[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 100526/2013
VASSILEV, ANTON
VS
CITY OF NEW YORK
Sequence Number : 001
ARTICLE 78

PART _____

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

is decided in accordance with the annexed decision.

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

Dated: 8/2/13

_____, 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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

ANTON VASSILEV,

Petitioner,

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, DENNIS WALCOTT, Chancellor of the New York City Department of Education,

Respondents.

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Index No. 100526/13

DECISION/ORDER

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Petitioner Anton Vassilev brings the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") (1) challenging respondent the New York City Department of Education's (the "DOE") determination sustaining (a) his Unsatisfactory end-of-year rating ("U-rating") for the 2009-2010 school year and the denial of completion of probation; and (b) the discontinuance of employment and termination as a teacher for the DOE; (2) seeking an Order mandating that respondents reinstate petitioner *nunc pro tunc* to his employment as of September 9, 2010 with all backpay and other lost benefits and emoluments of employment, including granting

him tenure; (3) ordering respondents to immediately turn over to petitioner a complete and unredacted copy of the Chancellor's Committee report pursuant to CPLR § 408; and (4) compelling respondents to issue a final determination regarding his "U-rating." Respondents cross-move for an Order pursuant to CPLR § 7804(f) and 3211(a)(5) dismissing the petition on the grounds that it is time-barred and that petitioner has failed to exhaust his administrative remedies and seeking costs, fees and disbursements. For the reasons set forth below, the petition is granted in part and denied in part.

The relevant facts are as follows. Petitioner was appointed as a probationary mathematics teacher with the DOE in or around September 2006 at Junior High School 291 ("J.H.S. 291") in Brooklyn, New York. For the 2006-2007, 2007-2008 and 2008-2009 school years, petitioner received "Satisfactory" ratings on his end-of-year evaluations. Petitioner alleges that he was tenured by estoppel at the conclusion of the 2008-2009 school year as he had received three consecutive "Satisfactory" end-of-year ratings. During the 2009-2010 school year, petitioner alleges that his class lessons were observed three times by Assistant Principal Noel Moses ("AP Moses") and that all of those observations were rated satisfactory but that Principal Sean Walsh ("Principal Walsh") rated petitioner's overall performance for the 2009-2010 school year "Unsatisfactory."

Due to the "U-rating," by letter dated July 9, 2010, petitioner received notice that his probationary employment was terminated and petitioner was denied tenure allegedly pursuant to an Extension of Probation Agreement (the "Agreement"), dated December 7, 2009. The Agreement states that petitioner "agrees to serve, an additional one year probationary period commencing December 7, 2009, and concluding on December 8, 2010 in the tenure area of 762B Mathematics" and that "[n]o later than December 8, 2010, [petitioner] shall either be granted tenure upon satisfactory completion of the additional probationary period or denied completion of probation

and/or discontinued prior thereto." Further, the Agreement states that "[t]he parties agree that the decision to either grant tenure to [petitioner] at a date no later than December 8, 2010, shall be based upon an evaluation of [petitioner's] probationary service during the additional one year of probationary service herein granted and also upon an evaluation of [petitioner's] probationary service rendered prior to December 7, 2009." Finally, the Agreement states that "[petitioner] waives any possible rights, claims or causes of action for tenure as a Mathematics Teacher arising on or prior to December 7, 2009."

Petitioner appealed both his "U-rating" and termination to the DOE's Office of Appeals and Reviews ("OAR") and a Chancellor's Committee hearing was held on March 26, 2012. Principal Walsh died before the hearing so petitioner was unable to question him. At the hearing, Debra Poulos, petitioner's union representative, asserted that there was no evidence to support petitioner's "U-rating" and that petitioner should be tenured by estoppel as the December 7, 2009 Agreement was never signed by petitioner and that the signature on the Agreement was forged. Ms. Poulos asserted that when confronted with the Agreement, she contacted the DOE's Special Commissioner of Investigations ("SCI") to investigate whether the Agreement was a forgery but that SCI closed the investigation, allegedly due to Principal Walsh's death. At the hearing, the Chancellor's representative noted certain irregularities on several documents and stated that he was not "one hundred percent convinced that probationer did sign [the Agreement]." Petitioner has not yet received a final determination affirming or overturning his denial of completion of probation and his "U-rating." Petitioner commenced the instant Article 78 proceeding seeking, *inter alia*, to challenge the "U-rating" he received for the 2009-2010 school year and his termination.

As an initial matter, the City of New York must be dismissed from this case as it is an improper party. It is well-settled that "[the DOE] is not a department of the [C]ity of New York"

but rather a separate and distinct entity. *Ragsdale v. Board of Education*, 282 N.Y.323 (1940), citing *Divisich v. Marshall*, 281 N.Y.1 70 (1939); *see also Perez v. City of New York*, 41 A.D.3d 378 (1st Dept 2007)(holding that "the City and the [DOE] remain separate legal entities.") As the City of New York did not make the determination petitioner seeks to challenge and is a separate entity from the DOE, it must be dismissed.

Further, that portion of the petition which seeks to challenge petitioner's termination is denied on the ground that it is time-barred. There is a four month statute of limitations to bring an Article 78 proceeding. *See* CPLR § 217. "The Statute of Limitations runs from the date the administrative determination becomes final and binding." *Matter of De Milio v. Borghard*, 55 N.Y.2d 216, 219 (1982). "A petition to challenge the termination of probationary employment on substantive grounds must be brought within four months of the effective date of termination" as "[t]he time to commence such a proceeding is not extended by the...pursuit of administrative remedies." *Kahn v. New York City Dept. of Educ.*, 79 A.D.3d 521 (1st Dept 2010), *aff'd.* 18 N.Y.3d 457 (2012). In the instant action, petitioner was notified of his termination on July 9, 2010. However, petitioner did not commence the instant Article 78 proceeding challenging such termination until March 29, 2013, more than two and a half years later. The fact that petitioner appealed his termination to the OAR and had it reviewed by the Chancellor's Committee is without merit as such review did not toll petitioner's time to commence this proceeding. Additionally, petitioner's assertion that he was entitled to a hearing pursuant to Education Law § 3020-a is also time-barred. If petitioner desired a § 3020-a hearing, it was necessary for petitioner to demand one and await a refusal before commencing an Article 78 proceeding. However, petitioner may not extend indefinitely the statute of limitations period by waiting to make such a demand. *See Austin v. Bd. of Higher Educ.*, 5 N.Y.2d 430 (1959).

Additionally, that portion of the petition which seeks to challenge petitioner's "U-rating" for the 2009-2010 school year is dismissed on the ground that petitioner has failed to exhaust administrative remedies. Appeals of unsatisfactory ratings are governed by section 4.3.1 of the DOE by-laws, which specify that a "U-rating" is not final until the Chancellor renders a decision. *See Kahn v. Dep't of Educ.*, 18 N.Y.3d 457 (2012); *see also Bonilla v. Bd. of Educ.*, 285 A.D.2d 548 (2d Dept 2011). In the instant proceeding, petitioner has yet to receive a final determination from the Chancellor regarding whether his "U-rating" for the 2009-2010 school year will be sustained. As no final determination has been made, petitioner's challenge to the "U-rating" is premature and must be dismissed. However, to the extent petitioner seeks relief in the nature of mandamus to compel respondent to issue a final determination regarding the "U-rating" so that petitioner may commence an Article 78 proceeding challenging such determination, such request is granted. Under New York law, "mandamus lies to compel the performance of a purely ministerial act where there is a clear legal right to the relief sought." *Matter of Legal Aid Society of Sullivan County v. Scheinman,* 53 N.Y.2d 12,16 (1981). Mandamus does not lie to compel acts that "are entrusted to the respondent official's discretion. Mandamus is available only where the petitioner's right to performance is so clear as to admit of no doubt or controversy." *Coastal Oil New York Inc. v. Newton,* 231 A.D.2d 55, 57 (1st Dep't 1997). In the present case, petitioner is entitled to the relief he seeks as the Chancellor's Committee's issuance of a final determination is a ministerial, not a discretionary, act. The Committee's hearing was held in March 2012 yet no final determination has been made thus far. This court is not advising the Committee on what decision to render but only that the Committee must issue a final determination regarding petitioner's "U-rating" for the 2009-2010 school year as expeditiously as possible.

Finally, petitioner's request for a complete and unredacted copy of the Chancellor's

Committee's report is denied. In an Article 78 proceeding, "a petitioner is not entitled to discovery as of right." *Town of Pleasant Valley v. New York State Bd. of Real Prop. Servs.*, 253 A.D.2d 8, 15-16 (2d Dept 1999). In a special proceeding, discovery will be permitted only where a petitioner first "demonstrate[s] that there is need for such relief." *Id.* at 15. In the instant action, petitioner seeks discovery in the form of the Chancellor's Committee's report because "such reports have been routinely turned over or compelled to be turned over to teachers in similar proceedings." However, petitioner fails to demonstrate his individualized need for the report, which is necessary to obtain discovery. *See Town of Pleasant Valley*, 253 A.D.2d at 15. Further, the Chancellor's Committee's report is a predecisional report that is advisory, not binding, in nature.

To the extent respondents seek costs, fees and disbursements in this action, such request is denied as respondents have failed to provide a basis for such relief.

Accordingly, the petition is granted only to the extent that respondents are hereby compelled to issue a final determination regarding petitioner's "U-rating" for the 2009-2010 school year as expeditiously as possible. If respondents are unable to issue a final determination within four months of the date of this decision, the parties shall appear for a Compliance Conference on December 10, 2013 at 11:00 a.m. at 60 Centre Street, Room 432. This constitutes the decision and order of the court.

Dated: 8/2/13

Enter: _____
J.S.C.