SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

----------X

GRIGORIY ZAGERSON,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION, RICHARD CARRANZA, SPECIAL COMMISSIONER OF INVESTIGATION FOR THE NEW YORK CITY SCHOOL DISTRICT

Defendant.

----------X

INDEX NO. 161586/2019

MOTION DATE 11/15/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 9, 10, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of the petitioner Grigory Zagerson (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that counsel for respondent New York City Department of Education shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner Grigoriy Zagerson (Zagerson) seeks a judgment vacating the decision of respondent New York City Department of Education (DOE) to terminate his employment on the ground that it was arbitrary and capricious (motion sequence number 001). For the following reasons, the petition is denied and this proceeding is dismissed.

FACTS

Zagerson began working for the DOE as a substitute education paraprofessional on June 18, 2010 and was later appointed to a position as a permanent paraprofessional, which he held from April 19, 2012 to September 17, 2019. *See* verified answer, ¶¶ 10, 36-37; exhibit 1. Zagerson spent his entire tenure as a permanent paraprofessional at P.S. 195 Manhattan Beach in Kings County, New York (PS 195). *Id.*

The DOE asserts that Zagerson's supervisor, PS 195 Principal Bernadette Toomey (Principal Toomey), placed letters of reprimand in Zagerson's employee file for acts of inappropriate paraprofessional conduct and/or failure to follow directives on four occasions between 2013 and 2018. *See* verified answer, ¶¶ 38-44; exhibits 2-6. The DOE states that Zagerson filed grievances in response to two of those letters, but that both of them were denied. *Id.* The DOE further asserts that, in March of 2018, Principal Toomey received a complaint from the parent of a first-grade student who claimed that Zagerson had inappropriately kissed the child on the cheek. *Id.*, ¶¶ 46-50. Principal Toomey immediately notified the co-respondent Special Commissioner of Investigation for The New York City School District (SCI) about the incident. *Id.* The SCI conducted an independent investigation, and thereafter presented a report of its results to DOE Chancellor Richard Carranza (Carranza) in a letter dated August 2, 2019 (the SCI report). *Id.*, ¶¶ 51-52; exhibit 9. The SCI report substantiated allegations that Zagerson

had inappropriately kissed three first and/or second grade students at PS 195 on separate occasions, and concluded as follows:

> "Zagerson was suspended from his position during the pendency of this investigation. It is the recommendation of this office that the [DOE] take strong disciplinary action regarding Grigoriy Zagerson up to and including termination from DOE employment." *Id.*; exhibit 9.

Principal Toomey held a meeting on September 6, 2019 with Zagerson and his union representative wherein she presented them with the SCI report and informed Zagerson of his rights to review the report and to receive the names of the complaining students, with whom Zagerson thereafter signed a confidentiality agreement. *Id.*, ¶¶ 53-57; exhibit 13. On September 9, 2019, Principal Toomey sent Zagerson a letter informing him that, pursuant to the terms of the collective bargaining agreement which governed his DOE employment (the CBA), she would hold a "due consideration meeting" on September 13, 2019 regarding the SCI report and its recommendation that his DOE employment be terminated. *Id.*, ¶¶ 58-59; exhibit 16. Zagerson submitted a written response to the SCI report in a letter dated September 12, 2019. *Id.*, ¶¶ 60-61; exhibit 17. At the September 13, 2019 "due consideration meeting," Principal Toomey concluded that the SCI report provided good cause to terminate Zagerson's DOE employment. *Id.*, ¶¶ 60-61. Principal Toomey thereafter sent Zagerson a letter on September 17, 2019 that set forth the basis for his termination (the termination letter), and specifically found as follows:

> "After evaluating all the investigatory results, including your responses at our September 6, 2019 conference, I conclude that you failed to appreciate appropriate paraprofessional/student boundaries when you kissed and hugged three students ranging in age from six to eight.
> "Chancellor's Regulation A-830 provides that employees are expected to be exemplary role models in the schools and in the offices in which they serve. It further provides that the sexual harassment of students by employees is strictly prohibited. The sexual harassment of a student by an employee includes situations where the conduct has the purpose or effect of unreasonably interfering with a student's education or creating an intimidating, hostile or offensive educational environment. When you failed to appreciate appropriate

> paraprofessional/student boundaries, you unreasonably interfered with the education of [the three complaining students] and violated Chancellor's Regulation A-830.
> "In light of the above, and after giving due consideration to the matter, you are hereby terminated from the New York City Department of Education, effective close of business September 17, 2019."

