Matter of White-Grier v New York City Bd./Dept. of Educ.
2012 NY Slip Op 32466(U)
September 24, 2012
Sup Ct, New York County
Docket Number: 106335/2011
Judge: Paul G. Feinman

[* 1]

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

PRESENT: HON. PAUL G. FEINMAN PART 12

Index Number : 106335/2011
WHITE-GRIER, CHERYL
VS.
NYC DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

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: 9/24/2012

Paul G. Feinman
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM PART 12

----------X

In the Matter of the Application of
CHERY WHITE-GRIER,
Petitioner,

Index Number 106335/2011
Mot. Seq. No. 001

For a judgment pursuant to Article 75 of the CPLR

against

DECISION, ORDER AND JUDGMENT

THE NEW YORK CITY BOARD/DEPARTMENT OF EDUCATION,
Respondent.

----------X

For the Petitioner:
Cheryl White-Grier, *pro se*
765 Forest Ave., ste 9
Staten Island, NY 10310

For the Respondent:
Michael A. Cardozo, Esq.
Corporation Counsel of City of New York
By: Pinar Ozgu, Esq.
100 Church St.
New York, NY 10007-2601

Papers considered in review of this petition to vacate and cross motion to dismiss[1]:

Papers	**Numbered**[2]
Notice of Petition and Verified Petition	1
Cross Motion, affirmation, exhibits, memo of law	2-3
Petitioner's Affirmation in Opp. to Cross Motion, exhibits	4 ("Sections 2-28")
Respondent's Affirmation in Further Supp., memo of law	5,6
Letter of March 28, 2012 (A.C.C. Pinar Ozgu, Esq.)	6A
Affirmation in Further Support of Petition's Opposition	7 ("Section 2")
Table of Contents for Petitioner's exhibits	8
Exhibits ("Sections 31-89"), Case Law ("Section 99-102)	9, 9A-12, 13 ("Sections 31-98)
Transcripts from Disciplinary Proceeding	14-16
Exhibits 1-6	17-19
"DOE" Exhibits	20
Compact Disc, Cheryl White-Grier Audio 3020A Hearing	21 ("Section 1")
Letter of April 10, 2012 (Cheryl White-Grier)	22

[1]On July 18, 2012, petitioner had delivered an Affidavit of Voluntary Motion to Discontinue pertaining to a Southern District litigation. On September 14, 2012, the court received a letter and documents from petitioner concerning "a demand to review the decision" in the underlying proceeding. The court has not considered the letter or the exhibits, as the petition and cross motion were already sub judice.

[2]Petitioner's exhibits, grouped in several binder clips, are labeled by her as "Sections." The court notes that there appear to a few "sections" not specifically labeled or not included in clipped-together materials.

PAUL G. FEINMAN, J.:

In this Article 75 proceeding, petitioner seeks to vacate the May 9, 2011 award issued by Hearing Officer Alan Berg, Esq. that, based on several instances of professional misconduct, the "appropriate penalty" is "immediate dismissal" from her position as a tenured special education teacher in the New York City public schools (Cross Mot. ex. D, Opinion and Decision). Respondent Department of Education (DOE) cross-moves to dismiss the petition. For the reasons which follow, the petition is denied, the cross motion is granted, and the proceeding is dismissed.

Petitioner, who is self-represented, timely commenced this proceeding (Ver. Pet. ¶ 3). As background, the petition states that petitioner joined the NYC Teaching Fellows program in April 2001, entered the Department of Education in August 2002, and taught at various schools while continuing to obtain Masters of Science degrees in Special Education, Literacy, and School Building Leadership with Distinction (Ver. Pet. ¶ 7). She had been teaching in a self-contained special education classroom at her current location in a middle school since the fall of 2005 (Ver. Pet. ¶ 7; Cross Mot. ex. J, White-Grier Tr. 743:114-17). According to the petition, she had not received any unsatisfactory ratings until the years 2008-2009, 2009-2010, and 2010-2011, following her reporting of sexual harassment by the school's principal. The principal had allegedly commenced an ongoing campaign of retaliation against her, including undertaking a "barrage of criticism" in all his communications with her (Ver. Pet. ¶¶ 7, 9, 15).

On February 8, 2011, the New York State Education Department on behalf of respondent DOE, formally issued specifications against petitioner, setting forth 12 separate charges and a conclusion that the totality of charges provided "just cause for termination" (Cross Mot. ex. A,

Specifications). On February 16, 2011, the principal of the school at which petitioner was employed submitted to the State Commissioner of Education a Supplemental Notification of Principal's Determination of Probable Cause, listing seven general claims and indicating that he "found probable cause on each charge" (Cross Mot. ex. B, Supp. Notification).

Petitioner requested a hearing on the charges, as was her right under Education Law § 3020-a (Cross Mot. ex. C, Request). A pre-hearing conference was held on March 8, 2011, with Allen Berg, Esq. as the appointed hearing officer, and with legal representatives for both White-Grier and the DOE, as well as White-Grier (Cross Mot. ex. E, Tr. of March 8, 2011). The hearing itself commenced on March 14, 2011 and took a total of eight days, concluding on April 28, 2011 (Cross Mot. ex. F [Tr. of 03/14/2011]; Cross Mot. ex. G [Tr. of 03/16/2011]; ex. H [Tr. of 03/23/2011]; ex. I [Tr. of 03/28/2011]; ex. J [Tr. of 04/01/2011]; ex. K [Tr. of 04/05/2011]; ex. L [Tr. of 04/07/2011]; ex. M [Tr. of 04/28/2011]). On the second day, petitioner requested that her union-appointed attorney be removed from representing her and that an adjournment be granted for her to acquire new counsel (Cross Mot. ex. G, Tr. 301:12-16). On the third day, petitioner was represented by new counsel who moved to dismiss the proceeding; Hearing Officer Berg reserved decision on the motion, although some discussion was held (Cross Mot. ex. H, Tr. 325-327, *et seq.*, 450-459).

The hearing resumed on March 28, 2011 and concluded with a discussion of a second motion to dismiss the proceeding based on the contents of the principal's testimony (Cross Mot. ex. I, Tr. 697-705). On the seventh date, April 7, 2011, White-Grier was again self-represented, her attorney having withdrawn as counsel the day before, and acting as White-Grier's advocate was Betsy Combier, a paralegal with eight years of experience in advocacy on behalf of teachers

(Cross Mot. ex. L, Tr. 1074:8-17; 1076:17-23).[3] The hearing concluded with closing arguments on April 28, 2011 (Cross Mot. ex. M, Tr. of April 28, 2011).

The hearing officer's 42-page Opinion and Decision was signed on May 9, 2011 (Cross Mot. ex. D). The opinion discussed the reasons for denying the two motions brought on behalf of petitioner to dismiss. It detailed the specifications including two additional ones requested by respondent at the pre-hearing conference, and against which the Hearing Officer found that White-Grier had been given a sufficient opportunity to defend herself. It discussed petitioner's defense of retaliation, finding at least six "major flaws" in her arguments (Cross Mot. ex. D, Opinion pp.10-12). It found all four of respondent's witnesses to be credible, and noted that "the strongest witnesses for [the DOE] may have been the [petitioner] and [one of petitioner's] witness[es]." (Cross Mot. ex. D, Opinion p. 13). Petitioner's testimony was found to be "unreliable and not credible" on "virtually every important point" (Cross Mot. ex. D, Opinion p. 13). The opinion stated that "[m]any of her answers seemed to be deliberately untruthful," and if some of the statements were not intentionally untruthful, they showed "a deeply flawed perception of events and job responsibilities" (Cross Mot. ex. D, Opinion pp. 13-14). Additionally, the opinion discussed in depth two documents proffered by White-Grier to support her claim of retaliation, both which the hearing officer deemed "clearly fabricated" and "fraudulent on their face," and about which petitioner and her witness "testified untruthfully" (Cross Mot. ex. D, Opinion p. 14-19). Hearing Officer Berg concluded that the two documents "were written long after those events are alleged to have occurred" (Cross Mot. ex. D, Opinion p.

[3]Petitioner provides as Exhibit 6 an unsigned, non-notarized "affidavit" by Ms. Combier, dated June 13, 2011, setting forth her impressions of the course of the hearing.

19). He found that the significance of the two documents was that "they serve to destroy the credibility of both the Respondent and her star witness" (Cross Mot. ex. D, Opinion, p. 19).

Hearing Officer Berg found that respondent had established most of the charges by a preponderance of the evidence, including that during the three school years at issue, petitioner had neglected her duties and failed to carry out several of her responsibilities pertaining to her engagement and teaching of her students; failed to adequately plan and execute lessons; was excessively late; failed to maintain attention to routine matters such as submitting lesson plans; failed to maintain and produce required records and documents during the school years; locked her classroom doors during instructional time and, separately, refused one student rightful entry into the classroom, both in violation of health and safety standards; and failed to report to the parents of the children involved that an incident had occurred that resulted in one student's injury.[4] It examined the evidence of training and support offered to petitioner during the same period, and concluded that support had been offered and provided to petitioner who had chosen not to use it.

The opinion also commented on petitioner's conduct during the course of the hearing, some of which he concluded mirrored the criticisms expressed in the teacher observations, including arriving late on several occasions, providing him with what as at best unintentionally inaccurate information and at worst information fabricated or designed to obfuscate, and evidencing an inability to "accurately assess the work of her attorney" (Cross Mot. ex. D, Opinion pp. 36-38). The opinion's discussion concluded that petitioner's claims of retaliation

[4]Certain of the specifications were dismissed on the grounds that they were redundant or that there was insufficient evidence proffered and that petitioner's conduct at issue could not be found punishable (Cross Mot. ex. D, Opinion pp. 19-33).

and character assassination were not substantiated, and the evidence showed that she was "both incompetent and untrustworthy" (Cross Mot. ex. D, Opinion pp. 41-42). Accordingly, Hearing Officer Berg issued an award that "there is only one appropriate penalty: immediate termination of [petitioner's] employment" (Cross Mot. ex. D, Opinion p. 41).

Petitioner timely moved for judicial review, seeking to vacate the award on two grounds. One is that the hearing officer misapplied the law when deeming the principal's finding of probable cause adequate under the Education Law. The other is that the charges were never brought initially to the Department of Education for a vote, and therefore the hearing violated her right to due process and was a nullity as there was no subject matter jurisdiction (Ver. Pet. ¶¶ 30-35).

Respondent cross-moves to dismiss the petition for failure to state a cause of action. The court provided additional time for the parties to supplement their pleadings and motion papers, and renders a decision based on the totality of the pleadings and exhibits.

APPLICABLE LAW

Education Law § 3020 (1) provides that no tenured employee may be removed during a term of employment except for just cause and in accordance with Education Law § 3020-a, discussed below. Education Law § 2590-j, pertaining specifically to schools in New York City, provides in relevant part that a tenured teacher may only be found guilty of charges after a hearing has been held as prescribed in Education Law § 3020-a. The charges "may be initiated by the community superintendent" for any of six offenses, including excessive lateness, neglect of duty, incompetent or inefficient service, and "any substantial cause that renders the employee unfit to perform [her] obligations properly to the service" (Education Law § 2590-j [7] [a]). In

advance of filing the charges and specifications, the community superintendent is to inform the employee accused and the community board of the nature of the complaint (Education Law § 2590-j [7] [c]).

Education Law § 3020-a provides that all charges against a tenured employee are to be in writing and filed with the clerk or secretary of the school district or employing board during the actual school year (Education Law § 3020-a [1]). Upon receipt of the charges, the clerk or secretary of the school district or employing board immediately notifies the board. Within five days, the employing board, in executive session, is to determine whether probable cause exists to bring a disciplinary proceeding against the employee (Education Law § 3020-a [2]). Upon so finding, a written statement specifying the charges in detail and the maximum penalty to be imposed if the employee does not request a hearing or that will be sought by the board if the employee is found guilty of the charges after a hearing, is "immediately" delivered to the employee (*id.*). The employee has 10 days to notify the clerk or secretary of the employing board in writing as to whether he or she desires a hearing on the charges (Education Law § 3020-a [2] [c]).

If a hearing is requested, the commissioner obtains a list of names from the American Arbitration Association (AAA) from its panel of labor arbitrators (Education Law § 3020-a [3] [a]). The employing board and the employee have 10 days to chose a hearing officer and if they do not or cannot, the commissioner is to request the AAA to appoint one from the list (Education Law § 3020-a [3] [b] [iii]). The selected or appointed hearing officer is compensated by the department "with the customary fee paid for service as an arbitrator under the auspices of the association for each day of actual service," plus reasonable expenses (Education Law § 3020-a

[3] [b] [i]).

The hearing officer is to hold a one-day pre-hearing conference within 10 to 15 days of appointment at which any motions or applications, including motions to dismiss the charges are heard and decided (Education Law § 3020-a [3] [c] [i-a] [C] [ii], [iii]). Pre-hearing motions or applications must be made upon written notice to the hearing officer and the adverse party no less than five days prior to the date of the pre-hearing conference, and motions or applications not made at that time are deemed waived except for good cause as determined by the hearing officer (Education Law § 3020-a [3] [c] [i-a] [C] [iv]). At the pre-hearing conference, the hearing officer will determine the "reasonable" amount of time needed for the hearing, and schedule the location, date, and time, with the days to be scheduled consecutively and not postponed except for a party's showing of good cause; the hearing must be completed within 60 days after the pre-hearing conference unless the hearing officer finds "extraordinary circumstances" that warrant an extension (Education Law § 3020-a [3] [c] [i-a] [C] [v] -[vi]).

The commissioner of education establishes the necessary rules and procedures for the conduct of hearings, but shall not require compliance "with technical rules of evidence" (Education Law § 3020-a [3] [c] [i]). The employee must have "a reasonable opportunity to defend himself or herself" and to testify if desired, and both sides have the right to be represented by counsel, subpoena and cross-exam witnesses (Education Law § 3020-a [3] [c] [i]). The hearing is to commence within seven days following the pre-hearing conference and, as noted above, is to be completed within 60 days of the pre-hearing conference (Education Law § 3020-a [3] [c] [i-a (A)]). After the hearing concludes, the hearing officer renders a written decision within 10 days if an expedited hearing, 30 days if not expedited (Education Law § 3020-a [4]

[a]). The decision is to include findings of fact on each charge, the conclusions based on the findings, and what penalty or other action is to be taken for each charge (*id*). If the employee requests, the hearing officer will, when determining what, if any, penalty or other action shall be imposed, "consider the extent to which the employing board made efforts towards correcting the behavior of the employee which resulted in charges being brought under this section through means including but not limited to: remediation, peer intervention or an employee assistance plan"(*id*).

The employing board is to implement the decision within 15 days of receipt of the hearing officer's decision (Education Law § 3020-a [4] [b]). Within 10 days after receipt of the decision, the employee may apply to state supreme court to vacate or modify the decision pursuant to CPLR 7511 (Education Law § 3020-a [5]). The pendency of an appeal does not delay implementation of the decision of the hearing officer (*id.*).

STANDARD OF REVIEW

It has been held that there is no due process violation by the Education Law's limitation of judicial review of hearing officers' decisions to the standard set forth in CPLR Article 75 rather than CPLR Article 78 (*see Roemer v Board of Educ. of City School Dist. of City of N.Y.*, 290 F Supp 2d 329, 331 [EDNY 2003], *affd* 150 Fed. Appx. 38 [2d Cir. 2006], *cert. denied* 549 U.S. 884 [2006]). Accordingly, review of this hearing at issue arbitration award is extremely limited (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert. dismissed* 548 U.S. 940 [2006], citing *United Paperworkers Intl. Union AFL-CIO v Misco, Inc.*, 484 U.S. 29 [1987]). This court may not consider the underlying evidence and arguments offered as the arbitrator is given plenary authority to rule on these matters (*see Rinaolo v Berke*,

192 AD2d 329 [1st Dept 1993], *lv denied* 81 NY2d 711 [1993] [finding that the claim that the arbitrator had not accounted for certain evidence lacked merit as it the arbitrator clearly was aware of the evidence and the plaintiffs' claims regarding it and, in any event, the court was barred from inquiry into those specific claims because of the arbitrator's plenary authority to rule]). In an arbitration award, questions of law and fact are merged, and the judiciary by statute has no authority to resolve them (*Fishman v Roxanne Mgmt.*, 24 AD3d 365, 366 [1st Dept 2005], citing *North Syracuse Cent. School Dist. v North Syracuse Educ. Assn*, 45 NY2d 195, 200 [1978]). Indeed, it has been held that as a matter of public policy, the merits of an arbitration are beyond judicial review (*Integrated Sales, Inc. v Maxell Corp. of America*, 94 AD2d 221, 224 [1st Dept 1983]).

CPLR 7511, the statute concerning vacatur or modification of an arbitrator's award, provides that a party who participated in the hearing may move to vacate an award on any of four grounds (CPLR 7511 [b]). These grounds are: corruption, fraud or misconduct in procuring the award; partiality of an arbitrator; an arbitrator exceeding his or her power or so imperfectly executing the powers that a final and definite award was not made, and the failure to follow the procedures of Article 75 of the CPLR (*see Lackow v Department of Educ. [or "Board"] of the City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008]). Where arbitration is compulsory, as here, judicial review must find evidentiary support for the award (*Matter of MVAIC v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996], citations omitted). The decision must be found to be rational or that it had a plausible basis (*Matter of Progressive Cas. Ins. Co. v New York State Ins. Fund,* 47 AD3d 633, 634 [2d Dept. 2008], citing *Matter of Petrofsky* [*Allstate Ins. Co.*], 54 NY2d 207, 211 [1981]). An arbitration award will be upheld where the arbitrator "'offers even a

barely colorable justification for the outcome reached'" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d at 479, quoting *Andros Compania Maritima, S.A. v Marc Rich & Co., A.G.*, 579 F.2d 691, 704 [2d Cir 1978]).

On a motion to dismiss, the court must "determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The pleadings are afforded a liberal construction (*EBC I, Inc. v Goldman. Sachs & Co.*, 5 NY3d 11, 19 [2005]). Factual claims, if contradicted by documentary evidence, are not entitled to such consideration, nor are allegations consisting of bare legal conclusions or factual claims which are inherently incredible (*Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]; *Franklin v Winard*, 199 AD2d 220, 220 [1st Dept. 1993]; *see Katebi v Fink*, 51 AD3d 424, 425 [1st Dept 2008] [holding that claim of legal malpractice involving settlement of a matrimonial action was contradicted by evidentiary material that the plaintiff had testified she signed the settlement to avoid further contact with her husband, understood that by settling before the completion of trial she was foregoing the right to pursue funds allegedly dissipated by him, and was satisfied by the services provided by her attorney]) .

ANALYSIS

Petitioner presents many arguments as to why the award should be vacated, and also acknowledges that this court is limited in its review powers.[5] She argues that the arbitration proceeding was based on a legal nullity and the arbitrator lacked subject matter jurisdiction. She points out that under the Education Law, the charges brought against her were first to have been

[5]Most of the documentary evidence provided by petitioner in support of her petition is not considered by the court in reviewing the petition and cross motion, as it is beyond the proper scope of the court's inquiry.

presented to the city's board of education for a finding of probable cause as set forth in Education Law § 3020-a (2) or, since she taught in the New York City schools, the charges could have been presented to the community superintendent pursuant to Education Law § 2590-h (38), providing that in New York City, the school's chancellor may delegate the responsibility to superintendents. Here, however, the principal of her school had himself issued the probable cause finding, and she argues this voided the safety feature embedded in the Education Law that protects tenured employees by providing that they will be brought up on charges only after a neutral entity has found probable cause.

This argument was made to Hearing Officer Berg who dismissed it (Cross Mot. ex. D, Opinion and Decision pp 7, 8). He reasoned that the principal of the school would logically be the Department employee with enough knowledge to find probable cause, and the superintendent should be "free" to rely on the principal's finding (*id.*). He opined that nothing suggests that because the legislature provides that a chancellor may, under Education Law § 2590-h (38), delegate any or all the duties and responsibilities set forth in Education Law § 3020-a to the community superintendents, that no other delegation of this duty is allowed (Cross Mot. ex. D, Opinion and Decision p. 8).

Petitioner argues that a principal has no statutory authority to sign the finding of probable cause, as this is a responsibility that rests with the chancellor in New York City, or with superintendents. This argument has been unsuccessfully presented to other trial level courts in recent years (*see, e.g., Matter of Haas v The New York City Board/Dept. of Educ.*, 2012 NY Slip Op. 50606U [Sup Ct New York County 2012, Edmead, J.]; *Matter of Liu v New York City Bd./Dept. of Educ.*, 2012 NY Slip Op. 300008U [Sup Ct New York County 2012, Lobis, J.];

Matter of Montanez v Department of Educ. of City of N.Y., 2011 NY Slip Op. 33408U [Sup Ct New York County 2011, Rakower, J.]; *Matter of Dunn v New York City Dept. of Educ.*, 2011 NY Slip Op 51505U [Sup Ct New York County 2011, Singh, J.]; *Matter of Soleyn v New York City Dept. of Educ.*, 2011 NY Slip Op. 51897U [Sup Ct New York County 2011, Goodman, J.]; *see also Menchin v New York City Dept. of Educ.*, 2011 NY Slip Op 51344U [Sup Ct Rockland County 2011, Jameson, J.]). These decisions rely on Education Law § 2590-f (1) (t), providing that in New York City, upon delegation by the chancellor, the community superintendent exercises "all of the duties and responsibilities of the employing board" pertaining to the discipline of teachers, and Education Law § 2590-f (1) (b), providing that in New York City, the community superintendent may "delegate any of her or his powers to such subordinate officers or employees of her or his community district as she or he deems appropriate." Consistently, the courts have read these two statutes to mean that a district superintendent may delegate to a principal the responsibility of preferring charges.

Here, respondent proffers not only a copy of a January 3, 2011 memorandum from then-New York City Schools Chancellor Cathleen P. Black, addressed to community school district superintendents, delegating to them "the authority to prefer charges against tenured pedagogical employees in your districts," but also a copy of a January 7, 2011 memorandum issued by Luz Cortazzzo, Community Superintendent District 4, addressed to the principals in the school district, delegating to them, among other duties, the duty to "[i]nitiate and resolve disciplinary charges against teaching and supervisory staff members in your schools who have completed

probation" (Ozgu Affirm. in Further Support of Respondent's Cross Mot. ex. P, Q).[6] Therefore, based on proof of an actual delegation of responsibilities to principals to "initiate" disciplinary charges against tenured employees, and based on the two sections of the Education Law discussed above, the branch of the petition seeking dismissal of the award based on lack of subject matter jurisdiction is without merit and is denied.

The petition also seeks dismissal on the ground that the school principal, when questioned under oath at the hearing, was unable to clearly articulate what was meant by "probable cause," stating that "[it] means that, a reason to do something," and did not know what it meant in the "context of this hearing" (Cross Mot. ex. I, Tr. 607:15-23). This argument was raised by petitioner's counsel in an oral application brought on March 28, 2011; he contended that because the principal did not understand the term, the proceeding which was based on a finding of probable cause was a nullity (Cross Mot. ex. I, Tr. 698). In opposition, respondent's counsel stated that there is "specific guidance in the packet" provided to the principal at the time he or she brings the charges, and there is an option not to find probable cause; counsel did not proffer a copy of these guidelines then or now (Cross Mot. ex I, Tr. 701:23-25 - 702:2-10). The motion was resolved as part of the Opinion and Decision. The hearing officer concluded that based on the principal's articulated definition as well as his testimony that he knew it was his actions that set the proceeding in motion, he had a sufficient understanding of probable cause (Cross Mot. ex. A, Opinion and Decision p. 9).

A court will not set aside an arbitration award even if the factual findings or the legal

[6] The delegation also provides that a principal may recommend suspension of tenured employees to the chancellor (Ozgu Affirm. in Further Support of Respondent's Cross Mot. ex. Q). This presumably would then require the chancellor to find probable cause.

conclusions of the arbitrator are unsound (*Matter of Sprinzen v Nomberg*, 46 NY2d 623, 629 [1979]). Here, there is evidentiary support and a rational basis for the hearing officer to have determined that the principal sufficiently understood the term "probable cause" and used it appropriately. Thus, the court may not second guess the arbitrator, and the branch of the petition seeking to dismiss on this ground is denied.

Petitioner's second argument, citing CPLR 7511 (b) (1), is that Hearing Officer Berg was biased, verbally abusive, and exceeded his authority by failing to make findings in accordance with the record. Where a petitioner challenges an award on the ground that the arbitrator was biased, the petitioner must prove bias by "clear and convincing evidence" (*Zrake v New York City Dept. of* Educ., 41 AD3d 118, 118 [1st Dept 2007]; *lv dismissed* 9 NY3d 1001 [2007]). The claim of bias is not borne out by the transcripts of the hearing. Hearing Officer Berg entertained two motions by petitioner that were technically untimely under Education Law § 3020-a [3] [c] [i-a] [C] [iv]). He gave great leeway in allowing her, over the objections of respondent's counsel, to produce for consideration near the end of the hearing both a witness and two documents of which no previous notice had been made; he had been prepared to allow Ms. Combier to present closing arguments and allowed petitioner, over objections of respondent's counsel, to close by reading from a document largely prepared by Ms. Combier; and had allowed various documents to be submitted for his consideration over the objection of the other party. The transcript shows she was provided ample time to present her case. He also allowed petitioner, when self-represented, to testify in support of initial claims withdrawn by her second attorney, that the principal had acted with animus toward her based on her race, age, and gender. All of this shows fairness and even-handedness in conducting the hearing.

Hearing Officer Berg's lengthy decision was thoughtful and presented detailed findings in the issues pertaining to the award, citing pertinent documentary and testimonial evidence. The Opinion and Decision show that Hearing Officer Berg very carefully considered her defense of retaliation, and determined based on the totality of the evidence, that the principal's actions could not have been retaliatory because he was not in fact aware that she had made allegations against him concerning sexual harassment of other school personnel. The hearing officer also found it unlikely that if the principal had been aware, he would have waited two years to begin his retaliatory actions. Hearing Officer Berg also very carefully considered the two documents and the testimony of the author of the documents, which petitioner had offered to show that the principal clearly and crudely, spoke of planning to get rid of petitioner. The hearing officer set forth his detailed thinking behind why he could not find either the documents or the witness credible. That he chose not to find petitioner's testimony credible, or the testimony of one of her witnesses, does not mean he was biased. As stated above, credibility determinations are best made by the person who actually sees and hears the witness, and the decision by a hearing officer to credit or not credit the testimony of a given witness is largely unreviewable by the courts (*see Berenhaus v Ward*, 70 NY2d 436, 443 [1987]; *Lindemann v American Horse Shows Assn.*, 222 AD2d 248, 250 [1st Dept. 1995] citing *Berenhaus* at 443).

