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

PRESENT: HON. MARILYN SHAFER, JSC PART 8

Justice

Index Number : 116017/2008

JUSTE, VALERY

VS.

KLEIN, JOEL I.

SEQUENCE NUMBER : # 001

VACATE

INDEX NO. 116017-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

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 petitioner's dismissed pursuant to attached Decision

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

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).

Dated: 7/28/09

MARILYN SHAFER J.S.C.

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 8

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In the Matter of the Application of
VALERY JUSTE,

Petitioner,

Index No.: 116017/08

-against-

DECISION

JOEL I. KLEIN, Chancellor of the Department of Education; THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

Respondents,

To Vacate a Decision after a Hearing Held Pursuant to Education Law § 3020-a(5) and CPLR 7511.

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MARILYN SHAFER, J.:

BACKGROUND

Petitioner moves, pursuant to Education Law § 3020-a (5) and CPLR 7511, to vacate and set aside a hearing officer's decision, based on the hearing officer having exceeded his jurisdiction; having been arbitrary and capricious; and having ordered a penalty that is irrational and shocking to the conscience. Respondents cross-move, pursuant to CPLR 7511, 404 (a) and 3211 (a) (5) and (7), and Education Law § 3020-a, to dismiss the petition.

Petitioner was a tenured school teacher, formerly employed by the New York City Department of Education. During the

academic years 2004 through 2006, petitioner was charged with numerous instances of misconduct, neglect of duty, incompetence, and unbecoming conduct, resulting in four specifications being charged against her. These specifications resulted in a disciplinary hearing, presided over by Hearing Officer Arthur A. Riegel (Riegel). Petitioner was represented by her union counsel, and the hearings were conducted on March 7, April 7, 9 and 11, May 9, 12, 14, and 19, and June 13, 2008, with closing arguments being heard on June 24, 2008.

On November 4, 2008, Riegel rendered his decision, in which he found petitioner guilty of the following charges:

> "Specification 1: From about September 2005, through about January 2006, Respondent [petitioner herein]:
> a. yelled in the faces of WA, DO, SB and AL stating words to the effect of *shut your mouths*.
> g. talked about Students DO and JB to the class and instructed the class that they should watch out for Students DO and JB and to report to her if they fooled around.
> Specification 2: On or about January 25, 2006, Respondent [petitioner herein] pushed Students DO and JB back into their seats.
> Specification 3: On or about January 31, 2006, Respondent [petitioner herein] called Student JB:
> a. a *pig*
> b. *stupid*
> c. *dumb*"

Reigel dismissed Specification 1, subsections (b), (c), (d), (e) and (f), and Specification 4 in its entirety.

In concluding his findings, Riegel recommended that petitioner be dismissed. Riegel based his penalty on three issues: (1) petitioner failed to assume any responsibility for

her misconduct, instead blaming the students and administration; (2) petitioner was unduly adversarial and confrontational during the hearing, despite the fact that she was represented by counsel; and (3) many of the charges were similar to charges filed against her in 2003, for which petitioner was found guilty and punished.

In the 2003 proceeding, that hearing officer recommended that petitioner be suspended for two months, that she be assigned to upper grades, and that she receive counseling. In that recommendation, petitioner was "advised that any proven repetition of the type of behavior for which she has been found guilty herein would be viewed by this Hearing Officer as grounds for termination." Cross motion, Ex. 1.

On November 21, 2008, petitioner was notified by letter that she was terminated.

In her petition, petitioner alleges that the evidentiary support enunciated by Riegel in his decision is not warranted by a reading of the transcripts of the hearings. In sum, petitioner asserts that Riegel believed the witnesses against her, and did not afford her testimony the weight that it deserved. She also says that much of the evidence was hearsay, and that Riegel was biased in believing testimony against her.[1]

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[1] Petitioner did not provide the court with full transcripts of the proceedings, but stated that such were available upon the court's request. Respondents, however, provided the complete transcripts of each session of the hearings.

DISCUSSION

Respondent's first contention is that this petition is time-barred, pursuant to the provisions of Education Law § 3020-a (5), which states:

> "Not later than ten days after receipt of the hearing officer's decision, the employee or the employee board 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."

According to the calculations supplied by respondents, and not contradicted by petitioner, the tenth day after notice was mailed to petitioner's counsel would have been November 27, 2008, Thanksgiving, meaning that the petition should have been filed no later than Friday, November 28, 2008. The petition was filed the immediately following Monday, December 1, 2008.

Since the tenth day fell on the day after Thanksgiving, when many people are away from work, it is reasonable that the petition was filed on the first work day following what many people take as a long holiday weekend. Consequently, using the court's discretion and common sense, respondent's statute of limitations argument is found unavailing.

However, the court does grant respondent's cross motion to dismiss the petition.

> "Education Law § 3020-a (5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR 7511. Under such review an award may only be vacated on a showing of misconduct, bias, excess of power or procedural defects [internal quotation marks

omitted]."

Lackow v Department of Education (or "Board") of City of New York, 51 AD3d 563, 567 (1st Dept 2008).

> "Petitioner was charged with making [certain] statements, and the record supports the hearing officer's conclusions that [she] made them. Whether the making of the statements, individually or in the aggregate, justified petitioner's removal is a separate issue."

Id. at 567-568.

The court has read and reviewed the entire transcript of the hearings in question, and finds that there is sufficient evidence to support the hearing officer's findings of facts. Petitioner's main objection to the evidence presented at the hearings is that she believes that all of the witnesses were prejudiced against her,[2] that they were not credible, and that the hearing officer failed to believe her testimony that the students were the culpable parties.

"It is basic that the decision by the Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts, who are disadvantaged in such matters because their review is confined to a lifeless record."

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[2] Part of petitioner's argument regarding witness bias is based on the recommendations appearing in the 2003 proceeding, in which that hearing officer recommended that petitioner be assigned to upper grades. Petitioner states that when she was thereafter assigned to the school in which the subject occurrences took place, she was assigned to teach first grade for her first year, and only later being assigned to teach fifth grade classes. Petitioner asserts that this demonstrates the school administration's bias against her. However, evidence indicates that the school was not aware of the earlier administrative decision when petitioner first started teaching there, and, once they did learn of the recommendations, petitioner was assigned to the fifth grade.

Berenhaus v Ward, 70 NY2d 436, 443 (1987). Further, the court's review of the complete transcript "does not support the inference that the witnesses upon whose testimony the hearing officer relied were incredible as a matter of law." *Lackow v Department of Education*, 51 AD3d at 568.

Further, "[p]etitioner has failed to meet [her] heavy burden of showing arbitrator misconduct or partiality by clear and convincing proof." *In re Moran v New York City Transit Authority*, 45 AD3d 484, 484 (1st Dept 2007). Petitioner's argument regarding bias is based on her disappointment that the hearing officer did not believe her, and no indication of bias appears in the record of the hearings.

Having considered petitioner's argument regarding the arbitrator's decision as being arbitrary and capricious, and the argument that the arbitrator was in some way biased, and finding those arguments not to be supported by the record, the court must now determine whether the penalty imposed, the termination of a tenured teacher, shocks the conscience and is so irrational as to warrant vacatur. *Green v New York City Department of Education*, 17 AD3d 265 (1st Dept 2005).

> "It is now well settled that an administrative penalty is not to be set aside ... unless it is so clearly disproportionate to the offense and completely inequitable in light of the surrounding circumstances as to be shocking to one's sense of fairness [internal quotation marks and citations omitted]"

Matter of Board of Education of City School District of City of

New York v Mills, 250 AD2d 122, 126 (3d Dept 1998).

The court notes that, in 2003, when she was found guilty of similar charges, petitioner was warned that a subsequent finding of guilt for similar charges would warrant her dismissal. Under such circumstances, the court finds that the penalty, although severe, does not shock the conscience. *Lackow v Department of Education*, 51 AD3d 563, *supra* (a tenured teacher was terminated after having been previously warned in writing about the inappropriateness of his behavior). The award of an arbitrator need not conform to the traditional relief that a court might grant. *Board of Education of Central School District No. 1 of Towns at Niagara, Wheatfield Lewiston & Cambria v Niagara-Wheatfield Teachers Association*, 46 NY2d 553 (1979).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that Valery Juste's petition to vacate the hearing officer's decision is denied and the proceeding is dismissed; and it is further

ORDERED and ADJUDGED that respondents' cross motion to dismiss the petition is granted.

Dated: 7/28/09

ENTER:

Marilyn Shafer, J.S.C.