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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: PETER H. MOULTON Justice

PART 40B

Index Number : 101682/2012
SCHEIN, KAREN
vs.
NYC DEPT. OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is ~~for~~ for is decided per attached

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

Dated: 9/24/12

PETER H. MOULTON, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 40 B

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In the Matter of the Application of

KAREN SCHEIN,

Petitioner,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION and THE CITY OF NEW YORK,

Respondents.

Index No.: 101682/12

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PETER H. MOULTON, J.S.C.:

Petitioner commenced this proceeding on February 15, 2012 to vacate the decisions by the New York City Department of Education ("DOE") awarding her an unsatisfactory rating ("U Rating") for the 2010-2011 school year and terminating her from probationary employment as a English Language Arts teacher. Petitioner seeks reinstatement with back pay, and to amend the U Rating in favor of a satisfactory rating.

Respondents cross-move to dismiss the petition (1) as time-barred, concerning petitioner's termination, (2) for failure to state a cause of action, and (3) because the City of New York is as an improper party.

BACKGROUND

Petitioner was appointed by DOE in September of 2009, subject to a three-year probation period scheduled to expire in September of 2012. During the 2010-2011 school year, petitioner had

four classroom observations, all made by the school's principal, Grismaldy Laboy-Wilson (the "Principal"). Two observations were rated as unsatisfactory and two were rated marginally satisfactory. On June 22, 2011, at her annual performance review, petitioner received an overall U Rating for the year, comprised of individual U Ratings in 17 of 23 categories. Petitioner complains that her performance review was missing a page containing vital information regarding her appeal rights, in violation of DOE procedures.

On July 1, 2011, petitioner received a letter from the Superintendent, dated June 30, 2011. That letter notified her of the U Rating and that the Superintendent "will review and consider whether your services as a probationer be discontinued as of the close of business August 1, 2011." It also provided petitioner with the opportunity to respond, which she did.

By letter dated August 1, 2011, DOE maintains that petitioner was notified that her probationary service was terminated, effective August 1, 2011. Petitioner claims that she did not get this letter until October 17, 2011, and submits a copy of the letter and a copy of the certified mailing, reflecting the date of October 15, 2011.

PETITIONER'S TERMINATION

Petitioner argues that her challenge to her termination is not time-barred because she did not receive the August 1, 2011 letter until October 17, 2011. She also notes that the letter "reaffirms the discontinuance, but there is no evidence of an action of discontinuance." She concludes that her effective date of termination is November 17, 2011, in light of Education Law § 3019-a's requirement of written notice to a probationary teacher of "at least 30 days prior to the effective date of termination."

Respondents maintain petitioner's challenge to her termination is time-barred in light of the August 1, 2011 letter. In their reply memorandum, respondents argue, for the first time, that even if petitioner received the termination letter in mid-October, her failure to return to work in September, 2011 indicates that she knew that she was terminated in August, 2011.

Respondents further contend that petitioner confuses the four month statute of limitations with Education Law § 3019-a's requirement of a 30 day notice of termination, which does not extend the statute of limitations. Respondents concede however, that due to DOE's error, petitioner is entitled to 60 days' back pay for DOE's failure to comply with Education Law § 2573 (1) (a)'s notice requirement.[1] DOE has represented in its papers that it has "already agreed to pay her for the days of back pay due to her."

Petitioner's challenge to the decision to terminate her is time-barred. An Article 78 proceeding against a public body may be commenced when a matter has been finally determined (*see* CPLR 7801 [1]). CPLR 217 (1) provides that an Article 78 proceeding must be commenced within four months of the final determination (*see Matter of Carter v State of N. Y., Exec. Dept. Div. of Parole*, 95 NY2d 267 [2000]). An agency determination becomes final and binding when petitioner has notice of a decision, which aggrieves the petitioner (*id.*).

The evidence demonstrates that petitioner did not receive the August 1, 2011 letter until mid-

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[1]Education Law § 2573 (1) (a) provides that persons not recommended for tenure shall be so notified by the Superintendent in writing not later than sixty days immediately preceding the expiration of his or her probationary period. Education Law § 3019-a mandates that schools which desire to terminate the services of a probationary teacher shall give written notice to the teacher at least thirty days prior to the effective date of such termination. Thus, whenever a probationary teacher's services are discontinued, whether by denial of tenure at the end of the probationary period or by termination of services before the end of the probationary period, the teacher has a right to 30 or 60 day notice (*see Matter of Tucker v. Board of Educ. Community School Dist. No. 10*, 82 NY2d 274, 278 [1993]).

