Matter of Portelos v New York City Bd. of Educ.
2015 NY Slip Op 30197(U)
January 28, 2015
Supreme Court, Richmond County
Docket Number: 85023/14
Judge: Charles M. Troia
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E-FILE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

In the Matter of the Application of
FRANCESCO PORTELOS,

Petitioner,

For a Judgment Pursuant to Article 75 of the CPLR

-against-

THE NEW YORK CITY BOARD OF EDUCATION,

Respondent.

DCM PART 1

Present:

HON. CHARLES M. TROIA

DECISION AND ORDER

Index No. 85023/14

Motion Nos. 1627-001
2098-002

The following papers numbered 1 to 5 were marked fully submitted on the 7th day of November, 2014.

	Papers Numbered
Notice of Petition, with Supporting Papers and Exhibits\ (dated May 13, 2014)	1
Notice of Cross Motion to Dismiss Petition, with Supporting Papers, Exhibits and Memorandum of Law (dated July 2, 2014)	2
Affirmation in Further Support of Petition (dated August 8, 2014)	3
Sur-reply by Petitioner (dated August 8, 2014)	4
Affirmation by Respondent in Further Support of Cross Petition (dated August 26, 2014)	5

Upon the foregoing papers, petitioner's application (No. 1627-001) pursuant to CPLR Article 75, reversing, annulling and setting aside the April 14, 2014 decision, which found petitioner guilty of certain specifications and fining petitioner $10,000.00 is denied, the cross motion (No. 2098-002) to dismiss the proceeding in its entirety is granted.

PORTELOS v THE NEW YORK CITY BOARD OF EDUCATION

Petitioner is a tenured science teacher at I.S. 49 in Staten Island since 2007. It is undisputed that in 2010-2011 petitioner was passed over for a promotion which would have appointed him to the lead technology position in the school. It is alleged in the charges and specifications of the complaint filed by the Department of Education (hereinafter "DOE") pursuant to Education Law § 3020-a, that "during the 2011-2012, and 2012-2013, school years respondent (petitioner in the within action), engaged in misconduct, insubordination, conflicts of interest, criminal conduct, conduct unbecoming his profession and neglect of duties" (*see* Cross Motion, Exhibit "2"). The DOE cited to 38 specifications, which they asserted amounted to violations and conduct which would ultimately justify petitioner's termination.

On September 5, 2014 a pre-hearing conference took place before Hearing Officer Felice Busto, an impartial arbitrator, selected pursuant to the collective bargaining agreement between the Board of Education and the United Federation of Teachers (hereinafter "UFT"). It is clear that all parties were fully represented by counsel at the evidentiary hearing that followed which took place over 21 days between September 12, 2013 and February 12, 2014. All parties offered voluminous testimonial and documentary evidence, which was recorded into the 3,600 page transcript annexed to the within cross petition as Exhibit "3". By opinion and award dated April 30, 2014, the arbitrator found petitioner guilty of 11 of the 38 charges leveled against him[1]. The arbitrator noted in his conclusion that the "Respondent ... if given the chance , can resume his effective career

[1]The Board of Education withdrew specification #3 See Exhibit 1 at 107

as a highly effective educator...the unique attributes of this teacher, which the Department has minimized, has many years ahead of him to provide a quality education to students and make a difference in their lives". In that light the arbitrator denied the DOE request to terminate but determined that the appropriate penalty for respondents's misconduct is a substantial fine of $10,000.00, which shall be deducted from his paycheck in equal installments over an 18 month period.

Education Law § 3020 governs the discipline of tenured teachers and provides that "[n]o person enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for just cause" and in accordance with statutory procedures. This statute is the "exclusive method of disciplining a tenured teacher in New York State" (Matter of Watkins v Board of Educ. of Port Jefferson Union Free School Dist., 26 AD3d 336, 337; quoting TeBordo v Cold Spring Harbor Cent. School Dist., 126 AD2d 542, 510). Education Law § 3020-a (5) provides that "[n]ot later than [10] days after receipt of the hearing officer's decision, the employee ... may make an application to the New York State Supreme Court to vacate or modify the decision of the hearing officer pursuant to [CPLR 7511]". On May 2, 2014, petitioner's counsel was notified of the decision and in turn notified petitioner via telephone and email. The letter is annexed to both the petition and the cross motion and the notification date is not disputed by the petitioner. In this regard, the within proceeding which was filed on May 13, 2014 one day after the applicable statute of limitations period is time barred and must be dismissed. While petitioner acknowledges in his affirmation in response to the cross petition dated August 8, 2014 that

a one day delay existed in the filing of the appeal, he request that this Court make an exception to the delay and decide the case on the merits. However, despite petitioner's request this Court is without the authority to extend the statute's limitation period (*see* Myers v City of New York, 99 AD3d 415; Awaraka v Board of Education of the City of New York, 59 Ad3d 442; Matter of Watkins v Board of Educ. of Port Jefferson Union Free, 26 AD3d 336)

However, even if this Court were to have concluded that an exception existed for the one day delay in filing the appeal, dismissal of the within petition would be warranted. It is axiomatic that Education Law § 3020-a (5) requires a court to review an arbitrator's determination pursuant to CPLR 7511, which permits vacatur of an award on three narrow grounds: "it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of NY, 1 NY3d 72, 79; *see* CPLR 7511 [b] [1]). "[T]he scope of the public policy exception to an arbitrator's power to resolve disputes is extremely narrow," (Matter of United Fedn. of Teachers, 1 NY3d at 80), and "[c]ourts will only intervene in the arbitration process in those 'cases in which public policy considerations, embodied in statute or decisional law, prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator'" (City School Dist. of the City of NY v McGraham, 17 NY3d 917, 919; quoting Matter of Sprinzen [Nomberg], 46 NY2d 623, 631). "Where, as here, parties are subject to compulsory arbitration, the award must satisfy an additional layer of judicial scrutiny - it 'must have

evidentiary support and cannot be arbitrary and capricious'" (McGraham, 17 NY3d at 919; quoting Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co., 89 NY2d 214, 223).

Here, petitioner claims that the hearing officer's decision was unwarranted and shocking to the conscience based on the evidence that was elicited during the course of the hearing. As respondent points out in support of dismissal of the petition, a review of the Opinion and Award does indicate, contrary to petitioner's claims, that the hearing officer's decision was not arbitrary and capricious, but instead supported by the record. Indeed, the hearing officer issued a 107-page decision in which he outlined the arguments set forth by both parties in the voluminous transcript before making independent determinations, supported by his reasoning, as to which side he would credit. The balance that the hearing officer applied when making his determinations is evidenced by the fact that he credited accounts where he could corroborate the DOE's claims, and dismissed those specifications where he could not. It is apparent to this Court that the Hearing Officer carefully weighed all of evidence included written statements, live testimony and other documentary evidence in reaching his conclusion that despite the request of the DOE a fine rather than termination was warranted.

Petitioner further alleges that the hearing officer was biased and not impartial in rendering his final decision, but offers little if any specific factual support for that claim. As a general matter, "[a] party seeking to set aside an arbitration award for alleged bias of an arbitrator must establish his claim by clear and convincing proof." Bias cannot be inferred

merely on account of a petitioner's issue with or different version of events with respect to allegations preferred against him (*see* Bronx-Lebanon Hosp. Ctr. v Signature Med. Mgt. Group,6 AD3d 261), 261).In the instant matter, petitioner's conclusory allegations of bias fall far short of the heavy burden that needs to be satisfied in order to vacate an arbitration award.

Similarly, petitioner alleges that the $10,000 fine imposed in this instance was "too harsh" and "excessive" and therefore shocks the judicial conscience. The standard of review with respect to that claim is "whether such punishment is 'so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness'" (*see* Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Town of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 233). Therefore, a penalty must be upheld as a matter law unless it shocks the judicial conscience in such a flagrant manner so as to constitute an abuse of discretion (Matter of Featherstone v Franco, 95 NY2d 550, 554). This Court does not find that the penalty imposed in this case, a $10,000.00 fine, shocks the conscience (*see* Batyreva v NYC Dept. of Educ., 95 AD3d 792, 792),especially in light of the fact that the arbitrator chose the lesser penalty of a fine over termination, which harsher penalty the DOE had sought.

In light of the foregoing, this Court concludes that even if the petition were in fact brought within the applicable statute of limitations the determination of the Hearing Officer was not contrary to law, against public policy, arbitrary and capricious, inappropriate and excessive, or demonstrative of any level of corruption.

PORTELOS v THE NEW YORK CITY BOARD OF EDUCATION

Accordingly, it is

ORDERED that the cross motion seeking dismissal is granted and the petition dismissed in its entirety.

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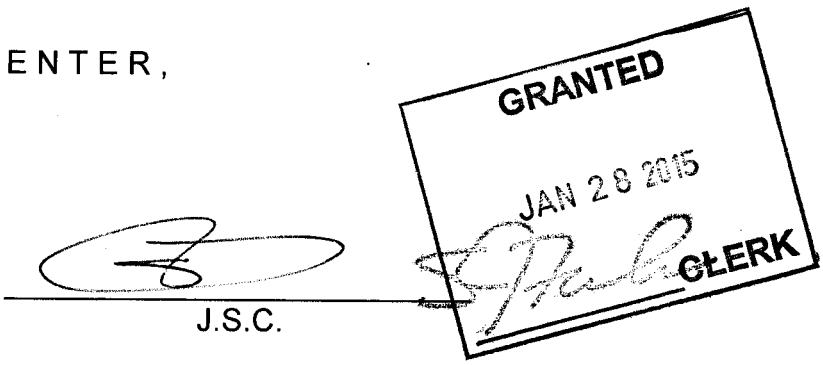

J.S.C.

Dated: January 29, 2015
gl

Hon. Charles M. Troia
Justice of the Supreme Court