

Roman v Department of Educ. of the City of N.Y.

2014 NY Slip Op 30472(U)

February 28, 2014

Sup Ct, New York County

Docket Number: 101122/2013

Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. Peter H. Moulton PART 57

Justice

AMADOR ROMAN

INDEX NO. 101122/2013

MOTION DATE _____

v.

MOTION SEQ. NO. 001

DEPARTMENT OF EDUCATION OF THE
CITY OF NEW YORK

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Papers Numbered

Notice of Motion/Order to Show Cause — Affidavits— Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

This case has been disposed pursuant to the attached written decision dated

February 28, 2014.

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).

Dated: 2/28/14

 **HON. PETER H. MOULTON**

J.S.C.

New York, New York

PETER H. MOULTON

- 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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 57

-----x
In the Matter of the Petition of AMADOR ROMAN,

Petitioner,

-against-

Index No.101122/2013

DEPARTMENT OF EDUCATION OF THE CITY
OF NEW YORK,

Respondent,

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).

For a Judgment Pursuant to Article 7511 of the CPLR.
-----x

PETER H. MOULTON, J.:

Petitioner Amador Roman petitions this court, pursuant to CPLR Article 7511(b), for a judgment vacating a hearing officer's decision and award, made pursuant to Education Law § 3020-a, finding just cause to terminate his employment. Petitioner contends that the hearing officer did not render an impartial decision, illustrated misconduct prejudicial to his case, and made findings not supported by a preponderance of the evidence.

Respondent New York City Department of Education (DOE) cross-moves, pursuant to CPLR §§ 404(a), 3211(a)(7) and 7511 for an order dismissing the petition on the grounds that petitioner fails to state a cause of action, and for an order confirming the arbitration award pursuant to CPLR § 7510.

BACKGROUND

Petitioner Amador Roman was a tenured Spanish teacher for the DOE employed at Tottenville High School located in Staten Island, New York. During the 2012-2013 school year, respondent DOE, through Tottenville High School Principal John Tuminaro, filed charges pursuant

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to Education Law § 3020-a against petitioner for engaging in conduct unbecoming his position that included "corporal punishment, verbal abuse, and inappropriate conduct" during the 2010-2011 and 2011-2012 school years. The charges initially contained 12 specifications, many of which included subparts, charging petitioner with numerous instances of verbal and physical abuse as well as a dereliction of his classroom duties. Specifically, petitioner was charged, in sum and substance, with the following acts: pushing a desk into the back of a student's chair causing the student's hair to get caught between the desk and chair; leaving his classroom for an extended period of time without notifying the administration; making remarks containing the use of profanity while suggesting that his students should not come to class or that they were "idiots"; using profanity during a telephone conversation with a student's parents; inquiring, during instructional time, as to whether one of his students was taking a prescribed medication; and, pulling a chair out from underneath a student, causing the student to fall to the ground and thereafter laughing at that student.

After the allegations against petitioner were made, a hearing was scheduled pursuant to Education Law § 3020-a. On February 26, 2013, a pre-hearing conference was conducted. Thereafter, hearings were held before a single hearing officer on the following dates: April 12, 23, 29, May 1, 8, 21, 23, and June 5, 27, 2013. Throughout the arbitration, petitioner was represented by counsel and was afforded a full opportunity to introduce evidence and argue in support of his position.

Following the nine-day hearing, petitioner was found guilty of both verbal and physical abuse as well as unsatisfactory performance as a teacher on various occasions. Indeed, the hearing officer sustained charges in Specifications 1, 2, 3, 4(b), 4(c), 4(d), 4(e), 4(f), 5, 6, 8, 9, 10(d), 11, 12(b), and 13. In doing so, the hearing officer found, based on the documentary evidence and the

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testimony of petitioner's students, the mother of a student, and various school administrators and an investigator, that petitioner was guilty of the aforementioned conduct, and as such, respondent had just cause to dismiss him.

In his decision, the hearing officer detailed the charges against petitioner as well as the reasoning for his findings. Specification 1 alleged that on or about March 21, 2012 petitioner intentionally pushed an empty chair connected to a desk into the back of another chair where a student was seated. In response to this allegation, petitioner stated that he pushed the chair only once and by accident. Respondent claimed that petitioner intentionally pushed the chair more than once causing a student's hair to become entangled and resulting in pain to that student. To resolve those conflicting accounts, the hearing officer received testimony and a formal statement from the aforementioned student as well as testimony from another student who corroborated the account proffered by the first student. Petitioner's description of the incident as a "mistake" and of the charged offense as a "tap" were found to be incredible in light of the competing testimony from the two students.

With respect to Specification 2, which stated that after committing the actions indicated in Specification 1 petitioner remarked to the student "just get up and get away from me," petitioner claimed that he did not make a comment of that nature to the student following the incident. In opposition, respondent claimed that the incident occurred in the manner alleged by the student, who testified that after telling petitioner that the student's hair was stuck, petitioner instructed the student to get away from him. At the hearing, the hearing officer did not find petitioner's account to be credible, especially in light of what was deemed to be a more credible account from the student based on testimony and a written statement.

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Specification 3 stated that petitioner during instructional time on or about April 3, 2012, was absent from his assigned classroom for 20 minutes without permission or authority to do so. Petitioner did not dispute that, but instead claimed that after going to the principal's office and receiving a notice of disciplinary charges pending against him during those 20 minutes, was unable to return to his classroom for the remaining 15 minutes of the day's lesson. Respondent claimed that as a teacher, petitioner was contractually bound to return to his classroom following a brief period in which he was called to the principal's office. His failure to do so therefore constituted misconduct. At the hearing petitioner was found to have committed misconduct based, in part, on petitioner's own acknowledgment that no one ever instructed him not to return to his classroom.

Specification 4(b) charged that on or about between September 2010 and December 2010, petitioner stated during instructional time that a student enrolled in special education classes belonged there because the student was a "moron." Petitioner denied making the statements, but the student to whom the comments were directed corroborated the allegation. The student's mother also testified that the student had recounted the incident to her.

Specifications 4(c), 4(d), 4(e), 4(f), all contained similar allegations with respect to petitioner's use of profane language against the same student referenced in Specification 4(b) during the same period of time, and also within a classroom setting. With respect to those allegations, petitioner denied telling a student that he would not amount to anything, and further denied stating that he had no remorse for the passing of a student's father and calling the student an "idiot." Again, the student to whom the comments were directed testified at the hearing, giving credence to the allegations set forth against petitioner.

With respect to Specification 5, which alleged between November 2010 and December 2010,

petitioner laughed and smiled during class time after learning that a student's father was dead, petitioner denied ever laughing or smiling upon learning that a student's father was dead. In support of respondent's position that he did, however, the student to whom the comments were directed, as well as another student, corroborated the allegations by testifying at the hearing.

Specification 6 stated that between November 2010 and December 2010, petitioner spoke to a student's parent and while discussing that student repeatedly used profane language. At the hearing petitioner did not deny using profane language in his conversation with the student's parent, but instead stated that the student's parent had misconstrued the profanity as being directed at her instead of as a reference to language that her child had used in the classroom. Based on the testimony proffered at the hearing, the hearing officer credited the student's parent's recall of the conversation with petitioner over petitioner's account due to the volume of details elicited by the student's parent in her written statement.

With respect to Specification 8, it was alleged that between September 2010 and December 2010 Petitioner, during classroom time, inquired as to whether a student had taken a prescribed medication. At the hearing, petitioner claimed that he had privately asked the student that question in order to assess whether the student's request for a bathroom break was legitimate. However, the student testified that petitioner had prior knowledge of the fact that the student took a medication which required frequent bathroom visits, and asked the question in a loud voice in front of the entire classroom in order to embarrass the student. Based on that testimony, the hearing officer concluded that petitioner's explanation was illogical in light of the fact that petitioner already knew that the student was taking medication that required frequent bathroom breaks.

Specification 10(d) stated that on or about and between September 2010 and December 2010

petitioner, during class time, stated to his assigned students, in sum and substance, "I can't stand this goddamn class." At the hearing, two students verified that petitioner had made the remark, with one student adding that Petitioner's words impacted his desire to be a part of the class. Petitioner denied making the remark. Based on the testimony elicited at the hearing, the hearing officer credited the students' account over Petitioner's.