October. However, petitioner acknowledges receipt, on July 1, 2011, of a letter from the Superintendent, dated June 30, 2011, providing that the Superintendent "will review and consider whether your services as a probationer be discontinued as of the close of business August 1, 2011." Petitioner does not state that she returned to work in early September, 2011 and provides no explanation for her failure to return, which would not be attributable to her knowledge of termination (such as, a prolonged medical illness). Therefore, the evidence demonstrates that petitioner knew or at least believed that she was terminated prior to the start of the new school year.

The failure to provide a 30 day notice under Education Law § 3019-a or, a 60 day notice under Education Law § 2573 (1) (a), has no bearing on whether the challenge is time-barred (*see Matter of Tucker v. Board of Educ. Community School Dist. No. 10*, 82 NY2d 274, 278 [1993] [neither Education Law § 2573 (1) (a) nor Education Law § 3019-a specify a remedy for violation of the notice requirements; however, it has been consistently held that the remedy is that teachers are awarded one day's pay for each day the notice was late]; *Khan v. New York City Dept. of Educ.*, 79 AD3d 521, 522 [1st Dept 2010] [although the notice of termination was procedurally defective for failure to provide 60 days' prior notice of discontinuance, as required by Education Law § 2573 (1) (a), that defect does not invalidate the discontinuance or render the statute of limitations inapplicable; it entitles a teacher to additional back pay]).[2]

As this proceeding was not commenced until February 15, 2012, more than four months after the beginning of the new school year--when petitioner knew or at least believed that she was terminated--her challenge to her termination is time-barred.

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[2] The teacher is entitled to back pay, with interest (*see Brunecz v City of Dunkirk Bd. Of Educ.*, 23 AD 3d 1126, 1128 [4th Dept. 2005]).

Even if her challenge was not time-barred, petitioner has not demonstrated that the decision to terminate her was made in "bad faith" or for "a constitutionally impermissible purpose or in violation of statutory proscription" the requisite showing for a probationary employee to prevail (*see Matter of Kaufman v Anker*, 42 NY2d 835 [1977]; *Matter of Weintraub v Board of Educ. of City School Dist. of City of N.Y.*, 298 AD2d 595 [1st Dept 2002]).

Petitioner claims that bad faith is evidenced because (a) two observations were conducted within the first two months of the school year, (b) all observations were performed by the Principal, when DOE procedures "recommended" that the observations include at least two periods by the Assistant Principal, in addition to the Principal's observation, (c) the Principal's wilful omission of a page of petitioner's performance review, (d) the Principal's misleading conversations with petitioner on June 17, 2011, discussing plans for the 2011-2012 school year thereby delaying petitioner's job search, (e) DOE's failure to provide petitioner with support to correct her shortcomings, as required by DOE procedures[3] and (f) DOE's failure, in violation of DOE procedures, to provide petitioner with written notice warning her that failure to improve might result in assessment of a U Rating.

Petitioner has not met her burden to demonstrate bad faith. The timing of the two observations early in the school year, the fact that all four observations were performed by the Principal, and the failure to provide notice of the potential U Rating all raise concern. However, these facts fall short of establishing bad faith. Further, petitioner's assumption that the Principal

[3]Petitioner points out that the although the Principal created a "Log of Assistance" delineating the assistance offered to petitioner, the Principal scheduled meetings during times when petitioner had to teach. Petitioner also complains that two support teachers assigned to her did not have certain necessary expertise.

intentionally omitted a page from her performance review is unsupported. Even if June 17, 2011 conversation was misleading, there is no reasonable inference that the Principal intended to mislead petitioner.[4] Moreover, although petitioner questions the quality of her support, she was in fact provided with several avenues of support. Accordingly, none of these contentions separately, or taken together, amount to a showing of bad faith.

PETITIONER'S U RATING

Unlike a probationary teacher's challenge to a termination, which requires a demonstration of bad faith or some other constitutionally impermissible purpose, a challenge to a U Rating requires a showing that the determination was arbitrary and capricious or without a rational basis (*see* CPLR 7803 [3]; *Matter of Hazeltine v City of New York*, 89 AD3d 613 [1st Dept 2011]; *Black v New York City Dept. of Educ.*, 62 AD3d 468 [1st Dept 2009]; *see generally Matter of Arrocha v Board of Education of City of N.Y.*, 93 NY2d 361, 363-364 [1999]). "'[A] court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion'" (*Matter of Arrocha*, 93 NY2d at 363 [emphasis in original; internal citations omitted]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

As explicitly conceded by respondents, the petition is not time-barred to the extent that it seeks review of petitioner's U Rating. A determination that a petitioner's teaching performance was unsatisfactory does not become final and binding until the Chancellor has denied the appeal (*see e.g.*,

[4]Petitioner also received the letter dated June 30, 2011, clearing up any mis-impression.

Matter of Hazeltine v City of New York, 89 AD3d 613, *supra*; *Matter of Andersen v Klein*, 50 AD3d 296 [1st Dept 2008]).

In addition to petitioner's previously discussed complaints, petitioner maintains that DOE's decision to give her a U Rating was arbitrary and capricious because the Principal arbitrarily checked off seventeen boxes with individual U Ratings, unsupported by documentary proof. Further, she contends that the individual U Ratings were contradicted, or undermined, by statements elsewhere in the observation reports (*see* pages 9-15 of the Verified Petition) or by other evidence favorable to petitioner. Petitioner's contentions may support a finding that the U Rating was arbitrary and capricious (*see e.g.*, *Matter of Kolmel v City of New York*, 88 AD3d 527 [1st Dept 2011] [U Rating vacated where, among other things, the principal who made the determination did not observe the teacher during either of his final two years, in violation of DOE's rules requiring at least one observation by the principal, and where the principal awarded unsatisfactory rankings in every category annual report, even where unsupported or contradicted by other evidence in the report]).

Respondents note in a footnote in their memorandum of law that the Chancellor designated a committee to hear and review the termination and the U Rating. According to respondents, a hearing was held, at which petitioner's representative was permitted to present evidence. The decisions were affirmed.

The court cannot review the issue of the U Rating without a complete record and further briefs. Even though the committee decision is advisory and the Chancellor does not have to follow the recommendations of the hearing committee (*see Matter of Kaufman v Anker*, 42 NY2d 835, *supra*), the court must first know what evidence was submitted to the committee, and considered by

the Chancellor, before it renders any decision.[5]

DISMISSAL OF RESPONDENT CITY OF NEW YORK

Petitioner states that she brought this proceeding against the City of New York because the City is listed as her employer on her pay stubs and W-2 statements. While petitioner's actions reflect her exercise of good caution, she only challenges DOE's determinations. The City is a separate entity from DOE (*see Perez v City of N.Y.*, 41 AD3d 378 [1st Dept 2007]). DOE is petitioner's employer (*see* Education Law § 2590-g [2]). Accordingly, the City is not a proper party.

It is hereby

ORDERED that the cross motion is granted as to dismissal of petitioner's challenge to her termination, and as to dismissal of the City of New York as a party, and is held in abeyance with respect to petitioner's challenge to the U Rating; and it is further

ADJUDGED that the petition is severed, denied and dismissed with respect petitioner's challenge to her termination and as against respondent City of New York; and it is further

ORDERED that the proceeding is held in abeyance with respect to petitioner's challenge to the U Rating, pending further submissions; and it is further

ORDERED that on or before October 22, 2012, the parties should submit a complete record and further briefs to the court regarding petitioner's challenge to the U Rating; and it is further

ORDERED that upon the representation of New York City Department of Education that petitioner is entitled to receive pay back and that respondent will make such payment, to the extent

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[5]Respondents did not move to dismiss petitioner's challenge to the U Rating as premature, and may not do so now.

it has not already done so, respondent is directed to pay petitioner back pay, with interest, within 30 days of receipt of a copy of this Decision, Order and Judgment.

This Constitutes the Decision, Order and Judgment of the Court.

DATED: September 24, 2012

ENTER:

J.S.C.

HON. PETER H. MOULTON

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).