[* 1]

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

PRESENT: HON EILEEN A. RAKOWER PART 15

C001

Index Number : 116402/2010
GRANT, ROBERT
vs.
NYC DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

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

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

[redacted]

Dated: 6/21/11

HON EILEEN A. RAKOWER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

In the Matter of the Application of
ROBERT GRANT

Petitioner,

-against-

THE NEW YORK CITY BOARD/DEPARTMENT OF EDUCATION,

Respondent.

----------X

Index No.
116402/10

DECISION and ORDER

Mot. Seq.
001

HON. EILEEN A. RAKOWER:

Robert Grant ("Petitioner") brings this proceeding pursuant to Article 75 of the CPLR seeking an order vacating the November 22, 2010 Arbitration Award ("the Award") issued by Arthur A. Riegel, Esq. ("the Arbitrator"), which found Petitioner guilty of several charges of misconduct (called "Specifications") and terminated his employment as a teacher with the New York City Department of Education ("DOE").

It is uncontested that, prior to his termination, Petitioner was a tenured social studies teacher who was assigned to Forest Hills High School in Queens. He began his teaching career after his discharge from the military in 1984, and began teaching in Forest Hills High School in September 2002. The charges against Petitioner include the following:

- In or around November 2005, Petitioner allegedly
  - approached a student identified as TM while in school and asked him to go out with Petitioner. He allegedly told TM that he looked older than his age, and that he knew of a bar in TM's neighborhood where they "don't card" (*i.e.*, demand I.D.);
  - told a student identified as BA that he would give him/her the answers to a test if he/she would "get [Petitioner] a girl;

- pointed his finger at TM and said something to the effect of "You shouldn't have done that," referring to his reporting of the prior incident with TM.

- On or about April 25, 2007, Petitioner allegedly:
  - pushed the classroom door into the back of a student identified as DD and then slammed the door a second time, causing DD's hand to break through the window of the door when she raised her hand to stop the door, resulting in cuts to DD's hand and/or wrist and bleeding;
  - told DD "you did that to yourself" after she was cut by the glass;
  - failed to assist DD with her injuries and failed to call for and/or take DD for medical treatment.
- In addition, Petitioner allegedly:
  - was excessively absent during the 2006-07 school year, missing 27 days between February 26, 2007 through April 13, 2007;
  - was excessively absent during the 2007-08 school year, missing 11 school days that year;
  - submitted false information on a DOE Comprehensive Injury Report on or around April 27, 2007.
  - left early or arrived late on seven occasions during the 2007-08 year;
  - left early or arrived late on seven occasions during the 2008-09 year;
  - left early or arrived late on seven occasions during the 2009-10 year.

After a hearing on the record, held pursuant to Education Law §3020-a, the Arbitrator Issued his Award, which found Petitioner guilty of:

- the charges concerning the alleged interactions with TM in November 2005;
- the charges concerning the incident with DD on April 25, 2007;
- the charges concerning excessive absenteeism during the 2006-07 year[1]; and
- the charges concerning excessive absenteeism during the 2007-08 year.

The remainder of the charges against Petitioner were dismissed. Based on the above, the Arbitrator held that Petitioner's "services are to be terminated forthwith." This petition ensued. DOE cross-moves for dismissal pursuant to CPLR §3211, and attaches the record of proceedings from the arbitration.

---

[1]The Arbitrator states that Petitioner's absences on February 27, 27, 28, and March 1, and 2, 2007 were dismissed because they fell outside of the three-year statute of limitations under Education Law §3020.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). However, when "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

The standard of review governing the court's analysis in this proceeding was succinctly stated by the First Department in *Lackow v. DOE*, (2008 NY Slip Op 4744, *3 [1st Dept. 2008]),

> *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' (*Austin v Board of Educ. of City School Dist. of City of N.Y., 280 AD2d 365, 365, 720 NYS2d 344 [2001]*). Nevertheless, where 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 (*see Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co., 89 NY2d 214, 223, 674 NE2d 1349, 652 NYS2d 584 [1996];Cigna Prop. & Cas. v Liberty Mut. Ins. Co., 12 AD3d 198, 199, 783 NYS2d 810 [2004]*). 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, 550 NE2d 919, 551 NYS2d 470 [2002]*).

> The party challenging an arbitration determination has the burden of showing its invalidity (*Caso v Coffey, 41 NY2d 153, 159, 359 NE2d 683, 391 NYS2d 88 [1990]).*

Further, when reviewing an arbitration award, "[a] hearing officer's determinations of credibility ... are largely unreviewable because the hearing officer observed the witnesses and was 'able to perceive the inflections, the pauses, the glances and gestures--all the nuances of speech and manner that combine to form an impression of either candor or deception'" (*id.* at *4) (*citing Berenhaus v. Ward*, 70 N.Y.2d 436 [1987]). In addition, where, as here, a petitioner challenges an award on the grounds that the arbitrator was biased, the petitioner must prove bias by "clear and convincing evidence" (*Zrake v. DOE*, 2007 NY Slip Op 4700, *1 [1st Dept. 2007]). Lastly, a court may only overturn the penalty imposed by the arbitrator it if is "so disproportionate to the offense[] so as to be shocking to the court's sense of fairness" (*Lackow* at *4).

Applying these principles to the petition herein, the court finds that the DOE is entitled to dismissal of the petition. The court has reviewed the record of proceedings of Petitioner's 3020-a hearing and, even assuming the truth of Petitioner's factual allegations, Petitioner fails to establish a basis for vacatur of the Award upon judicial review. First, the record demonstrates that Petitioner's hearing fully accorded with the procedural requirements of Education Law §3020-a. The hearing was held on April 9, May 3, July 20, August 11, 18, September 15, 16, 23, 24, October 7 and 18, 2010. Petitioner had (and utilized) the right to be represented by counsel; he had the right to (and did) subpoena witnesses. Moreover, assuming *arguendo* that there was a procedural deficiency with the hearing, his procedural due process claim would be waived based upon his failure to raise it at the administrative level (*see Assay Partners v. New York,* 149 A.D.2d 63, 68 [1st Dept. 1989]); *Rauer v. State University of New York*, 159 A.D.2d 835-36 [3rd Dept. 1990]).

Similarly, the record indicates that Petitioner proceeded with his hearing without raising any objection as to the alleged bias of the Arbitrator, and thus this claim is also waived. Moreover, review of the petition reveals that Petitioner's claim of bias on the part of the Arbitrator is wholly conclusory; and that the petition and its exhibits provide no credible evidence - much less clear and convincing proof - of bias on the part of the arbitrator.

As to the merits of the Award, the record of proceedings conclusively establishes that the Award was rationally based upon the evidence presented at the hearing, irrespective of Petitioner's denial of any wrongdoing. In each of the charges that were sustained by the Arbitrator, the allegations therein were testified to under oath by numerous student and employee witnesses, none of whom were found by the Arbitrator to have had any apparent animus towards Petitioner, or any other motive to commit perjury. For example, the student identified as TM (who was 15 at the time of the incident) testified that Petitioner "invited [him] to a bar," stating that "they don't card there." TM further testified that, after speaking with another teacher about the incident, Petitioner approached TM while he was sitting on a bus, "sat down in front of [TM and a fellow student], pointed his finger, and said you shouldn't have done that." TM testified that this made him feel "threatened and uncomfortable." The Arbitrator found TM's testimony to be credible. He observed that, in addition to TM testifying under oath that he had no personal animus toward Petitioner, the record was wholly devoid of any evidence that would give TM a motive to make false claims against Petitioner (such as bad grades or disciplinary action from Petitioner).

As for the April 25, 2007 incident involving DD, DD testified under oath that, as she was walking out of Petitioner's classroom,

> I felt a pushing on my back like the door just kept hitting me .... [W]hen I turned around, my hands were in front of me to like hold the door back. And he slammed it. Mr. Grant slammed it .... And then, my hand ended up going straight through the glass .... And Mr. Grant yelled at me. He said I did that to myself and walked away and sat down.

DD further testified that she was "in shock" and "gushing blood." She has a scar on her wrist from the incident. She also testified that a contemporaneous incident report that was dictated by her (due to her injured hand) was a true and accurate account of the incident.

DD testified that she was rushed to the nurse by her sister and two friends. These three individuals also testified at the hearing and corroborated DD's account of events. In addition Felician Lazar, a fellow teacher and Dean, testified that he heard glass breaking and responded to the scene. He observed blood on the floor

and asked Petitioner what had happened. Petitioner told him that "it was [DD and her sister] that did it." Lazar further testified that he asked Petitioner whether he called for assistance, and he indicated that he did not. The Arbitrator found the testimony of all of the witnesses to the April 25, 2007 incident to be credible, and noted that, "[i]n order for [Petitioner] to be right and all of the other witnesses to be in error there would have to be [a] grand conspiracy among the witnesses. There is not the slightest bit of evidence to support such a theory."

The record establishes that there was adequate evidence for a rational factfinder to conclude that Petitioner was guilty of the charges sustained by the Arbitrator.

With respect to Petitioner's alleged excessive absenteeism, Petitioner did not dispute the accuracy of the payroll records introduced into evidence. The Arbitrator further found two doctors' notes submitted by Petitioner to be suspect on the one hand, and lacking in sufficient detail to be given any weight on the other. Moreover, the Arbitrator accurately notes that courts have held that "medically certified absences do not preclude public employers from charging employees with excessive absenteeism" (*see Wallis v. Sandy Creek Cent. Sch. Dist. Bd. of Educ.*, 2010 NY Slip Op 9814 [4th Dept. 2010]).

Lastly, the court finds that the penalty of termination is not shocking to one's sense of fairness in light of the conduct that Petitioner was found to have engaged in on several different occasions (*see Cipollaro v. DOE*, 2011 NY Slip Op, *1 [1st Dept. 2011]) ("Considering petitioner's lack of remorse and failure to take responsibility for her actions, as well as the harm caused by petitioner's actions, the penalty of dismissal, even if there was an otherwise adequate performance record, cannot be said to shock the conscience.").

Wherefore it is hereby

ORDERED that DOE's cross-motion to dismiss the petition is granted; and it is further

ADJUDGED that Petitioner's motion to the Arbitrator's Award of November 22, 2010 is denied; and it is further

ADJUDGED that the November 22, 2010 Award is confirmed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: June 21, 2011

EILEEN A. RAKOWER, J.S.C.

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).