

Matter of Middleton v New York City Dept. of Educ.
2010 NY Slip Op 30892(U)
April 12, 2010
Supreme Court, New York County
Docket Number: 108247/09
Judge: Joan A. Madden
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. JOAN A. MADDEN**

PART 11

J.S.C.
Justice

Index Number : 108247/2009

MIDDLETON, ROSE MS.

VS.

N. Y. C. DEPARTMENT OF EDUCATION

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 10824709

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on 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~~ *Article 78 proceeding* is determined in accord with the annexed decision, order and judgment.

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

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).

Dated: April 10, 2010

J.S.C.
HON. JOAN A. MADDEN 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 11

-----X
In the Matter of the Application of ROSE MIDDLETON,

Petitioner,

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

INDEX NO. 108247/09

-against-

THE NEW YORK CITY DEPARTMENT OF
EDUCATION, JOEL L. KLEIN, CHANCELLOR,
KATHLEEN GRIMM, DEPUTY CHANCELLOR,
and THE CITY OF NEW YORK,

Respondents.

-----X

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

JOAN A. MADDEN, J:

In this Article 78 proceeding, petitioner Rose Middleton seeks to annul the determination of the New York City Department of Education (DOE), Chancellor Joel L. Klein, and Deputy Chancellor Kathleen Grim, which permanently revoked her school bus driver certification and placed her on DOE's Invalid List, making her permanently ineligible to drive a school bus for DOE. Petitioner contends that the determination was arbitrary and capricious, and that the penalty was so disproportionate as to shock one's sense of fairness.

Petitioner was employed by Atlantic Express Transportation Group, Inc. (Atlantic Express or Amboy Bus Company), which has a contract with DOE to transport students of the New York City public schools. As a school bus driver employed by a company that has contracted with DOE, petitioner must hold a certification of approval from DOE's Office of Pupil Transportation (OPT). Petitioner was first certified as a school bus driver in September

2003, and worked as a school bus driver for six years, prior to her decertification. She was previously certified by DOE as a school bus escort, and worked as an escort for six years.

Pursuant to section C-100 of the New York City Board of Education's Regulations of the Chancellor, when the OPT receives "a complaint or information upon which it may act to revoke or suspend" DOE certification of a school bus driver, "OPT shall commence an investigation of the matter." Also, "[i]n reviewing the complaint or information OPT shall first determine whether the alleged conduct of the bus company employee, if true, would pose a threat to health and safety of students or others who would come into contact with the school bus worker," and if "it would, OPT may immediately suspend the certification of the driver . . . during the period of the investigation and review." Once the investigation is complete, "OPT shall issue a report indicating its findings and containing a recommendation as to a penalty to be imposed," and "immediately transmit" a copy of the report to the school bus driver. The driver "may contest the OPT recommendation by filing a request for a Chancellor's disciplinary conference," where oral testimony and written documents can be presented.

On October 3, 2008, Atlantic Express received a complaint about petitioner from Jocelyn Weekes, a parent of a student on petitioner's bus, that her daughter had called from the bus to tell her that the bus driver's husband was on the bus, walking around telling the children to be quiet. Atlantic Express prepared a written report of the complaint and notified OPT. After speaking with Joe Scappatura, Atlantic Express' contract manager, OPT investigator Peter English prepared a OPT Customer Service Complaint Form (Complaint #869043), dated October 6, 2008. Petitioner later explained that the person on the bus was her husband, a retired certified school bus driver, who had a doctor's appointment in Manhattan.

On October 8, 2008, Atlantic Express received a complaint about petitioner from Eva Laurenno and Jose Jimenez, the parents of another student on petitioner's bus. According to the written report prepared by Scappatura, the parents said that petitioner was acting "harshly" towards their daughter, refused to allow her to sit in a certain seat at the front of the bus, and told them the seat was reserved for a special needs student. At Scappatura's request, Ms. Laurenno notified OPT. An OPT Customer Service Complaint Form (Complaint #871256) dated October 8, 2008, states that Ms. Laurenno reported that petitioner had "been very nasty and disrespectful." The record includes notes from English indicating that on October 8, 2008, Laurenno also said her daughter told her that petitioner had driven the bus into the bus yard, and left the bus unattended with her daughter and another child on board.

By letter dated October 8, 2008, OPT notified Amboy Bus Company that it had "received an allegation that the above school bus driver [Rose Middleton] engaged in unprofessional conduct during the performance of her duties on October 3, 2008," and "[d]ue to the serious nature of this allegation, Ms. Middleton is suspended immediately from performing duties of a Department of Education school bus driver pending the outcome of this investigation."

On October 9, 2008, Scappatura faxed English a written report that Eva Laurenno had called and said that her husband, Jose Jimenez had heard from his supervisor that petitioner and "another man" visited her husband's work site and spoke to the supervisor, asking questions and making unfavorable remarks about her husband to his supervisor. Coincidentally, Mr. Jimenez is employed in the maintenance department at Coop City, the apartment complex where petitioner resides.

On October 10, 2008, English interviewed petitioner. That same day, petitioner executed a "Handwritten Statement" that her husband was on the bus and she "thought it would be okay being that he is board certified"; "yes, I saved a seat for a child on the bus because I was asked by the school"; "I never [took] the children back to yard"; and "I have never went [sic] to work site."

By letter dated October 15, 2008, OPT notified petitioner that "[f]ounded upon related complaints from several sources," your certification of approval as a DOE school bus driver is "revoked." The letter stated that the "decertification is immediate as Ms. Middleton exhibited inappropriate behavior, allowed an unauthorized person on a General Education route, was not candid to parents regarding the presence of another individual (husband) on the route, visited parent's place of employment with another and made threatening statements, and left children (two) unattended on the school bus at the Amboy Bus Company in Hunt's Point." The letter enclosed a copy of an "investigation summary," and advised petitioner of her right to request a "disciplinary appeal conference regarding OPT's findings and recommendation."

Petitioner submitted a timely request for an appeal conference. She subsequently received a "Notification of Complaint and Summons to Appear Before a Disciplinary Conference Appeal of Certification," stating that "you are hereby notified that you are the subject of an investigation due to allegations that you have violated certain rules and procedures of performance and conduct required of all drivers and escorts who work in the New York City Department of Education School bus service." The Notification listed the "Charge" against petitioner as "inappropriate behavior," and "summoned" her to appear for an "appeal conference" on January 21, 2009, "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 . . . [I]f the allegations are substantiated, your certification for approval for Department of Education School bus service may be suspended or permanently revoked, thus affecting your employment.”

On January 21, 2009, Disciplinary Conference Officer JoAnn C. Rabot conducted an appeal conference. Petitioner testified on her own behalf; English, Scappatura, and two parents, Eva Lauren and Jocelyn Weekes, testified for OPT. OPT also submitted exhibits. Following the conference, Rabot issued a written decision recommending “[t]hat the revocation of Rose Middleton’s school bus driver certification by the Office of Pupil Transportation be affirmed in all aspects.”

Describing OPT’s case, Rabot wrote that OPT “was informed by the company [Atlantic Express] that it had received several complaints regarding Appellant [petitioner] having an unauthorized person on the bus. In addition, Ms. Eva Lauren, parent, complained that Appellant approached her husband’s supervisor and made disparaging remarks about him after they approached her regarding their daughter’s seat on the bus.”

Describing petitioner’s case, Rabot wrote that “[t]he Appellant admitted to both charges, stating that her husband was on the bus because he had a medical appointment in the vicinity of the route and it would be easier for him to come with her on the bus. The Appellant indicated that she felt this was permissible as he is a recently retired school bus driver himself. The Appellant stated that Mr. Laureano [Jose Jimenez] works for the maintenance department in Co-Op City, where she resides, and she was merely attempting to locate Mr. Lauren and explain to him why his daughter was moved from her regular seat. During her testimony, the Appellant

also admitted to questioning the supervisor as to why Mr. Laureano was at the bus stop during his work hours.”

