Matter of Bonifacio v City of New York
2007 NY Slip Op 34595(U)
January 17, 2007
Supreme Court, New York County
Docket Number: 109019/04
Judge: Doris Ling-Cohan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62/36

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In the Matter of the Application of
JOSE BONIFACIO,

Petitioner,

-against- Index No.: 109019/04

THE CITY OF NEW YORK, THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, et al., Motion Seq. No.: 001

Respondents.

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LING-COHAN, J.:

Jose Bonifacio petitions, pursuant to CPLR 7511 and Education Law 3020-a, for a judgment: (1) vacating the arbitration award (the Award) issued by Hearing Officer Judith Bello (the Hearing Officer) in a hearing conducted pursuant to Education Law 3020-a; and (2) restoring petitioner to his former position with the Department of Education (the DOE), with full rights and benefits; and costs and counsel fees. Respondent, the DOE, cross-moves to dismiss the petition, pursuant to CPLR 3211 (a) (1), 3211 (a) (7), 7510, 7511 (b) and 7511 (e),[1] on the ground that it fails to state a cause of action, and for costs, fees, and disbursements.

For the reasons set forth herein, the Award is confirmed, the petition to vacate is denied and the proceeding dismissed.

According to the petition, from in or around September 1992 until June 2004, the petitioner was employed as a social worker/guidance counselor and was assigned to Intermediate

[1]The DOE also moved pursuant to CPLR "1000 (a)," which the court will disregard, as, there is no such section.

School 166 (I.S. 166), located in the Bronx (Petition, ¶ 2). Among other things, petitioner's duties were to counsel children who were sent to him by teachers due to behavioral problems (*id.*). Petitioner was tenured in his position. On or about May 20, 2003, petitioner received specifications of charges, pursuant to Education Law 3020-a, in which the DOE charged that he "had, *inter alia*, made inappropriate comments to students of a sexual nature" and used inappropriate language (Petition, ¶ 13). According to the Award, the DOE further charged the petitioner with conduct unbecoming his position, endangering the welfare of students and neglect of duties (Award, at 7, 8 and 9).

A hearing was conducted over the course of approximately ten days, before the Hearing Officer,[2] in the latter half of 2003 and the early part of 2004, at which the petitioner was represented by counsel and afforded the opportunity to submit evidence and to present and cross-examine witnesses. Among others, the petitioner, three students, the principal, a guidance counselor and two teachers from I.S. 166 testified at the hearing. Also testifying at the hearing was Senior Investigator John T. La Cherra (LaCherra), one of two investigators who conducted the underlying investigation of the students' complaints. LaCherra testified that he was employed by the Special Commission of Investigation for the New York City School District (Petition, Exh. B, Tr. 40:1-3 [August 25, 2003]).[3] It was after LaCherra conducted the investigation that the DOE brought the charges against the petitioner in May 2003.

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[2]Pursuant to 3020-a [3] [b] [ii]), the American Arbitration Association (AAA) provides a list of persons from the AAA's panel of labor arbitrators and the parties may mutually agree on the selection of a hearing officer. In the event that the parties fail to agree on the selection, the AAA appoints a hearing officer from the list (3020-a [3] [b] [iii]). Thus, the Hearing Officer was not an employee of the DOE.

[3]Transcripts of testimony taken at the hearings are annexed to the petition as "EXHIBIT B" and will be referred to as "Tr."

The two teachers from I.S. 166, both of whom taught the two female students who made the accusations against petitioner, testified on petitioner's behalf at the hearing (Petition, ¶ 16). In addition, the grandmother of one of the two complaining students testified against her granddaughter (Petition, ¶ 17). Subsequent to the hearing, the Hearing Officer issued the Award, a 32-page decision, dated June 2, 2004. On or about June 9, 2004, petitioner was terminated from his employment with the DOE as a result of the Hearing Officer's determination (Petition, ¶ 15).

Initially, the petitioner brought three causes of action against the DOE and the other defendants, but has consented herein to the dismissal of the second cause of action, brought pursuant to 42 U.S.C. 1983, as well as the third cause of action. Accordingly, the second and third causes of action are dismissed.

