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

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Index Number : 106423/2008

TIERNEY, ANN

VS.

NYC DEPT. OF EDUCATION

SEQUENCE NUMBER : 001

VACATE OR MODIFY AWARD

EILEEN A. RAKOWER PART Part 5
J.S.C.

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 ...	1, 2, 3, 4, 5,
Answering Affidavits — Exhibits _____	6, 7, 8, 9
Replying Affidavits _____	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
NOV 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

IN ACCORDANCE WITH THE SIGNED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/25/08

EILEEN A. RAKOWER J.S.C.
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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ANN TIERNEY,

Petitioner

In the Matter of an Application
Pursuant to C.P.L.R. Article 75

Index No.
106423/08

Petitioner,

Mot. Seq. 001

-against-

Decision/Order

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

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HON. EILEEN A. RAKOWER:

Petitioner, Ann Tierney ("Tierney") brings this petition to vacate an arbitration decision terminating her employment from the Department of Education ("DOE") as a tenured guidance counselor based on findings that she took a handbag from a co-worker and removed from it approximately $140.00. ("DOE") cross-moves to dismiss petitioner's motion to vacate, pursuant to §3020-a(5) of the Education Law and sections 404(a) and 7511, as well as Rule 3211(a)(7) of the CPLR.

In support of her motion, petitioner has submitted the following documents: (1) a verified petition and notice thereof; (2) an affirmation in support of the verified petition (attaching the arbitrator's opinion and award and an affirmation of service of the petition, notice and exhibits on opposing counsel); (3) an amended verified petition (attaching the arbitrator's opinion and award, the transcripts of the arbitration proceedings, as well as an exhibit attaching various documents in the case (including petitioner's written statement from the date of the incident, reports of petitioner's arrest and the complainant's subsequent police report, etc.); and (4); petitioner's memorandum of law in support of the motion to vacate the award.

CPLR §7510 states:

The court shall confirm an award upon application of a party made

> within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.

The grounds for vacating an award is set out in CPLR §7511(b). That section states:

> 1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds the rights of that party was prejudiced by:
>
> > (I) corruption, fraud or misconduct in procuring 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.

The determination petitioner seeks to vacate resulted from consideration of the following facts and circumstances. On the morning of September 20, 2005, petitioner attended a meeting for her school's Academic Intervention Team ("AIT"). The meeting began at nine a.m. and ended approximately an hour later, with some members remaining in the room for a second meeting. Petitioner, who left after the first meeting, was observed in the ladies room by Andrea Ingram ("Ingram") who had also been at the AIT meeting. Ingram saw respondent with a pink handbag and recognized the bag as belonging to Deborah McHale ("McHale"), a staff developer who had been at the AIT meeting and remained in the room for the second meeting. Ingram claims to have recognized the bag because she was present when McHale purchased it. Another educator from the AIT meeting, Maria Papoutsakis ("Papoutsakis") also went to the ladies room where she found the handbag unattended. Papoutsakis returned the handbag to McHale, who, upon checking the contents, claimed that $140.00 was missing.

Assistant Principal Catalano ("Catalano") called the police, and at approximately one p.m., petitioner was interviewed by members of the NYPD and wrote a statement in which she denied memory of taking the money (though not

having taken it) and suggested that her behavior was impacted by having taken the prescription drug Klonipin along with Ambien the night before.[1] After school, McHale went to the police precinct and filed a formal complaint against petitioner, and, the following day, several police officers arrested petitioner at the school, charging her with Petit Larceny and Criminal Possession of Stolen Property in the 5th Degree. Petitioner pled guilty to the lesser offense of Disorderly Conduct.

The DOE's Office of Special Investigations ("OSI") also began an investigation of the matter, and Investigator Benjamin Francis ("Francis") interviewed Ingram, Papoutsakis, Catalano, and McHale, as well as petitioner and the investigating NYPD officer Savino. Francis then issued a report substantiating the allegation that petitioner took McHale's handbag and removed money from it. Principal Shelia Gorski ("Gorski")[2] received a copy of the OSI report and met with petitioner (who was accompanied by a UFT representative) on January 31, 2006.[3] Petitioner avoided discussing the OSI findings with Gorski, who then adopted those findings. The DOE then charged petitioner under Education Law §3020-a, contending that termination was the only appropriate penalty for the serious misconduct committed by the petitioner.

Pursuant to compulsory arbitration, the matter was submitted to Hearing Officer Arthur A. Riegel, ("Riegel"). On April 19, 2008, following a twelve day hearing, Riegel issued a forty-six page opinion and award sustaining two charges against the petitioner, dismissing others, and ultimately finding that the DOE's "...case in chief developed a sufficient quantum of evidence to support a finding of guilt to Specification 1 (A&B)."

"It is well settled that judicial review of arbitration awards is extremely limited." (*Wien & Malkin LLP v. Helmsley Spear, Inc.*, 6 NY3d 471, 479[2006], *citing United Paperworkers Intl. Union AFL-CIO v. Misco, Inc.*, 484 U.S.29 [1987].) An arbitration award must be upheld when the arbitrator "offers even a barely colorable

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[1] Petitioner tendered $123.00 (after borrowing some money from Lilia Bacino), to Police Sergeant Savino. Petitioner claims she did this because Savino threatened that failing to do so would result in her being arrested.

[2] Who became principal of PS 143Q on September 25, 2005, after the incident.

[3] On February 7, 2006, Gorski wrote petitioner a letter summarizing what petitioner said at the meeting.

justification for the outcome reached." (*Id.*) "An arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice." (*Id.* at 479-480).

Education Law §3020-a(5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR §7511. Determinations rendered pursuant to compulsory arbitration must be in accord with due process and supported by adequate evidence in addition to being rational and satisfying the arbitrary & capricious standards of Article 78. (*Lackow* at 567; *See also Tarasow v. NYC Department of Education* 21 Misc.3d 1113(a), 2008 WL 4602526 at *6 [Sup. Ct. 2008].). The party challenging an arbitration determination has the burden of showing its invalidity. *Lackow v. The Department of Education*, 51 A.D.3d 563 at 568 (First Dept. 2008). The First Department, in *Lackow*, also found that "[a] hearing officer's determinations of credibility...are largely unreviewable because the hearing officer observe[s] the witnesses and [is] 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." (*Id.* at 568.).

A review of Arbitrator Riegel's report demonstrates no indication that the decision rendered was arbitrary, capricious or subject to any of the defects set forth in CPLR §7511. Instead the report indicates that the arbitrator's determination was supported by adequate evidence. The petitioner was charged with two specifications, and Hearing Officer Riegel explained his reasons for dismissing part of the first charge and the second charge in its entirety.[4] As to the charges the hearing officer found to be sustained (that petitioner (1) took the handbag without permission and (2) removed approximately $140.00 without permission), the arbitrator's report explains that Hearing Officer Riegel's review included a comparison of contemporaneously written statements, as well as Francis' OSI report, and found them to be largely consistent with hearing testimony presented over two years later. The arbitrator also noted that no evidence had been presented to suggest that McHale might have left her purse in the restroom; rather, the evidence presented by the DOE compelled a finding

[4] Stating that, although the petitioner's conduct in leaving the purse in the ladies' room reflected "...poor judgment and a lack of consideration," that the specification did not constitute misconduct per se. The arbitrator further held that the second specification, concerning petitioner's arrest for violations of Penal Law §165.40 and §155.25 and her admission of guilt did not rise to a chargeable level of conduct under Education Law §3020-a.

that petitioner had taken McHale's handbag to the ladies' room.[5] The arbitrator also explained the reasons for his credibility findings[6] and clarified that he did not consider testimony of NYPD Sergeant Savino, who did not testify.[7]

Petitioner's claims of not having been afforded due process are unavailing. In addition to stating his reasons for discrediting petitioner's testimony, Hearing Officer Riegel further described why the record did not support petitioner's assertions that her interview with the NYPD was coercive. Hearing Officer Riegel also considered but rejected petitioner's complaint that OSI Investigator Francis coerced her into executing a statement admitting the charges against her. The arbitrator found Francis' report to substantiate the allegation that petitioner removed money from Ms. McHale's purse, noting that petitioner had her union representative present during the entire OSI interview and never asked to leave nor indicated that she felt compelled to remain.[8] The arbitrator also considered the fact that petitioner's union representative was present when petitioner wrote the statement in which she apologized for her conduct and could have advised her against executing an incorrect or coerced statement.[9] Moreover, the arbitrator noted that Francis was not present when petitioner wrote the statement. The hearing officer also expressed his cause for

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[5] Hearing Officer Riegel further notes that petitioner presented witnesses as to her character at the hearing, but neither of them was personally familiar with the incident alleged.

[6] One reason given for discrediting petitioner's testimony was her statement that she found the handbag in the bathroom but did not return it out of a concern she might be suspected of stealing. The hearing officer noted that such a statement was suspect, particularly in light of the fact that, testimony of petitioner's own witness, on cross, revealed that educators at the school were not commonly accused of stealing.

[7] The arbitrator determined that both allegations of conduct of Sergent Savino and his statement (that petitioner admitted to stealing) constituted hearsay, and gave neither any weight because Sergeant Savino did not testify during the hearing. Instead, the hearing officer relied on the testimony of Sergeant Cantor (another NYPD member investigating the complaint), finding his testimony credible to the extent he used his experience as a detective to analyze the information provided to him during his interview of petitioner.

[8] Hearing Officer Riegel also noted that, although the interview was "unusually long," a portion of that time was spent by the petitioner drafting a statement.

[9] The arbitrator also noted that petitioner did not deny any wrongdoing in her written statement, but instead asserted that her behavior was a result of having taken the prescription drug Klonopin in addition to Ambien the previous night.

rejecting petitioner's stated reason for not discussing the OSI report with the principal, stating "[i]t is difficult to understand how a veteran of the school system would honestly believe that a Certificate of Disposition to a Violation in a criminal proceeding obviated the need for her to respond to matters that could lead to disciplinary charges in a Education Law §3020-a proceeding." Finally, the arbitrator considered that, despite petitioner's having been represented by an attorney in both the criminal and OSI proceedings, she never raised a due process issue until nearly two years later at the hearing.

In determining the appropriate penalty, Hearing Officer Riegel noted the importance of respect and honor among school staff members in enabling them to work cohesively in a cooperative manner. Moreover, he considered that petitioner's conduct precluded her from serving as a proper role model for her students. Given that petitioner was employed as a guidance counselor, the decision to terminate her under these circumstances does not shock the conscience. The First Department has held that "...acts of moral turpitude committed in the course of public employment are an appropriate ground for termination of even long-standing employees with good work histories." (*Chaplin v. NYC Department of Education*, 850 N.Y.S.2d 425, 427 [First Dept. 2008]; *See also Pell v. Board of Education*, 34 N.Y.2d 222, 234-5 [1974] [noting that severe sanctions for certain offenses, including those that are "morally grave" may not shock the conscience, even if the amount of money at issue is small].)

Wherefore it is hereby

ORDERED that petitioner's motion to vacate is denied; and further

ORDERED that respondents' cross motion to dismiss is granted.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: November 25, 2008

EILEEN A. RAKOWER, J.S.C.