Specification 11 stated that on or about May 13, 2010, petitioner, during class time, repeatedly remarked that one of his students was "stupid," and required special education classes. Those remarks resulted in the student making a formal written complaint against petitioner. Based on that complaint as well as the student's testimony during the hearing, the hearing officer credited the student's account with respect to the allegation.

Finally, Specifications 12(b) and 13 stated that on or about September 2010 and May 2010, petitioner pulled a chair from underneath a student causing the student to fall to the ground, and subsequently laughed at the student. At the hearing, petitioner admitted partial responsibility for the student's fall to the ground, but attempted to minimize his conduct by stating that the student had laughed when the incident happened. Petitioner also stated that he "shook" the chair to get the student's attention. The student, both in a written statement given three years ago and in his testimony at the hearing, stated that petitioner had pulled the chair as the student was attempting to sit down and laughed once the student fell to the ground. Based on petitioner's admissions as well as the student's account, the hearing officer found petitioner guilty of Specifications 12(b) and 13.

The hearing officer found that there was insufficient evidence in the record to sustain the charges found in Specifications 4(a), 7, 10(a), 10(b), 10(c), 12(a), and 12(c) and those other charges were dismissed.

DISCUSSION

Education Law § 3020-a (5) provides that review of a hearing officer's decision and award is limited to the grounds set forth in CPLR 7511. *Lackow v. Department of Educ. of City of N.Y.*, 51 A.D.3d 563, 567 (1st Dept. 2008); *Austin v. Board of Educ. of City School Dist. of City of N.Y.*, 280 AD2d 365, 365 (1st Dept 2001). "Under CPLR 7511, an award may be vacated only if (1) the rights of a party were prejudiced by corruption, fraud or misconduct in procuring the award, or by the partiality of the arbitrator; (2) the arbitrator exceeded his or her power or failed to make a final and definite award; or (3) the arbitration suffered from an unwaived procedural defect." *Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 154-55 (1995). As such, there is a very limited scope for judicial review of arbitration awards. *Matter of Blamowski v. Munson Transp., Inc.* 91 NY2d 190, 194 (1997). However, because courts consider the disciplinary hearings under Education Law § 3020-a to be a form of compulsory arbitration, the hearing officer's decision and award must have a rational basis and adequate support in the record. *Matter of Hegarty v. Board of Educ. of the City of New York*, 5 AD3d 771, 772 (2d Dept. 2004); *Matter of Bernstein (Norwich City School Dist. Bd. of Educ.)*, 282 AD2d 70, 73 (3d Dept 2001), *lv denied* 96 NY2d 937 (2001); *Matter of Fischer v. Smithtown Cent. School Dist.*, 262 AD2d 560, 561 (2d Dept 1999).

Here, petitioner claims that the hearing officer's decision was unwarranted based on the evidence that was elicited during the course of the hearing. *See* Amended Petition at ¶ 1. As respondent points out in rebuttal, a review of the Opinion and Award does indicate, contrary to petitioner's claims, that the hearing officer's decision was not arbitrary and capricious, but instead supported by the record. Indeed, the hearing officer issued a 42-page decision in which he outlined the arguments set forth by both parties before making independent determinations, supported by his

reasoning, as to which side he would credit. The balance that the hearing officer applied when making his determinations is evidenced by the fact that he credited accounts where he could corroborate the DOE's claims, and dismissed those where he could not. Moreover, his evidence included written statements, live testimony and other documentary evidence.

Petitioner's claims that the hearing officer's determinations were unwarranted fails even in those circumstances where the hearing officer was presented with only two accounts from two separate witnesses and had to credit one witness over the other. Indeed, courts "accept the arbitrators' credibility determinations, even where there is conflicting evidence and room for choice" because the "hearing officer observed the witnesses and was able to perceive the inflections, the pauses, the glances, the gestures - all the nuances of speech and manner that combine to perform an impression of either candor or deception." *Lackow*, 51 AD3d at 568 (citing *Matter of Berenhaus v. Ward*, 70 NY2d 436, 443 (1987)). Consequently, the hearing officer's determination had a rational basis and adequate support in the record. As such, petitioner's inference that the record does not support the hearing officer's determination is without merit as a matter of law.

Petitioner further alleges that the hearing officer was biased and not impartial in rendering his final decision, but offers little if any specific factual support for that claim. As a general matter, "[a] party seeking to set aside an arbitration award for alleged bias of an arbitrator must establish his claim by clear and convincing proof." *Matter of Infosafe Sys. v. Int'l Dev. Partners*, 228 AD2d 272, 272-73 (1st Dept. 1996); accord *Batyreva v. N.Y.C Dept. of Educ.*, 95 AD3d 792, 792 (1st Dept. 2012); *Matter of Moran v. New York City Tr.. Auth.*, 45 AD3d 484, 484 (1st Dept. 2007). Indeed, mere allegations of bias, absent specific references, is not sufficient to vacate an administrative determination. *Matter of Moro v. Mills*, 70 AD3d 1269, 1270 (3d Dept. 2010). Bias cannot be

inferred merely on account of a petitioner's issue with or different version of events with respect to allegations preferred against him. *Bronx-Lebanon Hosp. Ctr. v. Signature Med. Mgt. Group*, 6 AD3d 261, 261 (1st Dept. 2004).

In the instant matter, petitioner's conclusory allegations of bias fall far short of the heavy burden that needs to be satisfied in order to vacate an arbitration award. In support of his claims that the hearing officer was biased, petitioner relies heavily on blanket assertions that the hearing officer colluded with the DOE's Administrative Trials Unit and takes exception to the hearing officer's determinations as to the admissibility of documents and credibility assessments with respect to witnesses that appeared at the hearing. *See* Amended Petition, at ¶ 48, 79. While those assertions demonstrate petitioner's disagreement with the hearing officer's rulings and award, they do not meet the threshold of clear and convincing evidence that the hearing officer exhibited bias.

Moreover, even if petitioner had presented this court with specific instances of bias on the part of the hearing officer, it is well settled that a petitioner who wishes to object to an arbitrator's alleged bias or partiality must do so immediately and not wait until after the award has been rendered. Indeed, "A party who proceeds with an arbitration with actual knowledge of bias on the part of an arbitrator or facts that should have prompted further inquiry, waives his objection to the arbitration." *Matter of Namdar (Mirzoeff)*, 161 AD2d 348, 349 (1st Dept. 1990), *appeal denied* 77 NY2d 802 (1991); *see also 1000 Second Ave. Corp. v Pauline Rose Trust*, 171 AD2d 429 (1st Dept. 1991) (finding that because the petitioner was aware of the alleged bias at the time of the arbitration, he waived any claim regarding the alleged prejudice). Here, assuming that petitioner took exception to the hearing officer and his subsequent rulings during the course of the hearing, petitioner had actual knowledge of this alleged basis for bias on the part of the hearing officer, and failed to raise

any objection. Consequently, petitioner's attempt to vacate the award on the grounds of partiality of the hearing officer lacks adequate support.

Petitioner also seeks to vacate or modify the award on the grounds that his due process rights were violated because respondent preferred charges against petitioner without initially presenting those charged to the New York City Board of Education for a vote on their specificity and reliability. See Amended Petition at ¶¶ 52-54, 63-68. Petitioner further states that the hearing officer had no authority to decide either just cause or specificity with respect to the charges brought against him. *Id.*

Despite the fact that the record indicates that petitioner was informed of his right to a hearing, and participated therein, with counsel, without complaint, in a process which involved a review of a significant amount of evidence and testimony, lasting a total of nine days, he claims that he was denied due process because charges were not initially reviewed by the governing school board for a finding of probable cause. Instead, Tottenville High School Principal John Tuminaro made the finding of probable cause. Education Law § 3020-a (1) provides that "[a]ll charges against a person enjoying the benefits of tenure ... shall be in writing and filed with the clerk or secretary of the school district or employing board" Section 3020-a (2) (a) requires that:

[u]pon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify said board itself. Within five days after receipt of charges, the employing board, in executive session, shall determine by a vote of a majority of all the members of such board, whether probable cause exists to bring a disciplinary proceeding against an employee pursuant to this section.

After such a vote, the board must notify the employee of his right to a hearing. Pursuant to Education Law §3020-a(2)(c), if the charges involve "pedagogical incompetence or issues involving

pedagogical judgment,” the employee is entitled to have the charges heard before “a single hearing officer or a three member panel”¹ The determination of the hearing officer is to be made within 30 days after the termination of the hearings. Education Law § 3020-a (4)(a).

However, respondent correctly points out that strict adherence to the procedures laid out in Education Law §3020-a (2)(a) for preferring disciplinary charges has routinely been rejected by the courts. See *Haas v. N.Y.C. Bd./Dept of Educ.*, No. 110190/11, 2012 N.Y. Misc. LEXIS 1590, at **3-4 (Sup. Ct., N.Y. Cnty. Apr. 2, 2012) (Authorizing hearing officer to conduct Education Law §3020-a proceeding on the basis of charges preferred by principal of petitioner’s school.”); *Luft v. N.Y.C. Bd./Dept. of Educ.*, No. 100370/11, 2011 Misc. LEXIS 4129, at *12-13 (Sup. Ct., N.Y. Cnty. Aug. 18, 2011) (“[A]s [B]OE and [petitioner’s principal] are authorized to [prefer charges] pursuant to Education Law §2590-h(38) and §2590-f(1)(b) and (c) respectively, the hearing officer did not exceed her authority in sustaining them.”). Indeed, Education Law § 2590-h grants the Chancellor the authority to “exercise all of the duties and responsibilities of the employing board as set forth in section thousand twenty-a of this chapter with respect to any member of the teaching or supervisory staff,” and to “delegate the exercise of all such duties and responsibilities to all of the community superintendents of the city district.” N.Y. Educ. Law § 2590-h(38). Furthermore, Education Law § 2590-f authorizes community superintendents to “delegate any of her or his powers and duties to such subordinate officers or employees of her or his community district as she or he deems appropriate, at his or her sole discretion...” N.Y. Educ. Law § 2590-f(1)(b).

Respondent maintains that due process was not violated because on April 19, 2011,

¹An exception is made for charges falling within Education Law § 3012-c, which is not applicable here.

Chancellor Dennis M. Walcott delegated, pursuant to Education Law § 2590-h(19), the power to initiate and resolve disciplinary charges against teaching and supervisory staff members who have completed probation, to community school district superintendents. Subsequently, on April 26, 2011, District 31 Community Superintendent Erminia Claudio delegated to principals of schools in Community School District 31 the authority to “[i]ntiate and resolve charges against teaching and supervisory staff...who have completed probation.” In rebuttal, petitioner maintains that under Education Law § 3020-a the power to initiate charges cannot be delegated. However, the case that petitioner cites to support this argument is factually distinguishable from the instant matter and has in any case been overruled by the First Department.² Moreover, Education Law §2590-h and §2590-f provide ample support in opposition to petitioner’s claims. Although petitioner also argues that such delegation would mean that the accuser makes the finding of probable cause, the Court does not find this to be a violation of due process, where the ultimate fact finder is a neutral decision maker. As such, pursuant to the aforementioned provisions of the Education Law and the facts and circumstances surrounding the instant matter, the Court finds that petitioner’s due process argument lacks a sufficient legal basis, and that the procedures set forth by the Educational Law were complied with in this matter.

Further, although petitioner maintains that he was entitled, under Education Law §3020-a, to a finding of probable cause by a panel, the court further notes that Education Law §3020(a)(4)

²Petitioner relies on *Matter of Smith v. N.Y.C. Dept. of Educ.*, 2008 N.Y. Misc. LEXIS 9843 (N.Y. Misc. 2008) to support his allegations of “administrative injustice.” The alleged administrative error in that case had to do with the substitution of one arbitrator for another to make a final determination after initial arbitrator had heard all the evidence in the hearing. Although an arbitrator’s decision was vacated in that matter, on appeal the Court unanimously reversed its decision, and reinstated the arbitrator’s award. See *Matter of Smith v. N.Y.C. Dept. of Educ.*, 67 AD3d 555 (1st Dept. 2009).

permits the DOE and United Federation of Teachers to enter into collective bargaining agreements which modify the procedures of Education Law §3020-a, as long as the modification ensures that a tenured teacher is not disciplined or removed except for just cause. Thus, no violation of due process can be established where the statute which provides the procedural protections can be modified either by delegation, as was the case here, or agreement.

Petitioner further contends that he was prejudiced, and therefore denied due process, by the ambiguity of the charges preferred against him. See Amended Petition at ¶¶ 53-58. However, courts have consistently held that charges brought forth in an administrative setting “need only be reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against him and to allow for the preparation of an adequate defense.” *Matter of Block v. Ambach*, 73 NY2d 323, 333 (1989); *Matter of Facey v. New York City Dept. of Educ.*, 105 Ad3d 547 (1st Dept. 2013). Contrary to petitioner’s assertions, the charges preferred by the DOE are sufficiently detailed. Indeed, though his account of many of the events detailed in the charges brought against him differed from that of the DOE, petitioner at various points during the hearing acknowledged his familiarity with the underlying circumstances that gave rise to the charges against him. Therefore, in light of petitioner’s admitted awareness of the incidents and the standard adopted by most courts, petitioner’s claim that the charges lacked specificity is without merit.

Also without merit is petitioner’s claim that the hearing officer’s decision should be vacated because it relied on “hearsay.” As a general matter, technical adherence to the rules of evidence does not govern hearing procedures. *Austin v. Board of Educ. of City School Dist. Of City of N.Y.*, 280 AD2d 365, 365 (1st Dept. 2001). As such, it is well within a hearing officer’s right to accept hearsay

testimony. Indeed, “[h]earsay evidence can be the basis of an administrative determination’ and, if sufficiently probative, it may constitute substantial evidence.” *Matter of Café La China Corp. v. New York State Liq. Auth.*, 43 AD3d 280, 281 (1st Dept. 2007) (quoting *Matter of Gray v. Adduci*, 73 NY2d 741, 742 (1988)). In any event, in this matter several of the witnesses whose testimony was considered by the hearing officer at the hearing testified live and were therefore subject to cross-examination. Therefore, their testimony was also part of the record that led to the hearing officer’s ultimate determination. As such, the hearing officer did not exceed his authority by considering hearsay in reaching his ultimate decision.

Finally, petitioner’s claims that he was denied procedural due process are without merit. As previously mentioned, petitioner was represented by an attorney at his hearing, received ample notice of the charges against him, and was able to call witnesses to testify on his own behalf and subject others to cross-examination. As such, petitioner fails to demonstrate that he was denied procedural due process.

The court has considered the petitioner’s remaining challenges to the decision and award, and finds that petitioner fails to demonstrate any legally cognizable ground for vacating the hearing officer’s decision and award. For instance, petitioner alleges that the hearing officer exceeded his authority by ignoring the requirements of Education Law §§ 3020-a(2)(A), 3020-a(4), 2590-h as well as the New York City Charter in assessing the penalty imposed against him. See Amended Petition at ¶ 81. Where such a claim is made, the petitioner must demonstrate that “the arbitrator’s award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator’s power.” *Bd. of Educ. v. Campbell*, No. 400780/09, 2010 N.Y. Misc. LEXIS 2067, at *15-16, 2010 NY Slip Op 31129(U), at **14-15 (Sup. Ct., N.Y. Cnty. Apr. 14, 2010 (citing

Matter of New York City Tr. Auth. v. Transport Workers' Union of Am., Local 100, AFL-CIO, 6 NY3d 332, 336 (2005)). As such, "Judicial intervention on public policy grounds is [,therefore,] permitted only in 'cases in which public policy considerations, embodied in statute or decisional law, prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator.'" *Campbell*, at *15-16 (citing *Matter of New York City Tr. Auth. v. Transport Workers' Union of Am., Local 100, AFL-CIO*, 99 NY2d 1, 7 (2002)). Here, petitioner does not specifically allege that the hearing officer's award violated a strong public policy. Instead, his argument that the hearing officer exceeded his enumerated powers is predicated upon his assertion that the hearing officer "ignored relevant caselaw[sic], statutory authority on the weight of hearsay, and the procedural and substantive due process rights of Petitioner." See Amended Petition at ¶ 83. However, as previously discussed, neither the hearing officer's consideration of charges preferred by a school principal nor his liberal adherence to the rules of evidence concerning hearsay violates Education Law §3020-a on its face, and its interpretation by other courts.

Similarly, petitioner alleges that the penalty of termination in this instance was "too harsh" and "excessive" and therefore shocks the judicial conscience. See Amended Petition at ¶ 46. The standard of review with respect to that claim is "whether such punishment is 'so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness.'" *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Town of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 (1974). Therefore a penalty must be upheld as a matter law unless it shocks the judicial conscience in such a flagrant manner so as to constitute an abuse of discretion. *Matter of Featherstone v. Franco*, 95 NY2d 550, 554 (2000). In determining whether a penalty is appropriate, the Educational Law requires hearing officers to consider whether adequate

measures have been taken to correct the behavior of the employee who charges have been preferred against. N.Y. Educ. Law §3020-a(4). A hearing officer may consider, but is not limited to considering the following means to correct employee behavior: remediation, peer intervention or an employee assistance plan. Following such consideration, the fact that a teacher has been a long-standing DOE employee does not rule out the ultimate penalty of termination of employment. *See Matter of Patterson v. City of New York*, 96 AD3d 565, 566 (1st Dept. 2012) (upholding a penalty of termination for a petitioner with 10 years of no disciplinary history); *see also Matter of Rogers v. Sherburne-Earlville Cent. School Dist.*, 17 AD3d 823 (3d Dept. 2005); *Matter of Robinson v. City of New York*, 33 Misc. 3d 1228(A), 2011 N.Y.Misc. LEXIS 5669, at ***13, ***20 (Sup. Ct., N.Y. Cnty Nov. 28, 2011) (dismissal warranted and not excessive notwithstanding petitioner's 23 years of satisfactory performance).

Here, petitioner argued at his hearing that the length of his tenure and previously unblemished record should be considered in crafting an appropriate punishment for his alleged actions. The transcript of the hearing officer's decision bears out that petitioner's tenure and lack of a prior record was considered by the hearing officer. However, when balancing that against the fact that petitioner's behavior continued and was widespread, even after "unmistakable notice that he was facing possible formal disciplinary action," the hearing officer decided that termination was an appropriate course of action. In making that determination the hearing officer specifically made reference to the fact that petitioner and his union representative had met with the school principal to discuss petitioner's misconduct on three prior occasions preceding petitioner's hearing. Moreover, the hearing officer noted that petitioner's lack of remorse with respect to his actions gave him little reason to believe that petitioner's "pattern of egregious classroom behavior" would cease were he

to continue to teach. As such, in accordance with the measures outlined in §3020-a(4), the hearing officer concluded that petitioner's termination was appropriate. Courts have held that conduct that includes a pattern of corporal punishment and verbal abuse is enough to sustain a hearing officer's determination that termination of one's employment does not shock the conscience. *See Matter of Camacho v. City of New York*, 106 AD3d 574 (1st Dept. 2013); *see also Haas v. New York City Dept. of Educ.*, 106 AD3d 620, 620-21 (1st Dept. 2013). Consequently, petitioner's claims on this ground are without merit.

Moreover, since petitioner fails to demonstrate that the decision and award lacks a rational basis and adequate support in the record, it is confirmed pursuant to CPLR §7510.

Accordingly, it is

ORDERED and ADJUDGED that respondents' cross motion to dismiss the petition and confirm the arbitration award is granted, the petition is denied, and the proceeding is dismissed; and it is further

ADJUDGED that the decision and award dated July 25, 2013 issued by James A. Brown, Esq., Hearing Officer in Matter of the Disciplinary Charges Proffered by the New York City Department of Education, Petitioner, against Amador Roman, Respondent, Pursuant to Education Law § 3020-a, Case # 21, 199, is hereby confirmed in its entirety.

Dated: February 28, 2014

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).

ENTER:


J.S.C.

HON. PETER H. MOULTON
J.S.C.