Based on the foregoing, Robot made the following findings of fact:

As both the Appellant and her husband were school bus drivers, they should have been aware that no unauthorized person is allowed on the bus under any circumstances. The Appellant chose convenience over regulations, which cannot be tolerated. In addition, the Appellant admitted to approaching Mr. Laureano’s [Mr. Jimenez’s] supervisor and intimating that he was not appropriately at his designated work assignment. The Appellant’s behavior was extremely unprofessional in both instances and OPT was correct in its determination to decertify the Appellant.

I find that the penalty of revocation of certification as a school bus driver to be appropriate in this case. I recommend that the charge and penalty be affirmed in all aspects.

By letter dated February 20, 2009, DOE Deputy Chancellor, Kathleen Grimm, informed petitioner that she had reviewed the report from the January 21, 2009 disciplinary conference, and “[a]fter careful consideration of your case, I concur with the decision of the Office of Pupil Transportation: permanent revocation of your bus driver certification as a result of your unsatisfactory performance. As a result of this determination, you have been placed on the Department of Education Invalid list. The penalty appears to be wholly appropriate.”

Petitioner thereafter commenced the instant Article 78 proceeding challenging DOE’s determination as arbitrary and capricious, and asserting that the penalty is disproportionate to the charged offenses. Respondents answered and oppose the petition. Respondents also argue that the petition should be dismissed for failure to join a necessary party, Atlantic Express.

“Judicial review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law.” Kelly v. Safir, 96 NY2d 32, 38 (2001). “[A] penalty must be upheld unless it is ‘so disproportionate to

the offense as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law." Id (quoting Pell v. Board of Education of Union Free School District No. 1, 34 NY2d 222, 237 [1974]). As the Court of Appeals explains, "[t]his calculus involves consideration of whether the impact of the penalty on the individual is so severe that it is disproportionate to the misconduct, or to the harm to the agency or the public in general." Id.

After reviewing hearing officer Robot's determination and the record from the disciplinary appeal, this court concludes that the penalty of permanent revoking petitioner's school bus driver's certification and placing her on DOE's invalid list, is so disproportionate to the offense, in light of all the circumstances, as to shock one's sense of fairness. See Kelly v. Safir, supra at 38. The hearing officer sustained just two of the charges originally made against petitioner, based on her testimony admitting that she permitted her husband to ride on her bus and she spoke to Mr. Jimenez's supervisor.¹ Although such unprofessional cannot be condoned, it does not rise to the level warranting the harshest penalty available of permanent decertification, which should be reserved for the most egregious situations.

For example, in Will v. Frontier Central School District Board of Education, 97 NY2d 690 (2002), the Court of Appeals held that the penalty of dismissal was not shocking to the "judicial conscience" where a school employee engaged in alcohol-related conduct that jeopardized public safety and the safety of the school children in her charge. In Duncan v. Klein, 38 AD3d 380 (1st Dept 2007), the Appellate Division First Department found that the penalty of permanently revoking a school bus escort's certification did not "shock our

¹Hearing officer Robot made no findings as to the additional complaints by Ms. Lauren and Mr. Jimenez that petitioner refused to permit their daughter to sit in the front seat of the bus, and took their daughter and another child to the bus yard and left them on the bus unattended.

conscience,” where the escort was found to have actively hit a student with an umbrella, rather than merely defending herself. In Thibodeau v. Northeastern Clinton Central School Board of Education, 39 AD3d 940 (3rd Dept 2007), the court upheld the termination of a school bus driver who snapped a child’s bra strap while she was on the bus, grabbed the child in a head lock and ruffled her hair, and retaliated against her for reporting such conduct. In Bottari v. Saratoga Springs City School District, 3 AD3d 832 (3rd Dept 2004), the court held that a school bus driver’s termination was not shocking or disproportionate, where the driver displayed poor judgment and lack of remorse, used threatening and obscene language against another bus driver who filed a complaint against her, the school district had a strict policy against threats of violence, and there were safety issues including reports of erratic driving. In Massaria v. Betschen, 290 AD2d 602 (3rd Dept 2002), the court upheld the dismissal of a school bus driver who on two occasions failed to drop a student off at her assigned bus stop, and on one or more occasions drove the bus into the middle of the road as he approached the bus stop with waiting children, creating a safety risk; the driver also failed to modify his behavior after direct warnings by his supervisor. In Collins v. Parishville-Hopkinton Central School District, 274 AD2d 732 (3rd Dept 2000), the court held that penalty of termination was not disproportionate, where the bus driver demonstrated a “complete lack of judgment” and violated the school policy prohibiting possession and consumption of alcohol on school premises, by bringing and consuming beer on school property, attending a bus driver safety workshop after consuming and while under the influence of alcohol, and after the workshop, driving out of the parking lot at a high rate of speed, spinning her tires. In Malloch v. Ballston Spa Central School District, 249 AD2d 797 (3rd Dept), lv app den 92 NY2d 810 (1998), the court upheld the termination of a

school bus driver who had a record of numerous traffic infractions and incidents, and was found guilty of six separately charged safety violations based on observations of his driving on six separate occasions within a short period of time. In Heslop v. Board of Education, Newfield Central School District, 191 AD2d 875 (3rd Dept 1993), the court found that the school bus driver's termination was not disproportionate to the offense, where the driver was accused of two separate and similar incidents of overreaction and loss of control involving the use of physical force against two students; the driver's performance evaluations disclosed that he had difficulty controlling his temper when disciplinary problems arose. In that case, the two children testified at the hearing. In one incident involving a hearing impaired child who was creating a disturbance on the bus, the driver "yelled" at the child and pushed his head against the bus window with such force that he began to cry. In the other incident involving a child in kindergarten, the bus driver told the child to stop eating a muffin and when she refused to do so, he "smacked" her on the cheek and threw the muffin out the window.

In contrast, in Betz v. West Genesee Central School District Board of Education, 20 AD3d 909 (4th Dept), lv app den 5 NY3d 716 (2005), a school maintenance worker displaced a manhole cover while snow plowing the school parking lot and a teacher later fell through the open manhole. The court held that the dismissal of the worker for incompetence in failing to investigate and discover the open manhole, was too harsh in view of mitigating factors, such as his length of service and the absence of prior incidents of incompetence. In Smith v. Board of Education of Taconic Hills Central School District, 235 AD2d 912 (3rd Dept 1997), the court held that dismissal of a school bus driver for one instance of speeding in a fast-moving section of a highway with no students on board, was disproportionate to the misconduct, where petitioner

was a licensed driver for 43 years, had not previously received a traffic ticket, and was employed by the school for 14 years with a good disciplinary record. In Smith v Board of Education, Ontario Central School District, 221 AD2d 755, 758 (3d Dept 1995), lv app den 87 NY2d 810 (1996), the termination of a school bus driver for misconduct and insubordination based on his attempts to discipline a student by slapping him, lifting him off the floor and banging his head into the bus roof, was found disproportionate and shocking in view of mitigating factors, including the driver's above-average work performance evaluations and the student's consistent misbehavior problems in both the classroom and the school bus. In Comins v. Camden Central School District, 214 AD2d 1032 (4th Dept), lv app den 86 NY2d 708 (1995), the penalty of dismissal of a school bus driver for misconduct and incompetence, based on an accident in which the driver failed to negotiate a curve on a snow-covered road and landed in a ditch, and no student passengers were seriously injured, was found to be too harsh in light of the driver's otherwise unblemished 13 ½ year record during which she received 13 safe driving awards. The court in Benson v Board of Education of the Washingtonville Central School District, 209 AD2d 693 (2nd Dept 1994), lv app den 85 NY2d 809 (1995), determined that the school bus driver's termination was disproportionate to her offense of operating the school bus in an unsafe, uncontrolled and negligent manner resulting in accident in bus garage, since no school children were involved in the accident, the incident was isolated and not indicative of a pattern of mishaps or misconduct, the driver was a relatively long-time employee with a clean record, and the driver was operating the bus with the express approval of her superiors. In Ross v. Oxford Academy & Central School District, 187 AD2d 898 (3rd Dept 1992), lv app den 81 NY2d 705 (1993), the court found the penalty of dismissal disproportionate to the offense of using physical force on

four students, given the driver's 15-year record and his most recent evaluation that he used good judgment in his work, and displayed enthusiasm and responsibility for the students, and the uncontradicted evidence of the difficult nature of the children involved. In Borkhuis v. Quinn, 158 AD2d 917 (4th Dept 1990), the court held that the dismissal of a school bus driver on three charges of misconduct was shocking to one's sense of fairness where the driver had an excellent driving record for 20 years, and received awards and commendations for her work; "[u]nder the circumstances presented, we consider a suspension without pay for 12 months to be the most severe sanction that should be imposed."

Here, petitioner's decision to permit her husband to ride on the school bus violated the provision in the New York City Board of Education's contract with Atlantic Express, which prohibits "passengers other than pupils" from being carried on the bus, except as "authorized in writing" by OPT. This isolated incident of misconduct, however, should not have become the catalyst for petitioner to permanently lose her certification. While this court is not unmindful of the special obligation of school districts to safeguard the well-being of their students, see Will v. Frontier Central School District Board of Education, *supra*, the record neither shows nor suggests that the presence of petitioner's husband, a retired certified school bus driver with 20 years of service, placed the students on the bus in danger of any harm or jeopardized the safe operation of the bus. As to petitioner's conversation with Mr. Jimenez's supervisor inquiring why he was at the school bus stop with his daughter rather than at his designated work assignment, that inquiry was unprofessional, but did not directly involve the performance of her duties as a school bus driver. Based on the cases cited above, most of which involve school bus drivers, the ultimate penalty of decertification or termination is reserved for misconduct of a significantly more

nature than petitioner's. Notably, at the hearing, DOE did not assert that petitioner had a prior history of disciplinary complaints or problems with parents or children during her 12 years of service as a bus driver and escort. To the contrary, the only time that issue was raised was by petitioner's attorney who in closing argued that petitioner had no history of prior disciplinary action.

In their answering papers, respondents argue, for the first time, that petitioner has a "long record" of not complying with rules and procedures. In support of that argument, respondents submit documents, presumably from petitioner's personnel file, that were not part of the record at the hearing. This court cannot properly consider respondents' new argument or any of those documents outside the record, in view of the well settled principles that in an Article 78 proceeding, judicial review of an administrative determination is limited to the grounds invoked by the agency, see Scherbyn v. Wayne-Finger Lakes Board of Cooperative Educational Services, 77 NY2d 753 (1991), based on the facts and record adduced before the agency, see Featherstone v. Franco, 95 NY2d 550, 554 (2000).

Respondents further argue that the penalty of permanently revoking petitioner's certification is not harsh, since she can still operate a school bus for nonpublic schools in New York City, and any school outside New York City. Respondents' argument is not persuasive. Petitioner is a resident of New York City and obtaining a bus driver position outside of the area would not only be burdensome, but would also be difficult once future employers learn that she was decertified and placed on DOE's invalid list.

Based on the foregoing, this court concludes that the penalty of permanently revoking petitioner's certification and placing her on DOE's invalid list, is so disproportionate as to shock

one's sense of fairness, and the matter should be remanded to DOE for the imposition of a lesser penalty. See Pell v. Board of Education of Union Free School District No. 1, supra at 234.

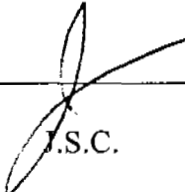
Finally, respondents's argument that the petition should be dismissed for failure to join Atlantic Express as a necessary party, is without merit. The petition challenges the administrative determination to decertify petitioner and place her on DOE's invalid driver list, which was made by DOE and not by Atlantic Express.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted, and the determination of the New York City Department of Education permanently revoking petitioner's school bus driver certification and placing her on the invalid list of drivers, is annulled and vacated, and the matter is remanded to the New York City Department of Education for imposition of a lesser penalty.

Dated: April 12, 2010

ENTER:



J.S.C.

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 1415).

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

PRESENT: _____

PART 48

Index Number : 100091/2010

BURDETT, JOYCE

INDEX NO. _____

vs

31 EAST 72ND STREET

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

DEFAULT JUDGMENT

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion IS DENIED

WITH LEAVE TO RENEW IN CIVIL COURT. CASE IS TRANSFERRED PURSUANT TO 325(D) CPLR

FILED
APR 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: APR 12 2010

MGD
CHEYEN G. DIAMOND 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):