

Pina-Pena v New York City Dept. of Educ.
2014 NY Slip Op 30893(U)
April 4, 2014
Supreme Court, New York County
Docket Number: 100517/2013
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 100517/2013

PINA-PENA, MATEO

vs

NYC DEPARTMENT OF EDUCATION

Sequence Number : 001

VACATE OR MODIFY AWARD

PART 52

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 5, were read on this motion to/for Article 75

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits cross motion + memo _____ | No(s). 2, 3, 4

Replying Affidavits _____ | No(s). 5

Upon the foregoing papers, it is ordered that this motion is

**motion and cross-motion are decided in accordance
with accompanying memorandum decision.**

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

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COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/4/14


_____, J.S.C.
HON. MARGARET A. CHAN

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
 NEW YORK COUNTY, PART 52

MATEO PINA-PENA,

Petitioner,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

Index Number: 100517/2013

DECISION/ORDER

HON. MARGARET CHAN

Justice, Supreme Court

Petitioner, appearing *pro se*, was terminated from his employment as a tenured teacher assigned to M.S. 22, the Jordan L. Mott School in Bronx, New York. He commenced this Article 75 proceeding pursuant to CPLR § 7511 and Education Law § 3020-a(5) seeking an order to vacate the Opinion and Award of Hearing Officer Patricia A. Cullen, Esq. (HO Cullen) dated February 28, 2013. HO Cullen found that petitioner was an incompetent teacher despite the respondent's numerous attempts to rehabilitate his teaching. Respondent submitted that the Board of Education of the City of New York, sued herein as New York City Department of Education (the BOE), had just cause to terminate the petitioner. Respondent also cross-moved pursuant to CPLR §§ 404(a), 3211(a)(7), and 7511 for an order dismissing the petition.

At the completion of the 2011/2012 school year, petitioner was charged with three (3) specifications by respondents. They were:

(1) During the 2010-2011 and or 2011-2012 school years, petitioner failed to properly, adequately, and/or effectively plan and/or execute separate lessons observed on the following dates:

- a. November 15, 2010;
- b. November 17, 2010
- c. November 29, 2010
- d. January 7, 2011
- e. April 1, 2011
- f. October 5, 2011
- g. October 20, 2011
- h. November 29, 2011
- i. December 13, 2011
- j. March 22, 2012 and/or
- k. June 15, 2012.

(2) petitioner failed to follow discipline reporting protocols and/or failed to manage classroom procedures, on or about October and/or November 2011; and

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 NEW YORK

(3) during the 2010-2011 and or 2011-2012 school years, petitioner failed to accept and/or heed advice, counsel, instruction, remedial and professional development and/or recommendations regarding:

- a. the elements of effective lesson planning and/or execution
- b. classroom management
- c. and/or production/maintenance of required records/documents.

(BOE Cross-Mot, Exh C).

A hearing was held before HO Cullen over nine nonconsecutive days; the hearing began in September 2012 and continued into November 2012. Both petitioner and the BOE were represented by counsel. HO Cullen's Opinion and Award is twenty-nine (29) pages long and discusses the testimony and evidence presented and mitigating factors offered by petitioner (*see* BOE Cross-Mot, Exh A). HO Cullen sustained specifications 1. a, d, e, g, h, i, j, k and 3. a and b, specification 1.f was withdrawn and the other specifications were dismissed (*see* BOE Cross-Mot, Exh A.). Overall, what is gleaned from the Opinion and Award is that petitioner was an ineffective teacher who was found incompetent to provide an educational experience for his students over two (2) school years (*see id.* at 26).

Petitioner was reassigned to M.S. 22 in September 2010 after two (2) years of reporting to a reassignment center for disciplinary charges unrelated to the specifications discussed herein. Upon his return, he was assigned to teach general sixth-grade education where prior to his time in the reassignment center he taught bilingual classes. Principal Linda Rosenbury (Principal Rosenbury) was petitioner's supervisor and rating officer. Principal Rosenbury worked with a consulting firm that assisted the school with guided discipline techniques. One of its consultants, Cassandra Bond, was tasked to provide individual training to teachers, conduct workshops, and help institute school-wide rules and procedures on discipline.

Petitioner attended the first of five workshops by Ms. Bond on classroom management and discipline on September 21, 2010. Days later, on September 28, 2010, Ms. Bond visited petitioner's class and found it in "chaos" (BOE Cross-Mot, Exh B, p 255). Thereafter, petitioner attended two more workshops. When Ms. Bond visited his classroom again on October 19, 2010, she indicated that petitioner still failed to institute any changes or implement her suggestions. Petitioner attended the final two (2) workshops at the end of October 2010. In September and November, petitioner met with the Assistant Principal to discuss specific classroom management strategies. On November 15, 2010, Principal Rosenbury conducted an informal observation of petitioner. On November 17, the Assistant Principal conducted a formal observation. Both observations were rated unsatisfactory. The administrators reported seeing students yelling at one another, petitioner yelling at his students, and students seeking to leave to use the bathroom in an unorganized way. Principal Rosenbury offered advice and guidance and direction to petitioner on the 15th, but when the Assistant Principal observed petitioner on the 17th she noticed that petitioner did not make use of the suggestions nor was his lesson plan considered appropriate by her. Petitioner was consistently offered guidance and teaching techniques by staff throughout the end of the 2010 calendar year (*see* BOE Cross-Mot, Exh B, pp 260-277).

In the start of 2011, petitioner was again provided another session of classroom management and discipline techniques by Ms. Bond. Additional formal observations of petitioner on January 14 and April 1, 2011, found petitioner's teaching unsatisfactory. The administration noted a lack of student engagement and unruly student behavior met without the appropriate consequences (*see* BOE Cross-Mot, Exh B, pp 557-579). In March, April, and June of 2011, Ms. Bond continued to meet with petitioner, even having one-on-one sessions with him, to provide discipline techniques. Despite this continuous professional instruction, petitioner was rated unsatisfactory for the 2010-2011 school year.

In the 2011-2012 year, petitioner again had several informal and formal observations all found to be unsatisfactory by the administration. Even some of the more rudimentary teaching techniques that were impressed upon petitioner, like instituting a seating chart, were ignored by petitioner (*see* BOE Cross-Mot, Exh B, p 307-310). In November 2011, the administration met with petitioner for a disciplinary conference concerning eleven separate incidents that occurred between October and November. Those incidents comprised of physical altercations between students, loud noises coming from petitioner's classroom, and times where objects were thrown by students at petitioner (*see* BOE Cross-Mot, Exh A, p 11). Invariably, petitioner continued to fail at implementing discipline in his classroom. After further unsatisfactory observations, petitioner was also faulted for failing to prepare lesson plans.

In January 2012, Principal Rosenbury invited petitioner to participate in a PIP Plus Program to help him with instructional improvement, but petitioner declined to participate (*see* BOE Cross-Mot, Exh B, pp 130-133). On March 22, 2012, Principal Rosenbury again observed petitioner and found that he again failed to follow prior recommendations and that students were still not engaged. Principal Rosenbury sent a report about her observation to petitioner and asked him to review it for a post-observation conference. Petitioner failed to read the report for the conference and commented that he would not change his teaching instruction were he to teach that class again because he believed he did not need improvement (*see* BOE Cross-Mot, Exh B, pp 180 -181). It is not surprising that petitioner was rated unsatisfactory for 2011-2012 school year.

Petitioner has the burden of showing an arbitration award is invalid (*see Lackow v Department of Education of City of New York*, 51 AD3d 563, 568 [1st Dept 2008]). As the arbitration here was compulsory, "[t]he 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" (*id.* at 567). A hearing officer's determinations are "largely unreviewable because the hearing officer observed the witnesses and was 'able to perceive the inflections, the pauses, the glances and gestures—all the nuances of speech and manner that combine to form an impression of either candor or deception'" (*id.* at 568, quoting *Matter of Berenhau v Ward*, 70 NY2d 436, 443 [1987]).

Petitioner argued that HO Cullen failed to impartially evaluate the evidence before her. However, petitioner failed to present proof of actual bias or the appearance of bias on the part of the arbitrator (*see Matter of Kornit*, 49 NY2d 842, 843 [1980]). Petitioner merely made conclusory allegations that HO Cullen was under the control of the school administration. Petitioner failed to provide any indication that HO Cullen failed to properly review his statements or make determinations from the facts that were presented. Indeed, HO Cullen considered the mitigating factors provided for by petitioner and discussed at length why she found them unpersuasive in her Opinion and Award (*see* BOE Cross-Mot, Exh A, pp 24-26).

Petitioner also argued that HO Cullen violated his due process rights by improperly considering hearsay evidence. Contrary to petitioner's allegation, compliance with the technical rules of evidence is not required in a disciplinary proceeding and hearsay may be considered (*see* Education Law § 3020-a[3][c]; *Colon v City of N.Y. Dept. of Educ.*, 94 AD3d 568, 624 [1st Dept 2012]). In any event, it is clear that HO Cullen's findings were consistent with the direct testimony provided witnesses based on personal knowledge through their formal and informal observations of petitioner and from professional development sessions.

Petitioner also argued that there was a "*de facto* denial of equal protection of [Education Law § 3020(a)]" because the charges against him were not put to a vote of the BOE before being proffered against him pursuant to Education Law § 3020(a) (Pet's Opp, p 14). Education Law § 3020(a), commonly called the Tenure Law, provides procedural protections for any disciplinary action taken against a tenured teacher (*see* Education Law § 3020(a)). According to the statute, prior to any disciplinary action, the written charges must be put to a vote by the employing board of education, in executive session, for a determination of probable cause for the charges (*see* Education Law § 3020(a)[2]). If the employing board of education affirms the charges, then an explanation of the charges must be provided to the accused teacher (*id.*; *Pollock v Kiryas Joel Union Free School Dist.*, 52 AD3d 722 [2nd Dept, 2008]). Petitioner argued that this was not done here and thus, his due process rights were violated.

However, respondent in its reply papers asserted that although Education Law § 3020-a(2)(a) provides that the employing board shall determine whether probable cause exists to bring a disciplinary proceeding against a tenured teacher, that procedure is not applicable to the City School District of New York pursuant to Education Law § 2590-h. The BOE Chancellor is given the authority to delegate the process of preferring charges against tenured teachers (*see* Education Law § 2590-h(19); *Dunn v New York City Dept. of Educ.*, 32 Misc3d 1230(A) [Sup Ct, NY Cty 2011]). Additionally, Education Law § 2590-h(38-a) provides the Chancellor may "exercise all of the duties and responsibilities of the employing board as set forth in section three thousand twenty-a of this chapter with respect to any member of the teaching or supervisory staff of schools which are not covered under subdivision thirty-eight of this section." Pursuant to these sections of law, the Chancellor delegated the relevant authority to the District Superintendent who, in turn, delegated her authority to local school principals (*see id.*; Education Law § 2590-f(1)(t)). Therefore, petitioner's

argument that the charges against him were made without due process fails. Notably, this argument has already been cast aside by other trial courts in recent years (*see e.g. In re White-Grier v The New York City Bd./Dept. of Educ.*, 2012 NY Slip Op. 32466(U)[Sup Ct, NY Cty 2012]; *Matter of Liu v New York City Bd./Dept. of Educ.*, 2012 NY Slip Op. 300008(U)[Sup Ct, NY Cty 2012]; *Matter of Dunn v New York City Dept. of Educ.*, *supra*; *Matter of Montanez v Department of Educ. of City of N.Y.*, 2011 NY Slip Op. 33408U [Sup Ct, NY Cty 2011]; *Matter of Soleyn v New York City Dept. of Educ.*, 2011 NY Slip Op. 51897U [Sup Ct, NY Cty 2011]; *Menchin v New York City Dept. of Educ.*, 32 Misc.3d 1216(A)[Sup Ct, Rockland Cty 2011]).

The record presented here demonstrates that HO Cullen thoroughly reviewed and weighed the evidence when making her decision. As to the penalty of termination, HO Cullen took into account the mitigating factors raised by petitioner, the severity of the sustained specifications, the cost and efforts invested by respondent to rehabilitate petitioner, and the likelihood that petitioner would not improve his performance. In reviewing a disciplinary penalty under Education Law § 3020-a, a court must consider whether the penalty imposed is “so disproportionate to the offense, in light of all the circumstances, as to be shocking to one’s sense of fairness” (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974][internal quotations marks omitted]). Given the consistent subpar performance of petitioner over the course of two (2) years, his demonstrated unwillingness to make reforms to his teaching, and the likelihood that he would not improve, the penalty of termination here is not shocking. Moreover, this court does not find the decision arbitrary or capricious as petitioner argued. As such, HO Cullen’s Opinion and Award and final determination of termination will not be disturbed.

Accordingly, the respondent’s cross-motion to dismiss is granted in its entirety and the petition is dismissed. The clerk of court shall enter judgment as such.

This constitutes the decision and order of the court.

Dated: April 4, 2014



MARGARET A. CHAN

J.S.C.

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