Robertson v City of New York
2018 NY Slip Op 33084(U)
November 27, 2018
Supreme Court, New York County
Docket Number: 652200/2018
Judge: Alexander M. Tisch
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52

----------X

LEONARD ROBERTSON,

Petitioner,

- against-

THE CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF EDUCATION; RICHARD A. CARRANZA, CHANCELLOR of NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents,

To Vacate a Decision of a Hearing Officer Pursuant to Education Law Section 3020-a and CPLR Section 7511

----------X

DECISION & ORDER

Index No.: 652200/2018

ALEXANDER M. TISCH, J.:

Petitioner Leonard Robertson commenced this article 75 proceeding for a judgment vacating an arbitration award made after a disciplinary hearing held pursuant to Education Law § 3020-a. The April 24, 2018 arbitration Opinion and Award (Award) found petitioner guilty of some of the disciplinary charges brought by his employer, respondent The New York City Department of Education (DOE), and the hearing officer directed petitioner to serve an unpaid suspension of 45 days from his position at the DOE. Petitioner is seeking to vacate the Award or have the matter remanded for a lesser penalty and/or remediation. Respondents the DOE, the City of New York and Richard A. Carranza, Chancellor of the DOE, cross-move to dismiss the petition, pursuant to CPLR 3211 (a)(7), § 404 (a), § 7511 and Education Law § 3020-a (5).

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioner is a tenured music teacher who has been employed by the DOE for approximately 15 years. Between 2005 and 2012, petitioner worked in four different schools, working as a dean in one school. In 2013, petitioner was excessed and placed in the Absent Teacher Reserve (ATR), where he is

still currently assigned. Petitioner states that, as part of the ATR, "he has been involuntarily rotated to dozens of schools," as a substitute or replacement teacher. Petition, ¶ 9.

In October 2017, pursuant to Education Law § 3020-a, the DOE served petitioner with "specifications," or charges, alleging that, between the 2015-2016 and 2016-2017 school years, petitioner, among other things, engaged in verbal abuse, inappropriate comments, inappropriate conduct and excessive absences. The DOE alleged that the charges constituted just cause for termination. Petitioner was charged with three specifications, which are set forth as follows:

> "SPECIFICATION 1: On or about April 4, 2016, [Petitioner], while assigned to James Madison High School, during instructional period, called student(s) names and/or made the following statements in sum and substance:
> a) Ass(es)
> b) Ugly ass
> c) Crazy ass
> d) Nasty ass mouth
> e) I'm crazy, go look in the mirror.
> f) [I'm ugly] go look in the mirror.
> g) Go talk to your mother like that [by cursing].
> h) Hey little black girl
>
> "SPECIFICATION 2: On or about April 4, 2016, [Petitioner], while assigned to James Madison High School, during instructional period:
> a) Yelled and/or told student(s) to leave his classroom.
> b) Failed to inform the Principal/designee that he removed student(s) from his class.
> c) Failed to complete and/or submit a student removal form.
>
> "SPECIFICATION 3: On or about and between October 2016 through May 2017, [Petitioner] was absent from work on approximately twelve (12) occasions on the following dates:
> 1) Thursday, October 13, 2016
> 2) Monday, October 17, 2016
> 3) Wednesday, October 19, 2016
> 4) Wednesday, October 26, 2016
> 5) Friday, October 28, 2016
> 6) Wednesday, November 2, 2016
> 7) Monday, November 14, 2016
> 8) Thursday, December 15, 2016
> 9) Tuesday, December 20, 2016
> 10) Wednesday, January 25, 2017

11) Friday, March 31, 2017
12) Monday, May 8, 2017.

"The foregoing constitutes:
- Just cause for discipline under Education Law §3020-a;
- Neglect of duty;
- Conduct unbecoming [Petitioner's] position or conduct prejudicial to the good order, efficiency, or discipline of the service;
- Verbal abuse;
- Inappropriate comments;
- Excessive absences;
-A violation of the by-laws, rules and regulations of the Chancellor, Department, School, or District;
-Substantial cause that renders [Petitioner] unfit to perform his obligations properly to the service; and
-Just cause for termination."

