Matter of Moorjaney v New York City Bd./Dept. of Educ.
2009 NY Slip Op 31975(U)
August 26, 2009
Supreme Court, New York County
Docket Number: 113794/08
Judge: Marcy S. Friedman
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SCANNED ON 9/1/2009

[* 1]

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

PRESENT: **MARCY S. FRIEDMAN** PART 57

Index Number : 113794/2008
MOORJANEY, YOLANDA
VS.
DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

INDEX NO. 113794/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

on this ~~motion to~~ petition /for Art. 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Memor of law M1–M3

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

FILED
SEP - 1 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/26/09

MARCY S. FRIEDMAN 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 57

PRESENT: Hon. Marcy S. Friedman, JSC

-- x

IN THE MATTER OF YOLANDA MOORJANEY,

Petitioner,

Index No.:113794/08

- against -

DECISION/ORDER

NEW YORK CITY BOARD/DEPARTMENT OF EDUCATION,

Respondents.

-- x

In this proceeding pursuant to CPLR Article 75, petitioner Yolanda Moorjaney, a former tenured special education teacher employed by respondent New York City Board of Education ("BOE"), seeks to vacate an award, dated September 23, 2008, issued after an arbitration hearing. The award sustained specifications of writing racial epithets and derogatory sexual language on the walls of a school bathroom and imposed the penalty of termination of petitioner's employment. Respondent cross-moves to dismiss the petition for failure to state a cause of action and to confirm the award of the hearing officer.

The standards for review of the arbitration award are well settled. Pursuant to Education Law § 3020-a(5), judicial review of the hearing officer's findings is subject to CPLR 7511 which limits the grounds for vacatur of an award to misconduct, partiality, excess of power or procedural defects. However, where the arbitration, as here, is compulsory, "judicial scrutiny is stricter than that for a determination rendered where the parties have submitted to voluntary

arbitration. The determination must be in accord with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78. The party challenging an arbitration determination has the burden of showing its invalidity." (Lackow v Dept. Of Educ. of City of New York, 51 AD3d 563, 567-568 [1st Dept 2008] [internal citations omitted]; Hegarty v Board of Educ. of the City of New York, 5 AD3d 771 [2d Dept 2004].)

The award in the instant case satisfies these standards. The hearing officer sustained two charges that on March 12, 2004 petitioner entered the bathroom at PS 256 and wrote highly offensive epithets on the bathroom walls. In sustaining these charges, the hearing officer found credible the testimony of New York City Police Detective William Ambery as to what had occurred. Detective Ambery, a member of the New York City Police Department's Hate Crime Task Force, was assigned to be the primary investigator of what appeared to be crimes motivated by bias at PS 256. He testified that at 7:00 am on the morning of the incident he, along with Detective Kahn who was also part of the investigation and the custodian Robert Perez, went inside and visually inspected the bathroom for graffiti and found none. Detective Ambery further testified that he continually observed the entrance into the bathroom area beginning shortly after 7:00 am, that no one entered the hallway leading to the bathroom area until petitioner entered the bathroom at approximately 7:50 am, that petitioner remained inside the bathroom for a couple of minutes and then exited, and that he immediately entered the bathroom and observed the graffiti written in black magic marker. He also testified that no one else entered the bathroom during that time and a black magic marker was found on petitioner's person after the incident. Thus, contrary to petitioner's contention, the hearing officer did not merely receive hearsay evidence as

to the BOE's claims, but heard testimony from the detective who investigated the incident.

The hearing officer also found that petitioner's cousin was an interested witness and lacked the qualifications to support his testimony that it would have been impossible for Detective Ambery to have seen petitioner entering the bathroom or to have conducted uninterrupted surveillance for 55 minutes. In addition, the hearing officer found credible Detective Ambery's statement that before giving his testimony, he did not review criminal records of petitioner that had been sealed or should have been sealed. (See Detective Ambery's transcript at 72-74.) Petitioner fails to identify particular records that should have been sealed and that she claims Detective Ambery improperly reviewed. In any event, even if Detective Ambery reviewed sealed records, such review is an insufficient basis for annulment of this decision, as the hearing officer also relied on the Detective's testimony from memory as to his investigation on the date of petitioner's arrest. (See generally Matter of Charles Q. v Constantine, 85 NY2d 571 [1995].)

A hearing officer's determinations of credibility are "largely unreviewable" because the hearing officer is in the position to observe the demeanor of the witnesses and form an impression of their candor or deception. (See Lackow, 51 AD3d at 568.) Here, the record does not contain support for the inference that Detective Ambery, the principal witness on which the hearing officer relied, was incredible as a matter of law. The court must therefore defer to the hearing officer's findings of credibility. (See id.)

The court is also unpersuaded by petitioner's contention that she was denied due process. She had an extensive hearing over fourteen days, during which she was represented by counsel and had the opportunity to confront and cross-examine witnesses. Petitioner submits no support

for her contention that her due process rights were violated because BOE did not produce certain logs or sign-in sheets for personnel in the building. Nor does petitioner produce any support for her claim that the investigation was inadequate and the hearing officer flatly dismissed this argument as mere conjecture.

Petitioner also fails to submit authority in support of her contention that, based on her acquittal in the criminal trial, respondent's witness should not have been found credible and the specifications should have been dismissed. As the hearing officer correctly noted, the burden of proof standard in a criminal trial is proof beyond a reasonable doubt rather than the usual civil standard of proof by a preponderance of the evidence.

The court further finds that the penalty of termination is not so disproportionate to the offense as to shock the court's sense of fairness. (See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1, 34 NY2d 222 [1974].) Although petitioner had a satisfactory record of performance evaluations and apparently had never before been the subject of disciplinary charges, the penalty of termination is not excessive given the seriousness of the charges that were sustained and the completely inappropriate nature of petitioner's conduct in a school setting. (See Lackow, 51 AD3d at 569.)

It is accordingly hereby ORDERED that respondent's cross-motion is granted to the extent of dismissing the petition; and it is further

ORDERED that the award, dated September 23, 2008, rendered in favor of respondent New York City Board of Education and against petitioner Yolanda Moorjani is confirmed.

This constitutes the decision, order, and judgment of the court.

Dated: New York, New York
August 26, 2009

MARCY FRIEDMAN, J.S.C.

FILED
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NEW YORK