

Vecchione v Department of Educ. of NYC

2012 NY Slip Op 30004(U)

January 3, 2012

Sup Ct, NY County

Docket Number: 100219/11

Judge: Alexander W. Hunter Jr

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: ALEXANDER W. HUNTER JR

PART 33

Index Number : 100219/2011
VECCHIONE, LISA
vs.
NYC DEPT OF EDUCATION
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

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

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-16

17-26

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

See memorandum decision and judgment annexed hereto.

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: 1/3/12

AH
ALEXANDER W. HUNTER JR 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 33**

-----X
Lisa Vecchione

Index No.: 100219/11

Petitioner,

For an Order Pursuant to C.P.L.R. Article 75

Decision and Judgment

-against-

Department of Education of NYC ("DOE")

Respondent.

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).

-----X
HON. ALEXANDER W. HUNTER, JR.

The application by petitioner for an order pursuant to C.P.L.R. Article 75 for an order vacating or modifying the Opinion and Award of Hearing Officer Robert L. Douglas, is denied. Respondent's cross-motion to dismiss the petition is granted and the award is confirmed.

Petitioner is a tenured Assistant Principal formerly employed by respondent Board of Education of the City School District of the City of New York ("BOE") (also known as and being sued herein as Department of Education of NYC). Petitioner became an Assistant Principal at P.S. 345 at the beginning of the 2003-04 academic year. On June 19, 2006, petitioner sustained injuries to her foot while she was on lunch duty. She was out of work for the remainder of the school year. On October 29, 2007, petitioner appeared for a BOE medical examination and was granted a leave for a Line of Duty Injury ("LODI") through that date. Petitioner was scheduled and expected to return to work on October 30, 2007. However, petitioner failed to return to work for the remainder of the year. As a result, she was placed on an unauthorized leave of absence. Pursuant to Education Law § 3020-a, petitioner was charged with neglect of duty, conduct unbecoming of her position, substantial cause rendering her unfit to perform her duties properly to the service, conduct prejudicial to good order, efficiency or discipline to the service, excessive absences, violation of Chancellor's Regulation C-601, and just cause for termination.

A hearing to determine whether there was just cause to terminate petitioner was held, over the course of four days, on September 15, October 6, October 12, and November 1, 2010. Both parties were represented by counsel during the hearing. Petitioner was charged with twenty-four excessive absences during the 2005-06 school year, nine excessive absences during the 2006-07 school year, and excessive absences from October 30, 2007 through May 30, 2008. Both parties stipulated that she was absent on those days. After hearing from all parties, witnesses, and reviewing documents, Hearing Officer Douglas issued a written Opinion and Award, dated December 21, 2010, outlining the relevant facts and the basis for his decision. Hearing Officer Douglas concluded that petitioner was guilty of all three specifications and that there was just cause for termination.

Petitioner argues that Hearing Officer Douglas' award should be modified or vacated for the following reasons: 1) the hearings were conducted without jurisdiction; 2) the determination was arbitrary and capricious; and 3) Hearing Officer Douglas improperly used the preponderance of the evidence standard instead of just cause. Petitioner maintains that Principal Holt does not have the requisite authority to bring charges against her, only District Superintendents may do so. She alleges that she never received word from the BOE to report back to work after her medical examination and that she continually updated Principal Holt about her condition and absences. Petitioner further argues that there was no evidence to support Hearing Officer Douglas' decision. She also maintains that she is ready, willing, and able to resume her duties, with proper accommodations as Assistant Principal.

Respondent opposes petitioner's application in its entirety and cross-moves to dismiss the proceeding on two grounds: 1) this court does not have personal jurisdiction over respondent and 2) petitioner fails to state a cause of action. Respondent asserts that they were not timely served with the petition and therefore this court does not have personal jurisdiction over respondent. Respondent also argues that petitioner has failed to establish any of the exclusive bases for vacating or modifying an arbitration award. Respondent further argues that Hearing Officer Douglas' Opinion is rational, supported by evidence in the record, and is in accord with due process.

This court issued an order, dated November 2, 2011, denying petitioner's request for a two week adjournment to submit opposition papers. Despite the order, petitioner submitted her opposition papers on November 4, 2011, the return date of the motion. Petitioner's opposition papers were thereafter disregarded by this court.

The statute of limitations for judicial review of an Article 75 proceeding is four months. **Education Law § 3020-a(5)**. Service must be made within fifteen days after the filing of the petition. **C.P.L.R. § 306-b**. Petitioner filed her petition on January 6, 2011. She had until January 25, 2011 to timely serve respondent. Petitioner did not serve respondent until January 27, 2011, two days after the expiration of the statute of limitation. No motion has been made to extend the time to serve respondent and petitioner has not shown good cause for such an extension. Therefore, petitioner's untimely service did not confer personal jurisdiction over respondent and the petition must be dismissed without prejudice.

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)**. An arbitration award shall be modified in three instances: 1) the award contains a miscalculation or a mistake in the description of any person, thing or property referred to in the award; 2) the award concerns matters not submitted to arbitration, and the award can be corrected without affecting the merits of the decision; or 3) the award is imperfect as a matter of form, not affecting the

merits of the controversy. C.P.L.R. § 7511(c).

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 (1st Dept. 1985). Also, credibility determinations by the hearing officer are largely unreviewable and should not serve as a basis for vacating an award. See, Lackow v. Dept. of Educ., 51 A.D.3d 563 (1st Dept. 2008); Matter of Berenhaus v. Ward, 70 N.Y.2d 436 (1987).

In cases of compulsory arbitration, such as the instant matter, the determination must be in accordance with due process, have evidentiary support, and cannot be arbitrary and capricious. See, Motor Veh. Mfrs. Assn. of US v. State of New York, 75 N.Y.2d 175 (1990); Caso v. Coffey, 41 N.Y.2d 153 (1976). A determination is arbitrary and capricious when it was made without sound reason and generally made without regard to the facts. See, Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cty., 34 N.Y.2d 222 (1974).

Petitioner’s conclusory allegations of discrimination on the part of Principal Holt and the arbitrator’s bias do not warrant vacating or modifying the arbitration award. There are a limited number of grounds on which a court may vacate or modify an arbitration award. Petitioner has failed to satisfy one of those exclusive grounds.

During the four day hearing, petitioner stipulated to all of her unauthorized absences. She did not file a medical grievance to challenge the BOE medical examination on October 29, 2007. Hearing Officer Douglas determined that petitioner’s excessive absences prevented her from performing her responsibilities as Assistant Principal. He further found that there was no credible evidence to explain petitioner’s actions and that respondent had proved that there was just cause for termination. By petitioner’s own admission, she was absent for more than one academic year, without explanation. This court finds that Hearing Officer Douglas’ determination was not arbitrary and capricious.

When reviewing the measure of a punishment or discipline imposed by an administrative agency, a court may only consider whether such action is so disproportionate as to shock the conscience. See, Matter of Pell, 34 N.Y.2d 222 (1974); Matter of Stolz v. Board of Regents of Univ. of State of N.Y., 4 A.D.2d 361 (3rd Dept. 1957). In the instant case, this court does not find that the penalty of termination shocks the conscience. There was evidence in the record which showed that petitioner was excessively absent over the course of three school years and her extended absences prevented her from performing her duties.

Accordingly, it is hereby,

ADJUDGED, that the application by petitioner to vacate or modify the Opinion and Award of Hearing Officer Douglas is denied, without costs and disbursements to either party. Respondents' cross-motion to dismiss the petition is granted and the award is confirmed.

Dated: January 3, 2012

ENTER:



J.S.C.

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).