[* 1].

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN PART 52

Index Number : 116085/2005
DUNCAN, HEATHER
vs
KLEIN, JOEL
Sequence Number : 001
ARTICLE 78

INDEX NO. 116085/05
MOTION DATE 3/15/06
MOTION SEQ. NO. 001
MOTION CAL. NO. 6

The following papers, numbered 1 to ____, were read on this motion to/for Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	To 5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, ~~it is ordered that~~ this ~~motion~~ petition is decided in accordance with the annexed decision, order + judgment.

Dated: 5/22/06

J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
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HEATHER DUNCAN,
Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules annulling determination to revoke certification

-against-

JOEL KLEIN, as Chancellor of the New York City Department of Education,
Respondent.

Index Number 116085/2005
Oral Arg. Date Mar. 15, 2006
Mot. Seq. No. 001
Mot. Cal. No. 6

DECISION, ORDER AND JUDGMENT

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Papers considered in review of this petition to annul determination:

Papers	Numbered
Notice of Petition, Affidavits, and Memo of Law	1,2
Verified Answer and Memo of Law	3,4
Reply Memorandum	5

PAUL GEORGE FEINMAN, J.:

In this Article 78 proceeding, petitioner seeks to annul the determination by respondent to revoke her certification as a school bus escort and to reimburse her for back pay lost since April 1, 2005, pursuant to CPLR 7803(3) and (4). For the reasons which follow, the petition is dismissed in its entirety.

Factual and Procedural Background

Petitioner was a school bus escort certified on about June 17, 1999, by respondent Board

of Education of the City School District of the Cit of New York (DOE). She was employed by a private bus company which operated under a contract with the New York City Department of Education. On March 29, 2005, a complaint was filed against petitioner with respondent's Office of Pupil Transportation (OPT). The "customer service complaint form," indicates that an assistant principal alleged "unacceptable behavior" by petitioner, in that while on the bus, a 19-year-old autistic student named Willy hit petitioner and she hit him back with her umbrella.[1]

On March 30, 2005, a DOE investigator spoke with a Ms. Rivas, a bus "para[professional]" assigned to another student who was on the same bus where the incident occurred, and who the school's principal thought to be "very reliable." Ms. Rivas told the investigator that she saw petitioner hit the approximately 300-pound Willy, "several times" or "three times" with an umbrella. Ms. Rivas did not know what triggered this incident, but she told petitioner to stopping hitting him. She also mentioned that petitioner is "harsh with the children, yells at them and threatens them," including the student that the paraprofessional is assigned to monitor.

On March 31, 2005, the investigator spoke with the driver of the bus who did not see the incident, although he heard "a commotion" behind him and heard the paraprofessional say "Why did you hit him?" The driver stated that Willy was in his seat during the incident, that he never gets up or takes off his seatbelt.[2] He also stated that petitioner is "harsh" with the passengers,

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[1]Petitioner's exhibits are not numbered. This decision, when referring to exhibits, describes the exhibit at issue by title and or date.

[2]In his written statement, the driver stated that Willy had been hitting the back of the driver's seat and he told Willy to stop it. He then heard petitioner say "do not hit me," and then heard the paraprofessional say "why did you hit him." When he looked in the mirror, the driver saw Willy biting his hands.

"yells at them and gets them upset." On March 31, 2005, the investigator spoke with petitioner, who denied hitting the student. She said that Willy was reaching across the aisle, trying to hit her, that her umbrella fell to the floor and another student picked it up and handed it to her, after which she raised her hand to block Willy's hand. According to the investigator's notes, petitioner denied having trouble controlling the students, but stated that the bus paraprofessional does not like her due to some past interactions, and "has had it in for her." She also submitted a written statement that same day, in which she wrote that Willy was trying to hit her in the face and that she "blocked him with the umbrella and he got hit on his arm."

On April 1, 2005, the investigator spoke with "the one passenger on the run who is able to clearly communicate verbally," a 15-year-old autistic student. When asked about the events of the day before, the student initially stated that the new driver took a different route from the normal one, upsetting some of the passengers. The investigator then asked whether Willy had been hit. The student said yes, and when asked who had hit Willy, he replied that petitioner had. When asked if she had hit Willy with her hand, the 15 year old said no, and when asked what was in her hand, he said an umbrella.

According to the investigator's report, based on these interviews, he determined that there was a preponderance of evidence to show that petitioner had hit Willy with an umbrella. The investigator apparently presented the facts of the investigation to the seven-member disciplinary panel who voted unanimously to revoke petitioner's certification. The Director of OPT thereafter concurred as did the Executive Director of OPT, who revoked petitioner's certification.

On April 1, 2005, respondent issued a letter to petitioner stating that the investigation of the report that she has used corporal punishment by hitting the boy with an umbrella was found,

by "a preponderance of the evidence" to be true, and revoking her certification. The letter further stated that she had 11 days to request an Office of Appeals and Review (OAR) disciplinary hearing "concerning OPT's findings and recommendations."[3] On April 4, 2005, petitioner requested a hearing by facsimile transmission. On April 24, 2005, she completed the OPT "notification and summons response form," indicating that she would appear at the disciplinary conference "prepared and ready to proceed with my defense." She was then directed by a "notification of complaint and summons to appear before a disciplinary conference, appeal of revocation of certification" to appear on June 22, 2005, at the Long Island City office of OPT, for a disciplinary conference "at which time evidence and testimony will be received to establish whether the allegations have merit and, if so, to determine whether, and to what extent, disciplinary action is warranted." She was represented by her counsel, an attorney for Local 1181 of the Amalgamated Transit Union, AFL-CIO.

At the hearing, among the witnesses who testified were the investigator, the paraprofessional, and respondent.[4] The investigator testified that he believed the paraprofessional and the bus driver and did not believe petitioner's explanation as concerned the umbrella (Tr. 39-40). He had been told by the assistant principal that the para was "a very reliable person" (Tr. 30), and that the 15 year old was "reliable" and could "give a reliable statement" (Tr. 43). During cross-examination, he was presented with copies of 15 complaints made by petitioner over a six-month period, 10 of which concerned the paraprofessional, and the

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[3]The notice referred to "Chancellor's Regulation C-100"

[4]References to the hearing transcript which is included in the petitioner's exhibits, are referred to by page number and designated herein as "Tr. xx."

others concerning various students on the bus, including Willy. He testified that he had not previously known about these other complaints, but testified that they would not have influenced his determination and that he would still have found that the incident occurred as the paraprofessional stated (Tr. 56-60, 62). The paraprofessional testified that she heard a commotion, looked up to see petitioner "whacking" Willy three times on his shoulder with her tote umbrella, and that Willy either had his hands in his lap or was at the very least not hitting her back (Tr. 79-80, 87-88). She refused to acknowledge that there was anything "personal" between petitioner and her, although she conceded that certain incidents alleged by petitioner had taken place (Tr. 81, 92-94). Petitioner testified that Willy reached across the aisle of the bus and hit her thighs, she rebuked him and swatted at the air, at which moment the bus hit a bump and her umbrella fell forward. Another student picked up the umbrella and handed it to her, after which Willy tried to grab it from her hand. She stated that he never actually touched the umbrella although it "tapped" him as she was trying to get it away (Tr. 102-104). She also testified that in the past, Willy has hit the drivers of the bus and when he gets upset, he rocks the back of the driver's seat, behind which he sits, and so she attempts to calm him down by speaking soothingly to him about going home (Tr. 106). She admitted to raising her voice to the other students but only in order to get them to settle down (Tr. 106-107). She denied being "hard" on the students and said the bus driver was close with the paraprofessional and thus willing to lie about her (Tr. 109-110).

On August 8, 2005, the hearing officer issued his report and recommendation. In his findings of fact, he noted the existence of personal problems between petitioner and the paraprofessional and the fact that the bus driver did not actually see the events. He also

apparently discounted the15-year-old student's account to the investigator. He found that "the evidence of corporal punishment is almost non-existent," but that there was an unprofessional "pulling/pushing match. . . over the umbrella." He further stated that "what sticks out in this case" is that nothing was done by the school concerning petitioner's many complaints concerning the paraprofessional. He recommended that the charge against petitioner be dismissed but that as a penalty for her "poor judgment," she not be given back pay.

Subsequently, on September 15, 2005, respondent's office wrote to petitioner stating that upon receipt of the report of the "officially designated committee" regarding the June 22, 2005 disciplinary conference held pursuant to Chancellor's Regulation C-100, respondent concurred with OPT that her certification should be permanently revoked.

Petitioner seeks to annul the determination by respondent to revoke her certification as a school bus escort on the grounds that it was not based on substantial evidence, was against the weight of evidence adduced at the hearing, arbitrary and capricious, an abuse of discretion, and constitutes excessive and unduly severe punishment. Respondent argues that its decision should be upheld as it was proper, reasonable, and in conformity with all applicable laws and statutes. It also argues that the question of substantial evidence is improperly before the court.

Legal Analysis

A proceeding brought pursuant to CPLR Article 78 may only address four questions. The two here at issue are, first, whether the determination at issue was made in violation of lawful procedure, affected by error of law or was arbitrary or capricious or an abuse of discretion (CPLR 7803[3]) and second, whether the determination, made as a result of a hearing at which evidence was taken, pursuant to direction by law, was on the entire record supported by substantial

evidence (CPLR 7803[4]). Where the issue of substantial evidence is raised, the court must first dispose of other objections which could terminate the proceeding without reaching the substantial evidence question, and only where the matter is not terminated shall the court make an order transferring the matter to the Appellate Division (CPLR 7804[g]).

Here, the crux of petitioner's argument is that respondent irrationally and arbitrarily refused to uphold the findings and recommendations of the hearing officer as concerns the revocation of her certification.[5] She further argues that respondent has not established substantial evidence that she engaged in corporal punishment.

Respondent argues that it is not by statute or law that a disciplinary conference is provided to workers whose bus escort's certification is suspended or revoked, but rather by DOE procedures set forth in Chancellor's Regulation C-100 (Memo of Law, p. 8; see also Resp. Letter of 9/15/05 to Pet., citing "appeal under Chancellor's Regulation C-100"; Hearing Tr. p. 4 ["we are meeting pursuant to Part 2 of chancellor's regulation C-100 to review the findings and recommendations of penalty"]). Thus, argues respondent, "substantial evidence" review under CPLR Art. 7803(4) is not applicable as the conference was not "pursuant to direction by law," and any determination must be reviewed under the "arbitrary and capricious" standard of CPLR 7803(3).[6] Although respondent does not point to any published decision directly on point to support its position, nevertheless its argument is persuasive upon examining analogous holdings such as in *Matter of Kaufman v Anker*, 42 NY2d 835, 836-837 (1977) (probationary teacher's

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[5]She also argues, however, that the hearing officer's recommendation that she not be given back pay was an abuse of discretion.

[6]Petitioner does not address this issue.

termination is governed by the by-laws of the New York City Board of Education which provide for an advisory hearing; proof is heard not by the chancellor but by a hearing committee; the chancellor does not have to follow the committee's recommendations; accordingly the advisory hearing is not within the contemplation of CPLR 7803[4]) and *Matter of Arrocha v Board of Educ. of City of New York*, 93 NY2d 361, 363 (1999) (teaching license); see also, *Matter of von Gizycki v Levy*, 3 AD3d 572, 573-574 (2d Dept. 2004) (termination of non-tenured teacher's certificate includes a right of review contained in the by-laws and Special Circular 31R issued by the Chancellor of the Board of Education and is reviewed by the court under the arbitrary and capricious standard); *Lovinger v New York City Dept. of Educ.*, 7 Misc. 3d 1016A, 801 NYS2d 236 (Sup. Ct., Kings County 2005) (review of termination of special education teacher based on whether the Chancellor's decision was arbitrary and capricious).

It is a well-settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept. 1983]). The test of whether a decision is arbitrary or capricious is "'determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609). Furthermore, an arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Matter of Pell*, at 232).

Here, it cannot be found that respondent's determination was arbitrary and capricious.

Although the evidence against petitioner is based on testimony of the bus driver who did not actually see any of the interaction and the paraprofessional's testimony may have been colored by her bias against the petitioner based on past experiences, the petitioner's own version of the facts does not clearly establish that she was acting to protect herself from physical injury or to restrain Willy "from interfering with the orderly exercise and performance of school district functions." (Ver. Ans. Ex. 1, Chancellor's Reg. A-420, sec. 2 [1, 3], setting forth what "corporal punishment" shall not encompass]). Petitioner initially told the investigator that she raised her hand to block Willy's hand as he was trying to hit her. She wrote in her statement for the investigator that he was trying to hit her in the face and that her umbrella came into contact with his arm. She testified that Willy tried to grab the umbrella from her hand. The testimony proffered by the other witnesses, when balanced by petitioner's somewhat inconsistent story, would perhaps not prove compelling to this court were it exercising a *de novo* review of the evidence, but it provides a sufficient basis for respondent to disbelieve petitioner's version of the facts and to find that she actively hit Willy, rather than merely defended herself. Moreover, it is axiomatic that credibility determinations are best made by the person who actually sees and hears the witness, rather than the court who reviews the record (*see, Berenhaus v Ward*, 70 NY2d 436, 443 [1987] [hearing officer]); *Lindemann v American Horse Shows Assn.*, 222 AD2d 248, 250 [1st Dept. 1995] [administrative fact finder]). Here, where there are two fact finders, namely the investigator and the hearing officer, the reviewing court may not pick and choose which one to believe but can only determine whether the agency decision was rationally based (*see Zubal v Ambach*, 103 AD2d 927 [3d Dept.1984]).

Reviewing courts are "not empowered to substitute their own judgment or discretion for

that of an administrative agency merely because they are of the opinion that a better solution could thereby be obtained." (*Peconic Bay Broadcasting Corp. v Board of App.*, 99 AD2d 773, 774 [2d Dept. 1984]). The scope of review does not include "any discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed by the Authority" and that "the sanction must be upheld unless it shocks the judicial conscience" (*Featherstone v Franco*, 95 NY2d 550, 554 [2000], citing *Matter of Pell v Board of Educ.*, 34 NY2d at 232-234). Once the court has found a rational basis exists for the determination, its review is ended (*Matter of Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 277-278 [1972]).

Here, it should be emphasized that it is not for this court to substitute what it might have done were it the trier of fact in the first instance. Rather, the court's role is limited to determining whether there is any reasonable basis to support respondent's determination and action. The record does not support a determination that the respondent's actions were either arbitrary or capricious. Accordingly, the petition must be denied. In addition, the determination to revoke petitioner's school bus escort certification does not shock the judicial conscience and is not an abuse of discretion (*Featherstone v Franco*, 95 NY2d at 554; *Matter of Pell v Board of Educ.*, 34 NY2d at 233]). It is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision, order and judgment of this court.

ENTER:

J.S.C.

Dated: May 22, 2006
New York, New York