Id., ¶¶ 64-66; exhibit 12.

Pursuant to the CBA's appellate review procedure, Zagerson filed a "Step 1 Grievance" September 23, 2019 that argued that the DOE's termination decision violated the CBA's Articles 22, 23 and 32. *Id.*, ¶¶ 67-68; exhibit 18. Principal Toomey met with Zagerson and his union representative on September 27, 2019 and sent Zagerson a letter decision on the same day that denied the "Step 1 Grievance," and specifically found as follows:

> "I held a meeting with you and Dana Brooks, your UFT chapter leader on September 27th 2019 to hear your grievance. At the grievance, you challenged the content of the letter.
> "I deny your grievance because you failed to demonstrate Articles 22, 23 or 32 of the collective bargaining agreement were violated."

Id., ¶ 69; exhibit 19.

Zagerson thereafter requested that his union initiate a "Step 2 Grievance" pursuant to the CBA's appellate review procedure; however, the union declined to do so before the specified time period had expired, which resulted in Zagerson's grievance being officially closed on December 17, 2019. *Id.*, ¶¶ 70-72; exhibit 20.

In the meantime, on November 27, 2019, Zagerson commenced this Article 78 proceeding challenging the DOE's termination decision. *See* verified petition. Respondents interposed an answer with affirmative defenses on February 25, 2020. *See* verified answer.

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. S*ee Matter of Pell v Board of Educ. of Union Free School Dist. No. 1*

of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). A determination is arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts." *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), *citing Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if there is a rational basis in the record for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232.

Zagerson's first cause of action asserts that the DOE's termination decision was arbitrary and capricious because: 1) "the SCI investigators failed to interview all potential adult witnesses and relied on hearsay in substantiating its investigation"; and 2) the SCI report "failed to provide specific dates regarding [the] allegations" against him. *See* verified petition, ¶¶ 27-31. Zagerson's second cause of action states that the DOE also acted arbitrarily and capriciously by allegedly placing an "employment termination," "license termination," "assignment flag" and/or "problem code" designation on Zagerson's name in its "internal system," which has made it difficult for Zagerson to find employment subsequent to his termination. *See* verified petition, ¶¶ 32-35.

In response to the first claim, the DOE responds that, because "[Zagerson's] misconduct . . . was substantiated after investigation, [and] followed by a subsequent review of the investigation's findings, the DOE's final decision was founded on a rational and good faith basis." *See* respondents' mem of law at 5-6. To the second, the DOE avers that "the penalty of termination was rational and in no way shocking to the conscience in this case, and therefore the

penalty must be upheld." *Id.* Zagerson's reply papers repeat the argument that the SCI's investigation was inadequate, and also assert that Principal Toomey improperly singled him out for termination because of her prejudice against his Russian heritage. *See* Zagerson reply aff, ¶¶ 20-26. The court notes that both parties' papers consist almost entirely of factual recitations and allegations, but very little in the way of legal argument. Nevertheless, the court finds as follows.

The two complaints about the SCI's investigation that Zagerson raised in his first cause of action indicate that he intends to assert a due process argument. The Appellate Division, First Department, has observed that "[d]ue process in the context of administrative hearings requires that the charges 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 Berkley v New York City Dept. of Educ.*, 159 AD3d 525, 526 (1st Dept 2018), *quoting Matter of Block v Ambach*, 73 NY2d 323, 333 (1989). In *Berkley*, the First Department specifically held that the petitioner's due process rights were not violated by the DOE's failure to specify the date on which he was alleged to have committed the act of inflicting corporal punishment on a student, because (a) he did not indicate any vagueness with regard to the incident; and (b) he knew the name of the student who made the complaint. 159 AD3d at 526. The court concluded that this demonstrated that the petitioner had been provided with enough information to mount an adequate defense. 159 AD3d at 526. The First Department also found that the petitioner's due process rights were not violated by the DOE's partial reliance on hearsay evidence, since the law allows such evidence to be the basis of an administrative determination. 159 AD3d at 526, *citing Matter of Colon v City of N.Y. Dept. of Educ.*, 94 AD3d 568 (1st Dept 2012). The court concluded that the DOE's termination decision was supported by the record, which consisted of "ample evidence, including petitioner's [own]

admissions" regarding his behavior, and that the DOE "was entitled to reject petitioner's explanations based on an assessment of his credibility." 159 AD3d at 526.

The facts of this case are remarkably similar to those of *Berkley*, in that Zagerson "did not indicate any vagueness" about the three occasions when he kissed first and second grade students on the cheek during the "due consideration meeting" on September 13, 2019. *See* verified answer, exhibit 12. Indeed, at the previous meeting with Principal Toomey on September 6, 2019, he had signed a "Privacy Acknowledgement for Student Witness Statements" which included the names of the three students. *Id*., exhibit 13. Zager also admitted his knowledge about the three incidents in the letter that he sent to Principal Toomey the day before the "due consideration meeting," and in his reply papers herein. *Id*., exhibit 17; Zagerson reply aff, ¶¶ 4, 14, 21. As a result, the court finds that Zagerson was provided with sufficient information to mount an adequate defense to the SCI's report. This finding, coupled with the First Department's legal ruling in *Berkley* that the DOE is entitled to rely on hearsay evidence and that it has the discretion to assess a petitioner's credibility, compels this court to reach the same conclusion that the First Department reached in *Berkley*; namely, that Zagerson's due process rights were not violated during the DOE proceedings.[1] As a result, the court finds that Zagerson's first cause of action is meritless.

Zagerson's second cause of action, which complains that the DOE's post-termination acts of (allegedly) placing an unfavorable designation of him in its database has caused him difficulty in securing employment, indicates that he intends to argue that the DOE's decision to terminate

[1] Zagerson raises an additional argument in his moving papers that "Principal Toomey failed to follow proper protocol mandated by DOE and New York State Education Department procedures," because she "decided to conduct her own flawed investigation," while the regulations provide that "the principal/office head/superintendent shall not gather any information or conduct an investigation of the allegations." *See* verified petition, ¶ 24. However, the court does not address this argument because it is plainly belied by the fact that the SCI conducted the investigation into Zagerson. *See* verified answer, exhibit 9.

his employment "shocks one's sense of fairness." *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 233. However, in *Berkley*, the First Department found that the penalty of dismissal that was imposed on the petitioner who performed an act of corporal punishment on a student "does not shock the conscience in light of the seriousness of the misconduct and petitioner's failure to heed warnings." *Matter of Berkley v New York City Dept. of Educ.*, 159 AD3d at 526, *citing Matter of Bolt v New York City Dept. of Educ.*, 30 NY3d 1065, 1068 (2018).

The court notes that the Court of Appeals' decision in *Matter of Bolt v New York City Dept. of Educ.* similarly found that the DOE's decision to terminate the employment of a tenured physical education teacher who engaged in inappropriately personal conversations with a middle-school student that "made her feel 'kind of uncomfortable'" did not "shock the conscience" because of "the seriousness of his misconduct." 30 NY3d at 1077-1078. This court believes that Zagerson's repeated acts of kissing first and second grade students on the cheek was also "serious misconduct." The court also notes that the DOE's administrative record includes evidence that Zagerson repeatedly "failed to heed warnings" about his behavior with students, and failed to obey his supervisors' instructions, in the form of the warning letters that Principal Toomey placed in his employee file over the course of a decade. *See* verified answer, exhibits 2-6. As a result, the court concludes, as the First Department did in *Berkley*, that the DOE's decision to terminate Zageson's employment did not "shock the conscience," and therefore does not consider its effect on his subsequent employment. [2]

---

[2] The court does not address the assertions in Zagerson's reply papers that the DOE's termination decision was based on Principal Toomey's personal bias against him and/or her alleged anti-Russian prejudice. *See* Zagerson reply aff, ¶¶ 20-26. This argument is not properly before the court as Zagerson did not raise it in either the "due consideration meeting," the "Step-1 Grievance" hearing, or in his original petition. The court also notes that Zagerson failed to support this argument with any sort of evidence.

Accordingly, the court finds that Zagerson's petition should be denied, and that this Article 78 proceeding should be dismissed.

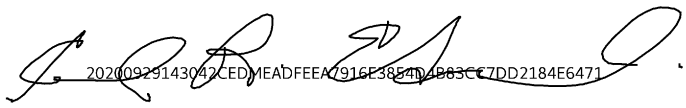
DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of the petitioner Grigory Zagerson (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that counsel for respondent New York City Department of Education shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.



9/29/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
		GRANTED	X DENIED	GRANTED IN PART		OTHER	
APPLICATION:		SETTLE ORDER		SUBMIT ORDER			
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT		REFERENCE	