SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** 12
Justice

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In the Matter of the Application of

SABRINA SANDIFORD,

Petitioner,

For Judgment Pursuant to Article 78, CPLR,

- v -

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

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INDEX NO. 155285/2017

MOTION DATE

MOTION SEQ. NO. 1

DECISION, ORDER AND JUDGMENT

The following e-filed documents, listed by NYSCEF document number 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this application to/for relief pursuant to CPLR article 78

In this CPLR article 78 proceeding, petitioner challenges her termination by respondents. Respondent filed an answer seeking dismissal of the petition and a judgment in its favor with costs, fees, and disbursements.

I. VERIFIED PETITION (NYSCEF 1)

Petitioner was a tenured teacher "under a common branch license." In August 2009, she was advised by written notice to take a multi-subject licensing examination which she took in January 2010 and received her common branch license 1-6. In August 2014, petitioner was excessed from a teaching position she held and remained in the absent teacher reserve until her termination.

Petitioner continuously taught under her common branch license through March 2016, when she was coerced into signing an "extension of probation agreement" whereby her probation

was extended from March 9, 2016 to March 9, 2017. A field supervisor threatened her with termination if she did not sign it.

Throughout her career with respondent, petitioner received only satisfactory annual professional performance reviews, and has taught continuously for 24 years under her common branch license, "clearly having a tenure in the subject area and subject to the provisions of Education Law § 3020."

On January 4, 2017, a supervisor spoke with petitioner about performing a formal observation of her. Petitioner expected a pre-observation meeting, and upon her supervisor's arrival on January 12, 2017, when she reminded her that she had stated that she was coming in to discuss a formal observation, the supervisor replied that she was doing an informal observation instead because she was in the building. Petitioner explained to her that the teacher for whom she was covering had instructed her on what the students should do, and again told her that she was covering as a gym teacher and that she picked the students up at 8:30 the same morning.

Petitioner takes issue with the supervisor's observation that she had put no aim for the students on the blackboard and that the students did not know what to do. Rather, had the supervisor been present when the class began, she would have seen that she and the teacher had a lesson plan. The following day, the supervisor gave petitioner a U- rating for the informal observation, and yelled at her in front of other people. Petitioner asked another teacher to call a UFT representative due to the supervisor's abuse and attempt to get her to sign an observation that was improperly performed. She unsuccessfully attempted to explain that she followed the teacher's instruction and claims that the teacher verified it in writing.

Two weeks later, the supervisor returned to perform another informal observation even though she had told petitioner that it would be a formal observation. Petitioner was with a kindergarten class of students with behavioral problems. The teacher was absent and had left no lesson plan. Petitioner had no time to plan or look for "any manipulative" to execute the lesson. She had a lesson plan and asked for a "manipulative in her room to accompany the lesson." Petitioner claims that the supervisor could not fully observe the students from her vantage behind a high stack of books and as she was texting on her phone. On February 1, 2017, in response to her complaint that she was ill and needed to go to the hospital, her supervisor told her to take advantage of benefits such as the Family Medical Leave Act and that she should speak to the payroll secretary for further information. These circumstances reflect the supervisor's motive to terminate her on March 9, 2017, thereby causing petitioner's blood pressure to rise to 160/110.

Petitioner received two U-ratings within three weeks in 2017 and was terminated by letter dated February 15, 2017, for failing to complete her probationary period. (NYSCEF 2).

Petitioner alleges that defendant's decision to fire her after more than 20 years of employment is arbitrary and capricious, and in bad faith, as she is an exemplary employee and had never received an unsatisfactory rating. The two unsatisfactory ratings she received while in the absent teacher reserve were the result of her supervisor's bias, and the preceding observations were conducted informally and without notice, even though formal observations had been scheduled. Moreover, to the extent that her lesson plans were insufficient, she disclaims

responsibility, as she followed instructions she had received from the students' regular teacher. In any event, she asserts, she was not given sufficient time to prepare lesson plans.

Petitioner asserts that she earned tenure by estoppel through years of continuous work, and was deprived of it without the benefit of a fair hearing.

