SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Index Number : 110190/2011
HAAS, DIANA
vs.
NYC BOARD/ DEPT. OF EDUCATION
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

INDEX NO. _____

MOTION DATE 12/12/2011

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/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

Motion sequence 001 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the cross motion to dismiss the petition is denied; and it is further

ADJUDGED that the petition is granted to the extent that the July 20, 2011 decision of hearing officer Joshua M. Javits is vacated, only to the extent of the penalty imposed, and the matter is remanded to a different hearing officer for a determination of the penalty, on the basis of the administrative record, taking no account of any evidence that petitioner sought to enlist the aid of her co-workers in relation to covering up the conduct charged in specification one; and it is further

ORDERED that counsel for respondent shall serve a copy of this order with notice of entry within twenty (20) days of entry on petitioner.

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

Dated: 4.9.2012

J.S.C.
HON. CAROL EDMEAD

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: IAS PART 35

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In the Matter of the Application of
DIANA HAAS,

Petitioner,

For a Judgment Pursuant to Article 75
of the C.P.L.R.

-against-

Index No. 110190/11

THE NEW YORK CITY BOARD/DEPARTMENT OF
EDUCATION,

Respondent.

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CAROL R. EDMEAD, J.S.C.:

Petitioner Diana Haas brings this proceeding pro se, pursuant to Education Law § 3020-a and CPLR 7511, to vacate the July 20, 2011 decision of hearing officer Joshua M. Javits terminating her. Respondent The New York City Board/Department of Education (Board) cross-moves to dismiss the petition.

The Board charged petitioner, a then-tenured teacher at P.S. 270 in Queens, with two specifications arising out of an incident that occurred on October 29, 2009. The first specification alleged that petitioner pulled a chair out from underneath student A (K.), told him to sit on the floor, and then repeatedly kicked him. K., at that time, was a four-year-old boy with special needs. The second specification alleged that, on the same date, petitioner directed the other students in the class not to discuss what they had seen.[1] The Hearing Officer sustained both charges.

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[1] The Hearing Officer's statement of the specifications mistakenly refers to October 24, 2009, and includes a typographical error, stating the subject matter of the first specification as occurring in 2019.

Education Law § 3020-a (5) provides that a court's review of an application to vacate or modify the decision of a hearing officer is limited to the grounds set forth in CPLR 7511, the provision pertaining to review of arbitrators' awards. It is now established, however, that, because § 3020-a hearings are compulsory, the hearing officer's "`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.'" *City School Dist. of the City of N.Y. v McGraham*, 75 AD3d 445, 450 (1st Dept 2010), *affd* 17 NY3d 917 (2011), quoting *Lackow v Department of Educ. (or "Board") of City of N.Y.*, 51 AD3d 563, 567 (1st Dept 2008), citing *Motor Veh. Mfrs. Assn. of U.S. v State of New York*, 75 NY2d 175, 186 (1990).

As an initial matter, petitioner argues, citing *Matter of Garzilli v Mills* (250 AD2d 131 [3d Dept 1998]), that she was deprived of her right to due process, and that the Hearing Officer lacked authority to conduct the hearing, because the charges against her were preferred by the school's principal, rather than by a vote of the New York City Board of Education. Education Law § 3020-a (2) (a) provides that, where charges are made against a tenured teacher, "the employing board" is to determine by majority vote "whether probable cause exists to bring a disciplinary proceeding" against the teacher. In *Matter of Garzilli*, the Court held that the petitioner was entitled to a writ of prohibition barring the continuation of disciplinary proceedings against her, because, at the time that the superintendent of the community

school district in which the petitioner's school was located had determined that there was probable cause to charge the petitioner, Education Law § 2590-j (7) vested all authority with regard to trials of charges against tenured teachers in the school board of each community district, rather than in the superintendent.

However, in 1998, Education Law § 2590-h was amended to add subsection 38, which vested in the chancellor of the New York City school district the power and duty "[t]o exercise all of the duties and responsibilities of the employing board as set forth in [§ 3020-a] with respect to any member of the teaching ... staff of schools under the jurisdiction of the community boards." L 1998 c 385 § 5. Education Law § 2590-h (38) also provides that the chancellor "may delegate the exercise of all such duties and responsibilities to all of the community superintendents of the city district." On August 19, 2002, the chancellor delegated "to the community school district superintendents the authority to prefer charges against tenured pedagogical employees pursuant to Education [Law] section 3020-a ... ." Welikson Affirm., Exh. D. Education Law § 2590-f (1) (b) gives community superintendents the power "to delegate any of her or his powers and duties to such subordinate officers or employees of her or his community district as she or he deems appropriate ... ." On August 27, 2007, Lenon Murray, the community superintendent of community school district 29, which includes P.S. 270, delegated to each principal of a school within the district the power to "[i]nitiate and resolve charges against teaching ... staff members in your school who have

completed probation ... ." Welikson Affirm., Exh. E. Accordingly, the Hearing Officer was authorized to conduct the Education Law § 3020-a proceeding on the basis of the charges preferred by the principal of petitioner's school. *See Matter of Simons-Koppel v New York City Bd./Dept. of Educ.*, 2011 WL 3556808, 2011 NY Misc LEXIS 3905, 2011 NY Slip Op 32160(U) (Sup Ct, NY County 2011).

The fact that the respective delegations by the chancellor and by Mr. McMurray were authorized by statute does not foreclose petitioner's argument that her right to due process was violated by the delegation of the power to prefer charges to her principal. *But see Matter of Soleyn v New York City Dept. of Educ.*, 33 Misc 3d 1211(A), 2011 NY Slip Op 51897(U) (Sup Ct, NY County 2011) (delegation to principal did not violate due process, because ultimate fact finder was a neutral decision maker). However, although petitioner asserts that she and the principal had disagreements concerning the proper number of students in petitioner's class, and the allocation of funds to that class, and also contends that the administration of the school had an interest in forcing out highly paid teachers, petitioner does not contend that she did not receive adequate notice of the charges against her, or that the principal had no basis for making the charges. Accordingly, petitioner has not shown that her right to due process of law was violated by the delegation to her principal of the power to prefer charges.

Petitioner called no witnesses at her hearing, other than herself. Petitioner testified that, on the day of the incident,

she asked K. to sit in his chair properly, because he was dangling from it, with one hand in the air and the other on the floor. She then briefly left her classroom to call the parent of one of her students, and while she was on her phone in the hall, she heard screaming in her classroom. Upon re-entering, she found Almara Harris, one of the two paraprofessionals who worked with petitioner, standing by the sink in the back of the classroom and yelling, because K. had licked her.

Numerous witnesses called by respondent testified, however, that they encountered K., shortly thereafter, weeping uncontrollably and repeatedly crying out that petitioner had kicked him. In addition, Ms. Harris testified that K. was short for his age, and that when he sat his legs extended straight out from his chair, rather than bending at the knees. Accordingly, when he was agitated and fidgeted, his legs would strike whoever was in their path. Ms. Harris testified that, on the day of the incident, she heard petitioner scream "you're touching me with your feet again," and she had then seen petitioner pull K.'s chair out from under him and kick him repeatedly, after he had fallen to the floor. The other paraprofessional assigned to petitioner's class, Olinda Ramirez, testified that she had been working in another part of the room with a group of children, and had heard petitioner scream "Don't kick me. I told you not to kick me.," and shortly thereafter, "You're not sitting in your chair. You're just--now, just sitting on the floor." Ms. Ramirez then turned toward petitioner and saw K. getting up from the floor, trying to grab his

chair, putting one hand up in front of him in a fist and pointing with the other hand at petitioner while crying out "No more, Ms. Haas, No more." Welikson Affirm., Exh. B at 256-257.

With regard to specification two, Ms. Ramirez testified that student S. told her that petitioner had told the class that K. had been kicked by another student, and that they should not speak to anyone about what had happened.

Petitioner's main argument is that the Hearing Officer erred in crediting the evidence of respondent's witnesses, rather than hers. "It is basic that the decision by an Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts ... ." *Matter of Berenhaus v Ward*, 70 NY2d 436, 443 (1987). "`[C]redibility determinations are the province of the Hearing Officer.'" *Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 856, 857 (1st Dept 2011), quoting *Matter of D'Augusta v Bratton*, 259 AD2d 287, 288 ((1st Dept 1999). Here, the Hearing Officer found that the testimony of respondent's witnesses was credible and that petitioner's testimony was not credible. Those findings are sufficiently supported in the record of the administrative hearing for the court not to second-guess them.

