[*1] Malcolm Menchin, Petitioner, for a Judgment under Article 75 of the Civil Practice Law and Rules against New York City Department of Education, Performance Conservatory High School, Respondents.

2250/2011

SUPREME COURT OF NEW YORK, ROCKLAND COUNTY

2011 NY Slip Op 51344U; 2011 N.Y. Misc. LEXIS 3520

July 13, 2011, Decided
NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

CORE TERMS: chancellor, probable cause, employing, delegate, teacher, petitioner claims, board of education, arbitration, arbitrator, delegated, teaching, staff, high schools, tenured teachers, procedural protections, executive session, authority to issue, superintendents, supervisory, originated, tenured, entity, disciplinary charges

COUNSEL: [**1] For Petitioner: Perkins-Cline, LLC, Suffern, NY.

For Respondents: Corporation Counsel of the City of NY, by Christopher A. Seacord, Esq., New York, NY.

JUDGES: HON. LINDA S. JAMIESON, Justice of the Supreme Court.

OPINION BY: LINDA S. JAMIESON

OPINION

Linda S. Jamieson, J.

Petitioner is a former tenured New York City school teacher who was dismissed from his position at the Performance Conservatory High School in the Bronx (the "School") pursuant to an Opinion and Award of an arbitrator, Patricia A. Cullen (the "Arbitrator"), dated February 17, 2011 (the "Decision"). The Decision found that there were grounds to sustain 17 of the "Specifications" (the allegations made against petitioner), and dismissed the remaining five Specifications. (One other Specification was withdrawn during the proceedings.)

Petitioner does not contest the Decision — which the Court finds to be even-handed, thoughtful, and carefully reasoned and written. Instead, the sole basis for the petition is that petitioner claims that he was deprived of due process, and the Arbitrator "exceeded her statutory powers by denying Petitioner's motion to dismiss and conducting a hearing without the requisite jurisdictional finding of probable cause over Petitioner's [**2] continuing objection." Amended Petition at ¶ 12. The whole crux of petitioner's claim is that the "probable cause" finding required by NY State Education Law § 3020-a was improper, because it was made by the principal of the School, which is not allowed.

State Education Law § 3020-a, "generally known as the Tenure Law, affords procedural protections to tenured teachers, in that a tenured teacher cannot be discharged from employment without proper cause, notice, and a hearing. The purpose of the statute is to protect teachers from the arbitrary imposition of formal discipline or removal." *Morrell v. New York City Dept. of Educ.*, 30 Misc 3d 1212(A), 924 N.Y.S.2d 310, 2010 WL 5600939 (Sup. Ct. NY Co. Dec. 3, 2010) (citation and quotations omitted).

Specifically, "The petitioner, as a tenured teacher, was entitled to the procedural protections set forth in Education Law § 3020—a. That statute provides, inter alia, that prior to any disciplinary action being taken against a teacher, all charges must be submitted in writing and filed with the clerk or secretary of the school district (*see* Education Law § 3020—a[1]). Thereafter, the employing board of education, in executive session, must vote [**3] as to whether there is probable cause for the charges (*see* Education Law § 3020—a[2]). If the board of education's determination is affirmative, a written statement specifying the charges in detail and outlining the employee's rights, including his right to a hearing, shall be immediately forwarded to that employee." *Pollock v. Kiryas Joel Union Free School Dist.*, 52 AD3d 722, 860 N.Y.S.2d 605 (2d Dept. 2008).

As the Court in *Morrell* went on to state (quoting *Lackow v. Department of Educ. of City of NY*, 51 AD3d 563, 859 N.Y.S.2d 52 (1st Dept. 2008)),Education Law section 3020—a(5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR [*2] 7511. Under such review, an award may only be vacated on a showing of misconduct, bias, excess of power or procedural defects. Nevertheless, where the parties have submitted to compulsory arbitration, judicial scrutiny is stricter than for a determination rendered where the parties have submitted to voluntary arbitration. The 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 [**4] an arbitration determination has the burden of showing its invalidity.

Morrell, 30 Misc 3d 1212(A), 924 N.Y.S.2d 310, 2010 WL 5600939. Petitioner here has not met this burden, as set forth below.

Petitioner claims that the probable cause finding was improper because it was made by the principal of the School, and not the "the employing board of education, in executive session." He argues that the then-New York City Schools Chancellor Joel I. Klein had no authority to issue the August 16, 2007 Delegation (the "Delegation") of power to the principals of high schools in District 75 and 79 (which encompasses the School). The Delegation states, in relevant part, that the Chancellor delegates to "each high school, District 75 and 79 principal the power to" "Initiate and resolve disciplinary charges against teaching and supervisory staff members in your school. . . ." There is no dispute that this proceeding involves disciplinary charges against a "teaching staff member" in the School.

The Court finds that the Chancellor did have the authority to issue the Delegation, pursuant to Education Law §§ 2590-h(38-a) and (19). "Section 2590-h(19) of the Education Law provides that the Chancellor may [**5] "[d]elegate any of his or her powers and duties to such subordinate officers or employees as he or she deems appropriate and to modify or rescind any power and duty so delegated." *Rivers v. Board of Educ. of City School Dist. of City of New York*, 66 AD3d 410, 886 N.Y.S.2d 159 (1st Dept. 2009). Petitioner argues that this means that only certain powers can be delegated, those powers that originated with the Chancellor. *See* Amended Petition at ¶ 33. Under this reasoning, powers which originated with other entities, such as the employing board, cannot be delegated. The Court, however, finds that Section 2590-h(19) of the Education Law is very broad, and has no such limits in its text.

Petitioner also claims that Education Law § 2590-h(38-a) sets a limit on what the Chancellor can delegate. The Court disagrees. Education Law § 2590-h(38-a) states that the Chancellor has the power "To exercise all of the duties and responsibilities of the employing board as set forth in section three thousand twenty-a of this chapter with respect to any member of the teaching or supervisory staff of schools which are [*3] not covered under subdivision thirty-eight of this section." That means that the Chancellor [**6] him- or herself has the power of the "employing board" — the entity charged in Section 3020-a with the power to "vote as to whether there is probable cause for the charges" — and, having the power of the employing board, the Chancellor may delegate it pursuant to Section 19, as he or she sees fit.

Petitioner's argument that Section 2590-h(38) does have a limiting provision ("The chancellor shall exercise all such duties and responsibilities for all community districts *or may delegate* the exercise of all such duties and responsibilities *to all of the community superintendents* of the city district") (emphasis added), restricting the Chancellor to delegating only to community superintendents, does not apply to this case, which undisputedly arises under Section 2590-h(38-a). *See* Amended Petition at ¶ 34. Indeed, the fact that Section 38 does have such a limit, whereas Section 38-a does not, underscores the power of the Chancellor to delegate.

Therefore, Education Law §§ 2590-h(38-a) and (19) allow the Chancellor to delegate his or her powers with respect to Section 3020-a. And in 2007 Chancellor Klein did just that, by issuing to the principal of the School the Delegation, pursuant to which [**7] the principal found probable cause to proceed against petitioner. To the extent that petitioner claims that it is not fair to have the complaining principal be the same person who found probable cause against him, the Court notes that the Decision amply documented multiple complaints about petitioner, most of which were not initiated by the principal. Accordingly, the petition is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: July , 2011

New City, New York

HON. LINDA S. JAMIESON

Justice of the Supreme Court