

Matter of Wu v New York City Bd./Dept. of Educ.

2012 NY Slip Op 32883(U)

December 3, 2012

Sup Ct, NY County

Docket Number: 102837/2012

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN B. LOBIS
Justice

PART 6

Index Number : 102837/2012
WU, AMY C.
vs.
NYC BOARD/DEPT. OF EDUCATION
SEQUENCE NUMBER : 001
VACATE STAY/ORDER/JUDGMENT

INDEX NO. _____
MOTION DATE 9/4/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to 18, were read on this motion to for vacate arbitration award.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	<u>Petition</u>	No(s) <u>1-6</u>
Answering Affidavits — Exhibits	_____	^{x-mot} No(s) <u>7-17</u>
Replying Affidavits	_____	No(s) <u>18</u>

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION,
Order and Judgment

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

DEC 06 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/3/12

JOAN B. LOBIS, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

FILED

DEC 06 2012

NEW YORK
COUNTY CLERK'S OFFICE
Index No. 102837/2012

-----X
IN THE MATTER OF THE APPLICATION OF
AMY C. WU,

Petitioner,

-against-

Decision, Order, and Judgment

THE NEW YORK CITY BOARD/DEPARTMENT
OF EDUCATION,

Respondent.

-----X
JOAN B. LOBIS, J.S.C.:

Petitioner, Amy C. Wu, proceeding pro se, petitions under Section 7511 of the Civil Practice Law and Rules and Section 3020-a.5 of the Education Law for an order vacating an arbitration decision. That decision, dated May 10, 2012, (Determination), found Petitioner had engaged in conduct unbecoming a teacher and neglect of duty, as charged by Respondent, the Board of Education of the City School District of the City of New York (BOE). The arbitrator imposed a one year suspension without pay. Respondent cross-moves to dismiss Wu's petition, as amended, under C.P.L.R. Rule 3211(a)(7) on the grounds that the petition fails to state a cause of action. For the following reasons, the cross-motion to dismiss Wu's petition is granted, and the petition to vacate the arbitration award is dismissed.

In support of its cross-motion to dismiss Wu's amended petition, the BOE has attached the arbitral record as exhibits to its motion. The facts set forth below are gleaned from that arbitral record, which consisted of several days of hearings, witnesses, and exhibits.

Petitioner has been employed by Respondent as a teacher since 1998. In 2004,

following an arbitration proceeding, she was found to have engaged in poor classroom management and conducting an inappropriate discussion with students and was penalized with three months' suspension without pay.

In 2010-2011, Petitioner co-taught kindergarten at P.S. 158 Warwick School. Wu received a satisfactory performance rating for the school year. Nevertheless, in the course of that school year, she did receive a warning letter from her principal relating to an incident that occurred on December 16, 2010. The record shows that Wu prevented a student from leaving the bathroom by holding the bathroom door closed.

The following school year, Wu co-taught first grade. Several incidents arose that became part of the charges in the arbitral proceedings involved in this case. On November 2, 2011, one of Wu's students was tapping other students with the teacher's pointer. After Wu retrieved the pointer, she grabbed the student by the student's wrist and dragged the student on the floor. Later that month, on November 18, 2011, the school principal observed two of Wu's students in the hallway. When the principal returned them to the class, she found that the children were not engaged in instruction. Wu acknowledged the lapse and explained that, at the time of the incident, she had been assisting the substitute teacher with learning the children's names. Wu received warning letters for each of these November 2011 incidents.

The next month, a third incident arose. A parent coordinator reported that near the cafeteria she had observed Wu grabbing a student by the student's hand. When Wu released the

student, the student fell onto a radiator and slid to the floor. In his factfinding, the arbitrator rejected the testimony relating to the radiator but otherwise found the circumstances as alleged to have been established.

In January 2012, disciplinary charges were filed against Wu relating to all of these incidences. Following several days of hearings on the charges, including testimony by Wu and other witnesses, as well as exhibits, the arbitrator ruled that the charges had been substantiated to the extent that they supported a finding of conduct unbecoming a teacher and neglect of duty. He rejected the BOE's contention that Wu's conduct constituted corporal punishment. He further rejected the BOE's proposed relief seeking dismissal. Instead he imposed a lesser penalty of one year's suspension without pay and ordered that Wu receive training in proper use of physical restraint and classroom management.

Wu appeals the arbitration decision under Education Law Section 3020-a.5. Section 3020-a.5 allows employees to appeal adverse decisions by applying to this Court under Section 7511 of the C.P.L.R. to vacate or modify the decision. In her petition, as amended, Wu claims that the arbitrator's findings are unsupported. She further claims that the Determination lacks a basis in law, is arbitrary and capricious, inappropriate and excessive, shocks the conscience, and shows a level of corruption and fraud perpetrated by the arbitrator. She requests that this Court vacate the award under C.P.L.R. § 7511 in favor of one that is reasonable and just.

Respondent BOE cross-moves pursuant to C.P.L.R. Rule 3211(a)(7) to dismiss Wu's

petition for its failure to state a cause of action under C.P.L.R. § 7511. In support of its cross-motion to dismiss, however, the BOE attaches copies of complete transcripts of the arbitral proceedings, the exhibits that were received into evidence during those proceedings, and the arbitrator's decision. Much of this evidence goes beyond the contents of Wu's amended petition. In its brief, the BOE addresses the merits of Wu's petition, contending that Wu has not merely failed to state a cause of action in her petition but also that Wu has failed to establish a cause of action under C.P.L.R. § 7511 for vacating the award. In support, the BOE refers extensively to its attachments, which includes the information beyond the face of Wu's petition. The BOE further argues on the merits that the penalty imposed by the arbitrator does not shock the conscience.

In general a motion to dismiss under C.P.L.R. Rule 3211(a)(7) will fail if within the four corners of the pleading there are discernable facts that show a cause of action. E.g., Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977). The Court must accept as true the facts alleged in the pleading and those in the non-moving party's submission opposing the motion to dismiss, and accord the plaintiff all favorable inferences. E.g., ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 227 (2011). Where the moving party presents evidence outside the four corners of the pleading, such as affirmations and exhibits, however, this Court shall determine “whether the proponent of the pleading has a cause of action, not whether he has stated one.” Biondi v. Beekman Hill House Apt. Corp., 257 A.D.2d 76, 81 (1st Dep't 1999), aff'd, 94 N.Y.2d 659 (2000) (quoting Guggenheimer, 43 N.Y.2d at 275). “[B]are legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference.” 81 A.D.2d at 81 (quoting Kliebert v. McKoan, 228 A.D.2d 232,

232 (1st Dep't 1996)).

This Court finds Respondent's cross-motion to be persuasive. Section 7511(b) provides, in pertinent part, that the court shall vacate an arbitration award where a party's rights were prejudiced by corruption, fraud or misconduct in procuring the award, by partiality of the arbitrator, by an arbitrator exceeding his power or "so imperfectly" executing it that a "final and definite award" was not made, or by failure to follow the procedure of Article 75. Id. § 7511(b)(1)(i)-(iv). None of those bases has been established in this case. Petitioner's allegations that the arbitrator's findings are improper are flatly contradicted by the arbitral record in this case, which is before this Court as attached to the BOE's papers. A review of that record shows that no due process violations have been shown. Petitioner had notice of the charges and was represented by counsel in the arbitration proceedings. The arbitrator held a multi-day hearing on the charges in which numerous witnesses testified, including Petitioner, and exhibits were admitted into evidence. Petitioner admits misconduct relating to the November 4, 2011, incident. The other incidents were all established by testimony of witnesses with personal knowledge of the facts. Under these circumstances, this Court concludes that the arbitrator's decision finding misconduct was not contrary to law, arbitrary and capricious, inappropriate and excessive, or demonstrative of any level of corruption or fraud.

Nor does the penalty imposed in this case, suspension without pay for one year, shock the conscience. E.g., Batyreva v. N.Y.C. Dep't of Educ., 95 A.D.3d 792, 792 (1st Dep't 2012). Although the penalty is harsher than the three month suspension without pay penalty that Petitioner received for misconduct earlier in her employment, as the arbitrator noted, this is not the first time

that Petitioner's conduct has been found wanting. Moreover, the disciplinary proceedings in this case involved more incidences of misconduct than did the first disciplinary action. Under these circumstances, this Court finds that the penalty imposed does not shock the conscience.

Accordingly, it is

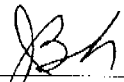
ORDERED that Respondent's cross-motion to dismiss the petition is granted; it is further

ORDERED that the proceeding is dismissed in its entirety, and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

Dated: December 3, 2012

ENTER:



JOAN B. LOBIS, J.S.C.

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