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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHLOMO S. HAGLER Justice

PART 25

Index Number : 106140/2011

GUZMAN, MINERVA

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — ~~Affidavits~~ — Exhibits ... VERIFIED PETITION w/	1, 2
~~Answering Affidavits — Exhibits~~	
Replying Affidavits P's + D's	5, 6
	3, 4

Cross-Motion: ☒ Yes w/ Memo of Law ☐ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION/OSC IS DECIDED IN ACCORDANCE WITH THE ATTACHED SEPARATE WRITTEN ORDER & JUDGMENT

FILED
MAR 05 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/29/2012

J.S.C.
SHLOMO S. HAGLER, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 25

----------X

MINERVA GUZMAN,

Petitioner,

INDEX NO.: 103370/11

-against-

DECISION/ORDER

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

Respondents.

----------X

HON. SHLOMO S. HAGLER, J.S.C.:

Petitioner Minerva Guzman ("Guzman" or "petitioner") moves by notice of petition and verified petition to vacate an arbitration award dated May 4, 2011 ("Award") pursuant to CPLR § 7511. (See Exhibit "A" to the Petition.) Respondent New York City Department of Education ("DOE" or "respondent") opposes the petition and cross-moves to dismiss the petition and confirm the Award pursuant to CPLR §§ 404(a), 3211(a)(7), and 7510.

Background

Petitioner is a tenured teacher employed by the New York City Department of Education and was formerly assigned to the Courtlandt School, P.S.1, District 1 in the Bronx. Pursuant to Education Law § 3020-a, the DOE preferred two (2) specifications or charges against petitioner for misconduct and conduct unbecoming her profession during the 2010-2011 school year as follows:

SPECIFICATION 1: On or about September 1, 2000, and September 24, 2010:

A) The [Petitioner] engaged in scheme by which the [Petitioner] used the address of a co-worker, namely School Aide Carmen Garcia:

1) To Enroll [Petitioner's] granddaughter ("student") into a Department of Education School, namely P.S.1 to avoid payment of out of state tuition for said student.

2) For [Petitioner's] granddaughter to receive services from P.S.1 for which she was not entitled.

B) The [Petitioner] acted in concert with others and with intent to defraud and/or deceive another namely the Department of Education by falsely making and/or completed a written instrument which is and/or calculated to become and/or represent if completed an instrument filed and/or required or authorized by law to be filed in or with:

1) A public office, namely the Department of Education.

2) A public office, namely P.S.1.

3) A public servant, namely the Pupil Accounting Secretary.

The DOE sought to terminate petitioner's employment.

As part of the agreement between the DOE and the United Federation of Teachers, compulsory arbitration was mandated and a hearing officer was selected to hold a hearing to determine the DOE's charges against petitioner. A pre-hearing conference was held on February 23, 2011. Hearings were held on March 10, 11, 13 and 31, and April 4 and 5, 2011. The DOE called five (5) witnesses: Special Commissioner Investigations ("SCI") Investigator James McCabe, School Principal Jorge Perdomo ("Principal" or "Perdomo"), Department of Education Placement Officer Rita Baboolal, Pupil Accounting Secretary Letrucee Holmes, and School Aide Carmen Garcia ("Garcia"). Petitioner testified along with her son, Jonathan Guzman, and April Bonilla, the mother of the student described above. The DOE's witnesses clearly described a scheme which was masterminded or orchestrated by Minerva Guzman to fraudulently use Garcia's residential address in the Bronx to register petitioner's granddaughter at P.S.1, the very school that petitioner was assigned to as a second grade teacher. Specifically, Garcia testified that Guzman asked her to use her home address to get Guzman's granddaughter placed in P.S.1. Garcia further testified that she

fulfilled Guzman's request and registered Guzman's granddaughter using her own address even though Guzman's granddaughter did not live with Garcia at that Bronx address. The adduced testimony showed that Guzman's granddaughter was ineligible for such placement in P.S.1 as it appeared she was actually living in New Jersey. As a result, the DOE was seeking to be reimbursed $35,000.00 for the cost of the education that Guzman's granddaughter received from the DOE. The Hearing Officer credited the above testimony of the DOE's witnesses. In contrast, the Hearing Officer found petitioner and her witnesses not credible. After a full evidentiary hearing, the Hearing Officer issued her Award finding that petitioner was guilty of both Specifications. The Hearing Officer imposed a penalty of termination from employment.

Vacature/Confirmation of an Arbitration Award

There is a strong public policy in New York State favoring arbitration as an efficacious method of dispute resolution. This policy is especially pronounced in the context of commercial matters as arbitration is routinely relied upon for an expeditious resolution of disputes by arbitrators with practical knowledge of the subject area. *(Matter of Goldfinger v Lisker*, 68 NY2d 225 [1986].) Courts are reluctant to set aside arbitration awards even when arbitrators err in deciding the law or facts "lest the value of this method of resolving controversies be undermined." (68 NY2d at 231.) The policy favoring arbitration gives rise to judicial deference because "it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded." (Id.) Consistent with this strong public policy, there are few grounds for vacating or modifying arbitration awards and they are narrowly applied.

It is well settled law that courts must confirm an arbitration award pursuant to CPLR § 7510, unless there are grounds to vacate or modify the award pursuant to CPLR § 7511.

CPLR § 7511(b)(1) enumerates the following grounds for vacating an award where the parties participated in the arbitration:

> (i) corruption, fraud, or misconduct in procuring the award; or
>
> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
>
> (iii) an arbitrator, or agency or person making the award exceeded his [or her] 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 in this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

The grounds for modifying an award are set forth in CPLR § 7511(c) as follows:

> 1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or
>
> 2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
>
> 3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

Where a dispute has been arbitrated pursuant to an agreement between the parties, the award may not be set aside unless it violates a strong public policy, is totally irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power. (*Matter of Town of Callicoon* [*Civil Serv. Empls. Assn., Town of Callicoon Unit*, 70 NY2d 907, 909 [1987]); *Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100*, 14 NY3d 119, 123 [2010].)

Education Law § 3020-a, section 5, limits judicial review of a hearing officer's determination and award to the above grounds as set forth in CPLR § 7511. However, inasmuch as the parties are subject to compulsory arbitration, the award must also satisfy further judicial scrutiny in that it "must have evidentiary support and cannot be arbitrary and capricious." *(City School Dist. of the City of N.Y. v McGraham*, 17 NY3d 917, 919 [2011]) quoting *Matter of Motor Vehicle*

Accident Indemnity Corp. v Aetna Casualty & Surety Co., 89 NY 2d 214, 223 [1996].) The hearing officer's determination as to the credibility of witnesses is entitled to deference and is "largely unreviewable because the hearing officer observed the witnesses." (*Lackow v Department of Education of the City of New York*, 51 AD3d 563, 568 [1st Dept 2008]). The judicial review, therefore, partially implicates application of both Article 75 and 78 of the CPLR.

Arguments

Petitioner argues that the Hearing Officer's decision was irrational and arbitrary and capricious because there was no evidence of misconduct showing that the petitioner concocted a scheme with Garcia to inappropriately place petitioner's granddaughter at P.S.1. More significantly, petitioner claims that the Hearing Officer impermissibly focused on petitioner's lack of remorse for not admitting to the alleged misconduct which petitioner continues to deny through this day. Petitioner also posits that she has suffered unequal treatment because Garcia was not charged with misconduct. Therefore, petitioner concludes that the penalty is excessive and shocking to the conscience, and should be vacated and remanded for a lesser penalty other than termination.

Arbitrary and Capricious Standard

As stated above, inasmuch as the parties are subject to compulsory arbitration, the Award must also satisfy further judicial scrutiny in that it must have evidentiary support and cannot be arbitrary and capricious. In a lengthy thirty-nine page Award, the Hearing Officer engaged in a thorough analysis of the specifications or charges, the positions of the parties, the facts and circumstances, and then made reasonable findings based on the credibility of the witnesses to support the Award. Thus, the Hearing Officer's determination of credibility was supported by the factual record and was not arbitrary and capricious. (*Lackow*, 51 AD3d at 568.)

Penalty

The courts may review and set aside a penalty imposed after a hearing pursuant to Education Law § 3020-a "only if the measure of punishment or discipline imposed is so disproportionate to the offense, in light of all the circumstances, as to be shocking to 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 222 [1974] citing to *Matter of Stolz v Board of Regents*, 4 AD2d 361, 364 [1957]). The Court of Appeals then explained this subjective standard in the following manner. The penalty is deemed shocking if it is "disproportionate" to the "harm or risk" to the agency or institution or to the public at large. *Pell*, 34 NY2d at 234. Other factors to be considered would be "deterrence" and "recurrence" by the individual charged and others who may repeat similar offenses. (*Id.*) The seriousness and deliberateness of the misconduct are to be weighed.

For instance, the Court of Appeals recounted that "habitual lateness" or "carelessness" involving substantial monetary loss would be treated less seriously than "larceny [and] bribery" even though it involved less money. (*Id.* at 234-235.) Moreover, the Court of Appeals highlighted serious offenses involving "grave moral turpitude and grave injury to the agency involved or to the public weal." (*Id.* at 235.) Indeed, where the misconduct was "deliberate, planned, [demonstrated] unmitigated larceny," the agency is entitled to impose an appropriate sanction to protect the "integrity and efficiency of their operations." (*Id.*)

In this case, the Hearing Officer found that petitioner engaged in the type of serious and deliberate misconduct that the Court of Appeals in *Pell* characterized as "grave moral turpitude and grave injury to the agency involved or to the public weal." The Hearing Officer found that petitioner asked Garcia to commit fraud against the DOE by registering Guzman's granddaughter

using Garcia's address even though Guzman's granddaughter did not live with Garcia at that Bronx address. The DOE alleged that said fraud resulted in a substantial monetary loss of $35,000.00 to educate petitioner's granddaughter.

While petitioner argues that the Hearing Officer erred in taking into account her lack of remorse and failure to take responsibility for her actions in imposing a penalty, the Appellate Division recently took into account these very same issues in deciding whether the penalty of termination of employment was appropriate. (*Cipollaro v New York City Dept. of Educ.*, 83 AD3d 543 [1st Dept 2011].) In *Cipollaro*, the First Department held, under facts strikingly similar to those in this case, that:

> There is no basis to disturb the Hearing Officer's determination that petitioner knowingly defrauded respondent of $98,000 over a two-year period by enrolling two of her children in New York City public schools while she and her family lived in Westchester County. . . . Considering petitioner's lack of remorse and failure to take responsibility for her actions, as well as the harm caused by petitioner's actions, the penalty of dismissal, even if there was an otherwise adequate performance record, cannot be said to shock the conscience.

(*Id.*)

To somehow allay the seriousness of petitioner's misconduct, petitioner claims that she has suffered unequal treatment because conspirator Garcia was not charged with misconduct. To the contrary, as a result of participating in the scheme to defraud the DOE, Garcia was forced to resign her employment as a school aide effective June 28, 2011. (See letter of Jorge Perdomo dated February 14, 2011 to Carmen Garcia, and counter-signed by her on February15, 2011, which was attached as an exhibit to the back of voluminous record introduced by petitioner and referenced in the transcript of closing arguments on April 5, 2011, at pages 631-633).

Based on the above, it is cannot be said that the penalty imposed by the Hearing Officer against the petitioner is either shocking to the conscience or disproportionate to the charged offenses.

Conclusion

Accordingly, it is

ORDERED and ADJUDGED, that the petition is denied and the proceeding is dismissed with prejudice; and it is further

ORDERED and ADJUDGED, that the cross-motion is granted to the extent of confirming the Award rendered in favor of respondent and against petitioner.

The foregoing constitutes the decision and order of this Court. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: February 29, 2012
New York, New York

Hon. Shlomo S. Hagler, J.S.C.