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

PRESENT: BARBARA JAFFE J.S.C. Justice

PART 12

Yan Ping Xu

- v -

NYC Dept of Health

INDEX NO. 109534/08

MOTION DATE 1/16/13

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for vacate administrative determination

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	

transcript 1/16/13

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

PETITION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION, ORDER AND JUDGMENT.

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: 5/14/13

BARBARA JAFFE 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 : IAS PART 12

----------x

In the Matter of the Application of:
YAN PING XU,

Petitioner,

Index No. 109534/08

Argued: 1/16/13
Motion Seq. Nos.: 002, 003, 004

DECISION & JUDGMENT

For a Judgment pursuant to Article 78
of the Civil Practice Law and Rules

-against-

THE NEW YORK CITY DEPARTMENT OF HEALTH,

Respondent.

----------x

BARBARA JAFFE, JSC:

For petitioner:
Yan Ping Xu, self-represented
12 Mallar Avenue
Bay Shore, NY 11706
646-894-6974

For respondent:
Benjamin Welikson, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-788-8685

By amended verified petition dated March 23, 2012, petitioner brings this Article 78 proceeding seeking an order expunging her unsatisfactory performance evaluation, reinstating her employment and benefits, awarding her back-pay, compensatory damages, and attorney fees and costs, and granting her permission to file a late notice of claim. Respondent opposes.

By notice of motion dated June 5, 2012, petitioner moves pursuant to CPLR 2308 for an order compelling respondent to comply with the subpoena duces tecum served on it on April 5, 2011 and, pursuant to CPLR 5251 and Judiciary Law § 753, for an order holding it in contempt. Respondent opposes.

By notice of motion dated September 27, 2012, petitioner moves pursuant to CPLR 3211(b) and 7804 for an order striking certain paragraphs from respondent's answer, its affirmative defenses, exhibits J and K to respondents answer, and portions of the affidavits of Dr. Jane Zucker, Brenda McIntyre, and Angel Lapaz. Respondent opposes.

I. FACTUAL BACKGROUND

On June 4, 2007, petitioner was appointed as a City Research Scientist Level I for respondent, a non-competitive position, and assigned to the Bureau of Immunization (BOI). (Ver. Ans., Exh. L). Upon appointment, petitioner became a member of a union, the Civil Service Technical Guild, Local 375, AFSCME, AFL-CIO and District Council 37, AFSCME, AFL-CIO (union). (Ver. Pet.; Affidavit of Brenda McIntyre, dated Aug. 2, 2012 [McIntyre Affid.]).

The collective bargaining agreement (CBA) between petitioner's union and respondent provides for a multi-step grievance process, culminating in arbitration, and reflects that only non-competitive employees with at least one year in their title may grieve a disciplinary action they claim to have been wrongful. (Ver. Ans., Exh. N).

During her tenure, petitioner worked in a unit responsible for administering the federal Vaccines for Children (VFC) program, through which the Centers for Disease Control and Prevention (CDC) purchases vaccines from manufacturers at a discount and distributes them to health agencies, which in turn distribute them to health care providers. (Ver. Pet.; Ver. Ans.; Affidavit of Dennis King, dated July 13, 2012 [King Affid.]). Petitioner, responsible for data analysis and database management, was directly supervised by Dennis King, Deputy Director of the BOI. (Ver. Pet.; Ver. Ans.; King Affid.). King reported to Dr. Jane Zucker, Assistant Commissioner of the BOI. (Ver. Pet., Ver. Ans).

An Office of Training and Professional Development registration form, dated December 13, 2007, reflects that King referred petitioner for training courses in "Assertive Communication," "Business Writing," and "Presentation Skills." (Ver. Pet., Exh. V[8]).

On February 7, 2008, petitioner met with King who informed her that, pursuant to the integration of the VFC unit with another BOI unit, Michael Hansen, a City Research Scientist Level I who had worked in her position before, would be supervising her. (Ver. Pet.; Ver. Ans.). According to petitioner, she told King that her reassignment would "not solve the serious data problems that existed at VFC," and he thanked her for her "straight and honest opinion." (Ver. Pet.). She denies having refused to accept the reassignment unless he required her to do so. (*Id.*).

Sometime in early 2008, petitioner began to prepare a portion of the 2007 VFC Program Management Survey, a report of respondent's "immunization policies, program activities, and accountability measures" for the CDC's review. (Ver. Ans.). According to her, she then discovered that respondent had been reporting to the CDC an inaccurate number of health care providers enrolled in the program. (Ver. Pet.). More specifically, she claims to have discovered that BOI had not been requiring healthcare providers to complete annual recertifications, in contravention of the VFC Operations Guide. (*Id.*).

At a meeting with King on March 3, 2008, petitioner reported her findings and claimed that she could not complete her portion of the survey with the data provided. (*Id.*). The next day, she was instructed to use data from 2006 for the survey, and she refused to do so on the ground that it was incorrect for that year. (*Id.*). Respondent did not submit petitioner's findings to the CDC, choosing instead to submit 2006 data as an approximation of the 2007 data. (Ver. Pet.; King Affid.; Affidavit of Jane Zucker, dated Aug. 2, 2012 [Zucker Affid.]).

A second registration form, dated March 5, 2008, reflects that King referred petitioner for additional training courses in "Effective Email" and "Customer Service." (Ver. Pet., Exh. V[8]).

By letter of the same date and addressed to Brenda McIntyre, Director of Human Resources for respondent, King requested petitioner's termination, citing her poor communication and collaboration skills. (Ver. Pet., Exh. A-C; Ver. Ans., Exh. C). Respondent approved petitioner's termination, and by letter dated March 13, 2008, McIntyre informed petitioner of it. (Ver. Ans., Exh. F).

A memorandum dated March 10, 2008 sets forth respondent's termination policy. (*Id.*, Exh. O). When non-competitive employees are hired, "they are placed on probation for the period of time specified for their title and [CBA]. This may be 3 months, 6 months or (one) 1 year. Non-competitive employees who have not completed their probationary period do not have disciplinary rights and may be terminated without formal charges." (*Id.*). Petitioner's title is subject to a one-year probationary period. (*Id.*).

On March 14, 2008, King completed an evaluation of petitioner's performance, rating it "unsatisfactory" overall, "based on [her] poor communication skills and inability to work in a [collegial] manner on assignments as directed." (*Id.*, Exh. E). The same day, he met with petitioner, informed her that she was being terminated, and gave her a copy of McIntyre's letter and her 2007 evaluation. (Ver. Pet.; Ver. Ans.).

Sometime thereafter, King completed six "note[s] for the record" describing petitioner's behavior at supervisory meetings that had been held in the fall of 2007 and early winter of 2008, her failure to leave respondent's property the day she was terminated, and her unauthorized entry onto respondent's property after her termination. (*Id.*, Exh. B). The notes detailing the

supervisory meetings reflect that King repeatedly counseled petitioner regarding her communication skills, that petitioner disparaged Hansen's and Lapaz's work, and that she resisted working under Hansen's supervision, stating that she would do so only if King insisted. (*Id.*).

On April 28, 2008, petitioner submitted to the New York City Department of Investigation (DOI) a complaint reflecting that she was terminated because she accused her supervisors of reporting incorrect statistics to the CDC. (Ver. Pet.; Affidavit of Melissa Ballard, dated Aug. 2, 2012 [Ballard Affid.]). Sometime thereafter, DOI commenced an investigation of petitioner's complaint. (Ballard Affid.).

On May 19, 2008, petitioner emailed King a letter contesting her evaluation and termination, copying McIntyre, Zucker, respondent's Commissioner, and respondent's Deputy Commissioner. (Ver. Pet.). She wrote, in pertinent part, that she "never received any criticism about [her] performance until the last day of [her] employment," that she "was terminated without any warnings," and that her "dismissal happened just after [she] had refused to commit to unethical data." (Ver. Ans., Exh. R). On June 18, 2008, petitioner faxed the letter to McIntyre, noting that she had submitted the letter to her via email on May 19, 2008 but had not received a response. (*Id.*).

On October 9, 2008, petitioner's union filed a grievance on her behalf, challenging her termination and seeking her reinstatement. (*Id.*, Exh. S). On October 27, 2008, her grievance was denied on the ground that petitioner "was terminated during her probationary year and did not earn nor is entitled to any grievance rights." (*Id.*). On November 3, 2008, the union appealed, and on March 30, 2009, the appeal was denied for failure to state a grievable claim. (*Id.*). The

union did not proceed to arbitration thereafter. (Ver. Ans.).

In November 2010, DOI closed its investigation of petitioner's complaint, deeming it unsubstantiated. (Ballard Affid.). There exists no record that DOI notified respondent of petitioner's complaint or its investigation. (*Id.*).

By affidavit dated August 2, 2012, and based on his personal knowledge and respondent's books and records, King states that petitioner "was unable to organize her analysis of the data in a clear and concise manner" and "often inappropriately disparaged her colleagues and their abilities," that he held supervisory meetings with her, that he counseled her regarding her performance during these meetings, and that she "was provided with a number of training opportunities to improve her communication skills." (King Affid.). King asserts that petitioner was reassigned to work under Hansen's supervision, also a City Research Scientist Level I, as he had created a database, and "it was decided that petitioner would benefit from his experience." (*Id.*). According to him, she "became extremely perturbed and expressed an inappropriately disparaging view of [] Hansen's qualifications" when he informed her of her reassignment. (*Id.*).

King also explains in his affidavit that the annual re-enrollment requirement "had little to do with whether BOI had access to accurate data regarding the number of enrolled and active providers," and thus, that petitioner did not disclose problems with the 2007 survey data but rather "resisted guidance from colleagues and supervisors about the appropriate methods for compiling and analyzing the data," thereby delaying the unit's completion of the survey. (*Id.*). As a result of petitioner's resistance, he contacted the CDC and obtained its permission to submit 2006 data "as a reasonable approximation" of the 2007 data. (*Id.*). He claims he was unaware that petitioner claims that she was terminated in retaliation for reporting problems with the data

respondent had been submitting to the CDC until she filed the instant action. (*Id.*). He is now working in Pakistan. (*Id.*).

By affidavit of the same date, and based on her personal knowledge and respondent's books and records, Zucker states that "[w]hen senior members of BOI reviewed [petitioner's] estimates, they determined that her report was both unreliable and unverfiable," that petitioner's inability to "generate reliable report data" for the 2007 survey resulted in its late submission to the CDC and the use of 2006 data as an approximation of the 2007 data, and that "[petitioner's] allegations with respect to this issue reflect her misunderstanding of the data analysis she was tasked to perform." (Zucker Affid.). Like King, she denies having known about petitioner's claim that she was terminated in retaliation for reporting problems with the data respondent had been submitting to the CDC until after the instant action was commenced. (*Id.*).

By affidavit of the same date, and based on her personal knowledge, conversations with respondent's employees, and respondent's books and records, McIntyre states that petitioner's employment rights are governed by the CBA between her union and respondent and respondent's termination policy, both of which reflect a one-year probationary period for petitioner's title, and thus, that petitioner had no disciplinary rights when she was terminated, having worked for respondent for only nine months. (McIntyre Affid.). She admits to having received petitioner's letter contesting her evaluation and termination, and explains that no action was taken on its receipt as petitioner had no right to appeal. (*Id.*). According to her, when the decision was made to terminate petitioner, she was "unaware of any allegation made by [petitioner] that BOI was [ ] reporting inaccurate data to the [CDC]," and she remained unaware of this claim until petitioner filed the instant action." (*Id.*).

By affidavit of the same date, and based on his personal knowledge, conversations with respondent's employees, and respondent's books and records, Lapaz states that he was Unit Chief for the VFC unit during petitioner's tenure, that he worked with her in gathering data for VFC surveys, that she had difficulty mastering the databases for which she was responsible, analyzing data, and communicating her findings, and that she failed to complete her portion of the 2007 survey. (Affidavit of Angel Lapaz, dated Aug. 2, 2012).

II. PROCEDURAL BACKGROUND

On July 14, 2008, petitioner commenced the instant Article 78 proceeding, seeking an order expunging her 2007 performance evaluation, reinstating her employment, and awarding her back-pay, costs, and compensatory damages, and asserting a claim of retaliatory termination pursuant to Civil Service Law § 75-b (Whistleblower Law). By notice of cross-motion dated September 30, 2008, respondent moved to dismiss the petition.

On October 25, 2008, petitioner, without leave of court, served a notice of claim on the Comptroller of the City of New York, describing the "time, place, and manner in which [her] claim[s] arose" as follows: "My employer signed and dated untruthful and unlawful performance evaluation on 14 March 2008. However, I was wrongful [sic] terminated on 13 March 2008." (Ver. Ans., Exh. U). In the notice of claim, petitioner mentions nothing about her discovery and report of respondent's submission of inaccurate data to the CDC. (*Id.*).

By notice of motion dated November 11, 2008, petitioner moved pursuant to General Municipal Law (GML) § 50-e(5) for leave to serve a late notice of claim.

On December 30, 2008, petitioner commenced an action against respondent in federal court, asserting claims pursuant to Title VII of the Civil Rights Act, the first and fourteenth

amendments, and the Whistleblower Law (federal matter). (Affirmation of Benjamin Welikson, ACC, in Opposition to Motion to Compel [Welikson Aff. in Opp. to Compel], Exhs. C, D).

By decision and order dated January 23, 2009, the justice previously assigned to this part denied the petition and petitioner's motion for leave to serve a late notice of claim and granted respondent's cross-motion to dismiss the proceeding, determining that: (1) although there existed issues of fact as to whether petitioner was a probationary employee when she was terminated, and thus, whether she was terminated properly, petitioner nonetheless failed to state a claim pursuant to the Whistleblower Law as she had failed to disclose the data problems to an agency; (2) assuming, as she claims, that she was a permanent employee, her petition is premature as she failed to appeal her performance evaluation; and (3) she demonstrates neither a reasonable excuse for her failure to file a notice of claim nor that respondent obtained actual knowledge of the facts underlying her claim within 90 days of her termination. (*Matter of Yan Ping Xu v New York City Dept. of Health*, 22 Misc 3d 1116[A], 2009 NY Slip Op 50147[U]).

Petitioner appealed, and by decision dated August 3, 2010, the Appellate Division, First Department, held that they could not "determine as a matter of law that petitioner either failed to exhaust administrative remedies or take the necessary steps to protect her whistleblower status," modifying the January 23, 2009 decision to the extent of remanding the matter for a hearing as to whether petitioner had the opportunity to appeal her evaluation, whether she should have reported the data discrepancies to persons other than King, and whether respondent obtained actual knowledge of the facts underlying her claim through petitioner's submission of a complaint to DOI. (*Xu v New York City Dept. of Health*, 77 AD3d 40).

By order dated March 22, 2012, the previously assigned justice ordered the matter

restored to the calendar for a hearing as directed by the Appellate Division. On March 23, 2012, petitioner filed an amended petition without leave of court.

On April 5, 2012, petitioner served respondent with a subpoena duces tecum containing 19 document demands, 5 of which contain a total of 42 subsections. (Welikson Aff. in Opp. to Compel, Exh. F). The documents demanded include, *inter alia*, a performance evaluation authored by King in January 2008 and documents pertaining to the federal matter. (*Id.*).

On April 22, 2011, respondent served petitioner with a response to the subpoena, whereby it declined to provide her with the requested documents on the ground that discovery is not permitted in an Article 78 proceeding. (Welikson Aff. in Opp. to Compel, Exh. G).

On May 29, 2012, a conference was held, and by order of the same date, the justice accepted the amended petition on consent of the parties, deeming it served and filed as of that date, established a briefing schedule for respondent's answer and petitioner's reply, and scheduled oral argument.

On June 6, 2012, petitioner served respondent with her motion to compel, specifying that respondent serve her with its opposition no less than seven days before the motion's return date, June 27, 2012. On June 22, 2012, respondent served petitioner with its opposition. Sometime thereafter, the return date was adjourned to January 16, 2013. On June 26 and June 27, 2012, petitioner served respondent with her reply and amended reply, respectively.

On August 3, 2012, respondent served petitioner with its verified answer. As pertinent here, exhibit J is a scholarly article evaluating Hansen's database, and exhibit K is Hansen's nomination for an award.

On October 18, 2012, petitioner served respondent with her motion to strike portions of

its answer and the exhibits, specifying that respondent serve her with its opposition no less than seven days before the motion's return date, October 31, 2012. On October 26, 2012, respondent served petitioner with its opposition. Sometime thereafter, the return date was adjourned to January 16, 2013. On November 27, 2012, petitioner served respondent with her reply.

On January 16, 2013, oral argument on the petition and the two motions was held before me.

III. MOTION TO STRIKE

A. Contentions

Petitioner claims that because respondent's affirmative defenses are identical to those it asserted in answering the original petition, and as the Appellate Division's determination constitutes the law of the case, respondent is precluded from asserting them again. (Affidavit of Yan Ping Xu, dated Sept. 27, 2012). She also claims that exhibits J and K are irrelevant and must be stricken, and that hearsay portions of the Zucker's, McIntyre's, and Lapaz's affidavits must be stricken. (*Id.*).

In opposition, respondent observes that, as petitioner's amended petition supersedes her original petition, and as the Appellate Division made no determination on the merits of the original petition, its decision is not law of the case as to the affirmative defenses. (Affirmation of Benjamin Welikson, ACC, in Opposition to Motion to Strike, dated Oct. 25, 2012). It also asserts that petitioner's disagreement with Zucker's, McIntyre's, and Lapaz's statements regarding her performance constitutes an insufficient basis for striking them, and it denies that exhibits J and K and the disputed portions of the affidavits constitute hearsay. (*Id.*).

In reply, petitioner asserts that respondent's opposition papers are untimely, having been

served on her less than seven days before the return date specified on the notice of motion in contravention of CPLR 2214(b). (Pet.'s Mem. of Law in Further Support of Motion to Strike). She denies that her amended petition supersedes her original petition, and maintains that the Appellate Division determined the merits of respondent's affirmative defenses. (*Id.*). She argues that Zucker's, McIntyre's, and Lapaz's perceptions of her performance constitute hearsay as neither Zucker nor McIntyre observed her working, and Lapaz lacks the expertise to evaluate her. (*Id.*).

B. Analysis

1. Respondent's untimely opposition

Pursuant to CPLR 2214(b), if a motion is served 16 or more days before its return date, opposition to it must be served no less than seven days before the return date. However, pursuant to CPLR 2214(c), a court may consider untimely papers if there is no prejudice to the opposing party. (*Bucklaew v Walters*, 75 AD3d 1140 [4th Dept 2010]; *Matter of Jordan v City of New York*, 38 AD3d 336, 338 [1st Dept 2007]; *Sheehan v Marshall*, 9 AD3d 403 [2d Dept 2004]). And, a party waives his objection to late service of papers by responding to them on the merits. (*Jones v Le France Leasing Ltd. Partnership*, 81 AD3d 900 [2d Dept 2011]; *Piquette v City of New York*, 4 AD3d 402 [2d Dept 2004]; *Adler v Gordon*, 243 AD2d 365 [1st Dept 1997]).

Here, although petitioner was served with respondent's opposition papers after the deadline set forth in her notice of motion, as the return date for the motion was adjourned, respondent's opposition was timely, and in any event, petitioner waived her right to contest late service by replying on the merits.

2. Law of the case

Pursuant to CPLR 3211(b), a party may move to dismiss one or more defenses on the ground that a defense is not stated or has no merit. To dismiss a defense, the plaintiff bears the burden of demonstrating that the defense is without merit as a matter of law. (*Deutsche Bank Natl. Trust Co. v Gordon*, 84 AD3d 443 [1st Dept 2011]; *Vita v N.Y. Waste Servs., LLC*, 34 AD3d 559 [2d Dept 2006]; *Santilli v Allstate Ins. Co.*, 19 AD3d 1031 [4th Dept 2005]). In deciding a motion to dismiss a defense, the court must give the defendant the benefit of every reasonable intendment of the pleading, which is to be liberally construed. (*Id.*; *Warwick v Cruz*, 270 AD2d 255 [2d Dept 2000]).

A legal determination that was necessarily resolved on the merits in a prior decision remains the law of the case. (*Erickson v Cross Ready Mix, Inc.*, 98 AD3d 717 [2d Dept 2012]; *Baldasano v Bank of N.Y.*, 199 AD2d 184 [1st Dept 1993]). However, as an amended pleading supersedes an earlier pleading, a determination on the merits of the earlier pleading does not constitute the law of the case as to the merits of the superseding, amended pleading. (*Thompson v Cooper*, 24 AD3d 203 [1st Dept 2005]; *Gay v Farella*, 5 AD3d 540 [2d Dept 2004]).

Here, in remanding the matter for a hearing, the Appellate Division expressly declined to address the merits of petitioner's claims, and in any event, the amended petition supersedes the original petition. Therefore, respondent's affirmative defenses may be entertained. (*See Gay*, 5 AD3d 540 [prior order denying defendant's motion to dismiss and granting plaintiff leave to file amended complaint did not bar court from entertaining defendant's motion to dismiss amended complaint as prior order did not address merits of original complaint and amended complaint superseded original complaint, "rendering the sufficiency of the allegations in the original

complaint academic"]).

3. Hearsay

Zucker, McIntyre, and Lapaz state in their affidavits that the facts set forth therein are based on their personal knowledge, and the affidavits reflect their involvement in either the VFC program or petitioner's termination. Consequently, they do not constitute hearsay. (*See Matter of Kirmayer v N.Y. State Dept. of Civ. Serv.*, 24 AD3d 850 [3d Dept 2005] [affidavit of agency official with personal knowledge of decision-making process underlying challenged determination properly considered in Article 78 proceeding in determining whether it had a rational basis]; *Jamaica Neighborhood Based Alliance Coalition v Dept. of Social Servs.*, 227 AD2d 40 [3d Dept 1997] [affidavits submitted in opposition to Article 78 petition do not constitute hearsay as they are "stated to have been based, *inter alia*, on the personal knowledge of the affiants [and] reflect sufficient involvement of those parties in the decision-making process to constitute sound evidentiary proof with respect to the matters addressed therein"]; *Matter of Gallo v Ritter*, 195 AD2d 461 [2d Dept 1993] [Article 78 petitioner challenging agency's refusal to promote petitioner denied as respondents offered affidavits based on personal knowledge from members of panel that interviewed candidates for promotion reflecting that petitioner lacked personal characteristics necessary for position]). That neither Zucker nor McIntyre personally observed petitioner working is immaterial, as they do not claim to have done so and address her performance only insofar as it related to the completion of the 2007 survey or the decision to terminate her, subjects about which Zucker and McIntyre, respectively, indisputably possess personal knowledge. (*See Charter One Bank, FSB v Leone*, 45 AD3d 958 [3d Dept 2007] [in mortgage foreclosure action, affidavit reflecting defendant is in default admissible; defendant's

claim that affidavit constitutes "hearsay because the affiant did not personally service [its] account is unavailing in light of the affiant's unchallenged assertion of personal knowledge of defendant's default"]). Petitioner's disagreement with Zucker's, McIntyre's, and Lapaz's statements regarding her performance provides no legal basis for striking them.

4. Exhibits J and K

As I rely on neither exhibit J nor exhibit K in addressing the merits of petitioner's claims (*see infra*, V.A.2.b.), this portion of petitioner's motion need not be addressed.

IV. MOTION TO COMPEL AND FOR CONTEMPT

A. Contentions

Petitioner asserts that respondent should be ordered to comply with the subpoena and be held in contempt for its noncompliance. (Petitioner's Affidavit in Support of Motion, dated June 5, 2012).

In opposition, respondent claims that discovery is unavailable in an Article 78 proceeding absent leave of court, and it may not be held in contempt for failing to comply with it. (Welikson Aff. in Opp. to Compel). It also notes, in any event, that petitioner failed to include the notice required by Judiciary Law § 756 in the notice of motion. (*Id.*). Moreover, to the extent that the motion is deemed one for leave to obtain discovery, respondent claims that it should be denied as petitioner's demands are neither narrowly tailored nor material to the instant action. (*Id.*).

In reply, petitioner claims that respondent's opposition, having been served less than seven days before the return date specified in the notice of motion, is untimely and should not be considered. (Petitioner's Amended Memorandum of Law in Reply). She denies that she is seeking discovery through the subpoena, and argues that her failure to include the notice required

by Judiciary Law § 756 should be disregarded as respondent failed to raise this objection within two days of being served with the notice of motion. (*Id.*). She also denies that the requested documents related to the federal action are immaterial to the instant matter. (*Id.*).

B. Analysis

1. Respondent's untimely opposition

Respondent's opposition is addressed for the reasons set forth in section III.B.1., *supra.*

2. Availability of discovery in an Article 78 proceeding

Discovery is only available in an Article 78 proceeding by leave of court. (CPLR 408; *Stapleton Studios, LLC v City of New York,* 7 AD3d 273 [1st Dept 2004]). Accordingly, I construe this motion as one seeking leave to obtain discovery.

To demonstrate entitlement to discovery, a party must establish that it is "material and necessary to the prosecution" of the proceeding. (*Abraham v Diamond Dealers Club, Inc.,* 80 AD3d 461 [1st Dept 2011]; *Matter of Allocca v Kelly,* 44 AD3d 308, 309 [1st Dept 2007]; *Stapleton Studios,* 7 AD3d at 275). Here, petitioner's conclusory assertion that her discovery demands are relevant to the instant proceeding is insufficient to warrant discovery. (*See Price v New York City Bd. of Educ.*, 51 AD3d 277 [1st Dept 2008], *lv denied* 11 NY3d 702 [leave to obtain discovery in Article 78 proceeding denied as respondent submitted evidence in opposition to petition credibly supporting its determination, and petitioners' "assertion that they were entitled to further inquire into whether [respondent] was justified in its position amounted to no more than an expression of hope insufficient to warrant deferral of judgment pending discovery"]). Even assuming, as petitioner asserts, that there exists a January 2008 evaluation, and that it was positive, this would be insufficient to demonstrate that she was terminated in bad

faith, as her reassignment to work under Hansen's supervision and her work on the 2007 survey, both of which provide a basis for her termination (*see infra*, V.A.2.b.), occurred thereafter.

In light of this determination, the portion of petitioner's motion seeking an order holding respondent in contempt need not be addressed.

V. PETITION

A. Petitioner's evaluation and termination

1. Contentions

Petitioner claims asserts that her 2007 performance evaluation and termination are arbitrary and capricious as she was, pursuant to section 5.2.1. of the Personnel Rules and Regulations of the City of New York (City Personnel Rules), a permanent employee and was deprived of the opportunity to appeal them in violation of sections 7.5.2, 7.5.4.(d) and (e), 7.5.5., and 7.5.6. of the City Personnel Rules, and as her unsatisfactory evaluation has no basis in fact. (Ver. Pet.).

In opposition, respondent denies that petitioner is entitled to appeal her evaluation and termination as she was evaluated and terminated during the one-year probationary period for her title as reflected in the list annexed to the March 10, 2008 memorandum. (Respondent's Memorandum of Law in Support of Verified Answer [Resp. Ans. Mem. of Law]). It, moreover, notes that even if petitioner's probationary period was six months, pursuant to section 5.2.1, she would not have been entitled to appeal her evaluation and termination as that section, by its express terms, does not provide any procedural protections to an employee whose probationary term has ended. (*Id.*).

2. Analysis

Article 78 review of an administrative determination is limited to whether the decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." (CPLR 7803[3]). An award is arbitrary and capricious if it is "without sound basis in reason or regard to the facts." (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; *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]).

a. Petitioner's employment status

Section 5.2.1(b) of the City Personnel Rules provides, in pertinent part, that appointments in the "non-competitive . . . class shall be for a probationary period of six months unless otherwise set forth in the terms and conditions for appointment as determined by the commissioner of citywide administrative services. . . . Nothing herein shall be deemed to grant permanent tenure to any non-competitive . . . employee. (55 RCNY Appx. A, Rule 5.2.1[b]).

As McIntyre's affidavit reflects that the CBA and respondent's termination policy, each of which provide for a one-year probationary period for petitioner's title, governed petitioner's employment, and as petitioner offers no evidence that section 5.2.1(b) controlled, she fails to demonstrate that she was a permanent employee when she was evaluated and terminated. In any event, even if petitioner's employment had been governed by section 5.2.1(b), and her probationary period had ended before she was terminated, application of the section would not result in her immediate and automatic permanent tenure.

b. Review of petitioner's evaluation and termination

A probationary employee "may be dismissed for almost any reason, or for no reason at all. A probationary employee has no right to challenge a termination by way of a hearing or otherwise, absent a showing that [s]he was dismissed in bad faith or for an improper or impermissible reason." (*Swinton v Safir*, 93 NY2d 758, 762-63 [1999]; *accord Matter of Kolmel v City of New York,* 88 AD3d 527 [1st Dept 2011]; *Witherspoon v Horn,* 19 AD3d 250 [1st Dept 2005]; *Brown v City of New York*, 280 AD2d 368 [1st Dept 2001]; *Matter of Soto v Koehler*, 171 AD2d 567 [1st Dept 1991], *lv denied* 78 NY2d 855). The employee bears the burden of raising and proving bad faith, "and the mere assertion of 'bad faith' without the presentation of evidence demonstrating it does not satisfy the employee's burden." (*Matter of Soto*, 171 AD2d 567; *Witherspoon*, 19 AD3d at 251; *accord Matter of Robinson v Health & Hosps. Corp.*, 29 AD3d 807 [2d Dept 2006]; *Brown*, 280 AD2d at 370).

Here, respondents offer evidence demonstrating that petitioner was terminated because of her poor performance and communication skills, and her inability to work collegially with others. Even if petitioner was terminated as a result of reporting problems with the data used in the 2007 survey, that is not an indication of a termination in bad faith. Rather, the evidence reflects that her refusal to comply with King's directives and her misunderstanding of the data not only prevented respondent from timely submitting the survey but also required that respondent submit the data from 2006. That petitioner disputes King's account of her response to her reassignment raises no issue of fact as to whether she was terminated in bad faith, as she admits to having protested it insofar as she claimed that it would not solve respondent's data problems, and in any event, she does not dispute that she disparaged Lapaz's work. So too is petitioner's claim that

her work was never criticized until she was terminated, as King's affidavit and the registration forms annexed to her petition reflect that she was, upon King's referral, registered for multiple communications and presentation skills courses, indicating that she was on notice that her performance needed improvement. Accordingly, petitioner fails to demonstrate that she was terminated in bad faith. (*See Johnson v Katz*, 68 NY2d 649 [1986] ["no hearing of issue of bad faith" required where "[e]vidence in the record supporting the conclusion that performance was unsatisfactory establishes that the discharge was made in good faith," and "no material issue of fact was raised by petitioner's disputed assertion that [she was told] she was being discharged to protect other employees from scheduled layoffs"]).

B. Whistleblower claim

1. Contentions

Petitioner claims that she was terminated as a result of reporting that respondent had been submitting incorrect data to the CDC in violation of the Whistleblower Law. (Ver. Pet.). She offers no argument in support of her application for leave to serve a late notice of claim. (*Id.*).

In opposition, respondent observes that petitioner offers no excuse for her failure to file timely a notice of claim and argues that petitioner's letter contesting her evaluation and termination, her complaint to DOI, and the notice of claim she served on October 25, 2008 were insufficient to provide notice of the facts underlying her claim. It maintains that it will be prejudiced by petitioner's late filing insofar as it has been deprived of an opportunity to investigate her claim, especially as King is in Pakistan and is difficult to reach. (*Id.*). In any event, respondent contends that petitioner's claim is meritless. (*Id.*).

2. Analysis

Filing a timely notice of claim is a condition precedent to asserting a cause of action pursuant to the Whistleblower Law. (*Thomas v City of Oneonta,* 90 AD3d 1135 [3d Dept 2011]; *Xu*, 77 AD3d 40). Pursuant to GML § 50-e(5), a notice of claim must be served within 90 days of the date on which the claim arose. However, the court may permit the late filing of a notice of claim, considering, *inter alia*, whether the municipal agency acquired actual knowledge of the essential facts constituting the claim within the 90-day deadline or a reasonable time thereafter, whether the delay in serving the notice of claim substantially prejudiced it in its ability to maintain a defense, and whether the claimant has a reasonable excuse for the delay. (GML § 50-e[5]; *Perez ex rel. Torres v New York City Health and Hosps. Corp.*, 81 AD3d 448, 448 [1st Dept 2011]).

