

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33730
N/prt

_____AD3d_____

Argued - December 1, 2011

MARK C. DILLON, J.P.
ANITA R. FLORIO
CHERYL E. CHAMBERS
ROBERT J. MILLER, JJ.

2010-11729

DECISION & ORDER

In the Matter of Darnel Powell, appellant, v Board of
Education of Westbury Union Free School District,
respondent.

(Index No. 16108/10)

Law Office of Steven A. Morelli, P.C., Garden City, N.Y. (Josh Beldner of counsel),
for appellant.

Jaspan Schlesinger, LLP, Garden City, N.Y. (Stanley A. Camhi, Jessica M. Baquet,
and Lawrence J. Tenenbaum of counsel), for respondent.

In a proceeding pursuant to CPLR article 75 to vacate a determination of an arbitrator
made pursuant to Education Law § 3020-a, dated August 7, 2010, which, after a hearing, inter alia,
sustained certain charges of misconduct against the petitioner and terminated the petitioner's
employment, the petitioner appeals from an order of the Supreme Court, Nassau County (Galasso,
J.), dated October 25, 2010, which, in effect, denied the petition and confirmed the determination.

ORDERED that the order is affirmed, with costs.

Where, as here, the obligation to arbitrate arises through a statutory mandate
(see Education Law § 3020-a), the determination of the arbitrator is subject to "closer judicial
scrutiny" under CPLR 7511(b) than it would otherwise receive (*Matter of Saunders v Rockland Bd.
of Coop. Educ. Servs.*, 62 AD3d 1012, 1013 [internal quotation marks omitted]; see *Matter of
Progressive Cas. Ins. Co. v New York State Ins. Fund*, 47 AD3d 633, 634). "An award in a

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compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious” (*Matter of Saunders v Rockland Bd. of Coop. Educ. Servs.*, 62 AD3d at 1013; see *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223). “In addition, article 75 review questions whether the decision was rational or had a plausible basis” (*Matter of Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207, 211). “When reviewing compulsory arbitrations in education proceedings such as this, the court should accept the arbitrators’ credibility determinations, even where there is conflicting evidence and room for choice exists” (*Matter of Saunders v Rockland Bd. of Coop. Educ. Servs.*, 62 AD3d at 1013; see *Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444; *Matter of Tasch v Board of Educ. of City of N.Y.*, 3 AD3d 502, 503).

Here, the petitioner argues, in essence, that the arbitrator’s determination was arbitrary and capricious because the arbitrator did not resolve issues of credibility in his favor. However, where, as here, “the evidence is conflicting and room for choice exists,” this Court “may not weigh the evidence or reject the choice made” by the arbitrator (*Matter of Berenhaus v Ward*, 70 NY2d at 443-444 [internal quotation marks omitted]; see *Matter of Saunders v Rockland Bd. of Coop. Educ. Servs.*, 62 AD3d at 1013; *Matter of Tasch v Board of Educ. of City of N.Y.*, 3 AD3d at 503).

Moreover, contrary to the petitioner’s contention, the arbitrator properly refused to admit into evidence his proffered polygraph test evidence (see *Matter of Harris v Novello*, 276 AD2d 848, 850; *Matter of Lessoff*, 231 AD2d 229, 230).

Finally, the petitioner’s contention that the respondent failed to comply with the mandates of Education Law § 3020-a(2)(a) by failing to differentiate between the penalty it sought in the event he requested a hearing on the charges preferred against him, and the penalty it sought in the event he did not request a hearing, was waived by his failure to raise it before the arbitrator (see CPLR 7511[b][1][iv]; *Matter of Sims v Siegelson*, 246 AD2d 374, 377; *Matter of Peckerman v D & D Assoc.*, 165 AD2d 289, 296).

Accordingly, the Supreme Court properly, in effect, denied the petition and confirmed the determination.

DILLON, J.P., FLORIO, CHAMBERS and MILLER, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court