

Lian v New York City Dept. of Educ.

2020 NY Slip Op 31857(U)

June 10, 2020

Supreme Court, New York County

Docket Number: 651703-2019

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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ROXANA LIAN,

Plaintiff,

Index No. 651703-2019

-against-

DECISION AND ORDER

Mot. Seq. 001

NEW YORK CITY DEPARTMENT OF
EDUCATION,

Defendant.

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Melissa A. Crane, J.S.C.

In this CPLR article 75 proceeding, the petitioner seeks to vacate an arbitrator’s award, made after a compulsory arbitration, that sustained charges related to petitioner’s failure to perform duties as a public-school teacher and terminated her teaching position with the respondent, New York City Department of Education (hereinafter “the DOE”). The DOE cross-moves pursuant to CPLR §3211(a)(7) to dismiss the petition for failure to state a cause of action.

The petitioner was a tenured teacher who, prior to her termination, was assigned to teach a bilingual curriculum to Chinese-English speaking first graders in Brooklyn. On December 11, 2017, the DOE brought charges against her pursuant to Education Law § 3020-a, alleging that she failed to “properly, adequately and/or effectively plan and/or execute multiple lessons the school’s administration observed and failed to fully and/or consistently implement the administration’s directives and/or recommendations for pedagogical improvement.”

The arbitrator heard the charges in a compulsory arbitration, pursuant to Education Law § 3020-a. After a hearing, arbitrator Elliot H. Shaller issued a 58-page Final Opinion and Award dated March 14, 2019, sustaining all the charges, and recommending termination of the petitioner’s employment as a penalty. The petitioner has commenced this proceeding pursuant to CPLR section 7511(b) to vacate the award, arguing that the findings of the arbitrator were

arbitrary and capricious, and that the penalty imposed was disproportionate to the offense and/or shocking to the conscience.

Education Law § 3020-a (5) provides that judicial review of a hearing officer or arbitrator's findings after an arbitration hearing must be conducted pursuant to CPLR 7511. Under this provision, an award may only be vacated upon a showing of "misconduct, bias, excess of power or procedural defects" (*Matter of Austin v Board of Educ. of City Sch. Dist. of City of N.Y.*, 280 AD2d 365, 365 [1st Dept 2001]). Nevertheless, where, as 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 (*see Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]; *Matter of Lackow v Department of Educ. of City of New York*, 51 AD3d 563, 567-568 [1st Dept 2008] [citations omitted]). Thus, the determination must follow due process, adequate evidence must support the finding, and must be rational and satisfy the arbitrary and capricious standard of CPLR article 78 (*see Matter of Lackow v Dept. of Educ. of City of New York*, 51 AD3d at 567). The party challenging an arbitration determination has the burden of showing its invalidity (*see id.* at 568; *see also Matter of Dikovskiy v New York City Bd. of Educ.*, 157 AD3d 501, 501-502 [1st Dept 2018]; *Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 418-419 [1st Dept 2013]).

Contrary to the DOE's contention, the petition states a cause of action. When assessing the adequacy of a complaint in the context of a CPLR 3211(a)(7) motion to dismiss, the court's role is "to determine whether plaintiffs' pleadings state a cause of action" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). On such a motion, the pleading is to be afforded a liberal construction, the facts alleged in the complaint must be deemed true, and the

plaintiffs must be accorded the benefit of every possible favorable inference (*see id.*; *see also Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 887 [2013]; *Simkin v Blank*, 19 NY3d 46, 52 [2012]; CPLR 3026). “The motion must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d at 152 [internal quotation marks omitted]; *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d at 887; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Thus, the court should determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d at 87-88). Here, the petitioner has met this liberal standard of pleading by contending that the compulsory arbitration award was arbitrary and capricious, and that the resulting penalty was disproportionate to the offense.

While denial of the motion generally would require a respondent to serve an answer, under the circumstances presented here, there is no need for the DOE to answer. No prejudice exists if the DOE does not file an answer, as the facts have been fully presented in the parties’ papers and no factual dispute remains (*see Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d 100 [1984]; *Matter of Applewhite v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 115 AD3d 427 [1st Dept 2014]; *Matter of Camacho v Kelly*, 57 AD3d 297 [1st Dept 2008]). Thus, upon denying the cross motion to dismiss, the court will now consider the merits of the petition.

The court denies the petition. An arbitration award is considered arbitrary and capricious when it is made “without sound basis in reason or regard to the facts” (*Matter of Peckham v Calogero* 12 NY3d 424, 431 [2009]; *see Matter of Pell v Board of Educ.* 34 NY2d at 231). Thus, the court must determine whether there was a rational basis in the record that supports the

arbitrator's decision (*see Matter of Eilenberg v City of New York*, 2017 NY Misc LEXIS 223, *5 [Sup Ct, N.Y. County, Jan. 18, 2017]). Here, there is ample evidence in the record to support the arbitrator's determination. The arbitrator found that the petitioner had deficiencies in her teaching that she had failed to address, even though the DOE provided numerous opportunities to develop and improve her professional skills. The arbitrator based his findings on the numerous observational reports and investigatory materials submitted as part of the record, as well as the testimony of several school officials and instructors. To the extent the petitioner argues her right to a fair hearing was violated because Hearing Officer Shaller grounded his determination on investigatory data and hearsay evidence, the court rejects her claim. It is well-settled that administrative determinations can be based on hearsay, and administrative determinations that rely on hearsay evidence are routinely upheld (*see, e.g., Gray v Adduci*, 73 NY2d 741, 742 (1988) (“[h]earsay evidence can be the basis of an administrative determination”) (citations omitted); *Berkeley v. New York City Dep’t of Educ.*, 159 AD3d 525, 526 [1st Dept 2018]; *Gisors v New York City Dep’t of Educ. for City Sch. Dist. Region 10*, 94 AD3d 584, 584 [1st Dept 2012]). Furthermore, the testimony of school witnesses supports the findings of the reports, and the petitioner had a full opportunity to cross-examine these witnesses. Accordingly, the petitioner’s argument is meritless.

To the extent the petitioner disputes the testimony or attacks the credibility of the witnesses as not being sufficiently familiar with the Chinese language or Chinese language instruction, this argument is also unavailing. Because an arbitrator or hearing officer observes the witnesses and generally is in a better position to determine credibility issues, his or her credibility determinations “are largely unreviewable” (*Lackow*, 51 AD3d at 568, *quoting Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). The court must thus defer to the arbitrator in

connection with these findings. Hence, the finding of misconduct based on pedagogical deficiencies is not arbitrary and capricious.

As to the penalty of termination, “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; see *Matter of Harris v Mechanicville Cent. School Dist.*, 45 NY2d 279, 285 [1978]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 313 NE2d 321, 356 NYS2d 833 [1974]; see *Matter of Kreisler v New York City Tr. Auth.*, 2 NY3d 775, 776 [2004]; *Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]). The penalty of termination from employment does not shock the judicial conscience and is not disproportionate to the petitioner's misconduct. The arbitrator reasonably found that the DOE gave petitioner numerous opportunities to improve her lessons and presentations and had, at best, only shown minimal improvement. Thus, the termination of the petitioner's employment was not disproportionate to the offenses committed.

The petitioner's remaining contentions are without merit.

For the reasons stated herein, it is hereby

ORDERED that the respondent's cross motion to dismiss the petitioner is denied; and it is further

ORDERED that the petition is denied; and it is further

ADJUDGED that the proceeding is dismissed.

The foregoing constitutes the Decision, Order, and Judgment of the Court.

ENTER JUDGMENT

ENTER :



Melissa A. Crane, J.S.C.

Dated: New York, New York
6/10/2020