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

PRESENT: HON. NICHOLAS FIGUEROA, J.S.C. PART 46

Index Number : 113413/2008
HOLLANDER, MICHAEL
VS.
DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

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

this motion to/for _____

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

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

See accompanying Decision and Judgment

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: 6/8/09

J.S.C.

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

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

In the Matter of the Petition of MICHAEL HOLLANDER,

Petitioner,

- against -

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent,

Index No. 113413/08

DECISION AND JUDGMENT

pursuant to Article 75 of the Civil Practice Law and Rules.

Nicholas Figueroa, J.S.C.:

Petitioner, pro se, seeks a judgment under Article 75 of the CPLR vacating an arbitral award terminating his employment as a high school teacher. Respondent moves to dismiss.

Petitioner, a special education teacher in the New York public school system since 1988, was given tenure in 1993. Near the end of the 2004-05 school year, when petitioner's high school was about to be closed, he formally elected to take a Seniority Transfer to Hillcrest High School for the following school year. Shortly thereafter, the Assistant Principal slated to be his immediate supervisor at Hillcrest asked him to visit the school to teach a sample lesson. Petitioner declined to do so since it would have entailed his taking a personal day. Petitioner's papers suggest that he had felt slighted by the implication that he needed to prove himself at this late stage of his career.

Despite this, in October 2005 his supervisor gave petitioner a "satisfactory" rating in her first observation report of his in-class performance. But in all of the supervisor's subsequent written evaluations petitioner's performance was rated "unsatisfactory." Two observation reports prepared by the school's Principal toward the end of the 2006-07 school year also rated

petitioner's performance as "unsatisfactory," notwithstanding certain remedial training programs in which petitioner was asked to participate.

In June 2007, petitioner was reassigned to a "temporary reassignment center" and advised that respondent had filed twelve disciplinary charges against him. The formal charges against him, which were subject to arbitration pursuant to the mandate of Education Law 3020-a, alleged various instances of professional misconduct in violation of the Regulations of the Chancellor of the Board of Education. Included was the charge that he had refused to teach his students mathematics at the level required of them under State-wide standards; that he had ignored his supervisor's directions to use a certain textbook and instead had distributed to his students textbooks that were inappropriate for their reading levels; that on two occasions his supervisor had found him in an empty classroom reading a newspaper although he was scheduled to be teaching a class; that he had been insubordinate in his dealings with his supervisor; and that he had neglected to alert school administrators and parents of individual students' excessive absences.

At the outset of the arbitration proceedings, petitioner was represented by his union's counsel, who appeared for him at a pre-hearing conference in November 2007.

Shortly after the pre-hearing conference, petitioner and other teachers who were also subjects of disciplinary proceedings formed a group that, among other things, commenced an action in federal court during the first half of 2008, challenging the arbitration process and seeking a stay of their separate arbitrations. Among the several defendants was the hearing officer assigned to preside over petitioner's case. During the preliminary stage of the litigation, certain e-mail correspondence between the plaintiffs and their counsel, proposing a hard-ball

litigation strategy against one of the hearing officer's co-defendants, was somehow intercepted and forwarded to respondent's counsel and each of the arbitrators.

At some point before May 21, 2008, when the first session of the arbitration hearing was scheduled to take place, petitioner discharged his union lawyer. Although petitioner attended that first session in the company of another lawyer, the latter advised the hearing officer that he was appearing for petitioner solely as "settlement counsel." When settlement efforts proved unsuccessful, the hearing officer advised petitioner that he could have as much time as he needed to secure substitute counsel for the balance of the proceedings. Nevertheless, despite several notices of scheduled hearings, petitioner failed to appear on the hearing dates.

The evidentiary hearing in petitioner's arbitration spanned three sessions, including live testimony on June 3 and 5, 2008, and a summation by respondent's counsel on June 12 , 2008. In a 43-page decision, dated September 12, 2008, based on documents filed by respondent as well as the testimony of a live witness, the hearing officer found that the evidence supported all charges, with the exception of one, which was withdrawn. The hearing officer concluded that, based on the record, termination of petitioner's employment was warranted.

Respondent's motion to dismiss in effect seeks summary judgment against the various grounds that petitioner has raised in his challenge to the award at bar. Such challenge appears to track the provisions (i) of CPLR 7511(b)(1), which in pertinent part reads as follows:

> 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 that the rights of that party 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 ... 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 (75), unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

Petitioner first alleges that the hearing officer was guilty of misconduct for not disclosing to him that she had received the previously-described e-mail relating to the federal litigation. Petitioner, however, does not indicate how her failure to reveal to him what he already knew prejudiced him in the arbitration. Nor is it clear how another e-mail annexed to the instant petition, referring the hearing officer, and other addressees, to a legal precedent concerning recusal, indicates misconduct attributable to the hearing officer. Even assuming the hearing officer had read the e-mails, such incidents of the lawsuit against her would not be a basis to disqualify her any more than could the lawsuit itself. That is, the arbitrator may not be disqualified on the basis of the lawsuit, since petitioner sued her after she had taken office, and any resultant cloud on her neutrality would thus be a self-inflicted injury on petitioner's part (*see Robert Marini Builder, Inc. v Rao*, 263 AD2d 846, 848). Indeed, to allow disqualifications on such a ground would be to give parties license to delay or burden proceedings with claims of bias that they themselves could manufacture.

Petitioner also claims that the hearing officer had an improper financial relationship with respondent because the compensation of hearing officers pursuant to Education Law 3020-a(3)(b)(i) is supplemented by respondent. But apart from unsupported speculations about this alleged additional compensation, petitioner offers no evidence to support his allegations concerning compromising payments. Petitioner further alleges that the hearing officer had ex

parte communications with respondent. But such contacts as are shown to have occurred between the hearing officer and respondent's counsel took place at hearing sessions in which petitioner had chosen not to participate, and there is nothing to substantiate that there were improper ex parte contacts.

Moreover, the allegations of bias that petitioner has leveled against the hearing officer would not warrant vacatur of the award at issue unless they were "supported by clear and convincing evidence" (*Kalfus v Kalfus*, 270 AD2d 41). But the record suggests no such bias.

In view of the foregoing, petitioner's claim that the hearing officer had prevented him from moving for her disqualification at the May 21st session does not require extended discussion. Even ignoring petitioner's failure to seek a further opportunity to make such motion at the subsequent sessions, the express terms of section 7511 make it clear that such a motion would have been unavailing unless such bias would have operated demonstrably to petitioner's prejudice. Since, for the reasons indicated above, a disqualification motion on such ground would have been ill-fated, any loss of petitioner's opportunity to make such motion would have been harmless.

Nor does the arbitration award fall short under the applicable legal standard. It is noted that a statutorily-mandated arbitration, as in this case, demands stricter judicial review than is appropriate to the voluntary arbitrations that are more typically the subject of Article 75 proceedings. Simply put, the standard in compulsory arbitration is akin to that applied under Article 78. Thus, an award in a compulsory arbitration may be vacated if it was arrived at arbitrarily and capriciously or is not supported by substantial evidence (*Motor Veh. Mfrs. Assn. of U.S. v State of New York*, 75 NY2d 175, 186; *Lackow v Bd. of Educ. of the City of New York*, 51

AD3d 563, 567).

In this case, the testimony of the sole fact witness, Hillcrest's Principal, as augmented by documentary evidence, substantially supports the hearing officer's decision to sustain all 11 of the charges. This is not to overlook petitioner's challenges to the Principal's credibility and to respondent's explanation for its failure to call as a witness petitioner's supervisor (*i.e.,* that she was on sick leave and unavailable to testify at the hearing). Such challenges, however, should have been raised by petitioner at the hearing itself and, in default of his having done so, they must be deemed to have been waived.

Petitioner also argues that the penalty imposed by the arbitrator is excessive. A penalty is excessive if it is so disproportionate to the proved offenses as to be shocking to the court's sense of fairness (*Harris v Mechanicville Cent. School Dist.*, 45 NY2d 279; *Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222). In view of the seriousness of the charges against petitioner and the evidence substantiating those charges, as well as the opportunities for remediation that had been made available to him to no apparent effect, the penalty prescribed by the hearing officer – petitioner's termination -- does not shock the conscience of the court. Moreover, there is no merit to petitioner's contention that an unsworn submission by him, annexed to the present petitioner and styled a "response," should have persuaded the hearing officer to decide on a penalty less serious than termination. Suffice it to say that the hearing officer was free to discount the utility of such self-serving submission, and she apparently did so.

Thus, petitioner has failed to demonstrate that the hearing officer carried out her office so imperfectly as to warrant vacatur of her award.

Finally, petitioner claims that the hearing officer failed to follow the procedures prescribed under the applicable provisions of the Education Law by (1) not holding a pre-hearing conference within 10-15 days of accepting her appointment (Education Law § 3020-a[3][c][iv]), (2) not completing the hearing within 60 days of the pre-hearing conference (Education Law § 3020-a[3][c][vi]), and (3) not rendering a timely award (*see* Education Law § 3020-a[4][a]). To be sure, the pre-hearing conference and hearing sessions were not scheduled within the time frame set by the statute and the hearing officer's decision did not meet the statutory deadline. Nevertheless, as respondent points out, petitioner did not object timely to such technical flaws, and his failure to do so must be deemed a waiver of such constraints (*see* CPLR 7507; *see also Wood v Tunnicliff,* 74 NY 38, 47; *Hottenstein v Kinstler,* 382 NYS2d 270). The First Department's decision in *Rosario* v *Carrasquillo* (88 AD2d 874) is not to the contrary, the parties in that case having timely objected to the delay.

Accordingly, it is ADJUDGED that the respondent's motion is granted. The petition is denied and the proceeding is dismissed.

This constitutes the decision and Judgment of the court.

Dated: June 15, 2009

ENTER:

J.S.C.