SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **IAS MOTION 52EFM**

Justice

----------X

ROBENNIAH SPAIN-BRANDON

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

INDEX NO. 655079/2017

MOTION DATE 08/15/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 21, 22, 23, 24, 25, 26, 27, 29, 30

were read on this motion to/for AMEND/MODIFY DECISION/ORDER/JUDGMENT .

Upon the foregoing documents, petitioner moves this Court pursuant to CPLR Article 75 for an order vacating the decision and award of Hearing Officer Torrey, which directed respondent New York City Department of Education (DOE) to terminate the petitioner. The hearing officer found just cause for termination, as a majority of the charges brought against petitioner were substantiated by a preponderance of the evidence presented over the course of an eleven-day (11-day) hearing pursuant to Education Law § 3020-a. The DOE cross moves to dismiss the petition.

Petitioner claims that it was irrational for the hearing officer to substantiate the charges; the hearing officer failed to consider petitioner's bias argument; the penalty of termination is disproportionate and shocking to one's sense of fairness; and that the hearing officer's decision was untimely.

Education Law § 3020-a governs the filing of charges and hearing procedures for discharging tenured teachers. Subdivision (5)(a) of the statute provides that an application may be made to vacate or modify a hearing officer's decision pursuant to CPLR 7511. The grounds

for vacating an arbitrator's decision under CPLR 7511 "include, inter alia, misconduct, abuse of power, and procedural irregularities" (Matter of Denhoff v Mamaroneck Union Free Sch. Dist., 101 AD3d 997, 998 [2d Dept 2012]; see Matter of Hegarty v Board of Educ. of City of N.Y., 5 AD3d 771, 772 [2d Dept 2004]). Where, as here, the parties are subject to compulsory arbitration, the decision "is subject to 'closer judicial scrutiny'" and "must have evidentiary support and cannot be arbitrary and capricious" (Matter of Saunders v Rockland Bd. of Coop. Educ. Servs., 62 AD3d 1012, 1013 [2d Dept 2009]; see City School Dist. of the City of New York v McGraham, 17 NY3d 917, 919 [2011]). Also, the decision "must be in accord with due process" (Matter of Denhoff, 101 AD3d at 998) and be reviewed as to "whether the decision was rational or had a plausible basis" (Matter of Petrofsky [Allstate Ins. Co.], 54 NY2d 207, 211 [1981]). When reviewing compulsory arbitrations in education proceedings, "the court should accept the arbitrators' credibility determinations, even where there is conflicting evidence and room for choice exists" (Matter of Saunders, 62 AD3d at 1013).

In support of her petition, petitioner points to one informal observation by Principal Hernandez on April 9, 2014 and an article wherein Chancellor Fariña purportedly advises Principal Hernandez how to "weed out" ineffective teachers. The hearing officer found the specification to have been unsubstantiated with respect to that particular observation and that specification was dismissed. Notably that one observation was just one of twelve (12) separate observations conducted by many different people over the course of the years at issue, 2013-2017, and the specifications concerning the other eleven observations were substantiated. Thus, the Court is not persuaded that this one unsubstantiated charge should infer that all other specifications were irrationally substantiated, or that it was arbitrary or capricious to find the same. Rather, the Court finds that the record contains adequate evidence to support the charges and the findings were entirely rational.

Petitioner fails to explain how the article demonstrates bias but, in any event, the article was only about Principal Hernandez and many others observed the petitioner and similarly testified as to her deficiencies. Further, there were documented issues with petitioner before that article was published. Based on the hearing officer's decision, it appears as though the petitioner's arguments on this issue were fully considered but simply found to be without merit as the hearing officer did not find any bias from Principal Hernandez; and the Court is required to accept such a determination (see Matter of Saunders, 62 AD3d at 1013).

Even though the hearing officer's decision and award was late under Education Law §3020-a(4)(a), it is understandable given the fact that the hearing took place over 11 days and resulted in an eighty-two (82) page determination and award. Moreover, to vacate the award on "grounds of untimeliness, a petitioner must demonstrate that he or she has suffered undue prejudice as a result of the alleged delay" (Morrell v New York City Dept. of Educ., 30 Misc 3d 1212[A], 2012 NY Slip Op 52360[U], *5 [Sup Ct, NY County 2010], citing Scollar v Cece, 28 AD3d 317 [1st Dept 2006]). Here, petitioner's memorandum of law claims that the delay "unduly prejudiced [petitioner's] ability to find new employment" because the timing of the award, issued on July 17, 2017, was "mere weeks before the start of school" (Dkt #3, p 3). This is completely unsupported by any evidence. This conclusory allegation in a memorandum of law is devoid of any evidentiary value. Even if the allegation were contained in the petition itself, the petition was verified by counsel and would be considered hearsay (see Beltre v Babu, 32 AD3d 722 [1st Dept 2006]).

Regarding the penalty of termination, the issue is whether the penalty is "'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness'" (Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 233 [1974], quoting

McDermott v Murphy, 15 AD2d 479, 479 [1st Dept. 1961], affd 12 NY2d 780 [1962]). "Unless an irrationality appears or the punishment shocks one's conscience, sanctions imposed by an administrative agency should be upheld" (Matter of Pell, 34 NY2d at 240). "That reasonable minds might disagree over what the proper penalty should have been does not provide a basis for vacating the arbitral award or refashioning the penalty" (City School Dist. of the City of N.Y., 17 NY3d at 920). The Court finds that the penalty of termination does not shock one's sense of fairness (see Krinsky v New York City Dept. of Educ., 28 AD3d 353 [1st Dept 2006]). Despite plenty of remedial efforts (teacher improvement plans, one-on-one meetings with administrators, instructional meetings, professional development coaches, etc.), it was rational for the hearing officer to conclude that petitioner's pattern of ineffective and unsatisfactory performance as a teacher would not improve, as she consistently failed to implement what she learned. Although petitioner points to some witnesses who claimed that they noticed some improvements with petitioner, such conflicting evidence is not a basis for this Court to vacate the hearing officer's determination, even where room for choice exists (see Matter of Powell v Board of Educ. of Westbury Union Free School Dist., 91 AD3d 955 [2d Dept 2012], quoting Matter of Berenhaus v Ward, 70 NY2d 436, 443–44 [1987]).

Accordingly, the petition is denied and dismissed. DOE's cross motion is denied as moot. This constitutes the decision and order of the Court.

12/12/2018
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION	HON. ALEXANDER M. TISCH	
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE