

Twente v City of New York

2018 NY Slip Op 32700(U)

October 18, 2018

Supreme Court, New York County

Docket Number: 651633/2018

Judge: Andrew Borrok

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Part 57**

-----X
KERI TWENTE

Petitioner(s)

Index no. 651633/2018

-against-

DECISION/ORDER

**THE CITY OF NEW YORK; NEW YORK CITY
DEPARTMENT OF EDUCATION;
RICHARD A. CARRANZA,
CHANCELLOR OF NEW YORK CITY
DEPARTMENT OF EDUCATION**

Motion Sequence No. 1

Respondent(s)
-----X

**Recitation, as required by CPLR § 2219(a), of the papers considered on the
review of this Petition to vacate or modify the award of the arbitrator and
cross-motion to dismiss the Petition**

PAPERS

NUMBERED

- | | |
|--|----------|
| Notice of Motion and Affidavits
and Exhibits Annexed | 1 |
| Answering Affidavits and
Exhibits Annexed | 2 |
| Replying Affidavits and Exhibits Annexed
Sur-Reply Affidavits | |

Upon the foregoing cited papers, it is adjudged and decreed that Keri Twente (**Petitioner**) Petition against The City of New York, New York City Department of Education, Richard A. Carranza and Chancellor of New York City Department of Education (collectively, the **Respondents**), pursuant to CPLR § 7511, to vacate and set aside the award of the arbitrator Officer Brown, terminating Petitioner's employment as a New York City teacher is denied and the Respondents cross-motion to dismiss the Petition is granted.

The Relevant Facts and Circumstances

The Petitioner was a New York City teacher at John Dewey High School in Brooklyn's 21st District. Following an investigation by the Office of the Special Commissioner of Investigation (SCI), pursuant to Education Law Section 3020-a, the Petitioner was served with two sets of Charges and Specifications alleging conduct unbecoming Petitioner's position and neglect of duty.

The first set of specifications were as follows:

1. On or about September, 2016 to April 19, 2017, Student A was observed to be in Petitioner's classroom on multiple occasions when he should have been in another classroom.¹
2. On or about September, 2016 to April 19, 2017 Petitioner was observed
 - (a) seated next to Student A in a locked, unlit classroom,
 - (b) alone with Student A in a classroom,
 - (c) showing Student A photos of herself,
 - (d) engaged in conversation with Student A while laughing and/or playing with her hair.²
3. On or about September, 2016 to April 19, 2017, on multiple occasions, Petitioner and Student A were observed alone in Petitioner's classroom with the door closed.³
4. On or about May 6, 2016 through May 5, 2017, Petitioner contacted Student A's phone number approximately 87 times: 71 calls and 16 text messages, at different hours of the day and night.⁴
5. On or about September 1, 2016 through June 15, 2017, Petitioner contacted Student A's phone number about 720 times, at varying hours of the day and night.⁵
6. On or about May 6, 2017 through August 4, 2017, Petitioner contacted Student A's phone number approximately four times.⁶

¹ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 13.

² Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 14.

³ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 16.

⁴ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 16.

⁵ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 16.

⁶ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 17.

7. By committing one, some or all of the actions described in Specification 1-6, Petitioner acted in a manner that has or would have the effect of unreasonably and substantially interfering with a student's mental, emotional or physical well-being.⁷
8. By committing one, some or all of the actions described in Specifications 1-6, Petitioner then acted in a manner which substantially interferes with a student's ability to participate in or benefit from an educational program, schools sponsored activity or any other aspects of a student's education.⁸
9. By committing one, some or all of the actions described in Specifications 1-6, the Petitioner engaged in communication or activity with Student A that did not have an educational purpose.⁹

The second set of specifications were as follows:

1. On or about February 6, 2016 to June 28, 2016 Petitioner was observed
 - (a) seated next to Student A in a locked, unlit classroom,
 - (b) alone with Student A in a classroom,
 - (c) showing Student A photos of herself,
 - (d) engaged in conversation with Student A while laughing and/or playing with her hair.¹⁰
2. On or about May, 2016 to June 2016, Student on multiple occasions Petitioner and Student A were observed alone in Petitioner's classroom with the door closed.
3. By committing one, some, or all of the actions described in Specifications 1-2, Petitioner acted in a manner that has or would have the effect of unreasonably and substantially interfering with a student's mental, emotional or physical well-being.¹¹ Officer Brown found that the record is insufficiently developed for any finding that the Petitioner is guilty of Specification 7.
4. By committing one, some or all of the actions described in Specifications 1-2, Petitioner acted in a manner which substantially interferes with a student's

⁷ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 21.

⁸ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 21.

⁹ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 21.

¹⁰ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 14. The DOE withdrew specifications 2(c) and (d) at the Hearing.

¹¹ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 21.

ability to participate in or benefit from an educational program, schools sponsored activity or any other aspects of a student's education.¹²

5. By committing one, some or all of the actions described in Specifications 1-2, the Petitioner engaged in communication or activity with Student A that did not have an educational purpose.¹³

The two sets of charges were consolidated into a single case on consent by the Petitioner. The Charges and Specifications were brought at a formal disciplinary proceeding before Hearing Officer James A. Brown, Esq., pursuant to a mandatory Section 3020-a neutral hearing (the **Hearing**). During the Hearing, the Department of Education (the **DOE**) elicited testimony from Teacher Christine Medina, Teacher Corey Brothers, Guidance Counselor Tara Neff, Sarah Kaplan, Interim Acting Assistant Principal, former ESL coordinator, Emily Smith, SCI Investigator Miguel Ruiz and Teacher Rossitza D'Agati. For the Petitioner, the Petitioner, Student A and teacher Cara Arcuni testified.¹⁴

At the conclusion of the 10 day Hearing, on March 27, 2018, Officer Brown issued a 25 page decision with very specific findings and determinations with respect to each of the Charges and Specifications.

With respect to the first set of Charges and Specifications, Officer Brown found as follows:

Specification 1: Guidance Counselor Neff credibly testified that she saw Student A in Respondent's classroom about 10 times when Student A was scheduled to be in another classroom (i.e., cut class), therefore Petitioner was guilty of Specification 1.

¹² Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 21.

¹³ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 21.

¹⁴ Officer Brown however found the testimony of the Petitioner and her witnesses to undermine her position – i.e., (x) Student A testified how the Petitioner's unyielding and undue attention caused other students to believe there was something going on between Student A and Petitioner and other students were jealous and (y) Petitioner testified that her colleagues repeatedly told her to stop engaging in certain activities with Student A and that her poor decision making regarding Student A was causing a terrible relationship with her colleagues. Hearing Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 24.

Specification 2a: Based on Teacher Medina's testimony that she twice observed the Petitioner alone in her unlit, locked classroom with Student A, and that there is no legitimate reason for a teacher to be alone with a student in an unlit classroom and it serves no legitimate educational purpose, even in the absence of a formal rule, Petitioner was guilty of Specification 2a.¹⁵

Specification 2(b): There was no basis to discipline Petitioner for being alone in her classroom with Student A.¹⁶

Specification 3: There was no basis to discipline Petitioner because there was no rule, regulation, or policy prohibiting a teacher from being alone with a student in a classroom and, in any event, ESL Coordinator Smith testified that she could not remember if she made any directive at any meeting prohibiting this conduct.¹⁷

Specifications 4, 5, and 6: Based on the T-mobile records of Student A and the Verizon Wireless records of Petitioner and the testimony from Student A, Officer Brown found Petitioner guilty of Specifications 4, 5 and 6. Specifically, he wrote that the over 700 telephonic contacts initiated by Petitioner were excessive and disturbing.¹⁸ To the extent that Petitioner argued that not all of the contacts were successful in that some of the alleged contacts were for no duration of time at all, Officer Brown found that Petitioner's own estimate of 398 "successful contacts/communications" during a four month period from mid-February to mid-June 2017 was sufficient to find misconduct.¹⁹ Officer Brown found that Petitioner's purported innocuous explanation was implausible given the time of day and the length of time which these specific contacts occurred.²⁰ More specifically, in rejecting the Petitioner's explanation, Officer Brown wrote that many of the phone calls occurred at approximately 2:00 am and lasted over an hour or began shortly before midnight and lasted several hours.²¹ Furthermore, as

¹⁵ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 15,

¹⁶ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 16.

¹⁷ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 15.

¹⁸ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 17-18.

¹⁹ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 21.

²⁰ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 19.

²¹ Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 18-20.

Student A testified that he came home from school and work exhausted further undermine the Petitioner's explanation.²²

Specification 7: The record was insufficiently developed for any finding that the Petitioner is guilty of Specification 7.²³

Specification 8: Because Student A cut class and appeared in Petitioner's classroom (Specification 1), Petitioner interfered with "aspects" of Student A's education,²⁴ and Petitioner was therefore guilty of Specification 8.

Specification 9: Because there is no evidence that the excessive phone calls cited in Specifications 4, 5, 6, were established for educational purposes, Petitioner was guilty of Specification 9.²⁵

Officer Brown dismissed all of the second set of Charges and Specifications (Case No. 32,561) due to a lack of evidentiary or testimonial support or because the alleged conduct did not have a proper basis for discipline.²⁶

Based on the underlying conduct and the violations of Specifications 1, 2a, 4, 5, 6, 8, and 9 of the first set of Charges and Specifications, Officer Brown wrote that Petitioner "shredded the boundaries intended to ensure that a teacher maintains that professionalism and her essential status as a role model," that Petitioner not only negatively affected Student A and his education but also negatively affected the academic environment of Petitioner's colleagues and other students and that termination of her employment was appropriate.²⁷

Petitioner brings this Petition to vacate and set aside the determination of Officer Brown, pursuant to CPLR § 7511, arguing that the Respondents failed to complete a full and fair investigation, and Respondents cross-moved to dismiss the Petition.

The issue is whether the determination by Officer Brown should be set aside as arbitrary and without evidentiary support and whether the penalty is so shocking to

²²Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 19.

²³Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 21.

²⁴Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 21.

²⁵Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 22.

²⁶Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 22-23.

²⁷Officer Brown's decision, Exhibit A, Affirmation of Shaina Wood In Support of Respondents' Cross-motion to Dismiss the Verified Petition pp. 25.

our sense of fairness. Because we hold that Officer Brown conducted a thorough hearing, based his determination on the evidence presented to him which was overwhelming as to the violation of the charged specifications and given the harm to Student A, other students and the school environment, we hold that termination of Petitioner's employment was not arbitrary and capricious and that under the circumstances termination was not unfair.

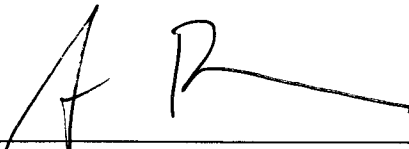
CPLR § 7511(1) sets forth the four grounds upon which an arbitration award may be set aside or vacated: (i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or (iii) an arbitrator, or agency or 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.

To survive judicial scrutiny, the arbitration must not be arbitrary or capricious. There must be evidentiary support. According to the Appellate Division, the penalty determined by the arbitrator should be affirmed unless it is "shocking to our sense of fairness." *Furstenberg v. Allstate Insurance Co.*, 1980, 49 N.Y.2d 757, 758, 426 N.Y.S.2d 465, 466, 403 N.E.2d 170, 171; *City School District of the City of New York v. McGraham*, 2011, 17 N.Y.3d 917, 918, 934 N.Y.S.2d 768, 770, 958 N.E.2d 897, 898; *Principe v. New York City Dep't of Education*, 2012, 94 A.D.3d 431, 433, 941 N.Y.S.2d 574, 576 (1st Dep't), *affirmed* 20 N.Y.3d 963, 958 N.Y.S.2d 325, 982 N.E.2d 88. The Court of Appeals, has been inclined to use a standard of review as to whether the arbitrator's penalty violated a specific limitation on the arbitrator's power, was irrational or was contrary to strong public policy. *Shenendehowa Central School District Board of Education v. Civil Service Employees Ass'n*, 2013, 20 N.Y.3d 1026, 1028, 960 N.Y.S.2d 725, 726, 984 N.E.2d 923, 924; *City School District of the City of New York v. McGraham*, *supra*, 17 N.Y.3d at 920, 934 N.Y.S.2d at 770, 958 N.E.2d at 899.

Simply put, there simply is no evidence that Officer Brown's determination resulting in the termination of the Petitioner's employment was procured by corruption, fraud, partiality, or misconduct, that it was arbitrary or capricious, that Officer Brown otherwise exceeded his authority or acted irrationally or that termination of the Petitioner's employment was against public policy. In fact, the record demonstrates quite the opposite. Officer Brown did not hold a cursory or perfunctory hearing. The Hearing lasted 10 days. Officer Brown reviewed the

testimony and the other evidence and made very specific and detailed findings which the documentary evidence (e.g., the phone records) and the Petitioner's own testimony supported (e.g., the frequency of calls to Student A). He found Petitioner guilty of the Charges and Specifications that he found the evidence supported and did not find the Petitioner guilty of the Charges and Specifications that he thought the rules or evidence did not support. For example, with respect to Specifications 2(b) and 3, Officer Brown found that although the evidence supported the conclusion that although Petitioner had been engaged in the charged conduct, he found no basis for discipline.

Accordingly, it is ADJUDGED and DECREED that the Petitioner's Petition to vacate or modify the award is denied and the Respondent's cross-motion to dismiss the Petition is granted and the Petition is hereby dismissed.



Dated: October 18, 2018

Hon. Andrew Borrok, J.S.C.