In the remaining cause of action, petitioner moves to vacate the arbitration award on the ground that it is irrational and not supported by the record. To that end, petitioner alleges that the Hearing Officer ignored certain factual issues and exculpatory evidence concerning the student witnesses and the petitioner (*see e.g.* Petition § I [A], ¶ 18 [A] [iv], [vii] [a] and [b], and [ix]). Petitioner also alleges that the investigation that resulted in the charges being brought against him was improperly conducted, inadequate and one-sided (Petition § I [A], ¶ 18 [A] [vii] and [ix]). Petitioner further alleges that the Hearing Officer exceeded her authority under Education Law 3020-a, because she factored in petitioner's alleged lack of remorse when she determined that the petitioner's punishment should be termination which, petitioner maintains, is excessive and "shocks the conscience" (Petition, § I [B], ¶¶ 25-28).

As described in the Award,[4] the DOE's charges against petitioner were based on petitioner's alleged conduct with and toward three students, LR , VC and JT, during the 2002-2003 school year. The DOE alleged that, among other things, the petitioner asked LR, a female student, if she had sex with her boyfriend, and said to LR words to the effect of "you are pretty like your mother and have a nice body" (Award, at 4). The DOE also alleged that in November 2002, petitioner lifted LR's shirt, exposing her skirt and directed other students to look at LR's body (Award, at 5).

The DOE also alleged that the petitioner told LR, who was sent to him for counseling, that "JT," a male student, would be good as her boyfriend and then pulled JT from his class and left LR and JT alone in the petitioner's office (Award, at 5). The DOE further claims that before leaving the two students alone in the office, petitioner directed JT to kiss LR, instructed JT to allow LR to touch his "huevos" and failed to provide counseling to LR (Award, at 5-6). The DOE alleged that "huevos" is Spanish slang for male genitals (Award, at 5). The DOE charged that petitioner engaged in conduct unbecoming his position and endangered the safety and welfare of LR and JT by leaving them unattended in his office, after providing them with the instructions described above, and in failing to escort the students back to their classrooms (Award, at 9-10).

The DOE further alleged that during January 2003, petitioner asked LR how many brothers and sisters she had (Award, at 6). When LR told the petitioner that there were nine children in her family, petitioner stated that there must not have been a television in her house

[4]The court will rely on the description of the charges in the Award, as neither party has submitted a copy of the specifications of charges. At the hearing, the Hearing Officer granted the DOE's application to withdraw the eighth specification (Tr. 39:16-21 [August 25, 2003]). Accordingly, the court will disregard the description of it by the Hearing Officer in the Award.

and that this was the reason why LR's mother had so many children (Award, at 6-7). He then got a calculator, mentioned the age of LR's mother and the number of children in her family, and proceeded to tell LR the average number of times her mother had sexual intercourse (Award, at 7).

According to the Award, the DOE also alleged that in January of 2003, petitioner failed to counsel another female student, VC, who was sent to his office for that purpose. Instead of providing counseling, the DOE charged that the petitioner had an inappropriate and "sexually charged" discussion with VC (Award, at 7). The petitioner was charged with having asked VC, inter alia, whether she had sexual intercourse with her boyfriend and whether she used protection (*id.*). After VC responded that she was too young to have sex, petitioner asked her whether she was a virgin (*id.*). He also asked her the name of her boyfriend and whether VC had future plans of having a baby with her boyfriend (*id.*).

Education Law § 3020-a (5) provides that review of a hearing officer's decision is limited to the grounds set forth in CPLR 7511. One seeking to vacate an arbitration award pursuant to CPLR 7511 must demonstrate that he or she has been prejudiced by corruption, fraud, misconduct, partiality or an abuse of power by the arbitrator (*see* CPLR 7511[b]); *Matter of Hegarty v Board of Educ. of the City of New York*, 5 AD3d 771, 772 [2d Dept 2004]; *Austin v Board of Educ. of the City School Dist. of the City of New York*, 280 AD2d 365, 365 [1st Dept 2001]). An arbitration award may also be vacated on the narrow grounds that it violates a strong public policy or is totally irrational (*Matter of United Fedn. of Teachers, Local 2 v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79 [2003]), citing *Matter of Board of Educ. of Arlington Cent. School Dist. v Arlington Teachers Assn.*, 78 NY2d 33, 37 [1991]).

Courts have found that disciplinary hearings under Education Law § 3020-a are compulsory (*see Matter of Hegarty*, 5 AD3d at 772; *Matter of Caroll [Pirkle]*, 296 AD2d 755, 756 [3d Dept] *lv dismissed* 98 NY2d 764 [2002]; *Matter of Bernstein [Norwich City School Dist. Bd. of Educ.]*, 282 AD2d 70, 73 [3d Dept] *lv denied* 96 NY2d 937 [2001]). Where arbitration is compulsory, the standard for determining whether an arbitration award will be upheld is "whether the award is supported by evidence or other basis in reason, as may be appropriate, and appearing in the record" (*Matter of Commercial Union Ins. Co. v Ewall*, 168 AD2d 247, 249 [1st Dept 1990], quoting *Mount St. Mary's Hosp. of Niagara Falls v Catherwood*, 26 NY2d 493, 508, *rearg denied* 27 NY2d 737 [1970]). "Such CPLR article 75 review import[s] ... the arbitrary and capricious standard of article 78 review or, stated differently, the governing consideration is whether the decision was rational or had a plausible basis" (*Curley v State Farm Ins. Co.*, 269 AD2d 240, 242 [1st Dept 2000] [internal quotation marks omitted], quoting *Matter of Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207, 211 [1981]); *see Matter of Carroll*, 296 AD2d at 756; *compare Austin*, 280 AD2d at 366 [1st Dept 2001] [stating that the trial court erred in applying the CPLR article 78 standard, and finding that the hearing officer's finding of guilt was supported by the record].[5]

Petitioner argues that the Hearing Officer ignored material and substantial evidence by failing to take into account that LR and VC were friends and troubled students who were retaliating against the petitioner, and motivated to fabricate lies about him. In particular,

[5]The DOE argues that the arbitration was not compulsory, as evidenced by Education Law § 3020-a (5) and the union contract "mandating this disciplinary procedure," (Respondents' Reply Memorandum of Law in Support of their Cross-Motion to Dismiss the Petition, at 17). The relevant portions of the union contract were not provided by the DOE, and the court notes that the DOE offers an alternative argument applying the broader compulsory arbitration standard (*id.*).

petitioner faults the Hearing Officer for failing to take into account that LR admitted to telling lies, and that VC was motivated to lie because she was LR's best friend. Petitioner also maintains that the Hearing Officer failed to properly consider VC's grandmother's testimony as to VC's proclivity for lying, and that JT testified that he was not acting at the petitioner's direction when he kissed LR. Petitioner further argues that the investigation was faulty and one-sided because, among other things, the investigator did not obtain certain information from the students' teachers that would have supported his version of the events.

According to the Award, the Hearing Officer credited the testimony of Investigator LaCherra, who testified that he was a 20-year veteran of the New York City Police Department, with the last five of those in the sex crimes unit. The Hearing Officer credited LaCherra's testimony that, on or about January 23, 2003, the petitioner admitted, during an investigatory interview, that he had engaged in much of the conduct described in the charges later brought by the DOE (Tr. 68:1-24-70:21 [August 25, 2003]; Tr. 230:25-231:23 [August 27, 2003]). The Hearing Officer states that LaCherra was accompanied by another investigator when he heard the admissions by the petitioner, that it was the petitioner's own corroboration of LR and VC's complaints that halted the investigation, and that there was no need for further investigation by LaCherra thereafter (Award, at 22-23). Thus, the Hearing Officer found that the investigation was adequate on its face.

The Hearing Officer also found that the petitioner's complete denial of a meeting with LR and JT in his office in November was not credible. Similarly, she did not find credible petitioner's assertion that the incident with LR and JT occurred in January, and that he told the students that any kissing could not be done on school property. Further, according to the Award,

the petitioner denied that he told LR that she was pretty like her mother, stating that he did not meet LR's mother until January 13, 2003, when she came to I.S. 166, which was subsequent to the incidents with the students. However, Principal Gonzalez-Marquez testified that petitioner appeared to recognize LR's mother when she came in, and "he indicated that he had met her before" (Award, at 26).

The Hearing Officer did not find credible petitioner's testimony that he pulled LR's shirt down to cover her body after LR tried to raise the shirt up and tie it in a knot. The Hearing Officer found petitioner's claim that LR was retaliating against him for his attempts to contact her mother unpersuasive, and that there was no credible proof in the record that the petitioner was attempting to communicate with LR's mother. Indeed, the Hearing Officer found that, although LR had serious behavior problems, there was no motive for her to fabricate claims against petitioner.

Regarding the charges that the petitioner made inappropriate comments to VC, the Hearing Officer found that VC testified credibly that she was sent to the petitioner's office after she got in trouble in class and was asked numerous questions by petitioner concerning whether she had a boyfriend, whether she had sexual intercourse with her boyfriend and whether she used protection (*see* Tr. 310:20-313:2 [September 23, 2003]). The Hearing Officer found that even after VC told petitioner that she was too young to have sex, petitioner, assuming she did have sex, asked VC whether she was a virgin. The Hearing Officer found that VC testified credibly that she felt uncomfortable with this inappropriate and sexually charged conversation. The Award states that VC's grandmother testified that VC was a liar, but that VC testified that her grandmother's failure to believe her hurt her deeply, and that she offered to be tested to prove to

her grandmother than she was not lying about her virginity (Tr. 335:6-11 [September 23, 2003]). According to the Award, the petitioner's defense was that VC would lie for LR because VC looked up to and was friends with LR. However, the Hearing Officer found that there was little in the record to support such an assertion.

The Hearing Officer states that there was unrefuted testimony at the hearing by the principal from I.S. 166 that questions regarding sex were inappropriate when initiated by the petitioner (*see* Tr. 419-421 [September 23, 2003]; Tr. 1468:17-23 [September 29, 2003]). The Hearing Officer found that petitioner presented no evidence to support his contention that the questions he asked students regarding their sexual activity were appropriate.

In addition, the Hearing Officer found to be without merit petitioner's claim that JT, who denied being instructed by petitioner to allow LR to touch his "huevos" and kiss LR, should be believed. The Hearing Officer found that JT's family was much more involved in his life and that it was obvious that he feared repercussions if he engaged in an activity that would have caused him a problem at school. She also found that JT's admission to kissing LR, but not being instructed by the petitioner to allow LR to touch his "huevos," was not credible.

"The touchstone of judicial review of awards rendered in compulsory arbitrations, although more exacting than that applicable to awards rendered in consensual arbitrations, is that the record contain a rational basis for the award " (*King v Nikko Secs. Co. Intl., Inc.*, 179 AD2d 490, 491 [1st Dept 1992]; *Karmilowicz v Allstate Insurance Co.*, 77 AD2d 131, 133 [1st Dept 1980] *lv dismissed* 54 NY2d 753 [1981]). Considering the nature of the charges, of significant importance was the Hearing Officer's assessment of the credibility of the witnesses. The Hearing Officer found the testimony of LR and VC credible. She also found credible LaCherra's

testimony that the petitioner admitted that he had engaged in the alleged misconduct. Although the petitioner brought to light certain background information about the students and claimed that it demonstrated the lack of veracity of the their testimony, the Hearing Officer was not persuaded. There is support in the record (*see e.g.* Tr. 68:1-24-70:21 [August 25, 2003]; Tr. 230-231 [August 27, 2003]; Tr. 15-16 [November 18, 2003]) upon which the Hearing Officer could have based her determination (*Austin,* 280 AD2d at 366), and the determination is clearly not irrational. The petitioner's attempt to have the court substitute its judgment regarding the credibility of the witnesses for that of the Hearing Officer before whom they testified is misguided (*see Austin,* 280 AD2d at 365; *Brown v Saranac Lake Cent. School Dist.*, 273 AD2d 785, 786 [3d Dept 2000]).

Petitioner also argues that the Award should be vacated because the DOE failed to comply with its own regulations when the Principal of I.S. 166 (the Principal) confronted him without providing him with 48 hours written notice or advising him of union representation, and "extracted" a statement (the Statement) from him that was admitted into evidence at the hearing.[6] Petitioner alleges that the Principal "connived" the Statement from him, telling his version of the events, despite the fact that petitioner did not know of the specifics of the allegations against him and, thus, could not properly respond to them (Petition, § I [A], ¶ 18 [A] [iii]). The petitioner has neither submitted nor discussed the contents of the Statement, he merely conclusorily states that it was prejudicial.

Petitioner asserts that, as a tenured employee, he held a property interest in his former position of which he may not be deprived without due process of law. He further asserts that the

[6]The Statement was written prior to petitioner's discussions with LaCherra.

DOE failed to follow its own rules, in that the Principal violated Chancellor's Regulation A-420 and A-421 ("Regulation A-421") which require that "the person alleged to have engaged in verbal abuse must be afforded an opportunity to appear with representation and address the allegations upon 48 hours written notice prior to any action being recommended" (Petitioner's Memorandum of Law in Opposition to Respondent's Motion to Dismiss the Amended Petition [Petitioner's Memorandum], at 14-15 [emphasis in original]). The court notes that Chancellor's Regulation A-420 applies to corporal punishment and is inapplicable to the facts of this case.

Petitioner contends that the "failure to accord due process to [him] led to admissions into evidence of damaging statements taken without the opportunity of the Petitioner to consult with his Union Representative in violation of Chancellor's Regulation A-421 ("Regulation A-421") as aforesaid" (Petitioner's Memorandum, at 18).[7] Regarding the Statement, the petitioner urges that the "Hearing Officer was not free to pick and choose the applications of due process as guaranteed in the 'rules or understandings'" (*id.*).[8] Thus, presumably, petitioner is arguing that the Hearing Officer improperly allowed the Statement into evidence, or otherwise improperly considered it.[9] This argument falls short, however, because the petitioner does not assert that he

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[7]Although the petitioner claims that "damaging statements" were admitted into evidence, he discusses only the Statement in his brief and petition.

[8]Petitioner also claims, in his brief, that the DOE did not provide him with a copy of the investigative report within six months as required by the collective bargaining agreement. However, there is no allegation in the petition to support this assertion and the petitioner has not augmented his pleading nor made an argument as to how such an omission impinged upon a substantial right.

[9]The petition states that the Award:

> "is not supported by the record in that the arbitrator *ignored* ... [that] Principal Gonzalez admitted that she never told Mr. Bonifacio the identity of the student making the allegations or their exact nature [and] connived a statement from Mr. Bonifacio telling his version of the events, despite the fact that he did not and could

competently raised before the Hearing Officer the issue of the due process violations that he alleges resulted in the Statement (*see Green v. New York City Police Department*, 34 AD3d 262 [1st Dept 2006][argument which was not raised at the administrative level not subject to judicial review in an Article 78 proceeding]). Furthermore, despite petitioner's contention that the failure to accord him due process led to admissions into evidence at the hearing of damaging statements, it is significant that the record reveals it was the *petitioner* who submitted the Statement into evidence before the Hearing Officer (Tr. 1495-96 [September 29, 2003]). Moreover, petitioner has failed to demonstrate substantial prejudice by the alleged lack of due process, as required (*see id.).*

In addition, Regulation A-421provides in pertinent part, as follows:

> "[w]hether the investigation is conducted by the Office of Special Investigations or the supervisor, the person alleged to have engaged in verbal abuse must be afforded an opportunity to appear with representation and address the allegations upon 48 hours notice *prior to any action being recommended or taken*". (emphasis supplied).

Thus, the regulation provides that the accused must be given an opportunity to appear with representation 48 hours "prior to any action being taken or recommended", not necessarily prior to the accused person's statement being taken, as plaintiff appears to be arguing here. As such, it has not been established that petitioner's rights under Regulation A-421 were violated. Moreover, the record shows that petitioner was given well over 48 hours prior to his termination being recommended to "appear with representation". Petitioner testified at his hearing that, prior to meeting LaCherra, petitioner had spoken with his Union representative about the allegations

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not know of any of the specifics and thus could not properly respond to them" (Petition, § I [A], ¶ 18 [A] [emphasis added]).

asserted against him. (Tr. 382 [December 11, 2003]. Additionally, the principal testified that he notified petitioner of his right to Union representation. (Tr. 1482 [September 29, 2003]). LaCherra testified that petitioner indicated he was "comfortable speaking to us without union representation" (Tr. at 179 [August 27, 2003]). The Hearing Officer found such witnesses to be credible. Thus, petitioner's due process arguments are rejected.

The petitioner's arguments to support his allegation in the petition that the determination is against public policy are the same arguments regarding the appropriateness of the penalty and, thus, are dealt with below. As to the Hearing Officer's determination that termination was the appropriate penalty, the petitioner argues that the Hearing Officer exceeded her authority because she considered the petitioner's alleged lack of remorse which, petitioner contends, is not permitted under Education Law §3020-a. Petitioner's contention is without merit. Education Law §3020-a contains no such enumerated or implied limitation, and the petitioner has provided no compelling argument that would support his assertion that the Hearing Officer exceeded her authority under the statute for this reason.

Petitioner also argues that the Hearing Officer failed to comply with Education Law §3020-a (4) (a) because she did not consider the DOE's lack of remedial efforts. Education Law §3020-a (4) (a) provides:

> "At the request of the employee, in determining what, if any, penalty or other action shall be imposed, the hearing officer shall consider the extent to which the employing board made efforts towards correcting the behavior of the employee which resulted in charges being brought under this section through means including but not limited to: remediation, peer intervention or an employee assistance plan."

There is no allegation in the petition that petitioner requested that the Hearing Officer consider

the extent to which the employing board made efforts toward correcting his behavior. In any event, the Hearing Officer specifically discussed the petitioner's arguments, which were advanced in post-hearing briefs, concerning mitigating factors and penalties other than termination. However, notwithstanding that consideration, the Hearing Officer determined that termination was supported by the petitioner's obliviousness to the offensiveness of his comments and actions, and his failure to concede that his actions were wrong, or to admit under oath that they occurred.

Finally, petitioner challenges the Hearing Officer's determination as to the penalty as excessive and shocking to the conscience in view of his history of satisfactory service. Petitioner's role at I.S. 166 was to guide and counsel troubled adolescents and children. Instead, the Hearing Officer determined that the petitioner used his position to the detriment of those he was responsible to aid. The penalty of termination is expressly provided for in Education Law 3020-a. In light the seriousness of the offenses, and the Hearing Officer's factual determinations regarding petitioner's conduct, which the court is obligated to accept, the penalty is neither irrational, nor so disproportionate to the offense as to be shocking to one's sense of fairness (*see Matter of Pell v Board of Educ.*, 34 NY2d 222, 233 [1974]).

When an application to vacate an arbitration is denied, the court must confirm the award (CPLR 7511(e); *see e.g. White v Department of Law*, 184 AD2d 229, 230 [1st Dept 1992] *lv denied* 80 NY 2d 759 [1992].

Accordingly, it is

ORDERED AND ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED AND ADJUDGED that the June 2, 2004 arbitration award finding that there was just cause for discipline under Education Law § 3020-a and for termination is hereby confirmed, without costs and disbursements; and it is further

ORDERED that respondents' cross-motion to dismiss the petition is granted to the extent that the second and third causes of action of the petition are dismissed, without opposition, and is otherwise granted in accordance with this decision; and it is further

ORDERED that within 30 days of entry of this order, respondents shall serve a copy upon all parties with notice of entry.

Dated: 1/17/07

Doris Ling-Cohan, J.S.C.

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Norman Goodman
CLERK

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