Matter of Williams v New York City Dept. of Educ.
2016 NY Slip Op 31648(U)
August 29, 2016
Supreme Court, New York County
Docket Number: 651640/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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In the Matter of the Application of
PEARLETTA WILLIAMS,

Index No. 651640/2016

Petitioner,

For a judgment and order pursuant to Article 75 of the Civil Practice Law and Rules

DECISION/ORDER

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

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CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is a CPLR 7511 action by Petitioner Pearletta Williams ("Petitioner"), a formerly-tenured teacher previously employed by Respondent New York City Department of Education (the "DOE"), to vacate the Decision and Award of Hearing Officer Barry Goldman terminating Petitioner's employment (the "Award", *Exh 2*; the "Hearing Officer"). The DOE cross-moves pursuant to CPLR 3211(a)(7) to dismiss the Petition.

BACKGROUND FACTS

Before her termination, Petitioner was employed by the DOE as a teacher for 10 years, most recently at Lorraine Hansberry Academy in the Bronx. Pursuant to Education Law § 3020-a, the DOE brought the following disciplinary charges against Petitioner under File No. 27,834:

> 1. During the 2012-2013, 2013-2014, and 2014-2015 academic years, [Petitioner] failed to properly, adequately, and/or effectively plan and/or execute lessons, as observed on:
>
> a. January 22, 2013;
> b. March 6, 2013;
> c. April 8, 2013;

d. May 21, 2013;
e. November 8, 2013;
f. January 8, 2014;
g. February 28, 2014;
h. April 28, 2014;
i. May 12, 2014;
j. May 20, 2014;
k. January 14, 2015;
1. March 13, 2015;
m. May 14, 2015; and
n. June 2, 2015.

2. On or about May 15, 2013, [Petitioner] neglected her duties, failed to follow school policy or procedure, failed to ensure the health, safety and/or well-being of a student and/or used poor judgment, in that she failed to maintain order in her classroom and/or failed to properly address a student's behavior.

3. On or about February 22, 2013, [Petitioner] neglected her duties, failed to follow school policy or procedure, used poor judgment and/or acted unprofessionally, in that she called the police when she believed a student had misbehaved in class and/or failed to properly address a student's behavior.

4. On or about November 19, 2012, [Petitioner] neglected her duties, failed to follow school policy and procedure and/or failed to ensure the health, safety, and/or well-being of her students, in that she failed to report to her assigned class and/or left the class unsupervised.

5. On or about October 22, 2012, [Petitioner] was insubordinate and/or acted unprofessionally, in that she stated "this is like professional bullying" in response to a question by administration.

6. During the 2012-2013, 2013-2014, and 2014-2015 academic years, the [Petitioner] failed to implement directives, recommendations, counsel, instruction, and/or professional development from observation conferences, group meetings, and/or one-to-one support with school administrators, support staff and/or other support with regard to:

(i) Effective lesson planning;
(ii) Effective classroom instruction and lesson execution;
(iii) Effective classroom management; and
(iv) Effective classroom environment and organization.

The Hearing Officer presided over a pre-hearing conference on October 28, 2015 and

a full hearing over the course of January 20 and 21 and February 9, 10, and 11, 2016. The DOE called three witnesses to testify: Assistant Principal Fidelita Zohosi ("AP Zohoski"), Assistant Principal Nancy Castron ("AP Castron"), and Principal David Cintron ("Principal Cintron"). Petitioner testified on her own behalf and called her former principal, Joy Daley ("Principal Daley"). On March 15, 2016, the Hearing Officer issued the Award, which upheld sub-specifications 1 (a)-(f), (i) and (k)-(n), and specifications (2)-(6) and dismissed sub-specifications 1 (g), (h), and (j). The Hearing Officer determined that termination was the appropriate penalty.

In support of the Petition, Petitioner argues: first, that the Hearing Officer "exceeded his power" within the meaning of CPLR 7511 (b) (1) (iii) by failing to sufficiently detail his findings of fact and conclusions so as to permit adequate judicial review, and by improperly shifting the burden to Petitioner by deferring to the DOE's educational judgment; and second, that termination was excessive and not justified by the sustained sub-specifications within Specification 1, the only basis explicitly relied upon in the Hearing Officer's determination.

In opposition and in support of its cross-motion to dismiss, the DOE argues: first, that the Petition should be dismissed because the Award is rational and based on the record as a whole and therefore satisfies CPLR 7511's deferential standard of review; and second, that termination for incompetence alone does not shock one's sense of fairness, and is therefore an appropriate penalty.

In reply, Petitioner reiterates that the Hearing Officer "exceeded his power" within the meaning of CPLR 7511 (b) (1) (iii) by failing to provide findings of fact specific to each charge and making only conclusory findings. Further, that the Hearing Officer's determination to terminate Petitioner, which did not implicate specifications 2 through 6 and was therefore based only upon Specification 1, was excessive and shocked the conscience.

In reply, the DOE argues that the Hearing Officer's determinations carefully weighed the evidence and therefore, were not conclusory. And, termination was appropriate because of Petitioner's sustained incompetence despite the DOE's extensive efforts at remediation.

DISCUSSION

Hearing Officer's Exercise of Power

Judicial review of this determination is limited to the grounds set forth in CPLR 7511 (see Education Law § 3020–a[5]), *i.e.*, "misconduct, bias, excess of power or procedural defects" (*Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567, 859 NYS2d 52 [1st Dept 2008]).

CPLR 7511(b)(1)(iii) provides a basis for vacating an award when an arbitrator "exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made." Inasmuch as an arbitrator's power under a broadly worded arbitration clause is virtually unlimited, the "excess of power" category rarely provides a successful basis for vacatur (Professor Vincent Alexander, *Practice Commentaries*, CPLR 7511:5 [McKinney's 2016]). Thus, the Court of Appeals has indicated that "courts are obligated to give deference to the decision of the arbitrator" *N.Y.C. Transit Auth. v Transport Workers' Union of America, Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]). "An arbitrator's rulings, unlike a trial court's, are largely unreviewable" (*Falzone v New York Central Mutual Fire Ins. Co.*, 15 NY3d 530, 534 [2010]).

Generally speaking, an arbitrator will only "exceed his power" within the meaning of CPLR 7511(b)(1)(iii) upon three circumstances: first, when a decision clearly exceeds an enumerated limitation on the arbitrator's authority (*see e.g. Silverman v Benmor Coats, Inc.*, 61

NY2d 299, 307–08 [1984]); second, when the decision is so irrational that there was "no proof whatever to justify the award" (*Eastman Assoc., Inc. v Juan Ortoo Holdings, Ltd.*, 90 AD3d 1284, 1285 [3d Dept 2011]); *Transparent Value, L.L.C. v Johnson*, 93 AD3d 599, 601 [1st Dept 2012]); and third, in the rare case when the award, on its face, violates public policy *(Hirsch v Hirsch,* 4 AD3d 451, 453 [2d Dept 2004] (arbitration award that deprived party of constitutional right to seek redress or protection in civil or criminal matter is against public policy); *compare Matter of Hirsch Const. Corp. (Cooper)*, 181 AD2d 52, 56 [1st Dept 1992] (newly discovered evidence does not justify vacatur of award)).

Compulsory arbitration, including arbitration under the Education Law, implicates a broader, more exacting standard of review: the award must afford due process, have evidentiary support and cannot be arbitrary and capricious *(City School Dist. of City of N.Y. v McGraham*, 17 NY3d 917, 919 [2011]).

The Court notes that, as pointed out by Petitioner, the Award's brief substantive discussion makes general pronouncements of credibility with little discussion, and reaches conclusions without citation to the record. Further, though citation to the record need not be exhaustive, it should be present in order to facilitate judicial review-particularly where the Hearing Officer characterizes the evidence as "extensive" and "voluminous" (*Award* at p. 10; see *Simpson v Wolansky*, 38 NY2d 391, 396 [1975] ("it is important . . . that findings of fact be made in a manner such that the parties may be assured that the decision is based on evidence of record, uninfluenced by extralegal considerations, findings of fact in some form being essential so as to permit intelligent challenge by a party aggrieved and adequate judicial review following the determination")). The DOE's papers suffer the same malady, failing to illuminate the relevant

portions of the record underpinning the Award.

Nevertheless, an arbitrator's failure to explain their reasoning with specificity does not justify vacatur under CPLR 7511 (b) (1) (iii) because the clarity of an arbitrator's reasoning process is "simply not a matter of concern" (*Purpura v Bear Stearns Companies Inc.*, 238 AD2d 216, 216 [1st Dept 1997]; *Meisels v Uhr*, 79 NY2d 526, 536 [1992]; *accord Abreu v New York City Dept. of Educ.*, 43 Misc 3d 1215(A) [Sup Ct, NY County 2014] (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"); *Solow Bldg. Co., LLC v. Morgan Guar. Trust Co. of NY*, 6 A.D.3d 356, 356–57, 776 N.Y.S.2d 547 (1st Dept 2004)). Indeed, even awards based on insufficient evidence are not judicially reviewable (*Lopez v Coughlin*, 220 AD2d 349, 350 [1st Dept 1995]).

To the extent that Petitioner argues that the Award violates Education Law 3020-a [4] [a] by failing to "include the hearing officer's findings of fact on each charge [and his] conclusions with regard to each charge based on said findings," Petitioner's reliance upon *Bader v Bd. of Educ. of Lansingburgh Cent. School Dist.*, (216 AD2d 708, 709 [3d Dept 1995]), is misplaced because *Bader*'s facts are distinguishable.[1] The *Bader* arbitration award included *no* findings of fact, merely attaching a copy of the charges and noting that they were upheld. Further, the Court is aware of no First Department case law supporting vacatur in a situation matching the one here, where findings were made.

To the contrary, the First Department has reversed such a finding made by a trial court where the arbitration award comported with due process, was supported by adequate evidence in

[1] *Bader* was also an Article 78 proceeding, not an Article 75 proceeding. Though Article 78 standards have been imported into Article 75 actions to review compulsory arbitrations, it is unclear what standards the Third Department applied in *Bader*.

the record, was rational, and was not arbitrary and capricious (*see Gongora v New York City Dept. of Educ.*, 34 Misc 3d 161, 175 [Sup Ct, NY County 2010] (vacating award of termination based on, among other things, arbitrator's failure to articulate the applicable standards or findings pursuant to Education Law § 3020-a [4] [a] and arbitrator bias), *rev'd as modified*, 98 AD3d 888, 890 [1st Dept 2012] (holding that court review under CPLR 7511 is limited to "whether the award is supported by evidence or other basis in reason, as may be appropriate, and appearing in the record," and reinstating petitioner's termination), *citing Lackow*, 51 AD3d at 567). Here, contrary to Petitioner's mischaracterizations, the Hearing Officer examined each specification – some in more detail than others, but all were addressed – and made individual determinations based on the record. Indeed, the arbitrator dismissed three specifications based on the strength of Petitioner's arguments and an examination of the record (*Award* at pp. 6-7).

The Court also rejects Petitioner's argument that the Hearing Officer's deference to the DOE witnesses on matters of academic judgment (*Award* at p. 6) improperly shifted the preponderance burden to Petitioner rather than the DOE. Placed in their proper context, the Hearing Officer's comments merely reflected his credibility determinations; that is, after finding the testimony and reports of DOE witnesses credible, and finding Petitioner (and Principal Daley) not credible, he ruled in favor of the DOE on matters of academic judgment unless there was evidence to the contrary. The Hearing Officer's judgment, in other words, flowed from his opportunity to see and hear the witnesses and examine the evidence, which the Court is not empowered to review.

Accordingly, the Court rejects Petitioner's argument that the arbitrator exceeded his power.

Appropriateness of Penalty

A penalty determined by an arbitrator should be affirmed unless it is "shocking to [one's] sense of fairness" (*Principe v New York City Dept. of Educ.*, 94 AD3d 431, 433 [1st Dept 2012], *affd*, 20 NY3d 963 [2012]). The standard for evaluating the appropriateness of a penalty encompasses many factors:

> "[A] result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude 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 (*Pell v Bd. of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974] [emphasis added]).

In determining the penalty of termination, an arbitrator must consider all of the circumstances and relevant evidence, taking care to place them in context (*id.*). Lesser sanctions should be considered if they might deter a petitioner from engaging in similar future conduct (*id.*).

Termination resulting from an individual's sustained ineffective teaching, however, does not implicate deterrence (*Brito v Walcott*, 115 AD3d 544, 547 [1st Dept 2014]); to that end, dismissal based on "inefficiency, lack of interest, and lack of cooperation" is not shocking to one's sense of fairness (*Root v Bd. of Ed. of Fulton Consol. School Dist.*, 59 AD2d 328, 332 [4th Dept 1977]). In mitigation, a hearing officer may also consider the adequacy of measures taken (if any) to correct behavior: for example, remediation, peer intervention, or an employee

assistance plan (*Roberts v Dept. of Educ. of City of N.Y.*, 45 Misc 3d 1206(A) [Sup Ct 2014], *citing* Education Law § 3020–a[4]). Extensive records catalog DOE's unsuccessful attempts at remediation through group and individual training and support, thus supporting the Hearing Officer's findings that future efforts would continue to be unsuccessful (*see e.g. NYSCEF 9* at pp. 23-29; *NYSCEF 10* at pp. 1-5; 49-82; *NYSCEF 11* at pp. 1-4; 13, *et seq.*).

No matter the considerations employed, even an extended, exemplary career alone does not, contrary to Petitioner's argument, preclude termination (*see Patterson v City of N.Y.*, 96 AD3d 565, 566 [1st Dept 2012] (upholding a penalty of termination for a petitioner with 10 years of no disciplinary history)). Moreover, though the Hearing Officer's failed to address the impact of specifications 2 through 6, they amount to findings that Petitioner failed to maintain order, unjustifiably called the police in response to student misbehavior, failed to report to class, stated that her treatment was "like professional bullying," and failed to improve her teaching. Those offenses, taken together, would also justify termination *(Ajeleye v New York City Dept. of Educ.*, 112 AD3d 425, 425 [1st Dept 2013] (adequate evidence in the record that petitioner was guilty of insubordination, neglect of duty, conduct unbecoming his position, and using language that constituted verbal abuse of his students as prohibited by the regulations of the DOE)).

To the extent that Petitioner relies upon *Broad v New York City Bd./Dept. of Educ.*, (50 Misc 3d 384, 398 [Sup Ct, NY County 2015]), to argue that termination was an excessive penalty, that case is distinguishable. *Broad*'s holding that the incompetence of that petitioner did not harm her students was specific to that case, and related only to whether certain specifications were upheld, not whether termination was appropriate based on those specifications. To the extent that the Hearing Officer relied upon the *Arrak* pedagogical standards in making his final

determination, Petitioner does not cite any basis for concluding that this was inappropriate, nor is the Court empowered to substitute its judgment (*Matter of Manhattan Triad Assoc. LLC v N.Y. State Div. of Hous. & Cmty. Renewal*, 20 Misc 3d 1124[A], 1124A, 2008 NY Slip Op 51605[U], *6 [Sup Ct, NY County 2008], *citing Peconic Bay Broadcasting Corp. v Board of App.*, 99 AD2d 773, 774, 472 NYS2d 21 [2d Dept 1984]).

Accordingly, the Court finds that termination was not an excessive penalty.

DOE's Cross-Motion to Dismiss

As an initial matter, the DOE's cross-motion to dismiss the Petition is arguably moot because the denial of an application to vacate or modify the award requires automatic confirmation of the award (*see e.g. Blumenkopf v Proskauer Rose LLP*, 95 AD3d 647, 943 NYS2d 885 [1st Dept 2012]).

Nevertheless, in determining whether a pleading should be dismissed pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). On a motion made pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund*, 104 AD3d at 403 *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

Accordingly, when documentary evidence is submitted by the parties, the criterion becomes "whether the proponent of the pleading *has* a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *see Abreu*, 43 Misc 3d 1215(A) [granting DOE's cross-motion brought pursuant to CPLR 3211 to dismiss an Article 75 petition seeking to vacate an arbitration award terminating petitioner]). Given the record discussed at length above, sufficient documentary evidence exists to support the Hearing Officer's findings and conclude that Petitioner has no cause of action.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the application of Petitioner Pearletta Williams for an Order pursuant to CPLR 7511 vacating the March 15, 2016 Decision and Award (the "Award") of Hearing Officer Barry Goldman is denied in all respects; and it is further

ORDERED that the application of Respondent New York City Department of Education for an Order to confirm the Award pursuant to CPLR 7511 and/or to dismiss the Petition pursuant to CPLR 3211(a)(7) is granted to the extent that the award is confirmed; and it is further

ORDERED that this Petition is hereby dismissed with prejudice; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that counsel for Respondent shall serve a copy of this Order with notice of entry upon all parties within 20 days.

This constitutes the decision and order of this court.

Dated: August 29, 2016

Hon. Carol R. Edmead, J.S.C.

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HON. CAROL R. EDMEAD J.S.C.