Matter of Curtis v Black
2012 NY Slip Op 30457(U)
February 27, 2012
Supreme Court, New York County
Docket Number: 102894/11
Judge: Paul G. Feinman
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SCANNED ON 2/29/2012

[* 1]

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

PRESENT: HON. PAUL G. FEINMAN PART 12

Index Number : 102984/2011
CURTIS, WALTER
vs.
BLACK, CATHLEEN P.
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

INDEX NO. 102854/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

...n this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

PETITION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION, ORDER AND JUDGMENT.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT

This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 2/27/2012

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

---X

In the Matter of the Application of
WALTER CURTIS,

Petitioner,

Index No. 102984/2011

- against-

Mot. Seq. No. 001

CATHLEEN P. BLACK, as Chancellor of Schools of the New York City School District, and DEPARTMENT OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondents.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

For a Judgment Pursuant to CPLR Article 75Vacating the Arbitration Award Issued by the Arbitrator pursuant to CPLR 3020-a of the Education Law

---X

APPEARANCES:

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Papers considered on review of this Article 75 proceeding:

PAPERS	NUMBERED
Notice of Petition, Verified Petition, Exhibits 1 - 2	1
Verified Answer, Exhibits A - G, Memorandum of Law	2, 3
Reply Affirmation, Exhibits 3 - 5	4

PAUL G. FEINMAN, J.:

Respondent Department of Education of the City School District of the City of New York (DOE) fired petitioner Walter Curtis from his teaching position after a mandatory arbitration hearing held pursuant to Education Law § 3020-a. Curtis now brings this Article 75 petition to vacate the arbitration award confirming his termination of employment.

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BACKGROUND AND FACTUAL ALLEGATIONS

Up until his termination from employment in March 2011, petitioner worked as an electronics teacher at a high school in the Bronx, New York. Petitioner began working as a teacher for the DOE in 2003, and attained tenure in 2006. For the next four school years, petitioner continually received unsatisfactory ratings.

In November 2010, pursuant to Education Law § 3020-a, the DOE served petitioner with "specifications," or charges, alleging that, between the 2007-2008, 2008-2009, 2009-2010 and 2010-2011 school years, among other things, petitioner was "incompetent," neglected his duties and demonstrated unprofessional conduct. DOE's Exhibit A, at 3. The DOE charged petitioner with eight specifications.

Pursuant to Education Law § 3020-a, a hearing began on December 7, 2010 to determine the outcome of the charges. The arbitration was compulsory pursuant to the terms of petitioner's collective bargaining agreement, and the DOE's rules. Hearing Officer Alan Berg (Hearing Officer Berg) was appointed to preside over the proceedings. A hearing took place over eight days, where both parties were entitled to examine and cross-examine witnesses and submit evidence. Many witnesses testified on petitioner's behalf, including petitioner's former students, current students and a former colleague.

As a result of the hearing, Hearing Officer Berg, in a 27 page decision, sustained most of the charges set forth in the specifications with respect to incompetency. Some of the other charges were dismissed. For example, Hearing Officer Berg did not find that the petitioner acted unprofessionally, nor was he insubordinate. For each specification, Hearing Officer Berg went through the facts as presented to him by both parties. He summarized the incompetency charges

as the "foundation of the Department's case," and that, absent sufficient evidence to support these specifications, petitioner would not be terminated. Petitioner's Exhibit 2, at 8.

The charges that were upheld encompass DOE's observations of petitioner which describe him as incompetent, unable to deliver a lesson plan or manage his classroom. By way of example, specifications seven and eight state the following:

> Specification 7: During the 2007-2008, 2008-2009 and 2009-2010 school years, Respondent failed to properly or adequately plan and/or execute lessons as documented in observation reports dated or conducted on:
>
> a) November 5, 2007;
> b) November 9, 2007;
> c) April 8, 2009;
> d) May 13, 2009;
> e) May 14, 2009;
> f) May 5, 2009;
> g) January 20, 2010;
> h) March 5, 2010; and
> i) June 4, 2010.
>
> ***
>
> Specification 8: During the 2007-2008, 2008-2009 and 2009-2010 school years, Respondent repeatedly failed to effectively implement recommendations and/or instruction from administrators, peer teachers, peer observers, mentors and/or coaches regarding:
>
> a) The elements of effective lesson construction;
> b) The elements of effective classroom instruction;
> c) The elements of effective classroom organization;
> d) The use of student behavior modification strategies; and
> e) The elements and use of proper classroom management and disciplinary methods.

Id.

The fourth specification, which alleges that the students' safety was compromised under petitioner's care, is as follows:

> During the 2007-2008, 2008-2009, 2009-2010, and 2010-2011 school years,

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> Respondent showed no regard for pupil health, safety and general welfare by:
> a) Failing to ensure that students wore safety goggles when working with hand tools and/or equipment.

Id. at 2.

> The nine charges were listed to constitute:
>
> 1) Just cause for disciplinary action under Education Law § 3020-a;
> 2) Neglect of duty;
> 3) Unprofessional Conduct and Insubordination;
> 4) Incompetent and inefficient service;
> 5) Conduct unbecoming Respondent's position;
> 6) Conduct prejudicial to the good order, efficiency or discipline of the service;
> 7) Substantial cause rendering Respondent unfit to properly perform her [*sic*] obligations to the service; and
> 8) Just cause for termination.

Id. at 3.

After reviewing the exhibits offered by both parties and listening to the testimony of both parties' witnesses, Hearing Officer Berg found that the petitioner's "classroom management skills are severely deficient and that he has great difficulty engaging most students." *Id.* He continued that the DOE initiated significant effort to try and assist petitioner with his classroom skills, to no avail. Hearing Officer Berg discussed the observation reports from petitioner's Assistant Principal, containing allegations of students sleeping in class and unsatisfactory lesson plans. Overall, 16 observation reports formed the basis of the incompetency charges.

In response, petitioner "acknowledged that before 2010 his classroom management skills were deficient." *Id.* at 9. He also contended that he was subjected to an "overwhelming and conflicting" set of demands that would be impossible to attain. *Id.* at 14. Petitioner also claimed that he was able to teach his students the substance of the material, even if he did not employ the preferred teaching methods.

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Hearing Officer Berg believed that the DOE provided the petitioner with adequate training and support. He stated that the DOE had met its burden to sustain incompetency charges. Hearing Officer Berg also noted that the DOE observed not only petitioner's teaching technique, but also the results of his teaching. These results included "students sleeping, talking to each other, and failing to pay attention." *Id.* at 17. He noted that it was appropriate for the DOE to believe that a tenured teacher could improve and that the petitioner failed to effectively teach the majority of his students.

Hearing Officer Berg described an incident that occurred on May 14, 2009, which comprised the fourth specification. On that date, Assistant Principal Cole (Cole) observed some of the students assembling a radio. Cole claimed that most of the students were not wearing safety goggles, which was required by state law. Cole then advised petitioner that, when students are soldering and cutting wire snips, they are required to wear safety goggles. Apparently Cole returned to petitioner's classroom two hours later, and found that at least two students were still not wearing safety goggles. The goggles were on the table in front of the students but were not being worn. Cole then wrote a letter to petitioner memorializing the incident. Petitioner's Exhibit 4.

In response, one of petitioner's former students testified that, when she was in petitioner's class, petitioner always insisted that the students wear safety goggles. Petitioner also claimed that the students were not soldering, but were only using wire cutters, which did not require the use of safety goggles.

Hearing Officer Berg concluded that, even if the students were only cutting wire and not soldering, they still should have been wearing safety goggles. He credited Cole's testimony over

the testimony of petitioner's former student and stated, "[t]he occurrence of a second incident within two hours is very distressing." Petitioner's Exhibit 2, at 13. However he did also believe that petitioner may have told the students to wear their goggles and that it was hard to ensure compliance with this rule. Regardless, Hearing Officer Berg concluded that "the teacher remains responsible for the safety of his students." *Id.* Hearing Officer Berg summarized his findings as follows:

> The record clearly establishes Respondent's deficiencies: poor communication skills, poor classroom management, inability to engage his students, inability to assess student performance, and inability to maintain an awareness of the classroom environment and student behavior. All of the deficiencies are areas where teachers either improve or fail to improve. They are not areas where a teacher's performance gets worse over time. Thus I believe it is fair to conclude Respondent was similarly deficient in all these areas when he received tenure.

Id. at 24-25.

Hearing Officer Berg concluded that the only appropriate remedy in this case was the immediate termination of petitioner's employment. He wrote that, if petitioner was only a classroom teacher, then maybe petitioner would be able to stay in his employment and try to improve some more. He mentioned that, since petitioner was tenured, apparently at one point the DOE felt that his performance was, by definition, satisfactory. However, since petitioner's courses involve tools and equipment, the Hearing Officer did not want to risk the safety of students by returning petitioner to the classroom. He claimed that, although no one had yet been injured while in petitioner's class, it is probably just by luck and not petitioner's efforts. He stated, "[p]etitioner's inability to maintain an awareness of the entire classroom, including whether or not students are wearing safety goggles or following other safety procedures, places his students in danger." *Id.* at 26.

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On February 16, 2011, Hearing Officer Berg submitted his determination that petitioner should be terminated from his teaching position as a result of the charges. In this proceeding, seeking to vacate the award and to return the Curtis to his teaching position, petitioner contends, among other things, that the arbitration award should not be upheld since it is allegedly not supported by substantial evidence, and is arbitrary and capricious. Petitioner further alleges that the penalty of termination is excessive.

Specifically, petitioner also contends that the arbitrator steered the testimony to distort the facts with respect to the issue of the safety goggles. Petitioner claims that the safety goggles were only reported on one day, and that this one day was given too much emphasis. Furthermore, in the letter sent from Cole to petitioner regarding the incident, Cole had noted that two students were not wearing safety goggles, not eight or nine which was testified to. As such, petitioner alleges that the arbitrator had a "personal agenda" to remove him as a tenured teacher. Silberman Affirmation, ¶ 44.

DISCUSSION

In an effort to "foster the use of arbitration as an alternative method of settling disputes," the court's role in reviewing an arbitrator's award is severely limited. *Matter of Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO (Albany Hous. Auth.)*, 266 AD2d 676, 677 (3d Dept 1999), citing *Matter of Goldfinger v Lisker*, 68 NY2d 225, 230 (1986). Pursuant to Education Law § 3020-a (5), CPLR 7511 provides the basis of review of an arbitrator's findings. *Lackow v Department of Education (or "Board") of City of N.Y.*, 51 AD3d 563, 567 (1st Dept 2008). CPLR 7511 limits the grounds for vacating an award to "misconduct, bias, excess of power or procedural defects [internal quotation marks and citation omitted]." *Lackow v Department of Education (or*

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"Board") of City of N.Y., 51 AD2d at 567.

However, where, as here, the parties are subjected to compulsory arbitration, the Appellate Division, First Department, has held that judicial scrutiny is greater than when parties voluntarily arbitrate. *Id.* 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." *Id.* The burden of showing an invalid award is on the person challenging the award. *Id.*

Petitioner argues that some of Hearing Officer Berg's conclusions were not supported by substantial evidence in the record. For instance, Hearing Officer Berg concluded that, although none of petitioner's students had ever been injured, petitioner still placed his students in danger. Since, in reality, none of the students was actually injured, petitioner argues that the arbitrator's conclusions were based on "personal opinion and biases, and not on facts in the record." Moreover, petitioner alleges that, due to the erroneous assumption by the arbitrator that petitioner placed his students in danger, petitioner was terminated, in lieu of being given another chance to improve.

Petitioner also cites to another example, in which the arbitrator stated that all of petitioner's deficiencies are areas where teachers improve or fail to improve, and are not areas where a teacher gets worse over time. The arbitrator even concluded that the petitioner's performance was probably deficient even before he was awarded tenure. Petitioner contends that this theory by the arbitrator is not supported by evidence in the record and thereby renders his award arbitrary and capricious.

In response, the DOE argues that the student safety allegations were not the sole basis of

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petitioner's termination, and that it was based on three years of incompetence, despite remediation efforts. The DOE notes that, not only were safety violations noted, but that the students were found to be sleeping in class, not engaged in the lesson, and talking to one another.

I. The Findings Were Rational and Were Not Arbitrary and Capricious

An action is considered arbitrary and capricious "when it is taken without sound basis in reason or regard to the facts." *Matter of Peckham v Calogero*, 12 NY3d 424, 431 (2009). An arbitration award is considered irrational if there is "no proof whatever to justify the award ... ." *Matter of Peckerman v D & D Associates*, 165 AD2d 289, 296 (1st Dept 1991).

Applying both standards to the present case, it was not irrational for Hearing Officer Berg to terminate petitioner based on incompetency. After Hearing Officer Berg reviewed the record and listened to testimony, he determined that petitioner's classroom management skills, including effective teaching, were deficient for over three years. He noted that the DOE did attempt to help petitioner improve, but that petitioner showed no signs of improvement.

Moreover, Hearing Officer Berg did not state that the sole reason for terminating petitioner was the safety goggles incident. Hearing Officer Berg concluded that the 11 evaluations and observations during which petitioner allegedly rendered incompetent service were the "foundation" of the DOE's case. He maintained that, absent sufficient evidence to sustain the incompetency charges, the attempts to remove petitioner would fail. For instance, in one of petitioner's classroom observations, Cole prepared a six-page report, setting forth how the lesson was unsatisfactory and providing 17 recommendations for improvement. Hearing Officer Berg noted that multiple people, who conducted different observations, found petitioner's classroom management skills and lesson plans to be unsatisfactory. Hearing Officer Berg also determined

that the DOE met its statutory requirement to provide remediation, yet petitioner showed no improvement. Accordingly, the arbitrator's award cannot be considered arbitrary and capricious.

It is well settled that, in reviewing an administrative determination, "courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists." *Matter of Jenkins v Novello*, 50 AD3d 381, 382 (1st Dept 2008). In his award, the arbitrator noted petitioner's belief that the students were only using wire snips and did not have to wear safety goggles. The arbitrator, even accepting petitioner's version of the events, concluded that the students were still required to wear safety goggles. The arbitrator even took into consideration the students' testimony that securing compliance with the goggles was difficult. Nevertheless, the record indicates that Cole observed petitioner's classroom and advised petitioner that the students should be wearing safety goggles. Two hours later, Cole returned to the classroom and found that some of the students were not wearing safety goggles. Even if petitioner believed that the students did not need to wear them, due to his recent observation, he should have been "especially aware" of the need for the use of safety goggles. Petitioner's Exhibit 2, at 13.

With respect to whether or not safety goggles were required by law if the students were only using wire snips, Hearing Officer Berg is free to apply his own sense of law and equity to the facts of the case. *See Matter of NFB Investment Services Corp. v Fitzgerald*, 49 AD3d 747, 748 (2d Dept 2008) (holding, "[a]n arbitrator is not bound by principles of substantive law or rules of evidence, and may do justice and apply his or her own sense of law and equity to the facts as he or she finds them to be").

Additionally, Hearing Officer Berg's comments, such as his opinion that petitioner's

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students were lucky not to have been injured, will not overturn the award. The statements made by Hearing Officer Berg do not allow petitioner "to meet his heavy burden of showing arbitrator misconduct or partiality by clear and convincing proof." *Matter of Moran v New York City Transit Authority*, 45 AD3d 484, 484 (1st Dept 2007).

Cole's testimony concerning the safety goggles incident does not appear to conflict with what he wrote in his letter to petitioner, except for the number of students in the afternoon class. The arbitrator stated in his award that he was giving the petitioner the benefit of the doubt that the students were just cutting wire snips and not soldering. Regardless, courts have held that, even when an arbitrator has "erred in judgment either upon the facts or the law," the arbitration award will not be set aside. *Matter of Goldfinger v Lisker*, 68 NY2d at 230.

Moreover, although petitioner disagrees with Hearing Officer Berg's credibility determinations, the award cannot be vacated on those grounds, since it is within the purview of the hearing officer to determine the credibility of the witnesses. As the Court stated in *Lackow v Department of Education (or "Board") of City of N.Y.* (51 AD3d at 568), "[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 [internal quotation marks and citation omitted]."

Accordingly, adequate evidence exists to support the arbitrator's award; it was rational, and the court will not disturb the award.

II. Termination is Not Shocking

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Petitioner claims that the penalty of termination is shocking and resulted from improper conduct of the arbitrator. He argues that the arbitrator "turned logic on its head, and used Petitioner's perfect safety record *against him.*" Silberman Affirmation, ¶ 46.

As evidenced by Education Law § 3020-a (4) (a), if applicable, the hearing officer is empowered to determine that termination is an appropriate penalty. In this case, Hearing Officer Berg determined that, based upon applying the standards necessary for termination of a teacher, the appropriate penalty was termination. He concluded that, based on the record, petitioner failed to reach the majority of his students. He also noted that "[m]ost important in this case is respondent's failure to maintain a classroom environment reasonably conducive to learning." Petitioner's Exhibit 2, at 26. This failure to manage a classroom environment, not only includes whether or not safety goggles are being worn, but a failure to "maintain an awareness of the entire classroom." *Id.*

An administrative penalty, such as petitioner's termination, "must be upheld unless it is so disproportionate to the offense ... as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a matter or law [internal quotation marks and citation omitted]." *Matter of Kreisler v New York City Transit Authority*, 2 NY3d 775, 776 (2004). The court has determined that the arbitrator's award was not arbitrary and capricious. Petitioner was given several unsatisfactory observation reports over a three-year period. Petitioner's classes necessitate hands-on tools and equipment, yet he was also given a letter reprimanding him for safety violations. Hearing Officer Berg also concluded that the DOE provided sufficient remediation pursuant to its statutory requirements. Given the record and the unsuccessful attempts at remediating petitioner, this court does not conclude that the penalty of termination shocks one's sense of fairness.

Conclusion

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition filed under index number 102984/2011 is denied and the proceeding is dismissed.

Dated: 2/27/2012

ENTER:

Paul G. Feinman

J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

2012 Pt 12 D&O_102984_2011_001_LD_BP