Matter of Henry v New York State Workers' Compensation Bd.
2020 NY Slip Op 33394(U)
October 13, 2020
Supreme Court, Kings County
Docket Number: 506420/20
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
----------X
In the Matter of the Application of

JOSSETH HENRY,

Petitioner,

For a Judgment Pursuant to Article 75 of the Civil Practice Law and Rules

-against-

NEW YORK STATE WORKERS' COMPENSATION BOARD,

Respondent.
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Index No.: 506420/20
Motion Date: 9-28-20
Mot. Seq. No.: 1

DECISION/ORDER

The following papers numbered 1 to 5 were read on this petition:

Papers:	**Numbered:**
Notice of Petition/Petition Affidavits/Affirmations/Exhibits/Memo of Law	1
Respondent's Answer	2
Answering Affirmations/Affidavits/Exhibits/Memo of Law	3-4
Reply Affirmations/Affidavits/Exhibits/Memo of Law	5
Other	

Upon the foregoing papers, the petition is decided as follows:

Petitioner commenced this proceeding pursuant to Article 75 of the New York Civil Practice Law and Rules for an Order and Judgment (1) vacating the arbitration award made after a disciplinary hearing pursuant to Article 33 of the contract between the Civil Service Employees Association ("CSEA") Administrative Services Unit ("ASU") and the State of New York; (2) alternatively, modifying the arbitration award and setting aside or reducing the penalty of termination as excessive, and restoring to Petitioner all back pay, benefits, service time, seniority, and all other fringe benefits; (3) granting Petitioner the costs and disbursements of this

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proceeding and reasonable attorney's fees; and (4) granting such other and further relief as this Court deems just and proper.

The law is well settled in the area of Article 75 litigation that "as a matter of public policy, the merits of an arbitration are beyond judicial review" (*Board of Educ. of Dover Union Free School Dist. v. Dover-Wingdale Teachers'Ass'n*, 95 A.D.2d 497, 501). New York courts give great deference to an arbitrator's decision and judicial review of an arbitration decision is narrowly circumscribed by statute (CPLR § 7511). Courts are statutorily mandated to "confirm an award upon application . . . unless the award is vacated upon a ground specified in Section 7511" (CPLR § 7510). Pursuant to CPLR § 7511(b)(1), an arbitration award can be vacated if the court finds a party's rights were prejudiced by:

> (i) corruption, fraud or misconduct in procuring the award; or
>
> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
>
> (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
>
> (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect without objection.

There is no merit to petitioner's contention that the arbitration award should be vacated pursuant to § CPLR 7511(b)(1)(iii) on the grounds that the arbitrator exceeded her power pursuant to Article 33 of the Collective Bargaining Agreement (CBA) between the Civil Service Employees Association, Administrative Services Unit and New York State. There is no provision in the CBA precluding the arbitrator from determining that termination was an appropriate penalty for petitioner's transgressions. Contrary to petitioner's contention, Article 33.3(a)(1) of the CBA clearly lists "dismissal from service" as an appropriate penalty.

Moreover, Article 33.4(g)(6) allows an arbitrator to consider "[t]he employee's entire record of employment" . . . "with respect to the appropriateness of the penalty to be imposed, if any." Any suggestion that the arbitrator was without authority to consider petitioner's many prior transgressions in determining that termination was an appropriate penalty is without merit. Finally, given plaintiff's employment history, the Court rejects petitioner's argument that there was a lack of progressive discipline in this case.

While the excessiveness of a penalty is not one of the enumerated bases upon which an arbitration award may be vacated (*see* CPLR 7511[b]), where, as here, an arbitration is compulsory, judicial review under CPLR article 75 requires that the award be in accord with due process (*see Matter of Hegarty v. Board of Educ. of the City of New York,* 5 A.D.3d 771, 773, 773 N.Y.S.2d 611; *Matter of Board of Educ. of Westhampton Beach Union Free School Dist. v. Ziparo,* 275 A.D.2d 411, 712 N.Y.S.2d 873). Accordingly, the excessiveness of a penalty is a basis upon which the arbitration award may be vacated (*see Matter of Russo v. New York City Dept. of Educ.,* 25 N.Y.3d 946, 948, 6 N.Y.S.3d 549, 29 N.E.3d 896; *Matter of Hegarty v. Board of Educ. of the City of New York,* 5 A.D.3d at 773, 773 N.Y.S.2d 611). Here, however, the penalty of termination was not so disproportionate to the offenses as to be shocking to one's sense of fairness (*see Weinstein v. New York State Workers' Comp. Bd.*, 135 A.D.3d 948, 949, 22 N.Y.S.3d 900, 901; *Matter of Poidomani v. Nassau Bd. of Coop. Educ. Servs.,* 127 A.D.3d 978, 979, 4 N.Y.S.3d 910; *Matter of Bosch v. City of Middletown, N.Y.,* 127 A.D.3d 855, 855, 4 N.Y.S.3d 898; *Matter of Martin v. Board of Trustees of the Vil. of Pelham Manor,* 86 A.D.3d 645, 646, 927 N.Y.S.2d 599; *Matter of Gibbons v. New York State Unified Ct. Sys., Off. of Ct. Admin.,* 78 A.D.3d 942, 944, 911 N.Y.S.2d 169; *see also Matter of Pell v. Board of Educ. of*

Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 237, 356 N.Y.S.2d 833, 313 N.E.2d 321).

Petitioner's contention that petitioner may have been prejudiced by the "partiality of the arbitrator appointed as a neutral" (CPLR § 7511(b)(1)(ii)) is also without merit. Petitioner argues that the impartiality of the arbitrator may have been compromised when during the arbitration proceeding, counsel for the Board sent her an e-mail about certain social media posts he believed were created by the petitioner. Importantly, the email was also sent to petitioner's counsel. Board counsel maintained that the social media posts annexed to the email mocked his physical appearance. Petitioner contends that the email may have prejudiced the arbitrator against her, or at the very least, created an appearance of impropriety.

Petitioner had the burden of proof to demonstrate by clear and convincing evidence that the arbitrator was partial or bias and the mere suggestion of partiality is insufficient to warrant interference with the award (*see, e.g., Batyreva v. N.Y.C. Department of Education*, 95 A.D3d 792; *InfoSafe Systems v. International Development Partners*, 228 A.D.2d 272; *New York Restaurants Exchange v. Chase Manhattan Bank*, 226 A.D.2d 312; *In re Cox*, 188 A.D.2d 915, 917). While the sending of the email did not reflect good judgment, it did not in any way demonstrate the "partiality of [the] arbitrator appointed as a neutral" (CPLR §7511(b)(1)(ii)). At best, the email constituted inadmissible evidence. The introduction of inadmissible evidence is not a ground for vacating an arbitration award.

Furthermore, the arbitrator informed all parties that she did not see the social media posts allegedly posted by the petition and that she believed herself to be unbiased. Petitioner's counsel never asked the arbitrator to recuse herself and indeed, petitioner's counsel sent out an email on October 10, 2019, indicating that he did not believe that the email chain concerning the posts

would objectively bias the arbitrator's ability to render a decision in the matter and that be believed that the arbitrator's ability to render an impartial decision on the merits had not been compromised. In the court's view, the failure of petitioner's counsel to object to allowing the arbitrator to render a decision after learning of the email constituted a waiver of any right to argue that the arbitrator's determination should be vacated due to partiality and bias.

The court has considered petitioner's remaining arguments in support of the petition and find them to be without merit.

Accordingly, it is hereby

ORDRED and ADJUDGED that the petition is **DISMISSED** and the arbitration award is confirmed.

This constitutes the decision, order and judgment of the Court.

Dated: October 13, 2020

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020