Matter of Leichtman v Farina
2018 NY Slip Op 30950(U)
May 10, 2018
Supreme Court, New York County
Docket Number: 655555/2017
Judge: Verna Saunders

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.VERNA L. SAUNDERS, J.S.C. PART 5

In the Matter of the Application of
BRETT LEICHTMAN,
Petitioner,

For a Judgment Pursuant to Article 75 of the CPLR

- against -

CARMEN FARINA, Chancellor, New York City Department of Education, and the NEW YORK CITY DEPARTMENT OF EDUCATION,
Respondents.

INDEX NO. 655555/2017

MOT. DATE 3/6/18

MOT. SEQ. NO. 001

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

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	ECFS DOC No(s). 2-19
Notice of Cross-Motion/Answering Affidavits — Exhibits	ECFS DOC No(s). 20-22
Replying Affidavits	ECFS DOC No(s). 23 &24

Petitioner, a former tenured public school teacher, seeks an order, pursuant to CPLR §7511, reviewing, annulling, and rescinding the August 14, 2017 decision and award of Hearing Officer Philip L. Maier where just cause was found for petitioner's termination. In addition, petitioner seeks a temporary restraining order, pursuant to CPLR §6313, compelling respondents to reinstate his teaching position and to remove any "problem code" from petitioner's personnel records which would indicate termination.

In support of the petition, petitioner asserts that he was a tenured teacher with over twenty years of experience, nineteen of which were with the New York City Department of Education. Petitioner denies any prior disciplinary history and claims a satisfactory teaching rating. Upon review of the hearing record, in September 2016, petitioner engaged in a series of inappropriate comments and gestures towards, then thirteen-year old, Student A and other students of his class. The conduct, in sum and substance, included telling Student A he loved her and would marry her; placing his hand on Student A's shoulder and telling her that he was too old for her, but would wait for her; asking Student B if she wanted to join in his marriage to Student A; hugging Student A; poking, punching, hitting, and/or touching Student A's hair bun; and forming rubber bands into the shape of a penis and showing it to students in the classroom. Student A reported these specific incidents, along with others, via a written letter, to her former sixth grade teacher, Denise Filadelfo. Filadelfo informed the Assistant Principal Palo Dedvukaj, who reported it to school principal Bonnie Butcher. Principal Butcher, advised Dedvukaj to contact the "SCI" (Special Commissioner of Investigation). After such report, a complaint was created

and the Office of Equal Opportunity ("OEO") commenced an investigation. The investigator, Dana Stein, interviewed the petitioner, as well as, nine students, including Student A. After the investigation, Stein issued a report concluding that petitioner engaged in sexual harassment in violation of Chancellor's Regulation A-830.[1]

At the 3020-a hearing, Hearing Officer Maier considered the following evidence: Student A's letter to Filadelfo; the OEO report which included the statements of all the students and individuals interviewed; and the testimony of Student A, Student A's father, Student G, Principal Butcher, and petitioner. At the hearing, petitioner denied saying he loved Student A or making any reference to marriage. Petitioner did admit that he said he was too old for Student A, but claimed he meant it as a joke after being asked his age. He also admitted to touching Student A's hair bun, but asserted that when she asked him to stop, he did. Petitioner denied ever punching, poking or hugging Student A. Regarding the rubber bands fashioned into the shape of a penis, petitioner testified that he used it as an opportunity to discuss perception, but admitted that he continued to show the rubber band shape to students even after realizing that some students thought that the rubber bands depicted a penis.

After a review of the evidence and testimony presented over the four-day hearing, Hearing Officer Maier credited the statements and testimony of the students over that of petitioner. Hearing Officer Maier determined that the students, who admitting to liking the petitioner, had no reason to be untruthful and made materially consistent statements. He also found that the OEO report was corroborated by other evidence and that overall, the Department's evidence was more credible than petitioner's denials. The hearing court sustained all of the charges against petitioner and issued a penalty of termination finding, *inter alia*, that his conduct was "grossly inappropriate."

Now, petitioner seeks to vacate the Hearing Officer's decision on the basis that it was "arbitrary, capricious, and shocks the conscience" and an abuse of discretion as the penalty imposed was disproportionate to the conduct which occurred. Petitioner contends that while his actions were "disturbing," the conduct was not egregious so as to warrant termination. Finally, petitioner submits that this court should issue a preliminary injunction arguing that he has set forth sufficient facts to be successful on the merits and that he will suffer harm each day he is not in the classroom.

Respondents oppose the motion and cross-move for dismissal on the ground that the petition fails to state a cause of action arguing that the hearing officer's determination was supported by sufficient evidence and petitioner has failed to show that the decision was irrational or biased. Respondents further assert that petitioner has failed to establish the prerequisites for an injunction, to wit: irreparable harm, likelihood of success on the merits, and/or that the balance of equities tip in his favor.

