

**Matter of Druyan v Board of Educ. of City School  
Dist. of City of N.Y.**

2014 NY Slip Op 30146(U)

January 14, 2014

Supreme Court, New York County

Docket Number: 400105/13

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART 7

In the Matter of the Application of  
JOCELYN DRUYAN,

Petitioner,  
- against -

INDEX NO. 400105/13

MOTION SEQ. NO. 001

For a Judgement Pursuant to the Provisions of  
Article 78 of the New York Civil Practice  
Law and Rules,

THE BOARD OF EDUCATION OF THE  
CITY SCHOOL DISTRICT OF THE CITY OF  
NEW YORK and DENNIS M. WALCOTT,  
as Chancellor of the City School District of  
the City of New York, and the CITY OF NEW  
YORK,

Respondents.

**FILED**

JAN 22 2014

COUNTY CLERK'S OFFICE  
NEW YORK

The following papers were read on this motion by petitioner for a judgment pursuant to Article 78.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits (Memo) \_\_\_\_\_  
Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

In this article 78 proceeding, petitioner Jocelyn Druyan seeks a judgment declaring that the determination by respondent The Board of Education of the City School District of the City of New York (BOE), to discontinue petitioner's probationary employment, was arbitrary and capricious and contrary to law. Petitioner seeks to be reinstated to her position with seniority. The BOE, Dennis M. Walcott, as Chancellor of the City School District of the City of New York and the City of New York<sup>1</sup> (collectively BOE), cross-move to dismiss the petition, pursuant to

<sup>1</sup> Petitioner incorrectly proceeds against the City of New York, which is not a proper party in this proceeding.

CPLR 306-b, 3211(a)(7), (10) and 7804 (f) on the grounds that petitioner has failed to obtain personal jurisdiction over the BOE, should not be permitted an extension of time to serve, and that the amended petition fails to state a cause of action.

#### BACKGROUND

During the 2010-2011 school year, petitioner was employed by the BOE as a probationary teacher. Although she received a teaching certification in English as a Second Language (ESL), petitioner was assigned to teach a general education second grade class located at an elementary school in New York, New York. Petitioner states that she "met consistently with the P.S. 124 literacy coach and math coach in an attempt to hone her general education teaching skills" (Amended petition, ¶ 9).

Petitioner was formally observed by two assistant principals on April 5, 2011. She had a pre-observation meeting on April 4, 2011 and a post-observation meeting on April 11, 2011. On May 10, 2011, petitioner received a letter memorializing the meetings and the lesson observation, for which she had been given an unsatisfactory rating. The letter states that the lesson was rated unsatisfactory "due to poor planning and preparation of work, ineffective use of methods and techniques, instruction that was not adapted to the needs and capacities of your students and limited evidence of pupil growth in knowledge and skills" (Petitioner's exhibit B at 4). In addition, the letter noted that the issue of the graphic organizer in the classroom had been discussed during the pre-observation conference but was still poorly prepared. Petitioner was told that she had been provided with professional development support such as a literacy coach and math coach and was expected to implement the strategies and techniques as provided by the support.

Petitioner was then observed again on May 16, 2011. There was no pre-observation conference for this lesson. Petitioner met with the assistant principal after being observed. She received an unsatisfactory rating for this lesson. A letter dated May 16, 2011,

memorializing the meeting, indicated that petitioner received the unsatisfactory rating due to the same issues "that were identified in previous observations" (Petitioner's exhibit C at 3).

On May 24, 2011, petitioner was observed again during a lesson. She had a pre- and post-observation meeting for this lesson. She received a satisfactory rating for this lesson and received a written report stating this on June 20, 2011. Five days prior to receiving the satisfactory lesson report, on June 15, 2011, petitioner received a notice from the principal that stated the principal was recommending that petitioner's probationary service be discontinued. Petitioner was effectively discontinued as of August 3, 2011.

Petitioner, initially proceeding without counsel, filed her original petition in Supreme Court, Kings County, on November 28, 2011. The petition directed that she was to serve the BOE by personal service, on or before December 6, 2011. This petition was never served on the BOE. In May 2012, after retaining counsel, petitioner served the BOE with an amended petition.

Petitioner alleges that, under the interest of justice standard as set forth in CPLR 306-b, an extension of time to serve the petition should be granted. She maintains, among other reasons, that she has a meritorious cause of action, that the delay in service is not great and that the BOE is not prejudiced by the delay. Petitioner believes that she has a meritorious claim that the BOE did not follow its own procedures and acted in bad faith when petitioner was not provided with a pre-observation conference in connection with her May 16, 2011 observation. She points to both her collective bargaining agreement and a memo received by all principals and superintendents explaining that the BOE is allegedly required to provide her with both a pre- and post observation meeting in connection with her formal observation. Similarly, according to petitioner, the BOE did not follow its own procedures and acted in bad faith when it failed to provide her with ample time to improve her teaching skills based on the recommendations given to her.

The BOE cross-moves to dismiss the amended petition based on untimely personal service of the amended petition, and also based on the failure to state a cause of action. It alleges that the amended petition was untimely served and that petitioner has not "explained the delay in service or proffered any reference to previous failed service attempts" (BOE's memorandum of law at 7). The BOE continues that it would be prejudicial to the BOE to "effectively state that discontinued probationary teachers, such as petitioner, are not bound by the applicable period of limitations and to require [the BOE] to defend against such a petitioner's claim regardless of how late service was effected" (*id.* at 8).

#### DISCUSSION

The standard of review in this Article 78 proceeding is whether the DOE's decision to terminate petitioner from her employment as a teacher "was arbitrary or capricious or without a rational basis in the administrative record" (*Matter of Partnership 92 LP & Bldg. Mgt. Co. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007]; see CPLR 7803[3]). The Court of Appeals has held "that the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]; see also *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of West Vil. Assoc. v New York State Div. of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000] [a rational and reasonable determination of an agency within its area of expertise is entitled to deference by the courts]). As such, a court "may not overturn an agency's decision merely because it would have reached a contrary conclusion" (*Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 278 [1972]; see also *Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101 [1st Dept 2003]). "Indeed, once it has been determined that an agency's

conclusion has a 'sound basis in reason' the judicial function is at an end and a reviewing court may not substitute its judgment for that of the agency" (*Paramount Communications v Gibraltar Cas. Co.*, 90 NY2d 507, 514 [1997], quoting *Matter of Pell v Board of Edu.*, 34 NY2d at 231 [1974]).

Petitioner requests that the court determine the case on the merits since the BOE allegedly failed to follow their own procedures by not providing her with one pre-observation conference, and by observing her late into the school year. The Court notes that the parties refer to a motion by the petitioner, pursuant to CPLR 306-b, granting her an extension of time to serve the amended verified petition. However, this relief is not before the Court as it is not requested in petitioner's Article 78 petition, nor is it before the Court in another motion sequence. Even assuming *arguendo* that this motion was before the Court, it is denied for the reasons set forth below.

Petitioner was effectively discontinued on August 3, 2011, requiring her to commence a petition within four months, and serve it by December 18, 2011. She filed a petition and order to show cause on November 28, 2011. The order to show cause directed that personal service was required. Petitioner made no diligent attempt at service and does not explain the five-month delay. Her prior self-represented status is "not an excuse" for noncompliance with the service requirement (*Matter of Ruine v Hines*, 57 AD3d 369, 370 [1st Dept 2008]).

As the BOE maintains, it would be prejudiced if its employees were not bound to the statute of limitations and it was required to defend against allegations by an employee, no matter how late service was effectuated. Accordingly, petitioner has not served the BOE timely and has not established jurisdiction. Moreover, even if petitioner were afforded an extension of time to serve the petition under CPLR 306-b, and effected service, petitioner has not set forth a meritorious action. It is well settled that "[a]s a probationary employee, petitioner was subject to termination at any time and for any reason, unless [she] establish[ed] that the termination was

for a constitutionally impermissible purpose, violative of a statute, or done in bad faith" (*Matter of DeVito v Department of Educ. of the City of New York*, 2013 NY Slip Op 08022, 975 NYS 2d 672, 672 [1st Dept 2013] [internal quotation marks and citation omitted]).

Petitioner's mere allegations do not meet her burden to raise and prove bad faith (*Witherspoon v Horn*, 19 AD3d 250, 251 [1st Dept 2005]). Petitioner received two unsatisfactory lesson observations which outlined professional deficiencies. Tellingly, petitioner never challenges the substantive aspects to these unsatisfactory ratings. As set forth in *Rivers v Board of Educ. of the City School Dist. of the City of N.Y.* (66 AD3d 410, 411 [1st Dept 2009]), "[e]vidence in the record supporting the conclusion that performance was unsatisfactory establishes that the discharge was made in good faith [internal quotation marks and citation omitted]." The court has considered petitioner's other contentions and finds them without merit.

CONCLUSION

Accordingly, it is hereby

ORDERED that the amended petition for an order annulling petitioner's termination is denied; and it is further

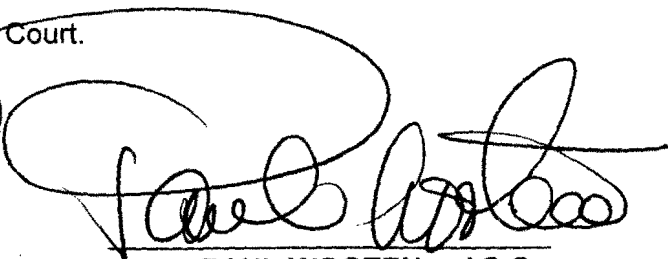
ORDERED that the cross motion of the Board of Education of the City School District of the City of New York, Dennis M. Walcott, as Chancellor of the City School District of the City of New York and the City of New York is granted and the amended petition is dismissed.

This constitutes a decision and order of the Court.

**FILED**

Dated: 1/14/14

JAN 22 2014



PAUL WOOTEN J.S.C.

COUNTY CLERK'S OFFICE  
NEW YORK

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: :  DO NOT POST  REFERENCE