

Matter of Giscombe v New York City Dept. of Educ.
2014 NY Slip Op 31534(U)
June 13, 2014
Supreme Court, New York County
Docket Number: 100595/13
Judge: Shlomo S. Hagler
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

SHLOMO HAGLER
J.S.C.

Index Number : *100595/2013

GISCOMBE, DELROY

vs

NYC DEPARTMENT OF EDUCATION

Sequence Number : 001

ARTICLE 78

PART 17

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 6, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Petition + Amended Petition | No(s) 1-2

Answering Affidavits — Exhibits Cross motion + Memorandum | No(s) 3-4

Replying Affidavits + opposition to cross motion | No(s) 5

reply memorandum in further support of cross-motion


Upon the foregoing papers, it is ordered that this motion is and cross-motion are denied
in accordance with the attached Decision + Order.

UNFILED JUDGMENT

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

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

Dated: 6/13/14


SHLOMO HAGLER, J.S.C.
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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X

In the Matter of the Application of
DELROY GISCOMBE,

INDEX NO.: 100595/13

Petitioner,

For a Judgment Pursuant to
Article 75 of the C.P.L.R.

-against-

DECISION/ORDER

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

-----X

HON. SHLOMO S. HAGLER, J.S.C.:

Petitioner Delroy Giscombe (“Giscombe” or “petitioner”) moves by notice of petition and verified petition to vacate an arbitration award dated March 28, 2013 (“Award”) pursuant to CPLR § 7511. (See Exhibit “E” to the Cross-Motion.) Respondent New York City Department of Education (“DOE” or “respondent”) opposes the petition and cross-moves to dismiss the petition and confirm the Award pursuant to CPLR §§ 404(a), 3211(a)(7), and 7511(e).

Background

Petitioner is a tenured teacher employed by the New York City Department of Education and was formerly assigned to A. Philip Randolph Campus High School, District 6 in Manhattan. Pursuant to Education Law § 3020-a, the DOE preferred three (3) sets of charges or specifications against petitioner for “inappropriate conduct, misconduct, verbal abuse and neglect[ing] his duties” and engaging in “corporal punishment, excessive absences and latenesses” during the 2009-2010, 2010-2011 and 2011-2012 school years as set forth in detail in pages three (3) through eleven (11) of the Award. The DOE sought to terminate petitioner’s employment.

As part of the agreement between the DOE and the United Federation of Teachers, compulsory arbitration was mandated and a hearing officer was selected to hold a hearing to determine the DOE's charges against petitioner. A pre-hearing conference was held on May 2, 2012. Hearings were held on July 10, 2012, August 21, 2012, September 19, 28, 2012, October 2, 4, 9, 17, 2012, November 13, 15, 27, 29, 2012, and December 4, 6, 12, 18, 2012. During the hearing, on September 28 and November 13, 2012, the hearing officer granted DOE's motion to consolidate the second and third sets of charges together with the first set of charges so as to be heard in the same hearing. As a condition of the consolidation, the hearing officer granted petitioner a reasonable amount of time to prepare for the defense of the two additional sets of charges. Closing arguments were held on January 9, 2013.

Both parties called a total of twenty-seven (27) witnesses to testify at the hearing including petitioner and students L.G., who is referred to as "D" in Specification 7 of the first set of charges, D.F. and A.D., concerning Specification 1 in the second set of charges, and S.O., who is referred to as "A" in Specification 1(a) of the third set of charges. After a full evidentiary hearing over the course of seventeen (17) days, the hearing officer issued her Award finding that petitioner was guilty of Specifications 7(c), (d), (e), (f) and 9 (in part) of the first set of charges, 1 (in part), 2, 3, 4 and 5 of the second set of charges, and Specification 1(a) of the third set of charges, and not guilty of the remaining Specifications. The hearing officer imposed a penalty of a six (6) month suspension without pay.

Vacature/Confirmation of an Arbitration Award

There is a strong public policy in New York State favoring arbitration as an efficacious method of dispute resolution. This policy is especially pronounced in the context of commercial matters as arbitration is routinely relied upon for an expeditious resolution of disputes by arbitrators

with practical knowledge of the subject area. (*Matter of Goldfinger v Lisker*, 68 NY2d 225 [1986].)

Courts are reluctant to set aside arbitration awards even when arbitrators err in deciding the law or facts “lest the value of this method of resolving controversies be undermined.” (68 NY2d at 230.)

The policy favoring arbitration gives rise to judicial deference because “it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded.” (*Id.*) Consistent with this strong public policy, there are few grounds for vacating or modifying arbitration awards and they are narrowly applied.

It is well settled law that courts must confirm an arbitration award pursuant to CPLR § 7510 unless there are grounds to vacate or modify the award pursuant to CPLR § 7511. CPLR § 7511(b)(1) enumerates the following grounds for vacating an award where the parties participated in the arbitration:

- (i) corruption, fraud, or misconduct in procuring the award; or
- (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
- (iii) an arbitrator, or agency or person making the award exceeded his [or her] power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
- (iv) failure to follow the procedure in this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

The grounds for modifying an award are set forth in CPLR § 7511(c) as follows:

- 1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or
- 2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
- 3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

Where a dispute has been arbitrated pursuant to an agreement between the parties, the award may not be set aside unless it violates a strong public policy, is totally irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power. (*Matter of Town of Callicoon [Civil Serv. Empls. Assn., Town of Callicoon Unit]*, 70 NY2d 907, 909 [1987]); *Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100*, 14 NY3d 119, 124 [2010].)

Education Law § 3020-a limits judicial review of a hearing officer's determination and award to the above grounds as set forth in CPLR § 7511. However, inasmuch as the parties are subject to compulsory arbitration, the award must also satisfy further judicial scrutiny in that it "must have evidentiary support and cannot be arbitrary and capricious." (*City School Dist. of the City of N.Y. v McGraham*, 17 NY3d 917, 19 [2011]) quoting *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY 2d 214, 223 [1996].) The judicial review, therefore, partially implicates application of both Article 75 and 78 of the CPLR.

Arguments

Petitioner argues, in part, that the Award was not supported by the evidence at the hearing; the hearing officer lacked jurisdiction to preside over the hearing because the DOE brought the charges against petitioner without first presenting those charges to the New York City Board of Education for a vote; the hearing officer was somehow biased against the petitioner; and the petitioner was denied his due process rights. Respondent contends that the Award was supported by the evidence in the voluminous record; petitioner failed to establish that the hearing officer lacked jurisdiction or was biased; and petitioner was afforded due process.

The Charges were Supported by the Record

In the first set of charges, the DOE charged petitioner with making offensive statements to L.G., a fourteen year old female student, that caused her to feel uncomfortable and (in her vernacular) “creeps [her] out.” Specifically, the hearing officer credited the testimony of L.G. that petitioner told her that she should not be overly friendly with a male student because he could become “sexually aroused” and “he was able to ejaculate and have sex.” Petitioner also allegedly inappropriately commented that L.G. should “carry herself better because her body was very mature.” The hearing officer concluded that these unwarranted remarks were injurious to the welfare of L.G.

In the second set of charges, on or about May 26, 2011, petitioner was assigned to supervise the “SAVE” room, a place “where students who are removed from class for disciplinary reasons or serving principal suspensions are placed.” (Award at 24). Student D.F. had been suspended and he was in the SAVE room on that day along with student A.D. and other students. D.F. had a long history of disciplinary problems and many suspensions. D.F. got up out of his seat without permission to open the door because it was hot in the room. Petitioner wanted the door closed and D.F. wanted it open. Petitioner told D.F. to sit down many times, but D.F. refused to sit. Petitioner testified that “D.F. had his hand on the doorknob and their hands met when D.F. took his hand off the doorknob and [petitioner] reached for the knob.” (Award at 26). While petitioner claimed that he wanted to close the door and D.F. wanted the door open, the hearing officer found that both of them now wanted the door open for obvious reasons. Petitioner then pushed the door into D.F. As such, the hearing officer concluded that the “evidence does not establish that [petitioner’s] safety necessitated pushing the door against D.F. . . . because the door was open at this point and

[petitioner] could have called for assistance.” (Award at 26). The hearing officer credited the testimony of D.F. and A.D. over petitioner’s conflicting testimony.

In addition, the hearing officer found that petitioner was excessively absent 53 days in the 2010-2011 school year and less so in school years 2009-2010 and 2011-2012, as well as late on the dates as specified in the second set of charges. While the absences were medically certified, the hearing officer concluded that petitioner’s habitual lateness and excessive absences “caused disruption to the school as coverage had to be provided for [petitioner’s] class.” (Award at 27).

In the third set of charges, the DOE charged petitioner with making an inappropriate remark to a female student S.O. on November 22, 2011. S.O. testified that petitioner told her that her sweat-pants were too tight and that remark made her feel very uncomfortable. The hearing officer found that petitioner prohibited students from wearing tight sweat-pants in his gym class even though it was not contained in the written school dress code. Petitioner acknowledged that many students would fail his gym class partly because they did not comply with the dress code. While petitioner denied making this inappropriate remark, the hearing officer credited S.O.’s testimony.

The above findings of the hearing officer were supported by the voluminous record. The hearing officer found that certain portions of the students’ testimony were credible and, conversely, that petitioner’s testimony was not credible in those instances. This Court can not review the hearing officer’s determination as to the credibility of witnesses because it is entitled to deference and is “largely unreviewable because the hearing officer observed the witnesses” (*Lackow v Department of Educ. [or “Board”] of City of N.Y.*, 51 AD3d 563, 568 [1st Dept 2008]).

Lack of Jurisdiction

Petitioner claims that the hearing officer lacked jurisdiction to hear the matter because “DOE preferred charges against the Petitioner, without first presenting these charges to the NYC Board of

Education for a vote on their specificity and reliability...” (Verified Amended Petition at ¶ 49). This very issue was raised and rejected by the Appellate Division which stated that there is no longer a requirement to have a majority vote of the board of education due to the later-enacted Education Law § 2590 that vested authority in the Chancellor in place of the board of education to delegate said authority to superintendents and others he or she deems appropriate. (*Matter of Munoz v Vega*, 303 AD2d 253 [1st Dept 2003]).

In this case, the Chancellor delegated his authority to “prefer charges against tenured pedagogical employees...under Educational Law § 3020-a...” to community school superintendents. (Exhibit “H” to the Cross-Motion). The Community Superintendent of District 6 then delegated her authority to principals of schools within the Community School District 6. (Exhibit “I” to the Cross-Motion). Therefore, the principal had the authority to prefer charges against petitioner.

Bias/Due Process

Petitioner alleges that the hearing officer had a bias against him and violated his due process rights because she denied his motion to dismiss the charges on the ground that they lacked requisite specificity, and granted the DOE’s motion to consolidate all the charges into one hearing.

In order to vacate an arbitration award due to an arbitrator’s bias, the petitioner must demonstrate such bias by clear and convincing evidence. (*Matter of Infosafe Sys. [International Dev. Partners]*, 228 AD2d 272 [1st Dept 1996]). The mere fact that the hearing officer made adverse determinations does not alone support the unsubstantiated allegations of bias. (*Matter of Mays-Carr [State Farm Ins. Co.]*, 43 AD3d 1439, 1440 [4th Dept 2007]). As such, petitioner’s conclusory and general claims of bias of the hearing officer is unproved and constitutes unsupported speculation (*Id*). Thus, petitioner failed to establish by clear and convincing evidence that the arbitrator was partial and had a bias against him.

Similarly, the petitioner has not demonstrated that his dues process rights were violated. The Court of Appeals has held that in an “administrative forum, the charges need only be reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against him.” (*Matter of Block v Ambach*, 73 NY2d 323, 333 [1989]). Moreover, the charges must be specific enough to enable the petitioner to prepare an adequate defense. (*Matter of Fitzgerald v Libous*, 44 NY2d 660, 661 [1978]; *Matter of Cassiliano v Steisel*, 64 NY2d 674, 676 [1984]). Here, the charges were specific enough in light of all the circumstances to apprise petitioner and to enable him to prepare and mount a vigorous defense throughout the lengthy hearing. In addition, petitioner was not prejudiced by the hearing officer’s discretionary determination to consolidate the second and third sets of charges together with the first set of charges so as to be heard in the same hearing because petitioner was permitted a reasonable amount of time to prepare for the defense of the two additional sets of charges.

Arbitrary and Capricious Standard

As stated above, inasmuch as the parties are subject to compulsory arbitration, the award must also satisfy further judicial scrutiny in that it must have evidentiary support and cannot be arbitrary and capricious. In a lengthy thirty-three page Award, the hearing officer engaged in a thorough analysis of the specifications or charges, the positions of the parties, the facts and circumstances, and then made reasonable findings based on the credibility of the witnesses to support the Award. Therefore, it is clear that the Award is rational, has evidentiary support and is not arbitrary and capricious. (*Lackow*, 51 AD3d at 568.)

Penalty

The courts may review and set aside a penalty imposed after a hearing pursuant to Education Law § 3020-a “only if the measure of punishment or discipline 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 [1974] citing to *Matter of Stolz v Board of Regents of Univ. of State of N. Y.*, 4 AD2d 361, 364 [1957]). The Court of Appeals then explained this subjective standard in the following manner. The penalty is deemed shocking if it is "disproportionate" to the "harm or risk" to the agency or institution or to the public at large. (*Pell*, 34 NY2d at 234). Other factors to be considered would be "deterrence" and "recurrence" by the individual charged and others who may repeat similar offenses. (*Id.*) The seriousness and deliberateness of the misconduct are to be weighed.

For instance, the Court of Appeals recounted that "habitual lateness" or "carelessness" involving substantial monetary loss would be treated less seriously than "larceny [and] bribery" even though it involved less money. (*Id.* at 234-235.) Moreover, the Court of Appeals highlighted serious offenses involving "grave moral turpitude and grave injury to the agency involved or to the public weal." (*Id.* at 235.) Indeed, where the misconduct was "deliberate, planned, [demonstrated] unmitigated larceny," the agency is entitled to impose an appropriate sanction to protect the "integrity and efficiency of their operations." (*Id.*)

In this case, the hearing officer found that petitioner engaged in "serious misconduct." (Award at 31). Specifically, the hearing officer found that petitioner was

"guilty of [making] inappropriate comments to students that went beyond the acceptable boundaries for a teacher. [Petitioner] used poor judgment in the manner he dealt with a confrontational student in the SAVE room that escalated to the point that [petitioner] pushed the student and the student tried to attack [petitioner]. [Petitioner] is also guilty of excessive absenteeism and lateness although the excessive absenteeism is mitigated by the period of time that [petitioner] was absent as a result of surgery during the 2010-2011 school year." (*Id.*)

As a result, the hearing officer concluded that the “charges of which [petitioner] has been found guilty warrant a significant penalty [of a six month suspension] but not the penalty of termination requested by the [DOE].” (*Id.*)

Recently, the Appellate Division upheld an arbitration award terminating petitioner’s employment as a schoolteacher where the hearing officer found petitioner guilty of “insubordination, neglect of his duty, conduct unbecoming his position, and using language that constituted verbal abuse of his students...” (*Matter of Ajeleye v New York City Dept. of Educ.*, 112 AD3d 425 [1st Dept 2013]). In this case the hearing officer took a more measured approach in imposing a six month suspension rather than termination of employment as a penalty for “serious misconduct” including (1) making offensive statements to a fourteen year old female student that caused her to feel uncomfortable and “creeps [her] out”; (2) needlessly pushing a student rather than de-escalating the situation; (3) excessive lateness and absences which “caused disruption to the school as coverage had to be provided for [petitioner’s] class (Award at 27.)”; and (4) making an inappropriate remark to a female student that her sweat-pants were too tight and that remark made her feel very uncomfortable. While only one of the above charges may not be sufficient to justify the penalty, the repeated pattern of making inappropriate remarks to female students that caused them to feel uncomfortable with the teacher, the excessive absences that disrupts the school’s ability to provide classes, and the un-excused pushing of a student taken together deem the penalty neither shocking to the conscience nor disproportionate to the charged offenses.

Conclusion


Accordingly, it is

ORDERED and ADJUDGED, that the petition is denied and the proceeding is dismissed with prejudice; and it is further

ORDERED and ADJUDGED, that the cross-motion is granted to the extent of confirming the Award rendered in favor of respondent and against petitioner.

The foregoing constitutes the decision and order of this Court. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: June 13, 2014
New York, New York



Hon. Shlomo S. Hagler, J.S.C.

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