[*2] In the Matter of the Application of LESLIE DRUCKER, Petitioner, for a judgment pursuant to Article 75 of the C.P.L.R. -against- THE NEW YORK CITY BOARD/DEPARTMENT OF EDUCATION, Respondent.

112638/10

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2011 NY Slip Op 31313U; 2011 N.Y. Misc. LEXIS 2366

May 13, 2011, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

CORE TERMS: hearing officer, arbitrator's, bias, specification, misconduct, shocking, arbitration award, process rights, penalty imposed, sense of fairness, disproportionate, credibility, notice, order vacating, school official, witnesses' credibility, probable cause, punishment imposed, arbitrary and capricious, credibility determinations, arbitrator's decision, convincing proof, arbitration, derelictions, partiality, appearance, evaluated, deference, fucking, vacated

COUNSEL: [1]** For Petitioner Self-Represented: Leslie Drucker, New York, NY.

For Respondent: Kathleen Comfrey, ACC, Michael A. Cardozo, Corporation Counsel, New York, NY.

JUDGES: PRESENT: Barbara Jaffe, JSC.

OPINION BY: Barbara Jaffe

OPINION

DECISION AND JUDGMENT

BARBARA JAFFE, J.S.C.:

By notice of petition and verified petition dated September 24, 2010, petitioner moves pursuant to CPLR Article 75 for an order vacating respondent's decision to suspend her for one year without pay. Respondent opposes the petition and, by notice of cross motion dated November 16, 2010, moves pre-answer pursuant to CPLR 3211(a)(7) for an order dismissing the petition for failure to state a cause of action.

I. BACKGROUND

Petitioner is a tenured teacher who has been employed by respondent since 1994 in various positions, including as an investigator with the Office of Special Investigations. In 2005 **[*3]** she began teaching at Unity High School as a special education teacher. (Petition, dated Oct. 8, 2010 [Pet.]). At the end of the 2005-2006 and 2006-2007 school years, petitioner received a satisfactory rating on her performance evaluations. (*Id*).

In October 2008, respondent filed charges against petitioner pursuant to Education Law § 3020(a), and a hearing **[**2]** officer was designated to determine whether there was just cause for disciplinary action against petitioner. (*Id*., Exh. 1). The charges brought against petitioner were: (1) specification one - petitioner engaged in misconduct by calling a student's parent a "fucking bitch" at a parent meeting on October 26, 2007; (2) specification two - petitioner engaged in misconduct by calling a fellow staff member a "fucking animal" on November 21, 2007; (3) specification three - petitioner committed acts of verbal abuse in violation of Chancellor's Regulation A-421 and poor judgment against student "A" on November 8, 2008 by yelling at the student to "get out" of the computer room and telling the student "fuck it, I hate this school;" and (4) specification four - petitioner knowingly and inappropriately injected herself into a confidential investigation by the Commissioner of Special Investigation (SCI), involving allegations by student "B" that a school official had sexually harassed her, by contacting student "B" at

home and by conveying false and inaccurate information to the student's guardian regarding the subject matter of the investigation. (*Id*.).

The hearing was held on March 9, 10, 18, **[**3]** 22, 23, April 7, 8, 13, 27, and May 10, 17, and 18, 2010, and both sides were represented by counsel and given an opportunity to present evidence, examine witnesses, and make arguments in support of their positions. (*Id*.). In a 47- page decision dated August 30, 2010, petitioner was found guilty of specifications one, three, and four, and found not guilty of specification two. Petitioner was suspended for one year without **[*4]** pay, upon consideration of the nature and severity of the misconduct and mitigating factors including petitioner's satisfactory employment record and evidence that she had volunteered her time and helped students. (*Id*).

II. CONTENTIONS

Petitioner argues that respondent Board failed to vote on and find probable cause for the charges against her before the hearing and that the hearing officer thus lacked jurisdiction to hear the matter and violated petitioner's due process rights. She also contends that the punishment imposed is excessive and shocking to the conscience and that the hearing officer exceeded her authority in rendering it, that her determination is contrary to the facts and testimony presented at the hearing, and that the penalty imposed reflects the hearing **[**4]** officer's bias against petitioner. (Pet).

Respondent maintains that the decision was supported by the record and neither arbitrary nor capricious as she considered the evidence, evaluated witnesses' credibility, and wrote a detailed decision, that petitioner received due process and notice of the charges against her before the hearing, and that the penalty was justified in light of the serious nature of petitioner's misconduct and as the hearing officer already considered mitigating factors. (Memo, of Law, dated Nov. 16, 2010).

III. ANALYSIS

The scope of judicial review of an arbitration proceeding is extremely limited. (*Wien & Malkin LLP v Helmsley-Spear, Inc*., 6 NY3d 471, 846 N.E.2d 1201, 813 N.Y.S.2d 691 [2006], *cert denied* 548 U.S. 940, 127 S. Ct. 34, 165 L. Ed. 2d 1012; *Matter of Campbell v New York City Tr. Auth*., 32 AD3d 350, 821 N.Y.S.2d 27 [1st Dept 2006]). The court must defer to the arbitrator's decision (*Matter of New York City Tr. Auth. v Transp. Workers' Union of Am., Local* **[*5]** *100, AFL-CIO*, 6 NY3d 332, 845 N.E.2d 1243, 812 N.Y.S.2d 413 [2005]), and is bound by the arbitrator's factual findings and interpretations of the agreement at issue (*Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368, 777 N.Y.S.2d 82 [1st Dept 2004]). It may not "examine the merits of an arbitration award and substitute its **[**5]** judgment for that of the arbitrator simply because it believes its interpretation would be the better one." (*Matter of New York State Correctional Officers and Police Benev. Assn. v State of New York*, 94 NY2d 321, 726 N.E.2d 462, 704 N.Y.S.2d 910 [1999]).

When a hearing is held pursuant to Education Law 3020-a, a party who was subject to the hearing may apply to vacate a hearing officer's decision pursuant to CPLR 7511 upon a showing of misconduct, bias, excess of power, or procedural defects. (*City School Dist. of the City of New York v McGraham*, 75 AD3d 445, 905 N.Y.S.2d 86 [1st Dept 2010], *lv denied* 16 N.Y.3d 735, 942 N.E.2d 310, 917 N.Y.S.2d 100 [2011]; *Austin v Bd. of Educ. of City School Dist. of City of New York*, 280 AD2d 365, 720 N.Y.S.2d 344 [1st Dept 2001]). And when a party is required to arbitrate, the arbitrator's decision is subject to closer judicial scrutiny; the arbitration award "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." (*Lackow v Dept. of Educ. (or "Board") of City of New York*, 51 AD3d 563, 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, 550 N.E.2d 919, 551 N.Y.S.2d 470 [1990])). The party challenging the arbitration award has the burden **[**6]** of proving that it is invalid. (*Lackow*, 51 AD3d at 568). The standard of review is "whether the award is supported by evidence or other basis in reason, as may be appropriate, and appearing in the record." (*Mount St. Mary's Hosp. of Niagara Falls v Catherwood*, 26 NY2d 493, 260 N.E.2d 508, 311 N.Y.S.2d 863 [1970]).

A. Was the award supported bv adequate evidence, rational, and not arbitrary and capricious

The hearing officer evaluated the evidence and testimony of the witnesses, considered the **[*6]** credibility of each witness, and made factual determinations based on the evidence before her, which she explained in a comprehensive 47-page decision, which is supported by the evidence, Her determinations as to the witnesses' credibility and the evidence are not reviewable here. (*See Cent. Squares Teachers Ass'n v. Bd. of Educ.*, 52 N.Y.2d 918, 419 N.E.2d

341, 437 N.Y.S.2d 663 [1981] ["The path of analysis, proof and persuasion by which the arbitrator reached [her] conclusion is beyond judicial scrutiny."]; *Cipollaro v New York City Dept. of Educ*, 2011 WL 1466603, 2011 NY Slip Op 03131 [1st Dept] [determination by hearing officer that evidence was not credible entitled to deference]; *Matter of Bd. of Educ. of Byram Hills Cent. School Dist. v Carlson*, 72 AD3d 815, 898 N.Y.S.2d 469 [2d Dept 2010] **[**7]** [hearing officer has discretion to determine what weight to give evidence and court may not substitute its judgment for that of officer]; *Matter of Saunders v Rockland Bd. of Coop Educ. Servs*., 62 AD3d 1012, 1013, 879 N.Y.S.2d 568 [2d Dept 2009] ["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 Tasch v Bd. of Educ. of City of New York*, 3 AD3d 502, 770 N.Y.S.2d 430 [2d Dept 2004] [as arbitrator entitled to deference in assessing credibility, court properly accepted arbitrator's credibility determinations even though evidence was conflicting]).

And even if factual errors were made, it is well-settled that an arbitration award may not be vacated on that ground. (*See Wien & Malkin LLP*, 6 NY3d at 479-480 ["we have stated time and again that an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator"]).

For these reasons and in light of the comprehensive and reasoned analysis set forth in the decision, respondent has established that the award is rational and supported by adequate **[*7]** evidence. (*Matter of Buffalo Teachers Fedn., Inc. [Bd. of Educ. of Buffalo City School Dist.]*, **[**8]** 67 AD3d 1402, 890 N.Y.S.2d 225 [4th Dept 2009] [arbitrator's findings supported by documentary evidence in record before arbitrator]; *Lackow*, 51 AD3 d at 568 [record of hearing supported hearing officer's conclusions]; *Austin*, 280 AD2d at 365 [hearing officer's finding was supported by record as officer credited certain testimony and found petitioner's testimony incredible]).

And, as petitioner submitted a copy of respondent's specifications against her, which indicate that respondent found that probable cause existed as to the charges against her, there is no merit to her claim that respondent failed to follow proper procedure in bringing charges against her, nor is there evidence that petitioner's due process rights were violated in any other way. (*See Harris v Dept. of Educ. of City of New York*, 67 AD3d 492, 890 N.Y.S.2d 11 [1st Dept 2009] [petitioner's due process rights were not violated as respondent held full hearing where evidence was presented and witnesses testified, and hearing officer issued detailed decision based on evidence]).

B. Was the hearing officer biased against petitioner

An allegation of bias against an arbitrator must be established by clear **[**9]** and convincing proof, showing more than a mere inference of partiality. (*Matter of lnfosafe Sys., Inc. [Intl. Dev. Partners, Ltd.]*, 228 A.D.2d 272, 643 N.Y.S.2d 585 [1st Dept 1996]). Partiality may be established by proof of actual bias or the appearance of bias, from which the arbitrator's conflict of interest may be inferred. (*New York Rest. Exch, Inc. v Chase Manhattan Bank, N.A*., 226 AD2d 312, 642 N.Y.S.2d 626 [1st Dept 1996], *lv denied* 89 N.Y.2d 861, 675 N.E.2d 1236, 653 N.Y.S.2d 283).

Here, petitioner argues conclusorily that the adverse decision and credibility findings reflect the hearing officer's bias against petitioner. Consequently, petitioner has not **[*8]** demonstrated by clear and convincing proof that the hearing officer was biased. (*See Zrake v New York City Dept. of Educ*., 41 AD3d 118, 838 N.Y.S.2d 31 [1st Dept 2007], *lv denied* 9 N.Y.3d 1001, 879 N.E.2d 168, 849 N.Y.S.2d 28 [petitioner's allegations of hearing officer's bias unsupported by clear and convincing evidence]; *Matter of Mays-Carr [State Farm Ins. Co.]*, 43 AD3d 1439, 842 N.Y.S.2d 835 [4th Dept 2007] [allegations of bias were wholly speculative and fact that adverse determination was made did not indicate that arbitrator was partial]; *Matter of Schwartz v New York City Dept. of Educ*, 22 AD3d 672, 802 N.Y.S.2d 726 [2d Dept 2005] [petitioner failed to submit evidentiary proof **[**10]** of arbitrator's bias or appearance of bias]).

C. Was the penalty excessive and shocking to the conscience

The standard for reviewing a penalty imposed after a hearing pursuant to Education Law § 3020-a is whether the punishment imposed "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 Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 233, 313 N.E.2d 321, 356 N.Y.S.2d 833 [1974]). A result is shocking to one's sense of fairness when:

> the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct... of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a

> reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved.

(*Id* at 234).

Here, **[**11]** petitioner was found guilty of engaging in misconduct and using inappropriate language toward a student's parent and students, being verbally abusive toward students, and, **[*9]** most seriously, of interfering with and violating the confidentiality of an investigation involving sexual harassment allegations by a student against a school official, which was especially egregious as petitioner had previously worked as an investigator and knew the importance of confidentiality in such an investigation. Thus, the penalty imposed was neither disproportionate to petitioner's offenses nor shocking to one's sense of fairness.

V. CONCLUSION

Accordingly, it is hereby

ADJUDGED and ORDERED, that the petition for an order vacating the award is denied; it is further

ADJUDGED and ORDERED, that respondent's cross-motion for an order dismissing the petition is granted and the proceeding is dismissed, with costs and disbursements to respondent; and it is further

ADJUDGED and ORDERED, that respondent, having an address at 100 Church Street, New York, New York 10007, do recover fronx petitioner, having an address at 160 Bleecker Street, Apartment #2BW, New York, NY 10012, costs and disbursements in the amount of **[**12]** $, as taxed by the Clerk, and that respondent have execution therefor.

ENTER:

/s/ Barbara Jaffe

Barbara Jaffe, JSC

DATED: May 13, 2011

New York, New York