SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE LOVE** **PART** **63M**

Justice

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MEGLYS NUNEZ,

Petitioner,

- v -

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

Respondent.

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INDEX NO. 654720/2021

MOTION DATE 01/20/2022

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, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for REINSTATE.

Upon the foregoing documents, the Petition is resolved as follows:

Petitioner commenced the instant CPLR Article 75/78 Petition on August 2, 2021, seeking to vacate the findings and recommendations of the Hearing Officer selected to hear and determine disciplinary charges filed against Petitioner by the Respondent pursuant to the procedure mandated under Section 3020-a of the Education Law. Said Petition alleges as follows: Petitioner, Meglys Nunez ("Nunez" or "Petitioner"), was a tenured teacher for the New York City schools. Petitioner was charged in March 2019 with the following charges pursuant to o Education Law § 3020-a:

1. During the 2016-2017, 2017-2018 and/or 2018-2019 school years, [Petitioner] failed to properly, adequately, and/or effectively plan and/or execute separate lesson as observed on or about each of the following dates: a. November 1, 2016; b. December 20, 2016; c. March 3, 2017; d. October 25, 2017; e. December 13, 2017; f. January 22, 2018; g. April 16, 2018; h. May 31, 2018; i. October 25, 2018; j. November 11, 2018; and/or k. March 19, 2019.

2. On or about October 25, 2017, [Petitioner] demonstrated a lack of professional fitness, and/or neglected her professional duties, in that, she failed to have an adequately prepared lesson plans for the lessons she would be conducting that day.
3. [Petitioner] demonstrated a lack of professionalism and/or used poor judgment, in that she arrived late to professional development sessions on the following dates: a. October 29, 2018; and/or b. November 5, 2018.
4. [Petitioner] demonstrated a lack of professionalism, used poor judgment, and/or neglected her professional duties in that. She failed to deliver instruction to her class during instructional time on or about the following dates: a. December 5, 2018; b. December 7, 2018; and/or c. December 14, 2018.
5. [Petitioner] failed, during the 2016-2017, 2017-2018 and/or 2018-2019 school years, to fully and/or consistently implement directives and/or recommendations for pedagogical improvement and professional development provided in observation conferences with administrators and/or outside observers; instructional meetings; teacher improvement plans; one-on-one meetings with administrators, school based coaches, and/or outside observers; as well as school wide professional development, with regard to; a. Proper planning, pacing, and/or execution of lessons; b. Using appropriate methods and/or techniques during lessons; c. Designing coherent instructions; d. Using assessment in instruction; e. Student engagement; and/or f. Using appropriate questioning and discussion techniques.

Pursuant to Education Law §3020-a, Ms. Nunez timely requested a hearing. The parties mutually selected Hearing Officer Barry Peek Esq. to preside over the proceedings. A hearing was held via telecommunications concerning the Charges and Specifications filed against Ms. Nunez on

January 15, 2021, January 25, 2021, February 4, 2021, February 5, 2021, February 25, 2021, February 26, 2021, March 12, 2021, March 17, 2021, March 23, 2021, March 31, 2021, April 9, 2021 and April 13, 2021. Ms. Nunez received the 108 page Decision on July 22, 2021, wherein Petitioner was found guilty of the conduct charged in Specification 1(a), 1(c), 1(d), 1(f), 1(g), 1(h), 1(i), 1(j), and 1(k); Specification 2; Specification 4(a), 4(b), and 4(c); and Specification 5(a), 5(b), 5(c), 5(d), 5(e), and 5(f) and further finding that Respondent had established just cause for termination, resulting in the instant Petition.

Petitioner contends that the arbitration decision was not rendered in a timely manner pursuant to Education Law Section 3020-a(4)(a), which provides that "The hearing officer shall render a written decision within thirty days of the last day of the final hearing or in the case of an expedited hearing within ten days of such expedited hearing and shall forthwith forward a copy thereof to the Commissioner of Education who shall immediately forward copies of the decision to the employee and the clerk or secretary of the employing board." It is undisputed that the subject hearing was concluded on April 13, 2021 and the arbitration decision was delivered over thirty days later on July 22, 2021. In Order to vacate an arbitration award for untimeliness, "a petitioner must demonstrate that he or she has suffered undue prejudice as a result of the alleged delay." *Matter of Morrell v. New York City Dept. of Educ.*, 924 N.Y.S.2d 310 (Sup. Ct. N.Y. 2010), citing *Scollar v. Cece*, 28 A.D.3d 317 (1st Dep't 2006). Here, Petitioner has not alleged any prejudice.

As to Petitioner's substantive contentions, pursuant to Education Law § 3020-a(5), judicial review of a hearing officer's findings must be conducted pursuant to CPLR 7511, *See, Lackow v. Department of Educ. (or "Board") of City of N.Y.* 53 A.D.3d 563. As such, an award may only be vacated on a showing of "misconduct, bias, excess of power or procedural defects." *Id*. citing *Austin V. Board of Educ. Of City School Dist. Of City of N.Y.*, 280 A.D.2d 365, 365 (2001). 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 N.Y.2d 214, 223 (1996). *Lackow* further holds that "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 CPLR Article 78, *citing Motor Vehicle Mfrs. Ass'n v. State*, 75 N.Y.2d 175, 186 (1990).

Petitioner contends that the arbitration decision was not supported by adequate evidence and was arbitrary and capricious. Petitioner argues that the DOE's practice of administrators observing Petitioner's teaching in fifteen minute observation periods is insufficient, malicious and undermines the integrity of evaluations because the conclusions are not based on fact but solely on personal opinions. Petitioner further contends that as all six of the classroom observations were in reading and writing, that the Principal, in choosing to do so engaged in a deliberate bad-faith effort to remove Petitioner. Petitioner admits that English is not her first language and as such, the Arbitrator could have conditioned her restoration of employment to complete a course regarding her accent and a college-level course on English grammar. Petitioner further contends that after Ms. Nunez completed a performance improvement plan with the UFT, held between December 2018 and February 2019, a formal observation of Petitioner was conducted on March 19, 2019. Such an observation requires a full period observation, a pre and post-observation conference, the actual written observation, and an opportunity for the teacher to respond to the observation. Petitioner contends that as the observation was completed the same day, that same is evidence of bad faith. Petitioner further contends that assigning her top teach fifth grade in the 2018-2019 school year was done in bad faith as she had never taught said age group in the past. In support of same, Petitioner highlights the testimony of her union delegate Mr. Santana and Fran Tavares, a

teacher at PS 132 from 1994 until his retirement in 2020, both of whom described the students in said fifth grade class as difficult to teach. Petitioner further highlights the progress made by her students over the course of the schoolyear as proof of her competence and cites the testimony of Kiamara Nova, the principal of PS 132 until her retirement in 2017, who consistently rated Petitioner highly. Petitioner also makes specific objections with regard to each of the specifications that she was accused of and further argues that the penalty of termination is shocking to one's sense of fairness.

Contrary to Petitioner's arguments, the arbitrator conducted an in depth, well supported decision, taking into account the credibility of all of the witnesses presented in coming to his determination. In such a case, the Court should find that the award was rational, supported by evidence, and not arbitrary and capricious, *See, Matter of Davis v. New York City Bd./Dept. of Educ*., 137 A.D.3d 716, 717 (1st Dep't 2016). Respondents repeatedly established that Petitioner showed years of pedagogical weakness. Specifically, Petitioner struggled at designing her lessons in accordance with the "Workshop Model" even after five weeks of individualized coaching in Reading and Writing in Fall 2017, one on one coaching in June 2018, and completing a performance improvement plan with the UFT, held between December 2018 and February 2019. For these reasons, the Decision found Petitioner guilty of Specification 5(a), for failing to improve her planning and execution of lessons between 2016-2019, as well as 5(c), for failing to implement recommendations in designing coherent instruction between 2016-2019.

The decision further notes that in Fall 2018, literary coach Ellen recommended Petitioner use a behavior management chart because she perceived Petitioner's classroom as "chaotic." Petitioner's classroom management continued to suffer through 2019; the March 19, 2019 observation report noted that "[c]lassroom management was an obvious issue that interfered with

student engagement," and contained details that "students were unresponsive and stayed talking at their seats" despite Petitioner's attempts to quiet the classroom and focus students' attentions. As such, there is sufficient evidence to establish Specification 5(e), failing to implement professional development to engage students in learning between 2016-2019.

A complete reading of the decision reveals that all of Petitioner's contentions were dealt with at length by Arbitrator Peek and that the instant Petition is largely a restatement of those contentions. From pages 12 through 36 of the decision, the arbitrator addressed, at length, the ratings that Petitioner received in each observation, the details from the reports explaining why Petitioner received developing or ineffective ratings, and testimony from the observer responsible for the report. Thereafter, the arbitrator addressed Petitioner's arguments at pages 51-68 and at pages 75-90 provides detailed analysis of the evidence supporting his rulings on Specifications 1(a)-(k). Arbitrator Peek also extensively wrote about the remediation efforts provided to Petitioner and found that Petitioner was either unwilling or unable to improve her performance.

As to Petitioner's complaints of bias, same is an evidentiary and credibility question for the hearing officer to determine. See e.g. *Ward-Bourne v. Dept. of Educ. of the City of N.Y.,* 2018 N.Y. Slip Op. 31047(U) (Sup. Ct. NY Cty. 2018). Said allegations were considered at the hearing wherein the arbitrator concluded that Principal Torres and Assistant Principal O'Neil were both forthright and credible, without any animus to Ms. Nunez. As such determinations were based upon credibility, this Court cannot disturb the arbitrator's findings as to bias. Petitioner's contention that the short time frame between her observation on March 19, 2019 and the filing of Charges and Specifications against her is also addressed in the arbitrator's decision wherein he held that Respondents were not predisposed to terminate her as "if the Department had a plan to terminate [Petitioner], there would have been no reason to offer her the amount of remediation it

did over the years." Petitioner's discussion of the testimony of witnesses who testified in her favor is similarly unavailing as said witnesses' credibility was also assessed by the arbitrator and should not be disturbed by this Court.

The decision does not "shock the conscience." As discussed in *Asch v. N.Y.C. Dep't of Educ.*, 104 A.D.3d 415, 421 (1st Dep't 2013), the standard for reviewing a penalty imposed after a 3020-a hearing is whether the "punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." A result is shocking to one's sense of fairness if "the sanction imposed is so grave in its impact…that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution." *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 234 (1974). Here, the Decision noted that "the penalty to be imposed cannot be excessive or punitive. Discipline should be corrective. It should be progressive." However, the decision further held that Petitioner received personalized one-on-one coaching, a Teacher Improvement Plan in 2018, and school-wide professional development classes. Despite this assistance, the decision found that Petitioner was "unwilling or unable to implement the suggestions given to help improve her performance," and found that "further remediation offered [Petitioner] would be to no avail." as Petitioner "took almost no responsibility for any of the alleged shortcomings in her pedagogy." It has been repeatedly held that termination is an appropriate remedy where, as here, Petitioner has performed unsatisfactorily for tears despite remediation efforts, *See Matter of Geist v. City of New York*, 144 A.D.3d 472 (1st Dep't 2016); *Matter of Davies v. New York City Dept. of Educ.*, 117 A.D.3d 446, 447 (1st Dep't 2014). As such, it is hereby

ORDERED that the Petition is DENIED in its entirety and DISMISSED.

4/13/2022
DATE

LAURENCE LOVE, 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