Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IA Part 12
Justice

x

IN THE MATTER OF THE APPLICATION OF NICOLA DEMARCO

- against -

THE NEW YORK CITY BOARD/DEPARTMENT OF EDUCATION, et al.

x

Index Number 26690 2009

Motion Date March 30, 2010

Motion Cal. Number 8

Motion Seq. No. 3

The following papers numbered 1 to 19 read on this petition by Nicola DeMarco seeking an Order pursuant to CPLR 7511 modifying or vacating the Findings and Award of Hearing Officer Eleanor E. Glanstein, dated September 21, 2009, issued pursuant to Education Law § 3020-a which terminated the petitioner; on the cross motion by the respondents New York Board/Department of Education and the Department of Education (collectively DOE) for an order pursuant to CPLR 7502(a) changing the venue of this proceeding from Queens County to New York County; and on the cross motion by the respondents to dismiss the amended petition.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-3
Notice of Cross Motion - Affidavits - Exhibits.....	4-12
Answering Affidavits - Exhibits.....	13-17
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Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

Petitioner was a tenured teacher, formerly employed by the DOE. Petitioner was employed by the DOE from 1994-1995 and then from 2003 until his termination. For the 2005-2006 and 2006-2007 school years, the petitioner was charged pursuant to Education Law § 3020-a with excessive absences, insubordination, and neglecting his duties while employed as an eighth grade social studies teacher at Louis Armstrong Middle School. In particular, the DOE charged the petitioner with twelve specifications alleging various incidents of lateness, absence, neglect of duty, insubordination and substantial cause rendering the petitioner unfit to perform properly his obligations to service. The specification included that the petitioner was absent thirty times during the 2005-2006 school year and one hundred fourteen times during the 2006-2007 school year.

Eleanor E. Glanstein was appointed to preside over the 3020-a hearing. Petitioner was represented by several different attorneys during the course of the hearing. A pre-hearing conference was held on October 2, 2008. Hearings were held on December 2, 4, and 9, 2008; January 6, 8, 29 and 30, 2009; and February 3, 5, 24, and 27, 2009. Closing arguments were held on May 29, 2009. During the hearing both parties called and cross-examined witnesses and submitted documents into evidence. On September 21, 2009, Hearing Officer Glanstein issued a 45-page decision. She found that the evidence supported 11 of the 12 specifications. Hearing Officer Glanstein found that the petitioner was guilty of excessive absences during the 2005-2006 and 2006-2007 school years. Additionally Hearing Officer Glanstein found that the evidence established that during the time periods were the petitioner was not absent, he was insubordinate and did not teach the required curriculum. Hearing Officer Glanstein found that while some of the charges that the petitioner was guilty of could warrant a less severe penalty, the petitioner's absences were so numerous as to provide just cause for his termination. Hearing Officer Glanstein terminated the petitioner from his employment. Petitioner commenced this Article 75 proceeding on October 5, 2009.

The respondents first cross-move to change the venue of this proceeding. This cross motion is denied. Under CPLR 7502(a), proceedings related to arbitration:

> [S]hall be brought in the court and county specified in the agreement. If the name of the county is not specified, proceedings to stay or bar arbitration shall be brought in the county where the party seeking arbitration resides or is doing business, and other proceedings affecting arbitration are to be brought in the county where at least one of the parties resides or is doing business or where the arbitration was held or is pending.

Here, the petitioner was employed in Queens County by the respondent at Intermediate School 227Q. Therefore, venue is proper in Queens County as the place of business of both the petitioner and respondent.

The respondents also cross-move to dismiss the amended petition as it fails to allege facts sufficient to warrant a vacatur of Hearing Officer Glanstein's Findings and Award. Education Law § 3020-a(5) provides that judicial review of a hearing officer's findings shall be limited to the grounds set forth in CPLR 7511. Under CPLR 7511, an arbitrator's award may be vacated only if the court finds that the rights of that party were prejudiced by:

> (i) corruption, fraud or misconduct in procuring the award; or
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> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
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> (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
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> (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.

However, where, as here, the parties have submitted to compulsory arbitration, judicial scrutiny is stricter than that for a determination rendered where the parties have submitted to voluntary arbitration (*see Matter of Saunders v Rockland Bd. of Coop. Educ. Servs.*, 62 AD3d 1012 [2009]). Thus, the determination must be in accord with due process and supported by adequate evidence in the record and the award cannot be arbitrary and capricious (*see Matter of Hegarty v Board of Educ. of City of New York*, 5 AD3d 771 [2004]).

Here, the petitioner did not demonstrate any basis for vacating the determination under CPLR 7511 (*see Matter of Roemer v Board of Educ. of City School Dist. of City of N.Y.*, 268 AD2d 479 [2000]). The Hearing Officer's determination had a rational basis and is supported by the record (*see Matter of Elmore v Plainview-Old Bethpage Cent. School Dist.*, 299 AD2d 545 [2002]). Hearing Officer Glanstein supported her conclusions based upon the evidence in the record and the credible testimony of numerous witnesses. Principal Renee David testified that petitioner's thirty days of absence in 2005-2006 and over a hundred and ten days of absence in 2006-2007 caused a tremendous hardship on the petitioner's students. Therefore, there was sufficient credible testimony and evidence to support the hearing officer's findings of fact.

Contrary to the petitioner's contention, the fact that a medical arbitrator determined that some of the dates he was absent were in fact excused by a medical arbitrator, was not

overlooked by Hearing Officer Glanstein. In fact, absences on the dates covered by the determination of the medical arbitrator were stricken from the petitioner's charges Therefore, none of the dates of absences that make up the petitioner's charges were authorized by the determination of the medical arbitrator.

Petitioner's contentions regarding the weight and credibility accorded to testimony were all raised at the hearing. In any event, a hearing officer, must be afforded broad discretion and such determinations are largely unreviewable by a court (*see Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). These arguments, therefore, do not provide a proper basis to vacate the order under CPLR 7511.

Additionally, the allegations by the petitioner that the hearing officer was a partial arbitrator, is without merit. The petitioner failed to present any evidentiary proof of actual bias or the appearance of bias on the part of the arbitrator (*see Schwartz v New York City Dept. Of Educ.*, 22 AD3d 672 [2005]).

Furthermore, the petitioner failed to establish that the punishment of termination was so disproportionate to the offense to be shocking to one's sense of fairness. The petitioner was found to be guilty of excessive absences which caused a tremendous hardship on the petitioner's students. The evidence at the hearing supported the hearing officer's conclusions that the petitioner's excessive absences disrupted the educational process and adversely affected his students (*see Matter of Fischer v Smithtown Cent. School Dist.*, 262 AD2d 560 [1999]).

The petitioner's argument that Hearing Officer Glanstein exceeded her authority in terminating the petitioner based upon absences that were authorized is meritless. First, the petitioner conceded that he was aware that pursuant to Chancellor's Regulation C-601, both unauthorized and authorized absences, if so numerous as to limit the effectiveness of service may constitute grounds for disciplinary action which may include termination. Second, Hearing Officer Glanstein noted that despite petitioner's claims of authorized absences the Department of Education's Medical Bureau examined the petitioner seven times and found him fit for duty.

Finally, the petitioner has failed to establish that his due process rights were violated. The petitioner participated in eleven days of proceedings and was represented by multiple attorneys over the course of the proceedings. Furthermore, the petitioner was granted multiple adjournments to find new counsel. The petitioner was thus given adequate notice and an opportunity to be heard and there was no due process violation (*see* Kingsley v Redevco Co., 61 NY2d 714 [1984]). The petitioner's contention that he was not afforded a private hearing for closing arguments is baseless. The petitioner requested and received

a public hearing for the proceeding, and participated in a public hearing for eleven days. After participating in a public hearing for eleven days, he could not request a private hearing on the day of closing arguments. Additionally, the fact that the petitioner was not represented by counsel for closing arguments was not a violation of his due process. The petitioner chose to terminate his counsel of several months during his closing arguments. The petitioner's counsel was ready to proceed with summation. Hearing Officer Glanstein had already granted numerous adjournments and had allowed the petitioner to replace counsel multiple times in during the proceeding. Hearing Officer Glanstein, reasonably denied his request for another adjournment on the day of closing arguments.

Petitioner's objection that a written decision was not rendered within thirty days of the last day of hearing as required under Education Law § 3020-a(4)(a) warrants dismissal is also without merit. The petitioner did not object to this technical flaw and therefore has waived this objection (CPLR 7507).

Petitioner's challenge to the fact that his hearing was presided over by a single hearing officer was without merit. Pursuant to Education Law § 3020(4) the right to a three member panel can be replaced with collectively bargained procedures. In accordance with this authority, under the Collective Bargaining Agreement between the Department of Education and the United Federation of Teachers, the petitioner was not entitled to a three-person panel.

Petitioner also contends that because a final hearing did not take place within sixty days of the pre-hearing conference his due process rights were violated. However, the petitioner sought numerous adjournments throughout the proceeding, both for alleged health issues and to replace counsel. Hearing Officer Glanstein used her lawful discretion to grant these adjournments (CPLR 7506[b]). Furthermore, the petitioner cannot demonstrate that he was prejudiced by this delay.

All other contentions brought by the petitioner, including any claims for FMLA violations or disability discrimination claims, are not proper in an Article 75 proceeding.

Accordingly, the cross motion to change venue is denied. The cross motion to dismiss this proceedings is granted and the petition is dismissed.

Dated: June 14, 2010

J.S.C.