Losak v City of New York
2017 NY Slip Op 30964(U)
April 28, 2017
Supreme Court, New York County
Docket Number: 654452/2016
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

---------- X

JEFFREY LOSAK,

Petitioner,

-against-

THE CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF EDUCATION; CARMEN FARINA, CHANCELLOR of NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

To Vacate a Decision of a Hearing Officer Pursuant to Education law Section 3020-a and CPLR 7511.

---------- X

Index No. 654452/2016
Motion Seq: 001

DECISION & ORDER & JUDGMENT

HON. ARLENE P. BLUTH

Petitioner's petition to vacate the decision of a hearing officer to terminate him is denied and respondents' cross-motion to dismiss this proceeding is granted.

Background

This proceeding arises out of petitioner's employment as a teacher in New York City. Petitioner contends that he was a teacher for 28 years until he was terminated. Petitioner insists that his termination from P.S. 89, where he served as a special education teacher, was retaliation by the principal, Ralph Martinez. Petitioner claims that Martinez was upset that petitioner informed the state Department of Education that there were special education violations. Petitioner maintains that Martinez orchestrated a conspiracy against petitioner to get back at him and contends that Martinez retaliated against petitioner during the 2010-11 and 2012-13 school years. Petitioner alleges that he made efforts to improve his relationship with Martinez during

the 2011-12 school year.

Petitioner insists that during the 2012-13 school year, Martinez issued unjustified negative observation reports that formed the basis of petitioner's hearing pursuant to Education Law § 3020-a.

The hearing took place before Hearing Officer Judith Pierce, who heard evidence regarding 12 specifications against petitioner. Petitioner claims that Pierce made errors of law and fact by substantiating all the specifications against petitioner (except for number 10) and that Pierce's decision was irrational, contrary to public policy, and arbitrary and capricious.

Respondents cross-move to dismiss the petition and claim that petitioner simply disagrees with the Hearing Officer's determination terminating petitioner. Respondents contend that petitioner was represented by counsel at a trial-like hearing where petitioner had the opportunity to call witnesses, challenge and produce evidence, and seek to mitigate penalties. Respondents insist that petitioner's instant petition is an attempt to re-litigate issues decided by the arbitrator. Respondents stress that petitioner had a full and fair opportunity to present his case and observes that petitioner called nine witnesses to testify on his behalf. Respondents conclude that Pierce sustained 11 of the 12 specifications and justifiably terminated petitioner.

Discussion

"Education Law § 3020-a(5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR 7511. Under such review an award may only be vacated on a showing of misconduct bias, excess of power or procedural defects" (*Lackow v Dept. of Educ. [or Board] of City of New York*, 51 AD3d 563, 567, 859 NYS2d 52 [1st Dept 2008]) [internal quotations and citation omitted]. "[W]here the parties have submitted to compulsory

arbitration, judicial scrutiny is stricter than that for a determination rendered where the parties have submitted to voluntary arbitration" (*id.* at 567). The hearing officer's "determination 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. The party challenging an arbitration determination has the burden of showing its invalidity" (*id.* at 567-68). To overturn a penalty of termination the punishment must shock's one sense of fairness (*Matter of Davies v New York City Dept. of Educ.*, 117 AD3d 446, 447, 985 NYS2d 76 [1st Dept 2014]).

A Hearing Officer's decision is not arbitrary or capricious where the "Hearing Officer engaged in a [thorough] analysis of the facts and circumstances, evaluated witnesses' credibility, and arrived at a reasoned conclusion" (*Matter of Davis v New York City Bd./Dept. of Educ.*, 137 AD3d 716, 717, 30 NYS3d 2 [1st Dept 2016]).

In support of its cross-motion to dismiss, respondents insist that the Hearing Officer's decision was rational and that Pierce exhaustively reviewed the evidence presented. Respondents note that Pierce found that petitioner exhibited gross insubordination on five occasions (from 2012-2015) by yelling at, menacing and threatening his superiors. Respondents also observe that Pierce found that petitioner left his students without supervision by a licensed teacher on two occasions in 2015. Respondents contend that hearsay evidence can form the basis of an administrative decision as long as it is relevant and probative to support the hearing officer's findings.

Respondents conclude that the penalty of termination does not shock the conscience because petitioner refused to fully avail himself of efforts to remediate his pedagogy and he neglected his duties by leaving his classroom full of students in the care of a para professional.

In response to the cross-motion, petitioner claims that because Assistant Principal Balkcom did not testify at the hearing, four out of the ten sub-specifications for specification 1 should be vacated. Petitioner claims that for specifications 2, 3, and 4, Pierce failed to consider petitioner's mitigating factor- his poor mental and physical health. Petitioner states that his behavior during the December 5, 2012, December 11, 2012 and January 9, 2013 conferences was not in line with his usual conduct and he took a medical leave later in January 2013. Petitioner insists that the penalty of termination is not rational given the evidence that petitioner was a superior teacher.

The Hearing Officer's Decision

After reviewing Hearing Officer Pierce's decision (*see* petition, exh A), the Court finds that this decision was rational, petitioner was given a full and fair opportunity to present his case and the penalty of termination does not shock the conscience.

"Contrary to petitioner's contention, hearsay evidence can be the basis of an administrative determination" (*Colon v City of New York Dept of Educ.*, 94 AD3d 568, 568, 941 NYS2d 628 [1st Dept 2012] [internal quotations and citation omitted]). Although Pierce used some hearsay evidence as the basis for her decision– the reports of Ms. Balkcom (the assistant principal who did not testify)– Pierce stated that her decision relied primarily "on what Ms. Balkcom wrote in her report, an exception to the hearsay rule and *Mr. Losak's own testimony*" (petition, exh A at 16 [emphasis added]). For example, Pierce sustained specification 1[a] and observed that, "Mr. Losak himself admitted that he acted inappropriately in the post observation meeting but sought to excuse his conduct because he was upset" (*id.*). In any event, respondent offered nine witnesses, including Mr. Martinez (the principal) that Pierce considered in reaching

her final determination.

Pierce analyzed every charge against petitioner and sustained every specification except for specification 10 (*id.* at 48). In her decision, Pierce evaluated the witnesses' credibility and concluded that "there is no credible evidence that Mr. Martinez engaged his staff in a conspiracy to deprive Respondent of his job" (*id.* at 44). Pierce insisted that Mr. Losak's witnesses "were not in the classroom when [Losak] was observed or present when Mr. Losak had his meltdowns with Ms. Balkcom, Mr. Martinez or his colleagues at the grade meeting" (*id.*).

Pierce observed that "the evidence clearly supports a finding that [Losak] was volatile and unable to control his emotions when criticized or where he perceived some slight or disagreement with his perspective. The two incidents involving leaving his students alone with paras illustrate the danger in returning him to the classroom because when stressed or angry he loses all judgment and control" (*id.* at 45). Pierce found that petitioner left his classroom the first time to "scream at Mr. Martinez" because petitioner thought he was being set up (*id.* at 45-46). In the second incident, petitioner left a classroom that included children with multiple disabilities to make an inquiry of another teacher (*id.* at 46). Pierce noted that during the second time petitioner left his classroom a child was bullied and petitioner dismissed these claims because the child "was a behavior problem who was often bullied" (*id.*).

Although petitioner stresses that there was no policy against leaving students with a paraprofessional, Pierce concluded that "Mr. Losak is well aware of the rule that it is against Department and school policy to leave children without supervision of a licensed teacher as he had been disciplined before for the same infraction" (*id.* at 42).

Aside from his claim that Pierce improperly relied on hearsay evidence, most of

petitioner's arguments merely state his disagreement with Pierce's findings of fact, which is not grounds for vacating his termination. For example, petitioner claims that Pierce failed to account for petitioner's poor physical and mental health. Pierce was aware that petitioner asserted that his poor health adversely affected him (*id.* at 32) and nevertheless sustained specifications 2, 4 and 5. Obviously, Pierce did not credit that excuse and although petitioner may believe his poor health forgives his behavior, Pierce reached a different conclusion.

The fact that petitioner disagrees with Pierce's findings does not compel this Court to vacate Pierce's decision. It is not this Court's role to conduct a *de novo* review of petitioner's hearing and decide if this Court would have reached a different conclusion. The narrow question for this Court is whether Pierce's conclusion was rational. Here, Pierce's decision evidences a thorough, reasoned and rational analysis. Pierce analyzed every specification and the basis for whether or not the specifications were sustained. The hearing spanned fourteen days, included the testimony of 18 witnesses and consideration of 95 exhibits. Petitioner simply does not agree with Pierce's view of the facts and the credibility of the witnesses. That is not enough for this Court to vacate her decision.

Penalty

Pierce's decision to render a penalty of termination does not shock the conscience. Pierce opined that petitioner "did not provide efficient service to his students during the charge period as is thoroughly discussed in the specifications above. In addition, there is ample evidence of neglect of duty, failure to follow school policy and . . . conduct unbecoming. Respondent is guilty of gross insubordination on numerous occasions. These sustained charges mandate termination" (*id.* at 48). Pierce further found that petitioner "does not think he did anything

wrong. Additional training or remediation is a waste of time" (*id.* at 49).

Pierce considered the 11 sustained specifications and concluded that petitioner, despite the fact that he had 28 years of experience, should be fired because he was unwilling or unable to improve his performance or his conduct. Petitioner did not sufficiently demonstrate a basis upon which this Court can vacate Hearing Officer Pierce's penalty of termination.

Accordingly, it is hereby

ORDERED and ADJUDGED that petitioner's petition is denied; and it is further

ORDERED AND ADJUDGED that respondents' cross-motion to dismiss the petition is granted and the clerk is directed to enter judgment accordingly.

This is the Decision and Order of the Court.

Dated: April 28, 2017
New York, New York

HON. ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH
J.S.C.