Matter of Hamilton v Alley
2015 NY Slip Op 32649(U)
June 25, 2015
Supreme Court, Onondaga County
Docket Number: 2014EF3535
Judge: Donald A. Greenwood

At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on June 9 2015.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application of
WILLIAM E. HAMILTON,

Petitioner,

v.

MARY ALLEY, JAMES FROIO and the BOARD OF EDUCATION OF THE JORDAN-ELBRIDGE CENTRAL SCHOOL DISTRICT,

Respondents,

DECISION AND ORDER

RJI No.: 33-14-3422
Index No.: 2014EF3535

ON SUBMISSION: **DENNIS O'HARA, ESQ., OF O'HARA, O'CONNELL & CIOTOLI**
For Petitioner

CHARLES SPAGNOLI, ESQ., OF THE LAW FIRM OF FRANK W. MILLER
For School District with respect to Amended Charge No. 1 only

LARRY P. MALFITANO, ESQ., OF BOND, SCHOENECK & KING, PLLC
For School District with respect to remaining charges

The petitioner moves for leave to renew with respect to this Court's Decision and Order dated December 16, 2014. A motion for leave to renew "(1) shall be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there was a change in the law that change the prior

determination; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion." *CPLR §221(e).*

In its Decision and Order this Court denied the petitioner's application in a CPLR Article 75 proceeding which sought to vacate and annul the Decision and Award of Hearing Officer Steven LaLonde dated August 12, 2014 rendered in a proceeding commenced in a proceeding pursuant to Education Law section 3020-a against petitioner by the Jordan Elbridge School District. The hearing was based upon charges filed against the petitioner in a 3020-a proceeding that combined initial charges filed on August 18, 2010 by respondent Mary Alley and amended charges filed on February 15, 2012 by respondent James Froio. The Hearing Officer sustained nine charges as set forth in the Statement of Charges and Amended Statement of Charges in a 154 page decision and granted the Board's demand for petitioner's termination form employment with the District effective as of the date of the Decision and Award. This Court dismissed the petition on the ground that it was untimely and also found that petitioner was not entitled to the relief sought and thus upheld termination of petitioner's employment. Petitioner filed a notice of appeal on January 14, 2015, but it has not perfected the appeal.

The petitioner predicates his motion to renew upon the February 17, 2015 Decision and Award of Hearing Officer Frederick Day in the Education Law section 3020-a proceeding against Jordan-Elbridge Central School District Administrator David Zehner, contending that that Decision and Award constituted "new facts" under the statute. *See, CPLR §2221(e).* On February 17, 2015 hearing Officer Day issued a Decision in the Zehner matter, which relates to charges concerning his duties as high school principal and pertain to alleged improper student grade changes and other alleged improper performance duties as principal. That Decision and

Award sustained one charge against Zehner regarding his conduct at a Board meeting and imposed a $2,000 fine.

Petitioner concedes that the timeliness issue as determined by this Court is a matter for resolution on appeal. However, petitioner moves to renew the petition and vacate the Decision and Award in his case on the merits and as it relates to the penalty of termination of employment based on findings made in the Zehner matter. The two were suspended at approximately the same time by the Board. Petitioner was suspended on July 7, 2010, while Zehner was suspended on September 20, 2010. The section 3020-a charges against petitioner and Zehner were levied by the same complainants and the Board made findings of probable cause on petitioner's charges on August 18, 2010 and on Zehner's charges on October 6, 2010. The hearings against petitioner and Zehner were conducted over the same relative time period, with petitioner's commencing June 10, 2013, over a ten month period, with 13 days of hearings ending on April 15, 2014, and Zehner's case commencing on January 19, 2012, with 42 days of hearing conducted over a 23 month period, ending on December 11, 2013.

Petitioner claims that the gravamen of this motion to renew is that the required due process protection cannot be made to depend on the luck of the draw of the appointment of the hearing officer without any meaningful judicial review and that to avoid this possibility Article 75 must be interpreted to empower a court to remedy a hearing officer's failure to provide due process and/or comply with fundamental principals of just cause. Petitioner claims that judicial review under Article 75 is illusory at best if the statute is interpreted so as to apply the same rules for compulsory public sector Education Law 3020-a proceedings as apply in consensual private sector arbitrations. Petitioner further contends that to be constitutionally applied CPLR Article

75 must enable the judiciary to determine whether a 3020-a hearing officer has given proper consideration to evidence that the charges have been prosecuted in bad faith, and that the Hearing Officer in his case did not apply the principals of just cause in rendering his decision. The petitioner describes in great detail what he contends was the "stark differences" in the approach of the two Hearing Officers, arguing that "a comparison of these two Decisions makes it clear that the luck of the draw on appointment of a 3020-a Hearing Officer determine the eventual outcomes. Zehner received substantive and procedural due process, while petitioner received mere lip service to that concept. The disparity in the experience and competence of the Hearing Officers translated into significant differences in the admission or exclusion of material evidence and in their determinations regarding witness credibility." *Petitioner's Memorandum of Law, p. 3.* In addition, the petitioner contrasts the experience of the two Hearing Officers, contending that Hearing Officer Day was far more qualified and thorough in the Zehner matter. Petitioner further contends that there is no rational way to reconcile the conflicting determinations concerning credibility of witnesses in petitioner's hearing, and that with respect to the standard of review applied by this Court as it related to Hearing Officer LaLonde's acceptance or rejection of witness testimony, the Court indicated that it was "required to accept the arbitrator's credibility determinations even when there is conflicting evidence and the room for choice exists." *See, Decision and Order, p. 7.* Petitioner argues, however, that the higher level of judicial scrutiny that applies to compulsory arbitration must also apply to credibility determinations and that although the case law is clear that when reviewing compulsory arbitrations in education proceedings, the court should accept the arbitrator's credibility determinations even when there is conflicting evidence and room for choice exists, the court should accept the Hearing Officer's

credibility determinations even with conflicting evidence (*see, Denhoff v. Mamaronek Union Free School District*, 101 AD3d 997 [2d Dept. 2012]), that does not mean this Court was required to do so.

In addition, the petitioner argues that this Court on review must have authority to determine whether Hearing Officer LaLonde properly considered relevant factors when imposing discipline. Petitioner claims that Hearing Officer LaLonde failed to do so and contrasts his findings with those of Hearing Officer Day with respect to Zehner matter. According to the petitioner, Hearing Officer LaLonde placed undue emphasis on what he referred to as multiple findings and gave no apparent consideration to the length of the employment of petitioner, the probability that it would leave him without a likelihood, the loss of his retirement benefits and the effect on his family. *See, Pell v. Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaronek, Westchester County*, 34 NY2d 222 (1974).

The petitioner's motion to renew is denied for a number of reasons. The necessary statutory threshold to bring a motion to renew is newly discovered evidence and reasonable justification for the failure to previously present such facts. *See, CPLR §2221(e).* However, petitioner offers no new facts here. There are no new witness statements or documentation that contradict or supplement the evidence and testimony considered by the Court in the prior determination. The entire motion is predicated on a Decision and Award issued on February 17, 2015, two months after this Court's Decision and Order, by a different Hearing Officer concerning a different individual. This does not constitute a new fact not offered on the prior motion that would change the prior determination nor does it demonstrate that there was a change in the law that change the prior determination. *See, CPLR §2221(e).* The petitioner's due

process contentions concerning judicial review in Article 75 proceedings and claims that this Court's denial of his Article 75 petition was improper at best, constitute a motion for leave to reargue. *See, CPLR §2221(d)*. If this Court were to consider the motion as one to reargue, it is denied. Since the motion was not made until nearly four months after petitioner was served with notice of entry of the decision, it is time barred. A motion to reargue has a very strict time limit and must be made within 30 days of service of the notice of entry. His time for reargument expired on January 16, 2015 and the motion was not filed until April 10, 2015 and is thus time barred. *See, Wells Fargo, N.A. v. Leven*, 101 AD3d 1519 (3rd Dept. 2012).

Even if this Court deemed the petitioner's motion as one to reargue and could consider it as timely, it is meritless inasmuch as petitioner contends that the entire statutory arbitration process is unconstitutional because of the differences in the competence and experience of available hearing officers, as well as the limited judicial review under Article 75. Although the petitioner goes to great lengths to criticize Hearing Officer LaLonde's experience, education and decision making, he neglects to acknowledge that hearing officers for such proceedings are selected by agreement between both parties from a list maintained for the State Education Department by the AAA. The record demonstrates that counsel for the parties mutually selected Hearing Officer LaLonde from the approved list.

Even viewing the petitioner's constitutionality argument through the lense of a motion to reargue, the motion fails. Petitioner is actually not claiming that the court overlooked or misapprehended some rule of law when it made its prior determination. Instead he argues that the law itself is incorrect and asserts that the Article 75 procedures concerning compulsory arbitration under Education Law 3020-a are an unconstitutional deprivation of his due process

rights. However, every presumption is in favor of the validity of a statute and the courts should not declare a statute unconstitutional unless required to do so by most cogent reasons or compelled by unanswerable grounds and unless such conclusions is unavoidable. *See, McKinney Statues, Section 150(a)(b).* Thus, there is no matter of law allegedly overlooked or misapprehended as claimed by the petitioner. Nor is there any basis to the claim that the entire statutory process of judicial review of a compulsory arbitration decision under 3020-a is unconstitutional. The law is well settled that 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. *See, Lackow v. Department of Education of City of New York*, 51 AD3d 563 (1st Dept. 2008). Therefore a different standard of review exists. This Court recognized that law and acknowledged it was "also authorized to vacate the Decision of the Hearing Officer for statutory grounds beyond those set forth in CPLR section 7511 if the Decision and Award does not have a rational basis in the record, even though Education Law section 3020-a explicitly states the Decision of the Hearing Officer is final and subject to vacatur only upon the four statutory grounds." *Decision and Order, p. 7.* This finding was consistent with the well settled principle that the decision of a section 3020-a hearing officer must satisfy an additional layer of scrutiny, must have evidentiary support and cannot be arbitrary and capricious. *See, City School District of City of New York v. McGram,* 17 NY3d 917 (2011).

Likewise, although petitioner raises four specific components of the judicial review process that he claims are unconstitutional, he does not argue that the Court misapprehended or overlooked the law, but rather that the law that exists is not constitutional. He claims it was unconstitutional for this Court to be prohibited from determining if a hearing officer has

wrongfully excluded material and relevant evidence in review of a compulsory arbitration. However, this Court noted that a hearing officer's "refusal or failure to pass upon an arguably relevant issue or piece of evidence even if mistaken as a matter of arbitral judgment, which being part and parcel of the arbitrator's determination is not judicially reviewable." *Decision and Order, p. 10, citing, Maross Construction, Inc. v. CNY Regional Transportation Authority*, 66 NY 341 (1985). Although petitioner seeks to distinguish *Maross, supra* and its prohibition on the judicial review of a hearing officer's exclusion of or decision not to consider certain evidence, arguing that it was not a compulsory arbitration case under the statute, the Education Law section explicitly provides that a hearing officer is empowered to set the rules of evidence that he will apply and that those "rules shall not require compliance with technical rules of evidence." *Education Law section 3020-a(3)(c)(i)* . Stated another way, "where reasonable men might differ as to whether the testimony of one witness should be accepted, or the testimony of another be rejected, or where from the evidence either of two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests solely upon the administrative agency." *Asch v. NYC Board of Education*, 104 AD3d 415 (1st Dept. 2013). The petitioner's case was subject to compulsory arbitration pursuant to the Education Law and this Court correctly applied the law as it relates to acceptance and consideration of evidence by a hearing officer in such a case. Therefore, nothing was overlooked or misapprehended.

The petitioner's contention that it was unconstitutional for this Court to not have been able to review the Hearing Officer's decision for errors of law is also without merit. A court may not reverse the determination of a hearing officer on a compulsory arbitration merely because the hearing officer has misapplied substantive rules of law. *See, Hegarty v. Board of Education of*

City of New York, 5 AD3d 771 (2d Dept. 2004). Petitioner claims that it was unconstitutional for this Court to not be able to examine the Hearing Officer's determination of credibility is contrary to the law, when reviewing compulsory arbitration proceedings such as this, the court is required to accept the arbitrator's credibility determination even where there is conflicting evidence and room for choice exists. This is in direct accord with a prior determination of this Court and its reliance upon a previous holding that "a hearing officer's determinations of credibility however are largely unreviewable because the hearing officer observed the witnesses and was able to perceive the inflections, the pauses, the glances and gestures - all of the nuances of speech and the manner that combined to form an impression of either candor or deception." *Lackow v. Dept,. of Education of City of New York,* 51 AD3d 563 (1st Dept. 2008).

Petitioner's contention that it is unconstitutional for this Court to lack the authority to review the penalty imposed by the hearing officer is also misplaced. Consistent with the law that its authority to review is limited to whether or not the penalty imposed was so disproportionate to the offense in light of all of the circumstances as to be shocking to one's sense of fairness (*see, Pell, supra.*), this Court did actually consider that issue, finding the determination was proper based upon findings of guilt concerning, *inter alia*, petitioner's acts of misconduct, incompetency and insubordination included among other things violating District policy and state law with respect to negotiation, bidding and procurement of millions of dollars of public contracts, attempting to withdraw from the public school's Workers' Compensation Trust Plan.

As petitioner concedes, the issue of untimeliness of the initial Article 75 application must be resolved at the Appellate Division, and the records amply demonstrates that petitioner's supporting papers, counsel's affidavit, petitioner's affidavit and memorandum of law referenced

in the notice of petition, were untimely and the Court thus found that "the substance of petitioner's application" was not timely filed. *Decision and Order, p. 3.*

NOW, therefore, for the foregoing reasons, it is

ORDERED, that the petitioner's motion for leave to renew pursuant to CPLR section 2221(e) is denied, and it is further

ORDERED, that to the extent that petitioner seeks leave to reargue pursuant to CPLR section 2221(d), the motion is denied.

ENTER

Dated: June 25, 2015
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Petitioner's Notice of Motion to Renew, dated April 10, 2015;
2. Affirmation of Dennis G. O'Hara, Esq. in support of petitioner's motion, dated April 10, 2015, and attached exhibits;
3. Petitioner's Memorandum of Law, undated;
4. Affirmation of Larry P. Malfitano, Esq. in opposition to motion, dated June 2, 2015;
5. Respondents' Answering Memorandum of Law in opposition to petitioner's motion, dated June 2, 2015; and
6. Petitioner's Reply Memorandum of Law, dated June 5, 2015.