Jean-Baptiste v Department of Educ. of the City Sch. Dist. of the City of N.Y.
2017 NY Slip Op 31565(U)
July 21, 2017
Supreme Court, New York County
Docket Number: 652683/2016
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

----------X

JEAN-BAPTISTE, MARJORIE,

Petitioner,

-against-

THE DEPARTMENT OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondent.

----------X

Index Number: 652683/2016

Sequence Number: 001

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on Petitioner Marjorie Jean-Baptiste's CPLR Article 78 proceeding to vacate the finding of her hearing pursuant to New York Education Law § 3020-(a)(5).

	Papers Numbered:
Notice of Petition (Amended) – Affidavit – Exhibits – (Memorandum of Law Included)	1
Answer to (Amended) Petition – Affidavit – Exhibits – (Memorandum of Law Included)	2
Reply – Affirmation – (Memorandum of Law Included)	3

Marjorie Jean-Baptiste ("Petitioner"), formerly a tenured teacher at P.S. 114 (Ryder Elementary School) in Brooklyn, NY, has brought this special proceeding against The Board of Education of the City School District of the City of New York ("The Department of Education" or "Respondent") pursuant to New York Education Law § 3020-(a)(5). She asks this court to vacate the unfavorable May 9, 2016, opinion and award of Hearing Officer James A. Conlon ("Hearing Officer").

Facts and Procedural History

Petitioner was employed by The New York City Department of Education ("DOE") starting in or about 1995. In 2015, petitioner was the subject of four DOE disciplinary charges (referred to herein as "specifications") related to acts and omissions allegedly committed during the 2012-2013, 2013-2014, and 2014-2015 school years. During these terms, petitioner taught first-grade and kindergarten classes. The specifications, detailed below, are best described cumulatively as accusations alleging petitioner's dereliction of duty.

(1) During the 2012-2013, 2013-2014, 2014-2015 school years, [petitioner] failed to properly, adequately, and/or effectively plan and/or execute [eight] lessons
(2) Respondent neglected her professional duties, in that she failed to pick up her students in a timely fashion on the school day, on or about April 24, 2015.
(3) [Petitioner] was excessively absent during the 2014-2015 school year
(4) [Petitioner] failed during the 2012-2013, 2013-2014, 2014-2015 school years, to fully and/ or consistently implement supervisory support, directives and/or recommendations for improvement and professional development…with regard to [seven specific pedagogical standards].

Petitioner taught first grade general education during the 2012-2013 school year. Despite receiving an unsatisfactory rating by Assistant Principal Reather Fields ("A.P. Fields") during this term, petitioner was rated satisfactory overall for the cumulative year. During the 2013-2014 school year, petitioner taught First Grade Integrated Co-Teaching with another teacher. The purpose of this program is to provide special education services within mainstream classes. For this term, petitioner elected to have her pedagogy evaluated in the form of three informal observations ("pop-in visits") and one formal observation, as was her right. While A.P. Fields testified that petitioner failed to meet the general standards of sufficiency during all of her observations, it should be noted that petitioner neither received a formal observation nor was she accompanied by the co-teacher during at least one of these observations. A.P. Fields maintains that absence of the co-teacher placed no restrictions on her ability to observe petitioner and that neither infirmity could call into question the legitimacy of the completed observations.

Respondent alleges that petitioner continuously failed to accomplish the "learning outcomes" or goals of her lesson plans and insufficiently maintained order and decorum in her class. A.P. Fields testified that despite the coherency of the instructional outcome and activities on the lesson plan, petitioner's delivery failed to focus on the actual learning outcome or incorporate the activities that she may have had in the plan. While petitioner submitted lessons into evidence to rebut these claims, she largely ignores the respondent's contention that she failed to execute them. A.P. Fields testified further:

> Unfortunately, on numerous occasions, I have passed [Petitioner's] room or actually walked inside the room, not just stand on the outside, and have noticed that there are students not engaged in learning. Meaning, they are out of their seats. They are talking to each other. They are touching each other. They're not doing the work she may have on the board, or that a few kids are actually doing, and that's how I can tell its work because you do see a few kids doing it.... And if they are not doing work, and they are not being actively engaged, then there is a large question that comes about as far as where is the learning taking place, if there is learning taking place, basically. (TR 57-58).

School officials grew increasingly concerned with petitioner's refusal to accept and/or implement supervisory recommendations to improve her pedagogy. A.P. Fields testified that petitioner "engaged in a limited way with colleagues and supervisors in professional conversation about practice.... [and petitioner] only participate[d] in mandated conversations with supervisors and professional development workshops." (TR 126-127). Even then, respondent contends, petitioner failed to heed the constructive criticism of her superiors. A.P. Fields noted that "A lot of times, while I gave her feedback, she wasn't writing down anything... it's basically almost like a waste of time." (TR 196). Petitioner admitted that one post-observation meeting with A.P Fields was not helpful, claiming that "[A.P. Fields] was negative."

Petitioner alleges that observation reports of her were untimely during the 2014-2015 school year, making it impossible for her to improve. Specifically, she notes that the post observation report for the first pop-in visit was not given until the day of her second pop-in visit. Additionally, she contends that the reports for her third and fourth visits were not given until the last day of school. Petitioner indicates that this was in violation of the Annual Professional Performance Review standards that the DOE is required to follow.

Respondent claims that petitioner was excessively late or absent during the 2014-2015 school year and on one occasion left her students in the classroom to go outside the school and "pick up a bag." Petitioner was advised during a meeting with a union representative that she was contractually obligated to be in front of her students at 8:00 A.M. Principal Smith testified, however, that on 15-20 occasions petitioner showed up after 8:00 A.M during this school year. He continued,

> [Petitioner's] pattern of arrival was between 8:00 and 8:05 or 8:00 and 8:10, and she would come in through a number of different exit/entry ways into the building and try and go to the time clock and move her time card. And it became a growing concern for numerous reasons, one the safety and concern of the students, two, the lack of preparedness to engage her kids. (TR 378).

Principal Smith stated that petitioner was absent 43 times in the 2014-2015 school year. Petitioner testified that the school and its administrators were aware of a medical condition that necessitated these absences. However, Principal Smith advised petitioner to speak to her union representative about the situation but "she continued to take days in multiple succession…to the dismay and…bewilderment of myself and Ms. Fields and parents and even to the dismay and concern of her union representative." (TR 384). He stated that petitioner's "attendance over the course of one or two school years was not what it should have been…," and the way she handled this situation was indicative that, "more often than not, [petitioner was] …combative and borderline in opposition to opportunities to grow her learning" and to cooperate with her superiors. (TR 389).

Finally, while the exact nature of the incident occurring on or about April 24, 2015, is disputed, the record of petitioner's 3020-a hearing reflected that she left her classroom to run a personal errand when her professional responsibilities obligated her to remain with her students.

Hearing Officer Conlon found both A.P. Fields and Principal Smith to be credible and he sustained the four specifications with which petitioner had been charged. Based on his decision, and finding that petitioner was incompetent without reasonable expectation of rehabilitation, Hearing Officer Conlon determined that the appropriate penalty would be termination of the petitioner's employment.

Arguments Presented

Petitioner alleges that she was targeted by V.P. Fields and Principal Smith after being absent for 43 days as a result of a documented medical condition and extended hospital stay. Petitioner maintains that while she is not perfect, her record, the testimony given on her behalf, and the mitigating factors she claims the hearing officer ignored require this court to vacate the order of termination. Petitioner points primarily to procedural deficiencies in respondent's evaluation methods in the hopes of discrediting its evaluation and the hearing officer's determination.

Petitioner has challenged Hearing Officer Conlon's decision on five grounds. (1) Hearing Officer Conlon exceeded and imperfectly executed his power; (2) the opinion and award was arbitrary and capricious; (3) the hearing officer abused his discretion; (4) Petitioner was denied her right to due process; and (5) the opinion and award is inconsistent with public policy. Petitioner posits that the decision of the hearing officer was not sufficiently based on the record, as he disregarded crucial mitigating factors, and alternatively, that the penalty of termination was disproportionate to the findings of the 3020-a hearing.

Respondent maintains that the record evidence provides this court with no basis to vacate the award under CPLR 7511. It contends that during the relevant period, petitioner consistently failed to deliver sufficient lesson plans; was "excessively" late and absent, to the detriment of her students; and repeatedly failed to implement the professional recommendations of her superiors. Respondent argues that the findings of the hearing officer were not arbitrary and capricious but logically based on the evidence in the record and maintains that the penalty of termination does not shock the conscious or a reasonable sense of fairness.

Analysis and Standard of Review

In order to vacate the decision of the hearing officer, this court must find that his decision to sustain each specification was arbitrary and capricious and that the ruling was not logically founded on fact or based on the record. See Lackow v Dep't of Educ. of the City of N.Y., 51 AD3d 563 (1st Dep't 2008). More specifically, to find the decision was arbitrary and capricious, and vacate pursuant to CPLR Article 78, the court must conclude that the finding "is without sound basis in reason and...without regard to the facts." Pell v Bd. of Educ., 34 NY2d 222, 231 (1974). If so found, the decision may be set aside.

The court may also analyze the penalty imposed. A penalty that shocks the conscious of the court and violates its fundamental sense of fairness may be set aside and remanded for a lesser (or harsher) penalty. Id.; see Matter of Rubino v City of N.Y., 34 Misc. 3d 1220(A) (Sup Ct 2012) ("The standard for reviewing a penalty imposed after a hearing held pursuant to Education Law § 3020-a is whether the punishment imposed 'is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness.'") quoting Pell, 34 NY2d at 233.

Pursuant to the above standards of review, the burden is on petitioner to prove that the decision was without a rational basis, or alternatively, that the penalty shocks one's fundamental sense of fairness. Lackow, 51 AD3d at 568 ("[t]he party challenging an arbitration determination has the burden of showing its invalidity") quoting Caso v Coffey, 41 NY2d 153, 159 (1990).

Discussion - Service

As an initial matter, this proceeding shall not be dismissed for insufficient service. While it is true that petitioner was required to serve the Notice of Petition on or before June 3, 2016 per CPLR 306-b (and did so three days late), this court grants an extension on the basis of good cause and in the interest of justice. Leader v Maroney, 276 AD2d 194, 195 (2d Dept. 2000), aff'd 97 NY2d 95 (NY 2001). Good cause requires a showing of diligence or serious effort to serve notice. Id., at 199; Bumpus v New York City Trans. Auth., 66 AD3d 26, 32 (2d Dep't 2009). Based on efforts and attempts by petitioner to serve notice, and the minute length of lateness, this court deems the petition as timely served *Nunc Pro Tunc*.

Discussion – Decision

For this court to determine that the hearing officer's decision was arbitrary and capricious, petitioner must show that the determination could not have been rationally based on the record. Pell, 34 NY2d at 231. ("The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact.").

Hearing Officer Conlon's determination to sustain the four specifications was sufficiently founded on evidence and fact properly derived from the record of petitioner's 3020-a hearing. The record demonstrates, or at least supports the finding, of petitioner's frequent absences, her failure to execute lesson plans, her failure to "pick-up" students on April 24, 2015, and her persistent refusal to accept or implement professional criticism. The decision to sustain the charges was not arbitrary and capricious.

Moreover, the hearing officer, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of NY Div. of Hous. & Community Renewal, 46 AD3d 425, 429, (1st Dept 2007), aff'd 11 NY3d 859, 901 (2008).

Discussion – Penalty

Petitioner's contention that the penalty of termination was excessive in light of all circumstances is also unpersuasive. The penalty cannot be remanded for a lesser punishment unless it "shock[s] the judicial conscience and, therefore, constitute[s] an abuse of discretion as a matter of law." Matter of Featherstone v Franco, 95 NY2d 550, 554 (2000); see also Matter of Diefenthaler v Klein, 27 AD3d 347, 348 (1st Dep't 2006). This normally occurs when "the shock…arises principally from a perceived disproportion between the penalty and the misconduct that brought it about." Matter of Patterson v. City of N.Y., 2011 NY Slip Op 30870(U), 6 (Sup. Ct.). No such disproportion exists here.

Petitioner was terminated as a result of her failures 1) to execute lessons; 2) to show up on time or at all and; 3) to remediate or display the possibility of remediating the aforementioned deficiencies. The record not only suggests that petitioner struggled to teach her students effectively, but also that she took an obstinate stance against anyone in the administration seeking to improve her lackluster performance. Petitioner did not believe professional criticism applied to her, nor did she consider 43 absences due to a medical condition relevant enough to bring to the attention of her union representative.

The penalty of termination cannot be said to be disproportionate to the specifications as they are directly related to petitioner's inability to educate. Cf Land v L'Anse Creuse Public School Bd. of Educ., No. 288612, 2010 Mich. App. LEXIS 999 (Ct. App. May 27, 2010) denied 789 NW2d 458 (2010) (where termination was vacated on ground that her behavior occurred outside of the school and did not impact her ability to teach). Petitioner's charges are directly related to in-school deficiencies.

While this court is allowed to consider mitigating factors, such as the petitioner's unblemished record, (See e.g. Matter of Solis v Department of Educ. of City of N.Y., 30 AD3d 532 (1st Dept 2006), case law suggests it will not tip the scale in this instance. A clean record, while always relevant, becomes a more important factor when the charges are unrelated to the educator's ability to perform in the classroom. Patterson NY Slip Op 30870(U). There is no question that the sustained specifications are related to acts and omissions directly connected to the responsibilities of petitioner to her students. While this court will not ignore petitioner's record, it will not defeat legitimate findings of pedagogical deficiency.

The court found the penalty of termination in Lackow not to shock the conscious because of the repetitive nature of the petitioner's misconduct. 51 AD3d 563. Here, petitioner had been informed not only of her inadequate performances in the classroom but also the growing concerns about her lateness and absence and its effect on the children. Petitioner dismissed these concerns and made no effort to remediate or indicate a plan to remediate these issues at any time, even during her hearing.

Petitioner argued that respondent's failure to sufficiently or completely observe her is grounds for not only remand but also vacatur of the decision. While petitioner brings to light another relevant and possibly mitigating factor, this court finds the argument unconvincing. The DOE would admit, similarly to petitioner, that it is not perfect. While incomplete annual observations and late delivery of individual reports strengthens petitioner's argument that it was unreasonable to expect her to remediate her behavior, this court remains unconvinced that she would have taken action were the observations completed or the reports given on time. Moreover, were this court to rule that minor procedural deficiencies in the DOE's review processes could dismantle the findings of a proper 3020-a decision, the DOE's ability to terminate inefficient or underperforming teachers would be seriously compromised.

Relatedly, Hearing Officer Conlon found A.P Fields and Principal Smith to be credible witnesses. The procedural deficiencies noted above cannot be said to discredit their testimony. The "courts cannot

substitute their judgment for that of a hearing officer who had the opportunity to hear and see witnesses." Matter of Douglas v. N.Y.C. Dep't of Educ., 34 NYS3d 340, 345 (Sup. Ct. 2016). "Thus, the credibility determinations of a hearing officer are entitled to deference, even where a party seeking to vacate a 3020-a decision claims that there is evidence which conflicts with the hearing officer's determination." Id.

This court finds that the penalty of termination was not disproportionate with the misconduct and cannot be said to shock the conscious or any senses of fairness. Thus, the court is constrained to find that the petitioners dismissal, while severe, cannot be vacated or remanded as a matter of law. Board of Education of Central School District No. 1 of Towns at Niagara, Wheatfield Lewiston & Cambria v Niagara-Wheatfield Teachers Association, 46 NY2d 553, (1979) (The award of an arbitrator need not conform to the traditional relief that a court might grant and should not be disturbed unless clearly punitive). The punishment in this case is consistent with the specifications.

Conclusion

Petitioner's application, pursuant to CPLR Article 78, to challenge the administrative determination of her 3020-a hearing is denied, and the Clerk shall enter judgement accordingly.

Dated: July 21, 2017

Arthur F. Engoron J.S.C