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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

In the Matter of the Application of

DONALD EDWARDS,

Petitioner,

Index No.: 22465/09
Motion Seq. No.: 01
Motion Date: 11/26/09
XXX

for a Judgment pursuant to Article 78 CPLR

- against -

THE OYSTER BAY-EAST NORWICH CENTRAL SCHOOL DISTRICT and THE OYSTER BAY-EAST NORWICH CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION,

Respondents,

The following papers have been read on this motion:

	Papers Numbered
Notice of Petition, Verified Petition and Exhibits and Memorandum of Law	1
Verified Answer, Objections in Point of Law and Exhibits and Memorandum of Law in Opposition to Petition	2
Affirmation in Further Support of Petition and Memorandum of Law in Further Support of Petition	3

Upon the foregoing papers, it is ordered that the application is decided as follows:

Petitioner, Donald Edwards ("Edwards"), brings this proceeding, pursuant to CPLR Article 78: (a) declaring respondents', the Oyster Bay-East Norwich Central School District and the Oyster Bay-East Norwich Central School District Board of Education (collectively referred to herein as "School District" or "Respondent") termination of the petitioner to be arbitrary, capricious, an abuse of discretion, affected by errors of fact and law, taken in bad faith, taken without substantial

evidence on the records and in violation of law; (b) declaring respondents' refusal to restore petitioner to his former position and salary is arbitrary, capricious, an abuse of discretion, affected by errors of fact and law, taken in bad faith, taken without substantial evidence on the record and in violation of law; (c) directing respondents to restore the petitioner to his employment in his former position and salary, plus interest, immediately; and (d) directing respondents to pay petitioner full back pay and other benefits and emoluments of his employment. Respondent opposes said petition. The Court holds that the petition is denied in its entirety.

Petitioner, Donald Edwards, is a Nassau County resident. Respondent, School District, is a public employer existing and subject to the laws of the State of New York, including the New York Civil Service Law ("NYSCSL").

On or about October 22, 2008, Edwards was hired by the School District as a custodian to work in the high school performing janitorial duties on its first floor. Petitioner was hired in a competitive civil service position; that is, he was selected from a list of candidates appearing on the civil service "list."

Edwards worked only until December 9, 2008. He failed to complete his probationary period or to become a permanent civil service employee.

On March 3, 2009, pursuant to NYSCSL § 75, petitioner was served with a Statement of Charges which enumerated two separate charges: one of incompetence and one of insubordination. The two charges further enumerated separate specifications, all of which substantially involved matters alleged to have occurred on eight separate days. The charges, in sum and substance, alleged tasks that the respondent had assigned to the petitioner but that the petitioner failed to perform as well as one specification of the petitioner walking out of a meeting that he was attending.

Respondent contends that, although Edwards was not entitled by law to a disciplinary hearing, one was held pursuant to the applicable Collective Bargaining Agreement ("CBA"), which incorporated the "protections of Section 75 of the Civil Service Law." Accordingly, pursuant to NYSCSL §75, Arthur Riegal, Esq. was selected, appointed and hired by the respondent as a hearing officer to preside over hearings to consider the charges served against Edwards.

Hearings commenced on March 19, 2009, with continuations on April 3, 2009 and May 15, 2009. Ultimately, in a document dated June 24, 2009, the Hearing Officer rendered his Findings and

Recommendations. The Hearing Officer found that Edwards was both incompetent and insubordinate. Specifically, the Hearing Officer found Edwards guilty of Charge No. 1, Specifications 4-11 and Charge 2, Specifications 3-4. The Hearing Officer dismissed Charge No. 1, Specifications 1-3 and Charge 2, Specifications 1-2. The Hearing Officer recommended the penalty of termination of employment.

The Board of Education adopted the Hearing Officer's findings and recommendations. At its regularly scheduled July 7, 2009 meeting, the School District passed a resolution to terminate Edwards' employment. Respondent ceased paying petitioner his wages and ceased contributing towards his pension and health insurance on or about July 15, 2009.

While inartfully pleaded, as best as can be determined by this Court, petitioner brings this Article 78 proceeding in the nature of mandamus-certiorari, that is, pursuant to CPLR 7803, subsection 3. Petitioner contends that the Hearing Officer's findings and conclusions are not supported by substantial evidence and that therefore the Hearing Officer's determination that petitioner is guilty of insubordination or to justify the Hearing Officer's finding of insubordination is not warranted. It is the petitioner's position that "[t]he Respondent(s) acted in an unjust, arbitrary and capricious manner in terminating Petitioner from employment when it failed to recognize and apply certain universally accepted principles of labor/management." *See Memo of Law in Support of Petition*, p. 5. Petitioner also contends that respondents' termination of petitioner is shocking to one's sense of fairness in that petitioner did not perform any act or acts that would warrant his termination from service. Petitioner maintains that in the absence of substantial evidence on the record to support the determination that he is guilty of misconduct and/or insubordination, or that he was otherwise incompetent, this Court should, *inter alia*, direct the respondent to immediately restore petitioner to his employment in his former position and salary, plus interest.

Here, it is undisputed that the petitioner was on a probationary period when he was terminated. Specifically, petitioner's custodial position would not have become permanent until the completion of at least twenty-six weeks of employment. As a result, petitioner obviously does not fall under any category of employee entitled to Section 75 protection (Civil Service Law §75).[1]

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[1]As a probationary civil service employee, this Court finds that the petitioner also has no right to challenge his termination by way of hearing or otherwise, absent a showing that he was

While petitioner was not entitled by law to a disciplinary hearing, the hearing that was had in this case was the result of a bargained for product of contract (not law), i.e., the CBA.

It is well settled that when procedural protections are provided by contract, not law, the standard by which an administrative body's decision must be judged is not the "substantial evidence" standard, as argued by the petitioner; rather the "arbitrary and capricious" test governs. *See Stoker v. Tarentino*, 64 N.Y.2d 994, 489 N.Y.S.2d 43 (1985). *See also Pierino v. Brown*, 281 A.D.2d 960, 722 N.Y.S.2d 845 (4th Dept. 2001). Under this standard, "[t]he judicial function is limited to the review of the propriety of the determination in terms of whether the administrative body acted in an arbitrary or capricious manner. . .the Court may not usurp the administrative function by directing the agency to proceed in a specific manner. . .." *See Burke's Auto Body, Inc. v. Ameruso*, 113 A.D.2d 198, 495 N.Y.S.2d 393 (1st Dept. 1985).

It is a well-settled rule that judicial review of administrative determinations is limited to the grounds invoked by the agency. *See Aronsky v. Board of Educ., Community School Dist. No. 22 of City of New York,* 75 N.Y.2d 997, 557 N.Y.S.2d 267 (1990). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis. *See Clancy-Cullen Storage Co., Inc. v. Board of Elections in the City of New York*, 98 A.D.2d 635, 469 N.Y.S.2d 391 (1st Dept. 1983). It is beyond the scope of judicial review to consider the facts *de novo* nor may the court substitute its judgment for that of the agency. *See In re C.K. Rehner, Inc.*, 106 A.D.2d 268, 483 N.Y.S.2d 1 (1st Dept. 1984). The test of whether a decision is arbitrary or capricious is "determined largely by whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact." *See Pell v. Board of Ed. Of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaronek, Westchester County*, 34 N.Y.2d 222, 356 N.Y.S.2d 833 (1974). An arbitrary action is without sound basis in reason and is generally taken without regard to the facts. *Id.*

Where a punishment has been imposed, the test is "whether such punishment is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness" *See Pell v. Board of Ed. Of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaronek, Westchester County, supra* at 233. It is well settled that a sanction will not be upheld

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dismissed in bath faith or for an improper or impermissible reason. *See Witherspoon v. Horn*, 19 A.D.3d 250, 800 N.Y.S.2d 377 (1st Dept. 2005); *Taylor v. State University of New York*, 13 A.D.3d 1149, 787 N.Y.S.2d 753 (4th Dept. 2004).

if it "shocks the judicial conscience and, therefore, constitute an abuse of discretion as a matter of law." *See Featherstone v. Franco*, 95 N.Y.2d 550, 720 N.Y.S.2d 93 (2000).

Based upon the twenty-five page decision of the hearing officer, Arthur A. Riegel, this Court rejects petitioner's challenge to the hearing officer's determination that he was incompetent and insubordinate, since that determination is supported by "some credible evidence" and is not arbitrary and capricious. *See Borenstein v. New York City Employees' Retirement System*, 88 N.Y.2d 756, 650 N.Y.S.2d 614 (1996). The Court is precluded from substituting it's own judgment for that of the School District. *Id.* at 761.

In a proceeding such as this, which challenges a determination made by an administrative agency, the Court's function is to ascertain, upon the proof before the agency, whether its determination had a rational basis in the record or, conversely, was arbitrary and capricious or affected by an error of law. *See County of Monroe on Behalf of Monroe Community Hospital v. Kaladjian*, 83 N.Y.2d 185, 608 N.Y.S.2d 942 (1994); *Heintz v. Brown*, 80 N.Y.2d 998, 592 N.Y.S.2d 652 (1992). An agency action is deemed to be arbitrary if it is taken "without a sound basis in reason and...without regard to the facts." *See Pell v. Board of Ed. Of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaronek, Westchester County*, *supra* at 231). The School District's determination need only be supported by a 'rational basis' if it is to be upheld. *See County of Monroe on Behalf of Monroe Community Hospital v. Kaladjian*, *supra* at 189.

In light of the foregoing, this Court defers to respondent's factual determination that petitioner was guilty of insubordination and that he was incompetent, as it was not arbitrary and capricious and had a rational basis in the record. Respondent considered documentary and testimonial evidence, including the testimony of the Head Custodian in the high school. The documentary and testimonial evidence provided the respondent with sufficient evidence to rationally conclude that petitioner lacked credibility, was incompetent and was guilty of insubordination. The Hearing Officer found that the School District proved that petitioner handled his duties in an incompetent manner. The Hearing Officer did not find anything in the record to indicate that petitioner was not provided with the materials with which to do his job. The Hearing Officer found that the School District did what it needed to do for petitioner to acquit himself successfully but that he did not do so and all of his defenses were rejected. The Hearing Officer also found that in addition to performing his duties incompetently, petitioner did so willfully and intentionally. The existence of evidence in the record supportive of an alternative decision that

would also be reasonable does not render respondent's determination irrational or require this Court's interference. *See Cooper v. New York State Teachers' Retirement System*, 19 A.D.3d 724, 795 N.Y.S.2d 802 (3d Dept. 2005); *Fernandez v. New York State and Local Retirement Systems*, 17 A.D.3d 921, 793 N.Y.S.2d 286 (3d Dept. 2005), *lv. denied* 5 N.Y.3d 707, 801 N.Y.S.2d 800 (2005).

Similarly, with respect to the penalty of termination, this Court finds that the determination to discontinue petitioner's employment was not arbitrary and capricious, but rationally based on the evidence. *See Pell v. Board of Ed. Of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaronek, Westchester County*, *supra* at 231. Further, petitioner has failed to demonstrate that his termination of employment was for a constitutionally impermissible purpose, violative of a statute or performed in bad faith. *See Frasier v. Board of Educ. of City School Dist. of City of New York*, 71 N.Y.2d 763, 530 N.Y.S.2d 79 (1988). Where the petitioner has refused to accept the responsibility for his action, evidenced the slightest bit of remorse for his actions, has developed a record of such poor credibility that there is reason to believe that he would repeat his misconduct if he were restored to his position, the penalty of termination of employment is not shocking to the conscience. *See Featherstone v. Franco*, *supra*.

For these reasons, petitioner's proceeding, pursuant to CPLR 7803(3) is denied in its entirety. The petition is dismissed.

Settle Judgment on Notice.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
April 8, 2010