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

PRESENT: JUDGE SHIRLEY WERNER KORNREICH PART 54

Index Number : 113500/2006

AKIDIL, ROSA

VS

NYC DEPT. OF EDUCATION

Sequence Number : 001

VACATE OR MODIFY AWARD

INDEX NO. _____

MOTION DATE 5/31/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this ~~motion to/for~~ article 75 petition

9 vols. Petitioner's papers.
2 vols. Cross-Motion

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

UNCALED 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: 9/17/07

HON. SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF YORK
COUNTY OF NEW YORK

----------X

In the Matter of the Application of

ROSA AKIDIL,

Petitioner,

For an Order Pursuant to Article 75 of the Civil Practice Law and Rules

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

----------X

Index No.: 113500/06

DECISION, ORDER & JUDGMENT

SHIRLEY WERNER KORNREICH, J.

In this proceeding pursuant to Article 75 of the CPLR, petitioner, a tenured school psychologist with more than thirty years experience, challenges a determination, dated August 29, 2006 and modified on September 8, 2006 ("Award"), by an arbitrator, Dr. Andre'e Y. McKissick ("Arbitrator"). The Award was rendered after an arbitration hearing pursuant to §3020-a of the New York State Education Law. Petitioner challenges the charges sustained against her, as well as the imposition of the penalty of a year's suspension without pay, which she claims is excessive. Respondent cross-moves to dismiss the petition. The cross-motion is granted, and the petition is denied and dismissed for the reasons that follow.

As a threshold matter, respondent argues that the petition should be dismissed because it was not timely served, pusuant to CPLR 306-b, which provides as follows:

> where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time

> provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

The statute of limitations for bringing this proceeding is contained in Education Law §3020-a(5), which limits the time for commencement to "ten days after receipt of the hearing officer's decision." Hence, the proceeding should have been filed ten days after receipt of the decision and then served fifteen days later.

Petitioner served respondent forty-four days after the petition was filed, which was twenty-nine days late. The court records reflect that the petition was filed and an index number was purchased on September 20, 2006. According to the affidavit of Phillip Clark, sworn to on January 24, 2007, the amended notice of petition and amended petition were served on respondent on November 3, 2006, but the original petition and notice of petition were never served.

Petitioner's counsel admits in his brief, p. 15, that the service was untimely. However, he argues that the court should extend the time in the interests of justice. He contends that the ten-day statute of limitations contained in Education Law §3020-a(5) is too short, given the length of compulsory arbitration hearings and the voluminous transcripts. He states that his practice is to file a bare bones petition within the prescribed period and then serve and file a more complete amended petition. He argues that his procedure saves respondent from having to answer two petitions, that respondent would not be able to timely answer a timely served petition and that during a period of many years it has not raised this defense before. Counsel for petitioner also argues that he gave respondent adjournments of more than two months to respond, while the amended petition was served less than four weeks late. In fact, the service was four weeks and

one day late.

In determining whether to extend the time for service in the interests of justice, pursuant to CPLR 306-b, "the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant." *Leader v. Maroney*, 97 N.Y.2d 95, 105-106 (2001).

Applying these standards to this case, the court feels that disagreement with the statute of limitations is not an interest of justice consideration. Even given the voluminous transcript, it cannot be said that petitioner was diligent in serving the amended petition, particularly when petitioner never requested an extension of time until respondent moved to dismiss. It is impossible to say when the statute of limitations expired because neither party advises the court of when petitioner received the hearing officer's decision. The delay in service was approximately one month. There was no prejudice to respondent, who delayed the proceeding more than petitioner. However, petitioner has not shown that oversight, mistake, or inadvertence was the reason for non-compliance with statutory mandates. The excuse that petitioner's counsel set forth - that he believes the mandates are unreasonable and that he routinely flouts them with the cooperation of the Corporation Counsel, does not strike the court as being in the interest of justice.

Moreover, the court ultimately is not persuaded by the merits of the proceeding. Education Law §3020-a(5) provides that:

the employee ... may make an application to the New York state supreme court to

> vacate or modify the decision of the hearing officer pursuant to section seven thousand five hundred eleven of the civil practice law and rules. The court's review shall be limited to the grounds set forth in such section.

The grounds for vacating or modifying an arbitration award under CPLR §7511 are as follows:

> (i) corruption, fraud or misconduct in procuring the award; or
> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
> (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
> (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

Petitioner has not demonstrated any of those grounds. The fact that petitioner speculates that the Arbitrator found for respondent in order to keep his job as an arbitrator is not evidence of corruption.

Where parties are forced to engage in compulsory arbitration, judicial review under CPLR Article 75 requires that the award be in accord with due process and supported by adequate evidence in the record. *Krinsky v. New York City Dept. of Educ.*, 28 A.D.3d 353 (1st Dept. 2006), *app. den.*, 7 N.Y.3d 718 (2006); *Hegarty v. Bd. of Educ.*, 5 A.D.3d 771, 772 (2nd Dept. 2004). An arbitrator's award should not be overturned for mistakes of law unless it violates a strong public policy, is totally irrational, or exceeds a specifically enumerated limitation on the arbitrator's power. *Hegarty v. Bd. of Educ., supra,* at 772-773.

Here, the record contains evidence to support findings by the Arbitrator that petitioner was guilty of various charges, including that she was insubordinate on several occasions, attempted to close a door on the principal's hand, blocked the principal from shutting a door, refused to give her supervisor a test record booklet for student M.N. and misplaced the M.N. test

booklet, told a parent after a conference with the School Board Assessment Team ("SBAT") that she disagreed with the assessment instead of discussing her disagreement with the SBAT, prepared an inadequate and contradictory testing evaluation on student P.I., submitted the evaluation of student P.I. late, failed to provide the raw data from the test of student P.I., failed to record the data from the test for student P.I. onto the correct Stanford Binet forms, failed to perform complete testing on student C.C., and submitted inaccurate age information and contradictory statements with regard to C.C.'s testing.

With respect to the penalty of suspension for one year without pay, the court does not find it shocking to the conscience. *Harris v. Mechanicville Cent. School Dist.*, 45 N.Y.2d 279 (1978)(one year suspension without pay appropriate for two instances of insubordination); *In re North Country Community College Assn. of Professionals,* 29 A.D.3d 1060 (3rd Dept. 2006), *app. den.*, 7 N.Y.3d 709 (2006)(fifteen month suspension without pay for profanity and mocking of supervisor); *Krinsky v. New York City Dept. of Educ., supra* (penalty of dismissal for insubordination). Petitioner's contention that the Arbitrator should have imposed a lesser penalty because he found that respondent made insufficient efforts to remediate and correct petitioner's behavior is unavailing. The Arbitrator took the insufficient remediation into account in concluding that the penalty should be suspension rather than termination, as requested by respondent. The court would also add that given petitioner's more than thirty years of experience, and the number of charges sustained involving improper performance of her duties and inability to behave professionally, the penalty is far from shocking. Accordingly, it is

ORDERED, ADJUDGED and DECREED that the cross-motion to dismiss the petition of

ROSA ADKIDIL is granted and the petition is denied and dismissed with prejudice.

Dated: September 17, 2007

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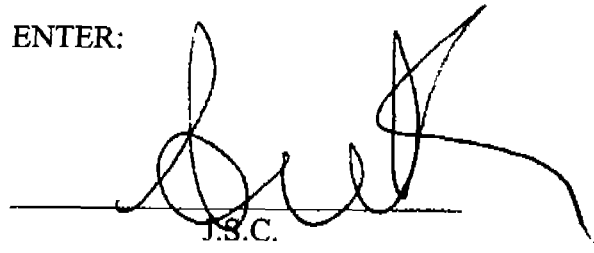

J.S.C.

UNFILED JUDGMENT

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