Matter of Belfonte v City of New York
2017 NY Slip Op 32723(U)
December 20, 2017
Supreme Court, New York County
Docket Number: 651409/2017
Judge: William Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY, J.S.C. PART 5

In the Matter of the Application of
PATSY BELFONTE,
Petitioner,
For a Judgment and Order Pursuant to Article 75 of the Civil Practice Law and Rules

-against-

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, AND CARMEN FARINA as CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION,
Respondents.

INDEX NO. 651409/2017

MOTION DATE October 17, 2017

MOT. SEQ. NO. 001

The following papers were read on this motion to/for Article 75

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits A-F	ECFS DOC No(s). 1-36
Notice of Cross-Motion/Answering Affidavits/Memo of Law — Exhibits 1-4	ECFS DOC No(s). 1-17
Replying Affidavits	ECFS DOC No(s). 1-17; 1-9

Petitioner brings this Article 75 proceeding seeking an order to vacate and modify a hearing officer's opinion and award dated March 13, 2017, finding just cause for petitioner's termination from employment. Respondents' oppose and by notice of cross-motion dated June 9, 2017, move pursuant to New York Education Law §3020-a (5) and CPLR §§7511 and 3211(a)(7), for an order dismissing the petition on the grounds that it fails to state a cause of action.

FACTUAL BACKGROUND and **CONTENTIONS**

Petitioner, a tenured teacher formerly employed by respondent Board of Education of the City School District of the City of New York ("BOE") (also known as and sued herein as the New York City Department of Education) and formerly assigned to P.S. 226 located in the Bronx, commenced this proceeding, seeking an order vacating Hearing Officer James A. Brown's ("HO Brown") opinion and award. After a hearing on charges preferred against petitioner, HO Brown, a designated impartial hearing officer under Education Law §3020-1 and §3020-c, found that there was just cause to terminate petitioner's employment. Based on the evidence presented at the hearing, HO Brown determined that petitioner's job performance during the 2013-2014, 2014-2015 and 2015-2016 school years was incompetent and that petitioner had engaged in neglect of duty, rendering petitioner unfit to properly perform obligations to the service and had a pattern of ineffective teaching or performance under Education Law §3012(c).

In commencing this proceeding, petitioner does not challenge HO Brown's findings with respect to charges of incompetence preferred; rather, he contends that the penalty of termination should be overturned claiming that the penalty shocks the conscience in light of petitioner's unblemished record prior to the 2013-2014 school year and the absence of any misconduct charges. Petitioner claims that he had an unblemished record for nineteen years as a technology teacher and that when he was asked to incorporate social studies into his job description respondents did not provide petitioner with any training or assistance to teach social studies. As such, petitioner argues that the penalty of termination, "shocks the

conscience" and that the BOE should have imposed a lesser penalty for the poor performance evaluations.

Petitioner contends that due to the fact that the BOE failed to provide any meaningful training or remedial assistance, tailored to help petitioner integrate social studies into his technology curriculum, he was, in essence, set up to fail and was thus rated ineffective for two consecutive school years, 2014-2015 and 2015-2016. Likewise, petitioner posits that the sudden obligation to incorporate an unfamiliar subject area into his technology curriculum, without ever receiving any training or remedial resources to assist him, qualifies as an "extraordinary circumstance", such that petitioner's termination shocks one's sense of fairness. (Petitioner's Memorandum of Law, p. 11).

Respondents maintain that petitioner erroneously relies on the "shock the conscience" standard for review of the termination decision. Additionally, respondents contend that petitioner has failed to establish that the decision to terminate his employment, after three consecutive years of substandard job performance, does not "shock one's sense of fairness" given the documented efforts made to assist petitioner improve his pedagogy. Respondents rely on the July 2015 amendments to the Education Law §3012-c(5-a) (j), which reversed the customary burden of proof for demonstrating teacher incompetence. A teacher who now receives an ineffective end-of-year rating in two consecutive years, may be charged under Education Law §§3012-c and 3020-b, wherein the BOE must establish a prima facie case of incompetence and the burden then shifts to petitioner to rebut the presumption of incompetence.

Respondents argue that petitioner relies on distinguishable and/or outdated caselaw, which does not involve teachers who were charged on the basis of incompetence, as was petitioner herein. Moreover, respondents note that there is no legal authority cited by petitioner to support the proposition that termination is improper where a hearing officer finds a teacher guilty of incompetence pursuant to charges under Education Law §§3012-c and 3020-b. Respondents contend that HO Brown's decision, finding just cause to terminate petitioner, was amply supported by the record evidence which demonstrates that petitioner, a tenured teacher, was professionally incompetent for a sustained period and the finding that there were "no 'extraordinary circumstances within the meaning of Section 3012-c(5-j)", is likewise, fully supported by the record. (Petition, Ex. A, at 1453).

HO Brown found that petitioner did not successfully rebut the presumption of his incompetence because he offered insufficient evidence and posited contradictory defenses. (Robins Aff., Ex. 1, at 23). Additionally, HO Brown relied upon evidence that established petitioner's poorly executed lessons and his inability to create an environment of respect and rapport utilizing questioning and discussion techniques to engage students in learning. (Robins Aff., Ex. 1, at 24-27). Finally, respondents seek to dismiss the petition as against the City on the grounds that the BOE, not the City, was petitioner's employer and as the City is a separate legal entity which is not a proper party to this proceeding. For the reasons that follow, the Petition to set aside the HO's determination must be denied and the City's cross motion to dismiss is granted.

STANDARD OF REVIEW and ANALYSIS

In the context of a disciplinary hearing charging a teacher with incompetence, "a pattern of ineffective teaching or performance as defined in Education Law § 3012-c" i.e., two consecutive ineffective ratings, "shall constitute very significant evidence of incompetence (Education Law § 3020-a [3] [c] [i-a] [former (B)]". *Mazzella v Bedford Cent. Sch. Dist.*, 49 Misc. 3d 675 (Sup. Ct. Westchester Co. 2015). "Education Law § 3020-a (5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR 7511." *Lackow v. Dep't of Educ.*, 51 AD3d 563, 567 (1st Dept. 2008); *Brito v. Walcott*, 115 AD3d 544 (1st Dep't 2014).

Judicial review for compulsory arbitration "requires that the award be in accord with due process and supported by adequate evidence in the record" (internal citation omitted); *Brito*, 115 AD3d at 545. Further, a "hearing officer's determination of credibility . . . are largely unreviewable." *Lackow*, 51 AD3d at 568; *Berenhaus v. Ward*, 70 NY2d 436, 443, (1987). "It is basic that the decision by an Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts". A hearing officer enjoys wide latitude to "observe the witnesses and . . . perceive . . . all the nuances of speech and manner that combine to form an impression of either candor or deception." *Lackow*, 51 AD3d at 568; *Douglas v. N.Y.C. Bd. /Dep't of Educ.*, 83 AD3d 856, 857 (1st Dept. 2011).

Contrary to petitioner's contentions, HO Brown's decision finding just cause to terminate, rendered at the conclusion of an eight-day hearing wherein the HO heard and considered testimony from five witnesses and petitioner, is amply supported by the record. As noted by respondents, under the new statutory scheme, in cases involving allegations of teacher incompetence, the BOE must establish a prima facie case of incompetence and the burden then shifts to petitioner to rebut the presumption of incompetence. N.Y. Educ. Law §3012-c(5-a) (j). Under Education Law §§3012-c and 3020-b, when a teacher receives an ineffective end-of-year rating in two consecutive years, that teacher may be subject to charges under the Education Law.

In order to establish a prima facie case of incompetence, a school district must demonstrate that (1) a teacher received two consecutive ineffective ratings; (2) the evaluation of an independent peer validator similarly resulted in an ineffective rating; and that (3) the school district developed and substantially implemented a teacher improvement plan for that teacher after the first-year ineffective rating. N.Y. Educ. Law §3012-c(5-a) (j). If the teacher is unable to successfully rebut the presumption of incompetence, absent extraordinary circumstances, there shall be just cause for removal. Id.

Petitioner argues that unlike cases where teachers accused of incompetence were unwilling or incapable of implementing steps or recommendations to improve their teaching performance, here, petitioner actively engaged in the prescribed remedial recommendations offered by the administration. Petitioner claims, however, that the remedial action plan offered was insufficient to improve the development of pedagogical performance in the area of social studies as the resources provided were not similarly tasked with incorporating social studies into a technology curriculum. (Amended Petition, ¶22). Moreover, petitioner claims that he did not ignore the BOE's efforts to remedy the pedagogical deficiencies, but rather the resources offered "missed the mark" by failing to incorporate social studies into his "tried-and-true" technology curriculum. Petitioner has failed to rebut the presumption of incompetence.

HO Brown found that the BOE established a prima facie case that petitioner's performance was incompetent by showing the petitioner received ineffective year end ratings in consecutive school years, received an ineffective rating from an independent evaluator and the administration "developed" and "substantially implemented" a teacher improvement plan. (Robins Aff., Ex. 1, at 21). HO Brown undertook an exhaustive review of the witnesses' testimony and the evidence presented and found that petitioner failed to rebut the presumption of his incompetence, noting that he offered "very little evidence" of his competence and that his defenses were contradictory. (Robins Aff., Ex. 1, at 23).

Petitioner claimed that he had difficulty aligning his technology class to the social studies curriculum, but petitioner is licensed to teach social studies. Petitioner claimed the Peer Validators should not have observed him while teaching self-contained special education classes, but did not offer evidence that a special education teacher would have been mandated. (Robins Aff., Ex. 1, at 23). Additionally, petitioner does not argue that there were any procedural irregularities, but claims that Danielson is inapplicable to him as a cluster teacher in technology. HO Brown rejected that claim, finding no exemption of cluster teachers from Danielson. (Robins Aff., Ex. 1, at 24-25). Accordingly, based on petitioner's failure to successfully rebut the presumption of incompetence, HO Brown found no "extraordinary cir-

cumstances", and thus, properly concluded that just cause existed for petitioner's termination of employment.

The penalty of termination in cases brought pursuant to Education Law §§3012-c and 3020-b are consistently upheld where the record supports a finding that a tenured teacher was professionally incompetent for a sustained period. See, e.g., *Russo v. New York City Dep't of Educ.*, 25 N.Y.3d 946, 948 (2015) (reversing First Department remand to Hearing Officer for re-determination of less severe penalty and, instead, upholding termination where teacher was found guilty of incompetence and failure to manage his special education class for three school years); *Davies v. New York City Dep't of Educ.*, 117 A.D.3d 446, 447 (1st Dep't 2014) (upholding termination for "neglect of duty, failure to follow procedures and carry out duties, and incompetent and inefficient service during two school years," in addition to "unwillingness to . . . implement any of the school administration's suggestions for improvement"); *Benjamin v. New York City Bd./Dep't of Educ.*, 105 A.D.3d at 678 (1st Dep't 2013) (termination appropriate where petitioner was "incompetent and inefficient" for three school years, and "refused to accept any responsibility for her failure to provide a valid educational experience and deliver consistently effective instruction"); *Wai Mui v. New York City Bd./Dep't of Educ.*, 34 Misc. 3d 1215[A] (Sup. Ct. N.Y. Co. 2011) (upholding termination where for two years, the teacher failed to "effectively manage her classroom," and "properly and/or adequately plan and execute lessons as documented in [10] observation reports).

HO Brown's finding that there were no "extraordinary circumstances" within the meaning of Education Law §3012-c(5-a) (j), is fully supported by the record evidence and witness testimony. HO Brown's decision demonstrated that he carefully weighed the evidence presented by both sides before rendering his decision finding just cause to terminate petitioner. Indeed, petitioner has only alleged that the decision shocks the conscience and he has not challenged any of the factual findings made by HO Brown. Petitioner has simply failed to demonstrate that being asked to introduce social studies into his technology curriculum is an "extraordinary circumstance", to justify vacatur of the HO officer's arbitral decision.

Notably, failure to incorporate social studies into the technology curriculum was not the sole issue in petitioner's performance evaluations. HO Brown credited evidence that established poorly executed lessons, and also credited Assistant Principal Manzella's testimony that petitioner failed to implement the recommendations he received, failed to complete templates for goal meetings as asked and failed to produce "action plans" as asked. (Robins Aff., Ex. 1, at 27-28). The evidence amply established that petitioner failed to implement the recommendations and did not improve his pedagogy.

Accordingly, HO Brown's conclusion that just cause existed for petitioner's termination, does not shock the conscience, nor is it "so disproportionate to the offenses as to be shocking to one's sense of fairness.". *Mazzella v. Bedford Cent. Sch. Dist.*, 49 Misc. 3d 675, 683 (Sup. Ct. Westchester Co. 2015). See also, *Brown v. City of New York*, 2017 N.Y. Misc. LEXIS 184, 2017 NY Slip Op 50068[U] (Sup Ct. NY County 2017) (finding the penalty of termination appropriate and not shocking to the conscience where petitioner had been employed by the BOE for over 25 years); *Douglas v New York City Dept. of Educ.*, 52 Misc. 3d 816 (Sup Ct. NY County 2016) (finding the penalty of termination appropriate where petitioner had been employed by the BOE for 14 years, noting that "even an unblemished record does not rule out termination" and "less severe behavior can also justify termination of a long-standing employee if the behavior is part of a pattern.").

Based on a review of the record and upon the circumstances presented herein, the Petition to set aside the HO's determination must be denied. Respondents' cross-motion pursuant to New York Education Law §3020-a (5) and CPLR §§7511 and 3211(a)(7), for an order dismissing the petition on the grounds that it fails to state a cause of action is granted.

CONCLUSION

Accordingly, it is hereby,

ORDERED that Petitioner's Motion Sequence No. 001, pursuant to Education Law Section 3020-a (5) and CPLR §7511, seeking to vacate and modify the decision of the Hearing Officer, is denied; and it is further

ORDERED that Respondents' Cross-Motion Sequence No. 001, to dismiss the petition pursuant to CPLR §7511 and CPLR §3211 (a)(7) and Education Law §3020-a (5) is granted in its entirety and the Clerk is directed to enter judgment, without costs and disbursements, accordingly.

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: December 20, 2017
New York, New York

HON.W. FRANC PERRY, J.S.C.

1. Check one: ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☑ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**