Petitioner makes many allegations of unethical conduct by the hearing officer, including "fraternizing" with one of respondent's female witnesses, speaking disparagingly about petitioner to respondent's attorney outside of her presence, and failing to keep an open mind in that he concluded as of the second day that she was "a liar" (Aff. in Opp. to Cross Mot., Revised Affidavit of Facts in Audio and Transcriptions, pp. 2 *et seq.*). It is petitioner's belief that her

termination had been arranged even before the hearing was commenced, and that Hearing Officer Berg "fell right into this plan" (Ver. Pet. ¶ 17). To support her claims, petitioner has provided a compact disc entitled "Cheryl White-Grier Audio 3020A Hearing," consisting of five audio files which she states were recorded during the course of her hearing, and which include both statements on the record as transcribed by the reporter hired for the hearing, as well as conversation and discussion off the record. In petitioner's Revised Affidavit of Facts in Audio and Transcriptions, she alludes to several instances where Hearing Officer Berg allegedly made improper comments off the record, made comments about her out of her presence, and showed a bias against her and favoritism toward the respondent.

At the very least, the contents of the CD have not been authenticated, and her affidavit concerning the recordings, although notarized, does not indicate that it is a sworn statement. Even overlooking these important evidentiary issues, the content of the recordings simply do not support petitioner's claims of bias or improper behavior. The five files each consist of basically the same recorded material, including a discussion between the hearing officer and petitioner concerning the time frame of the hearing, a discussion concerning the scheduling of the principal's testimony, and a muffled conversation between petitioner and another woman which seems to have been offered not for the contents of the conversation about credibility, but because in the background can be heard some laughter and words spoken by other persons.

In a similar vein, petitioner accuses Hearing Officer Berg of being more concerned about being paid than about conducting a fair hearing, apparently referring at least in part to his statements made on the morning that petitioner sought an adjournment to obtain new counsel; he noted on the record that by law he would still be paid for the entirety of the day and that

petitioner would be obligated to pay for "lost days" canceled at her request and would be penalized by losing a certain amount of time to present her case (Cross Mot. ex. G, Tr. 304, 306-307). Contrary to petitioner's suggestion, these statements clearly were made in the context of the hearing officer's stated desire to adhere to the statutory time frame for conducting the hearing.[7] It is noteworthy that he also stated on the record that he would not bill for the day of the adjournment as long as a schedule for the remaining days was agreed to (Cross Mot. ex. G, Tr. 30). Certain other alleged statements, concerning what office would pay him, are of no matter because payment of arbitrators is made pursuant to the Education Law.

Petitioner alleges the hearing officer "verbally assaulted" her when she did not correctly remember the name of a lawyer whom she was considering hiring (Ver. Pet. ¶ 17 [b]). Indeed, the circumstances surrounding petitioner's hiring of her second attorney on about March 16, 2011, proved to be of great significance to Hearing Officer Berg. It is clear that he became increasingly disturbed with her explanations of when and how she found a new attorney, and the manner in which she reported it to him, and that in his mind her credibility and her judgment became an issue.

According to the transcript, on March 16, 2011, petitioner indicated she was going to seek new counsel and asked for a two-week adjournment (Cross Mot. ex. G, Tr. 304:5-8). From the hearing officer's perspective, this was an unacceptable lengthening of the hearing schedule. He explained the 60-day statutory time frame and why he was thus asking petitioner to seek an attorney that very day (Cross Mot. ex. G, Tr. 308). He indicated he would remain on the

[7]Later that day, the hearing officer in discussing his schedule, indicated to petitioner that "come hell or high water," the hearing would be concluded by May 6, and that he and respondent's counsel then had "the rest of the year to be concerned about" (Cross Mot. ex. G ,Tr. 317:22-25, 318:2-6).

premises and told petitioner that he was very willing to speak to any attorney she contacted to discuss the "serious" importance of adhering to the schedule, because under the new procedures, "three-week adjournment[s]" would not be acceptable (Cross Mot. Ex. G, Tr. 310-311). He stressed that the hearing time frame was "inflexible" and suggested to petitioner than when talking to any prospective attorney, she could cast him as "the villain" concerning this inflexibility (Cross Mot. Ex. G Tr. 312). He then offered to find a room and a telephone for petitioner's use in finding a new attorney (Cross Mot. Ex. G, Tr. 312, 315-316). The hearing closed for the morning, with all parties agreeing to reconvene at 2:00 in the afternoon "to report progress." (Cross Mot. Ex. G, Tr. 309).

When the parties reconvened in the afternoon, the hearing officer reported on the record that petitioner had informed him that she had found an attorney named Mr. Cloven, that Mr. Cloven wanted first to speak to DOE's counsel and the hearing officer, and although he did not want petitioner to pass on his telephone number at that time, he would call both respondent's attorney and the hearing officer himself (Cross Mot. Ex. G, Tr. 316-317). Hearing Officer Berg then said he would remain in the office until "at least 4 p.m." and if Mr. Cloven did not call that day, the hearing officer would also be there "tomorrow" (Cross Mot. Ex. G, Tr. 317). All parties agreed as to when the hearing would continue on the next scheduled date in any event (Cross Mot. Ex. G, Tr. 317).

The proceeding reconvened on March 23, 2011, with petitioner represented by new counsel, Lawrence Cline, Esq. (Cross Mot. Ex. H, Tr. 325). The next two hearing dates passed without incident. On April 1, 2011, petitioner was called to offer her testimony. Mr. Cline asked her to relate the process she undertook to hire him, noting that Hearing Officer Berg had

expressed "some confusion" (Cross Mot. Ex. J, Tr. 732). Petitioner testified that she talked to at least four attorneys, three whose names she was able to generally recall (Cross Mot. Ex. J, Tr. 733). She explained that when Hearing Officer Berg asked for the attorney's phone number (i.e., Mr. Cloven's), she had two reasons for not giving it; she was not sure "exactly who I was going to use," and the attorneys had instructed her to get the phone numbers for the hearing officer and respondent's counsel (Cross Mot. Ex. J, Tr. 732-733). Hearing Officer Berg then interposed to ask if she was saying that Mr. Cloven and Mr. Cline were two separate attorneys, to which she replied that she had gotten them confused, but that she had hoped Mr. Cloven would represent her (Cross Mot. Ex. J, Tr. 734-735). Mr. Cline intervened to state that he was hired, he had assumed that petitioner had initially thought his name was Cloven, and had communicated as such to the hearing officer (Cross Mot. Ex. J, Tr. 737).[8] Hearing Officer Berg then stated that at the time he first spoke with Mr. Cline, he had believed that petitioner had made a "good-faith mistake" in confusing Mr. Cline's name, but now he was realizing that there were in fact two different individuals; he asked petitioner to provide him with Mr. Cloven's telephone number (Cross Mot. ex. J, Tr. 737-738). At that point, the testimony continued of petitioner first by her counsel and then the cross examination by respondent's counsel (Cross Mot. ex. J, Tr. 738 *et seq.*).

At the next hearing date, April 5, 2011, petitioner provided a business card of Mitchell Coven (Cross Mot. ex. K, Tr. 948). Testimony was taken from another witness, and then petitioner's examination resumed (Cross Mot. ex. K, Tr. 981). The hearing officer soon asked

[8]Elsewhere, Mr. Cline noted that petitioner had initially confused his name as well, writing to him as "Mr. Kleinman" (Cross Mot. ex. J, Tr. 736 *er seq.*).

again about her testimony concerning hiring Mr. "Cloven." He pressed her, asking whether she had combined the names Cline and Coven and come up with "Cloven," but she insisted she had only improperly remembered Coven's name (Cross Mot. ex. K, Tr. 996-998). At one point, petitioner explained that although she had only referred to Mr. "Cloven" on March 16, she had in fact spoken to Mr. Coven and to Mr. Cline, both of whom asked for the phone number of the hearing officer, and she had been referring to both men in her discussion with the hearing officer (Cross Mot. ex. K, Tr. 995-996). Later she said that she had spoken with "a number of attorneys" and they all said that the hearing officer should call them (Cross Mot. ex. K ,Tr. 994:10-25). Shortly thereafter the hearing officer stated on the record that "if you're going to make up stuff . . . that goes directly to your credibility" (Cross Mot. ex. K, Tr. 997:19-20, 22-23). Petitioner denied this and continued to state that on March 16, she had been referring to Mr. Coven (Cross Mot. ex. K, Tr. 998-999).

The hearing officer again stated that this incident had "raised some serious issues about the witness's credibility," and asked petitioner's counsel to help by presenting some argument in response (Cross Mot. ex. K, Tr. 1002 *et seq.*). The hearing officer asked petitioner if she had understood that the attorney's name was important, to which she stated she had not thought that a name would be that important (Cross Mot. ex. K, Tr. 1007). She then explained that she had not, at the time she spoke to the hearing officer and on the record on March 16, yet secured new counsel and had not made a decision (Cross Mot. ex. K, Tr. 1007-1008). She ultimately conceded that on March 16, she had not described the qualities possessed by Mr. Coven or any other attorney, but the qualities she was looking for (Cross Mot. ex. K, Tr. 1011). She agreed that she had stated that she had found an attorney named "Cloven" with the relevant legal

experience who was available on the scheduled dates of the hearing, but conceded that in fact she had not actually spoken to Mr. Coven and just assumed he would have the experience (Cross Mot. ex. K, Tr. 1012-1013). She again said that her references to Mr. Cloven on March 16 pertained to both Cline and Coven (Cross Mot. ex. K, Tr. 1015).

Although Hearing Officer Berg agreed with petitioner's counsel that she had derived no particular benefit from providing a mistaken name to him, he remained unconvinced as to her intent on March 16, and was bothered that on what "were the two most important days of her career when somebody that. . . she recognized as having a fairly important role in that career told her he needed information she, both times, didn't convey it accurately. . . . I don't think that's good" (Cross Mot. ex. K, Tr. 1022: 11-25, 1023:2-5). On redirect, she testified that she made an honest mistake and had no intention to mislead the hearing officer, and "if I had known it was going to be – cause such confusion, I would have taken a little more care." (Cross Mot. ex. K, Tr. 1025:6-21).

It is certainly likely that petitioner felt under siege by the persistent questions of the hearing officer. It might well be that another hearing officer would have not inquired into Mr. "Cloven," or assumed that petitioner had made a mistake in remembering the name and that she had meant Mr. Cline, who ultimately represented her. There is nothing improper or untoward in Hearing Officer Berg's desire to understand fully why and how there seemingly was a mix-up in the attorney's name, and it is understandable that he was not satisfied by the somewhat confusing testimony offered by petitioner, testimony that ultimately revealed, at the very least, that petitioner had not stated the true circumstances on March 16, 2011, and had either not told the truth or only a partial truth. It could be to the credit of Hearing Officer Berg that he continued to

probe in the hopes that her explanation would at last make full sense. As he not unreasonably found that her explanation was not trustworthy, it is also reasonable that he then believed that he could not easily trust anything she had to say. Petitioner may claim she felt "harassed" and verbally assaulted, but this arose because she was unable to offer a straightforward and cogent explanation for her actions. The hearing officer did nothing improper.

With respect to an arbitrator exceeding his power, "New York courts have uniformly held that an arbitrator exceeds his powers only when he ignores specific limitations on the powers delegated to him in the arbitration clause" (*Fishman v Roxanne Mgmt.*, 24 AD3d 365, 366 [1st Dept 2005], quotation and citations omitted). Petitioner's other contentions concerning the hearing officer's failure to adhere to the rules of Article 75 of the CPLR, none of which were raised during the course of the hearing itself, are deemed waived.

PENALTY

The standard of review of a penalty imposed after a hearing is whether the punishment is so disproportionate to the offenses as to be shocking to the court's sense of fairness (*Lackow v Department of Educ., supra*, 51 AD3d 563). The scope of review does not include "any discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed by the Authority" and "the sanction must be upheld unless it shocks the judicial conscience" (*Featherstone v Franco*, 95 NY2d 550, 554 [2000], citing *Matter of Pell v Board of Educ.*, 34 NY2d 222, 232-234 [1974]).

Petitioner argues that the penalty of termination shocks the conscience and is unnecessarily severe. She argues that even if respondent sufficiently established by a preponderance of the evidence that her performance generally fell below the minimal level of a

reasonable teacher, a claim she vigorously disputes, respondent did not sufficiently establish that her competence could not be improved, justifying a penalty of dismissal. She contends that based on her years of service and her successful advocacy for her students, that any penalty should focus on remediation, She argues that respondent made only vague and conclusory claims of misconduct, and that case law provides that in such an instance, any misconduct should be punished by a lesser penalty. She also points out that she was in a difficult classroom environment in a school that was deemed to be foundering in certain respects. She further contends she has shown a willingness to improve, although she does not point to specific examples, and the documentary evidence provided from her school strongly suggests she did not believe she needed to do much different from what she had been doing, and that criticisms or corrections were part of a vendetta against her.

The Opinion and Decision by Hearing Officer Berg concludes that there was "overwhelming evidence" of the particular misconduct alleged, as well as "incompetence and lack of fitness to teach" (Cross Mot. ex. D, Opinion p. 41). Although petitioner claims she was not offered any remedial help, this is belied by various comments in the many observation reports provided to her, where in addition to substantive written suggestions, several offers were made of further discussion or referral to other resources (see e.g., Cross Mot. ex. Q, Observation of March 6, 2009 [noting that two individuals would be "reaching out to you to provide assistance"]; Observation of Dec. 19, 2009 [lead ELA teacher would set up class for petitioner to watch and model]; Informal Observation of April 7, 2010 [assistant principal available to help in setting up and executing particular time of work]; Formal Observation of October 20, 2010 [suggesting two teachers to talk to, and offering meeting with interim assistant principal]).

In deeming termination of employment to be the proper penalty, Hearing Officer Berg relied on the reasoning in *Board of Education City of New York v Arrak*, 28 Educ. Dept. Rep. 302 (1988), a foundational case in which the then-commissioner of education articulated five qualities that establish a minimum standard for a competent teacher; Hearing Officer Berg concluded that petitioner met none of them (Cross Mot. ex. D, Opinion pp. 39-40). In particular, he found that petitioner had shown an inability to assess student performance and an unwillingness or inability to improve, as well as specific "very serious acts of misconduct" (*id.* at 40).

Reviewing courts are "not empowered to substitute their own judgment or discretion for that of an administrative agency merely because they are of the opinion that a better solution could thereby be obtained." (*Peconic Bay Broadcasting Corp. v Board of App.*, 99 AD2d 773, 774 [2d Dept. 1984], *lv denied* 62 NY2d 603 [1984]). The court may not substitute what it might have done were it the trier of fact in the first instance. The court's role is limited to determining whether there is a reasonable basis to support the award issued by Hearing Officer Berg on behalf of respondent. That the penalty may have harsh or, in the eyes of some, unfair consequences is not the standard of review. Petitioner did not establish her claims that there was corruption, fraud or misconduct in the events leading up to the hearing and in the hearing itself; that the hearing officer was biased and thus prejudiced her rights; or that he exceeded his powers so that a final and definite award was not made. Nor was there a failure to follow administrative procedures.

The record does not support a determination that the award signed on May 9, 2011, in the proceeding entitled *In the Matter of the Disciplinary Hearing of the Department of Education of*

the City School District of the City of New York v Cheryl White-Grier, SED File No. 17,157, was without substantial evidentiary support, nor was it without a rational basis. Accordingly, the petition must be denied, and the cross motion to dismiss the petition granted.

It is

ADJUDGED and ORDERED that the petition is denied, and the cross motion is granted, and the proceeding is dismissed, together with costs and disbursements.

The foregoing shall constitute the decision, order and judgment of this court.

ENTER

Dated: September 24, 2012
New York, New York

Paul G. Feinman
J.S.C.