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

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 21

PETER COHEN

INDEX NO. 651730/16

MOT. DATE

- v -

MOT. SEQ. NO. 001

THE CITY OF NEW YORK et al.

The following papers were read on this motion to/for vacate

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS DOC No(s). 1-7

Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS DOC No(s). 8-14

Replying Affidavits ECFS DOC No(s). 15

This is an CPLR Article 78 proceeding. Petitioner, formerly a tenured teacher with respondent New York City Department of Education ("DOE"), seeks an order vacating a decision by Hearing Officer Susan Sangillo Bellifemine ("HO Bellifemine") dated March 22, 2016 (the "decision") in a compulsory arbitration proceeding under Education Law § 3020-a. In the decision, HO Bellifemine terminated petitioner's employment based upon "[petitioner's] proven misconduct... [to wit] corporal punishment, verbal abuse, conduct unbecoming petitioner's position, and conduct prejudicial to the good order, efficiency or discipline of the service."

Respondents have answered the petition, denying the claims therein, and seek an order dismissing the petition. For the reasons that follow, the petition is dismissed.

Petitioner was charged with 12 specifications during the 2013-2014 and 2014-2015 school years, and was found guilty by HO Bellifemine after a six-day hearing of the following charges:

> Specification l: On or about and between September 9, or more than one occasion, [Petitioner] inappropriately: [b] treated Student N.M. harshly; [c] restrained Student N.M.; [d] placed Student N.M. in timeout and [e] rolled Student N.M. off the cot.
>
> Specification 2: During March 2014, [Petitioner] inappropriately: [a] grabbed Student J.L. from the rug area; [b] placed Student J.L. in timeout; and [c] restrained Student J.L.
>
> Specification 3: On or about March 17, 2014, during a professional development

Dated: 2/17/17

HON. LYNN R. KOTLER, J.S.C.

**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

session conducted by Principal Donny Lopez and in the presence of staff members, [Petitioner] held up the school's information rubric and ripped/tore the rubric while stating words to the effect of this part of the rubric does not pertain so why don't we just put it aside.

Specification 6: On or about April 2, 2015, and in the presence of student(s) and paraprofessional(s), [Petitioner] in an unprofessional tone and/or manner told staff member Joshua Raskin words to the effect of: [a] Mr. Raskin you do not just walk into my class; [b] it is disrespectful to me and my class; [c] you are messing up my flow; [d] leave my classroom; and [e] well you're always doing this.

Specification 9: On or about May 19, 2015 while in the presence of other students, [Petitioner] said to Student J.L. words to the effect of: [a] it was okay for Student J.L. to walk away because we don't want you hear anyway; [b] that [Petitioner] was going to call the police because Student J.L. was a delinquent and the police put delinquents in jail; [c] Come take him to jail; [d] we have a delinquent here.

Specification 10: During one, some or all of the conduct described in Specification 9, herein, [Petitioner]: [a] took out his cellphone and pretended to call the police on Student J.L.; [b] spoke into his cellphone as if he were speaking with the police and said words to the effect [of], the child is not listening, please come and take him away.

Specification 11: During one, some or all of the conduct described in Specification[s] 9 and 10, herein, [Petitioner] caused Student J.L. to become alarmed and/or scared while asking [Petitioner] not to call the police.

Specification 12: During one, some or all of the conduct described in Specification[s] 9, l0 and 11, herein, [Petitioner] knowingly acted in a manner likely to be injurious to the physical, mental and/or moral wellbeing of a child less than seven years old.

During the charged period, petitioner was a pre-kindergarten teach at Public School 163. Petitioner worked with special education students in a co-teaching environment. Although petitioner claims that he did not have a prior disciplinary history, respondents maintain that there were several incidents resulting in several investigations by school executives and the Office of Special Investigations. Respondents represent that ten disciplinary letters were placed in petitioner's personel file and that he received unsatisfactory ratings in his Annual Performance Review and Report for the 2013-2014 and 2014-2015 school years.

Petitioner maintains that the penalty of termination is disproportionate to the substantiated conduct, particularly harsh, irrational and shocking to the conscience in this case given his 28 years of employment with the DOE and lack of a disciplinary history. Petitioner challenges the decision based upon "the fact that no students testified during the course of the hearing, [and] the numerous errors made by the Hearing Officer…" Respondents argue that the petition should be denied because petitioner has failed to establish any basis for vacatur and the penalty of termination does not shock the conscience.

Education Law § 3020-a (5) provides that a petition to vacate or modify the determination of a hearing officer issued after a disciplinary proceeding must be filed in Supreme Court pursuant to CPLR §

7511. Under CPLR § 7511 (b) (1), judicial review of the hearing officer's determination is limited to finding whether the rights of the challenger were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

Because the arbitration at issue was compulsory, the court's review must also determine whether HO Bellifemine's decision was rendered "in accord with due process and [was] supported by adequate evidence," and whether it satisfies the arbitrary and capricious standard of CPLR Article 78. (*Rubino v. City of New York*, 34 Misc3d 1220(A) (NY Sup, NY Co 2012) aff'd 106 AD3d 439 [1st Dept 2013] citing *Lackow v. Dept. of Educ. [or "Board"] of the City of New York*, 51 AD3d 563, 567 [1st Dept 2008]; see also *Matter of Asch v. New York City Bd./Dept. of Educ.*, 104 AD3d 415 [1st Dept 2013]).

"Moreover, '[a]rbitration awards may not be vacated even if the court concludes that the arbitrator's interpretation of the agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law, unless it is violative of a strong public policy, is totally irrational, or exceeds a specifically enumerated limitation on his power' " (*Asch*, *supra* at 419, quoting *Matter of Wicks Constr. [Green]*, 295 AD2d 527, 528 [2d Dept 2002]).

Here, after a review of the record, the court must deny the petition. Contrary to petitioner's contention, the court does not find that termination was particularly harsh, irrational or shocking to the conscience. HO Bellifemine found that petitioner had physically restrained special educations students, rolled a student out of a cot to wake him up from a nap, and used fear against a student by pretending to call the police. Further, the Hearing Officer found that petitioner had acted unprofessionally towards the school's principal as well as his colleagues. The Hearing Officer concluded that "[Petitioner's] conduct as revealed here shows that he is guilty of the most egregious type of misconduct against the very students he is charged with teaching; and despite his lengthy service, this conduct renders him unfit to carry out his professional responsibilities and constitutes just cause for dismissal."

Here, the court finds no reasons to disturb HO Bellifemine's credibility determinations, and petitioner participated in a full and fair hearing with the opportunity to present his version of events and evidence. HO Bellifemine's findings were rationally supported by the record. Petitioner points to the fact that no student testified at the hearing, but given the tender age of his students, this fact is easily explained. Further, petitioner claims that HO Bellifemine made errors but fails to support this claim with any proof.

Finally, the penalty of termination does not shock the conscious given the nature of the charges he was found guilty of. Petitioner was charged with the care of young special education children and the conduct that he was found guilty of was a violation of that responsibility. Petitioner claims that his twenty-eight years of experience, standing alone, should warrant a reduced penalty. However, petitioner's length of employment does not outweigh the egregious nature of his conduct which was not merely an

isolated incident but rather, can fairly be characterized as a pattern of irresponsibility, disregard, and poor judgment.

Accordingly, the petition is dismissed.

**CONCLUSION**

In accordance herewith, it is hereby:

**ORDERED** that the petition is dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated: 2/17/17
New York, New York

So Ordered:

**Hon. Lynn R. Kotler, J.S.C.**