[* 1] 12/3/2008

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

PRESENT: RAKOWER PART 5

Index Number : 111636/2008
BOMSER, RONALD
VS.
KLEIN, JOEL I.
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

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

his motion to/for _____

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

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
DEC 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/24/08

EILEEN A. RAKOWER J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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IN THE MATTER OF RONALD BOMSER:

Petitioner

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

Petitioner,

-against-

Joel Klein, Chancellor, New York City Department of Education and the NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

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Index No. 104855/08

Mot. Seq. 001

Decision/Order

HON. EILEEN A. RAKOWER:

Petitioner, Ronald Bomser ("Bomser") brings this petition to vacate an arbitration decision terminating his employment as a tenured teacher. Defendants Joel Klein, Chancellor of the New York City Department of Education ("Klein") and the New York City Department of Education ("DOE") cross-move to dismiss petitioner's motion to vacate, pursuant to §3020-a of the Education Law and sections 404(a) and 7511, as well as Rule 3211(a)(7) of the CPLR. Petitioner opposes the cross motion.

Petitioner submits the following documents: (1) a verified petition and notice thereof; (2) an affirmation in support of the verified petition; (3) Hearing Officer Weinstock's opinion and award; (4) an April 17, 2006 memorandum from Investigator Robert Small ("Small"), reviewing his investigation of the complaints against petitioner and recommending that his report be forwarded to the Office of Legal Services (and that a technical assistance conference be convened to determine what disciplinary action should be taken against petitioner); (5) a copy of DOE regulation A-420, issued November 16, 2004; (6) an affidavit of service of the notice of petition and verified petition on respondents.

CPLR §7510 states:

> The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.

The grounds for vacating an award is set out in CPLR §7511(b). That section states:

> 1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds the rights of that party was prejudiced by:
>
> > (i) corruption, fraud or misconduct in procuring award; or
> > (ii) partiality of an arbitrator appointed as a neutral; except where the award was by confession; or
> > (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
> > (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

The determination petitioner seeks to vacate resulted from consideration of the following facts and circumstances. In January and February of 2006, the DOE's Office of Special Investigations ("OSI") became aware of numerous complaints about petitioner's engaging in corporal punishment of his special education students. On January 11, 2006, Principal, Jacqueline Jones ("Jones") reported a complaint that petitioner had grabbed a student's arm on numerous occasions. On February 15, 2006, Jones again contacted OSI, reporting that a student had informed her that petitioner grabbed and hit the student in the arm. Then, on February 16, 2006, Assistant Principal Yvonne Gardner ("Gardner") contacted OSI, reporting an allegation that petitioner had pulled a student by the arm. A subsequent search of DOE databases also revealed eight prior allegations against petitioner. A review of previous complaints showed that two cases had been substantiated, resulting in letters to petitioner's file. Additionally, a Technical Assistance Conference in 2003 had resulted in petitioner's having been suspended for two and one half months without pay. The record also revealed two active cases, two that had been substantiated, and

a verbal reprimand having been issued to petitioner.[1]

On January 18, 2006 and February 16, 2006, an OSI investigator, Robert Small, ("Small") interviewed the principal and vice principal, a paraprofessional Mr. Azoro ("Azoro"), a parent coordinator, and a school aide, as well as at least eight students[2] in connection with his investigation of three allegations of corporal punishment against petitioner. On February 9, 2006, Small interviewed petitioner in the presence of a United Federation of Teacher's representative. Small's investigation included re-interviews of a number of the students, and his report stated that numerous students had witnessed petitioner grabbing students by the arm and that the vice-principal had received numerous complaints of petitioner's engaging in this activity.

Based on the accounts he reviewed, Small found certain allegations to be substantiated and recommended that a copy of his report be forwarded to the Office of Legal Services and that a Technical Assistance Conference be convened to determine what disciplinary action should be taken against petitioner. The DOE charged petitioner with engaging in corporal punishment in violation of Chancellor's Regulations A-420 and A-421. It stated that, because petitioner had previously failed to heed warnings regarding similar conduct, termination would constitute the appropriate penalty.

Pursuant to compulsory arbitration, the matter was submitted to Hearing Officer Bonnie Sipser Weinstock ("Weinstock"). On August 4, 2008, following a nine day hearing, Weinstock issued a 30 page opinion and award dismissing some charges against petitioner, sustaining others, and ultimately finding that "[t]he proven Specifications demonstrate that...Ronald Bomser...has engaged in misconduct and has been incompetent in the performance of his duties as a classroom teacher."[3] Hearing Officer Weinstock further held that, because petitioner had "...received prior

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[1] The cases reviewed also included two that were found unsubstantiated.

[2] Small's report identifies the students interviewed by different letters in connection with the three incidents.

[3] Of eight specifications charged, the arbitrator found one substantiated in part and unsubstantiated as to other parts (Specification 1, which contained 5 sub-parts). She found four other specifications (Specifications 2, 3, 4 and 8) to be substantiated by the evidence and dismissed three others (Specifications 5, 6, and 7) that she found were not substantiated by the evidence.

progressive discipline and yet continued to engage in misconduct and to render incompetent service, the record in this matter demonstrates just cause for the termination of Mr. Bomser."

"It is well settled that judicial review of arbitration awards is extremely limited." (*Wien & Malkin LLP v. Helmsley Spear, Inc.*, 6 NY3d 471, 479[2006], *citing United Paperworkers Intl. Union AFL-CIO v. Misco, Inc.*, 484 U.S.29 [1987].) An arbitration award must be upheld when the arbitrator "offers even a barely colorable justification for the outcome reached." (*Id.*) "An arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice." (*Id.* at 479-480).

Education Law §3020-a(5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR §7511. Determinations rendered pursuant to compulsory arbitration must be in accord with due process and supported by adequate evidence in addition to being rational and satisfying the arbitrary & capricious standards of Article 78. (*Lackow* at 567; *See also Tarasow v. NYC Department of Education* 21 Misc.3d 1113(a), 2008 WL 4602526 at *6 [Sup. Ct. 2008].). The party challenging an arbitration determination has the burden of showing its invalidity. *Lackow v. The Department of Education*, 51 A.D.3d 563 at 568 (First Dept. 2008).

The First Department, in *Lackow*, upheld an arbitration award terminating a tenured teacher, and rejected the necessity of imposing a lesser sentence. (*Id.* At 569). The petitioner in *Lackow* was found by the arbitrator to have engaged in a pattern of misconduct and to have persisted in his violations of DOE policy, despite having previously received lesser sanctions. (*Id.*) The court found that "[a] hearing officer's determinations of credibility...are largely unreviewable because the hearing officer observe[s] the witnesses and [is] able to perceive the inflections, the pauses, the glances and gestures - all the nuances of speech and manner that combine to form an impression of either candor or deception." (*Id.* at 568.).

A review of Arbitrator Weinstock's decision reveals no evidence that the decision rendered was arbitrary, capricious or subject to any of the defects set forth in CPLR §7511. Hearing Officer Weinstock provided reasons for crediting certain students' testimony and for rejecting petitioner's. The arbitrator's report also states that, where certain items of evidence were founded on hearsay or contained student

descriptions hindered by poor verbal ability and/or conflation of ideas, the relevant charges were dismissed.

In determining the appropriate penalty, Hearing Officer Weinstock considered evidence indicating that petitioner was on notice of the Chancellor's regulations against corporal punishment, and that he had previously been reprimanded for conduct similar to that charged in the specifications at issue. The arbitrator also considered that, in 2003, petitioner had entered into a stipulation on similar charges, resulting in his being sanctioned with a two and one-half month suspension without pay and his being directed to enroll in classroom management courses at his own expense. For these reasons, Hearing Officer Weinstock found that "...there is nothing more this Arbitrator could direct the [petitioner] to do which would be likely to produce any improvement in the [petitioner's] classroom management skills." The arbitrator further found that petitioner was afforded all the procedural due process to which he was entitled under the Education Law in connection with the proceeding and that there was just cause for his termination.

Wherefore it is hereby

ORDERED that petitioner's motion to vacate is denied; and further

ORDERED that respondents' cross motion to dismiss is granted.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: November 24, 2008

EILEEN A. RAKOWER, J.S.C.