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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR **PART** 33

Justice

Index Number : 114039/2011
BROWN, AISHA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 31 **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	**No(s).** 1-7
Answering Affidavits — Exhibits _____	**No(s).** 8-29
Replying Affidavits _____	**No(s).** 30-31

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

See memorandum decision and judgment annexed hereto.

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).

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

Dated: 6/1/12

_____, J.S.C.
ALEXANDER W. HUNTER JR

1. **CHECK ONE:** ..... ☑ **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
COUNTY OF NEW YORK: PART 33

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Aisha Brown,

Petitioner,

Index No.: 114039/11

Decision and Judgment

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

City of New York, New York City Department of Education, Dennis Walcott, Chancellor of New York City Department of Education,

Respondents.

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HON. ALEXANDER W. HUNTER, JR.

The application by petitioner for an order pursuant to C.P.L.R. Article 78, compelling respondent New York City Department of Education ("DOE") to issue a final determination regarding her appeal and declaring respondents' determination to terminate her employment as a probationary teacher as arbitrary and capricious, an abuse of discretion, and in bad faith, is denied and the proceeding is dismissed, without costs and disbursements to either party.

Petitioner is a former probationary Special Education Teacher at P.S. 723X in the Bronx from September 15, 2008 to July 31, 2010. She received satisfactory ratings for the 2008-09 school year and the summer of 2009. On January 28, 2010, Principal Christine Walsh performed an informal observation. Principal Walsh noted in a letter dated February 11, 2010 that petitioner failed to engage all of the students in the lesson and petitioner could not produce a lesson plan. On March 2, 2010, Principal Walsh conducted a formal observation. This lesson was deemed Unsatisfactory. On June 16, 2010, Assistant Principal Ron Rodkin formally observed petitioner. This lesson was also rated Unsatisfactory. Petitioner was discontinued at the end of the 2009-10 school year after receiving an Unsatisfactory rating ("U-rating") for the year. By letter dated July 23, 2010, Superintendent Bonnie Brown informed petitioner of her discontinuance, effective July 31, 2010.

On or about June 25, 2010, petitioner requested a hearing through the DOE Office of Appeals and Reviews ("OAR"). The hearing was scheduled before a 3-member OAR panel on November 15, 2010. At the hearing, the panel reviewed petitioner's U-rating and discontinuance. On November 15, 2010, the Chancellor's Committee met to review petitioner's U-rating and discontinuance. On January 27, 2012, Superintendent Gary Hecht reaffirmed petitioner's 2009-10 U-rating and discontinuance.

During the pendency of this action, respondent DOE issued its final determination as to petitioner's appeal. Therefore, petitioner's first cause of action to compel respondents to render a final determination as to her appeal of her discontinuance and U-rating is hereby deemed moot.

Petitioner asserts that her U-rating for the 2009-10 school year, denial of completion of probation, and subsequent discontinuance should be annulled as arbitrary and capricious, in bad faith, and in violation of lawful procedure. Petitioner argues that Principal Walsh failed to adhere to the procedures required by the DOE in Chief Executive's Memorandum No.80 ("Memorandum 80") and the Rating Pedagogical Staff Member handbook by failing to timely observe and rate her performance and by not following the procedures regarding teachers who are in danger of receiving a U-rating. Petitioner also seeks respondents to turn over the Chancellor Committee's report following her hearing.

Respondents assert that the petition is barred by the four month statute of limitations. Respondents further argue that its determination was a proper exercise of discretion and consistent with DOE procedures and regulations. Respondents maintain that petitioner failed to develop professionally and performed poorly as a Special Education teacher, as evidenced in her pre-observation conferences, observations, and post-observation conferences. Respondents also assert that the City of New York is not a proper party to the instant petition and should be dismissed from the proceeding.

In reply, petitioner maintains that she learned for the first time in respondents' answering papers that the Chancellor's Committee unanimously recommended that she be restored to her probationary teaching position, have her U-rating reversed, and that there was no justifiable reason for her discontinuance. Despite the Chancellor's Committee's recommendation for reversal, Superintendent Hecht nonetheless rejected the recommendation and affirmed petitioner's U-rating and termination without explanation. The Superintendent's refusal to adopt the Chancellor's Committee's recommendation without explanation is another grounds to reverse respondents' determination. Petitioner contends that she was mistreated and wrongfully removed from her position.

The claims against respondent City of New York are hereby dismissed. Respondent City of New York was not petitioner's employer and therefore is not a proper party to the instant action. **See, Perez v. City of New York, 41 A.D.3d 378 (1st Dept. 2007); Matter of Leiva v. Department of Educ. of the City of N.Y., 2011 NY Slip Op 32165(U).**

Pursuant to C.P.L.R. 217(1), a proceeding against a body or officer must be commenced within four months after the determination becomes final and binding upon the petitioner. "An administrative determination becomes final and binding when the petitioner seeking review is aggrieved by it." **In the Matter of Yarbough v. Franco, 95 N.Y.2d 342, 346 (2000).** In cases of termination of a probationary employee, the statute of limitations begins to run from the effective date of the termination. Moreover, the time to commence the action is not tolled by the petitioner's pursuit of administrative remedies. **See, Matter of Murnane v. Department of**

Educ. of the City of N.Y., 82 A.D.3d 576 (1st Dept. 2011); Kahn v. New York City Dept. of Educ., 79 A.D.3d 521 (1st Dept. 2010).

Petitioner was notified that she was to be terminated effective July 31, 2010. She did not commence the instant proceeding until December 12, 2011, more than twelve months later. Therefore, petitioner's application to challenge the termination of her probationary employment is time-barred and must be dismissed.

However, petitioner's application to review respondent's determination to reaffirm her U-rating is not time-barred. Pursuant to Article 4, Section 4.3.2C of the Bylaws of the Department of Education, petitioner had a right to an administrative appeal and a hearing before the Chancellor's Committee. Respondent's determination reaffirming the U-rating did not become final until the Superintendent issued a decision on January 27, 2012.

It is well settled that a determination is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts." **See Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231 (1974).** "Even though the court might have decided differently were it in the agency's position, the court may not upset the agency's determination in the absence of a finding, not supported by this record, that the determination had no rational basis." **Matter of Mid-State Mgt. Corp. v. New York City Conciliation and Appeals Bd., 112 A.D.2d 72, 76 (1st Dept. 1985).** Therefore, this court's role is limited to whether or not respondents' final determination was made without a rational basis.

"[A]n agency's rules and regulations promulgated pursuant to statutory authority are biding upon it as well as the individuals affected by the rule or disposition." **Matter of Lehman v. Board of Educ. of City School Dist. of City of N.Y., 82 A.D.2d 832, 824 (2nd Dept. 1981).** However, where the failure to adhere to a procedural requirement is merely technical, such a deficiency does not rise to the level of bad faith. **See, Matter of Kolmel v. City of New York, 88 A.D.3d 527 (1st Dept. 2011).**

Petitioner asserts that respondents' failure to timely observe and rate her performance and its failure to follow the procedures required for teachers in danger of receiving a U-rating amounts to bad faith. Petitioner cites to Memorandum 80 and the Rating Pedagogical Staff Member Handbook ("Handbook"), however she has failed to specify which DOE rule or regulation that respondents violated. The Handbook is a guide, not a binding regulation or DOE policy. Ratings Officers are to consult the Handbook to assist in the rating of pedagogical staff members. Memorandum 80 provides that pre-conferences can take place in one-to-one conferences, in small groups, or by written notification outlining the areas to be evaluated. It further provides that teachers in danger of receiving a U-rating should have a one-to-one pre-conference. However, Memorandum 80 does not provide any guidance as to when a teacher is in danger of receiving a U-rating. Here, petitioner has failed to establish that respondents' failure to follow Memorandum 80 and the Handbook supports a finding of bad faith.

Petitioner's argument concerning Superintendent Hecht's decision to reaffirm her U-rating in spite of the Chancellor's Committee's recommendation is without merit. The Chancellor's Committee is an advisory panel which provides its recommendation regarding an affected teacher's appeal. The Chancellor is free to accept or reject the Committee's recommendation, with or without an explanation as to the final determination. **See, Matter of McAulay v. Board of Educ. of City of N.Y., 61 A.D.2d 1048 (2nd Dept. 1978); Matter of Golomb v. Board of Educ. of City School Dist., 106 Misc.2d 264 (1980).** Respondents' determination to sustain petitioner's U-rating is rationally supported by multiple observation reports and petitioner's failure to improve professionally despite the assistance of a literary coach and a math coach.

Accordingly,

ADJUDGED that the petition is denied and the proceeding is dismissed, without costs and disbursements to either party.

Dated: June 1, 2012

ENTER:

J.S.C.

ALEXANDER W. HUNTER JR