Abreu v New York City Dept. of Educ.
2014 NY Slip Op 30956(U)
April 15, 2014
Sup Ct, New York County
Docket Number: 101486/13
Judge: Joan B. Lobis
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[* 1]

SCANNED ON 4/16/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 101486/2013
ABREU, WILLIAM
vs
NYC DEPARTMENT OF EDUCATION
Sequence Number : 001
ARTICLE 78

PART _____

INDEX NO. _____
MOTION DATE 1/21/14
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). not 2, 3
Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is a Cross Motion and cross motion are decided as set forth in the accompanying decision, order & judgment

and cross motion are

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Order & Judgment

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

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).

Dated: 4/15/14

JOAN B. LOBIS, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... X ..... 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

----------X

WILLIAM ABREU,

Petitioner,

Index No. 101486/13

-against-

Decision, Order, and Judgment

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

----------X

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

Petitioner William Abreu moves under Article 75 of the Civil Practice Law and Rules and Section 3020-a(5) of the Education Law for an order vacating an arbitration decision. The October 11, 2013, decision found that Mr. Abreu made inappropriate sexual comments and inquiries to three 15-year-old female students. Hearing Officer Joel M. Douglas decided that Petitioner should be terminated from service. Respondent New York City Department of Education ("DOE") cross-moves to dismiss on the grounds that the petition fails to state a cause of action. For the reasons stated below, the cross-motion to dismiss is granted

During the 2010-2011 school year, William Abreu was an employee of the DOE. He served as the Assistant Principal of Security at Progress High School in Brooklyn, New York. On June 17, 2011, three female students met with Abreu to interview for summer jobs with Juan Martinez, the founder of the high school and the president of Progress Inc., a non-profit corporation that shared space with the high school. Mr. Abreu claims to have received a telephone call from Mr. Martinez requesting him to interview the three students at Petitioner's office. Petitioner's office is composed of an inner office and outer office. The outer office is where Mr. Abreu's

secretary, Carmen Diaz, had a desk, and the inner office is where Petitioner had his desk and computers. There is a door between the inner and outer offices.

The facts are disputed by Petitioner and the three students. Petitioner Abreu claims he was in his office with Victor de la Rosa, a technician who was fixing a computer at the time. When the students arrived, Mr. Abreu asked Ms. Diaz to send in one of the students. Petitioner then asked Mr. de la Rosa to step out. Petitioner claims to have interviewed Student A for 4 to 6 minutes, mostly discussing an essay and its grammatical errors. After the interview, Student A stepped out of the inner office and Student B stepped in. Petitioner claims that this interview lasted 4 to 5 minutes. He alleges that Student B became upset after discussing a rumor regarding her boyfriend. Petitioner states that the door to his inner office was open during both interviews. He claims that he could not interview Student C because of an emergency elsewhere in the school. Ms. Diaz and Mr. de la Rosa offer similar versions of events, though they testified that the students were interviewed for 6 to 8 minutes, instead of 4 to 6 minutes. The interviews were conducted in Spanish. Ms. Diaz claims that the Petitioner's daughter and a dean were in the outer office during portions of the interviews.

The three students offer a different version of events. Each student, including Student C, claims to have been interviewed, and that the interviews ranged from 30 minutes to 80 minutes. All three claim that Mr. Abreu made inappropriate sexual comments during their interviews. The students alleged that the door to Mr. Abreu's office was closed.

Student A reported the incident to Wanda Gonzalez, the youth leader of her church, who also happens to be a school safety officer. Ms. Gonzalez notified Student A's parents and Lindsey Martinez, the Associate Supervisor of Security at Progress High School. Ms. Martinez contacted Student A's father, interviewed Student A, and then reported the incident to the Special Commissioner of Investigation for the New York City School District (SCI). SCI assigned investigators George Nagy and Thomas Chin to the case. In November 2011, Jeffrey Anderson and Eddie Ramos were assigned as investigators after George Nagy retired. The SCI investigation resulted in a recommendation, sent by letter dated June 20, 2012, to Chancellor Dennis M. Wolcott that Petitioner be terminated from his position with the DOE.

Charges and specifications were prepared and served, notifying Mr. Abreu that the DOE was seeking to terminate him. The subject of his discipline and termination was subject to mandatory arbitration. Full evidentiary hearings were conducted in May and June of 2013. Hearing Officer Joel M. Douglas credited the students' testimony and concluded that Mr. Abreu should be terminated. In a letter dated October 25, 2013, the New York State Education Department informed the Petitioner of the findings and recommendations. In November 2013, Petitioner commenced this Article 75 proceeding.

Petitioner Abreu appeals the determination under Education Law Section 3020-a(5). In his petition, Mr. Abreu claims that 1) he was denied due process, 2) the decision was arbitrary and capricious, and 3) the hearing officer violated procedural provisions of Section 3020-a, which resulted in substantial prejudice toward the Petitioner. He requests that the Court vacate the award under Section 7511 of the Civil Practice Law and Rules. Respondent DOE cross-moves

pursuant to Rule 3211(a)(7) of the Civil Practice Law and Rules to dismiss Mr. Abreu's petition for its failure to state a cause of action. In support of its cross-motion to dismiss, the DOE attaches copies of the arbitral record including transcripts of the proceeding, the arbitrator's decision, investigative reports, and exhibits that were received into evidence during the proceedings.

In the petition, Mr. Abreu claims that he was denied due process before, during, and after the evidentiary hearing. Prior to the hearing, Petitioner contends that SCI's investigation was flawed. He argues that SCI failed to ascertain who was present in the office during the student interviews, as both Petitioner and his secretary explained that Mr. de la Rosa, the Petitioner's daughter, and a high school dean were present. As a result, Mr. de la Rosa, the Petitioner's daughter, and the dean were not interviewed by SCI. Petitioner states that the SCI investigation was also flawed because Investigator Nagy failed to determine whether the door to Petitioner's office was open or closed and who was present during the interviews. Petitioner maintains that the investigators did not ask relevant and common sense questions. Petitioner asserts that the Hearing Officer should not have admitted statements by Investigator Anderson regarding Investigator Nagy's investigation. Mr. Abreu claims that he did not have an opportunity to cross-examine Investigator Nagy. He argues that Hearing Officer Douglas inappropriately credited the June 2012 SCI report. Petitioner states that this deprived him of a fair and proper hearing. He also believes that the release of the SCI report and a press release by SCI in June 2012 eviscerated the intent behind Petitioner's right to a private hearing and provided a script for witnesses testifying against Petitioner.

Mr. Abreu asserts that during the hearing, the hearing officer indicated that he was aware of new allegations against Mr. Abreu. Petitioner alleges that the new allegations influenced the hearing officer. On September 4, 2013, SCI released an investigation report substantiating additional allegations against Petitioner for the rape of a 17-year old Progress High graduate. Petitioner maintains that the Court can infer prejudice on the part of Hearing Officer Douglas since he implies knowledge of the report in a footnote. He also states that the hearing officer mentioned facts that were not in the record, including that one school aide who spoke with the female students had since resigned. Petitioner contends that this indicates that Hearing Officer Douglas conducted a personal investigation.

Petitioner argues that Hearing Officer Douglas's decision was arbitrary and capricious. Petitioner Abreu contends that Hearing Officer Douglas made numerous factual errors which resulted in a decision without regard to the facts. Petitioner also argues that Hearing Officer Douglas's conclusions were unreasonable, including his conclusion that Petitioner and Mr. de la Rosa had a close relationship. In addition, Mr. Abreu states that hearsay evidence was improperly considered by Hearing Officer Douglas. Lastly, Petitioner asserts that the DOE did not comply with the procedural requirements of Education Law Section 3020-a, and that this created a substantial prejudice to the Petitioner. Mr. Abreu contends that the hearing officer did not issue a decision within 30 days of the final hearing, as required by Education Law Section 3020-a(4)(a).

In its cross-motion to dismiss, Respondent DOE argues that the Petitioner has not established a basis for vacating Hearing Officer Douglas's award. The DOE maintains that the Petitioner did not establish the award was arbitrary and capricious. It contends that the award was

supported by a 19 page decision that reviewed all of the testimony and provided detailed explanations for each conclusion.

Respondent argues that there is no cause of action because Petitioner is simply contesting the hearing officer's credibility determinations. Hearing Officer Douglas credited the testimony of the students based on record documents. He also credited the testimony of SCI Investigator Anderson, who had experience as an NYPD Sergeant specializing in sexual harassment and child abuse cases. Investigator Anderson testified that the students were forthright and consistent. The hearing officer did not credit the testimony of the Petitioner, Mr. de la Rosa, or Ms. Diaz.

Respondent asserts that there were no due process violations, and that Petitioner received a full Education Law Section 3020-a hearing. The DOE argues that Hearing Officer Douglas did not improperly consider the September 4, 2013, SCI report as the only reference is part of a footnote where he states that the allegations of the second report were not before him. It claims that during the hearing, Hearing Officer Douglas stopped Petitioner's representative from inquiring into the second investigation during a cross-examination. It argues that Petitioner's allegation that the hearing officer was materially influenced by the September 4, 2013, SCI report is factually unsupported. Respondent also claims that the use of hearsay evidence does not establish a violation of due process as it is well established that a hearing officer in a Section 3020-a hearing may consider hearsay evidence in reaching a determination. The DOE also maintains that the issuance of the award more than 30 days after the hearings also does not establish a due process violation as Petitioner needed to notify the arbitrator in writing of his objection prior to

delivery of the award and make a showing of prejudice that resulted from the delay. Lastly, the DOE argues that the Petitioner's claim that the SCI investigation violated his due process rights is not properly before the Court as (a) it is not a part of the arbitral proceeding, and (b) SCI was not joined as a party to the action.

In opposition to the cross-motion to dismiss, Petitioner reasserts his argument that he was denied due process because Investigator Nagy did not testify during the hearing. Mr. Abreu argues that the Hearing Officer Douglas favored all of the DOE's witnesses over Petitioner's witnesses. He contends that Hearing Officer Douglas considered the SCI Report dated September 4, 2013, and that the report could only have been obtained if the hearing officer conducted his own investigation. He claims that it is inconceivable that the hearing officer was not influenced by the SCI report. Petitioner Abreu maintains that the June 2012 SCI investigation also denied him due process because it was flawed and a report was released prior to his hearing. Lastly, Petitioner argues that Hearing Officer Douglas's decision was arbitrary and capricious because his credibility determinations were without sound basis in reason. Petitioner claims that the basis for each credibility determination was irrational.

In general a motion to dismiss under Rule 3211(a)(7) of the Civil Practice Law and Rules 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)).

Education Law Section 3020-a sets forth the procedures and penalties for disciplinary actions against tenured teachers. Subsection 5 of that statute authorizes judicial review of a hearing officer's decision. That review is limited to grounds set forth in Section 7511(b) of the Civil Practice Law and Rules. Section 7511(b), in turn, provides 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).

Where parties have submitted to compulsory arbitration, this Court applies a stricter standard of review than it does in voluntary arbitrations. See, e.g., Lackow v. Dep't of Educ., 51 A.D.3d 563, 567 (1st Dep't 2008). The arbitrator's decision must accord with due process, be supported by adequate evidence, and be rational and satisfy the arbitrary and capricious standards under Article 78 of the Civil Practice Law and Rules. Id. A hearing officer's credibility

determinations, however, are "largely unreviewable." Id. at 568. Petitioner bears the burden of proof in challenging the arbitrator's decision under these standards. Id.

The Petitioner has not met his burden of proof in challenging the arbitrator's decision. Petitioner's assertion that there was a due process violation due to the release of an SCI report in June 2012, before the evidentiary hearings took place, fails to establish any prejudice. Petitioner claims this provided a script for witnesses at his evidentiary hearing but the statements in the report were based on interviews with the witnesses who testified at the hearing. The Hearing Officer Douglas's determination to credit the SCI report is not reviewable. Nor are his determinations as to which witness testimony should be credited reviewable. The hearing officer observed the witnesses and "all the nuances of speech and manner that combine to form an impression of either candor or deception." Matter of Berenhaus v. Ward, 70 N.Y.2d 436, 443 (1987). The hearing officer did not have to explain why certain testimony was accepted or not as "arbitrators do not have to provide a reason for their decisions." Ebewo, 2011 N.Y. Misc. LEXIS 4318, at 17 (citing Solow Bldg. Co., LLC v. Morgan Guar. Trust Co. of N.Y., 6 A.D.3d 356, 356-57 (1st Dep't 2004)).

Petitioner's inability to cross-examine Inspector Nagy, one of the investigators who wrote the June 2012 SCI report, does not indicate that Petitioner was deprived of due process at his hearing. The Petitioner had a full opportunity to question his accusers. Under Education Law Section 3020-a(3)(c), Petitioner could have subpoenaed Inspector Nagy. There is no evidence in the record that Petitioner was not given the opportunity to subpoena Inspector Nagy or that Petitioner was not allowed to cross-examine witnesses present at the hearings. Nonetheless, the

investigative methodology was set out in the SCI report. The testimony of the investigator would in any event be wholly collateral.

Petitioner's claim that the hearing officer was influenced by the September 4, 2013, SCI report regarding new charges against Mr. Abreu is without merit. Hearing Officer Douglas references the report only to say that the matter is not in front of him. There is no other showing that he was influenced by the report or conducted any kind of personal investigation. Mere allegations do not "meet [Petitioner's] heavy burden of showing arbitrator misconduct or partiality by clear and convincing proof." Moran v. Tr. Auth., 45 A.D.3d 484 484 (1st Dep't 2007).

Petitioner Abreu also argued that Hearing Officer Douglas's determination was arbitrary and capricious. Petitioner suggests that minor factual discrepancies show that the decision was without sound basis in facts, but these discrepancies are between witnesses that the hearing officer credited and witnesses he did not credit. These types of discrepancies do not render the conclusions reached arbitrary and capricious.

Lastly, Hearing Officer Douglas's late issuance of the arbitration award is not a basis for vacating the award. While Education Law Section 3020(a) requires a hearing officer to render a decision within 30 days of the final hearing, Section 7507 of the Civil Practice Law and Rules states that a party waives the objection that an award was not made within the time required unless he notifies the arbitrator in writing of his objection prior to delivery. Petitioner did not make such an objection. Additionally, the Court of Appeals has held that a delayed award does not "constitute prejudice as a matter of law." Louis Harris and Assoc. v. deLeon, 84 N.Y.2d 698,

702 (1994). The Court cannot find that an arbitration award is unenforceable in the absence of evidence of prejudice arising out of the delay. See Scollar v. Cece, 28 A.D.3d 317 (1st 2006). There is no showing of any prejudice arising from the late award. Accordingly, it is

ADJUDGED that the cross-motion to dismiss the petition is granted; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed

Dated: April 15, 2014

ENTER:

JOAN B. LOBIS, J.S.C

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).