Matter of Rodgers-McClymont v New York City Dept. of Educ.
2012 NY Slip Op 33554(U)
February 26, 2012
Sup Ct, New York County
Docket Number: 103294/12
Judge: Jr., Alexander W. Hunter

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR. PART 33

Justice

Rodgers-McClymont

- v -

NYS Department of Education

INDEX NO. 103294/12

MOTION DATE

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to 41 were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-23
Answering Affidavits — Exhibits	24-27, 39-41
Replying Affidavits	28-38

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with memorandum order & judgment annexed hereto

RECEIVED

JAN - 4 2013

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 12/26/12

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

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

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In the Matter of the Application of
Latanya Rodgers-McClymont

Index No. 103294/12

Petitioner,

Order and Judgment

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

-against-

The 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.

Petitioner, pro se, moves pursuant to Article 78 of the C.P.L.R. for an order (1) reversing respondents' termination of petitioner's employment and "unsatisfactory" rating, and reinstating petitioner to her former position as a probationary teacher with back pay, interest, and any other benefits lost since the date of termination; (2) compelling respondents to remove petitioner's name from the "ineligible/inquiry" list; and (3) vacating the March 4, 2012 arbitrator's award. In regards to the first and third causes of action, petitioner's application is denied, and respondents' cross-motion to dismiss is granted. As to the second cause of action, respondents' cross-motion to dismiss is denied and respondents are directed to serve an answer. Petitioner's application for a trial pursuant to C.P.L.R. § 7804 (h) is denied.

Petitioner commenced this Article 78 proceeding on June 18, 2012, by filing a verified petition. Petitioner was a probationary teacher formerly employed by the New York City Department of Education ("DOE"). Petitioner worked as a substitute teacher from 2005 to 2007 at the DOE public schools, and was hired to teach first grade full time from August 2007 until her employment was terminated in January 2010. Petitioner received a satisfactory rating for the periods from August 30, 2007 to June 26, 2008 and August 28, 2008 to June 30, 2009.

Petitioner allegedly administered corporal punishment to a student on October 29, 2009. The Office of Special Investigations ("OSI") issued an investigation report, dated January 20, 2010, which substantiated the allegation. Pursuant to a request by petitioner to review the findings, OSI reviewed the report and in a memorandum dated August 9, 2011, affirmed the finding that petitioner had engaged in an act of corporal punishment.

On January 28, 2010, petitioner met with the principal of her school to investigate the allegation of corporal punishment, and a letter documenting the conference was placed in petitioner's file. On the same date, petitioner received a letter informing her that her certification of completion of probation with the DOE was denied and that her probationary status was terminated. Petitioner received an "unsatisfactory" rating for the period September 8, 2009 to January 28, 2010.

Petitioner was allegedly placed on the DOE's "ineligible/inquiry" list after she was terminated. Petitioner alleges that she did not learn that her name is on the "ineligible/inquiry" list until June 2012. The "ineligible/inquiry" list is an internal list kept by the DOE to keep track of teachers who have retired or whose employment was terminated to ensure they are not rehired by another DOE school.

On January 29, 2010, petitioner requested an appeal for the denial of completion of probation and "unsatisfactory" rating. However, on February 1, 2010, petitioner signed a waiver form, waiving her right to have an appeal of her adverse rating reviewed within one year, in order to proceed with a grievance. On the same date, petitioner filed a Step 1 grievance alleging an improper OSI investigation in violation of Chancellor's Regulation A-420. The grievance was denied on February 12, 2010, because petitioner failed to demonstrate that the investigation was improper.

A Step 2 grievance appeal was conducted and was again denied on April 1, 2010. On November 8, 2011, petitioner signed another waiver form requesting that her original waiver be extended pending arbitration. The United Federation of Teachers, Local 2, AFT, AFL-CIO ("union"), demanded arbitration of the grievance on behalf of petitioner, and an arbitrator's award was issued on March 4, 2012, again denying the grievance. The arbitrator's award found that Chancellor's Regulation A-420 was not applicable to OSI and thus the investigation was proper. Petitioner received the arbitrator's award on March 20, 2012.

Petitioner commenced a previous Article 78 proceeding, which was dismissed as moot because petitioner had already "received the relief requested by petitioner, namely back-pay." **Rodgers-McClymont v. Board of Education, Sup Ct, NY County, Nov. 15, 2010, Lobis, J., Index No. 106874/10**. In petitioner's affirmation in opposition to respondents' cross-motion to dismiss, for the first time, petitioner raised the argument that she was not a probationary teacher, but had reached tenured status after the DOE failed to give her sixty days notice of the discontinuance of her probation status. Petitioner should not raise a new matter or amend her complaint in her reply without leave and moreover, the claim is barred by res judicata. See, **Habiby v. Habiby, 23 AD2d 558 (1st Dept 1965); Mazza v. New York City Police Dept., 6 AD3d 186, 2004 NY Slip Op 02496 (1st Dept 2004); Matter of Klein v. Barrios-Paoli, 237 AD2d 165 (1st Dept 1997)**.

