SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

In the Matter of the Application of
BERNADETTE CAMACHO,
Petitioner,

For a Judgment under 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.

INDEX NO. 105656/11

MOTION SEQ. NO. 001

The following papers numbered 1 to 6 were read on this motion by petitioner for a judgment pursuant to CPLR Article 75 and cross-motion by respondent to dismiss pursuant to CPLR 3211.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits		No(s). 1,2
Answering Affidavits— Exhibits		No(s). 3,4
Replying Affidavits — Exhibits		No(s). 5,6

Cross-Motion: ■ Yes ☐ No

Upon the foregoing papers, it is ordered that

Bernadette Camacho (petitioner) brings this application pursuant to CPLR 7511, seeking an order annulling a judgment and determination of Hearing Officer Paul S. Zonderman (Hearing Officer Zonderman), made after a hearing pursuant to Education Law § 3020-a, which terminated her employment at the New York City Department of Education (NYCDOE). Petitioner also seeks to be reinstated to the position of tenured teacher with the NYCDOE. The City of New York, NYCDOE, and Dennis Walcott, Chancellor of NYCDOE (collectively, respondents) bring a cross-motion to dismiss, pursuant to CPLR §§ 3211(a)(7), 404(a), 7511 on the basis that the petition fails to state a cause of action and that the City of New York is not a proper party to this proceeding. Petitioner is in opposition to respondents' cross-motion.

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

BACKGROUND

Prior to her termination, petitioner was a tenured social studies teacher since June 2004 and was assigned to Hillcrest High School in Queens, New York (Hillside). Petitioner had been a teacher for approximately ten years with one prior disciplinary proceeding on her record for the verbal abuse of her students, in violation of Chancellor's Regulation A-421, which was settled on May 12, 2010 by stipulation. As a result of the settlement, among other things, petitioner was reassigned from the Gateway School of Environmental Research and Technology in the Bronx to Hillside.

After petitioner was at Hillside for a few months, respondents commenced a disciplinary proceeding against her, pursuant to Education Law § 3020-a alleging, *inter alia*, that petitioner was verbally abusive to her students in her bilingual social studies class in violation of Chancellor's Regulation A-421. The charges against the petitioner were that "Specification 1: On or about December 17, 2010, the Respondent: screamed during class and called students a) stupid. b) carajo (fuck).[1] Specification 2: On or about December 20, 2010, the Respondent told students in her class they had their minds in their ass" (*see* Verified Petition, exhibit A, p. 4). Education Law § 3020-a(3) requires that when charges are filed against a tenured person, as in this case a tenured teacher, that a disciplinary hearing be conducted by a hearing officer selected from the American Arbitration Association. Hearing Officer Zonderman conducted the hearing over a period of approximately five days on March 25, 29, 30 and April 7, 8, 2011. Oral closing arguments took place on April 11, 2011 and supporting decisions were submitted by the parties at that time.

Chancellor's Regulation A-421 states that "[v]erbal abuse of students is prohibited" and defines the prohibited verbal abuse as *inter alia*, "language that tends to cause fear or physical or mental distress or language that tends to belittle or subject students to ridicule" (*id.* at 5). At the petitioner's hearing, both parties were represented by counsel and a transcript of the proceedings were made.

[1] The respondent asserts "carajo" means fuck, hell or damn" (*see* Verified Petition, exhibit A, p. 6, footnote 5).

Moreover, both parties produced witnesses, cross-examined witnesses, and according to Hearing Officer Zonderman, "were afforded full opportunity to produce evidence, and make argument [sic] in support of their respective positions" (*id.* at 2). Eight students, ages 14 through 16, from, *inter alia*, the Dominican Republic and Honduras, testified at the hearing and all but one used a Spanish Language interpreter. Students testified that petitioner screamed at them in Spanish and called them "stupid," used the word "cono"[2] and told them that they had their mind in their asses (*id.* at 5-11).[3] All of the students testified that the petitioner's abusive language toward them made them feel very bad (*id.*).

Hearing Officer Zonderman issued a 22-page Opinion and Award dated April 25, 2011, in which he concluded that petitioner was guilty of the specifications charged against her, that there is "substantial cause rendering [petitioner] unfit to perform her obligations to the service" and imposed the penalty of termination of petitioner's employment, which he asserted was "mandated" (*id.* at 19). Significantly, Hearing Officer Zonderman notes that in imposing this penalty he appropriately considered the previous 3020-a discipline of petitioner, initiated due to petitioner's emotional outbursts deemed abusive to former students in violation of Chancellor's Regulation A-421. The prior disciplinary proceeding was settled between the parties via a Stipulation of Settlement dated and signed by petitioner on May 12, 2010. Pursuant to the stipulation petitioner was fined $6,500.00 and reassigned to a different school, and the stipulation also required petitioner to engage in ongoing treatment with a therapist or psychiatrist of at least four sessions each month for a period of one year (*id.*). Moreover, petitioner agreed in the Stipulation of Settlement that if she was ever brought up on an Education Law 3020-a charge for a violation of Chancellor's Regulation A-421 and if she was found guilty of such a

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[2] The respondent's interpreter informed Hearing Officer Zonderman in an "off-the-record discussion," which Hearing Officer Zonderman then reiterated on the record, that the word "cono" has several meanings, depending on one's country of origin, including "fuck," "go to hell," "damn," "fanny" or "jerk" (*see* Verified Petition, exhibit A, p. 6, footnotes 5, 6, and 7).

[3] One student, BE-B, testified in English that after being late to class, respondent said "stupid" and "carajo." (*see id.*, p. 9).

violation by a hearing officer, the penalty imposed would be the termination of her employment (*id.*). Pursuant to Hearing Officer Zonderman's decision, petitioner was terminated from her employment with the New York City Department of Education.

In her Verified Petition, petitioner challenges Hearing Officer Zonderman's decision claiming it was defective because: (1) the hearing officer's disposition imposed excessive and unwarranted punishment for the allegations; (2) it was irrational, arbitrary and capricious; and (3) the disposition shocks the conscience of the Court (*see* Verified Petition, p. 8, ¶ 28). Respondents cross-move to dismiss the petition, pursuant to CPLR §§ 3211(a)(7), 404(a), and 7511.

DISCUSSION

Pursuant to Education Law § 3020-a(5), a petition to vacate the determination of a hearing officer requires that the Court apply the standard set forth in CPLR 7511. The standard for granting a petition pursuant to CPLR 7511, is that there must be a "showing of misconduct, bias, excess of power, or procedural defects" (*Austin v Board of Educ. of City School Dist. of City of N.Y.*, 280 AD2d 365, 365 [1st Dept 2001]; *see also Matter of Hegarty v Board of Educ. of the City of New York*, 5 AD3d 771 [2d Dept 2004]). An arbitrator's award can be set aside if it violates strong public policy, is totally irrational, or exceeds a specifically enumerated limitation on the arbitrator's power (*see Frankel v* Sardis, 76 AD3d 136, 139 [1st Dept 2010]; *Matter of Hegarty*, 5 AD3d at 773). The petitioner has the burden of proof to show that the arbitrator's decision is invalid *(see Lackow v Department of Educ. (Or "Board") of City of N.Y.*, 51 AD3d 563, 568 [1st Dept 2008]).

Upon a review of all the papers submitted, the Court finds that petitioner has not met her burden of proof of establishing that Hearing Officer Zonderman's decision violated public policy, was totally irrational, or exceeded a specifically enumerated limitation on the arbitrator's power. The Court finds that Hearing Officer Zonderman's decision to terminate the petitioner was rational in light of, among other things, the testimony of the eight students, the testimony of petitioner, the testimony of

Principal Stephen Duch, the documentary evidence submitted, and in light of the previous disciplinary proceeding against petitioner, in which she was placed on notice that she would be terminated from her employment if found guilty of violating Chancellor's Regulation A-421. Moreover, petitioner has failed to present facts tending to show that the arbitrator was biased, acted in excess of his power, or that he violated petitioner's due process rights. The Court finds that petitioner's arguments in support of her petition are without merit and have no support in the record.

Accordingly, it is

ORDERED that petitioner's application pursuant to CPLR 7511 and Education Law § 3020-a is denied; and it is further,

ORDERED that respondent's cross-motion to dismiss pursuant to CPLR §§ 3211(a)(7), 404(a), and 7511, is denied as moot; and it is further,

ORDERED that the respondents shall serve a copy of this order with notice of entry upon the petitioner and upon the Clerk of the Court, who is directed to enter judgment accordingly.

Dated: 3-30-12

PAUL WOOTEN, J.S.C.

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☐ GRANTED ■ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE