Pecoraro v City of New York
2017 NY Slip Op 32459(U)
November 20, 2017
Supreme Court, New York County
Docket Number: 650152/2014
Judge: William Franc Perry

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.W. FRANC PERRY, J.S.C. PART 5

DAVID PECORARO,

Petitioner

INDEX NO. 650152/2014

MOT. DATE August 29, 2017

- v -

CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF EDUCTION; CARMEN FARINA, CHANCELOR of NEW YORK CITY DEPARTMENT OF EDUCATION,

MOT. SEQ. NO. 001

Respondents

The following papers were read on this motion to Vacate Arbitration Decision

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits A	ECFS DOC No(s). 1-31
Notice of Cross-Motion to Dismiss and Confirm Award — Exhibits 1 through 5	ECFS DOC No(s). 1-20
Replying Affidavits	ECFS DOC No(s).

Petitioner, David Pecoraro, ("Petitioner"), commenced this action against Respondents, CITY OF NEW YORK; NEW YORK CITY DEARTMENT OF EDUCATION; CARMEN FARINA, CHANCELLOR of NEW YORK CITY DEPARTMENT OF EDUCATION, ("Respondents"), seeking to vacate the Decision of Hearing Officer, Randi E. Lowitt, dated December 20, 2013, pursuant to Education Law Section 3020-a and New York City Practice Law and Rules Section 7511.

David Pecoraro was a teacher previously employed by the Board of Education of the City School District of the City of New York ("BOE") at Beach Channel High School in Queens, New York. Hearing Officer, Randi E. Lowitt, was selected pursuant to procedures in the collective-bargaining agreement (between the BOE and UFT) to preside over the hearings. After eight days of evidentiary hearings, the hearing officer issued a 32-page decision, which found the Petitioner guilty and due to unspeakable acts, terminated his employment.

STANDARD OF REVIEW and ANALYSIS

The issue before the hearing officer was whether Petitioner, Mr. Pecoraro, was guilty of abusing and spitting on a student during an incident that occurred on February 7, 2012 and if the penalty (termination of Petitioner's BOE employment) was excessive and unwarranted pursuant to Education Law Section 3020-a (5) and CPLR Section 7511. Furthermore, petitioner asserts that the decision was "arbitrary" and "capricious", concluding the penalty to be shocking to the conscience. Mr. Pecoraro had been repeatedly warned, over a ten-year observational period, to cease from being confrontational with students; these warnings were issued through formal disciplinary letters to file, counseling memos and unsatisfactory observation reports. Respondents alleged that if the petitioner had adhered to these warnings brought forth against him, he could have rectified the concerns of the school administrators by behaving more appropriately with the students. Consequently, the event that occurred on February 7, 2012, may have never occurred, if Mr. Pecoraro had heeded the warnings, preventing the disciplinary charges of misconduct. Mr. Pecoraro petitioned to annul the decision of the hearing officer on January 16, 2014 and Respondents cross-moved to dismiss the petition, dated April 3, and April 23, 2014. The Court, in a decision dated October 9, 2014 dismissed the action against the City of New York but otherwise denied the motion; the Court noted that a review of the "transcript of the arbitral proceedings," "the video," and petitioner's partial "prior disciplinary rec-

ord" was not enough to determine if the penalty was excessive. Respondents submitted a verified answer which illustrated that the petitioner had been repeatedly warned to treat students with some modicum of respect.

Petitioner now argues that the decision of hearing Officer Randi E. Lowitt should be vacated pursuant to the grounds set forth in the CPLR § 7511 because "there were serious deficiencies in the investigation of this incident". Petitioner was brought up on disciplinary charges under Education Law § 3020-a; under Specification 2 of these charges, petitioner's actions resulted in widespread negative publicity; his misconduct was reported online at www.youtube.com through two videos, dated February 8, 2012 and February 18, 2012. Now, petitioner asserts that if the "hallway surveillance video" had been considered by the hearing officer, it would've indicated that two members of the network staff stood outside the classroom during the incident and thus, respondents had the opportunity to intervene. Petitioner further argues that penalty for his conduct, if any, should be "minimal" based upon his past service with the BOE. Contending that his service with the BOE was free of any "prior disciplinary record" and the hearing officer failed to conduct a thorough review of the evidence, rendering a decision based upon a grainy, poorly shot video. Petitioner claims that the hearing officer exceeded her jurisdiction and thus, the decision and penalty therein ordered is irrational.

Respondents oppose the petition to vacate the decision of the hearing officer because the petition failed to allege facts sufficient to vacate the decision. Petitioner failed to set forth any facts that could justify disturbing the Hearing Officer's findings of fact. Petitioner brings into question, the "hallway surveillance video", yet disregarding the fact that the incident occurred in the classroom. Moreover, petitioner had the opportunity to cross-examine respondents during the hearing and did not. Petitioner asserts an offense against the video quality, yet two eye-witnesses testified about their direct observations of the incident that day, which were in line with what was presented in the video. The hearing officer's decision is supported by eight witnesses who testified, two of which were eye-witnesses. Furthermore, the penalty of termination does not shock the conscience.

The party challenging a Hearing Officer's decision carries the burden of establishing "grounds for vacatur". Lackow, 51 AD3d at 568 (citing Caso v. Coffey, 41 NY2d 153, 159 (1990)). Education Law § 3020-a (5) specifies that a disciplinary decision cannot be annulled except for the reasons set forth in CPLR § 7511, the Courts have held that the § 3020-a process is a compulsory arbitration and thus, judicial review requires a finding that the arbitrator's determination was made "in accord with due process and supported by adequate evidence." Lackow, 51 AD3d at 567; Hegarty v. Bd. of Educ., 5 AD3d 771, 772-73 (2d Dep't 2004).

A §3020-a decision is supported by adequate evidence in the record when "there is 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 Dep't 2002) (internal citations omitted). When conflicts appear in the evidence, a court will defer to the hearing officer's credibility determination and may not disturb an award that is rationally supported. Cipollaro v. N.Y.C Dep't of Educ., 83 AD3d 543, 544 (1st Dep't 2011) (a hearing officer's determination of confliction evidence "is entitled to deference"); Saunders v. Rockland Bd. of Coop. Educ. Servs., 62 AD3d 1012, 1013 (2d Dep't 2009). ("When reviewing compulsory arbitration in education proceedings such as this, the court should accept the arbitrators' credibility determinations, even where there is confliction evidence and room for choice exists.") (internal citation omitted).

"A court's review of a hearing officer's decision issued in an Education law § 3020-a hearing is extremely limited". "Education Law § 3020-a (5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR 7511." Lackow v. Dep't of Educ., 51 AD3d 563, 567 (1st Dep't 2008); Brito v. Walcott, 115 AD3d 544 (1st Dep't 2014). Judicial review for compulsory arbitration "requires that the award be in accord with due process and supported by adequate evidence in the record" (internal citation omitted); Brito, 115 AD3d at 545. Further, a "hearing officer's determination of credibility . . . are largely unreviewable." Lackow, 51 AD3d at 568; Berenhaus v. Ward, 70 NY2d 436, 443, (1987). "It is basic that the decision by an Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts". A hearing officer preserves the right to "observe the witnesses and . .. perceive . . . all the nuances of speech and manner that combine to form

an impression of either candor or deception." Lackow, 51 AD3d at 568; Douglas v. N.Y.C. Bd. /Dep't of Educ., 83 AD3d 856, 857 (1st Dep't 2011).

Petitioner claims that the hearing officer exceeded her jurisdiction and that the decision and penalty therein ordered is irrational. To establish that an arbitrator has "exceeded his/her power" within the meaning of CPLR § 7511 (b) (iii), a party must show that the award "violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power under CPLR § 7511 (b) (i)." Elul Diamonds Co., supra at 392.

Here, petitioner has not established grounds to vacate the decision, as there is no evidence before the court that the decision clearly exceeds the hearing officer's jurisdiction, nor is there proof that the decision violates "a strong public policy" or is "irrational. Petitioner may not be in favor of the hearing officer's decision, and it is true that the Petitioner was a long standing tenured teacher, however, Petitioner has failed to meet the burden for vacatur. The court has ruled that "the fact that a teacher has been a longstanding DOE employee does not rule out the ultimate penalty of termination of employment." Roman v. Dep't Educ. of N.Y., 2014 N.Y. Misc. LEXIS 848 (Sup. Ct. N.Y. Co. Feb 28, 2014). Petitioner contends that the penalty should have been minimal; Petitioner initiated conflict with the student, resulting in agony, abuse and aggressive behavior and thus, termination is the appropriate level of penalty, wherein a minimal penalty would not be just. This court cannot conclude that the hearing officer's decision was irrational.

In her decision, the hearing officer precisely reviewed all the evidence before her and found petitioner guilty; the nature of this misconduct not only warranted termination of his BOE employment but granted, in accordance to Education Law Section 3020-a and New York City Practice Law and Rules Section 7511, the Petitioner an appropriate penalty. Petitioner was found guilty of taunting, insulting and intimidating a student during class; petitioner handled the student in an aggressive, confrontational and violent matter. Specifically, the hearing officer referenced the Petitioner's Disciplinary record, which repeatedly addressed his behavior in regards to his approach and tactics against students. In analyzing the issues before her, the hearing officer established that "the petitioner's conduct was substantiated and substantial and therefore, found that, based on the record, including the publicity given this case, dismissal was the appropriate penalty". Petitioner demonstrated lack of accountability for his actions and further attempted to smear the hearing officer and student-victim.

Despite the Petitioner's arguments, the record before the court demonstrates that the hearing officer "voluntarily" resigned from the BOE-UFT panel in good standing; there is no evidence, as Petitioner may suggest, to support that Hearing Officer Lowitt could not return to the panel. Petitioner also argued that the student-victim was deported for criminal activity, when such distinct "speculation" was stricken from the record because those allegations were unprovable and no such evidence exists to support those claims. In attempt to unveil poor characterization of others, petitioner unveiled poor characterization of himself and did not establish at any point in time, that his behavior was wrong.

"The BOE argued that, given the heinous and crude nature of the [petitioner's] actions, termination from service is not only warranted but required", and which was based upon the petitioner's verbal and physical abuse. No other penalty would be justifiable to rectify actions of this magnitude. Petitioner spoke to the student about "going to jail", provoked the student by "telling the student not to touch him" but the Petitioner was found "guilty of touching the student" and then "spit bodily fluid onto the student", consequently taking the student's clothing from him to wipe the spit. Furthermore, the petitioner was found guilty of switching his justification for his behavior, by lying to cover up his actions. Through a monotonous set of warnings, the Petitioner had been noted for: not acting wisely in his duties when confronting students (January 2002 Letter), making bad situations worse (May 2003 Letter), fostering hostile relationships (March 2008 Informal Observation Report), lacking the ability to be empathetic to students and humiliating them (June 2008 Observation), inability to engage students (October 2010 Report) and finally warned in 2011, one year before the incident, to maintain sanitary office conditions, which Petitioner failed to do.

The standard for reviewing a penalty imposed after a hearing held pursuant to §3020-a is whether such punishment is so disproportionate that it is shocking to one's fairness, the hearing officer upheld to this measure to which the punishment was not shocking to one's fairness. Courts have repeatedly upheld §3020-a decisions that result in the termination of longstanding tenured teachers and thus, this punishment cannot be deemed disproportionate. Roman v. Dep't Educ. of N.Y., 2014. In considering Mr. Pecoraro's arguments that the hearing officer did not consider a lesser punishment, the hearing officer, expressly noted that if the Petitioner had been dedicated and provided excellent service to the Department of Education then penalty may have been minimal but given the Petitioner's egregious acts, this would not be so in this matter.

A court's review of a hearing officer's decision issued after an Education law §3020-a hearing is extremely limited and under the Education Law §3020-a (5) the judicial review must be conducted pursuant to CPLR §7511. These standards govern the hearing officer's decision. Given the standard of review set forth by CPLR §7511 and the record before the court, Petitioner has failed to meet his burden to disturb the hearing officer's decision; the evidence set forth by petitioner and the supported evidence set forth by the hearing officer's review support the decision sought to be vacated. Petitioner has failed to allege facts sufficient to vacate the decision. To the contrary, the record is replete with evidence to confirm the hearing officer's decision.

CONCLUSION

The record before the court does not demonstrate that the hearing officer exceeded her powers within the meaning of CPLR §7511 (b) (1) (iii), accordingly, the decision should be confirmed and the Petition to Vacate is dismissed. Accordingly, it is hereby,

ORDERED that Petitioner's Motion Sequence No. 001, pursuant to Education Law Section 3020-a (5) and CPLR §7511, seeking to vacate and set aside the decision of the Hearing Officer, is denied; and it is further

ORDERED that Respondents' Cross-Motion Sequence No. 001, to dismiss the petition pursuant to CPLR §7511 and Rules 404(a) and CPLR §3211 (a)(7) and Education Law §3020-a is granted; and it is further

ORDERED that Respondents' Cross-Motion Sequence No. 001, to confirm the arbitration award pursuant to CPLR §7511(e), is granted in its entirety and the Clerk is directed to enter judgment accordingly.

The court has considered the remaining arguments and finds them to be without merit. As such, the hearing officer's decision is confirmed. This constitutes the decision and order of the court.

Dated: November 20, 2017

HON.W. FRANC PERRY, 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**