Matter of Kaplan v Department of Educ. of the City of N.Y.
2006 NY Slip Op 30774(U)
February 9, 2006
Supreme Court, New York County
Docket Number: 108583/05
Judge: Emily Jane Goodman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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In the Matter of the Petition of SANDRA R. KAPLAN,

Petitioner,

–against- Index No. 108583/05

DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK,

Respondent,

For a Judgment Pursuant to Article 7511 of the CPLR.

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EMILY JANE GOODMAN, J.:

In this special proceeding, a former tenured high school teacher petitions this court, pro se, pursuant to CPLR 7511 (b), for a judgment vacating and/or modifying a hearing officer's decision and award, made pursuant to Education Law § 3020-a, finding just cause to terminate her employment. Petitioner contends that the hearing officer was not impartial, was guilty of misconduct prejudicial to her case, and made factual and procedural errors.

Respondent cross-moves, pursuant to CPLR 404 (a), 3211 (a) (7) and 7511 for an order dismissing the petition on the grounds that the petitioner fails to state a cause of action, and for an order confirming the arbitration award pursuant to CPLR 7510.

BACKGROUND

Petitioner Sandra R. Kaplan was a tenured art teacher employed by the New York City Department of Education at the High School of Art & Design in Manhattan. Pursuant to Education Law § 3020-a, respondent filed charges and specifications against petitioner for allegedly rendering incompetent and inefficient service during the 2000-2001 and 2001-2002

school years. The charges initially contained 23 specifications,[1] many of which included multiple subparts, charging petitioner with numerous instances of unsatisfactory classroom performance, in addition to locking students out of the classroom, failing to ensure the safety of students, failing to submit grades, refusing to cover an assigned class as instructed by the Assistant Principal, leaving the school building for an extended period of time without notifying the administration, and failing to follow a verbal directive from her supervisor.

On April 20, 2004, a pre-hearing conference took place in which petitioner participated pro se. The primary issue addressed was her lack of counsel. Thereafter, petitioner retained counsel on or about April 23, 2004, and the hearing proceeded before a single hearing officer on the following dates: May 19, June 2, June 11, June 15, August 11, and August 12, September 7, 2004 and January 11, 2005. Following the September 7th hearing session, the hearing officer adjourned the proceeding until January 2005 due to petitioner's illness. At each hearing, a stenographic record of the proceeding was taken. Throughout the arbitration, petitioner was represented by counsel and was afforded a full opportunity to introduce evidence and argue in support of her position. Following the final hearing on January 11, 2005, both petitioner and respondent each filed a post-hearing brief. The hearing officer declared the hearing closed, and issued a 45-page decision and award dated June 9, 2005.

The hearing officer found, based on the documentary evidence and the testimony of school administrators, and after carefully considering petitioner's arguments and defenses, that petitioner was guilty of 13 of the specifications. He determined that petitioner was no longer

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[1]According to the decision and award, specifications 4, 6, 8, 11 and 14 were withdrawn on May 19, 2004. Specification 9 was withdrawn on June 21, 2004, specification 10 was withdrawn on August 26, 2004, and specification 23 was withdrawn on March 21, 2005.

functioning effectively as a teacher, was incompetent and insubordinate on a recurring basis, and such, respondent had just cause to dismiss her.

Specifically, the hearing officer determined that petitioner was guilty of rendering an unsatisfactory lesson plan on seven different occasions, and sustained the charges in Specifications 1(a), 1(b), 1(d), 5(a), 5(b), 5(d), 5(f), 7(a)-(c), 12(a)-(c), 13(a), 13(b), 13(d), 16(a), 16(b), 16(d)-(f), 20(a)-(e), 21(a), 21(b) and 21(d). Specification 2 charged that, on or about November 3, 2000, the petitioner's locked classroom door made it difficult for a student to enter the classroom and receive instruction. This charge was sustained based on a witness' testimony that he had to unlock the door and that petitioner admitted to him that she locked the door. The hearing officer found credible evidence to sustain the charges in Specification 3 which alleged that the petitioner had undermined the health, safety and welfare of her students by failing to evacuate with her class during a fire drill/rapid dismissal on November 27, 2000. In sustaining the charge, the hearing officer considered a witness' testimony that petitioner originally informed that witness that petitioner was unaware of the fire drill, as compared to petitioner's testimony at the hearing that she actually participated in the fire drill. Specification 17, charging petitioner with failing to follow a verbal directive from the school principal regarding the submission of grades for a computer graphics class was sustained based on a witness' testimony that petitioner refused to do so because she had no computers in the classroom and therefore, the class was "illegal." The hearing officer also sustained the charges in Specifications 18 and 19, which asserted that, on May 13, 2002, petitioner refused to cover an assigned class, and left the school building for an extended period of time without notifying the administration. Although petitioner claimed to have a dental emergency at that time, the hearing officer considered the fact that she

produced nothing documenting the emergency, as well as the fact that a security guard found the students in the classroom, unattended by a teacher. The hearing officer found that there was insufficient evidence in the record to sustain the remaining charges, and these other charges were dismissed.

DISCUSSION

As an initial matter, the court notes that petitioner raised several new grounds for vacatur of the award in her "rebuttal" to respondent's motion to dismiss. Normally a court should not consider arguments making their initial appearance in reply papers. Azzopardi v American Blower Corp., 192 AD2d 453, 454 (1st Dept 1993). Due to petitioner's pro se status, and the fact that she is time-barred from any further challenge to the award (Education Law § 3020-a [5]), the court granted respondent the opportunity to offer a written response to these new factual claims, which was submitted on December 22, 2005. Thus, the court will consider these additional claims made by the petitioner.

Education Law § 3020-a (5) provides that review of a hearing officer's decision and award is limited to the grounds set forth in CPLR 7511. Austin v Board of Educ. of City School Dist. of City of New York, 280 AD2d 365, 365 (1st Dept 2001). "Under CPLR 7511, an award may be vacated only if (1) the rights of a party were prejudiced by corruption, fraud or misconduct in procuring the award, or by the partiality of the arbitrator; (2) the arbitrator exceeded his or her power or failed to make a final and definite award; or (3) the arbitration suffered from an unwaived procedural defect." Hackett v Milbank, Tweed, Hadley & McCloy, 86 NY2d 146, 154-55 (1995). However, because courts consider the disciplinary hearings under Education Law § 3020-a to be a form of compulsory arbitration, the hearing officer's decision

and award must have a rational basis and adequate support in the record. Hegarty v Board of Educ. of the City of New York, 5 AD3d 771, 772 (2d Dept 2004); Matter of Bernstein (Norwich City School Dist. Board of Educ.), 282 AD2d 70, 73 (3d Dept), lv denied 96 NY2d 937 (2001); Matter of Fischer v Smithtown Cent. School Dist., 262 AD2d 560, 561 (2d Dept 1999).

The petition alleges that the hearing officer did not act impartially and/or engaged in prejudicial misconduct by sending to petitioner's home a bill for the late cancellation of a hearing scheduled on May 18, 2004, which allegedly placed her in a position where she felt "afraid that if she couldn't afford to pay the Arbitrator's demand, the ruling against her would be harsh. Decisions determined by bank accounts can't be fair." Petition, at ¶ 4. In her rebuttal to respondent's motion to dismiss, petitioner alleged that she was not responsible for the cancellation of the May 18th hearing, that her attorney was available on that date, and that it was the hearing officer that cancelled the hearing. Petitioner also claims that she was forced to go forward with the September 7th hearing, despite a medical emergency, because the hearing officer refused to waive his late cancellation fee, and this caused her "pain and mental anguish." Id., at ¶ 7.

Pursuant to Education Law § 3020-a(3)(b)(i), the Department of Education compensates the hearing officer for each day of actual service rendered, but all other expenses of the proceedings "[s]hall be paid in accordance with the rules promulgated by the commissioner of education." Part 82 of the Regulations of the Commissioner, specifically states that any late cancellation fee charged by the hearing officer shall be paid by the party or parties responsible for the cancellation. See NYCRR § 82.1-11(a). The hearing officer's bill requesting payment of a late cancellation fee for May 18th was not a request for additional compensation that was found

to constitute arbitrator misconduct in Matter of Catalyst Waste-To-Energy Corp. of Long Island (164 AD2d 817 [1st Dept], lv dismissed 76 NY2d 1017 [1990]), but rather the enforcement of an established regulation governing 3020-a hearings. The record contradicts petitioner's claim that it was the hearing officer that cancelled the May 18th hearing. On May 19, 2004, prior to the start of testimony, the hearing officer noted that the petitioner's attorney had canceled the May 18th hearing and agreed that petitioner would be responsible for the late cancellation fee. See 5/19/04 Tr. at 28-29. Nor does petitioner allege that her attorney's request, on or about August 27th, for cancellation of the September 7th hearing did not entitle the hearing officer to collect a late cancellation fee. In any event, petitioner chose to go forward on that date, and while she contends that this caused her pain and mental anguish, she does not explain how her case was prejudiced. It is also noted that petitioner was thereafter granted a substantial adjournment of the proceeding to January 11, 2005 due to her medical condition.

Petitioner alleges that the hearing officer was not impartial, because he was the arbitrator in a June 2003 proceeding regarding a grievance filed by petitioner against the Department of Education. See Petition, at § 11. However, it is well settled that a petitioner who wishes to object to an arbitrator's alleged bias or partiality must do so immediately and not wait until after the award has been rendered. "A party who proceeds with an arbitration with actual knowledge of bias on the part of an arbitrator or facts that should have prompted further inquiry, waives his objection to the arbitration." Matter of Namdar v Mirzoeff, 161 AD2d 348, 349 (1st Dept), appeal denied 77 NY2d 802 (1991); see also 1000 Second Ave. Corp. v Pauline Rose Trust, 171 AD2d 429 (1st Dept 1991)(finding that because the petitioner was aware of the alleged bias at the time of the arbitration, he waived any claim regarding the alleged prejudice). Here, petitioner

had actual knowledge of this alleged basis for potential bias on the part of the hearing officer, and fails to demonstrate that any objection was made at the time he was appointed in April 2004.

In her rebuttal, petitioner argues the hearing officer had a undisclosed financial interest in the outcome of the proceeding, which justifies vacatur of the award in accordance with Commonwealth Coatings Corp. v Continental Casualty Co. (393 US 145 [1968]), where a supposedly neutral arbitrator was discovered to have an undisclosed business relationship with the successful party to the arbitration. Petitioner bases this claim on the fact that the hearing officer is compensated by the Department of Education. Petitioner then contends that he will not be given contracts to preside over 3020-a hearings by the Department of Education unless he consistently issues the maximum award in their favor, and "[t]he more times that the Arbitrator terminates a teacher, the more contracts the Arbitrator will receive from the DOE." See Rebuttal, at pp. 11-12. "A party seeking to set aside an arbitration award for alleged bias of an arbitrator must establish his claim by 'clear and convincing proof.'" Matter of Infosafe Systems, Inc. v International Dev. Partners, Ltd., 228 AD2d 272, 272 (1st Dept 1996)(citations omitted). Unsupported and conclusory assertions based solely on rank speculation such as this do not suffice.

This claim is meritless for other reasons. First, the fact that hearing officers in 3020-a hearings are compensated by the Department of Education derives from state law (see Education Law § 3020-a(3)(b)(i), and thus this is not an undisclosed financial interest. Second, petitioner wholly fails to address Education Law § 3020-a(3)(a), which provides that a list of hearing officers is chosen by the American Arbitration Association (AAA) from the association's panel of labor arbitrators to potentially serve as hearing officers, that the parties have 10 days after

receiving the list of potential hearing officers to agree on the selection of a hearing officer, and that if they do not agree within that time frame, the Commissioner of Education shall request the AAA to appoint a hearing officer from the list. Barring any evidence to the contrary, the court can only conclude that Hearing Officer Scheinman was appointed in accordance with state law, and not given this job as a reward for issuing awards favorable to the respondent.

Citing to CPLR 7511 (c), the petitioner alleges that the hearing transcript contains "many errors," and that she "disputes the accuracy of the transcript contents, including the wrong names of people and places," and submits a copy of a March 17, 2005 e-mail to her attorney outlining alleged errors in the August 12, 2004 hearing transcript. Petition, at ¶ 8, and Exh. D thereto. However, CPLR 7511 (c)(i) only authorizes a court to modify an arbitration award if the court finds that "there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award." Petitioner fails to set forth any proper basis for modification of the decision and award. In addition, she fails to allege that any of the transcript errors were communicated to the hearing officer, or that they are reflected in his decision.

Petitioner also complains that the decision contains a factual mistake. On page 24 of the decision, in discussing petitioner's claim that John Lachky one of respondent's witnesses, had a personal vendetta against her, the hearing officer found that the evidence demonstrates that Lachky did offer petitioner a position at the High School of Art & Design in 1992 or 1993, which petitioner could not accommodate with her travel plans. Petitioner claims that she was employed by the Department of Education at another high school during the 1992-93 school years, and not traveling as the hearing officer found. See Petition, at ¶ 10. Even if petitioner's evidence was sufficient to disprove the hearing officer's finding, which it is not, his characterization of

petitioner's whereabouts during the 1992-1993 school years is not a "correctable misdescription" pursuant to CPLR 7511 (c), but rather a conscious characterization on the part of the hearing officer as to the facts of the case. See Matter of Leombruno v City of Glens Falls, 110 AD2d 996, 998 (3d Dept), appeal denied 65 N.Y.2d 609 (1985). Furthermore, even accepting this as a factual error on the part of the hearing officer, a court may not set aside an arbitration award on this basis unless the court concludes that the award is totally irrational or violative of a strong public policy," and thus in excess of the arbitrator's powers (Hackett, 86 NY2d at 155, supra), which petitioner fails to prove is the case here.

In her rebuttal, petitioner suggests that issues concerning document production and witness identification were not addressed at the pre-hearing conference held on April 20, 2004, when petitioner was pro se. Petitioner claims that this failure was a violation of due process and a violation of Education Law § 3020-a (which requires, in relevant part, that at the pre-hearing conference, the hearing officer shall hear and decide all requests for production of materials, including witness statements, investigatory statements, exculpatory evidence and material related to the employee's defense). Under Education Law § 3020-a, discovery applications which are not made on notice, no less than five days prior to the pre-hearing conference, are deemed waived, except for good cause determined by the hearing officer. Because a mistrial was previously granted after 19 hearing sessions, on the basis that petitioner's prior attorney was suspended from the practice of law, the hearing officer deferred all issues concerning document production and witness identification until petitioner obtained new counsel. New counsel was obtained on April 23, 2004. It was incumbent upon new counsel to raise any discovery issues at that time. Petitioner has waived her right to raise these issues now, for the very first time.

Further, at the pre-hearing conference it was noted that petitioner was provided with copies of all the exhibits in the case, copies of every hearing transcript, and a copy of her personnel file in March 2004. See 4/20/04 Tr. at 15-16.

Another action taken by the hearing officer that allegedly prejudiced petitioner's case was "his neglect to consider Ms. Kaplan's defense document 'Motion to Dismiss,'" which had sought the dismissal of certain specifications based on a prior grievance filed by the petitioner. Rebuttal, at p. 9. The record, however, reflects that, prior to opening statements and the presentation of testimony on May 19, 2004, the parties had an extensive discussion of the issues raised in petitioner's motion, and that, in fact, the hearing officer made rulings in favor of the petitioner excluding certain evidence. See 5/20/04 Tr. at pp. 32-43.

The court has considered the petitioner's remaining challenges to the decision and award, and finds that petitioner fails to demonstrate any legally cognizable ground for vacating the hearing officer's decision and award. Moreover, since petitioner fails to demonstrate that the decision and award lacks a rational basis and adequate support in the record, it is confirmed pursuant to CPLR 7510.

Accordingly, it is

ORDERED and ADJUDGED that respondents' cross motion to dismiss the petition and confirm the arbitration award is granted, the petition is denied, and the proceeding is dismissed; and it is further

ADJUDGED that the decision and award dated June 9, 2005 issued by Martin F. Scheinman, Esq., Hearing Officer in Matter of the Disciplinary Charges Proffered by the New York City Department of Education, Petitioner, against Sandra R. Kaplan, Respondent, Pursuant

to Education Law § 3020-a, Case # 4, 470, is hereby confirmed in its entirety.

Dated: February 9, 2006

ENTER:

J.S.C.

EMILY JANE GOODMAN