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

PRESENT: EDWARD H. LEHNER PART 19

Index Number : 101143/2007

YIALOURIS, MARY

VS

DEPARTMENT OF EDUCATION

Sequence Number : 001

VACATE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

motion is 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)

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

Dated: NOV 05 2007

_____ J.S.C.

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 : IAS PART 19

MARY YIALOURIS,

Petitioner,

-against-

Index No.
101143/07

NEW YORK CITY BOARD / DEPARTMENT OF EDUCATION,

Respondent.

EDWARD H. LEHNER, J.:

Before the court is a petition to set aside an arbitrator's award (the "Award") that terminated her position as a teacher, and a cross-motion by respondent to dismiss the petition.

Petitioner was an elementary school teacher who began working in 1990 and became a full-time teacher in 1994 (Amended Petition, ¶¶ 4, 8). She taught at P.S. 112 from 1994 until she transferred to P.S. 127 in 2003 (Id. ¶¶ 9, 15). She alleges: that until 2001 she was positively rated (Id. ¶ 10); she was subjected to supervisory ridicule and she commenced a law suit against her supervisors and respondent (Id. ¶¶ 13, 16); that she was not afforded observation by her supervisors or individualized training (Id. ¶¶ 30, 32); that she received specification of charges pursuant to Education Law § 3020-a; that a compulsory arbitration hearing was held for 45 days commencing March 18, 2005 and

concluding February 8, 2006 (Id. ¶¶ 81, 84); and the arbitrator sustained sixteen charges and assessed a penalty of termination (Id. ¶¶ 86, 87).

Petitioner asserts: that the Award should be vacated due to bias of the arbitrator; the Award lacked support in the record and exceeded the arbitrator's authority; the penalty shocks the conscience; and the Award violates public policy.

The arbitrator found: petitioner guilty of misconduct in three separate school years; petitioner conducted a parent-teacher meeting in the presence of students on a school trip during which she divulged a student's disciplinary problems over the loudspeaker; petitioner made derogatory statements about her principal in front of parents and students; petitioner repeatedly violated the verbal and written instructions of her supervisors; and petitioner neglected her duties and revealed private information about another teacher's sexual orientation (Award pp. 113-116). The arbitrator noted that there were contradictions between petitioner's and respondent's versions of events and found that "Respondent testified falsely ... (and) was hostile, sarcastic and evasive ... (and) was not a believable witness" (Id. pp. 59-60).

> "Education Law § 3020-a (5) provides that '[t]he court's review shall be limited to the grounds set forth in [CPLR 7511].' The grounds for vacating an award thereunder include, inter alia, misconduct, abuse of power, or procedural defects (CPLR 7511 [b] [1] [i], [iii], [iv]). However, where, as here, the 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.' Moreover, arbitration awards

> may not be vacated even if the court concludes that the arbitrator's interpretation of the agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law, unless it is violative of a strong public policy, is totally irrational, or exceeds a specifically enumerated limitation on his power." [Hegarty v. Board of Education of the City of New York, 5 AD3d 771, 772-773 (1st Dept. 2004)].

Thus, "(t)o be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious" [Matter of Motor Vehicle Accident Indemnification Corp. v. Aetna Casualty & Surety Company, 89 NY2d 214, 223 (1996)]. See also, Mount St. Mary's Hospital of Niagra Falls v. Catherwood, 26 NY2d 493, 507 (1970).

The court must recognize "the degree of deference accorded the arbitrator in matters of credibility ... even though the evidence was conflicting and room for choice existed" [Tasch v. Board of Education of the City of New York, 3 AD3d 502, 503 (2nd Dept. 2004)]. See also, Austin v. Board of Education of the City of New York, 280 AD2d 365 (1st Dept. 2001). While petitioner contends that the "arbitrator is not entitled to ignore the record" (Richard Krinsky, reply affirmation ¶ 79), this does not constitute "evidentiary proof of actual bias or the 'appearance of bias' on the part of the arbitrator" [Matter of Schwartz v. New York City Department of Education, 22 AD3d 672, 673 (2nd Dept. 2005)]. Where the arbitrator "credited the testimony of (respondent's witnesses) and found petitioner's testimony to be inconsistent and incredible ... the (arbitrator's) finding of guilt ... was supported by the record, and ... must be upheld" [Austin v. Board of

Education of the City of New York, 280 AD2d supra at pp. 365-366 (1st Dept. 2001)]. The arbitrator rejected petitioner's testimony, finding her testimony inconsistent, and chose rather to accept the testimony of respondent's witnesses. Credibility determinations that were adverse to the petitioner do not constitute bias on the part of the arbitrator. Therefore, there is support in the record for the Award.

"(T)he penalty of dismissal (can be) so disproportionate to (a petitioner's offense) ... (where she has a) lengthy and otherwise unblemished record of service (so) that the imposition of this sanction 'shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law'" [Diefenthaler v. Klein, 27 AD3d 347, 348 (1st Dept. 2006](quoting Matter of Featherstone v. Franco, 95 NY2d 550, 554 (2006). In this case, the arbitrator found "extensive job performance problems over a two year period (and petitioner) failing to take full advantage of the remediation being offered to her" (Award, p. 117, 120) as well as failure to accept responsibility for her misconduct (Id., p. 122). Petitioner does not have a lengthy record of unblemished service, but rather after transferring to a new school, P.S. 127, she had a series of disciplinary problems and she was unwilling to accept remediation or to acknowledge that her conduct was wrong.

"In light of the litany of specifications proven against (her), the penalty of dismissal does not shock the conscience" [Krinsky v. New York City Department

of Education, 28 AD3d 353 (1st Dept. 2006)]. Dismissal is not an excessive penalty in the circumstances of this case.

Therefore, the respondent's cross-motion to dismiss the petition and to confirm the Award is granted. This decision constitutes the judgment of the court.

Dated: November 5, 2007

J.S.C.