[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

E

1/9/12

PRESENT: CAROL E. HUFF PART 32

Index Number : 104919/2011

POLITO, JULIANNE

INDEX NO. _____

VS

NYC DEPARTMENT OF EDUCTION

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

VACATE STAY / ORDER/ JUDGMENT

_____

_____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this [redacted]

motion is decided in accordance

with accompanying memorandum 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).

RECEIVED

JAN 09 2012

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: JAN 05 2012

_____ J.S.C.
CAROL E. HUFF

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
COUNTY OF NEW YORK: PART 32

----------x

Application of JULIANNE POLITO, : Index No. 104919/11

Petitioner, :

For a Judgment Pursuant to Article 75 of the CPLR :

- against -

NEW YORK CITY DEPARTMENT OF EDUCATION, A/K/A THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, :

Respondent. :

----------x

CAROL E. HUFF, J.:

Motions with sequence numbers 001, 002, 004 and 005 are consolidated for disposition.

In motion 001, pursuant to CPLR Article 75, petitioner, a special education teacher, seeks a judgment annulling or modifying the determination of respondent New York City Department of Education (DOE), dated April 7, 2011, which fined petitioner $7,500. DOE cross moves to dismiss the petition.

In motion 002, petitioner moves for an order for preliminary injunctive relief, staying imposition of the fine and for other relief related to the underlying determination.

In motion 004, petitioner moves for an order sealing the record of these proceedings.

In motion 005, petitioner moves for a stay of these proceedings pending the outcomes of investigations into the principal of petitioner's school and into the confidentiality of records submitted in this proceeding.

Petitioner has also submitted a letter application seeking judicial recognition of alleged

facts contained in a New York Post article.

As a threshold matter, petitioner's motion (005) for a stay pending investigations is denied. The first investigation, regarding the conduct of the subject school's principal, was instigated by petitioner and was closed on June 24, 2011. See Affidavit of Jamel R. Boyer, Confidential Investigator employed by DOE's Office of Special Investigations, Ex. 3 to Affirmation of Celine Chan dated July 14, 2011. The second investigation, also initiated by petitioner, regarding the confidentiality of the records of this proceeding, does not bear on the merits of this proceeding. The issue of confidentiality is addressed in connection with petitioner's motion 004, below.

Further, petitioner's application for judicial notice of a New York Post article concerning the principal is denied. "A court may only apply judicial notice to matters of common and general knowledge, well established and authoritatively settled, not doubtful or uncertain. The test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof." Carter v Metro N. Assoc., 255 AD2d 251 (1st Dept 1998) (citations omitted). The newspaper article does not meet this standard.

Petitioner is a tenured teacher who has worked for DOE for eighteen years. Pursuant to Education Law § 3020-a, with respect to alleged misconduct during the 2008-2009 and 2009-2010 school years, petitioner was charged with five specifications, and a hearing was scheduled. A pre-hearing conference was held on October 26, 2010. The hearing was conducted on November 9, 15, 22, and 30, 2010; December 1, 7, 13, 17 and 20, 2010; and January 5, 21, 24 and 25, 2011. Closing arguments were heard on February 17, 2011. DOE presented the testimony of three witnesses, and petitioner presented the testimony of ten witness, including

herself.

On April 7, 2011, the hearing officer issued her forty-nine page determination, in which she exhaustively reviewed the evidence including the troubled atmosphere at the school and petitioner's allegations with respect to the principal's exacerbating behavior and bias toward petitioner. Based on her review of the evidence, she upheld specification 3(a) and partially upheld specification 3(b), finding that petitioner stated to a student, "Here Mr. Smarty Pants, let's see if you can read," and "tossed" a book. The hearing officer found this behavior to constitute a violation of Chancellor's Regulation A-421, stating: "It is clear that [petitioner] was intending to punish [the student] for disrupting the class and, further, that by tossing the book and suggesting that he read it, she intended to belittle, ridicule, and to embarrass or humiliate [the student]." Determination at 34.

The hearing officer denied petitioner's request for attorney fees pursuant to Education Law § 302-1(4)(c) and CPLR 8303-a, finding that the specifications either were dropped or were not frivolous. She denied DOE's demand for termination, finding instead: "Polito's misconduct on May 21, 2009, involving verbal abuse of a special education student, and conduct unbecoming, even in the very difficult environment in which she taught, requires a penalty that recognizes the seriousness of her actions." The penalty imposed was a $7,500 fine payable in equal installments over twelve months.

Appeals such as this from Education Law § 3020-a hearings are made pursuant to CPLR 7511, governing arbitrations. However, when parties have submitted to compulsory arbitration, "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."

City School Dist. of the City of New York v McGraham, 75 AD3d 445, 450 (1st Dept 2010), quoting Lackow v Department of Educ. of City of New York, 51 AD3d 563, 567 (1st Dept 2008).

Accordingly, the DOE determination fining the petitioner will be upheld unless it is shown that the determination "was affected by an error of law . . . or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3). The test is whether the determination is "without sound basis in reason and is generally taken without regard to the facts." Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222, 231 (1974). An administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." Partnership 92 LP & Bld. Mgt. Co. Vv State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 425, 429 (1st Dept 2007), aff'd 11 NY3d 859 (2008).

In arguing that the determination should be annulled, petitioner raises numerous issues concerning the weight of the evidence, and disagrees with procedural rulings by the hearing officer with respect to witness subpoenas, right to cross examine and discovery requests. These arguments, even in their totality, are not sufficient to demonstrate that the determination lacked reason or was taken without regard to the facts. Thirteen witnesses were heard over thirteen hearing dates, and the hearing officer in her lengthy determination reasonably considered the issues raised by petitioner.

With respect to the punishment, "a court may vacate the punishment only when it is so disproportionate to the offense . . . that it shocks one's sense of fairness. . . . [P]unishment is a

subject of broad discussion and one open to disagreement . . . [T]he board must be given latitude in determining the penalty to be imposed." Kinsella v Board of Educ. of Cent. School Dist. No. 7, 64 AD2d 738, 740 (3d Dept 1978). Here, the $7,500 fine, spread over twelve months, is not disproportionate to the violation found by the hearing officer.

Also, petitioner is not entitled to attorney fees. The hearing officer considered and reasonably found that the specifications were not brought or continued "in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another." CPLR 8303-a(c)(ii).

Finally, petitioner's motion (004) to seal the records of this proceeding is denied. The determination, papers, transcripts and exhibits have all been redacted to prevent identification of the students, who are indicated only by their initials. Although she refers to an incident in a previous Article 78 proceeding, petitioner fails to specifically cite identifying information in this proceeding that requires a sealing order.

Accordingly, it is

ORDERED that the motion (002) for preliminary and other relief is denied; and it is further

ORDERED that the motion (004) for an order sealing the record of these proceedings is denied; and it is further

ORDERED that the motion (005) for a stay of these proceedings pending the outcomes of investigations into the principal of petitioner's school and into the confidentiality of records is denied; and it is further

ADJUDGED that the petition (001) is denied, the cross motion is granted, and the proceeding is dismissed.

Dated: JAN 05 2012

CAROL E. HUFF 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).