

Matter of Gabriel v Department of Educ.

2012 NY Slip Op 31102(U)

April 23, 2012

Supreme Court, New York County

Docket Number: 102539/10

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

ARETHA GABRIEL,

Petitioner,

-v-

DEPARTMENT OF EDUCATION, et al.,
Respondents.

INDEX NO. 102539/10

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1-4

Answering Affidavits- Exhibits _____ 5,6

Replying Affidavits _____

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is:

FILED

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

APR 25 2012

NEW YORK
CLERK'S OFFICE

Dated: 4/23/12

Donna Mills

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

-----X
In the Matter of the Application of
ARETHA GABRIEL,

Petitioner,

For a Judgment under Article 78
of the Civil Practice Law and Rules.

-against-

Index No. 102539/10

DEPARTMENT OF EDUCATION, CITY OF NEW
YORK FOR THE CITY SCHOOL DISTRICT OF
NEW YORK CITY, et al.,

Respondents.
-----X

FILED

APR 25 2012

DONNA M. MILLS, J.:

In this Article 78 proceeding, petitioner Aretha Gabriel, a former teacher, seeks a judgment annulling the determination of the Department of Education ("DOE"), which terminated her employment.

Petitioner commenced her employment with the DOE in the 1990's and received tenure in 2001. However, petitioner allowed her teaching license to lapse and she was ultimately removed from payroll in July 2007. Due to the lapse of her license, petitioner was advised to secure another teaching position, and thus was to serve as a probationary employee.

On August 30, 2007, petitioner was appointed as a probationary employee at P.S. 308 in Brooklyn, N.Y. Petitioner was due to complete a one-year probationary period on August 30, 2008. In or around 2007 and 2008, Petitioner was found guilty of misconduct by the Special Commissioner of Investigation for the New York City School District. Thereafter, by letter dated June 25, 2008, petitioner was notified that her

services as a probationary employee would be terminated, effective August 27, 2008.

On August 5, 2008, petitioner was notified of her placement on the Ineligible/Inquiry list due to inappropriate conduct. On October 6, 2008, petitioner instituted an administrative review pursuant to C-31 of the Chancellor's Regulations seeking to review, among other things, the termination of her DOE license, and her placement on the Ineligible/Inquiry list. By letter, dated June 2, 2009, and allegedly received by petitioner on October 28, 2009, the Deputy Chancellor of Teaching and Learning, Marcia V. Lyles, notified petitioner of the decision to reaffirm the June 25, 2008 decision to terminate petitioner's employment and the termination of the DOE license.

On February 25, 2010, petitioner commenced the instant Article 78 petition seeking an order annulling the August 27, 2008 determination of the DOE to terminate her probationary employment, and directing respondents to reinstate petitioner to her former position as a tenured teacher.

Education Law § 3813(1) declares that:

"[n]o action or special proceeding, for any cause whatever, except as hereinafter provided, ... involving the rights or interests of any district or any such school shall be prosecuted or maintained against any ... board of education ... unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim, and that the officer or body having the power to

adjust or pay said claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment.

In the case at bar, petitioner has brought a proceeding without filing a timely notice of claim. Petitioner concedes not having filed a Notice of Claim within three months of the termination of her probationary employment, yet alleges that it was unnecessary. This Court finds that petitioner should have filed a notice of claim by November 27, 2008; that is, within three months of the termination of petitioner's probationary employment on August 27, 2008. However, petitioner filed this proceeding on February 25, 2010, eighteen months after the termination of her probationary employment. Therefore, because petitioner failed to file a timely Notice of Claim pursuant to Section 3813, the petition must be dismissed.

Petitioner's challenge to the termination of her probationary employment is also time-barred. An Article 78 proceeding must be commenced "within four months after the determination to be reviewed becomes final and binding on the petitioner" (CPLR 217 1). An agency determination becomes final and binding when the aggrieved party received actual notice of the determination. (Matter of Metropolitan Museum Historic Dist. Coalition v De Montebello, 20 AD3d 28 [1st Dept 2005]). It is noted again, Petitioner received actual notice of the termination of her probationary employment on August 27, 2008.

"[A]n Article 78 proceeding commenced by a probationary teacher more than four months after the discharge" was untimely (Matter of Schulman v Board of Educ. of City of N.Y., 184 AD2d 643, 644 [2d Dept 1992]). Petitioner's contention that the limitations period should have been extended or tolled while she invoked the review

procedures contained in the collective bargaining agreement is unavailing. "Petitioner's time to commence a CPLR article 78 proceeding was not extended by her administrative appeal of (the) determination" to terminate her probationary employment]; Matter of Triana v Board of Educ. of City School Dist. of City of N.Y., 47 AD3d 554, 557 [1st Dept 2008] ["The law is well established that a decision to terminate the employment of a probationary teacher is final and binding on the date the termination becomes effective, and this is true even in circumstances where administrative review is available"]).

Petitioner's claim that the termination of her probationary employment was invalid because she was, in fact, a tenured employee is also without merit, since it is undisputed that the instant CPLR article 78 proceeding was not brought within four months of the letter advising petitioner of the termination of her probationary employment. The Court finds no distinction in the time to bring the Article 78 proceeding based on whether the petitioner is a probationary or tenured employee (see Matter of Lipton v New York City Bd. of Educ., 284 AD2d 140, 140-141 [1st Dept 2001]).

In the instant matter, petitioner was notified, by letter dated June 25, 2008, that in accordance with Section 2573 Subdivision 1 of the Education Law, the DOE was denying her certification of completion of probation and that her services would terminate as of August 27, 2008. Therefore petitioner was aggrieved and her cause of action to challenge her probationary termination and seek reinstatement and/or back pay accrued on August 27, 2008. Since the instant proceeding was not commenced until February 5, 2010, eighteen months after the termination of her probationary employment, petitioner's attempt to challenge her termination is barred by the four

month statute of limitations applicable to Article 78 proceedings. See CPLR § 217.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied and it is further

ORDERED and ADJUDGED that the cross motion is granted and the proceeding

is dismissed.

FILED

APR 25 2012

Dated: 4/23/12

ENTER: *Donna M. Mills*
CLERK OF THE COURT

Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.