SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ Justice PART 21

Index Number : 152165/2013
GARRETT, VALENCIA
vs
NEW YORK CITY DEPARTMENT OF
Sequence Number : 001
VACATE OF MODIFY AWARD

INDEX NO. _____
MOTION DATE 6/30/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for Art 78

Notice of ~~Motion/Order to Show Cause~~ — Affidavits — Exhibits Petition (3 vols) + Mem | No(s). _____

~~Answering Affidavits~~ — Exhibits (+ mem) | No(s). _____

~~Replying Affidavits~~ | No(s). _____

Upon the foregoing papers, it is ordered that this ~~motion is~~ See E-filing inventory of papers, and Article 75 proceeding pursuant to Education Law § 3020-a(5) is determined in accordance with the annexed memorandum Decision and Judgment.

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

Dated: 7/12/13

_____, J.S.C.

1. CHECK ONE: ..... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: Petition ..... MOTION IS: [ ] GRANTED [X] 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: IAS PART 21

---------- X

In the Matter of the Application of
VALENCIA GARRETT,

Petitioner,

Index No.:
152165/2013

Decision and
Judgment

For an Order Vacating a Decision of a Hearing Officer Pursuant to Section 3020-a (5) of the Education Law and Article 75 of the CPLR,

- against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

---------- X

HON. MICHAEL D. STALLMAN, J.:

Petitioner Valencia Garrett moves for an order, pursuant to CPLR 7511, vacating an arbitration award made after a disciplinary hearing held pursuant to Education Law § 3020-a, in which petitioner was terminated from her employment with respondent the New York City Department of Education (DOE). The DOE seeks to have the petition dismissed in its entirety.

BACKGROUND AND FACTUAL ALLEGATIONS

Up until her termination from employment in February 2013, petitioner worked as a teacher in Public School 183, located in New York, New York. Petitioner was a tenured employee, and had been working for respondent since 1993. Petitioner worked as a

second grade teacher in her last three years of service.

On May 31, 2012, pursuant to Education Law § 3020-a, DOE served petitioner with disciplinary charges, alleging that, during the 2009-2010, 2010-2011 and 2011-2012 school years, petitioner neglected her duties and failed to follow proper procedure. It was also alleged that petitioner engaged in "insubordination and incompetent and inefficient service." Petitioner's exhibit D-1 at 1. The specifications are set forth as follows:

> "1. Respondent failed to properly, adequately and/or effectively plan and/or execute lessons during the 2010-2011 and 2011-2012 academic school years, as observed on each of the following dates:
>
> a) February 15, 2011;
> b) May 4, 2011;
> c) May 10, 2011;
> d) October 6, 2011;
> e) February 10, 2012;
> f) March 13, 2012; and
> g) March 28, 2012.
>
> "2. During the 2009-2010 school year, Respondent exercised poor judgment, acted unprofessionally and/or acted in violation of Chancellor's Regulation A-670, when respondent failed to timely, properly, and/or adequately obtain signed permission slips for school trips.
>
> "3. Respondent exercised poor judgment, neglected duties, endangered the welfare of a child, and/or showed disregard for pupil health, safety, and general welfare when she locked her classroom door while she and the students were still inside the classroom, as referred to in a letter dated April 5, 2012.
>
> "4. Respondent was insubordinate, acted unprofessionally, and/or used poor judgment when she locked Principal Napoleoni out of respondent's classroom, on or about March 28, 2012.

"5. Respondent was insubordinate, acted unprofessionally, and/or used poor judgment when she slammed the door as Principal Napoleoni tried to re-enter the classroom, on or about March 28, 2012.
"6. During the 2011-2012 school year, Respondent exercised poor judgment, acted unprofessionally, and/or inappropriately, in that she directed her student, M.B.,
to bring respondent lunch from the cafeteria, on multiple occasions, as referred to in a letter dated May 1, 2012.
"7. During the 2011-2012 school year, Respondent failed to complete and/or submit lesson plans, as directed by school administration and/or pursuant to her Action Plan.
"8. During the 2011-2012 school year, Respondent failed to meet with the Literacy Coach, as directed by school administration and/or pursuant to her Action Plan.
"9. Respondent failed to timely, properly, adequately and/or effectively maintain and/or submit records and/or documentation during the 2009-2010, 2010-2011, and/or 2011-2012 school years, as referred to in letters dated as follows:

a) June 14, 2010;
b) October 19, 2011;
c) December 6, 2011;
d) March 5, 2012.

"10. During the 2011-2012 school year, Respondent failed to attend scheduled meetings with the administration, as referenced in letters dated as follows:

a) March 21, 2012;
b) March 22, 2012;
c) March 26, 2012;
d) April 5, 2012.

"11. Respondent failed to timely, properly, effectively, and/or adequately follow directives regarding the submission of running records, as referred to in a letter dated March 5, 2012.
"12. Respondent was insubordinate, acted unprofessionally, and/or exercised poor judgment when she stated to students that they should ignore Principal Napoleoni, on or about March 28, 2012.
"13. Respondent refused to allow Principal Napoleoni to observe her, in that she would not

> allow the principal to witness individual conferences and/or speak with students freely, on or about March 13, 2012 and March 28, 2012.
> "14. Respondent failed to implement, accept and/or heed advice, counsel, instruction, remedial professional development and/or recommendations regarding:
> a. Planning and pacing of lessons;
> b. Academically rigorous lessons;
> c. Student growth;
> d. Assessment of students' progress;
> e. Classroom management;
> f. Providing a room environment conducive to student learning;
> g. Providing meaningful feedback; and
> h. Differentiation of instruction in lessons."

Id. at 2-3.

Pursuant to Education Law § 3020-a, a hearing began on July 30, 2012 to determine the outcome of the disciplinary charges. Arbitration is compulsory in Education Law § 3020-a hearings according to petitioner's collective bargaining agreement and DOE's rules. Hearing Officer Stephen F. O'Beirne (Hearing Officer O'Beirne) was appointed to preside over the proceedings. A hearing took place over seven subsequent dates where both parties were entitled to examine and cross-examine witnesses and submit evidence. Over 80 exhibits were submitted at the arbitration.

Hearing Officer O'Beirne sustained the charges set forth in specifications 1 (a) through 1 (g), 4, 5, 6, 7, 8, 9 (b) through and including 9 (d), 10 (a) through and including 10 (d); 11, 12, 13, and 14 (a) through and including 14 (h). He dismissed the

other specifications. He noted that petitioner received unsatisfactory ratings in her annual performance reviews for the 2009-2010, 2010-2011, and 2011-2012 school years. For each specification, he went through the facts as presented to him by both parties and listened to the testimony of the witnesses. Hearing Officer O'Beirne categorized this arbitration as one concerning "allegations of both misconduct and incompetent service" by petitioner. Petitioner's exhibit A at 7. He concluded that the DOE has "proven elements of both by an overwhelming preponderance of the evidence." *Id.*

Hearing Officer O'Beirne stated that the DOE witnesses were credible and competent. On the contrary, Hearing Officer O'Beirne stated that petitioner "was neither a credible nor a convincing witness." *Id.* While petitioner did attend some of the professional development sessions offered to her, by her own admission, she ignored the other directives by the administration. These lapses included failing to attend meetings with administrators, failure to turn in lesson plans and failure to submit student assessments. *Id.* He found that the appropriate remedy for petitioner's behavior was dismissal from service.

In his award, Hearing Officer O'Beirne noted that petitioner believed that the school administration retaliated against her, starting in 2009, when petitioner refused to accept monetary

gifts from the parents. Petitioner claims that her actions with respect to the refusal caused a backlash from the parents, teachers and administration. After listening to the testimony, Hearing Officer O'Beirne found that petitioner's "whistle blower" defense did not withstand scrutiny. He continues, "[i]n order to believe [petitioner's] account, I would have to believe that [the witnesses] were so enraged by [petitioner] bucking the system that they began fabricating charges and falsifying documents to force her to leave the school. That is a leap of faith I am not prepared to make on the record before me." *Id.* at 8.

A summary of the sustained charges are set forth as follows:

Specification 1 concerns classroom observations conducted by Principal Tara Napoleoni (Napoleoni) and/or Assistant Principal Jennifer Leventhal (Leventhal). It was alleged that, at least in one of the observations, petitioner rehearsed the lesson with the students before her observation and promised them pizza and/or Chinese food if they performed well. Napoleoni discovered petitioner's actions after conducting the observation. She discussed them with petitioner and memorialized it in a written report. O'Beirne noted that petitioner signed this written report and did not submit a written rebuttal to the allegations.

With respect to specification 1, Hearing Officer O'Beirne continued discussing each of the unsatisfactory observations and/or reports at issue. He listened to the testimony of the

parties and noted in his award if petitioner had responded to the observation reports. Although petitioner contested the observation reports at the arbitration, Hearing Officer O'Beirne credited the testimony of the DOE witnesses and did not find petitioner's accounts to be persuasive.

For example, petitioner claimed that both the March 13 and 28, 2012 lessons were "good" lessons and that it was the Principal who was "rude and unprofessional." *Id.* at 12. Hearing Officer O'Beirne then indicated that he did not "believe a word" of petitioner's testimony in this regard. *Id.* He referred to Napoleoni's written memorializations of these observation reports, which she hand-delivered to petitioner on April 19, 2012. *See* Petitioner's exhibit D-14. Hearing Officer O'Beirne then commented that petitioner "did not attend the post-observation conferences for either of these observations and she refused to sign the post-observation reports." Petitioner's exhibit A at 12.

Specification two was dismissed. Hearing Officer O'Beirne found that the DOE did not carry out its burden of proof by a preponderance of the evidence. He stated that a letter regarding the alleged misconduct was placed in petitioner's file. Petitioner submitted a response to the letter. After listening to the testimony, he found that petitioner's argument that this specification lacked "sufficient specificity to allow her a

reasonable opportunity to respond to it," had merit. *Id.* at 13.

Specifications 3, 4, 5, 12, and 13 were grouped together by Hearing Officer O'Beirne since they were all triggered as a result of petitioner's insubordination. Hearing Officer O'Beirne found, after reviewing the documentation and listening to the testimony, that petitioner acted in a "grossly insubordinate manner" to Napoleoni. *Id.* at 14. During classroom observations on March 13 and 28, 2012, petitioner locked Napoleoni out of the classroom, slammed the door as the principal tried to re-enter the classroom, told her students to ignore Napoleoni and did not allow her to speak freely with the students. Furthermore, according to Napoleoni, among other things, petitioner videotaped her and took a book out of a student's hand and locked it in a cabinet to prevent the Principal from discussing the book with the student. Hearing Officer O'Beirne found the petitioner's account of the events to be "pure fiction." *Id.* at 15. He dismissed specification 3 because he found there was no evidence to show petitioner actually locked the door herself or knew that it would lock when she closed it the first time.

Specification 6 was triggered by a complaint from one of the parents to Leventhal. The complaint suggested that petitioner selected one of the students to bring her a hot lunch from the cafeteria up to her classroom five or six times as a "reward." Leventhal memorialized the complaint in a letter dated May 1,

2012. The letter summarized the complaint by the parent, and also noted that petitioner ignored Leventhal's request to attend a meeting on the matter. Petitioner was encouraged to bring a union representative to this meeting. The letter noted that petitioner expressed on several occasions how she refused to attend meetings with administration. The letter also stated the following:

> "Based on my investigation, I conclude that you have abused your position, demonstrated poor professional judgment and jeopardized student safety. It is wholly inappropriate for you to ask students to run your errands. A student's lunchtime is their opportunity to eat, play and socialize with peers. It should not be spent running personal errands for teachers. Further, such an errand is not a 'reward' but rather, an abuse of your authority.
> Please be advised that this incident may lead to further disciplinary action including an unsatisfactory rating and charges leading to your termination."

Petitioner's exhibit D-53.

At the time of the incident, the petitioner refused to sign and take the letter.

During the arbitration, Hearing Officer O'Beirne listened to the testimony about the lunch incident. He found petitioner's version of the events to be "quite strained" and he was "not inclined to credit it." Petitioner's exhibit A at 16. He then concluded, "[m]oreover, I find that by failing to address this allegation at the time it occurred, either by attending the disciplinary meeting with her Union Representative and/or submitting a written response, Respondent waived her right to

contest it in this proceeding." *Id.*

Hearing Officer O'Beirne sustained specification 7, because he found that petitioner refused to submit her lesson plans to the administration.

Hearing Officer O'Beirne sustained specification 8; he found that petitioner only sporadically met with the Literacy Coach, when, according to petitioner's action plan, she was required to meet with the Literacy Coach at least one time each week.

Hearing Officer O'Beirne sustained part of specification 9 when, after reviewing the evidence, he found that petitioner did not keep accurate records.

Hearing Officer O'Beirne sustained specification 10 after determining that petitioner missed meetings with administration.

Hearing Officer O'Beirne sustained specification 11 concerning petitioner's failure to turn in adequate records.

Hearing Officer O'Beirne sustained specification 14 after observing that, "[a]t some point [petitioner] decided to stop attending meetings with the administrators and refused to accept observation reports and counseling memorandums." *Id.* at 19. He concluded, "[u]nder those circumstances, I don't see how I can be expected to find [petitioner] was in fact an effective and competent teacher." *Id.*

After reviewing all of the specifications, Hearing Officer O'Beirne found the appropriate penalty was termination. He

commented that he struggled with the penalty since petitioner had a long career with the DOE and, prior to 2009, had only satisfactory reviews. However, he found that petitioner's record was filled with "voluminous evidence" of her "pedagogical and administrative deficiencies." *Id.* He found that her failure to keep records, as set forth in specifications 9 and 11, "particularly troubling," and indicated that this proven misconduct "adversely impacts students and the school's ability to serve those students." *Id.* at 19-20.

Hearing Officer O'Beirne concluded with the following:

> "Equally disconcerting is the proven misconduct concerning [petitioner's] interaction (and/or lack thereof) with school administrators (Specifications 4, 5, 7, 8, 10, 12, and 13). [Petitioner's] behavior during the two classroom observations Principal Napoleoni attempted to conduct on March 13 and March 28, 2012 constitutes insubordination on a grand scale. [Petitioner's] decision to stop communication with school administrators by refusing to attend meetings and accept correspondence is, in my mind, outrageous. I note in this regard, [petitioner] has a vocal and powerful bargaining representative to intercede on her behalf if she genuinely believed she was being treated unfairly. For whatever reasons, she decided to adopt self-help measures not sanctioned by the collective bargaining agreement ... or by any policy/practice I am aware of. The Department has established a compelling justification for discharge."

Id. at 20.

Shortly after receiving the arbitrator's award, petitioner filed this instant proceeding, seeking to vacate the award. The petition states that the award should be vacated because the Hearing Officer exceeded his authority and issued a totally

irrational decision. Petitioner alleges that Hearing Officer O'Beirne created a new "rule" in which the teacher waives her right to raise a defense at a 3020-a hearing. The petition also claims that the penalty imposed shocks the conscience.

DISCUSSION

Pursuant to Education Law § 3020-a (5), CPLR 7511 provides the basis of review of an arbitrator's findings. *Lackow v Department of Educ. (or "Board") of City of N.Y.*, 51 AD3d 563, 567 (1st Dept 2008). CPLR 7511 limits the grounds for vacating an award to "misconduct, bias, excess of power or procedural defects [internal quotation marks and citation omitted]." *Id.* However, where, as here, the parties are subjected to compulsory arbitration, the Appellate Division, First Department, has held that judicial scrutiny is greater then when parties voluntarily arbitrate. *Id.* The arbitration award 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." *Id.* The person challenging the award shoulders the "heavy burden" of vacating the award. *Lehman Brothers, Inc., v Cox,* 10 NY3d 743, 744 (2008).

Due Process Was Not Violated

Petitioner alleges that, during the course of her arbitration, Hearing Officer O'Beirne created what she refers to as the "Waiver Rule" when he held that a teacher waives her right

to defend herself at a disciplinary hearing if she had not previously submitted a written rebuttal to the charges. Petitioner argues that because the entire award relies "heavily" on this waiver rule, the award must be vacated. Petitioner's memorandum of law at 10. She further contends that, perhaps when the Hearing Officer stated that there was not a written rebuttal, he did "not know this to be true." *Id.* at 12. Petitioner claims that Hearing Officer O'Beirne applied this waiver rule to every specification, compromising fundamental fairness and the ability to be heard. She even goes so far as to say that much of her right to testify on her own behalf was waived.

With respect to due process, Education Law 3020-a (3)(c)(i)(c) states that the "employee shall have a reasonable opportunity to defend himself or herself and an opportunity to testify in his or her own behalf." Likewise, an employee "shall not be required to testify." *Id.*

After reviewing the record, the Court finds that petitioner's right to due process was not compromised. As held by the Appellate Division, First Department, a petitioner's due process rights were not violated when the "DOE held a full hearing pursuant to Education Law 3020-a and presented testimony from the complainant and other witnesses; petitioner also presented evidence, including his own testimony." *Harris v Department of Educ. of the City of N.Y.*, 67 AD3d 492, 493 (1st

Dept 2009). Similarly, in the present case, a full hearing was held whereby petitioner testified and presented evidence. *Compare Matter of Elmore v Plainview-Old Bethpage Cent. School Dist., Bd. of Educ.*, 273 AD2d 307, 307 (2d Dept 2000)(award vacated and new hearing directed when, during the hearing, the petitioner was not allowed to discuss his testimony with his attorney during any of the adjournments in the cross examination).

Petitioner cites to *Matter of Board of Educ. of City School Dist. of City of N.Y. v Mills* (250 AD2d 122, 126 [3d Dept 1998]) in support of her allegation that "the requirement that a teacher respond to ... prehearing memoranda, letters, investigations, or other means of accusation, also conflicts with the Education Law." Petitioner's memorandum of law at 11. She continues that she had a right not to submit written prehearing statements rebutting the charges.

In *Matter of Board of Educ. of the City School Dist. of the City of N.Y. v Mills*, the Appellate Division held that a teacher could not be found guilty of insubordinate behavior for refusing to testify during a Special Commissioner of Investigation (SCI) hearing. Specifically, charges were proffered against the petitioner alleging that he engaged in "uncooperative, disobedient and insubordinate behavior" for disobeying a Charter provision which required employees to answer questions during

prehearing investigations or be subject to dismissal for insubordination. The Appellate Division held that this Charter provision conflicted with the Education Law, since the Education Law provides protection for employees so that they don't have to testify against themselves in a proceeding where their job is at stake.

As set forth below, petitioner's reliance on *Matter of Board of Educ. of the City School Dist. of the City of N.Y. v Mills*, is unavailing. In the present case, contrary to petitioner's contentions, Hearing Officer O'Beirne did not create a "requirement" that petitioner respond to accusations before her disciplinary hearing. Her right to not submit responses to accusations before her hearing was not compromised. Even for specification six,[1] despite Hearing Officer O'Beirne's comments about waiving rebuttal rights, alternative grounds were still used to sustain the specification. Likewise, the facts, not the rebuttals or lack thereof, were used to sustain the other specifications. Moreover, charges grounded in insubordination were all established, according to Hearing Officer O'Beirne, by petitioner's behavior during classroom observations, not because of any refusal to participate in prehearing responses.

Accordingly, petitioner's claims that she was deprived of

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[1]The Court notes this is not a charge for insubordination but for poor judgment.

due process are without merit.

The Award is Supported by Adequate Evidence

In her memorandum of law, petitioner contests the way that Hearing Officer O'Beirne weighed her testimony versus that of other parties. For example, in specification 9, petitioner testified that she always submitted her running records and also submitted a complete set into evidence as proof. In his award, Hearing Officer O'Beirne does not mention petitioner's testimony on the records, but states that the respective specifications are proven by an abundance of evidence in the record. Hearing Officer O'Beirne then documented the evidence in the record and the transcripts.

The Court finds that the award is supported by adequate evidence. At the hearing, Hearing Officer O'Beirne engaged in a thorough analysis of the facts, allowed testimony and reviewed the documentation. In his conclusion, Hearing Officer O'Beirne described the reasons that he felt petitioner should be terminated. These included her failure to maintain records, which adversely impacted the students and the school, her gross insubordination during classroom observations, and her failure to accept correspondence from the DOE or attend meetings. He could not think of one workplace which would tolerate such conduct.

In his award, Hearing Officer O'Beirne noted multiple times in his award that petitioner was simply "neither a credible nor a

convincing witness." Petitioner's exhibit A at 7. It is well settled that a hearing officer has the authority to weigh the credibility of the witnesses. As such, the Court will not disturb Hearing Officer O'Beirne's credibility determinations. As set forth in *Lackow v Department of Educ. (or "Board") of City of N.Y.* (51 AD3d at 568), "[a] hearing officer's determinations of credibility, however, 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 [internal quotation marks and citation omitted]." *See also Cipollaro v New York City Dept. of Educ.*, 83 AD3d 543, 544 (1st Dept 2011) (holding that a hearing officer's determination of credibility is entitled to deference).

The Award is Not Arbitrary and Capricious and is Rational

Petitioner also implies that a finding of guilt was tied to whether or not she rebutted the charges at the time they occurred. She argues that the only specification which was dismissed, was also the only one to which she submitted a written response at the time of the occurrence.

An action is considered arbitrary and capricious when it is "taken without sound basis in reason or regard to the facts." *Matter of Peckham v Calogero*, 12 NY3d 424, 431 (2009). The record demonstrates that the Hearing Officer weighed the

arguments and analyzed the evidence for every specification regardless of whether or not a written rebuttal had been given by petitioner. For instance, petitioner did not submit a written rebuttal for specification 3, yet this specification was dismissed by Hearing Officer O'Beirne.

As he mentions in his conclusion, Hearing Officer O'Beirne's notations through out the course of his award of whether or not petitioner submitted responses to the voluminous disciplinary charges are linked to petitioner's inherent flaw as an effective teacher; the type of interaction or lack of interaction with her supervisors. Petitioner refused to meet with the Literacy Coach for assistance in teaching. On many occasions petitioner adopted "self-help" measures instead of utilizing her powerful bargaining representative, such as refusing to meet with administrators or accept letters from them. He believed that her one-sided decision to stop communication with her administration was "outrageous." As the notations correlate to petitioner's insubordination and lack of contact with her superiors, this award is not arbitrary and capricious.

Furthermore, irrespective of the method Hearing Officer O'Beirne used to create the award, contrary to petitioner's assertions, "[t]he path of analysis, proof and persuasion by which the arbitrator reached this conclusion is beyond judicial scrutiny." *Central Sq. Teachers Assn. v Board of Educ. of the*

Cent. Sq. Cent. School Dist., 52 NY2d 918, 919 (1981).

The Hearing Officer's determination is supported by a significant body of evidence and has a rational basis. Petitioner had three years of unsatisfactory ratings. Among other things, she was insubordinate, failed to turn in records and was an ineffective teacher. In just one of the subsections of a specification, she advised her students to ignore the Principal, and locked a student's book in the file cabinet to prevent the Principal from discussing it with the student. As such, it was rational for Hearing Officer O'Beirne to consider petitioner's conduct to be of a serious nature, and, in his words, gross misconduct.

Specification Six

As previously mentioned, petitioner's main objections to the award stem from the Hearing Officer's language in specification 6. However the Court notes that, in the Hearing Officer's summary of the charges, he included specifications 4, 5, 7, 8, 9, 10, 11, 12 and 13. There was no mention of 6. In any event, petitioner's allegations that Hearing Officer O'Beirne created a "waiver rule" which prevented her from testifying on her own behalf, are unfounded. While Hearing Officer O'Beirne may have noted in his award when and if the petitioner responded to any of the charges, it was only in specification 6 where he found that, since petitioner failed to address this allegation at the time it

occurred, she waived her right to contest it at the hearing. He certainly did not create a new "waiver rule," neither did he use this language for any of the other specifications. Moreover, despite this language, Hearing Officer O'Beirne still did consider petitioner's testimony for the incident and found it to be "quite strained," and was not inclined to credit it, inevitably sustaining specification 6.

Moreover, even if Hearing Officer O'Beirne made a mistake in the law when he noted that petitioner waived her right to contest a charge at her proceeding, the award will not be vacated for this reason. Courts have held that, even when an arbitrator has "erred in judgment either upon the facts or the law," the arbitration award will not be set aside. *Matter of Goldfinger v Lisker*, 68 NY2d 225, 230 (1986).

Similarly, petitioner's allegations of any factual mistakes, such as not knowing whether or not there were written rebuttals, are without merit. *See e.g. Wien & Malkin LLP v Helmsley Spear, Inc.*, 6 NY3d 471, 479 (2006) *cert dismissed* 548 US 940 (2006), (holding even "manifest disregard of the facts" alone is not a permissible ground to vacate the award). As such, petitioner cannot establish a valid ground for vacating the arbitrator's award due to a misapplication of law or facts.

Termination Not Shocking

The petition states that Hearing Officer O'Beirne imposed a

penalty that shocks the conscience. Administrative sanctions, such as petitioner's punishment, "must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." *Matter of Featherstone v Franco*, 95 NY2d 550, 554 (2000).

Hearing Officer O'Beirne considered mitigating circumstances, such as petitioner's long career with the DOE, and her previous satisfactory ratings. He was also impressed with the testimony given on petitioner's behalf by parents. However, after concluding that her proven misconduct affected both the students and the school, termination was the appropriate penalty. The Appellate Division, First Department, has held that, "[a]cts of moral turpitude committed in the course of public employment are an appropriate ground for termination of even long-standing employees with good work histories." *Matter of Chaplin v New York City Dept. of Educ.*, 48 AD3d 226, 227 (1st Dept 2008). Given the record and the charges upheld against petitioner, including ones for ineffective teaching and gross insubordination, this Court does not conclude that the penalty of termination shocks one's sense of fairness. *See also Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 421 (1st Dept 2013) ("Having seen and heard the witnesses, [the hearing officer] was in a far superior position than the motion court to make a determination as to an appropriate penalty to impose").

CONCLUSION

In conclusion, this court does not find that any basis exists to vacate the arbitration award.

Accordingly, petitioner's request to vacate the award is denied in its entirety, and pursuant to CPLR 7511 (e), the award is confirmed.

Accordingly, it is hereby

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

Dated: July 12 **, 2013**

New York, NY

ENTER:

J.S.C.