[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JUDITH J. GISCHE, J.S.C.

PRESENT: _____ **PART** 10

-Index Number : 104886/2011
AJELEYE, JOSEPH
VS
NYC DEPARTMENT OF EDUCATION
_Sequence Number : 001
TI ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001

N _____ | **No(s).** _____
Answering Affidavits — Exhibits _____ | **No(s).** _____
Replying Affidavits _____ | **No(s).** _____

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION, order + judgment

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

Dated: March 13, 2012

_____, J.S.C.
JUDITH J. GISCHE, J.S.C.

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** ..... Cross **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: IAS PART 10

----------X

In the Matter of the Arbitration and Certain Controversies Between

JOSEPH AJELEYE,

Petitioner,

For an Order Pursuant to Article 75 and 78 of the CPLR

- against-

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK AND THE CITY OF NEW YORK, and, DAVID HYLAND, HEARING OFFICER,

Respondents.

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Decision, Order and Judgment
Index No.: 104886/11
Seq No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Not of Pet and Pet w/SLK verif, exhs	1
Notice of x/m (dismiss) w/SK affirm, exhs	2
Pet opp to x/m and further support	3
Resps' reply and further support w/SK affirm . . .	4

JUDITH J. GISCHE, J.:

Petitioner Joseph Ajeleye moves, pursuant to CPLR 7511, for an order vacating an arbitration award made after a disciplinary hearing held pursuant to Education Law § 3020-a, in which petitioner was terminated from his employment with respondent The Department of Education of the City of New York (the DOE). The DOE, The City School District of the City of New York and the

City of New York[1] (collectively, DOE) cross-move to dismiss the petition, pursuant to CPLR 3211 (a) (7), 404 (a), and 7511. The DOE also seeks an order confirming the award, pursuant to CPLR 7511 (e).

BACKGROUND AND FACTUAL ALLEGATIONS

Up until his termination from employment in April 2011, petitioner worked as a Chemistry teacher at a high school in New York, New York. Petitioner was a tenured employee, and had been working for the DOE since 1997.

For the 2008-2009 school year, pursuant to Education Law § 3020-a, the DOE served petitioner with "specifications," or charges, alleging that, within the school year, petitioner "engaged in verbal abuse, inappropriate conduct, and conduct unbecoming to his profession." DOE's Exhibit A, Hearing Officer's Opinion and Award, at 2. The DOE charged petitioner with three specifications, two of which are as follows:

> Specification 1: On or about and between September 2008 through January 2009, Respondent referred to student(s) as being:
> a) Liar(s).
> b) Animal(s).
> c) Cheater(s).
> d) Niggers(s).
> e) Bums(s).
> f) Ghetto.
> g) Lazy.
>
> Specification 2: On or about and between September 2008

[1] Petitioner incorrectly proceeds against the City of New York, which is not a proper party in this proceeding.

through January 2009, Respondent stated in sum and substance to students that:
a) In his country people are more dedicated.
b) Americans are lazy.
c) Black Americans are lazy.
d) Americans are spoiled.
e) Americans have no values.
f) Africans are going to take over.
g) Africans are from the Motherland and have not forgotten their cultural roots in contrast to ignorant Black Americans.
h) Africans have better study habits.
i) Nigerians are smarter than you.
j) Africans are better in Math and Science.
k) My dogs could do math and science better than you.
l) You Americans are liars and cheats.

Id. at 2-3. The third specification alleged that petitioner read the students' grades out loud in the classroom.

Pursuant to Education Law § 3020-a, a hearing began on December 16, 2010 to determine the outcome of the charges. Hearing Officer E. David Hyland, Esq. (Hearing Officer Hyland) was appointed to preside over the proceedings.

A pre-hearing conference took place on December 16, 2010. After this date, the DOE served petitioner with additional charges, alleging that petitioner engaged in "insubordination, neglect of duty, and conduct unbecoming his profession." *Id.* at 4. These specifications were consolidated into the same hearing, and an additional pre-hearing conference took place on January 14, 2011.

