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

PRESENT: SALIANN SCARPULLA PART 19
Justice

Index Number : 118161/2009
COLON, GRACE
VS.
CITY OF NY DEPT OF EDUCATION
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

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

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~ Special proceeding

~~motion~~ and cross-motion are decided in accordance with accompanying memorandum decision.

~~UNFILED JUDGMENT~~
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B)

Dated: 10/29/10

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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In the Matter of the Application of
GRACE COLON,

Petitioner,

- against-

THE CITY OF NEW YORK DEPARTMENT OF EDUCATION, and JOEL KLEIN, CHANCELLOR OF THE CITY OF NEW YORK DEPARTMENT OF EDUCATION,

Respondents.

Index No.: 118161/2009

DECISION AND ORDER

To Vacate or Modify a Decision of a Hearing Officer Pursuant to Education Law § 3020-a and CPLR § 7511.

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For Petitioner:
The Law Offices of Fausto E. Zapata, Jr., P.C.
Broadway Chambers Building
277 Broadway, Suite 501
New York, NY 10007

For Respondent:
Michael A. Cardozo
Corporation Counsel for the City of New York
100 Church St., Rm. 5-161
New York, NY 10007

Papers considered in review of this petition:

Amended Verified Petition 1
Mem of Law 2
Cross Motion 3
Mem of Law 4
Aff in Support 5
Aff in Opp 6
Reply Mem of Law 7

HON. SALIANN SCARPULLA:

Petitioner Grace Colon ("Colon") moves for an order, pursuant to CPLR 7511, vacating or modifying an arbitration award made after a disciplinary hearing held

pursuant to Education Law § 3020-a, in which Colon was terminated from her employment with respondent the City of New York Department of Education ("DOE"). The DOE and respondent Joel Klein, Chancellor of the DOE (together, "DOE") cross move to dismiss the petition pursuant to CPLR 3211 (a) (7) and 404 (a), as well as pursuant to CPLR 7511 and Education Law § 3020-a. The DOE also seeks an order confirming the award pursuant to CPLR 7511 (e).

Background and Factual Allegations

Up until her termination from employment in December 2009, Colon worked as a special education resource room teacher at a high school in Manhattan. Colon was a tenured employee and had been working for respondent for 16 years. Colon's job responsibilities included, among other duties, "communicating with students' regularly assigned teachers on a continual basis to apprise them of any educational progress and identify areas where the student in question could grow."

In 2007, pursuant to Education Law § 3020-a, DOE served Colon with disciplinary charges, alleging that during the 2005-2006 and 2006-2007 school years, Colon engaged in "corporal punishment, verbal abuse, was insubordinate and engaged in conduct unbecoming in her profession."[1] Pursuant to Education Law § 3020-a,

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[1] The specifications are set forth as follows:
Specification 1: On or about December 12, 2005, Respondent [Colon]:
A. Yelled at Student A* in class.
B. Made Student A cry.
C. Used words to the effects of the following to Student A in class:

(continued...)

[1](...continued)

1. Did you or did you not do the homework.
2. The homework for my class is as important as homework for other classes.
3. I am tired of you lying to me and thinking you can get something over on me.
4. I'm going to call Ms. Parker and find out whether you did your homework and have her come down here.

Specification 2: On or about December 12, 2005, Respondent used a cell phone to contact another staff member during instructional class time.
Specification 3: On or about February 12, 2006, Respondent received a letter to file dated February 12, 2006 which she failed to sign and return to Principal Marta Jimenez, despite requests to do so.
Specification 4: On or about March 23, 2006, during Parent Teacher Conferences, Respondent left the school without prior authorization.
Specification 5: On or about May 8, 2006, Respondent received a letter to file dated May 5, 2006 which she failed to sign and return to Principal Marta Jimenez, despite requests to do so.
Specification 6: On or about March 27, 2006, Respondent removed the time cards of two (2) teachers from the main office without authorization and showed them to another teacher at the school.
Specification 7: On or about March 27, 2006, in relation to the incident described in specification 6 above, Respondent stated words to the effect of: she going to make copies of the time cards.
Specification 8: On or about May 18, 2006, Respondent received a letter to file dated May 17, 2006 which she failed to sign and return to Principal Marta Jimenez, despite requests to do so.
Specification 9: On or about September 15, 2006, Respondent was late for a third period class coverage.
Specification 10: On or about September 18, 2006, Respondent failed to cover a third period class despite having been directed to do so.
Specification 11: On or about September 19, 2006, Respondent failed to cover a third period class despite having been directed to do so.
Specification 12: On or about September 29, 2006, Respondent received a letter to file dated September 29, 2006 which she failed to sign and return to Assistant Principal Kristin Erickson, despite requests to do so.
Specification 13: On or about November 15, 2006, Respondent:
A. Yelled at Student B* to leave the room.