Here, absent any evidence that DOI informed respondent of petitioner's complaint or its investigation, actual knowledge of petitioner's claim may not thereby be imputed to respondent. (*See Singh v City of New York,* 88 AD3d 864 [2d Dept 2011 [filing of accident and injury reports and witness statements with New York City Transit Authority did not provide City with actual knowledge]; *Lyerly v City of New York,* 283 AD2d 647 [2d Dept 2001] [where notice of claim served on City of New York, actual knowledge not imputed to New York City Housing Authority]; *Seif v City of New York,* 218 AD2d 595 [1st Dept 1995] [same]). Moreover, King's, Zucker's, and McIntyre's affidavits reflect that they were unaware of petitioner's claim until she filed the instant action, and petitioner offers no evidence to the contrary. Although her letter contesting her evaluation and termination show that she was terminated after "refusing to commit to unethical data," it is insufficient to provide notice of the essential facts underlying her claim

absent any detail as to the circumstances of her refusal or any allegation that her evaluation and termination were retaliatory. (*See Smith v Otselic Valley Cent. School Dist.*, 302 AD2d 665 [3d Dept 2003] [although respondent's employees "had been generally alerted that" petitioner was injured on construction job, as "no details or specifics of the accident or the extent of injuries were given or known," respondent did not have actual knowledge of essential facts underlying claim]). So too is her October 25, 2008 notice of claim, as it reflects nothing regarding petitioner's disclosure of respondent's data problems to her superiors.

Having failed to demonstrate that respondent obtained actual knowledge of the facts underlying her claim, and as King is abroad and difficult to reach, petitioner fails to demonstrate that respondent will not be prejudiced by her late filing insofar as its ability to investigate is compromised. (*See Matter of Werner v Nyack Union Free School Dist.*, 76 AD3d 1026 [2d Dept 2010] [having failed to demonstrate actual knowledge, petitioner failed to rebut respondent's assertion that delay deprived it of opportunity to investigate claim]). Accordingly, and in light of her failure to offer any explanation for her delayed filing, petitioner fails to demonstrate entitlement to leave to serve a late notice of claim.

In light of this determination, the merits of petitioner's whistleblower claim need not be addressed. If they were, it is clear that respondent has demonstrated a "separate and independent basis" for petitioner's termination, namely her poor analytical and communication skills and her failure to work collegially with her peers, and thus, the dismissal of her claim would be warranted even if she had demonstrated entitlement to leave to serve a late notice of claim. (*Rigle v County of Onondaga,* 267 AD2d 1088 [4th Dept 1999]; *Roens v New York City,* 202 AD2d 274 [1st Dept 1994]; *see Chamberlain v Jacobson,* 260 AD2d 317 [1st Dept 1999] [whistleblower claim raised in Article 78 proceeding dismissed as respondent provided proof "establishing that

petitioner was terminated because of budgetary concerns and his lack of the appropriate professional background," and thus, "[t]here [was] no basis to find that [he] was terminated solely in retaliation for his purported whistleblowing disclosures"]; *Matter of Colao v Village of Ellenville*, 223 AD2d 792 [3d Dept 1996] [where petitioner, in Article 78 proceeding, claimed that he was terminated in violation of the Whistleblower Law, claim dismissed as respondent provided proof of inappropriate conduct on petitioner's part that, standing alone, justified his dismissal).

C. Claims regarding petitioner's grievance

Petitioner challenges the denial of her grievance on the grounds that the CBA violates Collective Bargaining Law §§ 12-303 and 12-307, and Civil Service Law §§ 75-b, 203, and 209. (Ver. Pet.).

With certain exceptions not pertaining here, "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." (*Lehigh Portland Cement Co. v New York State Dept. of Envtl. Conservation*, 87 NY2d 136, 140 [1995]; *Sumner v Hogan*, 73 AD3d 618, 619 [1st Dept 2010]). Failure to do so precludes the commencement of an Article 78 proceeding. (*Matter of Connor v Town of Niskayuna,* 82 AD3d 1329 [2d Dept 2011]).

As petitioner failed to proceed to arbitration after her union's appeal was denied, she has failed to exhaust her administrative remedies.

VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that petitioner's motion for an order striking respondent's affirmative defenses and certain exhibits to its verified answer is denied; it is further

ORDERED, that petitioner's motion for an order compelling respondent to comply with the subpoena duces tecum served on it on April 5, 2011 and for an order holding it in contempt is denied; and it is further

ORDERED and ADJUDGED, that the petition is denied in its entirety, and the proceeding is dismissed.

ENTER:

Barbara Jaffe, JSC

DATED: May 14, 2013
New York, New York