SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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LISA BROWN

Petitioner,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

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INDEX NO. 657036/2021

MOTION DATE 03/25/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 33, 34

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

This Article 75 Petitions seeks to challenge the decision to terminate Petitioner as a teacher with the New York City Department of Education after a New York State Education Law Section 3020-a disciplinary hearing. Respondent makes a pre – answer cross – motion to dismiss, per CPLR 3211(a)(7).

The amended verified petition states causes of action for (i) "the hearing officer exceeded his authority by failing to render findings in accordance with the statutory authority to which he was bound in assessing penalty," (ii) "the punishment shocks the conscience," (iii) "denial of due process," (iv) the arbitrator showed bias and prejudice in his decision," and (v) arbitrator McKenna exceeded his power" (see NYSCEF Doc. No. 15).

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (see *Leon v. Martinez*, 84 N.Y.2d 83 [1994]).

When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every

possible favorable inference and determining "only whether the facts as alleged fit within any cognizable legal theory" (see *D.K. Prop., Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505; *Weil Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004]).

On October 7, 2019, Petitioner was served with charges and specifications pursuant to Education Law 3020-a. Petitioner was charged amongst other things, with professional misconduct, failure to supervise, neglect of duty, insubordination, and conduct unbecoming of her profession (see NSYCEF Doc. No. 24).

A hearing was convened per Education Law 3020-a. From March 2021 to June 2021 evidence was presented, and testimony was given by Assistant Principal Dr. Madison Williams, and Principal Kerdy Bertrand, along with various teachers. On December 6, 2021, Hearing Officer McKenna rendered an Opinion and Award where the "award" stated "[t]he penalty imposed is termination from the service" (see NYSCEF Doc. No. 23).

In a proceeding under CPLR Article 75 the grounds for vacating a hearing officer's decision rendered pursuant to Education Law 3020-a are limited to the grounds set forth in CPLR 7511(b), which include, *inter alia*, misconduct, abuse of power and procedural irregularities (see *Matter of Denhoff v. Mamaroneck Union Free Sch. Distr.*, 101 A.D.3d 997 [2d Dept. 2012]). The parties are subject to a compulsory arbitration, the arbitration award must also satisfy the arbitrary and capricious standard of CPLR Article 78, be supported by adequate evidence, and in accordance with due process (see *Matter of Bell v. N.Y.C. Dept. of Educ.*, 2010 N.Y. Slip op 52380[U], at *7 [Sup. Ct., N.Y. Cnty. 2010]).

Petitioner alleges the Hearing Officer "exceeded his … statutory authority," and "exceeded his power," in her first and fifth cause of action. Respondent's memorandum of law

states, "[t]he Petitioner's argument appears to rely upon an allegation that Hearing Officer McKenna failed to follow what Petitioner identifies as the 'Just Cause Standard.' Petition at 30. However, neither [Education Law] 3020-a nor [CPLR] 7511 requires Hearing Officer McKenna to consider the 'seven elements of the just cause standard' before imposing a penalty. See generally NY Educ. Law 3020-a(4); NYS CPLR 7511" (see NYSCEF Doc. No. 21 P. 20 – 21).

Officer McKenna's Decision does not "shock the conscience," per the second cause of action. Petitioner's approximate 27 years of service, with no prior disciplinary charges were examined, along with the severity of petitioner's conduct – including her "refus[al] to accept responsibility for her misconduct, lack of "contrition or remorse," and her "failure to comprehend and appreciate the impact her actions had" (see NYSCEF Doc. No. 23 P. 66).

The Department of Education has complied with the elements of procedural due process as a hearing was held, mooting petitioner's third cause of action. Petitioner was notified of the charges and specification, represented by counsel, allowed to call witness and cross – examine opposing witnesses, enter exhibits, and otherwise defend herself in accordance with procedural due process.

Petitioner alleges bias in the fourth cause of action, of Hearing Officer McKenna. "Bias must be clearly apparent based upon established facts, not merely supported by unproved and disputed assertions" (see *Bronx – Lebanon Hosp. Ctr. v. Signature Med. Mgmt. Group, LLC*, 6 A.D.3d 261 [1st Dept. 2004]).

The Court of Appels has stated that, "an arbitrator's factual or legal determination is … not subject to judicial second – guessing, but only to review to determine whether the award is on its face prohibited by public policy" (see *Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146, 155 [1995]). "A hearing officer's determinations of credibility … are largely

unreviewable because the hearing officer observed the witnesses and was able to perceive the inflections, the pauses, the glances and gestures – all the nuances of speech and manner that combine to perform an impression of either candor or deception" (see *Lackow v. Dept. of Educ.*, 51 A.D.3d 563, 568 [1st Dept. 2008]).

A review of all the facts submitted along with corresponding case law it is determined that Hearing Officer McKenna acted without bias and within his statutory authority. The decision to terminate petitioner did not shock the conscience and was decided after a hearing that followed procedural due process.

ORDERED that the motion of Respondent New York City Department of Education to dismiss the petition herein is granted and the petition is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said Respondent; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

7/13/2022
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