Dikovskiy v New York City Bd. of Educ.
2023 NY Slip Op 32951(U)
August 25, 2023
Supreme Court, New York County
Docket Number: Index No. 652135/2015
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART 59**

Justice

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GENNADIY DIKOVSKIY,

Petitioner,

- v -

NEW YORK CITY BOARD OF EDUCATION D/B/A THE NEW YORK CITY DEPARTMENT OF EDUCATION, and CARMEN FARINA, as Chancellor of the New York City Board of Education,

Respondents.

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INDEX NO. 652135/2015

MOTION DATE 08/23/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for CONTEMPT.

ORDER

Upon the foregoing documents, it is

ORDERED that to the extent petitioner seeks an order adjudicating respondents in contempt of the judgment dated August 25, 2016 of this court (Schlesinger, J.), which was affirmed by Order dated January 11, 2018, of the Appellate Division, First Department, the motion of petitioner is DENIED; and it is further

ORDERED that to the extent petitioner seeks an order enforcing such judgment, the motion of petitioner is DENIED, as respondents have substantially fulfilled their obligations thereunder.

DECISION

With respect to petitioner's motion to hold respondents in contempt of a court order or judgment pursuant to Judiciary Law §§ 753 and 756, this court agrees with respondents that petitioner has failed to establish that the judgment dated August 25, 2016 (judgment), as affirmed by the Appellate Division, clearly and unequivocally ordered that respondents pay petitioner for lost per session work that petitioner now alleges he would have earned, but for his termination. Nor did such judgment direct respondents to pay either for loss of "all other monies" or attorney's fees incurred by petitioner in successfully prosecuting his Article 75 petition to vacate the hearing officer's Opinion and Award that terminated petitioner as teacher. Since petitioner has not established that the judgment expressed a clear unequivocal mandate directing respondents to pay him for lost per session work and/or attorneys' fees, petitioner's motion seeking an order of contempt against respondents for disobedience of the judgment must be denied. See Britt v City of New York, 160 AD3d 524, 525 (1st Dept 2018). This court must deny petitioner's contempt motion for the additional reason that his application is jurisdictionally defective in that the notice of motion does not comply with Judiciary Law § 756, which requires specified warning language. See Body Glove IP Holdings LP v On Five Corporation, 217 AD3d 516 (1st Dept 2023).

The true nature of petitioner's application is to enforce the judgment. However, even on that basis, petitioner is not entitled to the relief he seeks.

With respect to his application for per session compensation, the judgment granted the petition in which petitioner sought a judgment (a) declaring that the June 6, 2015, Decision of the Hearing Officer that terminated petitioner, as a teacher, was unlawful; (b) vacating such Decision and annulling the penalty imposed; and (c) directing respondents (i) to reinstate petitioner to his employment, as teacher, with back pay and benefits, including restoration with seniority, retroactive to the date of termination; (ii) to restore the Satisfactory rating that respondents removed from its files and petitioner's personnel files; and (iii) to remove petitioner from the DOE's ineligible list and any "problem codes" or other demarcations that would bar petitioner from employment in the DOE or for any DOE vendor.

As respondents urge, per session wages are merely potential earnings and are not backpay because there is no guarantee that but for petitioner's unlawful termination, he would have earned such per session pay. As referenced by respondents, respondent Chancellor's Regulations and the applicable collective bargaining agreement state that "The total number of hours the employee is assigned may vary from one per

session school year to another depending on the needs of the program." This court agrees with respondents that per session pay at bar, unlike the overtime to which the petitioner was held to be entitled in Stoker v Tarentino, 126 AD2d 815 (3d Dept 1987), was not guaranteed, and therefore does not constitute backpay.

The court agrees with respondents that the decision of the Public Employment Relations Board (PERB) in Bagarozzi v Board of Education of the City School District, Case No. U-35863 (PERB 8/16/18 [Cavas J.]), wherein petitioner was awarded lost per session pay, is likewise distinguishable on its facts. The PERB Administrative Law Judge awarded petitioner "lost per session" pay but declined to award backpay for summer school work offered to her pending the disciplinary charges against her, because petitioner turned down such summer school assignment. Implicit in such decision is that before the PERB ALJ was record evidence of a determinate amount of per session pay that such petitioner lost "but for" the disciplinary charges. In contrast, in the proceeding at bar, the record does not establish the amount of per session pay petitioner would have earned had he not been terminated, which amount is speculative, i.e., impossible to determine.

Moreover, lost per session pay does not meet the plain meaning of retroactive "benefits" that the judgment directed

respondents pay petitioner. As held in Weingarten v Board of Trustees of the New York City Teachers' Retirement System, 98 NY2d 575 (2022), any "per session" compensation that petitioner actually earned would constitute part of his pensionable salary base.

With respect to attorneys' fees, setting aside that petitioner never referenced such damages in his petition, and that the judgment never granted same, petitioner, in any event, is not entitled to recover such fees. First, "[]he has not successfully asserted a substantial federal constitutional claim in the proceeding" pursuant to 42 USC § 1988. Dechbery v Cassano, 157 AD3d 499 (1st Dept 2018). In addition, though CPLR § 8601[1] has been held applicable to a municipal corporation of the State of New York (see Brown v Schenectady, 209 AD3d 128 [3d Dept 2022]), petitioner has not

> met his burden of establishing that he is a "party" eligible for such an award. . .as petitioner failed to show that his net worth at the time he commenced the Article 78 proceeding did not exceed fifty thousand dollars, [as required pursuant to CPLR §8602(d)].

Cintron v Calogero, 99 AD3d 456, 457 (1st Dept 2012), lv to appeal

[1] Contrary to petitioner's argument made in his reply papers (NYSCEF Document No 62, page 9, ¶ 30), in her decision dated August 25, 2015, overturning the termination, Schlesinger, J., did not use the phrase "bad faith", though she characterizes respondents' decision sustaining the specifications as arbitrary and capricious and unsupported by a preponderance of the evidence, and the penalty of termination, as shocking to the conscious.

denied, 22 NY3d 855 (2013). Moreover, petitioner failed to submit an application seeking attorney's fees to the court within thirty days of the judgment, which became final when affirmed by the Appellate Division, First Department, as set forth in CPLR § 8601(b).

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8/25/2023		DEBRA A. JAMES, J.S.C.
DATE		

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