Taylor v Teachers' Retirement Sys. of the City of N.Y.
2016 NY Slip Op 31679(U)
August 22, 2016
Supreme Court, New York County
Docket Number: 650638/2016
Judge: Joan B. Lobis

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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DR. LOTTIE TAYLOR,

Petitioner,

-against-

Index No. 650638/2016

Decision, Order and Judgment

TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, TEACHERS' RETIREMENT BOARD OF THE TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, BOARD OF EDUCATION CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, SCOTT STRINGER, as Comptroller of the City of New York and the CITY OF NEW YORK,

Respondents.

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Currently before the Court is the petition of Dr. Lottie Taylor, a retired educator who challenges Arbitrator Mary J. O'Connell's decision (decision) that she was not entitled to pension credit for her two years as summer school principal at Camp Star, and the cross-motion of respondents (collectively, TRS) to dismiss the petition. The Court denies the petition and grants the cross-motion for the reasons below.

Petitioner Dr. Lottie Taylor became part of respondents' pension program on October 1, 1962. The parties do not dispute that she was an exemplary educator with a strong record as principal at A. Philip Randolph Campus High School (Randolph). For two summers during her three-year final average salary (FAS) period, Dr. Taylor served as principal of the math, science and technology program Camp Star, located on Randolph's campus. On August 16, 1991, Dr. Taylor retired from the Department of Education (DOE) and received a pension based on her FAS. TRS did not include the salary Dr. Taylor earned from CAMP STAR.

In 2002, the Court of Appeals issued its decision in Weingarten v. Board of Trustees of the New York City Teachers' Retirement Sys., 98 N.Y.2d 575 (2002). Weingarten ruled that "per session" compensation – "teaching summer school, evening or adult education classes, or working with various athletic and non-athletic extracurricular programs," id. at 575 – should be included in the pensionable salary bases of educators. The Court reasoned that

> "because the BOE [Board of Education] utilizes per session activities to provide legally-mandated educational instruction and commits vast monetary resources to provide those important services, it is evident that per session programs have become ingrained as fundamental, "regular" components of the New York City system of public education."

Id. at 584. The Court found that the reason for excluding additional payments to educators during their FAS years – to prevent teachers from funneling compensation to teachers in order to artificially raise their FAS – is not present in the context of per session work, in part because BOE oversees and regulates the work and this prevents manipulation of the FAS. Id. at 584-85.

A class action lawsuit challenging the failure to include per session pay in computing an educator's FAS, Nager v. Teachers' Retirement Syst. of the City of New York, Index No. 119294/2002 (Sup. Ct. N.Y. County), was pending while Weingarten was under consideration by the Court of Appeals. The Nager Court defined the class as every TRS member or surviving beneficiary deprived of pension benefits or credits due to the failure to include per session pay in the member's FAS. Following the issuance of the decision in Weingarten, the parties in Nager settled, providing notice to teachers pursuant to the agreement. On December 21, 2010, Dr. Taylor applied for review of her pension on the ground that her Camp Star work was pensionable because DOE paid for her per session work at Camp Star. She claimed the Randolph campus at City College was a high school/college collaborative project involving Lehman College and BOE and salaries,

including her own, came from both BOE and CUNY. Dr. Taylor's application was denied because of the lack of evidence that DOE paid her Camp Star salary, the fact that DOE payroll records did not show this salary, and there was evidence showing Lehmann College paid her salary.

Dr. Taylor appealed and a mandatory arbitration took place before Arbitrator O'Connell on August 4, 2015. Dr. Taylor provided evidence and testimony, and argued the work was includable because the program involved high school students from the New York City public school system. She noted that the students received school credit for their coursework. Dr. Taylor submitted her social security and W-2 forms, and a printout from DOE indicating in 1990 she received wages from the "T" bank, which includes per session wages. She also provided letters in support. The Executive Director of the High School Division of BOE and the founding director of the Lehman College Center for School College Collaborative and College Now Project wrote that Dr. Taylor's salary from Camp Star should be deemed per session pay. The city high school budget director at the time wrote that it was irrelevant which entity paid Dr. Taylor and noted that he had received pension credit for a graduate course he taught at CUNY. Dr. Taylor additionally stated that Nager's definition of the class mandated this outcome. She provided documentation about the CUNY Research Foundation (the Foundation), which it now appeared paid her salary, showing its purpose was to fund New York City public educational programs such as Camp Star.

TRS opposed, stating Dr. Taylor's evidence proved that the Foundation and not BOE paid for her work at Camp Star. Among other things, TRS noted that BOE's conflict of interest committee determined Camp Star was merely "interrelated with" a certain BOE program and Randolph's stationery should not be used for applications. It submitted a 2011 email from

DOE's HR division "which noted there was no evidence that her work for a CUNY/BOE summer school program from August 1990 through August 1991 was paid for by the Board of Education." Arb. Decision at 10. TRS contended the Foundation rather than CUNY itself actually paid Dr. Taylor for her work at Camp Star, and as this was a private nonprofit organization the money "was not pensionable under any circumstances." Id. at 11. TRS cited Nager for the proposition that "TRS shall determine, based upon the records of the DOE and/or such other records as may be presented to establish receipt of pensionable compensation in the form of Per Session Pay, the identity of class members," Nager, supra, ¶ 13, as evidence the DOE records were determinative. In response, Dr. Taylor adhered to her position, stated the Foundation paid a small portion of Camp Star's funding and the school system paid the operating costs and also administered the program itself, and argued the Foundation was a conduit for BOE funds. She submitted a letter from the Foundation stating that she was never an employee there.

Arbitrator O'Connell denied Dr. Taylor's application. She reiterated the facts that were not in dispute, including that the students received high school credit for their work at Camp Star and that New York City school system teachers taught there but the CUNY Research Foundation paid Dr. Taylor. Arbitrator O'Connell noted that BOE did make one payment to Dr. Taylor which may have been for summer work but she stated it was irrelevant as it was not made during the FAS period. The arbitrator found it "less than clear as to how the summer program was actually funded," Arb. Decision at 16, but noted that BOE, the New York State Education Department, the Macy Foundation, and the federal government were among the funders. She noted that Dr. Taylor received checks from more than one of the entities involved. She concluded that Camp Star was distinguishable from pensionable summer school work because the students were

from several different schools and many traveled to Randolph, which is on a college campus; because it provided extra-curricular and recreational activities; and because the manner of funding the program differed from summer school programs which were funded entirely by BOE. She found that because DOE's pertinent records were destroyed as a result of the World Trade Center terrorist attack, there was no way to establish precisely what entities paid Dr. Taylor.

After the decision was issued, Dr. Taylor commenced this Article 75 proceeding. She argues that the arbitrator was biased and improperly failed to disclose her prior working relationship with Valerie Budzik, who submitted Arbitrator O'Connell's name for approval. In particular, she states, Arbitrator O'Connell was a Board of Trustees alternate trustee for the New York City Retirement System when Ms. Budzik was Deputy Comptroller and General Counsel in the Comptroller's office and had policy discretion as to TRS. Dr. Taylor argues the arbitrator should have applied the rule of spoliation due to the destruction of DOE records and drawn an inference in her favor about the source of her wages. Although the destruction of records was not deliberate or related to her challenge, she states, DOE should have anticipated the documents might be destroyed and kept copies of the records elsewhere. As for the substantive challenges, Dr. Taylor alleges that (1) the arbitrator ignored the definition of class member set forth in Nager and incorrectly stated that the Department of Education's records must identify the class members; (2) the arbitrator's determination was one-sided and not based on substantial evidence.

In its opposition and cross-motion, TRS alleges there is no direct financial or ongoing relationship between the arbitrator and Ms. Budzik and Dr. Taylor has not presented clear, convincing proof sufficient to show bias. It adds that Dr. Taylor submitted no evidence of direct

interactions between the arbitrator and Ms. Budzik. Further, it argues, even if the arbitrator made all of the errors Dr. Taylor alleges – a point TRS does not concede – she has not established that Arbitrator O'Connell irrationally construed the law or the evidence, or that she exceeded the scope of her power. The arbitrator did not redefine the subject class by relying on the dearth of evidence at hand, it states, but considered all the evidence and concluded it did not support a determination favoring petitioner. In reply, Dr. Taylor adheres to her arguments and stresses the lack of evidence that DOE paid her for the per session work should not prejudice her due to spoliation.

Judicial review of an arbitration such as the one here is limited and must be based on "misconduct, bias, excess of power or procedural defects." Gongora v. The New York City Dep't of Educ., 98 A.D.3d 888, 889 (1st Dep't 2012) (citations and internal quotation marks omitted). In mandatory arbitrations such as the one at hand, "judicial scrutiny is stricter." Lackow v. Dep't of Educ., 51 A.D.3d 563, 567 (1st Dep't 2008). The arbitrator's decision must comport with due process and have an adequate evidentiary basis, and must be rational and not arbitrary and capricious. Id. at 567-68. Only when there is no rational basis to support the findings is the arbitrator's decision overturned. See, e.g., Polayes v. City of New York, 118 A.D.3d 425 (1st Dep't 2014). Disagreement with the decision of the arbitrator is insufficient.

Initially, the Court rejects Dr. Taylor's allegation that Arbitrator O'Connell was biased. The Court agrees with TRS that Dr. Taylor has not satisfied the "clear and convincing" standard that applies here. See Zrake v. New York City Dep't of Educ., 41 A.D.3d 118 (1st Dep't 2007). Moreover, there is no evidence that the purported bias impacted the arbitrator's decision. In addition, the Court concludes that, as the destruction of records was not intentional and it was

not foreseeable the documents would be destroyed during a terrorist attack on the building in which they were stored, the arbitrator's decision not to apply the principle of spoliation was rational.

Next, the Court turns to the substantive claims. After careful consideration, the Court concludes that Dr. Taylor has not satisfied the heavy burden of showing the arbitration decision was irrational or lacking in evidentiary support, or that the arbitrator abused her power. Contrary to Dr. Taylor's contention, the arbitrator did not change the definition of class by limiting the scope to individuals whose per session work could be established by DOE records. Instead, she considered additional information, including Dr. Taylor's salary and social security records and the letters she submitted in support of her claim and concluded that in light of the conflicting and confusing evidence of the parties and the lack of the actual payment records Dr. Taylor had not sustained her burden of proof. This ruling, though not the only possible one, was rational. Significantly, the arbitrator did not rely solely on the source of Dr. Taylor's salary in reaching her conclusion. In addition, Arbitrator O'Connell set forth several reasons Camp Star differed from summer schools for which teachers received pensionable credit. Therefore, it is

ORDERED that the petition is denied, and the cross-motion to dismiss is granted. The Clerk is directed to enter a judgment of dismissal.

Dated: Aug. 22, 2016

ENTER:

JOAN B. LOBIS, J.S.C.