SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA PART 19

Index Number : 100517/2010
RILEY, BEVERLY
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
VACATE

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

This motion to/for Article 75

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion and cross-motion are decided in accordance with accompanying memorandum decision.

This constitutes decision, order and judgment of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: September 13, 2010

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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In the Matter of the Application of

BEVERLY RILEY,

Petitioner

Index Number 100517/2010
Submission Date June 30, 2010
Mot. Seq. No. 001
DECISION and JUDGMENT

For a Judgment Under Article 75 of the Civil Practice Law and Rules

–against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, and JOEL KLEIN, CHANCELLOR OF NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

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Appearances:

For Petitioner :
Glass Krakower, LLP
By Bryan D. Krakow, Esq.
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For Respondent:
Corporation Counsel of the City of New York
By Gianfranco J. Cuadra, Esq.
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Papers considered in review of this petition to vacate arbitration award:

Seq 001	Papers	Numbered
	Affirm. in Supp. of Petition to Vacate Arbtr. Award	1
	Affid. in Supp. of Respond.'s Cross-Mot. to Dism. the Petition	2
	Memo. of Law in Supp. of Respond.'s Cross-Mot	3
	Reply Affirm	4

HON SALIANN SCARPULLA, J.:

Petitioner Beverley Riley ("Riley"), brings this Article 75 petition to vacate the determination entered in a compulsory arbitration held pursuant New York Education Law § 3020-a on December 22, 2009. The arbitration resulted in Riley's termination as a

teacher with the New York City Department of Education allegedly for slapping a student. Before termination, Riley had been an elementary school teacher for fifteen years with a record free of any prior formal discipline. Respondents (herein collectively "the DOE") move to dismiss the petition under CPLR 7511, 404(a) and 3211(a)(7).

According to the charges, on September 21, 2006, at aboout 3:00 p.m. a nine-year-old third-grade student (identified in the arbitration record only as "TT") waited in the first-floor hallway of P.S. 28 for her family to pick her up when Riley approached her and demanded to know why TT was idling in the hallway. As TT answered and tried to walk away, Riley allegedly grabbed TT, pulled her to the wall and slapped her on the left side of the face. Minutes later, TT left the school, came back with her aunt, orally complained to the school's principal Ms. Silver and the following day filed a written complaint. When given an opportunity to respond, Riley denied the incident and alleged she had never touched TT. There were no third-party witnesses to the alleged altercation.

On December 18, 2006, Ms. Silver filed form A-420 with the DOE's Office of Special Investigations, in which she concluded that TT's allegations were substantiated. The DOE subsequently initiated compulsory arbitration, preferring two charges, also known as "specifications," of misconduct in violation of November 2004 Regulation of the Chancelor A-420. The first specification was the allegation of the use of corporal punishment on TT. The second specification involved a separate, yet similar, allegation

of corporal punishment against another student KB, which had allegedly occurred on October 4, 2006 when Riley intervened in the melee between KB and BB.

Following a five-day hearing , the arbitrator issued his opinion and award dated December 22, 2009. The arbitrator fully sustained the first specification, but dismissed the second charge. The arbitrator concluded that despite minor inconsistencies, TT's testimony of events was credible, while Riley's denial of any physical contact was unpersuasive. However, the arbitrator found the second specification to have been unsubstantiated, because KB had had a prior history of fabricating complaints, did not make a contemporaneous written statement and did not appear at the arbitration hearing.

The arbitrator imposed the ultimate penalty of permanent termination from employment with the DOE. The arbitrator found that Riley failed to offer any mitigating considerations to warrant a lesser sanction and refused to accept responsibility for her actions by maintaining her innocence throughout the proceeding. While the arbitrator recognized that this incident was isolated in Riley's otherwise immaculate fifteen-year career, the arbitrator found it of no significance on ground that "even one proven incident of corporal punishment can have a devastating impact on the involved student, and justifies the imposition of severe discipline. . .[s]tudents and parents need to know that the Department will not tolerate teachers using physical force to discipline students, even where the incident of corporal punishment was isolated and the only bruise was 'on the inside'."

Discussion

Although review of any arbitration under Education Law 3020-a falls under CPLR Article 75, which provides that an arbitration award may only be vacated on a showing of "misconduct, bias, excess of power, procedural defects," the courts apply a hybrid Article 75 and Article 78 analysis. *See Lackow v Dept. of Educ. of City of New York*, 51 A.D.3d 563, 567 (1st Dep't 2008). Under such review, the arbitrator's determination must be in accord with due process and supported by adequate evidence, and must also be rational and not arbitrary and capricious. *See City School Dist. of the City of New York v Hershkowitz*, 7 Misc.3d 1012A, *8 (Sup. Ct. New York, 2005).

