Matter of Basile v New York City Dept. of Educ.
2018 NY Slip Op 31350(U)
May 18, 2018
Supreme Court, Richmond County
Docket Number: 85189/2017
Judge: Kim Dollard

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

In the Matter of the Application of
KELLEY BASILE,

Petitioner,

-against-

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent,

ORDER

Hon. Kim Dollard

Index No. 85189/2017

motion 001
002

The following papers numbered 1, 2, 3 and 4 were fully submitted on this 2nd day of March, 2018:

Notice of Petition and Petition on behalf of Kelly Basile.....1
(Dated September 18, 2017)

Notice of Cross-Motion on behalf of Respondent pursuant to N.Y. Education Law §3020-a(5) and CPLR §3511 to dismiss the petition and to enter judgment for respondent, Attorney's Affirmation with Exhibits and Memorandum of Law.....2
(Dated January 3, 2018)

Combined Affidavit and Memorandum of Law on behalf of Petitioner in Opposition.....3
(Dated January 12, 2018)

Reply Memorandum of Law by Respondent.....4
(Dated January 18, 2018)

The petitioner, Kelley Basile, is a tenured teacher assigned to P.S. 9 in Queens District 75, during the 2015-2016 school year. On June 13, 2016, it is alleged that petitioner, Basile, grabbed a student by the arm, swung the student around by the arm and/or hand and slapped the student in the face. Based on the foregoing, the petitioner was charged with engaging in corporal punishment, misconduct, neglect of duty and in conduct unbecoming to her position.

At a hearing held pursuant to Education Law §3020-a, two para professionals (Ms. Alicia Brown and Mr. Dillon Smith) and the assistant principal (Ms. Donna Addison) testified. Additionally, statements from several students taken shortly after the incident, including a statement from the student allegedly slapped, were admitted into evidence. This evidence revealed that Ms.

Basile sat a student by a computer and instructed him not to turn the computer on, which instruction he disregarded. A second student approached the computer and turned it off. Ms. Basile then became upset and grabbed the second student by the arm and slapped him across the face. The student began to cry and later told his counselor when she came to pick him up for therapy. Several students in the class provided statements regarding the incident to the counselor.

Ms. Basile testified that she sat a student at a computer and told him not to turn it on, but he started playing with the mouse. Thereafter, a second student went over to him and began yelling and attempted to strike him. She grabbed the second student's arm to avoid a fight and told him to keep his hands to himself. She did not hear about any complaint until the second student went to see his therapist.

Mr. Dillon Smith, a para professional present in the classroom, testified that he was sitting with his student when he saw the two emotionally disturbed children by the computer. He observed Ms. Basile walk over to the computer and pull the child off the computer and "smack" the child on the cheek. The child was very upset and asked several times "why did you hit me?". After lunch, he filed a report in the main office.

Ms. Alicia Brown, a para professional working with a female student in the classroom, testified that she heard Ms. Basile tell a student not to turn on the computer. When he turned it on, a second student got up and turned it off. She then observed Ms. Basile go the computer and grab the second student by the arm, pull him and smack him in the face with an open hand. She slapped him so hard that spit flew out. The student grabbed his face and started to cry. He asked "Why would you hit me like that. My mother doesn't even do that!". Ms. Brown stated that when the counselor returned the child to the class, she asked if Ms. Basile had hit him, and Ms. Brown said she did not know because she felt uncomfortable with Ms. Basile standing right there. However, Ms. Brown wrote a statement before the end of the day for the assistant principal describing the incident.

The assistant principal, Ms. Donna Addison, testified concerning required procedures in cases of corporal punishment. On the day of the incident, the staff alerted her by phone of the incident because she was not physically at the school. In accordance with regulations before she was

called, the para professionals provided statements and the students wrote statements with their counselors.

While Ms. Basile testified that Ms. Brown had a vendetta against her because Ms. Basile had reported that Ms. Brown was on her cell phone and posted pictures of the children on Instagram, the assistant principal testified that Ms. Basile never made any such complaints to her. Ms. Basile accused the assistant principal of providing false and malicious testimony and of witness tampering.

The hearing officer, Judith T. Pierce, Esq., found that Ms. Basile was not a credible witness and that she fabricated a conspiracy theory involving the para professionals and assistant principal that was unsubstantiated by her evidence. The standard of review was that of a preponderance of the evidence. Applying this standard, Ms. Pierce found that Ms. Basile lost her temper and slapped the student out of anger and then lied about it. Based on the credible evidence of the adult witnesses and the statements of the children, Ms. Pierce found that Ms. Basile was guilty of the charges of misconduct; conduct unbecoming her position; neglect of duty; and a violation of Chancellor's regulation A 420 which prohibits corporal punishment. While the Department of Education sought to terminate Ms. Basile, Judicial Hearing Officer Pierce suspended Ms. Basile without pay for six months and directed that she undergo appropriate classroom management training. Ms. Pierce indicated that termination was not warranted at this time based upon Ms. Basile's good teaching record and since it was her first violation of the corporal punishment regulation.

Petitioner, Basile, filed a petition to vacate the arbitration award and the respondent cross-moved to dismiss the petition and for costs. For the reasons set forth herein, the petition is denied and the respondent's cross-motion is granted to the extent that the petition is dismissed.

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. Pursuant to CPLR §7511, an award may be vacated 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 (see, Hackett v. Milbank, Tweed, Hadley & McCloy, 86 N.Y.2d 146, 154–55, 630

N.Y.S.2d 274, 654 N.E.2d 95 [1995]).

As in the present case, where the parties are subject to compulsory arbitration, judicial scrutiny is stricter than that for a determination rendered where the parties have submitted to voluntary arbitration (see, Asch v. N.Y.C. Board/Department of Educ., 104 A.D.3d 415, 960 N.Y.S.2d 106 [1st Dept.2013]. The determination must be in accord with due process and must be supported by adequate evidence, and further must be rational and satisfy the arbitrary and capricious standards of CPLR article 78 (see, Lackow, 51 A.D.3d at 567, 859 N.Y.S.2d 52).

A § 3020–a decision is supported by adequate evidence when there is a rational basis in the record for the findings of fact supporting the hearing officer's decision (see, Carroll v. Pirkle, 296 A.D.2d 755, 756, 745 N.Y.S.2d 271 [3d Dept.2002].

With regard to fact and credibility findings, courts cannot substitute their judgment for that of a hearing officer who had the opportunity to hear and see witnesses (*see* City School Dist. of the City of N.Y. v. McGraham, 75 A.D.3d 445, 450, 905 N.Y.S.2d 86 [1st Dept.2010], *affd.*, 17 N.Y.3d 917, 934 N.Y.S.2d 768, 958 N.E.2d 897 [2011]). The credibility determinations of a hearing officer are entitled to deference, even where a party seeking to vacate a § 3020–a decision claims that there is evidence which conflicts with the hearing officer's determination (see, Tasch v. Bd. of Education, 3 A.D.3d 502, 770 N.Y.S.2d 430 [2d Dept.2004]).

The party challenging an arbitration determination has the burden of showing its invalidity Caso v. Coffey, 41 N.Y.2d 153, 159, 391 N.Y.S.2d 88, 359 N.E.2d 683 [1976]).

Based on the submissions, Petitioner fails to establish a basis to vacate the Hearing Officer's Decision.

The petitioner claims that the arbitrator showed bias and prejudice in accepting the testimony of respondents' witnesses and in disregarding the petitioner's testimony. Petitioner further claims that her due process rights were violated by the arbitrator's refusal to permit her to call witnesses by Skype,; that the arbitrator applied an improper burden of proof; and that petitioner was not allowed to select the arbitrator. Petitioner also claims that the arbitrator failed to properly determine probable cause since an executive board session was never convened in which petitioner

was given notice. Lastly, petitioner argues that the punishment, namely a six month suspension without pay, shocks the conscience and is excessive.

As to petitioner's claim that the arbitrator misapplied certain principals of law, in reviewing the matter, there is no proof of any misapplication of the law. In support of the Department of Education's case, testimony of Alicia Brown, Dillon Smith and Donna Addison were presented, together with statements of students that eye witnessed the incident. While petitioner, Basile testified on her own behalf, the arbitrator found her testimony to be lacking in credibility. The arbitrator further determined that petitioner's conspiracy theory was unsubstantiated. Accordingly, based upon the foregoing, the award is clearly supported by the evidence and is neither arbitrary nor capricious. The arbitrator further determined that the appropriate standard was a "preponderance of the evidence" and that the burden was met by the Department of Education. The arbitrator also found that Ms. Basile was afforded ample opportunity to subpoena witnesses and declined.

Moreover, any misapplication of the law by the Hearing Officer, even under a heightened scrutiny of a compulsory arbitration proceeding, is not a sufficient basis for vacating the hearing officer's determination (see. Associated Teachers of Huntington, Inc. v. Board of Ed., Union Free School, Dist. No. 3, Town of Huntington, 33 N.Y.2d 229, 351 N.Y.S.2d 670, 1973.

Petitioner next claims that Department of Education failed to convene an executive board session and allow her to be present. However, this very argument was rejected by the Appellate Division which stated that there is no longer a requirement to have a majority vote of the Board of Education due to the subsequently enacted Education Law §2590 that vested authority in the Chancellor in place of the board to delegate authority to the superintendents and others deemed to be appropriate. In this case, the principals of District 75 were delegated the authority to initiate the charges. Further, the arbitrator was selected pursuant to a collective bargaining agreement, where hearing officers are assigned on a rotational basis from a panel of arbitrators, which panel is agreed upon by the DOE and the United Federation of Teachers.

With respect to petitioner's bias claim, in order to vacate an arbitration award based on bias, the petitioner must demonstrate such bias by clear and convincing evidence (see, Matter of Infosafe Systems, 228 A.D.2d 272, 1st Dept., 1996. The mere fact that an arbitrator renders adverse rulings does not alone support an unsubstantiated claim of bias. (see, Matter of Mays-Carr (State Farm Ins. Co.), 43 A.D.3d 1439, 4st Dept., 2007). The petitioner has failed to establish any evidence of bias by clear and convincing evidence.

Lastly, unless an irrationality appears or the punishment shocks one's conscience, sanctions imposed by an administrative agency should be upheld (see, Pell v. Board of Education of Union Free School District 1, 34 N.Y.2d 222, 1974). It is improper for courts to reweigh evidence and substitute its judgment for that of a hearing officer. That reasonable minds may disagree over what the proper penalty should have been does not provide a basis for vacating the abitral award in a disciplinary proceeding against a teacher or refashioning the penalty (Bolt v. NYC Dept. Of Education, 30 N.Y.3d 1965, 69 N.Y.S. 3d 255, 2018).

The penalty of a six month suspension without pay is not irrational or shocking to the conscience. Therefore, the penalty imposed by the hearing officer is upheld.

Accordingly, based upon the foregoing, it is,

ORDERED, that the petition to vacate the arbitrator's award is denied; and it is further,

ORDERED, that respondent's cross motion is granted to the extent that the petition is dismissed.

Dated: May 18, 2018

ENTER

Kim Dollard

Hon. Kim Dollard
Acting Justice Supreme Court