

Lobo v City of New York
2011 NY Slip Op 31902(U)
July 7, 2011
Sup Ct, NY County
Docket Number: 116548/10
Judge: Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Sean B. Lobo PART 6

Index Number : 116548/2010

LOBO, CHRISTOPHER

INDEX NO. _____

vs

CITY OF NEW YORK

MOTION DATE 4/22/11

Sequence Number : 001

MOTION SEQ. NO. _____

VACATE OR MODIFY AWARD

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____ x mod.

1-102

Replying Affidavits _____

103-106

107; 108-109

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this Petition motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

and order and

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).

judgment

Dated: 7/7/11

[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
NEW YORK COUNTY: IAS PART 6**

-----X
CHRISTOPHER LOBO,

Petitioner,

Index No. 116548/10

-against-

Decision, Order and Judgment

CITY OF NEW YORK; and NEW YORK CITY
DEPARTMENT OF EDUCATION; JOEL KLEIN,
CHANCELLOR of NEW YORK CITY DEPARTMENT
OF EDUCATION,

Respondents,

UNFILED JUDGMENT

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To Vacate a Decision of a Hearing Officer Pursuant to Education Law Section 3020-a and CPLR Section 7511

-----X
JOAN B. LOBIS, J.S.C.:

Petitioner Christopher Lobo, a former tenured public high school science teacher, brings this petition pursuant to Education Law § 3020-a and Article 75 of the C.P.L.R. seeking to annul an arbitrator's determination to terminate his employment after a hearing on misconduct charges. Respondents cross-move for an order, pursuant to C.P.L.R. Rule 3211(a)(7), dismissing the petition. For the reasons set forth below, the cross motion is granted, and the petition and the proceeding are dismissed.

In 2001, petitioner became an earth science teacher at Forest Hills High School in Queens County, where he worked until his termination in 2010. Mr. Lobo received satisfactory ratings on his professional performance reviews until the August 2007 to June 2008 school year ("07-08 year"). That year, Mr. Lobo was rated "unsatisfactory" in, *inter alia*, professional attitude and growth; skill in adapting instruction to the needs and abilities of his students; effective use of appropriate teaching methods; skill in making lessons interesting; and evidence of student growth in knowledge, skills, appreciation, and attitude. The next school year, August 2008 to June 2009 ("08-09 year"), Mr. Lobo received unsatisfactory

ratings in the same categories and in his planning and preparation. The unsatisfactory reviews were based in part on observations by Assistant Principal for Science Karl Hoffman ("A.P. Hoffman") and Principal Saul Gootnick during the 07-08 and 08-09 years. A.P. Hoffman and Principal Gootnick observed petitioner's earth science class on seven occasions.¹ The majority of the observations were conducted by both administrators, although on two occasions, A.P. Hoffman independently observed petitioner's class. After each observation, A.P. Hoffman and/or Principal Gootnick issued a report detailing their observations and petitioner's shortcomings. In five of the reports, the administrators observed that petitioner failed to use "differentiated instruction."² In four of the reports, the administrators observed that petitioner failed to ask "pivotal questions," or questions designed to promote critical thinking. Also on four occasions, the administrators noted that petitioner had either discussed facts irrelevant to the Regents Examination or conducted a class discussion or activity on an issue irrelevant to the lesson. In two of the reports, the administrators noted that petitioner had failed to define words or concepts in his lesson. Some of their observations of petitioner's shortcomings were noted on only one occasion, such as having 30% of the class absent; failing to use an overhead projector; failing to show improvement from the prior observation; wasting class time; failing to deal with disruptive students appropriately; having a poor lesson "flow;" and providing little or inapplicable notes for the students to take down. On one occasion, the administrators believed that petitioner should have conducted his lesson on the density of liquids "differently" and noted that he had failed to mention that there is water on Mars.

¹ The classroom observations took place on December 20, 2007; February 25, 2008; May 25, 2008; September 16, 2008; February 10, 2009; April 29, 2009; and June 11, 2009.

² A.P. Hoffman defined differentiated instruction as a teaching method "designed to bring every aspect of intellect from the class into the lesson."

On or about October 2, 2009, the New York City Department of Education ("DOE") served Mr. Lobo with specifications of incompetence and other misconduct pursuant to Education Law § 3020-a related to the 07-08 and 08-09 years. He was charged with, *inter alia*, falling to adequately prepare his lessons; failing to use accepted teaching models and techniques; failing to use classroom time efficiently; failing to engage the students; delivering unsatisfactory lessons on specific dates; and failing to take steps to improve his deficiencies.

A hearing before Hearing Officer Lawrence Henderson took place in the fall of 2010 and lasted thirteen days until its completion on November 5, 2010. During the hearing, Hearing Officer Henderson heard testimony from A.P. Hoffman and Principal Gootnick regarding the observation reports. Petitioner testified in his defense. As to the administrators' observations that he failed to use differentiated instruction, petitioner testified either that he had used differentiated instruction but that it was not obvious to the observer, or that he was never provided with a definition of differentiated instruction. Petitioner's other testimony generally consisted of denials of the shortcomings or excuses for the shortcomings. He testified that he did his best to deal with disruptive students. He disputed that he did not ask pivotal questions.

On or about December 3, 2010, Hearing Officer Henderson issued a 103-page determination (the "Determination"). Hearing Officer Henderson dismissed most of the charges and focused on petitioner's failure to deliver satisfactory lessons. For the most part, he found that the administrators' testimony mirrored their reports and was generally credible, although he did find that the testimony regarding their critique of petitioner's density of liquids lesson was confusing. He also doubted that

petitioner was responsible for low attendance rates. Hearing Officer Henderson found petitioner's testimony to be confusing and/or evasive at times. As to petitioner's testimony regarding his failure to use differentiated instruction, Hearing Officer Henderson set forth that the testimony was confusing, contradictory, and generally not credible. Ultimately, Hearing Officer Henderson found that DOE had established that, on the seven occasions that the administrators had observed petitioner's class over two school years, petitioner had delivered unsatisfactory lessons.

Having found that the lessons were unsatisfactory, Hearing Officer Henderson set forth that before determining the penalty, he would examine DOE's attempts to help petitioner improve as required under Education Law § 3020-a(4). Based on his review of documents submitted by DOE and the testimony, Hearing Officer Henderson found that, in addition having access to staff development days, petitioner was provided with assistance before and after each of Principal Gootnick's and A.P. Hoffman's observations, and peer review by RMC Research Corporation, "a private vendor selected by the Department and the UFT" from April 2, 2009 to June 2, 2009. Hearing Officer Henderson concluded that given the resources provided to petitioner, his failure to improve with these resources, and his reluctance to admit any deficiencies, it was unlikely that petitioner would ever improve and termination was appropriate.

In his amended notice of petition, petitioner claims that the penalty of termination is shocking to the conscience and should be vacated. Petitioner argues that the evidence against him was entirely subjective because DOE's witnesses lacked the expertise or independence to render their evaluations; that petitioner provided twenty years of satisfactory service; that the Determination violated federal and state law; and that the disciplinary process is a "charade" in that the hearing officers are not

neutral.

Respondents cross-move for an order dismissing the petition for failing to state grounds to vacate the Determination under C.P.L.R. § 7511(b). Respondents argue that the Determination was supported by evidence and, under the circumstances, not shocking to one's sense of fairness. In reply, in his own affidavit, petitioner disputes some factual findings made by Hearing Officer Henderson without addressing the substantive criticism of his lessons. Petitioner further argues that he was only provided with an eight-week peer review and not a ten-week peer review as required in RMC's training manual. Petitioner also contends that it was never made clear to him how to conduct differentiated instruction.

Under Education Law § 3020-a(5), an arbitration determination pursuant to disciplinary charges can only be vacated under the grounds listed in C.P.L.R. § 7511 (that the arbitrator was biased, committed misconduct, or exceeded his or her power), or if the determination is not supported by adequate evidence, is irrational, or otherwise fails to meet "the arbitrary and capricious standards of CPLR article 78." In re Lackow v. Dep't of Educ., 51 A.D.3d 563, 567-68 (1st Dep't 2008). Additionally, the court may vacate a penalty of termination when such punishment is "so disproportionate to the offenses as to be shocking to the court's sense of fairness." Id. at 569.

On a motion to dismiss a special proceeding, the court must "determine only whether the facts as alleged fit within any cognizable legal theory." In re Yan Ping Xu v. New York City Dep't of Health, 77 A.D.3d 40, 43 (1st Dep't 2010) (citation omitted); see also, In re Y & O Holdings (NY), Inc. v. Bd. of Mgrs. of Exec. Plz. Condo., 278 A.D.2d 173 (1st Dep't 2000). Accordingly, "the court must afford

to credibility findings are not cognizable arguments on a petition to challenge a determination after arbitration pursuant to Education Law § 3020-a. See In re Berenhaus v. Ward, 70 N.Y.2d 436, 443 (1987); In re Tasch v. Bd. of Ed., 3 A.D.3d 502, 503 (2d Dep't 2004). Petitioner's argument in reply that he was not given proper resources to help him improve cannot be considered by the court. See In re Jain v. New York City Transit Auth., 27 A.D.3d 273 (1st Dep't 2006).

In light of Hearing Officer Henderson's findings that petitioner was underperforming as an educator for two straight years, even after being offered resources to improve, petitioner cannot argue that the penalty of termination was unwarranted. See In re Rogers v. Sherburne-Earlville Cent. Sch. Dist., 17 A.D.3d 823, 824-25 (3rd Dep't 2005). Since petitioner has failed to sufficiently allege cognizable causes of action in this petition, it is hereby

ORDERED that the cross motion to dismiss is granted; and it is further

ORDERED and ADJUDGED that the petition and the proceeding are dismissed.

Dated: July 7, 2011



JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT

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