Santucci v Department of Educ.
2010 NY Slip Op 31805(U)
July 9, 2010
Sup Ct, NY County
Docket Number: 106278/09
Judge: Alice Schlesinger
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SCANNED ON 7/15/2010

[* 1]

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

ALICE SCHLESINGER

PRESENT: Schlesinger, Justice

IA PART 16

PART 16

SANTUCCI

INDEX NO. 106278/09

MOTION DATE

- v -

MOTION SEQ. NO. 002

NYC Dept of ED

MOTION CAL. NO.

The following papers, numbered 1 to ______ 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 by petitioner for leave to conduct discovery is denied in accordance with the accompanying memorandum decision, the original of which is attached to motion sequence 001.

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

JUL 09 2010

Dated: July 9 2010

ALICE SCHLESINGER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

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

PART IA PART 16

Index Number : ~~102654/2009~~ 106278/09

SANTUCCI, PAUL E.

VS.

DEPT. OF EDUCATION

SEQUENCE NUMBER : 001

VACATE OR MODIFY ARBITRATION

INDEX NO. ____________

MOTION DATE ____________

MOTION SEQ. NO. ____________

MOTION CAL. NO. ____________

The following papers, numbered 1 to ______ 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~~ Article 75 petition is denied and the proceeding is dismissed in accordance with the accompanying memorandum decision.

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).

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

JUL 0 9 2010 JUL 0 9 2010

Dated: July 9, 2010

ALICE SCHLESINGER J.S.C.

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
---X

PAUL SANTUCCI,

Petitioner,

Index No. 106278/09
Motion Seq. No. 001
and 002

-against-

DEPARTMENT OF EDUCATION, CITY OF NEW YORK FOR THE CITY SCHOOL DISTRICT OF NEW YORK CITY,

Respondent.
---X

SCHLESINGER, J.:

Petitioner Paul Santucci commenced this Article 75 proceeding to annul the decision by respondent Department of Education (DOE), sustained in a November 17, 2008 decision after an arbitration, which terminated Mr. Santucci's employment as a tenured teacher of English grades 7-12 after twenty years of service. Petitioner seeks reinstatement to his former position with back pay and benefits, alleging that the Education Law was violated in various respects. The DOE opposes, urging dismissal on the ground that the proceeding was neither timely commenced, nor the papers timely served, and also on the merits. In the course of the proceeding, petitioner also moved for discovery, seeking to depose various DOE personnel, and the DOE opposed that motion as well.

Background Facts and Procedural History

The relevant facts here are somewhat complex, and the procedural history is extensive. The highlights are summarized as follows.

Petitioner Paul Santucci was appointed a probationary teacher in the New York City school system in September 1985. He was granted tenure as a teacher of English grades 7-12 seven years later, in September 1992. Ten years thereafter, in September

2002, Mr. Santucci was assigned to teach English at Park West High School. Although his record had been exemplary until then, beginning in 2003 Mr. Santucci's absences and instances of lateness allegedly became more frequent. The Park West principal met with Mr. Santucci and wrote him letters about these problems on several occasions, and apparently placed the letters in Mr. Santucci's personnel file.

In February 2004, Mr. Santucci was transferred to the High School for Health Professions and Human Services following a reorganization at Park West. Mr. Santucci's tardiness and absenteeism allegedly worsened, and the principal there wrote letters to him about the problem. The accumulated absences were so great in number that Mr. Santucci had to borrow twenty-two days from his Cumulative Absence Reserve by June of 2004. On December 3, 2004, at a conference with the principal about this issue, Mr. Santucci allegedly attributed the problem to medication he was taking for manic depression. In response, the principal requested that Mr. Santucci be medically examined, and the Superintendent agreed a few months thereafter.

By letter dated March 7, 2005, Mr. Santucci was allegedly notified that his medical examination was scheduled for March 31, 2005. Because Mr. Santucci did not appear, he was notified in July 2005 that he was being removed from the payroll. In October 2005 Mr. Santucci was examined and determined to be medically fit to teach. Effective the following month, he was reinstated to the DOE payroll.

Nevertheless, problems continued. Mr. Santucci was rated "unsatisfactory" in every category during his annual review for the 2004-2005 academic year. The DOE documented eleven absences and 80 incidences of lateness for that year. Colleagues alleged that Mr. Santucci periodically smelled of alcohol, and students reported that he

used racial epithets to refer to students in the classroom and otherwise used inappropriate language when speaking to students. When the next academic year began, the DOE reassigned Mr. Santucci to the Reassignment Center (colloquially referred to as "the Rubber Room") effective September 2005 and served him with charges.[1]

The document sent to Mr. Santucci at that time was entitled "Specifications" and set forth 28 instances of alleged wrongdoing related to the issues discussed above for the academic years 2003-2004 and 2004-2005. (See Answer Exh. G). The document concluded by stating that the charges constituted a violation of Chancellor's Regulation A-421 and "just cause" not only for disciplinary action under Education Law §3020-a, but also for termination. Mr. Santucci remained in the Reassignment Center for the entire 2005-2006 academic year.

In letters dated May 16 and June 14, 2006, the DOE advised Mr. Santucci that "probable cause" had been found on the charges against him and he was being suspended with pay effective immediately. He was directed to continue reporting to the Reassignment Center. Mr. Santucci's instances of lateness and absenteeism allegedly increased during the 2006-2007 academic year.

Pursuant to Education Law §3020-a and the collective bargaining agreement between DOE and the United Federation of Teachers, the union that represents Mr. Santucci, Mr. Santucci was entitled to a hearing presided over by a single arbitrator. Hearing Officer Joshua M. Javits was appointed, and a hearing was held over multiple

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[1] During the relevant time, as a teacher assigned to the Rubber Room, Mr. Santucci apparently remained there with no duties, while receiving full pay.

days beginning in February 2008 and continuing through May, resulting in a transcript of more than 3000 pages. Initially, Mr. Santucci was represented by counsel provided by his union. However, in March, the Hearing Officer allowed counsel to withdraw based on an alleged conflict of interest. Counsel asserted that she could not ethically continue to represent Mr. Santucci as he was a plaintiff, along with several other teachers, in a lawsuit entitled *Teachers4Action, et al., v NYC Dept of Education,* Index No. 106304/08, that charged that the UFT's parent union was colluding with the DOE and failing to appropriately represent its members in connection with 3020-a hearings.

While it is not clear that Mr. Santucci fully understood the implications, he did not object to the withdrawal of his counsel, perhaps believing that counsel in the other lawsuit would step in on his behalf. However, Mr. Santucci was unable to retain any counsel to assist him with the balance of the hearing. Apparently, the attorney representing the teachers in the *Teachers4Action* lawsuit did obtain a temporary stay of the hearing, but when the stay was lifted, the hearing resumed with Mr. Santucci representing himself. The DOE presented fourteen witnesses. Mr. Santucci appeared on and off and was not able to represent himself effectively. In a sixty-page decision dated November 17, 2008 (Ans. Exh. M), the Hearing Officer recommended that Mr. Santucci's discharge be sustained.

This Article 75 proceeding was commenced by the filing of the petition on May 4, 2009. Service was completed on September 2, 2009. As indicated earlier, the DOE opposed the petition, urging dismissal on the ground that the proceeding was neither timely commenced, nor the papers timely served, and also on the merits. Specifically, the DOE asserted that, pursuant to Education Law §3020-a, an Article 75 proceeding to

vacate the decision of a hearing officer must be commenced withing ten days of the teacher's receipt of the hearing officer's decision. Based on the purported mailing date of November 21, 2008, the DOE asserts that the commencement of this proceeding by filing on May 4, 2009, was untimely. Further, based on the requirement in CPLR §306-b that the petition be served within fifteen days of the expiration of the statute of limitations, the DOE asserts that the service on September 2, 2009 was untimely and insufficient to acquire jurisdiction over the Department.

In response, Mr. Santucci insisted that he had timely commenced the proceeding in early May because he had not received the decision until the end of April 2009. Regarding service, counsel explained that she had been operating under the mistaken belief that she had 120 days to serve under another provision in §306-b, and she asked the Court to permit an extension of time to serve, *nunc pro tunc,* pursuant to the statute, in the interest of justice.

By decision dated March 12, 2010, this Court directed that a hearing be held, finding issues of fact regarding Mr. Santucci's receipt of the hearing officer's decision. That hearing was held later that month, and both counsel were then given an opportunity to submit additional memoranda of law. This decision determines the issues presented at the hearing and the issues raised in this proceeding as a whole.

This Proceeding was Timely Commenced

The ten-day statute of limitations that applies in this case is contained in subdivision 5 of Education Law §3020-a. That provision makes clear that the time begins to run upon the teacher's *receipt* of the decision. Specifically, the statute states in relevant part as follows:

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> Not later than ten days after receipt of the hearing officer's decision, the employee ... may make an application to the New York state supreme court to vacate or modify the decision of the hearing officer pursuant to section seven thousand five hundred eleven of the civil practice law and rules.

Based on the evidence adduced at the hearing, this Court finds that Mr. Santucci first received the decision on April 24, 2009. As explained more fully below, this finding is based in large part on the unrebutted evidence that all mailings before that time were addressed to Mr. Santucci at 693 Albin Street in Teaneck, New Jersey, an address that does not exist and that differs from Mr Santucci's actual address, which is 692 Albin Street. Therefore, the commencement of this proceeding by filing on May 4, 2009, was timely, as it was completed within ten days of April 24.

The DOE first called Mr. Santucci to the stand. He confirmed that he had received from the DOE a letter dated December 2, 2008, advising him that the hearing officer had rendered a decision calling for the termination of his employment (pp 15-16). A copy of the letter was admitted into evidence as Exhibit A. Significantly, it is addressed to "693 Albin." Mr. Santucci explained that he remembered having received it by hand while he was in the Reassignment Center, but that he did not recall ever having received it by mail (p 67). Thus, to the extent the DOE attempted to establish through that document that Mr. Santucci received mail directed to the wrong address "693", it failed to do so. Even if it had succeeded, the point would go to credibility only and would not constitute affirmative proof that Mr. Santucci had received the Hearing Officer's decision, which is an entirely different document.

With respect to the decision at issue, Mr. Santucci testified that he recalled having received a notice from the United States Postal Service in December 2008 advising him that a piece of certified mail was being held for him at the post office for pick up and that he went to the post office soon thereafter to retrieve the mail. However, when he arrived at the post office, the mail was not there (pp 17- 22). Although the exact dates were not spelled out, Mr. Santucci further testified that he had received at least one more notice from the Postal Service and that he had gone to the post office on various occasions to retrieve the document with no success.[2] At some point he ascertained that the mail was from the State Department of Education so he called them to say that he had not received the document and to ask them to mail another copy. Shortly thereafter, on April 24, 2009, Mr. Santucci received the Hearing Officer's decision for the first time by certified mail (pp 16-17).

The chief witness for the DOE at the hearing was Melissa Kovaluskie, an employee of the New York State Education Department in the teacher tenure hearing unit in Albany. Ms. Kovaluskie testified that she was responsible for mailing copies of the hearing officer's 3020-a decision to the affected teacher and to the New York City Department of Education. She testified (at pp 34-35) that she received the November 17, 2008 decision from Hearing Officer Javits in this case on November 21, 2008, and then mailed it with a cover letter from her supervisor to Mr. Santucci and to various other individuals connected with the New York City Department of Education. According to Kovaluskie, she mailed one copy to Mr. Santucci by regular mail and one by certified

[2] As this testimony was scattered throughout the examination, no specific page citation is provided.

mail (p 37). While the regular mail was not returned to her office (p 38), the certified mail was returned on January 4, 2009 (p 38). She then checked the address on the certified mail envelope with the one she had in the file, confirmed that they were the same, and then filed the envelope away (p 40). In April of that year, her supervisor told her that Mr. Santucci had called and said "that he never received a copy of the decision" (p 41, l 9-11), so she sent it again. The tracking information which Ms. Kovaluskie obtained from the US Postal Service for the certified mailings did not indicate the address to which the document was mailed, but did confirm that a notice was left on November 26, 2008 with respect to a document mailed to Teaneck, NJ and unclaimed as of December 30, 2008, and that another notice was left on April 9, 2009 with respect to a document ultimately delivered to the recipient on April 24, 2009. This information was wholly consistent with Mr. Santucci's testimony.

