

Avidu v New York City Dept. of Educ.

2009 NY Slip Op 31168(U)

May 18, 2009

Supreme Court, New York County

Docket Number: 401097-08

Judge: James A. Yates

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: Hon. JAMES A. YATES PART 50Y
Justice

In the Matter of the Application of
REDZEP AVDIU,
Petitioner,

INDEX NO. 401097-08
MOTION DATE
MOTION SEQ. NO. 001

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

MOTION CAL. NO.

-against-

NEW YORK CITY DEPARTMENT OF
EDUCATION, NEW YORK CITY SCHOOL
CHANCELLOR,
Respondents.

FILED
MAY 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to _____ were filed on this motion to for _____

Notice of Motion/Order to Show Cause - Affidavits - Exhibits...	_____
Answering Affidavits - Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Petitioner is seeking an order, pursuant to Article 78 of the CPLR, vacating the decision of the New York City Department of Education to revoke his bus driver's certificate. Respondents filed a cross-motion to dismiss, arguing that Petitioner has failed to state a cause of action.

Under the circumstances of this case, the Court finds that the determination revoking his certification was not arbitrary and capricious (see attached Decision and Order). Therefore, the petition is denied and dismissed.

Dated _____ **ENTER:** _____, **J.S.C.**

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**

regularly drove students in his capacity as a Pioneer employee.

On March 2, 2007, Mr. Avdiu was involved in an accident while driving a school bus from Public School 30R (P.S. 30R), located in Staten Island. It was alleged that shortly after the accident, Patricia Baxter, the Interim Principal of P.S. 30R, arrived on the scene and found Mr. Avdiu talking on his cell phone while students were left alone on the bus. Following the accident, Ms. Baxter also received several emails from parents complaining about Mr. Avdiu's reckless driving. On March 7, 2007, Ms. Baxter wrote to Pioneer and requested a change of driver. She did not want Mr. Avdiu to drive students from P.S. 30. The following day, on March 8, 2007, DOE suspended Mr. Avdiu's driving certificate pending the outcome of an OPT investigation into the allegations of reckless driving and misconduct.

Mr. Dennis Harrington, the OPT investigator, talked to Ms. Baxter, witnesses to the accident and several parents whose names he had received from Ms. Baxter. Mr. Harrington concluded that the allegation that Mr. Avdiu had driven recklessly on March 2, 2007 or that he had left the students in the bus while he talked on his cell phone outside of the bus after the accident were unsubstantiated. In fact, the police report indicated that the accident on March 2nd was likely not Mr. Avdiu's fault. However, based largely on his conversations with parents, Mr. Harrington found substantial evidence that Mr. Avdiu had driven recklessly on prior occasions. This evidence included statements of parents that they had witnessed Mr. Avdiu driving over the speed limit with the doors of the bus open and children standing in the aisles. As well, parents indicated that they saw Mr. Avdiu pull away from the curb immediately after letting children off, with the children only a few feet from the bus. Ms. Baxter also told Mr. Harrington that she frequently observed Mr. Avdiu driving over the speed limit, cutting cars off and not using his turn signals.

During the investigation and while Mr. Avdiu was suspended, Mr. Harrington found that Mr. Avdiu had repeatedly contacted, via telephone and home visits, several parents, a school staff member

and one student, to influence the outcome of the investigation. At least one parent indicated she felt uncomfortable with Mr. Avdiu's repeated attempts to contact her and stated that Mr. Avdiu encouraged her to make favorable statements about him to anyone investigating the incident. Based on the evidence of reckless driving and inappropriate contact with witnesses, OPT sent Mr. Avdiu a letter on May 7, 2007 informing him that OPT had revoked his certification. Mr. Avdiu then invoked his right to a disciplinary conference with the Office of Appeals and Review pursuant to Chancellor's Regulation C-100.

Hearing Officer JoAnn Rabot conducted the disciplinary conference on September 19, 2007. Petitioner was represented by counsel at the hearing. He claimed during the conference, as he does now, that Inspector Harrington was bound to the complaint against him, which allegedly involved only the March 2, 2007 accident, and therefore he could not investigate other allegations of his reckless driving. Hearing Officer Rabot found this argument "disingenuous as once an investigation begins any malfeasance must be included." *Resp. Verified Answer*, exhibit 28, Decision, at 4. OPT presented one witness, Mr. Harrington, while Mr. Avdiu presented no witnesses, but did enter eight exhibits on his behalf and requested that several witnesses be produced. Petitioner did not testify at the hearing. After the hearing, Ms. Rabot determined that revocation of Mr. Avdiu's certification as a school bus driver was appropriate based on findings that he had operated his vehicle in an unsafe manner and that "he harassed, threatened, and attempted to intimidate parents and school employees into making statements casting him in a favorable light." She recommended to the Chancellor that the charge and penalty be affirmed. On November 7, 2007, DOE Deputy Chancellor Kathleen Grimm sent a letter to Mr. Avdiu notifying him that, after review of the disciplinary conference report, OPT had decided to permanently revoke his bus driver certification. On March 5, 2008, Mr. Avdiu filed this Article 78 proceeding.

Legal Analysis

In an Article 78 proceeding the court's review is limited to

deciding "[w]hether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR § 7803(3). Mr. Avdiu contends that the proper standard of review is whether the determination was supported by substantial evidence.

However, substantial evidence review under CPLR § 7803(4) applies to full trial-type hearings compelled by law. *New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194 (1994); *Klein v Levin*, 305 AD2d 316 (1st Dept 2003). Since the disciplinary conference was conducted pursuant to Chancellor's Regulation C-100, which is in the nature of mandamus to review and not compelled by law, the appropriate standard of review is the "arbitrary and capricious" standard. See *Scherbyn v Wayne-Fingers Lakes Bd. of Cooperative Educ. Services*, 77 NY2d 753 (1991); *Duncan v Klein*, 38 AD3d 380 (1st Dept 2007) citing *Matter of Von Gizyki v Levy*, 3 AD3d 572, 574 (2d Dept 2004); *Downes v Klein*, 15 Misc 3d 1141 (A), 2007 NY Slip Op 51091U (Sup Ct, NY County 2007).

When conducting a review based on an arbitrary and capricious standard, the Court must find that the decision was rational and grounded on the facts. *Matter of Pell v Bd. of Education*, 34 NY2d 222 (1975). The fact that other reasonable minds might have reached another conclusion after analysis of the same facts is not enough to warrant annulment of the determination. Here, there is evidence on which Hearing Officer Rabot could have rationally determined that revocation of Mr. Avdiu's certification was appropriate. Investigator Harrington testified at the hearing that he spoke with numerous parents who personally witnessed Mr. Avdiu's reckless driving. These incidents included Mr. Avdiu driving at a high rate of speed with the bus door open and children standing in the aisle.

Courts have found that evidence of a bus driver's inability to safely supervise children is sufficient to form a rational basis for revoking certification. See *Robbins v Malone Cent. Sch. Dist.*, 182 AD2d 890, 892 (3d Dept 1992) ("The record contains ample documentation of complaints . . . regarding

petitioner's conduct as a bus driver, all of which implicated his ability to effectively supervise students and ensure their safety."). Thus, the evidence of Mr. Avdiu's reckless driving was enough to uphold the agency's determination as not being arbitrary or capricious.

Mr. Avdiu also contends that OTP's revocation of his certification was a violation of the collective bargaining agreement between OTP and his union. Mr. Avdiu, however, cannot sue for a breach of the collective bargaining agreement without first proceeding through the grievance procedure set out in the agreement. See *Matter of Bd. of Educ., Commack Union Free School Dist. v Ambach*, 70 NY2d 501 (1987). The only situation in which an employee can sue the employer directly is "when the union fails in its duty of fair representation." *Id.* at 508; *Parisi v New York City Hous. Auth.*, 269 AD2d 210 (1st Dept 2000). Mr. Avdiu did not initiate a grievance procedure through his collective bargaining agreement and does not allege a failure of representation by his union, thus his breach of contract claim is unavailing.

Furthermore, Petitioner contends that Hearing Officer Rabot's determination was based on "incompetent, unreliable, conclusory and hearsay testimony of the investigator Mr. Harrington." See Petition at ¶ 26. However, it is well established that hearsay evidence is admissible in an administrative hearing, and that hearsay alone may constitute substantial evidence. *Gray v Adduci*, 73 NY2d 741, 742 (1988) ("Hearsay evidence can be the basis of an administrative determination."); *Lumsden v New York City Fire Dept.*, 134 AD2d 595, 596 (2d Dept 1987) ("not only is hearsay evidence admissible in administrative proceeding . . . but findings of fact may be based on hearsay evidence alone"). Therefore, Mr. Avdiu's contention that the administrative determination was improperly made on the basis of hearsay is also without merit.

Finally, Mr. Avdiu contends that OTP's decision to revoke his certification was a violation of his right to due process. In order to show a due process violation, petitioner must, "identify a property [or liberty] right, second show that the

[*7]
State deprived him of that right and third show that the deprivation was effected without due process." *Rogovin v New York City Bd. of Educ.*, 2001 WL 936191, 2001 US Dist LEXIS 11923 citing to *Local 342, L.I. Pub. Serv. Employees v. Town Bd. of Huntington*, 31 F3d 1191, 1194 (2d Cir 1994) [quotations omitted]. The hearing conducted pursuant to Chancellor's Regulation C-100 is sufficient process. *Segal v City of New York*, 368 F Supp 2d 360 (SD NY 2005). Mr. Avdiu received a full hearing, was provided with Investigator Harrington's report prior to the hearing, and was afforded the opportunity to call and confront witnesses. *Leroy-Hill v New York City Dept. of Educ.*, 2007 WL 13468, 2007 US Dist LEXIS 94627. Contrary to Mr. Avdiu's claim that he did not have adequate opportunity to call witnesses, Mr. Avdiu neglected to attempt to call witnesses until after the hearing started, contrary to established procedure. Therefore, Mr. Avdiu's own failure to timely call witnesses according to C-100 regulations cannot be the basis of a due process claim.

Under the circumstances present here, OTP's determination revoking his school bus driver certification was not arbitrary or capricious. Accordingly, Respondents' cross-motion to dismiss the petition is granted.

This constitutes the Decision and Order of the Court.

Dated: May 18, 2009

New York, New York

HON. JAMES A. YATES

JAMES A. YATES, J.S.C.

PART 50Y
SUP. CT. N.Y. COUNTY

FILED
MAY 26 2009
COUNTY CLERK'S OFFICE
NEW YORK