22

At an IAS Term, Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of July, 2013.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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In the Matter of the Application of

TIFFANI NOTRE ELLIS,

Plaintiff-Petitioner,

- against -

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK and THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendants-Respondents.

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Index No.: 500554/2012

DECISION AND ORDER

Papers	**Numbered**
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1-2,
Opposing Affidavits (Affirmations)	3,
Reply Affidavits (Affirmations)	
Memorandum of Law	4, 5

2013 SEP -4 AM 7:26

Upon the foregoing cited papers and after oral argument the Court finds as follows:

This action has been brought to recover for personal injuries allegedly sustained by Petitioner, Tiffani Notre Ellis (hereinafter "the Petitioner"). The Petitioner alleges causes of action under Article 78 of the Civil Practice Law and Rules (CPLR), and under Article 1 Sections 6, 8, and 11 of the New York State Constitution. The Plaintiff seeks equitable relief against the Department of Education and the City School Districts of the City of New York (hereinafter "the Respondents") in the form of a finding that she has acquired tenure by estoppel, that her termination was in violation of the New York State Constitution, that she be awarded all past salary owed, and damages related to the injury to her professional reputation.

The Respondents now move pursuant to CPLR §§ 7804(f) and 3211(a)(7) on the grounds that the causes of action contained in the complaint may not be maintained because the complaint fails to state a cause of action. The Respondents argue that the Petitioner was a probationary employee and the decision to terminate her can only be reversed if the probationary employee can show that the termination was made in bad faith, for a constitutionally impermissible purpose, or in violation of the law. *See Lambert v. Kelly*, 78 A.D.3d 554, 555, 911 N.Y.S.2d 59 [1st Department, 2010)]. The Respondents also seek to have the causes of action claiming that the Respondents violated the rights of the Petitioner under the New York State Constitution dismissed for failing to state a cause of action.

As an initial matter, the Court finds that the claims related to alleged violations of her rights under the New York State Constitution (the Second, Third and Fourth Causes of Action) are sufficient to state a cause of action. Under New York State law, a Court must "'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" *Nonnon v. City of New York,* 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, 874 N.E.2d 720, quoting *Leon v. Martinez,* 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511. The cases cited by the Respondent involved Federal Claims pursuant to 42 U.S.C. §1983 which require a heightened pleading requirement pursuant to *Ashcroft v. Iqbal*, and are therefore inapposite. Accordingly, the motion, at this stage, as it pertains to the claims made pursuant to the New York State Constitution is denied.

Under CPLR §7804 the legal sufficiency of a petition is to be judged in relation to the sufficiency of the pleadings. In order to prevail on a motion to dismiss pursuant to CPLR § 3211(a)(7), "the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action." *Sokol v. Leader*, 74 A.D.3d 1180, 904 N.Y.S.2d 153, 155 [2nd Dept]; *see Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 [1977].

In opposition to that aspect of the Respondent's motion pertaining to the Article 78 claim, the Petitioner argues that the Amended Complaint sufficiently reflects that the decision to terminate her employment was not related to Petitioners actions while she was employed and was therefore arbitrary and made in bad faith. Petitioner's argument is as follows: 1) Petitioner had no control over these images being distributed over the web. These images were taken some twenty odd years ago when the Petitioner were in her late teens to early twenties. Petitioner issued letters, from her attorney, asking that these websites cease and desist the distribution of these images. 2) The photos were heavily photo-shopped, leaving her face in tact but completely changing the body. Thus Petitioner cannot control how people alter images of her and that in any event it was done without her authorization. 3) Petitioner had already acquired tenure by estoppel.

The facts of this case are allegedly as follows: Petitioner has been employed as a teacher by the Department of Education of the City of New York (hereinafter "DOE") from January 4, 1999 to December 23, 2011. Throughout her career, the Petitioner has taught elementary, middle and high school. Most recently she was employed at Murry Bergtraum High School as the 9th grades' academy guidance counselor. The Guidance Counselor position was subject to a three-year probationary period, initially scheduled to end on February 25, 2011. On or about November 16, 2010, Petitioner executed an agreement with Elaine Gorman, Manhattan High Schools Superintendent, that extended her probationary period to September 1, 2011. *See Respondent's Affirmation in Support, Exhibit B.* Throughout this initial probationary period, Petitioner consistently received a satisfactory evaluation. The Petitioner began preparing her application for tenure during the 2010-2011 school year. During this process she accrued a substantial number of recommendations from colleagues who recommended her for tenure. *See Affidavit of Plaintiff-Petitioner Exhibits 3-9.*

Petitioner acknowledges that during the ages of 17-20 the Petitioner was a professional model and modeled for companies such as Frederick's of Hollywood and Bebe Swimwear. Petitioner disclosed this information to the District 13 Superintendent Dr. Lester Young prior to being hired as a teacher in 1999. Though it was disclosed, the Petitioner states that she was the subject of several investigations throughout her teaching career. During the first year of her employment, the Petitioner was removed by the DOE and reassigned to administrative duties and after a being cleared of any wrongdoing was allowed to return to teaching. Petitioner was also investigated in 2004 and 2006 those times being assigned to a Temporary Reassignment Center in Staten Island. She was cleared of any wrongdoing on both occasions and returned to teaching. Though there were three different investigations, the basis for all three were the same pictures that were taken of Petitioner before she became a teacher.[1]

In June 2011, Petitioner alleges that Principal Andrea Lewis approached her during graduation ceremonies and stated that unless she signed another extension of her probationary period she would be terminated. The Petitioner acknowledges that she signed an extension, extending her probationary period to September 1, 2012. She states that the agreement was signed under duress. (*See Respondent's Affirmation in Support, Exhibit D).* At around the same time, Respondent alleges that images of the Petitioner appeared on websites depicting women who were totally or partially nude without Petitioner's permission. There was also a Facebook page allegedly set up under the Petitioner's name with those same pictures, of which Petitioner denied being the author. Respondent alleges that as a result of these images that Petitioner's initial

[1]For the purposes of the motion the information in this paragraph is taken as true as taken from Petitioner affidavit paragraphs # 24-27.

"Satisfactory" rating was then changed to "Unsatisfactory". Respondent states that Petitioner had "demonstrated conduct unbecoming a professional by appearing in inappropriate photos on Internet websites." *See Respondent's Affirmation in Support, Exhibit C.*

Petitioner alleges that on November 16, 2011, she was given a letter by the Principal referring to the same images. Petitioner upon receiving this letter allegedly explained to the Respondent that these images were posted on the internet without her permission. In addition, Petitioner allegedly represented that the images were photo-shopped, further, Petitioner showed the Principal cease and desist letters that her attorney sent to the subject websites. *See Petitioner's Affidavit's, Exhibit 10.* Petitioner also explained that the Facebook page was set up by a fan and not her. On November 23, 2011, Tamika S. Matheson, Acting Superintendent of Manhattan High Schools, informed Petitioner that her services would go under review on December 23, 2011. After this review the Petitioner's probationary service was discontinued and she was terminated. *See Respondents Affirmation in Support, Exhibit F.* Petitioner sought review of her discontinuance and "Unsatisfactory rating". The rating was reviewed by a three-member Chancellor's Committee on June 1, 2012. Petitioner was accompanied by her Union advisor and testified on her own behalf. *See Respondents Affirmation in Support, Exhibit C* at pgs 1-2. The Committee agreed with the previous ruling, stating that:

> "Guidance counselors play a significant role in the character development of students and that they are subject to greater scrutiny and are held to a higher standard. Either **by choice or by circumstances**, {petitioner} was associated with decidedly questionable websites which were intended for public viewing. That behavior competes with [BOE] expectation, which is to educate students to be responsible and respectful and to develop good moral character. The inappropriate photos of [petitioner] which were accessible to impressionable adolescents, is considered conduct unbecoming a professional by the [BOE]. That behavior has potentially adverse influence on her ability to counsel students and be regarded as a role model."

See Respondents Affirmation in Support, Exhibit C at pg. 4.

The Respondent states that Petitioner's cause of action should be dismissed because a probationary employee can be terminated at any time and for "almost any reason, or no reason at all" *Duncan v. Kelly*, 9 N.Y.3d 1024, 1025. The termination of a probationary employee can only be annulled if done so in bad faith. *Matter of Frasier v. Board of Education*, 71 N.Y.2d 763, 766 (1988). "Evidence in the record supporting the conclusion that performance was unsatisfactory establishes that the discharge was made in good faith." *Matter of John v. Katz*, 68 N.Y.2d 649, 650 (1986). In addition, there must be a rational basis for the ruling. *See Murnane v. Department of Educ. Of City of New York*, 82 A.D.3d 576 (1st Dept., 2011), *Cohn v. Board of Educ. Of City School Dist. Of City of New York*, 102 A.D.3d586 (1st Dept., 2013). *See Murnane v. Department*

of Educ. Of City of New York, 82 A.D.3d 576 (1st Dept., 2011), *Cohn v. Board of Educ. Of City School Dist. Of City of New York*, 102 A.D.3d586 (1st Dept., 2013).

At issue before this Court is whether the facts, as described, allege a cause of action, not whether the Petitioner actually has a cause of action on the merits. Moreover, the Respondent fails to state whether this Court has the discretion to rule for Petitioner if there is a showing that the ruling was "arbitrary and capricious **or** in bad faith." *See Murnane* and *Cohn*, *supra*. The Court of Appeals defines the arbitrary and capricious standard in *Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 1974, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321. "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Id.* at 231, 356 N.Y.S.2d at 839, 313 N.E.2d at 325. The question, the Court instructs, is whether the determination has a "rational basis." *Id.* Further, as stated in *125 Bar Corp. V. State Liquor Auth.,* 1969, 24 N.Y.2d 174, 299 N.Y.S.2d 194, 247 N.E.2d 157, the agency's reliance on ex-parte materials obtained by an independent investigation must be rationally based.

To make this standard clearer, the Court in *Matter of Pell* states that "We believe that, reasonably construed, the statute authorizes us to set aside a determination by an administrative agency, only if the measure of punishment or discipline imposed is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." *Matter of Pell v. Board of Educ. of Union Free School Dist, supra* at p 232. When determining what is "shocking to one's sense of fairness" the 2nd Department states that

> "A result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals"
> *Broich v. Village of Southhampton*, 70 A.D.3d 822, 823, 894 N.Y.S.2d 109,110 (2nd Dept, 2010) quoting *Matter of Pell.*

The pleadings in the instant proceeding describe a claim based upon images that the Petitioner apparently had no dominion or control over. Further, the pleadings describe the alleged actions taken by both the Petitioner and the Respondent and claim that those actions were made in bad faith. Accordingly, the Respondents motion is denied. Petitioner's Amended Complaint does sufficiently plead a cause of action. The issue as to the appropriateness of severance has not been addressed by either party and this decision is in no way determinative on that issue. The Respondents shall serve and file their Answer within thirty days of service of this Decision and Order.

The foregoing constitutes the Decision and Order of the Court.

Enter:

July 3, 2013

Carl J. Landicino
Justice Supreme Court