

**Adams v Department of Educ. of the City of New
York**

2011 NY Slip Op 31327(U)

May 13, 2011

Supreme Court, New York County

Docket Number: 116456-09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Twana Adams

Plaintiff (s),

INDEX NO. 116456/09

- v -

MOTION DATE _____

MOTION SEQ. NO. 002

DOE

Defendant(s).

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows:

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

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: 5/13/11

[Signature]
Hon. Judith J. Gische, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER

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 10**

-----x

Twana Adams,

Petitioner,
-against-

Department of Education of the City of
New York,

Respondent.

-----x

DECISION/ORDER

Index No.: 116456-09

Seq. No.: 002

PRESENT:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pet's n/m (RR) w/JH affirm, exhs, corresp	1
Resp's opp w/ML affirm, exhs	2
Pet's reply w/JH affirm, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is a summary proceeding brought pursuant to Article 78 of the CPLR. In accordance with court's prior decision, order and Judgment dated June 7, 2010 ("prior order"), the petitioner's motion for injunctive relief was denied, respondent's cross motion to dismiss was granted, and the petition was dismissed in its entirety. Petitioner has brought this motion to reargue the court's prior order, only to the extent that it granted respondent's cross motion dismissing the petition. Therefore, the court's decision to deny petitioner's motion for injunctive relief pursuant to CPLR 6301 stands.

Petitioner's bases her motion for reargument on a series of "mistakes" of fact she claims are contained in the court's prior order. Alternatively, she contends the court misapplied the law, largely based upon a decision from the Appellate Division, First

Department rendered one (1) week after this court's prior order (The City School District of the

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City of New York v. Colleen McGraham, 75 AD3d 445 [1st Dept 2010]) (“City v. McGraham”).

A motion for leave to reargue may be granted on a showing that the court overlooked or misapprehended the facts or the law (CPLR 2221; Williams P. Pahl Equip. Corp. v. Kassis, 182 A.D.2d 22 [1st Dept. 1992]). It is not an opportunity for the unsuccessful party to reargue points already made and rejected by the court (Id.). Furthermore, a party is charged with the duty to exercise due diligence in making their factual presentation clear in the original motion and a motion to reargue is not another opportunity for a party who has not done so to try again (see Prime Income Asset Management, Inc. v. American Real Estate Holdings L.P., 82 A.D.3d 550 [1st Dept 2011]; Leone Properties, LLC v. Board of Assessors for Town of Cornwall, 81 A.D.3d 649 [2nd Dept 2011]).

A motion for renewal, on the other hand, “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination” (CPLR 2221 [e][2]). As will be seen, under either standard, petitioner’s motion to reargue and/or reargue fails.

At the outset, the court observes that petitioner did not provide the court with a copy of the prior order or any of the papers filed in connection with the original motion. It is the respondent who provided the court with a copy of the prior order. This defect, alone, is ample basis to deny petitioner’s motion as it is the unsuccessful movant’s responsibility to provide the court with the complete record she is basing her motion on.

Moving on, the court notes that (with one exception) all the “mistakes” highlighted by petitioner are simply aspects of the court’s prior order that she disagrees with and her own rhetorical comments.

Both petitioner and respondent agree, however, that the court inadvertently referred to the charges against plaintiff as having been heard before a “AAA arbitrator” when, in fact, the

hearing officer was part of a permanent arbitration panel (Education Law § 3020-a). Although at one time such hearings did take place before a AAA arbitrator, this practice changed in 2000. As in the prior motion, petitioner spends much time criticizing this practice as being unfair to teachers. Petitioner also claims that the hearing officers on this panel make thousands of dollars a day – as much as an AAA arbitrator earns – and, consequently, these hearing officers *should* be held to the same standards as AAA arbitrators but they are not.

Petitioner then leaps from this observation to her claim that had the hearing officer been a member of the AAA, the hearing officer would have had to recuse herself from petitioner's case once petitioner confronted her about certain comments she claims the hearing officer made tending to show her inherent bias.

The court's inadvertent error in referring to the hearing officer as being a member of the AAA does not affect the court's prior order or command a different result. Education Law § 3020-a [5] provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR § 7511. Under such review, the court may only vacate an arbitral award when the rights of a party in an arbitration were prejudiced by corruption, fraud, or misconduct in procuring the award or the partiality of an arbitrator (CPLR § 7511 [b]; Lackow v. Department of Education of City of NY, 51 AD3d 563, 567 [1st Dept 2008]). CPLR § 7511 [b] further provides that an award may be vacated or modified where an arbitrator exceeded his or her power, or failed to follow the procedures of the article, unless the party seeking to vacate the award continued with the arbitration without objection and with notice of the defect (CPLR 7511 [b][1][iv]).

Petitioner did not meet her burden of establishing that the hearing officer's

determination was based on misconduct or bias. Despite the alleged comment by the hearing officer, petitioner took no steps to have the arbitrator disqualified or the proceeding stayed, but continued with the hearing (CPLR 7511 [b][1][iv]). The court also considered that petitioner involved herself in a lawsuit against the arbitrator and that she could not bootstrap a recusal through her own actions (see prior order). Petitioner simply did not prove any bias on the part of the hearing officer or that the decision she made was the product of misconduct.

As required by law, the court also took into consideration that the parties had submitted to compulsory arbitration. Thus, the court carefully scrutinized the process to see whether the award was in accordance with due process and found that it was (Lackow v. Department of Education of City of NY, supra).

The recent decision in City v. Graham does not mark a change in the law or state any legal principle that this court failed to apply in its prior order. In fact City v. Graham underscores how important it is that the court "examine an arbitration ... award on its face without engaging in extended factfinding or legal analysis . . ." (City School Dist. of City of New York v. McGraham, 75 A.D.3d at 450). Petitioner's argument, that the penalty imposed is disproportionate to the offense, is a rehash of a prior argument which was already carefully considered and decided against her for reasons set forth in the prior order.

Although Petitioner has pointed out one factual error in the court's prior decision, she has failed to show that the correction of that one error has any impact on the legal outcome of the underlying motion.

Petitioner has raised many arguments about the Federal Action, her belief that Supreme Court judges are cowed into making decisions because of their inherent political

natures and her conviction that the teacher's union has given away valuable rights. These freewheeling and random observations are well beyond the scope of this Article 78 proceeding.

For all the foregoing reasons, petitioner motion is granted only to motion is granted only to the extent that the court corrects the factual error to now provide that the charges against petitioner were heard before a hearing officer pursuant to Education Law §3020-a. In all other respects, the court adheres to its prior decision, order and the Judgment dismissing the petition stands.

Conclusion

It is hereby:

ORDERED that petitioner's motion to reargue and/or renew is only granted to the limited extent provided and after reargument, the court adheres to its original decision and the Judgment dismissing the petition stands; and it is further

ORDERED AND ADJUDGED that the petition is hereby dismissed, and it is further

ORDERED that any relief requested but not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
May 13, 2011

So Ordered:



Hon. Judith J. Gische, JSC

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