SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER **PART 6**
Justice

IRENE MULCAHY,

Petitioner,

- against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

INDEX NO. 155682/2019
MOTION DATE
MOTION SEQ. NO. 1
MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answer — Affidavits — Exhibits _____	
Replying Affidavits	

Cross-Motion: x Yes No

Petitioner Irene Mulcahy ("Petitioner") brings this action, pursuant to Article 78 of the New York Civil Practice Laws and Rules ("Article 78"), to challenge and reverse Respondent the New York City Department of Education's ("DOE") determination of the Denial of Completion of Probationary Service resulting in the termination of Petitioner. Petitioner also seeks to restore all backpay, benefits lost since the date of issuance, as well as grant attorney's fees and, costs.

DOE cross-moves to dismiss the Verified Petition pursuant to CPLR §§ 217, 7804(f) and 3211(a)(5) and (7), on the grounds that the Verified Petition was not commenced within the applicable four-month statute of limitations and fails to state a cause of action.

Background/Factual Allegations

Petitioner avers that she graduated from Manhattan College in 2003 with a Bachelor of Science in Physical Education and graduated from the Teacher's College in New York City in 2007 with a Master's Degree in Health Education. Petitioner contends that in 2004 she received a certificate to teach from the New York City school system and began teaching in the elementary school level. Petitioner contends that in 2005 she began teaching in the middle school

level. Petitioner avers that in 2006 she accepted a position to teach physical education at Mott Hall High School.

Petitioner contends that on June 17, 2009, she received a final evaluation for the 2008-2009 school year which stated that she had a "U" rating and that the principal of Mott Hall High School recommended "denial of certification of completion of probation." Petitioner avers that as a result of the final evaluation she was terminated from her teaching position. Petitioner contends that on March 12, 2010, she received a letter from Eline Gorman, the Superintendent of Manhattan High Schools, which affirmed the decision to deny Petitioner's denial of probationary services.

Petitioner contends that thereafter she filed an "Article 78 proceeding challenging her termination stating in her petition that the denial of the certification of her probationary status was both arbitrary and capricious and a denial of her due process rights." (Verified Petition at 3). The proceeding was dismissed by the lower court. Petitioner appealed the dismissal of her case and the Appellate Division, First Department, reversed the dismissal of Petitioner's case by Order and Judgment dated October 11, 2012.

The parties entered into a settlement agreement, which stated, *inter alia*, that:

> 3. Furthermore in consideration of the above, the Defendant agrees that the Plaintiff shall be reinstated to the [DOE] to the position of physical education teacher no later than seven days following the execution of this settlement agreement, and assigned in a manner consistent with the applicable collective bargaining agreement. Upon her reinstatement, Plaintiff shall be placed on payroll and subject to a one-year probationary period that will commence no later than seven days following the execution of this agreement. (Verified Petition at 4).

Petitioner contends that the settlement agreement was fully executed on March 20, 2015. Petitioner received the settlement amount as stated in the settlement agreement and a stipulation of discontinuance was filed with the New York Supreme Court. In November 7, 2017, Petitioner avers that she was appointed as a physical education teach at the "Independence High School-02M544."

Petitioner avers that within two to three weeks of being appointed to a position at Independence High School, Patricia Drew informally evaluated Petitioner. Ms. Drew stated in the evaluation that Petitioner is "developing." Petitioner contends that

on December 20, 2017, Petitioner is evaluated a second time by Esteban Colon. Petitioner contends that on January 9, 2018, Petitioner was evaluated by Principal Ron Smolken. Petitioner avers on January 18, 2018, Petitioner has her fourth and final evaluation. Petitioner contends that "in this evaluation, it says [Petitioner] is developing still in demonstrating knowledge and managing student behavior." Petitioner says at the end of the evaluation from Miss. Drew she is directed to meet with Miss. Drew in her office on January 22, 2018 at 8:15 a.m. "to review lesson planning based on the book Understanding Design."

Petitioner contends that on January 26, 2018, she received a letter from Superintendent Paul Rotondo ("Rotondo"), which stated that on February 28, 2018 he would determine whether Petitioner's probationary services should be discontinued and Petitioner had the right to submit a response by the close of business on February 19, 2018.

Petitioner contends that on February 28, 2018, she received a letter from Rotondo stating that after reviewing Petitioner's response dated February 6, 2018, he was affirming her discontinuance of probationary service, as of the close of business on February 28, 2018 and Petitioner had the right to appeal his decision to the Office of Appeals and Reviews within 25 school days of February 28, 2018.

Petitioner contends that on March 2, 2018, she appealed the decision to the Office of Appeals and Reviews. DOE contends that on November 7, 2018, a Chancellor's Committee was convened to consider Petitioner's appeal of her discontinuance.

Petitioner contends that on February 19, 2019, she received a letter from Rotondo stating that he affirmed the discontinuance of Petitioner's probationary service.

Parties' Contentions

Petitioner argues that DOE's determination was arbitrary and capricious because Petitioner was:

> tenured at the time she was told her probationary service was discontinued by Superintendent Rotondo and as such she was denied the appropriate due process as required under New York Law and her termination violated her rights based on the agreement in the settlement agreement that she was to be appointed seven days after the

> settlement agreement was signed which was in or about April 2016, and therefore, her probationary period ended on April 2017 and she was tenured by estoppel on said date and as such she was at the time of her discontinuance of service, tenured and not a probationary employee. (Verified Petition at 6-7).

Petitioner further argues that DOE violated Petitioner's constitutional rights under the due process clause.

In DOE's cross-motion to dismiss the Verified Petition, DOE argues that the Petition is time-barred pursuant to CPLR § 217. DOE asserts that Petitioner is challenging its decision to deny her completion of probation and discontinue her employment. DOE argues that the four-month statute of limitations began to run on February 28, 2018. DOE contends that Petitioner brought the Article 78 proceeding in June 7, 2019, over 11 months after the expiration of the statute of limitations. DOE argues that Petitioner did not gain tenure by estoppel. DOE asserts that the settlement agreement executed on March 29, 2016 reinstated Petitioner as a physical education teacher subject to a one-year probationary period. DOE further contends that on March 9, 2017, prior to the expiration of the one-year probationary period, Petitioner signed an agreement extending her probationary period for another year, until April 7, 2018. DOE argues that by Petitioner agreeing to extend the probationary period a second year, Petitioner "expressly acknowledged" that she entered into the agreement "freely, knowingly and openly, without coercion or duress" and Petitioner had the opportunity to seek legal counsel. DOE argues that Petitioner's probationary service was discontinued effective February 28, 2018, before the second one-year probationary period terminated.

Moreover, DOE argues that the Petition must be dismissed for failure to state of cause of action because Petitioner fails to allege facts that demonstrate bad faith. DOE asserts that the record shows that Petitioner's employment was discontinued in good faith, based on her poor teaching performance. DOE contends that Petitioner was observed on four occasions, and on each occasion, it was observed that there were "deficiencies in planning and preparation, delivery of instruction, questioning techniques, and student engagement." DOE argues that Petitioner failed to demonstrate improvement in her teaching.

In opposition to the cross-motion to dismiss, Petitioner asserts that the extension of the one-year probationary period would have begun on April 7, 2017, which is two days after the initial one-year period and therefore it would have been fulfilled by estoppel as of "April 5, 2019 (sic.)." (Petitioner's Memo of Law at

7). Petitioner argues that the extension of the one-year probationary period would be in the area of "Physical Education" but the condition of the agreement was violated because Petitioner was hired to be a "Fitness Instructor."

Petitioner argues that she was "pressured" into signing the "Stipulation" and was not given any time to speak with an attorney. Petitioner further argues that she was denied her right to work as a "Physical Education" teacher and did not waive her rights and therefore did not waive her tenure claim. Petitioner asserts that her claims are not time-barred. Petitioner asserts that the Petition is "hybrid proceeding raising claims under article 78 and under 42 U.S.C. § 1983. Petitioner contends that her claims were initially brought under 42 U.S.C. § 1983 and are not barred by the statute of limitations, which is three-years. Petitioner asserts that the determination was final on February 19, 2019, when Petitioner received a letter from Rotondo informing her of the "Chancellor's decision, stating that after his consideration of said determination he was discontinuing her probation." (Petitioner's Memo of Law at 12). Petitioner argues that she relied on Rotondo's "words and statements that she had the right to appeal, alluding to the fact that the case was not 'final' until the Chancellor's committee reviewed the appeal of her discontinuance." (Petitioner's Memo of Law at 13). Additionally, Petitioner argues that she has alleged bad faith and if the Court determines that she has not then she should be allowed to replead her petition pursuant to CPLR § 3211(e).

Legal Standard

"Article 78 proceedings exist for the relief of parties personally aggrieved by governmental action." *Dunne v. Harnett*, 399 NYS 2d 562, 563 [Sup Ct, NY County 1977]. Judicial review is limited to questions expressly identified by CPLR 7803. *Featherstone v. Franco*, 95 NY2d 550, 554 [2000]. One such question is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." *See* CPLR 7803[3]. "[I]t is settled that in a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious." *Flacke v. Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 [1987]. "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." *Testwell, Inc. v. New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010].

"A petition to challenge the termination of probationary employment must be brought within four months of the effective date of termination." *Hazeltine v. City of New York*, 89 AD3d 613, 613-14 [1st Dept 2011]. *See also* CPLR 217[1]. "Further, the time to commence a proceeding challenging the termination of probationary employment is not extended by the petitioner's pursuit of administrative remedies." *Id.* at 614.

"Tenure by estoppel results when a school board fails to take the action required by law to grant or deny tenure and, with full knowledge and consent, permits a teacher to continue to teach beyond the expiration of the probationary term." *Gould v. Bd. of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 451 [1993] (citation omitted). *See also Wolin v. Walcott,* 127 AD3d 648 [1st Dept 2015] (Petitioner was not entitled to tenure by estoppel where "the DOE rehired her as a teacher at a different school, the school at issue, she was subject to a new three-year term of probation, which was extended by another agreement.").

Duress, generally speaking, may be said to exist where one is compelled to perform an act which he has the legal right to abstain from performing." *Gerstein v. 532 Broad Hollow Rd. Co.*, 75 AD2d 292, 297 [1st Dept 1980]. "The compulsion must be such as to overcome the exercise of free will." *Id.* "It must involve an act or a threat of action from which the person sought to be influenced is entitled to be free." *Id.* (citation omitted).

Additionally, "a non-tenured paraprofessional, has no property rights in her position." *Pinder v. City of New York*, 49 AD3d 280, 281 [1st Dept 2008] (the First Department held that the "Plaintiff's cause of action pursuant to 42 USC § 1983 is not viable.").

Discussion

The settlement agreement executed on March 29, 2016, reinstated Petitioner as a physical education teacher for a one-year probationary period. Prior to the expiration of that period of probation, the parties entered into an agreement extending the one-year probationary period for an additional year until April 7, 2018. Petitioner's termination was effective February 28, 2018, before the expiration of Petitioner's probationary period. Accordingly, Petitioner did not acquire tenure by estoppel because she did not "continue to teach beyond the expiration of the probationary term." *Gould*, 81 NY2d at 451. Moreover, Petitioner failed to show that she entered into the agreements under duress. Petitioner merely states in conclusory terms that she "signed the document under duress."

Furthermore, Petitioner was terminated during her probationary period. The four month statute of limitations begins to run when her termination became effective. Petitioner failed to commence this Article 78 proceeding within four months of the effective date of her termination, which was on February 28, 2018. Petitioner had until June 28, 2018 to commence an Article 78 proceeding pursuant to CPLR § 217[1] and failed to do so.

Petitioner does not have a claim for deprivation of civil rights pursuant to 42 USC § 1983 because "[a] probationary teacher does not have a property right in his or her position." *Pinder*, 49 AD3d at 281.

Wherefore it is hereby

ORDERED that the Petition is denied; and it is further

ORDERED that Respondent's cross motion is granted and the Petition is dismissed and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: July 22, 2020

ENTER: _____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION