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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

BARBARA JAFFE
J.S.C.

PART 5

Index Number : 107292/2011
RUBINO, CHRISTINE
VS
CITY OF NEW YORK
Sequence Number : 001
VACATE STAY ORDER/ JUDGMENT
CAL # 135

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION ~~/ ORDER~~ Judgement

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
FEB 02 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/1/12
FEB 01 2012

BARBARA JAFFE
J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☑ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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In the Matter of the Application of:
CHRISTINE RUBINO,

Petitioner,

For a Judgment pursuant to Article 75
of the Civil Practice Law and Rules

-against-

CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF EDUCATION; DENNIS WALCOTT, CHANCELLOR of NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

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Index No. 107292/11

Argued: 11/1/11
Motion Seq. No.: 001
Motion Cal. No.: 135

DECISION & JUDGMENT

BARBARA JAFFE, JSC:

For petitioner:
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For respondents:
Adam E. Collyer, ACC
Michael A. Cardozo
Corporation Counsel
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By notice of petition dated June 22, 2011, petitioner brings this Article 75 proceeding seeking an order vacating the hearing officer's opinion and award in the disciplinary proceeding brought against her. Respondents oppose, and by notice of cross motion dated August 24, 2011, move pursuant to Education Law § 3020-a and CPLR 404(a), 3211(a)(7), and 7511 for an order dismissing the petition. For the following reasons, the petition is granted to the extent indicated and the cross motion is denied.

I. BACKGROUND

In 1995, petitioner, a tenured teacher, began working for respondent New York City

Department of Education (DOE). (Pet.). In February of 1997, she began working at Public School (P.S.) 203 in Brooklyn. (Petitioner's Appendix [Pet. Appx.]).

On June 22, 2010, a New York City public school student fatally drowned during a field trip to the beach. (*Id.*). On June 23, 2010, after the school day was over and petitioner was at home, she posted the following on her Facebook page: "After today, I am thinking the beach sounds like a wonderful idea for my 5th graders! I HATE THEIR GUTS! They are the devils (sic) spawn!" One of her Facebook friends then posted, "oh you would let little Kwame float away!" to which petitioner responded, "Yes, I wld (sic) not throw a life jacket in for a million!!" (*Id.*).

After viewing petitioner's postings, one of petitioner's Facebook friends, a P.S. 203 colleague, contacted the school's assistant principal and expressed concern about the propriety of the postings. (*Id.*). On June 24, 2010, the assistant principal showed the postings to the principal, and upon her instruction, contacted the Special Commissioner of Investigation for the New York City School District (SCI), which initiated an investigation. (*Id.*).

Sometime before November 15, 2010, the SCI investigator assigned to the matter issued his final report, observing, *inter alia*, that petitioner's Facebook account is linked to her e-mail address and that he had viewed the postings on her page. (*Id.*). On November 15, 2010, SCI issued its final report adopting the investigator's findings and recommending that petitioner be terminated. (*Id.*).

On November 23, 2010, the principal presented petitioner with SCI's final report. (*Id.*). Petitioner responded that she did not remember the postings and that a friend, whom she named, had access to her Facebook account. (*Id.*). Shortly thereafter, at the principal's request, petitioner

provided her with the friend's contact information which the principal forwarded to SCI. SCI then re-opened its investigation. (*Id.*).

On December 14, 2010, the principal met with petitioner to discuss an allegation leveled against her of corporal punishment. (*Id.*). The Facebook incident was not discussed. (*Id.*).

On December 15, 2010, the SCI investigator interviewed petitioner's friend who initially admitted responsibility for the postings. (*Id.*). However, when the investigator expressed disbelief and warned that she could be incarcerated for perjury, petitioner's friend recanted, stating that petitioner had asked her to take responsibility for the postings so that she would not lose her job. (*Id.*). On December 16, 2010, the investigator issued a new report wherein he summarized that interview, and on January 7, 2011, SCI issued a revised final report adopting his findings and again recommending petitioner's termination. (*Id.*).

Sometime shortly thereafter, DOE charged petitioner with, *inter alia*, "misconduct, neglect of duty and conduct unbecoming her profession," specifying, in pertinent part, as follows:

> Specification 1: On or about June 23, 2010, [petitioner] posted and/or disseminated comments on her ***Facebook.com*** webpage stating, "after today, I'm thinking the beach sounds like a wonderful idea for my 5th graders! I HATE THEIR GUTS! They are all the devils (sic) spawn!"
>
> Specification 3: On or about June 23, 2010, [petitioner] received a response to her previous comment described in Specification 1 from an individual with the ***Facebook.com*** screen name Scott J. Levine stating, "oh you would let little Kwame float away!" and [petitioner] posted and/or disseminated a subsequent message stating, "Yes, I wld (sic) not throw a life jacket in for a million!!"
>
> Specification 4: On or about and between November 2010 and December 2010, [petitioner] interfered with an official investigation of The Special Commissioner of Investigation for the New York City School District by directing her friend, Joanne Engel, to provide false information to investigators by claiming to have written the comments on [petitioner's] ***Facebook.com*** webpage as detailed in Specifications 1 & 3, so that [petitioner] would not get in trouble.

(Pet., Exh. A).

On February 16, 2011, a pre-hearing conference was held, and on February 28, March 2, 3, 8, 10, 14, and 25, April 4, 6, 7, 11, and 27, 2011, hearings were held at which petitioner, her friend, and others testified. (*Id.*). An audio recording and transcript of petitioner's friend's interview were admitted in evidence. (*Id.*).

Petitioner admitted to posting the comments in issue on Facebook, explaining that she did so after a hard day at work and removed them from her page three days later. She apologized for the postings, stating, "I'm sorry for it. I definitely chose the wrong forum to vent . . . . I'm sorry people took it as offensive, and if I could take it back, I certainly would, but I did take it down, when I realized it wasn't just how I felt anymore." (*Id.*). She also testified that the incident has changed her Facebook use, as she only uses it now to keep in touch with "very close friends [and] very close family members," and she no longer expresses her opinions on her page. (*Id.*). She claimed that she first realized the posted comments were problematic during her November 23, 2010 meeting with the principal, that she could not remember during the meeting whether she had posted them, that she provided the principal with her friend's contact information because her friend used her Facebook account, and that she discussed the posted comments with her friend in order to determine who had posted them. (*Id.*). She remembered that she had posted the comments sometime between the November 23 and December 14 meetings but declined to inform the principal of same, that her friend did not immediately tell her about her interview, and that when she did, she did not admit to telling the investigator that petitioner had asked to her lie. (*Id.*). She repeatedly denied having asked her friend to take responsibility for the postings. (*Id.*).

Petitioner's friend testified that the first time she became aware of the Facebook postings

was in late November 2010 when petitioner told her that the principal had approached her about them, that petitioner initially did not recall making them, and that petitioner told her she had given the principal her contact information. (*Id.*). She also denied having posted the comments or that petitioner had asked her to lie about doing so, explaining that she had told the investigator that she posted the comments in an effort to help a friend, that she subsequently recanted because he told her she would go to jail if she perjured herself, and that she then told him that petitioner had asked her to lie because she was nervous. (*Id.*). And, according to her, she called petitioner the day of the interview to tell her that she had tried to take responsibility for the postings but disclosed neither that she told the investigator petitioner had asked her to lie nor that the interview was taped. (*Id.*).

On June 6, 2011, the hearing officer issued a 52-page opinion and award, sustaining specifications 1, 3, and 4, and recommending termination of petitioner's employment. (Pet., Exh. A).

As petitioner admitted to posting the comments on Facebook, the hearing officer sustained specifications 1 and 3, emphasizing that petitioner had engaged in conduct unbecoming a teacher in posting offensive comments in a forum that is not truly private. (*Id.*). She noted that neither petitioner's removal of the postings nor her superior's failure to instruct her to do so altered the severity of the offense, as petitioner had already created an "electronic footprint" insofar as her postings were copied and disseminated. (*Id.*).

