

**Matter of New York City Dept. of Educ. v Santino**

2011 NY Slip Op 32919(U)

October 28, 2011

Supreme Court, New York County

Docket Number: 11401976/11

Judge: Alexander W. Hunter Jr

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 33**

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In the Matter of the Application of  
The New York City Department of Education and  
Dennis Walcott, as Chancellor of the New York  
City Department of Education,

Index No.: 11401976/11

Petitioners,

For an Order Pursuant to CPLR Article 75

Decision and Judgment

-against-

Kristie Santino,

Respondent.

**FILED**

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**HON. ALEXANDER W. HUNTER, JR.**

The application by petitioners for an order pursuant to C.P.L.R. § 7511 for an order vacating the decision of Hearing Officer Lawrence Henderson on the grounds that the hearing officer exceeded his jurisdiction and/or so imperfectly executed it that a final and definite award was not made, is granted without opposition. Petitioners' further application to remand the matter back to Hearing Officer Henderson to issue a penalty is also granted.

Petitioners the New York City Department of Education ("DOE") and Dennis Walcott, as Chancellor of the New York City Department of Education, commenced this proceeding pursuant to C.P.L.R. § 7511 to vacate the June 29, 2011 decision of Hearing Officer Henderson. Respondent is a tenured teacher with the DOE and was assigned to teach the second grade at P.S. 152 in Brooklyn.

On June 24, 2010, Principal Rhonda Farkas of P.S. 152 recommended that respondent participate in the Peer Intervention Plus Program ("PIP Plus"). Ellen Schuldberg was assigned as respondent's PIP Plus Observer on September 15, 2010. Ms. Schuldberg observed respondent in the classroom from September 22, 2010 to November 10, 2010. After preparing six observation reports, Ms. Schuldberg found respondent's performance unsatisfactory.

PIP Plus was designed to provide assistance to tenured teachers who have been identified as needing help for significant instructional improvement and who are in danger of receiving charges for incompetence under Education Law § 3020-a. The program is comprised of independent contractors who are not employed by the DOE or the United Federation of Teachers ("UFT"). Pursuant to the DOE and UFT contract governing PIP Plus, this program is completely voluntary and teachers may only participate once.

PIP Plus consists of six classroom observations by a PIP Plus Observer as well as post-observation conferences to discuss the Observer's opinion of each lesson. If necessary, the Observer provides the teacher with remedial support. Upon completion of the program, the Observer issues a "Final Report" outlining a written assessment of the teacher's instructional methods.

Petitioner DOE served respondent with Specifications on or about March 23, 2011. The Specifications charged respondent with incompetence, violations of the Chancellor's regulations and the New York City Charter, neglect of duty, poor personal and professional qualities, failure to properly plan and execute lessons, excessive absences and failure to implement professional development recommendations. Respondent served her Request for a Hearing on or about April 1, 2011.

Hearings were held on April 12, 27, 28, 29, May 3, 5, 10, 12, and 25, 2011. During the hearing, both parties were represented by counsel. Both parties were allowed to introduce exhibits into evidence, examine and cross-examine witnesses. After hearing from all parties, Hearing Officer Henderson issued a 107 page written decision in which he found respondent guilty of incompetence and inefficiency, conduct unbecoming her position, and neglect of duty. Hearing Officer Henderson ordered the DOE to return respondent to the classroom in a school of its choosing to undergo a new PIP Plus observation period for a minimum of three months. Hearing Officer Henderson reserved decision on a penalty pending completion of the new PIP Plus observation period. Petitioners and respondent were further ordered to return for a subsequent hearing for consideration of any new testimony and evidence regarding the new PIP Plus observation period.

Petitioners assert that the award must be vacated because the award is not final and definite. Petitioners also contend that the penalty imposed by Hearing Officer Henderson against respondent is unenforceable and it does not comport with the penalty options provided by Education Law § 3020-a. Petitioners cite Education Law § 3020-a(4)(a) which provides the possible penalties a hearing officer may impose on an employee. These penalties include a written reprimand, a fine, suspension for a fixed time without pay, or dismissal.

Petitioners argue that Hearing Officer Henderson's award is violative of Article 21(J)(3) of the UFT/DOE contract, which states that PIP Plus is a voluntary program. As such, respondent cannot be forced to participate in the program. Furthermore, Article 18A of the UFT/DOE contract provides that only a Principal can make the final decision as to the hiring and placement of teachers in their respective schools. It is outside the scope of petitioners' authority to place respondent in a given school as provided in Hearing Officer Henderson's award. Petitioners also assert that by withholding a decision as to respondent's penalty, Hearing Officer Henderson not only fails to resolve the submitted controversy but also creates a possible new controversy.

Education Law § 3020-a(5) states that judicial review of a hearing officer's decision shall be dictated by C.P.L.R. § 7511. The grounds to vacate an award include corruption, fraud or misconduct in procuring the award, the partiality of the arbitrator, or an arbitrator exceeding his or her authority or a failure to follow the procedure of Article 75. C.P.L.R. § 7511(b). It is well established that when reviewing an arbitration award, the court "is not to decide the appropriateness or the wisdom of an award or whether the judges of the court would have rendered the same award had they acted as the arbitrators, but, rather to ascertain whether the arbitrator who did make the award exceeded his powers or so imperfectly executed them as to require its vacatur." Matter of States Mar. Lines (Crooks), 13 N.Y.2d 206, 212 (1963); see, Matter of Mid-State Mgt. Corp. v. New York City Conciliation & Appeals Bd., 112 A.D.2d 72 (1<sup>st</sup> Dept. 1985).

C.P.L.R. § 7511(b)(1)(iii) provides that an arbitrator's award shall be vacated when "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." An arbitrator exceeds his or her power if the award violates a strong public policy, is irrational or exceeds a specifically enumerated limitation on the arbitrator's power. See, Matter of Kowaleski (New York State Dept. of Correctional Servs.), 16 N.Y.3d 85 (2010); Matter of Falzone v. New York Central Mut. Fire Ins. Co., 15 N.Y.3d 530 (2010). An award is not final and indefinite if the parties are "unable to determine their rights and obligations, if it does not resolve the controversy submitted, or if it creates a new controversy." Matter of Snyder-Plax v. American Arbitration Assn., 196 A.D.2d 872, 874 (2<sup>nd</sup> Dept. 1993).

Even though Hearing Officer Henderson found respondent guilty of incompetence and inefficiency, conduct unbecoming her position, and neglect of duty, he ordered respondents to place petitioner in a school of its choosing to undergo PIP Plus observations for an additional three months. Hearing Officer Henderson also reserved decision on a penalty until after respondent's completion of the PIP Plus program. Petitioners would not be able to effectuate the award even if they wished to do so. The award is violative of both Articles 18A and 21(J)(3) of the UFT/DOE contract. PIP Plus is voluntary and teachers can only participate in the program once. Respondent has already unsatisfactorily participated in the PIP Plus program before the start of the hearing. The PIP Plus Observer even testified at the hearing and shared her conclusions before the arbitrator. By forcing petitioners to violate the UFT/DOE contract and by reserving his decision on a penalty, the matter submitted has not been resolved. Therefore, this court finds the award to be indefinite and not final.

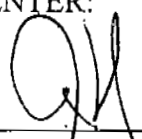
Accordingly, it is hereby,

ADJUDGED, that the petition to vacate the portion of the award ordering petitioners to place respondent in a school to participate in PIP Plus is granted without opposition. This matter

is remanded back to Hearing Officer Henderson to issue a penalty in accordance with Education Law § 3020-a(4)(a).

Dated: October 28, 2011

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J.S.G.

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