[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JUDGE GEOFFREY D WRIGHT

PRESENT: _____ **PART** 62

Justice

Index Number : 102551/2012
SALZ, MAXINE
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
VACATE STAY/ORDER/JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to 3 **, were read on this motion to/for** vacate ~~arbitrators~~ hearing officer decision

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	**No(s).** 1
Answering Affidavits — Exhibits _____	**No(s).** 2
Replying Affidavits _____	**No(s).** 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed hereto decision.

FILED
OCT 23 2012
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/16/12

GEOFFREY D. WRIGHT
AJSC

_____, 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

----------x

In the Matter of the Application of

MAXINE SALZ,

Index # 102551/2012

Petitioner,

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

DECISION

Respondents,

To vacate a Decision of Hearing Officer Pursuant to Education Law Section 3020-a and CPLR Section 7511

Present:
Hon. Geoffrey D. Wright
Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order to renew and to vacate.

Motion and Affidavits Annexed.....
Order to Show Cause and Affidavits Annexed
Answering Affidavits.....
Replying Affidavits.....
Exhibits.....
Other.....cross motion.....

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Petitioner, Maxine Salz ("Petitioner") formerly employed by the New York City Department of Education ("DOE") is a tenured Special Education teacher at Public School 181 ("P.S. 181") or the Brookfield School, located in District 29, in Queens, New York. On April 27, 2012 Petitioner commenced this proceeding pursuant to New York State Education law §3020-a(5) and New York Civil Practice law and Rules ("CPLR") §7511 seeking an order vacating the Opinion and Award of Hearing Officer Alan Berg ("Berg") dated April 6, 2012, which was issued after a hearing on disciplinary charges against Petitioner by the DOE. At the conclusion of the hearing, Berg found Petitioner guilty of incompetency for failing to execute effective lesson plans and manage classroom behavior. The Petitioner contends that (1) Berg's Opinion and Award was irrational, arbitrary and capricious given the subjective nature of the evidence;

(2) the penalty of termination shocked the conscience given Petitioner's long period of 14 years of service with the DOE, her marked teaching improvement before being charged with incompetency, her lack of prior disciplinary history and the subjective nature of the incompetency charges made against Petitioner; (3) Berg exceeded his authority; and (4) there was a denial of due process. Moreover, Petitioner alleges that she was subjected to a new procedure know as Peer Intervention Plus (PIP), which, has resulted in 90% of mentor teachers hired and paid by the DOE testifying that tenured teachers are incompetent at their 3020-a hearings. Respondents, The New York City of Education ("DOE") cross moves to dismiss the entire petition pursuant to sections §404(a), §7511, and §3211(a)(7) of the CPLR.

BACKGROUND

Petitioner is a licensed Special Education teacher formerly employed by DOE at P.S. 181 Brookfield School, located in District 29, in Queens, New York. During the 2008-2209 school year Petitioner taught kindergarten and first-grade for the school year 2009-2010. The following school years in 2010-2011 and 2011-2012 Petitioner taught third and fourth grade students respectively and taught an Interactive Collaborative Teaching (ICT) class-a program that pairs a special education teacher with a general education teacher in a classroom with both classifications of students. Petitioner was supervised by Assistant Principal Guissepina Napolitano ("Napolitano") and Principal Andrea Belcher ("Belcher").

At the conclusion of the 2008-2009, 2009-2010, and 2010-2011 school years, Petitioner received a total of seven unsatisfactory performance observations from both Belcher and Napolitano. Petitioner's unsatisfactory ratings were based upon a number of formal evaluations, which were documented by both of the Petitioner's supervisors. Belcher conducted five of the observations, four of which were formal observations with a pre-observation conference. Napolitano conducted two remaining observations. The majority of the observations involved assistance from paraprofessionals and a class size of a few students.

On or about January 2012, Petitioner was charged with incompetence, inefficient service, neglect of duty, insubordination, and unwillingness and/or inability to follow procedures and carry out normal duties, and engaging in misconduct during the 2008-2009, 2009-2010 and 2010-2011 school years. Specifically, the allegations were as follows:

> Specification 1: Petitioner failed to properly adequately, and/or effectively plan and/or execute separate lessons observed on each of the following dates:
>
> a) March 7, 2011;
> b) March 2, 2011,
> c) February 15, 2011;
> d) November 4, 2010;
> e) October 25, 2010;

f) October 6, 2010;
g) June 24, 2010;
h) May 20, 2010;
i) January 29, 2009;
j) March 26, 2010;
k) May 18, 2009;
l) November 24, 2009;
m) October 15, 2008; and
n) September 26, 2011.

Specification 2: Petitioner failed to timely properly and/or adequately manage her class, used poor judgment, and/or acted unprofessionally in that she kneed a student and/or told him to "shut up," on November 6, 2009.

Specification 3: Petitioner failed to timely, properly, and/or adequately manage class, used poor judgment, and/or acted unprofessionally in that she pulled a student across a classroom, on November 6, 2009.

Specification 4: Petitioner failed, during the 2008-2009, 2009-2010 and 2010-2011 academic years, to accept and/or heed advice, counsel, instruction, remedial professional development and/or recommendations and professional development from observation conferences and meeting with school staff with regard to:

a) Effective instructional management;
b) Effective use of instructional time;
c) Effective classroom instruction; and
d) Effective lesson construction, planning and execution; and
e) Effective classroom management.

Specification 5: During the 2008-2009, 2009-2010, 2010-2011 and 2011-2012 school years, Petitioner failed to properly or effectively manage and/or supervise her classroom.

A hearing was scheduled pursuant to Education Law §3020-a in which Hearing Officer Berg ("Berg") presided. A pre-hearing conference was held on January 23, 2012, and the matter was heard over the course of six dates: January 30, 2012, February 2, 2012, February 9, 2012, February 10, 2012, February 14, 2012 and February 15, 2012. Both parties were represented by counsel and were able to present their cases. Belcher, Napolitano and Dr. Rochelle Hendlin ("Dr. Hendlin") Petitioner's PIP Plus Observer, testified for the DOE. Petitioner testified on her own behalf. On April 6, 2012, Berg rendered a twenty-eight page Opinion and Award. Berg dismissed

five subdivisions (a), (c), (d), (f), and (j) of specification 1 because they were based on unrated observations but found that the DOE had proven specification 1(e), (g), (h), (k), (l), and (n). Specification 2 was withdrawn. Specification 3 was dismissed as Berg found that the record did not support a finding that Petitioner had engaged in any misconduct. Specification 4 (a), (b), (c) and (d) were dismissed as Berg found that although the DOE provided Petitioner with adequate support and training, the record did not support the conclusion that Petitioner failed to accept or heed the support. For Specification 5, classroom management, Berg found that "the record established that Petitioner's classroom management skills are severely deficient." Berg stated:

> ***"I do not believe that it is possible that Respondent ever possessed the ability to manage a classroom effectively. She lacked that basic ability more than ten years ago when she was granted tenure. Like so many of these cases of alleged incompetence we are here today because some time in the past a school principal granted tenure to a teacher who lacked basic fundamental teaching skills."***
>
> ***"the record established that Respondent's performance has been unsatisfactory particularly in the area of classroom management and that she has appropriately been given three consecutive unsatisfactory annual evaluations by a principal who treated her fairly."***

Berg found that DOE met its burden with respect to providing Petitioner with sufficient training and support to correct deficiencies in her performance. Additionally, Berg stated that

> ***"the record is clear that Respondent was receptive to all suggestions and advice she received. It is equally clear that Principal Belcher sincerely wanted Respondent to succeed and saw to it that Respondent received much valuable support and training regarding strategies and techniques to achieve success."***

On April 27, 2012, Petitioner commenced the instant CPLR Article 75 proceeding seeking to vacate Berg's award.

DISCUSSION:

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 A.D.3d 445, 450, 905 N.Y.S.2d 86 (1st Dept. 2010) *aff'd* 17 N.Y.3d 917, 934 N.Y.S2d 768, 958 N.E.2d 897 (2011), *quoting* Lackow v. Depart of Educ. (Or "Board") of City of NY, 51 A.D.3d 563, 567, 859 N.Y.S.2d 52 (1st Dept. 2008), *citing* Motor Veh. Mfrs. Assn. Of U.S. v. State of New York, 75 N.Y.2d 175, 186, 551 N.Y.S.2d 470, 550 N.E.2d 919 (1990)). Under such review, the court may only vacate an arbitral award when the rights of a party in an

arbitration were prejudiced by corruption, fraud or misconduct in procuring the award or the partiality of the arbitrator (CPLR § 7511[b]; Lackow v. Department of Education, 51 AD3d at 563 [1st Dept. 2008]). CPLR § 7511[b] further provides that an award shall be vacated if the rights of that party were prejudiced by "misconduct, bias, excess of power or procedural defects" (Id. At 567).

First, Petitioner argues that Berg's opinion and award was irrational, arbitrary and capricious given the subjective nature of the evidence, the penalty of termination shocked the conscience given the Petitioner's long period of 14 years of service with the DOE, her marked teaching improvement before being charged with incompetency, her lack of prior disciplinary history and the subjective nature of the incompetency charges made against Petitioner. This argument is unfounded. The decision to terminate Petitioner was neither arbitrary and capricious or shocking to the conscious. Each of the sustained specifications was well supported by both documentary evidence and witness testimony. (Batyreva v. N.Y.C. Department of Education, 95 A.D.3d 792, 946 N.Y.S.2d 856, [1st Dept 2012] citing (Lackow v. Department of Educ. Of City of N.Y., *supra* at 567-568)). During the course of six hearing dates, Berg had the opportunity to engage in a thorough analysis of the facts, circumstances and evidence presented during the hearing. Each side was allowed to present their defenses, arguments, objections and to examine and cross-examine witnesses. In his twenty-eight page opinion, Berg clearly and thoroughly explains how he reached his decision to sustain Petitioner's termination. Throughout his opinion, Berg consistently gives references and analysis to witness testimony and evidence. In addition, Berg provides detailed explanations for sustaining or dismissing specifications. For an example, when finding Petitioner guilty of failing to properly or effectively manage and/or supervise her classroom, Berg stated:

> ***"The record in this case establishes that all of these statements are true with respect to this Respondent. There is no dispute that Respondent recognized that she needed to improve her performance, no dispute that she was receptive to advice to address this problem, no dispute that she tried to implement the advice that she was given, and no dispute that she showed some improvement. The only dispute is whether that improvement was significant enough to allow Respondent to keep her job."***
>
> ***"A teacher should not be labeled as incompetent because of a failure to prevent or stop every incident of disruptive behavior or the failure to manage one student successfully. However given the amount of staff support provided in this case it is reasonable to expect Respondent to limit the number of unsuccessful management incidents. You may not be able to manage all the students all of the time but you should be able to manage most of the students most of the time."***
>
> ***"The record establishes that Respondent's classroom management skills are severely deficient. I do not believe that it is possible that Respondent ever possessed the ability to manage a classroom effectively. She lacked that basic***

[*7]

ability more than ten years ago when she was granted tenure."

The DOE demonstrated that it provided Petitioner with sufficient training and support to correct deficiencies in performance. The Petitioner voluntarily participated in the PIP Plus, a program jointly created by the United Federation of Teachers and the DOE. Dr. Rochelle Hendlin ("Dr. Hendlin") was selected as Petitioner's observer and worked with Petitioner from April 22, 2010 to June 24, 2010. Dr. Hendlin, a retired teacher with 44 years of experience in the field of education met with Petitioner a total of ten times and provided support and training to Petitioner. To the extent Petitioner argues that Berg improperly relied on Dr. Hendlin's testimony in deciding to terminate Petitioner, this Court does not agree. In his decision, Berg acknowledged Petitioner's argument that the focus of Dr. Hendlin's training did not align completely with the concerns identified by Belcher and Berg dismissed all four subdivisions of specification 4 , failure to accept or heed advice. However, Berg found that the record supported a finding that Dr. Hendlin provided valuable support and training. Additionally, Belcher testified she made other staff members and district personnel available to Petitioner for training and support. These included; Constance Gallagher, a reading recover teacher whom Petitioner acknowledged, Dierdre Martin a network specialist, Marion Johnson, a Department supervisor for children with disabilities, Alice Scott, an administrative assistant and staff developer, Ms. Joyner, the lead teacher for kindergarten whom Petitioner acknowledged as "very helpful" and "a good resource," Dr. Kearse, a guidance counselor acknowledged by Petitioner to be a "resource"and Elaine Glenn who was Petitioner's co-teacher and colleague and not assigned to train Petitioner but nonetheless provided Petitioner with "consistent and much needed support."

Lastly, Petitioner argues there was a denial of due process in that the process by which Petitioner's employment was terminated is not in accord with due process and deprives Petitioner of her property interest in tenured employment, as the PIP Plus intervenor and DOE administrators act as the functional equivalent of the neutral hearing officer. As previously mentioned Petitioner argues that Berg improperly relied on some of Dr. Hendlin's testimony in reaching his decision but Petitioner fails to acknowledge that Berg dismissed all four subdivisions of specification 4 which was based primarily on the testimony and documents prepared by Dr. Hendlin. To the extent that Petitioner alleges an action under 42 U.S.C. §1983 because of the participation of DOE administrators and the PIP Plus observer as a witness, her claim fails. As previously mentioned, Petitioner who was represented by counsel, was granted a hearing, given equal opportunity to present witnesses, evidence, make arguments and objections. Hence, Petitioner was given an opportunity to defend herself against the charges and her property interest in tenured employment. (Sullivan v. Bd. of Educ., 131 A.D.2d 836, 838 (2d Dept. 1987)). This Court finds nothing in the record to support Petitioner's allegation she was denied due process.

This Court has found no evidence of a denial of Petitioner's due process. On the contrary, Berg considered the testimony, objections and evidence of both sides and evaluated Petitioner's and DOE's testimony and credibility. Indeed, Berg dismissed Specification 1 (a), (c), (d), (f), (j), Specifications 3 and 4 and fully lays out his reasons for doing so. There is nothing in the

evidence presented to this Court that proves Berg's opinion was based on anything other than the evidence presented during the hearing, as such, there is no reason to disturb the opinion and award. All of the defenses and arguments presented to the court in connection with this petition were raised before the Berg. As previously noted, Petitioner had an opportunity to present her case, cross examine witnesses and make objections. Petitioner testified about the observations made of her, when they were made and to present her side of the events that occurred. These claims were either rejected or accepted by Berg for the reasons he articulated in his award. Petitioner has identified no evidence to this Court that she presented at the hearing which was not, but should have been, considered by Berg. Although not an easy decision, it was rational for Berg to conclude, based on the evidence presented that the proper penalty in this case was termination.

Accordingly, Petitioner's motion to vacate Berg's opinion and award to terminate Petitioner's employment is denied. Respondents cross-motion to dismiss the complaint is granted the arbitrator's opinion and award is confirmed.

This is the Decision and Order of this Court.

Dated: October 16, 2012

GEOFFREY D. WRIGHT
AJSC

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court