

Foggie v City of New York

2011 NY Slip Op 31080(U)

April 27, 2011

Sup Ct, NY County

Docket Number: 109692/2010

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 109692/2010
FOGGIE, ROY
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE 3/14/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

Rebuttal
this motion to/for Art 78 ruling

PAPERS NUMBERED

1-3

4-6

7

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

*petition is decided by the
annexed memoranda decisions, order and Judgment*

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: 4/27/11

JANE S. SOLOMON J.S.C.

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 55

-----X
ROY FOGGIE, Index No. 109692/2010

Petitioner

DECISION, ORDER
& JUDGMENT

-against-

CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF EDUCATION and NEW YORK
CITY DEPARTMENT OF EDUCATION OFFICE
OF PUPIL TRANSPORTATION

UNFILED JUDGMENT

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

SOLOMON, J.:

Petitioner Roy Foggie (Foggie) challenges the decision
of Department of Education Office of Pupil Transportation (OPT)
to revoke his school bus driver certification. Respondents
cross-move to dismiss for failure to timely file a notice of
claim and because the petition fails to state a cause of action.
The notice of claim argument has been withdrawn by agreement
between the parties. The motion is decided as follows.

The NYC Department of Education (DOE) contracts with
private transport companies for bus services for school children.
School bus operators must be certified by the Department of
Education Office of Pupil Transportation (OPT) before they can
transport children. Foggie was a certified school bus driver,
employed by non party Amboy Bus Company, a private transportation
company (Hallman Affidavit, Ex. 2).

On September 23, 2009, Foggie became the subject of an

OPT investigation because he left a loaded semi-automatic handgun on board a school bus. He was immediately suspended pending the outcome of the investigation, was arrested, and eventually pleaded guilty to disorderly conduct (Hallman Aff., Ex. 4).

During the investigation, Foggie argued that he had mistakenly taken the wrong bag from his home, and instead of bringing his work radio with him, he brought his personal firearm; and that no one was actually harmed by the mistake. Notwithstanding his 24 year tenure and his excuses, OPT found that Foggie had brought a loaded firearm on to a school bus, and his school bus driver certification was permanently revoked (OPT letter, dated December 16, 2009, attached to Hallman Affidavit, Ex. 5).

Foggie requested an appeal from the Office of Appeal and Review (OAR), pursuant to Chancellor's Regulation C-100 (Hallman Aff., Ex. 6). The hearing was held on March 17, 2010, and upheld the OPT determination, noting in particular:

The fact that [Foggie] did not intentionally leave a loaded gun on a school bus is irrelevant. [He], by his own admission, kept the weapon in an exact duplicate of the bag which he used for work and carelessly did not check to make sure he had the correct bag. As a result of his negligence, a loaded gun was on the morning run of a school bus full of students.

(OAR Decision, attached to Hallman Aff. Ex. 9, P. 3). On March 26, 2010, the Chancellor's Designee concurred (Id., Ex. 11). This petition followed.

Respondents entitled their opposition papers as a cross motion to dismiss for failure to state a cause of action, wherein they argue the merits of Foggie's petition. The cross motion must be denied, as Foggie has pleaded a valid cause of action under CPLR Article 78. However, because the cross motion fully responds to the petition on the merits, in the interests of judicial economy, it is deemed an answer.

Foggie argues that OPT's determination to decertify him was not supported by substantial evidence (CPLR 7803[4]). Respondents counter that the substantial evidence analysis is not applicable to an administrative decision under Chancellor's Regulation C-100. Respondents are correct that CPLR 7803(4) is inapplicable to OPT determinations (*Duncan v. Klein*, 38 AD3d 380 [1st Dept., 2007]).

Next, Foggie argues that the determination was arbitrary and capricious because the penalty--permanent revocation of his certification--was grossly disproportionate to the offense (CPLR 7803[3]). Respondents counter that the decision was rationally based on a concern for the safety of students. Foggie responds by citing a string of cases that stand, generally, for the proposition that the court must determine whether the underlying determination was rational, or otherwise discuss circumstances not applicable to this proceeding.

In an Article 78 proceeding, the court's function is to determine whether the agency acted rationally in its decision (*Matter of Pell v. Board of Education of Union Free School District 1*, 34 NY2d 222 [1974]). A decision to permanently revoke a school bus driver's certification based on a specific risk to the safety and welfare of the student population is not arbitrary or capricious (*see, e.g., Arrocha v. Board of Education*, 93 NY2d 361 [1999]).

Finally, the penalty of revocation does not shock the conscience (*see, Matter of Featherstone v. Franco*, 95 NY2d 550, 554 [2000]).

Accordingly, it hereby is

ORDERED that the cross motion to dismiss is denied; and it further is

ORDERED and ADJUDGED that, on the merits, the petition is denied and dismissed.

Dated: 4/27, 2011

Enter: 

J.S.C.
JANE S. SOLOMON

UNFILED JUDGMENT

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