[*2] In the Matter of the Application of TERRI PATTERSON, Petitioner, For a judgment pursuant to Article 75 of the C.P.L.R. -against- CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF EDUCATION; JOEL KLEIN, CHANCELLOR OF NEW YORK CITY DEPARTMENT OF EDUCATION, Respondents.

111175/2010

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2011 NY Slip Op 30870U; 2011 N.Y. Misc. LEXIS 1520; 245 N.Y.L.J. 80

April 8, 2011, Decided
April 11, 2011, Filed

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

CORE TERMS: teacher, arbitrator, misconduct, termination, hearing officer, terminated, remorse, ongoing, perpetrating, unblemished, convicted, remitted, vacated, warned, noticed, petitioner's misconduct, school records, inappropriate behavior, time records, role model, specifications, fabrication, supervisor, suspension, corrected, falsified, classroom, repeated, career, female

JUDGES: [**1] Present: Hon. Judith J. Gische, J.S.C.

OPINION BY: Judith J. Gische

OPINION

Decision and Order

Upon the foregoing papers, the decision and order of the court is as follows:

Gische J.:

Petitioner, a former tenured teacher at P.S. 8, District 13 in Brooklyn, New York brings this summary proceeding, pursuant to Education Law § 3020-a (5) and CPLR 7511, to vacate the August 2, 2010 Opinion and Award (Award) of Hearing Officer Stuart Elliot Bauchner. The Award found petitioner guilty of most of the charges brought against her, and terminated her employment. Respondents cross-move, pursuant to CPLR 404 (a), 3211 (a) (7), and 7511 to dismiss the petition, and, pursuant to CPLR 7511 (e) for an order [*3] confirming the Award. For the reasons given below, both the petition and the cross motion are granted in part.

Factual claims and arguments presented

The charges against petitioner, generally referred to as "specifications," were all based upon the fact that, as shown in the course of petitioner's Education Law § 3020-a hearing, her 2005, 2006, and 2007 W-2 forms listed as her address the address of her mother in Albany, although in those years petitioner was living in Brooklyn. Thus, for each of those three years, petitioner [**2] avoided paying the sum of approximately $300 in income taxes that she owed to the City of New York.

After petitioner learned that she was being investigated, she filed amended tax forms for each of the three years, and paid the taxes that were due, without incurring a penalty. Petitioner testified that, in 2004, she had noticed that her 2003 W-2 form incorrectly listed the Albany address, and she had had the form corrected, but that in the following three years she had not noticed the mistake. Petitioner also testified, and the evidence showed, that she had listed her mother's address on numerous non-tax-related documents that she submitted to the school.

The Arbitrator found petitioner's testimony, that she had not noticed that her W-2 forms for 2004, 2005, and 2006 bore her mother's address, incredible. He concluded that petitioner had used the Albany address in aid of "a deceptive and fraudulent course of conduct in an attempt to avoid New York City taxes." Opinion and Award, DOE Exh. 1, at 42.

There is no serious dispute about the facts underlying the [*4] charges against petitioner, and the Arbitrator's conclusion as to the credibility of petitioner's explanation of those facts, is "largely [**3] unreviewable." Lackow v Department of Educ. of City of N.Y., 51 AD3d 563, 568, 859 N.Y.S.2d 52 (1st Dept 2008). In any event, the court does not find the Arbitrator's conclusion irrational and it is supported by the record developed before the Arbitrator.

In determining that discharge was the appropriate penalty to be imposed upon petitioner, the Arbitrator noted that: by virtue of failing to correct her W-2 forms, petitioner had "involved the Department in perpetrating her fraud"; her misconduct "was not a one-time lapse in judgment"; and, rather than showing remorse for her misconduct, petitioner "testified to a version of events which the undersigned is convinced was a complete fabrication." Opinion and Award, DOE Exh. 1, at 43-44. While noting her unblemished work record during her 10-year career with respondent, he did not address the interplay between her misconduct and her work record in making his determination about the appropriate penalty to impose or fully appreciate arguments made by petitioner that her misconduct affected neither her teaching, nor the well- being of any of her students.

With regard to the Arbitrator's emphasis on petitioner's lack of remorse and her having given testimony [**4] that he found to be a fabrication, at least one court has observed that Education Law § 3020-a provides for unitary hearings, in which guilt and the penalty, if any, are determined in one award. Principe v City of New York [NY County Index No. 116031/2009, April 28, 2010]) (Principe). In Principe, the court held that at such a hearing a [*5] teacher who claims to be innocent of the charges against him, or her, cannot also be expected to simultaneously show remorse for guilt. The Principe court also noted that it is inappropriate for an arbitrator to take into account his or her disbelief of a teacher's testimony in determining the penalty for the misconduct alleged in the specifications. A similar situation is presented here. Having testified that she had inadvertently failed to have her W-2 forms corrected, petitioner could not reasonably have been expected to also show remorse for having deliberately failed to have made the required corrections.

As for petitioner's involving the Department in "perpetrating her fraud," every teacher who falsifies school records expects that the falsified records will be accepted and relied upon by his or her supervisors, and that the Department will, thereby, [**5] be involved in effecting the teacher's fraud. Yet, in an Education Law § 3020- a hearing, in which a teacher was shown to have falsified her time records for per-session work, and thereby to have attempted to involve the Department in perpetrating a fraud upon itself, the arbitrator rejected the Department's request for the teacher's termination from service, and, instead, ruled that the teacher should pay a fine of $1,500, and, for the following three years, be precluded from any per session assignment in which her hours of work would not be observable by a supervisor. State Education Department, Opinion and Award, File 7654, Glass Response Affirm., Exh. B.

The infirmity of the Arbitrator's stated reasons for discharging petitioner notwithstanding, an administratively imposed [*6] sanction may not be set aside unless it "shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." Matter of Featherstone v Franco, 95 NY2d 550, 554, 742 N.E.2d 607, 720 N.Y.S.2d 93 (2000); see also Matter of Diefenthaler v Klein, 27 AD3d 347, 348, 811 N.Y.S.2d 653 (1st Dept 2006). The shock that properly leads to setting aside a sanction arises principally from a perceived disproportion between the penalty and the [**6] misconduct that brought it about (Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County, 34 N.Y.2d 222, 234, 313 N.E.2d 321, 356 N.Y.S.2d 833 [1974]; Matter of Weinstein v Department of Educ. of City of N.Y., 19 AD3d 165, 798

N.Y.S.2d 383 [1st Dept 2005]), although other relevant circumstances, such as a teacher's otherwise unblemished multi-year career are also considered. See e.g. Matter of Solis v Department of Educ. of City of N.Y.. 30 AD3d 532, 817 N.Y.S.2d 901 (1st Dept 2006); Matter of Weinstein, supra.

Citing Lackow v Department of Educ. of City of N.Y. (51 AD3d 563, 859 N.Y.S.2d 52, supra), the Department argues that the repetitive nature of petitioner's misconduct warrants her termination. In Lackow, however, prior to being brought up on charges, the teacher had twice been warned about the inappropriateness of his ongoing use of sexual innuendo in his high school class, and about his pattern of offensive behavior in class, which reflected an inability to understand the necessary separation between a teacher and his students. Similarly, in Matter of Juste v Klein (2009 NY Slip Op 31691[U], 2009 WL 2416134 [Sup Ct, NY County 2009]), the court upheld the dismissal of a teacher for in-class behavior [**7] that she had earlier been warned would lead to her dismissal, if repeated. [*7] Here, petitioner's misconduct was repeated, but it was not ongoing, and it is not alleged to have impinged on her classroom performance. See also Matter of Rogers v Sherburne-Earlville Cent. School Dist., 17 AD3d 823, 792 N.Y.S.2d 738 (3d Dept 2005) (prior to being brought up on charges that resulted in his termination from service, the teacher had twice been warned to stop falsifying his time records).

Citing Green v New York City Dept. of Educ. (17 AD3d 265, 793 N.Y.S.2d 405 [1st Dept 2005]), the Department argues that, like the teacher in that case, petitioner cannot be a good role model for her students. In Green, the teacher had been convicted on a charge of grand larceny, after at least two prior convictions for fraud. By contrast, petitioner here has not been charged with any crime, much less convicted of one. In another case, in which a court has upheld the disciplining of a teacher, on the grounds of unfitness as a role model, the teacher, who taught driver education, had been convicted of criminally negligent homicide after being involved in a hit and run accident, and the court stressed that the accident had been widely reported in [**8] the press. Matter of Ellis v Ambach, 124 AD2d 854, 508 N.Y.S.2d 624 (3d Dept 1986). The teacher in the case was suspended for two years, but not terminated. By contrast, petitioner had not been charged with any crime, and there is no reason to think that petitioner's students had even an inkling of her misconduct.

Other cases are equally instructive. In City School Dist. of City of N.Y. v McGraham (75 AD3d 445, 905 N.Y.S.2d 86 [1st Dept 2010]), the hearing officer had imposed a penalty of a 90-day suspension without pay, and reassignment to a different school, on a female teacher who had engaged in ongoing inappropriate behavior with a male student. The [*8] Supreme Court granted the school district's petition and remanded for the imposition of a more severe penalty. The Appellate Division reversed and let the original penalty stand. In Nreu v New York City Dept. of Educ. (25 Misc 3d 1209 [A], 901 N.Y.S.2d 908, NY Slip Op 52007 [U] [Sup Ct, NY County 2009]), in which the male teacher had engaged in ongoing inappropriate behavior with a female student, the court upheld the hearing officer's imposition of a one-year suspension without pay. In Matter of Soils v Dept. of Educ. of City of New York. 30 AD3d 532, 817 N.Y.S.2d 901, supra, the hearing officer determined [**9] that the teacher had placed a student in a choke-hold, and terminated the teacher's employment. The Court remitted the matter to the Department for the imposition of a lesser penalty. In Matter of Weinstein, supra, the hearing officer terminated the teacher's employment after finding that the teacher had wrestled a student to the ground an choked him. The Court vacated the determination and reinstated the teacher with back pay and benefits.

Here, petitioner had an unblemished school record for 10 years, and her misconduct, unlike the misconduct found in Matter of Solis, Matter of Weinstein, supra, McGraham, supra, and Nreu, supra, did not inflict any damage on any student or impinge in any manner on her classroom performance. The penalty imposed in this case, in light of all the circumstances, is disproportionate to the conduct that brought it about and inconsistent with how respondents have disciplined other teachers for more serious matters. Therefore, the penalty of termination cannot stand. Therefore, the petition is granted to the extent that the penalty of termination [*9] is vacated, and the matter is remitted to the

Department of Education for the imposition of a penalty consistent [**10] with this decision, and the petition is otherwise dismissed. The respondents' motion to dismiss the petition is denied in part and granted in part; the respondents' request to serve an answer is denied.

Accordingly, it is hereby

ORDERED ADJUDGED AND DECLARED that the petition is granted to the extent that the penalty of termination is vacated, and the matter is remitted to the Department of Education for the imposition of a penalty consistent with this decision, and the petition is otherwise dismissed; and it is further

ORDERED that the cross motion is granted in part and denied in part; and it is further

ORDERED that this constitutes the decision order and Judgment of the court.

Dated: New York, New York

April 8, 2011

ENTER:

/s/ Judith J. Gische

Hon. Judith J. Gische, J.S.C.

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