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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

In the Matter of

DAMIAN ESTEBAN,

Petitioner,

E FILE

INDEX NO. 651904/13
MOTION DATE 09 -11-2013
MOTION SEQ. NO. 001

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

-against-

MOTION CAL. NO.

THE DEPARTMENT OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,
Respondents,

The following papers, numbered 1 to 6 were read on this petition to/for Art. 75 and Cross-Motion to Dismiss the Petition

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 2 ,3
Answering Affidavits — Exhibits ____cross motion	4-5
Replying Affidavits	6

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered and adjudged that the petition, seeking to vacate, and set aside the arbitrator's decision pursuant to CPLR §7511, and Education Law §3020-a [5], is granted. The cross-motion made in lieu of an answer, seeking to dismiss the petition pursuant to CPLR §404[a], CPLR §3211[a][7], and CPLR §7511, is denied.

Petitioner is a tenured teacher since 2010 teaching at the Williamsburg High School for Architecture. He has an unblemished record as a teacher and has never been the subject of discipline during his employment with Respondent. On October 17, 2012 Petitioner was arrested and charged with Misdemeanor possession of heroin; which was found when he was searched while entering the Criminal Court building at 100 Centre Street, where he was serving as a juror in a criminal trial. At arraignment he was given an Adjournment in Contemplation of Dismissal (ACD) under section 170.55 of the Criminal Procedure Law(CPL) on condition that he complete one day of community service with the Treatment Readiness Program. He completed the program in November of 2012 and six months after his arrest on April 17, 2013 the charges were dismissed and the record sealed. (See Cross-motion Exhibit C).

Petitioner's was the subject of newspaper articles that appeared one each in the New York Post, the Daily News and the New York Times, which was the only news generated by Petitioner's arrest. The New York Times article was written on October 17, 2012, the day of his arrest; the New York Post and Daily News Articles were written on October 18, 2012 and made reference to his receiving an ACD on condition that he

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

complete a one day Treatment Readiness program. (See Cross-motion Exhibit C).

Respondent brought disciplinary charges against Petitioner, charging him with five (5) specifications to wit:

Specification 1- on or about October 17, 2012 he entered 100 Centre Street while in possession of approximately 20 glassines of a controlled substance, namely heroin.

Specification 2- on or about October 17, 2012 he was removed as a juror in a murder trial that started on October 9, 2012.

Specification 3- on or about October 17, 2012 he violated chancellor's regulation C-105 when he :

a) failed to report his arrest for possession of a controlled substance in the seventh degree.

b)failed to provide a copy of the criminal complaint issued against him for said arrest.

c) failed to provide a copy of the disposition of said arrest.

Specification 4- on or about October 18, 2012 he did the following:
a) plead to an Adjournment in Contemplation of Dismissal (CPL§ 170.55).
b)entered a one day treatment readiness program.

Specification 5- On or about October 18, 2012-October 19, 2012 Respondent's arrest as detailed in the above mentioned specifications caused widespread negative publicity, ridicule, notoriety to the NYC Department of Education as said misconduct was reported in the New York area news reports and papers including but not limited to:

a) The New York Daily News ran an article about Respondent's conduct entitled: "Heroin Addicted Teacher sent to rubber room."
b) The New York Times ran an article entitled: "Should've left that at home, teacher is told at jury duty."
c) The New York Post ran an article entitled:
"Jury duty dope busted for bringing heroin to court."
d)The New York Daily News ran an article about Respondent's conduct entitled: "Junkie high school teacher sent to 'rubber room' after he was busted bringing heroin to court."
(see Cross-motion Exhibit C).

When charges are filed against a tenured person, Education Law §3020-a [3] requires that a disciplinary hearing be conducted by a hearing officer selected from the American Arbitration Association. The disciplinary hearing is a compulsory arbitration. This hearing took place on March 7 and April 23, 2013. At the hearing petitioner was represented by an attorney who produced evidence and examined Petitioner. The Respondent produced evidence and cross-examined Petitioner.

Petitioner admitted to Specifications 1, 2, 4 and 5 and denied the allegations of Specification 3. Petitioner also testified about his drug addiction, that he had it under control since January of 2012, that he was not aware the bag he used on October 17, 2012 contained a pack of cigarettes with drugs, that he only used drugs on the weekends and had never used drugs in or brought drugs with him to school.

Arbitrator Alan Berg, Esq., credited Petitioner's testimony finding it to be "entirely truthful", dismissed Specification 3, found the Department established Petitioner is guilty of the misconduct alleged in specification 1, 2, 4 and 5, and imposed a penalty of termination. Petitioner now seeks to vacate and set aside that penalty.

Pursuant to Education Law §3020-a [5], a petition to vacate the determination of a hearing officer, requires that 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." An arbitrator's award can be set aside if it violates strong public policy or is totally irrational (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 [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 [1st Dept., 2004], Matter of Pell v. Board of Education, 34 N.Y. 2d 222, 356 N.Y.S. 2d 833, 313 N.E. 2d 321 [1974], In re Gregg v. The Dept. of Educ. of the City of New York, 22 A.D. 3d 254, 801 N.Y.S. 2d 529 [1st Dept., 2005], In re Stephanie Cherry v. The New York State Insurance Fund, 83 A.D. 3d 446, 920 N.Y.S. 2d 342 [1st Dept., 2011], and Matter of Sprinzen [Nomberg], 46 N.Y. 2d 623, 389 N.E. 2d 456, 415 N.Y.S. 2d 974 [1979]). There is an additional standard applied and judicial scrutiny is stricter when the parties have submitted to compulsory arbitration rather 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 [1st Dept., 2008]; City School Dist. of the City of New York v. McGraham, 75 A.D. 3d 445, 905 N.Y.S. 2d 86 [1st Dept., 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 Educ. (or "Board") of City of New York, 51 A.D. 3d 563, supra; Austin v. Board of Educ. of the City School Dist. of City of New York, 280 A.D. 2d 365, supra).

Whatever the applicable standard of review in a compulsory arbitration, an award may be vacated if there is no rational basis for the determination based on the evidence adduced at the hearing (Weinstein v. Department of Education of the City of New York, 19 A.D. 3d 165, 798 N.Y.S. 2d 383 [1st Dept. 2005]). Petitioner argues that there is no rational basis for the determination based on the evidence adduced at the hearing. The Arbitrator found Petitioner to be "entirely truthful" and then came to speculative conclusions not supported by the record. Petitioner points out that the arbitrator's conclusion that (1) "Petitioner has subjected himself and the DOE to' extremely widespread ridicule' compromising his ability to retain the respect of students and thereby throwing away his ability to be an effective teacher; and (2) that Petitioner's conduct has left the DOE with no ability to know whether or not petitioner has brought the same drugs into a school building posing a risk to students", are not supported by the evidence on the record. Respondent never alleged or introduced evidence to support the contentions that petitioner was impaired in his ability to teach as a result of the conduct for which he was arrested and charged, or that he ever brought drugs to school.

Further, Petitioner argues that in imposing a penalty of termination the Arbitrator failed to consider mitigating factors such as Petitioner's unblemished criminal record; his outstanding record as a teacher; that the conduct at issue was off-campus, while Petitioner was off duty, involved no students and was highly unlikely to be repeated.

Petitioner also argues that the arbitrator applied the wrong standard. Private conduct beyond the scope of licit concern of school officials ceases to be such in at least either of two circumstances (1) if the conduct directly affects the performance of the professional responsibilities of the teacher, or (2) if without contribution of the school officials, the conduct has become the subject of such public notoriety as significantly and reasonable to impair the capability of the particular teacher to discharge the responsibilities of his position (See Matter of Goldin, 35 N.Y. 2d 534, 324 N.E. 2d 106, 364 N.Y.S. 2d 440[1974]).

There is no evidence that the conduct with which petitioner was charged affects his performance as a teacher or that any publicity would impair his capacity to discharge his responsibilities as a teacher. Instead the arbitrator concludes, without any supporting evidence that petitioner's "conduct and notoriety have seriously compromised his ability to retain the respect of students and to be perceived as a responsible adult to whom they should pay attention."

Judicial review of administratively imposed sanctions is limited (see Matter of Board of Education of Dundee Central School District, 96 A.D. 3d 1536, 947 N.Y.S. 2d 707 [4th Dept. 2012]). 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 individual." 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). Unless there is no proof whatever to justify the award so as to render it entirely irrational, the arbitrator's finding is not subject to judicial oversight (Matter of Peckerman v. D & D Associates, 165 A.D. 2d 289, 567 N.Y.S. 2d 416 [1st. Dept. 1991]).

There is no proof to justify the arbitrator's conclusions that petitioner's "conduct and notoriety have seriously compromised his ability to retain the respect of students and to be perceived as a responsible adult to whom they should pay attention; or to justify the arbitrator's conclusion that petitioner has brought or will in the future bring drugs into a school building posing a risk to students.," warranting the penalty of termination. Given the circumstances- including that petitioner has admitted and is in treatment for his drug addiction; his possession of drugs was inadvertent; he was charged with Misdemeanor drug possession: he received an Adjournment in Contemplation of Dismissal; the charges against him were dismissed and the record sealed; the conduct took place off the school site and no student was involved; he has a spotless record as a teacher for five years and that lesser sanctions are available that would deter him from engaging in similar conduct in the future- the penalty of termination is excessive and shocking to this court's sense of fairness (Principe v. New York City Department of Education, 94 A.D 3d 431, 941 N.Y.S. 2d 574 [1st. Dept. 2012]).

In Matter of Dubner (NYC DOE decision No. 13, 021, dated October 15, 1993) a hearing panel imposed a penalty of two years suspension without pay to a tenured teacher who was arrested and charged with multiple felony counts of sale and possession of controlled substances (A-II Felonies punishable by 81/3 years to life in prison), plead guilty

to a class B Felony and was sentenced to 2 to 6 years in prison. DOE claimed that because of substantial adverse publicity at the time of petitioner's arrest and sentencing it would be impossible for petitioner to discharge the duties of a teacher. The hearing panel looked at four factors: (1) whether or not the drug related arrest and conviction that formed the basis of the charges were the manifestation of respondent's substance abuse problem; (2) whether or not respondent has acknowledged his problem; (3) whether or not respondent has successfully undergone treatment for his problem and (4) whether or not respondent demonstrates a capacity to carry out his duties due to his progress in treatment. "On a record that supports the conclusion that petitioner suffered from drug addiction prior to his arrest, acknowledged his problem, sought treatment that has been successful and is capable of carrying out his professional responsibilities, termination would be unduly harsh."

Similarly in Matter of Lorber, the court affirmed denial of the City School District's motion to vacate an arbitrator's award imposing a fine equivalent to two month's pay, rather than termination, to a tenured teacher who had successfully undergone treatment for her addiction, was fit to teach and there was no allegation that her possession was for anything other than personal use (City School District of City of New York v., Lorber, 50 A.D. 3d 301, 854 N.Y.S. 2d 393 [1st. Dept. 2008]). In Matter of Lorber the court refused to apply its holding in Matter of Campbell (see City School District of City of New York v. Campbell, 20 A.D. 3d 313, 798 N.Y.S. 2d 54 [1st. Dept. 2005]) finding that unlike Campbell who was arrested, charged with drug possession with intent to sell, and plead guilty while employed as a dean responsible for enforcing school rules prohibiting drug use, was head of the Safe Cities-safe Streets program and provided counseling for those with substance abuse problems, because in Lorber there was no allegation that her possession was for anything other than personal use. The court did not say that Campbell's actions, egregious as they were, merited the penalty of termination. Nor was time in service as a teacher the determinative factor.

Petitioner herein like Lorber, was charged with Criminal Possession of a Controlled substance in the Seventh Degree (a Misdemeanor), and immediately at arraignment was given an Adjournment in Contemplation of Dismissal. After six months the charges were dismissed and the record sealed. The arrest was not for conduct at the school site or involving any of its students. There is no evidence that he has a criminal record, had been arrested before or since this one incident. There is no evidence that this one arrest or the publicity it generated has impaired his ability to teach, or that he has lost the respect of his students, or can be perceived by his students as a responsible adult to whom they should pay attention. Petitioner has admitted he has a substance abuse problem; the arrest is a manifestation of that problem; he is receiving treatment for that problem and is progressing in his treatment. Under these facts, termination of employment is unduly harsh, an abuse of discretion and shocking to this court's sense of fairness (see Dubner Supra; Lorber, 50 A. D. 3d 301, Supra]).

In accordance with the decisions in Dubner and Lorber suspension without pay seems to be a more appropriate penalty.

Accordingly, it is ORDERED AND ADJUDGED that the petition seeking to vacate, and set aside the arbitrator's decision pursuant to CPLR § 7511, and Education Law §3020-a [5], is granted, and it is further

ORDERED AND ADJUDGED that the portion of the arbitrator's decision dated May 3, 2013, imposing the penalty of termination is vacated, and it is further

ORDERED and ADJUDGED, that the cross-motion to dismiss the petition pursuant to CPLR §404[a], CPLR §3211[a][7], and CPLR §7511, is denied, and it is further

ORDERED and ADJUDGED, that this matter is remanded to Respondent for the imposition of an appropriate lesser penalty in accordance with the terms of this decision.

Enter:

Dated: September 16, 2013

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

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Norman Cardman
Clerk

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SUPREME COURT OF THE STATE OF NEW YORK
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Petitioner,

-against-

NEW YORK CITY BOARD/DEPARTMENT OF EDUCATION,

Respondent.

For an Order and Judgment Pursuant to Article 75 of the Civil Practice Law and Rules.

Order met

JUDGMENT

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Tel: 212-356-4077
2013-021139

Due and timely service is hereby admitted.

Dated: New York, N.Y. 2013

Signed: .....

Attorney For .....