Duncan v New York City Dept. of Educ.
2013 NY Slip Op 34170(U)
January 23, 2013
Supreme Court, New York County
Docket Number: 105115/2011
Judge: Peter H. Moulton
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[* 1]

Supreme Court: New York County
Part 40B

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TREVOR DUNCAN, M.D.

Petitioner,

-against-

10/5/15/2011

Index No. ~~105225~~/11

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

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Peter H. Moulton, Justice

In this Article 75 proceeding petitioner seeks to vacate the arbitration award dated August 11, 2011, which terminated petitioner's employment with respondent Department of Education ("DOE").

Respondent initially moved to dismiss the petition. The motion was denied by this court in a decision dated April 13, 2012. Respondent thereupon served its answer and supporting papers. The court held oral argument and the matter is now ripe for decision.

BACKGROUND

Petitioner has a medical degree obtained in the former Soviet Union. He emigrated to the United States from his native Guyana in 1998. Without sufficient funds to take the medical board examination in the United States, he began to teach and has continued in that profession.

He began teaching at Middle School 202, a school that seeks to prepare gifted and talented students for the City's selective public high schools, in 1999.

The disciplinary action brought against petitioner by the DOE was commenced by Specifications of Charges dated February 15, 2011. The specifications alleged neglect of duty, failure to follow procedures and carry out normal duties, misconduct and incompetent and ineffectual service during three consecutive school years: 2008-2009, 2009-10, and 2010-2011. The charges arise from an array of derelictions of duty, including, but not limited to, the unauthorized removal from school property of a laptop computer and an LCD projector, which was subsequently stolen from petitioner's home, failure to provide effective instruction, and failure to maintain an orderly and clean classroom. DOE generated a bill of particulars that augments the information in the specifications. Petitioner claims that he did not receive a copy of the bill of particulars prior to the hearing.

The hearing was held before an arbitrator on seventeen full and partial days from March 15, 2011 to May 27, 2011. The hearing officer issued her decision, in which she sustained all the charges against petitioner, on August 11, 2011. The hearing officer recommended that petitioner be dismissed. This proceeding ensued.

DISCUSSION

Education Law §3020-a(5) provides that a court's review of an application to vacate or modify the decision of a hearing officer is limited to the grounds set forth in CPLR 7511. Under that section vacatur is warranted only where there is proof that the dispute was not arbitrable, that a party's rights were prejudiced by fraud or partiality of the arbitrator, or that the arbitrator exceeded a specific limitation on his power. (CPLR 7511[b]; Matter of Matra Bldg. Corp. v Kucker, 2 AD3d 732, lv denied 2 NY3d 708.) An award may also be vacated if it is violative of a strong public policy or was totally irrational. (E.g. In re Wicks Construction, 295 AD2d 527.) Additionally, binding case law provides that because Section 3020-a hearings are compulsory a hearing officer's determination "must be in accord with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78." (City School Dist. of the City of New York v McGraham, 75 AD3d 445, 450, aff'd 17 NY3d 917 [citations and internal quotations omitted].)

Petitioner first challenges the means by which the hearing officer was designated. According to petitioner, the designation was in derogation of Education Law § 3020 because petitioner was not consulted. This argument fails as the collective bargaining agreement between petitioner's union, the United Federation of Teachers ("UFT"), and the DOE appoints the UFT as its members agent

in the selection of hearing officers.

Petitioner also argues, without any citation to apposite authority, that it was improper for petitioner's principal to have initiated the charges and signed the notice of charges. Education Law sections 2590-h, 2590-f and 2590-j, read in pari materia, demonstrates that principals have the authority to bring disciplinary charges as agents of the DOE.

Petitioner argues that he was deprived of due process because the charges against him were insufficiently specific. He maintained that he was not served with a bill of particulars which provides some additional detail about the facts underlying the charges against petitioner. The Hearing Officer was entitled to make the credibility determination as to whether petitioner received the bill of particulars. Even without the bill of particulars, the specification of charges adequately apprises petitioner of the charges against him. (E.g. Sperling v Bd. Of Educ. of Poughkeepsie City School Dist, 150 AD2d 584.)

The petition avers at length that the Hearing Officer was biased. However, the evidence of bias offered by petitioner is that the Hearing Officer did not interpret the evidence at the hearing as petitioner did. An allegation of bias against an arbitrator must be established by clear and convincing evidence showing more than a mere inference of partiality. (Matter of Infosafe Sys., Inc. v Int. Dev. Partners, Ltd., 228 AD2d 272, 272,

[1st Dept 1996].) Petitioner has not carried that burden here.

Petitioner also faults the Hearing Officers' evaluation of petitioner's witnesses, and petitioner's own testimony, particularly petitioner's presentation of his students' exam scores.[1] However, credibility determinations are for the Hearing Officer, the court may not substitute its evaluation of witnesses' credibility for that of the Hearing Officer. Additionally, the Hearing Officer was entitled to give no weight to petitioner's analysis of exam scores. (Lackow v Dep't of Educ. of the City of New York, 51 AD3d 563, 568.)

Petitioner has not shown that the penalty of termination was "so disproportionate to the offense ... as to be shocking to one's sense of fairness." (Matter of Kreisler v New York City Transit Auth., 2 NY3d 775, 776 [internal quotes omitted].) Using its own expertise in evaluating teachers, the DOE has determined that petitioner's performance was inadequate. This determination is not arbitrary and capricious and therefore the court has no power to second guess that determination.

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[1]The Hearing Officer notes that some of the students in question were not petitioner's students.

CONCLUSION

For the reasons stated, the petition is denied and this proceeding is dismissed.

This constitutes the decision and order of the court.

Date: January 23, 2013

AJSC

HON. PETER H. MOULTON
SUPREME COURT JUSTICE