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

PRESENT: HON JOAN A. MADDEN PART 11

Index Number : 111583/2007

PORTNOY, SYLVIA

VS

BOARD OF EDUCATION

Sequence Number : 001

ARTICLE 78

INDEX NO.

MOTION DATE 2-7-08

MOTION SEQ. NO.

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this cross motion is decided in accordance with the annexed Memorandum Decision + Order.

FILED
JUL 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: July 3, 2008

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

----------X

In the Matter of the Application of
SLYVIA PORTNOY

Petitioner,

-against-

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK; and JOEL I. KLEIN, as Chancellor of the City School of the City of New York,

Respondents.

Index No.
111583/07

JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner Sylvia Portnoy challenges the determination of respondents the Board of Education of the City School District of the City of New York ("DOE") and Joel I. Klein, Chancellor of the City School of the City of New York, placing her on an inquiry/ineligible list for re-employment. Respondents cross-move to dismiss the petition on statute of limitations grounds. For the reasons below, the cross-motion is granted.

Background[1]

Petitioner commenced employment with DOE in 1958 and was a tenured employee until her retirement in July 2003. During the 1999-2000 school year, petitioner was given an unsatisfactory rating based on substantiated charges of corporal punishment.

[1] The following facts are based on the allegations in the petition, which for the purposes of deciding the cross-motion must be accepted as true, as well as documentary evidence and affidavits submitted by the parties.

Petitioner appealed the rating and lost. As a result, in 2001, petitioner was placed on the DOE's inquiry/ineligible list (hereinafter "ineligible list"), which would preclude her from becoming re-employed by DOE after leaving its employment. In June 2003, petitioner discovered that her name was on the ineligible list and, in July 2003, petitioner retired.

Shortly after learning that her name was placed on the ineligible list, petitioner filed for a "Circular 31" or C-31 hearing to challenge the determination of the DOE and appeared at the Office of Appeals and Reviews of the DOE on May 27, 2004. The hearing examiner informed petitioner that he could not proceed with the C-31 hearing because the proceeding is unavailable to teachers with tenure at the time they are placed on the ineligible list. He also informed petitioner that since she was tenured, he believed that her name was on the list in error. As a result of this statement, petitioner believed that her name would be removed from the ineligible list.

Petitioner applied for a substitute teaching position with the DOE on April 25, 2007. At that time, petitioner was orally informed by respondents that her name was on the ineligible list and she was thus ineligible for a per-diem substitute teaching license.

On July 19, 2007, petitioner filed a verified notice of claim pursuant to Education Law § 3813, alleging, inter alia, that the refusal to grant her a per diem substitute teaching

license was arbitrary, capricious, and rendered in violation of law and procedure. Petitioner filed this Article 78 proceeding on August 24, 2007 challenging her placement on the ineligible list.

Respondents now cross-move to dismiss the petition on statute of limitations grounds, arguing that the four-month limitations period provided under CPLR 217 expired in October 2001, four months after petitioner received notice of the decision placing her on the ineligible list. In support of its position, respondents rely on the written appeal by petitioner of an unsatisfactory rating for the 1999-2000 school year which she signed on June 27, 2000, a letter dated June 8, 2001 from the Board of Education of the City of New York alerting school officials of the denial of that appeal, and the affidavit of Andrew Gordon.

Mr. Gordon is the Director of Employee Relations for the New York City Department of Education's Division of Human Resources and is in charge of maintaining the ineligible list. Mr. Gordon states that it is not common practice to maintain hard copies of notification letters sent to those placed on the ineligible list, but that petitioner was placed on the ineligible list on June 12, 2001 and was sent a letter informing her that she had been placed on the list on or about that date.

Respondents alternately argue that even if petitioner did not receive notice of the determination placing her on the

ineligible list until June 2003, as alleged in the petition, the proceeding is still untimely, since it was not commenced until four years after petitioner admittedly received such notice.

Petitioner opposes the cross-motion, asserting that respondents have failed to produce any document that establishes notice that petitioner was informed that she was placed on the ineligible list. Petitioner also asserts that the appeal of an unsatisfactory rating on the annual performance review for the 1999-2000 school year does not constitute notice to petitioner that her name was placed on the ineligible list. Petitioner further challenges Mr. Gordon's statement on the grounds that he was not an employee of the respondents at the time petitioner's name was placed on the ineligible list.

Next, although petitioner admittedly received notice of her placement on the ineligible list in June 2003, she contends that respondents are estopped from asserting a statute of limitations defense. Specifically, petitioner argues that she justifiably relied on the statement of the hearing officer at the May 27, 2004 hearing challenging her placement on the ineligible list that he believed petitioner's name to be on the list in error. In support of this position, petitioner submits the affidavit of Michael Grossman, an advocate for the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO ("UFT"). Mr. Grossman's job responsibilities include representing UFT members at C-31 hearings, discontinuance

hearings, unsatisfactory rating appeals, and other employment matters between the UFT and the Board of Education of the City School District of the City of New York. Mr. Grossman accompanied petitioner to her C-31 hearing on May 27, 2004. Mr. Grossman states that he heard the statement by the hearing officer that petitioner's name was on the ineligible list in error. Mr. Grossman believed from this statement that petitioner's name would be removed from the ineligible list.

Petitioner argues that, based on the hearing officer's representation, the statute of limitations period did not begin to run until April 25, 2007, when she was orally informed that she was denied a per diem substitute teaching license from DOE based on her placement on the ineligible list. She further argues that this proceeding was thus timely commenced on August 23, 2007, which is less than four months after she received the April 25, 2007 notification.

Discussion

A challenge to an administrative determination must be commenced within the four-month statute of limitations period governing an Article 78 proceeding. Todras v. City of New York, 11 A.D.3d 383, 384 (1st Dep't 2004), Roufaiel v. Ithaca Coll., 241 A.D.2d 865, 867 (3d Dep't 2001). The four-month period begins to run when the determination made by the agency becomes final and binding. Id. An administrative determination becomes final and binding when petitioner receives notice of the

determination and is aggrieved by it. Robertson v. Bd. Of Ed., 175 A.D.2d 836, 837 (2d Dep't 1991); Lubin v. Bd. Of Ed., 60 N.Y.2d 974 (1983), cert denied, 469 U.S. 823 (1984).

A request for reconsideration does not toll or revive the statute of limitations, even when the agency reconsiders its determination or negotiates with petitioner regarding modification of the administrative decision. Id.; Janke v. Cmty. Sch. Bd. Of Cmty. Sch. Dist. No. 19, 186 A.D.2d 190, 193 (2d Dep't 1992). Likewise, the statute of limitations generally will not be tolled where petitioner seeks a procedure that subsequently turns out to be unavailable, such as the C-31 hearing procedure the petitioner sought in this case. Montella v. Safir, 290 A.D.2d 261, 262 (1st Dep't 2002).

Petitioner does not dispute that she was placed on the ineligible list in 2001 following her unsuccessful appeal of the unsatisfactory rating she received for the 1999-2000 school year, or that she received notice of her placement on the ineligible list in June 2003.

Petitioner argues, however, that the proceeding is timely, and respondents are estopped from arguing otherwise, based on the representation of the hearing officer that she was placed on the ineligible list in error.

A party may invoke estoppel against a government agency when a manifest injustice has resulted from actions taken in its governmental capacity. Allen v. Bd. Of Educ. of Union Free

School Dist. No. 20, 168 A.D.2d 403 (2d Dep't 1990), appeal dismissed, 77 N.Y.2d 934 (1991). The agency's conduct must induce justifiable reliance by a party who then changed position to his or her detriment. Branca v. Bd. Of Educ., Sachem Cent. School Dist. at Holbrook, 239 A.D.2d 494, 496(2d Dep't 1997).

For a government agency to be estopped from using a statute of limitations defense, an aggrieved party must prove that the government engaged in fraud, misrepresentation, deception, or similar affirmative misconduct that party relied upon to its detriment. Yassin v. Sarabu, 284 A.D.2d 531 (2d Dep't 2001), lv. dismissed, 98 N.Y.2d 645 (2002); see, e.g., Academy Street Associates, Inc. v. Spitzer, 44 A.D.3d 592 (1st Dep't 2007) (alleged actions of Attorney General in assuring plaintiffs' counsel the amendment to offering plan at issue would be addressed in near future did not rise to the level of affirmative wrongdoing so as to equitably estop Attorney General from asserting the statute of limitations defense).

In order to invoke estoppel to preclude the assertion of a statute of limitations defense, there must be evidence that the misrepresentation was deliberate, and here the record is devoid of such evidence. Yessin, 284 A.D.2d at 531.

Furthermore, the hearing officer's statement is not a sufficient promise to invoke promissory estoppel, since he was not authorized to promise petitioner her name would be taken off the ineligible list. Carson v. New York City Dep't of

Sanitation, 271 A.D.2d 380 (1st Dep't 2000) (holding that if an agent of the government is not authorized to give a promise the agency is not bound by it). In addition, to establish promissory estoppel, petitioner must show that the promise she relied on was clear and unambiguous. Clifford R. Gray, Inc. v. LeChase Constr. Services, No. 503270, slip op. 4249 at 2 (N.Y. App. Div. 3d Dep't May 8, 2008); Roufaiel, 241 A.D.2d at 869. Here, a statement by a hearing officer who refused to decide on petitioner's case that he believed petitioner's name was on the ineligible list in error is insufficient to amount to a clear and unambiguous promise that her name would be removed from the list.

Finally, the court notes that petitioner failed to take further steps to assure her name was taken off the ineligible list in the approximately three years between the date of the hearing and the time she was orally denied a position by DOE. Under these circumstances, when a good faith inquiry would have disclosed the true facts, petitioner may not invoke the doctrine of estoppel. Parkview Assoc. v. City of New York, 71 N.Y.2d 274, appeal dismissed, cert denied, 488 U.S. 801 (1988).

Accordingly, as respondents are not estopped from asserting the four month statute of limitations period which began to run, at the latest, in June 2003, when petitioner received notice that she was placed on the ineligible list, the petition must be dismissed as untimely.

Conclusion

Accordingly, it is

ORDERED that the cross-motion to dismiss is granted, and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the petition.

DATED: ~~June~~ July 3, 2008

J.S.C