

Matter of Glyptis v New York City Bd/Dept. of Educ.

2014 NY Slip Op 31139(U)

April 10, 2014

Supreme Court, New York County

Docket Number: 101800/2012

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

MARK GLYPTIS

INDEX NO. 101800/2012

MOTION DATE _____

MOTION SEQ. NO. 001

NEW YORK CITY BOARD/DEPARTMENT OF EDUCATION

The following papers, numbered 1 to 5, were read on this ^{petition} ~~motion~~ to/for VACATE AN ARBITRATION AWARD

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

Answering Affidavits — Exhibits _____ | No(s). 4

Replying Affidavits _____ | No(s). 5

Upon the foregoing papers, it is ordered ~~that this motion is~~ *and adjudged thus:*

The court denies the petition to vacate an arbitration award, confirms the award, and dismisses this proceeding, pursuant to the accompanying decision. C.P.L.R. §§ 409(b), 7511(b)(1) and (e).

FILED

MAY 01 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/10/14

Lucy Billings, J.S.C.
LUCY BILLINGS
J.S.C.

- 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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46

-----X

In the Matter of the Application of

MARK GLYPTIS,

Index No. 101800/2012

Petitioner,

For a judgment pursuant to Article 75
of the C.P.L.R.

- against -

DECISION AND ORDER

NEW YORK CITY BOARD/DEPARTMENT OF
EDUCATION,

FILED

Respondent

MAY 01 2014

-----X

LUCY BILLINGS, J.:

COUNTY CLERK'S OFFICE
NEW YORK

This proceeding pursuant to C.P.L.R. Article 75 seeks to vacate an arbitration award terminating petitioner's employment as a teacher by respondent New York City Department of Education (DOE). Petitioner claims (a) misconduct and partiality by the arbitrator, particularly in failing to follow required arbitration procedures and disregarding petitioner's objections to the procedural defects, and (b) that the award was unwarranted by the charged offenses and therefore excessive. C.P.L.R. § 7511(b)(1).

I. UNDISPUTED BACKGROUND FACTS

During the 2010-2011 school year petitioner worked at the Manhattan Alternate Learning Center, in District 88 in Harlem, New York County. A resident of New Jersey, petitioner received a summons from the Mercer County Superior Court for jury duty for

the week of December 20-24, 2010. He was required to telephone the number listed on the summons or to look at the New Jersey judiciary website for an instruction to report to the courthouse if his service was required. He submitted the jury summons to respondent to show his service, for which respondent paid him approximately \$1,183.29 as compensation for completing jury service on December 20, 21, and 23, 2010.

Petitioner's school principal subsequently reviewed petitioner's record of absences, the lack of evidence of his actual jury service other than the initial summons, and the confirmation received from the Mercer County Superior Court that petitioner was not required to serve on any day during the week of December 20-24, 2010. After this review, in May 2011, the principal initiated an investigation by the Special Commissioner of Investigation for the New York City School District regarding petitioner's claimed jury service during that week. After finding probable cause, the principal initiated disciplinary action against petitioner pursuant to New York Education Law § 3020-a for two specifications of related misconduct. (1) He received compensation from respondent for jury service that he did not perform on December 20, 21, and 23, 2010. (2) He submitted a jury summons from the Mercer County Superior Court as proof of jury service on the three days for which he did not serve.

Upon petitioner's request for an arbitration pursuant to Education Law § 3020-a(3), a hearing officer conducted a pre-

hearing conference on November 8, 2011, and a hearing over five days, November 15, 17, 22, and 30 and December 6, 2011.

Petitioner was represented by his attorney and afforded an opportunity to present and cross-examine witnesses and to present other evidence. At the arbitration proceeding petitioner denied his misconduct and maintained that he did not intend to defraud respondent, that he believed he was on call for jury service and obligated to make himself available on December 20 and 21, 2010, and that he reported to his school that he was sick on December 23, 2010. He points to his attendance at work on December 22, 2010, as evidence of his lack of fraudulent intent, insisting that he would not have reported to work on a Wednesday in between his scheduled jury service if he intended to use it as a reason for compensated time off work. The hearing officer found that petitioner committed both specifications of misconduct, having claimed that he performed jury service and having received compensation for jury service that he did not perform, and imposed the penalty of termination of his employment.

II. THE PARTIES' POSITIONS IN THIS PROCEEDING

In this proceeding challenging the arbitration award terminating petitioner's employment, his claims break down as follows. (1) The hearing officer lacked jurisdiction over the charges against petitioner, C.P.L.R. § 7511(b)(1)(iv), depriving him of due process, because neither the Board of Education, the DOE Chancellor, or a DOE Community Superintendent found probable cause for the charges, in violation of Education Law §§ 2590-

j(7)(b) and 3020-a(2)(a), and the Chancellor never delegated authority to the principal who instituted the charges. See N.Y. Educ. Law § 2590-h(19). (2) The disciplinary proceeding was prosecuted and conducted in violation of lawful procedure, producing an award that was neither rational nor supported by adequate evidence. See C.P.L.R. § 7804(3) and (4). (3) Because respondent failed to prove the charges by a preponderance of evidence, the award of termination was arbitrary, in bad faith, unconscionable, and an excessive punishment. C.P.L.R. § 7511(b)(1)(i) and (ii). (4) The hearing officer exceeded her authority pursuant to Education Law 3020-a(4)(a) by issuing a disproportionately severe penalty, interfering with the contractual relationship between petitioner and respondent. C.P.L.R. § 7511(b)(1)(iv).

Respondent claims that its Chancellor delegated to the principals in Districts 75 and 79 the power to initiate disciplinary charges against teachers. N.Y. Educ. Law § 2590-h(19). Although the Alternate Learning Center where petitioner worked was transferred from District 79 to District 88, respondent maintains that the Chancellor intended District 88 principals to retain the same authority as when they were District 79 principals to find probable cause and institute disciplinary proceedings against teachers. Respondent fails to present any attestation on personal knowledge or any documentary evidence, admissible or inadmissible, however, of the Chancellor's intent that District 88 principals were to retain

the same authority as when they were District 79 principals. C.P.L.R. §§ 403(b), 409(b), 7804(e). Nor does respondent show that petitioner's principal instituted the disciplinary proceeding against petitioner before his position was transferred from District 79 to District 88. Nevertheless, respondent maintains that this lack of evidence is inconsequential, because petitioner failed to challenge the principal's authority to determine probable cause either at the pre-hearing conference as required under Education Law § 3020-a(3)(c)(iv) or at the arbitration hearing and thus waived any objection to the charges on that ground.

Respondent insists that petitioner's remaining claims are nothing more than challenges to the hearing officer's credibility determinations, which are not grounds to vacate the arbitration award, and that substantial documentary and testimonial evidence supports the findings of misconduct. Finally, respondent maintains that petitioner's misconduct in turn supports the penalty of termination.

III. PETITIONER'S MOTION TO AMEND HIS VERIFIED PETITION

In response to respondent's answer claiming that petitioner failed to challenge the principal's authority at the pre-hearing conference or at the arbitration hearing, petitioner has moved to add the affidavit of Betsy Combier, who attended his arbitration hearing, as evidence that he posed his procedural objections off the hearing record. Combier claims to have observed and heard petitioner and his attorney off the record, but in the

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arbitrator's presence, raising the lack of a probable cause determination by the Chancellor or a Community Superintendent, and the arbitrator's refusal to allow the procedural objection on the record.

Combiere offers nothing that petitioner himself, as well as his prior attorney, could not have offered in reply to respondent's answer. C.P.L.R. §§ 402, 403(b), 7804(d). While she also offers legal arguments that are not evidence and a party or attorney is free to make, since her evidentiary allegations simply corroborate petitioner's alleged procedural objections before or at the arbitration hearing, her account causes no surprise or other prejudice to respondent. In fact respondent claims none. Therefore the court grants petitioner's motion and considers the Combiere affidavit as part of the record in this proceeding. C.P.L.R. §§ 402, 3025(b), 7804(d); Giambrone v. Kings Harbor Multicare Ctr., 104 A.D.3d 546, 547 (1st Dep't 2013); McGhee v. Odell, 96 A.D.3d 449, 450 (1st Dep't 2012); Kocourek v. Booz Allen Hamilton Inc., 85 A.D.3d 502, 504 (1st Dep't 2011); Jacobson v. McNeil Consumer & Specialty Pharms., 68 A.D.3d 652, 655 (1st Dep't 2009).

IV. PETITIONER'S JURISDICTIONAL CLAIM

As set forth above, petitioner claims that the lack of a finding of probable cause for the charges against him by the Board of Education, the Chancellor, or a Community Superintendent deprived the hearing officer of jurisdiction to determine the specifications charged. Petitioner's reply further contends that

any delegation by the Chancellor of the authority to find probable cause was of no effect because respondent has never produced an employment contract between the Chancellor and the New York City Department of Education as required by Education Law § 2590-h, and therefore the Chancellor lacked any power to delegate.

Regarding this latter claim that no employment contract has been produced, Education Law § 2590-h provides simply that the "chancellor shall serve at the pleasure of the mayor of the city of New York by contract." Since the petition does not claim the Chancellor was serving without a contract, petitioner presents no basis that would require respondent to produce a contract. Thus its absence in the record does not demonstrate that the Chancellor in fact is serving without a contract. The absence of such a document further ignores the possibility of an oral contract, which the statute plainly permits.

Regarding petitioner's original claim that no authorized body found probable cause for the charges against him, Education Law § 3020-a(2)(a) requires that:

Upon receipt of the charges . . . , the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists to bring a disciplinary proceeding against any employee pursuant to this section.

The DOE Chancellor or any of DOE's Community Superintendents is considered "the employing board" in New York City. N.Y. Educ. Law §§ 2590-f(1)(s), 2590-h(38) and (38-a). Education Law § 2590-h(19) also empowers the Chancellor to delegate any of his

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powers, including his power to determine probable cause to bring a disciplinary proceeding, to subordinate officers other than Community Superintendents. See N.Y. Educ. Law § 2590-h(38) and (38-a).

Having presented no admissible evidence that the Chancellor delegated to District 88 principals or intended that, as former District 79 principals, they retain the authority to institute charges against teachers, respondent relies on petitioner having waived his jurisdictional objections by failing to pose them on the record, either by a pre-hearing motion or at the arbitration hearing. Pre-hearing motions or objections relating to "the sufficiency of charges" not made in writing at least five days before a hearing are considered waived except for good cause determined by the hearing officer. N.Y. Educ. Law § 3020-a(3)(c)(iv). Even if the jurisdiction of the hearing officer is unrelated to "the sufficiency of the charges," the record discloses neither any pre-hearing motion, nor any procedural objection at the hearing, contesting the jurisdiction of the hearing officer or the sufficiency of the charges. Consequently, petitioner's claim that procedural errors were presented to the hearing officer off the record is unpreserved for the court's review. Prendergast v. City of New York, 44 A.D.3d 414, 415 (1st Dep't 2007); Green v. New York City Police Dept., 34 A.D.3d 262, 263 (1st Dep't 2003).

Petitioner's jurisdictional claim also is unsupported by the Combier affidavit. Combier attests only that petitioner

requested his attorney to "present the issue of the improper determination to Arbitrator Glanstein" and that the arbitrator was in the room, but maintained she would not permit anything relating to procedural errors on the record. Aff. of Betsy Combier at 1-2. Combier never attests that either petitioner or his attorney actually raised any particular objection regarding the hearing officer's lack of jurisdiction or the deficiency of the charges, on or off the record, for the hearing officer to make a determination of good cause for the late objection pursuant to Education Law § 3020-a(3)(c)(iv).

The hearing officer's insistence that she would not permit anything relating to procedural errors on the record did not prevent petitioner or his attorney from simply noting the objection on the record. The transcript reveals no such attempt, even if cut off by the hearing officer, nor does petitioner claim any such attempt. By participating in the pre-hearing conference and the hearing, with representation by attorney who made several objections and cross-examined witnesses, without raising a jurisdictional objection on or off record, petitioner consented to the jurisdiction of the hearing officer to decide the charges and waived any jurisdictional claim. Morgan Stanley & Co., Inc. v. Feeley, 75 A.D.3d 417, 418 (1st Dep't 2010); DeMartino v. New York City Dept. of Transp., 67 A.D.3d 479, 479 (1st Dep't 2009); Metrobuild Assoc., Inc. v. Nahoum, 51 A.D.3d 555, 556 (1st Dep't 2008); Elul Diamonds Co. Lit. v. Z Kor Diamonds, Inc., 50 A.D.3d 293, 293-94 (1st Dep't 2008).

V. THE ARBITRATION AWARD

A compulsory arbitration award must be in consistent with due process, supported by adequate evidence, and rational according to the standards under C.P.L.R. Article 78. An award may be vacated only upon a showing that the hearing officer's determination exceeds the limits of her power, violates due process or another important public policy, or is irrational. Brito v. Walcott, 115 A.D.3d 544, 545 (1st Dep't 2014); Asch v. New York City Bd./Dept. of Educ., 104 A.D.3d 415, 418 (1st Dep't 2013); City School Dist. of City of N.Y. v. McGraham, 75 A.D.3d 445, 450 (1st Dep't 2010); Austin v. Board of Educ. of City School Dist. of City of N.Y., 280 A.D.2d 365, 365 (1st Dep't 2001). The court may not substitute its judgment for the arbitrator's credibility determinations and factual findings. C.P.L.R. § 7511(b)(1); Brito v. Walcott, 115 A.D.3d at 545; Cipollaro v. New York City Dept. of Educ., 83 A.D.3d 543, 544 (1st Dep't 2011); Lackow v. Department of Educ. (or "Board") of City of N.Y., 51 A.D.3d 563, 568 (1st Dep't 2008).

The gravamen of petitioner's non-jurisdictional claims is that respondent failed to prove that petitioner intended to commit fraud by a preponderance of evidence, so that the hearing officer's decision violated lawful procedure, was affected by errors of law, is the product of bias, and is arbitrary and unconscionable. Petitioner admits, however, that the summons for jury duty instructed him to report to the Mercer County courthouse at 8:30 a.m. December 20, 2010, because his place of

employment was too far away to enable him to come from his job to the courthouse if he were called to serve in the afternoon session, yet he did not report to the courthouse or to his job that day. He further admits that he failed to telephone in the evening of December 20, 2010, for instructions regarding his service the next day and does not indicate that he checked the court's website for those instructions.

Petitioner claims instead that he believed he was on call for jury duty December 21, 2010, relying on a conversation with personnel in the jury management office. Yet no evidence substantiated this claim, either from the court or from petitioner himself. He failed to specify what instruction he was given, who gave it, or whether it was in person or by telephone, despite testifying that he did not report to the courthouse that day. Nor did he reconcile this account of December 21, 2010, with his understanding that he was to telephone that evening for instructions regarding the next day, when he learned he was not needed for jury service December 22, 2010.

The assistant principal testified that on December 22, 2010, petitioner advised that, if he failed to report to work December 23, 2010, his absence would mean he was required for jury duty. Therefore the assistant principal recorded petitioner as absent for jury service when he did not report for work. Again petitioner claims otherwise, this time that he telephoned his school and asked for the day off due to illness, but presented no evidence to support his claim and to rebut the testimony of the

school secretaries responsible for taking telephone messages December 23, 2010, that they received no message from him. He presented no medical evidence of his illness or witness to his telephone message or conversation, for example, and gave inconsistent testimony whether he left a message on a telephone answering system or a person answered his telephone call. Although petitioner insists that the unavailability of the telephone message machine to corroborate or refute respondent's account incapacitates respondent from proving its account by a preponderance of evidence, he does not claim spoliation of evidence. Given that petitioner's claim was further undermined by his failure to correct his receipt of compensation for jury service December 23, 2010, the hearing officer's acceptance of respondent's evidence as more probative than petitioner's inconsistent and uncorroborated account was neither arbitrary nor indicative of her bad faith or bias.

In sum, adequate evidence in the record supports the determination that petitioner engaged in the misconduct specified by the charges against him: claiming jury service and collecting compensation for jury service he did not perform. See Campbell v. New York City Tr. Auth., 32 A.D.3d at 352. The record shows that the hearing officer carefully considered all the relevant evidence and provided ample rational support for her determination that petitioner committed this fraud against his employer. The record reveals no basis to disturb the hearing officer's determination to credit the testimony of the assistant

principal and school secretaries and the transcript of the jury service instructions from the Mercer County Jury Management Office over petitioner's testimony. See Asch v. New York City Bd/Dept of Educ., 104 A.D.3d at 420; Austin v. Board of Educ. of City School Dist. of City of N.Y., 280 A.D.2d at 365-66.

Therefore all her findings that petitioner defrauded his employer, notwithstanding his prior satisfactory performance, and that his disclaimer of any intention to defraud was incredible were rational and free from any indication of bad faith or bias.

Neither the hearing officer's findings nor her conclusions exceeded her statutory authority. Given that fraudulent conduct is unfitting for a teacher, the penalty of termination is not unconscionable or disproportionate to the misconduct rationally found and amply supported. Ajeleye v. New York City Dept. of Educ., 112 A.D.3d 425, 425-26 (1st Dep't 2013); Montanez v. Department of Educ. of the City of N.Y., 110 A.D.3d 487, 488 (1st Dep't 2013); City School Dist. Of the City of N.Y. v. Graham, 75 A.D.3d at 450; Cipollaro v. New York City Dept. of Educ., 83 A.D.3d at 544.

VI. DISPOSITION

Since petitioner has failed to meet his burden to establish the invalidity of the arbitration award on any ground, as explained above, the court denies his petition to vacate the award terminating his employment, confirms the arbitration award, and dismisses this proceeding. C.P.L.R. §§ 409(b), 7511(b)(1) and (e); Asch v. New York City Bd/Dept of Educ., 104 A.D.3d at

419. This decision constitutes the court's order and judgment of dismissal. C.P.L.R. § 411.

DATED: April 10, 2014

Lucy Billings

LUCY BILLINGS, J.S.C.

**LUCY BILLINGS
J.S.C.**

FILED

MAY 01 2014

COUNTY CLERK'S OFFICE
NEW YORK