Vanterpool v City of New York
2017 NY Slip Op 31669(U)
August 7, 2017
Supreme Court, New York County
Docket Number: 655701/2016
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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DONALD VANTERPOOL,

Petitioner,

DECISION, ORDER & JUDGMENT

Index No. 655701/2016

- v -

Mot. Seq. 1

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, CARMEN FARINA

Respondents.

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The cross-motion to dismiss the petition to vacate a hearing officer's determination to fire petitioner, a tenured teacher, is granted and this proceeding is dismissed.

Background

This proceeding arises out of petitioner's employment as a tenured math teacher for respondents. Since the 2011-2012 school year, petitioner has worked at Bushwick Community High School–a transfer high school for students aged 18 to 21. The school functions as a "second chance" for students to graduate from high school. The principal at the high school during petitioner's employment was Mr. Llerami Gonzalez and Ms. Tutti Touray served as an assistant principal. Ms. Touray conducted all the observations, sometimes with Mr. Gonzalez, of petitioner's work.

Beginning in the 2013-2014 school year, the City implemented a new rating system for teacher evaluations, which included four domains and four ratings (highly effective, effective, developing and

ineffective). Teachers are given one of these four ratings for each of the domains (and the various components within each domain) and for an overall rating.

As part of petitioner's application for a leadership program, Mr. Gonzalez provided petitioner with a letter of recommendation, dated November 1, 2013, in which he stated that petitioner has a "reputation as an extraordinary teacher" and he recommended petitioner "without reservation." However, for that same school year (2013-2014) petitioner received a Measure of Teaching Practice (MOTP) rating of developing and an overall rating of developing. Petitioner received the same ratings the next school year (2014-2015). For the 2015-2016 school year, petitioner received ratings of ineffective for both his MOTP and for his overall rating.

Respondents brought charges against petitioner under Education Law § 3020-a and sought a penalty of termination. At the hearing, respondents argued that petitioner was incompetent– for instance, they claimed he was not able to articulate strategies to help his students solve math problems. Respondents stressed *inter alia* that petitioner would put a problem up on the board and simply solve it without teaching his students.

Before the Hearing Officer, petitioner sought to characterize Ms. Touray and Mr. Gonzalez as not credible– he claimed that his observations were performed in bad faith. Petitioner noted that because of the transient nature of his students, it was difficult to engage them in the lesson.

The Hearing Officer concluded that respondents had met their burden to support every specification (Specifications 1a-o, 2, and 3b,c, g-k) except for Specification 3(a), (d), (e) and (f). The Hearing Officer found that Ms. Touray's testimony was credible and that petitioner admitted that Ms. Touray's notes were accurate (Hearing tr at 33). At the hearing, Mr. Gonzalez admitted that his letter

of recommendation was not truthful but the Hearing Officer found his testimony credible as well (*id.* at 33-34). The Hearing Officer concluded that the testimony of various teachers at the school (who testified in support of petitioner) did not support petitioner's assertion that the administration was involved in a conspiracy to remove tenured teachers (*id.* at 34).

The Hearing Officer found that petitioner "was provided with extensive individualized professional development during each of the school years charged" but that he "was unable to implement recommendations or otherwise improve his pedagogy" (*id.* at 49, 51) The Hearing Officer added that "there is no likelihood that further remediation efforts would improve the [petitioner's] competency. Based on the entire record, there is just cause to terminate the [petitioner]" (*id.* at 51).

Discussion

"Education Law § 3020-a(5) provides 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" (*Lackow v Dept. of Educ. [or Board] of City of New York*, 51 AD3d 563, 567, 859 NYS2d 52 [1st Dept 2008]) [internal quotations and citation omitted]. "[W]here 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" (*id.* at 567). The hearing officer's "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. The party challenging an arbitration determination has the burden of showing its invalidity" (*id.* at 567-68). To overturn a penalty of termination the punishment must

shock's one sense of fairness (*Matter of Davies v New York City Dept. of Educ.*, 117 AD3d 446, 447, 985 NYS2d 76 [1st Dept 2014]).

A Hearing Officer's decision is not arbitrary or capricious where the "Hearing Officer engaged in a [thorough] analysis of the facts and circumstances, evaluated witnesses' credibility, and arrived at a reasoned conclusion" (*Matter of Davis v New York City Bd./Dept. of Educ.*, 137 AD3d 716, 717, 30 NYS3d 2 [1st Dept 2016]).

In support of the cross-motion to dismiss, respondents maintain that there was more than enough evidence in the form of testimony and the 15 observations of petitioner's pedagogy to show that petitioner was incompetent. Respondents stress that the Hearing Officer issued a reasoned decision and made credibility determinations of the witnesses.

In opposition to the cross-motion, petitioner argues that the Hearing Officer did not properly evaluate petitioner's pedagogy and relied almost exclusively on the subjective evaluations of his administrators. Petitioner stresses that there were delays in receiving his observation reports and that this prevented him from implementing the changes contained in the reports.

The problem with petitioner's arguments are that his own admissions support the Hearing Officer's conclusion. Petitioner admitted at the hearing that he did not implement recommendations regarding differentiation (offering instruction to meet the individual needs of each student), noting that "because of the different levels that the kids are at, if I did that for every student I would be writing the lesson plan– it would take two to three hours to write the lesson plan and move forward (Hearing tr at 46 [sustaining Specification 3g]).

On November 19, 2015, a letter was placed in petitioner's file detailing his failure to have a lesson plan for class on November 12, 2015 (*id.* at 23). The letter noted that petitioner admitted that he did not have a lesson plan for that class (*id.*).

The Court also reviewed the observation reports and finds that although there were some delays in petitioner receiving his observation reports, these delays were not egregious nor did they prevent petitioner from implementing the recommendations over the course of three years. In many instances, petitioner acknowledged receiving the reports within a few weeks. For example, petitioner signed an acknowledgment that he received observations reports for November 13, 2013 and January 9, 2014 on January 29, 2014 (respondents' affirmation in support of the cross-motion, exh 2). Petitioner even added a response disagreeing with the conclusions of the January 9, 2014 report (*id.*). Further, despite the fact that petitioner acknowledged receiving the report for the March 20, 2014 observation on June 1, 2014, the form includes reference to a post-observation conference on March 25, 2014 and a detailed explanation of the numerous issues discussed at this conference (*id.*).

Another observation included immediate feedback– the December 22, 2014 informal observation includes petitioner's signature on that same day and specific notes about a feedback session on December 22, 2014 (*id.*). The Court notes that the instant facts are distinguishable from those in other cases where courts have found that delays in providing feedback justified vacating a penalty of termination (*see Beriguete v New York City Dept. of Educ.*, 53 Misc3d 347, 36 NYS3d 556 [Sup Ct, NY County 2016]; *see also Taylor v City of New York*, 139 AD3d 430, 30 NYS3d 104 [1st Dept 2016]).

The Court finds that the Hearing Officer made a rational and logical decision after hearing 12 days of testimony from both sides and the Hearing Officer's decision was neither arbitrary nor capricious. The penalty of termination does not shock one's sense of fairness because petitioner had 15 observation reports over the course of three years to make improvements and failed to make the appropriate adjustments. While petitioner disagrees with the findings of his administrators, the Court cannot discredit these witnesses simply because petitioner disputes their conclusions. Of course, observations reports prepared by Ms. Touray and Mr. Gonzalez (or any administrator) will always contain some aspect of subjectivity because they reflect the observer's thoughts of the lesson. But that does not mean they must be ignored– that is how the current system for teacher evaluations operates.

While the Court is bewildered at the existence and substance of the recommendation letter from the principal, that does not compel the Court to reach a different conclusion because Ms. Touray, rather than Mr. Gonzalez, was responsible for performing the vast majority of petitioner's evaluations. Clearly, Mr. Gonzalez should have been more careful before writing such an effusive letter praising petitioner– his admission at the hearing that the statements in the letter were untruthful is a shocking revelation, but it only reflects Mr. Gonzalez's poor judgment. It does not require this Court to usurp the Hearing Officer's credibility determinations regarding the testimony of Ms. Touray or other witnesses.

Summary

When reviewing Article 75 petitions to vacate teacher terminations, the Court can only determine whether the Hearing Officer's decision was arbitrary or capricious and whether the penalty shocks a sense of fairness. The Court cannot conduct a fact-finding hearing to evaluate witness credibility or to assess, as raised before the Hearing Officer here, whether administrators are simply

firing experienced teachers in order to replace them with younger (and cheaper) instructors. Those are determinations to be made by the Hearing Officer. Petitioner was provided with an opportunity to contest his evaluations and to offer theories regarding why his administrators should not be viewed as credible. The Hearing Officer rejected those claims.

Accordingly, it is hereby

ORDERED and ADJUDGED that respondents' cross-motion to dismiss the petition is granted and this proceeding is dismissed, and the clerk is directed to enter judgment accordingly.

This is the Decision, Order and Judgment of the Court.

Dated: August 7 ~~July 27, 2017~~
New York, New York

ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH