

Matter of Hunt v Klein
2011 NY Slip Op 30432(U)
February 28, 2011
Supreme Court, New York County
Docket Number: 111759/2010
Judge: Martin Schoenfeld
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SCANNED ON 2/28/2011

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

PRESENT: Schoenfeld
Justice

PART 28

Index Number : 111759/2010
HUNT, SHELDON LAMAR
VS.
KLEIN, JOEL
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

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

this motion to/for _____

PAPERS NUMBERED

1-3
4-5

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 to vacate hearing officer's award is denied, and the cross-motion to dismiss the petition is granted, all in accordance with the accompanying memorandum decision.

FILED

FEB 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/28/11

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 28

-----X
In the Matter of the Application of
SHELDON LAMAR HUNT,

Petitioner,

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

**MEMORANDUM DECISION
AND ORDER**

-against-

Index No.: 111759/2010

JOEL KLEIN, as Chancellor of the New York City
Department of Education and THE NEW YORK
CITY DEPARTMENT OF EDUCATION,

FILED

Respondent.

FEB 28 2011

-----X
Petitioner Pro Se: Sheldon Lamar Hunt
PO Box 2437
New York, New York 10108-2437
For Respondent: Michael A. Cardozo
Corporation Counsel of the City of New York
100 Church Street, Room 2-170
New York, New York 10007

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HON. MARTIN SCHOENFELD, J.:

It is ordered and adjudged that this Article 75 proceeding is dismissed; the petition is denied and respondents' Joel Klein and The New York City Department of Education's (collectively, the "Department") cross motion for dismissal is granted. The Clerk shall enter judgment accordingly.

In 2008, the Department filed five specifications against Petitioner Sheldon Lamar Hunt (the "Petitioner"), a tenured teacher employed by the Department, last assigned to the High School for Health Professions and Human Services. The specifications charged that petitioner engaged in: "[conduct] unbecoming his profession, neglect of duty, verbal abuse and academic

fraud.” Specifications 1 through 5 are as follows:

Specification 1: On or about May 21, 2007, petitioner pointed his finger at Assistant Principal Donna Lo Piccolo and said words to the effect of: (1) don't ever come into my room again; (2) I do not care who you are; and (3) if you come into my room again I will call the cops on you.

Specification 2: During the 2007-2008 school year, the petitioner told his students words to the effect of: (1) You can determine the size of a male's penis by the size of his feet; and (2) Asian men have a smaller penis.

Specification 3: On or about December 5, 2007, Petitioner told Student E.P. words to the effect of: (1) Are you acting stupid?; (2) You heard what I said; (3) if you have a problem, you could bring anybody up, I don't care; and (4) I'm smarter than anybody in here and I would say it both in English and in Spanish.

Specification 4: On or about December 6, 2007, Petitioner directed Student S.F. to the Nurse rather than school Health Aide when she had a headache, in violation of school policy and despite having been previously informed of the correct procedure.

Specification 5: During the Fall semester of the 2007-2008 school year, Petitioner: (1) assigned grades of Satisfactory to twenty-nine (29) students in his Laboratory Chemistry Classes who had below the required 65% passing rate for the class; and (2) assigned said grades without proper documentation and in violation of School policy.

Based on the specifications, the Department brought a disciplinary action against petitioner pursuant to Education Law §3020-a. Hearing Officer Alan Berg (the “Hearing Officer”) presided over the hearings. Petitioner's 3020-a hearings were scheduled to commence on February 9, 2010. Petitioner's union attorney requested a postponement of this hearing since petitioner had just returned from 17 days of active duty with the United States Army in Virginia. The Department consented to the adjournment and the hearing was rescheduled for March 16, 2010. On March 8, 2010, petitioner requested another postponement of the hearing through his union attorney, alleging he had been ordered to active duty in California from March 3, 2010

through March 19, 2010. The Department objected to this adjournment, but the Hearing Officer granted it.

On or about April 7, 2010, petitioner's union attorney withdrew her representation of petitioner. Petitioner represented himself at the April 8, 2010 hearing, explaining that his desire to plead "no contest" led to his attorney's withdrawal. Petitioner requested an additional adjournment to obtain new counsel and it was granted. The hearing was adjourned to May 11, 2010 to allow petitioner to obtain counsel. The Hearing Officer told Petitioner that by May 1, 2010 he should report his efforts to retain an attorney. Petitioner did not report back and did not appear at any additional hearings.

At the April 8th hearing, petitioner expressed his wish to plead no contest to the charges against him. He informed the Hearing Officer that he had a lawsuit pending in Federal Court against the respondent, pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). The Petitioner stated that he did not want any attorney who represented him at the hearings to object to: (1) any witnesses called by the Department's attorney; (2) any questions asked by the Department's attorney; or (3) any exhibits offered by the Department. He did not want to cross examine any of the witnesses or call witnesses. Petitioner also stated that he had initiated litigation at the New York State Public Employment Relations Board.

Petitioner then made an additional request for a postponement on the ground that the Army Reserve had called him to active duty from May 1, 2010 through May 14, 2010. The Department consented to cancel the May 11th hearing date, and reschedule to May 13th, and on that date the Department would produce its military expert to support the Department's claims

that petitioner was volunteering for those reserve assignments and was not otherwise ordered.

On May 13th, petitioner failed to appear. Colonel John Friedlander testified on behalf of the Department. He examined the five active duty orders submitted by petitioner in 2010 and determined that petitioner volunteered for all five assignments. The Hearing Officer found Friedlander's testimony credible and decided to proceed with the hearings regardless of whether the petitioner appeared, since the petitioner was voluntarily signing up for active duty training and as a result, voluntarily delaying the proceedings. The Hearing Officer advised petitioner of the scheduled hearing dates. Nonetheless, petitioner did not appear at the hearings.

The Hearing Officer issued an Opinion and Decision on August 17, 2010 (the "award") in which, based upon the testimony of ten witnesses and numerous documents offered by the Department, he found petitioner guilty of the charges alleged in Specifications 1,2,3,4 and 5, sustained those charges and recommended termination as the penalty. He directed that petitioner be discharged forthwith.

Petitioner brings this Article 75 challenging the award on the following grounds: (1) the Hearing Officer exceeded his authority by authorizing hearing procedures in violation of USERRA because he proceeded with the hearings despite petitioner's engagement in voluntary military service; (2) the Hearing Officer's ruling was not based upon the substantial evidence within the record, because the Hearing Officer did not take into consideration the petitioner's federal complaint that was entered into evidence; (3) the Hearing Officer scheduled the hearing ten months after the pre-hearing conference in violation of the Collective Bargaining agreement, the New York State Education Law Sec. 3020-a and USERRA; (4) petitioner was not represented by counsel at the initial hearing in violation of Education Law Sec. 3020-a; (5) petitioner was not

sworn in as a witness at the April 8, 2010 hearing; (6) petitioner was not given a probable cause hearing in violation of the Collective Bargaining Agreement, Education Law Sec. 3020-a and USERRA; and (7) the award was not based upon substantial evidence.

Petitioner seeks vacatur of the Hearing Officer's decision and reinstatement to his teaching position.

Discussion

Under Education Law §3020-a, the judicial review of a hearing officer's findings must be conducted pursuant to CPLR 7511. Vacatur of an arbitration award is strictly limited to the reasons stated in CPLR 7511(b), and is appropriate only when 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. *Lackow v. Department of Educ. Of the City of N.Y.*, 51 A.D.3d 563, 568 (1st Dept. 2008). The only ground petitioner articulated in this case is that the hearing officer "exceeded his authority." Such 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. *New York City Transit Authority v. Transport Workers' Union of America*, 6 N.Y.3d 332, 336 (2005). Where 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. *The City School District of the City of New York v. McGraham*, 75 A.D.3d 445, 450 (1st Dept. 2010). Because the arbitration here was compulsory, the determination must be in accord with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78. *Id.*, at 450. The party challenging an arbitration determination has the burden of showing its invalidity. *Lackow*, 51 A.D.3d at 568. “Most importantly, courts are obligated to give deference to the decision of the arbitrator.” *Henneberry v. ING Capital Advisors, LLC*, 10 N.Y.3d 278, 284 (2008).

Upon review of the Hearing Officer’s Decision, this court finds that petitioner has not established any of the grounds for vacatur under CPLR 7511. Petitioner does not allege any violations under CPLR 7511(b)(I) or (ii) and his allegations with respect to CPLR 7511(b)(iii) do not articulate reasons to vacate the award on their face, nor are they substantiated.

Petitioner argues in a conclusory fashion that the award was not based upon substantial evidence. Yet, this Court finds that the award is rationally supported by the evidence presented. *See Wien & Malkin v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471 (2006)(“An arbitration award must be upheld when the arbitrator ‘offer[s] even a barely colorable justification for the outcome reached”). As outlined in his award, the Hearing Officer relied upon the testimony of 10 witnesses from the Department as well as numerous documents. The witnesses include, the Assistant Principal, several of petitioner’s former students, a school aide and a nurse. Each testified about petitioner’s conduct from personal knowledge and in detail. The Hearing Officer relied upon this testimony as the basis for his findings.

Petitioner further argues both that the Hearing Officer unduly delayed the hearings and

that he proceeded with the hearings in petitioner's absence. As for the delay, he argues that although the pre-hearing conference was on April 2, 2009, the final hearings did not begin until February 2010. He further argues that the Hearing Officer wrongly proceeded with the hearings despite petitioner's absence as a result of his call to active duty with the United States Army Reserve.

Petitioner made the same argument--that the hearings were unfairly delayed--before the Hearing Officer. In his Decision, the Hearing Officer addresses petitioner's concern and finds that it was petitioner's participation in active duty service that led to the delays. The Hearing Officer writes:

[Petitioner] acknowledged that in 2008 and 2009, while he was in the reassignment center, he was called to active duty ten to twelve times each year for between seventeen to twenty one days each time. Thus, [Petitioner] by his own admission, was unavailable for at least 170 days and perhaps as much as 252 days in both 2008 and 2009. In 2010, Respondent requested a postponement of every hearing date that was set in his case. It is clear that Respondent was unavailable for a hearing from the time he was sent to the reassignment center in January 2008 until the present time.

Pursuant to Education Law §3020-a, "the day or days scheduled for the final hearing shall not be postponed except upon the request of a party and then only for good cause shown as determined by the hearing officer." Here, the record indicates that petitioner requested several adjournments based upon his participation in active duty reserve. The Hearing Officer granted petitioner's first four requests for adjournments. He then heard the testimony of Colonel Friedlander, the respondent's witness, and finding it credible, decided to proceed with the hearings regardless of whether the petitioner appeared, since the petitioner was voluntarily signing up for active duty training and as a result, voluntarily delaying the proceedings.

The Hearing Officer advised petitioner of the scheduled hearing dates, yet petitioner signed up for voluntary active duty reserve and did not appear at the hearings. He did not contact the Hearing Officer as to his retention of an attorney. Petitioner does not deny his participation in active duty, nor does he offer any different explanation for the delay. The Hearing Officer was therefore, pursuant to Education Law §3020-a(3)(c)(vi), entitled to proceed with the hearings in his discretion. *See Chawki v. New York City Department of Education*, 39 A.D.3d 321, 324 (1st Dept. 2007)(“Unjustified refusal to participate in an arbitration hearing does not afford a basis for attack upon an award rendered on default”)

Petitioner additionally argues that he was entitled to a probable cause hearing and did not receive one in violation of the Collective Bargaining Agreement, Article 21(G)(5), the Education Law §3020-a, and USERRA. The Hearing Officer explains in the Decision that a probable cause hearing, as set forth in the Collective Bargaining Agreement, is an option available to the Department of Education when it wishes to remove a teacher from its payroll during the pendency of a 3020-a proceeding and the Department did not choose to exercise that option in this case. This is precisely how the Contract addresses probable cause hearings:

If an employee is accused of committing serious misconduct, the employee shall be removed from payroll for a term not to exceed two (2) months after a finding by the “probable cause arbitrator” that there is probable cause to believe that the actions alleged were committed by the employee and that they constitute “serious misconduct” as described above.

This clause does not mandate a probable cause hearing for each and every disciplinary hearing charge, only those where the Department of Education seeks a suspension without pay. The Department did not choose to exercise that option in this case. The Hearing Officer therefore properly found Petitioner’s objection to be without merit.

Petitioner further alleges that his right to an attorney as set forth in Education Law §3020-a was violated as he did not have an attorney present with him at the hearing on April 8, 2010. According to the hearing transcript for that date, petitioner was present without counsel. The Hearing Officer read into the record a letter from the union attorney to petitioner indicating that the union was withdrawing its representation of petitioner in the 3020-a proceeding. Petitioner informed the Hearing Officer that he intended to contact an attorney named "Mr. Stone," who represented him in litigation before the New York State Public Employment Relations Board. The Hearing Officer suggested during the hearing on April 8th that petitioner contact Mr. Stone during the hearing—that he call him—but petitioner did not want to contact Mr. Stone during the hearing and instead told the Hearing Officer that he would contact him that evening. The Hearing Officer then adjourned the hearings until May 13, 2010, providing petitioner 30 days to retain an attorney. Although provided with the opportunity, petitioner did not retain an attorney—nor did he contact the Hearing Officer to communicate his attempts to retain an attorney as he had requested. Petitioner does not show that his failure to obtain counsel prejudiced his rights at the hearing. Because the Hearing Officer gave petitioner notice of the hearings and adjourned the hearings, providing petitioner ample time to find an attorney, he did not exceed his authority. *See Chawki v. New York City Department of Education*, 39 A.D.3d 321 (1st Dept. 2007)(finding that petitioner who was given notice of the hearings and ample time to find an attorney, namely six weeks, and did not appear for the hearings on the adjourn date, did not state a ground upon which to vacate the award).

The court reviewed petitioner's remaining arguments, i.e., that the award should be vacated because he was not sworn in at the hearing on April 8th, he did not receive a copy of the

transcript and the Hearing Officer did not review his federal complaint along with the evidence presented at the hearings, and finds them to be without merit.

In accordance with the foregoing, the petition is denied and the cross-motion to dismiss the petition is granted.

This constitutes the decision and order of the Court.

Dated: New York, New York

28 February , 2011



J.S.C.

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