

Davies v New York City Dept. of Educ.

2012 NY Slip Op 33652(U)

June 14, 2012

Sup Ct, New York County

Docket Number: 100349/11

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

NAOMI DAVIES,
Petitioner,

INDEX NO. 100349/11
MOTION DATE 05-02-2012
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

For an Order Pursuant to Article 75
of the Civil Practice Law and Rules

-against-

NEW YORK CITY DEPARTMENT OF
EDUCATION,
Respondent,

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

The following papers, numbered 1 to 6 were read on this petition to/for Art. 75
and Cross-Motion to Dismiss the Petition

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____

PAPERS NUMBERED
<u>1 - 3</u>
<u>4 - 5, 6</u>

Cross-Motion: Yes No

Upon a reading of the foregoing papers, it is ordered and adjudged that the petition pursuant to CPLR § 7511, and Education Law §3020-a to vacate the arbitrator's decision and remand this matter for a determination of a lesser penalty, is granted. The cross-motion to dismiss the petition pursuant to CPLR §3211[a][5],[7], and CPLR §404[a], is denied.

Petitioner seeks an Order pursuant to CPLR 7511, vacating and setting aside an arbitrator's decision and award that resulted in dismissal from her teaching position in the Department of Education. Petitioner claims that the arbitrator exceeded his authority, and that the final determination is excessive.

Respondent opposes the petition and cross-moves to dismiss. Respondent withdrew its claim for dismissal under CPLR §3211[a][5], and only seeks to dismiss under CPLR §3211[a],[7] for failure to state a cause of action. Pursuant to CPLR §404[a], respondent seeks to interpose an answer to the petition.

Pursuant to Education Law §3020-a the petition to vacate a determination of a hearing officer or arbitrator, requires that the Court apply the standard set forth in CPLR §7511. The standard for granting a petition pursuant to CPLR §7511 is to, "show misconduct, bias, excess of power, or procedural defects." An arbitrator's award can be set aside if it violates strong public policy or is totally irrational (Austin v. Board of Education of the City School Dist. Of City of New York, 280 A.D. 2d 365, 720 N.Y.S. 2d 344 [N.Y.A.D. 1st Dept., 2001] and Matter of Pell v. Board of Education, 34 N.Y. 2d 222, 356 N.Y.S. 2d 833, 313 N.E. 2d 321 [1974]). Compulsory arbitration has stricter judicial scrutiny. After compulsory arbitration the determination, "must be in accord with due

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78" (Lackow v. Dept. of Education (or "Board") of City of New York, 51 A.D. 3d 563, 859 N.Y.S. 2d 52 [N.Y.A.D. 1st Dept., 2008]; City School Dist. of the City of New York v. McGraham, 75 A.D. 3d 445, 905 N.Y.S. 2d 86 [N.Y.A.D. 1st Dept., 2010]).

The burden of proof is on the party challenging the determination to show that it is invalid (Lackow v. Dept. of Educ. (or "Board") of City of New York, 51 A.D. 3d 563, supra; Austin v. Board of Educ. of the City School Dist. of City of New York, 280 A.D. 2d 365, supra). Hearsay evidence can be the basis for the administrative determination (Gisors v. New York City Dept. of Educ. for City School Dist. Region 10, 94 A.D. 3d 584, 942 N.Y.s. 2d 108 [N.Y.A.D. 1st Dept., 2012]). A hearing officer's finding that the testimony was inconsistent or lacked credibility is not a basis to vacate the award (Lackow v. Dept. of Educ. (or "Board") of City of New York, 51 A.D. 3d 563, supra). A claim of actual bias or misconduct by a hearing officer requires clear and convincing evidence, inference of partiality is not enough to vacate the award (Zrake v. New York City Dept. of Educ., 41 A.D. 3d 118, 838 N.Y.S. 2d 31 [N.Y.A.D. 1st Dept., 2007]).

The petitioner is a tenured teacher with twenty-two (22) years of service, and no prior disciplinary charges. She was retained to teach eighth grade English by the East Bronx Academy for the Future (EBA) starting the September 2007 school year. Petitioner did not have prior experience teaching eighth grade students. She taught English at EBA for two years and in 2009 was charged with specifications seeking termination based on unsatisfactory performance. Petitioner was accused of not following disciplinary procedures as outlined in the "staffulty" handbook; failing to submit daily lesson plans; failure to keep records of grades, attendance and student work; delivery of unsatisfactory lessons and failing to effectively implement recommendations of administrators, peer observers, peer teachers, consultants and coaches.

A hearing took place over the course of fifteen days with witnesses and other evidence submitted. Amongst the evidence submitted was, the Chancellor of the New York City Department of Education's "Citywide Standards of Discipline and Intervention Measures," petitioner's Annual Performance Review, written complaints by petitioner and students (Cross-Mot. Exh. R & S), and Logs of Assistance (Mot. Exh. D). The arbitrator, Richard M. Gaba, Esq., rendered a decision dated December 18, 2010, finding that almost all of the specifications were sustained (Mot. Exh. A). The arbitrator found that petitioner resisted efforts of school administration to help her become a satisfactory teacher, failed to make necessary efforts to improve and determined she should be dismissed from her teaching position.

Petitioner claims that the arbitrator's determination was excessive and disproportionate to the charged conduct. She claims the arbitrator ignored a history of physical and sexual assaults by the students that went undisciplined by school administration in violation of the Chancellor's Regulations and Code of Student Conduct. Petitioner also claims that the Logs of Assistance relied on by the arbitrator, were incomplete and disclose many inappropriate entries that were overlooked, including assistance in the form of substitute teachers on days she was not teaching, and counting staff or disciplinary meetings as assistance. Petitioner states that she was not sent to classes or offered a course, even though she did not have any training in the "workshop model" the school asked her to follow.

Petitioner refers to another hearing conducted conterminously with hers, Dept. of Education v. Jane Lewinter, SED File # 13, 498, involving a tenured science teacher at (EBA,) that came from another school, and never previously used the "workshop model." The Department of Education in the *Lewinter* matter claimed that despite significant assistance she was not capable of imparting knowledge to students. The hearing officer in the *Lewinter* matter, found the Logs of Assistance incomplete and not tailored for the needs of the teacher, and that the Department failed to take reasonable steps to permit, encourage or otherwise assist in improving her performance. The award in the *Lewinter* matter found that Department did not sustain its burden of proof to justify discharge but that her performance was substandard. Jane Lewinter was suspended without pay for six months, and directed to take classes/workshops, up to six sessions, in classroom management sessions or any area selected by, and paid for by the Department. The petitioner seeks to have the December 18, 2011 determination remanded for a lesser punishment consistent with the facts and mitigating factors as stated in the *Lewinter* matter.

Respondent seeks to dismiss the petition claiming that it fails to state a cause of action. Respondent states that the arbitrator considered all of petitioner's claims, including those concerning physical and sexual assault and found them unavailing. Respondent also states that the arbitrator found the record established that petitioner had more than twenty years of experience, should have been able to comply with the recommendations provided, and refused all efforts at remediation. Respondent distinguishes the *Lewinter* matter claiming that Ms. Lewinter made requests for assistance which were not properly addressed, but the petitioner did not seek assistance. Respondent claims that petitioner has not demonstrated that a lesser penalty was warranted or alleged facts sufficient to vacate or modify the arbitrator's determinations. Alternatively, pursuant to CPLR 404[a], respondent seeks to submit an answer.

Pursuant to CPLR 404[a], the Court may permit the respondent to submit an answer after denial of its motion to dismiss a petition, if there remain issues that could be clarified (In re Cline, 72 A.D. 3d 471, 901 N.Y.S. 2d 2 [N.Y.A.D. 1st Dept., 2010]).

Upon review of all the papers submitted this Court finds that the petitioner has met her burden of proof. The arbitrator failed to address school administration's noncompliance with the Chancellor's Rules as a potential contributing factor to the inability to control the classroom. The penalty of termination, after twenty two years of service without prior disciplinary charges, the arbitrator's reliance on inadequate evidence in the form of "Logs of Assistance" and the department's failure take steps to provide assistance tailored to the petitioner's needs, is shocking to this Court's sense of fairness. It is also shocking to one's sense of fairness that petitioner was dismissed from employment, when under similar circumstances another teacher received a penalty of six months suspension without pay and classroom management workshops. The petitioner has met her burden of proof as to relief sought in the petition. Respondent has not established a basis to grant its motion to dismiss for failure to state a cause of action or that there remain issues that are a basis to permit the submission of an answer.

Accordingly, it is ORDERED AND ADJUDGED that the petition pursuant to CPLR §7511, and Education Law §3020-a to vacate, and set aside the decision of the arbitrator and remand this matter for a determination of a lesser penalty, is granted, and it is further,


ORDERED, that the arbitrator's decision and award, dated December 18, 2011, is reversed and annulled and it is further,

ORDERED that the matter is remanded for the imposition of a lesser penalty, the remainder of the relief sought is denied, and it is further,

ORDERED and ADJUDGED, that the cross-motion to dismiss the petition pursuant to CPLR §3211[a][5],[7] and CPLR §404 [a], is denied

This constitutes the decision and judgment of this court.

ENTER:



MANUEL J. MENDEZ,

J.S.C.

Dated: June 14, 2012

MANUEL J. MENDEZ

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

UNFILED JUDGMENT
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In order for entry cannot be served filed herein.
When entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1418).