SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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DENISE BYFIELD-ABOAGYE

Petitioner,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

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INDEX NO. 158036/2016

MOTION DATE 08/25/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 20, 21, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

ORDER

Upon the foregoing documents, it is

ADJUDGED that the petition is denied, and the proceeding is dismissed, without cost and disbursements to respondent.

DECISION

Petitioner Denise Byfield-Aboagye brings this CPLR article 78 proceeding seeking judicial review of a decision by respondent, New York City Department of Education ("DOE"), denying her certification of completion of probation as an assistant principal. Petitioner seeks reinstatement as an assistant principal, with back pay.

Background

In this proceeding, the following factual assertions are not disputed.

DOE hired petitioner as a teacher in 1993. In 2009, she was appointed to the position of probationary assistant principal at The Heritage School in Manhattan. The probationary period for this position is a minimum of five years and may be extended by agreement between the DOE and probationary employee.

In November 2011, Dyanand Sugrim was appointed as principal of The Heritage School. At the recommendation of Mr. Sugrim, petitioner reluctantly consented to the extension of her probationary period on three occasions. The purpose of the extensions was to enable petitioner to improve in the areas of curriculum development, improving teacher practice, and professional development. Petitioner was afforded opportunities for professional development, including, among other things, individualized support from a member of a Harlem-based teacher support program, and professional training from another Harlem-based program.

Petitioner received satisfactory ratings for the school years 2012-2013, 2013-2014, and 2014-2015, with recommendations that she continue her probationary period. However, in February 2016, petitioner received unsatisfactory ratings in eight of the nine categories of her mid-year review.

On March 24, 2016, petitioner requested medical leave effective March 28, 2016. Her request was approved and was subsequently extended until August 31, 2016.

By letter dated May 23, 2016, respondent's superintendent denied her certification of completion of probation and terminated her appointment as an assistant principal effective the close of business on September 1, 2016. On September 1, 2016, she was returned from medical leave to the position of teacher in the absent teacher reserve.

Petitioner filed an administrative appeal with the DOE on July 5, 2016. She then commenced this article 78 proceeding, without any determination or hearing date having been scheduled for the administrative appeal.

Petitioner's Contentions

In her petition, petitioner alleges that she fulfilled all the requirements for completion of probation, and that the decision to deny her certificate of completion of probation was arbitrary, capricious, and made in bad faith.

Discussion

Preliminarily, the Court may properly entertain the petition despite the absence of a resolution of the administrative appeal. A petition to challenge the termination of probationary employment on substantive grounds must be brought within four months of the effective date of termination (see CPLR 217[1]); Matter of Anderson v Klein, 50 AD3d 296, 297 [1st Dept 2008]). The time to commence such a proceeding is not extended by petitioner's pursuit of administrative remedies (see

Matter of Strong v New York City Dept. Of Educ., 62 AD3d 592, 593 [1st Dept 2009]).

Turning to the merits, Education Law § 2573(1)(a) provides, in part, that a probationary employee "may be discontinued at any time during [the] probationary period, on the recommendation of the superintendent of schools, by a majority vote of the board of education." It is a basic policy underlying Education Law §2573(1)(a) that the responsibility for selecting probationary teachers and evaluating them for appointment on tenure lies with the board of education upon appropriate recommendation of its professional administrators (see Honeoye Falls-Lima Cent. Sch. Dist. v Honeoye Falls-Lima Educ. Assn., 49 NY2d 732, 734 [1980]).

Furthermore, a board of education has the unfettered right to terminate the employment of a teacher during the probationary period, unless the teacher establishes that the termination was for a constitutionally impermissible purpose, in violation of a statute, or done in bad faith (see, Matter of Frasier v Board of Educ. of City Sch. Dist. of City of N.Y., 71 NY2d 763, 765 [1988]). The probationary employee has the burden of proof (see Matter of Soto v Koehler, 171 AD2d 567, 568 [1st Dept 1991]). Documentary evidence of employee's unsatisfactory performance in the probationary title is sufficient to establish as a matter of

law that the termination of probationary position was in good faith (see Fichter v Egan, 223 AD2d 516 [1st Dept 1996]).

Petitioner argues that the decision to deny her certification of completion of probation and terminate her appointment as an assistant principal was arbitrary, capricious, and made in bad faith. To support her position, petitioner maintains that she received satisfactory ratings every year, prior to 2016, that she worked as an assistant principal. She also asserts that she reluctantly consented to the three extensions of her probationary period; that Mr. Sugrim criticized her for contacting her union concerning the extensions of her probation; and that he failed to provide any support during the periods when her probation was extended. Petitioner further maintains that during her probationary period, The Heritage School substantially progressed; that the DOE chancellor visited and recognized the school's accomplishments; that the DOE superintendent complimented her on the performance of her duties during a visit to the school in 2015; and that Mr. Sugrim repeatedly encouraged her to pursue a principal position at another school.

Petitioner fails to meet her burden of establishing bad faith. Respondent's answer includes documentary evidence of multiple extensions of petitioner's probationary period, on mutual consent, to facilitate improvement in certain areas;

opportunities for professional development afforded to petitioner; and petitioner's unsatisfactory performance in the probationary title. Respondent's documentary evidence, including petitioner's midyear report of 2015-2016 school year, her responsibility in incurring late fees for the Advance Placement exams, and the Regents exam results for an area in which petitioner developed the curriculum, rebuts any allegations of bad faith and is sufficient to establish as a matter of law that the termination of petitioner's probationary position was in good faith (see Fichter v Egan, supra).

Petitioner speculates that discrimination may have played a role in the denial of her certificate of completion of probation. She asserts that she was the only African-American assistant principal at The Heritage School and the only staff member with dreadlocks. She further asserts that she was offended when Mr. Sugrim, who is of Indian descent and from Guyana, wore a dreadlocks wig to school every Halloween. She also asserts that she was treated in a disparate manner, as she was denied important information that was given to other staff members. In addition, she asserts that during the 2015-2016 school year, the principal did not notify her of meetings; that she was required to spend her own money to pay fees for advanced placement examinations, and that she was mistreated by other staff members who were never disciplined by the principal.

Petitioner further speculates that the denial of her certificate of completion of probation may have been in retaliation for her taking medical leave. Petitioner's speculations are simply insufficient to make out a prima facie case of either discrimination or retaliation. See Almonte v Department of Education of the City of New York, 132 AD3d 505 (1st Dept. 2015).

10/10/2018
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE