SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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PASCALE BENJAMIN-PEREIRA,

Plaintiff,

- v -

RICHARD CARRANZA, SUPERINTENDENT BEVERLY MITCHELL, NEW YORK CITY DEPARTMENT OF EDUCATION

Defendant.

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INDEX NO. 156168/2020

MOTION DATE 08/06/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

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

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Pascale Benjamin-Pereira (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent New York City Department of Education shall serve a copy of this order on all parties along with notice of entry within ten (10) days.

In this Article 78 proceeding, petitioner Pascale Benjamin-Pereira (Benjamin-Pereira) seeks a judgment to overturn an employment reclassification decision by the respondent New York City Department of Education (DOE) as arbitrary and capricious (motion sequence number 001). For the following reasons, her petition is denied and this proceeding is dismissed.

FACTS

Benjamin-Pereira has been employed by DOE in various teaching and administrative capacities since 1993. *See* verified amended petition, ¶ 13. In 2006, DOE appointed Benjamin-Pereira to a position as an Assistant Principal, and she eventually received tenure in that role. *Id.* On April 1, 2015, DOE appointed Benjamin-Pereira to the position of Interim Acting Principal at Public School 37Q, a/k/a Cynthia Jenkins School (PS37Q). *See* verified answer, ¶ 48; exhibit A. On February 9, 2016, DOE appointed Benjamin-Pereira as the Principal of PS37Q, with a four-year probationary period set pursuant to Education Law § 2573 (1) (b) (ii). *See* verified answer, ¶¶ 48-49; exhibit A. DOE states that Benjamin-Pereira's probationary period was originally calculated to run from April 1, 2015 through April 1, 2019. *Id.*, ¶ 50; exhibit C. However, a December 11, 2018 observation of Benjamin-Pereira's performance by DOE Superintendent Beverly Mitchell (Mitchell) resulted in her receiving a "developing" rating on several of her job performance metrics that year, rather than the "effective" rating that she had achieved in the prior three years. *Id*, ¶¶ 51-51, 57; amended verified petition, ¶ 23. As a result, on December 21, 2018, Benjamin-Pereira and Mitchell executed an "extension of probation agreement" which provided, in pertinent part, as follows:

> "1. The Superintendent agrees to grant, and Ms. Benjamin-Pereira agrees to serve, an additional probationary period commencing April 1, 2019, and concluding on April 1, 2020 in the tenure area of principal.
> "2. Ms. Benjamin-Pereira shall have all the rights of a principal during her extended probationary period. No later than April 1, 2020, Ms. Benjamin-Pereira shall either be

granted completion of probation; denied completion of probation and/or discontinued prior thereto; or granted an additional extension of probation.

"3. The parties agree that the decision to either grant completion of probation, deny completion of probation, or grant an additional extension of probation to Ms. Benjamin-Pereira at a date no later than April 1, 2020, shall be based upon an evaluation of Ms. Benjamin-Pereira's probationary service during the additional probationary period herein granted and also upon an evaluation of Ms. Benjamin-Pereira's probationary service rendered prior to April 1, 2019.

"4. Ms. Benjamin-Pereira waives any possible rights, claims or causes of action for tenure as a principal arising on or prior to April 1, 2019.

"5. Ms. Benjamin-Pereira waives any rights, claims or causes of action and agrees not to commence any claims, motions, actions or proceedings of whatever kind against the Chancellor, the Superintendent, or the Department of Education of the City of New York, or any agents or employees for any actions taken or not taken, or statements made or not made by them prior to the date of this agreement.

"6. It is understood that with the exception of that stated in paragraph #5 above, Ms. Benjamin-Pereira does not waive by terms of this agreement any right, cause of action, claim or defense arising subsequent to the date of this agreement. Ms. Benjamin-Pereira retains any and all rights to which a probationer is entitled."

Id., verified answer, ¶ 54; exhibit C.

DOE provided Benjamin-Pereira with a "Principal Performance Review" (PPR) for the 2018-19 school year which included feedback on her job performance that year, and also provided her with a "Principal Improvement Plan" (PIP) to help her identify and strategize goals for job improvement in the 2019-2020 school year. *See* verified answer, ¶¶ 55-57; exhibits E, F, I. During that school year Mitchell and Deputy Superintendent Shawn Rux (Rux) made three visits to PS37Q to observe Benjamin-Pereira's performance once each individually, and once together, after which they provided her with written feedback. *Id*., ¶¶ 58-63; exhibits G, H, I. Mitchell and Rux then met again with Benjamin-Pereira on January 24, 2020 to discuss the status of her probation, and thereafter sent her a letter on March 20, 2020 which stated as follows:

"On Friday, January 24, 2020, Dr. Rux and I met with you to discuss the status of your probation. We have made a decision to extend your tenure based on the following data sets: decease [sic] 6.8 points in student performance in ELA as measured by the NYS assessment from 2017 to 2019 (33.1% Levels 3 and 4 in 2017 as compared to 26.3% levels 3 and 4 in 2019). You struggle to provide grade level teams with adequate time to plan for instruction, select appropriate instructional resources and determine how to teach concepts to students with varying needs. You also struggles [sic] to have grade

> level teacher teams use some of their team time to analyze student work-products produced during units of study to make strategic adjustments to upcoming limits and lessons. Per several conversations with you about implementing guided reading at your school, you failed to have teachers effectively trained on the concept. Moreover, you failed to provide adequate professional development at your school on other research-based instructional practices shared. This has yielded a significant gap in achievement between student groups within each grade level. You received written expectations for implementing effective instructional practices at the school. This included my expectations for professional learning and classroom implementation.
>
> * * *
>
> "You will align action steps in your CEP to these expectations. You will collaborate closely with the TDEC and the Queens South Borough Office staff on professional development to support with training teachers and to ensure teachers are implementing instructional practices to increase student achievement.
>
> "Please be advised that if your performance does not improve we may terminate your probationary services."

Id., ¶¶ 64-67; exhibit J.

Benjamin-Pereira declined to sign another "extension of probation agreement" with Mitchell after she received the March 20, 2020 letter. *See* amended verified petition, ¶ 27; verified answer, ¶ 68. Because she had recently taken a leave of absence between January 29, 2020 through February 17, 2020, Mitchell notified her in a second letter, dated April 3, 2020, stating that her probationary period had been adjusted to end on April 19, 2020, and notifying her as follows:

> "This is to inform you that in accordance with Section 2573 Subdivision 1 of the State Education Law, I am denying your Certification of Completion of Probation with the New York City Department of Education.
>
> "Under the Collective Bargaining Agreement between the Department of Education and the Council of Supervisors and Administrators, you are entitled to the review procedures as prescribed in Article VII and Section 4.3.2 C of the Bylaws of the Department of Education.
>
> "Please be advised that your service under this appointment shall terminate as of the close of business effective April 3, 2020."

Id., verified answer, ¶ 70; exhibit K. Also on April 3, 2020 Mitchell sent Benjamin-Pereira a second letter which reassigned her to a position as an Assistant Principal at PS37Q effective as of April 6, 2020. *Id.*, ¶ 71; exhibit L.

Aggrieved, Benjamin-Pereira commenced this proceeding on August 6, 2020, and later filed an amended petition that set forth causes of action for violations of: 1) CPLR Article 78; and 2) DOE's notice regulations. *See* verified petition. DOE filed an answer on November 24, 2020. *See* verified answer. Benjamin-Pereira subsequently filed a reply, and this matter is now fully submitted (motion sequence number 001).

DISCUSSION

Benjamin-Pereira's first cause of action alleges that DOE violated CPLR Article 78 because "it was in bad faith, arbitrary, capricious, unlawful, and in excess of respondents' jurisdiction to discontinue petitioner when she had been rated as an effective principal in the prior four years." *See* amended verified petition, ¶¶ 29-34. Normally, a reviewing court's role in an Article 78 proceeding is to determine whether, upon the facts before an administrative agency, a challenged agency determination had a "rational basis" in the record or was "arbitrary and capricious." *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302, 302 (1st Dept 1996). Here, however, a different standard of review applies.

DOE issued the challenged order reappointing Benjamin-Pereira as an Assistant Principal on April 3, 2020, while she was still the probationary Principal of PS37Q. Education Law § 2573 (1) (b) (i) provides that any individual who the DOE appointed to a position as a school Principal before July 1, 2015 was required to serve a three-year period of probation before receiving tenure in that position. Benjamin-Pereira states that she was appointed Principal of PS37Q on April 1, 2015, and does not challenge that her statutorily mandated probationary period originally ran from April 1, 2015 through April 1, 2019. *See* amended verified petition,

¶¶ 13-14; verified answer, ¶¶ 48-49; exhibit A. Nor does Benjamin-Pereira dispute that she and Mitchell executed the "extension of probation agreement" on December 21, 2018 which extended her probationary period through April 1, 2020. *Id.*, verified petition, ¶ 23; verified answer, ¶ 54; exhibit C. Finally, Benjamin-Pereira does not contest that her probationary period was extended yet again until April 19, 2020 as a result of the 19-day leave of absence that she had taken from her position between January 29, 2020 and through February 17, 2020. *Id.*, amended verified petition, ¶¶ 26-27; verified answer, ¶¶ 70-71; exhibits K, L. Because Mitchell issued the challenged DOE reappointment order on April 3, 2020, i.e., before April 19, 2020, it is clear that Benjamin-Pereira's statutorily mandated probationary period was still in effect at the time she was reappointed as an Assistant Principal.

Under this circumstance, the case law interpreting Education Law § 2573 provides that a Principal's "employment may be terminated during his or her probationary period for any reason, or no reason at all, and without a hearing, unless [s/he] establishes that his or her employment was terminated for a constitutionally impermissible purpose, in violation of a statutory proscription, or in bad faith," and that "[t]he petitioner bears the burden of establishing bad faith or illegal reasons by competent evidence." *See Matter of Muller v New York City Dept. of Educ.*, 142 AD3d 618, 620 (2d Dept 2016); citing *Matter of Speichler v Board. of Coop. Educ. Servs., Second Supervisory Dist.*, 90 NY2d 110, 114 (1997); and quoting *Matter of Deitch v City of New York*, 90 AD3d 924, 925 (2d Dept 2011); *see also Sweeny v Millbrook Cent. Sch. Dist.*, 130 AD3d 1011, 1012 (2d Dept 2015), citing *Matter of Speichler v Board. of Coop. Educ. Servs., Second Supervisory Dist.*, 90 NY2d at 114. Because appellate case law confirms that the "arbitrary and capricious" standard of review does not apply to Article 78 challenges mounted by probationary DOE employees, the court rejects so much of Benjamin-Pereira's petition as seeks

to invoke that standard. As a result of the foregoing, the court also rejects so much of Benjamin-Pereira's first cause of action as alleges that respondents' decision to reappoint her as an Assistant Principal violated Education Law § 2573. That law afforded Mitchell the authority to order such a reappointment during Benjamin-Pereira's period of probation without explanation.

On the issue of "bad faith," Benjamin-Pereira asserts that she "was the target of retaliation for uncovering and confronting illegal and fraudulent acts perpetrated by . . . Mitchell and her former employees," and that "Mitchell's retaliation against her created a hostile work environment." *See* amended verified petition, ¶ 30. The petition describes three such allegedly "illegal and fraudulent acts;" (a) one in which Benjamin-Pereira discovered checks and cash in the PS37Q school safe which she believed had been misappropriated by a school employee, but which that employee later stated had actually been set aside for student activities, and (b) two instances where PS37Q employees successfully appealed requests for vacation time that Benjamin-Pereira had denied. *Id.*, ¶¶ 19-22. The petition alleges that all of the implicated PS37Q employees were Mitchell's former subordinates and/or cronies. *Id.* However, it does not allege that Mitchell herself committed any "illegal or fraudulent acts," but merely infers that she was aware of and/or approved of them because she favored the subject employees over Benjamin-Pereira. *Id.* Appellate precedent recognizes that "conclusory and unsubstantiated allegations," that DOE and/or Mitchell engaged in improper activities are insufficient to sustain a petitioner's burden of demonstrating "bad faith." *See e.g.*, *Matter of Muller v New York City Dept. of Educ.*, 142 AD3d at 620, citing *Matter of Petkewicz v Allers*, 137 AD3d 1045 (2d Dept 2016). Here, Benjamin-Pereira's reliance on inferences and her failure to document any of the allegedly improper acts compel the court to find that her accusations are, indeed, "conclusory

and unsubstantiated." As a result, the court rejects so much of her first cause of action as alleges that respondents acted in "bad faith."

