[*1]

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

PRESENT: _____ PART _____

Justice

Index Number : 103798/2006
LACKOW, DOUGLAS
VS
DEPARTMENT OF EDUCATION
Sequence Number : 001
VACATE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 is decided pursuant to attached Dec

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

FILED
JAN 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/23/07

J.S.C.

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

PRESENT: HON. MARILYN SHAFER PART 62
Justice

DOUGLAS LACKOW,

Petitioner,

-against-

THE DEPARTMENT OF EDUCATION (or 'BOARD") OF THE CITY OF NEW YORK and JOEL KLEIN, CHANCELLOR OF THE DEPARTMENT OF EDUCATION (or 'BOARD") OF THE CITY OF NEW YORK,

Respondents.

INDEX NO. 103798/06

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to 5, were read on this petition:

	PAPERS NUMBERED
Notice of Petition	1
Brief of Petitioner	2
Notice of Cross Motion to Dismiss	3
Memo of Law in Support of Cross Motion	4
Opposition in Reply to Cross Motion	5

Pursuant to CPLR §7511 and Education Law §3020-a, petitioner Douglas Lackow (Lackow) seeks to vacate or modify the final determination of Hearing Officer Joshua Javits (the Hearing Officer) affirming his termination as a tenured biology teacher at Susan Wagner High School in Staten Island. Respondent Department of Education and Joel Klein (together, respondent) cross-moves to confirm the award and dismiss the petition for failure to state a cause of action. In reply, Lackow asks that this court review the underlying petition pursuant to CPLR Article 78. Lackow had been teaching for over six years when the Report and Recommendation (the Report) of the Hearing Officer upheld specifications brought by the respondent school, concluding that Lackow should be dismissed for "offensive and reprehensible words towards his students" (Notice of Petition, Exhibit 2).

In the petition, Lackow states that all but one of the comments he is alleged to have made occurred during his fifth period biology class over the fall semester of 2004 during a section on human sexual reproduction, and were in response to questions posed by his pupils. Lackow says that each of the three charges (" specifications") and subcharges are arbitrary and capricious, irrational, and unsupported by substantial evidence. Lackow also states that he has no prior record of discipline nor record of warnings, and that under the totality of the circumstances, the decision should be vacated or remanded for a lesser penalty. In reply, respondents state that the determination is supported by adequate evidence in the record, that Lackow was on notice, and that his behavior is beyond remediation (Respondent's Memorandum of Law).

Discussion

Standard of Review

Education Law §3020-a (4) provides, in relevant part:

> The written decision shall include the hearing officer's findings of fact on each charge, his or her conclusions with regard to each charge based on said findings and shall state what penalty or other action, if any, shall be taken by the employing board . . .in those cases where a penalty is imposed, such penalty may be a written reprimand, a fine, suspension for a fixed time without pay, or dismissal. In addition to or in lieu of the aforementioned penalties, the hearing officer, where he or she deems appropriate; may impose upon the employee remedial action including but not limited to leaves of absence with or without pay, continuing education and/or study, a requirement that the employee seek counseling or medical treatment or that the employee engage in any other remedial or combination of remedial actions.

Education Law §3012 is incorporated by reference into §3020-a and provides that the basis for removal of a tenured teacher is limited, in relevant part, to 2 (a) insubordination, immoral character or conduct unbecoming a teacher; and (b) inefficiency, incompetency, physical or mental disability, or neglect of duty (*Bott v Bd of Educ*, 41 NY2d 265, 268 [1977]).

As a threshold matter, Education Law §3020-a (5) explicitly requires that judicial review of

the final determination of a Hearing Officer be brought pursuant to CPLR §7511 (*Austin v Bd. of Educ.*, 280 AD 2d 365 [1st Dept 2001]). The court has found reversible error where Article 78 was the standard of review for a hearing pursuant to §3020 (a) (*Austin v Bd. of Educ.*, 280 AD 2d 365, *supra*).

