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

PRESENT: **WALTER B. TOLUB** PART 15

Justice

Index Number : 108943/2006
PAPKOFF, MYRA
vs
NYC DEPARTMENT OF EDUCATION
Sequence Number : 001
VACATE OR MODIFY AWARD

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.
tion 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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

This judgment has been entered by the County Clerk and notice of entry cannot be obtained from counsel or from the Judgment Clerk's Desk (Room 141B).

Dated: 1/29/08

WALTER B. TOLUB 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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MYRA PAPKOFF,

Petitioner-Respondent,

-against- Index № 108943/06

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent-Complainant.

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WALTER TOLUB, J.:

In this petition, petitioner/respondent Myra Papkoff (Papkoff) seeks an order and judgment, pursuant to CPLR 7511, vacating the determination of arbitrator/hearing officer James A. Cashen, Esq. (Cashen), dated June 13, 2006, which sustained 7 out of 15 specifications and authorized the termination of Papkoff's employment. Petitioner seeks this relief on the grounds that: (1) the arbitrator exceeded his power and/or so imperfectly executed it that the determination was not final and definite because its findings are not supported by the record; (2) the penalty of termination shocks the conscience; and (3) the award is violative of public policy. Respondent-Complainant New York City Department of Education (DOE) opposes the petition and cross-moves for a judgment, pursuant to CPLR 3211 (a) (7) and 7511 (a), dismissing the petition and confirming the Decision and Award.

The charges against petitioner were filed pursuant to Section 3020-a of the Education Law on February 16, 2005. Prior to this time, Papkoff had been employed as a school secretary by DOE for approximately 12 years and had become a tenured employee. The specifications of misconduct asserted against her were alleged to have occurred during the time that Papkoff was assigned to Intermediate School (I.S.) 68, as both the payroll secretary and the principal's

secretary during the 2002 - 2003 school year and part of the 2003 - 2004 school year. The DOE charged petitioner with the following 15 Specifications: Specification 1 - mishandling CARs between June and September 2002[1]; Specification 2 - receiving $3,757.50 in unauthorized per session payments between August 28, 2002 and June 30, 2003; Specification 3 - submitting a personnel time report with a forged signature; Specification 4 - directing a Clerical Associate to enter into the completer system that petitioner had worked approximately 20 unauthorized per session hours between August 28, 2002 and August 30, 2002; Specification 5 - entering approximately 146 unauthorized per session hours in the computer system for the period of September 3, 2002 and June 30, 2003; Specification 6 - offering to pay three school aids for overtime without permission or authority to do so; Specification 7 - entering into the computer system that she had worked per session hours on April 1, 4, 7, 8, 11, and 14, 2003 even though she was absent on those days; Specification 8 - 48 absences from work during the 2002 - 2003 school year; Specification 9 - filling out and delivering to the district office, without the required signature of the principal, the Report of Rating/Service of Instructional Personnel for the year ending 6/26/03 (OP 152) in which she incorrectly listed herself has having received a satisfactory rating; Specification 10 - entering into the computer system that she worked approximately six unauthorized per session hours between September 2 and 9, 2003; Specification 11 - working, on October 20, 2003, at Secretary Poretsky's computer accessing payroll information for M.S. 367 without permission; Specification 12 - returning from lunch two hours late on December 16,

[1]CARs are the documents in which an employee's lateness and attendance is recorded. They are an integral part of each person's end of year evaluation, and contain information regarding accumulated days which are exchangeable for pay upon an employee's retirement or leaving the system under other circumstances.

2003; Specification 13 - stating that she was late returning from lunch on December 16, 2003, because she was shopping and lost her way; Specification 14 - accessing the payroll system with permission on December 18, 2003 from Secretary Armanno's computer; and Specification 15 - lying to Principal Iris Zvi on December 18, 2003, when stating that Principal Dupree at I.S. 340 gave her permission to enter I.S. 340's payroll into the computer system.

In conformance with Section 3020-a of the Education Law, a pre-hearing conference was held on September 14, 2005, followed by compulsory arbitration hearings which took place on October 14, 20, 21, 28, and 31; November 9, 10, 17, 18, and 22; and December 6, 7, 13, 14, and 15, 2005. Petitioner was represented by counsel throughout the proceedings.

Among petitioner's defenses to these charges were her contentions that she was improperly and/or inadequately supervised; that she was subjected to ill will by the other secretaries, at least one of whom could have made entries relative to her per session payments while petitioner was working at another school; and that she offered to pay the money back.

After the hearings concluded, the hearing officer issued his written Decision and Award finding petitioner guilty of specifications 1, 2, 3, 5, 6, 7 and 9, and recommended termination of petitioner's employment. In her petition for a judgment vacating the determination as to the specifications for which she was found guilty, Papkoff both reiterates her defenses and contends that the hearing officer, among other things: did not properly weigh the evidence; credited the wrong party's testimony; ignored evidence of a break-in at the school which could explain the missing CARs; made conclusions based on inadequate and inconsistent evidence and/or upon his own suppositions; and did not hold the DOE to its burden of proof.

The parties do not dispute that an arbitration award may be vacated on three narrow

grounds: it violates a strong public policy, it is irrational, or it clearly exceeds a specifically enumerated limitation on the arbitrator's power and/or it was so imperfectly executed that it was not final and definite because its findings are not supported in the record (Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO, v Board of Educ. of the City School Dist. of City of N.Y., 1 NY3d 72, 79 [2003]; CPLR 7511 [b] [1] [iii]). Furthermore, pursuant to Education Law § 3020-a (5), judicial review of a hearing officer's determination and award is limited to the grounds set forth in CPLR 7511, notwithstanding the fact that, where, as here, the arbitration is compulsory, "judicial review under CPLR article 75 is broad, requiring that the award be in accord with due process and supported by adequate evidence in the record" (Motor Veh. Mfrs. Assn. of U.S. v State of New York, 75 NY2d 175, 186 [1990]).

To this end, petitioner asserts that the hearing officer's Decision and Award is not supported by the record in that the arbitrator ignored evidence tending to show that: (1) there was a theft at the school which could explain the missing CARs; (2) the principal had authorized her per session work; (3) the principal's signature was not forged; (4) payroll secretaries sometimes share their I.D.s and passwords in order to assist each other; (5) there is no limitation as to when a payroll secretary can go back into the records and make changes; and finally (6) the secretaries who testified against petitioner bore her ill will.

Papkoff attempts to substantiate these contentions by arguing, repeatedly throughout her petition, that the hearing officer erred with respect to his findings by choosing to ignore certain testimony (hers) in favor of the less worthy testimony offered by DOE. However,

> [i]t is basic that the decision by [Cashen] to credit the testimony of a given witness is largely unreviewable by the courts, who are disadvantaged in such matters because their review is confined to a lifeless record. The Hearing Officer before whom the witnesses

> appeared, on the other hand, 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. . . . "Where there is a conflict in the testimony produced * * * where reasonable men might differ as to whether the testimony of one witness should be accepted or the testimony of another be rejected, where from the evidence either of two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests solely upon the [administrative agency]. The courts may not weigh the evidence or reject the choice made by [such agency] where the evidence is conflicting and room for choice exists" [citations omitted]

(Matter of Berenhaus v Ward, 70 NY2d 436, 443 - 444 [1987]).

With the issue of credibility no longer before the court, this court's review is directed to whether the Decision and Award is supported by substantial evidence. To make this determination, "we assess the evidence relied on by the administrative agency to determine if it constitutes 'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact'" (Matter of Healy v Clifton-Fine Central School Dist., 240 AD2d 892, 893 [3rd Dept 1997], citing 300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 180 [1978]). Upon review of the parties' submissions, including the hearing transcripts, and assessing only that evidence which was relied upon by DOE, this court finds that the record reveals ample evidentiary support for the arbitrator's findings and determination. This is particularly true given petitioner's acknowledgment that she, among other things, cashed checks for overtime she did not work, including per session payments for days when she was on leave of absence; entered per session work for May 2, 2002 over a year later, on June 26, 2003; and that she was unable to produce the CARs when asked to do so on repeated occasions by other employees (see Matter of Healy v Clifton-Fine Cent. School Dist., 240 AD2d at 893. Petitioner's contention that the hearing officer's Decision and Award was not supported by the record, is unfounded.

Turning to her "dismissal," despite petitioner's assertions that the penalty of termination shocks the conscience and is against public policy, there is no basis to vacate the Decision and Award on these grounds. It is well settled that an award violates strong public policy when "the award itself violate[s] a well-defined constitutional, statutory or common law of this State" (Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO, v Board of Educ. of the City School Dist. of City of N.Y., 1 NY3d at 81 [internal quotation marks and citation omitted]). In this instance, the penalty of dismissal of a tenured employee is among the enumerated penalties available to a hearing officer under Education Law § 3020-a (4). As such, it cannot be said that the hearing officer's award of "dismissal" violates public policy.

It is also well settled that "[w]hen determining the appropriateness of a penalty, a court must consider whether, in light of all the relevant circumstances, the penalty is so disproportionate to the charged offense as to shock one's sense of fairness" (Matter of Bottari v Saratoga Springs City School Dist., 3 AD3d 832, 833 [3rd Dept 2004][internal quotation marks and citations omitted]). The Decision and Award followed a 15-day hearing at which ample evidence was produced. Although petitioner believes that a less severe penalty was more appropriate, the hearing officer, who was charged with imposing an appropriate award, clearly did not. In his decision, the hearing officer emphasized that, except on several minor points, Papkoff did not accept responsibility for her actions (blaming others instead), he found that she had been untrustworthy over a long period of time, and he noted that she offered no mitigating factors for her misconduct other than her long-term employment with the DOE. Based upon the record, it is clear that Cashen's findings and ultimate determination reflect the seriousness of the charges, the ongoing and often repetitive nature of her of improper and sometimes untrustworthy

conduct, and the ramifications her actions had on both her fellow employees and the school.

Finally, contrary to petitioner's contentions, the fact that the DOE filed a cross motion, pursuant to CPLR 3211 (a) (7), seeking a dismissal of the petition, does not relieve petitioner, in the first instance, of her burden of establishing that the hearing officer's determination violates public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power and/or that it was so imperfectly executed that it was not final and definite because its findings are not supported in the record (Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO, v Board of Educ. of the City School Dist. of City of N.Y., 1 NY3d at 79). The petitioner has not met her burden in this respect, and based on the foregoing, the Decision and Award is entitled to confirmation. Accordingly, it is

ADJUDGED that the petition is denied; and it is further

ADJUDGED that the cross motion is granted to the extent that the Decision and Award, dated June 13, 2006, is confirmed.

Dated: 12/07

ENTER:

Hon Walter B. Tolub, J.S.C.