SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42
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PALMORE CLARKE,

Petitioner,

- against -

NEW YORK CITY DEPARTMENT OF EDUCATION, CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK

Respondents.
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DECISION AND ORDER

Index No.652634/2013

MOT SEQ 001

NANCY M. BANNON, J.:

I. INTRODUCTION

In this CPLR article 78 proceeding, the petitioner, Palmore Clarke, moves pursuant to CPLR 7511(b)(1) seeking (i) to vacate the arbitration award made after a disciplinary hearing held pursuant to Education Law § 3020-a, (ii) an order setting aside or reducing the penalty of termination imposed by the respondent, the New York City Department of Education, City School District of the City of New York, and (iii) attorneys' fees and costs. The respondent opposes the petition. The petition is granted to the extent that the arbitration award is vacated and the matter is remanded for an additional hearing to determine what, if any, penalties should be assessed against the petitioner in light of the key witness against her recanting her testimony.

II. BACKGROUND

The petitioner was a tenured special education teacher employed by the respondent and assigned to James P. Sinnott Magnet School for Health & Health Careers (I.S. 218) for twelve years. During the 2011-2012 school year some of her students accused her of verbal abuse, alleging she called them, *inter alia*, "animals" and "retarded." The principal of I.S. 218, Valena Welch-Wooley, and the Office of Special Investigation (OSI), conducted an investigation pursuant to Chancellor's Regulation A-42. As a result of the investigation, the respondent commenced a disciplinary action against the petitioner pursuant to Education Law § 3020-a for misconduct, verbal abuse, neglect of duty and conduct unbecoming of her profession. Subsequently, additional claims of intimidation, harassment, and tampering with a witness were included in the disciplinary action on the basis that the petitioner allegedly tried to intimidate the complaining students during the original investigation.

The petitioner and respondent participated in compulsory arbitration, and Hearing Officer Douglas S. Abel was appointed to the adjudicate the matter. The only student who testified was 14-year-old special education student, TD. Testimony was elicited that TD could be difficult and had an "unusually close" relationship with principal Welch-Woodley, in that she could

often go to Welch-Woodley's office if she did not feel like going to lunch or class, but Hearing Officer Abel credited her testimony as reliable. Partially based upon TD's testimony, Hearing Officer Abel found that the petitioner had, in fact, referred to her students as "monkeys" and called them "retarded." Partially based upon the testimony of Wanda Ruff (Ruff) a paraprofessional who worked with the petitioner, Hearing Officer Abel found that the petitioner had called one student a "gorilla" and threatened both Ruff and her students in response to the investigation. Hearing Officer Abel concluded that because the petitioner was not remorseful for her actions termination of her employment was the proper penalty.

TD thereafter recanted her testimony from the hearing. In a sworn statement made on July 25, 2013, TD stated in relevant part that:

> "Ms. Clarke did not curse at us or call us name. Ms. Woodley and Ms. Ruff make us write and say those things… Ms. Woodley said that we could not leave to go home before we write a statement and so we all write what they tell us to write because I want to go home."

TD also stated that principal Welch-Woodley originally forced her to testify against her will. TD's recantation was accompanied by a sworn statement from her mother averring that she did not consent to TD testifying at the hearing and told the respondent's attorney that she would not allow TD to testify.

She further averred that she called the school the day that TD was taken to court to testify when principal Wooley-Welch misrepresented that TD was in the bathroom when TD was actually testifying at the hearing without her parent's consent or knowledge.

III. PROCEDURAL HISTORY

The petitioner filed her petition on July 26, 2013. By an order dated September 22, 2014, this court (Milton A. Tingling, J.) summarily granted the petition to vacate the arbitrator's opinion and award, finding that the petitioner engaged in serious misconduct, and remitted the case for a hearing before a different hearing officer. The respondent appealed the decision, and on November 15, 2016, the Appellate Division, First Department, reversed the decision and vacated the grant of the petition and directed the matter be remanded with instructions that the respondent be permitted to serve an answer addressing the allegations that, *inter alia*, the arbitration award was procured through fraud or misconduct.

At a conference held on April 11, 2018, the parties informed the court that the respondent had not filed any answer following the issuance of the Appellate Division order. By an order dated April 13, 2018, and filed April 16, 2018, this court ordered that the respondent file and serve an answer to the

petition pursuant to CPLR 404(a) within 30 days. The respondent interposed an answer on May 15, 2016.

IV. DISCUSSION

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." Austin v Board of Educ. of City School Dist. of City of N.Y., 280 AD2d 365, 365 (1st Dept. 2001). Nevertheless, where the parties have submitted to compulsory arbitration, judicial scrutiny is stricter than that for a determination rendered where the parties have submitted to voluntary arbitration. See Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co., 89 NY2d 214 (1996); Cigna Prop. & Cas. v Liberty Mut. Ins. Co., 12 AD3d 198 (1st Dept. 2004). 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 Article 78. See Motor Veh. Mfrs. Assn. of U.S. v State of New York, supra.

Additionally, when the penalty is termination, courts may vacate the arbitrator's decision on a finding that such a penalty shocks the conscience. See Matter of Harris v

Mechanicville Cent. School Dist., 45 NY2d 279 (1978); Matter of Pell v Bd. Of Educ., 34 NY2d 222 (1974). The party challenging an arbitration determination has the burden of showing its invalidity. See Caso v Coffey, 41 NY2d 153, 159 (1976); Lackow v Dep't of Educ. (or "Board") of City of New York, 51 AD3d 563 (1st Dept. 2008).

The petitioner moves to vacate the arbitration award pursuant to CPLR 7511(b)(1)(i), which states that an arbitration award "shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of a party were prejudiced by… corruption, fraud, or misconduct in procuring the award." The petitioner argues that TD's recantation bolstered by her mother's statement that she did not consent to TD testifying in the arbitration, demonstrates that principal Welch-Woodley engaged in misconduct and/or fraud in procuring the award. The petitioner further argues that principal Welch-Wooley conducted an unfair and biased investigation. The petitioner alleges the record shows principal Welch-Wooley had an unusually close relationship with TD and only interviewed students who TD told her to, and that principal Welch-Wooley neglected to interview students within the time frame mandated by Chancellor's Regulation A-42. The petitioner contends that Hearing Officer Abel determined two of the most

serious charges against the plaintiff based upon TD's testimony, and that in light of her recantation, the award is not supported by adequate evidence. The petitioner also claims that the termination was excessive, as she had no prior disciplinary history.

The petitioner meets her burden pursuant to CPLR 7511(b)(1)(i), presenting clear and convincing evidence that the respondent procured the award against the petitioner through fraud and/or misconduct. In TD's sworn statement, TD avers that "Ms. Woodley and Ms. Ruff make us write and say those things. Ms. Ruff writes and make us copy what she writes. Ms. Woodley said that we could not leave to go home before we write a statement and so we all write what they tell us to write because I want to go home." TD's statement demonstrates that she and other students were coerced into giving statements alleging the petitioner's abuse, at the very least amounting to misconduct.

Moreover, TD stated that "[t]he morning that they took me to court I was not going to go, but Ms. Woodley forced me. Ms. Woodley sent Mr. Archer to get me." TD's mother's statement further shows that she did not consent to have TD testify against the petitioner, and that she told the respondent's attorney that she would not allow TD to testify. She further states that when she called the school on the day that TD

testified, principal Welch-Wooley told her that TD was in the bathroom, when she was testifying at the hearing. These allegations further support a concerted effort by the staff of I.S. 218 to coerce students into making allegations against the petitioner.

In response, the respondent, cites to Field v BDO USA, LLP, which holds that an arbitration award should only be vacated on the basis of fraud if there is clear and convincing evidence that the fraud materially related to an issue in the arbitration, and that the fraud would not have been discoverable upon the exercise of due diligence prior to or during the arbitration, and argues that the petitioner failed to establish fraud or misconduct by clear and convincing evidence, and that the alleged fraud would not have been discoverable during the arbitration. 129 AD3d 497 (1st Dept. 2015); see also Klikocki v N.Y. Dept. of Corr., 216 AD2d 808 (3rd Dept. 1995) *citing* State Farm Mut. Auto. Ins. Co. v. Rodriguez, 121 AD2d 386 (2nd Dept. 1986) (unsubstantiated claims of fraud insufficient to warrant vacating judgment).

The respondent also submits the affidavit of Valena Woodley, formerly the Principal of I.S. 218, denying that TD's claim that she was coerced into writing a statement against the petitioner and claiming that TD's mother gave her permission to

bring TD to the hearing. The respondent further submits the affidavit of Vanessa Legagneur, the Department of Education attorney who handled the case against the petitioner, which states that (i) she had spoken with TD's mother and obtained permission to bring her to the hearing, (ii) when TD appeared at the hearing she did not seem to be under duress, and (iii) when TD testified, she was calm and collected. These submissions do not warrant a denial of the petition, however they do raise issues that must be addressed through an additional hearing on this matter.

Specifically, the conclusory denials of wrongdoing in the Valena Woodley and Legagneur affidavits do not utterly rebut the clear and convincing evidence of fraud or misconduct presented by the petitioner, particularly to the extent that they do not address why TD would recant her testimony and allege wrongdoing in procuring her testimony. Rather the affidavits submitted raise an issue of credibility between TD and her mother, and Valena Woodley and Legagneur, that would be better addressed at a subsequent hearing.

Moreover, as TD has recanted her testimony, and the record reflects that Hearing Officer Abel found TD's testimony credible and relied upon it to support the most serious findings against the petitioner, the holding of the Appellate Division, Second

Department in Alarcon v Bd. of Educ. of S. Orangetown Cent. Sch. Dist., (85 AD3d 780 [2nd Dept. 2011]) applies. There the court held that when a hearing officer's recommendation was largely based upon the testimony of an eyewitness who later recanted, an opportunity to recall the witness should be afforded. Although the holding in Alarcon applies to a recantation made prior to the arbitration award, the court nonetheless finds the underlying reasoning persuasive inasmuch as the petitioner and the respondent should be afforded an opportunity to question TD. Id.

Furthermore, as correctly noted by the petitioner, the respondent makes no argument as to how a compulsory arbitration award based almost exclusively upon testimony that was later recanted comports with due process or is supported by adequate evidence. As discussed herein, Hearing Officer Abel's determination was based upon testimony from TD and collateral testimony from Wanda Ruff regarding the petitioner's alleged threats against her and her students in response to the investigation. Inasmuch as TD has recanted her testimony, the record lacks sufficient evidence supporting the finding that the petitioner verbally abused her students. To the extent that Ms. Ruff's testimony was also considered in Hearing Officer Abel's determination, the court notes that Ms. Ruff is one of the parties alleged by TD to have coerced her into her written

statement and testimony at the hearing. As such, an affirmation of the underlying arbitration award would be improper, as it is not in accord with due process or supported by adequate evidence. See Motor Veh. Mfrs. Assn. of U.S. v State of New York, supra.

Therefore, the arbitration award made against the petitioner after a disciplinary hearing held pursuant to Education Law § 3020-a, is vacated, and this case is remanded for another hearing to determine whether the penalty assessed against the petitioner, termination, is proper in light of TD's recantation. As the court has determined that remanding the case is proper, the court does not reach the petitioner's remaining contentions that Welch-Woodley's investigation against her was biased and not made in the requisite time frame set by the Chancellor's Regulation A-42, and that her termination should be set aside, as it shocks the conscience.

V. CONCLUSION

Accordingly, it is hereby,

ORDERED that the July 8, 2013 Opinion and Award, issued against the petitioner after the arbitration hearing held pursuant to NY Education Law §3020-a, is hereby vacated; and it is further,

ORDERED that this action is remanded for an arbitration hearing pursuant to NY Education Law §3020-a in accordance with this determination.

This constitutes the Decision and Order of the court.

Dated: May 8, 2020 **ENTER:**

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

J.S.C.