

**Matter of Vilfort v New York City Dept. of
Educ.**

2008 NY Slip Op 33056(U)

November 12, 2008

Supreme Court, New York County

Docket Number: 110395/08

Judge: Eileen A. Rakower

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

PRESENT: EILEEN A. RAKOWER
J.S.C.

PART 5

Index Number : 110395/2008
VILFORT, YANICK
vs.
NYC DEPT. OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1, 2
3, 4
5

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

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

FILED

NOV 14 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/12/08



EILEEN A. RAKOWER J.S.C.

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: PART 5

-----X
In the Matter of the Application of
YANICK VILFORT,

110395/08

Petitioner,

-against-

DECISION
and ORDER

THE NEW YORK CITY DEPARTMENT
OF EDUCATION and JOEL I.KLEIN
Chancellor

Respondents.

FILED

NOV 14 2008

Mot. Seq. 001

COUNTY CLERK'S OFFICE
NEW YORK

For an Order and Judgment Pursuant to CPLR
Article 78

-----X
HON. EILEEN A. RAKOWER:

Petitioner, Yanick Vilfort ("Vilfort"), was formerly employed as a bus driver by a private bus company, Grandpa's Bus Company, Inc. ("Grandpa's") which contracts with the New York City Department of Education ("DOE") to transport students to DOE schools. Vilfort brings this Article 78 petition seeking to annul the DOE's revocation of her school bus driver certification.

The DOE's Office of Special Investigations ("OSI") investigated and substantiated an allegation against Vilfort, that she caused corporal punishment to be used against a student in an incident allegedly occurring on November 21, 2007. The Office of Pupil Transportation ("OPT") then permanently revoked petitioner's school bus driver certification based on the substantiated allegation and informed Vilfort of such by a letter dated December 10, 2007. Petitioner requested a hearing pursuant to Chancellor's Regulation C-100, which was held before Hearing Officer Joann Rabot ("Rabot") on February 29, 2008. The hearing officer upheld the OPT's finding, recommending that permanent revocation of petitioner's school bus driver certification was appropriate under the circumstances. Kathleen Grimm ("Grimm"), DOE Deputy Chancellor, by letter dated April 2, 2008, informed Vilfort of Grimm's

concurrence with the OPT determination. The final determination resulted in Vilfort being placed on the DOE "invalid" list.

Petitioner now challenges the DOE's decision, by an Article 78 petition dated July 29, 2008, served August 6, 2008, and filed with the Court on August 8, 2008. Petitioner urges that the hearing officer reached a factually inaccurate determination as a result of inaccurate and/or incomplete evidence introduced at the hearing by Investigator Dennis Harrington ("Harrington") and by David Giancarlo ("Giancarlo"), a social worker employed by Brookdale Hospital. Petitioner contends that the ultimate determination on this matter is not supported by substantial evidence.

Respondents cross-move to dismiss on two grounds: (1) that the petition is time-barred to the extent it seeks to challenge petitioner's termination from employment and (2) that the petition fails to state a cause of action. Respondents request an entry of judgment in their favor, as well as costs, fees, disbursements and such other and further relief as the Court deems just and proper. Respondents' motion to dismiss also asserts that this court's review must consider only whether the DOE's determination was "arbitrary and capricious," a lower standard than that of whether it was supported by "substantial evidence."

The First Department has stated that "A CPLR article 78 proceeding against a public body must be commenced within four months 'after the determination to be reviewed becomes final and binding upon the petitioner.'" (*Rocco v. Kelly* 20 A.D.3d 364, 365-366 [First Dept. 2005], citing *Matter of Yarborough v. Franco*, 95 NY2d 342 [2000]; see also CPLR §217[1].) The court further noted "An administrative determination becomes 'final and binding' when the petitioner seeking review has been aggrieved by it." (*Id.* at 366, citing *Yarborough*).

