Reinaldo Palencia, Petitioner, against The New York City Board/Department of Education, Respondent.

112557/10

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2011 NY Slip Op 50905U; 2011 N.Y. Misc. LEXIS 2381

May 13, 2011, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

CORE TERMS: arbitrator, hearing officer's, hearing officer, arbitration, notice, arbitrary and capricious, exceeded, bias, probable cause hearing, arbitration award, sub-specification, termination, shoulder, teacher's, process rights, credibility determinations, biased, verbal abuse, sense of fairness, inconsistencies, credibility, misconduct, conclusory, shocking, vacatur, vacate, gym, order vacating, sexual harassment, burden of proving

COUNSEL: [**1] For petitioner: Reinaldo Palencia, self-represented, Kew Gardens, NY.

For respondent City: Blanche Greenfield, Esq., Celine Chan, Michael A. Cardozo, Corporation Counsel, New York, NY.

JUDGES: Barbara Jaffe, JSC.

OPINION BY: Barbara Jaffe

OPINION

Barbara Jaffe, J.

By notice of petition dated September 23, 2010, petitioner moves pursuant to CPLR 7511 for an order vacating the hearing officer's award in the disciplinary proceeding brought by defendant Department of Education (DOE) against petitioner herein pursuant to Education Law § 3020-a. By notice of cross motion dated November 12, 2010, respondent moves pursuant to CPLR 306-b, 404(a), 3211(a)(7), (8), and 7511, and Education Law § 3020-a(5) for an order dismissing the petition. Petitioner opposes.

I. UNDISPUTED FACTUAL BACKGROUND

Petitioner, a tenured teacher, was employed by the Department of Education and was assigned to Martin Van Buren High School, District 26, in Queens, New York. (Pet.). In 2010, DOE, pursuant to Education Law § 3020-a, charged petitioner with neglect of duty, lack of fitness to perform his obligations, and conduct unbecoming his position, allegation as follows:

> Specification 1: On or about October 22, 2009, Respondent
>
> a) Approached Student A [**2] and placed his hands on Student A's shoulders.

b) Stated to Student A words to the effect of if Respondent was Student A's age, he would [*2] fuck Student A.

(Affidavit of Celine Chan, dated Nov. 10, 2010 [Chan Affid.], Exh. A).

A pre-hearing conference was held on March 19, 2010. (Id., Exh. B). A probable cause hearing was conducted on April 13, 2010. (Id., Exh. C). As a result of this conference, the hearing officer determined that there existed probable cause to believe that petitioner committed "verbal abuse of a sexual nature." (Id., Exhs. D, M). On April 16, 2011, a second pre-hearing conference was held, and hearings on the merits were held on April 19, 2010, April 21, 2010, May 12, 2010, May 17, 2010, and June 1, 2010. (Id., Exhs. E, F, G, H, I). During these hearings, petitioner, three students, and two teachers testified on petitioner's behalf. (Id.). Student A, two students who witnessed the incident, Dean John Friel, and Assistant Principal Gus Smardagas testified for DOE. (Id.). In addition, Student A's written statement to Friel, Friel's notes from his meeting with Student A and her two friends, and an Office of the Special Commission of Investigation (SCI) report were admitted [**3] in evidence. (Id.).

Student A testified that she went to the gym to pick up her bag and that petitioner put his right arm on her left shoulder and whispered to her the statement set forth in sub-specification 1(b). (Id.). She also testified that she told two friends about the incident soon after it happened, that they escorted her to Friel's office, that he met with and interviewed all three of them, and that he subsequently told Smardagas. (Id.). Student A also said that she had been interviewed by a SCI investigator on October 27, 2009. (Id.).

Although petitioner did not deny touching Student A's shoulder, he denied whispering the statement to her, and he pointed out a number of inconsistencies in her story, namely that his witnesses did not see her or her bag in the gym that day and that she claimed the incident occurred in one gym when he had been working in another. (Id.). He also claimed that one of Student A's witnesses had motive to lie because she had failed his class. (Id.).

Closing arguments were held on June 11, 2010 (Id., Exh. J), and the hearing officer issued his 16-page findings on August 31, 2010, determining that petitioner was guilty of both sub-specification 1(a) and [**4] 1(b). (Id., Exh. A). As to sub-specification 1(a), the hearing officer found that DOE satisfied its burden of proving that petitioner had touched Student A's shoulder. (Id.). As to sub-specification 1(b), he found that petitioner had made the statement, crediting Student A's testimony as credible and accurate because she quickly told others about the incident without embellishment, could not have misunderstood petitioner's statement, had no reason to fabricate the story, and testified consistently with Friel's notes and the SCI report. (Id.). The hearing officer determined that termination of petitioner's employment was the appropriate penalty for his "serious misconduct," as "his actions and statement constitute[d] classical sexual harassment" and "extreme verbal abuse," and such behavior demonstrated his lack of fitness as a teacher. (Id.).

II. CONTENTIONS

Petitioner claims that the hearing officer's decision was arbitrary and capricious and that he exceeded his authority by terminating his employment, as the record does not support so severe a penalty. (Pet.). He also argues that the hearing officer violated Article 75 procedures and that his due process rights were violated because [**5] the Board of Education (Board) did not vote on the charges against him, the hearing officer violated Education Law § 3020-a(4) in [*3] failing to consider whether or not DOE attempted to correct petitioner's behavioral problems, and the SCI investigation and probable cause

hearing were conducted in an unfair, biased manner. (Id.). Petitioner alleges that the hearing officer was biased in rendering his decision, as well. (Id.).

In opposition, and in support of its cross motion to dismiss, respondent argues that petitioner has failed to establish that the hearing officer exceeded his authority, rendered an arbitrary and capricious decision, or violated Article 75 procedures, as the record shows that he weighed witness credibility and carefully supported his findings, and petitioner has failed to identify the procedures allegedly not followed. (Memorandum of Law in Support of Respondent's Cross Motion to Dismiss the Petition, dated Nov. 12, 2010). Respondent also contends that petitioner has failed to show that the hearing officer was biased because he has provided only conclusory allegations of bias, and not clear and convincing evidence thereof. (Id.). It claims that petitioner has not shown [**6] that he was denied due process, either, as the record shows that he was provided adequate notice and an opportunity to be heard, and his allegations regarding the Board's failure to vote on the charges, the hearing officer's alleged failure to comply with section 3020-a(4), the insufficiency of the probable cause hearing, and the allegedly unfair, biased nature of the SCI investigation are without merit. (Id.). Also, because petitioner's behavior was so egregious, respondent argues that petitioner has not shown that his termination is shocking to one's sense of fairness. (Id.).

In reply, and in opposition to respondent's cross motion, petitioner argues that the hearing officer's decision was arbitrary and capricious, as the hearing officer failed to consider inconsistencies in Student A's testimony. (Affidavit of Reinaldo Palencia in Opposition to Respondent's Cross Motion to Dismiss, dated Jan. 4, 2011). He reiterates his alleged denial of due process rights and the severity of his termination. (Id.).

In surreply, and in further support of its cross motion, respondent maintains that petitioner has failed to establish any basis for vacating the award. (Reply Memorandum of Law in Further [**7] Support of Respondent's Verified Answer, dated Jan. 14, 2011).

III. ANALYSIS

A. Applicable Law

When a hearing is held pursuant to CPLR 3020-a, a party who was subject to the hearing may apply to vacate a hearing officer's decision pursuant to CPLR 7511, and the court's review shall be limited to grounds set forth therein. An award may be vacated on the application of a party who either participated in the arbitration or received a notice to arbitrate if the party demonstrates that his rights were prejudiced by:

> (i) corruption, fraud or misconduct in procuring the award;
>
> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession;
>
> (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 was not made; or
>
> (iv) failure to follow the procedures of this article.

(CPLR 7511[b][1]). [*4]

When a party must arbitrate, the arbitrator's decision is subject to closer judicial scrutiny, and 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." [**8] (Lackow v Dept. of Educ. of the City of New York, 51 AD3d 563, 567, 859 N.Y.S.2d 52 [1st Dept 2008]). The party challenging the arbitration award bears the burden of proving it invalid. (Id.).The scope of judicial review of an arbitration proceeding is extremely limited (Matter of Campbell v New York City Tr. Auth., 32 AD3d 350, 351, 821 N.Y.S.2d 27 [1st Dept 2006]), and the court must give deference to the arbitrator's decision (Matter of New York City Tr. Auth. v Transp. Workers' Union of Am., Local 100, AFL-CIO, 6 NY3d 332, 336, 845 N.E.2d 1243, 812 N.Y.S.2d 413 [2005]). In reviewing an award, the court is bound by the arbitrator's factual findings and interpretations of the agreement at issue (Matter of Brown & Williamson Tobacco Corp. v Chesley, 7 AD3d 368, 372, 777 N.Y.S.2d 82 [1st Dept 2004]), and may not "examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one" (Matter of New York State Correctional Officers and Police Benev. Assn., Inc. v State of New York, 94 NY2d 321, 326, 726 N.E.2d 462, 704 N.Y.S.2d 910 [1999]). Finally, if a motion to vacate an award is denied, the court must confirm the award. (CPLR 7511[e]).

B. Did petitioner prove that his rights were prejudiced?

1. Bias

An allegation [**9] of bias against an arbitrator must be established by clear and convincing evidence, showing more than the mere inference of partiality, and thus conclusory allegations of bias are insufficient. (5 NY Jur 2d, Arbitration and Award § 220 [2010]). Here, petitioner's allegations are conclusory, as the fact that the hearing officer decided against his interests does not demonstrate bias in and of itself. (See County of Niagara v Bania, 6 AD3d 1223, 1225, 775 N.Y.S.2d 744 [4th Dept 2004] [allegations of bias were wholly speculative and fact that adverse determination was made did not indicate that arbitrator was partial]).

2. Scope of arbitrator's power

To show that an arbitrator exceeded the scope of his power such that the award must be vacated pursuant to CPLR 7511(b)(1)(iii), a petitioner must demonstrate that the "arbitrator's award violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power." (Transp. Workers' Union of Am., Local 100, AFL-CIO, 6 NY3d at 336 [2005]).

Although petitioner claims that the hearing officer exceeded his authority by rendering a decision unsupported by the record, he is actually challenging the hearing officer's [**10] credibility determinations, and which does not constitute a ground for vacatur of an arbitration award. (See Saunders v Rockland Bd. of Co-Op Educ. Svces., 62 AD3d 1012, 1013, 879 N.Y.S.2d 568 [2d Dept 2009] ["When reviewing compulsory arbitrations in education proceedings . . ., the court should accept the arbitrator's credibility determinations, even where there is conflicting evidence and room for choice exists."]). The hearing officer based his decision on the evidence and carefully weighed witness credibility in determining that petitioner was guilty of both sub-specifications. Thus, the decision was not irrational. As petitioner has failed to show that the award violates public policy or that the hearing officer exceeded a specifically enumerated limitation on his power, there is no basis for vacatur of the award pursuant to CPLR 7511(b)(1)(iii).

3. Article 75 procedures

[*5] The procedures for an Article 75 arbitration hearing are set forth in CPLR 7506, pursuant to which an arbitrator must provide the parties at least eight days notice of the time and place of the hearing. At the hearing, the parties have the right to representation by an attorney and are "entitled to be heard, to present evidence, [**11] and to cross-examine witnesses," and the arbitrator must be sworn in before they do so. (CPLR 7506). "A defect in procedure is waived where the party applying to vacate the award based thereon continues with the arbitration with notice of the defect and without interposing objection to it." (5 NY Jur Arbitration and Award § 225).

Here, petitioner has failed to cite any specific procedure, and there is no evidence in the record demonstrating that the hearing officer violated any procedure or that petitioner objected. Therefore, there is no ground for vacatur of the award pursuant to CPLR 7511(b)(1)(iv).

C. Was the proceeding in accord with due process?

Petitioner claims that his due process rights were violated because the Board did not vote on the charges against him. Education Law § 2590-f(1)(b) permits community superintendents "to delegate any of her or his powers and duties to such subordinate officers or employees of his or her community district . . . ." Here, the Board properly permitted DOE to prefer charges against petitioner, and petitioner was not deprived of his due process rights as a result.

Moreover, there is no evidence in the record showing that petitioner requested that [**12] the hearing officer consider the extent to which DOE attempted to correct his behavioral problems. Section 3020-a(4)(a) expressly provides that an arbitrator must consider the employing board's attempts to correct petitioner's behavior "at the request of the employee," and absent such a request here, there is no violation.

Additionally, the record reflects that petitioner was provided notice of the hearing and was given an opportunity to be heard, and petitioner has failed to provide evidence of any due process violations with respect to the SCI investigation or the probable cause hearing.

D. Was the award supported by adequate evidence?

A review of evidence and testimony presented at the hearing shows that the hearing officer grounded his decision on the record. He took into account the inconsistencies in Student A's story and determined that they did not undermine her credibility in light of the fact that her account was corroborated by Dean Friel's notes and the SCI report and that she did not have a history of disciplinary problems. Therefore, the award was supported by adequate evidence. (See Wien & Malkin v Helmsley-Spear, Inc., 6 N.Y.3d 471, 846 N.E.2d 1201, 813 N.Y.S.2d 691 [2006] ["An arbitration award must be upheld [**13] when the arbitrator offer[s] even a barely colorable justification for the outcome reached.'"]).

E. Was the award arbitrary and capricious?

As outlined in his award, the hearing officer's determination was based upon the evidence and testimony presented at the hearing and his credibility determinations thereof. There is thus no basis for finding that his decision was arbitrary and capricious. (McGraham, 75 AD3d at 452 [finding award neither arbitrary nor capricious where arbitrator took into account entirety of record and made credibility determinations regarding petitioner teacher]).

F. Was the discipline imposed excessive?

The standard for reviewing a penalty imposed after a hearing held pursuant to Education Law § 3020-a is whether the punishment imposed "is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." (Bd. of Educ. of [*6]

Union Free School Dist. No. 1 of the

Towns of Scarsdale, et al v Mayor of Syracuse, et al., 34 N.Y.2d 222, 233, 313 N.E.2d 321, 356 N.Y.S.2d 833 [1974]). A result is shocking to one's sense of fairness when:

the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct [**14] . . . of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved.

(Id. at 234).

Here, petitioner was found guilty of touching Student A's shoulder and telling her that if her were her age, he would fuck her, actions the hearing officer determined to constitute "classical sexual harassment" and "extreme verbal abuse." Although termination is a severe penalty, it is proportionate to the egregious, highly inappropriate nature of petitioner's behavior, notwithstanding petitioners history with DOE. (See Matter of Rogers v Sherburne -Earlville Sch. Dist., 17 A.D.3d 823, 824-25, 792 N.Y.S.2d 738 [3d Dept 2005] [considering teacher's "lack of remorse and failure to take responsibility for his actions" in determining that termination was not excessive]).

V. CONCLUSION

Accordingly, [**15] it is hereby

ADJUDGED, that the petition for an order vacating the award is denied; it is further

ADJUDGED, that respondent's cross-motion for an order dismissing the petition is granted to the extent that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondent; it is further

ADJUDGED, that respondent, having an address at 100 Church Street, New York, New York 10007, does recover from petitioner, having an address at 84-38 130th Street, Kew Gardens, New York 11415, costs and disbursements in the amount of $, as taxed by the Clerk, and that respondent has execution therefor.

ENTER:

Barbara Jaffe, JSC

DATED: May 13, 2011

New York, New York