Fofana v New York City Dept. of Educ.

2009 NY Slip Op 31212(U)

June 2, 2009

Supreme Court, New York County

Docket Number: 101302/09

Judge: Carol R. Edmead

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[* 1] SCANNED ON 6/5/2009

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 101302/2009
FOFANA, BOUBAKAR
VS.
THE N.Y.C. DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : # 001
VACATE ARBITRATION AWARD

INDEX NO. 101302-09
MOTION DATE
MOTION SEQ. NO. #001
MOTION CAL. NO.

_ were read on this motion to/for

	PAPERS NUMBERED
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

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

The instant motion and cross motion are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the petition is denied, the cross motion is granted, and the proceeding is dismissed; and it is further

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

This constitutes the decision and judgment of the court.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 6/2/09

J.S.C.
HON. CAROL EDMEAD

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

---x

In the Matter of the Application of

BOUBAKAR FOFANA

Petitioner,

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

-against-

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

---x

Index No. 101302/09

DECISION/ORDER

UNFILED JUDGMENT
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EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Boubakar Fofana, a tenured mathematics teacher employed by respondent New York City Board of Education (BOE), brings this proceeding *pro se*, pursuant to CPLR 7511 (1), to vacate a January 7, 2009, Award by Hearing Officer Jay M. Siegel, Esq., issued in a disciplinary proceeding conducted pursuant to Education Law § 3020-a. Mr. Siegel is a member of a panel of hearing officers (Panel) established pursuant to the collective bargaining agreement (CBA) between BOE and the United Federation of Teachers (UFT). The Award upheld all but one of the charges brought against petitioner by BOE and suspended petitioner without pay for two months. BOE cross-moves, pursuant to Education Law § 3020-a and CPLR 404 (a), 3211 (a) (7), and 7511, for an order dismissing the petition.

At a pre-conference hearing held on September 21, 2007,

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petitioner was represented by Antonio Cavallaro, Esq. on behalf of James R, Sander, Esq. of New York State United Teachers (NYSUT). NYSUT is a teachers union that provides various services, including legal services, to local affiliates, including the UFT in New York City. Thereafter, on January 21, 2008, Teachers4action, a group of teachers, including petitioner, who were employed by BOE, filed an action, *Teachers4action v Bloomberg et al.* (08 CV 548 [VM]), in the United States District Court for the Southern District of New York, alleging, among other things, that the conduct of disciplinary proceedings against tenured teachers and administrators in the New York City public school system violates their rights to due process. On February 28, 2008, Teachers4action filed an amended complaint adding the UFT as a party defendant, and alleging that the UFT was breaching its fiduciary duties to its members with regard to the due process violations alleged in the initial complaint. The amended complaint alleged, among other things, that the UFT had conspired with Mayor Bloomberg, Chancellor Klein and BOE to deprive the plaintiffs of their due process and statutory rights, and that NYSUT attorneys had been instructed to provide the plaintiffs with inadequate representation in disciplinary hearings. By letter, dated March 14, 2008, Mr. Sander advised petitioner that, because NYSUT represents the UFT, NYSUT was withdrawing as his counsel, because of the conflict of interest posed by the federal action, and because that action sought to require NYSUT to assert specific claims and defenses in disciplinary hearings, many of which Mr. Sander considered to be frivolous.

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On March 3, 2008, petitioner wrote to the Hearing Officer, requesting that he adjourn the disciplinary proceeding pending the outcome of the *Teachers4action* action. By letter dated March 31, 2008, the Hearing Officer denied the request, on the grounds that Education Law § 3020-a, as well as the CBA, require hearing officers to conduct disciplinary hearings in an expeditious manner, and that there is no legal basis for adjourning a hearing for an indefinite time.

On March 24, 2008, Teachers4action filed an Article 78 proceeding in the Supreme Court, New York County, seeking to enjoin members of the Panel from continuing to preside over disciplinary proceedings. The petition alleged that the Panel is biased against teachers, suffers from conflicts of interest, conceals evidence, and takes directions from third parties who are improperly influencing the conduct of disciplinary proceedings.

Petitioner's hearing continued on May 7, 2008, at which time petitioner stated that he was not represented by counsel, and that he was not representing himself, but was attending the hearing because he was required to do so by BOE. Petitioner objected that the Hearing Officer should not preside over the hearing, for the reasons given in the state court action, and again requested that the hearing be adjourned until both the state and federal actions were concluded. The Hearing Officer denied the request for adjournment for the reasons that he had given in his March 31, 2008, letter, and he stated that he knew of no reason why he could not conduct the hearing in an impartial manner. The hearing then

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continued on May 28, 2008, and June 3, June 4, June 11, and June 16, 2008.

On August 6, 2008, Justice Kibbie Payne dismissed Teachers4action's petition in the state court action, on the ground that it should have been brought pursuant to Article 75, rather than pursuant to Article 78. On September 23, 2008, Teachers4action withdrew its federal action.

CPLR 7511 (b) provides that a court may vacate an arbitral award when the rights of a party in the arbitration were prejudiced by

> (i) corruption, fraud, or misconduct in procuring the award; or
>
> (ii) partiality of an arbitrator appointed as a neutral ...; or
>
> (iii) an arbitrator ... exceeded his power ... .
>
> (iv) Failure to follow the procedures of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

The petition alleges that the Award must be vacated on each of these grounds. Specifically, the petition alleges that the Hearing Officer concealed *ex parte* communications that had been made to him, that he improperly failed to refer petitioner's motion to disqualify him to a neutral party, and that, like the other members of the Panel, he had an improper relationship with BOE. The petition also alleges that the Hearing Officer failed to comply with certain timing requirements set forth in the CBA, and in Education Law § 1020-a (3).

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Petitioner's contention as to *ex parte* communications requires some background discussion. The members of Teachers4action had all been reassigned to one or another temporary reassignment center, colloquially and collectively known as the "rubber room," pending disciplinary proceedings being brought against them. Once they named the UFT as a defendant in their federal action, NYSUT ceased to represent them, leaving them to proceed on their own, or to retain private attorneys. At that juncture, Florian Lewenstein, the president of Teachers4action, devised a plan to scuttle all disciplinary proceedings brought against the members of Teachers4action, at least until such time as NYSUT resumed free representation of those teachers. On April 3, 2008, Mr. Lewenstein sent an e-mail to all the members of Teachers4action advising each of them to file an ethics complaint with the disciplinary committee of the appropriate Department of the Appellate Division, against the arbitrator who would be presiding over that member's proceeding. The complaints would be based upon the arbitrator's insistence that the teacher proceed with the hearing, although unrepresented by counsel. At the start of the hearing, the teacher was to present a copy of the ethics complaint to the arbitrator and demand that the arbitrator recuse him- or herself because of that complaint. Several hours after sending that e-mail, Mr. Lewenstein sent another, urging the teachers not to retain private attorneys. It appears that one of the teachers who received those e-mails, and who had retained a private attorney, Richard Krinsky, Esq., provided the e-mails to him. Mr. Krinsky, thereupon, provided them

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to Nancy Ryan, a member of the staff of Theresa Europe, Deputy Counsel to Chancellor Klein, and head of the trials unit of the BOE. At a disciplinary hearing held on April 7, 2008, and at a number of other disciplinary hearings, Ms. Europe read Mr. Lewenstein's e-mails into the record. It is those e-mails that constitute the *ex parte* communication that petitioner alleges.

There is no indication in the record, and the petition does not allege, that petitioner followed Mr. Lewenstein's advice to file an ethics complaint against the Hearing Officer, prior to the commencement of his disciplinary hearing. Accordingly, even if Ms. Europe provided the Hearing Officer with a copy of Mr. Lewenstein's e-mails, and petitioner no more than surmises that she did, those e-mails bore no relationship to petitioner's proceeding, and they, therefore, do not qualify as *ex parte* communications. *See R&R Capital LCC v Merritt*, 56 AD3d 370 (1st Dept 2008); *Matter of Hausknecht v Comprehensive Med. Care of New York*, 24 AD3d 778 (2d Dept 2005).

Petitioner also alleges that confidential communications between him and the attorney representing Teachers4action in the federal lawsuit "were shared with Respondent's attorneys and the arbitrators." However the petition alleges no facts to support that contention. Neither the alleged communications, nor the manner by which they may have been disclosed to BOE, nor the manner in which petitioner may have become aware of such disclosure, is identified.

