Iorfida v Department of Ed. of City of N.Y.
2020 NY Slip Op 31729(U)
June 3, 2020
Supreme Court, New York County
Docket Number: 650650/2019
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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INDEX NO. 650650/2019

LUCIO IORFIDA

MOTION DATE 10/10/2019

Petitioner,

MOTION SEQ. NO. 001

- v -

DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK,

DECISION + ORDER ON MOTION

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Petitioner Lucio Iorfida brings this proceeding, pursuant to CPLR 7511 (b) (1), to vacate the January 23, 2019 Opinion and Award (Award) of Hearing Officer (H.O.) Elliot H. Shaller. The Award determined that respondent Department of Education of the City of New York (DOE) had just cause to terminate petitioner from his position as a tenured teacher of foreign languages at Tottenville High School, in Staten Island (the School). DOE cross-moves to dismiss the petition. As a direct result of the Award, on January 25, 2019, non-party Robert Scarnardella, of the Staten Island New York City DOE Borough Office wrote to petitioner that, "[a]s per [Shaller's] decision dated January 23, 2019, your employment with the [DOE] is terminated as of today." NYSCEF Doc. No. 19, at 1.

It is undisputed that up through the 2013-2014 school year, petitioner was rated as a successful teacher, and that he received numerous commendations for his teaching. In September 2014, a new principal was appointed at the School, and soon, petitioner's ratings plummeted.

CPLR 7511 (b) provides that the grounds for modifying, or vacating an arbitral award are:

(i) corruption, fraud or misconduct in procuring the award; or
(ii) partiality of an arbitrator appointed as a neutral; except where the award is by confession; or
(iii) an arbitrator or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
(iv) failure to follow the procedures of this article . . .

In addition, when arbitration is compulsory as here, an arbitral award must be "in accord with due process, supported by adequate evidence, and rational." *Matter of Berkley v New York City Dept. of Educ.,* 159 AD3d 525, 525 (1st Dept 2018); *Matter of Asch v New York City Bd./ Dept. Of Educ*., 104 AD3d 415, 419 (1st Dept 2013).

Education law § 3012-d (4) (b) provides, in relevant part, that the required annual classroom observation of tenured teachers must include "classroom observations by an impartial trained evaluator or evaluators selected by the district," and that such evaluator "may be employed within the school district, but not the same school building, as the teacher being evaluated." It is undisputed that, in neither of the two years in which petitioner was rated "ineffective," was he evaluated by an impartial evaluator. However, petitioner failed to challenge his unlawful evaluations in either of those two years, and it is only now, with the arbitration concluded, that he complains of the disciplinary hearings. Similarly, petitioner contends, without dispute, that DOE violated Education Law § 3012-c (4) by failing to provide him with a school-year-long Teacher Improvement Plan, and by failing to set forth any objective way to measure any manner of improvement in his pedagogical skills.

Petitioner cites *Matter of Syquia v Board of Educ. of Harpursville Central Sch. Dist.,* 80 NY2d 531 (1992), *Blaize v Klein,* 68 AD3d 759 (2d Dept 2009), *Matter of Lehman v Board of Educ. of the City School Dist. of City of N.Y.,* 82 AD2d 832, 834 (2d Dept 1981)*, Matter of*

Taylor v City of New York, 39 AD3d 430, 433 (1st Dept 2016), and *Matter of Gumbs v Board of Educ of the City Sch. Dist. of the City of New York,* 125 AD3d 484, 485 (1st Dept 2015) in support of his legal arguments, but he ignores the fact that each of those cases was brought pursuant to CPLR Article 78, and that their holdings are inapplicable to his petition to vacate an arbitral award.

Petitioner also argues that the Award should be vacated, because the H.O. failed to affirm the Award, in compliance with CPLR 7507, which provides, in relevant part, "[t]he award shall be in writing, signed and affirmed by the arbitrator making it." Where an arbitral award is not affirmed, it may not be judicially enforced. *Matter of MBNA Am Bank, N.A. v Anastasio,* 35 AD3d 474, (2d Dept 2006); *Abreu v Nationwide Mut. Ins. Co.,* 87 AD2d 572, 572 (2d Dept (1982). Here, however, DOE is not seeking judicial enforcement of the Award. The H.O.'s failure to perform the "ministerial act" of affirming the Award "does not affect the validity of the [A]ward" *Matter of Alava v Consolidated Edison Co. of N.Y.,* 183 AD2d 713, 714 *(2d Dept 1992)*. Petitioner's additional argument, that the Award was not issued within the time provided for by Education Law § 3020-a (4) (a), is unavailing, because, having failed to object, prior to the late issuance of the Award, he waived that objection. *See* CPLR 7507.

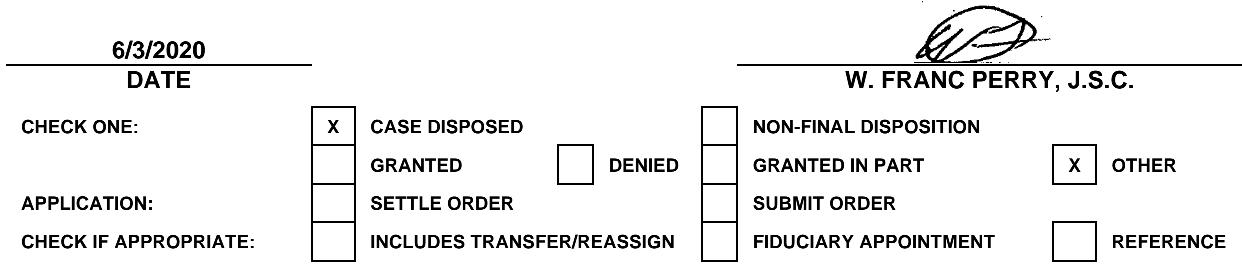
Petitioner argues that the penalty of termination was excessive, in view of his long record of successful teaching. However, courts have upheld the termination of teachers for incompetence, even when those teachers have had long and successful teaching careers, *See e.g, Matter of Russo v New York City Dept of Educ.*, 25 NYY3d 946 (2015); *Matter of Patterson v City of New York,* 96 AD3d 565 (1st Dept 2012). Petitioner cites *Matter of Brito v Walcott*, 115 AD3d 544 (1st Dept 2014), *Matter of Principe v New York City Dept. of Educ.,* 94 AD3d 431 (1st Dept.2012) *affd* 20 NY3d 963 (2012), and *Matter of Riley v City of NewYork,* 84 AD2d 442

(1st Dept 2011) for the proposition that termination was disproportionate to his pedagogical failings, as found by the H.O. In each of those cases, however, the teacher had been terminated because of a one-time act on his or her part.

Finally, petitioner argues that the Award is inconsistent with *Board of Educ. v Arrak*, 28 Ed. Dept. Rep. 302 (1989), a case that DOE urges the court to disregard as "stale." In *Arrak*, the New York State Commissioner of Education opined that the performance of a teacher's students on the regents examinations, in the subject taught by the teacher, was a good indicator of the teacher's competence. It is established, however, that an arbitrator need not follow rules of substantive law, and that courts "'are obligated to give deference to the decision of the arbitrator, even if the arbitrator misapplied the substantive law.'" *Cenni v Cenni,* 180 AD3d 509, 509 (1st Dept 2020), quoting *Matter of New York City Tr. Auth. v Transport Workers of Am. Local 100, AFL-CIO,* 6 NY3d 332, 336 (2005). Accordingly, it is hereby

ADJUDGED that the petition of petitioner Lucio Iorfida is denied, the cross petition of respondent The New York City Department of Education is granted, and this proceeding is dismissed without costs.

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.



6/3/2020		W. FRANC PERRY, J.S.C.
DATE		

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION	
		GRANTED		DENIED	GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE