

Matter of Littera v Board of Educ. of the City School Dist. of the City of N.Y.
2009 NY Slip Op 30176(U)
January 23, 2009
Supreme Court, New York County
Docket Number: 114542/2008
Judge: Carol Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 114542/2008
LITTERA, TERESA
VS.
BOARD OF EDUCATION
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

INDEX NO. _____
MOTION DATE 01/20/09
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

The instant application is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the Petition of Teresa Littera for an order and judgment pursuant to Rule 7511 of the CPLR vacating the Award and Opinion of Medical Arbitrator William B. Head Jr., M.D., P.C., dated July 24, 2008, on the ground that Arbitrator Head allegedly exceeded his authority in finding that Respondent Board of Education of the City School District of the City of New York Medical Bureau, HR-Connect Medical Administration decision to end petitioner's line of duty injury status as of approximately October 29, 2005, was "medically reasonable" instead of "medically justifiable," is denied in its entirety; and it is further

ORDERED and ADJUDGED that the cross motion of respondents to dismiss the petition pursuant to Section 7511 and Rules 404(a) and 3211 (a)(7) of the CPLR on the ground that petitioner has failed to state a cause of action. In his July 24, 2008 Award, Arbitrator Head precisely determined the issues presented in the express agreement of the parties in finding that petitioner's placement in LODI status was medically reasonable until approximately October 29, 2005. Since

~~Dated: _____ J.S.C.~~

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

UNFILED - JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based thereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1100)

petitioner's allegations are insufficient to establish that Arbitrator Head exceeded the scope of his authority, petitioner has failed to state any ground to vacate the award under the narrow review of CPLR § 7511(b), is granted and the petition is hereby dismissed in its entirety and the arbitration award confirmed pursuant to CPLR § 7511(e); and it is further

ORDERED that counsel for respondents shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for petitioner.

Dated 1/23/09

ENTER: *Carol Edmead*, J.S.C.

HON. CAROL EDMEAD

Check one: 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 35

_____ x
In the Matter of the Application of

TERESA LITTERA,

Petitioner.

Index No. 114542/2008

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

DECISION/ORDER

-against-

THE BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF THE CITY OF NEW YORK
and JOEL L. KLEIN, As Chancellor of the New York
City Public Schools,

Respondents.

_____ x
EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Teresa Littera ("petitioner") moves for an order and judgment pursuant to Rule 7511 of the CPLR vacating the Award and Opinion of Medical Arbitrator William B. Head Jr., M.D., P.C., ("Arbitrator Head" and/or "Medical Arbitrator"), dated July 24, 2008 (the "Award"), on the ground that Arbitrator Head allegedly exceeded his authority in finding that Respondent Board of Education of the City School District of the City of New York ("Board of Education" or "BOE") (also known as the New York City Department of Education "DOE") Medical Bureau, HR-Connect Medical Administration ("medical bureau" or "HR-Connect") decision to end petitioner's line of duty injury ("LODI") status as of approximately October 29, 2005, was "medically reasonable" instead of "medically justifiable."

Respondent cross-moves to dismiss the petition pursuant to Section 7511 and Rules 404(a) and 3211 (a)(7) of the CPLR on the ground that petitioner has failed to state a cause of action. In his July 24, 2008 Award, Arbitrator Head precisely determined the issues presented in the express agreement of the parties in finding that petitioner's placement in LODI status was medically reasonable until approximately October 29, 2005. Since petitioner's allegations are insufficient to establish that Arbitrator Head exceeded the scope of his authority, petitioner has failed to state any ground to vacate the award under the narrow review of CPLR § 7511(b). Accordingly, the petitioner fails to establish grounds for vacatur of the arbitration award under CPLR § 7511, the petition must be dismissed in its entirety and the arbitration award confirmed pursuant to CPLR § 7511(e).

Background

Petitioner, a retired Assistant Principal formerly employed by DOE at Intermediate School 49 ("I.S. 49"), commenced employment with the BOE as a teacher on or around September 6, 1989 and received tenure on or around September 6, 1992. On or about June 1, 1999, petitioner was appointed to the position of Assistant Principal and she remained in this position until her retirement on July 3, 2007.

On or around February 26, 2004, petitioner allegedly attempted to break up an altercation between students while on duty at I.S. 49 and sustained injuries. As a result of this incident, petitioner was granted LODI status from the BOE Medical Bureau from February 2004 to June 2004. In mid-January, 2005, petitioner directed a female student to return to her class. In response, the student allegedly stated "My mother is going to ---- you up." Approximately one week later, on January 26, 2005, the student's mother came to the school and confronted

petitioner, allegedly saying in sum and substance "stay the ---- away from my kid" or "I will ---- you up" and "I am going to eat your food. They will find you in the gutter." Petitioner allegedly perceived these statements as a threat of death, and perceived that this woman would kill her. Petitioner subsequently reacted to these statements by running into a "vault" in the school building and hiding for the remainder of the day until the Principal drove her home. Petitioner did not return to work after the above-mentioned incident and retired as of July 3, 2007, two and one half years after the incident, having never returned to work at the BOE.

Following the January 26, 2005 incident, petitioner requested that her absences allegedly due to this incident be classified as LODI, and that she receive LODI pay for the absences. After an investigation. BOE Superintendent, Edward Seto, administratively denied petitioner's LODI injury. In the interim, the BOE Medical Bureau conducted an Employee Medical Review of petitioner on June 17, 2005 and determined that "[n]o objective findings preclude return to work as of August 29, 2005." The petitioner filed a grievance and requested the administrative bar created by the Superintendent's denial of LODI status be lifted and allow the Medical Bureau, HR-Connect Medical Administration, to evaluate the petitioner's medical condition. The administrative bar was lifted and on March 6, 2007, CSA and the BOE reached a settlement in regard to petitioner's LODI grievance. The settlement provided that petitioner receive LODI pay from January 27, 2005, through April 30, 2005. Additionally, the settlement also provided that petitioner receive medical arbitration pursuant to the Article VII, Section M of the collective Bargaining Agreement between CSA and the BOE to allow the petitioner to contest the June 17, 2005 determination of the medical bureau that "[n]o objective findings preclude return to work as of August 29, 2005. In a letter dated March 13, 2007, CSA requested a scheduling of the

medical arbitration and specified the issues presented for the medical arbitrator to determine. The issues submitted by the parties for determination by the medical arbitrator were: "1) Were Ms. Littera's absences from August 29, 2005 until the present medically justifiable? (if some but not all were medically justifiable, specify which); 2) If so, which of those medically justifiable absences were caused by the January 26, 2005 line of duty injury?" HR-Connect, referred the medical arbitration to Arbitrator Head and scheduled an appointment for November 14, 2007 for petitioner to meet with the medical arbitrator.

On November 14, 2007 Arbitrator Head examined petitioner in his capacity as the medical arbitrator. Thereafter, on December 11, 2007, Dr. Head issued an Award ("December 11, 2007 Award") which stated that: When comparing the records to Ms. Littera's account of the incidents in question, as well as her presentation in my office, it appears that Ms. Littera is exaggerating. It is my opinion that her emotional reaction to the incidents was temporarily disabling, but I feel that Ms. Littera in [sic] no longer psychiatrically disabled, but has made a conscious career decision not to resume teaching. Nonetheless, it is my opinion that she should have been given line of duty injury status for an additional 2 months or until approximately October 29, 2005.

After this determination, CSA attorney, David Grandwetter, wrote a letter to Arbitrator Head requesting the medical arbitrator to reconsider the December 11, 2007 Award on two grounds: (1) that the medical arbitrator claimed that the petitioner did not bring any records with her on the date of the examination, which the petitioner denied; and (2) that the medical arbitrator claimed to have spoken with petitioner's physician, Dr. Klebanov, also which the petitioner denied.

In response to the request to review the additional documentation by HR-Connect, Arbitrator Head reviewed the additional evidence and issued a response on March 14, 2008 ("March 14, 2008 Response") In the March 14, 2008 Response, Arbitrator Head first noted: Ms. Littera ... claimed that I did not review records that she claimed that I had in my possession, and that I refused to take another copy of those records that she claims that she offered to me during her evaluation. neither of which is correct. She also claimed that I did not speak with Dr. Klebanov, which I most certainly did on December 7, 2007 as detailed in my report. Additionally, after detailing his review of the records attached to the February 13, 2008 letter from CSA, the medical arbitrator determined that: Considering the information and documentation in those records, I would now view Ms. Littera's emotional condition as being due to the combined effects of the 2004 and January 2005 incidents up to April 2006, and, to a lesser extent up to July 2006, when she started to improve, before her son's cranial surgery in July 2006. After July 2006, it would appear that her other problems, including her medical problems, her son's surgery, and "personal problems," upon which Dr. Braver did not elucidate, became the dominant reason for her anxiety and depression and inability to return to work. Finally, in the March 14, 2008 Response, Arbitrator Head requested that a re-evaluation by him of the petitioner be scheduled, and he also requested that he be provided with all the relevant medical records and requested to speak with Dr. Braver, Ms. Lax, Dr. Gardner, and Dr. Klebanov. In response to this request, HR-Connect- Medical Administration scheduled a re- evaluation of the petitioner on May 23, 2008. On May 23, 2008, Arbitrator Head again re-evaluated the petitioner. After the second evaluation of petitioner by Arbitrator Head, he issued an Award dated July 24, 2008. In this Award, Arbitrator Head first addressed communication with petitioner's doctors and

psychotherapists as well as the records he reviewed of the petitioner prior to the follow-up visit. In this report, Arbitrator Head noted "that in the period from April 2006 until July 2006, there had been a number of stressors unrelated to her school experiences, in her life, including both her medical problems diagnosed in April 2006, and her son's cranial surgery in July 2006, and other, undisclosed "personal problems." Upon review of petitioner's medical records, Arbitrator Head noted that Dr. Gardner concluded that petitioner should be able to return to work September 2005, relative to the January 2005 incident. Ultimately, in the July 24, 2008 Award, Arbitrator Head concluded: I would stand by my original arbitration decision of December 11, 2007. I think that HR-Connect's original decision to end her line of duty disability status as of August 2005 had generally been medically reasonable, except that the period of disability should have been extended somewhat longer, until October, 2005. Apart from that, it is clear that the incident of January 2005 should not have lead to the prolonged emotional reaction that she is claiming, that she had said she had generally felt, "burnt out" due to other issues in June 2005, and that multiple other medical problems later supervened.

Petitioner's Contentions

The Medical Arbitrator's jurisdiction was specifically limited by the DOE's letter dated October 25, 2007. Medical Arbitrator Head was limited to determining whether petitioner's absences subsequent to August 29, 2005 onward were "medically justifiable." Instead of determining whether the absences in question were "medically justifiable," Medical Arbitrator Head determined that "...HR-Connect's original decision to end her [Littera's] line of duty disability status as of August, 2005 had generally been medically reasonable,..."

Medical Arbitrator Head exceeded his power and authority by failing to render his

decision based on the specific issues that were presented to him. Medical Arbitrator Head was only empowered to determine if petitioner's absences from August 29, 2005 to the present were medically justifiable. Since petitioner retired July 3, 2007, the time period in question is August 29 through July 3, 2007.

In basing his decision on the issue of whether the decision to end petitioner's line of duty disability status was generally medically reasonable, Medical Arbitrator Head exceeded his authority. Consequently, as the Medical Arbitrator Award of Arbitrator Head exceeded the arbitrator's enumerated powers, the award must be vacated.

Respondents' Contentions

To the extent that petitioner is seeking to vacate the arbitration award, the petition utterly fails to set forth any basis for vacatur under CPLR § 7511(b). An arbitration "conducted pursuant to the parties' governing collective bargaining agreement-is consensual in nature, and, as such, subject to the limited scope of review established by CPLR § 7511." Jania v. New York State Div. of Hous. and Cmty. Renewal, 271 A.D.2d 878, 879 (3d Dep't 2000). In this regard, the petitioner bears the burden of establishing that the award must be vacated under one of the narrow grounds listed set forth in CPLR § 7511(b). Id. at 879. Pursuant to CPLR § 7511(b), an arbitrator's award may be vacated only if the court finds that the rights of the petitioning party were prejudiced by: (I) corruption, fraud, or misconduct in procuring the 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. (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. These grounds are the exclusive bases for vacating an arbitration award. Moreover, disagreement with the way the arbitrator resolves a dispute is not a statutory ground upon which an award may be vacated. Thus, an arbitrator's award will not be disturbed "unless it is violative of strong public policy, it is totally irrational, or exceeds a specifically enumerated limitation on his power." Silverman v. Benmour Coats, Inc., 61 N.Y.2d 299, 307 (1984).

Here, the petition simply fails to provide an allegation, much less any evidence, to establish that the medical arbitrator exceeded his power or so imperfectly executed it that a final and definite award on the subject matter was not made. The petition states the operative standard to vacate an award under CPLR § 7511 (b)(iii), but fails to provide facts sufficient to establish a basis for the extraordinary relief requested. In this regard, the petitioner seemingly attempts to establish grounds for vacatur by alleging that the arbitrator exceeded his authority by stating that HR-Connect's decision to end petitioner's LODI was "medically reasonable" rather than specifically stating the words "medically justifiable." This argument is without merit. The medical arbitrator was given jurisdiction to determine the issues.

Analysis

CPLR 7511 provides for the vacatur of an award in arbitration where "an arbitrator ... exceeded his power or so imperfectly executed it that a final and definite award upon the subject submitted matter was not made...." CPLR 7511(b)(1)(iii). The scope of judicial review of arbitration awards is extremely limited. *Matter of Brown & Williamson Tobacco Corporation v Chesley*, 7 A.D.3d 368, 777 N.Y.S.2d 82 (1st Dept. 2004). Where a party to arbitration claims that the arbitrator exceeded his or her powers, "[s]uch an excess of power occurs only where the

arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power." *Matter of New York City Transit Authority v Transport Workers' Union of America, Local 100, AFL-CIO*, 6 N.Y.3d 332, 336, 812 N.Y.S.2d 413, 845 N.E.2d 1243 (2005); see also *Matter of United Federation of Teachers, Local 2, AFT, AFL-CIO v Board Education of City School District of City of New York*, 1 N.Y.3d 72, 79, 769 N.Y.S.2d 451, 801 N.E.2d 827 (2003).

Judicial review of arbitral awards pursuant to Education Law § 3020-a(5) is limited to the grounds set forth in CPLR 7511. *Matter of Hegarty v Board of Education of City of New York*, 5 A.D.3d 771, 773 N.Y.S.2d 611 (2d Dept. 2004). "However, where, as here, the parties are forced to engage in compulsory arbitration, judicial review under CPLR article 75 requires that the award be in accord with due process and supported by adequate evidence in the record [internal quotation marks and citations omitted]." *Id.* at 772, 773 N.Y.S.2d 611. Further, "closer judicial scrutiny of the arbitrator's determination" is required of the court in the cases of compulsory arbitration. *Matter of Motor Vehicle Accident Indemnification Corporation v Aetna Casualty & Surety Company*, 89 N.Y.2d 214, 223, 652 N.Y.S.2d 584, 674 N.E.2d 1349 (1996). Thus, the award must have "evidentiary support and cannot be arbitrary and capricious." *Id.* at 223, 652 N.Y.S.2d 584, 674 N.E.2d 1349.

Furthermore, given the strong public policy of this State, which "prefers arbitration as a device for resolution of labor controversies and frowns upon judicial attempts to resolve such disputes," *Board of Education, Bellmore-Merrick Central High School District v Bellmore-Merrick United Secondary Teachers, Inc.*, 39 N.Y.2d 167, 171, 383 N.Y.S.2d 242, 347 N.E.2d 603 (1976), the Court of Appeals has held that "an arbitration award may be vacated [only] on

three narrow grounds: it violates strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power." *United Federation of Teachers, Local 2 v Board of Education of the City of New York (Linda Feil)*, 1 N.Y.3d 72, 79, 769 N.Y.S.2d 451, 801 N.E.2d 827 (2003), citing *Matter of Board of Educ. of Arlington Cent. School Dist. v Arlington Teachers Assn.*, 78 N.Y.2d 33, 37, 571 N.Y.S.2d 425, 574 N.E.2d 1031 (1991). In *Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York* (94 N.Y.2d 321 [1999]), the court refused to disturb an award, cognizant of the fact that "[a] court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice" (*id.* at 326, 704 N.Y.S.2d 910, 726 N.E.2d 462 [citations omitted and emphasis added]).

Conclusion

This court finds that the Medical Arbitrator's Award is amply supported by the evidence, and is not arbitrary or capricious. The Award is very detailed and thoughtful, and makes substantial references to the record.

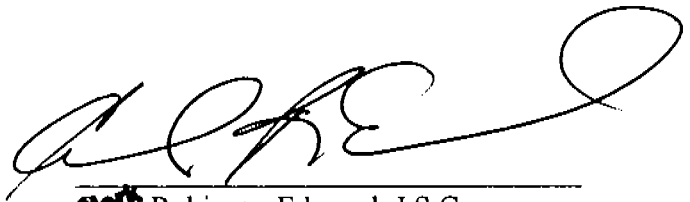
In conclusion, Arbitrator Head indeed answered the issues presented in finding that the petitioner's LODI status should have been extended through October 29, 2005 due to her inability to return to work as a result of the January 2005 incident. Consequently, the petition has failed to establish a ground for vacatur under the narrow review of CPLR § 7511(b), and must be dismissed for failure to state a cause of action.

Accordingly, it is hereby

ORDERED and ADJUDGED that the Petition of Teresa Littera for an order and judgment pursuant to Rule 7511 of the CPLR vacating the Award and Opinion of Medical Arbitrator William B. Head Jr., M.D., P.C., dated July 24, 2008, on the ground that Arbitrator Head allegedly exceeded his authority in finding that Respondent Board of Education of the City School District of the City of New York Medical Bureau, HR-Connect Medical Administration decision to end petitioner's line of duty injury status as of approximately October 29, 2005, was "medically reasonable" instead of "medically justifiable," is denied in its entirety; and it is further

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Dated: January 23, 2009



Robinson Edmead, J.S.C.

ROBIN. CAROL EDM EAD

UNFILED JUDGMENT
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and notice of entry cannot be served based hereon. To
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1419).