It is well settled that an administrative sanction must be upheld unless it "shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." *Matter of Diefenthaler v Klein*, 27 A.D.3d 347, 348-49 (1st Dep't 2006). A sanction shocks the conscience when it is so grave in its impact that it is disproportionate to the offense. *Matter of Pell v Bd. of Educ.*, 34 N.Y.2d 222, 232-34 (1974). Where, as here, the parties have submitted to compulsory arbitration, the arbitrator's determination is subject to closer judicial scrutiny than voluntary arbitration. *See Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 N.Y.2d 214, 223 (1996); *see also Hegarty v Bd. of Educ.*, 5 A.D.3d 771, 772 (2nd Dep't 2004). The credibility of witnesses at a hearing is for the hearing officer, not the court, to decide. *See Matter of Mack Markowitz Oldsmobile Inc. v State Division of Human Rights*, 271 A.D.2d 690, 690 (2nd Dep't 2000).

The Court accepts all of the arbitrator's factual findings as a true and correct rendition of the events that took place between Riley and TT. *See Matter of Saunders v Rockland Bd. of Coop. Educ. Serv.*, 62 A.D.3d 1012, 1013 (2nd Dep't 2009). The court, however, finds that the arbitrator abused his discretion in having imposed a disproportionate penalty. *See Matter of Diefenthaler v Klein*, 27 A.D.3d 347, 348 (1st Dep't 2006). While corporal punishment has no place in New York City's educational institutions, the ultimate penalty of dismissal is reserved for those situations involving the most egregious conduct, when no measure of alternative deterrence would be effective. See e.g., *Lackow v Dept. of Educ.*, 51 A.D.3d 563, 569 (1st Dep't 2008) (termination after repetitive inappropriate references to students' sexual organs and activities); *see Matter of Cruz v New York City Dept. of Educ.*, 26 Misc. 3d 1208A (Sup. Ct. New York County, 2010) (termination after two years worth of instances of incompetent service, neglect of duty and abusive conduct); *see City School District of the City of New York v Hershkowitz*, 7 Misc. 3d 1012A, *8 (Sup. Ct. New York County, 2005) (termination as a result of a continuous attempt to seduce a student).

Riley's incident constituted the only isolated instance of aberrant behavior during her fifteen-year tenure, and was not "a continued pattern of offensive behavior that reflects inability to understand the necessary separation between a teacher and his students," which justified termination in *Lackow v Dept. of Educ.*, 51 A.D.3d at 569. Riley's lack of remorse alone is insufficient to place a single occurrence of slapping in

league with cases involving sexual miscreants and wholly incompetent teachers. *See Matter of Gabriel v New York City*, 2009 N.Y. Slip. Op. 32248U, *8 (Sup. Ct. New York County, 2009).

This Court, of course, recognizes the paramount importance of ensuring the safety and welfare of children. *See e.g.*, Social Services Law § 384-a. However, a recent First Department decision in the *City School Distr. of the City of New York v McGraham*, 2010 N.Y. Slip. Op. 6065, *6 (1st Dep't 2010) incorporates this public policy consideration as part of the analysis evaluating the proportionality between a teacher's offensive conduct and the penalty. Alone, such policy does not justify the imposition of the most severe penalty irrespective of other considerations.

Here, TT admitted that she did not sustain any physical or persistent emotional injury as a result of September 21, 2006 occurrence. Further, Riley showed no predisposition towards like misconduct either before or after this only incident. The second charge of hitting KB on October 4, 2006 entirely lacked in any merit. For the fifteen years before the incident, Riley had received not a single formal reproach. Under these circumstances, a less draconian sanction should sufficiently vindicate the public policy against the use of corporal punishment in public schools, while at the same time effectively deter Riley from falling into like predicament in the future. *See Matter of Gabriel*, 2009 N.Y. Slip. Op. 32248U at 8.

In accordance with the foregoing, it is hereby

ORDERED and ADJUDGED that Beverly Riley's petition is granted in part to the extent of vacating the arbitration award made by Hearing Officer James Darby on December 22, 2009 insofar as it dismisses petitioner from employment, and is otherwise denied; and it is further

ORDERED and ADJUDGED that respondents' cross-motion to deny and dismiss the petition is denied; and it is further

ORDERED and ADJUDGED that this matter is remanded to the New York City Department of Education for assignment to a Hearing Officer to assess a new penalty consistent with the Court's opinion.

This Constitutes the decision and judgment of the Court.

Dated: New York, New York
September 13 ,2010

ENTER:

Hon. Saliann Scarpulla, J.S.C.