Varriale v City of New York
2015 NY Slip Op 31256(U)
July 10, 2015
Supreme Court, New York County
Docket Number: 652189/14
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

----------x

SUZANNE VARRIALE,

Petitioner (s),

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION; CARMEN FARINA, CHANCELLOR of NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent (s),

To Vacate a Decision of a Hearing Officer Pursuant to Education Law Section 3020-a and CPLR 7511.

----------x

DECISION/ ORDER
Index No.: 652189/14
Seq. No.: 001

PRESENT:
Hon. Lynn R. Kotler
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Paper	**Numbered**
Pet's n/pet, ver pet, exhs	1
Resp's n/x-mot, MO affirm, exhs	2
BDG affirm in opp	3
MO reply affirm, exh	4

Upon the foregoing papers, the decision and order of the Court is as follows:

Petitioner is a former teacher at Queens High School of Teaching, Liberal Arts, and the Sciences. During the 2012-2013 school year, she was charged with engaging in "verbal abuse, threatening behavior, misconduct and conduct unbecoming her profession." Petitioner now commences this proceeding pursuant to New York Education Law § 3020-a(5) and CPLR § 7511 seeking an order vacating the decision of Hearing Officer Howard Stiefel, Esq. ("HO Steifel") dated July 7, 2014 (the "7/7/14 Determination") after a disciplinary hearing which imposed the penalty of termination.

Respondents BOE, The City of New York and Carmen Farina, Chancellor of New York City Department of Education now cross-move to dismiss the petition. Petitioner opposes the cross-motion.

For the reasons that follow, the cross-motion is denied.

Facts and arguments

Petitioner had an unblemished thirteen-year tenured teaching career which abruptly came to a halt on May 7, 2013. On that day, petitioner's counsel admits that petitioner had "an emotionally-charged outburst during a stressful period in her life that was completely out of character..." Petitioner was ultimately charged with six specifications concerning the events that took place on May 7 and 8, 2013. Petitioner claims that she "was assaulted and verbally abused by a physically imposing student with a violent and troubled past who was suspended form the school for his threatening conduct towards [her]." Meanwhile, at the hearing, evidence was introduced that petitioner was held back by security personnel while she shouted at the student "my husband will kill that fucking kid" in earshot of other students. Petitioner's husband came to the school the next day. HO Steifel concluded that "the possibility of violence would have been very real" and that petitioner's conduct was not a "momentary lapse in judgment."

Petitioner maintains that the penalty of termination is particularly harsh, irrational and shocking to the conscience in this case given her record of employment with the BOE, "the emotionally charged context of the incidents in question, the egregious conduct of the student involved and the administration's lack of support in dealing with the student in the past, and petitioner's lack of any prior disciplinary history..."

Respondents argue that the petition should be dismissed because petitioner has failed to establish any basis for vacatur and the penalty of termination does not shock the conscience. Respondents further argue that The City of New York is not a proper party to this proceeding.

Discussion

At the outset, insofar as respondent BOE is not a department of respondent The City of New York, BOE is therefore a separate and distinct legal entity (see Education Law § 2590-g [2]), respondents' motion to dismiss the petition as to respondent The City of New York must be granted (see i.e. *Perez v. City of New York*, 41 AD3d 378 [1st Dept 2007]).

The Court now turns to the balance of the motion, which attacks the sufficiency of the petition. Education Law § 3020-a (5) provides that a petition to vacate or modify the determination of a hearing officer issued after a disciplinary proceeding must be filed in Supreme Court pursuant to CPLR § 7511. Under CPLR § 7511 (b) (1), judicial review of the hearing officer's determination is limited to finding whether the rights of the challenger were prejudiced by:

> (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.

Because the arbitration at issue was compulsory, the court's review must also determine whether the 7/7/14 Determination was rendered "in accord with due process and [was] supported

by adequate evidence," and whether it satisfies the arbitrary and capricious standard of CPLR Article 78. (*Rubino v. City of New York*, 34 Misc3d 1220(A) (NY Sup, NY Co 2012) aff'd 106 AD3d 439 [1st Dept 2013] citing *Lackow v. Dept. of Educ. [or "Board"] of the City of NY*, 51 AD3d 563, 567 [1st Dept 2008]; see also *Matter of Asch v. New York City Bd./Dept. of Educ.*, 104 AD3d 415 [1st Dept 2013]).

"Moreover, '[a]rbitration awards may not be vacated even if the court concludes that the arbitrator's interpretation of the agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law, unless it is violative of a strong public policy, is totally irrational, or exceeds a specifically enumerated limitation on his power' " (*Asch*, *supra* at 419, quoting *Matter of Wicks Constr. [Green]*, 295 AD2d 527, 528 [2d Dept 2002]).

Here, the petition easily survives respondent's cross-motion to dismiss pursuant to CPLR § 3211 (a) (7). All petitioner needs do is allege sufficient facts to establish entitlement to the relief she seeks. Respondent's arguments go to the merits of the petition, which is not the proper subject of a motion to dismiss. Accordingly, the cross-motion is granted only to the extent that the petition as to respondent The City of New York is severed and denied. Respondents are directed to file and serve an answer within 30 days from the date of service of this order with notice of entry.

Conclusion

In accordance herewith, it is hereby

ORDERED that respondent's cross-motion to dismiss is granted only to the extent that the petition as to respondent The City of New York is severed and denied; and it is further

ORDERED that the cross-motion is otherwise denied; and it is further

ORDERED that Respondents are directed to file and serve an answer within 30 days

from the date of service of this order with notice of entry

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

Dated: July 10, 2015
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.