

Barlow v New York City Dept. of Ed.

2021 NY Slip Op 30116(U)

January 11, 2021

Supreme Court, New York County

Docket Number: 651003/2020

Judge: Carol R. Edmead

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

DIANE BARLOW

Plaintiff,

- v -

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

-----X

INDEX NO. 651003/2020

MOTION DATE 02/13/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 75, of petitioner Diane Barlow (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondent New York City Department of Education (motion sequence number 001) is granted and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order along with Notice of Entry on all parties within twenty (20) days.

MEMORANDUM DECISION

In this Article 75 proceeding, petitioner Diane Barlow (Barlow) seeks a judgment to vacate the arbitrator's opinion and award which terminated her employment with the respondent New York City Department of Education (DOE), and the DOE cross-moves to dismiss Barlow's petition (together, motion sequence number 001). For the following reasons, the petition is denied and the cross motion is granted.

FACTS

Barlow was employed as a teacher by the DOE for 23 years until she was terminated on February 5, 2020. *See* verified petition, ¶ 4. For the past 15 of those years, she was assigned to PS 19, where she received tenure in September 2007. *Id.*

The DOE asserts that Barlow's job performance at PS 19 declined over time to the point where it became unacceptable. On June 4, 2018, the DOE filed three "charges and specifications" against Barlow for: 1) "failure to properly, adequately, and/or effectively plan and/or execute separate lessons"; 2) "demonstrating lack of professionalism, and/or poor use of judgment"; and 3) "failure to fully and/or consistently implement directives and/or recommendations for pedagogical improvement and professional development." *See* verified petition, ¶ 6; notice of cross motion, exhibit A. The DOE withdrew the second charge prior to the hearing on the charges. *Id.*, verified petition, ¶ 6.

Pursuant to Education Law § 3020-a, the above charges were referred to DOE impartial hearing officer Marc Adelman, Esq. (HO Adelman), who conducted 12 days of hearings in 2019 during which he received evidence and heard testimony from Barlow and from PS 19 officials including principal Genie Calibar (Calibar), assistant principal Carmen Montas (Montas), assistant principal Ivette Casado Faya (Faya), and math coach Diane Peruche (Peruche). *See*

notice of cross motion, exhibit A. Both Barlow and the DOE were represented by counsel at those hearings. *Id.* On February 3, 2020, HO Adelman issued an opinion and award that upheld 12 of the 13 specifications in the first charge against Barlow, as well as six of the eight specifications in the third charge, and found that termination was the appropriate penalty (the HO's award). *Id.* The DOE thereafter confirmed that award and terminated Barlow as of February 5, 2020. *See* verified petition, ¶ 4. The bulk of the HO's award reviewed the documents and the testimony that the DOE presented regarding the various occasions on which Barlow failed to prepare lesson plans for her classes and/or failed to follow them, and the instances when she declined to accept or employ the teaching strategies that the DOE had requested her to utilize. *See* notice of cross motion, exhibit A. The relevant findings in the HO's award stated as follows:

“As referenced above, the Department has proven many of the charges preferred against the Respondent, which demonstrate through the observations and testimony of three experienced and credible supervisors that the Respondent was not an effective teacher during the Charge Period. Consequently, this Hearing Officer finds that the proven charges are substantial, and are directly related to the Respondent's competency to teach and her ability to provide her students with a valid educational experience. Specifically, this Hearing Officer finds that although the Respondent was not necessarily unwilling to follow the suggestions of her supervisors in order to improve her pedagogy, the record shows that she did not make the requisite effort or actually do enough to implement these recommendations and was unable to deliver effective lessons during the Charge Period on numerous documented occasions. This Hearing Officer notes that although the Respondent claims that she was more effective in teaching mathematics and was not afforded that opportunity until the final school year in the Charge Period, it is undisputed that Respondent holds a Common Branch teaching license, which qualifies her to teach all of the subjects in the school years during the Charge Period, not just mathematics. Thus, this Hearing Officer finds that while the Respondent did in fact demonstrate marginally more success in teaching mathematics, including related to the MOSL [measure of student learning] as shown by her overall APPR [annual professional performance review] 'Effective' rating during the 2017-2018 school year, the record still shows that the Respondent did not materially improve during the third year of the Charge Period in her numerous deficient MOTP [measure of teacher practice] components despite now teaching mathematics. In fact, many of the same substantial issues with her pedagogy were still prevalent during the classroom observations during the 2017-2018

school years. These issues ultimately culminated in the Respondent's fourth consecutive school year with a MOTP rating of 'Developing.'

"In determining the appropriate penalty, the Hearing Officer must consider whether the Respondent is willing and capable of improvement so that, with remediation, she may provide her students with a valid educational experience. As part of the necessary deliberation, the Hearing Officer must also consider the extent to which the Department made efforts towards correcting the behavior of the Respondent that resulted in Section 3020-a charges through means such as remediation, peer intervention or an employee assistance plan. In the instant matter, the Respondent was provided with extensive, individualized professional development during the Charge Period, as evidenced in the record and documented above, including various support and recommendations that included topics directly related to the Respondent's pedagogical deficiencies, such as assessment, lesson planning, engagement, instructional strategies, differentiation, student engagement, and effective questioning and discussion techniques.

"Significantly, the Respondent's ratings during the Charge Period show that Respondent was unable to effectively implement the recommendations she received from her administrators and, consequently, unable to improve her pedagogy. Thus, while this Hearing Officer understands that the Respondent is a long-term employee, which is a very significant mitigating factor when considering the penalty of termination, there is very little evidence in this record to show that the Respondent is capable of improving. To the contrary, based on the substantial evidence presented, particularly the testimony of the Respondent herself, it is highly unlikely that further remediation efforts would improve the Respondent's competency. Further, as a result of her lack of acceptance of her proven 'Developing' and 'Ineffective' pedagogy, it is reasonable to conclude that further support and remediation efforts would not be effective as it appears that the Respondent actually feels that she does not need to improve and/or cannot accept, understand or take responsibility for her deficiencies, which are important steps in order to actually improve her pedagogy.

"Therefore, based on the entire record and the judgment of the experienced educational professionals at PS 19, this Hearing Officer must conclude, notwithstanding the Respondent's contentions to contrary, that there is just cause to terminate the Respondent's employment with the Department for incompetency and that is the appropriate penalty in this case."

Id.

Aggrieved, Barlow commenced this Article 75 proceeding to vacate the HO's award on February 13, 2020. *See* verified petition. Shortly thereafter, the Covid-19 national pandemic forced the court to suspend most of its operations indefinitely. Rather than file an answer, the DOE submitted a cross-motion to dismiss the petition on May 11, 2020. *See* notice of cross motion. The parties have filed reply papers, and this matter is now fully submitted (together, motion sequence number 001).

DISCUSSION

As indicated, the DOE commenced its disciplinary proceeding against Barlow pursuant to Education Law § 3020-a. Education Law § 3020-a (5) provides that an employee may file a petition pursuant to CPLR § 7511 to vacate or modify a hearing officer's decision within 10 days of his/her receipt of that decision. CPLR § 7511 (b) sets forth four exclusive grounds on which an arbitrator's award may be vacated:

- “1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party 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 and without objection.”

The Appellate Division, First Department, has observed that:

“Where . . . the parties are subjected to compulsory arbitration, the arbitration award 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.’ ‘A hearing officer's determinations of credibility, however, are largely unreviewable because the hearing officer observed the witnesses and was able to perceive the inflections, the pauses, the glances and gestures - all the nuances of speech and manner that combine to form an impression of either candor or deception.’”

Matter of Brito v Walcott, 115 AD3d 544, 545 (1st Dept 2014), quoting *Lackow v Department of Educ. [for “Board”] of City of N.Y.*, 51 AD3d 563, 567 (1st Dept 2008) (additional citations omitted). The First Department also holds that “[t]he party challenging an arbitration determination has the burden of showing its invalidity.” *Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 419 (1st Dept 2013), citing *Caso v Coffey*, 41 NY2d 153, 159 (1976). Here, Barlow asserts that the HO's award violated CPLR § 7511 (b) (1) (iii) because HO Adelman “exceeded his power or so imperfectly executed it that a final and definite award upon

the subject matter submitted was not made.” *See* petitioner’s mem of law at 3. She specifically argues that he did so by: 1) making unsupported evidentiary findings that were “arbitrary and capricious” rulings; and 2) awarding the penalty of termination, which was “disproportionate” and “shocking to the conscience.” *Id.* at 4-12. Barlow does not raise a due process argument. The court makes the following determinations.

First, the court finds that Barlow did not demonstrate that the HO’s award was arbitrary and capricious. The First Department holds that DOE arbitrator’s decisions may be considered arbitrary and capricious if they are “without sound basis in reason and ... generally taken without regard to the facts.” *Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 856, 858 (1st Dept 2011), quoting *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974). However, determinations which have a “rational basis” in the administrative record are not deemed to be arbitrary and capricious. *See e.g., Jennings v Walcott*, 110 AD3d 538, 538-539 (1st Dept 2013), citing *Matter of Pell*, 34 NY2d at 231. Here, Barlow argues that: 1) HO Adelman did not give adequate weight to her claim that principal Calibar and assistant principals Montas and Faya were biased against her; or 2) to her own testimony that she had prepared and followed lesson plans for the classes identified in the first charge specifications (and had followed the directives identified in the third charge’s specifications). *See* petitioner’s mem of law at 4-11. The DOE responds that Barlow’s argument must fail because she offers no proof that HO Adelman refused to consider any of her evidence or testimony, and because the HO is within his authority to make determinations about witness credibility. *See* respondent’s mem of law at 12-18. The DOE is correct. That HO Adelman compiled and reviewed an enormous body of evidence over the 12 days of hearings on the charges against Barlow is evident, and is amply reflected in the 40 page

opinion and award that he rendered on those charges. Barlow does not argue that HO Adelman improperly omitted any documents or testimony from consideration. Instead, she argues that he minimized or ignored her testimony by finding that the DOE's witnesses were more credible than her with regard to 12 of the 13 the specified episodes of inadequately planned or organized classes. *See* petitioner's mem of law at 4-11. However, the First Department consistently holds that a reviewing court in an Article 75 proceeding must defer to an HO's credibility determinations, which are "largely unreviewable." *Matter of Brito v Walcott*, 115 AD3d at 545; *see also Matter of Ghastin v New York City Dept. of Educ.*, 169 AD3d 507, 507 (1st Dept 2019) ("The fact that the hearing officer found [respondents'] testimony more credible than petitioner's is not a basis to find that his determinations were arbitrary and capricious"); *Matter of Martin v Department of Educ. of the City of N.Y.*, 167 AD3d 545 (1st Dept 2018); *Matter of Brizel v City of New York*, 161 AD3d 634 (1st Dept 2018). As a result, this court discounts Barlow's arguments that HO Adelman made his credibility determinations improperly.

Barlow also argues that she offered evidence at the administrative hearing below which, she asserts, contradicted the DOE's evidence of her supposedly incompetent teaching as outlined in the specifications in charges one and three. *See* petitioner's mem of law at 4-11. The DOE responds that HO Adelman's determinations were "rationally based on the record." *See* respondent's mem of law at 18-21. After reviewing the administrative record, the court agrees with the DOE. HO Adelman's 40 page opinion and award included separate findings with respect to each of the specified instances of conduct that were alleged in connection with the first and third charges against Barlow. *See* notice of cross motion, exhibit A. In each of those findings, HO Adelman identified the documentary evidence and/or testimony that he relied on. *Id.* It is therefore clear that HO Adelman's findings were based on material contained in the

administrative record. Barlow's argument appears to be that those findings were not "rationally based" on said material because he rejected her interpretation of it and/or accorded it weight that she did not agree with. *See* petitioner's mem of law at 4-11. However, the court has already rejected Barlow's attack on HO Adelman's credibility determinations. Barlow's reply papers do not advance any further legal arguments, but instead assert that upholding the instant HO's award would undermine the security of all of the DOE's tenured teachers by sanctioning terminations without requiring an AAPR of "ineffective." *See* petitioner's reply mem at 2-5. However, this dire prediction does not address the fact that the instant HO's award was plainly rationally based on evidence contained in the administrative record below which HO Adelman painstakingly identified. Therefore, the court rejects Barlow's argument, and concludes that the HO's award was not an "arbitrary and capricious" ruling.

Next, the court finds that Barlow did not demonstrate that the penalty of termination that HO Adelman awarded was so disproportionate as to shock the conscience. Barlow cites the decision of this court (Schlesinger, J.) in *Matter of Broad v New York City Bd./Dept. of Educ.* (50 Misc 3d 384 [Sup Ct, NY County 2015]) to support the proposition that it was "shocking" to impose the penalty of termination on a tenured teacher with more than 20 years of experience, who was near retirement and whose employment history mainly contained performance reviews that found her "effective." *See* petitioner's mem of law at 11-12. However, the court notes that the First Department later reversed Justice Schlesinger's decision, and found instead that "[t]he penalty of termination from employment does not shock our sense of fairness." *Matter of Broad v New York City Bd./Dept. of Educ.*, 150 AD3d 438 (1st Dept 2017). For its part, the DOE correctly asserts numerous First Department decisions have found that terminating long serving tenured teachers on the grounds of inefficiency and/or incompetence is not shocking to the

conscience. See respondent's mem of law at 21-24; see e.g., *Matter of Johnson v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 171 AD3d 548 (1st Dept 2019); *Matter of Denicolo v Board of Educ. of the City of N.Y. and/or N.Y. City Dept. of Educ.*, 171 AD3d 565 (1st Dept 2019); *Matter of Broad v New York City Bd./Dept. of Educ.*, 150 AD3d at 438. The court observes that HO Adelman specifically noted the length of Barlow's employment with the DOE, and stated that he gave that factor due consideration when deciding upon an appropriate penalty. See notice of cross motion, exhibit A. The court finds that the law did not compel him to impose a lesser penalty than termination because of Barlow's mostly lengthy and mostly positive employment history. Therefore, the court rejects Barlow's "disproportionate" argument.

Finally, the court noted earlier that Barlow did not argue that her due process rights were violated during the arbitration which resulted in the HO's award. In the context of DOE arbitrations, "due process . . . requires that the charges be 'reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against him - and to allow for the preparation of an adequate defense.'" *Matter of Berkley v New York City Dept. of Educ.*, 159 AD3d 525, 526 (1st Dept 2018), quoting *Matter of Block v Ambach*, 73 NY2d 323, 333 (1989). Here, the DOE's first charge against Barlow listed 13 specifications which identified the dates, times and class periods in which she was alleged not to have prepared and/or followed a lesson plan. See notice of cross motion, exhibit A. The DOE's third charge against Barlow listed eight specifications which identified the DOE directives and teacher training techniques that she failed to utilize, and the recommendations and advice from PS 19's officers that she failed to implement. *Id.* Further, HO Adelman conducted Barlow's Education Law § 3020-a hearing over 12 days, at which she was represented by counsel. *Id.* Under these circumstances, it is clear that Barlow was "apprised of the charges against her," and

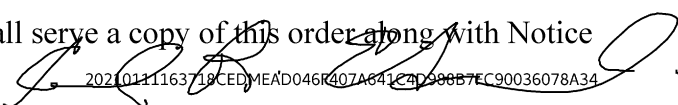
that she was afforded the opportunity to “prepare an adequate defense” against them. Therefore, the court concludes that the HO’s award did not violate Barlow’s due process rights.

At the beginning of this decision, the court noted that judicial review of an award that was rendered through compulsory arbitration requires analysis of whether the aggrieved petitioner satisfied any of the grounds for vacatur set forth in CPLR § 7511 (b), as well as ensuring that the award was not arbitrary and capricious and comported with the requirements of due process. See *Matter of Brito v Walcott*, 115 AD3d at 545. After conducting a thorough review of Barlow's petition, the court concludes that she failed to establish that HO Adelman violated CPLR § 7511 (b) (1) (iii), failed to show that the HO’s award was arbitrary or capricious, and failed to show that her due process rights were violated during the arbitration. Accordingly, the court finds that Barlow’s Article 75 petition should be denied as meritless, and that the DOE’s cross motion to dismiss it should be granted.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby
ADJUDGED that the petition for relief, pursuant to CPLR Article 75, of petitioner Diane Barlow (motion sequence number 001) is denied; and it is further
ORDERED that the cross motion, pursuant to CPLR 3211, of the respondent New York City Department of Education (motion sequence number 001) is granted and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order along with Notice of Entry on all parties within twenty (20) days.



20210111163718 CEDMEAD046R407A641C9D988B7EC90036078A34

1/11/2021
DATE

CAROL R. EDMOAD, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT