

**O'Brien v Department of Educ. of the City of N.Y.**

2022 NY Slip Op 30901(U)

March 17, 2022

Supreme Court, New York County

Docket Number: Index No. 655700/2021

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

ELIZABEITH O'BRIEN,

Petitioner,

- v -

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

Respondent.

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INDEX NO. 655700/2021

MOTION DATE 11/10/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for REINSTATE

Petitioner, a former tenured teacher employed by the New York City Department of Education (DOE), seeks an order, pursuant to Articles 75 and 78, and New York State Education Law § 3020-a to vacate the Opinion and Award dated September 21, 2021, of Hearing Officer Daniel McCray, Esq. (H.O. McCray). On September 21, 2021, H.O. McCray submitted his award together with his opinion, finding that the appropriate penalty for petitioner's conduct was termination of employment.

Respondent cross-moves to dismiss the petition, alleging that petitioner has failed to allege any facts that would satisfy the requirement to vacate the award. For the reasons set forth below the petition is denied and respondents' cross-motion is granted.

Background

Petitioner was employed by the DOE for 19 years. At the time of the hearing and for 11 years petitioner was assigned to the Absent Teacher Reserve (ATR). Teachers assigned to the ATR are provided daily schedules and are not provided a permanent assignment. See NYSCEF

Doc. 13. Accordingly, petitioner received various assignments at multiple schools over a 3-year period<sup>1</sup>.

On November 23, 2020, petitioner was served with charges and specifications pursuant to Education Law § 3020-a. Petitioner was charged with having engaged in instances of professional misconduct, failure to supervise, neglect of duty, insubordination, and conduct unbecoming of her profession. A hearing was held virtually on April 13, 2021, April 14, 2021, May 17, 2021, May 18, 2021, May 24, 2021, May 25, 2021, and June 1, 2021. During the hearing, the DOE called multiple witnesses to testify on its behalf as well as submitted documentary evidence. Petitioner testified on her own behalf, did not call any witnesses, and submitted documentary evidence.

The award by H.O. McCray, dated September 21, 2021, sustained Specification 1, Specification 2 (a), and (b) Specification 7 and determined that termination was appropriate. *See* NYSCEF Doc. 13.

Petitioner now moves to vacate H.O. McCray's award on the grounds that it is untimely, as the decision was rendered over 30 days after the hearing was held, that the decision is arbitrary and capricious and that the penalty of termination shocks the conscience.

In opposition, and in support of its cross-motion to dismiss the petition, respondent contends that petitioner has failed to establish a valid basis for vacating the award, and that H.O. McCray's decision is not arbitrary and capricious as it is rationally supported by the record. Moreover, respondent contends that petitioner has failed to establish that the penalty of termination is so unfair and disproportionate as to shock the conscience.

*Applicable Law*

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<sup>1</sup> The Court specifies a period of three years as that is the time frame of the charges in the underlying arbitration hearing.

Pursuant to CPLR §7511(b)(1), an arbitration award can be vacated or modified on the grounds that:

- (i) corruption, fraud, or misconduct in procuring the award;
- (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession;
- (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.

CPLR § 7511(b)(1).

To be upheld, the award must have evidentiary support or other basis in reason, appear in the record, and not be arbitrary or capricious (*Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996]; *Mount St. Mary's Hosp. v Catherwood*, 26 NY2d 493 [1970]). The standard of review of a penalty imposed after a hearing is whether the punishment is so disproportionate to the offenses as to be shocking to the court's sense of fairness (*Lackow v Dept. of Educ. (or "Bd.") of the City of NY*, 51 AD3d 563 [1st Dept 2008] citing, *Pell v Bd. of Educ.*, 34 NY2d 222 [1974]). "An award is not arbitrary and capricious or irrational simply because there are differing views as to the appropriate sanction." (*Matter of Bolt v NY City Dept. of Educ.*, 30 NY3d 1065, 1069 [2018]). The Court of Appeals has held that termination of employment does not 'shock the conscience' when an employee has an otherwise unblemished career. *See, id.*; *Matter of Ward v City of New York* 23 NY3d 1046 [2014]; *Matter of Lozinak v. Board of Educ. Of the Williamsville Cent. Sch. Dist.* 24 NY3d 1048. Further, it should be noted that upon determining whether the penalty imposed "exceeds the bounds of acceptable punishment" the court should not replace the judgment of the arbitrator with its own. (*Bolt* 30 NY3d 1065 at 1071, citing *Pell v Bd. of Educ.*, 34 NY2d 222 [1974]).

Discussion

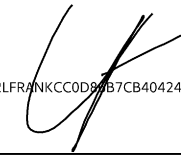
Preliminarily, as to petitioner's argument that the award must be vacated because it was untimely, the Court finds that petitioner has failed to establish how she was prejudiced by the delay. Further, as respondent's point out, petitioner did not notify H.O. McCray of the untimeliness, thus waiving that objection. *See* CPLR § 7507.

Petitioner contends that a violation of Education Law § 3020-a(4)(b) requiring the "employment board to implement the decision" because discipline was not implemented by respondent but by "others" and a public meeting was not held. The Court is unpersuaded by this argument. As it is well established that Education Law § 2590-h, enables the Chancellor to exercise the duties and responsibilities of the employing board and to delegate said duties. Here, that delegation was made to Principal Ann Gordon-Chang, thus the Court does not find that a violation of the Education Law has occurred.

The Court finds that petitioner has failed to meet its burden to establish that H.O. McCray's award must be vacated. A thorough review of H.O. McCray's opinion, as well as the exhibits, supports respondent's position that the determination was rational and based upon the record. H.O. McCray supported his decision by citing to information in the record, credibility determinations, petitioner's demeanor, and responses to the allegations as well as petitioner's past disciplinary history. H.O. McCray determined that since petitioner would likely repeat the same behaviors, especially as she continued to justify her behavior, that a lesser penalty would be inappropriate.

This Court finds that H.O. McCray's findings and determination that termination was warranted, was deliberative, comprehensive, well-reasoned, supported by the record, and does not "shock the conscience". Accordingly, it is hereby

ADJUDGED that the petition is denied and the cross-motion to dismiss the petition is granted.

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3/17/2022  
DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE