[*2] In the Matter of the Application of PHYLLIS NUCHMAN, Petitioner, -against- JOEL I. KLEIN, CHANCELLOR, NEW YORK CITY DEPARTMENT OF EDUCATION, and THE NEW YORK CITY DEPARTMENT OF EDUCATION, Respondents, To Vacate a Decision of a Hearing Officer Pursuant to Education Law Section 3020-a and CPLR Section 7511. Index No. 111217/10

111217/10

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2011 NY Slip Op 30694U; 2011 N.Y. Misc. LEXIS 1215

March 10, 2011, Decided
March 14, 2011, Filed

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

CORE TERMS: hearing officer's, teacher, special education, arbitration, misconduct, annual, petitioner's request, arbitration award, procedural defects, cross-motion, confirm, adhere, bias, teaching positions, line of duty, disciplinary, signature, scheduled, tenured, spoke

JUDGES: [**1] CYNTHIA S. KERN, J.S.C.

OPINION BY: CYNTHIA S. KERN

OPINION

JUDGMENT/ORDER

HON. CYNTHIA S. KERN, J.S.C.

In this Article 75 proceeding, petitioner Phyllis Nuchman ("petitioner") seeks to vacate the Opinion and Award of Hearing Officer Jay M. Siegel, Arbitrator ("Hearing Officer Siegel"), dated August 2, 2010 issued pursuant to Education Law § 3020-a. The New York City Department of Education (the "DOE") cross-moves to dismiss the petition and to confirm the [*3] arbitration award. This court denies petitioner's request and grants the DOE's cross-motion for the reasons set forth below.

The relevant facts are as follows. Petitioner was employed by the DOE as a tenured teacher. Petitioner commenced employment with DOE approximately 29 years ago and has held a variety of special education teaching positions during her teaching career. In 2005, petitioner left her job as a special education teacher at PS 147 and accepted a special education tenured teaching position in January 2006 at PS 268, the school where the instant dispute arose. Petitioner's duties varied during the 2006-2007 school year while employed at PS 268. Among other responsibilities, her duties included serving as a resource room teacher providing students [**2] needing special education services with additional academic assistance and writing Individualized Education Plans (IEPs) for the students she was assigned to serve as a resource room teacher.

In April 2007, CD, the parent of student PD, visited PS 268 to inquire about his son's annual IEP meeting. CD spoke to PS 268's Assistant Principal Wilburn Smith to ask him why PD's annual IEP review had not taken place. When Mr. Smith looked at PD's file, he informed PD's father that PD's annual IEP conference had been held on April 20, 2007. PD's IEP indicated that CD had participated in the IEP conference via telephone, which CD vehemently denied.

Mr. Smith also spoke with guidance counselor Catherine Marasa regarding PD's IEP conference. Ms. Marasa stated that she never attended an IEP conference for PD on April 20, 2007 and that the signature on page two of the IEP was not hers. Mr. Smith reported this information to the principal of PS 268, Lissa Stewart, who then asked Mr. Smith to do a random [*4] inspection of all IEPs for which petitioner was responsible. During this investigation, other teachers at PS 268 came forward to Mr. Smith, alleging that petitioner had asked them to sign IEPs indicating [**3] they were present for certain IEP conferences when they were not.

In June 2007, Ms. Stewart asked DOE's Special Commissioner of Investigations (SCI) to look into several claims that petitioner had falsified or attempted to provide false information on several students' IEPs. Consequently, the matter was transferred from SCI to the DOE's Office of Special Investigations (OSI). The resulting investigation, completed on December 20, 2007, revealed that the allegations against petitioner were substantiated and that petitioner had forged the signature of Ms. Marasa and had asked teachers to sign IEP forms to make it appear that they had been present at IEP meetings when they had not.

Petitioner was notified of the allegations against her when she was interviewed by OSI as part of its investigation on October 2, 2007. This put petitioner on notice and gave her ample opportunity to respond. While the investigation was being conducted, petitioner was approved to take leave due to a line of duty injury in November 2007. She remained absent due to her injury until April 7, 2008, at which time she returned to a reassignment center and never returned to work at PS 268.

After the DOE received the [**4] OSI report on December 20, 2007, petitioner was informed of a disciplinary conference scheduled for January 14, 2008. In a fax memorandum to Ms. Stewart, petitioner stated that she was "unable to attend the scheduled appointment...on 1/14/08" because she was "out of work due to a line of duty injury which has caused me to be disabled and unable to drive." On February 12, 2008, Ms. Stewart informed petitioner that disciplinary charges were being preferred against her regarding her conduct at PS 268.

[*5] "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.'" Lackow v. Dept. of Education of the City of New York, 51 A.D.3d 563, 567, 859 N.Y.S.2d 52 (1st Dept 2008); See The City School Dist. of the City of New York v. McGraham, 75 A.D.3d 445, 905 N.Y.S.2d 86, 2010 WL 2731911 at *4 (2010, N.Y.App. Div. 1st Dept.). However, where arbitration is mandated by law, as it is here, "judicial scrutiny is stricter than that for a determination rendered where the parties have submitted to voluntary arbitration. The determination must be in accord [**5] with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR Article 78. The party challenging an arbitration determination has the burden of showing its invalidity." Lackow, 51 A.D.3d at 567-68 (internal citations omitted).

Petitioner initially filed a motion to dismiss the charges against her asserting that the DOE failed to comply with the procedural requirements of Article 21 (C) of the Collective Bargaining Agreement ("CBA") between the DOE and the United Federation of Teachers ("UFT"). Her argument, however, is unfounded. Article 21 (C) of the CBA provides, in part, that incidents investigated by OSI must be reduced to writing by the appropriate supervisor within six months from the date the incident occurred, or within twelve months from the date the incident should have been discovered by appropriate school officials. Although petitioner first received a summary of the investigation in writing in June 2008, Hearing Officer Siegel determined that the DOE is not contractually bound to dismiss the charges if the specific procedures discussed are not adhered to. As determined by Hearing Officer Siegel, "there [**6] is nothing in the provision that even hints at the notion that the [DOE's] failure to strictly adhere to [*6] the times set forth in the provision would lead to the draconian penalty of not allowing the [DOE] to proceed with 3020-a charges." Furthermore, Hearing Officer Siegel made clear that

"without express language evincing the parties mutual intent that the Department's failure to strictly adhere to time limits set forth in the provision will result in the dismissal of any Section 3020-a charges filed by the Department against an employee," Article 21 (C) cannot be interpreted in the way petitioner suggests.

Turning to Hearing Officer Siegel's Opinion and Award, the court finds that the decision was rational and supported by adequate evidence. Additionally, petitioner has failed to provide any evidence demonstrating misconduct, bias, excess of power, or procedural defects. While respondents requested that petitioner be fully terminated, Hearing Officer Siegel instead found that petitioner should be suspended without pay and benefits for four months commencing September 1, 2010 and concluding on December 31, 2010. Hearing Officer Siegel decided upon this much less severe penalty after [**7] taking into account petitioner's overall 29 year record of no prior discipline, finding that petitioner's "long record of commendable service is of high value." Thus, this court finds that the penalty of four months suspension without pay and benefits is appropriate given the seriousness of the misconduct of which petitioner was found guilty.

Accordingly, this court denies petitioner's request for relief under Article 75 of the CPLR and dismisses the proceeding in its entirety. The DOE's cross-motion to dismiss the petition and confirm the arbitration award is granted. This constitutes the decision, order and judgment of the court.

Dated: 3/10/11

Enter: Cynthia S. Kern J.S.C.

CYNTHIA S. KERN J.S.C.

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