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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LOUIS B. YORK
J.S.C.

PRESENT: _____ **PART** 2
Justice

Index Number : 102401/2012
PARRIS, ANDREA
vs.
NYC DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

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

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

FILED
NOV 15 2012
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 11/9/12

_____, J.S.C.
LOUIS B. YORK
J.S.C.

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: IAS PART 2

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In the Matter of

DR. ANDREA PARRIS,

Petitioner,

For a Judgment pursuant to Article 78 CPLR

-against-

Index No. 102401/12

THE NEW YORK CITY DEPARTMENT OF EDUCATION and GALE REEVES,

Respondents.

----------X

LOUIS B. YORK, J.S.C.:

Petitioner Dr. Andrea Parris brings this Article 78 proceeding to annul the December 30, 2011 determination (Determination) of respondent Gale Reeves denying petitioner a Certification of Completion of Probation, and, thereby, denying petitioner tenure, or a second term as a probationary principal of the Choir Academy of Harlem (the School). Petitioner was appointed as probationary principal of the School as of January 2, 2008. Reeves is the Community Superintendent of Community School District 5, within which the School is located.

Education Law § 2573 (1) (b) provides that administrators, including principals, "shall be appointed for a probationary period of three years." Education Law § 2573 (5) provides that:

> [a]t the expiration of the probationary term of any persons appointed for such term, the superintendent of schools shall make a written report to the board of education recommending for permanent appointment those persons who have been found competent, efficient and satisfactory...

In December 2010, Reeves and petitioner agreed that petitioner would serve an additional one-year probationary period, commencing on January 2, 2011 and concluding on January 2, 2012. On July 15, 2011, petitioner submitted a Request For Internal Transfer to Reeves, requesting assignment to a different high school, because of respiratory problems that she attributed to the presence of mold in the School. On July 27, 2011, petitioner sent the HR Connect Medical Administration Office an Accommodation Request Form requesting the same relief. On September 9, 2011, petitioner sent Chancellor Walcott a letter complaining that she had been retaliated against for making a number of complaints and for advocating on behalf of the school. Among other things, she wrote that, after responding to a comment that a New York Times reporter had written about the School, she was called in by Reeves and told that she would not receive tenure. *See* Reeves Aff,. Exh. 7, at 3.

In December 2011, Reeves signed, and sent petitioner, another Extension of Probation Agreement (Agreement) providing for a one-year term commencing on January 2, 2012 and concluding on January 2, 2013. However, after petitioner also signed the Agreement, to which she had added a number of handwritten comments, and faxed it to Reeves, Reeves responded with the Determination. The Determination recites, in pertinent part:

> I am in receipt of your fax dated December 28, 2011 in which you stated, among other things, that you signed the proposed Extension of Probation Agreement under duress; you disagree with the contents of the proposed Extension of Probation Agreement; and you feel [that] your rights have been violated. In light of these statements, the Department of Education cannot accept the documents as a valid Extension of Probation Agreement.

...

> Please be advised that your services under this appointment shall terminate effective the close of business December 30, 2011.

Petition, Exh. A. A three-person Chancellor's Committee (Committee) reviewed, and unanimously concurred in, the Determination.

The petition alleges that: respondents waived any right to deny petitioner tenure; petitioner acquired tenure by estoppel on January 3, 2011; both the failure to grant petitioner tenure, and the failure to grant her the additional period of probation commencing on January 2, 2012, were arbitrary and capricious; and the termination of petitioner discriminated against her on the basis of disability, and constituted retaliation for her complaints that mold was present throughout the School. Petitioner served a notice of claim on January 27, 2012.

Petitioner received the Determination on January 3, 2012. She cites *Matter of Brunecz v Dunkirk Bd. of Educ.* (23 AD3d 1126 [4th Dept 2005]) for the proposition that respondents waived their right to deny her tenure by failing to notify her of the decision in a timely manner. *Brunecz* holds that such a failure confers no right to tenure, but only an entitlement to one day's pay for each day that the notice is late. *See also Kahn v New York City Dept. of Educ.*, 79 AD3d 521 (1st Dept 2010), *affd* 18 NY3d 457 (2012).

A public school teacher, or principal, may acquire tenure by estoppel "when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the

teacher's probationary term." *Matter of McManus v Board of Educ. of Hempstead Union Free School Dist.*, 87 NY2d 183, 187 (1995). In *McManus*, the Court found that the petitioner had worked for 11 months past her probationary period, as that period should have been calculated. Here, petitioner received the termination notice on January 3, 2012, one day after the expiration of her one-year extension of probationary period. The verified petition states that petitioner was out sick that day, called the School and instructed one, Debra Willet, to draft a memorandum stating that the assistant principal was in charge for the day, and proceeded to do some work at home. These statements do not suffice to show that respondents "`with full knowledge and consent,' permit[ted] her to continue to [work] after her probationary term expired." *Matter of Andrews v Board of Educ. of the City School Dist. of the City of N.Y.*, 92 AD3d 465, 465 (1st Dept 2012), quoting *Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 451 (1993).

Reeves's affidavit in opposition to the petition recites a number of performance-related reasons for denying petitioner tenure. However, notwithstanding such concerns, Reeves chose to offer petitioner an additional one-year probationary term. The sole reason that the Determination states for Reeve's subsequent denial of the additional probationary term provided for in the Agreement is the comments that petitioner had added to the Agreement. In her March 2012 presentation to the Committee, Reeves stated that petitioner's written statement on the Agreement, that

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she was signing it under duress, "in effect," invalidated the Agreement. Reeves Aff., Exh. 13, at 2. There is no indication that Reeves discussed any of petitioner's other written comments. The Committee found that petitioner's comment "would seem to violate the spirit of the [A]greement, [and that u]nder the circumstances [Reeves] had no choice but to withdraw the offer." *Id.*, at 3. Notably, the Committee did not find that petitioner's comment invalidated the Agreement, or that it indicated that petitioner would not perform the duties that the Agreement imposed on her. Indeed, it is indisputable that petitioner's comment did not mean that she did not feel free to leave the school, but rather, that she signed the Agreement solely because she was not offered tenure, to which she believed herself to be entitled. Petitioner's written comments on the Agreement expressed her opinion about the Agreement as a whole, and about some of the terms thereof, but she signed the Agreement, and none of her comments varied the terms set forth therein. Notably, petitioner neither crossed out any part of the Agreement, nor added any terms thereto.

In December 2010, under the handwritten heading "Signature Stipulations," petitioner had made a number of notations on the initial extension of probation agreement, the first of which, stated that she disagreed with the explanations that she had been given for receiving an extension of probation, rather than tenure. Reeves did not respond in any way to petitioner's written comments.

"A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a

different result on essentially the same facts is arbitrary and capricious." *Matter of Charles A. Field Delivery Serv. (Roberts)*, 66 NY2d 516, 517 (1985); *see also Matter of Lafayette Stor. & Moving Corp.*, 77 NY2d 823 (1991). "`Absent such an explanation, failure to conform to agency precedent will ... require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made.'" *Matter of Klein v Levin*, 305 AD2d 316, 318 (1st Dept 2003), quoting *Matter of Field Delivery Serv.*, 66 NY2d at 520.

Here, respondents ignored the comments that petitioner wrote on the 2010 extension of probation, but, assertedly, terminated her because of the substantially similar comments that she wrote on the Agreement. Whether or not Reeves issued the Determination solely on the basis of petitioner's written comments on the Agreement, or, in part, because of petitioner's complaints of mold in the School, the Determination appears to have resulted from nothing other than pique. Accordingly, the Determination cannot stand.

Accordingly, it is hereby

ADJUDGED that the petition is granted to the extent that the December 30, 2011 determination of respondent Gale Reeves denying petitioner a Certification of Completion of Probation is annulled; and it is further

ADJUDGED that this matter is remanded to the Department of Education which is ordered to return petitioner's position forthwith as probationary principal of the Choir Academy of Harlem,

with back pay from January 3, 2012 to the date upon which she is returned to her position.

Dated: Nov. 9, 2012

ENTER:

J.S.C.