To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

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In the Matter of the Application of
MAURA ANN BROWN,

Petitioner,

-against -

BOARD OF EDUCATION OF THE MAHOPAC CENTRAL SCHOOL DISTRICT and THOMAS MANKO, SUPERINTENDENT,

Respondents.

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DECISION & ORDER

Index No. 523-2011
SEQ 2

LUBELL, J.

The following papers were considered in connection with this motion by petitioner for an Order (i) striking and dismissing as a matter of law the letter, dated June 21, 2012, from counsel to the respondents, Mahopac Central School District and Superintendent Thomas Manko, purporting to provide respondents' "calculation" of petitioner's Education Law §3012(3) probationary period end date, upon the basis that the calculation was undertaken in a manner that is contrary to the legal conclusions and express directives set forth in this Court's Amended Decision & Order dated March 19, 2012 (the "Decision and Order"); (ii) striking and dismissing as a matter of law the respondents' Letter upon the further basis that it is unsworn, factually unsupported, not admissible as evidence, and transparently insufficient to satisfy the express directives set forth in the Decision and Order or to establish a triable issue of fact, sufficient to avoid a summary determination in petitioner's favor on her claim of tenure by estoppel; (iii) granting petitioner summary determination on her claim for tenure by estoppel and enforcement of the June 2010 Side Letter Agreement, upon the pleadings, papers and admissions before the Court, and upon the material facts and law of this case as established by the Decision and Order; (iv) declaring and adjudging that petitioner acquired tenure by estoppel prior to the respondents' termination of her employment on January 21, 2011; (v) reinstating petitioner to her position as a tenured Chemistry teacher with the Mahopac Central School District, effective as of January 21, 2011, together

with an award of back-pay, reimbursement of all employment benefits, including but not limited to medical, retirement and pension contributions, and other compensatory damages, in the amount to be determined at a damages hearing before this Court pursuant to CPLR §§410 and 7804(h); (vi) setting a date for such a hearing before this Court for the limited purpose of fixing damages; (vii) declaring and adjudging that respondents breached the terms of the June 2010 Settlement Agreement between the District, the Mahopac Teachers' Association and petitioner and which the Court has previously determined is fully enforceable as against the District and in favor of petitioner, and directing the immediate expungement of the negative evaluations, teacher improvement plans, counseling memos, reports, letters, and any other records from petitioner's employment file commencing with the October 2009 Pease Evaluation and any subsequent negative record; (viii) severing the balance of the claims and issues raised by petitioner's Amended and Supplemental Verified Petition, dated March 28, 2011, pursuant to CPLR §407, to the extent, if any, that the full relief requested herein is not granted to petitioner; (ix) awarding petitioner the costs and expenses of this motion, including reasonable attorneys' fees, and such other and further relief as this Court may deem just and proper:

PAPERS	**NUMBERED**
Motion/Affirmation/Exhibits A-C (Brown)	1
Affirmation in Opposition/Exhibits A-D (Manko)	2
Reply Affirmation (Brown)	3

This is a CPLR Article 78 proceeding through which petitioner seeks, among other things, reinstatement to her teaching position with back pay and compensatory damages, the enforcement of certain terms of a settlement agreement between the various parties herein (including the expungement of certain negative observation reports contained in her personnel file), and the granting of tenure.

By Amended Decision & Order of March 19, 2012, (the "Decision & Order) wherein the Court sets forth the extensive factual background of this proceeding, the Court ruled as follows:

> At the outset, the Court finds that respondents are bound by the originally established and thereafter repeatedly reasserted June 30, 2010 probationary period end-date. It is from this date that any properly attributed extension of the probationary period must be calculated.
>
> . . .

The Court further rules that the extension of Petitioner's probationary period may be extended but only to the extent permitted under Maras v. Bd. of Educ. of City School Dist. of City of Schenectady (275 AD2d 551, 552 [3d Dept., 2000]) wherein the Court determined that it was error to have extended petitioner's probationary period beyond the period of time that petitioner was absent from school in excess of her contractually allotted sick days. More specifically, the Court ruled:

> [There is no authority under Education Law §2509(7)] . . . to exclude those absences provided for by contract, i.e., petitioner's 20 days of sick leave, five days of personal time and five days of medical leave that fell on school-wide vacation days. Indeed, Education Law §2509 (7) expressly prohibits extension of an employee's probationary period by adding thereto contractually bargained for sick or personal leave days or school-wide vacation days.

(Maras v. Bd. of Educ. of City School Dist. of City of Schenectady, supra. at 552).

With the probationary end-date and manner in which to calculate an extension thereof now established, and upon consideration of the fact that Respondents have never **administratively calculated** Petitioner's probationary end date as may have been extended by her leaves of absence or otherwise, the Court finds it necessary to **remand the matter to Respondents for such a calculation as may properly be supported by its attendance and leave records.** [Emphasis Added].

Upon the rendering of a calculation as herein directed, the answer to whether Petitioner has acquired tenure by estoppel

under New York law, thus entitling her to reinstatement with back pay and associated benefits and relief, as of the date of her termination, January 21, 2011, can be resolved seemingly without further Court intervention and without prejudice to the parties' rights to judicial review, be it appellate or otherwise.

In the event that Respondents reach the determination that Petitioner was terminated before the expiration of her probationary period as calculated in accord with this Decision & Order (see, supra), the Court further finds that the proceeding is not otherwise ripe for judicial review since, admittedly, Respondent Board of Education did not act upon Respondent Superintendent's recommendation to deny tenure (Fusco v. Bd. of Educ. of E. Quogue Union Free Sch. Dist., 185 A.D.2d 887, 887-88, 586 N.Y.S.2d 1012 [2d Dept., 1992]). "[R]ipeness is a matter pertaining to subject matter jurisdiction which may be raised at any time, including *sua sponte*" (Agoglia v. Benepe, 84 A.D.3d 1072, 1076, 924 N.Y.S.2d 428, 432 [2d Dept., 2011]).

Finally, the Court rules in Petitioner's favor on the issue as to whether the June 2010 written Settlement Agreement executed by Petitioner, the Mahopac Teachers Association ("MTA") and Respondent Thomas Manko, as Superintendent, is enforceable as against the District to the extent that it deals with issues directly related to Petitioner individually (see, Board of Education for the City School District of Buffalo v. Buffalo Teachers Federation, 89 N.Y.2d 370, 375, 675 N.E.2d 1202 [1996]), but not to the extent that it relates to matters requiring funding or an amendment to the collective bargaining agreement (see, Patrolmen's Benev. Ass'n of City of Long Beach, Inc. v. City of Long Beach, 57 A.D.3d 499, 868 N.Y.S.2d 306 [2d Dept., 2008]); Mayor of the City of New York v. Council of the City of New York, 9 N.Y.3d 23, 874 N.E.2d 706 [2007]).

Having considered and found "all other arguments raised in regard to these issues, procedural or otherwise, [without] . . .

merit . . . ", the Court

> ORDERED, that, within fifteen days of service of a copy of this Decision & Order with Notice of Entry, Respondents shall perform a calculation of Petitioner's Education Law §3012(3) probationary period end date as calculated in accord with this Decision & Order; and, it is further
>
> ORDERED, that, if upon said calculation, Petitioner's section 3012 probationary period end date falls on a date before January 21, 2011, then Petitioner may submit judgment accordingly, on notice; and, it is further
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> ORDERED, that, if upon said calculation, Petitioner's section 3012 probationary period end date goes beyond January 21, 2011, the matter is hereby remitted for further proceedings before Respondents in accord with this Decision & Order.

The Decision & Order could not have been more clear. It expressly remitted the matter to respondents for an administrative recalculation in accord with the Court's Decision & Order as may properly be supported by respondent's attendance and leave records, with the expectation that such a roadmap would necessarily answer the question as to whether petitioner had acquired tenure by estoppel or not, all without further Court intervention. The time frame directed for the administrative recalculation was "within fifteen days of service of a copy of [the] Decision & Order with Notice of Entry." Rather than performing the recalculation as directed, respondents filed an appeal, which was dismissed upon petitioner's motion on June 5, 2012.

Now, some seven months after this Court's March 19, 2012, Decision & Order, respondents have yet to address the issue remitted to them, i.e., the administrative recalculation of petitioner's Education Law §3012(3) probationary period end date in accord with the Court's Decision & Order including the application and the Court's interpretation of Maras v. Bd. of Educ. of City School Dist. of City of Schenectady, supra). Instead, on or about June 21, 2012, the Court was presented with a letter wherein a calculation is made by respondents' counsel without any underlying documentary support.

Counsel's letter of June 21, 2012, is not a substitution for the administrative determination directed by the Court, nor will it be deemed its lawful or de facto equivalent.

As such, that aspect of petitioner's motion for an Order striking and dismissing said letter as a matter of law is granted. The Court did not direct such a letter, it is not a substitution for what the Court directed, and it is not within respondents' power to decide what is acceptable to the Court and what is not. The Court further notes that the submission is unsworn and factually unsupported.

However, given that the June 21, 2012, letter was issued reasonably soon after the Appellate Division's dismissal of respondents' appeal, and given the procedural posture of this proceeding and the underlying need for an administrative determination as earlier directed by the Court, the Court denies that aspect of petitioner's motion seeking a summary determination on her claim for tenure by estoppel and related relief. Instead, the Court will treat the application as one seeking to compel compliance with the Court's Decision & Order of March 19, 2012, which application is granted as herein below directed.

Respondents' application for severance pursuant to CPLR §407 of that aspect of the petition resulting in that portion of the Court's Decision & Order addressing the June 2010 Settlement Agreement between the District, the Mahopac Teachers' Association and petitioner, and for the entry of judgment thereon declaring and adjudging that respondents breached the terms of the June 2012 Settlement Agreement between the District, the Mahopac Teachers' Association and petitioner, and directing the immediate expungement of the negative evaluations, teacher improvement plans, counseling memos, reports, letters, and any other records from petitioner's employment file commencing with the October 2009 Pease Evaluation and any subsequent negative record, is granted in the Court's discretion.

Among other things, no valid purpose would be served in further delaying the entry of judgment thereon, and any further delay may, in all likelihood, prejudice petitioner.

All remaining aspects of the motion are denied, without prejudice to reapplication upon the administrative recalculation so directed.

In that latter regard, the Court notes that the administrative recalculation must be performed in accord with the Court's March 19, 2012, Decision & Order including the Court's application and interpretation of Maras v. Bd. of Educ. of City School Dist. of City of Schenectady, supra) and *without* any reargument thereof. The Court has already rendered its determination, the appeal of which has been dismissed and reargument of which has not been timely sought.

Respondents' finalized administrative recalculation should be served upon petitioner for whatever further relief she may deem advisable. It should not be directly submitted to the Court except perhaps as proof of respondents timely compliance with the Court's directive.

Based upon the forgoing, it is hereby

ORDERED, that, the June 21, 2012, letter is hereby stricken; and, it is further

ORDERED, that, the matter is (again) remitted to respondents for the recalculation directed in the Court's Amended Decision & Order dated March 19, 2012, which shall be performed and provided to petitioner within thirty days hereof; and, it is further

ORDERED, that, petitioner's claim with respect to the June 2010 Settlement Agreement between the District, the Mahopac Teachers' Association and petitioner is hereby severed from this action pursuant to CPLR §407 and, with respect thereto, the Court declares and adjudges that respondents breached the terms of the June 2010 Settlement Agreement between the District, the Mahopac Teachers' Association and petitioner and, as such, the Court hereby directs the immediate expungement of the negative evaluations, teacher improvement plans, counseling memos, reports, letters, and any other records from petitioner's employment file commencing with the October 2009 Pease Evaluation and any subsequent negative record derrived therefrom, and petitioner may submit judgment thereon, on notice to respondents; and, it is further

ORDERED, that, to any further extent, the motion is denied.

Dated: Carmel, New York
October 25, 2012

S/ _____
HON. LEWIS J. LUBELL, J.S.C.

TO: Susan E. Galvao, Esq.
Bleakley Platt & Schmidt, LLP
Attorney for the Petitioner
1 North Lexington Avenue
White Plains, New York 10601

Stephen J. Brown, Esq.
Veneruso, Curto, Schwartz & Curto, LLP
Attorney for the Petitioner
The Hudson Valley Bank Bldg.
35 East Grassy Sprain Road - Suite 400
Yonkers, New York 10710

Gus Mountanos, Esq.
Law Offices of Ingerman Smith, LLP
Attorney for Respondents
150 Motor Parkway - Suite 400
Hauppauge, New York 11788