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

PRESENT: Hon. EILEEN A. RAKOWER **PART 6**
Justice

In the Matter of the Application of

LYNN IRBY,

Petitioner,

for Judgment pursuant to Art. 78, CPLR,

-against-

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, and THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondents.

INDEX NO. 161206/2019
MOTION DATE
MOTION SEQ. NO. 1
MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answer — Affidavits — Exhibits _____	
Replying Affidavits	

Cross-Motion: Yes x No

Petitioner Lynn Irby ("Petitioner") brings this action, pursuant to Article 78 of the New York Civil Practice Laws and Rules ("Article 78"), for monetary and equitable relief including a declaration issued by Respondents The Department of Education of the City of New York, and The Board of Education of the City School District of the City of New York (hereinafter, "DOE") was arbitrary and capricious and in bad faith and in violation of the New York City Administrative Code 8-107, an Order reinstating Petitioner retroactively to the position of teacher, an Order expunging the code on Petitioner entered into the DOE's system, and expunging the unsatisfactory rating if any or converted to a satisfactory. Petitioner also seeks an Order immediately declaring her eligible for employment with the DOE. Petitioner also seeks a judgment for incidental damages including all past salary lost and benefits lost retroactively, a reasonable attorney fee, plus costs and disbursements of this lawsuit. DOE opposes the Petition.

Background/Factual Allegations

DOE avers that Petitioner was appointed as a Probationary Teacher of Special Education at the High School of the Arts and Technology, Martin Luther King Jr. Educational Campus on January 11, 2019. DOE contends that Petitioner's appointment was subject to a two-year probationary period, scheduled to conclude on January 11, 2021.

Petitioner contends that during the 2018-2019 school year, Petitioner had a serious back condition and had to undergo spinal surgery on July 5, 2019. Petitioner contends that DOE had notice of Petitioner's condition and surgery. Between January 11, 2019, and May 14, 2019, Petitioner had been out on 14 separate days. Petitioner contends that her absences were a result of her medical condition.

On May 17, 2019, a meeting was held between Petitioner, a United Federation of Teachers ("UFT") representative, and Principal Mariela Graham ("Principal Graham") to discuss Petitioner's attendance/lateness record. Petitioner contends that she and the UFT representative submitted medical documentation that supported the reasons for her absences and provided Principal Graham with information about her surgery that would take place on July 5, 2019 after the semester ended. Petitioner asserts that she "told the Principal that she again was attempting to minimize the disruption that it would cause the school if she had the surgery when school was in session." Principal Graham sent Petitioner a letter to file dated May 24, 2019, which concluded that Petitioner's record of absences was excessive.

DOE asserts that:

> [On] June 10, 2019, Principal Graham observed Petitioner standing outside during the students' dismissal. See Graham Aff. ¶ 22, Exhibit "4." Principal Graham proceeded to ask Petitioner why she was not inside the building, as a teacher's workday ends at 3:43 p.m. on Mondays. Id. In response, Petitioner stated that she had an MRI appointment. Id. Despite leaving work early, Petitioner had failed to inform any administrator of this intended absence, nor had she clocked out when leaving the school. See Graham Aff. ¶ 26, Exhibit "4."

On June 14, 2019 a meeting was held between Petitioner and Principal Graham. DOE asserts that Petitioner declined to have a UFT representative present during the meeting. DOE contends that Principal Graham discussed with Petitioner

why she left early on June 10, 2019 and Petitioner stated that "I apologized profusely. I didn't understand. The doctor wrote the referral for March 23rd but…I messed up and I apologize. I know you didn't want me to make up the time, and that's your decision. There was no malicious intent; it was just a terrible mistake." DOE further contends that Principal Graham asked Petitioner if she clocked out when she left early and Petitioner responded that she "didn't think about it" and Petitioner was "stressed out because there were going to be two machines, and I was flustered. There was a lot going on in my mind." DOE asserts that "Principal Graham concluded that by leaving work early without informing any administrator or clocking out, Petitioner engaged in professional misconduct." Petitioner received a letter to file, dated June 17, 2019, which was signed and dated by Petitioner on June 18, 2019. Principal Graham informed Petitioner that as a consequence of the professional misconduct on June 10, 2019, Petitioner was required to clock in and out each day for the remainder of the school year, and Petitioner was advised that this may lead to further disciplinary action including termination.

