

Matter of Storman v New York City Dept. of Educ.

2007 NY Slip Op 33648(U)

October 26, 2007

Supreme Court, New York County

Docket Number: 0118337/2006

Judge: Marcy S. Friedman

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: **MARCY S. FRIEDMAN**

PART 57

Index Number : 118337/2006

STORMAN, GLENN

vs
NYC DEPT. OF EDUCATION

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this ~~motion to/for~~ Art 78 petition

Petition
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2
3

Memos of Law M1 - M4

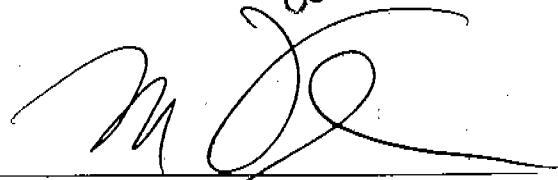
Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this ~~motion~~ petition is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED
NOV 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10-26-07



MARCY S. FRIEDMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

In the Matter of
GLENN STORMAN,

Index No.: 118337/06

Petitioner,

DECISION/ORDER

- against -

NEW YORK CITY DEPARTMENT OF
EDUCATION,

Respondent.

_____ x

In this Article 78 proceeding, petitioner Glenn Storman challenges a determination of respondent New York City Department of Education (“DOE”), rating his performance “unsatisfactory.” This determination, dated August 14, 2006, by Deputy Chancellor Andres Alonso, as designee for Chancellor Joel I. Klein, stated in full: “Please be advised that the appeal of Mr. Glenn Stroman [sic] from the rating of ‘Unsatisfactory’ for the period ending June 2005 has been denied and the said rating is sustained as a consequence of a substantiated incident of corporal punishment.” (Ex. B to Petition.)

The threshold issue is whether this proceeding must be transferred to the Appellate Division pursuant to CPLR 7804(g), which requires that where a substantial evidence issue is raised, “the court shall make an order directing that it be transferred for disposition” to the Appellate Division. CPLR 7803(4) defines a substantial evidence issue as “whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to

direction of law is, on the entire record, supported by substantial evidence.” Case law has clarified that:

Evidentiary hearings that are constitutionally required and have some of the characteristics of adversary trials, including cross-examination, result in ‘quasi-judicial’ determinations that are subject to article 78 review in the nature of certiorari, where the ‘substantial evidence’ inquiry is applicable. Hearings that are not required as a matter of due process, in contrast, result in what have been termed ‘administrative’ determinations, which are subject to review only by mandamus and are governed by the ‘arbitrary and capricious’ standard.

New York City Health & Hosps. Corp. v McBarnette, 84 NY2d 194 [1994] [internal citations omitted]; Matter of Street Vendor Project v City of New York, 43 AD3d 345 [1st Dept 2007].)

Here, the Chancellor’s determination was made after a “review” by a committee designated by the Chancellor pursuant to § 4.3.1 of the By-Laws of the Panel for Educational Policy of the DOE (“By-Laws”). Section 4.3.3 of the By-Laws provides that the review shall afford the employee an opportunity to appear with a collective bargaining representative, and the right to call and confront witnesses and introduce relevant evidence. In petitioner’s case, such a hearing was held before the committee on May 23, 2006. After this hearing, the committee issued a report to the Chancellor, dated July 27, 2006, recommending denial of petitioner’s appeal. (Ex. 6 to Answer.)

While the hearing before the committee bore many of the earmarks of a judicial hearing, the Chancellor was not present at and did not conduct the hearing. Moreover, pursuant to section 4.3.1 of the By-Laws, the findings and recommendations of the committee were not binding on the Chancellor but, rather, were to be “submitted to the Chancellor for a final decision” (emphasis in original). As the DOE hearing procedure is “advisory rather than determinative,”

the hearing was not one pursuant to direction by law - that is, one within the contemplation of CPLR 7803(4). (See Matter of Kaufman v Anker, 42 NY2d 835 [1977] [DOE committee hearing on termination of probationary teacher pursuant to By-Laws]; Matter of Bigler v Cornell Univ., 266 AD2d 92 [1st Dept 1999], lv dismissed 95 NY2d 777 [2000] [advisory hearing not hearing pursuant to direction by law].) The standard for review of the Chancellor's determination is therefore not whether it was supported by substantial evidence but whether it was arbitrary and capricious. (Matter of Kaufman v Anker, 42 NY2d at 837.) The proceeding should therefore be determined by this court rather than transferred to the Appellate Division.

On this record, however, the court is unable to determine whether the Chancellor's determination was arbitrary and capricious or had a rational basis. The August 14, 2006 determination upheld petitioner's unsatisfactory rating based on the conclusion that there was a substantiated incident of corporal punishment. The determination does not set forth any facts in support of this conclusion. Notably, it appears to be inconsistent with the July 27, 2006 committee report to the Chancellor after the hearing. This report noted that petitioner's principal had rated petitioner unsatisfactory based on a substantiated incident of corporal punishment. However, the finding made by the committee was not of a substantiated incident of corporal punishment but of an "inappropriate incident." (Report, Findings Section.) Moreover, in the transcript of the hearing, DOE's own investigator testified that he did not believe that the incident "rose to the level of corporal punishment," but constituted "inappropriate physical contact." (Hearing Transcript at 38-39 [Ex. E to Petition].)

A remand to an agency is proper "when further agency action is necessary to cure deficiencies in the record, such as when an agency fails to make appropriate findings." (Matter

of Police Benevolent Assn. v Vacco, 253 AD2d 920, 921 [3d Dept 1998], lv denied 92 NY2d 818.) As the Court of Appeals has explained, “[f]ailure of the agency to set forth an adequate statement of the factual basis for the determination forecloses the possibility of fair judicial review and deprives the petitioner of his statutory right to such review.” (Matter of Montauk Improvement, Inc. v Proccacino, 41 NY2d 913, 914 [1977]; Matter of Simpson v Wolansky, 38 NY2d 391, 396 [1975].)

Here, a remand is necessary for findings of fact. Given the committee’s failure to find that the incident rose to the level of corporal punishment, the remand should also address whether the rating was proportionate to the offense. (See generally Matter of Pell v Board of Educ., 34 NY2d 222 [1974].)

It is accordingly hereby ORDERED that the petition is granted to the extent of remanding the matter to respondent for issuance of a determination containing findings on which the determination is based.

This constitutes the decision and judgment of the court. If review of the determination upon remand is sought, a new Article 78 proceeding shall be brought.

Dated: New York, New York
October 26, 2007

ENTER:

Marcy Friedman
MARCY FRIEDMAN, J.C.

FILED
NOV 13 2007
COUNTY CLERK'S OFFICE
NEW YORK