SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR Justice

PART 33

Index Number : 401944/2012
BARNES, JR., JAMES
vs.
NYC DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

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

The following papers, numbered 1 to 8, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-8

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

Replying Affidavits _____ | No(s). _____

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

consolidated for disposition with the action under the same index number 401944/2012, sequence number 002. Motion is decided in accordance with attached memorandum decision & judgment

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: 1/16/2013

_____, 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

----------X

In the Matter of the Application of
James Barnes, Jr.,

Index No. 401944/12

Petitioner,

Decision and Judgment

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

-against-

The Department of Education of the City
of New York,

Respondent.

----------X

HON. ALEXANDER W. HUNTER, JR.

Two separate motions were filed by the parties in this action. Both motions will be decided herein. The application by petitioner, pro se, for an order, pursuant to Article 78 of the CPLR, to reverse respondent's determination terminating petitioner's employment and to reinstate petitioner and make him whole, is denied. The application by respondent for an order, pursuant to CPLR 7804 (f) & 3211, dismissing the petition, is granted.

Petitioner was employed by the Board of Education of the City School District of the City of New York, sued herein as Department of Education of the City of New York ("BOE"), as an educational paraprofessional. Petitioner worked at the P 754X school from on or about January 3, 2000 until his employment was terminated on October 19, 2010. On February 24, 2010, Assistant Principal Daniel Hoehn contacted the Office of the Special Commissioner of Investigation for the New York City School District ("SCI") to lodge a complaint against petitioner. The complaint alleged that petitioner was involved in an inappropriate relationship with a 20-year-old female special education student ("Student A"). Petitioner was reassigned while SCI investigated the allegations.

SCI substantiated the allegations against petitioner in an investigation report and letter to the BOE Chancellor, dated September 24, 2010. SCI recommended that petitioner be placed on the "Ineligible Inquiry List" and that his employment be terminated. On October 7, 2010, a due consideration conference was held to give petitioner a chance to respond to the SCI report with his United Federation of Teachers ("UFT") union representative present. Petitioner was formally terminated and placed on the "Ineligible Inquiry List" in a letter dated October 19, 2010. On October 21, 2010, petitioner filed his initial grievance appeal and a Step 2 grievance appeal conference was held on January 7, 2011. On January 21, 2011, the Chancellor's Representative issued a grievance decision denying petitioner's grievance, finding that "the grievant received due process and was properly terminated without contractual violations." Petitioner appealed to the UFT union's Ad Com Grievance Committee ("Committee") to take further action. In a letter

dated June 8, 2010, the Committee denied the appeal and declined to take any further action on petitioner's behalf, stating "that the Union cannot overcome the Department of Education's argument that you were terminated for good and sufficient reason and received due consideration." Petitioner commenced the instant proceeding by verified petition on August 31, 2012.

Petitioner argues that respondent's determination terminating his employment should be reversed on the basis of the following allegations. Petitioner alleges that at an unemployment insurance hearing held on May 5, 2011, the SCI investigator admitted to altering petitioner's subpoenaed phone records, which were used for evidence that petitioner had been talking to Student A. Petitioner alleges that the witnesses for respondent lied at the unemployment insurance hearing. Petitioner alleges that the SCI investigator failed to investigate false claims made by Student B that petitioner and Student A were seen together at a certain Wendy's location. Petitioner alleges that there is no Wendy's at that location. Petitioner alleges that the SCI report has too many flaws.

Respondent filed a separate motion for an order to dismiss the petition on October 11, 2012. Respondent cross-moved to dismiss on the grounds that (1) the petition is time barred by the four-month statute of limitations set forth in CPLR 217 and (2) petitioner has failed to exhaust all his administrative remedies.

First, respondent argues that the petition must be dismissed as time barred because it was not commenced within four months of a final and binding termination. Respondent argues that the determination became final and binding on the date petitioner's employment was terminated. Respondent further argues that the filing of a grievance appeal does not toll the applicable statute of limitations.

Second, respondent argues that the petition must be dismissed for petitioner's failure to exhaust his administrative remedies. Respondent alleges that the grievance process outlined in Articles 22 and 23 of the collective bargaining agreement ("CBA") between the BOE and the UFT union must be completed to exhaust all administrative remedies. Respondent argues that petitioner failed to exhaust all administrative remedies because he did not proceed beyond Step 2 of the grievance process. Respondent argues that although it was the Committee's decision to decline proceeding with the appeal, the decision is binding on petitioner because he opted to grieve his termination pursuant to the CBA.

Petitioner submits a motion for opposition in response to respondent's cross-motion to dismiss. First, petitioner again raises allegations that witnesses lied at the unemployment hearing and that there were errors in the SCI investigation. Petitioner argues that the court should consider the testimony given and conclusions drawn at the unemployment hearing. Second, petitioner argues that the petition is not time barred because he had to wait until the union process was done to commence the instant proceeding. Petitioner argues that the relevant date for the four-month statute of limitations is June 8, 2012, when petitioner's appeal was denied. Third, petitioner argues that he cannot be held liable for the flaws of the UFT union's actions.

First, respondent asserts that it is settled law that unemployment hearing testimony, findings of fact, and conclusions of law are inadmissible in subsequent court proceedings and therefore petitioner cannot rely upon such evidence. **See, Labor Law §§ 537 (1) and 623 (2); Matter of Watson v. Bratton, 243 AD2d 295 (1st Dept 1997); Matter of Strong v. New York City Dept. of Educ., 62 AD3d 592, 2009 NY Slip Op 04114 (1st Dept 2009)**. Second, respondent again argues that the relevant date for the four-month statute of limitations is the date petitioner was fired. Respondent alleges that petitioner brought the instant proceeding seeking review of respondent's decision to terminate petitioner, not seeking review of the union's determination. Third, respondent reiterates that petitioner is bound by his union's decision not to complete the grievance process. Respondent argues that petitioner is liable for the flaws of the union actions because petitioner elected to pursue the grievance process outlined in the CBA.

A party must commence a special proceeding under Article 78 of the CPLR by filing a petition within four months after the administrative determination to be reviewed becomes final and binding on the aggrieved party. **See, CPLR 217 (1) & 304; Matter of Best Payphones, Inc. v. Department of Info. Tech. & Telecom. of City of N.Y., 5 NY3d 30, 2005 NY Slip Op 04616 (2005); Matter of De Milio v. Borghard, 55 NY2d 216 (1982)**. A determination to discontinue a probationary BOE employee's service becomes final and binding on that employee on his last day at work. **See, Kahn v. New York City Dept. of Educ., 18 NY3d 457, 2012 NY Slip Op 01098 (2012); Matter of Zarinfar v. Board of Educ. of the City School Dist. of the City of N.Y., 93 AD3d 466, 2012 NY Slip Op 01753 (1st Dept 2012)**. The internal appeal procedure provided for under the CBA constitutes an optional procedure to review grievances, and is not an administrative remedy that petitioner must exhaust before litigating the termination of his employment. **Kahn v. New York City Dept. of Educ., 18 NY3d 457**. Furthermore, the grievance proceeding does not toll the four-month statute of limitations. **Matter of Lubin v. Board of Educ. of City of N.Y., 60 NY2d 974 (1983).** Petitioner's employment was terminated on October 19, 2010, but he did not commence the instant proceeding until almost two years later on August 31, 2012. Accordingly, the petition is time barred insofar as it seeks to reverse respondent's determination terminating petitioner's employment.

Petitioner must exhaust his administrative remedies before a claim is ripe for Article 78 review. **CPLR 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 did not proceed beyond Step 2 of the grievance process and is bound by his union's determination not to proceed. Therefore, the petition must be dismissed for failure to exhaust all administrative remedies.

Petitioner does not argue that the union's determination declining to pursue further administrative remedies is arbitrary and capricious. Nonetheless, it should be noted that this argument is without merit. "When [petitioner] elected to follow the contract grievance procedure, he did so knowing that his union would control the decision whether to reach arbitration. He left that authority with them. Without a showing that the union breached its duty

of fair representation in prosecuting the employee's grievance, its decision to conclude the grievance process short of the final step allowed by contract or law is binding on the employee and precludes resort to additional remedies." **Matter of Board of Educ., Commack Union Free School Dist. v. Ambach, 70 NY2d 501, 511 (1987); see, Matter of Sapadin v. Board of Educ. of City of N.Y., 246 AD2d 359 (1st Dept 1998).**

Petitioner's remaining contentions are without merit.

Accordingly, it is hereby,

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

Dated: January 16, 2013

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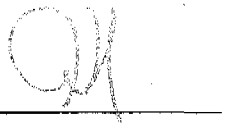

J.S.C.

ALEXANDER W. HUNTER JR