DOE contends that "[b]y Review and Report on Probationary Service of Pedagogical Employee for Petitioner, dated June 18, 2019, Principal Graham rated Petitioner 'Unsatisfactory' for School Year 2018-2019 in the areas of attendance and punctuality, and professional attitude and professional growth … [and] Principal Graham recommended that Petitioner's probationary service with the DOE be discontinued." DOE asserts that "[o]n June 26, 2019, Petitioner refused to sign Principal Graham's Review and Report on Probationary Service of Pedagogical Employee for Petitioner, dated June 18, 2019."

Superintendent Fred Walsh ("Superintendent Walsh") sent a letter to Petitioner dated June 18, 2019, stating that he was to review and consider her discontinuance. Superintendent Walsh stated that:

> My consideration of your discontinuance will be based on the reasons included in documentation you received. Such documentation constitutes a written statement of the reasons for my consideration of your discontinuance.

Superintendent Walsh further stated that Petitioner could provide a written response at least seven days prior to Superintendent Walsh's consideration and final determination of Petitioner's Discontinuance.

Petitioner asserts that on July 9, 2019, she sent a letter by overnight mail and email to Superintendent Walsh explaining the situation and asking to stop the discontinuance of her employment.

Petitioner contends that she received a letter on August 3, 2019 from Superintendent Walsh, which was dated July 17, 2019, affirming Petitioner's Discontinuance of Probationary Service. Superintendent Walsh wrote:

> This [letter] is to inform you that since I have not received any written response from you as requested in the letter dated June 18, 2019; I affirm your Discontinuance of Probationary Service effective close of business July 17, 2019.

DOE asserts that Superintendent Walsh confirmed receipt of Petitioner's written response dated July 9, 2019, and the supporting documentation by letter dated August 5, 2019. Superintendent Walsh reaffirmed Petitioner's "Discontinuance of Probationary Service effective close of business July 17, 2019."

On November 14, 2019, a conference was held before the Chancellor's Committee to review Petitioner's Discontinuance and Unsatisfactory rating for School Year 2018-2019. The Chancellor's Committee determined that:

> The members of the Chancellor's Committee unanimously found that neither the Advisor nor the Probationer was able to provide any convincing evidence to support the claim that the Probationer received unfair treatment because of being discontinued from her probationary service with the DOE. In addition, the Chair found that there was not enough compelling evidence to necessitate a reversal of the Unsatisfactory rating the Probationer received for the 2018-2019 School Year. As such, the Chancellor's Committee unanimously recommended that the Superintendent's decision to discontinue the Probationer's service with the DOE be left undisturbed and that the Chair recommended that the Unsatisfactory rating the Probationer received for School Year 2018-2019 be respected.

The DOE contends that Superintendent Walsh informed Petitioner by letter dated February 6, 2020, that that he was in receipt of the advisory report from the Chancellor's Committee for the meeting held on November 14, 2019, and he reaffirmed the discontinuance of Petitioner's probationary service.

Parties' Contentions

Petitioner argues that the DOE "has acted arbitrarily and capriciously and in bad faith by declaring that Petitioner was ineligible to be employed with the DOE, discontinuing Petitioner, and giving her an unsatisfactory performance evaluation." Petitioner asserts that "[t]he discontinuance is due to Petitioner's disability and retaliation for being absent 14 days from work due to her disability and with the full knowledge of the Department of Education, in violation of the ADA (American with Disability Act), the New York City Human Rights Law (Administrative Code of the City of New York § 8-107 and the New York State Human Rights Law, (New York State Executive Law 291 et. seq.)." Petitioner contends that as a result of the termination she has been damaged "by loss of wages, loss of future income, by damage to her reputation and consequent inability to secure other employment and by extreme emotional and psychological upset and distress."

In opposition, DOE asserts that Petitioner's discrimination claims pursuant to Education Law § 3813(1) and General Municipal Law §50-e(1) should be dismissed for failure to file a timely notice of claim within three months after the accrual of such claim and prior to commencing any action. DOE contends that Petitioner commenced the Article 78 proceeding on November 18, 2019, by Notice of Verified Petition and Verified Petition dated November 18, 2019. DOE further contends that it was not served until January 16, 2020, at which time it was served with an Amended Notice of Verified Petition dated January 16, 2020, and a Verified Petition dated November 18, 2019. DOE asserts that it was never served with the original Notice of Verified Petition.

DOE argues that Petitioner fails to demonstrate that its decision to discontinue her probationary employment was made in bad faith. DOE asserts that "[a]side from her fourteen absences, allegedly due to medical issues, and 53 minutes of lateness, Petitioner has a well-documented record of pedagogical weaknesses and one instance of professional misconduct—all within only six-months of probationary employment. DOE contends that "Petitioner received her second letter to file for an incident of professional misconduct that, yet again, reflected a concerning attendance record" when Petitioner left on Monday, June 10, 2019 at 2:40 p.m. when the teacher's workday ends at 3:43 p.m. on Mondays without notifying the administration or clocking out. DOE further contends that "[i]n the Review and Report on Probationary Service of Pedagogical Employee for Petitioner, dated June 18, 2019, Principal Graham rated Petitioner 'Unsatisfactory' for School Year 2018-2019 in the areas of attendance and punctuality, and professional attitude and professional growth … [and] Principal Graham recommended that Petitioner's probationary service with the DOE be discontinued." DOE argues that "in addition

to Petitioner's absences, Petitioner's observations revealed inadequate pedagogy." DOE asserts that "Petitioner was observed four times during the school year on: March 11, April 16, May 8, and May 23, 2019 … [and] it was observed that Petitioner's lessons had consistent weakness across the following areas: demonstrating knowledge of content and pedagogy, designing coherent instruction, using questioning techniques, engaging students in learning, using assessment in instruction, and growing and developing professionally." DOE further asserts that "the lessons observed during the school year revealed: activities that were moderately challenging, minimal student engagement and participation, activities not aligned with Petitioner's lesson plan, a lack of rigor, a lack of differentiated instruction and, in one instance, a lesson that was built on misinformation." DOE argues that Petitioner appealed her discontinuance and Unsatisfactory rating and the Chancellor's Committe found:

> The members of the Chancellor's Committee unanimously found that neither the Advisor nor the Probationer was able to provide any convincing evidence to support the claim that the Probationer received unfair treatment because of being discontinued from her probationary service with the DOE. In addition, the Chair found that there was not enough compelling evidence to necessitate a reversal of the Unsatisfactory rating the Probationer received for the 2018-2019 School Year. As such, the Chancellor's Committee unanimously recommended that the Superintendent's decision to discontinue the Probationer's service with the DOE be left undisturbed and that the Chair recommended that the Unsatisfactory rating the Probationer received for School Year 2018-2019 be respected.

Moreover, DOE asserts that "Petitioner makes the conclusory claim that DOE's decision to discontinue her probationary employment was the result of an actual or perceived disability in violation of the Americans with Disabilities Act ('ADA'), the New York City Human Rights Law ('NYCHRL'), and the New York State Human Rights Law ('NYSHRL') — and not her inadequate professional performance throughout her probationary service, including a pattern of excessive absences, lateness, persistent weaknesses in Petitioner's pedagogy, as well as an incident of professional misconduct that resulted in Petitioner's second letter to file." DOE argues that "even if Petitioner's medical conditions qualify as disabilities, even within the meaning under the NYCHRL - which Respondent does not concede - Petitioner still cannot show that Respondent acted in bad faith." DOE argues that

Petitioner fails to address her "persistent weaknesses in Petitioner's pedagogy, as well as an incident of professional misconduct that resulted in Petitioner's second letter to file, all unrelated to her alleged medical conditions." DOE further argues that "[c]ontrary to Petitioner's assertions, DOE's supported decision to discontinue Petitioner did not terminate her underlying license, so there would be no effect on her ability to be hired by a private school."

Furthermore, DOE argues that "[a]ssuming, arguendo, that the Article 78 proceeding at bar is brought by way of mandamus to compel, Petitioner fails to demonstrate a clear legal right to the relief she seeks and, thus, a cause of action of mandamus to compel cannot be sustained. DOE asserts that "Petitioner has arguably styled her Article 78 as one of mandamus to compel a ministerial act, that is, to compel her retroactive reinstatement to the position of teacher, to remove any code entered into the DOE's system concerning Petitioner, and to expunge her unsatisfactory or convert it to a satisfactory, instead of mandamus to review the determination to discontinue Petitioner's probationary employment and issue her an Unsatisfactory rating for the 2018-2019 School Year." DOE argues that it was rational for it to place an "internal problem code" in Petitioner's file based on Petitioner's probationary service record and professional misconduct. DOE asserts that [t]o remove the unsatisfactory rating and any internal problem/ineligible code, as a general matter, would not only ignore the fact that there were letters to file and evaluations concerning Petitioner, but it would also overlook the fact that they were signed by Petitioner."

In reply, Petitioner argues that "since the relief sought by Petitioner is equitable such as a declaration that Respondent acted arbitrary and capricious, reinstatement and the expungement of the ineligible code, Petitioner is not required to file a notice of claim and thus there is no procedural defect."

