SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHLOMO S. HAGLER, J.S.C. PART 25

Justice

Index Number : 103370/2011

STERGIOU, JOANNA

vs.

NYC DEPARTMENT OF EDUCATION

SEQUENCE NUMBER : 001

VACATE OR MODIFY AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

Motion to/for _____

No(s). _____

No(s). _____

No(s). _____

Upon the foregoing papers, it is ordered that this motion is denied and the cross-motion is granted as per the attached separate written Decision & Order

FILED
MAR - 5 2012
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/21/2012

_____, J.S.C.
SHLOMO S. HAGLER, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

4. CROSS-MOTION IS: ☑ GRANTED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 25

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JOANNA STERGIOU,

Petitioner,

INDEX NO.: 103370/11

-against-

DECISION/ORDER

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

----------X

HON. SHLOMO S. HAGLER, J.S.C.:

Petitioner Joanna Stergiou ("Stergiou" or "petitioner") moves by notice of petition and verified petition to vacate an arbitration award dated February 16, 2011 ("Award") pursuant to CPLR § 7511. (See Exhibit "A" to the Petition.) Respondent New York City Department of Education ("DOE" or "respondent") opposes the petition and cross-moves to dismiss the petition and confirm the Award pursuant to CPLR §§ 404(a), 3211(a)(7), and 7510.

Background

Petitioner is a tenured teacher employed by the New York City Department of Education and was formerly assigned to P.S. 173, District 6 in Manhattan. Pursuant to Education Law § 3020-a, the DOE preferred five (5) specifications or charges against petitioner for insubordination, incompetent and inefficient service, misconduct, corporal punishment and conduct unbecoming her profession during the 2007- 2008 and 2008-2009 school years as follows:

SPECIFICATION 1: The [Petitioner] submitted a fraudulent doctor's note to substantiate her absence from work on Monday, April 27, 2009.

SPECIFICATION 2: On or about and between January to February 2009, [Petitioner] pulled Student A's hair.[1]

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1. At the June 11, 2010 hearing the DOE moved to amend Specification 2 to read, "On or about April 20, 2009, [Petitioner] pulled Student A's hair." That motion was granted.

SPECIFICATION 3: On or about and between November 2007 to January 2008, [Petitioner]:

a) Slapped Student B on the face.
b) Kicked Student B while he was seated on the carpet.
c) Hit Student B on the head with her hand and books.

SPECIFICATION 4: On or about December 2, 2008, [Petitioner] rendered an unsatisfactory lesson, as detailed in an observation report prepared by Assistant Principal Madrid Deratus, in that [Petitioner] failed to:

a) Monitor and ensure the class' full attention.
b) Provide the students with the opportunity to demonstrate their understanding of the strategy.
c) Provide clear and concise instructions on the steps students must follow in order to adequately practice the skill.
d) Encourage students to explain the steps they used when attempting the strategy.
e) Analyze reading materials in order to decide whether it was suitable for the students' learning needs.
f) Emphasize to the students that they should apply all skills learned as they are carefully reading the word.

SPECIFICATION 5: On or about April 29, 2009, [Petitioner] rendered an unsatisfactory lesson as detailed in an observation report prepared by Assistant Principal Madrid Deratus, in that [Petitioner] failed to:

a) Align the lesson plans that were submitted for the mini lesson and the guided reading instruction of the reading workshop to the lesson delivered to students.
b) Utilize a think-aloud technique when teaching students about verbal cues and how to elaborate words from reading text.
c) Provide prompts that would promote thinking skills on the part of the students.
d) Provide a second poem to the students in order to maximize their learning skills from the lesson.
e) Provide a model or written directions for the students to follow.
f) Involve the entire group of students by not monitoring their understanding of what was being read.
g) Introduce vocabulary prior to reading a selection in order to ensure that they understand the text.
h) Instruct the students to record their homework and ensure that they understand the assigned task.
i) Equip the students with a strategy or assisting them at recalling techniques when they did not know a word.

The DOE sought to terminate petitioner's employment.

As part of the agreement between the DOE and the United Federation of Teachers, compulsory arbitration was mandated and a hearing officer was selected to hold a hearing to

determine the DOE's charges against petitioner. A pre-hearing conference was held on March 9, 2010. Hearings were held on June 9, 11, 15, 2010, July 20, 2010, August 19, 2010, and November 9, 17, 19, 23, and 30, 2010. Both parties called many witnesses to testify at the hearing including C.S., a girl in the third grade who is referred to as "A" in Specification 2, and G.A, an eight year boy in the third grade who is referred to as "B" in Specification 3. The hearing officer permitted the two third graders to testify even though they were only eight years of age because she believed that they were competent witnesses. The hearing officer excluded the petitioner from observing said minor students' testimony, but permitted petitioner's counsel to cross-examine them. After a full evidentiary hearing, the hearing officer issued her Award finding that petitioner was guilty of Specifications 3b, c (only partial) 4, 5a, b, c, d, e, f, h, and i; and not guilty of Specifications 1, 2, 3a and 5g. The hearing officer imposed a penalty of an eight (8) month suspension without pay and directed completion of remediation courses to improve her teaching and classroom skills.

Vacature/Confirmation of an Arbitration Award

There is a strong public policy in New York State favoring arbitration as an efficacious method of dispute resolution. This policy is especially pronounced in the context of commercial matters as arbitration is routinely relied upon for an expeditious resolution of disputes by arbitrators with practical knowledge of the subject area. *(Matter of Goldfinger v Lisker*, 68 NY2d 225 [1986].) Courts are reluctant to set aside arbitration awards even when arbitrators err in deciding the law or facts "lest the value of this method of resolving controversies be undermined." (68 NY2d at 230.) The policy favoring arbitration gives rise to judicial deference because "it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded." (Id.) Consistent with this strong public policy, there are few grounds for vacating or modifying arbitration awards and they are narrowly applied.

It is well settled law that courts must confirm an arbitration award pursuant to CPLR § 7510, unless there are grounds to vacate or modify the award pursuant to CPLR § 7511. CPLR § 7511(b)(1) enumerates the following grounds for vacating an award where the parties participated in the arbitration:

> (i) corruption, fraud, or misconduct in procuring the award; or
>
> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
>
> (iii) an arbitrator, or agency or person making the award exceeded his [or her] 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 procedure in this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

The grounds for modifying an award are set forth in CPLR § 7511(c) as follows:

> 1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or
>
> 2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
>
> 3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

Where a dispute has been arbitrated pursuant to an agreement between the parties, the award may not be set aside unless it violates a strong public policy, is totally irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power. (*Matter of Town of Callicoon [Civil Serv. Empls. Assn., Town of Callicoon Unit]*; 70 NY2d 907, 909 [1987]); *Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100*, 14 NY3d 119, 124 [2010].)

Education Law § 3020-a limits judicial review of a hearing officer's determination and award to the above grounds as set forth in CPLR § 7511. However, inasmuch as the parties are subject to compulsory arbitration, the award must also satisfy further judicial scrutiny in that it "must

have evidentiary support and cannot be arbitrary and capricious." *(City School District of the City of New York v McGraham*, 17 NY3d 917, 19 [2011]) quoting *Matter of Motor Vehicle Accident Indemnity Corp. v Aetna Casualty & Surety Co.*, 89 NY 2d 214, 223 [1996].) The judicial review, therefore, partially implicates application of both Article 75 and 78 of the CPLR.

Arguments

Petitioner argues that the hearing officer failed to consider and address her retaliation defense under Civil Service Law § 75-b. Specifically, petitioner states that all the charges were "manufactured and trumped up" in retaliation for complaining that the Assistant Principal wrongly directed her and other teachers to increase the grades of failing students. (See Affirmation of James D. Moran, Esq., dated March 15, 2011, in support of the Petition, at ¶ 6.) Next, petitioner claims that the hearing officer permitted the testimony of eight (8) year old children to support the charge of corporal punishment without a proper and sufficient foundation to determine their competency to testify. Petitioner also argues that the hearing officer violated her due process rights when she excluded her from hearing and confronting these minor witnesses while they testified. Last, petitioner charges the hearing officer with bias as she allegedly engaged in "impermissible ex parte communications with attorneys for the Department of Education." (See Affirmation of James D. Moran, Esq., dated March 15, 2011, in support of the Petition, at ¶ 20.)

Retaliation Defense

Civil Service Law § 75-b prohibits public employers from taking any disciplinary action to retaliate against employees for reporting improper governmental action more commonly known as whistle-blowing. The employee may assert this defense before the designated arbitrator or hearing officer. The arbitrator or hearing officer is mandated to consider and determine the

employee's defense in the arbitrator's award or hearing officer's decision. (Civil Service Law § 75-b[3][a].) The failure to consider and determine the employee's affirmative defense of retaliation on the merits would require vacature of the award or the decision. *(Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85 [2010] [Arbitrator's holding that he did not have the authority to consider the employee's retaliatory defense was in excess of the arbitrator's power and warranted vacature of the award].)

Unlike *Kowaleski*, the hearing officer specifically acknowledged and reiterated petitioner's retaliatory defense five (5) times on pages 8, 9, 10, 23, and 34 of her Award. The hearing officer clearly considered the defense and squarely rejected the defense based on the credible evidence. In fact, the hearing officer determined that: "I do not credit [Petitioner's] argument that the unsatisfactory ratings for the December 2, 2008 and April 29, 2009 lessons were because Ms. Deratus [the Assistant Principal] was too inexperienced to properly evaluate the lesson or because Ms. Deratus intentionally set out to rate the lessons unsatisfactory." (See Exhibit "A" to the Petition, at p. 34.) Since the hearing officer properly considered and determined the petitioner's retaliatory defense on the merits, there would be no grounds to vacate the Award under CPLR § 7511(b)(1)(iii).

Incompetent Witnesses/Failure to Confront Witnesses

As stated above, the two minor children, G.A. and C.S., testified at the hearing in support of the DOE's corporal punishment charge. Petitioner now challenges the improper and inadequate foundation due to the incompetency of the children to testify as witnesses.[2] The courts are the gate-keepers in ensuring that only competent witnesses may testify under oath. Children are

2. Petitioner's counsel never objected on the record at the hearing to the improper or inadequate foundation due to the incompetency of the children to testify as witnesses.

no exception and they may testify after a preliminary examination gauging the capacity and intelligence of the child, the appreciation of the difference between right and wrong, and the obligations of taking an oath. As eloquently stated by United States Supreme Court Justice Brewer, "The decision of this question rests primarily with the trial judge [or hearing officer], who sees the proposed [child] witness, notices his manner, his apparent possession or lack of intelligence, as well as his understanding of the obligations of an oath." (*Wheeler v United States*, 159 US 523, 524-525 [1895].) The hearing officer conducted an adequate *voir dire* or preliminary examination into the witnesses competency and was able to gauge their level of understanding, ability to tell the truth and to take an oath. More telling that the hearing officer's line of inquiry was satisfactory, is that petitioner's counsel did not seek any *voir dire* whatsoever into the minor witnesses competency. The hearing officer also did not prompt the children to affirmatively answer her questions related to their competency, but merely inartfully informed them to verbalize their responses so that it may be recorded. Even assuming *arguendo* that the hearing officer did not have a proper foundation for children's testimony, the hearing officer was not bound by the strict rules of evidence and was permitted to elicit such testimony that she believed would be just and proper under the circumstances. (*Matter of Erin Constr. & Dev. Co. v Meltzer*, 58 AD3d 729, 730 [2d Dept 2009].)

For all intents and purposes, the hearing officer rejected C.S.'s testimony and credited G.A.'s testimony which was supported and corroborated by his mother, Kairis Castillo. Again, even assuming *arguendo* that G.A.'s testimony should have been excluded based on competency, the hearing officer could have solely relied on Ms. Castillo's "credible" testimony to support the corporal punishment allegations set forth in Specification 3.

This Court also finds unpersuasive that petitioner was denied her due process rights to hear the testimony or confront the eight (8) year old witnesses as petitioner does not have an

absolute right to do so in the context of an arbitration/administrative disciplinary hearing. (*Matter of Abdur-Raheem v Mann*, 85 NY2d 113 [1995]; *Matter of Murphy v Selsky*, 3 AD3d 631 [3d Dept 2004].) Notwithstanding the above, petitioner's counsel was permitted to remain in the hearing and to confront or cross-examine them on petitioner's behalf.

Bias

Petitioner alleges that the hearing officer had a bias against her because she had a "close relationship" with DOE, she was hesitant to grant petitioner an adjournment because she was allegedly "anxious to proceed with the proceeding," and she had *ex parte* communications with the DOE's counsel on the August 19, 2010 hearing date.

Petitioner's conclusory and general claims of bias that the hearing officer allegedly had a "close relationship" with DOE is unproved and unsupported speculation. (*Matter of Infosafe Sys. [International Dev. Partners]*, 228 AD2d 272 [1st Dept 1996]; *Cruz v New York City Dept. of Educ.*, 26 Misc 3d 1208[A] [Sup Ct, New York County 2010] [Scarpulla, J.].) The refusal to grant an adjournment generally rests within the sound discretion of the hearing officer and should not be disturbed. (*Harwyn Luggage v Henrry Rosenfeld, Inc.*, 90 AD2d 747 [1st Dept 1982] *affd* 58 NY2d 1063 [1983].)

Last, petitioner's claim of the hearing officer's bias or misconduct due to impermissible *ex parte* communications with the DOE's counsel on an August 19, 2010 hearing date is also unavailing. The communication occurred when petitioner's counsel did not appear at a previously scheduled hearing date on August 19, 2010, seemingly because he had earlier obtained a stay of the hearing from the Supreme Court pending the determination of a dispute between the petitioner and her out-going attorney. On that previously scheduled hearing date, the hearing officer and DOE's counsel merely innocuously commented as to the length of the stay of the hearing since

petitioner's counsel failed to inform either the hearing officer and DOE's counsel that Supreme Court issued a stay a day before the scheduled hearing date. Such an exchange between the hearing officer and DOE's counsel occurred as a result of petitioner and her counsel's choice not to participate at the previously scheduled hearing date on August 19, 2010, and there is "nothing to substantiate that there were improper ex parte contacts." *(Hollander v New York City Dept. of Educ.*, 2009 Slip Op. 31399[U], [Sup Ct, New York County 2009, Figueroa, J.].)

Arbitrary and Capricious Standard

As stated above, inasmuch as the parties are subject to compulsory arbitration, the award must also satisfy further judicial scrutiny in that it must have evidentiary support and cannot be arbitrary and capricious. In a lengthy thirty-eight page Award, the hearing officer engaged in a thorough analysis of the specifications or charges, the positions of the parties, the facts and circumstances, and then made reasonable findings based on the credibility of the witnesses to support the Award. The penalty imposed on petitioner is not shocking to the conscience or disproportionate to the charged offenses. Therefore, it is clear that the Award is rational, has evidentiary support and is not arbitrary and capricious.

Conclusion

Accordingly, it is

ORDERED and ADJUDGED, that the petition is denied and the proceeding is dismissed with prejudice; and it is further

ORDERED and ADJUDGED, that the cross-motion is granted to the extent of confirming the Award rendered in favor of respondent and against petitioner.

The foregoing constitutes the decision and order of this Court. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: February 21, 2012
New York, New York

Hon. Shlomo S. Hagler, J.S.C.