Matter of Benjamin v New York City Bd./Dept. of Educ.
2013 NY Slip Op 32537(U)
October 16, 2013
Sup Ct, New York County
Docket Number: 103741/12
Judge: Barbara Jaffe

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE Justice PART 12

Index Number : 103741/2012
BENJAMIN, RAYBEURN
vs.
NYC BOARD/DEPT. OF EDUCATION
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

INDEX NO. 103741/2012
MOTION DATE
MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for Vacate

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1, 2, 3

Answering Affidavits — Exhibits ____ | No(s). 4, 5

Replying Affidavits ____ | No(s). ____

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

PETITION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION, ORDER AND JUDGMENT.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 10/16/13

, 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
COUNTY OF NEW YORK : IAS PART 12

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In the Matter of the Application of RAYBEURN BENJAMIN,

Petitioner,

For a judgment pursuant to Article 75 of the CPLR

-against-

THE NEW YORK CITY BOARD/DEPARTMENT OF EDUCATION,

Respondent.

----------x

Index No. 103741/12

Motion seq. no. 001

DECISION AND JUDGMENT

BARBARA JAFFE, JSC:

For petitioner, self-represented:
Raybeurn Benjamin
46 Birmingham Dr.
Columbus, NJ 08022
609-372-4703

For respondent:
Gati Dalal, ACC
Michael A. Cardozo
Corp. Counsel of the City of New York
100 Church St., Room 2-102
New York, NY 10007
212-788-8685

By notice of petition and verified petition, petitioner moves pursuant to CPLR 7511 and Education Law 3020-a for an order vacating an arbitration award rendered on August 18, 2012. Respondent opposes the motion and, by notice of cross-motion, moves pursuant to CPLR 7511 and 404(a) and CPLR 3211(a)(7) for an order dismissing the petition.

I. PERTINENT BACKGROUND

Petitioner has been employed by respondent for approximately 24 years. In 2011, respondent brought three charges against him: (1) corporal punishment and misconduct involving four students; (2) corporal punishment and misconduct involving two other students; and (3) interfering with an active investigation being conducted by the Office of Special Investigation (OSI) into the allegations of corporal punishment by bribing students to tell him

about it. Petitioner had never before been disciplined by respondent. (Affidavit of Gati Dalal, dated Nov. 15, 2012 [Dalal Affid.], Exh. A).

In an opinion and award dated August 18, 2012, the hearing officer assigned to hear the charges found that respondent had not proven the corporal punishment specifications, but also found petitioner guilty of interfering with the OSI investigation. He relied in large part on statements reportedly made by the students, none of whom testified at the hearing, and imposed a punishment of either a 30-day suspension or a fine in an amount equivalent to petitioner's pay for 30 days (approximately $8,500), to be imposed at respondent's discretion. He also directed respondent to reassign petitioner at its discretion, which reassignment could include placement in the Absent Teacher Reserve pool. (*Id.*). He observed:

> The Charges proven herein constitute extremely serious misconduct. [Petitioner] is a teacher. The student witnesses involved are among the most vulnerable of the New York City School system population. His act of questioning them about a confidential investigation, and bribing them to extract information, sets a terrible example for those students. His actions are not only a violation of the Chancellor's Regulations, they are fundamentally wrong. Based on his testimonial demeanor, and the witnesses who attested to his good character, I believe [petitioner] is better than that. Therefore, I do not believe dismissal from service is the appropriate penalty in this case. However, a stringent disciplinary penalty is warranted.

(*Id.*).

II. ANALYSIS

A. Applicable law

The scope of judicial review of an arbitration proceeding is extremely limited. (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471 [2006], *cert denied* 548 US 940; *Matter of Campbell v New York City Tr. Auth.*, 32 AD3d 350 [1st Dept 2006]). The court must defer to the decision of the arbitrator or hearing officer (*Matter of New York City Tr. Auth. v Transp.*

Workers' Union of Am., Local 100, AFL-CIO, 6 NY3d 332 [2005]), and is bound by the arbitrator's factual findings and interpretations of the agreement at issue (*Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368 [1st Dept 2004]). It may not "examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one." (*Matter of New York State Correctional Officers and Police Benev. Assn. v State of New York*, 94 NY2d 321 [1999]).

When a hearing is held pursuant to CPLR 3020-a, a party who was subject to the hearing may apply to vacate a hearing officer's decision pursuant to CPLR 7511 upon a showing of misconduct, bias, excess of power, or procedural defects. (*City School Dist. of City of New York v McGraham*, 75 AD3d 445 [1st Dept 2010]; *Austin v Bd. of Educ. of City School Dist. of City of New York*, 280 AD2d 365 [1st Dept 2001]). And when a party is required to arbitrate, the arbitrator's decision is subject to closer judicial scrutiny; the arbitration award "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." (*Lackow v Dept. of Educ. (or "Board") of City of New York*, 51 AD3d 563 [1st Dept 2008], *citing Motor Vehicle Mfrs. Assn. of U.S. v State of New York*, 75 NY2d 175, 186 [1990]). The party challenging the arbitration award has the burden of proving that it is invalid. (*Lackow*, 51 AD3d at 568). The standard of review is "whether the award is supported by evidence or other basis in reason, as may be appropriate, and appearing in the record." (*Mount St. Mary's Hosp. of Niagara Falls v Catherwood*, 26 NY2d 493 [1970]).

B. Corruption, fraud, and misconduct by the hearing officer

An allegation that an arbitrator is biased must be established by clear and convincing

proof, showing more than a mere inference of partiality. (*Matter of Infosafe Systems, Inc. [Intl. Dev. Partners, Ltd.]*, 228 AD2d 272 [1st Dept 1996]). Partiality may be established by proof of actual bias or the appearance of bias, from which the arbitrator's conflict of interest may be inferred. (*New York Restaurants Exchange, Inc. v Chase Manhattan Bank, N.A.*, 226 AD2d 312 [1st Dept 1996], *lv denied* 89 NY2d 861).

It is well-settled that hearsay evidence is admissible and may be considered by an arbitrator at an arbitration hearing. (*Silverman v Benmor Coats, Inc.*, 61 NY2d 299 [1984]; *Austin,* 280 AD2d at 365). Hearsay may also constitute the sole basis for the arbitrator's decision. (*Lindemann v Am. Horse Shows Assn., Inc.*, 222 AD2d 248 [1st Dept 1995]).

In light of this well-settled case law, the arbitrator's consideration and reliance on the students' statements does not constitute misconduct or evidence of bias. (*See eg Brill v Muller Bros., Inc.*, 13 NY2d 776 [1963], *cert denied* 376 US 927 [1964] [actions of arbitrator in receiving evidence that would be inadmissible at trial in court did not constitute corruption, fraud, or misconduct]; *Crossman-Battisti v Traficanti*, 235 AD2d 566 [3d Dept 1997] [that fact-finder relied on hearsay did not require annulment of determination]; *Commercial Union Ins. Co. v Ewall*, 168 AD2d 247 [1st Dept 1990] [arbitrator's receipt in evidence of medical reports from doctors who did not testify at hearing did not warrant vacatur of award]).

Even if the arbitrator erred in admitting the hearsay statements, it is well-settled that an arbitration award may not be vacated on that ground. (*See Wien & Malkin LLP*, 6 NY3d at 479-480 ["we have stated time and again that an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator"]). His determinations as to credibility and the evidence are likewise unreviewable. (*See Cent. Sq. Teachers Assn. v Bd. of Educ. of the Cent. Sq. Cent.*

School Dist., 52 NY2d 918 [1981] ["The path of analysis, proof and persuasion by which the arbitrator reached [her] conclusion is beyond judicial scrutiny."]; *Bd. of Educ. of Byram Hills Cent. School Dist. v Carlson*, 72 AD3d 815 [2d Dept 2010] [hearing officer has discretion to determine what weight to give evidence and court may not substitute its judgment for that of officer]; *Saunders v Rockland Bd. of Coop Educ. Servs.*, 62 AD3d 1012, 1013 [2d Dept 2009] ["When reviewing compulsory arbitrations in education proceedings . . . the court should accept the arbitrators' credibility determinations, even where there is conflicting evidence and room for choice exists."]; *Lindemann*, 222 AD2d at 250 [court may not weigh evidence or substitute its assessment of evidence or witnesses' credibility for that of hearing officer]).

For the same reason, petitioner's argument that his interactions with the students do not constitute tampering or interfering with an investigation, which argument was considered and rejected by the arbitrator, may not be reviewed.

In addition, the fact that the hearing officer not only dismissed the corporal punishment charges but found petitioner's explanation to be more credible than respondent's version of the incidents undermines petitioner's contention that the officer prejudged the evidence or was biased against him. (*See Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415 [1st Dept 2013] [hearing officer did not demonstrate bias as he carefully weighed evidence presented by both sides and dismissed several specifications against petitioner in whole or part]).

For all of these reasons, the award is rational and supported by adequate evidence. (*Matter of Buffalo Teachers Fedn., Inc. [Bd. of Educ. of Buffalo City School Dist.]*, 67 AD3d 1402 [4th Dept 2009] [arbitrator's findings supported by documentary evidence in record before arbitrator]; *Lackow*, 51 AD3d at 568 [record of hearing supported hearing officer's conclusions];

DiNapoli v Peak Auto., Inc., 34 AD3d 674 [2d Dept 2006] [conclusion supported by evidence in record]; *Austin*, 280 AD2d at 365 [hearing officer's finding was supported by record as officer credited certain testimony and found petitioner's testimony incredible]).

Absent any other ground advanced to support his claim that the arbitrator was biased and partial against him, petitioner has not satisfied his burden of proving that the arbitrator engaged in corruption, fraud, or misconduct.

C. Excess of power

Having failed to prove that the arbitrator was partial or biased against him, petitioner has also failed to demonstrate that the arbitrator exceeded his power.

D. Procedural defects

As the arbitrator's reliance on hearsay was not improper (*supra.*, II.B.), petitioner has failed to establish that the arbitrator failed to follow proper procedures. To the extent that he argues that other procedures were not followed, petitioner's claim is conclusory and he has not shown that any alleged errors warrant reversal of the award. (*See eg Travelers Ins. Co.*, 239 AD2d at 292; *see Travelers Ins. Co. v Job*, 239 AD2d 289 [1st Dept 1997], *quoting Korein v Rabin*, 29 AD2d 351 [1st Dept 1968] [courts will not concern themselves with form or sufficiency of evidence before arbitrators or some departure from formal technicalities in absence of clear showing that statutory grounds exist to vacate award]).

E. Arbitrary and capricious

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious under CPLR Article 78, the test is whether the determination "is without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v Board of Educ. of Union Free*

School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assoc. v Division of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]). Moreover, the determination of an administrative agency, "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 N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]). And, a hearing officer's credibility determinations are "largely unreviewable because the hearing officer observed the witnesses and was able to perceive . . . all the nuances of speech and manner that combine to form an impression of either candor or deception." (*Matter of Berenhaus v Ward,* 70 NY2d 436, 443 [1987]; *Lackow*, 51 AD3d at 569).

Here, as petitioner admitted that he bribed the students to tell him about the investigation against him, and as the hearing officer explained his rationale for finding against petitioner, the determination is neither arbitrary nor capricious.

F. Proportionality of penalty

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." (*Matter of Pell*, 34 NY2d at 233). A result is shocking to one's sense of fairness when:

> the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct . . . of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the

> derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved.

(*Id.* at 234).

As the hearing officer weighed the seriousness of petitioner's misconduct against evidence of his good character and lack of disciplinary history and assessed a reasonable penalty, the punishment is neither disproportionate to the offense, nor shocking to one's sense of fairness. (*Asch*, 104 AD3d at 421 [hearing officer took into account seriousness of charges against petitioner and lack of prior disciplinary history during 20-year teaching career, and thus penalty not disproportionate to offense]).

III. RESPONDENT'S CROSS-MOTION

As I have denied petitioner's motion to vacate the award, it must be confirmed. (CPLR 7511[e]).

IV. CONCLUSION

Accordingly, it is hereby

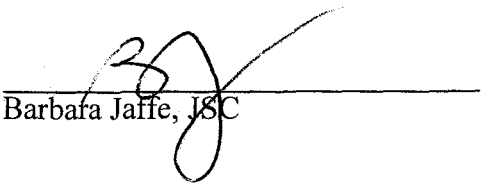
ADJUDGED and ORDERED, that the petition for an order vacating the award is denied; it is further

ADJUDGED and ORDERED, that respondent's cross-motion for an order dismissing the petition is granted and the proceeding is dismissed, with costs and disbursements to respondent; and it is further

ADJUDGED and ORDERED, that respondent, having an address at 100 Church Street, New York, New York 10007, do recover from petitioner, having an address at 46 Birmingham

Drive, Columbus, NJ 08022, costs and disbursements in the amount of $ _____, as taxed by the Clerk, and that respondent have execution therefor.

ENTER:



Barbara Jaffe, JSC

DATED: October 16, 2013
New York, New York

UNFILED JUDGMENT

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