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

PRESENT: Saliann Scarpulla Justice PART 19

Index Number : 400108/2011
BOARD OF EDUCATION
VS.
OSTRIN, STEVEN
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

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

this motion to/for _____

	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 is determined in accordance with the accompanying decision.

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: 9/21/12

Saliann Scarpulla J.S.C.
SALIANN SCARPULLA

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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 THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, AND CATHLEEN P. BLACK, AS CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioners,

- against-

STEVEN OSTRIN,

Respondent.

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Index No.: 400108/11

Submission Date: 12/21/2011

DECISION, ORDER AND JUDGMENT

For Petitioners:
Michael A. Cardozo, Corporation Counsel of the City of N.Y.
100 Church Street, Room 2-318
New York, NY 10007

For Respondent:
Richard A. Casagrande
52 Broadway, 9th Floor
New York, NY 10004

Papers considered in review of this petition and cross motion to dismiss:

Notice of Petition 1
Verified Answer 2
Cross Motion to Dismiss 3
Reply 4

HON. SALIANN SCARPULLA, J.:

In this Article 75 proceeding, petitioners The Board of Education of the City School District of the City of New York and Cathleen P. Black (together "DOE") seek to vacate the penalty asserted in an arbitration award dated December 27, 2010, made after a disciplinary hearing held pursuant to Education Law § 3020-a. Respondent Steven Ostrin ("Ostrin") cross moves to dismiss the petition and to confirm the arbitration award.

Prior to the commencement of this proceeding, and for the past twenty three-years Ostrin was a social studies teacher at Brooklyn Technical High School, a highly regarded specialized high school. On or about March 2, 2005, Ostrin had an encounter with a female student ("G.O."), during which he inappropriately touched her bare shoulders and neck and made sexually charged comments to her. G.O. reported the incident to her parents and the principal. Ostrin was placed in the Teacher Reassignment Center and was arrested and charged for endangering the welfare of a child. He was acquitted of those charges after trial.

Then, on or about April 26, 2007, Ostrin was arrested and charged with criminal possession of marijuana and for patronizing a prostitute. These charges were later dismissed, but the DOE elected to pursue disciplinary action against Ostrin for both incidents and a hearing was conducted pursuant to Education Law § 3020-a.

By decision dated December 21, 2010, hearing officer Howard C. Edelman found that Ostrin was culpable of some of the DOE charges leveled against him, and that the BOE had failed to prove other charges. In a thorough, twenty-four page opinion, the hearing officer directed that Ostrin be suspended for one half year without pay and then be permitted to return to work as a classroom teacher.

In his decision, the hearing officer explained that Ostrin's conduct did not amount to a repeated pursuit of a student to engage in an inappropriate relationship, which is the standard for imposing a penalty of termination. He further explained that there are

situations where a single incident could require termination, however, this was not one of them. The hearing officer found that, based upon the credible evidence before him, Ostrin was not soliciting sex from G.O., rather, he was engaging in sexually charged banter with an introverted student.

The hearing officer explained that the penalty also took into consideration letters that Ostrin received in 1992 and 1993 reminding him not to use foul language or touch students inappropriately in class. The hearing officer also took into account the student testimony highly commending Ostrin for his teaching talent over a long number of years. Finally, the hearing officer maintained that the penalty of a one-half year suspension without pay is reasonable in light of the evidence presented and puts Ostrin on notice that any "repeat behavior of the type for which he was charged will lead to his dismissal."

DOE commenced this Article 75 proceeding seeking to vacate the penalty asserted in the arbitration award, on the ground that the penalty was grossly inadequate, inconsistent with the hearing officer's findings, and in violation of public policy. After the DOE commenced this proceeding, Ostrin fully and completely retired from teaching.

DOE maintains that pursuant to the contract between the DOE and United Federation of Teachers, if a teacher is found guilty of sexual misconduct, there is a mandatory penalty of termination. DOE explains that "sexual misconduct" is defined in the contract as "sexual touching, serious or repeated verbal abuse (as defined in the Chancellor's Regulations) of a sexual nature, action that could reasonably be interpreted

as soliciting a sexual relationship, possession or use of illegal child pornography, and/or actions that would constitute criminal conduct under Article 130 of the Penal Law against a student or minor who is not a student." Verbal Abuse is defined in the Chancellor's Regulations as "language that tends to cause fear or physical or mental distress; discriminatory language based on race, color, national origin, alienage/citizenship status, ethnicity, religion, gender, disability, or sexual orientation which tends to cause fear or physical or mental distress; language that tends to threaten physical harm; or language that tends to belittle or subject students to ridicule."

DOE maintains that the hearing officer disregarded the plain language of the contract and the Chancellor's Regulations by (1) labeling Ostrin's conduct as "sexual banter" and not verbal abuse of a sexual nature; and (2) imposing a new standard of proof which requires the actual solicitation of sex, rather than the DOE contract standard of proof of "action that could reasonably be interpreted as soliciting a sexual relationship," to constitute sexual misconduct warranting termination.

DOE next contends that Ostrin exhibited a pattern of behavior, as evidenced by reprimand letters issued to Ostrin for making offensive comments and inappropriately touching students in the past, and therefore, the current case was not a single event as described by the hearing officer. Specifically, in 1992 and 1993, Ostrin had received letters admonishing him for using profanity in class, rubbing students' arms and backs and telling stories with sexual details. DOE also indicates that Ostrin's comments were

not only sexually charged but also offensive and discriminatory. Finally, DOE maintains that the record does not support the hearing officer's assertion that the penalty imposed will prevent Ostrin from committing similar misconduct in the future and the award violates the public policy of protecting children.

Ostrin cross moves to dismiss the petition and confirm the arbitration award, arguing that the hearing officer's decision was based upon sufficient, credible evidence, was not arbitrary and capricious, was not internally inconsistent and was not in violation of public policy.

Discussion

Education Law § 3020-a(5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR 7511. 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. The party challenging an arbitration determination has the burden of showing its invalidity. *Lackow v. Department of Education (or "Board") of City of N.Y.*, 51 A.D.3d 563, 567-568 (1st Dept. 2008).

An action is considered arbitrary and capricious when it is "taken without sound basis in reason or regard to the facts." *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009). The courts may review and set aside a penalty imposed after a hearing pursuant to Education Law §3020-a if the measure of punishment or discipline imposed is

so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness. *Sanchez v. Popolizio*, 156 A.D.2d 210 (1st Dept. 1989). "That reasonable minds might disagree over what the proper penalty should have been does not provide a basis for vacating the arbitral award or refashioning the penalty." *City School Dist. of the City of New York v McGraham*, 17 N.Y.3d 917, 920 (2011).

Moreover, 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 Dept. 2008) (termination after repetitive inappropriate references to students' sexual organs and activities); *Matter of Cruz v. New York City Dept. of Educ.*, 26 Misc. 3d 1208A (Sup. Ct. N.Y. Co., 2010) (termination after two years worth of instances of incompetent service, neglect of duty and abusive conduct); *City School District of the City of New York v. Hershkowitz*, 7 Misc. 3d 1012A, *8 (Sup. Ct. N.Y. Co., 2005) (termination as a result of a continuous attempt to seduce a student).

Here, the hearing officer undertook a thorough analysis of the facts and circumstances, evaluated the credibility of the witnesses, and arrived at a reasoned conclusion that Ostrin did not engage in conduct warranting the penalty of dismissal. The hearing officer found that Ostrin (now retired) gave twenty three years of exceptional teaching service to the DOE, during which time he was described as an "inspiring" teacher. While, in addition to the 2005 incident with G.O., Ostrin had been warned about

inappropriate behavior toward students in 1992/1993, the evidence presented did not demonstrate "a continued pattern of offensive behavior that reflects inability to understand the necessary separation between a teacher and his students," similar to that of which justified termination in *Lackow v Dept. of Educ.*, 51 A.D.3d at 569.

This Court recognizes the public policy of ensuring the safety and welfare of school children, particularly because of the important role teachers play in their students' lives. While inappropriate conduct should never be tolerated, the penalty for such conduct should not be reviewed in a vacuum. In *City School Distr. of the City of New York v. McGraham*, (2010 N.Y. Slip. Op. 6065, *6 [1st Dept. 2010]), the First Department incorporated 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 ultimate penalty of dismissal, and here, the Court finds that the penalty imposed was not so disproportionate to the offense to be shocking to one's sense of fairness. *See generally City School Distr. of the City of New York v. Campbell*, 2010 N.Y. Slip. Op. 31129U (Sup. Ct. N.Y. Co., 2010).

For the reasons stated above, the Court finds no basis to vacate the penalty asserted in the arbitration award. Accordingly, DOE's petition is denied in its entirety and Ostrin's cross motion to dismiss the petition and to confirm the arbitration award is granted.

In accordance with the foregoing it is

ORDERED and ADJUDGED that the petition of petitioners Board of Education of the City School District of the City of New York and Cathleen P. Black, as Chancellor of the Board of Education of the City School District of the City of New York to vacate the arbitration award is denied and dismissed; and it is further

ORDERED that the cross motion of respondent Steven Ostrin to confirm the arbitration award and to dismiss this proceeding is granted.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York
March 21, 2012

ENTER:

Saliann Scarpulla, J.S.C.

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).