

[1] In the Matter of the Application of MICHAEL PORTNOY, Petitioner, For a Judgment under Article 75 of the Civil Practice Law and Rules, - against - NEW YORK CITY DEPARTMENT OF EDUCATION, Respondent.**

INDEX NO. 156146/12

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2013 N.Y. Misc. LEXIS 5057; 2013 NY Slip Op 32739(U)

October 21, 2013, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS

CORE TERMS: cibelli, specifications, hearing officer, minutes, sum and substance, alarmed, annoyed, harass, annoy, alarm, electronic mail, arbitration, cross-motion, statute of limitations, arbitrator's, tenured teacher, misconduct, interest of justice, teachers, vacate, front, times, disciplinary charges, process rights, disciplinary, credibility, compulsory, expiration, school year, dirty work

JUDGES: [*1] PRESENT: HON. PAUL WOOTEN, Justice.

OPINION BY: PAUL WOOTEN

OPINION

Michael Portnoy (petitioner), brings this application pursuant to New York Education Law § 3020-a(5) and CPLR 7511, seeking an order vacating the Opinion and Award of Hearing Officer Haydeé Rosario (Hearing Officer Rosario), made after a hearing on disciplinary charges pursuant to Education Law § 3020-a, which terminated his employment with respondent Board of Education of the City School District of the City of New York (BOE or respondent), also known and sued herein as the New York City Department of Education. Petitioner was a tenured teacher formerly employed by BOE at John Philip Sousa Middle School 742, located in District 11 in the Bronx, New York. Petitioner also seeks to be reinstated to the position of a tenured teacher with the BOE. Also before the Court is a cross-motion by the BOE to dismiss, pursuant to Section § 3020-a(5) of the Education Law and CPLR §§ 306-b, 404(a) and 3211(a)(7), for untimely service and failure to state a cause of action.

[**2] Petitioner requests that the Court: (1) vacate or annul the determination of Hearing Officer Rosario, dated August 24, 2012; and/or (2) reduce the penalty to a lesser penalty than the [*2] penalty of termination, on the grounds that for a first offense it shocks the conscience of the Court; or (3) remand the matter to the arbitrator for a lesser sentence. Petitioner contends that the arbitration award must be vacated, annulled or modified on three grounds: (1) the penalty of termination imposed was excessive and "shocking to one's sense of fairness," particularly given petitioner's lack of any prior disciplinary record; (2) Hearing Officer Rosario exceeded her power by failing to base her decision on the record of the hearing; and (3) petitioner's due process rights were violated at the arbitration hearing when Hearing Officer Rosario denied him the right to call witnesses who would have offered mitigating testimony (*see* Verified Petition ¶¶ 6, 8, 10).

The BOE cross-moves to dismiss, pursuant to Section § 3020-a(5) of the Education Law and CPLR §§ 306-b, 404(a) and 3211 (a)(7). First, respondent asserts that petitioner did not serve the BOE within 15 days after the statute of limitations expired, as specified in CPLR 306-b, and therefore the verified petition must be dismissed as untimely. Specifically, the BOE notes that pursuant to Education Law § 3020-a(5), the statute [*3] of limitations for an Article 75 petition seeking to vacate an arbitration award is 10 days from the receipt of the Hearing Officer's decision. As petitioner received the Hearing Officer's decision on September 1, 2012, he should have served the respondent no later than September 26, 2012, whereas he served the respondent on October 1, 2012. Second, as a matter of law, petitioner has not demonstrated sufficient grounds to vacate or modify the award as the Hearing Officer afforded petitioner a full and fair hearing. Specifically, at the hearing petitioner was represented by counsel, had the opportunity to cross-examine respondent's witnesses and present seven witnesses of his own, in addition to

presenting his own testimony. Respondent further proffers that the Hearing Officer's 30-page Opinion and Award thoroughly and carefully assessed the witnesses' credibility and testimony and considered all exhibits presented in individually addressing each of the specifications with which petitioner was charged. Petitioner is in opposition to respondent's cross-motion.

[3] BACKGROUND**

Respondent brought disciplinary charges against Petitioner, charging him with five (5) specifications in the First **[*4]** set of Specifications to wit:

MICHAEL PORTNOY (hereinafter referred to as "Respondent") is a tenured teacher assigned to John Philip Sousa Middle School in the Bronx, District 11, under File # 745034. During the 2010-2011 school year, Respondent engaged in misconduct, conduct unbecoming his profession, unlawful discrimination, insubordination, inappropriate filming at a school facilities, and neglect of duty as follows:

SPECIFICATION 1: On or about June 11, 2011, while in the presence of students, the Respondent used his hand to shove Teacher David Fierman's face.

SPECIFICATION 2: On or about January 5, 2011, the Respondent:

- A) Charged towards the Principal Casimiro Cibelli.
- B) Yelled at Principal Casimiro Cibelli and said, in sum and substance, the following:
 1. I'll kick your fucking ass.
 2. I'll shove a stick up your guinea* ass.
 3. Motherfucker.
 4. I am not afraid of you.

SPECIFICATION 3: On or about January 14, 2011, the Respondent uploaded a video to be viewed by the public onto YouTube, entitled Principal Video: A Principal with no Principles, that contained:

- A) **[*5]** Images of Principal Casimiro Cibelli in front of John Philip Sousa Middle School without approval from the Department of Education.
- B) Images of students, without parental consent.
- C) The exterior and signage of John Philip Sousa Middle School without the approval of the Department of Education.

SPECIFICATION 4: On or about March 16, 2011, the Respondent uploaded a video to be viewed by the public onto YouTube, entitled Cibelli Part2: Principal Without Principles, pt. II, that contained:

- A) Images of Principal Casimiro Cibelli in front of John Philip Sousa Middle School without approval from the Department of Education.
- B) Images of students, without parental consent.
- C) The exterior and signage of John Philip Sousa Middle School without the approval of the Department of Education.

SPECIFICATION 5: On or about and in between January 2, 2011 and March 15, 2011, the Respondent videotaped:

- A) Principal Casimiro Cibelli while he was driving up to and/or entering into the school without the Cibelli's permission or authority.
- B) The exterior and signage of John Philip Sousa Middle School in violation of Chancellor's Regulation A-640.
- [**4]** C) A number of New York City School students in violation of Chancellor's **[*6]** Regulation A-640 and A-820.

Respondent brought disciplinary charges against Petitioner, charging him with twelve (12) specifications in the second set of Specifications to wit:

MICHAEL PORTNOY (hereinafter referred to as "Respondent") is a tenured teacher assigned to John Philip Sousa Middle School in the Bronx, District 11, under File # 745034. During the 2008-2009 and 2010-2011 school years, Respondent engaged in misconduct, conduct unbecoming his profession, insubordination, criminal conduct, and neglect of duty as follows:

In Particular:

SPECIFICATION 1: During the 2008-2009 school year, Respondent reported late to work sixteen (16) times on the following dates:

1) Tuesday	December 16, 2008	30 minutes.
2) Monday	January 12, 2009"	10 minutes.
3) Tuesday	January 13, 2009*	2 minutes.
4) Wednesday	January 14, 2009*	2minutes.
5) Tuesday	March 17, 2009"	2 minutes.
6) Wednesday	March 25, 2009*	5 minutes.
7) Thursday	March 26, 2009*	3 minutes.
8) Tuesday	March 31, 2009	50 minutes.
9) Wednesday	April 8, 2009	50 minutes.
10) Wednesday	April 22, 2009	5 minutes.
11) Thursday	April 23, 2009*	5 minutes.
12) Friday	April 24, 2009*	21 minutes.
13) Monday	April 27, 2009*	30 minutes.
14) Tuesday	April 28, 2009"	30 minutes.
15) Wednesday	April 29, 2009*	30 minutes.
16) Thursday	April 30, 2009	30 minutes.

SPECIFICATION [*7] 2: on or about January 11, 2010 at 6:28 p.m., the Respondent, with intent to harass, annoy, threaten or alarm another person, sent an electronic mail to Nwabueze Crooks and Principal Casimiro Cibelli that caused Principal cibelli to be alarmed and annoyed, that stated, in sum and substance,:

- A) Mr. Cibelli is a snake who will do anything at this point to have me removed from the school.
- B) If Mr. Cibelli is going to use other educators and administrators to do his dirty work.
- C) I, in turn, will attempt to use that person against Mr. Cibelli at any official hearings that may come about.
- D) At this point I will expose anyone in the school in order to protect myself from Mr. Cibelli's personal agenda and to support my interests against Mr. Cibelli.
- [**5] E) My suggestion to you is, stay out of my battles with Mr. Cibelli and let Mr. Cibelli do his own dirty work. You may proceed as you wish at this point

SPECIFICATION 3: On or about January 11, 2010 at 6:56 p.m., the Respondent, with intent to harass, annoy, threaten or alarm another person, sent an electronic mail to Principal Casimiro Cibelli that caused him to be alarmed and annoyed, that stated, in sum and substance,:

- A) However, I did let Mr. [*8] DelValle know that I would use him and his testimony at any hearings that may occur due to this matter.
- B) I also made Mr. DelValle aware that he should not do your dirty work and to let you proceed on your own in search of your personal agendas.
- C) Man to I'm not sure what you are, you should not include others in our personal business.
- D) I have been a man throughout this ordeal while you are now trying to use your subordinates to help you with giving me a hard time since you have been unsuccessful on your own.
- E) This is deplorable and disgusting for you to do, hiding behind your teachers and assistant principals in order to have your weak agenda carried out.
- F) I told you we would one day meet in front of a hearing officer where I will lay you out for the sub-par individual that you have always been.
- G) You have made so many mistakes that I can not see any way that you can now slither your way out of.
- H) You had many chances to meet with us and be an upstanding person but you have resisted our request for so long that you will now have strangers determine your fate and hopefully an end to your career.

SPECIFICATION 4: On or about September 7, 2010 at 2:47 p.m., the Respondent, with intent [*9] to harass, annoy, threaten or alarm another person, sent an electronic mail to Principal Casimiro Cibelli that caused him to be alarmed and annoyed, that stated, in sum and substance,:

- A) when I told the investigator that I was in possession of the e-mails from Lisa Hyman it made you look like a total fool.

- B) You have lost 3 times in the past 3 years (u rating, reassignment 2009 & today).
- C) I will also be vindicated from the current reassignment which will make you a 4 time loser.
- D) I have been many steps ahead of you throughout this whole ordeal.

SPECIFICATION 5: On or about November 11, 2010 at 7:56 a.m., the Respondent, with intent to harass, annoy, threaten or alarm another person, sent an electronic mail to Principal Casimiro Cibelli that caused him to be alarmed and annoyed, that stated, in sum and substance, Now you are not only a loser but you are also a liar. See you tomorrow.

SPECIFICATION 6: On or about November 12, 2010 at 7:52 p.m., the Respondent, with intent to harass, annoy, threaten or alarm another person, sent [**6] an electronic mail to Teacher Lori Solano, Teacher Gretchen Hazell, and Principal Casimiro Cibelli that caused him to be alarmed and annoyed, that stated, in [*10] sum and substance,:

- A) Mr. Cibelli and I have been in a battle since he arrived a few years ago.
- B) I have been cleared of his ridiculous allegation 2 times and I have never had to face charges due to his incompetence.
- C) Please do not do his evil bidding for him.
- D) You do not want to have yourself included in my current efforts to bring a lawsuit against Mr. Cibelli and the NYC DOE for the anguish that he has put me through for no apparent reason.
- E) I will take others down with him if necessary.

SPECIFICATION 7: On or about November 13, 2010 at 9:05 a.m., the Respondent, with intent to harass, annoy, threaten or alarm another person, sent an electronic mail to Principal Casimiro Cibelli that caused him to be alarmed and annoyed, that stated, in sum and substance,:

- A) You are still not receiving any copies of my lesson plans.
- B) I will hold my course as the contract states.
- C) If you don't like it, its just too bad.
- D) Don't place yourself in a situation where you will once again lose and look foolish in front of the staff.
- E) You have already done this many times and it doesn't fare well for you.
- F) My final intentions are to drag you into court and take all that you have.
- G) I will attempt [*11] to place you out on the street with your family by all legal means.

SPECIFICATION 8: On or about November 13, 2010 at 9:35 a.m., the Respondent, with intent to harass, annoy, threaten or alarm another person, sent an electronic mail to Principal Casimiro Cibelli that caused him to be alarmed and annoyed, that stated, in sum and substance:

- A) We all need to sit down and discuss all of the issues that is affecting my ability to function as an educator in the building.
- B) You have created an environment of hatred, ugliness and failure within the school building.
- C) I am considering not to be a part of this ugly abortion of a school any longer.
- D) With all that has been done to me wrongfully, I am going to request an emergency harassment transfer to another school to be sure that I "land on my feet" once Sousa closes due to your inability to be an effective leader and lack of being a human being.
- E) I don't believe that you will be able to do the same once the school closes and you add that failure to your resume.
- F) Until Ms. Cooper-Jackson arrives I will remain in the auditorium and will not enter a classroom as not to expose myself to your animal tactics.

SPECIFICATION 9: On or about November [*12] 23, 2010 at 12:08 p.m., the Respondent, with intent to harass, annoy, threaten or alarm another person, sent an electronic mail to Principal Casimiro Cibelli that caused him to be alarmed [**7] and annoyed, that stated, in sum and substance:

- A) Understand that Mr. Waxman cannot help you with my situation.
- B) Follow the rules that are set forth in the contract so that you do not find yourself in a compromising situation once legalities against you begin.
- C) Tread carefully Cibelli.

SPECIFICATION 10: On or about November 24, 2010 at 6:58 p.m., the Respondent, with intent to harass, annoy, threaten or alarm another person, sent an electronic mail to Principal Casimiro Cibelli that caused him to be alarmed and annoyed, that stated, in sum and substance,:

- A) Sign off on what?
- B) You seem to be the one confused, which I can certainly understand with the fact that your school and job may be in peril.
- C) Don't ask your subordinates to do what you are afraid to do yourself.

SPECIFICATION 11 : On or about November 24, 2010 at 7:01p.m., the Respondent, with intent to harass, annoy, threaten or alarm another person, sent an electronic mail to Principal Casimiro Cibelli that caused him to be alarmed and annoyed, [*13] that stated, in sum and substance:

- A) One last note . . . since I missed seeing the Quality Review people last year, I am really looking forward to meeting them this year.
- B) Please be sure to bring them to see my classroom so that I can tell them about how the school is being run from my point of view.

SPECIFICATION 12: On or about November 24, 2010 at 8:29 p.m., the Respondent, with intent to harass, annoy, threaten or alarm another person, sent an electronic mail to Principal Casimiro Cibelli that caused him to be alarmed and annoyed, that stated, in sum and substance:

- A) Speaking of significant improvement, you could use some of that as an administrator.
- B) It is almost worth possibly becoming ATR to see you removed from your position.
- C) I have been in this situation before and the lead administrator is always the one pulled out of the building first.
- D) I will be the first one in line to watch you go.
- E) Got Tenure!!!
- F) Didn't think so.

When charges are filed against a tenured person, Education Law § 3020--a[3] requires that a disciplinary hearing be conducted by a hearing officer selected from the American Arbitration Association. The disciplinary hearing is a compulsory arbitration. [*14] In this matter, the Pre-Hearing conferences were held on August 30, 2011 and September 21, 2011. The hearings were held on January 17, 23, 30, 31, February 7, 17, and March 5, 22, 2012. At the hearing petitioner was [**8] represented by an attorney who produced witnesses and evidence, examined petitioner and cross-examined the respondent's witnesses. The Respondent produced evidence and cross-examined petitioner.

Hearing Officer Rosario found in the Opinion and Award that petitioner is guilty of Specifications 1 through 5 alleged in the first set of charges filed against him and guilty of Specifications 1 through 12 alleged in the second set of charges, and that the BOE has just cause to discipline petitioner and he be imposed the penalty of termination of his employment. She found that:

"[a]s to Portnoy's remorse for his misconduct, the Hearing Officer does not believe he was honest about any of the regrets he expressed during his testimony. The record is replete with instances when he downplayed the serious nature of his misconduct and at the hearing his anger was still palpable. In sum, the Hearing officer is convinced Portnoy would engage in similar conduct if return [sic] to the classroom. [*15] For all the foregoing reasons, the Hearing officer finds Portnoy is not fit to perform his duties to the service and should be terminated from his position as a tenured teacher" (*see* Notice of Cross-Motion, exhibit 3 at 29).

DISCUSSION

As an initial matter, the Court must address the procedural objection raised by the BOE in its cross-motion, namely that the petition should be denied pursuant to CPLR 306-b as it was served more than fifteen days from the expiration of the statute of limitations. CPLR 306-b provides in relevant part:

[W]here the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in

this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

Petitioner received the Hearing Officer's decision on September 1, 2012 and timely commenced this proceeding by filing his petition on September 10, 2012. Petitioner did not serve the respondent until October 1, 2012, [*16] which is more than fifteen days from the expiration of the statute of limitations. However, the portion of respondent's cross-motion seeking dismissal on such grounds is denied in the interest of justice (*see* CPLR 306-b) and in the interest of deciding this matter on its merits [**9] (*Henneberry v Borstein*, 91 AD3d 493, 497, 937 N.Y.S.2d 177 [1st Dept 2012] ["Granting plaintiff the opportunity to pursue this action is not only consistent with the "interest of justice" exception set forth in CPLR 306-b, but also with our strong interest in deciding cases on the merits where possible"]). Specifically, petitioner was only five days late in serving the respondent, and respondent fails to show how it is prejudiced by such a short delay (*see Henneberry*, 91 AD3d at 496 [under the "interest of justice" prong, the court "may consider [plaintiff's] diligence, or lack thereof, along with any other relevant factor ..., including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant"], quoting *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 761 N.E.2d 1018, 736 N.Y.S.2d 291 [2001]; *see also* [*17] *McKenney v Beth Abraham Family of Health Servs.*, 99 AD3d 630, 952 N.Y.S.2d 878 [1st Dept 2012]). In light of the above, the Court now turns to the relief requested in the petition.

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, 720 N.Y.S.2d 344 [1st Dept 2001]; *see also Matter of Hegarty v Board of Educ. of the City of New York*, 5 AD3d 771, 773 N.Y.S.2d 611 [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, 904 N.Y.S.2d 18 [1st Dept 2010]; *Matter of Hegarty*, 5 AD3d at 773). There is an additional standard applied and judicial scrutiny is stricter when the parties have submitted to compulsory arbitration rather than a determination rendered after voluntary arbitration. After compulsory arbitration the determination, "must be in [*18] 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" (*Lackow v. Dept. of Education of City of New York*, 51 AD3d 563, 859 N.Y.S.2d 52 [1st Dept, 2008]; *City School District of the City of New York v. McGraham*, 75 AD3d 445, 905 N.Y.S.2d 86 [1st Dept, 2010]). The petitioner has the burden of proof to show [**10] that the arbitrator's decision is invalid (*see Lackow v Department of Education of City of New York*, 51 AD3d 563, 568, 859 N.Y.S.2d 52 [1st Dept 2008]).

Upon a review of all the papers submitted, the Court finds that petitioner has not met his burden of proof of establishing that Hearing Officer Rosario's Opinion and Award violated public policy, was totally irrational, or exceeded a specifically enumerated limitation on the arbitrator's power or violated petitioner's due process rights. The Court finds that Hearing Officer Rosario's decision to terminate the petitioner from his employment was rational in light of, among other things, the extensive record provided and was supported by adequate evidence. Moreover, petitioner has failed to present sufficient facts or evidence tending to show that Hearing Officer Rosario was biased, acted [*19] in excess of her power, or violated petitioner's due process rights (*see* CPLR 7511). Moreover, the arbitrator's Opinion and Award relied heavily upon the credibility of the witnesses that testified. "A hearing officer's determinations of credibility, however, 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'" (*Lackow v Department of Educ. (Or "Board") of City of N.Y.*, 51 AD3d 563, 568, 859 N.Y.S.2d 52 [1st Dept 2008], quoting *Matter of Berenhaus v Ward*, 70 NY2d 436, 443, 517 N.E.2d 193, 522 N.Y.S.2d 478 [1987]). As such, the Court finds that the petition must be denied and the remainder of the BOE's cross-motion denied as moot. The Court has considered petitioner's remaining arguments and finds them to be without merit and lack support in the record.

CONCLUSION

Accordingly, it is

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

ORDERED that the portion of respondent New York City Department of Education's cross- **[**11]** motion to dismiss the petition pursuant **[*20]** to CPLR 306-b is denied; and it is further,

ORDERED that the remainder of respondent New York City Department of Education's cross-motion to dismiss is denied as moot; and it is further,

ORDERED that the respondent New York City Department of Education 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: Oct. 21, 2013

/s/ Paul Wooten

PAUL WOOTEN, J.S.C.