

Matter of Desvarieux v New York City Dept. of Educ.
2012 NY Slip Op 32852(U)
November 19, 2012
Sup Ct, Queens County
Docket Number: 3172/12
Judge: Robert J. McDonald
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SHORT FORM ORDER
NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. ROBERT J. McDONALD
Justice

IAS PART 34

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In the Matter of the Application of

Index No.: 3172/12

CAMILLE DESVARIEUX,

Motion Date: 6/21/12

For a Judgment pursuant to Article 75 of
the CPLR

Motion No.: 12

Motion Seq.: 1

Petitioner,

- against -

NEW YORK CITY DEPARTMENT OF EDUCATION,
DENNIS M. WALCOTT Chancellor, NEW YORK
CITY DEPARTMENT OF EDUCATION, CITY OF NEW
YORK,

Respondents.

- - - - - x

The following papers numbered 1 to 13 on this motion:

	<u>Papers Numbered</u>
Petitioner's Notice of Petition-Affirmation- Affidavit(s)-Service-Exhibit(s)	1-4
Respondents' Notice of Cross-Motion & Memorandum of Law	5-7
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In this proceeding brought pursuant to CPLR 7511, petitioner Desvarieux moves to vacate an arbitration award, dated January 20, 2011, which resulted in the termination of his employment as a New York City public school teacher. Respondents New York City Department of Education (DOE) and The City of New York cross-move to dismiss the petition.

Desvarieux was employed by respondent DOE as a tenured teacher of social studies at Martin Van Buren High School in Queens, New York from 2002 until 2011, at which time he was terminated from the subject employment. While assigned to Van Buren High School, Desvarieux received unsatisfactory performance ratings for several years. As a result, the DOE brought six (6) specifications or charges against Desvarieux, inter alia, for neglect of duty, failure to follow procedures and carry out normal duties, and incompetent service during the 2008-2009, 2009-2010 and 2010-2011 school years, pursuant to Education Law § 3020-a, as follows:

SPECIFICATIONS

1) During the 2009-2010 school year, [Desvarieux] displayed poor personal and professional qualities and committed an act of verbal abuse by speaking to students to an inappropriate tone and manner and stated to students keep laughing, you'll be sorry [sic].

2) During the 2008-2009, 2009-2010 and 2010-2011 school years, [Desvarieux] neglected his duties, displayed poor personal and professional qualities, and was insubordinate towards school administrators by:

(a) Yelling at the administration in front of a classroom full of students;

(b) Leaving the classroom during instructional time;

(c) failing to create and maintain a classroom conducive to an effective educational experience;

(d) Failing to attend Department meetings;

(e) Failing to attend professional development after being directed by the administration to do so;

(f) failing to use allotted time for instruction;

(g) failing to effectively and efficiently write lesson plans; and

(h) failing to follow an action plan developed to improve his instructional practices, after being directed by the administration to do so.

3) During the 2008-2009, 2009-2010 and 2010-2011 school years, [Desvarieux] failed to effectively plan and provide instruction for his students as exemplified by:

(a) failing to ensure and assess students' understanding of lessons;

(b) failing to keep students on-task and engaged;

(c) failing to differentiate instruction;

(d) failing to review and hold students accountable for homework and class work; and

(e) failing to effectively engage student participation

during classroom instruction.

4) During the 2008-2009, 2009-2010 and 2010-2011 school years, [Desvarieux] failed to effectively manage his classroom by:

- (a) failing to implement classroom rules and routines;
- (b) failing to maintain a safe and secure environment;
- (c) failing to ensure order in his classes;
- (d) failing to address students' off task behavior;
- (e) failing to maintain acceptable levels of attendance and punctuality of his students; and
- (f) failing to address student punctuality and attendance daily.

5) During the 2008-2009, 2009-2010 and 2010-2011 school years, [Desvarieux] failed to properly and/or adequately plan and execute lessons as documented in observation reports dated:

- (a) May 7, 2010;
- (b) April 21, 2010;
- (c) March 18, 2010;
- (d) December 17, 2009;
- (e) October 21, 2009;
- (f) September 23, 2009;
- (g) May 19, 2009;
- (h) March 23, 2009;
- (i) February 23, 2009; and
- (j) November 25, 2008.

6) During the 2008-2009, 2009-2010 and 2010-2011 school years, [Desvarieux] repeatedly failed to implement directives, recommendations, counsel, instruction and professional development from observation conferences and meeting with school staff with regard to:

- (a) effective instructional management;
- (b) effective use of instructional time;
- (c) effective classroom instruction; and
- (d) effective lesson construction and planning.

As a result of the foregoing, respondent DOE sought to terminate Desvarieux's employment.

THE HEARING

As part of the agreement between DOE and the teachers' union, compulsory arbitration was mandated and a hearing officer was selected to hold a hearing to determine DOE's charges against Desvarieux. A pre-hearing conference was held by telephone on May 25, 2011. The arbitration hearing was held over a period of

several days on June 2, 16,17, 21, 23 and 24; July 14 and 15; and August 17 and 18, 2001.

Both parties called witnesses to testify at the hearing which included Ms. Marilyn Shevell, the principal of Van Buren High School who had served in that capacity for 11 years prior to the date of the hearing and testified that Desvarieux repeatedly demonstrated poor classroom management techniques when she observed him in the classroom in March 2010; Ms. Darlene Bullock, Assistant Principal of the social studies department at Van Buren High School, who served as Desvarieux's direct supervisor during the 2010-2011 school year and observed him in the classroom during that period; Ms. Rhonda Huegel, Co-Assistant Principal of the social studies department at Van Buren High School in 2008, who observed Desvarieux in the classroom several times in 2008 and offered him assistance to improve his lessons; Mr. Blayne Gelbman, Dean and social studies teacher at Van Buren High School for approximately five years, who observed violations of school policy and the chancellor's regulations regarding cell phone use occur in Desvarieux's classroom during the 2008-2009 academic year; Mr. Angelo Marra, Assistant Principal of the social studies department at Van Buren High School from 2007-2009 and Desvarieux's immediate supervisor; Assistant Principal Prenner; and Mr. Frank Bancone, a dean and union representative at Van Buren High School, who advocated for Desvarieux by discussing any purported contract violations when the teacher filed a grievance but whom admittedly was never present in the classroom to observe him; and Desvarieux, who testified on his own behalf.

Among other things, the testimony elicited by DOE demonstrated that during the academic years between 2008 and 2011, Desvarieux failed to create a classroom that is conducive to an effective educational experience; ensure his students' understanding of the lessons, keep students on task and engaged, differentiate instruction, and hold students accountable for completing their work. He repeatedly received unsatisfactory ratings after observations of him in the classroom were conducted.

The evidence also included testimony that during the 2008-2009 school year, Desvarieux attended a social studies department meeting held by Assistant Principal Marra to discuss requirements for all social studies faculty. The faculty was directed to incorporate writing activities and higher order thinking questions into lesson plans and should give all students assigned seats so that friends do not sit together and disrupt the class. Based upon his observations of Desvarieux's classroom, Assistant Principal Marra noted that Desvarieux failed to follow either of those directives.

Assistant Principal Huegel succeeded Assistant Principal Marra Marra as head of the social studies department during the 2008-2009 academic year and offered assistance to Desvarieux by suggesting that he attend weekly meetings with her. In response, Desvarieux rejected her offer. She also provided Desvarieux with a copy of her written observation reports wherein she provided information on ways he could improve his lessons, including the formation of temporary learning groups to allow for differentiation of instruction and provide students an opportunity to converse and learn from one another. She further instructed him to ask critical thinking questions and include a summary in his lessons. Assistant Principal Huegel also gave Desvarieux advice on how to differentiate instruction and ask critical thinking questions. Her testimony demonstrated that he did not incorporate any of her instructions or follow her advice.

During the 2009-2010 school year, Desvarieux had the benefit of one on one planning sessions with Assistant Principal Prenner as well as four written observation reports from her. Assistant Principal Prenner testified about Desvarieux's teaching deficiencies and that she discussed those with Desvarieux. She stated that she gave him specific, concrete suggestions on how to improve his lesson plan and class management. Although it was conceded that Desvarieux improved his lesson planning, there was little evidence that he followed Assistant Principal Prenner's suggestions for improving the execution of his lessons and, on occasion, rejected her suggestions by doing the contrary.

There was also testimony that during the 2010-2011 academic year, Assistant Principal Bullock made arrangements for Desvarieux to have inter-visitations with other teachers so that he could learn some techniques for managing his class. She indicated, however, that he failed to acknowledge that there was anything he could learn from his peers that would help him in his classes.

Desvarieux testified, among other things, that he was deprived of remediation, that he was never offered individual professional development, and that he sought help but did not receive it. He also claimed that observation reports were not true, the administrators were not credible, and that no matter what he did or how he performed he would be rated as unsatisfactory because he was a "target."

After a full evidentiary hearing, the hearing officer issued an Award finding Desvarieux guilty of specifications 2c, 2d, 3a, 3b, 3c, 3d, 4b, 4c, 5a, 5b, 5c, 5d, 5e, 5g, 5h, 5i, 5j, 6a, 6b, 6c and 6d. Specifications 1, 2a, 2b, 2e, 2f, 2g, 2h, 3e, 4a, 4d, 4e, 4f and 5f were dismissed.

The hearing officer found that there is substantial evidence in the record of Desvarieux's deficiencies in effective instructional management, effective use of instructional time, effective classroom instruction, and effective lesson construction and planning. The hearing officer also also rejected Desvarieux's claims as not credible and/or contradicted by his own testimony. She determined that Desvarieux had been counseled about ongoing and serious deficiencies in his teaching but refused help or to acknowledge that there is anything wrong with his teaching and that he needs to change; thus, providing her with no basis to conclude that he would change in the future. As a result, the hearing officer imposed a penalty for Desvarieux's culpability under the sustained charges of immediate termination of his employment with respondent New York City Department of Education.

DISCUSSION

There is a strong public policy in New York State favoring arbitration as method of dispute resolution and arbitration is routinely relied upon for an expeditious resolution of disputes by arbitrators with practical knowledge of a subject area. (*Matter of Goldfinger v Lisker*, 68 NY2d 225 [1986].) Courts are reluctant to set aside arbitration awards even when arbitrators err in deciding the law or facts "lest the value of this method of resolving controversies be undermined." (*Matter of Goldfinger v Lisker*, 68 NY2d 225, supra.) The policy favoring arbitration gives rise to judicial deference because "it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded." (*Id.*) Moreover, "consistent with this strong public policy, there are few grounds for vacating arbitration awards and they are narrowly applied." (*Stergiou v New York City Dept. of Educ.*, 34 Misc 3d 1229(A), 2012 WL 593099 [2012].)

Pursuant to CPLR § 7511(b)(1), the grounds for vacating an award where the parties participated in the arbitration are as follows: "(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 [or her] 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 in this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection." Education Law § 3020-a limits judicial review of a hearing officer's determination and award to the aforementioned grounds set forth in CPLR § 7511. However, insofar as the parties are subject to

mandatory arbitration, the award must also satisfy further judicial scrutiny in that it "must have evidentiary support and cannot be arbitrary and capricious." (*City School District of the City of New York v McGraham*, 17 NY3d 917 [2011], quoting *Matter of Motor Vehicle Accident Indemnity Corp. v Aetna Casualty & Surety Co.*, 89 NY2d 214, 223 [1996]; *Lackow v Department of Educ.*, 51 AD3d 563 [2008].) Thus, where a matter has been arbitrated pursuant to an agreement between the parties, the award may not be set aside unless it violates a strong public policy, is totally irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power. (*Matter of Town of Callicoon [Civil Serv. Empls. Assn., Town of Callicoon Unit]*, 70 NY2d 907, 909 [1987]); *Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100*, 14 NY3d 119, 124 [2010].) It is clear, therefore, that judicial review of this matter involves the application of both CPLR Article 75 and Article 78.

Upon a review of the record the court finds that the hearing officer's determination is not totally irrational, does not violate a strong public policy, and does not exceed a specifically enumerated limitation on the arbitrator's power. Moreover, the hearing officer's determination was supported by the evidence and was neither arbitrary or capricious. Nor does the penalty of termination imposed in this matter shock the conscience and did not constitute an abuse of discretion so as to warrant the court to revise the sanction. (*Matter of Pell v Board of Educ.*, 34 NY2d 222 [1974]; see *Matter of Short v Nassau County Civil Service Commission*, 45 NY2d 721 [1978]; cf., *Matter of Harris v Mechanicville Cent. School Dist.*, 45 NY2d 279 [1978].)

Accordingly, the application to vacate the hearing officer's determination must be and is hereby denied.

In light of the foregoing, the cross motion to dismiss the petition is granted. Further, the court recognizes that City of New York was not the petitioner's employer and, in any event, was not a proper party to this action. (Education Law § 2590-g(2).)

This constitutes the decision, judgment, and order of the Court.

Dated: Long Island City, NY
November 19, 2012

ROBERT J. McDONALD
J.S.C.