SCANNED ON 6/1/2011

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

PRESENT: MANUEL J. MENDEZ *Justice* PART 13

MOHAMADOU KHOUMA,
Petitioner,

-against-

CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF EDUCATION; JOEL I. KLEIN, CHANCELLOR of 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. 115740/10
MOTION DATE 05-11-2011
MOTION SEQ. NO. 001
MOTION CAL. NO.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

The following papers, numbered 1 to 5 were read on this petition to/for Art. 78 and Cross-Motion to Dismiss the Petition

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 2, 3 -4
Answering Affidavits — Exhibits ____ cross motion ____	
Replying Affidavits ____	5

Cross-Motion: X Yes No

Upon the foregoing papers, it is ordered and adjudged that the petition pursuant to CPLR § 7511, and Education Law §3020-a [5] to vacate, and set aside the decision of the Hearing Officer imposing a $15,000.00 penalty, is granted. The cross-motion to dismiss the petition pursuant to CPLR 3211[a][7] and CPLR 7804[f], for failure to state a cause of action, is denied.

The petitioner is a tenured veteran ESL teacher with twenty (20) years of service and no formal disciplinary charges prior to the events that took place, on December 22, 23, 2008 and January 5, 2009. Petitioner was charged with misconduct, neglect of duty, insubordination and conduct unbecoming his profession, related to taking unauthorized time off from work before and after the 2008-2009 winter break.

A hearing took place over the course of three days, with witnesses and other evidence submitted, including a Teachers handbook prepared by Principal Alexander Angueira [Cross-Mot. Exh. 2 - 4]. The hearing officer, Roger R. Kaplan, Esq., rendered a decision dated November 11, 2010, finding that the Specifications for Violations against the petitioner were sustained with the exception of Subsection [c] of Specification 2. The petitioner was not found to have violated Subsection [c] of Specification 2, which involved school administration requirements for absenteeism on January 5, 2009. Roger R. Kaplan took into consideration the petitioner's history of no prior disciplinary charges and satisfactory performance evaluations until 2007- 2008, in deciding that although the misconduct was serious, termination was too severe a penalty. The petitioner was found to be a potentially productive teacher in the classroom. The hearing officer decided that a penalty was needed to help petitioner understand that insubordination is,"serious misconduct" and "totally unacceptable"[Cross-Mot. Exh. 1, p.18]. The penalty imposed was a fine of $15,000.00, payable over a period of 18 months in equal installments, taken out of petitioner's paycheck.

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

The petitioner claims that given his prior disciplinary record, the conduct at issue was relatively de minimus in nature, and the Hearing Officer's determination was clearly excessive, harsh and disproportionate requiring that it be promptly vacated. The petitioner seeks to have the November 11, 2010 determination vacated, alternatively to have a penalty imposed that is no harsher than a letter of reprimand.

The respondents seek to dismiss the petition pursuant to CPLR 3211[a][7] and CPLR 7804[f], for failure to state a cause of action, claiming that the petitioner has failed to demonstrate that determination, based on his deliberate act of insubordination and misconduct, warranted a lesser penalty. Respondents claim that the petitioner fails to allege facts sufficient to vacate or modify the hearing officer's determinations.

Pursuant to Education Law §3020-a [5], a petition to vacate the determination of a hearing officer, requires the Court apply the standard set forth in CPLR §7511. The standard for granting a petition pursuant to CPLR §7511 is to, "show misconduct, bias, excess of power, or procedural defects" (Austin v. Board of Education of the City School Dist. Of City of New York, 280 A.D. 2d 365, 720 N.Y.S. 2d 344 [N.Y.A.D. 1st Dept., 2001]; Hegarty v. Board of Education of the City of New York, 5 A.D. 3d 771, 773 N.Y.S. 2d 611 [N.Y.A.D. 1st Dept., 2004] and Matter of Pell v. Board of Education, 34 N.Y. 2d 222, 356 N.Y.S. 2d 833, 313 N.E. 2d 321 [1974]). Judicial scrutiny is stricter when the parties have submitted to compulsory arbitration than a determination rendered after voluntary arbitration. After compulsory arbitration the 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" (Lackow v. Dept. of Education (or "Board") of City of New York, 51 A.D. 3d 563, 859 N.Y.S. 2d 52 [2008]; City School Dist. of the City of New York v. McGraham, 75 A.D. 3d 445, 905 N.Y.S. 2d 86 [2010]). The burden of proof is on the party challenging the determination to show that it is invalid. A hearing officer's finding that the testimony was inconsistent or lacked credibility is not a basis to vacate the determination (Lackow v. Dept. of Education (or "Board") of City of New York, 51 A.D. 3d 563, supra; Austin v. Board of Education of the City School Dist. Of City of New York, 280 A.D. 2d 365, supra).

The petitioner states that the hearing officer did not consider evidence presented that he did not have any issues with time off in the past. Petitioner also states that the hearing officer should have taken into consideration that he was not assigned to a regular class at the school, and that he was unaware of changes concerning absenteeism implemented by the new principal, Alexander Angueira.

The respondents claim that the petitioner has not met his burden of proof. The cross-motion seeks to dismiss for failure of the petitioner to state a cause of action and meet his burden of proof concerning bad faith, violation of statutory or decisional law or violation of a constitutional purpose. Respondents state that the hearing officer acted within his power to make credibility determinations regarding the evidence presented which is not grounds for judicial review, and that the determination was not irrational because evidence submitted by all the parties was taken into consideration.

The hearing officer is permitted to make credibility determinations in rendering a determination, and it would be improper for this Court to credit petitioner's evidence to the exclusion of others. The respondents have established that the hearing officer's determination was proper and beyond review, with the exception of the sanction imposed.

Judicial review of administratively imposed sanctions is limited. An administrative sanction may only be revised in those circumstances where it is, "so disproportionate to the offense as to shock the conscience of the court." The Court would have to find that the determination is "shocking to one's sense of fairness." A result is, "shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it

that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the public generally visited or threatened by the derelictions of the individuals." Additional factors would include deterrence or the reasonable prospect of recurrence, and "the standards of society to be applied to the offense involved" (Matter of Pell v. Board of Education, 34 N.Y. 2d 222, supra ; Harris v. Mechanicville Central School District, 45 N.Y. 2d 279, 380 N.E. 2d 213, 408 N.Y.S. 2d 384 [1978]). A teacher's conduct that does not involve "moral deliquency," is not as morally grave as, "larceny, bribery and sabotage," and is not based on a "predatory motive," should not result in a greater sanction where the there are no prior charges, and those currently alleged do not indicate a lack of capacity or grave injury to the school (Matter of Pell v. Board of Education, 34 N.Y. 2d 222 ,supra ; Harris v. Mechanicville Central School District, 45 N.Y. 2d 279, supra, Riley v. The City of New York, 2011 N.Y. Slip Op. 03668 [N.Y.A.D. 1st Dept., 2011]).

The petitioner claims that the nonexistence of a prior disciplinary record in twenty years and the lack of pedagogical or financial impact of his time off to the students, makes the $15,000.00 fine against his salary clearly disproportionate to his conduct. He claims that the misconduct involved did not injure the students and would only warrant a letter of reprimand or lesser fine. Petitioner states that his absence may have required a day to day substitute teacher at no more than $200.00 a day for two days, which is substantially less than the $15,000.00 fine that was imposed.

The respondents claim that the award was not shocking to one's sense of fairness because Education Law §3020-a allows penalties of termination or suspension without pay, and the fine imposed was a lesser penalty. Respondents states that the fine imposed by the hearing officer was to make the petitioner "understand that insubordination is serious misconduct and totally unacceptable," [Cross-Mot. Exh. 1, p.18]. The respondents claim a lesser sanction would make it difficult for the new principal, Alexander Anguelra, to have his efforts to reduce absenteeism taken seriously by other teachers.

Upon review of all the papers submitted this Court finds that the petitioner has met his burden of proof as to the sanctions imposed. The penalty imposed while lesser than termination or suspension without pay, is still shocking to this Court's sense of fairness. The petitioner has met his burden of proof as to the respondent's motion to dismiss for failure to state a cause of action only concerning the sanctions imposed.

Accordingly, it is ORDERED AND ADJUDGED that the petition pursuant to CPLR §7511, and Education Law §3020-a [5] to vacate, and set aside the decision of the Hearing Officer imposing a $15,000.00 penalty, is granted, and it is further

ORDERED, that the case is remanded for determination of an appropriate lesser sanction; and it is further

ORDERED and ADJUDGED, that the cross-motion to dismiss the petition pursuant to CPLR 3211[a][7] and CPLR 7804[f], for failure to state a cause of action is denied, as petitioner states a cause of action as to sanctions imposed; and it is further

This constitutes the decision and judgment of this court.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: May 25, 2011

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE