[* 1]

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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Index Number : 116808/2008

GISORS, ROSELYNE

VS

DEPT. OF EDUCATION

Sequence Number : 001

VACATE OR MODIFY AWARD

CalH 43

INDEX NO. 116808/08

MOTION DATE 5/19/10

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for vacate arbitration award

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits _____	4
Replying Affidavits _____	5, 6

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)

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 6-22-10

JUN 22 2010

BARBARA JAFFE J.S.C.

Check one: ✓ FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

ROSELYNE GISORS,

Petitioner,

-against-

THE DEPARTMENT OF EDUCATION, CITY OF NEW YORK FOR THE CITY SCHOOL DISTRICT REGION 10, JOEL KLEIN CHANCELLOR, in his official capacity and individually,

Respondents.

----------x

Index No. 116808/08
Motion Date: 05/04/10
Motion Seq. Nos.: 01, 03, 04
Calendar No.: 37

DECISION & JUDGMENT

BARBARA JAFFE, JSC:

For petitioner:
Roselyne Gisors, self-represented
245 West 72nd Street, Apt. 7B
New York, NY 10023

For respondent City:
Blanche Greenfield, Esq.
Lucas Gomez-Sanchez, Esq.
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-788-0883

By notice of petition dated April 16, 2009, petitioner moves pursuant to CPLR 7511 for an order vacating the hearing officer's award in the disciplinary proceeding brought by defendant Department of Education against petitioner herein pursuant to Education Law § 3020-a. By notice of cross-motion dated May 26, 2009, respondents move pursuant to CPLR 306-b, 404(a), 3211(a)(7), (8) and 7511, and Education Law § 3020-a(5), for an order dismissing the petition. Petitioner opposes.

By order to show cause dated on or about October 28, 2009, petitioner moves for an order compelling the production of discovery. Respondents oppose. By notice of motion dated April 24, 2010, petitioner moves for an order compelling production of approximately 100 documents,

admissions, and interrogatories. Respondents oppose, and, by notice of cross-motion dated April 30, 2010, move for a protective order.

I. UNDISPUTED FACTUAL BACKGROUND

Petitioner, a tenured guidance counselor, has been employed by the Department of Education (DOE) since 1987. (Respondents' Memorandum of Law in Support of Their Cross-Motion to Dismiss the Amended Petition, dated May 26, 2009 [Resp. Mem.] at 6; Affirmation of Daniel Gomez-Sanchez, Esq., dated May 26, 2010 [Gomez-Sanchez Aff.], Exh. B; Amended Petition of Roselyne Gisors v Department of Education et al. [Petition]).

In 2004, when petitioner was working at Frederick Douglass Academy, DOE charged her, under Education Law § 3020-a, with misconduct, neglect of duty, insubordination and conduct unbecoming her position, allegation as follows:

> Specification 1: Changed a student's grade from 55 to 85, without permission or authority.
>
> Specification 2: Submitted an altered doctor's note for an absence.
>
> Specification 3: Failed to return timecards to the school's payroll secretary, despite being directed to do so.
>
> Specification 4: Left school during school hours without permission or authority.
>
> Specification 5: Altered the staff sign-out sheet, changing her time.

(Gomez-Sanchez Aff., Exh. C). Eleanor E. Glanstein, Esq. was selected as the hearing officer. (*Id.*, Exh. B at 2).

On April 28, 2006, the parties met with Glanstein for a pre-hearing conference. Petitioner was represented by an attorney who served of counsel to the New York State United Teachers (NYSUT). (Resp. Mem. at 7). At the time, petitioner was a plaintiff in an action in the Southern

District of New York, *Teachers4Action v Bloomberg*, 08 CV 548. (*In the Matter of the Disciplinary Proceeding bet. Dept. of Education City of New York, Region 10 v Gisors*, SED File No. 5476, Nov. 14, 2008 [Findings & Award]), annexed as Exh. B to Gomez-Sanchez Aff.). A hearing was scheduled for December 2007. (*Id.*).

By letter dated May 14, 2007, petitioner advised her NYSUT attorney, Steven A. Friedman, that she was on medical leave until August 30, 2007. (Petition, Exh. 5). By letter to petitioner dated May 21, 2007, Friedman asserted that the hearing would commence in September 2007 after petitioner's medical leave had ended, and on September 11, 2007, advised petitioner that the hearing would proceed on October 2, 2007 unless petitioner's medical leave had been extended; he requested documentation showing that the extension had been approved. (*Id.*).

By letter dated September 13, 2007, petitioner advised Friedman that she was still on medical leave which was extended to January 31, 2008 and that there had been a delay with the paperwork for the extension. (*Id.*). On September 21, 2007, Friedman advised petitioner that on September 20, 2007, Glanstein had ordered her to provide updated proof of her approved medical leave as soon as possible. (*Id.*). By letter dated September 26, 2007, petitioner informed Friedman that she was awaiting approval for medical leave. (*Id.*). On October 15, 2007, Friedman advised petitioner that he had relayed her request for an adjournment due to medical reasons to Glanstein and that Glanstein had requested documentation showing that her medical leave had been approved. (*Id.*).

On November 16, 2007, petitioner discharged Friedman (Gomez-Sanchez Aff., Exh. N) and on December 11, 2007, requested an adjournment of the scheduled hearing due to

unspecified medical problems, and to give her time to find new counsel. (Findings & Award at 3; Petition, Exh. 7). On December 17, 2007, Glanstein rescheduled the hearing for March 4, 2008. (*Id.*). Sometime in January 2008, petitioner's request for an extension of her medical leave was rejected. (*Id.*).

On March 1, 2008, petitioner sent a letter to Glanstein requesting another adjournment, and advising that she was a plaintiff in the *Teachers4Action* case. (*Id.*). The hearing was rescheduled to March 14, 2008 to determine if it had been stayed. (*Id.*).

On March 12, 2008, petitioner sent Glanstein a facsimile transmittal advising that she was unable to attend the March 14 hearing due to illness. (*Id.* at 3). Nevertheless, she appeared at the hearing after Glanstein advised her that the case had been scheduled for that day. (*Id.*). Glanstein also contacted petitioner's attorney in the federal action, who advised her that he was representing petitioner only in the federal action, and that there was no stay of the 3020-a proceeding. (*Id.* at 4).

The hearing proceeded over petitioner's objection, and Glanstein heard the testimony of Verna Reid, a witness to the grade change charge, who testified that she had originally entered a grade of "55" for the student whose grade petitioner allegedly charged. (*Id.* at 11). The hearing was adjourned once again to April 1, 2008, for petitioner's cross-examination of Reid, and to give her additional time to obtain an attorney and to prepare her defense. (*Id.* at 4).

On March 17, 2008, Glanstein received a letter from the NYSUT advising that it was withdrawing from representing petitioner in the hearing before Glanstein. (Petition, Exh. 5).

Petitioner appeared on April 1, 2008 but refused to participate, arguing that the hearing was illegal and unconstitutional. (*Id.* at 4; Gomez-Sanchez Aff., Exh. E at 38-39). Glanstein

denied her request for another adjournment to obtain an attorney. (Gomez-Sanchez, Exh. E at 39-40). The hearing proceeded without petitioner's participation. (*Id.*). Thomas Barnes, confidential investigator for the Chancellor's Office of Special Investigations, testified for DOE. (*Id.* at 49-50).

Petitioner again appeared on April 3, 2008, and again refused to participate, claiming that the hearing was "illegal." (Gomez-Sanchez Aff., Exh. F at 204-213). Over DOE's objection, petitioner was permitted a companion to accompany her. (*Id.* at 212-214). Assistant program chair Jie Li testified that petitioner had asked him to change a student's grade from 55 to 85 (Findings & Award at 12), payroll secretary Roberta Maio testified that petitioner never returned her original time cards (*id.* at 13), and the principal's secretary Iris Rosado testified that she saw petitioner alter the staff sign-out sheet (*id.* at 15). Petitioner remained silent during the proceeding, and did not cross-examine the witnesses (Findings & Award at 4-5; Gomez-Sanchez Aff., Exh. F at 220-239). Glanstein informed petitioner that on the next date she would have the opportunity to present testimony, evidence, and witnesses on her behalf. (Gomez-Sanchez Aff., Exh F. at 237).

Plaintiff did not appear at the April 29, 2009, hearing, and it was adjourned to May 13. (Gomez-Sanchez Aff., Exh. G at 245-246). On May 12, 2008, she submitted a doctor's note stating she that she was not able to work until May 15. (Gomez-Sanchez Aff., Exh. H at 253-254). Glanstein adjourned the hearing to May 16, 2008, with instructions to plaintiff that she bring the doctor's note and other requested documentation. (*Id.* at 256). On May 14, 2008, petitioner sent Glanstein a fax requesting an adjournment of the May 16 hearing with a note from a different doctor stating that petitioner was advised to rest at home until May 16. (Findings

& Award at 5). The hearing was adjourned from May 16 to May 28 for plaintiff to appear and bring documentation explaining her earlier failure to appear at the hearing. (*Id.* at 6).

On May 27, 2008, an attorney who stated that he was representing petitioner in her claims in federal and state courts, including the 3020-a proceeding, sent an e-mail to Glanstein, with no attached documentation, informing her that petitioner would attend no further hearings due to disability and unspecified federal and state litigation. (Gomez-Sanchez Aff., Exh. W). There is no indication in the record that the attorney filed a notice of appearance.

Petitioner did not appear for the hearing on May 28, 2008. (Findings & Award at 6). On May 16, 2008, and May 28, 2008, DOE sent petitioner requests for a medical evaluation of petitioner, to which she did not respond. (Gomez-Sanchez Aff., Exh. Z; Petition, Exh. 7). On June 2, Glanstein warned petitioner that if she did not appear for the next hearing, it would proceed without her. (Gomez-Sanchez Aff. Exh. Y).

On June 12, 2008, petitioner did not appear for the rescheduled hearing and it continued without her. (Gomez-Sanchez Aff., Exh. K). Dr. Gregory Hodge, principal of Frederick Douglass Academy, testified for DOE that neither he nor Reid authorized the grade change. (Findings & Award at 10-11). Margaret Galligan, school secretary in the guidance office, also testified. (Gomez-Sanchez Aff., Exh. K at 284). At the conclusion of the hearing, Glanstein adjourned the hearing to July 15 to afford petitioner a final opportunity to present evidence. (*Id.* at 300-301). By letter dated June 16, Glanstein explained to petitioner that July 15 was her last chance to present her case. (Gomez-Sanchez Aff., Exh. Z).

When petitioner failed to appear on July 15 without explanation, Glanstein permitted DOE to present its closing argument, and Glanstein then closed the record. (*Id.*, Exh. L).

By email dated September 18, 2008, petitioner requested that the NYSUT represent her in making a closing argument at the hearing as she had withdrawn her complaint against it in the *Teachers4Action* proceeding. (Petition, Exh. 5). By letter dated September 23, 2008, NYSUT denied petitioner's request on the ground that it would not be able to represent her properly at the hearing by simply presenting a closing statement. (*Id.*).

By letter dated October 1, 2008, petitioner argued that the hearings were improperly held while she was disabled. (Gomez-Sanchez Aff., Exh. AA). Glanstein considered the letter before making her determination. (Findings & Award at 7).

Glanstein issued her 17-page findings on November 14, 2008, determining that petitioner was guilty of the first, third, and fifth specifications. (Hearings & Award at 17). As to the first, Glanstein found that, based on the witnesses' testimony, petitioner asked Li to change the grade from a 55 to an 85 without any authority or permission to do so, in order to help that student secure an athletic scholarship. (*Id.* at 12-13). Glanstein also credited Maio's testimony in finding petitioner guilty of not submitting her time cards (*id.* at 14), and Rosado's testimony that she saw petitioner alter the sign out sheet (*id.* at 15). Glanstein exonerated petitioner of the charge of altering a doctor's note (*id.* at 13-14), and found that there was insufficient evidence for finding that petitioner had left the school during school hours without permission (*id.* at 13-15).

