Matter of Mirenberg v New York City Dept. of Educ.
2017 NY Slip Op 30775(U)
March 30, 2017
Supreme Court, New York County
Docket Number: 653846/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46
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In the Matter of the Application of

EVAN MIRENBERG, Index No. 653846/2015

Petitioner,

For a Judgment Pursuant to Article 75 of the C.P.L.R.

- against - DECISION AND ORDER

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent

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LUCY BILLINGS, J.S.C.:

Petitioner, a former tenured teacher for respondent New York City Department of Education, seeks to vacate a disciplinary decision terminating his employment after a hearing pursuant to New York Education Law § 3020-a.

I. UNDISPUTED BACKGROUND FACTS AND THE PARTIES' CLAIMS

In June 2014, petitioner resigned from Public School (P.S.) 188, where he had worked since 2004, after P.S. 188's Principal Frederick Tudda cautioned petitioner about his excessive absences. Petitioner, who had been absent 16 days during the 2013-14 school year, advised Principal Tudda that a kidney condition had caused these absences.

Petitioner then accepted a position at P.S. 307K for the 2014-15 school year. Respondent claims that he was absent September 16-17, 2014, and submitted a forged physician's note excusing these absences. When P.S. 307K's principal, Roberta

Davenport, contacted petitioner's physician, Dean Giannone M.D., to verify the note's authenticity, Dr. Giannone responded that he did not write the note. Principal Davenport contacted respondent's Office of the Special Commissioner of Investigation (SCI), who investigated, concluded that petitioner had forged the note, and recommended that he be terminated from his employment. In January 2015, Davenport discovered 15 prior notes from Dr. Giannone in petitioner's personnel file, many related to the 16 absences during 2013-14, and also referred them to SCI, who again investigated, concluded that petitioner had forged the notes, and recommended termination of his employment.

Respondent preferred two sets of charges against petitioner in 2015. The first set of charges alleged that he (1) was excessively absent 16 times between September 9, 2013, and June 27, 2014, while assigned to P.S. 188; (2) submitted a forged physician's note for September 16 and 17, 2014, while assigned to P.S. 307K; and (3) received pay for these medical absences when they were not due to a medical condition. The second set of charges alleged that petitioner (1) submitted forged physician's notes to excuse his absences 19 times between November 1, 2011, and September 2, 2014; (2) received pay for medical absences when they were not due to a medical condition during that same period; and (3) was excessively absent nine times during the 2014-15 school year.

Petitioner was afforded a hearing before a neutral arbitrator pursuant to Education Law § 3020-a, where petitioner

claimed that he suffers from an anxiety disorder and panic attacks, which caused his absences and prompted him to forge the notes. He admitted that he altered the notes in question, but maintained that his absences and fraudulent notes did not impact his effectiveness as a teacher or his students in any way and that he did not derive a monetary benefit from the altered notes, as his available vacation leave covered all his absences for which he submitted a fraudulent note. Finally, petitioner explained that his behavior resulted from Dr. Giannone's mistreatment of the anxiety disorder and panic attacks, that petitioner subsequently had addressed his condition through current therapy with Judy Scher Psy.D., and that he was an excellent teacher regardless of these incidents.

The Hearing Officer found against petitioner on all but one of the charges and recommended termination of his employment, because he intentionally forged the physician's notes and continued to be excessively absent even after Principal Tudda confronted petitioner about his absences. The Hearing Officer held that petitioner failed to produce any evidence that his anxiety disorder or panic attacks caused him to forge the notes or that Dr. Giannone mistreated petitioner, causing his behavior. The Hearing Officer concluded that petitioner's dishonesty outweighed his excellence in teaching and, combined with his excessive absences that negatively affected his teaching, warranted termination of his employment as the only suitable penalty.

II. THIS PROCEEDING

Petitioner challenges the Hearing Officer's decision as irrational and arbitrary, because the Hearing Officer relied on testimony by Dr. Giannone that was not credible and ignored evidence that petitioner suffered from an anxiety disorder and panic attacks that affected his judgment in deciding to forge the notes. Dr. Giannone testified in person and, while acknowledging that petitioner suffered from an anxiety disorder, never diagnosed panic attacks and found that the anxiety disorder was under control and did not affect his daily functioning or professional capabilities. Petitioner, in contrast, presented his psychological evidence only through Dr. Scher's brief sworn report. Moreover, she attested only that she treated petitioner for panic attacks in 2007 and that his diagnosed anxiety disorder, which continued into 2015, could, but not that it did, alter his judgment and affect his decisionmaking. Petitioner presented no medical or psychological evidence that Dr. Giannone negligently or ineffectively treated petitioner, causing his aberrant behavior. All these factors bore on the Hearing Officer's assessment of these witnesses' credibility, their testimony's probative weight, and his consequent factual findings, for which the court may not substitute its own judgment. C.P.L.R. § 7511(b)(1); Brito v. Walcott, 115 A.D.3d 544, 545 (1st Dep't 2014); Cipollaro v. New York City Dept. of Educ., 83 A.D.3d 543, 544 (1st Dep't 2011); Lackow v. Dept. of Educ. (or "Board") of City of N.Y., 51 A.D.3d 563, 568 (1st Dep't

2008).

Nevertheless, petitioner also claims that the evidence in the hearing record does not support the Hearing Officer's finding that petitioner's absences were excessive, because no evidence indicates his absences affected his teaching or his students' learning. Finally, petitioner challenges the penalty as shocking to the conscience and disproportionate to his conduct in view of his teaching record and his rehabilitation. Respondent moves to dismiss the petition because, in all these respects, it fails to state a claim. C.P.L.R. § 3211(a)(7).

III. RESPONDENT'S MOTION TO DISMISS THE PETITION

When evaluating respondent's motion to dismiss under C.P.L.R. § 3211(a)(7), the court must accept petitioner's allegations as true, liberally construe them, and draw all reasonable inferences in his favor. JF Capital Advisors, LLC v. Lightstone Group, LLC, 25 N.Y.3d 759, 764 (2015); Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d 342, 351 (2013); Lawrence v. Miller, 11 N.Y.3d 588, 595 (2008); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007). Dismissal is warranted only if the petition fails to allege facts that fit within any cognizable legal theory. Lawrence v. Miller, 11 N.Y.3d at 595; Nonnon v. City of New York, 9 N.Y.3d at 827; Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 570-71 (2005); Mill Financial, LLC v. Gillett, 122 A.D.3d 98, 103 (1st Dep't 2014).

Without the complete record of the administrative hearing,

respondent fails to establish that petitioner lacks any cognizable legal claim. As set forth above, petitioner claims that the record does not support the Hearing Officer's finding that petitioner was excessively absent during the 2013-14 school year as no evidence indicated his absences limited his effectiveness. Both petitioner and the Hearing Officer cite to the New York City Department of Education Chancellor's Regulation § C-601(1)(c), which provides that excused absences alone are not grounds for disciplinary action. Only "absences which are so numerous as to limit the effectiveness of service may lead to disciplinary action."

The Hearing Officer did not conclude that this regulation was inapplicable because petitioner's absences, excused only by fraudulent notes, were unexcused. The omission of such a conclusion allows for a conclusion that his absences would have been covered by his available vacation leave. The Hearing Officer held only that petitioner's absences during the 2013-14 school year were so numerous that they limited his effectiveness, relying on Principal Tudda's testimony, correspondence to petitioner in February 2014 warning him about his absences, and petitioner's testimony that another teacher was capable of replacing him. V. Pet. Ex. A, at 17-18.

Principal Tudda's testimony that the Hearing Officer cites, however, concludes only that excessive absences, in the abstract, may disrupt continuity in the teaching and curriculum and impact learning, but does not find that petitioner's excessive absences

disrupted his teaching, curriculum, or students' learning or limited his effectiveness. Id. Ex. M, at 732-33. While petitioner's testimony may bear on whether petitioner was replaceable, this testimony does not support the conclusion that his excessive absences limited the effectiveness of his teaching. Id. Ex. N, at 753.

Finally, respondent may not rely on the February 2014 letter that the Hearing Officer cites, as informing petitioner that his absences disrupted his students' learning and might result in an unsatisfactory rating, id. Ex. A, at 17, since this correspondence is not an exhibit to the petition and therefore, even had respondent presented such an exhibit, may not be considered to support respondent's motion. Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d at 351; Lawrence v. Miller, 11 N.Y.3d at 595; GEM Holdco, LLC v. Changing World Tech., L.P., 127 A.D.3d 598, 599-600 (1st Dep't 2015). In fact this correspondence may be simply notice to petitioner regarding his unsatisfactory performance, rather than a finding of disruption to his students' learning based on personal knowledge. Even insofar as respondent may rely on this correspondence as a warning to petitioner, he denies that he received it, and the Hearing Officer did not find to the contrary.

On the other hand, the exhibits to the petition do include many positive evaluations of petitioner during the 2013-14 school year and letters of recommendation and praise from multiple faculty members, including Principal Tudda. This evidence, if

also in the administrative hearing record, buttresses petitioner's claim that his absences did not limit his effectiveness and thus were not excessive. Therefore, drawing all inferences in his favor, the complete record may establish that his absences did not limit the effectiveness of his teaching and thus were not excessive, such that the Hearing Officer's contrary finding was not supported by the record.

While petitioner's success on this claim would not negate his admitted dishonesty, the Hearing Officer, in finding termination of petitioner's employment the only penalty warranted, cited to the finding against petitioner on the charge of excessive absences for the 2013-14 school year. As respondent acknowledges, it terminated his employment because of his unprofessional conduct in two respects: his dishonesty and his excessive absences. The Hearing Officer nowhere concludes that, if excessive absences were removed from his analysis, petitioner's dishonesty alone would warrant termination of his employment. As petitioner urges, the very fact that he did not need the physician's notes to obtain paid leave, as the complete record will disclose accumulated vacation leave to cover all the days for which he used the notes, shows that a disorder affected his judgment, negates any dishonest derivation of compensation, and otherwise ameliorates his dishonesty. Therefore the penalty imposed, if no longer based on the excessive absences, may be disproportionate.

IV. PETITIONER'S MOTION FOR A PRELIMINARY INJUNCTION

Although the petition alleges cognizable legal claims, petitioner does not demonstrate such a likelihood of success on those claims as to warrant a preliminary injunction reinstating him in his teaching position with respondent. C.P.L.R. §§ 6301, 6312(a); Kalyanaram v. New York Inst. of Tech., 63 A.D.3d 435, 435 (1st Dep't 2009). See Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 N.Y.3d 839, 840 (2005); A1 Entertainment LLC v. 27th St. Prop. LLC, 60 A.D.3d 516, 516 (1st Dep't 2001); Metropolitan Steel Indus., Inc. v. Perini Corp., 50 A.D.3d 321, 322 (1st Dep't 2008); U.S. Re Cos., Inc. v. Scheerer, 41 A.D.3d 151, 154-55 (1st Dep't 2007). Nor does he demonstrate the irreparable harm required for a preliminary injunction because, if he does succeed on his claim, he will be reinstated with retroactive compensation and benefits. C.P.L.R. §§ 6301, 6312(a); Valentine v. Schembri, 212 A.D.2d 371, 372 (1st Dep't 1995). See Zodkevitch v. Feibush, 49 A.D.3d 424, 425 (1st Dep't 2008); OraSure Tech., Inc. v. Prestige Brands Holdings, Inc., 42 A.D.3d 348, 348-49 (1st Dep't 2007); U.S. Re Cos., Inc. v. Scheerer, 41 A.D.3d at 155; Wall St. Garage Parking Corp. v. New York Stock Exch., Inc., 10 A.D.3d 223, 228-29 (1st Dep't 2004).

V. CONCLUSION

For the reasons explained above, the court denies respondent's motion to dismiss the petition. C.P.L.R. § 3211(a)(7), and also denies plaintiff's motion for a preliminary injunction. C.P.L.R. §§ 6301, 6312(a). Respondent shall serve

an answer to the petition within 30 days after service of this order with notice of entry, as requested. See C.P.L.R. §§ 3012(a), 3211(f), 7804(c)-(f). Petitioner shall serve any reply to the answer within 20 days after service of the answer. C.P.L.R. §§ 3012(a), 7804(c), (d), and (f). Upon petitioner's subsequent service and delivery to Part 46 of a new notice of his petition, the court will schedule a further hearing on the petition.

DATED: March 30, 2017

LUCY BILLINGS, J.S.C.

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