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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 103209/2008
GABRIEL, ALENA
VS
NYC DEPT. OF EDUCATION
Sequence Number : 001
VACATE OR MODIFY AWARD

INDEX NO. _____
MOTION DATE 6/23/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

...is motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-6
Replying Affidavits	7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

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).

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 9/10/09

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

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

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 54

----------X

In the Matter of the Application of
ALENA GABRIEL,

Index No.:103209/2008

Petitioner,

For an Order Pursuant to Article 75 of the
Civil Practice Law and Rules

DECISION and ORDER

- against -

NEW YORK CITY DEPARTMENT
OF EDUCATION,

Respondent.

----------X

KORNREICH, SHIRLEY WERNER, J.:

Petitioner, Alena Gabriel, moves to vacate or modify an arbitration award dated February 13, 2008, finding that petitioner had committed corporal punishment while teaching in her third grade class, and recommending that petitioner be terminated from her employment with the respondent NYC Department of Education (DOE).

I. *Background*

This case stems from an April 18, 2005 incident between two boys who were allegedly misbehaving in Petitioner's third grade class at PS 46 in Manhattan. The incident began when one of the boys ("Boy #1") was playing with another child's toy and distracting the class. When Gabriel could not get the boy to refrain from distracting the class, she attempted to remove him from the classroom. At the classroom door, another boy ("Boy #2") in the class, intervened and the two boys' heads collided. No injuries were sustained by the boys.

However, Gabriel was charged by the DOE with four specifications (charges) related to using excessive or unnecessary force and yelling at the students. She had not previously been charged with engaging in corporal punishment during her eighteen year tenure with the DOE. Petitioner moved to dismiss the charges on the grounds that DOE violated Chancellor's Regulation A-420 and Gabriel's due process rights. An impartial hearing officer was designated to hear the matter and serve as an arbitrator (Deborah M. Gaines, Esq.). This process is compulsory pursuant to the applicable rules and regulations and the collective bargaining agreement between petitioner's union and the DOE. During the six days of hearings, both parties called and cross-examined witnesses and submitted documents into evidence.

The arbitrator issued a 37 page decision on October 4, 2007. She denied Gabriel's motion to dismiss, finding that the record as a whole did not support the finding that DOE violated Chancellor's Regulation A-420 or Gabriel's due process rights. The arbitrator determined that Gabriel was guilty of screaming, grabbing and pushing the two children and causing their heads to collide, but that there was no credible evidence to support the charges that Gabriel kicked, choked or struck the children. Nevertheless, the arbitrator found just cause for terminating Gabriel from her employment with the DOE.

II. *Discussion*

This Court's jurisdiction to vacate or modify an arbitration award is controlled by CPLR 7511(b), which provides,

> An arbitration 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 that the rights of that 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.

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." *Lackow v. Department of Educ. (or "Board") of the City of New York*, 51 A.D.3d 563, 567-568 (1st Dept 2008), *quoting Austin v. Board of Educ. of City School Dist. of City of N.Y.*, 280 AD2d 365 (2001). The decision by the Hearing Officer to credit the testimony of a witness is largely unreviewable by the courts. *See Lackow v. Department of Educ. (or "Board") of the City of New York*, 51 A.D.3d 563, 568 (1st Dept 2008)

Where, as here, the parties have submitted to compulsory arbitration, judicial scrutiny is stricter than that for a determination rendered where the parties have submitted to voluntary arbitration. *Id.; see Matter of Motor Veh. Acc. Indem. Corp. v. Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 (1996); *Cigna Prop. & Cas. v. Liberty Mut. Ins. Co.*, 12 AD3d 198, 199 (2004). Thus, 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. *Motor Vehicle Mfrs. Ass'n v. State*, 75 NY2d 175, 186 (2002). The party challenging an arbitration determination has the burden of showing its invalidity. *Caso v. Coffey*, 41 NY2d 153, 159 (1990).

Finally, it is well settled that an administrative sanction must be upheld unless it '"shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law."' *Matter of Diefenthaler v. Klein*, 27 A.D.3d 347, (1st Dept 2006), *quoting, Matter of Featherstone v. Franco,* 95 NY2d 550, 554 (2000); *see Matter of Pell v. Board of Educ.,* 34 NY2d 222 (1974). A sanction shocks the judicial conscience when it is so grave in its impact that it is disproportionate to the offense. *Matter of Pell, supra* at 232-234). *Kreisler v. N.Y. City Transit Auth.*, 2 NY3d 775 (2004); *Lagala v.. N.Y. City Police Dep't*, 286 AD2d 205 (1st Dept 2001) (sanction of dismissal disproportionate where no evidence petitioner's misconduct involved dishonesty, venality or threat to public safety).

The court finds no basis on which to vacate or modify the arbitrator's decisions on the motion to dismiss and on the merits. These include the decisions that: (1) the record as a whole does not support the finding that DOE violated Chancellor's Regulation A-420 or Gabriel's due process rights; and (2) there is a rational basis in the record for the arbitrator's decision finding Gabriel guilty of Specifications 1.4-1.6. 1.9-1.10, 2.1, 2.6-2.7, 3 and 4. The penalty of termination imposed by the arbitrator is, however, disproportionate to the severity of the offense and "shocks the conscience."

Motion to Dismiss

Chancellor's regulation A-420 provides, in pertinent part, that an incident be telephoned in before an investigation is begun, that the accused be given copies of the statements, and that the "person alleged to have engaged in corporal punishment must be afforded an opportunity to appear with representation and address the allegations upon 48 hours written notice prior to any action being recommended or taken." Although Gabriel was reassigned before meeting with her

accusers after 48 hours written notice, removal from the classroom is authorized by the regulation. The record also supports the arbitrator's findings that Gabriel was provided the witness statements and that DOE's preliminary investigation was fair under the circumstances.

The Merits

The arbitrator's decision was based on her assessment of the witness' credibility. Arbitrators assigned as Hearing Officers pursuant to Education Law § 3020-a, like other arbitrators, must be afforded broad discretion in determining witness credibility. The testimony of the boys, to the extent it established that Gabriel shoved and pushed the boys, was corroborated by their classmates, and the arbitrator found Gabriel incredible when she denied using physical force other than resistance. The decision on the merits stands.

The Penalty

Petitioner argues that the Arbitrator exceeded her power by increasing the Petitioner's punishment to termination of her DOE position based on the Arbitrator's finding that the Petitioner "failed to show remorse" for her conduct. Petitioner argues that this was beyond the Arbitrator 's power because the relevant Education Law statute contains no provision for increasing the punishment where remorse is not shown.

Petitioner argues that the punishment she received "shocks the conscience" because it was excessive in light of: (1) Petitioner's more than seventeen years of satisfactory service to the DOE; (2) the NYS School Boards Association view that in corporal punishment arbitrations, termination will not result if the incident resulted from either student provocation or was a response to the heat of the moment; (3) The only witnesses to the incident were third grade children whose testimony was inconsistent; (4) Petitioner was forced to fend off the children at

the classroom door when the second boy intervened; and (5) The Arbitrator's determination that Boy #1's testimony that petitioner choked and slapped him was "exaggerated."

Respondent argues that Petitioner's punishment does not "shock the conscience" because Petitioner's lack of remorse indicated that punishment short of Petitioner's termination would not prevent a similar incident from occurring in the future. Respondent further argues that the arbitrator carefully considered the testimony of all the people involved with the incident and found some testimony of both the third grade children and the Petitioner to be unconvincing.

At the outset, the arbitrator found Gabriel's testimony of self defense incredible. There is nothing in the record establishing that this finding was irrational or arbitrary and capricious. Nor did the arbitrator exceed her power by considering Gabriel's lack of remorse in fixing the penalty. *See Matter of Binghamton City School Dist. (Peacock)*, 33 A.D.3d 1074, 1077 (3d Dept), *appeal dismissed by*, 8 N.Y.3d 840 (2007) (rejecting two-year suspension and observing that "[u]ntil respondent acknowledges the harm he has caused and undertakes counseling and remedial action [following inappropriate sexual relationship with student], no period of suspension could safeguard petitioner's students upon his return to classroom teaching"); *cf. Fauci v. Dept. Disciplinary Comm.*, 28 A.D.3d 192, 198 (1st Dept 2006) (construing lack of remorse by attorney as aggravating factor).

Nonetheless, the court finds that the ultimate penalty of termination is disproportionate to the offense of using excessive force to resolve the situation Gabriel faced with the two, out-of-control third grade boys. The record establishes there were no injuries, that the boys inadvertently banged their heads and that Gabriel was acting in the "heat of the moment." There is no evidence that Gabriel acted with an intent to injure the children. Her lack of remorse does call into

question her judgment, but a brief suspension and an anger management course should sufficiently deter Gabriel from using excessive force in the future. The ultimate penalty should be reserved for those situations involving the most egregious conduct, such as a teacher's sexual liason with a 16-year old in the *Binghamton* case, *supra,* or the teacher's allowing a special education student to be strapped into a restraining chair without cause, and striking a student in the jaw and chest in *Matter of Saunders v. Rockland Bd. of Coop. Educ. Servs.*, 62 AD3d 1012 (2d Dept 2009).

Further, the arbitrator's finding that termination was the only way to ensure that Gabriel would not use excessive force in the future is belied by the fact that Gabriel had not been similarly accused in her entire seventeen year tenure. This, based on the record, was an isolated incident. Reduction of the penalty to a suspension and attendance at an anger management course would be more proportional a penalty and appropriate under the circumstances. *See Matter of Mark Diefenthaler v. Klein*, 27 A.D.3d 347, 348 (1st Dept 2006) (lengthy unblemished career and fact that incident was isolated warranted reduction of penalty); *Matter of Solis v. Department of Educ. of City of New York*, 30 A.D.3d 532 (2d Dept 2006) (otherwise unblemished twelve year record warranted penalty reduction); *cf. Matter of Weinstein v. Department of Educ. of City of N.Y.*, 19 AD3d 165 (1st Dept), *leave to appeal denied,* 6 NY3d 706 (2006) (single incident and no rational basis for finding corporal punishment). Accordingly, it is hereby

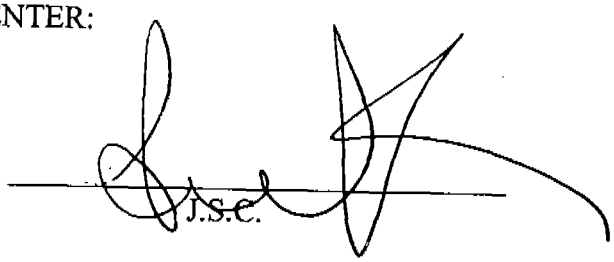
ORDERED and ADJUDGED that Alena Gabriel's petition is granted in part to the extent of vacating the judgment insofar as it dismisses petitioner from employment; and it is further

ORDERED that the petition is denied in all other respects; and it is further

ORDERED that the mater is remanded to the Department of Education for assignment to a Hearing Officer to assess a new, less egregious penalty consistent with this Decision; and it is further

ORDERED that the Clerk shall enter judgment forthwith.

ENTER:



Date: September 10, 2009
New York, N. Y.