Finding that petitioner had willfully absented herself from the hearings and in order to foster petitioner's understanding that changing a grade is wrong and sets a "dangerous precedent," Glanstein imposed a six-month suspension without pay. (*Id.* at 16-17).

Petitioner alleges that she received Glanstein's findings on December 6, 2008. (Petition at 2). On December 16, 2008, she commenced the instant proceeding, and on April 13, 2009,

served DOE. (Resp. Mem. at 20).

II. CONTENTIONS

In support of her petition to vacate the award, petitioner argues that the finding was prejudiced by corruption, fraud, partiality, imperfect execution of power, and failure to follow Article 75 procedures. She specifically alleges that the hearings were illegal because they were conducted in her absence. (Petition). In support of her motion to compel and her order to show cause, petitioner argues that disclosure is permissible under CPLR 408. (Affidavit of Roselyne Gisors, dated Apr. 24, 2010).

In opposition to the petition, and in support of its own cross-motion to dismiss the petition, respondents argue that petitioner did not obtain personal jurisdiction over them absent timely service of petition, that she failed to satisfy any of the standards for vacatur under Article 75, that the penalty is not shocking to one's sense of fairness, and that the claims against Chancellor Klein individually have no factual basis. (Resp. Mem.). In opposition to petitioner's motion to compel and her order to show cause seeking discovery, and in support of their cross-motion for a protective order, respondents argue that there is no right of disclosure for Article 75 proceedings. (Affidavit of Daniel Gomez-Sanchez, Esq. in Support of Respondents' Cross-Motion for a Protective Order, dated Apr. 30, 2010).

III. PETITION TO VACATE ARBITRATION AWARD

A. Service of Process and Personal Jurisdiction

Because petitioner's hearing was ordered pursuant to Education Law § 3020-a(5), the proper vehicle for judicial review of the findings is this Article 75 proceeding, which is initiated by a petition. (*Lackow v Dept. of Ed. of the City of New York*, 51 AD3d 563, 567 [1st Dept 2008];

Cruz v New York City Dept. of Ed., 26 Misc 3d 1208[A], 2010 Slip Op 50016[U] [Sup Ct, NY County 2010]). The statute of limitations for such a petition is 10 days from the date that the petitioner receives the determination.

Pursuant to CPLR 306-b, in an action where the statute of limitations is four months or less, service must be made within 15 days after filing the petition. (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001]; *Palmateer v Greene County Indus. Dev. Agency*, 38 AD3d 1087, 1088 [3d Dept 2007]). If service is not timely, the court has no jurisdiction over the respondent. (*Ruine v Hines*, 57 AD3d 369, 370 [1st Dept 2008]). However, in the interest of justice, the court may consider numerous factors in determining whether to extend time for service, including the degree of petitioner's diligence, the expiration of the statute of limitations, the meritorious nature of the action, length of delay in service, the promptness of plaintiff's request for an extension of time, and prejudice to defendant. (*Leader*, 97 NY2d at 105-106).

Although petitioner filed the petition on December 16, 2008, she did not serve respondents until April 13, 2009, on the mistaken belief that the 120-day requirement of CPLR 306-b applies. Although respondents concede that they are not prejudiced by the delay (Resp. Mem. at 22), petitioner never requested an extension of time (*id.*), and she has presented no evidence as to whether she would have been entitled to one. (*See Leader*, 97 NY2d at 107 [appellate division did not abuse its discretion in denying leave, where plaintiffs offered no explanation for failure to serve timely, offered no excuse for delay in making motion to extend, even after they were made aware of their mistake and given another opportunity]). Her status as a self-represented litigant does not excuse her failure to comply with the service requirement. (*Ruine*, 57 AD3d at 370; *Goldmark v Keystone & Grading Corp.*, 226 AD2d 143, 144 [1st Dept

1996]).

Accordingly, petitioner has not served respondents timely and has not established jurisdiction over respondents. Nevertheless, even if jurisdiction were established, petitioner has not demonstrated any grounds upon which to vacate the hearing officer's findings. (*See Goldmark*, 226 AD2d at 144 [addressing petitioner's failure to establish grounds under CPLR 7511, despite lack of jurisdiction for failure to serve]; *Cruz*, 26 Misc 3d 1208[A], 2010 NY Slip Op 50016[U] [same]).

B. Applicable Law

When a hearing is held pursuant to CPLR 3020-a, a party who was subject to the hearing may apply to vacate a hearing officer's decision pursuant to CPLR 7511, and the court's review shall be limited to grounds set forth in that statute. CPLR 7511 provides that an award may be vacated only the application of a party who either participated in the arbitration or received a notice to arbitrate if the party demonstrates that her rights were prejudiced by:

> (i) corruption, fraud or misconduct in procuring the award;
> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession;
> (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 was not made; or
> (iv) failure to follow the procedures of this article.

When a party is required to arbitrate, the arbitrator's decision is subjected to closer judicial scrutiny, and the arbitration award "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." (*Lackow*, 51 AD3d at 563). The party challenging the arbitration award bears the burden of proving that it is invalid. (*Id.*).

The scope of judicial review of an arbitration proceeding is extremely limited (*Matter of Campbell v New York City Tr. Auth.*, 32 AD3d 350 [1st Dept 2006]), and the court must give deference to the arbitrator's decision (*Matter of New York City Tr. Auth. v Transp. Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332 [2005]). In reviewing an award, the court is bound by the arbitrator's factual findings and interpretations of the agreement at issue (*Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368 [1st Dept 2004]), and may not "examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one" (*Matter of New York State Correctional Officers and Police Benev. Assn., Inc. v State of New York*, 94 NY2d 321 [1999]). Finally, if a motion to vacate an arbitration award is denied, the court must confirm the award. (CPLR 7511[e]).

1. Did petitioner prove that her rights were prejudiced under CPLR 7511?

Absent any evidence that Glanstein or respondent engaged in misconduct, corruption or fraud, petitioner's claim is fatally conclusory. (*Scollar v Cece*, 28 AD3d 317 [1st Dept 2006] [respondent's allegations of corruption, fraud, misconduct and/or bias were conclusory and without factual support]).

An allegation of bias against an arbitrator must be established by clear and convincing evidence, showing more than the mere inference of partiality, and thus conclusory allegations of bias are insufficient. (5 NY Jur 2d, Arbitration and Award § 220 [2010]). Here too, petitioner's allegation that Glanstein was biased is fatally conclusory, and the fact that Glanstein's determination was against petitioner does not, in and of itself, indicate bias. (*See In Re Mays-Carr [State Farm Ins. Co.]*, 43 AD3d 1439 [4th Dept 2007] [allegations of bias were

wholly speculative and fact that adverse determination was made did not indicate that arbitrator was partial]).

Similarly unavailing is petitioner's claim that Glanstein engaged in *ex parte* communication with respondent's attorney. (*See Moran v New York City Transit Auth.*, 45 AD3d 484 [1st Dept 2007] [petitioner's claim of *ex parte* communication by arbitrator unsupported by any evidence]; *Regan v New York State and Local Employees' Retirement System*, 14 AD3d 927 [3d Dept 2005], *lv denied* 4 NY3d 709 [allegation of *ex parte* contact was unsupported and thus insufficient to establish arbitrator's bias]). Finally, petitioner's allegation that Glanstein did not follow proper procedures is conclusory and unsupported by the record.

