal detailed complaints about petitioner. The principal, Lillian Raimundi-Ortiz, placed five letters of complaint into petitioner's file. The letters are all dated during the month of June 2010. However, petitioner alleges she received them all on the same day, the last day of the school year and indeed, petitioner's signatures on the letters indicated receipt are all dated June 29, 2010. Ms. Ortiz indicated in these letters that she would recommend that petitioner be discontinued as assistant principal, a mere six months prior to the end of petitioner's probationary period. On July 8, 2010, petitioner also received an

unsatisfactory rating as well as a recommendation of discontinuance signed by superintended Luz Cortazzo, which petitioner was informed she could respond to. On August 18, 2010, petitioner allegedly sent via certified mail a response to the charges against her and included letters of support from teachers at P.S. 155 (which she submits as exhibits to her petition as well). Petitioner alleges that the superintended did not receive her response. By letter dated August 31, 2010, Ms. Cortazzo informed her that her discontinuance had been affirmed and was effective as of the date of the letter. On September 3, 2010, she then hand delivered her response to the superintendent. By letter dated September 7, 2010, petitioner was informed that her discontinuance had been affirmed, effective as of the date of the letter. On December 7, 2010, a chancellor's committee meeting was held at petitioner's request. At the meeting two parents spoke on behalf of petitioner. Petitioner also submitted the letters from teachers who supported her. The meeting was allegedly audio-taped but the DOE has not submitted a transcript of the proceedings. By letter dated January 10, 2011, petitioner received a letter informing her that her discontinuance had been reaffirmed. She subsequently filed the instant petition.

Petitioner's claim regarding her discontinuance, which was effective September 7, 2010. 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 September 7, 2010, the date of petitioner's discharge. Therefore, the statute of limitations expired four months later, on January

7, 2011. Petitioner did not commence this action until May 2, 2011, nearly four months after it became time-barred.

As for petitioner's challenge of her unsatisfactory rating, respondent concedes that claim is timely. Furthermore, this court finds that there is a question of fact as to whether that rating was made in bad faith, was without a rational basis, or was arbitrary and capricious. "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) [emphasis added]. Where petitioner submits evidence raising an issue as to whether respondents terminated her in bad faith, a hearing is required. *Turner v Horn*, 69 A.D.3d 522 (1st Dept 2010).

In the instant case, the fact that all of the complaints about petitioner were clustered in the last two weeks of the school year, with only 6 months remaining in her probationary period raises a question of fact as to whether the petitioner's U rating was given in bad faith. Moreover, although the letters were all dated within two weeks of each other, the fact that they were all signed by petitioner on the same, single day, also raises the issue of whether that rating was assigned in bad faith. Petitioner's detailed explanations of the incidents that allegedly formed the basis for her U rating were not addressed, also raising the issue of whether there was a bad faith basis for her unsatisfactory rating. The suspicious timing of Ms. Ortiz's complaints and the disregard for petitioner's explanations of her actions constitute concrete evidence, not mere speculation, which raise questions of fact requiring a hearing.

However, the fact that respondents failed to submit a transcript of the chancellor's

committee meeting is not a separate basis for the court denying the motion to dismiss the petition. The cases cited by petitioner involve "disciplinary proceedings" held by the chancellor's committee. *See Crudo v Fogg*, 69 A.D.2d 902 (2nd Dept 1979); *Gittens v Sullivan*, 151 A.D.2d 481 (1989). In the instant case, the chancellor's committee meeting does not appear to be a disciplinary meeting as it was convened at the request of petitioner.

Accordingly, the petition in its entirety is dismissed against the City only. Petitioner's claim regarding her discontinuance is dismissed against the remaining parties. With respect to the remaining claims, the parties should contact the clerk of this part to schedule an evidentiary hearing before this court. This constitutes the decision, judgment and order of the court.

Dated: 10/20/11

J.S.C.

CYNTHIA S. KERN
J.S.C.