

Singh v New York City Dept. of Educ.

2012 NY Slip Op 31221(U)

April 27, 2012

Supreme Court, New York County

Docket Number: 104918/2011

Judge: Geoffrey D. Wright

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT

PART _____

Index Number : 104918/2011

SIGNH, TULSIE

INDEX NO. _____

vs

NYC DEPARTMENT OF EDUCATION

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 001

VACATE/STAY ORDER/ JUDGMENT

_____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed written decision.*

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

FILED

MAY 09 2012

NEW YORK COUNTY CLERK'S OFFICE

[Signature]

GEOFFREY D. WRIGHT, J.S.C.
A.I.C.C.

Dated: 4-27-2012

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X
TULSIE SINGH,

Petitioner,

Index No.: 014918/11

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

FILED

Respondent.

MAY 09 2012

-----X
GEOFFREY WRIGHT, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Petitioner moves, pursuant to CPLR Article 78, to vacate the determination of the arbitrator Felice Busto and/or reduce the penalty to a lesser penalty than termination on the ground that, for a first offense, is shocks the conscience, or, in the alternative, to remand the matter for a lesser sentence.

Respondent cross-moves, pursuant to section 3020-a of the New York State Education Law (Education Law) and sections 404 (a), 7511, and 3211 (a) (7) of the CPLR, to dismiss the petition.

BACKGROUND

Petitioner was accused of sexual misconduct, including, but not limited to, sexual touching and repeated abuse of a sexual nature. Petitioner is a tenured teacher, formerly assigned to P.S. 306 in the Bronx. According to the petition, during the academic 2009-2010 school year, petitioner was charged with the following acts of sexual misconduct:

Specification 1: On or about April 26, 2010, petitioner said

to student E.S.: "I'm giving you money because you are so cute; you are so cute; I love you; I want to take you home."

Specification 2: On or about April 26, 2010, petitioner engaged in the following: gave student E.S. money; held student E.S.' hand; separated student E.S. from being trip partners with another student; and made student E.S. be his trip partner on the school trip.

Specification 3: On or about May 5, 2010, petitioner said to student E.S. words to the following effect: "I'm giving you money because you are so cute; you are so cute; I love you; I want to take you home."

Specification 4: On or about May 5, 2010, petitioner engaged in the following: gave student E.S. money; held student E.S.' hand; separated student E.S. from being trip partners with another student; and made student E.S. be his trip partner on the school trip.

Specification 5: Between April 2010 and June 2010, petitioner said to Student E.S.: "You are so cute," while petitioner tickling student E.S. on the stomach; "I love you; I want you to be my toy; you are so cute; you should wear perfume; you are so tall for your age."

Specification 6: Between April 2010 and June 2010, petitioner did the following: wrote "I love you" in student E.S.' notebook; tickled student E.S.' stomach; touched student E.S.'

face; rubbed student E.S.' legs and arms; and offered to buy things for student E.S.

Specification 7: Between April 2010 and May 2010, petitioner continued to touch student E.S., despite the student telling petitioner that he did not want to be touched.

Specification 8: As a result of the foregoing, between April 2010 and May 2010, petitioner made student E.S. feel uncomfortable, fearful and/or afraid, and reluctant to go to school.

Petitioner has been employed by the Department of Education for 12 years and has been a teacher for 10 years, and the above-referenced incidents occurred while he was teaching a first grade class.

Pursuant to section 3020 of the Education Law, a pre-hearing conference was held on January 13, 2011, at the offices of the Department of Education, and hearings were held on January 28, 31 and February 4 and 14, 2011. After the hearings, petitioner was found not guilty of committing an overt sexual act, but was found guilty of sexual misconduct and attempting to engage in a sexual relationship with a student. The mandatory penalty for such findings is termination.

At the hearing, both sides were represented by counsel. The hearing officer's opinion stated that E.S. had spent part of the academic 2009-2010 year with his parents in the Dominican

Republic, but that, at the time of the alleged incidents, he was residing with his aunt because his father was working in upstate New York.

E.S.' father testified that his son first complained to him about petitioner during a telephone conversation, and his father asked the aunt to visit the school to check out petitioner. The aunt reported back to the father that petitioner looked "okay."

E.S.' father also testified that, in May 2010, E.S. told him that petitioner had offered him money. In June, E.S. and his parents went on a weekend trip, during which time E.S. said that he did not want to go back to school because petitioner had been touching him. The parents immediately went to the school to report petitioner's conduct to the principal, such conduct forming the above-quoted specifications.

The school principal also testified at the hearing, and averred that he asked E.S. to write down his concerns, to which E.S. wrote the following:

"Mr. Singh was toshing me like toshing my foot and heand and he say to me I love me and I am so cuet all the time and when all the kids go on trips he want to de my parner all the time. And he wanted to by me a toy and I said no."

This statement was accompanied by a drawing that depicted E.S. and petitioner at the classroom table.

The principal further stated that E.S. became very upset and started crying when he was asked to write down his concerns.

Later, the principal had a bilingual teacher speak to the four other students who sat at E.S.' classroom table, and they all indicated that petitioner treated E.S. differently, even stating that petitioner would touch E.S.' leg and hold E.S.' hand, and says that E.S. is cute.

After receiving the complaint from E.S.' parents, the principal contacted the Special Commissioner of Investigation (SCI) and the police. The SCI interviewed E.S.'s mother, who confirmed that E.S. had come home with money that petitioner had given him because he was cute and that petitioner had written "I love you" in E.S.' notebook. The SCI also interviewed E.S., who said that petitioner would tickle him while telling him that he was cute, and that petitioner made him feel very uncomfortable.

The SCI interviewed the other teacher in the classroom, who said that, whereas she never witnessed any inappropriate touching by petitioner, she was uncomfortable with the attention that petitioner would give to E.S.

On November 10, 2010, the SCI issued a report summarizing his findings, and recommending petitioner's termination. At the hearing, the SCI testified that petitioner's behavior was inappropriate and of a sexual nature.

E.S. testified at the hearing, and confirmed the above, as did another of the students.

Petitioner testified and denied that he engaged in any

inappropriate touching. He said that he would wipe E.S.' eyes when E.S. came to school tired, he denied that he offered E.S. money or toys, and he claimed that he had been instructed, during his training, to give positive reinforcement to students by saying that he loved their work. This statement was contradicted by the principal who testified that teachers are not taught to convey positive reinforcement by using the word "love."

Petitioner said that he separated E.S. from another student on a field trip because the two students did not get along, and admitted that he took E.S.' hand during the trip.

At the hearing, respondent's contention was that petitioner was engaged in sexual misconduct that could reasonably be interpreted as soliciting a sexual relationship, and that he was grooming E.S. prior to committing an overt sexual act. Respondent maintained that E.S.' testimony was credible, and was supported by the testimony and report of the SCI, the principal and the other student.

Petitioner contended that respondent failed to meet its burden of proof to establish that he engaged in any misconduct.

The hearing officer found that, whereas petitioner was not guilty of all of the above-listed specifications, he was guilty of specifications 1; 2; 5 (1), (2) and (4); 6 (2), (4) and (6); 7 and 8, based on the evidence presented, and concluded that the mandatory penalty for such conduct was termination.

The court notes that the petition merely states the following causes of action, verified only by petitioner's attorney, and fails to present any argument: (1) the penalty shocks the conscience; (2) the hearing officer exceeded her power; and (3) the hearing officer exceeded her power in finding petitioner guilty.

In opposition of the instant petition, and in support of its cross motion, respondent states that the hearing officer's 33 page decision is based on rational evidence presented at the hearings and that the penalty imposed, pursuant to the collective bargaining agreement entered into by respondent and petitioner's union, is mandatory after a finding of sexual misconduct. Cross Motion, Ex. 6.

DISCUSSION

It is well settled that "a court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [internal quotation marks and citation omitted] [emphasis in original]." *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232 (1974). The test is whether the action taken is justified or without foundation in fact. *Id.* at 231. "Arbitrary action is without sound basis in reason and is generally taken without

regard to the facts." *Id.*

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

"[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action;"

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 (1st Dept 1999). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *Guggenheimer v Ginzburg*, 43 NY2d 268 (1977); *Salles v Chase Manhattan Bank*, 300 AD2d 226 (1st Dept 2002).

"Education Law § 3020-a (5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR 7511. Under such review an award may only be vacated on a showing of 'misconduct, bias, excess of power or procedural defects' [citation omitted]."

Lackow v Department of Education (or "Board") of the City of New York, 51 AD3d 563, 567 (1st Dept 2008).

"A hearing officer's determinations of credibility ... are largely unreviewable because the hearing officer observed the witnesses and was 'able to perceive the inflections, the pauses, the glances and gestures - all the nuances of speech and manner that combine to form an impression of either candor or deception.'"

The record does not support the inference that the witnesses upon whose testimony the hearing officer relied were incredible as a matter of law [internal citation omitted]."

Id. at 568.

In the case at bar, each of the specifications upheld by the hearing officer was supported by the testimony of witnesses or hearsay that substantiated the charges, and such findings of the hearing officer are entitled to deference. *Gisors v New York City Department of Education for City School District Region 10*, 2012 WL 1345494, *1, 2012 NY App Div LEXIS 2900 (1st Dept 2012).

Pursuant to the collective bargaining agreement entered into between respondent and petitioner's union, termination is mandatory when a finding of sexual misconduct has been made.

Hence,

"[t]he penalty of termination does not shock our sense of fairness. Petitioner's unacceptable behavior compromised his ability to function as a teacher and the school's position in the community. Further, '[a]cts of moral turpitude committed in the course of public employment are an appropriate ground for termination even of long-standing employees with good work histories' [internal citation omitted]."

Matter of Douglas v New York City Board/Department of Education, 87 AD3d 856, 857 (1st Dept 2011).

In addition to the foregoing, the court finds that petitioner has failed to present any argument in support of his position, has failed to provide any indication as to how the hearing officer exceeded her powers, and has not filed any

opposition to respondent's cross motion to dismiss.

CONCLUSION

Based on the foregoing, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that respondent's cross motion to dismiss the petition is granted, with costs and disbursements to respondent as taxed by the Clerk of the Court upon submission of an appropriate bill of costs.

Dated: 4/27/12

ENTER:


GEOFFREY D. WRIGHT
A.J.S.C.

Geoffrey Wright, J.S.C.

FILED

MAY 09 2012

**NEW YORK
COUNTY CLERK'S OFFICE**