[* 1]

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

PRESENT: Cahn PART 49

Justice

Index Number : 113925/2007

DIAMOND, ADRIAN

VS.

BRD OF EDUCATION OF THE CITY

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
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 IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . . .

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 11/3/08

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: IAS PART 49

----------X

In the Matter of the Application of

ADRIAN DIAMOND,

Petitioner,

- against -

Index No. 113925/07

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and JOEL I. KLEIN, as Chancellor of the City School District of the City of New York,

Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

----------X

HERMAN CAHN, J.:

Petitioner Adrian Diamond, who was formerly employed as a substitute teacher by respondent The Board of Education of the City School District of the City of New York, a/k/a the New York City Department of Education (the Board), brings this Article 78 proceeding to vacate respondent's determination terminating Diamond's New York City teaching licenses and certificates.

FACTUAL ALLEGATIONS

Diamond was employed by the Board as a non-tenured, per diem, substitute teacher for approximately six months. During that time, he was assigned to work in various schools by the SubCentral Office (SubCentral), the department of the Board which is responsible for placing substitute teachers in Board schools, and for hiring, terminating and handling other personnel matters involving substitute teachers.

The Board advised Diamond by letter dated March 9, 2007 that, at SubCentral's request, it had placed him on its "Ineligible/Inquiry List" for "inappropriate conduct," an action which rendered him ineligible to teach in any New York City public school (Answer, Ex. 1). In a second letter dated the same date, the Board advised Diamond that, "[i]n accordance with Regulation of the Chancellor C-31 [Regulation C-31] and under the Collective Bargaining

Agreement, you have the right to a meeting with the United Federation of Teachers [UFT] and they will decide whether to file an appeal on your behalf" (*id.*, Ex. 7). Regulation C-31 sets forth procedures pursuant to which the Chancellor may terminate New York City teaching licenses or certificates held by substitute teachers. On March 19, 2007, pursuant to Regulation C-31, Diamond sought a review of "the Board's intention to terminate his licenses/certificates and . . . his being placed on the [Ineligible List]" (Petition, ¶ 7).

The Board's Office of Appeals and Reviews conducted the Regulation C-31 review on May 16, 2007. At the review, Barbara Biscotti, an assistant director of SubCentral, testified on behalf of the Board as to the reasons for SubCentral's decision to place Diamond on the Ineligible List and to seek termination of his teaching licenses and certificates. The Board submitted six documents into evidence, namely, copies of the two letters which it sent to Diamond on March 9, 2007 and copies of four letters in which principals or administrators of schools where Diamond had been assigned to teach asked that he not be sent back to their schools, for various reasons that were set forth in the letters. The UFT representative at the review objected to inclusion of the latter four documents in the record, on the grounds that they were not "file documents," and that there was no indication that Diamond had seen, or was aware of, the letters prior to the review (*see* Answer, Ex. 10, Review Transcript, at 2-3). The hearing committee chair who conducted the review on the Chancellor's behalf excluded those four letters from the record, but indicated that Biscotti could nevertheless testify concerning, and make reference to, the four letters.

Biscotti then testified to the effect that SubCentral had received letters by fax and e-mail from three principals or administrators at schools where Diamond had worked as a substitute teacher, requesting that he not be sent back to their schools to teach on account of, respectively, his having (1) spoken in an inappropriate manner to students, (2) failed to carry out assigned curriculum and demonstrated poor classroom management skills, and (3) used profanity when speaking to students (*see id.* at 4-11).

Diamond testified on his own behalf to the effect that he had not used profanity when addressing students, that he was not aware that there was any issue with respect to his management of a classroom or his ability to carry out an assigned curriculum, and that he had never received any notice of the foregoing allegations against him until he heard them at the review.

The hearing committee chair issued a report recommending that Diamond's teaching licenses and certificates be terminated. By letter dated June 18, 2007, Deputy Chancellor Andres Alonso, as the Chancellor's designee, advised Diamond that, upon review of the chairperson's report, he had determined to terminate Diamond's teaching licenses and certificates effective as of the date in March 2007 when Diamond had been placed on the Ineligible List.

DISCUSSION

Because the review or hearing provided for in Regulation C-31 is "not held 'pursuant to direction by law' (CPLR 7803 [4]), the standard of review for termination of a teaching certificate is whether the determination was arbitrary and capricious" (*Matter of Von Gizycki v Levy*, 3 AD3d 572, 574 [2d Dept 2004]). Diamond has failed to establish that the determination was either arbitrary or capricious. His petition is, therefore, denied.

Diamond argues that respondents failed to comply with their own regulations, and denied him procedural due process, because: (1) at the Regulation C-31 review, respondents denied him the rights, which are set forth in that regulation, to present all relevant evidence and to call witnesses on his behalf; and (2) as regards the allegations that Diamond used inappropriate language when speaking to students, respondents failed to follow the procedures that are required by the Chancellor's Regulation A-421, a regulation which applies in instances where students are verbally abused by Board employees. However, Diamond has not established that respondents failed to comply with any of the applicable requirements of Regulation C-31 or Regulation A-421, or that respondents deprived him of any of the rights afforded by those regulations.

Courts which have considered the matter have found that the procedures set forth in

Regulation C-31 for the termination of teaching licenses held by non-tenured teachers are more than sufficient to satisfy the requirements of due process (*see e.g. Segal v City of New York*, 368 F Supp 2d 360, 362-363 [SD NY 2005], *affd* 459 F3d 207 [2d Cir 2006]; *Koehler v New York City*, 2005 WL 3502042, *4 [SD NY 2005]). Subsection 3.2.3 of Regulation C-31 provides, in relevant part, that:

> [the employee] is entitled at [a Regulation C-31] review to:
>
> – be represented by an advocate selected by the Union;
> – present all relevant evidence;
> – call witnesses in his/her behalf;
> – cross-examine witnesses; and
> – make an oral presentation.
>
> . . .
>
> At the review, the employer shall present evidence in support of its decision but shall not be obligated to present witnesses.

Diamond asserts that at the review, he was denied the right to present all relevant evidence and the right to call witnesses on his behalf. However, he does not allege, and there is no indication in the record, that he ever attempted to present any relevant and material evidence at the review, or that he ever attempted to call any witness which he was not permitted to call.

What Diamond actually appears to be arguing is that he could not meaningfully avail himself of the rights to present all relevant evidence and to call witnesses on his own behalf because: (1) he was not adequately advised as to the particulars of the allegations against him prior to the review; and (2) respondents did not present any witnesses at the review who had firsthand knowledge of the facts from which the allegations against him arose, and who could be cross-examined in a manner as to meaningfully challenge those allegations. However, Regulation C-31 expressly provides, as quoted above, that "the employer . . . shall not be obligated to present witnesses" at the review, and Diamond has failed to demonstrate that he could not have obtained particulars concerning the allegations against him, and presented evidence and/or called witnesses on his own behalf concerning those allegations at the review.

The Board's letter to Diamond dated March 9, 2007 did not apprize him of the specifics

of the allegations against him, but merely stated that the basis for SubCentral's request that Diamond be placed on the Ineligible List was "inappropriate conduct" (Answer, Ex. 1). However, the letter also stated: "Should you have any questions please contact [SubCentral at] (718) 935-4401 and/or contact your union representative" (*id.*). Respondents have submitted an affidavit by Melissa Yard, in which she states that she is the director of SubCentral; that she is in charge of managing a help desk of operators who answer questions called in to SubCentral by substitute teachers; that, "[w]hen a substitute teacher inquires about his/her placement on the Ineligible List, I will advise the teacher of the amount of complaints that have been received and the general nature of each complaint"; that, "[a]fter advising the teacher about the quantity and nature of the complaints that resulted in their placement on the Ineligible List, I then instruct the teacher to call the [UFT] and request a representative," and "to have the assigned UFT representative contact me concerning the allegations"; that, "[w]hen I am contacted by the UFT, I will provide the details of the allegations against the aggrieved substitute teacher, including the name of the school and the complaining principal"; that "[t]he UFT may then contact the . . . principal to inquire further about the allegations against the teacher," and "can inquire about the identity of complaining students and the nature of the complaints made by the students"; and that, "upon information and belief, and based upon a review of SubCentral's files, it appears that [SubCentral] was never contacted concerning [Diamond's] case" (Answer, Ex. 6, Yard Affid., ¶¶ 1, 2, 7-11).

Respondents have also submitted an affidavit by Virginia Caputo which states: that she is the director of the Board's Office of Appeals and Reviews (OAR); that, as director she is "in charge of supervising and managing the functions of OAR" and "fully familiar with [Regulation] C-31 and the [Board's] practices with respect to reviews conducted pursuant to that regulation"; that a "responding teacher may request that those with first hand knowledge or direct information regarding the allegations against him/her appear as witnesses at his/her C-31 Review"; and that "[p]etitioner had the right, pursuant to . . . Regulation C-31, to call witnesses on his behalf" (*id.*,

Ex. 9, Caputo Affid., ¶¶ 1-3, 8, 9).

Diamond stated at one point during the review that "[a] number of times, I called . . . SubCentral. They would not give me any information, at all, about what the accusations were, so I could defend myself against them" (*id.*, Ex. 10, Review Transcript, at 18). However, at a later point during the review, Diamond related certain particulars of a discussion that he had had with a SubCentral employee, in which the employee apparently informed Diamond of some details of the allegations against him relating to at least one of the schools involved (*see id.* at 25-26). Given the absence of any particularized statement by Diamond or his UFT representative that either of them ever made any substantial attempt to ascertain the particulars of the allegations against Diamond, his conclusory assertions are insufficient to establish that he was unable to obtain specific information regarding those allegations or, accordingly, that he would have been unable to present relevant evidence, or call relevant witnesses, on his own behalf.

Diamond also asserts that respondents failed to follow the procedures required by Regulation A-421. That regulation provides that certain procedures must be followed where there are allegations that a student has been verbally abused, including: that all allegations of such verbal abuse must be reported immediately to the Chancellor's Office of Special Investigations; that an investigation of the matter must be conducted; that written statements must be taken from the victim and all witnesses as quickly as practicable; that an "A-421 Form" must be completed; and that the employee alleged to have engaged in verbal abuse must be afforded an opportunity to address the allegations against him or her (*see* Petition, Ex. B).

However, Diamond has not established that the inappropriate language which he allegedly used in speaking to students necessarily fell within the scope of the verbal abuse which is addressed by Regulation A-421, such as to implicate the provisions of, or mandate application of the procedures set forth in, that regulation. Regulation A-421 defines the term "[p]rohibited verbal abuse" to include certain types of language which tend to "cause fear or physical or mental distress," or to "threaten physical harm" or to "belittle or subject students to ridicule" (*see id.*).

Diamond may have used language which was inappropriate, because it contained profanity, but which did not constitute verbal abuse within the ambit of the definition of that term set forth in Regulation A-421. Thus, Diamond has failed to establish that respondents were required to follow any of the procedures set forth in that regulation in connection with his alleged use of inappropriate language.

Diamond's petition asserts that the determination should be vacated, additionally, because the allegations against him were not supported by a fair preponderance of the evidence offered at the Regulation C-31 review.[1] However, assuming, arguendo, that the Board bore the burden of establishing by a fair preponderance of the evidence adduced at the review that a determination terminating Diamond's licenses to teach was warranted, Diamond has failed to establish that there was not a rational basis upon which to find that the Board had satisfied that burden.

Evidence constitutes a preponderance of the evidence where it is "of such weight as to produce a reasonable belief in the truth of the facts asserted" (*Jarrett v Madifari*, 67 AD2d 396, 404 [1st Dept 1979] [citation and internal quotation marks omitted]). It is "the quality of the evidence, rather than the number of witnesses or the length of their testimony," which determines what should constitute a preponderance (*see Torem v 564 Cent. Ave. Rest.*, 133 AD2d 25, 26 [1st Dept 1987]). At the review, the Board relied primarily upon Biscotti's testimony to the effect that -- within the space of approximately two months -- SubCentral had received letters from three principals or administrators requesting that Diamond not be sent back to their schools to teach on account of, respectively, his having (1) spoken in an inappropriate manner to students, (2) failed to carry out assigned curriculum and demonstrated poor classroom management skills,

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[1] Diamond has not cited any legal authority which supports either the proposition that the standard of proof applicable to a Regulation C-31 review is a fair preponderance of the evidence standard or the proposition that the burden of proof at such a review rests upon the Board rather than upon the employee at whose request the review is conducted (*compare e.g.* State Administrative Procedure Act § 306 [1] [providing, with respect to certain hearings or proceedings conducted by state agencies, that, "[e]xcept as otherwise provided by statute, the burden of proof shall be on the party who initiated the proceeding"]).

and (3) used profanity when speaking to students. The only evidence which Diamond presented at the review was his own testimony to the effect that he did not engage in the alleged inappropriate conduct. However, Diamond's self-serving testimony raised an issue of credibility which the hearing committee chairperson was entitled to resolve against Diamond (*cf. Matter of Kingston v Gorman*, 17 AD3d 1079, 1081 [4th Dept 2005]). It cannot be concluded, under the circumstances, that there was no rational basis upon which to determine that a fair preponderance of the evidence presented at the review supported the allegations against Diamond, and warranted the termination of his teaching licenses and certificates.

Diamond argues that Biscotti's testimony was an insufficient basis for the Chancellor's determination because it was merely hearsay testimony. However, "hearsay is admissible at an administrative hearing and hearsay alone may constitute substantial evidence" (*Matter of BiCounty Brokerage S. Corp. v State of New York Ins. Dept.*, 4 AD3d 470, 471 [2d Dept 2004] [citation and internal quotation marks omitted]; *see also Matter of Gray v Adduci*, 73 NY2d 741, 742 [1988] [stating that "[h]earsay evidence can be the basis of an administrative determination"]; *Matter of Tsakonas v Dowling*, 227 AD2d 729, 730 [3d Dept 1996] [stating that "hearsay evidence, if sufficiently believable, relevant and probative, may constitute substantial evidence"]). Diamond's contention that Biscotti's testimony was insufficient -- because she had no firsthand knowledge concerning the facts upon which the allegations against him were based -- lacks merit, additionally, inasmuch as Diamond could have called the persons who had such firsthand knowledge to testify at the review, but did not do so (*cf. Matter of Kingston v Gorman*, 17 AD3d at 1081).

CONCLUSION AND JUDGMENT

For the foregoing reasons, it is hereby

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

This constitutes the decision and judgment of the court.

Dated: November 3, 2008

ENTER:

J.S.C.