II. VERIFIED ANSWER (NYSCEF 6)

Petitioner began working for respondent in 1996 as a substitute teacher. (NYSCEF 7). In 2001, she was appointed to a full-time teaching position in the license area of pre-K through 6\sixth grade. In July 2008, she was fired for failing to maintain her state teaching license. (NYSCEF 8). In the termination notice, respondent advised that if she received a satisfactory rating, she would receive a substitute teaching certificate effective September 8, 2009, for "day-to-day service" only, and that any work done pursuant to the certificate would not be for full-time service or any position normally paid on the full-time teacher payroll. (*Id.*). In August 2008, she restored her license, and returned to her employment with respondent. (NYSCEF 7).

In July 2009, petitioner was again fired for failing to maintain her state teaching license. She was again advised as to her ability to receive a substitute teaching certificate under the same terms set forth in the July 2008 termination notice. (NYSCEF 9).

In October 2009, petitioner began working as a substitute teacher, providing "occasional per diem" services. (NYSCEF 7). On March 9, 2012, after obtaining her state teaching license, petitioner was appointed to a probationary full-time teaching position. (NYSCEF 6).

In 2014, petitioner was transferred to the absent teacher reserve. (NYSCEF 7, 16). On March 9, 2015, she signed a contract extending the period of her probationary employment for one year. The contract contains terms whereby petitioner "waives any possible rights, claims or causes of action for tenure as a teacher (in the license area of Common Branches (781B)) arising on or prior to March 9, 2015," and acknowledges that she entered into the contract "freely, knowingly and openly, without coercion or duress," and that she had an opportunity to seek legal counsel throughout "these proceedings." (NYSCEF 10). On March 9, 2016, she again signed a contract extending the probationary period for a year, on the same terms. (NYSCEF 11).

On September 28, 2016, petitioner met with her supervisor and discussed, as relevant here, the expectation that petitioner would have a lesson plan for each class. (NYSCEF 13).

On January 12, 2017, petitioner's supervisor informally observed her. She noted that although petitioner had been given time to prepare the lesson and a coverage schedule of the lessons she would teach that day, petitioner neither had a plan nor did she know the objective of the lesson. At a post-observation conference, petitioner and the supervisor discussed the learning during the lesson and petitioner's probationary license. In her observation report, the supervisor noted areas of concern: the lesson had no motivation, the purpose was not made clear to the students, and the students had been given no directions. She reminded petitioner of their discussion in September 2016 of the need to have a lesson plan for every lesson taught. She also observed that petitioner did not assess the students' learning or understanding and did not seem

to understand the varying needs of the students and their learning capabilities. She rated petitioner's performance as unsatisfactory and warned her of the possibility that she could receive an overall unsatisfactory rating at the end of the school year and possible termination. (NYSCEF 13).

On January 25, 2017, the supervisor observed petitioner teach a kindergarten class. She asked for the lesson plan but petitioner had none. She observed that petitioner did not clearly direct the students who had difficulty understanding what they were to do. In her observation report, the supervisor pointed out petitioner's failure to have a lesson plan and that her instructions and materials were "poorly aligned with the outcome or aim of the lesson." She also saw that petitioner had trouble managing students' behavior. Petitioner was rated unsatisfactory, and she was placed on a plan of assistance for lesson planning and preparation, and engaging students in learning. Petitioner refused to sign the plan. (NYSCEF 14). At a February 1, 2017 post-observation conference with petitioner, petitioner refused to work with the supervisor. (NYSCEF 15).

By letter dated February 15, 2017, petitioner was advised that respondent had denied her certification of completion of probation and that she would be terminated effective March 9, 2017. (NYSCEF 12). She was rated unsatisfactory for the 2016-2017 school year.

Respondent submits petitioner's service history which reflects the following:

9/11/96-2/1/01	assigned as a substitute teacher under common branch license
2/1/01-7/1/08	assigned as teacher under common branch license
7/1/08	failed to meet Chancellor's requirement of license
8/28/08	license restored
8/28/08-7/1/09	assigned as teacher under common branch license
7/1/09	failed to meet Chancellor's requirement of license
10/5/09-3/9/12	assigned as occasional per diem
3/9/12	terminated as per diem
3/9/12-9/2/14	assigned as teacher under common branch license
9/2/14	excessed and transferred
9/2/14-12/8/14	ATR
12/8/14	resigned, failed for ATR to appear for interviews, reinstated
12/8/14-3/9/17	assigned as teacher under common branch license
3/9/17	probation discontinued

III. CONTENTIONS

A. Petitioner (NYSCEF 19, 24)

Petitioner denies having served as a substitute teacher before August 2009 and claims that she was tenured under her common branch license, having been employed full-time as a fourth grade teacher since 2010, earning regular raises and service time. She denies that her employment was probationary as she was treated as a full-time employee, and that her probationary term ended in September 2013, after she had completed three years of teaching, and

from August 2014, when she was assigned to the absent teacher reserve and continuously worked until March 2016. She thus claims that she is tenured by estoppel. That she signed a contract extending her alleged probationary period is irrelevant, she maintains, as she signed it under duress when another supervisor had threatened her with termination. Moreover, she was never advised of her right to seek help from a union representative.

Absent tenure by estoppel, petitioner claims that respondent acted in bad faith in terminating her after 25 years of satisfactory ratings, based solely on two unsatisfactory ratings which followed informal observations. Although acknowledging having signed the March 2016 extension of probation agreement, she maintains that it was coerced, that she was not given union representation, and that she had not understood that she was tenured. She denies respondent's allegations concerning the two informal observations and states that she was "always prepared with lesson plans." She also denies having received a plan of assistance and asserts that she was given no time to address her alleged deficiencies.

B. Respondent (NYSCEF 17)

Respondent argues that its decision to terminate petitioner was rational, as it was made in good faith, based on two unsatisfactory ratings and petitioner's failure to follow the plan of assistance offered by her superior. It observes that petitioner's explanations of her alleged failings do not excuse her failure to prepare properly for her classes, and that her claims of bias and discrimination on the basis of disability are fatally conclusory.

Given petitioner's record, respondent denies that she obtained tenure by estoppel. Rather, she was on probation when terminated, and had signed two contracts extending her probation. Absent any evidence that she was entitled to service credit before her 2012 appointment, or that she taught continuously for 24 years, the 2012 appointment created a new probationary period, and petitioner's attempts to link her prior probationary appointment fails as she twice failed to maintain her license, with resulting terminations of her probationary appointment in 2008 and 2009. It also observes that petitioner does not deny that she was not entitled to additional service credit for her per diem substitute teaching, and the record proves that she was a per diem occasional teacher, which cannot be used for service credit.

IV. ANALYSIS

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious, the test is whether the determination "is without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assocs., Ltd. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]). Therefore, an agency's determination "is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

It is well-settled that a probationary employee may be discharged for any or no reason absent proof that the discharge was in bad faith, for a constitutionally impermissible purpose, or in violation of law. (*Frasier v Bd. of Educ.*, 71 NY2d 763, 765 [1988]; *Matter of Brown v City of New York*, 280 AD2d 368 [1st Dept 2001]). "[T]he burden falls squarely on the petitioner to demonstrate, by competent proof, that a substantial issue of bad faith exists . . . and mere speculation, or bald, conclusory allegations are insufficient to shoulder this burden." (*Matter of Finkelstein v Bd. of Educ. of the City School Dist. of the City of New York*, 150 AD3d 464, 464 [1st Dept 2017]).

Petitioner not only fails to support her denial of having served as a substitute teacher before August 2009, but she is contradicted by the service history provided by respondent, which she does not challenge in terms of its authenticity or reliability. Her claim that she was tenured under her common branch license due to her full-time employment as a fourth grade teacher since 2010, earning regular raises and service time, is also unsupported, as are her assertions that her probationary term ended in September 2013 following three years of teaching and her claim that she had continuously taught through March 2016. These conclusory allegations are insufficient to sustain petitioner's burden of proof. Consequently, petitioner does not demonstrate that she obtained tenure by estoppel. Her other allegations concerning her supervisor's conduct and the failure to afford her union representation are legally insignificant given her probationary status. Her claim of discrimination based on a disability is also fatally conclusory.

In contending that she was coerced into signing the March 2016 extension of probation agreement by virtue of a threat of termination, petitioner fails to address the clause contained therein, which is also contained within the identical contract she signed the previous year, providing that in signing the contract, she states that she had not been coerced. In any event, her contention that she was coerced is insufficient to warrant relief. (*See Stefandel v Sielaff*, 176 AD2d 651, 651 [1st Dept 1991] [choice of resignation or termination following reveal of positive results of urine test did not establish coercion], and authorities cited therein). Given the foregoing, petitioner's remaining contentions need not be addressed.

Accordingly, it is hereby

ORDERED, that this proceeding is dismissed and the petition is denied.

7/11/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	DO NOT POST		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE