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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Joan B. Lobis Justice

PART 6

Index Number : 107545/2011

LIU, TINA

VS.

NYC BOARD OF EDUCATION

SEQUENCE NUMBER : 001

VACATE OR MODIFY AWARD

INDEX NO. _____

MOTION DATE 10-21-11

MOTION SEQ. NO. _____

tion to/for _____

No(s). 1-2

No(s). Xmot 3, 4-16

No(s). 17-21

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION, ORDER + JUDGMENT

ANCE
DUM DECISION

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).

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

Dated: 1/4/12

J.S.C.
JOAN B. LOBIS

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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In the Matter of the Application of TINA LIU,

Petitioner,

Index No. 107545/11

For a judgment pursuant to
Article 75 of the C.P.L.R.,

Decision, Order and Judgment

- against -

THE NEW YORK CITY BOARD/DEPARTMENT OF EDUCATION,

Respondent.

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JOAN B. LOBIS, J.S.C.:

Petitioner Tina Liu, proceeding pro se, brings this petition pursuant to C.P.L.R. § 7511, seeking an order vacating the arbitration award issued by Hearing Officer Martin F. Sheinman, Esq., after a hearing conducted pursuant to Education Law § 3020-a. Petitioner seeks to vacate the award on the grounds that the fine of $12,500 is excessive and unwarranted punishment for unproven allegations; misconduct of the Hearing Officer; partiality of the Hearing Officer; and failure to follow procedure. Respondent Department of Education of the City of New York s/h/a The New York City Board/Department of Education ("DOE") cross-moves for an order dismissing the petition on the grounds that it fails to state a cause of action (C.P.L.R. Rule 3211[a][7]) and confirming the award.

Petitioner is a tenured math teacher employed by respondent for fifteen years, formerly assigned to Business, Computer Applications and Entrepreneurship High School in Queens teaching high school students. Petitioner was removed from her assignment in November 2009 and assigned to a reassignment center. Prior to the incident that is the subject of this proceeding,

petitioner had an unblemished teaching record. The touchstone incident in question occurred on September 28, 2009, when petitioner trapped or placed a kitten in a bag at her residence. She telephoned animal control on the date in question and when the animal control officer opened the bag, he found that the kitten was dead. Petitioner was later arrested for this act and eventually pled guilty to disorderly conduct. Apparently, during the arrest on November 8, 2009, petitioner said words to the effect of, "Now I see what this country is about, I should have killed them all and not called anyone."

Petitioner received a specification of charges, pursuant to Education Law § 3020-a, in which the DOE specified (1) that on September 28, 2009, she had tortured, unjustifiably injured, unjustifiably killed, or deprived air to a kitten by placing said live kitten in a bag; and (2) that on November 8, 2009, she said words to the effect of, "Now I see what this country is about, I should have killed them all and not called anyone." On the first day of the hearing, Hearing Officer Sheinman granted DOE's motion to consolidate the initial charges with four additional charges and specifications, which specified (3) & (4) that on September 28, 2009, she had tortured, unjustifiably injured, unjustifiably killed, or deprived air to a kitten by asphyxiating said kitten; (5) that on September 28, 2009, she had engaged in acts of animal cruelty which caused injury or death to a kitten; and (6) that on or about March 22, 2010, respondent pled guilty to disorderly conduct. The specification of charges set forth, inter alia, that the aforementioned charges constituted just cause for disciplinary action under § 3020-a.

The hearings took place over six days in February, March, and April 2011, before Hearing Officer Sheinman, at which petitioner was represented by counsel and was afforded the

opportunity to submit evidence and present or cross-examine witnesses. The witnesses who testified were Kevin Sexton, the animal control officer who found the kitten; Joanne Sandano, special agent for the American Society for the Prevention of Cruelty to Animals ("ASPCA") who investigated the incident and arrested petitioner and to whom petitioner allegedly said, "I should have killed them all"; Rhonda Windham, a veterinarian for the ASPCA who assisted during the necropsy (animal autopsy) of the kitten; Sean Patrick McDonough, a veterinarian at Cornell University College of Veterinary Medicine who reviewed tissue slides that were prepared during the necropsy; Randall Lockwood, Senior Vice President for Forensic Sciences and Anticruelty Projects with the ASPCA; Carmen Reinoso, petitioner's tenant; and petitioner. At the close of evidence, petitioner's attorney asked that petitioner be returned to work without further punishment, and DOE requested termination. After the hearing, Hearing Officer Sheinman issued a 28-page determination and award, wherein he determined that petitioner was guilty of three of the specifications: that on September 28, 2009, petitioner had deprived air to a kitten by placing said live kitten in a bag; that on November 8, 2009, she said words to the effect of, "Now I see what this country is about, I should have killed them all and not called anyone;" and that on or about March 22, 2010, respondent pled guilty to disorderly conduct. The other specifications were dismissed. Hearing Officer Sheinman determined that the appropriate penalty is a fine of twelve thousand five hundred dollars ($12,500) to be paid over the course of eighteen (18) months from her paychecks.

Petitioner now seeks to vacate the award. She argues that the award is excessive, is unwarranted, is arbitrary and capricious, shocks the conscience, and "shows a level of corruption and fraud perpetrated by an arbitrator who is not authorized to give himself the jurisdiction to decide

probable cause for the specifications brought against Petitioner pursuant to Education Law §3020, §3020-a and §2590-j." She maintains that Hearing Officer Sheinman's decision shows prejudice against her and violates her rights under the New York State Constitution, the United States Constitution, the New York City Charter, and Education Law §§ 2590-j and 3020-a. Petitioner argues that Hearing Officer Sheinman's evaluation of the testimony shows that he was biased against her, and that his comments and interjections during the testimony shows that he was prejudiced against her. She also argues that it was error for him to permit DOE to add four specifications against her, since it prevented her from defending herself against the second set of charges. Further, petitioner argues that the Education Law requires that a vote by the school board precede a determination of probable cause upon which to bring charges against teachers removed from their schools, and that the process against her failed to comply with the law.

Respondent cross-moves to dismiss the petition on the grounds that it fails to allege facts sufficient to warrant a vacatur of the opinion and award. To the extent that petitioner alleges that Hearing Officer Scheinman was biased or partial, respondent argues that there is no evidence in the record to support this allegation and that petitioner failed to object to any alleged bias during the hearing or prior to the issuance of the award and therefore failed to preserve the issue for judicial review. Respondent also argues that petitioner has failed to set forth any basis for vacating the award under C.P.L.R. § 7511(b), and that the award is rational and supported by adequate evidence. Respondent maintains that petitioner's assertion that Hearing Officer Scheinman exceeded his authority is meritless. It further argues that petitioner was afforded due process, in that she had notice of the charges; her attorney did not object to the consolidation of the charges or seek an

adjournment when DOE's motion to consolidate the charges was granted; and under New York City law, the Chancellor has the authority to delegate to principals the power to determine probable cause without having to go to a vote before the school board. Finally, respondents argue that given the circumstances, the penalty of a fine of $12,500 over eighteen months does not shock the conscience.

In opposition to respondent's cross motion, petitioner asserts that DOE failed to address all of her causes of action, and therefore its motion to dismiss should be denied.

Under Education Law § 3020-a(5), an arbitration determination pursuant to disciplinary charges can only be vacated under the grounds listed in C.P.L.R. § 7511 (that the arbitrator was biased, committed misconduct, exceeded his or her power, or failed to follow procedure), or if the determination is not supported by adequate evidence, is irrational, or otherwise fails to meet "the arbitrary and capricious standards of CPLR article 78." Lackow v. Dep't of Educ. of City of N.Y., 51 A.D.3d 563, 567-68 (1st Dep't 2008). Additionally, the court may vacate a penalty of termination when such punishment is "so disproportionate to the offenses as to be shocking to the court's sense of fairness." Id. at 569.

On a motion to dismiss a special proceeding, the court must "determine only whether the facts as alleged fit within any cognizable legal theory.'" Yan Ping Xu v. New York City Dep't of Health, 77 A.D.3d 40, 43 (1st Dep't 2010) (citation omitted); see also, In re Y & Q Holdings (NY), Inc. v. Bd. of Mgrs. of Exec. Plaza Condo., 278 A.D.2d 173 (1st Dep't 2000). Accordingly, "the court must afford the pleadings a liberal construction." EBC I, Inc. v. Goldman, Sachs & Co.,

5 N.Y.3d 11, 19 (2005). However, the petition must not consist of only a "conclusory assertion" of the wrong; it must contain factual allegations. Goldin v. Eng'rs Country Club, 54 A.D.3d 658, 659-60 (2d Dep't 2008), app. denied, 13 N.Y.3d 763 (2009); see also Chappo & Co., Inc. v. Ion Geophysical Corp., 83 A.D.3d 499, 500 (1st Dep't 2011). Furthermore, the court may examine the evidence presented to determine if "a material fact as claimed by the [petitioner] . . . is not a fact at all." Rietschel v. Maimonides Med. Ctr., 83 A.D.3d 810 (2d Dep't 2011), citing Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); see also Katebi v. Fink, 51 A.D.3d 424, 425 (1st Dep't 2008).

Petitioner's allegations fail to make out a cognizable cause of action. To the extent that petitioner argues that her due process rights were violated, she has not alleged facts sufficient to withstand the motion to dismiss. Petitioner was represented by counsel during the entire hearing process. She was duly and timely noticed of the specifications against her. She was provided with, and took advantage of, all opportunities to present witnesses and evidence. Further, during the hearing, her attorney never objected to the consolidation of the charges against her and never raised an issue regarding any perceived partiality or bias of the arbitrator. Moreover, the process of the principal determining probable cause did not violate the Education Law. Although § 3020-a(2)(a) provides that the employing board shall determine whether probable cause exists to bring charges against a tenured teacher, in New York City, the Chancellor has both the authority to exercise the duties of the employing board and to delegate those duties. Education Law §§ 2590-h(19) and (38-a). Since at least 2007, New York City chancellors have broadly delegated their powers to initiate and resolve disciplinary charges to principals. This process has been found to comport with due process. See In re Soleyn v. New York City Dep't of Educ., 2011 N.Y. Slip Op. 51897U, *3,

33 Misc. 3d 1211A (Sup. Ct. N.Y. Co. 2011); In re Dunn v. New York City Dep't of Educ., 2011 N.Y. Slip Op. 51505U, *6, 32 Misc. 3d 1230A (Sup. Ct. N.Y. Co. 2011). Accordingly, petitioner has not set forth facts sufficient to make out a claim that her due process rights were violated or that the hearing officer exceeded his power by deciding charges that had not been put to a vote.

To the extent that petitioner argues that Hearing Officer Scheinman was biased, such allegation is merely conclusory and supported by no factual allegations. The simple fact that Hearing Officer Sheinman ultimately ruled against petitioner on some of the charges is not evidence of bias. See In re County of Niagara v. Bania, 6 A.D.3d 1223, 1225 (4th Dep't 2004); Palencia v. New York City Bd./Dep't of Educ., 2011 N.Y. Slip Op. 50905U, 31 Misc. 3d 1229(A) (Sup. Ct. N.Y. Co. 2011). Furthermore, the record reveals that Hearing Officer Sheinman took a balanced approach in reaching the determination and award. The hearings were lengthy and comprehensive, and the hearing officer wrote thoughtful and detailed findings in issuing the award, based on testimony and evidence, explaining why he rejected most of the charges and sustained three of charges. Petitioner has failed to allege facts sufficient to make out a claim that the hearing officer was biased or that the decision and award is arbitrary and capricious or without reason.

As to the penalty, petitioner has failed to allege facts to support her claim that the penalty is so excessive as to render it shocking to one's sense of fairness. Hearing Officer Sheinman determined that his finding that petitioner acted negligently with regard to the death of the kitten did not support termination, but that this negligence, her statement that she should have "killed them all" and her guilty plea were factors to be considered in determining discipline. Hearing Officer

Sheinman also credited petitioner's fifteen (15) years of unblemished service without a "scintilla of evidence" that she had ever previously acted improperly. He felt, however, that her acts demonstrated a lack of judgment, and that her job required common sense and good judgment. Therefore, he found that there existed a legitimate basis for discipline, and on that basis, imposed the $12,500 fine. Beyond her contentions that the arbitrator exceeded his authority or acted impartially, or that she had not been afforded due process, all of which are unsupported factually, petitioner's allegations that the award was excessive are merely conclusory. Petitioner has not pled sufficient facts to make out a claim that the penalty was irrational, arbitrary and capricious, or shocking to one's sense of fairness.

Since petitioner has failed to sufficiently allege cognizable causes of action in this petition, it is hereby

ORDERED that the cross motion to dismiss the petition is granted; and it is further

ADJUDGED that the award is confirmed; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: January 4, 2012

ENTER:

JOAN B. LOBIS