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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

Index Number : 100048/2014

PART 15

PEREZ, MARITZA

vs

CITY OF NEW YORK

INDEX NO. _____

Sequence Number : 001

MOTION DATE _____

ARTICLE 78

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3

Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is

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).

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/11/14

HON. EILEEN A. RAKOWER J.S.C.

1. CHECK ONE: ..... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER

3. CHECK IF APPROPRIATE: ..... [ ] SETTLE ORDER [ ] SUBMIT ORDER

[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

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

PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

In the Manner of the Application of
MARITZA PEREZ,

Petitioner,

-v-

CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF EDUCATION; AND DENNIS WALCOTT, CHANCELLOR OF NEW YORK CITY DEPARTMENT OF EDUCATION

Respondents.

INDEX NO. 100048/2014

MOTION DATE

MOTION SEQ. NO. 001

MOTION CALL NO.

The following papers, number 1 to were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – Affidavits – Exhibits	1,2
Answers – Affidavits – Exhibits	3
Replying Affidavits	4

Maritza Perez ("Petitioner") brings this Article 78 proceeding for an Order compelling the City of New York ("the City"), New York City Department of Education ("DOE"), and Chancellor of New York City Department of Education (collectively, "Respondents") to reverse Petitioner's Unsatisfactory annual rating ("U-rating") for the 2011-2012 school year, and to rescind Petitioner's discontinuance as a probationary teacher. Petitioner claims her U-rating and subsequent discontinuance were arbitrary, capricious and made in bad faith as retaliation for Petitioner calling in sick for the week of January 9-13, 2012. Respondents cross-move to dismiss the petition on the grounds that it fails to state a cause of action upon which relief can be granted, is time-barred, and that Respondents' decision to sustain Petitioner's U-rating was not arbitrary and capricious. Respondents also assert the City is not a proper party to this proceeding.

Petitioner's verified petition (the "Petition") states that Petitioner is a French teacher formerly employed, with probationary status, at the Environmental, Science, Mathematics and Technology School, Intermediate School 190 ("the School"). The Petition further states, "During her first two

and a half years as a French teacher at [the School], Petitioner Maritza Perez received only Satisfactory ratings and observations" and that "On or about June 21, 2012, Petitioner received her first ever end of the year Unsatisfactory rating ('U-rating') for the 2011-2012 school year."

In her Petition, Petitioner claims that, "during the first week of January 2012, Petitioner fell sick with acute bronchitis and was forced to miss time at school. Prior to falling sick with bronchitis, Petitioner had no negative letters to file or Unsatisfactory observations."

Petitioner claims that, "On or about March 16, 2012, Petitioner met with her Principal to discuss whether she would pass her probationary period and receive tenure." Petitioner further claims, "Having only had one day notice of this meeting, Petitioner asked to postpone this meeting because she was not able to assemble her portfolio showcasing her work for the year on such short notice. Her principal refused to postpone this meeting." The Petition states that Petitioner was unable to answer questions during the March 16, 2012, meeting "because she did not have her portfolio."

Petitioner further asserts that, by letter dated July 2, 2012, Petitioner received notice of a discontinuance, and that, "on or about August 4, 2012, Petitioner was officially discontinued as a probationary teacher."

Petitioner claims that, "Respondents' issuance of Petitioner's Unsatisfactory annual rating for the 2011-2012 school year, as well as their reaffirmation of her discontinuance of probationary status in September 2013, was arbitrary and capricious, wrongful, discriminatory and in bad faith, in that it was wholly based on documents issued in retaliation for Petitioner taking a sick leave in January 2012."

By letter dated October 18, 2011, Petitioner's supervisor at the School and the School's assistant principal, Mark Turcotte ("Assistant Principal Turcotte") informed Petitioner that Petitioner failed to submit student work samples and set up the class bulletin board as required by "instructional policies and practices outlined in section six of [the School's] Staff Handbook." By letter dated January 9, 2012, Principal Santiago notified Petitioner that Petitioner failed to submit her midterms by the January 6, 2012 deadline.

By letter dated January 9, 2012, Assistant Principal Turcotte notified Petitioner that the Petitioner "had no generic lesson plans on file to cover for unanticipated absences" and that Petitioner "continue[d] to neglect school protocol and timelines".

By letters dated January 10, 2012, January 11, 2012, and January 13, 2012, Assistant Principal Turcotte informed Petitioner that she "failed to have generic lesson plans on file", that Petitioner "continue[d] to neglect school protocol and timelines", and that Petitioner's "failure to follow school policy is unacceptable."

By letter dated January 17, 2012, Assistant Principal Turcotte informed Petitioner that a meeting was scheduled between Principal Santiago, Assistant Principal Turcotte, and Petitioner, to discuss Petitioner's lack of lesson planning and missed deadlines.

In the affidavit of DianaJade Santiago ("Principal Santiago"), the School's principal, Principal Santiago avers that Petitioner received intensive mentoring services during the 2009-2010 and 2010-2011 school years, and that Petitioner's mentors "deserved much of the credit for the timely completion of [Petitioner's] tasks" during that time. Principal Santiago further avers that Petitioner did not did not have any mentors for the 2011-2012 school year, the school year at issue. Additionally, Principal Santiago avers that Petitioner worked as a probationary teacher at the Renaissance Leadership Academy, I.S. M286 during the 2008-2009 school year, and that Petitioner received a U-rating for that school year.

Principal Santiago further avers that, "during the 2011-2012 year, the petitioner missed deadline after deadline." Specifically, Principal Santiago avers that Petitioner left her bulletin board blank in October 2011, failed to submit her holiday packages in December 2011, failed to turn in her midterms for review in January 2012, failed to submit her students' holiday package grades in February 2012, and failed to turn in her final exams for review in May 2012. With respect to the holiday packages, Principal Santiago avers that, "petitioner not only submitted the holiday package more than one week late, but she also she [sic] submitted a very flawed product. She made a single holiday package for sixth-, seventh-, and eighth-grade students—even though each grade was responsible for different material."

Principal Santiago avers, "Our school's staff handbook requires teachers to have four to five generic lesson plans on file every month. The goal is to ensure that a teacher's absence does not inhibit student learning." Principal Santiago further avers, "The petitioner was the only teacher to call in sick without having lesson plans prepared during the 2011-2012 school year." Principal Santiago further avers that, "beginning in late January 2012, I estimate that I entered the petitioner's classroom at least twice weekly because the noise coming from the class was so loud. I would enter petitioner's room for about 15 minutes each time to calm down the class." Principal Santiago avers that the same students "had few behavioral problems in in other teachers' classes."

Principal Santiago also avers that, "On Monday, March 5, 2012, I announced that all teachers who were eligible for tenure should begin to compile their materials for their tenure interview."

Additionally, Respondents submit evaluation reports for Petitioner's lesson observations, dated April 23, 2012, and June 6, 2012. In the evaluation report dated April 23, 2012, Principal Santiago rated Petitioner's lesson "Unsatisfactory" based on Principal Santiago's observations that Petitioner was "unprepared with resources," and that the "lesson had no structure" and that "the students were unsure of what they should be doing".

In the evaluation report dated June 6, 2013, Principal Santiago rated Petitioner's lesson "Unsatisfactory" for similar reasons, including Petitioner's failure to produce a lesson plan upon request, in violation of the requirement that "Lesson plans are to be visible and available at all times. (See attachment—Labor Law Book p. 42)". The evaluation report dated June 6, 2013, further states, "In conclusion, it was evident that the students spent 26 minutes playing games instead of receiving instruction."

By letter dated June 12, 2011, Principal Santiago "issued [P]etitioner a U-rating" for the 2011-2012 school year and "recommended the discontinuance of her probationary service." By letter dated July 2, 2012, Community Superintendent Myrna Rodriguez ("Superintendent Rodriguez") "affirmed the discontinuance of [P]etitioner's probationary service effective August 6, 2012."

Petitioner appealed her U-rating and discontinuance to the New York City Board of Education's Office of Appeals and Reviews ("OAR") on

November 27, 2012. According to OAR's Review of Recommendation to Discontinue Probationary Service, OAR unanimously concurred with the "recommendation to discontinue probationary service due to ineffective teaching, lack of lesson plans, and lateness to class." By letter dated September 11, 2013, Superintendent Rodriguez reaffirmed Petitioner's U-rating and termination[1]. Petitioner filed the instant petition on January 10, 2014.

As an initial matter, the City and the DOE are separate and distinct entities. (*Perez v. City of New York*, 41 A.D.3d 378 [1st Dep't 2007]). Accordingly, the City is not a proper party to this proceeding. (*Stepper v. Department of Educ. of the City of N.Y.*, 104 A.D.3d 412 [1st Dep't 2013]).

An Article 78 petition to challenge the termination of probationary employment must be brought within four months of the effective date of the petitioner's determination. *See Hazeltine v. City of New York*, 89 A.D.3d 613 [1st Dep't 2011]. "Because a determination pursuant to Education Law § 2573 (1) (a) to discontinue a probationary employee's service becomes final and binding on that employee on his or her last day at work . . . CPLR 217 (1) dictates that any suit to challenge the determination must be commenced within four months after that date." (*Kahn v. New York City Dept. of Educ.*, 18 N.Y.3d 457, 472 [2012]).

Additionally, the pursuit of administrative remedies does not extend the time period a petitioner can challenge her termination. *See Matter of Strong v. New York City Dept. of Educ.*, 62 A.D.3d 592 [2009].

Petitioner argues that this petition is timely brought because Superintendent Rodriguez did not reaffirm her discontinuance until September 11, 2013. However, Petitioner's effective date of determination became final and binding on her last day of work, which was in 2012. Petitioner filed this petition on January 10, 2014, more than four months after the effective date of her termination. Accordingly, Petitioner's challenge to her termination is time-barred.

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[1] Petitioner's Petition states, "On or about September 11, 2013, after Petitioner through her attorney requested a decision on her U rating appeal held on November 27, 2012, Superintendent Myrna Rodriguez finally issued Petitioner a litter affirming her Discontinuance of Probationary Service, almost 10 months after her hearing was held."

With respect to Petitioner's challenge to her U-rating, Respondents concede Petitioner's challenge is timely. Nevertheless, it is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." *See Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]. The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. *See Matter of Clancy-Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635, 636 [1st Dept. 1983]. Once the court finds a rational basis exists for the agency's determination, its review is ended. *See Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y.2d 269, 277-278 [1972]. The court may only declare an agency's determination arbitrary and capricious if it finds that there is no rational basis for the determination. *Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974].

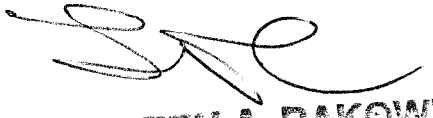
Here, the record does not demonstrate that Petitioner's U-rating is arbitrary and capricious. Although Petitioner claims that, "At her U-rating appeal hearing, Respondents illegally included unsigned disciplinary letters allegedly issued to Petitioner that she never received" and that, "In reality, as she argued in her appeal, Petitioner received no negative letters prior to her sick leave," the detailed observations in Principal Santiago's evaluation reports, dated April 23, 2012, and June 6, 2012, provide a rational basis for Petitioner's U-rating. *See Matter of Cohn v. Board of Educ. of City Sch. Dist. of the City of N.Y.*, 102 A.D.3d 586, 587, 960 N.Y.S.2d 362 [1st Dept. 2013].

Wherefore, it is hereby,

ORDERED AND ADJUDGED that the Petition is denied and Respondents' cross motion is granted and the proceeding is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: July 11, 2014



HON. EILEEN A. RAKOWER