To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

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In the Matter of the Application of
MAURA ANN BROWN,

Petitioner,

-against -

BOARD OF EDUCATION OF THE MAHOPAC CENTRAL SCHOOL DISTRICT and THOMAS MANKO, SUPERINTENDENT,

Respondents.

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AMENDED DECISION/ORDER[1]

Index No. 523-2011

LUBELL, J.

Petitioner Maura Ann Brown ("Petitioner") was employed as a high school Chemistry teacher by the Respondent Board of Education of the Mahopac Central School District (the "Board of Education" or "District") from September 1, 2007, through January 21, 2011, on which date she was terminated. Petitioner brings this CPLR Article 78 proceeding seeking, among other things, reinstatement to her teaching position with back pay and compensatory damages, the enforcement of certain terms of a settlement agreement between the various parties herein (including the expungement of certain negative observation reports contained in her personnel file), and the granting of tenure.

More particularly, Petitioner alleges that Respondents acted arbitrarily, capriciously and in bad faith as allegedly evidenced through a series of acts and omissions, all culminating in her unlawful termination. While it is clear that certain of Petitioner's factual allegations, such as those of bad faith and

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[1] This Amended Decision & Order issues in response to plaintiff's letter of March 15, 2012 and upon this Court's inherent power to conform its March 7, 2012 Decision & Order to that which the Court intended (see, Reback v. Reback, 73 A.D.3d 890, 905 N.Y.S.2d 178 [2d Dept., 2010] and cases therein cited]). More precisely, the Court has herein changed the date of June 30, 2011 as appears on pages 6 and 7 of the March 7, 2012 Decision & Order to June 30, 2010 , and has changed the second decretal paragraph as herein noted.

improper motivation, are vigorously contested, the Court and counsel have identified three distinct and ripe legal issues that may very well prove dispositve of this proceeding without the need for trial.

This Decision & Order is based upon the parties' submissions including their briefs on the following potentially dispositive issues:

> whether Petitioner acquired tenure by estoppel under New York law, thus entitling her to reinstatement with back pay and associated benefits and relief, as of the date of her termination, January 21, 2011;
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> whether a certain June 2010 written Settlement Agreement executed by Petitioner, the Mahopac Teachers Association ("MTA") and Respondent Thomas Manko, as Superintendent, is enforceable as against the District as a matter of law; and
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> if the Court were to rule against Petitioner on the issue of tenure by estoppel, whether the Board of Education acted arbitrarily and capriciously in failing to review and formally act on or vote to adopt the recommendations of the Superintendent by, instead, allowing the Superintendent's recommendation to take effect "automatically" or "by operation of law," so as to deny Petitioner tenure and, thus, terminate her employment effective January 21, 2011.

By letter dated June 18, 2007, then-District Superintendent, Robert J. Reidy, Jr., advised Petitioner that he would recommend to the Respondent Board of Education, Petitioner's "probationary appointment as a teacher in the Secondary Science area effective September 1, 2007 through June 30, 2010." In accordance therewith, on July 11, 2007, Respondent Board of Education appointed Petitioner to the position of teacher in the Secondary Science tenure area, with a probationary period of September 1, 2007 to June 30, 2010. This specified probationary term was likewise recorded in Petitioner's Personnel File, as kept and maintained by the District.

Petitioner was advised of her appointment and of the specified Probationary Period by letter dated July 12, 2007 from then-Superintendent Reidy. She worked the entirety of the 2007-2008 school year and received "satisfactory" evaluations coupled with notations for improvement following classroom observation sessions.

With Board approval, Petitioner was out on unpaid maternity leave from September 1, 2008 to January 21, 2009, following the birth of her son over the summer of 2008.

Petitioner returned to work on January 22, 2009 and continued to work in her tenure-track position for the balance of the 2008-2009 school year. Ms. Brown was observed twice during the 2008-2009 year, and continued to receive "satisfactory" evaluations, which again were coupled with notations for improvement.

Petitioner returned to work at the commencement of the 2009-2010 school year. Classroom activities were observed by Principal Pease on October 19, 2009 which resulted in an "unsatisfactory" evaluation. Petitioner was then observed on October 22, 2009 by Assistant Principal Bilyeu who gave petitioner a "satisfactory" review with notations of areas of needed improvement.

In connection with Principal Pease's October 27, 2009 "unsatisfactory" rating, Petitioner filed a grievance pursuant to Article XIII of the Collective Bargaining Agreement ("CBA"). The MTA filed a related grievance on Petitioner's behalf, wherein the MTA contested the Pease Evaluation under Article XII of the CBA, on the grounds that the evaluation had not been provided to Petitioner within five (5) days of the underlying observation. The MTA filed a second grievance on January 15, 2010, contesting, inter alia, the Teacher Improvement Plan (see, 8 NYCRR 100.2[o][2][iii][b][4]) imposed in connection with the Pease Evaluation. Among other things, therein the MTA sought expungement of the Improvement Plan from Petitioner's Personnel File.

Petitioner was again observed on January 13, 2010 by Assistant Principal Bilyeu, who gave Petitioner a "satisfactory" rating with noted areas of improvement. On June 22, 2010, Petitioner received a year-end, overall "satisfactory" rating, with attendant notations for improvement, from Assistant Principal Bilyeu.

In or around June 2010, the parties began discussions in an effort to resolve the pending grievances. They eventually came to terms. In pertinent part, the parties agreed to the expungement from Petitioner's personnel file of the Pease Evaluation and the

Teacher Improvement Plan and a full release of claims by and on behalf of Petitioner. Additionally, the District and the MTA agreed to meet, review and negotiate a possible change to that aspect of the CBA addressing the timing of teacher evaluations.

In May 2010, the District provided the Petitioner and the MTA with a proposed three-party agreement by and between the District, the MTA and Petitioner (the "Settlement Agreement" entitled "Side Letter Agreement"). The signature block of the Settlement Agreement provides for Superintendent Manko's signature, along with a signature line for the MTA and Petitioner, and was executed accordingly in June 2010.

By memorandum dated May 27, 2010, the District notified Petitioner in writing that she had once again been assigned to the Mahopac High School to teach science for the upcoming school year, 2010-2011.

Thereafter, on June 24, 2010 and although the Settlement Agreement contained no provision conditioning its effectiveness on subsequent Board of Education approval, Respondent Manko forwarded a letter to the MTA informing the MTA that the "Board did not approve the proposed side letter agreement". Respondents have since refused to recognize the efficacy of or abide by the terms of the Settlement Agreement.

The expiration of Petitioner's Probationary Period, as set forth in the July 12, 2007 letter of appointment and as otherwise indicated in Petitioner's Personnel File, passed without comment, express extension, modification, correction, amendment or otherwise. Additionally, the District neither rendered a determination nor scheduled a hearing on Petitioner's grievances that were slated to be withdrawn as part of the since dishonored Settlement Agreement.

Petitioner returned to her scheduled teaching assignment in the Fall of 2010. Thereafter, she filed a Notice of Claim upon the Respondents in connection with the District's repudiation of the parties' June 2010 Settlement Agreement.

Then Assistant Principal Ljumic performed a classroom evaluation of Petitioner on October 5, 2010, in connection with which Petitioner was rated "unsatisfactory", with attendant comments. Petitioner, now seven months pregnant with her third child, was placed on medical leave and bed rest by her treating obstetrical physicians. In connection therewith, Petitioner utilized accrued, contractual, and paid medical leave.

As the result of alleged occurrences that took place during an October 8, 2010 post-observation conference between Petitioner and Assistance Principal Ljumic, Ms. Ljumic drafted and forwarded a scathing "counseling memorandum", dated October 19, 2010, about Petitioner's alleged inappropriate and unprofessional conduct during the post-observation conference. Petitioner objected to same by letter dated October 29, 2010.

On October 20, 2010, Petitioner was served with notice from Respondent Manko of his intention to "recommend to the Board of Education at its meeting of December 14, 2010, that you not be granted tenure and that your employment with the District be terminated at the conclusion of your probationary period". On November 4, 2010, Petitioner requested that the District provide its reasons for the decision to deny Petitioner tenure and terminate her employment. On or around November 10, 2010, Superintendent Manko provided an explanation in writing. One of the "reasons" cited by Superintendent Manko is the Pease Evaluation of October 29, 2009, which, as provided for in the Settlement Agreement, was to be expunged from Petitioner's personnel file.

By letter dated December 7, 2010, Petitioner responded to the Superintendent's stated reasons for his recommendation and specifically requested that the Board provide her with a hearing and the opportunity to challenge the recommendation, together with the Counseling Memo, in order to clear her name. Her request was rejected by Superintendent Manko via letter dated January 10, 2011.

On December 14, 2010, the date set by the District for consideration of Superintendent Manko's recommendation to deny tenure to Petitioner, the Mahopac Board of Education met, but took no action with respect thereto. On December 16, 2010, counsel for Petitioner contacted counsel for the District, via email, and inquired whether the Board had made any decision with regard to Petitioner's tenure. In response, counsel for the District advised that the Board was going to consider the matter at its December 21, 2010 meeting. Although the Board met on December 21, 2010, the Board took no action with respect to Superintendent Manko's recommendation not to grant Petitioner tenure and to terminate her employment.

Petitioner received a letter the next day wherein she was advised by Superintendent Manko that she was going to recommend to the Board that she "not receive tenure" and that her employment would thus be terminated, effective on January 21, 2011.

Petitioner returned to work on January 13, 2011, as scheduled at the end of her maternity leave. The District assigned her a project within her tenure area, directing her to compile and create a Chemistry Department curriculum and lab assignments. Petitioner

worked full-time on the assigned project within her tenure area for the balance of her employment period.

The Board of Education never voted, acted on nor formally reviewed the Superintendent's recommendation to deny tenure and terminate Petitioner. The District terminated Petitioner's employment effective January 21, 2011.

Upon review and consideration of the papers then before the Court and in furtherance of earlier discussions had by and between counsel with the Court, the Court directed the parties to address the following factual and legal issues in writing by January 6, 2012:

> 1) what are the number of workdays missed by Petitioner while out on maternity leave between September 2, 2008 and January 21, 2009;
>
> 2) upon extending the three-year section 3012 Education Law probationary period, workday for workday, what is the date that the probationary period would have expired if one were to use an original probationary period expiration date of August 31, 2010 and, alternatively, June 30, 2010; and
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> 3) whether Fusco v. Board of Education (185 A.D.2d 887 [2d dept., 1992]) is applicable.

Having done so and upon due and deliberate consideration of all of the papers now before the Court, the Court rules as follows.[2]

At the outset, the Court finds that respondents are bound by the originally established and thereafter repeatedly reasserted June 30, 2010 probationary period end-date. It is from this date that any properly attributed extension of the probationary period must be calculated.

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[2] Although intended by the Court to be a matter of simple calculation, the Court has again been presented with argument, if not reargument, on the various issues presented. Further frustrating this matter is the failure of Respondents to have administratively calculated and disclosed probationary period extensions as they have come to pass. For example, Respondents could easily present probationers returning from leave with a recalculation of their new probationary end date so as to allow an informed, proper and timely challenge to same, if necessary.

The June 30, 2010 probationary end-date is not only set forth in then-District Superintendent Robert J. Reidy, Jr.'s June 18, 2007 letter to Petitioner wherein he advised Petitioner that he would recommend to the Respondent Board of Education that she be granted a "probationary appointment as a teacher in the Secondary Science area effective September 1, 2007 through June 30, 2010", but it is also the date specified by the Respondent Board of Education upon their July 11, 2007 appointment of Petitioner to the position. Consistent therewith, this specified probationary term is found in Petitioner's Personnel File, as kept and maintained by the District.

In addition, more recently and initially as part of this litigation, Respondents cited to and relied upon the June 30th date without reservation. Reference to June 30th as the probationary end-date is made more than once in the Verified Answer and is identified as such in connection to various arguments initially advanced in this proceeding.

Absent a showing of a properly noticed administrative or judicial determination to the contrary, the Court concludes that, for purposes of this proceeding, Respondents are bound by their oft repeated probationary end-date calculation of June 30, 2010. Respondents cannot properly challenge their *own determination* within the context of this proceeding, nor can they unilaterally change the established date to the detriment of Petitioner at this time.

Contrary to Respondents' position, the equities do not lie with the Respondents which, among other things, not only established the original probationary period end date that they now wish to disavow, but which also never re-established and advised their probationer of any newly calculated date during her tenure. Had Respondents done so, any disagreements regarding same could have been properly and timely challenged so as to avoid any uncertainty.

The Court further rules that the extension of Petitioner's probationary period may be extended but only to the extent permitted under Maras v. Bd. of Educ. of City School Dist. of City of Schenectady (275 AD2d 551, 552 [3d Dept., 2000]) wherein the Court determined that it was error to have extended petitioner's probationary period beyond the period of time that petitioner was absent from school in excess of her contractually allotted sick days. More specifically, the Court ruled:

> [There is no authority under Education Law §2509(7)] . . . to exclude those absences provided for by contract, i.e., petitioner's 20 days of sick leave, five days of personal

> time and five days of medical leave that fell on school-wide vacation days. Indeed, Education Law §2509 (7) expressly prohibits extension of an employee's probationary period by adding thereto contractually bargained for sick or personal leave days or school-wide vacation days.

(Maras v. Bd. of Educ. of City School Dist. of City of Schenectady, supra. at 552).

With the probationary end-date and manner in which to calculate an extension thereof now established, and upon consideration of the fact that Respondents have never administratively calculated Petitioner's probationary end date as may have been extended by her leaves of absence or otherwise, the Court finds it necessary to remand the matter to Respondents for such a calculation as may properly be supported by its attendance and leave records.

Upon the rendering of a calculation as herein directed, the answer to whether Petitioner has acquired tenure by estoppel under New York law, thus entitling her to reinstatement with back pay and associated benefits and relief, as of the date of her termination, January 21, 2011, can be resolved seemingly without further Court intervention and without prejudice to the parties' rights to judicial review, be it appellate or otherwise.

In the event that Respondents reach the determination that Petitioner was terminated before the expiration of her probationary period as calculated in accord with this Decision & Order (see, supra), the Court further finds that the proceeding is not otherwise ripe for judicial review since, admittedly, Respondent Board of Education did not act upon Respondent Superintendent's recommendation to deny tenure (Fusco v. Bd. of Educ. of E. Quogue Union Free Sch. Dist., 185 A.D.2d 887, 887-88, 586 N.Y.S.2d 1012 [2d Dept., 1992]). "[R]ipeness is a matter pertaining to subject matter jurisdiction which may be raised at any time, including *sua sponte*" (Agoglia v. Benepe, 84 A.D.3d 1072, 1076, 924 N.Y.S.2d 428, 432 [2d Dept., 2011]).

Finally, the Court rules in Petitioner's favor on the issue as to whether the June 2010 written Settlement Agreement executed by Petitioner, the Mahopac Teachers Association ("MTA") and Respondent Thomas Manko, as Superintendent, is enforceable as against the District to the extent that it deals with issues directly related to Petitioner individually (see, Board of Education for the City School District of Buffalo v. Buffalo Teachers Federation, 89 N.Y.2d 370, 375, 675 N.E.2d 1202 [1996]), but not to the extent that it relates to matters requiring funding or an amendment to the

collective bargaining agreement (see, Patrolmen's Benev. Ass'n of City of Long Beach, Inc. v. City of Long Beach, 57 A.D.3d 499, 868 N.Y.S.2d 306 [2d Dept., 2008]); Mayor of the City of New York v. Council of the City of New York, 9 N.Y.3d 23, 874 N.E.2d 706 [2007]).

The Court having considered all other arguments raised in regard to these issues, procedural or otherwise, and finding no merit to same, based upon the foregoing, it is hereby

ORDERED, that, within fifteen days of service of a copy of this Decision & Order with Notice of Entry, Respondents shall perform a calculation of Petitioner's Education Law §3012(3) probationary period end date as calculated in accord with this Decision & Order; and, it is further

ORDERED, that, if upon said calculation, Petitioner's section 3012 probationary period end date falls on a date before January 21, 2011, then Petitioner may submit judgment accordingly, on notice; and, it is further

ORDERED, that, if upon said calculation, Petitioner's section 3012 probationary period end date goes beyond January 21, 2011, the matter is hereby remitted for further proceedings before Respondents in accord with this Decision & Order.

The foregoing constitutes the Opinion, Decision and Order of the Court.

The Court has considered the following papers in connection with this Article 78 determination:

PAPERS	**NUMBERED**
Amended, Supplemental Petition/Table of Contents	1
Answer(Board)/Exhibits A-EE	2
Reply (Petitioner)/Exhibits 1-3	3
Petitioner's Memorandum of Law	4
Board's Memorandum of Law	5
Petitioner's Reply Memorandum of Law	6
Petitioner's Affirmation/Exhibits A-E	7
Letter (Mahopac Central School District)/Exhibits A-D	8

Dated: Carmel, New York
March 19, 2012

S/
HON. LEWIS J. LUBELL, J.S.C.

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