Petitioner did not want the charges consolidated, claiming that he was not given time to review the additional charges. Despite the objection by petitioner to consolidation of the

charges, Hearing Officer Hyland decided that it was proper, pursuant to the parties' collective bargaining agreement, to consolidate the charges. The Hearing Officer believed that, because both sets of charges included misconduct, rather than incompetence, petitioner would not be prejudiced, nor would he be denied a fair hearing on the charges. The Hearing Officer additionally maintained that petitioner's counsel would be permitted to have additional time, if necessary, to review the new materials provided to her. One of the additional specifications, which is representative of the others, is listed as follows:

> Specification 3: On or about December 18, 2008, Respondent prevented Assistant Principal Jennifer Hodge from serving an observation of his class by engaging in the following misconduct:
> 1. blocking access to the classroom.
> 2. grabbing the observation report document.
> 3. ripping up the observation report document.
> 4. throwing the observation report into the garbage.
> 5. pointing his middle finger toward Assistant Principal Hodge.
> 6. slamming the door in Assistant Principal Hodge's face.

Id. at 4.

A hearing took place over six days, where both parties were entitled to examine and cross-examine witnesses and submit evidence. In his decision, Hearing Office Hyland indicated that this case began with complaints by parents about verbal abuse and grading techniques. He continued that the school's principal initiated an investigation by contacting the Office of Special

Investigations (OSI).

Among other witnesses, Hearing Officer Hyland heard testimony from Assistant Principal Hodge (Hodge) with respect to the insubordination charges. For instance, Hodge testified that prior to conducting an observation of petitioner, she attempted to notify petitioner with a written notice to attend a pre-observation conference. According to Hodge, when she gave the notice to petitioner, in front of another witness, petitioner crumpled up the paper and threw it in the garbage. Hodge continued that, after she actually observed his classroom, she attempted to give him an observation report. As she attempted to give him the report, petitioner "ripped up the document in front of [her] and said words to the effect 'why are you so desperate? You are not getting enough?' while pointing at her with his middle finger." *Id.* at 15. When she walked away, petitioner slammed the classroom door shut.

Hodge also testified that petitioner refused to meet with some parents who requested conferences with him. These parents also complained about petitioner and asked that their children be removed from his class.

Hodge recalled an incident where one of petitioner's students requested to use the bathroom. Petitioner refused to allow the student to use the bathroom. The student, who had been diagnosed with cancer, could not wait and left the classroom to

use the bathroom. She was denied access back into the classroom when she returned. The student then returned back to the classroom with the Dean, who explained to petitioner why the student left the classroom and demanded that petitioner allow the student back into the classroom. Petitioner refused to allow the student back into the classroom, stating that she would disrupt the class. When the student entered the classroom, petitioner walked out.

Among other witnesses, five students provided testimony regarding petitioner's behavior in the classroom. By way of example, one of the students testified that if a student was being loud and not working, petitioner would ask, "why are you guys so lazy? You're supposed to be doing your work ... and students in Africa would appreciate education more ... unlike you guys who are so spoiled." *Id.* at 27. This student recalled the incident where the fellow student was not allowed to use the bathroom. He also recalled that petitioner used to call students "ghetto" and also used to tell the students that they were "liars and cheaters." *Id.* at 28.

In his defense, a student testified that they never heard petitioner make comments similar to "Nigerians are smarter." *Id.* at 47. Despite indicating that she did not learn any chemistry while in petitioner's classroom, the student also testified that she believed petitioner was a good teacher, and that if she did

not learn anything, it was due to the students' misbehavior in the classroom, not petitioner's teaching.

Petitioner denied most of the student allegations regarding his use of language. He continued that he never called a student a liar. Petitioner did mention that he compared schools in Nigeria to ones in America, but only when the students asked him about Africa. Petitioner explained that he grew up in a Nigerian village and moved to the United States in 1995. Petitioner did admit that he refused to attend a parent/teacher meeting, giving the reason that he did not want to miss lunch for this meeting.

With respect to the bathroom incident, petitioner responded that no one had ever told him anything about that student's particular need for the restroom. He testified that the principal stated to him, "I'll fire you today." *Id.* at 58. In response to ripping up documents from Hodge about her observations, petitioner contends that he asked for time to read the documents, and this request was denied.

Petitioner conceded that he did read the students' grades out loud in class but stated that he was asked by the students to do so. In response to the students' testimony, petitioner contended that all of these students had disciplinary or anger problems.

During the course of the hearing, among other things, counsel for petitioner maintained that Hearing Officer Hyland

should not be using the preponderance of the evidence standard, but must apply the clear and convincing evidence standard. Counsel also indicated that the principal did not deny making certain comments to petitioner, such as that petitioner should look for other work. Counsel continued that the OSI investigation was flawed and that the students' testimony was not credible.

Hearing Officer Hyland sustained some but not all of the specifications, using the preponderance of the evidence standard. He began by stating that, although he did believe that OSI conducted an imperfect investigation, it was fair and objective. He found that the testimony elicited from the student witnesses by both OSI and himself was credible. Hearing Officer Hyland did not find petitioner to be a credible or reliable witness, nor did he find petitioner's student's testimony to be credible.

Hearing Officer Hyland concluded that petitioner was "clearly on notice that Chancellor's Regulations exist ... ." *Id.* at 72. He continued with the following, in pertinent part:

> Some of the charged misconduct need not even reference a Chancellor's Regulation. Professionally trained teachers should be independently aware that referring to students as liars, animals, cheaters, niggers, bums, ghetto or lazy is at best a poor classroom management strategy and, more importantly, is discriminatory, degrading and insulting to students.

Id. at 72-73.

For each specification, Hearing Officer Hyland went through the facts as presented to him by both parties. He found that the DOE had proven most of the verbal abuse charges against petitioner. For example, for specification 2 (i), Hearing Officer Hyland set forth the following conclusions:

> i) Nigerians are smarter than you. J.R. testified that he heard [petitioner] address his class with this statement. M.R.'s hearsay statement was slightly different but tends to corroborate J.R.'s testimony. I credit J.R.'s testimony. Again, [petitioner] denied ever making such a remark. However, given the totality of [petitioner's] testimony, it is plausible he made such a statement. I conclude the remark was made and, accordingly, this sub specification is sustained.

Id. at 79.

Hearing Officer Hyland also noted that where he found misconduct, he "did so because the evidence met a preponderance standard and was actionable conduct based on the applicable regulations and ordinary standards if conduct expected of Teachers." *Id.* at 74. Hearing Officer Hyland also concluded that, given the testimony, it was clear to him that petitioner was insubordinate.

In his determination, Hearing Officer Hyland explained how the cases cited by counsel for petitioner were not applicable to the present situation. On March 31, 2011, Hearing Officer Hyland determined that petitioner should be terminated from his teaching

position as a result of the charges. In his comprehensive 93-page determination, he concluded by stating:

> I do not believe [petitioner's] behavior will improve if he is returned to a classroom. The proven misconduct warrants dismissal from service.
> Again, for clarity's sake, the sub specifications I have found proven and actionable constitutes [*sic*] just cause for discipline, including dismissal from service under Education Law Section 3020-a, conduct unbecoming [petitioner's] position or conduct prejudicial to the good order, efficiency, or discipline of the service and neglect of duty in addition to being in violation of cited Chancellor's regulations.

Id. at 92.

Petitioner contends that he received the determination on April 13, 2011. Shortly thereafter, petitioner filed this instant proceeding, both under Article 75 and 78, seeking to vacate the award and returning the petitioner to his teaching position. Among other things, petitioner contends that the decision should not be upheld by the DOE as it was rendered to him after the 30-day time limit set forth in Education Law § 3020-a (4) (a). Petitioner further alleges that Hearing Officer Hyland improperly used the standard of preponderance of the evidence. Petitioner claims that the DOE was supposed to conduct a public meeting after the Hearing Officer's decision had been rendered. Petitioner additionally maintains that the Hearing Officer did not take into consideration the principal's bias

and/or vendetta against petitioner. Furthermore, the penalty of termination was allegedly too harsh, given petitioner's unblemished record.