Petitioner argues that she was terminated in bad faith based on her disability. Petitioner asserts that "DOE's termination letter and deadline to respond perfectly timed while knowing Petitioner was undergoing spinal surgery and recovery was done in bad faith." Petitioner further asserts that she was improperly rated because DOE "did not follow the proper procedure in observing/evaluating Petitioner because at the time Petitioner was observed/evaluated, Petitioner was teaching for less than a year and Petitioner received excessive evaluations for this short period of time." Petitioner argues that "DOE then falsely claimed to Petitioner that a teacher could not be represented by private counsel when she inquired and wanted counsel representation to challenge her discontinuance" because there is no CBA "provision stating that teachers cannot be represented by counsel exists." Petitioner asserts that her termination was shocking.

Legal Standard

"Article 78 proceedings exist for the relief of parties personally aggrieved by governmental action." *Dunne v. Harnett*, 399 NYS 2d 562, 563 [Sup Ct, NY County 1977]. Judicial review is limited to questions expressly identified by CPLR 7803. *Featherstone v. Franco*, 95 NY2d 550, 554 [2000]. One such question is "whether a determination 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." *See* CPLR 7803[3]. "[I]t is settled that in a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious." *Flacke v. Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 [1987]. "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." *Testwell, Inc. v. New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010]. "[C]laims, which are equitable in nature, are not barred by [Petitioner's] failure to file a notice of claim pursuant to Education Law § 3813(1), which is only required when money damages are sought. *Kahn v. New York City Dept. of Educ.*, 79 AD3d 521, 522 [1st Dept 2010], *aff'd,* Matter of *Kahn v. New York City Dept. of Educ.*, 18 NY3d 457 [2012].

"It is well settled that a probationary employee may be discharged without a hearing and without a statement of reasons in the absence of any demonstration that dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional law." *York v. McGuire*, 63 NY2d 760 [1984]. "Judicial review of the determination to discharge this probationary employee is limited to an inquiry as to whether the termination was made in bad faith." *Matter of Johnson v. Katz*, 68 NY2d 649, 650 [1986]. "Bad faith includes retaliation for the exercise of protected conduct." *Amankwah v. The Dept. of Educ. of the City of New York*, 2019 N.Y. Slip Op. 31033[U], 8 [N.Y. Sup Ct, New York County 2019]. "Evidence in the record supporting the conclusion that performance was unsatisfactory establishes that the discharge was made in good faith." *Matter of Johnson*, 68 NY2d at 650. "[T]he burden falls squarely on the petitioner to demonstrate, by competent proof, that a substantial issue of bad faith exists, or that the termination was for an improper or impermissible reason, and mere speculation, or bald, conclusory allegations are insufficient to shoulder this burden." *Che Lin Tsao v. Kelly*, 28 AD3d 320, 321 [1st Dept 2006] (internal citation omitted).

Discussion

Petitioner does not need to file a notice of claim for an Article 78 proceeding asking for equitable relief, however Petitioner has failed to demonstrate that DOE's discontinuance of Petitioner's probationary employment is arbitrary, capricious and in bad faith. *Flacke*, 69 NY2d at 363. Petitioner's probationary employment was discontinued not only as a result of her fourteen absences and 53 minutes of lateness but also as a result of her pedagogical weaknesses and one instance of professional misconduct, all within six-months of her probationary employment. Petitioner was observed four times during the school year on: March 11, April 16, May 8, and May 23, 2019 and Petitioner's lessons were observed to have consistent weakness across the following areas: demonstrating knowledge of content and pedagogy, designing coherent instruction, using questioning techniques, engaging students in learning, using assessment in instruction, and growing and developing professionally. DOE avers that "the lessons observed during the school year revealed: activities that were moderately challenging, minimal student engagement and participation, activities not aligned with Petitioner's lesson plan, a lack of rigor, a lack of differentiated instruction and, in one instance, a lesson that was built on misinformation."

Petitioner makes a conclusory claim that the discontinuance of her probationary employment was the result of an actual or perceived disability in violation of the ADA, the NYSHRL, and not her inadequate professional performance throughout her probationary service, including a pattern of excessive absences, lateness, persistent weaknesses in Petitioner's pedagogy, as well as an incident of professional misconduct that resulted in Petitioner's second letter to file. Petitioner failed to demonstrate that her termination was made in bad faith. *Matter of Johnson*, 68 NY2d at 650. Therefore, Petitioner fails to meet her burden of demonstrating that the DOE's determination should be disturbed by the Court.

Wherefore it is hereby

ORDERED that the Petition is denied and the proceeding is dismissed and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: September 2, 2020

ENTER:

J.S.C.

HON. EILEEN A. RAKOWER

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION