SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice PART 8

Index Number : 653927/2013
REED, LISA
vs
DEPARTMENT OF EDUCATION
Sequence Number : 001
VACATE OR MODIFY AWARD

INDEX NO. 653927/13
MOTION DATE 3/7/14
MOTION SEQ. NO. 001

The following papers, numbered 1 to 14, were read on this motion to/for vacate or modify Arbitration Award

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 1-8
Answering Affidavits — Exhibits rX Motion No(s). 9-13
Replying Affidavits ____ No(s). 14

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

Petitioner Lisa Reed (Petitioner) seeks a judgment, pursuant to CPLR 7511, vacating the "Opinion and Award" of a hearing officer (the Arbitrator) selected to hear and determine proceedings pursuant to section 3020-a of the Education Law, and for monetary, equitable, and other relief against the respondents, the Department of Education of the City of New York, and the Board of Education of the City School District of the City of New York (collectively, the DOE). The decision of the Arbitrator (the Award) was issued as of October 21, 2013 after a hearing at DOE offices on several days between May 21, 2013 and August 21, 2013 (the Hearing).

As a result of perceived impropriety, Petitioner seeks a judgment: (i) vacating the October 21, 2013 Opinion and Award of the Arbitrator; (ii) expunging all specifications from the Petitioner's record, removing the Petitioner from the ineligible/inquiry list, and restoring

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

Dated: May 13, 2014

JOAN M. KENNEY, 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

Petitioner to her tenured teaching position; (iii) prohibiting the DOE from enforcing the terms of the Award; (iv) returning Petitioner to her position as a classroom teacher in full capacity in conformity with her teaching license and rights of tenure and as set forth in the currently applicable collective bargaining agreement; and (v) prohibiting the DOE from taking any further action against Petitioner with respect to the allegations and specifications raised at the Hearing; together with (vi) costs and reasonable attorneys' fees in connection with this petition.

New York State Education Law § 3020-a (5) provides, and case law elucidates that:

> "judicial review of a hearing officer's findings must be conducted pursuant to CPLR 7511. Under such review an award may only be vacated on a showing of misconduct, bias, excess of power or procedural defects. Nevertheless, where the parties have submitted to compulsory arbitration, judicial scrutiny is stricter than that for a determination rendered where the parties have submitted to voluntary arbitration. The 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." *Lackow v Department of Educ. (or "Board") of City of N.Y.*, 51 AD3d 563, 567-68 (1st Dept 2008) (internal quotation marks and citations omitted).

Aside from the standard set out in *Lackow*, CPLR 7511 also provides, in relevant part, that an "award shall be vacated . . . if the court finds that the rights of that party were prejudiced by: . . . an arbitrator, or agency or person making the award exceeded his power."

FACTUAL BACKGROUND

According to the Petition, Ms. Reed was a tenured teacher, employed by the DOE at Harry S. Truman High School (Truman) since 2002. She allegedly received satisfactory ratings until the 2010-2011 school year. In that year, the principal of Truman assigned Ms. Reed to teach three special education classes in a self-contained classroom, beyond the legal size limit for such classes. She apparently had no assistance or prior or subsequent training in special

education.

In the 2011-2012 school year, despite having received some "U" (unsatisfactory) ratings for 2010-2011, Ms. Reed was reassigned to teach literacy. Literacy also allegedly required a special certification for which Ms. Reed received no prior or subsequent training.

After numerous observations and reports, on December 19, 2012, the DOE submitted charges under mandatory arbitration provisions against Ms. Reed, pursuant to New York State Education Law 3020-a, alleging incompetence or inefficient service, misconduct, neglect of duty, and, among other allegations, just cause for termination.

THE HEARING AND AWARD

As noted above, the Hearing took place at DOE offices on several days between May 21, 2013 and August 21, 2013. The Award, issued as of October 21, 2013, substantiated many of the charges relating to Ms. Reed's competency to teach and her ability to provide her students with a valid educational experience. The Arbitrator also found that the evidence demonstrated that Ms. Reed was unable to develop and deliver an appropriate lesson plan and provide her students with clear instructional outcomes. As a result, the Arbitrator found that the DOE had proven that there was just cause to discipline Ms. Reed for incompetent and ineffective service, and substantial cause rendering Ms. Reed unfit to properly perform her obligations.

Based on that conclusion, the Award indicated that termination of Ms. Reed was an appropriate remedy and based on specific considerations of the extent to which the DOE made efforts to correct Ms. Reed's behavior through professional development and/or remediation (Education Law section 3020-a[4][a]), found that Ms. Reed could not be rehabilitated.

DISCUSSION

Ms. Reed seeks to vacate the Award of a the Arbitrator because: (i) as the matter was determined by compulsory arbitration, the Award had to be, and was not, supported by substantial evidence; (ii) the Award was arbitrary and capricious, irrational, and violative of public policy, federal, and state law; and (iii) given the circumstances, the penalty of termination is disproportionate to the charged offences. In addition, Ms. Reed argues that the Award was made beyond the applicable statutory deadline, and, therefore, the Arbitrator exceeded his powers in rendering it.

As a result, Ms. Reed invokes CPLR 7511 for the purposes of vacating the Award, expunging its specifications, and returning her to her position, and she invokes CPLR 7801 et seq. to prohibit the DOE from taking any further action against her under the specifications. For the reasons set forth below, the petition is denied, and dismissed.

Arbitrator Exceeding Power Due to Lateness of Award

It is undisputed that the last day of the 3020-a Hearing was August 21, 2013, and the Award was not issued until October 21, 2013. It is beyond cavil that under Education Law § 3020-a (4) (a) "[t]he hearing officer shall render a written decision within thirty days of the last day of the final hearing." Ms. Reed argues that as a result of such a late decision, the Arbitrator exceeded his powers (CPLR 7511 [b] [iii]), and the Award should be vacated.

This argument fails because Ms. Reed has not given any evidence that she notified the Arbitrator that the Award would be untimely. See CPLR 7507 ("[a] party waives the objection that an award was not made within the time required unless he notifies the arbitrator in writing of his objection prior to the delivery of the award to him"). In all events, even if Ms. Reed had

satisfied CPLR 7507, she has not indicated any prejudice from the delay in the issuance of the Award. See *Matter of Westminster Constr. v Peconic Bay Golf*, 288 AD2d 231, 232 (2d Dept 2001) ("[t]o vacate the arbitration award on the ground that the arbitrator failed to adhere to the parties' contractual time limitation, the appellant was required to demonstrate that it suffered prejudice as a result of the delay"); accord *Scollar v Cece*, 28 AD3d 317 (1st Dept 2006).

Award Unsupported by the Evidence or Arbitrary and Capricious

Ms. Reed argues that, as the Award was determined under compulsory arbitration, the Award had to be, and was not, supported by substantial evidence. Moreover, Ms. Reed argues that the Award was arbitrary and capricious, and, therefore, should be vacated. More specifically, Ms. Reed argues that the DOE violated its own rules and regulations regarding observations and evaluations, that there were no bona fide attempts at remediation, and the Award violated public policy, federal law, state law by approving the actions of the DOE.

In relevant part, CPLR 7511 provides that an "award shall be vacated . . . if the court finds that the rights of that party were prejudiced by: . . . an arbitrator, or agency or person making the award exceeded his power." Under CPLR 7803 (3), an award may be vacated where it "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed."

If the court finds that the Award violated these standards, it "may grant the petitioner the relief to which he is entitled, or may dismiss the proceeding either on the merits or with leave to renew." CPLR 7806.

Despite this, New York courts have clearly adopted a policy of noninterference with

dispute resolution mechanisms. In this regard, the courts have noted that "the arbitrator is not bound to abide by, absent a contrary provision in the arbitration agreement, those principles of substantive law or rules of procedure which govern the traditional litigation process." *Matter of Sprinzen (Nomberg),* 46 NY2d 623, 629 (1979) (citations omitted). As a result, an arbitrator's award should not be vacated for errors of law and fact, but only for "completely irrational" findings. See *Rochester City School Dist. v Rochester Teachers Assn.*, 41 NY2d 578, 581-582 (1977).

Here, the Arbitrator provided a full explanation of the thinking that led to his conclusion, and demonstrated that all of the allegations of the DOE and Ms. Reed were given due consideration. The Arbitrator was not arbitrary in making the Award, and, significantly, did not sustain all the charges. However, he concluded that "the charges that were proven are substantial and are directly related to [Ms. Reed's] competency to teach and her ability to provide her students with a valid educational experience." Award at 27. The Arbitrator then went on to scrutinize the appropriateness of the penalty of termination of Ms. Reed's employment, and presented the evidence upon which he concluded that she could not be rehabilitated. Id. at 27. Finally, the Arbitrator noted that Ms. Reed received satisfactory ratings for the period preceding the charging period. Id. at 28.

Thus, far from being completely irrational (Rochester City School Dist., 41 NY2d at 582), the Award clearly had a rational basis. In such circumstances, the court, even if it disagrees with the conclusion, and this court has made no such finding, will not substitute its own judgment for that of the arbitrator. See e.g. *Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 (1999) ("[a] court cannot

examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one"). In short, the court cannot, and declines to, assume the role of overseer in order to conform the Award to the Ms. Reed's sense of justice. See *Matter of Santer v Board of Educ. of E. Meadow Union Free School Dist.*, __ NY3d __, 2014 NY Slip Op 03189, 2014 WL 1767705 (2014).

Accordingly, it is hereby

ORDERED, ADJUDGED and DECREED that the petition of Lisa Reed to vacate the Opinion and Award of Hearing Officer James McKeever, dated October 22, 2013, that terminated her employment with the New York City Department of Education is hereby dismissed; and it is further

ORDERED that the October 22, 2013 Award in favor of the respondents is hereby CONFIRMED in all respects; and it is further

ORDERED that any relief requested not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision, order and Judgment of the Court.

Dated: May 13, 2014

ENTER:

JOAN M. KENNEY J.S.C.