Brezski v Rockville Ctr. Union Free School Dist.

2012 NY Slip Op 31184(U)

April 18, 2012

Sup Ct, Nassau County

Docket Number: 277/12

Judge: Jeffrey S. Brown

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[* 1]

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

---X

RICHARD BREZSKI,

Petitioner,

-against-

ROCKVILLE CENTRE UNION FREE SCHOOL DISTRICT,

Respondent.

---X

TRIAL/IAS PART 17

INDEX # 277/12

Motion Seq. 1, 2
Motion Date 1.25.12
Submit Date 2.27.12

XXX

The following papers were read on this motion: Papers Numbered

Petition, Cross Petition, Affidavits (Affirmations), Exhibits Annexed.................	1,2,
Answering Affirmation..	3,4
Memoranda of Law...	5,6,7,8

This proceeding, brought pursuant to CPLR Article 75, seeks to vacate the determination of a Hearing Officer made pursuant to Education Law §3020-a, dated December 15, 2011 which, after ten hearings, sustained the charges preferred against the petitioner herein, Richard Brzeski (Brzeski), by the respondent, Rockville Centre Union Free School District (School District), and, as penalty for his actionable misconduct, on January 4, 2012, adopted a resolution implementing the decision of the Hearing Officer and terminated petitioner's employment effective January 5, 2012 (hereinafter referred to as Arbitration Award).

Respondent, Rockville Centre Union Free School District, in turn, cross-petitions this court, for an order and judgment pursuant to CPLR Article 75 confirming the aforementioned Arbitration Award.

The petition and cross-petition are determined as follows:

Petitioner, Richard Brzeski, is a tenured teacher employed by the respondent, School District.

On September 28, 2010, Dr. William H. Johnson, Superintendent of Schools for the respondent, School District, charged petitioner with engaging in various acts that allegedly constituted cause for discipline pursuant to New York State Education Law §3020-a. Specifically, petitioner was charged with misconduct, neglect of duty and insubordination in connection with providing inappropriate assistance to students while proctoring the 2010 New York State Grade 5 Mathematics Test and causing students to alter their answers on the examination in violation of New York State testing regulations. The charges were filed against petitioner following an internal investigation conducted by the School District, and a second independent investigation conducted by the Nassau BOCES in the spring of 2010 at the direction of the New York State Education Department (NYSED).

The specific charges of misconduct and neglect of duty that were filed against the Petitioner on September 28, 2010 were:

> Charge I: After having been provided with a copy of the teacher's direction, Petitioner failed to read the teacher's directions for the 2010 New York State Grade 5 Mathematics Test exam prior to administering the exam.
>
> Charge II: On or about May 6, 2010, Petitioner failed to follow the teacher's directions for the 2010 New York

State Grade 5 Mathematics Test exam in that Petitioner made comments to students regarding the correctness and/or sufficiency of their test answers during the administration of the exam.

Charge III: On or about May 6, 2010, Petitioner failed to follow the teacher's directions for the 2010 New York State Grade 5 Mathematics Test exam in that Petitioner inappropriately caused students to alter their responses on the exam.

Charge IV: As a result of Petitioner's failure to follow test protocols, Petitioner caused the test scores of fifteen students to be recorded as "administrative error, no score."

The Charges of insubordination filed against the petitioner on September 28, 2010 were:

Charge V: Petitioner was insubordinate in the performance of his duties as a teacher in that prior to the administration of the 2010 New York State Grade 5 Mathematics Test on or about May 6, 2010, he disregarded management directives to read the teacher's directions for the exam.

Charge VI: Petitioner was insubordinate in the performance of his duties as a teacher in that on or about May 6, 2010, he disregarded the directives of the New York State Education Department regarding the administration of the 2010 New York State Grade 5 Mathematics Test exam by making comments to students regarding the correctness and/or sufficiency of their test answers during the exam.

Charge VII: Petitioner was insubordinate in the performance of his duties as a teacher in that on or about May 6, 2010, he disregarded the directives of the New York State Education Department regarding the administration of the 2010 New York State Grade 5 Mathematics Test exam by causing students to alter their responses on the exam.

On December 15, 2010, the NYSED appointed Arbitrator Eugene Ginsberg as the Hearing Officer (referred to hereinafter as Arbitrator or Hearing Officer) to preside over the Education Law §3020-a disciplinary proceeding .

On January 7, 2011, the parties participated at a pre-hearing conference. At the pre-hearing conference: (1) Hearing Officer Ginsberg made pre-hearing disclosures on the record regarding his past business relationships and contacts with the School District and the School District's legal representatives, the law firm Ingerman Smith, LLP; (2) the parties agreed on a schedule for discovery; and (3) the parties scheduled dates for the disciplinary hearing.

Hearings were held on March 14, 2011, March 15, 2011, March 31, 2011, April 12, 2011, April 28, 2011, May 26, 2011, June 23, 2011, June 30, 2011, September 19, 2011 and October 11, 2011. The School District presented the testimony of twelve witnesses at the disciplinary hearing to establish the misconduct, insubordination and neglect of duty that formed the basis for the disciplinary charges. The petitioner presented the testimony of fifteen witnesses to establish the petitioner's defense.

Following the submission of post-hearing briefs by the parties, on December 15, 2011, Hearing Officer Eugene Ginsberg signed a written decision, i.e., the Arbitration Award, entitled, "Findings, Decision and Award By Hearing Officer Eugene S. Ginsberg." The Hearing Officer determined that the School District had proven all of the charges that had been filed against the petitioner by a preponderance of the credible evidence, and that petitioner's offenses were sufficiently serious to warrant the termination of his employment. Specifically, the Hearing Officer concluded as follows:

[* 5]

I conclude, and find, that [Petitioner] received, or had knowledge of, the Teachers Directions and the School Administration Manual, or if he did not, he should have known of their existence and content. I do not credit his denials or his lack of recall.

With his lack of prior discipline, had he admitted his error in judgment from the start, the discipline herein might have been different.

[Petitioner,] an experienced sixth year teacher, who administered many State exams knew, or should have known, that interacting, or coaching, students during a test was more than inappropriate. It was wrong and punishable. He admitted he knew coaching was improper . . . He was administering the test in question, although he was not an Administrator. The School Administrator's Manual applied to him.

Whether the student's answers were correct or incorrect is not the factor. The fact is the coaching and interaction in which he engaged.

The overwhelming credible student evidence . . . clearly meets the preponderance of evidence requirement . . . The evidence for that category alone supports the Penalty herein imposed.

The investigation conducted by the District was appropriate. The questions asked in the interviews of the students were sufficient for the purposes of the inquiry. [Petitioner's] arguments that different questioning should have occurred, and the articles submitted relating to children and their memories, were considered and are rejected.

[Petitioner] was accorded due process. The Charges, Bills of Particular and pre-hearing possession of later introduced evidence were sufficient to apprise [Petitioner] of the scope of this proceeding.

[Petitioner] was afforded the opportunity to present arguments, theories and evidence . . . He thought they would be helpful, but ultimately they were not. Some proposed evidence, including that related to, or from his wife, was excluded, because it was not relevant. In this proceeding the technical rules of evidence

[* 6]

> [are] not required [citations omitted]. [Petitioner's] decision was to require the District to meet its burden of proof. It has, by a preponderance of the credible evidence.
>
> Based upon the entire record, testimonial and documentary, I conclude, and find, that all of the Charges have been proven . . .
>
> The [Petitioner] denied the Charges. He has not expressed any regret or remorse. There is, therefore, no assurance such actions would not be repeated in the future. Allowing him to return to the classroom would send the wrong message to students and faculty.
>
> The offenses of [Petitioner] were sufficiently serious to warrant the termination proposed by the District.

On January 4, 2012, the School District adopted a resolution implementing the decision of the Hearing Officer, and in accordance with the Hearing Officer's decision, petitioner's employment was terminated effective January 5, 2012.

On January 10, 2012, petitioner filed the instant application with this court, pursuant to CPLR §7511 and Education Law §3020-a(5), for a judgment vacating the Hearing Officer's award and determination of guilt of the charges.

Initially, it is noted that the petition to vacate the Arbitration Award is timely under Education Law §3020-a(5) which provides that an employee may make an application to the New York State Supreme Court to vacate or modify the arbitration award of a hearing officer pursuant to Section 7511 of the CPLR not later than ten days after receipt of the hearing officer's decision.

Having been represented by counsel at all times, petitioner's time to file the instant petition must be measured from the date on which his counsel received a copy of the Hearing Officer's decision (*Awaraka v. Board of Educ. Of City of N.Y.*, 59 AD3d 442 [2nd Dept. 2009]). Notably, this date is not listed in the petitioner's counsel's affirmation in support of the petition.

Nonetheless, the documentary evidence herein confirms that pursuant to Education Law §3020-a(4), the NYSED sent both the petitioner and the District Clerk of the Rockville Centre Union Free School District copies of the Arbitration Award, via certified mail, return receipt requested, along with letters dated December 23, 2011, advising them of the law governing petitioner's right to appeal. The NYSED letter sent to the petitioner also makes plain that the NYSED simultaneously sent copies of the Arbitration Award to (1) counsel for the petitioner, Scott Lockwood, Esq., and (2) Kathy Gail Bergmann, Esq. Furthermore, according to the certified mail return receipt and the USPS tracking/confirmation receipt, petitioner received the Arbitration Award on December 29, 2011. The School District's legal counsel in the underlying Education Law §3020-a proceeding, John H. Gross, Esq. and Regina M. Cafarella, Esq., also each received separate copies of the Arbitration Award on December 29, 2011. Further, both Mr. Lockwood and Ms. Bergmann, petitioner's counsel herein, received separate copies of the arbitration award on December 29, 2011 as well. Therefore, petitioner's time to file an appeal began to run on December 30, 2011 and expired on January 9, 2012. This court has confirmed that, pursuant to the records of the Nassau County Clerk, counsel for the petitioner filed the instant petition to vacate the arbitration award on January 9, 2012. Accordingly, the petition is timely.

Turning to the merits of the petition to vacate the arbitration award and the merits of the cross-petition seeking to confirm the arbitration award, this court notes the following:

In support of the application to vacate the arbitration award, petitioner argues the following: (1) the award should be vacated due to the partiality of the Hearing Officer; (2) the award should be vacated based upon corruption, fraud and misconduct in procuring the award; (3) the award should be vacated based upon the failure of the Hearing Officer to follow the required procedures under the law; (4) the award and determination of the Hearing Officer was in

violation of the standards required to support an award and determination involving compulsory arbitration; and, (5) the penalty in this matter is grossly disproportionate to the offense charged and shocks the conscience and must be vacated for a new determination before a different Hearing Officer.

In opposition to the petition, and in support of the cross-petition, the respondent School District, argues the following: (1) there is no evidence in the record that supports petitioner's claim of arbitrator bias or petitioner's claim that there was corruption, fraud and misconduct in procuring the award because: [a] the School District's Legal Counsel's appearance before the Hearing Officer in a separate matter that was ongoing at the time of the §3020-a proceeding does not constitute proof of arbitrator bias, corruption or fraud and did not create a conflict of interest; [b] the exclusion of petitioner's sister from the hearing does not constitute proof of actual bias or the appearance of bias; and [c] the Hearing Officer's evidentiary rulings relative to the testimony of petitioner's spouse are not probative of his claim of arbitrator bias; (2) the Hearing Officer followed the procedures required under Article 75 of the CPLR and Education Law §3012-c and therefore the arbitration award is valid and should be confirmed; (3) the arbitration award is in accord with due process, has overwhelming evidentiary support in the record, and is not arbitrary and capricious; and, (4) the Hearing Officer's determination that petitioner's employment should be terminated, based upon his finding of guilt on all of the charges is not disproportionate to the offenses or shocking to one's sense of fairness.

This court begins with the acknowledgment that courts are reluctant to disturb arbitration awards, lest the value of the arbitration method of resolving controversies is undermined (*Matter of Goldfinger v. Lisker*, 68 NY2d 225 [1986]); *Matter of Motors Ins. Corp. (Lewis)*, 221 AD2d 634 [2nd Dept. 1995]). Thus, an arbitrator's award may be vacated only upon the grounds

specified in the CPLR. If the party moving to vacate cannot establish one of the statutory grounds, the award must be confirmed (*Matter of New York City Tr. Auth. v. Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332 [2005]; *Matter of NFB Inv. Servs. Corp. v. Fitzgerald*, 49 AD3d 747 [2nd Dept. 2008]).

Pursuant to Education Law § 3020-a(5) entitled "Disciplinary procedures andpenalties":

> 5. Appeal. Not later than ten days after receipt of the hearing officer's decision, the employee or the employing board may make an application to the New York state supreme court to vacate or modify the decision of the hearing officer pursuant to section seven thousand five hundred eleven of the civil practice law and rules. The court's review shall be limited to the grounds set forth in such section.***

CPLR 7511(b) entitled "Vacating or modifying award", in turn, provides, in pertinent part, as follows:

> (b) Grounds for vacating.
> 1. The award shall be vacated on the application of a party who either participatedin the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:
> (I) corruption, fraud or misconduct in procuring the award; or
> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
> (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 submitted was not made; or
> (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

In petitioning this court to vacate the Hearing Officer's determination of culpability, Brzeski submits that of the four grounds outlined in CPLR 7511(b)(1), the ones applicable to the facts at hand are subsections (I), (ii), and (iv). Subsection (iii) is not applicable in this action.

Initially, it is noted that petitioner's assertion that the penalty in this matter is grossly disproportionate to the offense charged and shocks the conscience and must be vacated for a new determination before a different arbitrator, is not a specific ground in the statute upon which the petitioner may predicate his claim to vacate the award (*Matter of States Mar. Lines (Crooks)*, 13 NY2d 206 [1963]; *DeVitre v. Bohn*, 22 AD2d 856 [1st Dept. 1964]). Indeed, the excessiveness (or inadequacy) of an award, in the absence of any evidence that a strong public policy has been violated, is an insufficient ground for vacating the award (*Berman v. Congregation Beth Shalom*, 171 AD2d 637 [2nd Dept. 1991]; *State University of New York v. Young*, 170 AD2d 510 [2nd Dept. 1991]). Furthermore, petitioner has failed to establish that the penalty imposed by the Hearing Officer herein violates a strong public policy.

Therefore, in light of the overwhelming authority granting arbitrators the right to terminate a teacher (*Altsheler v. Board of Educ. of Great Neck Union Free School Dist.*, 62 NY2d 656 [1984]; *Carangelo v. Ambach*, 130 AD2d 898 [3rd Dept. 1987]), and as stated by the Hearing Officer herein, in light of the petitioner's abject refusal to acknowledge any wrongdoing on his part despite the overwhelming evidence produced at the disciplinary hearing, together with petitioner's lack of remorse about the consequences of his actions for the children at Riverside School, *supra*, there is no basis on which to overturn the Hearing Officer's determination of a penalty of termination.

As to the petitioner's remaining arguments in support of his petition to vacate the arbitration award, for the sake of clarity, this court will address each separately and in turn.

CPLR 7511(b)(1)(I): Corruption, Fraud or Misconduct

This ground requires clear and convincing proof that the arbitrator has engaged in misconduct (*Matter of 645 First Ave. Manhattan Co. v. Kalisch-Jarcho, Inc.*, 220 AD2d 517 [2nd Dept. 1995]), or that the opposing party procured the award through fraud or other misconduct (*Matter of Motors Ins. Corp. (Lewis)*, supra; *Matter of Insinga v. Liberty Mut. Ins. Co.*, 265 AD2d 411 [2nd Dept. 1999]). A mere suspicion of fraud on the part of a party is not a sufficient ground for a vacatur (*State Farm Mut. Auto. Ins. Co. v. Rodriguez*, 121 AD2d 386 [2nd Dept. 1986]) nor is an unsubstantiated claim thereof (*Matter of Klikocki [New York Dept. of Corrections, Mount McGregor]*, 216 AD2d 808 [3rd Dept. 1995]). Further, a party to an arbitration waives his or her right to a vacatur of the award based on arbitrator misconduct where he or she had actual or constructive knowledge of the misconduct, and an opportunity to object thereto, but failed to do so until after the award was rendered (*Lindenhurst Fabricators v. Iron Workers Local 580*, 206 AD2d 282 [1st Dept. 1994]).

Notably, in this case, petitioner claims that the factual reasons underlying his claim of "corruption, fraud and misconduct" are the same as his claim for "partiality." That is, the petitioner claims that the Hearing Officer dissimilarly treated similar evidentiary rulings, repeatedly precluded "clearly relevant evidence," "acknowledg[ed] that one party's evidence is being treated differently than another's," and failed to disclose relationships between one side and the Hearing Officer (Petitioner's memo of law, pp. 12-13).

First, the Hearing Officer's preclusion of evidence which may have been irrelevant is not such misconduct as will justify a vacatur of the award (*Matter of English v. New York City Tr. Auth.*, 203 AD2d 288 [2nd Dept. 1994]).

Secondly, although counsel for the petitioner notes several pages worth of testimony which he claims represents that the Hearing Officer dissimilarly treated similar evidentiary rulings, this court is not persuaded that such testimony and dialogue between counsel and the arbitrator demonstrates any misconduct by the Hearing Officer. Furthermore, even if the Hearing Officer erroneously limited the petitioner's evidence and excluded certain other evidence proffered by the petitioner, the Hearing Officer's erroneous evidentiary ruling does not constitute misconduct sufficient to require vacatur of the award, particularly where the petitioner does not have any hard or conclusive evidence to support his contentions (*Matter of New York State Inspection, Sec. and Law Enforcement Empls. Dist. Council 82, Am. Fedn. of State, County and Mun. Empls., AFL-CIO (Coughlin)*, 183 AD2d 1034 [3rd Dept. 1992]). Here, the petitioner submits that based upon the dialogues during the hearings between counsel and the Hearing Officer:

> [O]ne can readily see that the position of the arbitrator has shifted on the issue of hearsay evidence and the arbitrator is taking a different approach to hearsay evidence presented by Mr. Brzeski as part of his direct case. It should also be noted that, as the testimony of Paul Barrett made clear, the "kind of hearsay" in Mrs. Brzeski's testimony is no different from the hearsay testimony presented by the school district. Indeed, given the fact that mother of a twelve year old child was refusing to have her child produced for the arbitration, a case could be made that the child was "unavailable" thereby necessitating the use of secondary testimony as opposed to the hearsay presented by the Charging Party in the tribunal below.

This court does not agree that the Hearing Officer's evidentiary ruling constitutes hard or conclusive evidence and rises to a level so prejudicial as to constitute misconduct sufficient to justify judicial interference. The documentary evidence confirms herein that the Hearing Officer had initially stated that "hearsay objections would be waived and we would continue with

hearsay and it would come in and you would give it the weight, not that it would be precluded, you would give it the weight." It is equally true that the Hearing Officer subsequently precluded the testimony of the petitioner's wife who purportedly overheard a conversation between a student and school administration. However, this court does not agree that the different evidentiary rulings constitute "hard and conclusive evidence" of dissimilar treatment of similar evidentiary rulings. The fact is that the Hearing Officer determined that the testimony of the petitioner's wife was "not sufficient or better evidence" than the testimony of the student herself. Specifically, the Hearing Officer made clear the following:

> HEARING OFFICER: . . . I'm not having the primary target or the primary presenter of the evidence [the student]. I'm going to hear her [the petitioner's wife's] evidence?
>
> What I said early on, and maybe I'm going to repeat this, is we have a relaxed evidentiary standard here in terms of proof. And I think that what I said, but I'm saying it again now, the more important the proof is of what you're trying to establish give me the better evidence.
>
> I'm telling you now, that kind of hearsay is not sufficient or better evidence.
>
> It is precluded because of my belief that the current witness would not be appropriate to give me that kind of helpful evidence, so be it. You may conclude from that.
> I'm rejecting your utilization of this witness to elicit what you have just told me will be her assistance to me in what I have to consider.

Even if incorrect, the Hearing Officer's misinterpretation of a rule of law is not so prejudicial as to constitute misconduct sufficient to justify judicial interference (*Maross Constr. v. Central NY Regional Transp. Auth.*, 66 NY2d 341 [1985]; *Financial Clearing & Servs. Corp. v. Katz*, 172 AD2d 290, 291 [1991]).

Thus, in the absence of any evidence constituting misconduct, the application to vacate the arbitration award, pursuant to CPLR 7511(b)(1)(I) is denied.

Petitioner's contention that the Hearing Officer failed to disclose relationships between one side and the Hearing Officer goes to the partiality of the Hearing Officer, a separate basis for vacatur of the award under CPLR 7511, *infra*.

CPLR 7511(b)(1)(ii): Partiality of an Arbitrator

Like CPLR 7511(b)(1)(I), a claim of arbitrator bias must be established by clear and convincing proof (*Matter of 645 First Ave. Manhattan Co. v. Kalisch-Jarcho, Inc.*, supra; *Matter of Public Empls. Fedn. (Dasrath)*, 191 AD2d 569 [2nd Dept. 1993]) demonstrating more than a mere inference of partiality (*Rose v. Lowrey & Co.*, 181 AD2d 418 [1st Dept. 1992]). Wholly speculative allegations of bias and purported conflicts of interest on the part of the arbitrator are insufficient to support a petitioner's contention that the arbitrator's award should be vacated based on the alleged partiality of the arbitrator (*Matter of Meisels v. Uhr*, 79 NY2d 526 [1992]). Having said that, the arbitrator bears the burden of disclosure to the parties of all facts which might reasonably cause one of the parties to ask for his or her disqualification and might give rise to an inference of bias (*Matter of J. P. Stevens & Co. (Rytex Corp)*, 34 NY2d 123 [1974]; *Falcon Forwarding Co. v. Moran*, 84 AD2d 777 [2nd Dept. 1981]). The arbitrator need not reveal every facet of his or her past but must follow reasonable judgment in disclosing potentially disqualifying facts (*Matter of J. P. Stevens & Co. (Rytex Corp)*, supra). Absent a showing that the arbitrator and the party or witness have an *ongoing* relationship, occasional past associations between a neutral arbitrator and a party or a witness do not warrant the vacatur of an award (*Matter of Henry Quentzel Plumbing Supply Co. v. Quentzel*, 193 AD2d 678 [2nd Dept. 1993]).

Moreover, even if the court determines that the Hearing Officer should have disclosed his involvement in a prior proceeding involving one of the parties or their counsel, in order to provide a basis for vacatur of award, there must still exist evidence that the prior proceeding had an effect upon the arbitrator's ability to be neutral in the current arbitration and that the arbitrator breached his/her duty to remain impartial (*Matter of Atlantic Purch., Inc. v. Airport Props. II, LLC,* 77 AD3d 824 [2nd Dept. 2010]).

Furthermore, if a party goes forward with the arbitration having actual knowledge of the arbitrator's bias or of facts that reasonably should have prompted further inquiry, it may not later claim bias based upon the arbitrator's failure to disclose such facts (*Matter of J. P. Stevens & Co. (Rytex Corp)*, supra; *Falcon Forwarding Co. v. Moran*, supra). However, where such prejudice is known to the party before completion of the arbitration proceeding but no objection is raised until well after the award has been rendered the party going forward with the arbitration waives any claim relating to an arbitrator's alleged prejudice (*Matter of Namdar (Mirzoeff)*, 161 AD2d 348 [1st Dept. 1990]).

In this case, the record is clear. At the pre-trial hearing in this matter, the Hearing Officer made the following statement on record:

> I've got a couple of disclosures to make. I have had prior appearances before me by members and representatives of Ingerman Smith. I quickly counted seven or eight over the past ten years in various forums. I know John Gross professionally through the State Bar Association for more years that we both want to remember and my prior firm, in which I was a named partner and I'm out 15 years ago, my expertise area included surplus school buildings, sales and leases and I believe I did one for Rockville Centre and it's got to be more than 15 years ago. Of course, I would know the Complainant, Mr. Johnson, because he was superintendent when I was there.

Petitioner acknowledges that while the Hearing Officer made this disclosure on the record, this statement is inaccurate because, petitioner argues, this suggests only that the Hearing Officer had occasional encounters in the past and had no current, ongoing hearings or relationships. Petitioner submits that as this case proceeded, "it became clear that the relationship between counsel for the school and the arbitrator was much more" which ultimately led them – counsel for the petitioner – to make an application on the record for the recusal of the arbitrator based upon a claim of bias. Specifically, petitioner submits the affidavit of his counsel, Kathy Bergmann, Esq., who states that the arbitrator was *apparently* getting further business from the counsel for the school district. Counsel for the petitioner argues that:

> [I]f prior appearances needed to be disclosed [by the arbitrator] than [sic] how much more important is it for the arbitrator to disclose contemporaneous hearings between those two parties. Contemporaneous proceedings between the same arbitrator and attorney handling the arbitration for the firm are much more than fleeing or occasional contacts. It is because of these undisclosed contemporaneous relationships and the arbitrator's purposeful nondisclosure of these relationships that Petitioner herein claims the arbitration in this matter was partial towards the Respondent herein.

This forms the basis of petitioner's claim of the arbitrator's bias. Notably, petitioner does not dispute that the Hearing Officer made the appropriate pre-hearing disclosures on the record regarding his *past* business relationships and contacts with the District and the District's legal representatives, Ingerman Smith, LLP and John Gross, Esq. Indeed, counsel for the petitioner also never claims that he did not interpose any objections to the Hearing Officer's continued service based on such pre-hearing disclosures. Rather, the basis of petitioner's claim for partiality and bias of the Hearing Officer is a separate proceeding involving the Freeport Union Free School District, which is apparently represented by Ingerman Smith, LLP. Counsel for the

[* 17]

plaintiff claims that with respect to the Freeport Hearing, the Hearing Officer and the counsel for the School District, in an *open* discussion that occurred in the presence of petitioner's attorney, Kathy Gail Bergmann, Esq., were attempting to schedule a fact finding hearing.

First, it is noted that in light of the fact that the conversation with respect to the Freeport Hearing took place in the open presence of petitioner's attorney, this court cannot find that such nondisclosure was "purposeful" thereby rendering petitioner's argument that there was "fraudulent concealment" meritless.

Further, since petitioner's counsel, Ms. Bergmann, was clearly in the room at the time of the Freeport Hearing conversation and had the facts that should have prompted further inquiry then, it is clear that counsel for the petitioner went forward with the hearing on September 19, 2011 and October 11, 2011, without objection, and never raised the issue at any time prior to the issuance of the arbitration award on December 15, 2011 (*Matter of J. P. Stevens & Co. (Rytex Corp)*, supra).

Next, even assuming that the petitioner is correct to require the Hearing Officer to make an on the record disclosure with respect to his involvement in the Freeport Hearing, the petitioner fails herein to establish that the Hearing Officer's involvement in the Freeport Hearing created actual bias, a presumption of bias or gave rise to a conflict of interest. In the absence of any evidence showing an actual conflict of interest, this court finds that the disclosure by the Hearing Officer was not required in the first place.

Furthermore, the respondent herein has sufficiently rebutted the petitioner's contention that Hearing Officer Ginsberg was "simultaneously openly benefitting from the Charging Party's association" suggesting that the Freeport Union Free School District or their law firm, Ingerman Smith, was compensating Ginsberg for the fact finding services at the Freeport Hearing, by

furnishing a letter from the Public Employment Relations Board's Director of Conciliation confirming the circumstances of Ginsberg's independent appointment and the manner in which Ginsberg was compensated for his services as fact finder n the Freeport matter (Respondent's Exhibit 5). This letter provides sufficient evidence to render Bergmann's accusation that Ginsberg was "simultaneously openly benefitting from the Charging Party's association" false and frivolous and based upon nothing more than an accusation.

Therefore, in the absence of any evidence of partiality by the Hearing Officer, the application to vacate the Arbitration Award, pursuant to CPLR 7511(b)(1)(ii) is also denied.

CPLR 7511(b)(1)(iv): Failure to follow the procedure of this article

An arbitration award must be vacated if the court finds that the rights of that party were prejudiced by a failure to follow the procedure of CPLR Article 75, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection. Thus, an arbitrator's refusal to, for example, introduce evidence as required by the CPLR (CPLR 7506[c],[d]) constitutes prejudicial error requiring that the arbitration award be vacated (*Matter of Nixon Taxi Corp.*, 128 AD2d 616 [2nd Dept. 1987]; *Mikel v. Scharf*, 85 AD2d 604 [2nd Dept. 1981]). Prejudice is required in order for an award to be vacated upon the application of a participating party. Except for an arbitrator's denial of a party's right to representation by an attorney, which right may not be waived (CPLR 7506[f]) a defect in procedure is waived where the party applying to vacate the award based thereon continues with the arbitration with notice of the defect and without interposing an objection to it (*Block v. St. Paul Fire & Mar. Ins. Co.*, 137 AD2d 475 [2nd Dept. 1988]).

In this case, petitioner contends that the Hearing Officer failed to follow the procedures set forth under Article 75 and the Rules promulgated by the Commissioner of Education by

precluding his two defenses, "thereby effectively depriving him of any defenses to the charge" (Petitioner's memo of law, p. 16); to wit, (1) both the petitioner and his wife had been improperly terminated from their positions, and that the administration, in particular, Ms. Bock, together with same parental help, trumped up the charges against him; and, (2) the students were improperly being coerced by the administrators in an effort to have the petitioner terminated (*Id.* at pp. 16-17). Petitioner claims that in the underlying disciplinary proceeding, the Hearing Officer's rulings with respect to the testimony of petitioner's wife, *supra*, did not comply with the procedural requirements of the CPLR Article 75 or Education Law §3020-a because they denied the petitioner the opportunity to defend himself.

CPLR 7506[c] provides in pertinent part: "The parties are entitled to be heard, to present evidence and to cross-examine witnesses." Education Law §3020-a(3)(c)(I) further provides, "the employee shall have a reasonable opportunity to defend himself or herself and an opportunity to testify in his or her own behalf."

Based upon the voluminous record presented for this Court's consideration, it is clear that despite the School District's arguments that petitioner's allegations of conspiracy were in no way relevant to the Charges, the Hearing Officer nonetheless allowed the petitioner to present ample evidence in furtherance of his defense of student coercion and conspiracy. Indeed, the bulk of the record before this Court consists of, *inter alia*, the statements of students and school administrators. Petitioner was permitted to present testimony from fourteen witnesses of his own choosing in the underlying proceeding and he was permitted to examine a number of individuals to develop his theory of student coercion and conspiracy. He was also permitted to testify in his own behalf.

Based upon the extensive record in the underlying 3020-a proceeding, submitted for this court's consideration, this court finds that the petitioner's argument that he was denied the opportunity to defend himself is unsubstantiated and wholly meritless. Indeed, based upon the record presented, it is clear that the petitioner was given the opportunity to be heard, the opportunity to defend himself, the opportunity to testify on his own behalf and the opportunity to cross examine each and every witness who testified at the disciplinary hearing as is required under CPLR 7506[c] and Education Law §3020-a(3)(c)(I).

As to the Hearing Officer's decision to preclude petitioner's spouse, as stated above, the Hearing Officer was clearly within his powers to preclude that testimony, on the grounds that the petitioner's wife was not the appropriate witness to be utilized by the petitioner for that purpose.

In light of the fact that the petitioner has failed to present any evidence that the Hearing Officer failed to follow the procedures of CPLR 7511 and/or Education Law §3020-a, his application to vacate the Arbitration Award, pursuant to CPLR 7511(b)(1)(iv) is also denied.

A school board in a disciplinary case against a tenured teacher is free to draw reasonable conclusions from facts on the record and, on review, a court may only determine if those conclusions can be rationally supported (*Matter of Kinsella v. Board of Educ. Of Cent. School Dist. No. 7 of Towns of Amherst and Tonawanda*, 64 AD2d 738 [3rd Dept. 1978]). Thus, when reviewing compulsory arbitrations in education proceedings such as this, this court "should accept the arbitrators' credibility determinations, even where there is conflicting evidence and room for choice" (*Matter of Saunders v. Rockland Board of Cooperative Educ. Services*, 62 AD3d 1012, 1013 [2nd Dept. 2009]). Where the record does not support the inference that the witnesses upon whose testimony the hearing officer relied were incredible as a matter of law, it is

improper for the court to interfere with the hearing officer's credibility determinations (*Lackow v. Dept. of Education of the City of NY*, 51 AD3d 563 [1st Dept. 2008]).

Based upon this court's reading of the extensive record, and even affording the record and the Hearing Officer's determination a "closer judicial scrutiny" (*Motor Veh. Acc. Indem. Corp. v. Aetna Cas.& Sur. Co.*, 89 NY2d 214, 223 [1996]), this court finds that the arbitration award herein is in accord with due process and supported by adequate evidence in the record (*Id*; *see also*, *Motor Veh. Mfrs. Assn. Of U.S. v. State of New York*, 75 NY2d 175 [1990]).

Having found a rational basis for the Hearing Officer's decision, petitioner, Richard Brzeski's application to vacate the Hearing Officer's award and determination of guilt of the charges is **DENIED.**

Accordingly, the Respondent, School District's cross petition for an Order and Judgment pursuant to CPLR Article 75 confirming the aforementioned Arbitration Award is **GRANTED** (*Matter of New York City Tr. Auth. v. Transport Workers' Union of Am., Local 100, AFL-CIO*, supra; *Matter of NFB Inv. Servs. Corp. v. Fitzgerald*, supra).

The parties' remaining contentions have been considered by this Court and do not warrant discussion.

This shall constitute the decision and order of this court. All applications not specifically addressed are denied.

Settle Judgment on Notice.

Dated: Mineola, New York
April 18, 2012

ENTER:

HON. JEFFREY S. BROWN, JSC

ENTERED
APR 24 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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