Of particular significance, however, are the documents that were admitted into evidence by the various parties at the hearing before this Court, as they all confirm Mr. Santucci's position that he first received the decision in April of 2009, when the decision was finally mailed by certified mail to his correct address. Petitioner's Exhibit 1 is the mailing envelope from the New York State Education Department that corresponds to the first certified mailing. It has a postmark date of November 24, 2008. Significantly, it is addressed to Mr. Santucci at "693" Albin. It is stamped "UNCLAIMED" and the number "693" is crossed out and the number "692" is handwritten. Respondent's Exhibit B is an affirmation from Stuart James of the US Postal Service confirming that an article of mail with the certified mail number corresponding to that envelope was marked unclaimed as of December 30, 2008. In her testimony, Ms. Kovaluskie confirmed that

she had received this envelope back at her office in Albany, that she did not know who had written "692" on its face, and that she did not re-send the envelope to "692" at that time because her file indicated that "693" was a proper address.

Petitioner's Exhibit 2 is an official map showing Mr. Santucci's neighborhood in Teaneck, NJ. The map confirms Mr. Santucci's testimony that his address of 692 Albin Street exists, but that no building bears the address "693." Petitioner's Exhibit 3 is another certified mail envelope sent by the New York State Education Department. This envelope is postmarked April 7, 2009. Significantly, it is addressed to Mr. Santucci at his correct address 692 Albin Street. This envelope, with a copy of the hearing officer's decision enclosed, was the one Mr. Santucci testified that he received.

The presumption of receipt of mail on which the DOE seeks to rely here applies only where the party has established that the mail was properly addressed. *Prince, Richardson on Evidence,* §3-128 (11th ed. 1995). As the DOE failed to establish that it mailed the hearing officer's decision to a proper address before April 2009, it failed to prove that Mr. Santucci received the decision on a date before April 24, 2009. Mr. Santucci's testimony and the documentary evidence set April 24 as the date of receipt. Therefore, pursuant to the ten-day statute of limitations quoted above, this proceeding was timely commenced on May 4, 2009.

Petitioner is Granted an Extension of Time to Complete Service

Calculated from the May 4 expiration of the statute of limitations, petitioner had fifteen days under CPLR §306-b, or until May 19, 2009, to complete service, but did not do so until September. In delaying until that time, Mr. Santucci's counsel improperly relied on the 120-day rule in the statute applicable to proceedings with a longer statute

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of limitations. To remedy that problem, counsel asked this Court for an extension of time to serve, *nunc pro tunc*, pursuant to CPLR 306-b. That statute expressly allows for such an application, stating in relevant part as follows:

> Service of the ... petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the filing of the ... petition, provided that in an action or proceeding ... where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service

In reversing the trial court's denial of such an application in *Jordan v City of New York*, 38 AD3d 336, 339 (1st Dep't 2007), the Appellate Division relied on the standard articulated by the Court of Appeals in *Leader v Maroney, Ponzini & Spencer,* 97 NY2d 95, 105-06 (2001):

> The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. ...[T]he court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of plaintiff's request for the extension of time, and prejudice to defendant.

Here, the delay was attributable solely to counsel's misreading of the statute. It was brief — less than a few months – and service was made before the expiration of the Statute of Limitations, as found above. The DOE has not established any prejudice due to the delay. In contrast, the denial of the motion will deny Mr. Santucci his day in court

based solely on law office failure. For all these reasons, this Court grants petitioner's motion for an extension of time to serve in the interest of justice, and the service completed in September 2009 is deemed timely.

No Basis has been Established for Vacating the Hearing Officer's Decision

Petitioner Santucci has failed to meet the very high burden of establishing that the Hearing Officer's decision should be vacated or modified. Pursuant to Education Law §3020-a, a court may not annul a Hearing Officer's decision unless the petitioner proves one of the four grounds for vacatur of an arbitrator's award as specified in CPLR §7511(b). Section 7511(b) requires a showing that the rights of the petitioner were prejudiced by one or more of the following circumstances:

1. Corruption, fraud, or misconduct in procuring the award;
2. Partiality of an arbitrator appointed as a neutral body;
3. The person making the award exceeded his power or so imperfectly executed it that a final and definite award was not made; or
4. Failure to follow the procedure of this article.

Judicial review of an arbitrator's award is very limited, and the grounds specified in the statute are the exclusive bases for vacating an award. *Lackow v Dept of Educ of the City of NY*, 51 AD3d 563, 568 (1st Dep't 2008). A finding may not be made that the arbitrator exceeded his authority absent a showing that the "award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power." *Henneberry v ING Capital Advisers*, LLC, 10 NY3d 278, 284 (2008). Further, great deference is given to the award, even if the arbitrator misapplied the substantive law. *NYC Transit Auth v Transp. Workers' Union*, 6 NY3d 332, 336 (2005).

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In the case at bar, Mr. Santucci has failed to establish any of the permissible grounds for vacating the award. As noted above, Mr. Santucci was presented with a specification of 28 detailed charges, with dates, times, and names included where relevant. According to the sixty-page decision of the Hearing Officer, six of the charges were withdrawn by the DOE at the hearing and two were not proven, but the remaining charges were sustained. After hearing all the evidence over a period of days and reviewing it in detail in his decision, the Hearing Officer made the following findings (at p 58 of decision) in support of his decision to sustain Mr. Santucci's discharge:

- Mr. Santucci was "repeatedly and persistently late for his employment starting time and ... deliberately and blatantly refused to clock in despite being directed to do so. Moreover, the number of absences ... was simply remarkable."
- "There is no question that the frequency and magnitude of [Mr. Santucci's] absences had a disruptive or detrimental impact on [the] students."
- Mr Santucci "also used irresponsible, offensive and reprehensible statements to his students ... [and] lacked a basic understanding of his role in the classroom, failed to grasp the purpose of his being there, and did not appreciate the gravity and seriousness of his behavior."
- Taken as a whole, Mr. Santucci's conduct render him "unfit to perform his teaching obligations."
- "Given the nature of [Mr. Santucci's] misconduct, and the repeated warnings which had been issued to him, it appears that [Mr. Santucci] is incapable of remedying his behavior.

Wholly without merit is Mr. Santucci's claim that his rights were violated because he did not have an adequate opportunity to defend himself. When his counsel withdrew, he did not object. Moreover, the Hearing Officer's decision to allow the withdrawal based on a conflict of interest was not improper. The Hearing Officer gave Mr. Santucci ample opportunity to obtain counsel and present a defense. Unfortunately, Mr. Santucci was unable to obtain counsel, and he failed to appear on several of the designated

hearing dates, despite notice, or to present any meaningful defense. However, that was not the fault of the Hearing Officer, nor did it violate any of the governing procedures.

Contrary to Mr. Santucci's claim, the record does not establish that the Hearing Officer exceeded his authority or acted with bias. Similarly without merit, and unsupported by the record, is any evidence of corruption. The various procedural violations alleged by Mr. Santucci have all been adequately addressed by the DOE in its papers and are equally unpersuasive. They need not be detailed here.

In sum, this Court does not, and cannot find, that any basis exists to vacate the November 17, 2008 decision by Hearing Officer Joshua M. Javits. Nor is the penalty of termination shocking to the conscience, considering the severity of the charges sustained. Further, petitioner's request for discovery is denied, as no basis exists for permitting depositions under the circumstances of this case.

Accordingly, it is hereby

ORDERED that petitioner's request for an extension of time to serve respondent pursuant to CPLR §306-b is granted, and the proceeding is determined to be timely commenced and the pleadings timely served *nunc pro tunc*; and it is further

ORDERED that petitioner's motion for leave to conduct discovery (sequence 002) is denied; and it is further

ADJUDGED that the petition (sequence 001) to vacate the November 17, 2008 decision of Hearing Officer Joshua M. Javits sustaining the termination of petitioner's employment is denied, and this proceeding is dismissed without costs, disbursements, or attorney's fees to either party.

Dated: July 9, 2010

JUL 0 9 2010

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).

ALICE SCHLESINGER