Matter of Cassidy v New York City Dept. of Educ.
2011 NY Slip Op 32163(U)
July 13, 2011
Sup Ct, NY County
Docket Number: 100279/10
Judge: Eileen A. Rakower
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SCANNED ON 7/18/2011

[* 1]

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

PRESENT: RAKOWER PART 15

Index Number : 100279/2011

CASSIDY, GERARD

vs

NYC DEPARTMENT OF EDUCATION

Sequence Number : 001

VACATE OR MODIFY AWARD

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

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 ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4
	5

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

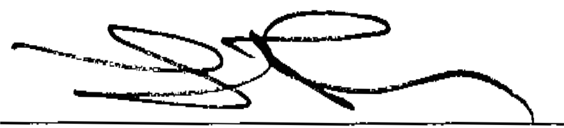
UNFILED JUDGMENT

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

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

Dated: 7/13/11



HON. EILEEN A. RAKOWER

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

[* 2]

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

---X

In the Matter of the Application of
GERARD CASSIDY,

Petitioner,

-against-

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

---X

Index No. 100279/10

DECISION and ORDER

Mot. Seq. 001

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HON. EILEEN A. RAKOWER:

Gerard Cassidy ("Petitioner") brings this proceeding pursuant to Article 75 of the CPLR seeking an order vacating the December 14, 2010 Arbitration Award ("the Award") issued by Douglas S. Abel, 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"). Prior to his termination, Petitioner was a tenured 8th grade physical education teacher who had been teaching in New York City for 18 years. The Specifications brought against Petitioner alleged, in pertinent part[1], as follows:

> **SPECIFICATION 2:** On or about and between February 2009 through July 2009, [Petitioner] did the following:
>
> c. Purchased eye glasses for Student A.
> d. Purchased an iPhone for Student A.

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[1]Specification 1 and Subsections a, b, and e-m of Specification 2 were dismissed by the Arbitrator prior to the date of the Award. Accordingly, those allegations are not addressed herein.

> **SPECIFICATION 3:** On or about and between March 20, 2009 through July 7, 2009, [Petitioner] telephoned Student A approximately five hundred fifty-three (553) times.

> **SPECIFICATION 4:** On or about and between March 20, 2009 through July 7, 2009, [Petitioner] sent text messages to Student A approximately tree hundred eighty-three (383) times.

> **SPECIFICATION 5:** On or about and between March 17, 2009 through June 27, 2009, [Petitioner] was financially liable for Student A's iPhone account.

At all times relevant to the instant petition, Student A was a 16 year-old female who was a student of Petitioner's some time prior to the alleged misconduct.

Petitioner's hearing was conducted on November 29 and 30, and December 2, 2010. Petitioner was represented by counsel at the hearing. Principal Laura Mastrogivanni testified as a witness for the DOE at the hearing. Mastrogivanni testified that, as Petitioner was being investigated by DOE, he came to her to discuss the allegations. Petitioner admitted that he "was giving [Student A] some gifts," such as a "a cell phone and glasses." Petitioner told Mastrogivanni that the whole matter was a misunderstanding, and that he was dating Student A's mother.

Special Investigator John LaCherra of the office of the Special Commissioner of Investigation also testified on behalf of DOE. LaCherra investigated the allegations brought against Petitioner. He testified that he obtained Petitioner's cell phone records from Sprint/Nextel pursuant to a subpoena. The phone records were introduced into evidence. LaCherra testified, and the phone records disclose that, from March 20, 2009 through July 7, 2009, Petitioner called Student A's cell phone 553 times, and sent her text messages 383 times. The phone records indicate that over 100 of these communications took place between 8:00 p.m. and 6:00 a.m. Records pertaining to the iPhone purchased for Student A further disclosed that Petitioner was solely responsible for paying Student A's iPhone charges.

Student A's mother testified on behalf of Petitioner. She testified that Petitioner is her boyfriend. She and Petitioner met in April 2008 when Student A came to meet her at work. Petitioner happened to pass by the store where the mother worked and Student A introduced Petitioner as her former gym teacher. The mother testified that, in the course of their relationship, they would frequently go shopping together and would buy items for her children, including Student A. On one occasion, Petitioner purchased pairs of prescription glasses both for the mother and for Student A. She testified that she and Petitioner each paid half of the price for Student A's glasses. She also testified that Petitioner purchased an iPhone for Student A, and stated that she paid half. The mother stated that a number of the phone calls from Petitioner's cell phone to Student A's iPhone were calls to her, rather than Student A, and that this was due to the fear that her husband would break her phone.

The mother further testified that she was aware of the communications between Petitioner and Student A. She testified that Petitioner would provide Student A with guidance and emotional support on matters that she did feel comfortable discussing with her mother or father, who was abusive toward the mother. The mother testified that Petitioner would give Student A guidance and advice about her ex boyfriend, and would call Student A to encourage her and make sure that she went to school. Petitioner would talk to Student A about her personal issues because the mother was uncomfortable talking about such matters with her daughter. She attributed this to her cultural background (the mother is from Trinidad). The mother testified that she fully approved of these communications, and that Petitioner had a very positive influence on Student A's life. She testified that

> [S]he's doing really good in her studies. Her average, I went to her school like three weeks ago. All her teachers talk about her so highly. They want to know who is the reason this child, who is motivating this child. I mean her average is like 96 point something, something.

On cross-examination, it was revealed that Student A was in a satellite school due to her failing grades, and that her report card contained a cumulative average of 55.86 out of 100.

Petitioner also testified on his own behalf. Petitioner similarly testified that he and the mother were dating, and that he acted as a role model for Student A, providing guidance, advice and encouragement.

In his December 14, 2010 decision, the Arbitrator first noted that there was no dispute that Petitioner purchased an iPhone and eyeglasses for Student A; nor were the cell phone records indicating the number, timing, duration, and frequency of communications between Petitioner and Student A disputed. With respect to Petitioner's defense, he found that both the mother and Petitioner's testimony were not credible. The Arbitrator stated that their testimony was "at time internally inconsistent, inconsistent with surrounding circumstances and documents, and implausible and inconsistent with common sense expectations." With respect to the penalty to impose, the Arbitrator, having found that Petitioner "gave expensive gifts to a student, and called and texted that student repeatedly and at all hours over a multi-month period," held that termination was appropriate under the circumstances.

This petition ensued. DOE now cross-moves to dismiss the petition, and provides a copy of the entire record of Petitioner's 3020-a hearing.

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 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 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.

There was undisputed evidence in the record that Petitioner purchased an iPhone for Student A, as well as eyeglasses; that Petitioner paid for Student A's iPhone charges; and that Petitioner called or texted Student A's phone 936 times from March 20, 2009 through July 7, 2009. All of this evidence would permit a rational factfinder to conclude that Petitioner was engaged in a relationship with a student that was inappropriate for a person in Petitioner's position. While Petitioner attempted to provide an innocent explanation for buying Student A gifts, being financially responsible for her iPhone bills, and calling or texting her several times a day (on average) through both his testimony and through the testimony of Student A's mother, the Arbitrator's determination that their testimony was incredible and unreliable cannot be disturbed by the court.

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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 repeatedly over a period of several months (*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

ADJUDGED that the petition to vacate the Arbitrator's Award of December 14, 2010 is denied and the proceeding is dismissed; and it is further

ADJUDGED that the December 14, 2010 Award is confirmed.

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

Dated: July 13, 2011

EILEEN A. RAKOWER, J.S.C.

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