Petitioner's exhibit A, Award at 2-3.[1]

Pursuant to Education Law § 3020-a, a hearing began on January 25, 2018, to determine the outcome of the charges. Arbitration is compulsory in Education Law § 3020-a disputes according to petitioner's collective bargaining agreement, and the DOE's rules. Hearing Officer Michael S. Lazan, Esq. (Lazan) was appointed to preside over the proceedings. A hearing took place over six days, where both parties were entitled to examine and cross-examine witnesses and submit evidence. Petitioner was represented by counsel and testified on his own behalf. In the detailed and comprehensive 31-page Award, Lazan found that the DOE had proven specifications 1a, 1c, 1d, 1f, 1g and specification 2a. Violations were not established as to specifications 1b, 1e and specifications 2b and 2c.

The charges stem from an incident occurring on April 4, 2016. Lazan summarized the incident, while noting that the parties contest what transpired. Petitioner was assigned for the day to teach an orchestra class at a high school located in Brooklyn, New York. The students were primarily ninth graders and some of them were not behaving during petitioner's class. After petitioner asked them to be quiet and behave, some of the students started an "insult war" against petitioner, particularly Student R.M. Petitioner then responded to the students and told them to leave the room. After leaving the room,

[1] The DOE withdrew specification three prior to the start of the hearing.

the students met a security guard in the hallway and explained what happened in petitioner's classroom. Anna Kauser (Kauser), another teacher, was in the hallway and heard petitioner yelling at the students. The students advised the vice principal that petitioner had gotten into an argument with them and that he had cursed at them.

On that date, 11 students from the class wrote statements as to what transpired in petitioner's classroom. By way of example, Student R.M. and Student S.O.'s statements included the following:

> "[T]hey had an argument with a teacher, which involved them cursing back and forth at each other." Student R.M.'s written statement "accused [petitioner] of calling her a 'crazy ass' and telling the students to 'get out' of the room. . . . . when her friend called [petitioner] 'ugly,' petitioner returned the insult saying : 'How about you look at yourself in the mirror.' Student S.O. wrote that [petitioner] cursed at Student R.M., saying 'nasty ass mouth,' 'go talk to your mother like that,' and telling them to get out of the classroom without providing them with a place to go."

Id. at 6.

On April 5, 2016, Kauser wrote a statement that she "saw [petitioner] yelling at a group of students . . . telling them to keep on walking and get out of here with your nasty-ass attitudes." *Id.* at 7.

After providing the circumstances surrounding the charges, Lazan set forth the positions of the parties. In relevant part, petitioner denied the charges and believes that the students who testified against him are not credible as they made up stories to cover up their own misbehavior. Petitioner further argued that the students' statements and testimony are inconsistent. In addition, petitioner "pointed out the difficulties that ATR teachers face, such as burdensome travel, new protocols to learn, a lack of supervision, the difficulty of forming relationships with students, and the fact that students do not have respect for substitute teachers." *Id.* at 9. Petitioner indicated that he has never had any charges brought against him in the past, "that he was placed in the ATR through excessing," and that he has been employed for 15 years. *Id.* at 9.

The DOE maintained that petitioner has a "considerable amount of experience, including as a dean, and was aware of the rules on how to address disruptive students in the classroom." Instead of acting as a role model, he "engaged the students in a childish altercation." *Id.* at 9. The DOE noted that

petitioner had two previous letters in his file regarding the same conduct. It sought termination for the charges, arguing that petitioner "does not care to be responsible because he is in the ATR, cannot be remedied . . . ." *Id.* at 10. By way of example, the court will discuss some of the specifications below, and how they were addressed by Lazan in his Award.

Specification 1(a) – (d):

This specification charges petitioner for engaging in verbal abuse and inappropriate comments. Pursuant to Chancellor's Regulation Section A-421 (II) (A), verbal abuse is defined as, among other things, "language about or directed toward students that belittles, embarrasses or subjects students to ridicule . . . . or has or would have the effect of unreasonably and substantially interfering with a student's mental, emotional, or physical wellbeing . . . ." *Id.* at 13. (internal quotation marks omitted). During the hearing, Student R.M. testified that petitioner called her a "crazy ass" in front of the whole class and told her to "get out of here" with her "crazy ass" or "nasty ass" attitude as she was leaving the classroom. Kauser testified that she was in the hallway when she heard petitioner referring to the "students' nasty ass attitudes." *Id.* at 16.

Petitioner testified that he never used the word "ass," and that the students said this because they were angry that they were asked to leave the classroom. Petitioner noted the conflicting use of the words between the students' statements and the testimony. For example, Student R.M. had indicated on her written statement that petitioner called her a "crazy ass" and not "nasty ass." Petitioner further argued that Kauser could not hear him because she was around the corner. According to petitioner, if Kauser had heard the yelling, she should have assisted him with the students.

Five students testified during the hearing. Lazan explained that petitioner was "less credible than any of the [DOE's] witnesses. His testimony about writing Student R.M. a hall pass and pleading with her to take it, only to have students crumple it up and throw it back to him was not believable . . . ." *Id.* at 12. He added that petitioner's contention that the "students are friends who colluded to undermine his

employment is not supported by anything but conjecture." *Id.* at 11. He also added that the students had nothing to gain by lying under oath during the testimony and that they "simply expressed what they remembered about these events, which occurred almost two years earlier." *Id.* at 11.

Lazan found petitioner's arguments unavailing with respect to the discrepancies between the students' written statements regarding the use of the curse words and their testimony. He explained, "[i]n this context, there is no material difference between being called 'crazy ass,' 'nasty ass,' or 'ugly ass,' particularly where the charges contain the phrase 'in sum and substance.'" *Id.* at 15.

Lazan stated that petitioner is a former dean who was trained to deal with misbehaving students and aware of the Chancellor's Regulations. Lazan added, that petitioner "should have known not to direct curse words at the students, who clearly felt belittled as a result." *Id.* at 15. He further found Kauser to be credible and indicated that her testimony was "consistent with the written statement that she provided after the incident." *Id.* at 11. Lazan noted that Kauser had no motive at all to make up her testimony as she does not know petitioner and does not even work for the DOE.

Lazan concluded by sustaining specifications 1a, 1c and 1d. He found that "[b]ecause S.K.'s references to [petitioner] using the phrase 'ugly ass' were not convincing and not sufficiently corroborated, Specification 1 b) is dismissed." *Id.* at 17.

Penalty

After addressing the remaining specifications, Lazan discussed the appropriate penalty. He found that petitioner has been charged with verbal abuse and conduct unbecoming of a teacher. Lazan stated that petitioner "made inappropriate, unprofessional comments to students in April 2016, and then inappropriately told them to leave their classroom without providing them with a destination. There is just cause to discipline this teacher." *Id.* at 27. Lazan took into consideration the fact that petitioner was placed in a difficult classroom with misbehaving students. However, he found that petitioner, who was a veteran teacher and a dean, should have exercised control of himself while addressing the students' behavior.

Lazan noted the following, in relevant part:

> "[Petitioner] went so far as to, in effect, call teenage girls ugly, as well as cursing students and telling at least one of the students to, in effect, go curse their mother. He then simply kicked them out of the classroom, aimlessly, which could have resulted in some harm coming to the students, who were angry and emotional at the time."

Id. at 28.

Lazan found petitioner's defense that he was working in the ATR, to be unavailing. He held that petitioner "is not being forced to work in the ATR. This is his current assignment and, having accepted the work, it is his duty to do the work in the most professional manner possible." *Id.* at 28.

Moreover, Lazan indicated that petitioner has been presented with similar allegations of misconduct in the past and failed to correct the issues. Petitioner had been issued letters to his file twice, with one incident occurring only one month prior to the instant one. After each incident, petitioner angrily protested, "arguing that he was in the right and that he was the true victim." *Id.* at 29. Lazan continued that, "[a]t the hearing, Petitioner expressed no remorse or suggested that he could have acted differently." *Id.* Lazan found that "[t]his kind of defiance suggests that [petitioner] will continue to discipline students as he sees fit without heed to the Chancellor's Regulations unless and until a significant penalty is assessed." *Id.*

Although the DOE sought to terminate petitioner, Lazan found that the "misconduct here, limited to actions that occurred during one class period, does not rise to the level necessary to support termination." *Id.* at 30. Lazan considered mitigating factors, and found petitioner to be "an intelligent person who is genuinely interested in teaching music to children, and [Petitioner] has not been subject to a Sect. 3020-a proceeding for this misconduct previously." *Id.*

In conclusion, Lazan suspended petitioner for 45 days without pay on the basis that petitioner "has ignored two prior notices, expressed no remorse, and suggested that he will continue to engage in this sort of misconduct in the future." *Id.* Lazan warned petitioner that further misconduct of this type in the future could result in a more severe penalty such as termination.

Shortly after receiving the Award, petitioner commenced this proceeding. Petitioner believes that the penalty imposed of a 45-day suspension without pay is shocking, excessive and that the matter should be annulled or remanded for a lesser penalty and/or remediation. Petitioner alleges that some of the numerous specifications were dismissed and that the remaining sustained specifications relate to what allegedly occurred while petitioner was acted as a substitute teacher during one period of music class. He claims that Lazan should have found that, under the circumstances, petitioner's actions did not constitute misconduct or warrant a penalty. As conceded by Lazan, the class was unruly, and petitioner was assigned as a substitute with no familiarity with the students. The petition states, "[Petitioner] was placed in an untenable situation in this particular classroom, and acted reasonably under the circumstances to try and maintain order, safety, and discipline in the classroom, in the best interests of all of the students in the class." Petition, ¶ 21. He adds that he was given no instruction or support from the school's administration about the procedures available to him to assist with misbehaving students.

According to petitioner, the penalty was "irrational, arbitrary and capricious, excessive, and shocking to the conscience, and should be vacated and remanded, in accordance with prior precedent in this Court reviewing NYCDOE teacher 3020-a decisions which have been found to be shocking to the conscience." *Id.*, ¶ 28.

In response, the DOE argues that the petition fails to state a cause of action and must be dismissed because petitioner has not established any basis to vacate the Award. According to the DOE, the record supports Lazan's conclusion that petitioner failed to act reasonably by, among other things, insulting students. The DOE further argues that here, considering the charges, suspension without pay does not shock the conscience. Further, petitioner failed to take responsibility for his actions nor did he attempt to improve his classroom behavior. The DOE alleges that the penalty of suspension has been upheld in similar cases where the teacher has been charged with verbal abuse and inappropriate

conduct.[2] Finally, the DOE contends that the City of New York is not a proper respondent and any claims against it must be dismissed.

In reply to the cross motion, petitioner alleges, in pertinent part, that the two other letters in his personnel file referring to verbal abuse "were used to accuse without evidence or meetings," and that they should not have been in his personnel file at all. In addition, petitioner claims that no one informed him prior to the hearing that Kauser would be testifying. Moreover, Kauser was "allowed to testify by Skype over my objections, which is a fundamental violation of my due process rights." Petitioner's reply aff, ¶ 7. Petitioner concludes by stating that "the true motive for these 3020-a charges was my advocacy and complaints about my ATR status, grievances I filed against the NYCDOE, and communications to higher legal officials commencing in August 2014." *Id.*, ¶ 18.

DISCUSSION

City of New York

As an initial matter, the City of New York is a distinct legal entity from the DOE. *Perez v City of New York*, 41 AD3d 378, 379 (1st Dept 2007). As a result, the City of New York is an "improper party to the action," and is dismissed as a respondent. *Stepper v Department of Educ. of the City of N.Y.*, 104 AD3d 412, 412 (1st Dept 2013).

Standards for Vacating an Arbitration Award

Pursuant to Education Law § 3020-a (5), CPLR § 7511 provides the procedure for reviewing a hearing officer's findings. *City School Dist. of the City of N.Y. v McGraham,* 17 NY3d 917, 919 (2011). CPLR 7511 limits the grounds for vacating an award to "misconduct, bias, excess of power or procedural defects." *Lackow v Department of Educ. (or "Board") of City of N.Y.*, 51 AD3d 563, 567 (1st Dept 2008) (internal quotation marks and citation omitted).

[2] The remainder of the DOE's papers refer to extraneous and hypothetical arguments, not even alleged by petitioner, such as the contention that the Award should not be vacated due to a potential mistake made in the law and that the arbitrator did not engage in misconduct.

However, where, as here, the parties are subject to mandatory arbitration, "the award must satisfy an additional layer of judicial scrutiny." *City School Dist. of the City of New York v McGraham,* 17 NY3d at 919. 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." *Lackow v Department of Educ. (or "Board") of City of N.Y.*, 51 AD3d at 567. The person "seeking to overturn an arbitration award faces a heavy burden." *Matter of Fagan v Village of Harriman*, 140 AD3d 868, 868 (2d Dept 2016) (internal quotation marks and citations omitted).

The Findings Were Rational and Were Not Arbitrary and Capricious

An action is considered arbitrary and capricious when it is "taken without sound basis in reason or regard to the facts." *Matter of Peckham v Calogero*, 12 NY3d 424, 431 (2009). An arbitration award is considered irrational if there is "no proof whatever to justify the award . . . ." *Matter of Roberts v City of New York,* 118 AD3d 615, 617 (1st Dept 2014) (internal quotation marks and citation omitted).

Petitioner believes that the Award is irrational, because, under the circumstances, he did not commit any misconduct during the incident in the classroom. However, applying both standards above to the present case, Lazan's determination of verbal abuse and conduct unbecoming of a teacher is rational, and the Award cannot be considered arbitrary and capricious. Verbal abuse is defined as, among other things, language that "belittles, embarrasses or subjects students to ridicule." It was reasonable for Lazan to find that petitioner's language rose to the level of verbal abuse when, among other incidents, he called teenage girls ugly and told the students to go and curse at their mother instead of at him.

In addition, in the Award, Lazan addressed and acknowledged all of petitioner's concerns. Lazan conceded that the students were 13 years old, and that they were being difficult. However, he found that, petitioner still is expected to control his own behavior and not engage in childish taunts. Lazan heard petitioner's testimony about the difficulties faced by teachers in the ATR, but Lazan did not believe this placement entitled petitioner to act unprofessionally. Additionally, Lazan noted that

petitioner, a former dean, was trained with behavior management strategies and was aware of the Chancellor's Regulations with respect to verbal abuse.

Petitioner argued during the hearing that he was not given any guidance on how to manage unruly students and that he did attempt to use the phone to get assistance during the incident. However, Lazan did not believe petitioner's testimony. Petitioner also disputed the language he used with the students and argued that the students' stories do not support the charges. Similarly, Lazan found that petitioner was less credible than any of the DOE's witnesses, including the students. It is well established that petitioner's contention regarding the credibility of witnesses is not a proper ground to vacate an arbitration award. *See e.g. Matter of Saunders v Rockland Bd. of Coop. Educ. Servs*, 62 AD3d 1012, 1013 (2d Dept 2009) ("When reviewing compulsory arbitrations in education proceedings such as this, the court should accept the arbitrators' credibility determinations, even where there is conflicting evidence and room for choice exists"); *see also Matter of Telemaque v New York City Bd./Dept. of Educ.*, 148 AD3d 503, 503 (1st Dept 2017) (internal citation omitted) ("The hearing officer's determination was rational and not arbitrary and capricious, given his credibility findings, which are largely unreviewable").

As a result, petitioner provides no basis to disturb the Award. *See e.g. City School Dist. of the City of New York v McGraham,* 17 NY3d at 920 ("Nor is the award arbitrary and capricious or irrational. The hearing officer engaged in a thorough analysis of the facts and circumstances, evaluated [petitioner's] credibility and arrived at a reasoned conclusion that a 90-day suspension and reassignment was the appropriate penalty").

Penalty Appropriate and Not Shocking

Petitioner argues that the 45-day unpaid suspension is excessive and shocking, given that he "did not contextually commit actionable misconduct warranting a penalty herein." Petition, ¶ 2. In the Award, Lazan provided the rationale behind assessing the penalty of a 45-day suspension without pay. He explained that petitioner had received two prior warnings for engaging in verbal abuse. Lazan found

petitioner's attitude remained the same, despite the two prior warnings. As in the past, petitioner denied any wrong doing, accepted no responsibility for his actions and refused to change the way he disciplined students. He noted that petitioner believed his conduct was appropriate and offered no apology or alternative way he would have handled things. Lazan found that petitioner's defiance in heeding the Chancellor's Regulations regarding student discipline, warranted a significant penalty. He reiterated that petitioner "needs to understand that he cannot lose control of his temper in the classroom when children become difficult." Award at 29.

"An administrative penalty must be upheld unless it is so disproportionate to the offense . . . as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a matter of law." *Matter of Kreisler v New York City Tr. Auth.*, 2 NY3d 775, 776 (2004) (internal quotation marks and citation omitted). 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 a suspension for a fixed time without pay being one such penalty.

Given the record and the petitioner's conduct, this Court concludes that the penalty of a 45-day suspension without pay is not shockingly disproportionate to the offenses committed. The penalty was fashioned to force petitioner to reflect on his behavior and to give him warning that any further misconduct of this type could lead to termination. The Court finds that the penalty was "well-tailored" to the charges of which petitioner was found guilty. *Matter of Facey v New York City Dept. of Educ.*, 105 AD3d 547, 547 (1st Dept 2013), *lv denied* 22 NY3d 861, *cert denied* 134 S Ct. 2887 (2014); *see also Matter of Telemaque v New York City Bd./Dept. of Educ.*, 148 AD3d 503, 504 (1st Dept 2017) ("[t]he penalty imposed is not disproportionate to the offense, given petitioner's lack of remorse or appreciation of the seriousness of [his behavior]").

The DOE sought to terminate petitioner. Nevertheless, Lazan found that the misconduct alleged was only limited to one class period and did not rise to the level necessary to support termination. In the alternative, petitioner argues that the matter should be remanded for a lesser penalty and/or remediation,

in accordance with prior precedence. However, petitioner's contention that the penalty is excessive, is unpersuasive. Moreover, the cases cited by petitioner are distinguishable. For example, in *Matter of Polayes v City of New York* (118 AD3d 425, 426 [1st Dept 2014]), the Appellate Division vacated the arbitration award after concluding that the arbitrator's determination of misconduct was not supported by adequate evidence and because there was no evidence to "indicate that petitioner failed to heed prior warnings." Here, however, the arbitrator's finding of misconduct is supported by adequate evidence and petitioner did fail to heed two other warnings.

Regardless, in the instant situation, the penalty is not disproportionate to the offense. In fact, in cases of verbal abuse, courts have routinely upheld the penalty of termination, not just suspension without pay. For example, in *Matter of Ajeleye v New York City Dept. of Educ.* (112 AD3d 425, 425 [1st Dept 2013]), the Appellate Division upheld an arbitration award terminating petitioner's employment, after the hearing officer concluded that "petitioner was guilty of the specifications charging him with 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 Department of Education." Moreover, it is well settled that, "[h]aving seen and heard the witnesses, [Lazan] was in a far superior position than the motion court to make a determination as to an appropriate penalty to impose." *Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 421 (1st Dept 2013).

Pursuant to CPLR § 7511 (e), upon denial of a motion to vacate or modify an arbitration award, the court "shall confirm the award." As a result of this decision denying the petition, the Award should be confirmed and a "judgment shall be entered upon the confirmation of an award." CPLR § 7514 (a).

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED and ADJUDGED that respondents' cross motion to dismiss the petition denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment confirming the April 24, 2018 Award.

Dated: November 27, 2018

ENTER:

A.J.S.C.

HON. ALEXANDER M. TISCH