

<b>Eilenberg v City of New York</b>
2017 NY Slip Op 30140(U)
January 18, 2017
Supreme Court, New York County
Docket Number: 654780/16
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. CAROL R. EDMEAD
J.S.C.

PRESENT: \_\_\_\_\_
Justice

PART 35

Eilenberg, Marla

INDEX NO. 654780/16

-v-

MOTION DATE 1/13/17

City of New York

MOTION SEQ. NO. 001

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

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

In this Article 75 proceeding, petitioner moves for an order vacating the Opinion and Award ("Opinion") of the respondent New York Department of Education ("DOE") hearing officer (the "Hearing Officer") which terminated her employment as a tenured guidance counselor after a statutory hearing under Education Law 3020-a. and remanding the matter for a lesser penalty and/or remediation. Petitioner argues that the hearing officer made numerous errors in substantiating certain specifications lodged against petitioner, and that the sanction of termination is irrational, arbitrary and capricious, disproportionate to the conduct at issue, and shocks the conscious (first cause of action).

In response, respondents, The City of New York, DOE and the Chancellor of DOE (collectively, "respondents"), move to dismiss the petition pursuant to Education Law 3020-a(5) and CPLR 7511 and 306(b) on the grounds that the Petition was not timely served and fails to state a cause of action. The statutory period for service is no more than 15-days after the 10-day statute of limitations ends, i.e., September 8, 2016. Thus, service of the petition on September 28, 2016 was untimely. Respondents add that the City of New York is not a proper party to this action and all claims against it should be dismissed,<sup>1</sup> and that judgment should be entered in favor of respondents, plus costs, fees, and disbursements.

<sup>1</sup> Petitioner does not contest that the City of New York is an improper party to this action.

Dated: \_\_\_\_\_, 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):

In opposition to dismissal, petitioner argues that dismissal for late service should be denied as service was late only several days and respondents have failed to show any prejudice from the delay. And, the lack of testimonial and evidentiary support for the specifications and presentation of witnesses on petitioner's behalf render petitioner's termination arbitrary and excessive.

In further support of their cross-motion, respondents add that petitioner failed to establish good cause to extend the time for service or why it would be in the interest of justice to extend the time for service.

*Discussion*

As to the issue of timely service, it is uncontested that petitioner failed to timely serve the petition.<sup>2</sup>

CPLR 306-b provides that "If service is not made upon a defendant within the time period provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, *or upon good cause shown or in the interest of justice, extend the time for service.*" (*Henneberry v Borstein*, 91 A.D.3d 493, 937 N.Y.S.2d 177 [1<sup>st</sup> Dept 2012]). "A 'good cause' extension requires a showing of reasonable diligence in attempting to effect service upon a defendant" (*Henneberry*, 91 A.D.3d at 496). To support an extension in the "interest of justice," a court "may consider [plaintiff's] diligence, or lack thereof, along with any other relevant factor . . . , including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" (*id.*) Here, petitioner failed to allege any facts to support a basis to excuse the late service of the petition on the ground of good cause or in the interest of justice.

In any event, even assuming the petition was timely served, petitioner failed to establish a basis to vacate or remand the matter for a lesser penalty and/or remediation.

Education Law § 3020-a[5] provides that review of a hearing officer's decision and award is limited to the grounds set forth in CPLR § 7511" (*Roberts v Department of Educ. of City of N.Y.*, 45 Misc 3d 1206(A), 3 NYS3d 287 [Sup Ct, NY County 2014]; *see also Abreu v N.Y.C. Dept. of Educ.*, 43 Misc 3d 1215(A), 990 NYS2d 436 [Sup Ct, NY County 2014] *citing Lackow v Department of Educ. of City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008]). "Under CPLR 7511, an award may be vacated only if (1) the rights of a party were prejudiced by corruption, fraud or misconduct in procuring the award, or by the partiality of the arbitrator; (2) the arbitrator exceeded his or her power or failed to make a final and definite award; or (3) the arbitration suffered from an unwaived procedural defect" (*Roberts*, 45 Misc 3d 1206(A), *citing Hackett v Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 154-55 [1995]).

Where, as here, the parties are subject to compulsory arbitration, "judicial scrutiny is stricter than that for a determination rendered where the parties have submitted to voluntary

---

<sup>2</sup> Education Law 3020-a[5] provides that "[n]ot later than ten days after the receipt of the hearing officer's decision, the employee .... may make an application to the New York State Supreme Court to vacate or modify the decision..." (Educ. Law 3020-a.) CPLR 306-b states that "where the applicable statute of limitations is four months or less, service of the petition] shall be made not later than fifteen days after the date on which the applicable statute of limitations expires."

arbitration” (*Asch v N.Y.C. Board/Department of Educ.*, 104 AD3d 415, 960 NYS2d 106 [1st Dept 2013] citing *Lackow*, 51 AD3d at 567). “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*, 51 AD3d at 567). A § 3020-a decision is supported by adequate evidence when “there is a rational basis in [the whole record] for the findings of fact supporting the [hearing officer’s decision]” (*Carroll v Pirkle*, 296 AD2d 755, 756 [3d Dept 2002]; see also *Principe v N.Y.C. Dept. of Educ.*, 94 AD3d 431, 437 [1st Dept 2012], *affd*, 20 NY3d 963 [2012] [decision must be in accord with due process, have adequate evidentiary support, and cannot be arbitrary, capricious or irrational]).

With regard to fact and credibility findings, courts cannot substitute their judgment for that of a hearing officer who had the opportunity to hear and see witnesses (see *City School Dist. of the City of N.Y. v McGraham*, 75AD3d 445, 450 [1st Dept 2010], *affd*, 17 NY3d 917 [2011]). Thus, the credibility determinations of a hearing officer are entitled to deference, even where a party seeking to vacate a § 3020-a decision claims that there is evidence which conflicts with the hearing officer’s determination (see *Cipollaro v N.Y.C. Dept. of Educ.*, 83AD3d 543, 544 [1st Dept 2011]; *Tasch v Bd. of Educ.*, 3 AD3d 502, 770 [2d Dept 2004]).

Ultimately, the party challenging an arbitration determination has the burden of showing its invalidity (*Caso v Coffey*, 41 NY2d 153, 159, 391 NYS2d 88, 359 NE2d 683 [1976]).

Based on the submissions, Petitioner fails to establish a basis to vacate the Hearing Officer’s Decision. The Hearing Officer found petitioner guilty of five of eight specifications lodged against her. DOE produced the following witnesses: Principal Nicholas Mele, former Assistant Principal Diana Hayes, Guidance Counselor Keri Wanzie, and DOE administrator, Carol Dawson. Petitioner, on the other hand, presented her own testimony, and that of the parent of a former student, and a former student. Based on the testimony and numerous documentary evidence, the Hearing Officer stated, in relevant part:

Based on my review of the record, my assessment of the credibility of the witnesses, and my review of the probative value of the exhibits and evidence, I find the Department has met its burden and shown the Respondent to be Guilty of Specifications 1-4, and 8. The Department did not meet its burden of proof with respect to Specifications 5-7. The Specifications proven by the Department in this case constitute: just cause for disciplinary action under Education Law §3020-a; incompetence and inefficient service; neglect of duty; insubordination; a violation of Chancellor's Regulation A-412; conduct unbecoming Respondent's position and conduct prejudicial to the good order, efficiency, and discipline of the service; substantial cause rendering Respondent unfit to perform properly her obligations to the service; and just cause for termination.

As set forth below, I find that the appropriate disciplinary penalty for the violations committed is termination.

The Opinion and Award is 28 pages, and includes findings of fact and conclusions as to each specification.

It cannot be said that the Hearing Officer’s decision was not rationally supported by the

record, or arbitrary, capricious, or unreasonable.

Further, as to the penalty issued, the proportionality of a petitioner's penalty should be examined "in light of all the circumstances," and should be affirmed unless it is "shocking to one's sense of fairness" (*Principe*, 94 AD3d at 433, 434 [penalty excessive where the petitioner had a "spotless" record for five years and was promoted to dean two years prior to the incidents at issue], *citing Pell*, 34 NY2d at 233). "[A] result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved" (*Brito v Walcott*, 115 AD3d 544, 546, 547 [1st Dept 2014] [termination for sexual conduct with a colleague on school property, a "one-time mistake" unwitnessed by students, inappropriate where the petitioner was a tenured teacher who had made many positive contributions to the school, had an unblemished disciplinary record, and was described by her supervisor as one of the best teachers she had ever worked with], *citing Pell*, 34 NY2d at 234; see also *Matter of Solis v Department of Educ. of City of N.Y.*, 30 AD3d 532, 532, 817 NYS2d 901 [2d Dept 2006] [termination disproportionate "(i)n light of, among other things, the petitioner's otherwise unblemished 12-year record as a teacher"]).

The Appellate Division has recently held that a pattern of "professional misconduct, neglect of duty, failure to follow procedures and carry out duties, and incompetent and inefficient service during two school years" is sufficient to justify termination (*see, e.g., Davis v N.Y.C. Bd.*, 137 AD3d 716 [1st Dept 2016] *citing Davies v N.Y.C. Dept. of Educ.*, 117 AD3d 446, 447 [1st Dept 2014]).

In addition to *prima facie* evidence of consecutive years of incompetent performance by Petitioner, the Hearing Officer's other findings were sufficient to justify termination. For example, as to the Hearing Officer's determinations of Specification 1 and 8, which were upheld, the Opinion indicates as follows:

Specification 1 During the 2013-2014 and 2014-2015 school years, Respondent failed to properly, adequately, and/or effectively plan and/or execute counseling sessions, as observed on the following dates:

- a. May 5, 2014;
- b. December 18, 2014; and
- c. February 9, 2015

\* \* \* \* \*

Specification 8 Respondent failed, during the 2013-2014 and 2014-2015 school years, to fully and/or consistently implement supervisory support, directives and/or recommendations for improvement and professional development, provided in observation conferences with administrators, one-to-one meetings

with school administrators or staff, as well as outside professional development, with regard to:

- a. Effective questioning and discussion;
  - b. Engaging students during counseling sessions; and
  - c. Group counseling with students.
- (Pages 2, 3, 15, and 24).

Based on the testimony and documents, the Hearing Officer found that "The conduct proven constitutes: incompetence and inefficient service; neglect of duty; insubordination; violation of Chancellor's Regulation A.-412; conduct unbecoming Respondent's position and conduct prejudicial to the good order, efficiency, and discipline of the service; substantial cause rendering Respondent unfit to perform properly her obligations to the service; and, just cause for termination."

And, as to instituting a lesser penalty, the Hearing Officer opined:

I have carefully considered the cases cited by Respondent in support of the argument that some penalty less than discharge is appropriate here, and I find each of those cases to involve significant elements not present here. There is hope of remediation in each of those cases - a spark of some indication that the Respondent wants to do things the proper way, or the problem involved misconduct rather than competence. The Respondent only wants to do things her way. There is no hope of remediation in a situation such as this.  
(Page 27).

Therefore, in light of the above, the Court finds that the petition fails to state a basis to vacate the Hearing Officer's decision or to remand the matter for a lesser penalty and/or remediation.

*Conclusion*

Based on the foregoing, it is hereby


ORDERED that the application of Petitioner pursuant to CPLR 7511 for an order vacating the Opinion and Award dated August 29, 2016 of the respondent New York Department of Education's hearing officer and remanding the matter for a lesser penalty and/or remediation is denied; and it is further

ORDERED that cross-motion of respondents to dismiss the Petition pursuant to Education Law 3020-a(5) and CPLR 7511 and 306(b), is granted, and the proceeding is dismissed; and it is further

ORDERED that the Clerk may enter judgment accordingly, together with costs upon a submission of an appropriate bill of costs.

This constitutes the Decision and Order of the Court.

Dated 11/18/17

ENTER:  J.S.C.  
**HON. CAROL R. EDMEAD**  
J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
Check if appropriate:     DO NOT POST     REFERENCE