

Matter of Luft v New York City Bd./Dept. of Educ.

2011 NY Slip Op 32268(U)

August 18, 2011

Supreme Court, New York County

Docket Number: 100370/11

Judge: Barbara Jaffe

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: BARBARA JAFFE
J.S.C.

PART 5

Index Number : 100370/2011

LUFT, LAURIE

INDEX NO. 100370/11

vs
NYC BOARD OF EDUCATION

MOTION DATE 5/31/11

Sequence Number : 001

MOTION SEQ. NO. 001

VACATE OR MODIFY AWARD
CAL # 59

MOTION CAL. NO. 59

The following papers, numbered 1 to 4 were read on this motion to/for vacate arbitration award.

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

1

Replying Affidavits _____

2,3

4

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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 1413).

Dated: 8/18/11
AUG 18 2011

[Signature]
BARBARA JAFFE 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 5

-----X
In the Matter of the Application of:
LAURIE LUFT,

Petitioner,

Index No. 100370/11
Argued: 5/31/11
Motion Seq. No.: 001
Motion Cal. No.: 59

DECISION & JUDGMENT

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

-against-

THE NEW YORK CITY BOARD/DEPARTMENT OF
EDUCATION,

Respondent.

-----X
BARBARA JAFFE, JSC:

For petitioner:
Laurie Luft, self-represented
2660 Rosebud Avenue
Merrick, NY 11566
516-672-2829

For respondent:
Celine Chan, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007

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).

By notice of petition dated January 10, 2011, petitioner moves pursuant to CPLR 7511
for an order vacating the hearing officer's award in the disciplinary proceeding brought by
respondent against her. By notice of cross-motion dated March 8, 2011, respondent moves
pursuant to CPLR 404(a), 3211(a)(7), and Education Law § 3020-a(5) for an order dismissing the
petition and confirming the award. Petitioner opposes.

I. BACKGROUND

Petitioner, a tenured pre-kindergarten teacher employed by respondent New York City
Department of Education (DOE), began working at Public School (P.S.) 97 in Brooklyn in 1987.

(Pet.). She was charged with conduct unbecoming her position, conduct prejudicial to the good order, efficiency, or discipline of the service, and endangering the welfare of a child for the 2007 to 2008 school year, specifications as follows:

SPECIFICATION 1: On or about March 10, 2008 Student A [K.Z.] left the school building without [petitioner's] knowledge.

SPECIFICATION 2: On or about March 10, 2008 [petitioner] left Student A unsupervised and outside the school building.

(Affirmation of Celine Chan, Special ACC, dated March 8, 2011, Exh. A).

A pre-hearing conference was held on November 23, 2009, and a hearing on the merits was held on April 27, April 29, May 4, and May 6, 2010. (*Id.*, Exhs. B, C, D, E, F, G). Petitioner was represented by counsel. (*Id.*, Exhs. B, C, D, E, F, G). The sole witnesses were Kristine Mustillo, Principal of P.S. 97, for respondent, and petitioner. (*Id.*, Exhs. B, C, D, E, F).

Mustillo testified that petitioner taught a daily morning and afternoon pre-kindergarten class, that she had been in a portable classroom until she reported a problem with the floor and was reassigned on March 3, 2008 to a room in the basement of the main building, that a letter was sent to petitioner's students' parents advising of the classroom change, that on March 10, 2008, petitioner was re-assigned to another room in the main building after expressing concerns about the basement space, and that at class dismissal from the door of her portable classroom, she was responsible for "mak[ing] sure that each child [got] to their appropriate guardian at the end of the day." (*Id.*, Exh. C). According to Mustillo, on the morning of March 10, 2008, petitioner's paraprofessional had called in sick, that Mustillo's secretary did not provide petitioner with a substitute, and instead sent a Family Worker to assist. (*Id.*). She also testified that at approximately 1:00 p.m. that day, an assistant principal informed her that the Family Worker had

argued with petitioner and was no longer assisting her, that petitioner came to her office after class dismissal and said that she was upset by the visit from the assistant principal and that she had difficulty during dismissal, and that a School Safety Agent had brought a student, K.Z., to her office while petitioner was there, stating that a parent had found him in the school yard alone and crying. (*Id.*). The incident was reported to the Office of the Special Commission on Investigation (SCI), which referred it to the Office of Special Investigations (OSI), which found that the allegations against petitioner were substantiated. On September 16, 2008, Mustillo called together a disciplinary conference with petitioner and a union representative. (*Id.*)

Petitioner testified that the paraprofessional that usually assisted her was “[her] full support for everything [she] did,” that they normally dismissed class directly from the portable classroom’s door, that the move to the main building was disruptive in that she could no longer dismiss her students directly from their classroom and had to instead walk them through the building to an exit off a small gym, and that she could not see who was approaching the exit to pick up her students without simultaneously opening two sets of doors. (*Id.*, Exh. E). And, on March 10, 2008, she was able to dismiss her morning class at a different exit because she had arrived early and had a parent distribute a letter regarding the exit change to other parents, that she told Mustillo she needed help serving lunch, that she asked the assistant principal for assistance when she visited her classroom after lunch, and that she was five minutes late for dismissal because one of her students had difficulty in the bathroom. (*Id.*). Petitioner also testified that parents, upset by her lateness, rushed the small gym doors and yelled obscenities at her and that she had difficulty seeing whether students reached their parents as a result, that she could not call anyone for assistance because she did not have her cell phone, that K.Z. had been

paired with another student in line during dismissal, that she did not recall seeing him exit the building, that he likely clung to the other student and was discovered by that student's parent shortly after exiting the building, and that she could not have done anything to prevent the incident. (*Id.*).

Respondent offered, *inter alia*, a disciplinary letter written by Mustillo after the September 16, 2008 conference reflecting her conclusion that petitioner had been negligent in permitting K.Z. to exit the building without her knowledge, and petitioner's written rebuttal wherein she stated in pertinent part that "[a]pparently, [K.Z.] had exited the building without my knowledge, without my having seen his parent, [and] without my having called him to the door." (*Id.*, Exh. H). Petitioner offered section 151-1.3 of the New York Code of Rules and Regulations, which requires that pre-kindergarten classes of 18 or more students be assigned one teacher and one paraprofessional. (*Id.*, Exh. I). Neither party offered K.Z.'s "blue card," which identifies those authorized to pick him up at dismissal. (*Id.*, Exhs. H, I).

On December 15, 2010, the hearing officer issued a 20-page opinion and award. (*Id.*, Exh. A). She sustained the first specification on the basis of petitioner's testimony that she did not see K.Z. exit the building and her written rebuttal reflecting same. (*Id.*). She found support for the second specification in Mustillo's testimony, opining that although the parent could have intercepted K.Z. immediately after he exited the building, the testimony established that he had been left unattended for some period of time. (*Id.*).

The hearing officer declined to terminate petitioner, finding "that while it is [her] responsibility . . . to make sure her students are properly dismissed to the appropriate caregivers, the failure of the school to provide [her] with a substitute paraprofessional mitigates [her]

culpability for the incident.” (*Id.*). Instead, she ordered her to pay a \$1,000 fine through equal paycheck deductions over the course of a year, as she found that petitioner had erred in failing to ask specifically for assistance at dismissal. (*Id.*). Although the hearing officer considered petitioner’s testimony that she had asked the assistant principal for assistance during her classroom visit, she assigned it little probative value in light of petitioner’s failure to mention it in her rebuttal letter and her having made alternative arrangements for dismissal of her morning class, and observed that she could have had the Family Worker stay to assist. (*Id.*).

II. CONTENTIONS

Petitioner claims that the hearing officer was biased and that her decision reflects corruption, fraud, and misconduct, given respondent’s failure to call K.Z. as a witness, its failure to offer K.Z.’s blue card in evidence, and failure to comply with the law requiring a paraprofessional’s presence in classes of 18 or more students. For these reasons as well, she maintains that the record does not support the penalty. She also argues that the hearing officer exceeded her authority and violated her due process rights in sustaining the charges, as the New York City Board of Education (Board) had not voted on them, and because the hearing officer relied on hearsay, rendered her decision more than 30 days after the last hearing date, and imposed a penalty that is disproportionate to her offense. (*Id.*).

In opposition, and in support of its cross-motion to dismiss, respondent argues that petitioner has not shown that the hearing officer was biased or corrupt, or that she engaged in fraud or misconduct, as she provides only conclusory assertions of bias, and the record reflects that the hearing officer weighed the relative credibility of the witnesses and based her decision on the evidence presented. (Mem. of Law in Support of Respondent’s Cross-Motion to Dismiss). It

also contends that petitioner fails to demonstrate that the hearing officer exceeded her authority, as hearsay is admissible in such proceedings, and her allegation that the Board failed to vote on the charges is without merit. (*Id.*). It, moreover, asserts that the timing of the hearing officer's decision provides no basis for its vacatur and that the penalty is not shocking to one's sense of fairness. (*Id.*).

In reply, and in opposition to respondent's cross-motion to dismiss, petitioner claims that as Mustillo preferred the charges against her, the hearing officer exceeded her authority in sustaining them, absent the Chancellor's authority to delegate his powers to principals. (Affidavit of Laurie Luft in Opposition to Respondent's Cross-Motion, dated April 7, 2011). She also claims that the hearing officer was biased insofar as DOE uses the section 3020-a hearing process to remove tenured teachers from their classrooms without good cause, and she maintains that the penalty is shocking to one's sense of fairness in light of her unblemished record. (*Id.*).

III. ANALYSIS

A. Applicable law

When a hearing is held pursuant to Education Law § 3020-a, a party who is subject thereto may seek to vacate the hearing officer's decision pursuant to CPLR 7511. The court's review is limited to the following grounds:

- (i) corruption, fraud or misconduct in procuring the award;
- (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession;
- (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 was not made; or
- (iv) failure to follow the procedures of this article.

(CPLR 7511[b][1]).

Additionally, the arbitration award “must be in accord with due process and supported by adequate evidence, and must [] be rational and satisfy the arbitrary and capricious standards of CPLR article 78.” (*Lackow v Dept. of Educ. of the City of New York*, 51 AD3d 563, 567 [1st Dept 2008]). The party challenging the arbitration award bears the burden of proving invalidity. (*Id.*).

The scope of judicial review of an arbitration proceeding is extremely limited (*Matter of Campbell v New York City Tr. Auth.*, 32 AD3d 350, 351 [1st Dept 2006]), giving deference to the arbitrator’s decision (*Matter of New York City Tr. Auth. v Transp. Workers’ Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]). In reviewing an award, the court is bound by the arbitrator’s factual findings and interpretations and may not “examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one.” (*Matter of New York State Correctional Officers & Police Benev. Assn., Inc. v State of New York*, 94 NY2d 321, 326 [1999]; *Matter of Campbell*, 32 AD3d at 351). And, if the motion to vacate is denied, the court must confirm it. (CPLR 7511[e]).

B. Did petitioner prove that her rights were prejudiced?

1. Corruption, fraud, or misconduct

As the hearing officer based her decision on the evidence and weighed the relative credibility of the witnesses (*see infra*, at III), absent an offer of any evidence that she was corrupt or engaged in fraud or misconduct, there is no basis to vacate the award pursuant to CPLR 7511(b)(1)(i).

2. Bias

An allegation of bias against an arbitrator must be established by clear and convincing evidence showing more than an inference of partiality. (*Matter of Infosafe Sys., Inc. v Int. Dev.*

Partners, Ltd., 228 AD2d 272, 272 [1st Dept 1996]). Partiality may be established by proof of actual bias or the appearance of bias from which the arbitrator's conflict of interest may be inferred. (*New York Rest. Exch., Inc. v Chase Manhattan Bank, N.A.*, 226 AD2d 312 [1st Dept 1996], *lv denied* 89 NY2d 861 [1996]). A decision adverse to the petitioner does not constitute evidence of bias. (*Matter of Mays-Carr v State Farm Ins. Co.*, 43 AD3d 1439, 1440 [4th Dept 2007]).

Here, petitioner's claims of bias are supported by nothing other than baseless allegations of the existence of a conspiracy to remove tenured teachers from their classrooms. Absent any evidence of actual or apparent bias, petitioner has failed to sustain her burden. (*See id.*, 43 AD3d at 1440) [allegations of bias wholly speculative and fact that adverse determination was made did not indicate that arbitrator was partial]; *Matter of County of Niagara v Bania*, 6 AD3d 1223, 1225 [4th Dept 2004] [same]; *see also Matter of Schwartz v New York City Dept. of Educ.*, 22 AD3d 672, 673 [2d Dept 2005] [as petitioner offered no evidentiary proof of actual or apparent bias, she failed to sustain her burden]).

3. Scope of arbitrator's power

a. Failure of Board to vote on charges

Pursuant to Education Law § 3020-a(2)(a), the Board must vote on charges against a teacher to determine "whether probable cause exists to bring a disciplinary proceeding against [her] pursuant to this section." However, Education Law § 2590-h(38) permits the Chancellor to "exercise all of the duties and responsibilities of the [Board] as set forth in [§ 3020-a] of this chapter" and provides that he "may delegate the exercise of all such duties and responsibilities to all of the community superintendents," and section 2590-f(1)(c) specifically endows community

superintendents with the authority to discharge all employees. Furthermore, community superintendents may delegate any of their powers and duties to subordinate employees within their districts. (Education Law § 2590-f[1][b]).

Although there is no proof in the record as to who preferred the charges against petitioner, as DOE and Mustillo are authorized to do so pursuant to Education Law § 2590-h(38) and 2590-f(1)(b) and (c), respectively, the hearing officer did not exceed her authority in sustaining them.

b. Hearsay

A hearing officer need not comply with the technical rules of evidence (Education Law § 3020-a[3][c]), and may consider hearsay (*Austin v Bd. of Educ. of the City School Dist. of the City of New York*, 280 AD2d 365 [1st Dept 2001]). Consequently, she did not exceed her authority in considering hearsay in reaching her decision.

4. Article 75 procedures

Pursuant to CPLR 7506, an arbitrator must provide the parties at least eight days notice of the time and place of the hearing, at which the parties have the right, *inter alia*, to representation by an attorney, and are “entitled to be heard, to present evidence, and to cross-examine witnesses.”(CPLR 7506).

Here, there is no dispute that petitioner received adequate notice, was represented by counsel, and was afforded an opportunity to be heard, present evidence, and cross-examine witnesses

5. Timeliness

Pursuant to Education Law § 3020-a(4) and article 21(G)(2)(e) of the collective

bargaining agreement between petitioner's union and DOE, a hearing officer must render her decision within 30 days of the last hearing date. In order to vacate an arbitration award on the ground of untimeliness, prejudice must be shown. (*Scollar v Cece*, 28 AD2d 317 [1st Dept 2006]). As petitioner makes no claim of prejudice, the hearing officer's delay in rendering her decision provides no basis for vacatur.

C. Was the award supported by adequate evidence and was neither arbitrary nor capricious?

The evidence reflects that the specifications sustained against petitioner were supported by Mustillo's and petitioner's testimony as well as by the documentation presented, and that the hearing officer considered petitioner's mitigating evidence. Consequently, absent any demonstration to the contrary, the award was supported by adequate evidence. (*See Wien & Malken v Helmsley-Spear, Inc.*; 6 NY3d 471, 479 [2006] ["An arbitration award must be upheld when the arbitrator 'offer[s] even a barely colorable justification for the outcome reached.'"]; *Lackow*, 51 AD3d at 568 [hearing record supported hearing officer's conclusions]).

To the extent that petitioner is challenging the hearing officer's credibility determinations, this does not constitute a ground to vacate the award. (*See Saunders v Rockland Bd. of Co-Op Educ. Servs.*, 62 AD3d 1012, 1013 [2d Dept 2009] ["When reviewing compulsory arbitrations in education proceedings . . . the court should accept the arbitrator's credibility determinations, even where there is conflicting evidence and room for choice exists."]).

As my review is limited to whether the hearing officer's decision was based on the evidence presented at the hearing, petitioner's claims as to the blue card and K.Z.'s testimony are without merit. In any event, petitioner has not demonstrated how this evidence would alter the result, as she only speculates as to the content of K.Z.'s testimony, and even if he had testified

that he was discovered immediately after exiting the building or that he was crying for some reason other than that he was left alone outside, the record still supports the hearing officer's conclusions, as petitioner testified that she did not see him exit the building, and the parent who discovered him stated that she found him standing alone in the courtyard.

D. Was the discipline imposed excessive?

The standard for reviewing a penalty imposed after a hearing held pursuant to Education Law § 3020-a is whether the punishment imposed "is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." (*Bd. of Educ. of Union Free School Dist. No. 1 of the Towns of Scarsdale, et al v Mayor of Syracuse, et al.*, 34 NY2d 222, 233 [1974]). A result is shocking to one's sense of fairness when:

the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct . . . of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved.

(*Id.* at 234).

Here, although the hearing officer sustained both specifications, she rejected termination and determined that a fine was an appropriate penalty insofar as petitioner had failed to request assistance at class dismissal and was thus partially responsible for the incident. Although petitioner has an unblemished record, she has failed to show that the fine imposed is so disproportionate to her offense as to shock one's sense of fairness. (*See Matter of Rogers v Sherburne-Earlville Central School Dist.*, 17 AD3d 823 [3d Dept 2005] ["even a long and

previously unblemished record does not foreclose dismissal from being considered as an appropriate sanction”]).

IV. CONCLUSION

Accordingly, it is hereby

ADJUDGED, that the petition for an order vacating the award is denied; it is further

ADJUDGED, that respondent's cross-motion for an order dismissing the petition is granted to the extent that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondent; it is further

ADJUDGED, that respondent, having an address at 100 Church Street, New York, New York 10007, does recover from petitioner, having an address at 2660 Rosebud Avenue, Merrick, New York 11566, costs and disbursements in the amount of \$ _____, as taxed by the Clerk, and that respondent has execution therefor.

ENTER:


Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: August 18, 2011
New York, New York

AUG 18 2011

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).