SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59
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In the Matter of the Application of

RICHARD RONGA,

Index No.: 653367/2014

Petitioner,

For an Order Vacating a Decision of a Hearing Officer Pursuant to Section 3020-a(5) of the Education Law and Article 75 of the CPLR

Motion Sequence No. 001

- against-

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

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DEBRA A. JAMES, J.:

Petitioner Richard Ronga moves, pursuant to CPLR 7511, for an order vacating an arbitration award made after a disciplinary hearing, held pursuant to Education Law § 3020-a, in which petitioner was terminated from his employment with respondent The New York City Department of Education (DOE). The DOE answers and opposes the petition.

BACKGROUND AND FACTUAL ALLEGATIONS

Until his termination from employment in October 2014, petitioner had been a tenured employee working for the DOE for approximately 30 years. From 2007-2008, petitioner held the position of probationary principal of PS 166, located in New

York, New York.

In January 2011, pursuant to Education Law § 3020-a, the DOE served petitioner with nine "Specifications," or charges, alleging that, within the 2005-2006, 2006-2007, and 2007-2008 school years, petitioner engaged in "misconduct, criminal conduct and neglected his duties". Petitioner was also served with two additional charges in June 2012.

Pursuant to Education Law § 3020-a, a hearing was held to determine the outcome of the charges. Hearing Officer Patricia A. Cullen, Esq. (Cullen) was appointed to preside over the proceedings. On January 11, 2013, Cullen issued an opinion and award (first award), sustaining four specifications and issuing a penalty of termination. The four sustained specifications were specifications 5, 6, 7 and 9.

Petitioner filed an article 75 petition seeking to vacate the first award. This court (Wright, J.) denied the petition and confirmed the first award. Petitioner appealed this determination. The Appellate Division, First Department, affirmed in part and modified in part. The Court affirmed that petitioner was found guilty of two of the four specifications, and remanded the matter back to the hearing officer for reconsideration of the penalty. It held the following, in pertinent part:

> We find that [specifications nos. 5 and 6] were not specific enough to satisfy the principle of due process

> that actual notice be given so as to allow the preparation of an adequate defense. . . . We find that the hearing officer's determination that petitioner was guilty of specifications Nos. 7 and 9 pertaining to specific acts of misconduct on June 17 and June 18, 2008 is supported by adequate evidence. . . . The hearing officer rationally concluded that the false documents found to have been prepared the night before constituted the material petitioner himself admitted sending to the superintendent. Since the penalty of termination was based on the finding of guilt on all four charges, the matter must be remanded for reconsideration of the penalty [internal citations omitted].

Matter of Ronga v New York City Dept. of Educ., 114 AD3d 527, 528-529 (1st Dept 2014).

The matter was then remanded to Cullen. Cullen permitted petitioner to make an application for leave to present new evidence, thereby re-opening the record, but he did not do so. The parties presented an oral argument in front of Cullen on April 10, 2014, pertaining to her determination of penalty for the two remaining specifications, which are the following:

> Specification 7: On or about June 17, 2008, [petitioner] directed and/or had Assistant Principal and/or Math Coach Deborah Forschein to:
> a) create fabricated observation reports.
> b) create fabricated Professional Development Plans for the 2007-2008 school year.
>
> Specification 9: On or about June 18, 2008, [petitioner] submitted fabricated observation reports and Professional Development Plans to Superintendent Roser Salavert.

Cullen issued her opinion and award (second award) on October 24, 2014, reaffirming the penalty of termination. In her second award, Cullen addressed the positions of, and the case law

presented by, the parties. For instance, petitioner had argued, among other things, that the penalty of termination is excessive, given his long unblemished history with the DOE. Petitioner alleged that it was appropriate to re-examine the evidence prior to assessing the penalty.

Cullen found that the cases cited to by petitioner were distinguishable, as "the conduct charged is not comparable to that of petitioner." She concluded that a re-evaluation of the evidence was not warranted as the Appellate Division had already concluded that petitioner was guilty of two specifications. As she found in her first award, petitioner directed a math coach to create "fabricated" observation reports and professional development plans. These false reports were then delivered to the petitioner's supervisor. Cullen found that these charges alone amount to conduct unbecoming of petitioner's position.

Although she recognized petitioner's long period of service, Cullen found it was not sufficient to offset the penalty. Cullen writes, "[i]n this case, the imposition of the same penalty, termination of [petitioner's] employment, has a sound rational basis due to the nature and severity of the remaining sustained charges."

Shortly after receiving the second award, petitioner filed this proceeding. Petitioner contends that the evidence offered in support of his guilty specifications, was "weak." He further

claims that the penalty of termination is excessive, given the charges sustained and his long period of service. Counsel refers to petitioner as an "exceptional principal and educator." Petitioner further maintains that, even if guilty of the conduct alleged, he should not be deprived of his livelihood, due to a single incident. He claims that Cullen exceeded her authority, that the second award is irrational and that the penalty imposed is too excessive.

The DOE maintains that petitioner has failed to state a cause of action. Among other things, petitioner allegedly cannot demonstrate that the penalty received was shocking in light of his conduct.

DISCUSSION

Pursuant to Education Law § 3020-a (5), CPLR 7511 provides the basis of review of an arbitrator's findings. See Lackow v Department of Educ. (or "Board") of City of N.Y., 51 AD3d 563, 567 (1st Dept 2008). CPLR 7511 limits the grounds for vacating an award to "misconduct, bias, excess of power or procedural defects [internal quotation marks and citation omitted]." Lackow at 567. However, where, as here, the parties are subject to compulsory arbitration, the Appellate Division, First Department, has held that judicial scrutiny is greater than when parties voluntarily arbitrate. 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." Id. Nevertheless, the person challenging the award shoulders the "heavy burden" of vacating the award. Lehman Bros., Inc. v Cox, 10 NY3d 743, 744 (2008).

Hearing Officer Did Not Exceed Her Authority:

Petitioner claims that the evidence supporting the remaining charges was weak. Nevertheless, as explained by Cullen, the Appellate Division specifically found that the culpability on the two remaining charges was supported by adequate evidence. The record was not re-opened on remand. "[U]nder the law of the case doctrine, an appellate court's resolution of an issue on a prior appeal is binding on the trial court, as well as on the appellate court, and operates to foreclose reexamination of the question absent a showing of subsequent evidence or change of law." People v Codina, 110 AD3d 401, 406 (1st Dept 2013). As a result, the only issue for this court to consider is whether or not Cullen's penalty of termination was excessive.

Pursuant to Education Law § 3020-a (4) (a), a hearing officer is vested with the authority to issue a determination of penalty after a hearing has been held, with termination being one such penalty. By such rationale, contrary to petitioner's contentions, Cullen did not exceed her authority when she rendered the determination in her second award.

An arbitration award is considered irrational if there is

"no proof whatever to justify the award" Matter of Peckerman v D & D Assoc., 165 AD2d 289, 296 (1st Dept 1991).

After Cullen listened to the oral argument and reviewed the legal authorities presented by the parties, she found that the appropriate penalty for petitioner's "egregious act of fraud and deceit," was termination. Petitioner was found guilty of directing subordinates to fabricate reports, and then delivering these false reports to his supervisor. Cullen found that the cases cited to by petitioner were distinguishable, in that the conduct charged was not comparable to that of petitioner. Accordingly, it was not irrational for Cullen to impose the penalty of termination, based on the record.

Termination Appropriate and Not Shocking:

"The standard for reviewing a penalty imposed after a hearing pursuant to Education Law § 3020-a is whether the punishment of dismissal was so disproportionate to the offenses as to be shocking to the court's sense of fairness." Lackow, 51 AD3d at 569.

Given the record and serious misconduct, this court does not find that the penalty of termination shocks one's sense of fairness. Cullen was aware of and noted petitioner's prior service with the DOE. Nonetheless, she concluded that petitioner's fraudulent actions impacted other teachers and caused irreparable harm to his relationship with his employer.

As a result, termination was the appropriate penalty. As held by the Appellate Division, First Department, "acts of moral turpitude committed in the course of public employment are an appropriate ground for termination of even long-standing employees with good work histories [internal quotation marks and citation omitted]." Matter of Douglas v New York City Bd./Dept. of Educ., 87 AD3d 856, 857 (1st Dept 2011).

Petitioner believes that his conduct did not rise to the level of termination and that he should not be deprived of his livelihood due to a single incident. See e.g., Matter of Mauro v Walcott, 115 AD3d 547, 550 (1st Dept 2014) (Court found penalty of termination excessive in light of petitioner's conduct, which consisted of a one-time lapse in judgment - petitioner was not on duty in her official capacity when the incident occurred and it was not observed by any students.)

However, on this record petitioner is mistaken when he argues that this court should vacate this penalty in accordance with prior precedent. Courts have consistently upheld the penalty of termination based on fraudulent or dishonest conduct by petitioners. See e.g., Matter of Montanez v Department of Educ. of City of N.Y., 110 AD3d 487, 488 (1st Dept 2013) ("Although petitioner has an unblemished record as a teacher and offered to resolve the dispute by making restitution, the penalty of termination is not shocking in light of her having used a

fraudulent affidavit to obtain a free New York City education for her nonresident child"); see also Matter of Aiken v City of New York, 92 AD3d 448, 449 (1st Dept 2012) (Court upheld termination of a tenured DOE secretary when she fabricated time sheets and refused to take responsibility for her actions).

Award Upheld and Confirmed:

In accordance with CPLR 7511 (e), the October 24, 2014 Award is confirmed.[1] See e.g. Matter of Board of Educ. of Unadilla Val. Cent. Sch. Dist. (McGowan), 97 AD3d 1078, 1080 (3d Dept 2012) ("Petitioner then commenced this proceeding seeking to vacate that determination — an arbitration award — pursuant to CPLR 7511 (b). . . . Supreme Court denied the application to vacate and confirmed the award").

Accordingly, it is hereby

ADJUDGED that the petition is denied; and it is further

ADJUDGED that the arbitration award dated October 24, 2014 is confirmed.

Dated: August 7, 2015 ENTER:

J.S.C.
DEBRA A. JAMES

[1] CPLR 7511 (e) "upon the denial of a motion to vacate or modify, [the court] shall confirm the award."