(continued...)

Colon's collective bargaining agreement and the DOE's rules, arbitration of the specifications was mandatory.

Arbitrator Dr. Andree McKissick was appointed to preside over the proceedings as an impartial hearing officer ("hearing officer"). The arbitration began on March 17, 2009 and took place over eleven days, and both parties examined and cross-examined witnesses and submitted evidence. Colon rebutted many of the charges and requested leniency based on her longstanding unblemished record.

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[1](...continued)
B. Attempted to close the classroom door while Student B was still in the doorway.
Specification 14: On or about November 15, 2006, in relation to the incident [above], Respondent stated, in class, words to the effect of, I'm tired of this shit.
Specification 15: On or about November 17, 2006, Respondent grabbed Student C* by the waist to prevent her from leaving the room.
Specification 16: On or about December 7, 2006, Respondent stated words to the effect of the following to Teacher Ben Friedman:
A. Kiss my ass.
B. Let's take it outside.
Specification 17: On or about December 8, 2006, Respondent:
A. Knocked Teacher Ben Friedman's hat off his head.
B. Stepped on the hat.
C. Struck and/or attempted to strike Ben Friedman.
D. Stated words to the effect of:
    1. You closet queen.
    2. Why didn't you step outside yesterday after school and finish it with me.
Specification 18: On or about February 6, 2007, Respondent received a letter to file dated February 5, 2007, which she failed to sign and return to Principal Marta Jimenez, despite requests to do so.

As a result of Specifications 1, 13 and 14, Colon was investigated by Office of Special Investigations ("OSI") for charges of violating Chancellor's Regulation A-421, which prohibits verbal abuse. As a result of Specifications 13 and 15, OSI also investigated Colon for her alleged violations of Chancellor's Regulation A-420, which prohibits corporal abuse.

At the conclusion of the arbitration the hearing officer sustained the charges set forth in Specifications 1, 2, 4, 6, 7, 9, 10, 11, 13, 14, 15, 16 and 17. The hearing officer also found that the First Amendment did not protect Colon's lewd speech. Among other things, the arbitrator noted that despite Colon's "argument involving the usage of student's statements alone when they do not testify at the hearing, as being hearsay, this is not the case in this proceeding. All of the allegations were corroborated by another independent witness as to those particular allegations, as discussed earlier." In addition, the hearing officer concluded that Colon was not guilty of Specifications 3, 5, 8, 12, and 18, which were all charges for insubordination, finding that the refusal to sign a disciplinary letter is "outside the ambit of the charge of insubordination" and should more appropriately be labeled an "act of disobedience of an administrative order."

The hearing officer noted the mitigating factors of Colon's actions, such as the death of Colon's mother and her unexpected physical problems such as glaucoma, eye surgery and diabetes. However, the hearing officer held that "[petitioner's] continuing

physical and verbal abuse of students and faculty members cannot be excused or rationalized."

The hearing officer found that the appropriate penalty for Colon was termination. She noted the importance of teachers serving as role models. She wrote, "[Petitioner] cannot return to the New York City school system for the aforementioned reasons, due to the egregious nature of the various categories of charges."

Shortly after receiving the arbitrator's award, Colon initiated this proceeding, seeking to vacate or modify the award. Colon argues that this award should be vacated because the hearing officer's findings lack a rational basis, and the findings of misconduct were not supported by substantial evidence and were arbitrary and capricious. Colon also argues that the penalty of termination was too harsh for the circumstances. DOE cross moves to have the arbitration award confirmed and also seeks to have the petition dismissed for failure to state a cause of action.

Discussion

"Education Law § 3020-a(5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR 7511. Under such review an award may only be vacated on a showing of 'misconduct, bias, excess of power or procedural defects.'" *Lackow v. Department of Education (or "Board") of City of N.Y.*, 51 A.D.3d 563, 567 (1st Dept 2008) (quoting *Austin v. Board of Educ. of City School Dist. of City of N.Y.*, 280 A.D.2d 365,(1st Dep't 2001)). However, where, as here, the parties are

subjected to compulsory arbitration, judicial scrutiny is greater then when parties voluntarily arbitrate. *Lackow*, 51 A.D.3d at 567. "The determination must be in accord with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78. The party challenging an arbitration determination has the burden of showing its invalidity." *Lackow*, 51 A.D.3d at 567-568 (internal citations omitted).

Student Witnesses and Credibility of Witnesses:

Colon alleges that many of the findings of misconduct should not have been upheld because the student and/or teacher witnesses were not reliable witnesses, and because the evidence provided to the hearing officer was not factually correct, leading to an award which was not based on substantial evidence. For example, Colon contends that the witnesses were not reliable in relation to Specification 1, which charged that Colon yelled at a student while in the class room for not completing her homework, and that this yelling made the student cry. Colon argues that one of the student witnesses was unreliable as he was a "problematic" student who was "constantly in trouble." Colon also argues that allegations made by the school psychologist and principal were "empty" and did not corroborate the student witnesses. Colon claims that, although she did ask the student why she did not complete the homework assignment, she never meant to be "disrespectful or intimidating." Colon believed that she and the student had a comfortable relationship and that she was trying to help the student.

Despite Colon's assertion that the witnesses were unreliable, "[a] hearing officer's determinations of credibility, however, are largely unreviewable because the hearing officer observed the witnesses and was able to perceive the inflections, the pauses, the glances and gestures – all the nuances of speech and manner that combine to form an impression of either candor or deception." *Lackow,* 51 A.D.3d at 568 (internal quotation marks and citation omitted). Accordingly, the hearing officer's finding that the student and teacher witnesses were credible, and crediting their versions of the pertinent facts, must be upheld.

With respect to the student witnesses, Colon also argues that their unsworn written statements should be considered hearsay. In the decision, the hearing officer addressed Colon's allegations related to the testimony of the student witnesses, and found that the statements were corroborated. Even setting the hearing officer's rationale aside, "[p]ursuant to Education Law § 3020-a (3) (c), the rules governing hearing procedures do not require compliance with technical rules of evidence; therefore, a Hearing Officer may accept hearsay testimony." *Austin v. Board of Education of City School District of City of N.Y.*, 280 A.D.2d 365, 365 (1st Dept 2001). *See also Matter of NFB Investment Services Corp. v. Fitzgerald,* 49 A.D.3d 747, 748 (2d Dept 2008) ("[a]n arbitrator is not bound by principles of substantive law or rules of evidence, and may do justice and apply his or her own sense of law and equity to the facts as he or she finds them to be"). Thus, the

hearing officer's decision to accept alleged hearsay evidence from student witnesses is not a sufficient ground upon which to vacate the arbitration award.

The Hearing Officer's Findings Were Not Arbitrary and Capricious:

Colon also contends that the hearing officer's conclusions were arbitrary and capricious. One of the examples she provides is her dissatisfaction that the hearing officer upheld Specification 4, which charges Colon with leaving a parent-teacher conference early. Colon argues that she was experiencing genuine gastric problems and told her direct supervisor that she was leaving the parent-teacher conferences early. The direct supervisor testified that he did not give Colon permission to leave early, and another coworker testified that Colon called him later that evening from a theater. Colon further asserts that she did not violate any DOE procedure because, in addition to informing her direct supervisor, she informed a colleague that she was leaving early. The hearing officer upheld the charges based on the testimony of the witnesses, which corroborated that Colon did not inform a supervisor, which is the DOE policy, and spoke to another colleague later on that evening.

An action is considered arbitrary and capricious when it is "taken without sound basis in reason or regard to the facts." *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009). An arbitration award is considered irrational if there is "no proof whatever to justify the award." *Matter of Peckerman v D & D Associates,* 165 AD2d 289, 296 (1st Dept 1991). Applying both standards to the facts of Specification 4, it was not irrational

for the hearing officer to determine that Colon did not follow proper procedure when leaving a parent-teacher conference early and/or was not suffering from a genuine illness. Although Colon may disagree with the applicability of the DOE procedures regarding leaving a parent-teacher conference early, the hearing officer's award was not arbitrary or capricious.

Misapplication of Law:

Colon claims that the hearing officer erred when she confirmed charges of corporal abuse for Specification 15, which charges that Colon held a student by her waist in an attempt to prevent the student from leaving the classroom. The hearing officer found that Colon violated Chancellor's Regulation A-420, which prohibits corporal abuse. Colon asserts that "[u]sing the definition in Chancellor's Regulation A-420, Petitioner's conduct cannot be said to constitute corporal punishment when using the evidence that was introduced by the Department to substantiate Specification 15." This argument is without merit.

Even if the hearing officer incorrectly applied the definition of Chancellor's Regulation A-420, which does not appear to be the case, the Court will not set aside the award for this reason. "[A]s long as arbitrators act within their jurisdiction, their awards will not be set aside because they have erred in judgment either upon the facts or the law." *Matter of Goldfinger v. Lisker*, 68 N.Y.2d 225, 230 (1986). Further, "courts must defer to an administrative agency's rational interpretation of its own regulations in its area

of expertise." *Peckham,* 12 N.Y.3d at 431. In sum, Colon has not shown a valid ground for vacating the hearing officer's award due to a misapplication of law or facts.

Termination Not Shocking:

Colon argues that, in light of her personal situation and also her unblemished record, the penalty of termination is excessive and shocks one's sense of fairness. An administrative sanction, such as Colon's termination, "must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." *Matter of Featherstone v. Franco,* 95 N.Y.2d 550, 554 (2000).

The hearing officer considered Colon's mitigating circumstances, and found that there was no excuse for Colon's continued physical and verbal abuse of students and teachers. The hearing officer also noted that the continued physical and verbal abuse of students prevented Colon from acting as a proper role model for her students. The First Department, has held that, "[a]cts of moral turpitude committed in the course of public employment are an appropriate ground for termination of even long-standing employees with good work histories." *Matter of Chaplin v. New York City Department of Education,* 48 A.D.3d 226, 227 (1st Dept 2008).

Given the record developed in the arbitration and the charges upheld against Colon (including ones for verbal abuse and corporal punishment), this Court finds that the penalty of termination is not shocking to the conscience.

In an effort to "foster the use of arbitration as an alternative method of settling disputes," the Court's role in reviewing an arbitrator's award is severely limited. *Matter of Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-C10 v. Albany Hous. Auth.*, 266 A.D.2d 676, 677 (3d Dept 1999), citing *Matter of Goldfinger v. Lisker*, 68 N.Y.2d 225, 230 (1986). Courts are reluctant to disturb an arbitrator's award, and it may not be vacated unless it is irrational, violative of public policy or exceeds the power given to the arbitrator. *Civil Serv. Empls. Assn.*, 266 A.D.2d at 677. For the reasons stated above, there is no basis to vacate the arbitration award. Accordingly, Colon's petition to vacate the award is denied in its entirety and DOE's cross motion to dismiss the petition, and to confirm the arbitration award, is granted.

The Court has considered Colon's other contentions, including her allegation that the arbitrator was biased, and finds them without merit.

In accordance with the foregoing it is

ADJUDGED that the petition of petitioner Grace Colon to vacate or modify the arbitration award is denied and dismissed; and it is further

ORDERED that the cross motion of respondents the City of New York Department of Education and Joel Klein, Chancellor of the City of New York

Department, to confirm the arbitration award and to dismiss this proceeding is granted in its entirety; and the petition is denied and dismissed.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York
October 21, 2010

ENTER:

Saliann Scarpulla, J.S.C.