[* 1]

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE

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

PRESENT: Hon. EMILY JANE GOODMAN, Justice PART 17

Solegn, Earl

v.

NY C Dept / Education

INDEX NO. 106290/10

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

	Papers Numbered
Notice of Motion/Order to Show Cause — Affidavits— Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

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

Petition is decided per attached decision / memorandum

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).

Dated: 9/29/11
New York, New York

EMILY JANE GOODMAN 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: PART 17

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In the Matter of the Application of
EARL SOLEYN,

For an Order Pursuant to CPLR Article 75

Petitioner,

Index No. 106290/10

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

----------X

Emily Jane Goodman, J.S.C.:

Petitioner Earl Soleyn brings this petition, pursuant to CPLR Article 75, to vacate an order of respondent New York City Department of Education (DOE) which terminated petitioner from his position as a tenured teacher in the New York City school system. Alternatively, petitioner seeks the remand of this matter to DOE to impose a penalty short of termination. DOE cross-moves to dismiss the petition.

Petitioner, licensed by the State of New York to teach mathematics in grades 7-12, has been in the New York City school system since 1996. In February 2005, petitioner was assigned to teach mathematics in the special education department of South Shore High School (South Shore). Judy Henry (Henry) was the principal of South Shore when petitioner was given his teaching assignment.

Petitioner was employed at South Shore for the school terms 2005-2006, 2006-2007, and 2007-2008. During that time, he taught mathematics and science to both special education and general education students in the 2005-2006 and 2006-2007 school terms, before he was "placed in excess," that is, placed temporarily without a position, in June 2007. Petitioner eventually was chosen to fill a vacancy in the science department at South Shore in October 2007.

Petitioner was reassigned on April 1, 2008 to the Integrated Service Center in Staten Island, based on an unexplained incident which allegedly occurred on March 28, 2008. The letter reassigning petitioner stated that he was being reassigned because of allegations of employee misconduct, neglect of duty and interfering with an ongoing investigation. Supplemental Petition, Ex. A.

On June 19, 2008, DOE, through Henry, filed nine charges against petitioner for the school terms 2005-2006, 2006-2007, and 2007-2008. *Id.*, Ex. B. The charges were (1) just cause for disciplinary action under Education Law § 3030-a; (2) professional misconduct; (3) insubordination; (5) incompetent and ineffective service; (6) conduct unbecoming respondent's position or conduct prejudicial to the good order, efficiency, or discipline of the service; (7) substantial cause rendering respondent unfit to properly perform his obligations to the

service; (8) neglect of duty; and (9) just cause for termination. Henry stated that she would be "preferring and filing the above charges" and that petitioner would be "informed of the procedures involved in the Trial of the Charges." *Id.*

In "Form 3020-a-1," entitled "Notice of Determination of Probable Cause on Charges Brought Against Tenured School District Employee," addressed to petitioner, and apparently forwarded to the Commissioner of Education (*id.*, Ex. C), Henry informed petitioner that she had "found that there was probable cause on the attached preferred charges against you." Henry continued "[w]ithin ten (10) days of receipt of these charges, you must elect to request a hearing before an impartial hearing officer, or you will waive your right to such a hearing." Petitioner was warned that the maximum penalty that might be imposed upon him was termination. Petitioner duly filed Form 3020-a (2), requesting that a hearing be held on the charges specified in Henry's Notice of Determination of Probable Cause.

Hearing Officer Melissa H. Biren, Esq. (HO) was assigned to petitioner's hearing. A pre-hearing conference was held on November 24, 2008, followed by 23 days of hearings between February 2008 and July 2008.

The HO rendered a 123-page Opinion and Award (Award), dated April 25, 2010. *Id.*, Ex. E. As a result of the Award, petitioner received a letter advising him that he was being

terminated, effective April 30, 2010. *Id.*, Ex. F. This proceeding ensued.

In the present proceeding, brought pursuant to CPLR Article 75, petitioner seeks to vacate or modify the Award on the grounds that his due process rights were violated; the HO "exceeded enumerated limitation on her authority"; that the Award is "grossly disproportionate to the allegations, lacks evidentiary support in the record, and is arbitrary and capricious." *Id.* at 4.

In reviewing the determinations of administrative agencies, the court looks only to whether the determination is "supported by a rational basis, and is neither arbitrary nor capricious ... ." *Matter of Nehorayoff v Mills*, 95 NY2d 671, 675 (2001); *see also Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaraneck, Westchester County*, 34 NY2d 222 (1974). An agency's interpretation of its own statutes must be given deference, if the matter is one which involves an agency's special expertise. *Raritan Development Corporation v Silva*, 91 NY2d 98 (1997).

Despite that fact that petitioner was informed of his right to a hearing, and participated therein, with counsel, without complaint, in a process which involved a review of a significant amount of evidence and testimony, lasting a total of 23 days, he claims that he was denied due process because charges were not

initially reviewed by the governing school board for a finding of probable cause. Instead, Henry made the finding of probable cause. Education Law § 3020-a (1) provides that "[a]ll charges against a person enjoying the benefits of tenure ... shall be in writing and filed with the clerk or secretary of the school district or employing board ... ." Section 3020-a (2) (a) requires that

> [u]pon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify said board itself. Within five days after receipt of charges, the employing board, in executive session, shall determine by a vote of a majority of all the members of such board, whether probable cause exists to bring a disciplinary proceeding against an employee pursuant to this section.

After such a vote, the board must notify the employee of his right to a hearing. Pursuant to Education Law § 3020-a (2) (c), if the charges involve "pedagogical incompetence or issues involving pedagogical judgment," the employee is entitled to have the charges heard before "a single hearing officer or a three member panel ... ."[1] The determination of the hearing officer is to be made within 30 days after the termination of the hearings. Education Law § 3020-a (4) (a).

Further, petitioner claims that his due process was violated because the matter was heard by one arbitrator, instead of a

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[1]An exception is made for charges falling within Education Law 3012-c, which is not applicable here.

three member panel, which he states he orally requested.

The Court requested further briefs on the due process issue, in light of *Syquia v Board of Eduction*, 80 NY2d 531 (1992) (although the Court of Appeals never reached the issue of due process, it held that a new 3020-a hearing was required, because even though there was no showing of prejudice, Education Law §3020-a's directive, regarding compensation of the arbitrator and its residency requirements were mandatory procedures safeguards).

In its further brief, respondent maintains that due process was not violated because on August 16, 2007, then-Chancellor Joel Klein delegated, pursuant to Education Law §2590h(19), the power to initiate and resolve disciplinary charges against teaching and supervisory staff members who have completed probation, to all high school principals. The delegation is attached as an exhibit. Petitioner concedes generally that delegation is permissible, but maintains because Education Law §3020-a refers to "the employing board in executive session" and not just "the employing board" that the power to initiate charges cannot be delegated. However, petitioner cites no cases to support this argument, and Education Law §2590h(19) does not make this distinction. Although petitioner also argues that such delegation would mean that the accuser makes the finding of probable cause, the Court does not find this to be a violation of due process, where the ultimate fact finder is a neutral decision

maker.

Further, although petitioner maintains that he requested, and was entitled, under Education Law §3020-a, to a three member panel to decide the arbitration, respondent cites Article 21 Section G of the DOE-UFT Collective Bargaining Agreement, which provides for a single arbitrator. Respondent cites *Adams v New York State Department of Education*, 2010 US Dist LEXIS 15635 at 104 (SDNY 2010), and the federal court cases cited therein, which hold that due process is not violated where a three member panel is replaced by a single decision maker. Respondent further notes that Education Law §3020(a)(4) permits the DOE and UFT to enter into collective bargaining agreements which modify the procedures of Education Law §3020-a, as long as the modification ensures that a tenured teacher is not disciplined or removed except for just cause. Thus, no violation of due process can be established where the statute which provides the procedural protections, can be, and was modified by agreement.

Nor is petitioner entitled to any relief because the hearing officer took more than 30 days to produce a report, where the requirement in the regulation must be read as directly only (*see Matter of Dickinson v Daines, MD.*, 15 NY3d 571 (2010). Therefore, the matter before the court is not a question of due process, but of whether the hearing officer exceeded her authority, or rendered a decision that was irrational or

arbitrary and capricious. The court finds that the decision is not irrational nor arbitrary or capricious, and it was not made in excess of authority.

The decision of the hearing officer is very detailed, and involves a review of every charge, and every subsection of every charge, in considerable depth. Considerable attention is given to the evidence in relation to the charges. The HO discussed each instance where Henry, or another person in authority, sat in on petitioner's classes and reported whether or not petitioner was in control of the class, or providing his students with adequate learning opportunities, with regard to set goals required for all teachers. The HO had ample opportunity to view petitioner's testimony, and found that he generally lacked credibility in answering the charges against him.

For instance, in Specification Two, petitioner was charged with using class time to ask his students to fill out a petition for him. Petitioner claims that, "as framed," this specification only applied to any time he may have spent where students actually signed the petition, and does not relate to any time in which he may have spent discussing the subject matter of the petition with his students. Petition, at 12. Petitioner feels that it was "improper" for the HO to discuss that issue. *Id.*

The HO's discussion of this matter is made on page 28 of her Award. She notes that the clear and rational implication of the

evidence shows that petitioner used instructional time not only to allow students to sign the petition, but also to discuss it. Petitioner's argument is nonsensical, based as it is on the unreasonable presumption that he asked his students to sign a petition without explaining what it was for, and that the charge should be read in an awkward and illogical manner to exclude that time. The court finds the HO's determination as to this issue to be rational, and not subject to court refutation.

In another instance, in addressing Specification Six, petitioner was charged with leaving two paraprofessionals alone in his room with the students for 15 minutes, and thus endangering his students, while he sought aid for a disruptive student. The matter is discussed in pages 53-56 in the HO's Award, wherein she discusses evidence tending to show that, as a matter of policy, leaving paraprofessionals alone in charge of the classroom is not permitted, and that petitioner should have sent one of the paraprofessional for help, instead of leaving himself. The HO's view of the evidence against petitioner on this charge is in no way irrational.

As a final example, petitioner claims that the HO's finding of insubordination on petitioner's part, set forth in Specification Five, must be vacated "on the grounds that the evidence offered does not support the charge." Petition, at 13. Petitioner claims that there was no evidence produced at the

hearings upon which to base a finding of insubordination.

In her discussion of Specification Five, on pages 36 through 40 of the Award, the HO discusses DOE's witnesses' testimony to the effect that petitioner acted in a loud and offensive manner toward a school administrator, refusing to leave her office upon her request, until reinforcements arrived. The HO, relying on her right to judge a party's credibility, discounted petitioner's claim that it was he who was the subject of harassment. She found petitioner's testimony "inconsistent" with that of the other witnesses (*id.* at 39), and that it was "inconceivable" to her that the events unfolded as petitioner claimed. *Id.* at 40. Again, the finding of the HO as to credibility is not to be disturbed by the court and, in any event, her decision as to the events does not appear irrational in any way.

In summation, the HO noted that

> [t]he evidence demonstrated that on numerous occasions, Soleyn engaged in unprofessional conduct towards supervisors, other professionals and students alike. He was confrontational and insubordinate towards his supervisors, Henry and Ying. He neglected his professional responsibilities in various respects and exercised poor professional judgment. Moreover, in 14 different observations over a three-year period, he received unsatisfactory ratings, demonstrating that he is unable to provide a valid educational experience for the students assigned to his classroom. These are serious charges, including not only Soleyn's competance as a teacher, but numerous acts of misconduct.

It is settled that "an agency's determination, acting pursuant to legal authority and within its area of expertise, is

entitled to deference." *Matter of Tockwotten Associates, LLC v New York State Division of Housing and Community Renewal*, 7 AD3d 453, 454 (1st Dept 2004). This court is impressed by the thoroughness of the HO's decision, in which she carefully parsed all of the charges (several of which had subsections), and dismissed specific charges if the DOE failed to present evidence to support them. Petitioner has failed to show that the 123-page decision is arbitrary and capricious, or that the hearing officer's findings defy reason.

Nor has petitioner shown that the penalty of termination was "'so disproportionate to the offense ... as to be shocking to one's sense of fairness.'" *Matter of Kreisler v New York City Transit Authority*, 2 NY3d 775, 776 (2004), quoting *Matter of Pell*, 34 NY2d at 222. Using its own expertise in pedagogical matters, the DOE has determined, as it has the right to do, that petitioner's performance was lacking and, under the circumstances, the penalty of termination is not disproportionate to the offenses charged against him.

Accordingly, it is

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

ORDERED that the cross motion to dismiss the petition is moot.

This Constitutes the Decision, Order and Judgment of the Court.

Dated: September 29, 2011

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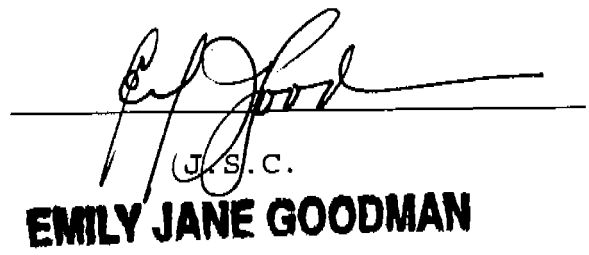

J.S.C.

EMILY JANE GOODMAN

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