

Matter of Pape v Walcott
2014 NY Slip Op 31779(U)
July 9, 2014
Supreme Court, New York County
Docket Number: 101387/13
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

IN THE MATTER OF THE APPLICATION OF
DONNA PAPE,

Petitioner,

INDEX NO. 101387/13

MOTION SEQ. NO. 001

-against-

DENNIS M. WALCOTT, Chancellor, New York City
Department of Education, and the NEW YORK CITY
DEPARTMENT OF EDUCATION,

FILED

Respondents.

JUL 11 2014

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1-6 were considered on this Article 78 proceeding and cross-motion to dismiss:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2,</u>
Answering Affidavits — Exhibits _____	<u>5</u>
Replying Affidavits _____	<u>6</u>
Cross-Motion: [X] Yes [] No _____	<u>3, 4</u>

Upon the foregoing papers, it is ordered that respondents' cross-motion to dismiss this Article 78 proceeding is granted in part and denied in part, as indicated below.

Petitioner commenced this Article 78 proceeding against respondents Dennis M. Walcott and the New York City Department of Education (Department of Education or DOE), for an order: (1) reviewing, annulling and rescinding respondents' determination dated June 26, 2013, which reaffirmed petitioner's Discontinuance of Probationary Service, as a probationary teacher effective July 26, 2013; (2) ordering respondents to rescind petitioner's termination and unsatisfactory rating for the 2012-2013 school year; and (3) ordering respondents to reinstate

petitioner to her teaching position, *nunc pro tunc*, to July 26, 2013, with back pay and other benefits of employment lost since the date of termination of her employment, together with such other and further relief as may be appropriate.

FACTS

Petitioner taught special education at the Science Skills Center High School from September 2012 to July 2013. Two of petitioner's classes were observed by the Principal, Dahlia McGregor (Principal McGregor), on December 4, 2012, and May 20, 2013, and petitioner received an unsatisfactory rating in the observation report for each observation. Petitioner received post-observation conferences for each observation. Thereafter, petitioner submitted rebuttals in response to both observation reports.

On June 13, 2013, petitioner was given her annual review, which was unsatisfactory (U-Rating). Petitioner was rated unsatisfactory in 13 separate categories on the annual review, while the other categories were left without evaluation or comment. The annual review also contained Superintendent Karen Watts' recommendation that petitioner's probationary service be discontinued. On June 25, 2013, petitioner received a notice of discontinuance and submitted a rebuttal to such notice that same day. By letter dated June 26, 2013, Superintendent Watts affirmed the discontinuance of petitioner's probationary service, as of July 26, 2013, the date of petitioner's termination.

Petitioner subsequently commenced this Article 78 proceeding seeking to rescind her termination and U-Rating for the 2012-2013 school year. Respondents now jointly move to dismiss the petition, pursuant to CPLR 7804(f), 3211(a)(2), and 3211(a)(7), on the basis that petitioner lacks standing to challenge the U-Rating she received on her annual review because such rating is not final and that petitioner fails to state a cause of action.

DISCUSSION

Petitioner's Challenge to the U-Rating on her Annual Review

As an initial matter, respondents correctly argue that this Article 78 proceeding as to petitioner's U-Rating on her annual review is premature since no final determination has been rendered by the Chancellor concerning petitioner's administrative challenge to such rating.

CPLR 7801(1) clearly states that:

“a proceeding under [Article 78] shall not be used to challenge a determination: (1) which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application.”

The Appellate Division, First Department, has held that “[t]he determination that petitioner's teaching performance was unsatisfactory did not become final and binding until the Chancellor denied his appeal sustaining the rating.” *Matter of Hazeltine v City of New York*, 89 AD3d 613, 614 (1st Dept 2011); *see also Matter of Leo v New York City Dept. of Educ.*, 100 AD3d 536, 537 (1st Dept 2012). Here, it is uncontested that the Chancellor has yet to issue a determination on petitioner's appeal, which challenges, *inter alia*, petitioner's U-Rating on her annual review. As such, this Article 78 proceeding was prematurely commenced and must be dismissed as to petitioner's U-Rating on her annual review. “The policy underlying the dismissal for prematurity of article 78 proceedings before a final and binding determination is to preclude the initiation of litigation that may thereafter become academic.” *Matter of Committee to Save the Beacon Theater v City of New York*, 146 AD2d 397, 404 (1st Dept 1989).

Review of Petitioner's Termination

To the extent that this Article 78 proceeding seeks review of petitioner's termination, however, the Court of Appeals has held, in *Kahn v New York City Dept. of Educ.*, 18 NY3d 457,

462 (2012), that the “DOE’s decisions were ‘final and binding’ within the meaning of CPLR 217(1) as of the dates when [the teachers’] probationary service ended,” and, thus, in *Kahn* the “lawsuits, brought more than four months after the dates when their probationary service ended, [were] time-barred.” *Id.* In the instant case, petitioner filed the petition on October 11, 2013, and it is undisputed that petitioner’s employment as a probationary teacher was terminated on July 26, 2012. As respondents’ decision was final and binding as of such date, this Article 78 proceeding is not premature as to petitioner’s termination.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the movant has the burden to demonstrate that, based upon the four corners of the complaint, liberally construed in favor of the nonmoving party, the pleading states no legally cognizable cause of action. *See Leon v Martinez*, 84 NY2d 83, 87-88 (1994). This standard is applicable to Article 78 proceedings. *See Matter of Fitzgerald v Matthews*, 244 AD2d 193 (1st Dept 1997); *Tucker v Battery Park City Parks Corp.*, 227 AD2d 318 (1st Dept 1996). In determining whether to grant a motion to dismiss, the court accepts the facts alleged in a complaint as true, and determines whether the facts, as alleged, fit within any cognizable theory of law. *See Morone v Morone*, 50 NY2d 481, 484 (1980); *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Additionally, all such facts must be accorded every favorable inference. *See Beattie v Brown & Wood*, 243 AD2d 395, 395 (1st Dept 1997).

Applying the above principles here, respondents have failed to meet their burden of showing that the verified petition fails to state a legally cognizable cause of action. Here, the verified petition is sufficiently particular to meet the pleading standards set forth in CPLR 3211 and 7804, and to warrant a denial of respondents’ cross-motion to dismiss for failure to state a cause of action. The verified petition specifically pleads that respondents’ discontinuance of

petitioner's probationary service was arbitrary, capricious, without any basis in fact or law, an abuse of discretion, irrational, in bad faith, unlawful, and in violation of appropriate procedures, including failure to provide a minimum of four formal classroom observations per year, as required by respondent Department of Education's Chief Executives' Memorandum # 80. Verified Petition, ¶ 45. In addition, petitioner argues that respondents failed to provide a meaningful opportunity to improve any alleged deficiencies in her teaching performance, especially by not conducting sufficient observations (Verified Petition, ¶ 49), or providing any "meaningful" assistance and that all of the instances of assistance referred to by respondents were group meetings and not direct, individualized meetings outside of the three coaching sessions with Mr. McEvoy (Petitioner's aff in opposition, ¶¶ 21-22). Taking the alleged facts as true, petitioner has sufficiently pled the facts to give respondents notice that petitioner intends to prove that respondents acted in bad faith and her termination was arbitrary and capricious, and should be reversed. Thus, respondents' cross-motion to dismiss must be denied as to a review of petitioner's termination.

Accordingly, it is

ORDERED that respondents' cross-motion to dismiss the petition for failure to state a cause of action is denied as to a review of petitioner's termination; and it is further

ORDERED that respondents' cross-motion to dismiss is granted as to petitioner's request to rescind the U-rating on her annual review; and it is further

ORDERED that respondents shall serve and file their answer to the petition within 20 days of service upon them of a copy of this order with notice of entry; failure to timely serve/file an answer may result in the granting of the requested relief upon default; and it is further

ORDERED that petitioner shall re-notice this matter in accordance with CPLR 7804(f), returnable to the Motion Support Office, Room 130, 60 Centre Street, within 30 days of receipt of respondents' answer (or move for a default within 30 days of expiration of the time to answer); and it is further

ORDERED that within 30 days of entry, petitioner shall serve a copy of this order upon respondents with notice of entry.

This constitutes the decision and order of the court.

Dated: 7/9/14


DORIS LING-COHAN, J.S.C.

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Check if Appropriate: DO NOT POST

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