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

PRESENT: GISCHE Justice PART 10

ADAMS, TWANA

-v-

CITY OF NEW YORK, ET AL.

INDEX NO. 116456/09

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ 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

and petition are

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: JUN 07 2010

HON. JUDITH J. GISCHE 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: IAS PART 10

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Twana Adams,

Petitioner,

-against-

City of New York, Department of Education,

Respondent.

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DECISION/ ORDER
Index No.: 116456-2009
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pet's OSC w/TA affid, exhs, (tabs, memo of law)	1,2,3,4
Resp x/m (dismiss) and opp w/MOL affirm	5
Pet reply	6
Resp reply	7

Upon the foregoing papers, the decision and order of the Court is as follows:

GISCHE J.:

Petitioner is a tenured science teacher and this is an action brought pursuant to Article 75 of the CPLR (CPLR § 7511), to vacate the opinion and award made on October 30, 2009 by the AAA arbitrator ("hearing officer") who presided over the disciplinary charges by respondent against petitioner. Respondent is petitioner's employer.

Petitioner has brought this motion for injunctive relief pursuant to CPLR § 6301 staying enforcement of the hearing officer's award which requires her to pay a $10,000 fine to respondent as a penalty. Petitioner alleges, among other things, that the hearing officer was biased because the hearing officer is a named defendant in a Federal court

action in which petitioner is the plaintiff. Furthermore, petitioner argues the hearing officer's decision dehors the record, is internally inconsistent and the award is unconscionable.

Respondent opposes petitioner's motion for a preliminary injunction and has separately cross moved to deny the petition and dismiss this proceeding pursuant to CPLR 3211 [a] [4] and [7], as well as pursuant to CPLR 404 [a] and 7511. Petitioner opposes the cross motion in all respects.

Petitioner's motion for a preliminary injunction, may be granted only if she demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in her (the moving party's) favor (Grant Co. v. Srogi, 52 N.Y.2d 496 (1981); Doe v. Axelrod, 73 N.Y.2d 748 [1988]; New York City Off-Track Betting Corp. v. New York Racing Ass'n, Inc., 250 A.D.2d 437 [1st Dept. 1998]).

However, since respondent's cross motion is aimed at the sufficiency of the petition, the court must assume the truth of all allegations contained in the challenged pleadings and resolve all inferences which may reasonably flow therefrom in favor of the non-movant (Cron v. Hargro Fabrics, Inc., 91 NY2d 362 [1998]; Sanders v. Winship, 57 NY2d 391 [1982]).

The following facts and arguments are considered:

Facts, the dispute, and arguments presented

Charges, also known as "specifications," were brought against petitioner following an investigation by the Special Commissioner of Investigations ("SCI"). The charges, brought pursuant to section 3020-a [1] of the Education Law, are that

petitioner prepared, signed, and submitted a comprehensive injury report that was false. Respondent sought petitioner's termination based upon "misconduct, criminal behavior and conduct unbecoming her position." Following an eight (8) day hearing, the hearing officer issued her opinion and award dated October 30, 2009 ("award"), sustaining both charges against petitioner. Although the hearing officer sustained both charges, she did not order petitioner's termination from employment. Instead, the hearing officer ordered that petitioner pay a $10,000 fine to respondent in 10 equal installments of $1,000 each ("fine"); the payments were to be deducted from petitioner's paycheck.

The parties' dispute is deep rooted and, according to petitioner, stems from the Mayor's decision to assume control over the New York City schools. Many constitutional arguments are raised by petitioner, including that teachers have lost certain statutory protections under Education Law § 3020-a. Education Law § 3020-a set forth requirements pertaining to disciplinary charges. Petitioner is also a named plaintiff (with other teachers) in an action recently dismissed in Federal court, discussed at greater length later in this decision and order (Adams et al v. New York State Dept Educ et al, 08 CV 5996 [SDNY 2008]) ("Federal action").

The defendants in the Federal action included Mayor Bloomberg, the City of New York, the New York State Education Department and DOE. In that action petitioner herein asserted due process and free speech violations in the course of disciplinary proceedings, hostile work environment discrimination and breach of the collective bargaining agreement. In the Federal action, petitioner alleged retaliation for speaking out against the school system program and policies. The findings and recommendations of the Magistrate were adopted and confirmed by Judge Peck on

April 6, 2010, dismissing most of the claims for failure to state a cause of action (Adams v. New York State Dept of Educ, et al., --- F.Supp.2d ----, 2010 WL 1374675 [S.D.N.Y. 2010]).

Respondent has cross moved to dismiss the instant petition on several bases. First, respondent argues that most of the claims raised by petitioner in this action are identical to those in the Federal action and, therefore, binding on this court based upon principles of res judicata. Respondent claims further that the award by the hearing officer who is an AAA arbitrator, can only be vacated in the most extreme circumstances, none of which are present in this action.

Petitioner commenced this proceeding with the filing of an Order to Show Cause containing a proposed temporary restraining order ("TRO"). The TRO was for a stay on enforcement of the hearing officer's award to respondent. After argument on the TRO, the court ordered that deductions from petitioner's paycheck be suspended. That suspension was continued after oral argument and remains in effect pending the court's decision and order on these motions.

Petitioner argues the opinion and award by the hearing officer was arbitrary, capricious and not rationally based on the record developed before her. Petitioner contends the hearing officer knew petitioner was a lead plaintiff in the Federal action and that the hearing officer wanted to "punish" petitioner for being a whistle blower. According to petitioner, hearing officers who are AAA arbitrators are very highly compensated and by attacking the present system of resolving disciplinary charges, petitioner also indirectly attacked the hearing officers and threatened their livelihoods. Petitioner claims she overheard hearing officer McKissick talking to the DOE attorney

about petitioner's claims and that not only did it make petitioner uncomfortable, it shows the hearing officer and DOE lawyer conspired to have the hearing officer render an unduly harsh result against the petitioner. The hearing regarding petitioner's disciplinary charges began before petitioner became involved in the Federal action.

In rendering her opinion and award, the hearing officer credited petitioner's testimony that she had not intended to commit a fraud and that it was "quite likely that she wrote the injury report in haste and failed to proofread it. The hearing officer also credited petitioner's testimony, that she was "experiencing pain from her arm and hand" when she was completing the form. The hearing officer also credited petitioner's testimony that she had taken strong pain medication some 15-20 minutes before filling out the injury report. The hearing officer did not, however, credit petitioner's testimony, that the medication had already taken effect and clouded her judgment when petitioner improperly wrote the principal's name on the form and turned it in. The hearing officer found that there was no evidence the medication took effect in just the 15-20 minute interval between being swallowed and petitioner filling out the form. The hearing officer determined that petitioner was very familiar with this particular form and she had filled out other injury forms in the months immediately preceding the injury leading to the false submission. According to the hearing officer, petitioner was thoroughly familiar with how to fill out the form correctly.

Although the hearing officer sustained the charges against petitioner, she found that the "serious mistake" petitioner made did not warrant petitioner's termination from employment, as DOE had demanded. Rather, the hearing officer decided the imposition of a fine was justified because the "purpose of a penalty is to alert one of the

'inappropriateness' of one's conduct and to concurrently serve as a 'warning' that future acts will not be tolerated . . " The hearing officer took into account that this was an isolated incident for a teacher with an otherwise unblemished record. The hearing officer also credited testimony by petitioner that she was contrite, although the DOE insisted that petitioner had never taken responsibility for her wrongful act, nor did she seem remorseful for what she had done.

Petitioner contends the fine is unduly harsh and disproportionate not only to the mistake she made, but also to her income which is approximately $3,300 per month. According to petitioner, the harshness is due to the hearing officer's thinly disguised bias against her and part of a larger conspiracy to demoralize, if not weed out, competent, tenured teachers.

Discussion

Although the hearing officer is an arbitrator and this is an action brought pursuant to Article 75, there is a essentially an Article 78 analysis to be applied. 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 Education of City of New York, 51 A.D.3d 563, 567 [1st Dept 2008]). However, where, as here, the parties have submitted to compulsory arbitration, judicial scrutiny is stricter than when the parties have submitted to voluntary arbitration (*see* Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co., 89 NY2d 214, 223 [1996]; Lackow v. Department of Education of City of New York, supra at 567). Therefore, the hearing officer's determination must be in accord with due process and

supported by adequate evidence; it must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78 (Lackow v. Department of Education of City of New York, supra at 568 *citing* Motor Vehicle Mfrs. Assn. of U.S. v State of New York, 75 NY2d 175, 186 [1990]). Since petitioner is challenging the arbitrator's determination, she has the burden of showing it is invalid (Lackow v. Department of Education of City of New York, *supra* at 568 *citing* Caso v Coffey, 41 NY2d 153, 159 [1976]).

Accepting the petitioner's facts as true facilitates the court's analysis of whether petitioner has shown a likelihood of success on the merits and allows both motions to be addressed holistically. If petitioner does not have a cause of action against DOE, it renders her motion for a preliminary injunction academic because there is no likelihood of success on the merits and, to prevail on a motion for a preliminary injunction, all three prongs must be satisfied.

Petitioner's facts do not establish her claim, that she was forced to proceed with an arbitrator who was biased against her. The opinion indicates that the parties selected the arbitrator. Furthermore, the hearing began before petitioner was involved in the Federal action. Petitioner did not seek a stay of the arbitration, or seek to have arbitrator disqualified. In any event, petitioner cannot bootstrap her claim of bias by involving herself in a lawsuit against the arbitrator (Hayes v. New York City Dept. of Educ., 25 Misc.3d 1238(A) [N.Y.Sup. 2009]; Cruz v. New York City Dept. of Educ. 26 Misc.3d 1208(A) [N.Y.Sup. 2010]).

Crediting her facts, petitioner has not now shown any facts tending to show that the hearing officer was biased. While admitting she "wrote" the name of her principal on the injury report and she "submitted" the report, petitioner still claims that the

charges should not have been sustained because they were not proved. She also claims the penalty shocks the conscious as being disproportionate to the charges sustained (*see*, The City School District of the City of New York v. Lobber, 50 AD3d 301 [1st Dept 2008]). These arguments are without merit and have no support in this record.

As set forth in the hearing officer's opinion and reflected in the transcripts of the hearing, the petitioner's actions were serious; they could easily have resulted in her termination from employment. The credibility of witnesses at a hearing is for the hearing officer, not the court, to decide (Matter of Mack Markowitz Oldsmobile, Inc. v. State Division of Human Rights, 271 A.D.2d 690 [2nd Dept. 2000]). The hearing officer took into account – and credited petitioner's testimony that– she had not intended to defraud her employer. The hearing officer believed that petitioner had made a mistake. The "mistake" however, was a serious one and punishable. Essentially what petitioner did was file a false report. The petitioner's lack of intent did not absolve petitioner from responsibility, which is why the charges against petitioner were sustained.

Although Petitioner disagrees with the imposition of a fine, her disagreement with the hearing officer's decision does not establish that the decision is arbitrary and capricious. Nor is her argument, that the opinion is inherently inconsistent with the award made persuasive (Spear, Leads & Kellogg v. Bulseye Sec., Inc., 291 A.D.2d 255 [1st Dept 2002]). The opinion has evidentiary support, it is thoughtfully written; it shows why the charges were sustained and the penalty was imposed (*compare* Rindos v. Board of Educ. of Longwood Cent. School Dist., 20 A.D.3d 572 [2nd Dept. 2005]). The decision and award are rationally based.

Turning to the amount of the fine, petitioner claims she cannot support herself if

she has to pay the fine at the rate of $1,000 a month which is to be deducted from her paychecks. Education Law § 3020-a [4] sets forth the available remedies when charges are sustained and the imposition of a fine is one of them (see, Garcia v. Department of Educ. of City of New York, 18 Misc.3d 503 [Sup Ct N.Y. Co. 2007]). One of the penalties that Education Law § 3020-a provides for is suspension without pay. With regard to the collection of the fine, there is no statute or rule stating how it is to be collected. Suspension of two months have been upheld on appeal (Matter of Marcato v. Board of Educ. of Cent. School Dist. No. 1 of Towns of Carmel & Putnam Val., Putnam County, 40 A.D.2d 978 [2nd Dept 1972]).

Had petitioner been suspended without pay, she would not have had any income from employment during her suspension. The hearing officer did not however, terminate or suspend petitioner - both harsher penalties - but she ordered petitioner to pay a fine over time. Thus, the penalty reduces her income for a period of time which is roughly equivalent to three months' pay. The fine and method of collection is not shockingly disproportionate to the offense committed; it does not warrant the court's interference therewith (Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222 [1974]).

All the weighty constitutional claims raised by petitioner in the Federal action were dismissed by the Hon. Victor Marrero (Adams v. New York State Dept of Educ, et al., --- F.Supp.2d ----, 2010 WL 1374675 [S.D.N.Y. 2010]). In his decision dated April 6, 2010, written after a de novo review of the Magistrate's decision, Judge Marrero concluded that "no plausible grounds exist to support Plaintiffs' claims against the State Defendants . . ." Importantly, the Federal judge found that "[Adams'] claims under §

3020 of the New York State Education Law (" § 3020") alleging denial of due process rights [fails] because pursuant to State Education Law § 3020(4) the procedure set forth in § 3020-a may be modified by collective bargaining agreement, as was the case here pursuant to the contract between DOE and the UFT..."

The doctrine of res judicata precludes a party from litigating "a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter" (Matter of Hunter, 4 N.Y.3d 260, 269 [2005]). Once a claim is brought to its final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 [1981]). This court is bound by the decision in the Federal action and it cannot be collaterally attacked here, in State court. Thus, the court has only considered whether, in this disciplinary action, the punishment petitioner received was arbitrary, capricious, without a rational basis or the result of bias (i.e in retribution for having pursued claims in the Federal action). There is no factual basis for any of those claims in this record. Therefore, not respondent's cross motion to dismiss is granted in its entirety and the award by the hearing officer remains undisturbed.

In accordance with the decision dismissing this petition, petitioner's motion for a preliminary injunction is denied as academic. Furthermore, the stay on enforcement of the award is vacated and may recommence deductions from petitioner's paycheck when service of Notice of Entry of this decision/order is completed.

Conclusion

It is hereby

ORDERED that respondent's cross motion to dismiss the petition is granted in all respects; and it is further

ORDERED that petitioner's motion for a preliminary injunction is denied as academic; and it is further

ORDERED AND ADJUDGED that the petition is denied and this proceeding is dismissed; and it is further

ORDERED that the stay on enforcement of the award against petitioner is vacated and respondent may recommence deductions from petitioner's paycheck when service of Notice of Entry of this decision/order is completed; and it is further

ORDERED that any relief not expressly addressed has been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision, order and Judgment of the court.

Dated: New York, New York
June 7, 2010

ENTER:

Hon. Judith J. Gische, JSC