2. Was the proceeding in accord with due process?

Pursuant to CPLR 7506(c), a party is entitled to be heard, present evidence, and examine witnesses at a hearing, and "notwithstanding the failure of a party duly notified to appear, the arbitrator may hear and determine the controversy upon the evidence produced." Moreover, an arbitrator's decision to grant or deny an adjournment is within his or her sound discretion, and only if the discretion is abused may there be a finding of misconduct. (5 NY Jur 2d, Arbitration and Award §163 [2010]). Thus, in *Doris Trading Corp. v Melody Knitting Mills, Inc.*, 172 AD2d 399 (1st Dept 1991), the court found that the arbitrators did not abuse their discretion in denying two adjournments as the respondent's attorney's claim that he was ill was unaccompanied by any documentation of his illness either before the arbitrator or the court in reviewing the petition to vacate the award. (*See also Shearson Lehman Hutton, Inc. v Meyer*, 174 AD2d 496 [1st Dept 1991] [respondent failed to demonstrate that genuine medical emergency existed entitling her to adjournment]).

Here, when petitioner submitted a doctor's note indicating that she was unable to appear until a specific date, Glanstein adjourned the hearing to a date beyond that set forth in the note, but thereafter, petitioner failed to submit any medical documentation to support her claim that she was disabled. Petitioner thus failed to establish that Glanstein's decision to deny her any further adjournments was an abuse of her discretion.

Petitioner's failure to appear at and participate in the hearing did not preclude the hearing officer from rendering her decision (*see Whale Securities Co., L.P. v Godfrey*, 271 AD2d 226 [1st Dept 2000], *lv denied* 96 NY2d 721 [2001] [arbitration panel did not abuse discretion in rejecting third request for adjournment and in rendering decision in absence of respondent's appearance on last hearing date]), nor did it deprive her of due process (*see Kingsley v Redevco Corp.*, 61 NY2d 714 [1984] [as respondent failed to appear at hearing, having been given notice of it and chance to be heard, its claim that its right to due process was violated is meritless]).

Pursuant to CPLR 7506(d), a party has the right to be represented by an attorney at a 3020-a hearing. While Glanstein repeatedly informed petitioner that she had the right to have an attorney represent her at the hearing and adjourned the hearing several times to give her time to obtain representation, petitioner nonetheless failed to do so. Rather, she insisted that an attorney from NYSUT represent her. However, NYSUT had recused itself from representing her due to allegations she made against it in her federal lawsuit. Thus, not only was petitioner not prohibited from hiring her own attorney, but her own conduct precluded her representation by NYSUT. Petitioner has thus failed to show that she was deprived of her right to representation. (*See Rosengart v Armstrong Daily, Inc.*, 9 Misc 2d 174 [Sup Ct, Queens County 1957], *affd* 6 AD2d 1052 [2d Dept 1958] [petitioner was not denied right to counsel as record showed he

neither waived right nor was deprived of it but instead did not choose to exercise right]).

3. Was the award supported by adequate evidence?

Petitioner's argument that the witnesses who testified at the hearing were not credible and that Glanstein accepted hearsay evidence is not a proper ground upon which to vacate the award. (*See Saunders v Rockland Bd. of Co-Op Educ. Svces.*, 62 AD3d 1012, 1013 [2d Dept 2009] ["When reviewing compulsory arbitrations in education proceedings . . . the court should accept the arbitrators' credibility determinations, even where there is conflicting evidence and room for choice exists."]; *Austin v Bd. of Educ. of City School Dist. of City of New York*, 280 AD2d 365 [1st Dept 2001] [hearing officer may accept hearsay testimony]).

As petitioner failed to submit any evidence on her behalf at the hearing, she is foreclosed from relying on evidence that was not before Glanstein in support of her petition. (*Kelly v Safir*, 96 NY2d 32 [2001] [review of administrative determination is limited to facts and record adduced before agency]; *Torres v New York City Housing Auth.*, 40 AD3d 328 [1st Dept 2007] [court erred in basing determination to vacate arbitration award on arguments raised for first time in petition to vacate award]).

Finally, a review of the evidence submitted to Glanstein reflects that the charges that were sustained against petitioner were supported by testimony from a number of witnesses as well as documentation, and thus the award was supported by adequate evidence. (*In re Buffalo Teachers Fed., Inc. [Bd. of Educ. of Buffalo City School Dist.]*, 67 AD3d 1402 [4th Dept 2009] [arbitrator's findings supported by documentary evidence in record before arbitrator]; *Lackow*, 51 AD3d at 568 [record of hearing supported hearing officer's conclusions]; *DiNapoli v Peak Auto., Inc.*, 34 AD3d 674 [2d Dept 2006] [conclusion supported by evidence in record])

4. Was the award arbitrary and capricious?

As Glanstein's determination had evidentiary support and a rational basis, it was neither arbitrary nor capricious. (*See Mercury Cas. Group v Healthmakers Med. Group, Inc.*, 67 AD3d 1017 [2d Dept 2009] [determination of master arbitrator confirming original arbitration award had evidentiary support and rational basis, and was not arbitrary and capricious]; *Country-Wide Ins. Co. v May,* 282 AD2d 298 [1st Dept 2001] [as award was supported by rational view, it could not be set aside as arbitrary and capricious]).

5. Was the discipline imposed excessive?

The standard for reviewing a penalty imposed after a hearing pursuant to Education Law 3020-a is whether the punishment imposed "is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." (*Bd. of Educ. of Union Free School Dist. No. 1 of the Towns of Scarsdale, et al. v Mayor of Syracuse, et al.*, 34 NY2d 222, 233 [1974]). A result is shocking to one's sense of fairness when:

> the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct . . . of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved.

(*Id.* at 234).

Here, petitioner was found guilty of changing a student's grade in order to help him obtain an athletic scholarship, failing to submit her time cards, and changing a sign-out sheet, and Glanstein imposed the six-month suspension without pay after determining that petitioner needed

to learn that her actions were wrong and to deter others from acting similarly. There is thus no ground for finding that the punishment was disproportionate to the misconduct.

C. Conclusion

For all of these reasons, petitioner has failed to establish that there exists any basis upon which the award must be vacated.

IV. DISCOVERY

While a court may order disclosure in a special proceeding, such as one brought following an arbitration, disclosure need not be permitted except under extraordinary circumstances. (5 NY Jur 2d, Arbitration and Award § 115 [2010]). Thus, disclosure is not permitted for the parties' convenience, but is permitted where it is absolutely necessary for the protection of the party's rights, such as when the party requested discovery would be severely prejudiced without it and the other party is not prejudiced. (*Id.*).

Here, the discovery which petitioner seeks could have been requested by her before or during the hearing. (CPLR 3102[c]). It may not be requested now in an *post-hoc* effort to raise questions about Glanstein's impartiality and contest the evidence presented at the hearing. (*See Miller v Arnold Worldwide LLC*, 13 Misc 3d 1216[A], 2008 NY Slip Op 51849[U] [Sup Ct, New York County 2008] [denying motion to compel arbitrator to comply with subpoena for information as to possible bias; plaintiff could have sought information before arbitration]; *Nemo Tile Co., Inc. v 260 Park Ave. South, LLC*, 17 Misc 3d 1130[A], 2007 NY Slip Op 52195[U] [Sup Ct, New York County 2007] [court could not order discovery and use it to second-guess arbitrator's findings; petitioner could have requested pre-arbitration disclosure or asked panel to allow discovery]).

Moreover, petitioner has failed to show that extraordinary circumstances warrant discovery here absent a demonstration that the information requested is absolutely necessary for the protection of her rights.

V. CONCLUSION

Accordingly, it is hereby

ADJUDGED, that the petition for an order vacating the award is denied; it is further

ADJUDGED, that respondents' cross-motion for an order dismissing the petition is granted to the extent that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondents; it is further

ADJUDGED, that respondents, having an address at 100 Church Street, New York, New York 1007, do recover from petitioner, having an address at 245 West 72nd Street, Apt. 7B, New York, New York 10023, costs and disbursements in the amount of $ _____, as taxed by the Clerk, and that respondents have execution therefor; it is further

ORDERED, that petitioner's motions to compel discovery are denied; and it is further

ORDERED, that respondents' cross-motion for a protective order is denied as moot.

This constitutes the decision and judgment of the court.

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: June 22, 2010
New York, New York

JUN 22 2010

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).