Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **ALLAN B. WEISS** IA PART_2_

In the Matter of the Application of

ELLEN ZAKIN

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION and JUDY LYNN MITTLER

Respondents.

Index Number: 25632/12

Motion Date: 3/8/13

Motion Seq. No. 1

The following papers numbered 1 to 10 read on this Article 78 proceeding by petitioner Ellen Zakin for (1) a judgment directing respondents to restore her to her probationary service. Respondents New York City Department of Education (DOE) and Judy Lynn Miller cross move for an order dismissing the petition on the grounds of statute of limitation, failure to exhaust contractual remedies, and failure to state a cause of action, pursuant to CPLR 3211(a)(5) (7), and 7804(f).

	Papers Numbered
Notice of Petition-Verified Petition-Exhibits-.....	1-4
Notice of Cross Motion-Memorandum of Law.....	5-6
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Memorandum of Law.....	
Memorandum of Law.....	
Reply Memorandum of Law.....	

Upon the foregoing papers the motion and cross motion are determined as follows:

Petitioner Ellen Zakin, a female over the age of 40, commenced the within Article 78 proceeding on December 28, 2012, and seeks a judgment directing respondents to restore her to her probationary service. Petition alleges that respondents' determination to discontinue her status as a probationary teacher was arbitrary and capricious, an abuse of discretion, not supported by substantial evidence and made in bad faith, and based upon impermissible reasons. It is asserted that respondents determination to issue an unsatisfactory rating and to terminate her employment was made in an arbitrary and capricious manner that can be inferred from the pretextual nature of her evaluations, from a discriminatory animus against petitioner, and by respondents' violations of their own policies and procedures.

Respondents have not served an answer and have cross moved to dismiss the petition on the grounds of statute of limitations, failure to state a claim and failure to exhaust contractual remedies.

Background / Petition:

Petitioner was employed with respondent DOE in various teaching postions since 1994. At all times she has been a probationary teacher, as she has not completed her masters degree, passed the special education exam, or been granted tenure. In September 2011, petitioner was appointed to a probationary position at Intermediate School 125 (I.S. 125) where she taught fifth and sixth grade special education students.

On September 21, 2011, Ms. Zakin was observed teaching an independent reading lesson, and received a satisfactory rating from the assistant principal. The post-observation report of September 23, 2011, is annexed to the report and contains three recommendations for improving Zakin's lessons.

On October 31, 2011, Principal Judy Lynn Mittler, co-respondent herein, observed Ms. Zakin teach a science lesson and conducted a post observation meeting. Ms. Zakin received a rating of "N", needs improvement. The observation report dated November 3, 2011, annexed as an exhibit to the petition contains five specific recommendations.

Ms. Zakin administered the State Language Arts Exam to her students from April 17 through April 19, 2012. She alleges that on April 19, 2012, she was called to Ms. Mittler's office and accused of impermissibly reading passages of the exam to the student test takers. Ms. Zakin alleges that on each of the test days she read the test instructions the students, per the test administration handbook and that on April 18, she also read the listening portion of the test to the students, per the test administration handbook. She alleges that she explained

to Ms. Mittler that she did not improperly read any portion of the exam; that on April 18 she had read a story pertaining to the listening portion of the exam, as she had been instructed to do; and that the accusation against her stemmed from confusion regarding the date the listening portion of the exam was read to the students. She alleges that respondent Mittler was not receptive to her explanation. Petitioner further alleges that although the exam was proctored by two teachers, herself and Ms. Sugarman, a female under the age of 30, Ms. Sugarman was not accused of misconduct or investigated.

On April 30, 2012, petitioner was observed by Ms. Mittler while teaching a social studies lesson, and received an unsatisfactory (U) rating. The observation report attached as an exhibit to the petition sets forth seven specific recommendations and directed Ms. Zakin to meet weekly with the assistant principal for professional development. Petitioner alleges that she was not provided with a pre-observation conference as required by the School Based Option, an addendum to the teachers' collective bargaining agreement, and Executive Memorandum #80. She alleges that Mittler "falsely" claimed that she had not received Zakin's notice electing to receive pre-observation conferences prior to formal observations. She also claims that the April 23, 2012 observation did not constitute a formal observation under Article 8(J)(1) of the collective bargaining agreement.

Petitioner alleges that she received her first performance review, with an unsatisfactory rating on June 15, 2012. Although the petition recites that this review is annexed as Exhibit G, said performance review is not included in any of the exhibits attached to the petition.

Petitioner alleges that she met with her union representative, an assistant principal and Ms. Mittler on June 27, 2012, the last day of school, to discuss the administration of the April 2012 State exam. She stated that Ms. Mittler and the assistant principal were not receptive to her explanation of what occurred on April 19, 2012 while she was proctoring the exam.

Petitioner alleges that on July 11, 2012 she received a letter from Ms. Mittler stating that she had concluded that Zakin had impermissibly read exam passages to the students, and that a copy of the letter would be placed in her file. A copy of the letter is annexed to the petition. Ms. Mittler, in said letter summarized the meeting held on June 27, 2012, and stated that based upon interviews she conducted with other staff members and the students, Ms. Zakin's responses were not credible. She concluded that Ms. Zakin "had read the passages to the fifteen students and had instructed the relieving proctor to continue to read the passages which is a misadministration of the test". She further stated that as a result, the fifteen students did not receive a grade on the State exam, and that it negatively affected their promotion and the school's annual yearly progress grade.

Petitioner also alleges that she received an "amended performance review" along with the July 11, 2012 letter, stating that her performance was unsatisfactory and recommended a discontinuance of her probationary service. Said "amended performance review" is annexed to the petition and is entitled "ANNUAL PROFESSIONAL PERFORMANCE REVIEW AND REPORT OF PROBATIONARY SERVICE OF PEDAGOGICAL EMPLOYEE". Said report, dated July 17, 2012 and executed by Ms. Mittler and Madeline Chan, Superintendent, rated Ms. Zakin's professional attitude and professional growth as unsatisfactory; listed "7/11/12 letter of prof misconduct" under additional comments; and "misadministration of ELA State exam 7/11/12 letter"; listed as documentation the observations of September 21, 2011, October 20, 2011, and April 23, 2012 with the corresponding ratings of "S", "N" and "U" and the July 11, 2012 letter of misconduct; and recommended discontinuance of Zakin's probationary service.

Petitioner alleges that the July 17, 2012 review was in violation of the her teaching contract and the SBO; and further alleges that because it was issued after the school year she was unable to receive union assistance with the matter. Petitioner alleges that on August 7, 2012 she received a letter from Superintendent Chan, indicating that she would review all documents in connection with the recommendation to discontinue Zakin's probationary. service. On August 14, 2012 Zakin submitted a response, in which she rebutting Mittler's letter of July 11, 2012, and asserted that she did not read any passages of the State exam to the students on April 19, 2012.

On August 30, 2012, petitioner received a letter from Chan stating that her probatinary service had been discontinued as of that date. Zakin filed an appeal with the DOE on September 14, 2012, and alleges that at this hearing she learned that witnesses had made statements against her during the course of the investigation. She was not provided with the names or statements of the witnesses, or an opportunity to question them at that time. Petitioner alleges that approximately two weeks later she received a letter from Chan who stated that she had received an email from the DOE stating that it had confirmed her decision to discontinue Zakin's probationary service. Petitioner asserts she has not received a determination from the DOE.

Legal Standard:

It is well established that on a motion to dismiss pursuant to CPLR 3211(a)(7), "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court's "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest

any cause of action cognizable at law, a motion for dismissal will fail" (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; *Tom Winter Assoc., Inc. v Sawyer,* 72 AD3d 803 [2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc*., 70 AD3d 928 [2nd Dept 2010]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703 [2nd Dept 2010]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1st Dept 1985], *affirmed* 66 NY2d 946 [1985]).

"When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see*, *id.*; *accord*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)" (*Gershon v Goldberg*, 30 AD3d 372 [2nd Dept 2006], *quoting Doria v Masucci*, 230 AD2d 764,765 [2d Dept 2006]; *lv. to appeal denied* 89 NY2d 811 [1997]).

A probationary teacher who challenges a termination is required to demonstrate that the decision to discontinue her probationary service was made in "bad faith" or for a "constitutionally impermissible purpose or in violation of statutory prescription" (*see Frasier v Bd. of Educ.,* 71 NY2d 763[1988]; *Venes v Community Sch. Board*, 43 NY2d 520, 525 [1978]; *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]).

A challenge to a U rating requires a showing that the determination was arbitrary or 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 the 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]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and without regard to the facts." (*Matter of Pell v Board of Education,* 34 NY2d 222, 231 [1974]).

Discussion:

That branch of respondents' cross motion which seeks to dismiss the within proceeding on the grounds that it is untimely, is denied. The "Web Civil Supreme" website relied upon by respondents is the official site of the County Clerk's file, and contains the following disclaimer : "Because transcription or other errors may arise when compiling the information provided on this website, users should verify the accuracy of information by consulting original court records or sources. The Unified Court System is not responsible for consequential use of website errors." Respondents do not claim to have verified the accuracy of the information contained in the website by consulting the County Clerk's file.

The affidavits and documentary evidence submitted herein, as well as an examination of the official file maintained by the County Clerk, establishes that petitioner Ellen Zakin commenced this Article 78 proceeding by filing the notice of petition, the petition and supporting documents and a request for judicial intervention with the Clerk of the Court on December 28, 2012, pursuant to CPLR 304 and 2102. At the time the petition was filed and the appropriate fees were paid, the within proceeding was assigned Index Number 35632/2012 (*see* CPLR 306-a). As petitioner Ellen Zakin was notified that her employment by the DOE was terminated on August 30, 2012, the within proceeding was timely commenced on December 28, 2012 (*see* CPLR 217).

Petitioner's allegations are insufficient to establish that the U-rating and termination of her probationary status were the product of a constitutionally impermissible purpose or in violation of statute. Although petitioner claims the respondents' actions were arbitrary and capricious in that they were motivated by a discriminatory animus and for pretextual reasons she does not allege any claims under the State or City Human Rights Law. In addition, petitioner has failed to plead any facts tending to demonstrate that respondents' actions were the result of or caused by age discrimination. Consequently, there is nothing in the petition which suggests that petitioner's U-rating, the subsequent termination of her employment, or any action taken by respondents occurred under circumstances giving rise to an inference of discrimination. Furthermore, although petitioner alleges, upon information and belief, that Ms. Sugarman, a younger teacher, who also proctored the State ELA exam was not accused of misconduct or investigated, she does not allege that Ms. Sugarman improperly read any portions of the exam to the students, or that she also received a U-rating. Nor does she allege any facts suggesting the respondents were motivated by discriminatory animus.

Petitioner has failed to show that the U-rating was arbitrary and capricious, or made in bad faith. The detailed observations in the reports prepared by the principal, describing petitioner's poor performance in the engagement of students, instruction, and lesson planning,

as well as the misconduct letter, provided a rational basis for the rating (*see Matter of Cohn v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 102 AD3d 586, 586-587 [1st Dept 2013]; *Murnane v Department of Educ. of the City of N.Y.*, 82 AD3d 576 [1st Dept 2011]; *Batyreva v New York City Dept. of Educ.*, 50 AD3d 283 [1st Dept 2008]). While petitioner complains that she did not receive a pre-observation conferences prior the April 2012 classroom observation, she has not demonstrated that the U-rating was made in violation of lawful procedure or any substantial right (*see Matter of Cohn v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 102 AD3d at 586-587 *;Matter of Brown v Board of Educ. of the City School Dist. of the City of N.Y.,* 89 AD3d 486 [1st Dept 2011]; *Matter of Munoz v Vega*, 303 AD2d 253, 254 [1st Dept 2003]; *compare Matter of Kolmel v City of New York*, 88 AD3d 527 [1st Dept 2011]).

With respect to petitioner's claim that respondents violated the ratings guidelines and Chancellor's Memoradum # 80, this court follows the general rule that judicial relief is not available, as these guidelines are not a rule or regulation guaranteeing a substantial right (*see Matter of Gumbs v Board of Educ. NYC Sch. Dist.*, 2013 NY Slip Op 31132 (U), NY Misc. LEXIS 2245 [Supreme Court, 2013]; *Applewhite v NYC Bd. of Educ.*, 2012 NY Slip Op 32182[U], 2012 N.Y. Misc. LEXIS 3995 [Supreme Ct, NY County 2012]; *see Matter of Cohn*, 102 AD3d 586 [1st Dept 3013]; *Brown v City of New York*, 2012 N.Y. Misc. LEXIS 2644, 2012 NY Slip Op 31472[U] [Supreme Court, NY County 2012]; *Richards v Board of Educ. of the City School Dist. of the City of NY*, 2012 N.Y. Misc. LEXIS 2644, 2012 NY Slip Op 31472[U] [Supreme Court , NY County 2012]; *Matter of Rodriguez v Board of Educ. of the City School Dist. of the City of NY*, [Supreme Court New York County, 2013].

Petitioner has also failed to demonstrate that the discontinuance of her probationary service was the product of "bad faith". Respondent's Mittler's determination that Ms. Zakin had failed to properly administer the State ELA exam to the fifteen students she proctored was based upon interviews she conducted with Ms. Zakin, other school employees and the student test-takers. Although Ms. Zakin disputes the respondents' findings in this regard, they are not subject to de novo review by this court.

Petitioner's allegations are insufficient to establish that the discontinuance of her probationary service was the result of " bad faith". The detailed observations made by Ms. Mittler in report following the April 30, 2012 observation described petitioner's poor performance in lesson planning and engaging the students, and provided a rational basis for the U-rating (*see Murnane v Department of Educ. of the City of New York*, 82 AD3d 576 [1 st Dept 2011]).

To the extent that Ms. Zakin alleges a violation of her contract, she has not stated a claim for breach of contract. Petitioner admittedly did not file a grievance with respect to her contractual rights. Although petitioner claims that she was unable to receive union assistance as the annual review was submitted after the school year had ended, it is noted that petitioner does not allege that the main union headquarters was closed during the summer months, or that a grievance could not have been filed prior to the commencement of this proceeding.

As regards petitioner's claims regarding the Chancellor's Committee review of her appeal, petitioner alleges that she was not allowed to confront witnesses who gave statements with respect to the allegation that she had improperly administered the State ELA exam. In essence, petitioner is claiming that the Chancellor's Committee should not have considered hearsay evidence. However, hearsay evidence is generally admissible at an administrative hearing, (*see Brown v Ristich*, 36 NY2d 183 [1975]; *Austin v Bd. of Education,* 280 AD2d 365 [1st Dept 2001]), and petitioner does not claim that such evidence is barred by any applicable rule or regulation. In addition, although it is alleged that the respondents failed to provide petitioner with certain documents in advance of said hearing, such a deficiency does not render the determination to terminate her probationary status arbitrary and capricious, as there was ample evidence to support her termination (*see Matter of Brown v Board of Educ. of the City School Dist. of the City of New York*, 89 AD3d 486 [1st Dept 2011]).

Conclusion:

In view of the foregoing respondents' cross motion to dismiss the petition is granted for the reasons stated above.

Dated: June 10 , 2013

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J.S.C.