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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER PART 15

Index Number : 105008/2011

MONTANEZ, MADELYN

VS

NYC DEPARTMENT OF EDUCATION

Sequence Number : 001

-VACATE/STAY ORDER/ JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

[illegible]	No(s). 1
Answering Affidavits — Exhibits	No(s). 2, 3
Replying Affidavits	No(s). 4, 5

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 12/13/11

_____, J.S.C.
HON. EILEEN A. RAKOWER

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 15

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In the Matter of the Application of
MADELYN MONTANEZ,

Petitioner,

-against-

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, and ELEANOR ELOVICH, HEARING OFFICER,

Respondents.

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Index No. 105008/11

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER:

Madelyn Montanez ("Petitioner") brings this proceeding pursuant to Article 75 of the CPLR seeking an order vacating the April 9, 2011 Arbitration Award issued by Eleanor E. Glanstein, Esq. ("the Arbitrator"), made after a hearing pursuant to Education Law §3020-a, which found Petitioner guilty of several charges of misconduct (called "Specifications") and terminated her employment as a teacher with the New York City Department of Education ("DOE"). Prior to her termination, Petitioner was a tenured teacher assigned to P.S. 168 in the Bronx. The Specifications brought against Petitidner alleged as follows:

> **SPECIFICATION 1:** During the 2009-10 school year, Petitioner fraudulently obtained a free New York City public school education for her son when she enrolled in at P.S. 194 in the Bronx, using 2 Bronx addresses, when in fact Petitioner lived in Carmel, NY.
>
> **SPECIFICATION 2:** During the 2009-10 school year, Petitioner fraudulently stated that she resided at 1350 Herschell Street in the Bronx, when in fact Petitioner was living in Carmel, NY.

SPECIFICATION 3: During the 2009-10 school year, Petitioner fraudulently stated that she resided at 2161 Powell Avenue in the Bronx, when in fact Petitioner was living in Carmel, NY.

SPECIFICATION 4: Petitioner did not pay tuition, as required for non-City residents, for the education provided to her son by DOE.

SPECIFICATION 5: Petitioner did not seek permission from DOE to obtain a free education for her son during his enrollment at P.S. 194.

SPECIFICATION 6: During the 2009-10 school year, Petitioner was made aware of Chancellor's Regulation A-125, regarding the payment of tuition for students residing outside New York City, but fraudulently continued to maintain that she lived in the Bronx while her son was enrolled at P.S. 194.

SPECIFICATION 7: On or around November 20, 2009, Petitioner provided fraudulent documents regarding her residency in the Bronx.

Petitioner's hearing was conducted on January 11 and 26, and February 8 and 10, 2011. It was undisputed at the hearing that Petitioner's address of record with DOE since February 2006, and continuing through the 2009-10 academic year, was 222 North Terry Road in Carmel. Petitioner testified at the hearing that the Carmel address was her legal address. At the time she registered her son at P.S. 194 for the 2009-10 academic year in June 2009, however, Petitioner listed her address as 1350 Herschell Street in the Bronx. Petitioner testified that she did so because she expected to be living there with her friend Anna Quezada. Petitioner testified that she lived there in the spring of 2009 and expected to return to live there with her son during the week in September 2009.

Quezada testified that Petitioner stayed with her two to three times a week during the 2008-09 academic year. She further testified that Petitioner did not pay any rent but occasionally helped with money for food and Quezada's bills.

However, Petitioner's son did not stay with Petitioner in Quezada's apartment during the spring of 2009. Petitioner testified that although she intended to stay with Quezada, Quezada moved in early September 2009, prior to the start of the 2009-10 academic year. Petitioner testified that she and her son lived with her parents in Carmel from September 2009 through November 20, 2009. During this time, Petitioner's son attended P.S. 194.

Petitioner testified that, in October 2009, she discussed the issue of her son's residency with Elmer Myers, Principal of P.S. 194. She testified that Myers told her to complete an Affidavit of Residency. Petitioner claimed that she told Myers that she intended to find a place to live in the Bronx. She further testified that Myers told her that as long as her son was staying in the City during the week, there would not be a problem. Petitioner also testified that, until her meeting with Myers, she was unaware of Chancellor's Regulation A-125, which governs non-resident student enrollment in DOE schools.

An Affidavit of Residency dated November 20, 2009 was admitted into evidence at the hearing. In this affidavit, Petitioner affirmed that she was living with Mildred Cora at 2161 Powell Avenue in the Bronx. Cora was described in the affidavit as Petitioner's cousin.

Cora testified at the hearing that Petitioner filled out the affidavit and that she signed it without reading it. Both Petitioner and Cora testified that the two are not actually cousins, but share a close friendship and regarded themselves as cousins. Cora testified at the hearing that Petitioner and her son stayed with her three or four days a week from early November 2009 until May 2010. However, Cora was confronted with a prior statement made to a DOE investigator that Petitioner only stayed with her a few times during periods of inclement weather. Cora testified that this statement was a misunderstanding due to her imperfect command of the English language, and that she intended to tell the investigator that Petitioner only went to stay with her family in Carmel when the weather was bad. Cora also testified that she was a paraprofessional with DOE, a position which required knowledge of the English language.

Susan Holtzman, the hearing officer who presided over Cora's disciplinary proceeding (which resulted in the loss of Cora's employment as a paraprofessional based upon her statements in the Affidavit of Residency), testified that Cora

testified in English during her proceeding and never requested a Spanish interpreter.

Yvonne Rodriguez, a paraprofessional at P.S. 168 and 194, also provided testimony at the hearing. Rodriguez testified that during the 2009-10 school year, she visited Cora six or seven times a month and would see Petitioner and her son there. She also testified to observing Cora and Petitioner arriving together at work in the mornings. Rodriguez testified that she was a close friend of Cora's.

In her April 9, 2011 Findings and Award, the Arbitrator found Petitioner guilty of Specifications 1, 3, 4, 5, 6, and 7. The Arbitrator found that "[t]he credible evidence does not establish that [Petitioner] and her son resided in New York City during the 2009-2010 school year so as to entitle her son to a free New York City public school education in accordance with the requirements of Chancellor's Regulation A-101." The Arbitrator credited Petitioner's testimony that she intended to reside with Quezada during the 2009-10 school year (rendering her not guilty of Specification 2). However, the Arbitrator did not credit Petitioner's testimony with respect to her knowledge of DOE's residency requirements and non-resident enrollment provisions. The Arbitrator observed that Petitioner had been a teacher with DOE for nine years, and "[was] certainly on notice" of DOE's rules and regulations. She further noted that, at the very least, Petitioner had unequivocal, actual notice after her October 2009 meeting with Prinicpal Myers. He further credited Myers's testimony that he never told Petitioner that she could take a few weeks to find an apartment.

With respect to the Affidavit of Residency, the Arbitrator observed that "Cora was fired from her position with [DOE] for stating on the Affidavit of Residency that [Petitioner] and her son resided with her and then telling the investigator assigned to [Petitioner's] case that [Petitioner] stayed with her a couple of times when the weather was bad." The Arbitrator found Cora's explanation for her prior inconsistent statement lacking in credibility. She noted that Cora's position as a paraprofessional required that she understand English. The Arbitrator further credited the testimony of Susan Holtzman, the hearing officer in Cora's disciplinary proceeding, that Cora testified in English in that proceeding and did not request an interpreter.

The Arbitrator partially credited the testimony of Rodriguez, inasmuch as she testified to observing Petitioner and her son at Cora's residence after school.

However, she did not credit Rodriguez's testimony as to the number of times she purportedly saw Petitioner and her son at Cora's residence, finding that "Ms. Rodriguez's friendship with Ms. Cora impacts on her credibility."

Finding Petitioner guilty of the above specifications, the Arbitrator held that Petitioner was to be terminated from DOE. This petition ensued. Petitioner argues that the Arbitrator's decision must be annulled because (1) the Arbitrator's decision was rendered more than 30 days after the final hearing date, in violation of Education Law §3020-a(4); (2) "the decision was not implemented by the respondent but rather by others," in violation of §3020-a(4)(b); (3) "Respondents did not conduct a public meeting after the hearing officer's decision had been rendered"; (4) DOE's fraud allegations had to be proven by clear and convincing evidence; (5) the arbitrator was biased; and (6) the penalty of termination was "grossly disproportionate" to the offenses alleged.

DOE cross-moves to dismiss the petition pursuant to CPLR §3211(a)(7).

The standard of review governing the court's analysis in this proceeding was succinctly stated by the First Department in *Lackow v. DOE*, (2008 NY Slip Op 4744, *3 [1st Dept. 2008]),

> *Education Law § 3020-a (5)* provides that judicial review of a hearing officer's findings must be conducted pursuant to *CPLR 7511*. Under such review an award may only be vacated on 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, 720 NYS2d 344 [2001]*). Nevertheless, where the parties have submitted to compulsory arbitration, judicial scrutiny is stricter than that for a determination rendered where the parties have submitted to voluntary arbitration (*see Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co., 89 NY2d 214, 223, 674 NE2d 1349, 652 NYS2d 584 [1996];Cigna Prop. & Cas. v Liberty Mut. Ins. Co., 12 AD3d 198, 199, 783 NYS2d 810 [2004]*). The 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* (*Motor Vehicle Mfrs. Ass'n v State, 75 NY2d 175, 186, 550 NE2d 919, 551 NYS2d 470 [2002]*). The party challenging an arbitration determination has the burden of showing its invalidity (*Caso v Coffey, 41 NY2d 153, 159, 359 NE2d 683, 391 NYS2d 88 [1990]*).

Further, when reviewing an arbitration award, "[a] hearing officer's determinations of credibility ... 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'" (*id.* at *4) (*citing Berenhaus v. Ward*, 70 N.Y.2d 436 [1987]). In addition, where a petitioner challenges an award on the grounds that the arbitrator was biased, the petitioner must prove bias by "clear and convincing evidence" (*Zrake v. DOE*, 2007 NY Slip Op 4700, *1 [1st Dept. 2007]). Lastly, a court may only overturn the penalty imposed by the arbitrator it if is "so disproportionate to the offense[] so as to be shocking to the court's sense of fairness" (*Lackow* at *4).

Chancellor's Regulation ("CR") A-101, subsection "3" provides that a student must be a New York City resident in order to attend a New York City public school. Those residing outside of the City must submit an application to the Office of Student Enrollment in order to be considered for enrollment in accordance with CR A-125. CR A-125, subsection "F" provides that DOE employees who send their non-resident children to City public schools without paying the appropriate tuition will "be subject to appropriate action, which may include referral to the Special Commissioner of Investigation and disciplinary measures including termination from employment."

Here, the court finds that Petitioner fails to state a claim for which relief can be granted. Petitioner cites to no authority, nor has the court's independent research uncovered any authority which supports her claim that the Arbitrator's Award must be vacated because it was rendered more than 30 days after the last hearing date. "To vacate an arbitration award on grounds of untimeliness, a petitioner must demonstrate that he or she has suffered undue prejudice as a result of the alleged delay" (*Morell v. DOE*, 2010 NY Slip Op 52360U, *6 [Sup. Ct., N.Y. Co. 2010]). No such prejudice is alleged to have been caused by the approximately 30-day delay herein. Moreover, DOE notes that Education Law §3020(4) authorizes DOE and the United Federation of Teachers to enter into a

Collective Bargaining Agreement ("CBA"), which modifies the provisions for disciplinary proceedings for tenured teachers contained in Education Law §3020-a, subject to certain limitations inapplicable herein. DOE points out that the CBA provides that the failure to issue a decision within 30 days constitutes grounds for removal of the hearing officer, but does not automatically divest the hearing officer of authority to decide a case, or render any such decision a nullity.

Petitioner's claim that "the decision was not implemented by the respondent but rather by others," based "[u]pon information and belief,"also fails to state a cause of action. As observed by the Supreme Court in *Dunn v. DOE*,

> '*Section 2590-h (19) of the Education Law* provides that the Chancellor may [d]elegate any of his or her powers and duties to such subordinate officers or employees as he or she deems appropriate and to modify or rescind any power and duty so delegated' (*Rivers v. Board of Education of City School District of City of New York, 66 AD3d 410, 410, 886 N.Y.S.2d 159 [1st Dept., 2009]).* Likewise, *Education Law section 2590-h(38-a)* states that the Chancellor has the power 'to exercise all of the duties and responsibilities of the employing board as set forth in section three thousand twenty-a of this chapter with respect to any member of the teaching or supervisory staff of schools which are not covered under subdivision thirty-eight of this section.'

(2011 NY Slip Op 5105U, *5-6 [Sup. Ct., N.Y. Co. 2011]). Accordingly, Petitioner's claim that the decision was implemented by "others" is insufficient to state a cause of action. Plaintiff also fails to provide any authority that DOE was required to hold a public meeting before implementation of the Arbitrator's Award.

With respect to Petitioner's claim that DOE was required to prove its allegations by clear and convincing evidence, such a claim finds no support either in the Education Law, or in applicable case law. As noted above, the Arbitrator's decision need only be "supported by adequate evidence" (*Lackow* at *3). Plaintiff fails to provide any decisional authority in which the "clear and convincing evidence" standard has been applied to Article 75 review of a §3020-a hearing. To the contrary, prior decisions in this court have sustained DOE determinations

involving allegations of fraud without applying a heightened standard of review (*see Hunt v. Klein*, 2011 NY Slip Op 30432U [Sup. Ct., N.Y. Co. 2011]) (allegations of academic fraud).

Petitioner's claim that the Arbitrator was biased also fails because her allegation is purely conclusory and does not contain any supporting factual allegations (*see Terry v. DOE*, 2011 NY Slip Op 32380U, *6 [Sup. Ct., N.Y. Co. 2011]).

Lastly, the court finds that the penalty of termination is not shocking to the court's sense of fairness. DOE regulations clearly provide that a DOE employee's failure to pay tuition for his or her non-resident child constitutes grounds for termination. Moreover, the First Department has specifically held that termination for such misconduct does not shock the conscience, notwithstanding the teacher's otherwise satisfactory performance record (*see Cipollaro v. DOE*, 2011 NY Slip Op 3131 [1st Dept. 2011]).

Wherefore it is hereby

ORDERED that DOE's cross-motion to dismiss is granted; and it is further

ADJUDGED that the petition to vacate the Arbitrator's Award of April 9, 2011 is denied and the proceeding is dismissed; and it is further

ADJUDGED that the April 9, 2011 Award is confirmed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: December 15, 2011

EILEEN A. RAKOWER, J.S.C.