It is well settled that when arbitration is compulsory, decisional law imposes closer judicial scrutiny of the arbitrator's determination under CPLR §7511 (b) *(Motor Vehicle Accident Indemnification Corp. v Aetna Casualty Corp.*, 89 NY 2d 214, 223 [1996]). Pursuant to the standard of judicial review applicable to an arbitrator's determination under CPLR 7511 (b), an award in a compulsory arbitration, if it is to be upheld, must have evidentiary support and cannot be arbitrary and capricious *(Motor Vehicle Accident v Aetna Casualty Corp.*, 89 NY 2d 214, *supra*, at 215; *Empire Insurance Company v Eagle Insurance* Company, 4 Misc. 3d 25 [2d Dept 2004]). This standard has been interpreted to import into Article 75 review of compulsory arbitrations the arbitrary and capricious standard of Article 78 review (*Petrofsky v Allstate Ins. Co.*, 54 NY 2d 207, 211 [1981]). 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 (*Hegarty v Bd of Educ.*, 5 AD 3d 771 [2d Dept 2004], *internal citations omitted*).

Petitioner has the burden of establishing that the hearing officer's determination was arbitrary and capricious, or based on misconduct or bias (*Hegarty v Bd of Educ.*, 5 AD 3d 771, *supra* at 773). As noted in the Report, it is the movant's burden of proof by a preponderance of the evidence (Notice of Petition, Exhibit 2). A "preponderance," and not "substantial" evidence, is the standard of proof in a §3020-a hearing (*Martin v Ambach*, 67 NY2d 972, 976 [1986]).

The Court of Appeals has defined arbitrary and capricious as "action without sound basis in reason and generally taken without regard to the facts" (*Pell v Board of Education of Union Free School District,* 34 NY2d 222, 231 [1974]). Where a punishment has been imposed, the test is "whether such punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness" (*Pell v Board of Education of Union Free School District,* 34 NY2d 222, 231, *supra* at 233, *internal citations omitted*). A sanction is shocking to one's sense of fairness "if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution . . ." (*Pell v Board of Education of Union Free School District,* 34 NY2d 222, 231, *supra* at 234). It is by now well settled that a sanction will not be upheld if it "shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law" (*Featherstone v Franco*, 92 NY2d 550 [2000]).

The court has also found that to survive judicial scrutiny of a §3020-a determination, there must be a rational basis for the decision. For instance, when the trial court remanded a final determination of termination for a gym teacher charged with corporal punishment, the First Department granted the teacher's petition in the entirety on grounds that there was no rational basis for firing a teacher who used physical force on students "when carrying out his assigned duty" (*Weinstein v Dept of Educ*, 19 AD3d 165 [1st Dept 2005]).

On §3020-a review, the First Department has upheld dismissal when a preschool teacher was convicted of grand larceny for fraud over a period of three years, a felony, with a history of prior fraud convictions (*Green v Dept of Educ.*, 17 AD 3d 265 [1st Dept 2005]). In considering the

penalty, the hearing officer, "noting the similarity of the prior offenses to the conduct upon which her more recent conviction was premised, observed that the petitioner evidently had not learned from her experience and was not an appropriate role model" (*Green v Dept of Educ.*, 17 AD 3d 265, *supra*).

The court has also upheld dismissal when a teacher was alleged to have fraudulently submitted time sheets for educational services the teacher never rendered (Hegarty v Bd. Of Educ., 5 AD 3d, 722 [2d Dept 2004]). The teacher had been charged with violating rules and regulations of respondent Board of Education, and neglect of duty, resulting from the fraudulent attempt to be paid for work he never performed.

However, Hearing Officer Javits recently rejected termination as too harsh for a respondent teacher guilty of corporal punishment of her first grade students, including directing two pupils to punch and kick a third pupil, drawing window shades and closing the classroom door to permit the beating, and threatening another pupil that had she been a boy, she too would have been beaten. On these facts, the Hearing Officer recommended a fine of ninety days salary and relocation to a different school (Brief of Petitioner, Exhibit B, name of respondent redacted).

Following a §3020-a hearing, Officer Javits recommended suspension for one year, reassignment, and a "last chance" for a male sixth grade teacher found, among other charges, to have made sexually suggestive gestures to a female student, to have referred to another sixth grader as a lesbian, and to have stated to the same child that he had just the night before had sexual relations with her mother. On these facts, the Report concluded that the teacher lacked self-control and had used inappropriate language and gestures with his pupils, warranting the penalty of a year's suspension (*In the Matter of Disciplinary Hearing, Dept of Educ v Cohen*, 200304-N03b,

1/13/04, Notice of Petition, Exhibit 4).

Also pursuant to §3020-a, a Report recommended suspension for half of one school year on a finding by the Hearing Officer that a substitute eighth grade teacher with nine years of service had repeatedly used the "f" word with his students, called them "punk bitches and pussies," "pieces of shit," and "faggot." The Hearing Officer rejected a recommendation of removal by petitioner Department of Education on grounds, among other things, that the penalty was mitigated by the eighth graders' unruliness and that the teacher had not been guilty of physical or psychological abuse (*In the Matter of the Arbitration Between Dept of Educ and Gennaro Fardella*, 4766, 1/20/04, Respondents Memo of Law, Appendix A).

A written reprimand and a $500 fine were recommended by a Hearing Officer who found that on open school night, a tenured high school math teacher informed the mother of a female teenage student that the student was "very pretty"; told the teenage student that she "looked good in pink"; pressed his arms against the arms of said student; touched other female students on the arm; told another female student "you look good today"; and touched the hair of a female student. The Hearing Officer concluded that touching teenage female students on the arm and complimenting them on their appearance constitutes conduct unbecoming a teacher *(In the Matter of Arbitration Between NYC Dept of Educ and David Berkowitz*, 5287, 3/4/06, Respondents Memo of Law, Appendix A).

SPECIFICATION I

The Report and Recommendations (the Report) dismisses specification I (b) and notes that I (c) was withdrawn by the respondent. Of the three charges in Specification I, the Report upholds only 1 (a), which charges that during the 2003-2004 school year Lackow remarked to a female

student that her underwear was exposed to view and commented on its color.

The student witness for respondent testified that her memory of the remark was vague and could not recall when the exchange occurred, stating "I don't really remember, but I just remember him saying something about my underwear showing" (Notice of Petition, Exhibit 3).

The Report accepts Lackow's explanation that if he made the the comment it was only intended as a courtesy, and concedes that notifying a student that their underwear is visible "is not in and of itself misconduct." The Report notes that the student witness for respondent came forward some two years after the alleged incident and only when she was approached by the principal.

Nevertheless the Report finds credible the testimony of the student who testified for respondent and the witness corroborating her account, despite undisputed testimony by Lackow that both students had failed an earlier class taught by Lackow. The Report concludes, curiously, that Lackow's alleged remark on the color of the student's underwear "indicates that his comments were designed to be provocative" (Notice of Petition, Exhibit 2, p 10).

Inasmuch as Lackow's alleged remarks that a female student's underwear was exposed to view "could reasonably be anticipated to invoke an uncomfortable reaction by young female students when made by a male teacher," as alleged by respondent, the testimony of respondent's witness supports a finding that Lackow's language was inappropriate. However, the penalty of dismissal for the alleged remark is so disproprtionate to the offense as to be shocking to one's sense of fairness. Accordingly, the recommendation must be remanded for reconsideration of a lesser penalty.

SPECIFICATION II

The Report upholds Specification II, that on or about November 23, 2004, Lackow stated to a student words to the effect that "you suck, or that's what it says in the boys bathroom." The Hearing Officer accepts the testimony of respondent's student witness, who corroborated Specification I and who earlier failed one of Lackow's classes. This witness admits to having first alleged Specification II to an assistant principal (AP) in the context of being "screamed at" by the AP and her English teacher for the student's intransigent tardiness (Notice of Petition, Exhibit 2).

Lackow denies making this remark to the student and suggests she may have fabricated the allegation to avoid discipline for her chronic lateness, an explanation rejected by the Report. Lackow does, however, admit to having made a similar remark to another student, which he maintains was meant to illustrate the inappropriate nature of such language, and suggests the remark may have been overheard and reiterated by respondent's witness. This explanation is corroborated by a student appearing for Lackow, a high school graduate and former student testifying independently and on her own initiative. The Report notes that "[w]hile he accepted that this method was 'a little unorthodox,' [Lackow] insisted that the comment was necessary to make the student understand that such comments were unacceptable" (Notice of Petition, Exhibit 2).

The Report sustains Specification II on grounds that, while the alleged colloquy could be perceived as "classroom banter," Lackow's language was "spiteful and vindictive in nature." The Report does not explain this finding nor offer any evidence of Lackow's spitefulness. However, inasmuch as Lackow admits having used this language with another student, albeit with a benign motive, and insasmuch as "you suck" is language unbecoming a teacher, as respondent contends, respondent has met its burden and Specification II must be upheld. However, the penalty of dismissal for the alleged remark is so disproprtionate to the offense as to be shocking to one's

sense of fairness. Accordingly, the recommendation must be remanded for reconsideration.

SPECIFICATION III

Specification III consists of subcharges (a) through (l), of which (b) was dismissed and (e), (f), (h), and (I) were withdrawn by respondent. The Report states that each of the remaining seven subcharges arise from comments allegedly made by Lackow in his fifth period biology class during instruction on human sexual reproduction, between September and December of 2004, to wit:

a) said to student AO words to the effect (while teaching with a model of female reproductive organs) that he would never see one, so enjoy it, referring to a woman's vagina;

c) said words to the effect that 'I don't want to hear stories of you with your legs up in the air;"

d) said words to the effect that, in reference to masturbation, there are some students in this class who will never leave their rooms;

g) talked to students about how many times he ejaculates;

j) talked to students about humans having sex with animals;

k) talked to students about humans having sex with dead people;

l) talked to students about multiple orgasms.

Specification III (a)

A male student witness for respondent stated that as Lackow was showing the class a diagram of female reproductive organs on an overhead projector, Lackow remarked that "this 'would be the first time' he [the student] would see such a picture" (Notice of Petition, Exhibit 2), testimony corroborated by another student witness for respondent. Lackow does not deny this

remark, and explained in testimony that it was intended as a reprimand to another student entirely, whose response to the diagram had been to announce to the class that he "had that for breakfast this morning." Lackow stated that in an effort to control the disruptive student, he replied that if the student persisted with such language, "you're never going to see one of these" (Notice of Petition, Exhibit 2).

On this basis the Report upholds the finding that Lackow's use of language constitutes conduct unbecoming a teacher. Inasmuch as Lackow admits to the riposte and a witness for respondent corroborates, the Report upholding Specification III a must be sustained. Here too, however, while Lackow's words may have been inappropriate, the harshest penalty of dismissal is disproportionate to the offense and shocks one's sense of fairness. Accordingly, Specification III (a) is remanded for reconsideration.

Specification III (c)

Nor does Lackow deny making the statement alleged in Specification III (c), though here again he testified that the remark was in direct response to disruptive behavior in the classroom. A student witness for respondent testified that Lackow informed another female student in class that "he didn't want to hear stories about her with her legs up in the air" (Notice of Petition, Exhibit 2). Lackow related that during class a female student could be heard describing to a classmates how "'the boy put my legs in the air like this.'" As the Report states, "[Lackow] testified that this female student actually lifted her legs up over her desk and raised them up into the air. It was at this point that [Lackow] told the student in question that 'no one wants to hear stories about you with your legs in the air.'" Lackow further explained that the students were working in groups during class when

> one group of girls were goofing around a little bit . . . one girl was being kind of loud and she all of a sudden said something that – and then the boy put my legs up in the air like this.
>
> Not only did she say it, but she actually lifted her legs up from her desk to actually perform what happened. Upon hearing and seeing this, I said to her no one wants to hear stories about you with your legs up in the air. I said besides the fact that it's not very ladylike, you're supposed to be doing your work (Notice of Petition, Exhibit 2).

The Report does not dispute this explanation and does no more than to refer in passing to the testimony of Mary D'Orio, a probationary English teacher in the adjoining classroom during 2004-2005 who alleges she could overhear portions of Lackow's lessons and "recalled that she had heard [Lackow] yell out to the class '[g]irls, I don't need to hear any stories about you with your legs up" (Notice of Petition, Exhibit 2).

Here, respondent has failed to show how Lackow's reprimand constitutes language or behavior unbecoming a teacher. Inasmuch as the testimony of respondent's witness does not contradict the fuller, contextual account by Lackow, the finding of guilt is arbitrary and capricious and without rational basis in the record. Accordingly, Specification III(c) must be vacated.

Specification III (d)

Respondent offered no more than the testimony of D'Orio, who merely states that Lackow "made a comment to the class that there are some people in this class that would never leave their rooms." Lackow does not deny that during a discussion of safe sex, he remarked that "there are some people who will misunderstand this information and they may not leave the house," and testified that at the time of the remark, he felt it was a harmless joke (Notice of Petition, Exhibit 2).

The Report offers no finding for why this remark, in and of itself, constitutes language unbecoming a teacher during a classroom discussion of safe sex. Given this paucity of evidence and argument in the record, the recommendation that Specification III(d) be sustained is likewise

without rational basis and must be vacated.

Specification III(g)

The Report upholds the allegation that Lackow talked to his students about how many times he ejaculates. However, the Report does not more than to quote probationary teacher D'Orio, who overheard portions of Lackow's lessons and testified to the effect that "while the students would often initiate . . . sexual discussions, [Lackow] appeared to be enjoying it" (Notice of Petition, Exhibit 2). D'Orio had to admit that at no point did she ever hear the word "masturbation" uttered by Lackow (Notice of Petition, Exhibit 2).

The Report is bereft of support for this allegation, Lackow does not admit to it, and the Hearing Officer cites no testimony whatsoever to support a finding of guilt. Accordingly, this finding is without rational basis in the record and is arbitrary and capricious as a matter of law.

Specification III (j)

In sustaining specification III j, the Report finds that D'Orio overheard remarks by Lackow in November 2004 to the effect that "animals don't enjoy having sex and that's why they make strange noises" (Notice of Petition, Exhibit 2). D'Orio recalled that class instruction "progressed into an exchange about sexual intercourse between humans and animals" (*id*).

Lackow does not deny that he discussed bestiality during instruction on human sexual reproduction, but states that it was in response to questions posed by pupils. Lackow's version is confirmed by the Report, stating that Lackow

> insisted that, during a discussion about human fertilization, a student asked whether sex between an animal and a human would result in the birth of a half human-half animal creature. It was in this context that [Lackow] had discussed bestiality with his class. [Lackow] stated that the exchange was limited to scientific aspects of the process and the genetic consequences of such intercourse. He maintained that it was his practice to permit such curiosity from his students, as he did not wish to crush their academic interest by

dismissing their questions. (Notice of Petition, Exhibit 2).

The transcript reveals the following explanation for the lesson by Lackow, who testified that

> We had been talking about the formation of sperm and eggs, when they come together during fertilization, the formation of a zygote. And we get a little bit of genetics in. And one student asked, well, if a human had sex with an animal, say a dog or a cat, would it be a half animal half human? And I said no, something like that can't happen, and they were all wondering why.
>
> So I would explain it to them, you know, when they have a general curiosity I don't like to crush it because if I 'no, no' every question they ask, they won't ask any questions . . . So I said to them the topic you're talking about is called bestiality. It's a sexual disorder in which people want to have sex with animals (Notice of Petition, Exhibit 2).

Notwithstanding this explanation, the Report concludes that the comments were inappropriate. However, the Report is devoid of an evidence or argument as to how this coloquy on cross-fertilization constitutes conduct unbecoming a teacher. Since the allegations of D'Orio do not contradict the fuller account by Lackow, the recommendation that Specification III(j) be sustained is without rational basis in the record and must be vacated.

Specification III (k)

Nor does Lackow deny that the addressed the question of necrophilia during class discussion of human sexuality, but states that this was in response to student questions. Again, the only witness to Lackow's alleged classroom comment about "people having sex with dead people" was teacher D'Orio, who claims to have overheard a story by Lackow about a man who was once arrested for necrophilia. Lackow does not dispute that the topic of necrophilia was raised in class, but testified that the question was raised by students (Notice of Petition, Exhibit 3).

The Hearing Officer's finding of fact on this allegation is sparse and unsupported by testimony for respondent or other evidence in the record. Given that Lackow was carrying out his assigned duty of instruction on the topic of sexual reproduction in the context of a biology class, a

duty which includes response to relevant questions posed by pupils, respondent has not demonstrated that Lackow's language, without more, constitutes conduct unbecoming a teacher pursuant to §3020-a. Accordingly, respondent has failed to meet its burden, and this finding is arbitrary and capricious as a matter of law.

Specification III (l)

Lastly, the Report upholds the allegation that Lackow talked to students in class about women having multiple orgasms. Here, respondent's only witness was a teaching assistant for Ms. D'Orio from the classroom next door, who claims to have overheard Lackow "discuss personal sexual issues, including masturbation and ejaculation" (Notice of Petition Exhibit 2). Lackow testified that the issue was raised by a student and that, as the Report says, he " . . . attempted to provide a scientific explanation as to why females were able to have multiple orgasms whereas it was not possible for men to do so" (Notice of Petition, Exhibit 3).

It is not disputed that classroom instruction included a discussion of female orgasm. The record further reveals that, as Lackow's testified

> we were talking about the male and female reproductive system and I think we were talking about the – that when a man ejaculates, he releases two hundred million sperm per ejaculation. And one student, a male student, said, well – it's not fair. And I said, well what's not fair? And he said, well, why is it that women can have multiple orgasms and men can't? And again the class laughed. And I said, well there's a reason behind that. . . Meiosis takes place within the gonads and the testis, specifically, the epididymis so it takes anywhere between forty five minutes . . . to an hour to make a new batch of viable sperm. So that's why a male can't have multiple orgasms. I mean, his job is to renew the species (Notice of Petition, Exhibit 3).

Here, respondent has shown no rational basis for why class discussion of orgasm and ejaculation constitutes language unbecoming a school teacher in the context of instruction on human sexual reproduction. Accordingly, this charge must be vacated.

Notice

The Report maintains that Lackow was on notice from the Science Department and had been repeatedly warned by the principal and vice principal that he should "refrain from making inappropriate comments to his students" (Notice of Petition, Exhibit 2). Yet the Report merely states that Assistant Principal Ira Cohen (AP Cohen) testified that Lackow's instruction on human reproduction was beyond the scope of the Regent's Exam and for that reason he "would not have approved such an amended course outline" (Notice of Petition, Exhibit 2). AP Cohen additionally testified that he once observed a discussion of "farting" in the human biology class and that he informed Lackow that the lesson was inappropriate.

In fact, the record reveals that a Science Department Observation Report (the Observation) signed by AP Cohen in April, 2004, finds Lackow's lesson in human reproduction was "satisfactory" (Petitioner's Reply, Exhibit B). Notably, the Observation was based on a class discussion of "how the male reproductive system works," and Lackow's "do-now" on the blackboard stating ["w]hen a man gets excited, he becomes erect. How does this happen? Keep it clean." The Observation states that the topic and treatment were entirely fitting, and AP Cohen commended Lackow for achieving the aim of the lesson. While the Observation concludes that Lackow's instruction on male sexual reproduction was satisfactory, the evaluation recommends that Lackow use "proper terminology" in discussing human reproduction and not "accept slang and vulgarities" used by the students (Petitioner's Reply, Exhibit B). Nowhere in the Observation is Lackow reprimanded for his use of language, nowhere is he put on notice of a dissatisfactory performance, and nowhere is he warned about potential adverse consequences for his use of slang.

Furthermore, on cross-examination AP Cohen testified that Lackow's lesson plan was

appropriate, that he had no memory of discussing the fifth period biology class with Lackow prior to the academic year in question (Notice of Petition Exhibit 3), and that AP Cohen would not have objected to class instruction on human reproduction (*id*). AP Cohen also admits that Lackow "adjusted his teaching style" to Cohen's earlier suggestions (*id*). Yet on cross examination AP Cohen could not recall any of Lackow's alleged use of improper terminology and does not deny observing Lackow correct student references to "boners" as improper and anatomically inaccurate (Notice of Petition, Exhibit 3).

Conclusion

The record reveals that Lackow was carrying out his duty of instruction in biology and human sexual reproduction in a classroom dominated by obstreperous teenage pupils. AP Cohen readily admits that there were up to 34 students in Lackow's 2004 biology class, most of whom had failed the class previously (Notice of Petition, Exhibit 3). AP Cohen admitted on cross-examination that the fifth period biology class included a number of students who needed a single additional science credit to graduate and that students had been placed in Lackow's class who "shouldn't have been in there" (Notice of Petition Exhibit 3). A student in Lackow's biology class described her peers as "extremely disruptive," "loud," "obnoxious," and "would always bother him . . . always make comments" (Notice of Petition, Exhibit 3). Lackow testified that one of his female students referred to him as a "fucking homo bastard," and that when he sought to have her suspended the student countercharged that Lackow had insinuated in class that she was a "hooker" (Notice of Petition, Exhibit 3). These factors could certainly mitigate the severe penalty of dismissal.

Furthermore, nothing in the record contradicts Lackow's claim that most of his alleged remarks were in direct response either to questions posed by students during instruction on human

sexual reproduction, or efforts to redirect class discussion toward appropriate subject matter. Indeed Lackow is charged only with responding to inappropriately worded questions from students in colloquial language the students could understand. Rrespondent's own witness, investigator Mr. Anderson, conceded on cross examination that the comments alleged to have been made by Lackow were "in response to something that a student asked or said in class" where human sexuality was the topic of instruction, and that the remarks were not initiated by Lackow (Notice of Petition, Exhibit 3).

The record also confirms that in some six years preceding the academic year in question, not a single student, parent, or teacher came forward to complain about Lackow's performance as a teacher. Lackow is not charged with fraud, theft, or the commission of a felony, touching or inappropriately disciplining a student, nor is he alleged to have intimidated, harrassed, or made advances to a student.

Moreover, the record fails to show that Lackow was on notice that he was subject to dismissal for his use of language. There is thus no rational basis for the conclusion of the Report that he is "incapable of remedying his behavior" or that "[t]here is no indication that [Lackow] would alter his teaching if reinstated" (Notice of Petition, Exhibit 3).

Under these circumstances, the penalty of dismissal is so disproportionate to Lackow's conduct and so grave in its impact on his livelihood, that in view of seven years of service and documentation of satisfactory teaching, firing him "shocks one's sense of fairness and constitutes an abuse of discretion as a matter of law" (*Dieffenthaler v New York City Dept of Educ.*27 AD 3d 347 [1st Dept 2006]), *internal citations omitted*).

Accordingly, Specifications III(c), (d), (g), (j), (k) ,and(l) are hereby vacated, and

Specifications I, II, and III(a)are remanded for reconsideration consistent with this opinion.

This reflects the decision and order of this court.

Dated: January , 2007

HON. MARY ANN BRANDER, J.S.C.

J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION