

In the Matter of the Application of: LEONETTE BELFIELD, Petitioner, -against- JOEL KLEIN, as the Chancellor of the Department of Education of the City of New York, CITY OF NEW YORK, and NEW YORK CITY DEPARTMENT OF EDUCATION, Respondents. For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules. Index No. 114094/10

114094/2010

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2011 NY Slip Op 31862U; 2011 N.Y. Misc. LEXIS 3389

July 1, 2011, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

CORE TERMS: rating, administrative remedies, probationary teacher, final determination, termination, collective bargaining agreement, challenging, bylaws, lesson, grade, failed to exhaust, recommendation, terminated, cross-motion, bad faith, statute of limitations, instituting, exhausted, teacher, exhaust, binding, notice, wait, school year, arbitrary and capricious, unknown, annual, kill

COUNSEL: [**1] For Petitioner: Kevin P. Sheerin, Esq., Mineola, NY.

For Respondents: Adam Collyer, Alan M. Schlesinger, ACC, Michael A. Cardozo, Corporation Counsel, New York, NY.

JUDGES: Barbara Jaffe, J.S.C.

OPINION BY: Barbara Jaffe

OPINION DECISION & JUDGMENT

By notice of petition dated October 26, 2010, petitioner brings this Article 78 proceeding seeking an order annulling her unsatisfactory (U) rating and reinstating her employment with the Department of Education of the City of New York (DOE) as a probationary teacher. By notice of cross-motion dated December 30, 2010, respondents move pursuant to [CPLR 3211\(a\)\(7\)](#) and [CPLR 7804\(f\)](#) for an order dismissing the petition. Petitioner opposes.

At oral argument, petitioner made clear that she is challenging her termination, not her U [*3] rating.

I. BACKGROUND

Pursuant to DOE's bylaws and the collective bargaining agreement between the DOE and the teacher's union, a terminated probationary teacher is entitled to a review of her termination. ([Matter of Von Gizycki v Levy](#), 3 AD3d 572, 573, 771 N.Y.S.2d 174 [2d Dept 2004]). The review takes the form of a hearing before a committee, which renders a report and issues a recommendation to the Chancellor on completion of the hearing. ([Frasier](#), 71 NY2d at 766). [**2] The Chancellor, not the committee, makes the final determination. (*Id.*; [Matter of Von Gizycki](#), 3 AD3d at 573-74).

In November of 1997, petitioner began working for the Board of Education of the City of New York, which is now the DOE, as a General Education Paraprofessional. (Pet, Exh. A). In 2006, she began her teaching career as a probationary teacher in the first grade at Public School 110 in Manhattan. (Pet., Exh. A). For the 2006 to 2007, 2007 to 2008, and 2008 to 2009 academic years, she received satisfactory (S) ratings on her annual evaluations. (*Id.*, Exh. B).

In 2009, petitioner was assigned to teach the second grade. (*Id.*). On June 28, 2010, she received a U rating on her annual evaluation for the 2009 to 2010 academic year due to her poor performance in the following areas: "[p]rofessional attitude and professional growth," "[r]esourcefulness and initiative," "[p]lanning and preparation of work," "[s]kill in adapting instruction to individual needs and capacities," "[e]ffective use of appropriate methods and techniques," and "[s]kill in making class lessons interesting to pupils." (*Id.*, Exh. C). This rating was based on "Formal Observation Reports" completed on November 4, [**3] 2009, December 22, 2009, and April 7, 2010. (*Id.*).

On an unknown date thereafter, petitioner was terminated. (*Id.*). Subsequently, she [*4] invoked her administrative remedies under DOE's bylaws and the collective bargaining agreement, although the Chancellor has yet to make his final determination. (Respondents' Mem. of Law).

By affidavit dated January 11, 2011, petitioner describes the principal's conduct toward her during the 2009 to 2010 school year. (Affirmation of Kevin P. Sheerin, Esq. in Opposition to Cross-Motion, dated Jan. 11, 2011 [Sheerin Aff. in Opp.], Exh. A). Specifically, she states that she was not offered offsite professional development during the 2009 to 2010 academic school year even though her colleagues were, and that the principal stopped attending grade level meetings in which she actively participated, never asked to see her lesson plans, informally observed her and gave her positive feedback, which included a "brief description of the lesson which shows how [she] made students interested in the class lessons, and failed to observe her after March 15, 2010. (*Id.*).

On an unknown date, Melanie Levy Fagelson, a Literacy Coach with whom petitioner worked between September [**4] of 2009 and June of 2010, wrote a letter of recommendation for petitioner, which provides in pertinent part that petitioner has a strong work ethic, that she cares for and challenges her students, and that she is a "joyful, collaborative teacher." (*Id.*, Exh. B).

II. CONTENTIONS

In light of the fact that she had never before received a U rating during her 14 years of employment with DOE, petitioner contends that her U rating and consequent termination were arbitrary and capricious. (Pet.). She also argues that she was required to bring this proceeding despite having not exhausted her administrative remedies, as there is a four-month statute of limitations for Article 78 actions. (*Id.*).

[*5] Respondents seek dismissal of this proceeding on the ground that petitioner has failed to exhaust her administrative remedies, and that her failure to do so bars the proceeding regardless of its timeliness. (Respondents' Mem. of Law). And, even if the petition were not barred, they contend that it must be dismissed on its merits, as petitioner has demonstrated neither that the U rating was arbitrary and capricious nor that it was issued in bad faith. (*Id.*).

In opposition to the cross-motion, and in reply, [**5] petitioner offers her affidavit of January 11, 2011 and Fagelson's recommendation letter to demonstrate the principal's bad faith in issuing her U rating. (Sheerin Aff. in Opp.). She contends that the principal's actions

described in her affidavit evidence the principal's bad faith, as she gave her a U rating after placing her in the second grade without providing her with the professional development and guidance necessary to permit her to learn the new curriculum. (*Id.*, Exh. A).

III. ANALYSIS

Pursuant to [CPLR 217\(1\)](#), an Article 78 proceeding must be commenced within four months after the challenged determination becomes final and binding. "An administrative determination becomes final and binding when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies." ([Walton v New York State Dept. of Corr. Servs.](#), 8 NY3d 186, 194, 863 N.E.2d 1001, 831 N.Y.S.2d 749 [2007]; [Matter of Brown v New York State Racing & Wagering Bd.](#), 60 AD3d 107, 112, 871 N.Y.S.2d 623 [2d Dept 2009]). Therefore, generally, and with certain exceptions not pertaining here, "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a [**6] court of law." ([Lehigh Portland Cement Co. v New York State Dept. of Envtl. Conservation](#), 87 N.Y.2d 136, 140, 661 N.E.2d 961, 638 N.Y.S.2d 388 [1995]; [Sumner v Hogan](#), 73 AD3d 618, 619, 901 N.Y.S.2d 236 [1st Dept 2010]). Failure to do so acts as a bar to an [*6] Article 78 proceeding. ([Matter of Connor v Town of Niskayuna](#), 82 AD3d 1329, 917 N.Y.S.2d 759 [2d Dept 2011]).

A terminated probationary teacher fails to exhaust her administrative remedies when he brings an Article 78 proceeding before the Chancellor has made his final determination. ([Villalba v New York City Dept. of Educ.](#), 50 AD3d 279, 853 N.Y.S.2d 881 [1st Dept 2008]; [Sapadin v Bd. of Educ. of the City of N.Y.](#), 246 AD2d 359, 666 N.Y.S.2d 421 [1st Dept 1998]; [Lewis v Macchiarola](#), 73 AD2d 663, 423 N.Y.S.2d 200 [2d Dept 1979]).

Here, petitioner admits that she has not exhausted her administrative remedies, and respondents maintain that although a review of petitioner's U rating and termination has been conducted, the Chancellor has yet to make his final determination. Therefore, this proceeding is barred. (See [Sapadin](#), 246 AD2d 359, 666 N.Y.S.2d 421 [probationary teacher challenging termination failed to exhaust administrative remedies where he appealed rating pursuant to bylaws and collective bargaining agreement but did not wait for Chancellor's determination before instituting [**7] Article 78 proceeding]; [Matter of Grinins v New York City Dept./Bd. of Educ.](#), 2009 NY Slip Op 50789[U], 23 Misc 3d 1117[A], 886 N.Y.S.2d 71 [Sup Ct, New York County 2009] [probationary teacher challenging U rating failed to exhaust administrative remedies where he appealed rating pursuant to bylaws and collective bargaining agreement but did not wait for Chancellor's determination before instituting Article 78 proceeding]). Petitioner was not required to file the instant petition before the Chancellor made his final determination in order to comply with the statute of limitations, as the limitations period will not begin to run until a final determination is made. ([Walton](#), 8 NY3d at 195).

In light of this determination, the merits of the petition need not be addressed, and even if petitioner were challenging her U rating, the result would remain the same.

IV. CONCLUSION

[*7] Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied in its entirety and the proceeding is dismissed.

ENTER:

/s/ Barbara Jaffe

Barbara Jaffe, JSC

DATED: July 1, 2011

New York, New York