At the time that petitioner's hearing had commenced, on March

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5, 2008, petitioner and Mr. Cavallaro anticipated that the UFT would provide petitioner with substitute counsel, and the hearing was adjourned. However, when the hearing resumed on May 7 2008, it was evident that substitute counsel would not be provided and that petitioner had not, and would not, retain private counsel. Petitioner, thereupon, stated that he objected to Mr. Cavallaro having been allowed to withdraw from the proceeding, and that he objected to participating in the hearing without counsel. Petitioner then moved to have the Hearing Officer disqualify himself, on the grounds of "conflict of interest, bias, [and] ex parte communications ... ." Petitioner contends that the Hearing Officer should have referred that motion to a neutral person or body. However, there is nothing in the CBA, or Education Law § 3020-a, that requires such a referral. If petitioner believed that he could show at least the appearance of bias on the part of the Hearing Officer, based upon established facts, he could have made an application to the court to disqualify the Hearing Officer. *See Bronx-Lebanon Hosp. Ctr. v Signature Med. Mgt. Group, LLC*, 6 AD3d 261 (1st Dept 2004). He cannot defeat the cross motion to confirm the Award by alleging a non-existent duty on the part of the Hearing Officer to have referred petitioner's motion to some other entity.

The CBA provides for a panel of 20 arbitrators who, absent good cause for their removal, agreed upon by both BOE and the UFT, serve for at least one year and provide 54 hearing dates per year. Petitioner alleges that the same staff attorney represents BOE in most of the disciplinary proceedings over which the Hearing Officer

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presides, and he contends that the combination of the cozy relationship between hearing officers and BOE staff members, together with the economic benefits that accrue to the hearing officers from membership in the Panel, bars them from being impartial. That contention overlooks the fact that the CBA requires that Panel members be agreeable to both BOE and the UFT, and that, if the parties cannot agree to a full complement, the additional Panel members will be chosen pursuant to the procedures of the American Arbitration Association. Moreover, "the mere inference of partiality ... is not sufficient to warrant interference with [an] arbitrator's award." *Matter of Infosafe Sys. v International Dev. Partners*, 228 AD2d 272, 273 (1st Dept 1996) (internal quotation marks and citation omitted). Here, the only overt misconduct that petitioner alleges on the part of the Hearing Officer in his conduct of the proceeding is that he refused to adjourn the proceeding to an indefinite date, and that as a consequence, petitioner had to defend himself without the benefit of free legal representation. A decision on whether to grant an adjournment is within the discretion of the arbitrator, *Matter of Whale Securities Co., L.P. v Godfrey*, 271 AD2d 226 (1st Dept 2000], and a refusal to grant an adjournment will lead a court to vacate an award only where such a refusal forecloses the presentation of material evidence. *Matter of HSBC Bank USA, Natl. Assn. v National Equity Corp.*, 23 AD3d 305 (1st Dept 2005); *Matter of Bevona v Superior Maintenance Co.*, 204 AD2d 136, 138 (1st Dept 1994). Petitioner cross

examined BOE's witnesses, introduced documentary evidence, and presented witnesses on his behalf. He does not allege that there was material evidence which he was unable to present.

While it is indisputable that the Hearing Officer failed to hold the pre-hearing conference, or to complete the final hearing, or to render the Award, within the times set forth in Education Law § 3020-a, petitioner does not allege that he suffered any prejudice as a result. Accordingly, the Hearing officer's delays do not warrant vacating the Award, *Scollar v Cece*, 28 AD3d 317 (1st Dept 2006).

Accordingly, it is hereby

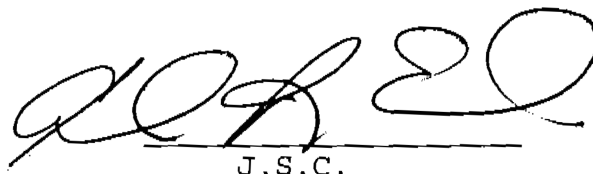
ORDERED and ADJUDGED that the petition is denied, the cross motion is granted, and the proceeding is dismissed; and it is further

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

This constitutes the decision and judgment of the court.

Dated:June 2, 2009

ENTER:



J.S.C.

HON. CAROL EDMEAD

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