

Matter of Bolt v New York City Dept. of Educ.

2015 NY Slip Op 30683(U)

April 27, 2015

Sup Ct, NY County

Docket Number: 653285/2014

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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In the Matter of the Application of
ERICKA BOLT,

Index No.:653285/2014

Petitioner,
For a Judgment and Order pursuant to
Article 75 of the Civil Practice Law
and Rules

- against-

THE NEW YORK CITY DEPARTMENT OF EDUCATION,
Respondent.

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JOAN M. KENNEY, J.:

This proceeding is brought pursuant to Article 75 of the Civil Practice Law and Rules seeking to vacate an arbitration Opinion and Award dated October 15, 2014, issued by arbitrator James McKeever in the *Matter of the Charges Preferred by: The Department of Education of the City of New York v. Ericka Bolt*.

Petitioner, Ericka Bolt, now seeks an Order pursuant to CPLR 7511 vacating an arbitration award made after a disciplinary hearing held pursuant to Education Law § 3020-a, in which petitioner was terminated from her employment with respondent, The New York City Department of Education (NYCDOE).¹

The NYCDOE cross-moves to dismiss the petition, pursuant to CPLR 3211 (a) (7), 404 (a), and 7511.

BACKGROUND AND FACTUAL ALLEGATIONS

Up until her termination from employment in October 2014, petitioner worked as a fifth grade teacher at PS 199x in the Bronx. Petitioner was a tenured employee, and had been working

¹Respondent is sued herein as The New York City Department of Education but cross-moves as the Board of Education of the City School District of the City of New York.

for the NYCDOE since 2003. She held several positions while at PS 199x, including second grade teacher, math specialist and pre-kindergarten teacher, among others.

In October 2013, pursuant to Education Law § 3020-a, the NYCDOE served petitioner with "Specifications," or charges, alleging that, within the 2010-2011 school year, petitioner neglected her duties and engaged in "misconduct, insubordination and conduct unbecoming a teacher" Petitioner's exhibit 3 at 1. The NYCDOE charged petitioner with three specifications (Specifications), which are set forth as follows:

"Specification 1: On or about and between April and/or May of 2011, [petitioner] improperly assisted several students during the administration of a statewide Math exam by directing them to correct their wrong answers on the exam.

Specification 2: On or about and between April and/or May of 2011, [petitioner] improperly assisted several students during the administration of a statewide English Language Arts exam by directing them to correct the wrong answers on the exam.

Specification 3: The [petitioner], by engaging in the conduct specified in Specifications 1 and 2 above:

- a) Violated the school's protocol for administering statewide exams.
- b) Committed insubordination by assisting students during the administration of the statewide exams when she was expressly directed not to do so.
- c) Yielded false results on the statewide exams.
- d) Caused an inaccurate measurement of students' performance.

THE FOREGOING CONSTITUTES:

- Just cause for disciplinary action under Education Law § 3020-a;
- Conduct unbecoming [petitioner's] position, or conduct prejudicial to the good order, efficiency and discipline of the service;
- Substantial cause rendering [petitioner] unfit to perform properly her obligations to the service;
- Violation of the State Regents examination standards;
- Violation of the Rules and Regulations of the Chancellor, the school and/or the district;

- Neglect of duty; and
- Just cause for termination."

NYCDOE's exhibit A at 1.

Pursuant to Education Law § 3020-a, a hearing began on January 30, 2014, to determine the outcome of the charges. Hearing Officer James McKeever, Esq. (McKeever) was appointed to preside over the proceedings.

A hearing took place over 10 days, where both parties were entitled to examine and cross-examine witnesses and submit evidence. In his 20-page opinion and award (Award), McKeever systematically addressed and explained the parties' contentions with respect to the Specifications. He heard testimony from six witnesses called by the NYCDOE and six witnesses called by petitioner, as well as from petitioner.

McKeever started his Award with a factual background. Petitioner's charges stemmed from an investigation conducted by the NYCDOE's Office of Special Investigation (OSI). Evidently, some of petitioner's fifth grade students, after matriculating into sixth grade at PS 303x, told their sixth grade teachers that their previous teacher had helped them with their State exam the previous year. This occurred in April 2012, when the students were taking the State exams again. They asked the sixth grade teachers for help, and when the teachers refused, the students told the teachers that their teacher in the past had helped them.

As a result, in June 2012, approximately one year after petitioner's fifth graders had taken their State exam, the sixth grade teachers anonymously informed OSI that the teachers at PS

199x had tampered with students' state test results. The principal (Bentley) conducted a review of the subject students' records and found that some of their test scores were higher at PS 199x than at PS 303x, and that the students had been in petitioner's class. Principle Bentley did not think the allegations had merit and did not report the matter to NYCDOE.

Nevertheless, about another year passed and an investigator, Juliana Celik (Celik), was assigned to the case. At the conclusion of Celik's investigation, in May 2013, OSI asserted that petitioner "improperly assisted her students on the 2011 State ELA and Math exams." Award at 3. The NYCDOE subsequently filed the current charges against petitioner.

Among other non-student witnesses, three out of the eight students who participated in the investigation, testified during the hearing as follows. Student C.C., who was in petitioner's fifth grade class, testified that, after her test, C.C. handed the test booklet to petitioner, "who then told her to fix her incorrect answers." Award at 4. Although petitioner did not provide C.C. with the correct answers, when C.C. resubmitted her test booklet to petitioner after she changed her answers, petitioner "did not comment." *Id.* C.C. also testified that she did not take any practice exams with petitioner and that petitioner was a "great" teacher. *Id.*

Student A.C. testified that she heard petitioner tell other students to fix their answers. Upon hearing this, A.C. changed two of her answers on the exams and "felt bad about changing her

answers on the exam because she knew it was wrong." *Id.* at 5.

Student R.A. testified that petitioner walked around the room to make sure students were not cheating. Petitioner also allegedly "told her, and other students, that they should correct some of their answers on the exam because they were wrong and that as a result of [petitioner's] assistance, she actually corrected some of her answers on the exam." *Id.* at 6. R.A. testified that changing her answers was "wrong."

Celik testified that petitioner told Celik during the investigation that she had simply walked around the classroom reminding students to bubble in their answers correctly. In pertinent part, Celik testified that she did not find petitioner's explanation credible because it contradicted the students' statements. Celik confirmed that petitioner had no prior substantiated allegations against her and that petitioner was a good teacher. Celik further stated that her report was not completed until eight months after her last interview with petitioner.

During the hearing, petitioner denied that she assisted her students in any way during the exam. She also stated that she did not even tell them to make sure and bubble in their answers. Petitioner testified that she has always been identified as a "model" teacher for her 10-plus years of teaching.

Petitioner also argued that the investigation took too long and was improper. She maintained that the allegations were "suspect" as they arose a year after the alleged incident.

In his Award, McKeever concluded that Specification one, regarding petitioner's alleged assistance during the State-wide math exam, should be dismissed, as all the students testified about the State-wide ELA exam. However, he sustained Specification two, concluding that petitioner assisted students, either "directly or indirectly," during the State ELA exam. McKeever states, however, that although the statements "of each testifying student was not flawless." *Id.* at 15.

McKeever also sustained Specification three, and found that, among other misconduct, and found that termination is the appropriate penalty for such conduct. McKeever acknowledged petitioner's record of satisfactory performance with the NYCDOE, but found that her "actions demonstrated a lack of integrity and irrevocably compromised her ability to serve as a role model for her students." *Id.* at 19. He found that petitioner conveyed the message to her 10-year old students that cheating is permitted. As a result, petitioner engaged in gross misconduct and should be terminated.

Shortly after receiving the Award, petitioner filed this proceeding. Petitioner contends that, as McKeever credited some student witnesses over others, he disregarded the credible evidence given and his award is irrational. For instance, McKeever allegedly did not "discuss the credible testimony provided from the Petitioner's student witnesses, but instead sought to rehabilitate the inconsistencies in the NYCDOE student witnesses' testimony." *Petition*, ¶ 34.

In her memorandum of law, petitioner again denies assisting any of the students. She believes it was wrong for McKeever to disregard the opinions of her student witnesses and that he exceeded his power by doing so. According to petitioner, the student witnesses were in different middle schools, while the NYCDOE witnesses attend the same school and are friends. In addition, there was a year delay between the test and the interview with OSI. The students may have been confused about the test and whether or not they were taking a practice exam at the time.

In addition, according to petitioner, the imposed termination is excessive and shocking, as petitioner has had an "unblemished" career with the NYCDOE. She contends that her genuine connection with her students should be taken into consideration. Petitioner believes that she would be able to modify her behavior in the future, if given the opportunity. She argues that, in similar situations, tenured teachers have received lesser penalties.

DISCUSSION

Pursuant to Education Law § 3020-a (5), CPLR 7511 provides the basis of review of an arbitrator's findings. *Lackow v Department of Educ. (or "Board") of City of N.Y.*, 51 AD3d 563, 567 (1st Dept 2008). CPLR 7511 limits the grounds for vacating an award to "misconduct, bias, excess of power or procedural defects [internal quotation marks and citation omitted]." *Lackow* at 567. However, where, as here, the parties are subjected to compulsory arbitration,

the Appellate Division, First Department, has held that judicial scrutiny is greater than when parties voluntarily arbitrate. *Id.* The arbitration award 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.*

An arbitration award is considered irrational if there is "no proof whatever to justify the award" *Matter of Peckerman v D & D Assoc.*, 165 AD2d 289, 296 (1st Dept 1991).

Here, this Court finds that the arbitrator's award was not rational having ignored, or failed to address, the testimony of students that testified on behalf of petitioner. By doing so and not addressing the testimony provided by the witnesses on behalf of petitioner, the arbitrator demonstrated bias. If the arbitrator would have at least addressed the merit, or lack thereof, of petitioner's witnesses - rather than completely ignore it - a more balanced opinion could have been discerned from the arbitrator's award. Moreover, the arbitrator admits that there were inconsistent statements from students upon whose testimony the arbitrator relied upon to render the award itself. As such, on its face, the decision and award appears inconsistent.

"The standard for reviewing a penalty imposed after a hearing pursuant to Education Law § 3020-a is whether the punishment of dismissal was so disproportionate to the offenses as to be shocking

to the court's sense of fairness." Lackow, 51 AD3d at 569. Given the reliance upon inconsistent statements, the arbitrator's decision to terminate appears disproportionate. The lack of evidentiary support to substantiate the inconsistent student testimony relied upon by the arbitrator, together with petitioner's unblemished work record prior to these specious allegations did not warrant the decision to terminate petitioner's employment. Termination of employment is ordinarily granted in matters that rise to a finding of egregious misconduct. Here, there was no such support for a finding of "egregious" misconduct and the award of terminating petitioner's employment in light of the arbitrator's decision is disproportionate and excessive. It is further noted that even Principle Bentley's initial investigation concluded that the claims against petitioner were without merit. In fact, the arbitrator himself notes that "There is no evidence in the record to support a finding that [petitioner] assisted any of her students with state-wide math exams" and in fact there was no hard evidence to support any of the other claims asserted against petitioner in Specifications 2 and 3. In light of said conclusion by the arbitrator himself, termination is not supported or warranted.

This Court additionally finds that the inordinate delay in the OSI's investigation and subsequent charges against petitioner some two years after the alleged incident, did in fact prejudice petitioner, contrary to the arbitrator's conclusion. This is

especially so when relying upon the memory of children asked to recall matter which may or may not have occurred years before they are asked to testify.

Accordingly, it is hereby


ADJUDGED that the petition is granted and the Opinion and Award dated October 15, 2014, issued by arbitrator James McKeever in the *Matter of the Charges Preferred by: The Department of Education of the City of New York v. Ericka Bolt*, respecting Specifications 2 and 3, is vacated; and it is further

ADJUDGED that Opinion and Award dated October 15, 2014, issued by arbitrator James McKeever in the *Matter of the Charges Preferred by: The Department of Education of the City of New York v. Ericka Bolt*, respecting Specification 1, is confirmed; and it is further

ADJUDGED that the cross motion of the respondent The New York City Department of Education is denied, in its entirety.

Dated: April 27, 2015

ENTER:



JOAN M. KENNEY
J.S.C.

J.S.C.