

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

2011 NY Slip Op 31045(U)

April 20, 2011

Supreme Court, New York County

Docket Number: 113595/10

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE J.S.C. Justice

PART 5

Index Number : 113595/2010
GARCIA, CARLOS
VS.
NYC DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD
CAL # 36

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for vacate award

PAPERS NUMBERED
1, 2, 3
4

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

FILED
APR 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/20/11

[Signature] BARBARA JAFFE J.S.C.

APR 20 2011
Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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 5

-----X
In the Matter of the Disciplinary Charges

Index No. 113595/10

CARLOS GARCIA

Petitioner,

-against-

Motion Date: 2/22/11
Motion Seq. No.: 001
Calendar No.: 36

DECISION & JUDGMENT

THE NEW YORK CITY DEPARTMENT
OF EDUCATION,

Respondent.

-----X
BARBARA JAFFE, JSC:

For petitioner:

Sergio Villaverde, Esq.
Sergio Villaverde, PLLC
295 Madison Avenue 23rd floor
New York, NY 10017
212-370-5297

For respondent:

Gail M. Mulligan, Of Counsel
Michael A. Cardozo
100 Church Street
New York, NY 10007
212-788-8685

By notice of petition dated October 15, 2010, petitioner moves pursuant to CPLR 7811 for an order vacating portions of an arbitration award. Respondent opposes and cross-moves for an order dismissing the petition.

I. FACTS

Following a hearing held pursuant to Education Law § 3020-a and by decision dated September 23, 2010, a hearing officer sustained specifications advanced by respondent, finding, based on the testimony of three students, that petitioner directed profanity at them during 2008 to 2009, and thereby violated Chancellor's Regulation A-421 which prohibits misconduct and verbal abuse in the classroom. At the hearing the three students testified in English and used a Spanish word, "cono" when describing "curse words in Spanish" or "bad" words leveled by

petitioner at students in the classroom. The hearing officer also received from the parties submissions concerning the meaning of Spanish word “cono,” and found that in the context used, it constituted an obscenity. He thus found petitioner guilty of misconduct under departmental specifications 2(c), 2(e), and 2(f) for using the words “shit kids,” “fuck,” and “shit,” found him not guilty of specifications 2(b) and 2(d), specification 1 having been withdrawn by respondent, rejected respondent’s request that petitioner be terminated, and imposed a penalty in the form of a fine in the amount of \$15,000, payable over 18 equal monthly installments. (Affirmation of Sergio Villaverde, Esq., dated Oct. 15, 2010 [Villaverde Aff.], Exh. 1).

II. CONTENTIONS

Petitioner maintains that the hearing officer exceeded his power in violation of CPLR 7511(b)(1)(iii) by improperly using the court interpreter as an expert on the meaning of the word cono, and rendering an award which is arbitrary and capricious. (Villaverde Aff.).

Respondent denies that the interpreter was employed as an expert but that he provided a literal translation of the word “cono,” and that based on the context with which it was used, it could only have been understood as “insulting, provocative or profane.” It argues that there is no evidence that the award was irrational and that the hearing officer properly determined the credibility of the witnesses and resolved all factual issues. It thus moves, pursuant to Rules 404(a) and CPLR 3211(a)(7) and 7511, for an order dismissing the petition. (Affirmation of Gail M. Mulligan, ACC, dated Dec. 15, 2010).

III. ANALYSIS

Judicial review of an administrative agency’s decision is limited to whether the decision “was made in violation of lawful procedure, was affected by an error of law or was arbitrary and

capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed.” (CPLR § 7803[3]). In reviewing an administrative agency’s determination as to whether it is arbitrary and capricious, the test is whether the determination “is without sound basis in reason and is generally taken without regard to the facts.” (*Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *E.W. Tompkins Co., Inc. v. State Univ. of New York*, 61 AD3d 1248, 1250 [3d Dept 2009], *lv denied* 13 NY3d 709; *Matter of Mankarios v. New York City Taxi and Limousine Commn.*, 49 AD3d 316, 317 [1st Dept 2008]; *Matter of Soho Alliance v. New York State Liquor Auth.*, 32 AD3d 363, 363 [1st Dept 2006]; *Matter of Kenton Assoc. Ltd. v. Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]). Moreover, courts generally do not second-guess the decisions of educational institutions, as they “involve the exercise of highly specialized professional judgment and these institutions are, for the most part, better suited to make relatively final decisions concerning wholly internal matters.” (*Maas v Cornell Univ.*, 94 NY2d 87, 92 [1999]; *see also Matter of Altman v New York City Dept. of Educ.*, 2006 WL 6158084, 2006 NY Slip Op 30521[U] [Sup Ct, New York County 2006] [applied to termination of Department of Education teacher]).

Chancellor’s Regulation A-421 defines verbal abuse as, *inter alia*, “[l]anguage that tends to cause fear or physical or mental distress [or l]anguage that tends to belittle or subject students to ridicule.”

Although I doubt that petitioner’s use of the word “cono” tended to cause fear or physical or mental distress or belittle or subject the students to ridicule, there is an insufficient legal basis for finding that the hearing officer’s determination is arbitrary and capricious, or that his

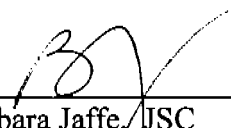
determination of the meaning of the word "cono" was arrived at improperly. However, while the hearing officer properly rejected respondent's request that petitioner be terminated, the penalty imposed was disproportionate. Consequently, I reduce the penalty to \$1,000, payable in two equal monthly installments on or before August 1, 2011.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the petition is granted solely to the extent of reducing the penalty imposed to \$1,000, payable in two equal monthly installments on or before August 1.

This constitutes the decision and order of the court.



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.G.

DATED: April 20, 2011
New York, New York

APR 20 2011

FILED
APR 25 2011
NEW YORK
COUNTY CLERK'S OFFICE