Petitioner also argues that the Hearing Officer was biased against her, improperly based his award on hearsay, failed to issue the award within 30 days of the last day of the final hearing, as required by Education Law § 3020-a (5), and imposed a penalty shocking to the conscience.

An allegation of bias against an arbitrator must be established by clear and convincing proof. *Matter of Moran v New York City Tr. Auth.*, 45 AD3d 484 (1st Dept 2007); *Matter of Infosafe Sys. [International Dev. Partners]*, 228 AD2d 272 (1st Dept 1996). Petitioner's claim of bias rests on her assertions that the Hearing Officer sustained the charges, without any testimony by K.; that he refused to accept petitioner's full binder of "anecdotals," a book in which petitioner recorded behavioral problems of her students; and that he sustained the charges, although there was some evidence that, rather than petitioner having kicked K., K. had kicked petitioner, or another student had kicked K.

As stated above, K. was a four-year-old special-needs child. As discussed above, respondent introduced numerous witnesses who testified that they heard K. say that petitioner had kicked him, and one witness who testified that she had seen petitioner kicking K. Accordingly, the Hearing Officer had sufficient evidence upon which to base his determination, even in the absence of testimony from K. Moreover, petitioner could have subpoenaed K., had she believed that his testimony would have aided her. She did not do so.

With regard to the book of anecdotals, petitioner agreed to redact the book in order to protect the privacy of the students, other than K., and in order to protect K.'s privacy in regard to matters, such as his toilet habits, that were irrelevant to the proceeding. *See* Welikson Affirm., Exh. B at 1020-1021. As accordingly redacted, the anecdotals were admitted into evidence.

The fact that the Hearing Officer credited the testimony that petitioner had kicked K., although there was some evidence, in addition to petitioner's denial, that was at variance with that conclusion, is not evidence of bias, especially where there was testimony that the latter evidence had been suggested to the students by petitioner. In sum, petitioner has failed to show any partiality on the part of the Hearing Officer.

"`Hearsay evidence can be the basis of an administrative determination' and, if sufficiently probative, it alone may constitute substantial evidence." *Matter of Café La China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 281 (1st Dept 2007), quoting *Matter of Gray v Adduci*, 73 NY2d 741, 742 (1988). Here, numerous witnesses testified that K. repeatedly and agitatedly stated that petitioner had kicked him. Moreover, that hearsay evidence was corroborated by the testimony of Ms. Harris, summarized above.

CPLR 7507 provides, in relevant part, that "[a] party waives the objection that an award was not made within the time required unless [the party] notifies the arbitrator in writing of [the party's] objection prior to the delivery of the award to [the party]." Petitioner made no such notification. Moreover, the violation of a regulatory deadline for rendering a decision offers no grounds for substantive relief. *Matter of Dickinson v Daines*, 15 NY3d 571 (2010).

Turning, finally, to petitioner's challenge to the penalty that the Hearing Officer imposed, the court does not find

Matter of Murray v Murphy, 24 NY2d 150, 157 ((1969); *see also Wolfe v Kelly*, 79 AD3d 406 (1st Dept 2010); *Matter of Sulzer v Environmental Control Bd. of City of N.Y.*, 165 AD2d 270 (1st Dept 1991). Accordingly, the Hearing Officer's decision imposing the penalty of termination cannot stand, because it appears to be based, in significant part, on evidence of wrongdoing that was not charged.

Accordingly, it is hereby

ORDERED that the cross motion to dismiss the petition is denied; and it is further

ADJUDGED that the petition is granted to the extent that the July 20, 2011 decision of hearing officer Joshua M. Javits is vacated, only to the extent of the penalty imposed, and the matter is remanded to a different hearing officer for a determination of the penalty, on the basis of the administrative record, taking no account of any evidence that petitioner sought to enlist the aid of her co-workers in relation to covering up the conduct charged in specification one; and it is further

ORDERED that counsel for respondent shall serve a copy of this order with notice of entry within twenty (20) days of entry on petitioner.

Dated: April 4, 2012

ENTER:

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD