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SHORT FORM ORDER

INDEX NO.: 0011461/2007
SUBMIT DATE: 7/11/2007
MTN. SEQ.#: 001

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:
HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 5/11/2007
MOTION NO.: MD;CASEDISP

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In the Matter of the Application of the :

BOARD OF EDUCATION OF THE WILLIAM FLOYD UNION FREE SCHOOL DISTRICT, :

Petitioner, :

-against- :

GARY LEMAY, :

Respondent, :

For a Judgment Pursuant to Article 75 of the Civil Practice Law and Rules. :

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NEW YORK STATE UNITED TEACHERS
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Upon the following papers numbered 1 to 24 read on this petition for an order pursuant to CPLR 7511 vacating award; Notice of Petition/Order to Show Cause and supporting papers 1-9; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 10-17; Replying Affidavits and supporting papers 18-24; Other _____; it is

ORDERED that this application by petitioner, Board of Education of the William Floyd Union Free School District, for an order pursuant to Article 75 vacating the Opinion and Award of Hearing Officer Howard C. Edelman dated March 22, 2007, is

denied; and it is further

ORDERED AND ADJUDGED that the petition is dismissed; and it is further

ORDERED AND ADJUDGED that this decision constitutes the judgment of the Court and that respondent shall recover from petitioner costs and disbursements in the sum of $ _____ as taxed by the clerk, and respondent shall have execution therefor.

Petitioner, Board of Education of the William Floyd Union Free School District (Board), commenced this proceeding pursuant to CPLR 7511 for a judgment vacating the Opinion and Award of Hearing Officer Howard C. Edelman on the ground that it is arbitrary and capricious, irrational, in excess of power and against public policy. Respondent, Gary Lemay, answered the petition and opposed the application. The undisputed facts indicate that respondent is a tenured teacher in the William Floyd Union Free School District who was assigned to teach 5 eighth grade English classes in the William Paca Middle School during the 2005 - 2006 academic year. Prior to the statewide English Language Arts (ELA) examination which was scheduled to begin on January 18, 2006, respondent attended a meeting held by Assistant Principal Robert King, during which he was given the Teacher's Directions booklet. The booklet includes an instruction that teachers must "Completely cover or remove charts on the walls and all boardwork." On the day of the examination, however, respondent intentionally posted an essay checklist on bright yellow paper near the pencil sharpeners in each of the classrooms where his students were taking the examination. One test proctor, Stephanie McPhail, testified at a subsequent hearing conducted pursuant to Education Law § 3020-a that respondent reminded students to sharpen their pencils and stated to them, "sharper pencils, sharper minds." After the first day of the ELA examination, respondent was confronted by another teacher about his posting of the essay checklist on the classroom walls in which his students were taking the examination, and ultimately the NYS Education Department invalidated the results of the examination because of the posting of the checklist. All five of respondent's classes, consisting of approximately 124 students, were affected by the invalidation of the test. Ultimately, William Paca Middle School was designated a "school in need of improvement" by the NYS Education Department, at least partly as a result of the respondent's mis-administration of the ELA examination.

On or about February 4, 2006, the District found probably cause to bring disciplinary charges against the respondent pursuant to Education Law § 3020-a. At the hearing requested by respondent, he acknowledged that he mis-administered the ELA examination and claimed that he had provided the essay checklist in order to provide "comfort" to his students. He maintained, however, that the posting of the checklist

was not done with the intent to surreptitiously provide answers to his students, since the checklist was posted openly and notoriously. He also testified that in January 2006 he did not consider the grades his students attained on the ELA test to be the evaluative tool used to measure the proficiency of his students in English, but that his views on the importance of the ELA test had changed.

On March 22, 2007, the hearing officer issued his award, finding petitioner guilty of the charges of misconduct and determining that a six-month suspension without pay was an appropriate penalty. Before the ELA examination respondent had received evaluations from the District impressing upon him the need to improve the ELA test scores of his students, and the hearing officer determined that respondent had tried to improperly assist his students. While he did not find respondent's testimony to be totally credible, he found it believable that respondent did not consider his actions to be a form of cheating, since the ideas, sentence structure, spelling and diction of each student's essay was their own. The hearing officer concluded that respondent's actions in posting the checklist openly and informing his students of it "were not consistent with someone who intended to defraud school officials by falsifying test results or by producing test results which were fundamentally dishonest." The respondent was found to be remorseful and was given notice that "he must act with complete honesty and integrity or he will face dismissal in the future."

Petitioner contends that the hearing officer exceeded his power, and that he had no rational basis to impose "the lenient penalty of a six month suspension upon a teacher who engages in this kind of flagrant misconduct." Petitioner also argues that the award violates the strong public policies of maintaining qualified teachers who serve as role models for their students and of maintaining the integrity of standardized educational assessments.

In rejecting the District's call for discharge, the hearing officer found that the respondent lacked the intent to defraud the District, and he distinguished respondent's conduct from that involved in cases where, for example, grades were fraudulently altered. In addition, it was noted that the labeling of the William Paca Middle School a "school in need of improvement" was attributed not only to respondent's mis-administration of the ELA examination, but also to an unrelated finding that special education students did not show adequate academic progress.

Education Law § 3020-a provides that the review of the Court shall be limited to the grounds set forth in CPLR 7511. Pursuant to CPLR 7511 (b) (1), an award may be vacated only if the Court finds that the rights of a party were prejudiced by:

(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.

In addition to the statutory grounds, an arbitration award may be vacated if it violates a strong public policy, is irrational, or if it clearly exceeds a specifically enumerated limitation on the arbitrator's power (*see* ***Board of Educ. of the Arlington Cent. School Dist. v Arlington Teachers Assn.***, 78 NY2d 33, 574 NE2d 1031, 571 NYS2d 425 [1991]; *see also* ***Matter of Hegarty v Board of Educ. of the City of New York***, 5 AD3d 771, 773 NYS2d 611 [2d Dept 2004]). Here, petitioner has failed to sustain its burden of establishing grounds to vacate the award. In view of the evidence, the hearing officer did not exceed his power, nor was his determination "totally irrational" or arbitrary or capricious (*see* ***Matter of Liberty Mut. Ins. Co. v Sedgewick***, ___ AD3d ___, 2007 NYAppDiv LEXIS 9784 [2d Dept 2007]). Rather, the determination was rationally based upon the evidence presented at the hearing. The hearing officer's conclusion that respondent did not believe that his actions in posting the checklist was cheating and that he did not have an intent to defraud the District is supported by the evidence that the checklist was posted openly in five different classrooms and that over 100 students were told about the checklist. Furthermore, after hearing the respondent testify at the hearing, the hearing officer believed him to be remorseful. Moreover, the analysis of the hearing officer is consistent with other decisions involving tenured school employees whose conduct did not rise to the level so as to be penalized by discharge [*see*, e.g., ***Matter of Harpursville CSD v Sheila P.***, SED # 3,971 (H.O. Falcigno 2000); *see also* ***Matter of East Islip UFSD v Rena C.***, SED # 4,525 (H.O. Campagna 2004)].

Accordingly, the petition is dismissed.

DATED: 27 Sept. '07

HON. JOHN J.J. JONES, JR.
J.S.C.

CHECK ONE: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION