LUIS VILLADA, Petitioner, -against- CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF EDUCATION; DENNIS WALCOTT, CHANCELLOR of NEW YORK CITY DEPARTMENT OF EDUCATION, Respondents. Index Number: 650838/2013

650838/2013

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2013 N.Y. Misc. LEXIS 5273; 2013 NY Slip Op 32899(U)

November 7, 2013, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

CORE TERMS: teacher's, specifications, sexual misconduct, investigator, hearing officer's, disciplinary, remorse, evidence presented, hugged, mouth, school year, penalty imposed, irregularities, termination, shocking, testing, hallway, kissed, appropriate penalty, sense of fairness, arbitrary and capricious, disproportionate, distinguishable, interfering, challenging, misconduct, cross-motion, egregious, perceive, slapping

JUDGES: [*1] HON. MARGARET A. CHAN, Justice, Supreme Court.

OPINION BY: MARGARET A. CHAN

OPINION

DECISION/ORDER

Petitioner brings this Article 75 proceeding seeking an order to vacate a hearing officer's opinion and award in a disciplinary proceeding brought against him. Respondents oppose, and by notice of cross-motion dated May 16, 2013, move pursuant to CPLR§§ 404(a), 3211 (a)(7), and 7511 for an order dismissing the petition.

Petitioner, a tenured teacher assigned to Multicultural High School as a bilingual math teacher, had been working for the Board of Education of the City of New York (BOE) for twenty (20) years with an unblemished record when he was charged by the BOE with sexual misconduct towards another teacher and interfering with an investigation conducted by the Office of Special Investigation (OSI). Petitioner was also a Chapter Leader for the Teacher's Union, a job which he contended put him at odds with the school's principal, Altagracia Liciaga (Principal Liciaga).

The charges against petitioner emanated from incidents occurring during the 2011 school year. Pursuant to Education Law § 3020-a, a disciplinary hearing was held. The hearing took place over seven (7) intermittent days beginning on August 21, **[*2]** 2012 and ending on November 28, 2012. Petitioner was represented by an attorney at all times during the hearing. Hearing Officer Haydee Rosario (HO Rosario) conducted the hearing and determined that of the six (6) specifications against petitioner the BOE sustained four (4) of them -- all relating to the sexual misconduct towards another teacher. The other specifications, related to interfering with an OSI investigation regarding testing irregularities, were not sustained. Ultimately, HO Rosario found the appropriate penalty was termination. The relevant hearing testimony revealed the following:

The BOE presented the testimony of Lacey Litvin, a then twenty-two year old teacher working at Multicultural High School as an ESL teacher who was hired there in October 2010. From October 2010 through January 2011, Litvin had only professional interactions with the petitioner. In January 2011, in response to finding out that Litvin's relative had passed away the petitioner **[**3]** hugged her as did other professionals expressing their condolences. From January 2011 through April 8, 2011, petitioner continued to hug Litvin whenever he saw her. Litvin testified the embraces lingered and petitioner became **[*3]** more affectionate towards her even when she indicated that she did not want to be hugged. On April 8, 2011, Litvin was alone in a copy room when petitioner approached. He began a conversation, hugged Litvin, lifted her off the floor, and kissed her face and mouth without consent. Petitioner forcefully pushed his tongue inside Litvin's mouth and continued to hug her until she struggled out of his

embrace. Litvin claimed that petitioner told her to keep the incident between themselves. Litvin testified in the aftermath of the April 8th incident she did made a formal complaint to the Office of Equal Opportunity (OEO) and did not report to work for two days afterwards. As a result of the incident she avoided contact with other school professionals for fear of running into petitioner. Petitioner called Litvin at home and requested that they speak in person. Litvin declined. A few days later, while Litvin was instructing a class, petitioner interrupted the class and again asked to discuss the incident with Litvin. Petitioner later found Litvin in a school hallway and insisted they speak about the incident. Litvin again declined and reported petitioner's attempts to speak with her to Principal **[*4]** Liciaga.

The BOE further presented the testimony of: Alexis Pajares, another teacher at Multicultural High School; Norma Prado, a retired teacher assigned as Litvin's mentor during the 2011-2012 school year; and Aida Lane, an OEO investigator (Investigator Lane). All of these witnesses corroborated Litvin's testimony. Indeed, Investigator Lane substantiated Litvin's sexual harassment complaint and recommended that petitioner receive an Unsatisfactory rating for the school year and attend Corrective Action Training. Investigator Lane testified that during her investigation, petitioner only admitted kissing Litvin on the check during the April 8th incident and appeared nonchalant about the investigation. Petitioner explained that he acted in a "'fatherly'" way towards Litvin and kissed and hugged her "'whenever she needed it'" (Resp Cross Mot, Exh 1, p 12). Petitioner stated to Investigator Lane that the incident arose because Litvin was upset about Principal Liciaga's negative teaching feedback. Principal Liciaga also testified and her testimony was in essence neutral; she did not participate in the investigation of Litvin's complaint against petitioner.

Petitioner also testified in his **[*5]** defense. He denied kissing Litvin on the mouth or forcefully putting his tongue in her mouth. He conceded that he lifted Litvin up by her waist, put her down, and kissed her. He further admitted to calling her at home that night and to insisting to speak with her thereafter in front of her class and later in a hallway. He claimed that he sought to apologize for the April 8th incident. Petitioner completed the recommended Corrective Action Training on March 21, 2012. He testified that it was helpful to him to better perceive the boundaries of his colleagues.

HO Rosario carefully weighed the evidence adduced at the hearing. She recounted all of the witnesses and their testimony and the records submitted. HO Rosario further addressed the charges concerning petitioner's interference with the OSI investigation. Briefly, the OSI investigation concerned testing irregularities at the school and had nothing to do with the April 8th incident involving Litvin. Those charges were not substantiated and are not the basis of petitioner's Article **[**4]** 75 action. However, it worth noting that HO Rosario's opinion and award also thoroughly discussed the evidence presented concerning charges of testing irregularities **[*6]** and the positions taken by the BOE and petitioner. HO Rosario concluded that the evidence presented as to those specifications was unreliable hearsay and she found that the BOE failed to establish those specifications. Thus, it cannot be said that HO Rosario failed to evaluate the evidence presented.

Addressing petitioner's penalty, HO Rosario took issue with petitioner's lack of remorse over the April 8th incident. HO Rosario indicated that even though petitioner completed the Corrective Action Training he failed to understand his "egregious sexual misconduct" (*id* at 28). Further, HO Rosario found petitioner lacked remorse for his actions and avoided taking responsibility for his misconduct. Lastly, she noted that it was particularly disturbing that petitioner painted his interactions with Litvin as related to his Chapter Leader status. HO Rosario found that tended to show petitioner "sought to use his position as a Chapter Leader to cover up his sexual misconduct." (*id* at 29). Hence, based on a lack of understanding of his offense and his failure to accept responsibility for his actions, HO Rosario found petitioner could not be remediated, and therefore, termination was the appropriate **[*7]** penalty.

In challenging HO Rosario's arbitral award, petitioner argued that his employment termination was unduly harsh for the specifications. The standard for reviewing a penalty imposed after a hearing held 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*, 34 NY2d 222, 233, 313 N.E.2d 321, 356 N.Y.S.2d 833 [1974]).

Petitioner, in challenging the award, has the burden of showing an award 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]). As the arbitration here was compulsory, "[t]he 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" (*id* at 567). Additionally, the hearing officer's determinations 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 568, *quoting Matter of Berenhaus v Ward*, 70 NY2d 436, 443, 517 N.E.2d 193, 522 N.Y.S.2d 478 [1987]).

Petitioner **[*8]** argued that HO Rosario "inexplicably credited all of the evidence and witness statements submitted by the [BOE] over that of the [p]etitioner, despite numerous inconsistencies in the witness statements and evidence submitted" (Pet Mot, p 5, para 17). However, petitioner failed to further discuss those inconsistencies. HO Rosario went into detail as to why she found Litvin credible; she was consistent and other witnesses corroborated her testimony. HO Rosario's decision demonstrated that she carefully weighed the evidence presented by both sides. She certainly did not accept all of the BOE's evidence and testimony at face value. Indeed, two (2) of the six (6) specifications were dismissed completely.

[5]** Petitioner raised *Riley v NYC BOE*, 84 AD3d 442, 921 N.Y.S.2d 849 (1st Dept 2011), to show that hearing officer decisions have been vacated by the courts when the penalty is unduly harsh. In *Riley* a tenured teacher was found to have engaged in a single misconduct of using corporal punishment (slapping) in an otherwise spotless record of fifteen (15) years. In *Riley*, the affected party, a student, conceded that she "sustained no physical or emotional injury as a result of the incident" (*id*.). The matter here **[*9]** is distinguishable. Litvin she was "dramatically" affected by the incident (Resp Cross Mot, Exh 2, p 610); she took two (2) days off from work following the incident, was afraid to encounter the petitioner after the incident, asked other teachers to escort her in the hallways, parked her car outside of the teacher's parking area and used a bathroom on another floor to avoid the petitioner (*see* Resp Cross Mot, Exh 2, p 609-612). Moreover, the lower court in *Riley* noted petitioner's lack of remorse, but stated that the lack of remorse alone was "insufficient to place a single occurrence of slapping in league with cases involving sexual miscreants and wholly incompetent teachers." (*Riley v City of New York*, 2010 N.Y. Misc. LEXIS 4521, 2010 NY Slip Op 32540[U] [NY Sup Ct, NY Cty 2010]). Here, petitioner was found to have committed egregious sexual misconduct. Thus, this matter, for that reason alone, is distinguishable from the facts in *Riley*.

In reviewing a disciplinary penalty under Education Law § 3020-a, a court must consider whether the penalty imposed is "so disproportionate to the offense, in 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, 313 N.E.2d 321, 356 N.Y.S.2d 833 [1974] **[*10]** [internal quotations marks omitted]). The record presented here demonstrated that HO Rosario took into account the seriousness of the charges, as well as petitioner's lack of prior disciplinary history during his 20-year career with the BOE and the likelihood that petitioner would likely not correct his inappropriate behavior. It cannot be said that, under all of the circumstances here, the penalty imposed is either shocking to the conscience or arbitrary and capricious as petitioner contends. As such, HO Rosario's determination and award will not be disturbed (*see Lackow v Department of Education of City of New York, supra*).

Accordingly, the respondents' cross-motion to dismiss is granted and the petition is dismissed.

Dated: November 7, 2013

/s/ Margaret A. Chan

MARGARET A. CHAN

J.S.C.