Matter of Razzano v Remsenburg-Speonk Union Free Sch. Dist.
2014 NY Slip Op 30390(U)
January 31, 2014
Sup Ct, Suffolk County
Docket Number: 13-16057
Judge: Daniel Martin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 9

In the Matter of the Application of JANICE RAZZANO.

Petitioner,

For a Judgment Pursuant to Article 75 of the Civil Practice Law and Rules

- against -

REMSENBURG-SPEONK UNION FREE SCHOOL DISTRICT,

Respondent.

By: Martin, J.S.C.
Dated: January 31, 2014

Index No. 13-16057
Mot. Seq. #001 - MD; CDISPSUBJ

Return Date: 7-29-13
Adjourned: 10-01-13

WOLIN & WOLIN
Attorney for Petitioner
420 Jericho Turnpike, Suite 215
Jericho, New York 11753

GUERCIO & GUERCIO, LLP
Attorney for Respondent
77 Conklin Street
Farmingdale, New York 11735

In this article 75 proceeding, the petitioner seeks to vacate or modify an arbitration decision dated May 31, 2013 which terminated the petitioner from her employment as a tenured school psychologist. The petitioner further seeks reinstatement with back pay and other benefits which would have been otherwise due.

On or about June 14, 2012, the respondent, Remsenburg-Speonk Union Free School District ("the school district") filed charges and commenced a proceeding against the petitioner pursuant to Education Law § 3020-a, requesting that she be disciplined and removed from her position as a tenured school psychologist in the school district. The charges included 22 specifications under "I. Conduct Unbecoming a Teacher," 23 specifications under "II. Neglect of Duty," 10 specifications under "III. Insubordination," and six specifications under "V. Physical/Mental Disability."[1] Following pre-hearing conferences held on August 7, 2012 and September 5, 2012, a hearing was conducted over approximately 12 days from September 11, 2012 to March 15, 2013. In support of its charges, the school district introduced testimony from Ronald Masera, Ph.D., its superintendent and principal since December 2010, Randall Solomon, M.D., a psychiatrist who evaluated the petitioner at the request of the school district (its expert witness), Katherine Salomone, Ph.D., the superintendent and principal for the

[1]There is no category of specifications under Roman numeral "IV."

school district who retired at the end of 2010, and Ms. Jan Achillich, the director of special education for the school district. Additionally, the school district examined the petitioner. In opposition to the charges, the petitioner testified and Glen Kalash, D.O. testified as petitioner's expert witness. In all, over 100 exhibits were part of the record upon which the hearing officer based his decision. Following the submission of post-hearing briefs, the hearing officer issued a comprehensive 69-page opinion and decision dated May 31, 2013.

The school district withdrew the following seven specifications at the conclusion of their case:

I. Conduct Unbecoming a Teacher, Specifications 12 and 13
II. Neglect of Duty, Specifications 12, 13, and 23
III. Insubordination, Specifications 2 and 3

The hearing officer dismissed the following specifications in his opinion and decision:

I. Conduct Unbecoming a Teacher, Specifications 2, 3, 4, 5, 6, 8, 9, 10, 11, 16, and 18
II. Neglect of Duty, Specifications 2, 3, 4, 5, 6, 8, 9, 10, 11, 16, and 18
III. Insubordination, Specification 5

Thus, the hearing officer's decision to terminate the petitioner from her employment was based upon his sustaining the following specifications:

I. Conduct Unbecoming a Teacher, Specifications 1, 7, 14, 15, 17, 19, 20, 21, and 22
II. Neglect of Duty, Specifications 1, 7, 14, 15, 17, 19, 20, 21, and 22
III. Insubordination, Specifications 1, 4, 6, 7, 8, 9, and 10
V. Physical/Mental Disability, Specifications 1, 2, 3, 4, 5, and 6

Specification 1 under "I. Conduct Unbecoming a Teacher," "II. Neglect of Duty," and "III. Insubordination" each reference the petitioner's failure to supervise students during her assigned lunch period from 11:25 a.m. to 12:10 p.m. on June 22, 2010. Specification 7 and 17 under "I. Conduct Unbecoming a Teacher" and "II. Neglect of Duty," and Specification 6 under "III. Insubordination" refer to the petitioner's leaving confidential student information on "at least seven occasions between January and June of 2011" and on January 17, 2012 on public printers in the special education department and student lab or in an unsecured public location, after having been directed on numerous occasions to adhere to the Family Educational Rights and Privacy Act provisions. Specifications 14, 19, 20, and 21 under "I. Conduct Unbecoming a Teacher" and "II. Neglect of Duty" and Specification 4, 7, 8, and 9 under "III. Insubordination" allege that the petitioner failed to purge unnecessary e-mails in her district e-mail account on October 6, 2011, and February 3, 9, and 17, 2012 after having been directed to do so. Specifications 15 under "I. Conduct Unbecoming a Teacher" and "II. Neglect of Duty" maintain that the petitioner "told two students that another district employee 'couldn't even count to four'." Specification 22 under "I. Conduct Unbecoming a Teacher" and "II. Neglect of Duty" and Specification 10 under "III. Insubordination" claim that the petitioner failed to cooperate with the school district psychologist, Dr. Solomon, in order to permit him to complete the Section 913 examination as ordered by the school

district.

As to the Specifications under "V. Physical/Mental Disability," the school district claims that the petitioner demonstrated her physical/mental disability or incapacity to work as a school psychologist when on January 13, 2012 and on January 17, 2012 she left confidential student records in an unsecured public location; when on January 20, 2012 "she drove past the school building three times while videotaping and/or photographing the building and its employees"; and when on March 19, 2012 Dr. Solomon examined her and concluded that she "has psychological and emotional difficulties involving deficits in judgment, insight, information processing, empathic understanding, ability to accept responsibility and ability to engage in a healthy process of introspections, and that such deficits substantially interfere with her ability to function appropriately and safely in the workplace . . . she is either unable and/or unwilling to accept responsibility for the difficulties that she has had with fellow employees in the workplace . . . [and] she is not mentally fit to continue working in the District."

The petitioner argues that the opinion and decision of the hearing officer–in which he determined that "the termination of [the petitioner's] employment as a School Psychologist in the [school district] is the only appropriate remedy . . . rel[ying] on the proven specifications of misconduct, neglect of duty and insubordination, which provided the bases for the Section 913 referral and examination as well as the findings/Report of Dr. Randall Solomon upon which the Physical/Mental Disability Specifications are based–was "totally irrational, arbitrary, capricious and shocking to one's conscience." She claims that it was not supported by adequate evidence on the record. Thus, the petitioner urges the court to vacate or modify the decision.

"Education Law § 3020-a (5) limits judicial review of a hearing officer's determination to the grounds set forth in CPLR 7511" (***City School Dist. of the City of New York v McGraham***, 17 NY3d 917, 919, 934 NYS2d 768 [2011]). CPLR 7511 (b) (1) sets forth the exclusive grounds for vacating an award where, as here, the aggrieved party participated in the arbitration:

> (i) corruption, fraud or misconduct in procuring the award; or
>
> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
>
> (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
>
> (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

Under CPLR 7511 (b), an arbitrator exceeds his power under section (iii) and a court may vacate the award if it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power (***Kowaleski v New York State Dept. of Corr. Serv.,*** 16 NY3d 85, 917

NYS2d 82 [2010]; ***Falzone v New York Cent. Mut. Fire Ins. Co.,*** 15 NY3d 530, 914 NYS2d 67 [2010]; ***Matter of Town of Callicoon [Civil Serv. Empls. Assn., Town of Callicoon Unit],*** 70 NY2d 907, 524 NYS2d 389 [1987]). As such, judicial review of arbitration awards is extremely limited, and even where an arbitrator has made an error of law or fact, courts are obligated to give deference to an arbitrator's decision (***Falzone v New York Cent. Mut. Fire Ins. Co.,*** *supra*). "[T]he courts should not assume the role of overseers to mold the award to conform to their sense of justice" (***Matter of MBNA Am. Bank v Karathanos***, 65 AD3d 688, 883 NYS2d 917, 918 [2d Dept 2009]).

However, where the obligation to arbitrate arises through statutory mandate, as is the case under Education Law § 3020-a, the arbitrator's findings are subject to closer judicial scrutiny than they would receive had the arbitration been conducted voluntarily. A compulsory arbitration award must have evidentiary support and cannot be arbitrary and capricious (***Hauppauge Union Free School Dist. v Hogan***, 109 AD3d 817,819, 971 NYS2d 147 [2d Dept 2013]; ***City School Dist. of the City of New York v McGraham***, *supra*). Additionally, the decision must be rational and have a plausible basis, although where room for choice exists because the evidence is conflicting, the court may not weigh the evidence or reject the arbitrator's decision (***Powell v Board of Educ. of Westbury Union Free School Dist.***, 91 AD3d 955, 955, 956, 938 NYS2d 123 [2d Dept 2012]), and public policy is not violated and no basis for vacating an arbitrator's determination is provided merely because "reasonable minds might disagree over what the proper penalty should [be]" (***Shenendehowa Cent. School Dist. Bd. of Educ. v Civil Serv. Empl. Assn., Inc.***, 20 NY3d 1026, 1028, 960 NYS2d 725 [2013] *quoting* ***City School Dist. of the City of New York v McGraham***, *supra* at 920).

Here, the hearing officer considered the facts and evidence applicable to each of the specifications and clearly enunciated his reasons for dismissing or sustaining each one. He made a determination as to the credibility of the expert witnesses and found that the testimony of Dr. Solomon was both persuasive and credible and that it "was not diminished or negated by the opinion of the [petitioner's] expert . . . Dr. Kalash . . . [whose] report cannot be deemed credible." In his decision, the hearing officer opined that "the evidence in its entirety [persuaded him] that the [petitioner] has exhibited a pattern of behavior which proves that she is mentally unfit to continue her duties as a School Psychologist in the [school district] . . . [and that] the pattern of [her] aberrant behavior, as distinguished from isolated incidents, supported the District's decision to refer her for a Section 913 examination to ascertain her fitness for duty." The hearing officer further stated that his "observations of [the petitioner's] demeanor at the hearing support the observations made by the District's witnesses and its expert, Dr. Solomon. [Petitioner's] responses to questions posed by either attorney were often rambling, non-responsive, disconnected, vague, or some combination thereof."

The court finds, therefore, that the decision of the arbitrator was rational and had a plausible basis, and although it appears that conflicts may have existed, primarily concerning the opinions and testimony of expert witnesses, the court cannot weigh that testimony or evidence and reject the decision of the hearing officer (*see* ***Powell v Board of Educ. of Westbury Union Free School Dist.***, *supra*). Similarly, although the penalty of removal appears to be harsh, the hearing officer considered the totality of the evidence and his determination to uphold the removal by the school district, did not exceed a limitation of his power, was not irrational, and did not violate public policy (*see* ***Shenendehowa Cent.***

School Dist. Bd. of Educ. v Civil Serv. Empl. Assn., Inc., *supra*).

Based on the foregoing, the petition is denied and the proceeding is dismissed.

Submit judgment (*see* CPLR 7514).

Dated: January 31, 2014

J.S.C.