

Hardaway v City of New York
2016 NY Slip Op 30019(U)
January 4, 2016
Supreme Court, New York County
Docket Number: 652253/2015
Judge: Cynthia S. Kern
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
THERESA HARDAWAY,

Petitioner,

Index No. 652253/2015

-against-

JUDGMENT/ORDER

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF EDUCATION and CARMEN FARINA,
as CHANCELLOR OF THE NEW YORK CITY
DEPARTMENT OF EDUCATION,

Respondents,

To Vacate a Decision of a Hearing Officer Pursuant to
Education Law Section 3020-a and CPLR Section 7511.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2
Affirmations in Opposition to the Cross-Motion.....	3
Replying Affidavits.....	4
Exhibits.....	5

In this Article 75 proceeding, petitioner Theresa Hardaway ("Petitioner") seeks to vacate the Opinion and Award of Hearing Officer David J. Reilly ("Hearing Officer Reilly") dated June 11, 2015 issued pursuant to Education Law § 3020-a. Respondents cross-move to dismiss the petition. This court denies Petitioner's petition and grants respondent's cross-motion to dismiss for the reasons set forth below.

The relevant facts are as follows. Petitioner was a tenured teacher employed by respondent Department of Education ("DOE"). At all times relevant to this Petition, Petitioner was assigned to the Gateway School of Environmental Research and Technology in District 8 in

Bronx County. Petitioner was served with charges and specifications pursuant to Education Law § 3020-a, charging Petitioner with incompetent or ineffective service, insubordination, misconduct, neglect of duty and conduct unbecoming her profession and prejudicial to the service during the 2010-2011 and 2011-2012 school years. In all, DOE proffered nine specifications against Petitioner, as follows:

1. During the 2011-2012 academic years, Respondent failed to properly, adequately and effectively plan and/or execute separate lessons and/or manage her class as observed on each of the following dates:
 - a. April 18, 2012;
 - b. April 23, 2012; and
 - c. May 22, 2012.
2. Respondent failed to timely, properly and/or adequately comply with directives and/or instructions for administering and/or proctoring examinations during the 2010-2011 and 2011-2012 academic years.
3. Respondent failed to timely, properly and/or adequately comply with administrative directives to maintain written lesson plans and/or to submit lesson plans during the 2011-2012 academic year.
4. Respondent acted unprofessionally and/or used poor judgment in that Respondent repeatedly interrupted Assistant Principal Schwartz as he was speaking and/or rolled her eyes at him during a meeting on October 5, 2011.
5. Respondent acted unprofessionally and/or used poor judgment, in that Respondent interrupted Assistant Principal Schwartz as he was conducting a departmental meeting, on October 3, 2011.
6. Respondent acted unprofessionally and/or used poor judgment in that Respondent used an inappropriate tone of voice and/or loudly demanded that Assistant Principal Schwartz correct "inadequacies" in a snapshot on October 3, 2011.
7. During the 2011-2012 academic year, Respondent demonstrated a lack of professional fitness, used poor judgment and/or behaved inappropriately, in that Respondent contacted students at their residences and/or on a personal telephone line related to an effort to secure written statements to attempt to rebut an "unsatisfactory" rating Respondent received from Principal Siegel.

8. Respondent used poor judgment and/or failed to comply with an administrative directive in that Respondent entered and/or interrupted an examination in progress on June 13, 2012.

9. During the 2010-2011 and 2011-2012 academic years, the Respondent failed to implement directives, recommendations, counsel, instruction and/or professional development from observation conferences, group meetings and/or one-to-one support with school administrators, support staff and/or other support with regard to:

- i. Effective lesson planning;
- ii. Effective classroom instruction and lesson execution;
- iii. Effective classroom management; and
- iv. Effective classroom environment and organization.

Pursuant to Education Law § 3020-a, a hearing was convened on the charges proffered against Petitioner. A pre-hearing conference was conducted on November 21, 2012 before Hearing Officer Eleanor Glanstein. Full evidentiary hearings were held before Hearing Officer Reilly on October 29, 2014; October 30, 2014; November 5, 2014; November 12, 2014; November 18, 2014; November 25, 2014; December 1, 2014; December 3, 2014; December 9, 2014; December 17, 2014; December 19, 2014; January 7, 2015; January 9, 2015; January 16, 2015; January 20, 2015; January 22, 2015 and February 2, 2015. The record before Hearing Officer Reilly consisted of seventeen days of transcribed testimony along with exhibits offered into evidence.

After hearing the witnesses and reviewing the evidence presented, on June 11, 2015, Hearing Officer Reilly rendered a 64-page Award. Hearing Officer Reilly's Award contains detailed findings of fact and conclusions with regard to each charge brought against Petitioner. Hearing Officer Reilly found that DOE met its burden by establishing by a preponderance of the evidence that Petitioner was culpable on Specifications 1(a), 1(b), 1(c), 2, 3, 4, 5, 6, 8, 9(i) and (ii) as to the 2011-2012 school year only and 9(iv) as to the 2010-2011 school year only. His finding was based on evidence including the testimony of Assistant Principal Ruth Halmond,

Superintendent Caron Staple, Assistant Principal Lucille DeMeglio and Assistant Principal Aaron Schwartz and the log of assistance showing Petitioner's failure to submit lesson plans pursuant to Principal Clifford Siegel's instruction. Accordingly, based upon the finding of Petitioner's guilt with regard to the aforementioned Specifications, Hearing Officer Reilly found just cause for a penalty of a termination.

"Education Law § 3020-a(5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR § 7511. Under such review an award may only be vacated on a showing of 'misconduct, bias, excess of power or procedural defects'." *Lackow v. Dept. of Education of the City of New York*, 51 A.D.3d 563, 567 (1st Dept 2008). However, where arbitration is mandated by law, as here, "judicial scrutiny is stricter than that for a determination rendered where the parties have submitted to voluntary arbitration. The determination must be in accord with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR Article 78. The party challenging an arbitration determination has the burden of showing its invalidity." *Id.* at 567-568 (internal citations omitted). "A hearing officer's determinations of credibility... are largely unreviewable because the hearing officer observed the witnesses and was 'able to perceive the inflections, the pauses, the glances and gestures...that combine to form an impression of either candor or deception'." *Id.* at 568 (internal citations omitted).

In the present case, petitioner has failed to provide any evidence demonstrating misconduct, bias, excess of power or procedural defects in the manner in which the hearing was conducted. Moreover, Hearing Officer Reilly's decision was rational and supported by adequate evidence. Petitioner's argument that Hearing Officer Reilly based his decision on the subjective observations and testimony of the school's administrators and dismissed Petitioner's

explanations of what happened during the observations is without merit as Hearing Officer Reilly had the discretion to determine the credibility of the witnesses and credit or discredit their testimony. Further, Petitioner's argument that Hearing Officer Reilly failed to consider the testimony of eight witnesses who testified in her favor is without merit. Hearing Officer Reilly had the discretion to accept or reject the evidence submitted, including the testimony of Petitioner's colleagues that she was an effective teacher.

Finally, the court finds that the penalty of termination does not shock one's sense of fairness. An award may be modified only if the "punishment is so disproportionate to the offense, in light of the circumstances as to be shocking to one's sense of fairness." *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 233 (1974). A penalty is shocking to one's sense of fairness if "the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution." *Id.* The penalty of termination may be based, in part, on a determination that the petitioner is unlikely to correct her behavior. *See Matter of Ajeleye v. New York City Dept. of Educ.*, 112 A.D.3d 425, 425-26 (1st Dept 2013) (upholding the termination of petitioner, where he had a lack of prior disciplinary history during his 14-year career with DOE, based on the seriousness of the charges and the likelihood that his behavior would not improve); *Matter of Leon v. Dept. of Education of the City of New York*, 115 A.D.3d 435, 436 (1st Dept 2014).

In the present case, given the finding of Hearing Officer Reilly of Petitioner's failure to properly plan lessons and adequately proctor examinations on multiple occasions, the court finds that the penalty of termination does not shock one's sense of fairness. Hearing Officer Reilly

