

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

2014 NY Slip Op 30088(U)

January 10, 2014

Sup Ct, New York County

Docket Number: 150950/13

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART 1A PART 16

Index Number : 150950/2013
PRINCIPE, PETER
vs.
DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 002
PUNISH FOR CONTEMPT

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

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) _____
Answering Affidavits — Exhibits _____ | No(s) _____
Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion *is* and cross-motion are determined on an interim basis in accordance with the accompanying memorandum decision.

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

JAN 10 2014

Dated: _____

Alice Schlesinger

ALICE SCHLESINGER, J.S.C.

- 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 STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Application of

PETER PRINCIPE,

Petitioner,

Index No.150950/13
Motion Seq. No.002

For a Judgment confirming an Arbitration Award Under
Article 75 of the Civil Practice Law and Rules,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.
-----X

SCHLESINGER, J.:

Justice delayed can be justice denied. Certainly here, justice has been delayed. Further, if the Court were to agree with the respondent here and grant the relief requested in its cross-motion to vacate the Award rendered on January 28, 2013, by an Administrative Law Judge, I believe it would be a reasonable conclusion that justice had been denied as well.

Strong language? Yes, but I believe the tortured history of this case warrants such a finding. The facts and history of this case have been recited on many occasions. However, at the very least, a summary showing the chronology of events would help to understand why I have made this comment.

Petitioner Peter Principe was a teacher at Middle School 218 in Brooklyn for five years before he was promoted to Dean in 2005. Two years later, in April 2007 while on the job, Mr. Principe was involved in two incidents that gave rise to charges that he had engaged in corporal punishment with two boys. These charges became Specifications and were addressed in a hearing held, pursuant to §3020-a of the Education Law, between

January and August 2009. On October 27, 2009, the Hearing Officer, rejecting all of what Mr. Principe had testified to and finding no mitigating factors in his favor, found Principe guilty of the charges. The punishment was termination, and that penalty was imposed on November 9, 2009. Four days — not months but days — later, on November 13, Principe brought an Article 75 proceeding to vacate the decision and the penalty.

The petition came before this Court. On April 28, 2010, I dictated a decision on the record. In the course of that decision, I explained why I believed that an Answer to the Petition by respondent Department of Education ("DOE") was not necessary, and I then partially granted certain aspects of Principe's petition to vacate and certain aspects of the DOE's cross motion to confirm. I upheld the Arbitrator's findings on liability but vacated the penalty part, finding it too harsh and shocking to the judicial conscience.

I chose the more informal decision making procedure of dictation and dispensed with an Answer by respondent because I believed that as soon as possible a lesser penalty should be determined and enforced. Because it was not the Court's role to determine the lesser penalty, I directed a remand for a new hearing. I believed time was of the essence and I wanted to move things along.

The DOE, of course, had a right to appeal, and it did. Pursuant to §5519 of the CPLR, during the appeal, my order was stayed and stayed and stayed. The Appellate Division affirmed my opinion by a 3-2 vote on April 5, 2012. 94 AD3d 431. This was almost two years after my decision had been rendered. Mr. Principe still was without his job and still was receiving no pay. The DOE had a right to appeal one more time to the Court of Appeals, and it did. The stay continued. On December 13, 2012, by a vote of 5-1, that court affirmed the Appellate Division. 20 NY3d 963.

That meant that finally a new arbitration would be held, something I had ordered nearly three years earlier (32 months). An arbitrator was chosen on January 7, 2013, by the State Education Department. That entity had not been a party to the proceedings and, as far as can be seen, did not participate in the new hearing. Nor did it inform anyone that petitioner's teaching certification might be a problem.¹

On January 17, 2013, a hearing was held before Hearing Officer Alan Berg. Only 11 days later, on January 28, 2013, he issued his decision (Exh A to petitioner's motion). Arguably those concerned wanted him to act quickly and announce a new lessened penalty. He did that while noting that Mr. Principe had by then been off the payroll for 38 months.²

It is extremely doubtful that Hearing Officer Berg was prescient to the extent of anticipating that at some future time the DOE would challenge his award of back pay — he ordered it from May 2011, forward. But he did point out in the decision that he was primarily relying for guidance upon *Riley v City of New York*, 84 AD3d 442 (1st Dep't 2011), wherein the First Department affirmed the trial court in granting the teacher's petition to vacate the arbitrator's penalty of termination and to remand for a lesser penalty (p 7 of Berg decision). Nevertheless, the DOE did challenge the award of back pay in this case.

¹The DOE is a New York City department. Its attorneys claim that they first learned about a lapsed certification when they were effectuating Mr. Principe's return to work and to the payroll in February 2013. No one is in a position to question this assertion and thus it must be accepted.

²It was quite remarkable how expeditiously Berg performed his task. He noted in his decision that in preparation for the hearing, he had read the previous 72 page decision by the original Hearing Officer, all three court decisions, as well as all 3986 pages of the minutes. He also read relevant case law. In my July 2013 decision confirming his Award, I noted that it was well thought out and reasonable.

In *Riley*, a new hearing officer presided at the second hearing because the first, similar to the situation here, was no longer available. In *Riley*, the new hearing officer decided that the penalty should be a one-year suspension rather than termination. The lesser penalty was found to be appropriate in light of one corporal punishment episode and a spotless fifteen year record for Beverly Riley, the teacher.

Mr. Berg, during his discussion in this case, noted that on those facts, the DOE, in responding to petitioner's motion to confirm the Award, had taken the position that the award of back pay was a "nullity" as the Hearing Officer there had "lacked authority to award back pay". Berg observed that the respondent's position on this point was rejected by the trial court, and he then proceeded to quote from the court's opinion confirming the Riley Award. In that portion of the decision, Justice Carol Huff had pointed out that if the DOE had its way and the teacher received no back pay for the then two years she was suspended, such a penalty would not be consistent with the Appellate Division's directive to remand for a lesser penalty.

While *Riley* is not on all fours with our case, as Berg pointed out in setting Principe's penalty at an 18 month suspension, the posture of the respondent was similar in that in both cases, DOE vigorously opposed a lesser penalty. However, Berg could not have known when he wrote his decision what predicate the Department would use to challenge the Award. But it certainly appears that he expected that some challenge would be made. And, of course it was.

Hearing Officer Berg, during the hearing, specifically asked counsel to compare and contrast the facts in *Riley* with the instant controversy. Factors would be termed "mitigating" or "aggravating" depending upon whether the suspension was for more or less

than one year. Riley's one year suspension was to be the "baseline". The "strongest aggravating factor" found by Berg was that *Principe* involved two separate and completely unrelated acts of corporal punishment, while in *Riley* there was but one.

There was also the aggravating factor that the two boys in *Principe* had suffered injuries, while in *Riley*, not so. Further in *Riley*, the teacher had an unblemished record of fifteen years and here *Principe* has only five. However, in the instant case, the Hearing Officer made a persuasive distinction on the role that the length of good service played when termination was being considered as a penalty, as opposed to when termination had been ruled out and length of service became "at best a minor factor" (p 9).

Before presenting his ultimate decision, Hearing Officer Berg again addressed the issue of back pay, stating (p 10) that:

It [i.e., the fact that "reinstatement is merely the obvious and only logical consequence of the suspension"] would not require discussion or even mention but for the fact that the Department apparently disputed it, after the fact, in *Riley*.

In conclusion, Berg found that the aggravating factors outweighed the mitigating ones, emphasizing that here there were two episodes. That meant that the baseline of a one-year suspension set in *Riley* was to be increased. And it was. Berg said: "I find that a suspension of eighteen months from the date when [*Principe*] was removed from the Department's payroll is the appropriate penalty" (p. 11). That meant that *Principe* was to receive back pay for twenty months.³ But *Principe* was not reinstated, or perhaps he was

³The termination went into effect in November 2009; the substituted eighteen month suspension period ran from that date through May 2011. The back pay award ran from the end of the suspension period through January 17, 2013, the date of the hearing, a period of 20 months.

for a day or so. That is when the Department says it discovered that petitioner, who had held a provisional certificate to teach from February 2004, no longer had a non-expired certificate.

Such was the status when the controversy returned to me in the form of a petition by Principe to confirm Berg's Award. This petition was opposed by the Department, which also filed its own petition under Index No. 450285/13 to vacate the Award "on the grounds that the penalty violates public policy, statute and decisional law".

As noted in my decision of July 9, 2013 deciding both petitions, the Department was relying on the fact, never disclosed before, that Principe did not then hold a valid New York State Teaching Certification. His initial provisional certificate, which had been valid into 2009, had been extended twice through January 31, 2011. By law, only a third one-year extension could be granted for hardship. However, while petitioner did apply for the third extension to January 31, 2012, he opted to withdraw that request and applied instead in April 2013 for an Initial Certificate. As of my July 9, 2013 decision, that application had not been determined.

I also pointed out in my decision that in a Reply to the Petition submitted by the Department, an affidavit from Ann Jasinski, Assistant Director of the Office of Teaching Initiatives of the New York State Education Department ("NYSED"), had been submitted. She said there that she was the individual "responsible for teacher certification in New York State" (Aff ¶1). She attempted to explain a somewhat confusing process for obtaining a teaching certificate. One aspect of this was particularly significant, which was that a prerequisite for a permanent certification was two years of teaching experience. As noted earlier in this decision, Principe had taught for 5 years before he was promoted to Dean in 2005.

I granted Principe's petition to confirm the Berg Award and denied the Department's petition to vacate it. I found that "Hearing Officer Berg carefully and thoughtfully weighed all the mitigating and aggravating factors and selected a penalty that is rational and in accord with similar cases" (p 5).

I did not then, and do not now, see the absence of a valid certification as a bar to Principe's entitlement to back pay. As pointed out, the pay award retroactive to May 7, 2011 dealt with a period where the absence of the certificate was in fact irrelevant. Principe was not able to teach in 2010, 2011 and 2012 because he had been terminated effective November 2009, and despite judicial decisions directing a lessening of that penalty, the Department's multiple appeals had resulted in such a modification not occurring until January 2013.

The above facts clearly distinguish this situation from the one in *Matter of Smith v Board of Educ. of Wallkill Cent. School District*, 65 NY2d 797 (1985), a decision heavily relied upon by the Department in its newest papers submitted in support of its motion to renew and modify my July 9, 2013 decision. Essentially, the Department argued that Education Law §3009 and §3010 prevented the DOE, on pain of criminal prosecution, from paying Principe this retroactive money.

Smith was a mathematics teacher who had been suspended without pay because his provisional certificate had expired and he had failed to obtain a permanent certificate. He applied for one and obtained it retroactive to September 1981, but he had been suspended in May 1981. A co-petitioner, Cutler, an elementary education teacher, had also been suspended for the same reason effective September 1981. He was then able to obtain a certificate of qualification in industrial arts, retroactive to the date of his suspension.

Both men sought back pay from the effective date of their new certificates. The Court denied this request, stating (at p 799) that:

Here, neither appellant was certified to teach on the day he was suspended. The defect in Smith's credentials was not remedied by the provisional certification, which, though retroactive to September 1, 1981 still left a gap between his suspension and his certification. Neither was Cutler's suspension rendered unlawful because of the issuance of a retroactive certificate of qualification, which did not authorize him to teach (see, 8 NYCRR 80.2[1].) Since appellants were unqualified to teach when respondents suspended them, in neither case did subsequent certification render the suspensions unlawful.

In other words, the respondents had correctly suspended the teachers because at the time of their suspensions, they lacked a valid certificate and so could not teach. Therefore, they were properly removed from the classroom. But here, Principe's removal from the classroom had nothing to do with a certificate. In fact, that was never even mentioned until early 2013, four years after his termination. In Berg's award in January 2013 he said:

I also stated on the record that I would follow the format used by Hearing Officer Glanstein in her decision in Riley. I explained that this meant that I would order reinstatement with back pay as I had determined that the suspension in my final decision would be for a period less than 38 months. I therefore ordered reinstatement as an interim remedy. In these remand situations, where the Respondent has already been off the payroll for more time than the length of the eventual suspension, reinstatement with back pay is merely the obvious and only logical consequence of the suspension. It would not require discussion or even mention but for the fact that the Department apparently disputed it, after the fact, in Riley.

Berg's Award was his way of making Principe whole by compensating him for the 20 months without a salary — 20 months that by Berg's Award Principe was now entitled to receive.

Up to this point, while I have made reference to the motions now pending before me, I have not explicitly said what they are and what relief is requested. Now is the time to do that. In the first instance, on December 10, 2013, petitioner moved to hold the Department in contempt for its refusal to comply with my July 9, 2013 decision and order. Counsel, in relatively brief papers, merely set down a chronological review of the decisions in this controversy beginning with the first hearing before Hearing Officer Stuart E. Bauchner in 2009 and concluding with this Court's decision of July 9, 2013, ordering that DOE reinstate Principe immediately and pay him back wages.

Counsel then reported that he had served Notice of Entry of my decision and order, but respondent had still not complied. Rather, the DOE had once again filed a Notice of Appeal, on August 30, 2013. On September 4, 2013, petitioner moved in the Appellate Division to vacate the automatic stay granted to the DOE pursuant to CPLR §5519(a)(1). The Appellate Division responded with an order dated October 29, 2013. There it ordered:

that the motions are granted to the extent of vacating CPLR 5519(a)(1) stay unless respondent/petitioner-appellant [the Department] perfects their appeal on or before December 2, 2013 for the February 2014 Term with no further enlargements to be granted. Upon failure to so perfect, an order dismissing the appeal may be entered ex parte provided that petitioner-respondent/respondent [Principe] serves a copy of this order upon respondent/petitioner-appellant [DOE] within 10 days after the date of entry hereof.

As noted, the instant motion was made on December 10. By that date, the Department had still not perfected its appeal, the deadline for which was December 2:

The Department, however, apparently determined to avoid the clear mandate of the Hearing Officer and this Court, cross moved for leave to renew or alternatively to modify or stay the "Impact of Order". This motion was made pursuant to Rule 2221 of the CPLR. A motion to renew relies on a new fact or facts not offered previously. What were they alleged to be?

According to cross moving counsel, the new fact was a very recent decision by Supreme Court Justice Joseph Teresi sitting in Albany County, dated December 10, 2013, coincidentally the same day that counsel for Principe brought his contempt motion. The Albany case was in the nature of an Article 78, naming the New York State Education Department (NYSED) as the respondent. By petition dated June 14, 2013, Principe had asked the court to declare that NYSED's denial of his application for an unexpired Provisional Certificate for teaching was unlawful, arbitrary and capricious and an abuse of discretion. Principe had also asked the court to direct NYSED to issue a Provisional Certificate to him with an effective date six months and 39 days from issuance.

The State answered and included an affidavit from the same Ann Jasinski who had aided the City respondent earlier here. The State also moved to dismiss the Petition, but dismissal was denied in a September 30, 2013 decision and order by the Judge.

Counsel for the Department is now arguing that Justice Teresi's December 10 decision has resolved the "until-now-outstanding issue of whether Principe[] might be eligible to be reinstated and whether he may receive back wages for teaching" (§43 of Aff). He further urges that Justice Teresi's decision makes it "impossible" to comply with this

Court's July 9, 2013 decision and order. In fact, counsel goes so far as to claim that "Principe has been judged not to have the requisite teaching credentials for either reinstatement to his former position or to legally qualify to receive back pay as a pedagogue." (§44).

But counsel's reading of Justice Teresi's decision is much too broad, and counsel confuses dicta with findings. It also has no relevance to this Court's July 2013 order. What did Justice Teresi's decision actually say and hold? It is relatively short, probably because the judge viewed the application as falling within the strict parameters that judges oftentimes use in deciding whether to grant Article 78 relief. In the first instance, Justice Teresi noted that petitioner was challenging the NYSED's March 8, 2013 "Denial Letter" and that "Because Petitioner failed to demonstrate his entitlement to the relief he seeks, his petition is denied" (p 2).

The "Denial Letter" was expanded upon by Ms. Jasinski in ¶21 of her affidavit in support of the State's Answer. There she explained that she had notified Principe that in order for the Office of Teaching Initiatives ("OTI") to evaluate his application for a third and final one-year extension of his provisional certificate (which he ultimately withdrew), he would need to provide certain documentation, which she then went on to enumerate. Significantly, she noted in ¶22 that "by the plain terms of [8 NYCRR] §80-1.6(c)", even if Principe had met the requirements, the certificate still would have expired as of January 31, 2012.

Justice Teresi went on to discuss the extremely limited role that a judge has in deciding an Article 78 petition like the one before him. Citing *Matter of Pell*, 34 NY2d 222 (1974), he stated that the administrative ruling could not be disturbed "unless it has no

rational basis ... or the action complained of is arbitrary and capricious." Further, there must be deference given to an agency's rational interpretation of its own regulations (p 2). But here, "Petitioner failed to demonstrate that Respondent's regulatory interpretation has no rational basis" (p 3). He then turned to Ann Jasinski's explanation of the Denial Letter, earlier referred to by me, and found that "while Respondents' construction of the regulations is premised on a strict reading of the text, it is not irrational" (p 4). Respondents had construed the absence of a provision in §80-1.6(a) and (c) authorizing a further extension of a provisional certificate as a bar or prohibition to granting one.

As far as Principe not now being able to return to his prior teaching provision with his Provisional Certificate, that is very probably why he withdrew his application for that certificate and elected instead to pursue obtaining an Initial Certificate, something new and different. In fact, Justice Teresi refers to just such an alternative at the bottom of page 4. He added, "while the 'permanent' and 'initial' certificates do require additional credentials, Petitioner failed to demonstrate that the Denial Letter completely prohibits him from reacquiring his prior position" (pp 4-5).

While it is correct that the Judge seems to adopt Ms. Jasinski's position that Principe could have done more in the interim time to obtain more credentialing, that adoption, together with his characterization of Principe's explanation of the disciplinary hold's effect as "conclusory and unsubstantiated", was not a finding. Rather, it was another reason why the contents of the Petition were of limited value to him "and does not demonstrate that Respondents' determination was arbitrary and capricious" (p 4).

Therefore, I find that, contrary to what counsel argues, Justice Teresi's opinion in no way resolved the issue of petitioner's teaching credentials or his entitlement to back pay. In fact, back pay is not mentioned at all in the decision.

So to summarize, the basis of the cross motion to renew, Justice Teresi's decision, fails to convince me that "new facts" exist to lead me to review and modify my July 9 decision in any way. Therefore, the motion for renewal is denied in its entirety. I am still directing that Berg's Award be complied with, at least as to the 20 months of back pay. As I explained earlier, the *Smith* case (*supra*) does not require a different result. There has never been a fiction pursued by anyone here that the back pay award was compensation for teaching. It was not. Rather, it was compensation for the erroneous termination, later revoked. All the courts found that this was too harsh a penalty. Then, because of repeated appeals which took years, the precise terms of the lesser penalty were not decided until January 2013, one year ago.

Therefore, I find that it is neither impossible, nor a violation of Education Law §3009(1) and §3010, for the Department to do what they were ordered to do in January and July 2013; that is, pay Mr. Principe the 20 months of his salary that he was awarded. However, the resumption of his teaching and any payment beyond the 20 months are problematic. As of now, I believe Mr. Principe does not have a valid teaching certificate. Further, the Education Law and the courts state that such a lack makes him "unqualified" to teach. Therefore, I would be exceeding my authority if I directed him back to the classroom. However, I can and will direct the State Education Department to come for the first time here to my courtroom. *Matter of Storrs v. Holocomb*, 245 AD2d 943 (3rd Dep't 1997).

It is the Department's position, as articulated in ¶21 and ¶28 of its papers, that DOE does not issue certifications but rather NYSED, a separate entity, does. This issue of petitioner's certification is thus still unresolved. But in order to grant complete relief and comply with the Berg Award, NYSED must be joined as a party here. Then it can be sorted

out where precisely Mr. Principe is in the certification process and also who bears responsibility for the lapse of his certification and failure to obtain a new, valid one.

Therefore, I am directing pursuant to CPLR §1001(b) that NYSED be joined as a party to these proceedings. Counsel for petitioner is directed to effectuate this joinder by serving a copy of this decision and a Supplemental Notice of Petition and Amended Petition on NYSED and on counsel for the DOE without delay. A copy shall be filed with the County Clerk, and a courtesy copy submitted to Room 222. NYSED shall similarly serve and file answering papers within twenty days of service, and petitioner may reply within ten days thereafter. All counsel shall then appear before this Court for further proceedings on Wednesday, February 26, 2014 at 3:30 p.m.

Accordingly, it is hereby

ORDERED that petitioner's motion is granted on an interim basis to the extent of directing respondent to pay to petitioner the full amount of the back pay awarded by Hearing Officer Berg, with further proceedings to follow as set forth herein; and it is further

ORDERED that respondent's cross motion to renew is denied in its entirety.

This constitutes the interim decision and order of this Court.

Dated: January 10, 2014

JAN 10 2014



J.S.C.
ALICE SCHLESINGER