In *Edmead v. McGuire* (490 N.E.2d 853, 854 [1986]), in language similar to the First Department's articulation of the standard in *Rocco*, the Court of Appeals identifies an administrative determination as having become final and binding when it "has impact upon the petitioner who is thereby aggrieved" (*Id.*) and more recently it clarifies that "...the statutory period does not run until the aggrieved party is notified of the final and binding determination and that determination has an impact on the aggrieved party." (*Adler v. The Office of Court Administration of the Unified Court System of the State of New York* 9 Misc.3d 1109(A) at *4 [2005]; see also *R. Bernstein v. P. Popolizio* (97 A.D.2d 735 [First Dept. 1983], in which First Department explained that an administrative determination does not become final and binding

within the meaning of §217 “until notice of the determination is given.”). In the *Matter of Carter v. State of New York* (95 N.Y.2d 267, 270-272 [N.Y. 2000] citing, *Muncy v. Nassau County Civ. Serv. Comm.*, 44 N.Y.2d 352, 358 [N.Y.1978].), the Court held that petitioner is aggrieved once an agency has issued an unambiguously final decision that puts the petitioner on notice that all administrative appeals have been exhausted.

Under the standards articulated above, the statute of limitations on petitioner’s claim began to run with Grimm’s April 2, 2008 letter informing Vilfort of the final revocation of her certification pursuant to the recommendation of the hearing officer, as adopted by the DOE. The time ceases running when the action is commenced and the index number is assigned. (*Gotay v. Breitbart*, 2008 WL 4821764 [1st Dept., 2008]) Here, the cashier stamp on the request for judicial intervention is dated August 8, 2008 at 2:22 pm, which corresponds with the filing of the petition, stamped by the court on the back of the petition, and is the date the index number was purchased. The filing of a notice of petition, stamped by the County Clerk as received July 30, 2008 “Not Compared with Copy File” and not bearing an index number, does not commence the Article 78 Petition.

Assuming the Article 78 Petition were timely filed, however, petitioner’s argument that the determination must be annulled because it was not supported by substantial evidence is unavailing. The DOE review of a hearing conducted “...by the ‘disciplinary conference,’ pursuant to the Chancellor’s Regulation C-100...was properly reviewed under the arbitrary and capricious rather than the substantial evidence standard.” (*In the Matter of Heather Duncan v. Joel Klein as Chancellor of the New York City Department of Education*, 38 A.D.3d 380 [First Dept. 2007], citing *Matter of Von Gizyki v. Levy* 3 AD3d 572, 574 [Second Dept. 2004]. See also *Downs v. Klein* 15 Misc.3d 1141(A) [Sup. Ct. N.Y. County 2007] [Reiterating that the appropriate standard of review of an OED determination - specifically an OPT determination - is “...whether the agency determination was *arbitrary and capricious* or affected by an error of law.”).].

As a general matter, the “[j]udicial review of an administrative determination is confined to the ‘facts and record adduced before the agency’.” (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency’s determination but must decide if the agency’s decision is supported on any reasonable basis. (*Matter*

of *Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [First Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]). Additionally, if a penalty is imposed by the agency, "the sanction must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." (*Featherstone v. Franco*, 95 NY2d 550, 554 [2000]).

Here, the evidence considered by the hearing officer charged petitioner with instructing other students (all classified special education students between the ages of five and eleven and attending Public School 368 at Brookdale Hospital) to restrain and "beat up" Marvin F. ("Marvin"), a six year old passenger on the bus. Petitioner alleges that Marvin's grandmother or mother made the original complaint¹ and was not present at the hearing. The evidence evaluated by the panel consisted of statements of other students on the bus as compiled and presented by Harrington and Giancarlo. Petitioner asserts that Giancarlo obtained written statements from four of the eleven students who rode the bus and that Harrington later obtained verbal statements from three of the four students from whom Giancarlo. Petitioner urges that the statements of the student witnesses presented at the hearing should not have been considered, since they were second hand, through interview notes and testimony of an investigator and social worker. Petitioner ignores the fact that hearsay evidence is admissible as competent evidence at an administrative hearing. (*Aliberti v. O'Connor*, 231 AD2d 472 [1st Dcpt. 1996])

The hearing officer found that the student statements supplied "...provided significant, credible evidence that the incident did occur as originally reported," and further notes that "...Investigator Harrington's interviews with the students more than two weeks after their original statements yielded no change in their accounts." Under the circumstances presented here, it cannot be said that the DOE's, decision was arbitrary, capricious or an abuse of discretion. Accordingly, the petition must be denied.

¹ Some of petitioner's papers refer to the complainant as Marvin's grandmother and others as his mother.

Wherefore, it is hereby

ORDERED that petitioner's Article 78 petition is denied; and

ORDERED that respondents' cross-motion to dismiss is granted.

This constitutes the decision and order of the court.

All other relief requested is denied.

Dated: November 12, 2008



EILEEN A. RAKOWER, J.S.C.

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