On the issue of "constitutionally impermissible purpose," Benjamin-Pereira asserts that she "was denied [the] basic due process, [that is] due even to a probationary employee, in the face of false and discriminatory actions by her employer." *See* verified petition, ¶ 33. However, this argument fails as a matter of law since, as a probationary Principal, Benjamin-Pereira did not have a "property right" in her position that is a prerequisite to a due process claim. *See e.g.*, *Kahn v New York City Dept. of Educ.*, 79 AD3d 521, 522-523 (1st Dept 2010), citing *Ciambriello v County of Nassau*, 292 F3d 307, 313 (2d Cir 2002). Further, "[t]he [review] process provided for in [a] collective bargaining agreement did not create" such a property right. *Kahn v New York City Dept. of Educ.*, 79 AD3d at 523, citing *Sealed v Sealed*, 332 F3d 51, 56 (2d Cir 2003). As a result, the court rejects so much of Benjamin-Pereira's first cause of action as alleges that she was deprived of due process. In light of the foregoing findings, the court concludes that Benjamin-Pereira's first cause of action should be denied as meritless.

Benjamin-Pereira's first cause of action alleges that she "was not given adequate notice of issues needing correction or improvement prior to her termination." *See* amended verified petition, ¶¶ 35-39. She specifically asserts that, although she "was given a [PIP] in March 2019," respondents gave her "no opportunity to address any alleged shortcomings prior to her termination, as required by DOE policy and law." *Id.* Respondents counter that "[t]he record clearly belies this assertion," because Mitchell and Rux visited, observed and met with Benjamin-Pereira at PS37Q on three occasions after she received the PIP, and Mitchell subsequently offered Benjamin-Pereira a second extension of her probationary period in the March 20, 2020 letter, which Benjamin-Pereira declined. *See* respondents' mem of law at 6-9,

11-12. The court notes that Benjamin-Pereira does not contest these facts. *See* amended verified petition, ¶ 27; verified answer, ¶ 68; exhibit J. The court also notes that, while Benjamin-Pereira as not required to accept the second probation extension (*see e.g.*, *Matter of Jackson [Commissioner of Labor]*, 120 AD3d 1503 [3d Dept 2014]), appellate precedent has interpreted the offer of such an extension to constitute an act of good faith by DOE to address a probationary Principal's ongoing employment dispute. *See Matter of Parris v New York City Dept. of Educ.*, 111 AD3d 528 (1st Dept 2013). Here, the evidence demonstrates that DOE afforded Benjamin-Pereira several opportunities to "address the alleged shortcomings" listed in her PIP before Mitchell was obliged to render a decision on her tenure application. As a result, the court rejects so much of her second cause of action as alleges that respondents "failed to give her notice issues needing correction or improvement" prior to her reappointment.

Benjamin-Pereira also asserts that she "was not given 60 days notice by mail of her proposed termination, nor proper notice ten days prior to her discontinuance as required by Education Law 3031." *See* verified petition, ¶ 37. However, this argument is unavailing as a matter of law. The Appellate Division, First Department, has plainly held that "[a]lthough the notice of termination was procedurally defective in that [petitioner] was not given the requisite 60 days' prior notice of discontinuance, as required by Education Law § 2573 (1) (a), that defect does not invalidate the discontinuance" itself. *Kahn v New York City Dept. of Educ.*, 79 AD3d at 522. As a result, the court rejects so much of her second cause of action as is based on the assertion that respondents failed to observe the proper notification requirements.

The final portion of Benjamin-Pereira's petition argues that "it is a shock to a reasonable sense of fairness to terminate [her] employment." *See* verified petition, ¶¶ 40-47. Although Benjamin-Pereira does not raise this argument in support of either of her causes of action, the

court nevertheless rejects it. In the first place, her DOE employment was not "terminated." She admits that Mitchell merely reappointed her as an Assistant Principal – a position for which she had already earned tenure. In the second place, her argument fails as a matter of law. The First Department has held that even the penalty of termination does not "shock the sense of fairness" where DOE has provided a teacher with "assistance and opportunities" to improve his/her performance, but the teacher "was either unable or unwilling" to comply with the suggestions and strategies provided. *See Matter of March v New York City Bd./Dept. of Educ.*, 157 AD3d 555 (1st Dept 2018). Here, Benjamin-Pereira admits that she declined Mitchell's offer to extend her probation in order to address the issues listed in her PIP, and chose instead to contest the need to address them at all. The court thus finds nothing shocking about Mitchell's decision to reappoint Benjamin-Pereira to a different position. As a result, the court rejects Benjamin-Pereira's final argument.

Accordingly, for the foregoing reasons, the court concludes that Benjamin-Pereira's Article 78 petition should be denied as meritless, and that this proceeding should be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Pascale Benjamin-Pereira (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent New York City Department of Education shall serve a copy of this order on all parties along with notice of entry within ten (~~10~~) days.

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5/26/2021
DATE

CAROL R. EDMEAD, 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