Sidibe v New York City Bd./Dept. of Educ.
2022 NY Slip Op 30628(U)
February 28, 2022
Supreme Court, New York County
Docket Number: Index No. 656239/2021
Judge: Arlene Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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ABENA SIDIBE

Petitioner,

- v -

THE NEW YORK CITY BOARD/DEPARTMENT OF EDUCATION,

Respondent.

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INDEX NO. 656239/2021

MOTION DATE 02/25/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for VACATE – AWARD (ART 75).

The cross-motion to dismiss the petition that seeks to set aside an arbitral award penalizing petitioner with a three-week unpaid suspension and mandatory training is granted.

Background

Petitioner is a tenured teacher at a school in New York City. Respondent brought misconduct charges against her for the 2018-2019 school year and alleged that she was excessively absent and late, engaged in misconduct, neglect of duty and conduct unbecoming. Specifically, respondent maintained that she failed to read the exam text and passages to students during a Regents Exam in 2019 as directed in these students' Individualized Education Programs ("IEP"s). It insists that this resulted in the students not receiving the required testing

accommodations, not understanding the material, not having enough time to finish the test and general confusion by the students.

Respondent also detailed that petitioner was absent from work on 24 occasions from September 5, 2018 through May 13, 2019 and arrived late (or left early) 16 times during the school year. It sought disciplinary action based on these offenses.

Petitioner denied the allegations against her and maintained that respondent did not produce witnesses concerning the test question allegations. She argues that it was the principal's obligation to ensure that students receive the appropriate testing accommodation and that both the principal and the assistant principal are to blame. Petitioner also argues than an IEP coordinator never gave her the names and testing accommodations needed for the students taking the test in her assigned room. Petitioner also took issue with the investigation completed by respondent and that the assistant principal accused her of misconduct without speaking to petitioner about the testing incident. With respect to the absences and lateness, petitioner argues that she put substantial effort into her work but acknowledged experiencing personal issues.

The Hearing Officer considered the evidence presented by both petitioner and respondent and concluded that "the evidence corroborates that the [petitioner] failed to provide these accommodations as she was mandated to do when she assigned to room 219, a designated question read/test (aloud) room, and while she proctored the 2019 New York State English Language Arts English (ELA) Regents Examination" (NYSCEF Doc. No. 3 at 14-15).

He continued that "Despite this violation, there is insufficient evidence to establish that such a violation caused students to not have a complete understanding of the testing material or enough time to complete the exam and/or undo and/or revise portion(s) of the examination as allowed by the Department" (*id*. at 15). The arbitrator added that all students who took the exam,

with the exception of one, graduated and that passing this exam is a requirement for graduation (*id*.).

The Hearing Officer also credited respondent's allegations with respect to petitioner's absences and lateness and found that "While [petitioner] contends that such absences and lateness were caused by stress and health issues associated with allegations delineated in Specifications 1 & 2, the record is devoid of credible evidence to support this assertion (*id*. at 16). Next, the arbitrator concluded that the appropriate penalty was a three-week suspension (without pay) and mandatory training for testing accommodations for students with disabilities (*id*.).

Petitioner argues that the Hearing Officer was biased and pre-disposed to find that she was guilty of something. She insists that there is no evidence that she was willfully absent and maintains the decision is confusing. Petitioner contends that none of the proctors knew what the accommodations were for each student and so they all had to guess; she concludes she should not face any penalty based on her superiors' disorganization. Petitioner characterizes this proceeding as a set-up as part of an effort by the school administrators to avoid their own responsibility for improper administration of this Regents Exam.

Respondent cross-moves to dismiss on the ground that the Hearing Officer's decision was neither arbitrary nor capricious. It argues that he was entitled to credit the testimony of certain witnesses and that it was a carefully considered decision (as evidenced by the fact that petitioner was found not guilty of certain charges).

In reply and opposition to the cross-motion, petitioner insists that she was denied due process and that certain requirements of the Education Law were not followed with respect to the proper delegation of authority to pursue disciplinary charges. She emphasizes that no student

who was allegedly harmed by petitioner's actions testified at the hearing and so there is no proof to support any penalty.

Discussion

"Education Law § 3020-a(5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR 7511. Under such review an award may only be vacated on a showing of misconduct bias, excess of power or procedural defects" (*Lackow v Dept. of Educ. [or Board] of City of New York*, 51 AD3d 563, 567, 859 NYS2d 52 [1st Dept 2008]) [internal quotations and citation omitted]. "[W]here the parties have submitted to compulsory arbitration, judicial scrutiny is stricter than that for a determination rendered where the parties have submitted to voluntary arbitration" (*id*. at 567). The hearing officer's "determination 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. The party challenging an arbitration determination has the burden of showing its invalidity" (*id*. at 567-68).

As an initial matter, here, the Hearing Officer was authorized to conduct the hearing even if the Board of Education did not hold an Executive Session (to vote on the charges to be brought against petitioner) (*see Pina-Pena v New York City Dept. of Educ.*, 2014 NY Slip Op 30893(U) (Trial Order), 2014 WL 1414983 [Sup Ct, NY County 2014]). Courts have held that the Chancellor of the Board of Education can delegate the process of bringing charges against tenured teachers (*id.*; *see also Matter of Roberts v Dept. of Educ. of the City of New York*, 45 Misc3d 1206(A), 3 NYS3d 287 (Table) [Sup Ct, NY County 2014]).

The Court grants the cross-motion and dismisses the petition. The Court finds the Hearing Officer's decision to be rational and well-reasoned. The Hearing Officer was entitled to

make credibility determinations and findings of fact concerning whether petitioner followed the correct procedure for providing students with their testing accommodations. That petitioner disagrees with that conclusion or thinks blame should fall with others is outside the purview of this Court's decision. This Court can only consider whether the award is irrational and it clearly is not.

Moreover, petitioner's argument that the award was irrational because the students who were allegedly negatively affected by petitioner's failure to properly proctor the test did not testify is wholly without merit. Contrary to petitioner's contention, "hearsay evidence can be the basis of an administrative determination" (*Colon v City of New York Dept. of Educ.*, 94 AD3d 568, 941 NYS2d 628 [1st Dept 2012] [internal quotations and citations omitted]).

And, of course, petitioner did not contest the assertion that she had 24 absences and 16 times where she was excessively late or left early. Petitioner's excuse for this poor attendance was not credited by the Hearing Officer and this Court sees no reason to disturb that conclusion.

Finally, the Court observes that the penalty here is not so disproportionate to the misconduct so as to shock the conscience (*id.*). Petitioner received a three-week suspension (without pay) and mandatory training for mishandling the proctoring of a Regents Exam (a requirement to graduate) and missing more than an entire month of school due to her absences. As the Hearing Officer noted in his decision, the subject school's handbook states that more than five absences is considered excessive and, here, petitioner was absent 24 times and late/left early 16 times. A brief suspension is entirely reasonable under these circumstances.

Accordingly, it is hereby

ORDERED that the cross-motion by respondent to dismiss is granted; and it is further

ADJUDGED that the petition is dismissed and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor.

2/28/2022
DATE

ARLENE BLUTH, J.S.C.

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