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

PRESENT: MARILYN SHAFER PART 8

Index Number : 117175/2008
ADDOO, MARIE
VS.
NYC BOARD OF EDUCATION
SEQUENCE NUMBER : 001
COMPEL OR STAY ARBITRATION

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

denied pursuant to attached Decision

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

Dated: 10/17/09

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 STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

In the Matter of the Application of

MARIE ADDOO,

Petitioner,

-against- Index No. 117175/08

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

----------X

MARILYN SHAFER, J. ,

In this Article 75 proceeding, petitioner, Marie Addoo, a tenured teacher, seeks an order vacating a hearing officer's decision suspending petitioner from teaching for one semester and requiring that she engage in continuing education and study prior to returning to work.

Specifically, respondent requests that the award be modified to require only study, and that she be required to attend no more than two courses, with respondent providing a list of specific courses. Respondent also seeks an order that respondent reassign her as an appointed permanent teacher in another school. In reply, plaintiff also requests back pay, and argues that a letter of reprimand she received should suffice as punishment. Respondent New York City Department of Education (DOE) cross-moves to dismiss the petition as time-barred pursuant to the Education Law § 3020-a and CPLR 3211 (a) (5), and for failure to state a cause of action, pursuant to CPLR 3211 (a) (7).

Petitioner is a special education teacher, and has been assigned to a Vocational and Technical high school in Queens. Petitioner was charged with 10 specifications, most of which

are based on the observations and evaluations of petitioner's lessons by Assistant Principal Melissa Burg. The remaining two specifications allege that respondent failed to produce telephone and clinical records for her students, as requested by Burg, and that respondent refused to sign a letter that was to be placed in her personnel folder.

Pursuant to Education Law § 3020-a, disciplinary hearings were conducted for 14 days during the months of December 2007 through July 2008. During the hearing, at which petitioner was represented by counsel, witnesses were heard and evidence was taken.

By Opinion and Award dated October 24, 2008 (the Award), the hearing officer (HO) found petitioner guilty of all of the assertions in specifications 1, 3, 7 and 8, and of a number of assertions in each of specifications 5, 6 and 9. Specifications 2, 4 and 10 were dismissed in their entirety. The HO also found that petitioner's teaching deficiencies were of a nature that constituted cause for suspension and the completion of further study or education. The HO retained jurisdiction over disputes between petitioner and the respondent concerning the course of study.

Petitioner seeks vacatur of the HO's findings, and a reduction of the penalty, on the grounds that the decision (1) demonstrates bias; (2) demonstrates disparate treatment and harassment; (3) is not in accordance with due process or supported by adequate evidence; and (4) violates the collective bargaining agreement. Petitioner also contends that the decision should be vacated because the suspension constitutes an unduly harsh punishment, she has been penalized in a manner that violates Education Law § 3020-a (4), and the Award was received by petitioner late, making it impossible for her to appeal.

Petitioner claims that she was accused by respondent of "improper record keeping,

attendance, classroom management and confused instructions, math errors and withholding requested files of students['] work" (Petition, at 2). She further claims that she did not receive adequate remediation, professional development or peer intervention, as required pursuant to CPLR 3020-a (4), to assist her in the alleged areas of weakness, that no efforts were made by respondent on her behalf in curriculum planning or lesson planning or delivery from 2004-2006, and that there was little help in math. In addition, petitioner claims that too many observations of her teaching were done in one month, and that she was not given time to respond to alleged deficiencies or recommendations. Petitioner further contends that she was forced to teach five courses outside of her license, which included math, science, English, "Advisory . . . [and] Push In and Resource Room [ ] classes" (*id.*).

Petitioner maintains that she should receive only one penalty, not suspension, course work and a letter in her file, and that the determination that she has to take courses, when she does not have a job, is enough punishment. Petitioner also states that she needs a list of specific courses from the DOE that will satisfy their demands, and that the reprimand letter in her file should be removed from her records.

Respondent argues that the petition should be dismissed as untimely. Respondent also argues that the petition should be dismissed because it fails to state a cause of action, and that the penalty imposed is proper given petitioner's serious misconduct, and is not shocking in light of what it calls the serious nature of the multiple deficiencies in petitioner's classroom teaching ability. Respondent also contends that petitioner did not receive two penalties because the HO did not order a letter or reprimand to be placed in her file.

"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 City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008] [internal quotation marks and citation omitted]). In cases in which the parties are compelled by law to arbitrate, the courts must also consider whether "the award [is] in accord with due process and supported by adequate evidence in the record" (*Matter of Bernstein [Norwich City School Dist. Bd. of Educ.*], 282 AD2d 70, 73 [3rd Dept] [citation and internal quotation marks omitted], *lv dismissed* 96 NY2d 937 [2001]; *Matter of Hegarty v Board of Educ. of City of N.Y.*, 5 AD3d 771, 771 [2d Dept 2004]). Petitioner has the burden of establishing that the hearing officer's determination was arbitrary and capricious, or based on misconduct or bias (*see Hegarty*, 5 AD3d at 773). An arbitration award is only considered irrational if there is "'no proof whatever to justify the award'" (*Matter of NFB Inv. Servs. Corp. v Fitzgerald*, 49 AD3d 747, 748 [2d Dept 2008], quoting *Matter of Peckerman v D & D Assoc.*, 165 AD2d 289, 296 [1st Dept 1991]).

Respondent contends that petitioner did not timely challenge the HO's decision within the 10-day limitations period of Education Law § 3020-a (5), which provides that:

> Not later than ten days after receipt of the hearing officer's decision, the employee or the employing 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. The court's review shall be limited to the grounds set forth in such section.

In support of its defense, respondent has submitted the affidavit of an employee of the Teacher Tenure Hearing Unit in the State Education Department's Office of School Personnel Review and Accountability (Service Affidavit) who avers that in accordance with her job responsibilities, she served copies of the Award upon petitioner's attorney on December 1, 2008. Petitioner

commenced this proceeding on December 23, 2008, and states that she received the decision late. Petitioner does not address service of the decision on her attorney, but provides an envelope that shows, as best the court can determine, several delivery attempts made to her.

Because petitioner was represented by counsel, for purposes of section 3020-a (5), her time to file the petition was measurable from the date such counsel received a copy of the hearing officer's decision (*see Matter of Case v Monroe Community Coll.*, 89 NY2d 438, 443 [1997]; *Matter of Awaraka v Board of Educ. of City of N.Y.*, 59 AD3d 442, 443 [2d Dept 2009]). The averments in the Service Affidavit must be reviewed in terms of whether respondent has carried its burden of proof on the affirmative defense that it has raised. As the Service Affidavit, however, addresses only when the Award was mailed, but not when it was received, it does not establish that this proceeding was not timely commenced.

Respondent's argument that petitioner's counsel must be deemed to have received the mailed copy within five days of the date on which it had been mailed is based on a portion of CPLR 2103 (b) (2) which provides that

> "papers to be served upon a party in a pending action shall be served upon the party's attorney. . . . Service by mail shall be complete upon mailing; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period . . . ."

Courts have found that this statute applies only when papers are served in a "pending action" or special proceeding, however, and not in an administrative proceeding (*Matter of Fiedelman v New York State Dept. of Health*, 58 NY2d 80, 82-83 [1983]; *Matter of Maye v New York City Dept. of Educ.*, 2009 NY Slip Op 31815 [U] [finding that "section 3020-a (5) must be taken to intend that actual receipt be the starting point of the limitations period" and "even though not strictly necessary under the statute, a certified mailing, return receipt requested, would have

furnished respondent what it critically lacks here -- a document evidencing the actual date of receipt by union counsel"). As respondent has not demonstrated when the petition was received by petitioner's counsel, it has not met its burden to demonstrate that the petition was not timely served.

As previously noted, petitioner contends that the Award should be vacated because it demonstrates bias, disparate treatment and harassment. Regarding the bias claim, "[a] party seeking to set aside an arbitration award for alleged bias of the arbitrator must establish his claim by clear and convincing proof" (*Matter of Infosafe Sys. [International Dev. Partners]*, 228 AD2d 272, 272-273 [1st Dept 1996] [citation and internal quotation marks omitted]). The petitioner must have evidentiary proof of the hearing officer's actual bias or "appearance of bias" (*Matter of Schwartz v New York City Dept. of Educ.*, 22 AD3d 672, 673 [2d Dept 2005]). A "mere inference" of partiality is not sufficient to warrant disturbance of an award (*Matter of Saldana v State Farm Fire & Cas. Co.*, 39 AD3d 416, 417 [1st Dept 2007]). Petitioner has not submitted evidence of bias, or evidence from which even an inference of partiality may be drawn. In terms of conducting the hearing, the HO appears to have been exceedingly careful to ensure that charges that were not supported by evidence were dismissed (*see e.g.* Award, at 27, 33 [finding petitioner not guilty of certain specifications]).

Petitioner's assertions of harassment and disparate treatment are similarly bald. Petitioner only attempts to support her assertions in her reply, in which she states, presumably in reference to these assertions, that only teachers with certain "*names*" were allowed to attend the "NYC Writing Project " in 2005-2006, but she was not (Reply Aff., ¶ 6). Also in reply only, petitioner claims that the union has filed an action or proceeding for age discrimination.

Petitioner further contends that the DOE violated the collective bargaining agreement because she was forced to teach outside of her license, and that this conduct created a "hostile work environment," and that she was given additional teaching assignments, which was "disparate treatment" (Reply Aff., ¶¶ 17,18). To the extent that these assertions, some of which were made only in reply, may be entertained, petitioner points to nothing in the record to demonstrate that she raised these issues before the HO, has failed to provide a copy of the allegedly violated provisions of the collective bargaining agreement, and has cited to no authority that would permit modification of the decision under these circumstances. What petitioner provides are mere allegations, which do not suffice to meet her burden to establish that the HO's determination was arbitrary and capricious, and "[p]etitioner has failed to meet [her] heavy burden of showing arbitrator misconduct or partiality by clear and convincing proof" (*Matter of Moran v New York City Tr. Auth.*, 45 AD3d 484, 484 [1st Dept 2007]).

The DOE argues that the petition should be dismissed because the Award is in accord with due process and supported with adequate record evidence. Petitioner avers that she was denied pre-observation conferences for the lessons where she was observed and evaluated by school administration. In her reply, petitioner contends that this alleged denial of pre-observation conferences was a violation of her due process rights. Petitioner does not argue here, however, that she brought this contention to the HO's attention at the hearing, and that the HO disregarded the contention. Furthermore, the record reveals that there is evidence that petitioner was provided with at least some pre-observation conferences for formal observations (*see* Resp. Aff., Exh. A, at 60-61, 173, 347-348).

Petitioner's assertion that respondent violated her due process rights when it made her a

substitute teacher in 2005-2006 and when the school's principal added social studies and science classes to her course load cannot be considered here because they are only made for the first time on reply. In any event, the Award is essentially based on petitioner's teaching performance, and petitioner presents no evidence of due process violations concerning the events leading up to the hearing, or in connection with the hearing itself. Accordingly, petitioner's due process assertions are unsupported and she may not prevail on them.

Petitioner also contends that the collective bargaining agreement governing the parties' relationship specifically states that suspension is proper only for a crime committed, drug use, or sexual misconduct. In reply, she states that the law only allows for a suspension of two months. Like so many of petitioner's other contentions, these are unsupported. Petitioner does not provide the relevant provision(s) of the collective bargaining agreement, and the court's research has revealed no support in the law for petitioner's contention about a two-month limit on suspension time. Indeed, in *Mongitore v Regan* (133 AD2d 815, 815 [2d Dept 1987]), the Court upheld the severe penalty of termination based on "the petitioner's inability to control her class and to effectively plan and teach lessons."

Petitioner argues that she was provided little to no adequate remediation, professional development or peer intervention to assist her in the alleged areas of weakness. Education Law § 3020-a (4) (a) provides that

> "[a]t the request of the employee, in determining what, if any, penalty or other action shall be imposed, the hearing officer shall consider the extent to which the employing board made efforts towards correcting the behavior of the employee which resulted in charges being brought under this section through means including but not limited to: remediation, peer intervention or an employee assistance plan."

The record reveals that the HO considered the remediation that was provided to petitioner and

found it adequate (*see* Award, at 34-36).

There is record support for the HO's determination, including that a Ms. Sorhand testified that she gave petitioner training in classroom management techniques.[1] Petitioner asserts that the testimony of the school administration and Ms. Sorhand was false.[2] "It is basic that the decision by an 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" (*Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]; *see Matter of Moran*, 45 AD3d at 484 [finding that arbitrator's determination of petitioner's credibility based on his demeanor is beyond judicial review]). The HO clearly relied on credibility determinations, and was free to do so. That Ms. Sorhand, a witness at the hearing, may not have produced documents demonstrating her assistance, as petitioner claims in reply, was for the HO's consideration in determining credibility, and the court may not substitute its judgment for the HO's on that issue.

Petitioner argues that the DOE failed to provide her with adequate time to respond to some of the alleged deficiencies noted in the late-school-year lesson observations. The HO considered this contention and criticized the school's administration for this conduct (Award, at 42). More importantly for petitioner, the Award indicates that the HO determined that this factor

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[1]The record also reveals that a DOE "Crisis Intervention Teacher" assisted petitioner and testified with positive comments about petitioner as a teacher (Tr., at 1394).

[2]Similarly, the court cannot second guess the HO, because in reply, petitioner contends that Ms. Newman's statement about a student's blurting out of an expletive was false. Also, in reply, petitioner states that the insubordination charge was false, because she did not refuse to comply with Assistant Principal Burg's directives about records. The HO found in petitioner's favor on this charge and dismissed it, however.

mitigated against granting the relief that the DOE sought, termination of the petitioner (*id.*), and likely contributed to the HO's findings that petitioner was not beyond rehabilitation. Such a determination is not arbitrary or capricious, but evidences the HO's thoughtful consideration of petitioner's position regarding the conduct of the school's administration.

Petitioner objects to the penalty. Petitioner argues that she should not have received two penalties, a suspension and a fine and seeks to have the course of study limited to two classes due to financial hardship. Petitioner points to Education Law § 3020-a (4), which lists the possible penalties a hearing officer may impose. They are: a written reprimand, fine, suspension for some fixed time without pay and dismissal. Education Law § 3020-a (4) (a) further provides that:

> "[i]n addition to or in lieu of the aforementioned penalties [of written reprimand, fine, suspension without pay or dismissal], 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 see counseling or medical treatment or that the employee engage in any other remedial or combination of remedial actions."

Education Law § 3020-a (4) (a) thus permits a HO to impose upon the employee remedial action, in addition to a fine or suspension. This is what the HO did. While petitioner makes mention of a letter that was sent to her file, she has not provided the letter here, and thus the court cannot determine the nature of the letter, including whether or not it was a reprimand, as petitioner contends, or merely an advisory letter. Finally, on this point, the HO did not impose a written reprimand as a penalty.

Although petitioner contends that the penalty imposed was excessive, the penalty may not be set aside on such ground unless it is so clearly disproportionate to the offense as to be shocking to one's sense of fairness (*Matter of Nino v Yonkers City School Dist.*, 43 NY2d 865 [1978]); *see Green v New York City Dept. of Educ.*, 17 AD3d 265 [1st Dept 2005]). The penalty

imposed, a semester suspension and the requirement that petitioner undergo a course of study, does not shock the conscience, and is not so irrational as to warrant vacatur, but appears calculated to attempt to help to ensure that petitioner returns to the classroom with skills that will enable her to better manage teaching situations that appear to be extremely trying.

While the court does not find the award shocking, CPLR 7511 (b) provides that an arbitration award may be vacated where: "(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." The Award does not permit plaintiff to return to service or be restored to payroll until "she successfully has competed, at her own expense, a course of study, satisfactory to the [DOE], in curriculum and teaching, which focuses on lesson presentation and classroom management" (Award, at 45). This portion of the Award is indefinite because there is no indication of the number of classes that petitioner was to take. In addition, Education Law § 3020-a (4) provides only for a suspension for a fixed term. While the HO's determination of a single-semester suspension is a suspension for a fixed term, the portion of the Award making petitioner's return to work conditional upon DOE's satisfaction with petitioner's course of study imposes a condition that allows the DOE potential control over petitioner's return to her job, and the power to effectively lengthen the suspension term. This is not consistent with a fixed term. While the remedial study portion of the Award may have been designed to permit petitioner to choose classes that she could afford, such as those that may be offered through the petitioner's union, petitioner was given no direction as to the number of courses to take, and the DOE was given no specific direction as to what would suffice as remediation. Accordingly, that portion of the Award dealing with remediation is indefinite, and impermissibly invites further

controversy that would have been avoided by designating a specific number of courses in a particular subject and requiring petitioner to take those courses during the period of suspension, and/or while back on the job.[3]

A court cannot impose its own penalty instead of remitting the matter for a redetermination on the issue of penalty (*see Matter of Board of Educ. of E. Hampton Union Free School Dist. v Yusko*, 269 AD2d 445, 446 [2nd Dept 2000]). Accordingly, the petition is granted in part, but only to the extent that the court is vacating that portion of the Award that requires petitioner to engage in a course of study satisfactory to the DOE, and the matter is remanded to the HO for reconsideration of that portion of the Award in accordance with the decision herein. The parties are, of course, free to come to an agreement that would negate the necessity of additional proceedings on this matter by, for example, agreeing on a course of study in which petitioner may engage while she is back on the job, if so-advised by counsel. The remainder of the well-reasoned and supported Award stands.

Accordingly, it is

ORDERED AND ADJUDGED that, consistent with this decision, the petition of Marie Addoo is granted to the extent of vacating that portion of the Award in the Matter of The Disciplinary Charges Proffered by The New York City Department of Education v Marie Addoo, dated November 26, 2008, that provides that the petitioner Marie Addoo shall not be returned to service or restored to payroll until she has completed a course of study satisfactory to the New York City Department of Education; and it is further

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[3]While the HO retained jurisdiction over disputes regarding the course of study, this does not make the remediation portion of the Award definite.

ORDERED AND ADJUDGED that, consistent with this decision, the petition is granted solely as to the remand of the matter to the Hearing Officer for an assessment of appropriate remedial action pursuant to Education Law § 3020-a, and that the matter is so remanded; and it is further

ORDERED and ADJUDGED that the remainder of the petition is denied; and it is further

ORDERED and ADJUDGED that the cross motion to dismiss the petition is denied.

Dated: 10/13/09

ENTER:

MARILYN SHAFER J.S.C.

J.S.C.

...nis 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).