The hearing officer also discredited petitioner's denial of having asked her friend to take responsibility for the postings and her claim that she did not think to notify the principal once she remembered having posted the comments. (*Id.*). She also determined that if it were true that

petitioner's friend had decided, by herself, to take responsibility for the postings, she "could easily have maintained at least that part of her story and maintained her part in the entire failed enterprise without ever blaming [petitioner]," and that her friend's tone during the interview does not reflect having been pressured into implicating petitioner. (*Id.*). Concluding that petitioner had "attempted to obstruct the investigation by continuously denying knowledge of the comments and by pointing to [ ] Engel as the likely or possible source," the hearing officer sustained specification 4. (*Id.*).

The hearing officer declined to "render a conclusive decision on the [first amendment] rights of a person making inappropriate comments on Facebook," but determined that, having referred to her students in her postings, petitioner was acting as a teacher, not as a private citizen, and that while the drowning itself may have been a matter of public concern, the postings were not. (*Id.*).

In deeming termination the appropriate penalty for petitioner's misconduct, the hearing officer emphasized the public nature of online postings and noted that petitioner had breached DOE's trust by conspiring with her friend such that "it is impossible for her employment to be continued" and that teachers should instill in their students the importance of taking responsibility for their actions. (*Id.*). She also found that petitioner did not apologize for doing so and only apologized "begrudgingly" for the postings. (*Id.*).

II. CONTENTIONS

Petitioner asserts that the hearing officer's decision and award is arbitrary and capricious and that her termination is shocking to one's sense of fairness, as she had a 15-year unblemished employment history with respondent, her offense bears no relation to her teaching ability, and the

hearing officer impermissibly focused on her alleged lack of remorse. (*Id.*). She also contends that her termination infringed on her first amendment right to free speech, as her statement pertained to a matter of public concern, and she made it in her capacity as a private citizen. (*Id.*).

In opposition, and in support of their cross motion, respondents deny that the hearing officer's opinion and award is arbitrary and capricious, as she considered each specification separately and explained her decision by citing to the record. They argue that petitioner's termination is proportionate to her offense, as the hearing officer was entitled to consider her lack of remorse. (Resps.' Mem. of Law). They also contend that petitioner was speaking in her official capacity as a teacher in posting her comments on Facebook, and thus, that her termination does not violate her first amendment rights. (*Id.*).

In reply, and in opposition to respondents' cross-motion, petitioner maintains that the penalty of termination is disproportionate to the severity of her offense, as she made the statement to a small, private, adults-only audience, and the hearing officer disregarded her apology for her actions. (Affirmation of Bryan D. Glass, Esq., in Opposition, dated Sept. 16, 2011).

In reply, and in sur-reply, respondents maintain that petitioner's termination is an appropriate penalty, emphasizing that she was also found guilty of conspiring to mislead the SCI investigator and that Facebook is a public forum insofar as anything posted on it may be copied and publically disseminated. (Affirmation of Adam E. Collyer, ACC, in Reply, dated Sept. 28, 2011).

III. ANALYSIS

A. Applicable law

When a hearing is held pursuant to Education Law § 3020-a, a party who was subject to

the hearing may apply to vacate the hearing officer's opinion and award on the grounds that her rights were prejudiced by:

> (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 was not made; or
> (iv) failure to follow the procedures of this article.

(CPLR 7511[b][1]).

In reviewing such an award, the court must also determine whether it was rendered "in accord with due process and [was] supported by adequate evidence," and whether it satisfies the arbitrary and capricious standard of Article 78. (*Lackow v Dept. of Educ. [or "Board"] of the City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008]). The party challenging the arbitration award bears the burden of proving that it is invalid (*id.*), and if the motion to vacate is denied, the court must confirm the award (CPLR 7511[e]).

B. Petitioner's first amendment claim

As errors of fact or law provide no basis for vacating an award (*Matter of New York State Correctional Officers & Police Benevolent Assoc., Inc. v State of New York*, 94 NY2d 321 [1999]), and as the hearing officer determined that the Facebook postings do not constitute protected speech insofar as she decided that petitioner posted the comments as a teacher and that the comments did not pertain to a matter of public concern, I do not address the merits of petitioner's first amendment claim.

And, even if petitioner's first amendment claim are construed an allegation that the hearing officer exceeded her authority in rendering an award that violates public policy (CPLR

7511[b][1][iii]), the limited scope of review nonetheless precludes an analysis of the merits of her claim (*see Matter of New York State Correctional Officers,* 94 NY2d at 329 [where arbitrator made determination implicating petitioner's first amendment rights, and respondent claimed award violates public policy, court declined to analyze merits of claim "under [ ] guise of public policy," as doing so would "invade [ ] province of [ ] arbitrator"]).

As petitioner alleges neither that her rights were prejudiced by any of the other circumstances set forth in CPLR 7511(b)(1) nor that her due process rights were violated, I need only determine whether the award is arbitrary or capricious.

C. Arbitrary and capricious

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious under CPLR Article 78, the test is whether the determination "is without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assoc. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]). Moreover, the determination of an administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]). And, a hearing officer's credibility determinations are "largely unreviewable because the hearing officer observed the witnesses and was able to perceive . . . all the nuances of speech and manner that combine to

form an impression of either candor or deception." (*Matter of Berenhaus v Ward,* 70 NY2d 436, 443 [1987]; *Lackow*, 51 AD3d at 569).

Here, given petitioner's admission to posting the subject comments on her Facebook page, the hearing officer's determinations as to specifications 1 and 3 are neither arbitrary nor capricious. And, although both petitioner and her friend denied that petitioner asked her to take responsibility for the postings, the hearing officer discredited the friend's explanation of why she implicated petitioner during her interview. She also discredited petitioner's explanation of why she failed to notify the principal that she had posted the comments. Absent a sufficient basis for disturbing these credibility determinations, the hearing officer's determination as to specification 4 is neither arbitrary nor capricious.

D. Proportionality of penalty

The standard for reviewing a penalty imposed after a hearing held pursuant to Education Law § 3020-a is whether the punishment imposed "is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." *(Matter of Pell,* 34 NY2d at 233). A result is shocking to one's sense of fairness when:

> the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct . . . of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved.

(*Id.* at 234).

The penalty of termination has been held to shock one's sense of fairness where the petitioner had a long and otherwise unblemished employment history. (*See Matter of Riley v City*

of New York, 84 AD3d 442 [1st Dept 2011] [where, "in the 15 years preceding the incident, petitioner had received not a single formal reproach"]; *Matter of Diefenthaler v Klein,* 27 AD3d 347 [1st Dept 2006] [where misconduct was "an isolated error of judgment" and petitioner had more than 10 years of unblemished service]; *Matter of Solis v Dept. of Educ. of the City of New York*, 30 AD3d 532 [2d Dept 2006] [where petitioner had 12 years of unblemished service]; *Matter of Weinstein v Dept. of Educ. of the City of New York*, 19 AD3d 165 [1st Dept 2005], *lv denied*, 6 NY3d 706 [2006] [where petitioner had "30-year history of exemplary service in the teaching profession"]). Termination has also been considered disproportionate to offenses that cause no injury. (*See Matter of Riley*, 84 AD3d 442 [student admitted to sustaining no emotional or physical injury]; *Matter of Patterson v City of New York*, 2011 NY Slip Op 30870[U] [Sup Ct, New York County Apr. 11, 2011] [offense did not affect petitioner's teaching ability]).

Here, petitioner's 15-year employment history with the DOE was unblemished before she posted the offensive comments, and she posted them outside the school building and after school hours. Moreover, there is no indication in the record, nor any finding, that her postings affected her ability to teach. (*Cf Land v L'Anse Creuse Public School Bd. of Educ.*, 2010 WL 2135356 [Mich App May 27, 2010], *lv denied* 488 Mich 913, 789 NW2d 458 [2010] [where petitioner terminated after photographs of her engaging in lewd behavior at bachelorette party were posted on internet, termination vacated on ground that her behavior was legal and occurred outside school context, did not impact her ability to teach, and thus did not constitute misconduct]).

There is also no evidence that her postings injured her students or that she intended any injury. Although the hearing officer emphasized the public nature of her postings and her

creation of an "electronic footprint," she made no finding as to their effect on petitioner's past and future students. And, the specter of racism emerging from the postings did not originate with petitioner, and there is no indication in the record apart from the posting that she is intolerant or that the feeling she expressed, made after a hard day at work, affects the manner in which she teaches and treats her students.

While I do not address the hearing officer's determination as to the alleged violation of petitioner's first amendment right to freedom of speech (*see* III.B., *supra*), in these circumstances, termination of petitioner's employment is inconsistent with the spirit of the first amendment. Facebook has rapidly evolved from a platform used solely by American college students to a world-wide social and professional network. It is commonly used to advertise businesses, organize parties, debate politics, and air one's grievances, among myriad other uses. (*See generally* Sengupta and Rusli, *Personal Data's Value? Facebook Set to Find Out*, New York Times, Feb. 1, 2012, section A, col 0). Indeed, with Facebook, as with social media in general, one may express oneself as freely and rapidly as when conversing on the telephone with a friend. Thus, even though petitioner should have known that her postings could become public more easily than if she had uttered them during a telephone call or over dinner, given the illusion that Facebook postings reach only Facebook friends and the fleeting nature of social media, her expectation that only her friends, all of whom are adults, would see the postings is not only apparent, but reasonable. While her reference to a child's death is repulsive, there is no evidence that her postings are part of a pattern of conduct or anything other than an isolated incident of intemperance.

Moreover, there is no reason to believe that petitioner will again post inappropriate or

offensive comments online, as she repeatedly apologized during the administrative hearing for the posts, and expressed tearful remorse at oral argument before me. Although she was found to have violated DOE's trust by interfering with the investigation, petitioner denies having done so and thus cannot be expected to express remorse for it. (*See Matter of Patterson*, 2011 NY Slip Op 30870[U] [as petitioner denied intentionally engaging in wrongdoing, she could not be expected to express remorse for doing so]). In any event, her clumsy attempt at a coverup reflects panic, not planning.

And, while students must learn to take responsibility for their actions, they should also know that sometimes there are second chances and that compassion is a quality rightly valued in our society. Ending petitioner's long-term employment on the basis of a single isolated lapse of judgment teaches otherwise. While I do not condone petitioner's conduct and acknowledge that teachers should act as role models for their students, termination in these circumstances does not correspond with the measure of compassion a teacher should show her students. Rather, it places far too great a strain on the right to express oneself freely among friends, notwithstanding the repulsiveness of that expression. (*Cf Hurley* v *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 US 557, 574 [1995] ["the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."]; *Texas v Johnson*, 491 US 397, 414[1989] ["If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."]).

For all of these reasons, petitioner's termination is so disproportionate to her offense as to shock one's sense of fairness. The petition is therefore granted to the extent that petitioner's

termination is vacated, and the matter is remanded to DOE for the imposition of a lesser penalty in accordance with this decision.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the petition is granted to the extent that petitioner's termination is vacated, and the matter is remanded to respondent New York City Department of Education for the imposition of lesser penalty in accordance with this decision; and it is further

ORDERED, that respondents' cross motion to dismiss the petition is denied.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

FILED
FEB 02 2012
NEW YORK
COUNTY CLERK'S OFFICE

DATED: February 1, 2012
New York, New York

FEB 01 2012