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| Matter of McIlwain v New York City Dept. of Educ. |
| 2020 NY Slip Op 33084(U) |
| July 16, 2020 |
| Supreme Court, Kings County |
| Docket Number: 523475/2018 |
| Judge: Richard Velasquez |
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KINGS COUNTY CLERK
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2020 SEP 15 PM 4:18

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16th day of JULY, 2020

PRESENT:
HON. RICHARD VELASQUEZ
Justice.

-----X
In the Matter of the Application of

BERNARD MCILWAIN, Petitioner, Index No.: 523475/2018

For a Judgment Pursuant to Article 75 of the Civil Practice Law and Rules, Decision and Order

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,
RICHARD A CARRANZA,

Respondents.
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The following papers numbered 17 to 35 read on this motion:

| <u>Papers</u> | <u>Numbered</u> |
|---|-----------------|
| Notice of Motion/Cross-Motion/Order to Show Cause Affidavits (Affirmations) Annexed _____ | 17-19; 22-28 |
| Opposing Affidavits (Affirmations) _____ | 31-33 |
| Reply(Memorandum) _____ | 35 |

After having heard Oral Argument on June 29, 2020 and after review of the submissions herein the court finds as follows:

Petitioner moves this court pursuant to CPLR Article 75 under sections 7511 of the Civil Practice Law and Rules and section 3020-a.5 of the Education Law seeks an

order vacating an arbitration decision dated November 1, 2018¹ as arbitrary and capricious.

Respondents cross-move to dismiss contending that this petition was filed 3 days after the 10-day statute of limitations for such challenges expired. Further respondents contend they were not served the Petition until January of 2019 and CPLR 306-b provides a maximum of 15 days after the expiration of the statute of limitations to serve. Additionally, respondents contend the petitioner was given due process and a fair hearing and the decision should not be overturned. Petitioner opposes the same contending he received the notice of termination on November 2, and the Petition was timely filed on November 12, 2020. Petitioner further contends the respondents were served timely as this is an e-file case and pursuant to those rules respondents were put on notice on November 12, 2020.

FACTS

The Petition seeks to vacate and annul the decision issued after an 10 day Education Law § 3020-a disciplinary hearing, which found petitioner, a former Assistant Principal guilty of several charges including fraud, and terminated his DOE employment. Said decision was dated October 29, 2018. Electronic notification of the decision was sent on October 30, 2018. The instant Petition was e-filed on November 12, 2018. Petitioner effectuated service of process in December 24, 2018 and January 9, 2019.

ANALYSIS

Education Law § 3020(5)(a) provides, "Not later than **ten days after receipt of the hearing officer's decision**, the employee or the employing board may make an application to the New York state supreme court to vacate or modify the decision of the

¹ The Court notes the Arbitrator Decision is dated October 29, 2018 not November 1, 2018.

hearing officer pursuant to section seventy-five hundred eleven of the civil practice law and rules. The court's review shall be limited to the grounds set forth in such section. The hearing panel's determination shall be deemed to be final for the purpose of such proceeding. See NY Educ Law § 3020-a (McKinney).

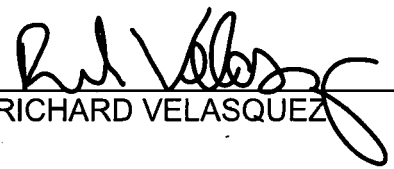
In the present case, it is undisputed that the petition was e-filed on November 12, 2018. It is also undisputed that Petitioner received notice the Hearing Officer's decision dated October 29, 2018 was issued electronically on October 30, 2018. Petitioner contends that the Petition was filed within ten (10) days of receipt of the Notice of Termination. However, the above language is clear in that the clock on the statute of limitation begins to run on the date the decision is issued not the date petitioner is terminated. In the present case, the petition before the court was filed three (3) days after the statute of limitations to file such claim expired. Therefore, Petitioner failed to timely file the petition.

Additionally, even assuming, arguendo, that Petitioner did timely file based on the termination letter receipt on November 2, 2018, his service of the Petition on the DOE was not timely. CPLR 306-b provides, in pertinent part, that "where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires." Accepting that Petitioner received the Termination letter on November 2, 2018, pursuant to CLR 306-b Petitioner had 15 days after the 10 day statute of limitations, or by November 27, 2018, to serve the DOE. However, Petitioner served the Petition on the DOE on December 24, 2018 and January 9, 2019. Petitioner did not request an extension of time to serve the DOE under CPLR 306-b.; See *Cruz v. New York City Dep't of Educ.*, 26 Misc. 3d

1208(A), 906 NYS2d 778 (Sup. Ct. 2010).

Accordingly, Petitioner's motion to vacate the Arbitrators decision is hereby denied, as untimely. (MS#1). Respondents cross-motion to dismiss is hereby granted, for the reasons stated above. (MS#2).

Dated: Brooklyn, New York
July 16, 2020


HON. RICHARD VELASQUEZ

So Ordered
Hon. Richard Velasquez

JUL 16 2020

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