[1] The petitioner was charged with five specifications based on the incidents alleged and investigated. At a subsequent probable cause hearing, no probable cause was found for the specification of sexual misconduct.

Petitioner opposes the cross-motion arguing that the arbitrator showed bias by favoring the arbitration decisions provided by respondents rather than the more "on point" decisions cited by petitioner.

Education Law § 3020 (1) provides that no tenured employee may be removed during a term of employment except for just cause and in accordance with Education Law § 3020-a. Education Law § 3020-a (5) provides that review of a hearing officer's decision and award is limited to the grounds set forth in CPLR § 7511 which permit vacatur only if: (1) the rights of a party were prejudiced by corruption, fraud or misconduct in procuring the award, or by the partiality of the arbitrator; (2) the arbitrator exceeded his or her power or failed to make a final and definite award; or (3) the arbitration suffered from an unwaived procedural defect.

Further, it is well-settled that an arbitration award made after all parties have participated "will not be overturned merely because the arbitrator committed an error of fact or of law." (*Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.,* 89 NY2d 214 [1996]). To be upheld, the award must have evidentiary support or other basis in reason, appear in the record, and not be arbitrary or capricious (*id.*; *Mount St. Mary's Hosp. v Catherwood,* 26 NY2d 493 [1970]). The standard of review of a penalty imposed after a hearing is whether the punishment is so disproportionate to the offenses as to be shocking to the court's sense of fairness (*Lackow v Dept. of Educ. (or "Bd.") of the City of NY*, 51 AD3d 563 [1st Dept 2008] citing, *Pell v Bd. of Educ.*, 34 NY2d 222 [1974]).

Here, the petitioner asserts that the penalty imposed is arbitrary and capricious because it is so disproportionate to the conduct that it shocks the conscience. While petitioner argues that the penalty is unfair, "unfair consequences is not the standard of review." (See *Matter of White-Grier v NY City Bd./Dept. of Educ.,* 2012 NY Slip Op 32466[U] [Sup Ct, NY County 2012). Petitioner has failed to establish pursuant to CPLR§7511 that there was corruption, fraud or misconduct; that the hearing officer was biased and thus prejudiced his rights; or that he exceeded his powers. Here, a final and definite award was made and this court finds that the award was not arbitrary and capricious under the standards set in CPLR§7803(3).

On the contrary, the award was based on substantial evidentiary support and a rational basis. A reviewing court may not substitute judgment for the trier of fact as its role is limited to determining whether there is a reasonable basis to support the award issued by the hearing officer. (*Matter of White-Grier,* supra). Specifically, the hearing officer credited Student A's letter, statements to the investigator, and her testimony at the hearing, finding it reliably credible and consistent. Furthermore, the hearing officer credited the testimony of Student A's father and the other students who testified and/or made statements as credible and consistent with that of Student A, but found the petitioner's denials incredible. Specifically, Hearing Officer Maier did not credit petitioner's explanation about the rubber bands

fashioned as a penis as there was "no corroboration for his statement regarding perception or that it was an attempt to use the rubber bands, which he moved from desk to desk in the same shape, as a teaching moment." Hearing Officer Maier found the rubber band fashioned as a penis to be the "most significant breach of propriety" and opined that "there is no excuse for such conduct." Furthermore, "it is without dispute of a sexual nature … completely unrelated to any legitimate pedagogical classroom instruction taking place in class [and] totally inappropriate." While petitioner now concedes that his behavior may have been "disturbing," during his testimony he maintained that he often used humor in class and believed his jokes to be harmless. On this point, the hearing officer stated that the specifications "show a teacher who likes to use humor in class, but acted more like a fellow student than a teaching professional…[that] Leichtman was inappropriately crossing boundaries with 13 year-old students … mentioning marriage and telling a student he loves her." There is no basis to conclude that the petitioner's comments, urged to be harmless and/or teaching tools, were of any assistance, pedagogical or otherwise, to any student in the class. Hearing Officer Maier determined that the level of behavior of petitioner fell well short of parents' reasonable expectations and in fact, had a negative effect on Student A.

Based on the foregoing, this court finds that Hearing Officer Maier's findings and determination that termination was warranted was deliberative, comprehensive, well-reasoned, supported by the record, and not shocking to the court's conscience. Accordingly, the petition is denied, the cross-motion to dismiss is granted and the proceeding is hereby dismissed.

This constitutes the decision and order of the Court and any relief not expressly addressed in this order has nonetheless been considered and is hereby denied.

Dated: May 10, 2018

HON. VERNA L. SAUNDERS, 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**