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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

In the Matter of the Application of

CAMILA ANN DEVITO,

Petitioner,

- v -

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK AND THE CITY OF NEW YORK,

Respondents.

INDEX NO. 107636/11

MOTION DATE 3/14/12

MOTION SEQ. NO. 001

The following papers, numbered 1 to 4 were read on this Article 78 petition.

Notice of Petition— Verified Petition — Exhibit A	No(s). 1
Notice of Cross Motion—Affirmation — Exhibits 1-6	No(s). 2
Petitioner's Affirmation in Opposition to Cross Motion — Exhibit 1	No(s). 3
Verified Answer— Exhibits 1-12	No(s). 4

Upon the foregoing papers, it is ADJUDGED that this Article 78 petition is decided in accordance with the annexed memorandum decision and judgment.

Respondents' cross motion was decided in a prior decision and order dated January 31, 2012.

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).

Dated: 7/31/12
New York, New York

_____, J.S.C.

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

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... PETITION 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: IAS PART 21

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In the Matter of the Application of

CAMILA ANN DEVITO,

Petitioner,

For a Judgment pursuant to Article 78, CPLR,

-against-

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK AND THE CITY OF NEW YORK,

Respondents.

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Index No.:

107636/2011

DECISION AND JUDGMENT

Hon. MICHAEL D. STALLMAN, J.:

Petitioner initially brought this Article 78 proceeding against respondents the Department of Education of the City of New York, the City School District of the City of New York and the City of New York (collectively, DOE), seeking a judgment declaring that DOE's actions in connection with her U rating, the discontinuing of her probationary status, and her subsequent termination, were arbitrary and capricious. Petitioner also sought monetary and equitable relief for, among other things, alleged loss of wages and damage to her reputation, and sought to be reinstated as a tenured teacher. DOE cross-moved to dismiss the petition.

In a decision and order dated January 31, 2012, this court held that petitioner had failed to exhaust her administrative remedies in connection with her U rating, and that portion of the petition challenging the U rating was dismissed. However, petitioner's challenge to her notice of termination was found to have been presented within the statute of limitations, given that petitioner's time line was extended 30 days after having filed a notice of claim, according to binding appellate case law in other departments. This court found that the City of New York was not a proper party and dismissed it from the action. This court also directed the DOE to answer the remaining portion of the petition.

At issue here is whether or not the DOE's discontinuation of petitioner's probationary status and her subsequent termination was arbitrary and capricious.

BACKGROUND AND FACTUAL ALLEGATIONS

The facts were previously set forth in the court's order and decision dated January 31, 2011. The following background relates to the matter currently before the court.

Petitioner was employed as of August 27, 2007 by the DOE as a probationary ESL teacher at a school in the Bronx. She received satisfactory ratings on her annual professional performance reviews for the 2007-2008 and 2008-2009 school years. However, on her 2009-2010 review, dated June 2010, she received an overall U rating. Despite the U rating, petitioner's

probation status was extended by agreement.

On her review dated December 13, 2010, petitioner received an overall U rating. On the review, every category had a U rating and both the principal and Superintendent Elena Papaliberios, the Superintendent of the Bronx High Schools (Superintendent), recommended the "denial of certification of completion of probation." Respondents' Exhibit 6, at 2. The review, along with supporting documentation, such as letters to petitioner's file, was forwarded to the Superintendent's Office.

On December 30, 2010, petitioner mailed respondents a letter of resignation. The letter states, in pertinent part:

> I, Camila Ann Devito, hereby resign from The Felisa Rincon De Gautier Institute of Law and Public Policy (X519) located on 1440 Story Avenue in the Bronx borough of New York as of Thursday, December 30, 2010 due to a reckless and unfit building administration.
> Please accept this letter of resignation as my given notice. My tenure at public high school X519 will come to a close on Friday January 14, 2011.
> Thank you for permitting me the opportunity to guide and celebrate the lives of the many students I have had the pleasure of educating in the past three and a half years. It is time now for me to move on in pursuit of new challenges and opportunities which await me.

Petitioner's Exhibit A, at 1.

On January 13, 2011, the day before the effective date on which petitioner's letter said the resignation would become effective, the Superintendent mailed petitioner a letter stating that, on February 14, 2011, the Superintendent would be

considering whether or not petitioner would be terminated. Based on the Superintendent's decision, the effective termination date was also to be as of February 14, 2011. Petitioner was advised that she could submit any evidence in opposition to the documentation attached to her review, and that this evidence had to be submitted "no later than seven (7) days prior to the date of my consideration and final determination or [*sic*] your Discontinuance." Respondents' Exhibit 9, at 1.

On February 14, 2011, the Superintendent mailed petitioner an official discontinuance of probation, which advised petitioner that, after an additional review, she was being terminated as of February 14, 2011. Respondents' Exhibit 10.

On May 9, 2011, petitioner filed a notice of claim with the Office of Corporation Counsel.

On June 30, 2011, petitioner commenced the initial Article 78 proceeding. With respect to the notice of discontinuance, petitioner alleged that the DOE acted arbitrarily, capriciously and in bad faith when it terminated her after she had already resigned as a teacher. Petitioner sought compensatory damages in the amount of $2 million, and requested that the U rating, and her termination of probation, be expunged from her record.

As stated in the papers submitted with its cross motion to dismiss, DOE argues that, because petitioner's alleged resignation letter was not irrevocable, DOE was allowed to

proceed with her discontinuance. DOE contends that the language in petitioner's letter did not indicate that it was not irrevocable. As such, according to DOE, the Regulation of the Chancellor would have allowed petitioner to withdraw her resignation, under certain circumstances, and possibly seek reappointment. Therefore, because the resignation was not final, the DOE was permitted to proceed with her discontinuance.

Assuming, arguendo, that the DOE was permitted to proceed with its discontinuance despite petitioner's letter, in its answer DOE argues that its decision to deny petitioner certification of completion of her probation was not arbitrary and capricious. DOE contends that many letters were placed in petitioner's file, which substantiated allegations of verbal and corporal punishment, insubordination, professional misconduct and violation of school policy. DOE contends that petitioner received multiple U ratings on her review which demonstrated petitioner's poor performance.

Specifically, DOE points to an incident which occurred on November 10, 2010 in petitioner's classroom. The incident, an "alleged corporal punishment and/or verbal abuse report of investigation", was confirmed by the Assistant Principal Aaron Schwartz (Schwartz), and was sent to the Office of Special Investigations. The incident is described as follows:

> [The student] went to the principal crying and told her that when she couldn't answer

> the "Do Now" Ms. Devito told her that she had been in America for many years & should know english. Then Ms. Devito made her move her seat saying "move your fucking seat."

DOE's Exhibit 7, at 3.

After interviewing the student involved and other witnesses, Schwartz found the allegation to be substantiated. Schwartz concluded, among other things, that petitioner had "created a climate of intimidation and disrespect by engaging in a pattern of inappropriate and punitive behaviors ... ." *Id.*

Petitioner was informed about this investigation in a meeting with Schwartz and waived her rights to union representation. DOE's Exhibit 8, at 6.0-6.4. According to Schwartz, petitioner claimed that the students were lying, yet she did not provide a reason for why they would do so. She was informed, via a letter which was placed in her file, that she had committed acts of unacceptable teacher conduct.

Petitioner argues that her notice of discontinuance was arbitrary and capricious, in that DOE terminated her after she had already resigned from her position. She believes that DOE's allegations related to her conduct "merely attempt to show a basis for the 'U' rating." Petitioner's Memorandum of Law, at 6.

As explained above, petitioner submitted her letter of resignation on December 30, 2010, informing DOE that her resignation would be effective as of January 14, 2011. She cites to the Regulation of the Chancellor 205, ¶ 26, quoting the

following, in pertinent part, "[r]esignations shall be submitted in writing and, once submitted by an employee, shall be considered final."

However, the entire Regulation of the Chancellor 205, ¶ 26, reads as follows:

> Resignation - Except in the case of resignation to return to a former position, the resignation by a member of the teaching and supervising staff shall be deemed to be a resignation from the pedagogical service of the public school system. Thereafter, upon application, the resigned employee may be issued a certificate for substitute service so long as service is satisfactory and the holder indicates his or her availability for continuing service. Resignations shall be submitted in writing and, once submitted by an employee, shall be considered final. However, if there has been no break in actual service, the appointing authority may, in its discretion, permit the employee to rescind the resignation before its effective date.

Respondents' Cross Motion, Exhibit 6.

Petitioner received the official notice that she was being terminated, and her probationary status was being discontinued, as of February 14, 2011. Nonetheless, petitioner maintains that she had resigned as of January 14, 2011, and that respondents effectively terminated her after her resignation from DOE, disparaging her reputation as a teacher.

DISCUSSION

Notice of Discontinuance

In deciding an Article 78 proceeding, "a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious." *Matter of Soho Alliance v New York State Liq. Auth.*, 32 AD3d 363, 363 (1st Dept 2006), citing to *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *see* CPLR 7803 (3). "The arbitrary and capricious standard asks whether the determination in question had a rational basis [internal quotation marks and citations omitted]." *Matter of Mankarios v New York City Taxi and Limousine Commn.*, 49 AD3d 316, 317 (1st Dept 2008).

However, with respect to the termination of a probationary employee, a public employer like DOE is allowed to discharge a probationary employee like petitioner "for any or no reason at all in the absence of a showing that his or her dismissal was in bad faith, for a constitutionally impermissible purpose or in violation of law [internal quotation marks and citation omitted]." *Matter of Kolmel v City of New York*, 88 AD3d 527, 528 (1st Dept 2011).

For the reasons set forth below, the decision to terminate

petitioner was permissible. The DOE was allowed to proceed with petitioner's discontinuance because petitioner's letter was not irrevocable, and she could have possibly withdrawn it and reapplied to be a teacher.

In support of its view that DOE was allowed to proceed with petitioner's discontinuance despite her resignation letter, DOE relies on *Matter of Folta v Sobol* (210 AD2d 857 [3d Dept 1994]). In *Matter of Folta v Sobol, supra*, the petitioner, a tenured teacher, was awaiting an Education Law § 3020-a hearing panel's determination to see whether or not charges would be upheld against him for alleged sexual harassment. While the outcome of the hearing was pending, the petitioner submitted a resignation letter. Despite petitioner's alleged resignation, the hearing panel proceeded to uphold the charges, and recommended that petitioner be dismissed. Petitioner then brought an Article 78 proceeding seeking to nullify the charges and his dismissal, based on the fact that he had already allegedly resigned.

The Appellate Division, Third Department found that the petitioner Folta's resignation did not preclude the hearing panel from proceeding with the charges and ultimately terminating him. It further found that, absent an irrevocable resignation or a voluntary settlement, the school board was not obligated to halt the administrative hearing and determination process. It held that because the petitioner's letter was not irrevocable, his

resignation was "tantamount to a waiver under Education Law § 3020-a (2) and a school board may proceed accordingly." *Id.* at 858. The Appellate Division further explained that, under the Regulation of the Chancellor and the applicable bargaining agreement, because petitioner's letter was not irrevocable, "petitioner could, subject to the approval of the Chancellor, withdraw his resignation and apply for reemployment." *Id.* at 858-859. It concluded that such a possibility, "provides a valid reason for allowing an Education Law § 3020-a hearing to proceed and placing the Hearing Panel's decision in a teacher's personnel file, thereby foreclosing the potentiality that a Chancellor would unwittingly approve an unfit teacher's request for reemployment." *Id.* at 859.

In a recent New York Department of Education Commissioner's decision, the Commissioner found that *Matter of Folta v Sobol* applied to petitioners therein who were probationary employees with the Board of Education. *Matter of Fine v Board of Educ. of Southampton Union Free School Dist.*, 2011 NY Educ Dept LEXIS 81, *5-6 (July 22, 2011, Decision No. 16,266). Although the petitioners in *Matter of Fine v Board of Educ. of Southampton Union Free School Dist.* had submitted resignation letters, the Commissioner found that the Board of Education was permitted to go ahead with their terminations. The decision cited to *Matter of Folta v Sobol* and held the following, in pertinent part:

> Petitioners' resignation letters were not irrevocable (the board had not accepted petitioners' resignations nor had the effective date occurred) and there was no settlement. Prior to June 30, 2010 - their respective effective dates - petitioners could have rescinded their resignations at any time. In light of the foregoing, I find that respondents were within their authority to act on June 17, 2010 and terminate petitioners' probationary appointments.

Id.

The reasoning of *Matter of Folta v Sobol and Matter of Fine v Board of Educ. of Southampton Union Free School Dist.* applies to the situation presented in the instant proceeding. Petitioner's resignation letter was not irrevocable. The DOE contacted petitioner before the alleged effective date of her termination and told her that it was proceeding to review whether or not she would be discontinued as a probationer. There had not been a break in service.

Similar to *Matter of Folta v Sobol*, because petitioner was not part of a voluntary settlement, and her letter was not irrevocable, she could have potentially rescinded her resignation, were she to have received permission, and reapplied for her position or for a substitute position. As set forth above, the Regulation of the Chancellor, C-205 ¶ 26, provides the following, in pertinent part:

> Thereafter, upon application, the resigned employee may be issued a certificate for substitute service so long as service is satisfactory and the holder indicates his or

> her availability for continuing service. Resignations shall be submitted in writing and, once submitted by an employee, shall be considered final. However, if there has been no break in actual service, the appointing authority may, in its discretion, permit the employee to rescind the resignation before its effective date.

Petitioner argues that she would need permission to apply for substitute service or another teaching position. She also contends that her resignation was final and in accordance with the Regulation of the Chancellor. In this context, "final" is not synonymous with "irrevocable." As in *Matter of Folta v Sobol*, even the "possibility" that the teacher could withdraw the resignation, permits the DOE to disregard petitioner's resignation and proceed with the discontinuance. The DOE rationally would not want the Chancellor to be in a potential situation of "unwittingly" approving an unfit teacher who was applying for reemployment. *Id.* at 859. Moreover, the DOE notified petitioner of its intention to consider discontinuance of probation before the stated effective date for leaving DOE service contained in petitioner's purported resignation letter.

Because petitioner's resignation letter was not irrevocable, it was permissibly disregarded by the DOE; contrary to petitioner's contentions, DOE still had the opportunity to terminate her. Accordingly, petitioner cannot now claim that she was impermissibly terminated after she had already resigned. Moreover, as discussed below, DOE's decision to terminate

petitioner was not unconstitutional or illegal or done in bad faith.

In her original petition, petitioner asserts, without any proof, that she was retaliated against by the DOE for complaining about the number of students assigned to her class. She also alleges, again with out any evidence, that as a result of her complaints, she was given "untrue" performance evaluations. Petition, ¶ 10. However, these contentions are "speculative and insufficient to establish bad faith." *Matter of Murnane v Department of Educ. of City of N.Y.*, 82 AD3d 576, 576 (1st Dept 2011).

Allegations of confirmed verbal and/or corporal abuse were forwarded to the Office of Special Investigations and letters were placed in petitioner's file. Petitioner was also reprimanded by her school for violation of school policy, professional misconduct and insubordination. The record establishes that DOE's decision to discontinue petitioner's probationary service was not in bad faith, illegal or unconstitutional. Even if the discontinuance were to be analyzed, as petitioner urges, under the general Article 78 standard of CPLR 7803 (3), it cannot be considered arbitrary and capricious. DOE had a rational basis.

In response, as previously mentioned, petitioner does not dispute the DOE's reasons, stated in its answer, for why she was

terminated. Instead, she incorrectly claims that DOE's reasons for terminating her solely relate to the challenge of her U rating, which challenge was already dismissed. However, petitioner's evaluation clearly indicates that the letters to her file were being included as part of the documentation sent over to the Superintendent's office for review of her potential denial of completion of probation. Petitioner has not provided any evidence demonstrating that DOE's termination of her probationary status on the merits, which was supported by a rational basis, was done "in bad faith, for a constitutionally impermissible purpose or in violation of law."

In light of the court's analysis, petitioner has not demonstrated entitlement to any damages or other relief.

CONCLUSION AND JUDGMENT

Accordingly, it is hereby

ADJUDGED that the petition is denied in its entirety and the proceeding is dismissed.

Dated: July 31, 2012 ENTER

New York, NY

J.S.C.

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).