A decision by the Unemployment Insurance Appeal Board, dated November 4, 2011, found that petitioner was entitled to receive benefits as the credible evidence failed to establish misconduct by petitioner. Petitioner also attaches numerous letters stating that petitioner did not engage in an act of corporal punishment in support of her petition.

Respondents cross-moved to dismiss, pursuant to C.P.L.R. §§ 3211, 7511 (a), and 7804 (f), on the grounds that this proceeding is time barred, petitioner failed to exhaust her administrative remedies, and that the petition fails to state a cause of action. Respondents allege that the decision to terminate petitioner and to place her on the "ineligible/inquiry" list was final and binding no later than 2010. In the alternative, respondents allege that petitioner has not yet exhausted her administrative remedies for challenging her "unsatisfactory" rating and termination.

As a preliminary matter, petitioner requested a trial pursuant to C.P.L.R. § 7804 (h). A trial is usually appropriate when there are relevant facts in dispute and there is no record upon which the court can ascertain the facts upon which the agency based its action. **See, ADC Contr. & Constr. Corp. v. New York City Dept. of Design & Constr., 25 AD3d 488, 2006 NY Slip Op 00401 (1st Dept 2006).** In the instant proceeding there is a voluminous record. While certain issues have not been developed, petitioner is entitled to a hearing on those issues, but has thus far waived her right to such hearing. As discussed below, it is not appropriate for the court to hold a trial for Article 78 relief when petitioner has not yet exhausted her administrative remedies.

First, respondents have not yet reached a final determination regarding petitioner's termination and rating, thus the four month statute of limitations has not begun to run. **C.P.L.R. § 217 (1).** However, these issues are not ripe for Article 78 review, as petitioner has not yet exhausted her administrative remedies. **C.P.L.R. § 7801 (1); Young Men's Christian Assn. v. Rochester Pure Waters Dist., 37 NY2d 371 (1975).** "It is well established that an aggrieved union member whose employment is subject to the terms of a collective bargaining agreement entered into by his union and employer must first avail himself of the grievance procedure set forth in the agreement before he can commence an action in court." **Matter of Cantres v. Board of Educ. of City of N.Y., 145 AD2d 359, 360 (1st Dept 1988).** Petitioner has thus far waived her right to appeal through the procedures outlined in the collective bargaining agreement between DOE and her union. No Article 78 review is possible until the appeal has been completed and there are issues of fact, which need to be brought out at an administrative hearing. Petitioner's Article 78 petition is dismissed without prejudice insofar as it seeks to reverse respondent's termination of petitioner's employment and "unsatisfactory" rating before the issuance of a final determination.

Second, respondents argue that petitioner's cause of action to challenge her termination and placement on the "ineligible/inquiry" list accrued on January 28, 2010, when she received notice of her termination. However, respondent does not state exactly when petitioner was placed on the "ineligible/inquiry" list, or how petitioner received notice that she was on the list. As petitioner alleges that she did not receive notice of her placement on the "ineligible/inquiry" list until June 2012, the statute of limitations does not bar this cause of action. As respondents concede in their cross-motion to dismiss, the four month statute of limitations period begins to run from the date of notification that a placement has occurred on the DOE's "ineligible/inquiry" list. **See, Matter of Hazeltine v. City of New York, 89 AD3d 613, 2011 NY Slip Op 08625 (1st Dept 2011); Matter of Strong v. New York City Dept. of Educ., 62 AD3d 592, 2009 NY Slip Op 04114 (1st Dept 2009).**

The instant proceeding is in contrast to cases in which a petitioner did receive notice of her placement on the "ineligible/inquiry" list, for instance by letter. **See, Matter of Brennan v New York City Dept. of Educ., 2010 NY Slip Op 31807(U) (Sup Ct, NY County 2010); Knox v. New York City Dept. of Educ., 85 AD3d 439, 2011 NY Slip Op 04735 (1st Dept 2011); Matter of Spata v. Levy, 306 AD2d 534 (2d Dept 2003)**. Respondents' cross-motion to dismiss must be denied and respondents allowed to serve an answer.

Third, petitioner's application to vacate the arbitration award is time barred. "An application to vacate or modify an award may be made by a party within ninety days after its delivery to him." **C.P.L.R. § 7511 (a)**. Petitioner admits that she received the arbitration award on March 20, 2012, but did not commence the instant proceeding until nearly four months later on July 18, 2012. Moreover, even if the application was not time barred, there are no grounds for vacating the arbitration award as it provides a reasonable interpretation of the relevant regulations. **C.P.L.R. § 7511 (b)**.

Accordingly, it is hereby,

ORDERED that the cross-motion to dismiss is granted as to petitioner's motion for an order reversing respondent's termination of petitioner's employment and "unsatisfactory" rating, and vacating the March 4, 2012 arbitrator's award are dismissed; and it further

ORDERED that the cross-motion to dismiss is denied as to petitioner's motion for an order removing petitioner's name from the "ineligible/inquiry" list; and it is further

ORDERED that respondents are directed to serve an answer within 20 days after service of a copy of this order with notice of entry; and it is further

ADJUDGED, petitioner's application for a trial pursuant to C.P.L.R. § 7804 (h) is denied.

Dated: December 26, 2012

ENTER:

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J.S.C.

ALEXANDER W. HUNTER JR