Petitioner mentions many alleged violations of his due process, including the fact that he was unable to prepare for the second set of specifications. He also alleges that many of the letters used as evidence were not part of the file. Petitioner further claims that the OSI investigation was biased.

DISCUSSION

In an effort to "foster the use of arbitration as an alternative method of settling disputes," the court's role in reviewing an arbitrator's award is "severely limited." *Matter of Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO (Albany Hous. Auth.)*, 266 AD2d 676, 677 (3d Dept 1999), quoting *Matter of New York State Department of Taxation & Finance [Public Employees Fedn]*, 241 AD2d 780, 781 (3d Dept 1997); *see also Matter of Goldfinger v Lisker*, 68 NY2d 225, 230 (1986). Pursuant to Education Law § 3020-a (5), CPLR 7511 provides the basis of review of an arbitrator's findings. *Lackow v Department of Education (or "Board") of City of N.Y.*, 51 AD3d 563, 567 (1st Dept 2008). CPLR 7511 limits the grounds for vacating an award to "misconduct, bias, excess of power or procedural defects [internal quotation marks and citation omitted]." *Id.*

However, where, as here, the parties are subjected to compulsory arbitration, the Appellate Division, First Department, has held that judicial scrutiny is greater then when parties voluntarily arbitrate. *Id.* The arbitration award 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." *Id.*[2] The burden of showing an invalid award is on the person challenging the award. *Id.*

Alleged Procedural and Due Process Violations:

Many of petitioner's problems with the determination stem from alleged administrative/procedural violations. For example, petitioner believes that the investigations into his misconduct were not done properly since they were instigated by the principal. He further maintains that he was never summoned to the principal's office after the allegations of verbal abuse. Since he was never made aware of these allegations, he could never respond in writing. He mentions secret files that he was not aware of, which were allegedly introduced for the first time at petitioner's hearing. According to petitioner, the introduction of these allegedly secret files at the hearing, as well as the second set of charges, purportedly violated

[2] Nevertheless, petitioner's appeal is correctly brought pursuant to CPLR 7511, not 78. *See* Education Law § 3020-a (5).

petitioner's due process.

At the start of the hearing, Hearing Officer Hyland decided to consolidate all of the charges since they were similar and it would not be violative of petitioner's collective bargaining agreement. "The notice due process requires is notice reasonably calculated, under all of the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections." *People v Ramos*, 85 NY2d 678, 683-684 (1995). Counsel for petitioner was advised that she would be able to take additional time, if necessary, to review the new discovery. As such, the court finds that the petitioner was not prejudiced in any way and was not deprived of due process.

Hearing Officer Hyland did acknowledge that the OSI investigation had some flaws, but that it was fair and objective. He also mentioned petitioner's objections to other alleged secret files. Upon review of the record, the court does not find that the DOE nor the arbitrator committed any administrative violations during the course of petitioner's investigations and hearings. Moreover, "courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise." *Matter of Peckham v Calogero*, 12 NY3d 424, 431 (2009).

Petitioner additionally maintains that Hearing Officer Hyland should have applied the clear and convincing evidence test to his hearing. However, petitioner is mistaken. As set forth by the Court of Appeals, "[p]reponderance of the evidence, and not substantial evidence, is the proper standard of proof to be applied by a hearing panel in determining whether disciplinary charges brought pursuant to Education Law § 3020-a have been established." *Matter of Martin v Ambach*, 67 NY2d 975, 977 (1986).

As such, petitioner cannot establish a valid ground for vacating the award due to administrative or procedural violations.

The Findings Were Rational and Were Not Arbitrary and Capricious:

Petitioner claims that Hearing Officer Hyland's determination was irrational and arbitrary and capricious. Specifically, petitioner contends that the principal was biased against petitioner and that there was insufficient evidence to find that petitioner had committed any of the specifications. All of these issues were presented to the Hearing Officer and discussed by him as part of the determination.

An action is considered arbitrary and capricious "when it is taken without sound basis in reason or regard to the facts." *Matter of Peckham v Calogero*, 12 NY3d at 431. An arbitration

award is considered irrational if there is "no proof whatever to justify the award ... ." *Matter of Peckerman v D & D Associates*, 165 AD2d 289, 296 (1st Dept 1991).

Applying both standards to the present case, it was not irrational for Hearing Officer Hyland to terminate petitioner based on the testimony and evidence. After Hearing Officer Hyland reviewed the record and listened to testimony, he determined that petitioner was guilty of some specifications but not others. Hearing Officer Hyland, in his lengthy determination, went through every specification and sub part and explained both parties' arguments and why he believed they could be substantiated or not. Petitioner was found guilty of verbal abuse, specifically referring to his students as "liars, cheaters, niggers, bums, ghetto and lazy." Petitioner did not deny refusing to meet with a parent, refusing to take an observation report from Hodge, refusing to allow a student to return to the classroom after his supervisor instructed that he do so, and reading his students' grades out loud, among other things.

Hearing Officer Hyland did not find the petitioner to be a reliable witness, nor did he find the student testimony on petitioner's behalf to be credible. After listening to the other administrative professionals and students who were familiar with

petitioner, Hearing Officer Hyland credited their testimony, including the testimony of the principal, as to petitioner's direct violations of the Chancellor's Regulations and other common-sense professional ideals prohibiting verbal abuse and misconduct. It is well settled that a hearing officer has the authority to determine the credibility of the witnesses. As the Court stated in *Lackow v Department of Education (or "Board") of City of N.Y.* (51 AD3d at 568), "[a] hearing officer's determinations of credibility, however, 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 form an impression of either candor or deception [internal quotation marks and citation omitted]."

Termination Appropriate and Not Shocking:

An administrative sanction, such as petitioner's punishment, "must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." *Matter of Featherstone v Franco,* 95 NY2d 550, 554 (2000). Petitioner argues that the penalty of termination is shocking since he had an unblemished record and he was a dedicated professional.

However, this court does not conclude that the penalty of

termination shocks one's sense of fairness. Hearing Officer Hyland was aware of petitioner's prior service before issuing his decision that petitioner should be terminated. Nevertheless, he recommended that petitioner's behavior and misconduct warranted termination. After reviewing the record and listening to testimony, Hearing Officer Hyland concluded that he did not believe that petitioner's behavior would improve if petitioner was returned to the classroom. As one Court noted, "even a long and previously unblemished record does not foreclose dismissal from being considered as an appropriate sanction [internal quotation marks and citations omitted]." *Matter of Rogers v Sherburne-Earlville Central School District*, 17 AD3d 823, 824-825 (3d Dept 2005).

Award Will Not Be Vacated For Delay:

Petitioner argues that, since he received his decision after 30 days from the last date of the hearing, the decision does not comply with Education Law § 3020-a (4) (a), and must not be considered by the DOE. Education Law § 3020-a (4) (a) states, in pertinent part, "[t]he hearing officer shall render a written decision within thirty days of the last day of the final hearing ... ."

Section 7507 of the CPLR, which governs the arbitrator's award in question, states the following, in pertinent part:

> the award shall be in writing, signed and affirmed by the arbitrator making it within the time fixed by the agreement, or, if the time is not fixed, within such time as the court orders. The parties may in writing extend the time either before or after its expiration. A party waives the objection that an award was not made within the time required unless he notifies the arbitrator in writing of his objection prior to the delivery of the award to him.

In the present case, the hearing concluded on February 9, 2011. Hearing Officer Hyland rendered his decision on March 31, 2011. Petitioner received this award on April 13, 2011. Petitioner does not provide evidence, nor even allege, that he notified Hearing Officer Hyland of his objection prior to the delivery of the award, pursuant to CPLR 7507. As such, the award cannot be vacated on this premise.

Award Upheld:

Accordingly, petitioner's request to vacate the award is denied in its entirety, and the DOE's cross motion to dismiss the petition, and to confirm the arbitration award, is granted.

The court has considered petitioner's other contentions and finds them without merit.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that the cross motion of the respondents The Department of Education of the City of New York, The City School District of the City of New York and the City of New York, is granted in its entirety, dismissing the petition and confirming the arbitration award.

Dated: New York, New York
March 13, 2012

ENTER:

Hon. Judith J. Gische

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).