McCray v City of New York
2022 NY Slip Op 32344(U)
July 19, 2022
Supreme Court, New York County
Docket Number: Index No. 155507/2021
Judge: William Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

---X

STANDLEY MCCRAY

Petitioner,

- v -

CITY OF NEW YORK - DEPARTMENT OF EDUCATION,

Respondent.

---X

INDEX NO. 155507/2021

MOTION DATE 06/08/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

In this special proceeding, petitioner Standley McCray, a former paraprofessional with the New York City Department of Education, alleges that respondent City of New York, Department of Education, ("City" and/or "DOE") violated his due process rights by failing to schedule a hearing prior to his termination from employment as required by Section 75 of the N.Y. Civil Service Law. (NYSCEF Doc. No. 1, Para 29, Petition). On October 3, 2019, petitioner allegedly grabbed a nine-year old student by the neck repeatedly and squeezed the student's hands. The incident was investigated by the Office of the Special Commissioner of Investigation for the New York City School District ("SCI").

Petitioner contends that respondent's investigation failed to confirm whether Mr. McCray committed the alleged misconduct through video evidence or other reliable evidence, and as such, his termination was not "based on good and sufficient reason". (NYSCEF Doc. No. 1, Para. 33, Petition). Petitioner seeks to be reinstated to his employment and awarded back pay and other benefits of employment claiming that his termination was arbitrary and capricious and in violation of the Collective Bargaining Agreement ("CBA").

Respondent opposes the application and cross moves to dismiss the petition. Respondent argues that the court does not have jurisdiction to hear this special proceeding because petitioner's CBA provides a mandatory, final, and binding three step grievance procedure for petitioner to raise a challenge to his termination. Respondent maintains that petitioner failed to follow this procedure and exhaust his administrative remedies and is now seeking to circumvent the grievance process by seeking the instant relief. Respondent contends that the petition fails to state a claim because the CBA provides a mandatory grievance procedure, and as such, petitioner cannot demonstrate a violation of Civil Service Law section 75. (NYSCEF Doc. Nos. 4, 12). Alternatively, respondent argues that the petition should be dismissed because petitioner has failed to demonstrate that his termination was arbitrary and capricious as the allegations in the petition demonstrate that he was terminated for engaging in corporal punishment.

In further support of his application, petitioner contends that his failure to exhaust the administrative remedies set forth in the CBA should be excused because his union informed him that it did not believe he could be successful in a Step 2 grievance conference and the union ignored his request to appeal to a Step 2 grievance conference Petitioner reiterates that he was deprived of due process because his grievance efforts were rendered futile by respondent and that the decision to terminate petitioner for engaging in corporal punishment was arbitrary and capricious since respondent's investigation did not confirm that petitioner committed acts which constituted corporal punishment.

DISCUSSION

It is well-settled that a petitioner must exhaust all available administrative remedies before obtaining judicial review of agency actions. (See *DiBlasio v. Novello*, 28 A.D.3d 339, 341, 814 N.Y.S.2d 51 [1st Dept. 2006]). A petitioner whose terms of employment are subject to

a collective bargaining agreement must pursue the grievance procedure outlined in that agreement prior to seeking relief through an article 78 proceeding. (See *Hosp. v. Seniuk*, 86 A.D.2d 667, 668-669, 447 N.Y.S.2d 15 [2nd Dept. 1992]; *Jensen v. Klein*. 2010 NY Slip Op 30175(U) [Sup Ct, New York County 2010]). Moreover, a petitioner is obligated to arbitrate his or her grievance under an applicable collective bargaining agreement and failure to do so operates as a bar to an article 78 proceeding. (See *Ciccone v. Jacobson*, 262 A.D.2d 78, 79, 692 N.Y.S.2d 33 [1st Dept. 1999]).

An exception exists to the exhaustion of remedies doctrine, when the pursuit of the administrative remedy is futile or would lead to irreparable harm, a petitioner need not exhaust his or her administrative remedies. (*Community Sch. Bd. Nine v. Crew*, 224 A.D.2d 8, 13, 648 N.Y.S.2d 81 [1st Dept 1996] lv denied 89 NY2d 807, 678 N.E.2d 500, 655 N.Y.S.2d 887 [1997]; *Matter of Barele, Inc v. City of New York Human Resources Admin.*, 2010 NY Slip Op 30760(U) [Sup Ct, New York County 2010]; see also *Reed v Oakley*, 172 Misc 2d 659, 662, 661 N.Y.S.2d 754 [Sup Ct, Saratoga County 1996] [arbitration with insolvent company would be futile]; *compare Matter of Goddard v City Univ. of N.Y. (CUNY), Hunter Coll.*, 129 AD3d 583, 583, 10 N.Y.S.3d 866 [1st Dept 2015] [employee's petition challenging university's denial of reappointment, dismissed for failure to pursue grievance under CBA; Chancellor's judgment of scholarly record does not constitute an agency policy that would render arbitration futile]; *Matter of Meegan v Brown,* 66 AD3d 1437, 1439, 885 N.Y.S.2d 854 [4th Dept 2009] [failure to exhaust administrative remedies under CBA warrants dismissal; no showing of futility where union previously arbitrated similar disputes]).

Application of exceptions to the exhaustion of remedies doctrine lies within the court's discretion. (See *Matter of Monaco v New York Univ*., 48 Misc 3d 1210[A], 18 NYS3d 580, 2015 NY Slip Op 51025[U] [Sup Ct, NY County 2015]).

Contrary to petitioner's contention, the United Federation of Teachers ("UFT") has not declined to pursue a Step 2 grievance. Rather, on May 18, 2021, the UFT's Director of Grievance, wrote to the Chancellor requesting that several cases, including petitioner's, be extended, and held in abeyance until December 10, 2021. (NYSCEF Doc. No. 24). The record evidence aptly demonstrates that petitioner's opportunity to be heard at a Step 2 grievance conference has not yet been exhausted, and neither has the DOE had an opportunity to fully present the facts related to its decision to terminate petitioner for engaging in corporal punishment. (NYSCEF Doc. Nos. 22, 23, 24). Accordingly, the court finds that the exception to the exhaustion of remedies doctrine does not apply.

Here, respondent has met its burden to establish, as a matter of law, that petitioner is subject to the terms of his CBA, which provided the exclusive remedies for the resolution of grievances. (NYSCEF Doc. No. 24, Article 22). Having failed to exhaust his administrative remedies, the petition and application are premature and fail to state a claim for relief.

"CPLR 7801 . . . provides that a determination must be final' before being subjected to CPLR article 78 review" (*Matter of Geherin v Sylvester*, 75 A.D.2d 991, 991, 429 N.Y.S.2d 114 [4th Dept 1980]; see also *Matter of Cohoes Memorial Hospital v Department of Health*, 48 N.Y.2d 583, 590, 399 N.E.2d 1132, 424 N.Y.S.2d 110 [1979]). An agency determination, therefore, becomes ripe for review when the determination becomes final and binding upon the petitioner seeking such review (see *Yarbough v Franco*, 95 N.Y.2d 342, 346, 740 N.E.2d 224, 717 N.Y.S.2d 79 [2000]). "[A]n agency determination becomes final and binding within the

meaning of [article 78] when the petitioner seeking review has been aggrieved by it" (*Matter of Mateo v Board of Educ. of City of New York*, 285 A.D.2d 552, 553, 728 N.Y.S.2d 71 [2nd Dept 2001]). "A petitioner is aggrieved once the agency has issued an unambiguously final decision that puts the petitioner on notice that all administrative appeals have been exhausted" (*Carter v State of New York, Executive Dept., Div. of Parole*, 95 N.Y.2d 267, 270, 739 N.E.2d 730, 716 N.Y.S.2d 364 [2000]). When a final determination has not been issued and "there are further administrative steps available to secure a change in result, a party must pursue them before going to court" (*Matter of Geherin*, 75 A.D.2d at 991).

The petitioner has failed to exhaust his administrative remedies as set forth in the CBA, as respondent had scheduled a Step 2 conference on May 19, 2021, and then requested that the Chancellor extend the date for the conference and hold the matter in abeyance until December 10, 2021. As such, petitioner's claims must be heard pursuant to the mandatory grievance process set forth in the CBA through the Step 2 conference, where petitioner will have the opportunity to be represented by a union representative, produce witnesses and documentary evidence.

Petitioner's claims are premature and must be dismissed consistent with the terms of employment as set forth in the CBA. (*See Matter of Board of Education v Ambach*, 70 N.Y.2d 501, 508, 517 N.E.2d 509, 522 N.Y.S.2d 831 [1987] ["when an employer and employee enter into a collective bargaining agreement that creates a grievance procedure, an employee subject to the agreement may not sue the employer directly for breach of that agreement but must proceed, through the union, in accordance with the contract"]).

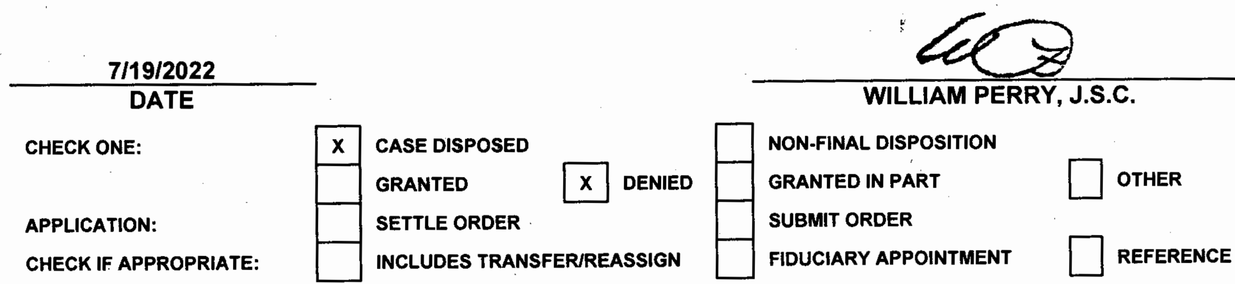
Additionally, the court finds that petitioner has failed to demonstrate that respondent's decision to terminate him following the investigation conducted by the SCI, was arbitrary and

capricious. As set forth in the SCI report, video evidence of the incident was presented which showed petitioner grabbing Student A's fingers for over two minutes while Student A attempts to get away. (NYSCEF Doc. No. 4). This evidence contradicts petitioner's claim that Aziza Homnick, a gym teacher who was in the cafeteria at the time of the incident, did not witness any physical contact between Student A and petitioner. Indeed, the SCI Investigator found that Homnick's account of the incident was contradicted by Student A's "firsthand, candid account that [Homnick] both witnessed McCray squeezing Student A's fingers and asked McCray why that transpired". (NYSCEF Doc. No. 4).

Finally, contrary to petitioner's claim that the video evidence does not show his face, the SCI report indicates that petitioner was the individual grabbing Student A, as supported by the testimony of two students who identified the adult in the video as "McCray." (NYSCEF Doc. No. 4). Based on the detailed findings in the SCI report and the video evidence, petitioner's contention that his termination was not "based on good and sufficient reason" is unavailing. Accordingly, it is hereby,

ADJUDGED that the application is denied, and the petition is dismissed, with costs and disbursements to respondent; and it is further

ADJUDGED that respondent, recover costs and disbursements, as taxed by the Clerk, and that respondent have execution therefor.



7/19/2022

DATE

WILLIAM PERRY, J.S.C.

CHECK ONE:	[X] CASE DISPOSED		[ ] NON-FINAL DISPOSITION	
APPLICATION:	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART	[ ] OTHER
	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
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