

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

2014 NY Slip Op 31045(U)

April 23, 2014

Supreme Court, New York County

Docket Number: 101263/13

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 101263/2013

FOX, GLEN

vs
NYC DEPARTMENT OF EDUCATION

Sequence Number : 001

VACATE OR MODIFY AWARD

PART 16

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 ^{CROSS-} motion is denied and the petition is granted in accordance with the accompanying memorandum decision and the record of March 26, 2014.

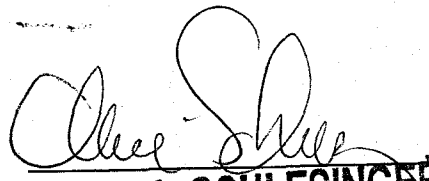
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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).

APR 23 2014

Dated: _____


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

GLEN FOX,

Petitioner,

Index No.101263/13
Motion Seq. No.001

-against-

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

-----X
SCHLESINGER, J.:

This is a difficult decision to begin. It is an Article 78 proceeding involving a tenured school guidance counselor who was terminated as an employee of the Department of Education. Why is it difficult? Because this Court feels so strongly that the termination was completely unjustified and was perhaps motivated by the personal feelings of both the new Principal, Pamela Bradley, who first came to P.S.150 for the school year 2010-2011, as well as Hearing Officer Lana Flame, who presided over the case. Knowing that is a harsh judgment to make, one I reluctantly reach, I nevertheless find that it is compelled by the circumstances of both the multiple charges or specifications against Fox and the detailed decision by the Hearing Officer, which recommended the most severe penalty of termination.

Petitioner Glen Fox, after receiving the appropriate licensing, was hired in 2004 to be the School Guidance Counselor at P.S.150 in Brooklyn by then Principal Sharon Wallace and Assistant Principal Pamela Bridges-Price. From that time until the new Interim Principal Pamela Bradley arrived, Mr. Fox had always received satisfactory ratings. In fact, Ms. Bridges-Price, called as a witness for respondent New York City

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Department of Education (“DOE”) at Mr. Fox’s hearing pursuant to Education Law §3020-a, testified in part that: “Mr. Fox performed the duties, I believe, that were required of him. Whether he performed them to the required specifications of the principal, he performed the duties to the best of his ability” (pp 527-28 of Hearing Transcript, “TR”, Exh B to DOE Cross-Motion). She further testified that she could not speak as to tasks given to him by the principal, but: “I can only speak for anything I ever asked Mr. Fox to do Anything I ever requested him to do, he’s done.” (TR 528, on cross-examination by counsel for Fox).

The hearing was held and testimony given on April 12, 15 and 30, and on May 1, 3, and 13, 2013. On August 15, 2013, the Hearing Officer ruled on the multiple Specifications that had been set forth in two sets, for a total of 22 Specifications. She found that all the Specifications in the first set, except 1, 2 and 19(b), had been sustained, along with all the Specifications in the second set, except for 3(b). As stated earlier, the Hearing Officer recommended that: “The appropriate penalty for Respondent’s culpability under the sustained charges is termination of his employment with the New York City Department of Education” (Exh. A., p.49, the final page of the decision). Mr. Fox did have counsel, who represented him at the hearing and post-hearing phase. However, now before this Court, he is representing himself.

In her decision, Hearing Officer Flame first set down the 22 Specifications against Mr. Fox. I will do that also, even though it is somewhat tedious to recite them all, as it is necessary not only to present a complete record, but also to give a flavor for what these charges really concerned. For the most part, they had to do with inadequate documentation, failure to precisely meet deadlines, and most significantly, not complying with the directions and instructions that Principal Bradley had issued.

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It seems absolutely clear that by the end of Ms. Bradley's first year as Principal of P.S. 150, first in an interim capacity, she had concluded that Mr. Fox was not to her liking and should not continue working at the school, now her school. Ms. Bradley rejects this conclusion, but I find the facts bear it out. And I believe the actual predicate for this is an event that occurred in a highly charged meeting on June 1, 2011. Bradley and Fox were there, as was Fox's union representative and Assistant Principal Pamela Bridges-Price. In fact, this meeting was the subject matter of Specification 3, as well as footnote 4 by the Hearing Officer, which appears on page 18 of the decision.

The testimony was that Mr. Fox was upset, though not shouting, when confronted with allegations that he had not timely completed the middle school matriculation paper work. Fox did stand up and did move papers around the table. His tone became emotional and he was told by the others to "bring it down". However, it is what Ms. Bradley said, loud enough to have others such as Yolanda Carmen Creiner outside the office hear, that revealed the Principal's true feelings (TR 758). She shouted to Mr. Fox, twice: "You're finished."

The Hearing Officer does not give the statement much importance and attributes it to a loss of composure by the Principal. She adds that there is no other evidence to support that "this outburst was more than an isolated lapse in Principal Bradley's conduct." Hearing Officer Flame then observes that Principal Bradley continued to support Mr. Fox's professional development, as evidenced on pages 46-47 of the transcript. But these pages merely have Ms. Bradley being sworn in as the Department's first witness. Assuming the Hearing Officer meant pages 146-147, here there are long self-serving answers by Ms. Bradley interpreting the disciplinary letters

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she sent to Mr. Fox. The Q and A on these pages of her direct testimony proceed in this way, beginning with a reference to Exhibit 18, a letter Bradley had sent to Fox (TR 145, l 3, to 146, l 11):

Q. How did that make you feel?

A. It concerned me one, because the reason I say to have documentation is because documentation takes you off the spot. All you have to do is refer to your documentation. ...

Q. So did the Respondent take any responsibility for his poor recordkeeping?

A. No responsibility at all. ...

Q. And how did that make you feel?

A. Again, just like at the end of the year before, every time I brought Mr. Fox up and had a conversation with him and even gave him ways to improve, keep your documentation, keep accurate documentation it wasn't happening. And so as, you know, when you're thinking about what's best for children accurate documentation is necessary so it made me very frustrated as a supervisor because it impacts the lives of children.

The above exchange is an apt portion to read because it nicely summarizes what the case against Glen Fox really was about, which was Principal Bradley's growing frustration and irritation with her perception that Mr. Fox was not documenting matters to her taste. But as the testimony also clearly shows, both on behalf of the Department and on behalf of Fox, the latter mostly ignored by the Hearing Officer, the case via its Specifications for the most part did not deal with the important work a counselor in Mr. Fox's shoes does and whether he was good and successful at doing that work. I find that the evidence shows that he was. However, more importantly, I find that the penalty

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of termination, the most severe penalty, is shockingly harsh because the Department was unable to prove the converse; i.e., that Mr. Fox was not good at his work.

These are the Specifications (Exh C). In the first set, dated October 15, 2012:

1) Respondent failed to enter all the required middle school admission decision information into the Student Enrollment Management System (SEMS) by the deadline in May 2011.

2) Respondent demonstrated a lack of professional fitness, and/or provided false and/or misleading information, in that respondent advised his supervisor that he (respondent) had entered all the required middle school decision information into SEMS by May 31, 2011.

These two Specifications were dismissed. Hearing Officer Flame took three plus pages to discuss these claims, and in doing so, she recites the relevant testimony in impressive detail. The Specifications continued as follows:

3) Respondent demonstrated a lack of professional fitness and/or insubordination, in that he shouted at his supervisor during a disciplinary meeting on June 1, 2011.

This Specification was sustained, although there is some serious question as to whether it should have been because there is no testimony in the record that Fox did shout at Bradley at the June 1st meeting. And the Hearing Officer fails to cite to any. However, there is clear testimony that Ms. Bradley shouted at Fox.

A witness called by Fox, Yolanda Carmen Creiner, stated that she worked in an office outside of Bradley's and heard the Principal yell: "You're finished. You're finished". (TR 758). She added: "I don't know based on what, but that's what I heard". The next question asked of Ms. Creiner was: "Could you hear Mr. Fox yelling anything?"

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She answered: "No, not at all. ... I didn't hear anything from Mr. Fox." The Specifications continued (emphasis added):

4) Respondent failed to timely, properly, and/or adequately provide documentation of the services, or dates and times that he provided counseling to **A** student on May 12, 2011.

Specification 4 was proven based on Fox's admission in his testimony (p.24 of decision).

5) Respondent failed to report to his assigned post on September 8, 2011.

September 8, 2011 was the first full day of school. The charge was sustained based on the undisputed testimony that Fox was in neither the lunch room nor the SAVE room during the 4th and 6th periods. It was also undisputed that this absence never occurred again.

6) Respondent failed to properly and/or adequately maintain documentation of students' middle school placements, in that respondent failed to produce such documentation, as required, on September 9, 2011.

This charge was sustained, despite the fact that the discussion by the Hearing Officer dealt with only one student. Further, all acknowledge that Fox did provide documentation for this child, a signed consent form later on that day, despite his inability to do so when first directed to produce it. Hearing Officer Flame seems most disturbed here by Fox's refusal to take responsibility. But the question is, responsibility for what?, since there was no testimony that this unidentified child suffered in any way from this confusion.

7) Respondent demonstrated a lack of professional fitness, and or violated Chancellor's Regulation A-820, in that without authorization, he disclosed confidential student information to a social worker not employed with the New York City Department of Education, on September 19, 2011.

This charge was sustained because at the time, on September 19, 2011, the social worker in question saw a copy of the child's IEP ("Individualized Education Program") without authorization given to Fox. However, the authorization was faxed to the school later that same day.

8) Respondent exhibited unprofessional conduct, in that he left a professional development workshop, prior to the end of his work day, without seeking the permission of, or notifying, an administrator on February 10, 2012.

This charge was sustained as Mr. Fox admitted to the conduct. He explained that he left 20 minutes early because he received word that his daughter had "pink eye" and had to be picked up by him and taken home. The Hearing Officer found this "unauthorized early departure was unprofessional conduct" (p. 29 of decision).

9) Respondent demonstrated a lack of professional fitness, and/or was insubordinate, in that he failed to follow his supervisor's directive to take a student to his (respondent's) office and provide said student counseling on March 9, 2012.

This charge was sustained because "Mr. Fox allowed Assistant Principal Bridges-Price and Dean Kwateng to take the student Br. from him ..." (p.29 of decision). It should be noted that both the Dean and Assistant Principal were Mr. Fox's supervisors. AP Bridge's-Price testified that the child resisted going with Mr. Fox (TR

502) and that Mr. Fox did not want to be unduly aggressive with the child. Hearing Officer Flame found Mr. Fox's explanation "without merit and disingenuous" (p.30 of decision). She seemed particularly offended because, in the midst of this incident, Mr. Fox failed to tell the others that Ms. Bradley had given him instructions to take the child to his own office.

10) Respondent demonstrated a lack of professional fitness, and/or neglected his duties, in that he failed to provide counseling to a student in crisis, on March 13, 2012.

This event involved a young child who was in the SAVE room and who had threatened to jump from the classroom window. It was Mr. Fox's lunch period when he was called about this child, whom he was scheduled to counsel the following period. At the time Fox was called, the child was huddled and crying on the floor behind the door in the SAVE room. Fox walked to the room, evaluated the situation, and concluded that the child, who was being monitored by another adult and was not in danger, could be seen by him soon after.

The Hearing Officer found that the child was in crisis and should have been seen immediately by Fox. It should be noted, however, that nothing bad happened to the child that day. Further, his mother gave powerful testimony at the hearing on behalf of Mr. Fox. (More on this later). Nevertheless, the charge was sustained.

11) Respondent demonstrated a lack of professional fitness, and/or provided false, inaccurate, and/or misleading information, in that respondent informed his supervisor that respondent had analyzed a situation and determined that a student did not need immediate counseling, on March 13, 2012.

This related to the same incident as Specification 10 and was sustained. The “misleading information” seems to be that Fox told Bradley that he had “analyzed the situation” but never told her he had not “visually assessed the student.” This, according to the Hearing Officer, “demonstrated a lack of professional fitness” (p.32 of decision), rather than, as others might see it, as an exercise of professional judgment.

12) Respondent demonstrated a lack of professional fitness, and/or was insubordinate in that respondent failed to follow his supervisor’s directives regarding a student’s alleged threat to commit physical harm against another student, on April 16, 2012.

This is at best a confusing situation wherein two issues were in play. One was that DM., a young child, claimed to have a plan to kill another child, leading Fox to call DM’s mother. The second issue involved the mother telling Fox that she was coming to the school. However, the problem was that she had, at an earlier time, been given limited access to the school and to her child. The Hearing Officer did not find Mr. Fox insubordinate, but she did find that he demonstrated a lack of fitness because he seems to have focused more on the “mother” situation than the “child” one. The charge was sustained.

13) Respondent demonstrated a lack of professional fitness, and/or neglected his duties, in that he failed to follow school protocol with respect to a report to the Administration for Children’s Services (ACS) on April 16, 2012.

This charge was sustained because a form relating to the school’s call to ACS was placed on the Dean’s desk, rather than in his hands, which violated protocol.

14) Respondent demonstrated a lack of professional fitness, neglected his duties, and/or was insubordinate, in that he failed to follow his supervisor's directives regarding reporting a case to ACS, on April 28, 2012.

Here the charge was sustained even though Fox reported the case, as he had been directed to do by the Principal, and called ACS about sexual abuse between two children on a stairway. The basis for the finding against Fox appears to be that he, without any direction from Bradley, also reported a case of "educational neglect" vis-a-vis the male student involved in the incident. The latter complaint was "ultimately" determined to be unfounded.

15) Respondent neglected his duties and/or displayed insubordinate conduct, in that he failed to follow his supervisor's directive to contact ACS to identify the caseworker for two students, on May 24, 2012.

This charge was sustained because the Hearing Officer found that Fox had failed to contact ACS to learn the identity of the caseworker for two brothers. He explained that he had inadvertently given Principal Bradley the wrong name. This misinformation simply slowed the process of Bradley ascertaining that a mother who was coming to the school was not allowed to see her boys. In fact, the information was obtained, and when the mother came to the school she was escorted out without seeing the boys.

16) Respondent exhibited unprofessional, misleading, and/or deceptive conduct, in that he provided false information to his supervisor, on May 24, 2012.

The charge relates to the same incident as 15, but here the wrong name given to Bradley is characterized as something somehow more sinister. The charge was sustained.

17) During the 2011-2012 school year, Respondent failed to properly, adequately, and/or effectively plan and/or execute counseling sessions, as observed on April 23, 2012.

This charge involved a formal observation of Fox and his counseling of two children. The observation was conducted by Principal Bradley. It did not go well, as even Fox acknowledged. However, it is hard to see how he failed to “effectively plan” for the session when one of the boys, Br, came to the session extremely agitated after having a fight with another child, Ka. Fox believed and said that Bradley’s presence and unwanted intervention made this bad situation worse. After the session, Fox took Br back to his classroom, where Ka was, even though Br had threatened to hit Ka back. After Fox left the room, Br did hit Ka, despite the teacher’s presence in the room. The charge was sustained.

18) Respondent provided false information regarding school policy to an ACS caseworker on September 6, 2012.

This charge was sustained as the Hearing Officer found that it was not inconsequential for Fox to tell an ACS caseworker that the Principal’s policy was to staple ACS information to a student’s blue card. This was wrong, or as characterized by the Hearing Officer, “false information” (p. 38).

19) Respondent failed to implement professional development recommendations from observation conferences, plans of assistance, and professional development sessions, during the 2010-2011 and 2011-2012 school years with regards to:

- a. Following the directives of his supervisors;
- b. Responding appropriately to crisis situation and;
- c. Properly and adequately maintaining required documentation.

Specification 19a was essentially a repeat of earlier accusations, such as Specifications 4, 14 and 18, so it was sustained. Specification 19b — the only one arguably even dealing with Fox's real counseling work — was dismissed for failure of proof. Specification 19c was sustained as Mr. Fox was unable to produce requested documentation for his counseling sessions.

As indicated earlier, there was a second set of Specifications. These referred to the time after Mr. Fox was removed from his guidance counseling duties and directed to do clerical work in an office at the school.

1) Respondent demonstrated a lack of professional fitness and/or insubordination, in that he failed to provide the principal with the name and/or contact number of a specific Administration for Children's Services (ACS) caseworker assigned to a specific student during the 2012-2013 school year.

As noted above and noted by the Hearing Officer in her discussion of this charge, Mr. Fox had been removed from his duties as a guidance counselor on October 18, 2012. Nevertheless, the charge was sustained as it referred to information he should have retained in the school, not at his home. Although he could not locate a log he kept, he did help Principal Bradley locate the information elsewhere.

2) Respondent demonstrated a lack of professional fitness and/or insubordination, in that he failed to maintain a copy of a specific student's ACS caseworker in the student's file in the guidance office during the 2012-2013 school year.

This charge was sustained and covers the same material as the previous one discussed in Specification 1.

3) Respondent failed to implement professional development conferences, plans

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of assistance, and professional development sessions, during the 2012-2013 school year with regards to:

- a. Following the directives of his supervisors;
- b. Responding appropriately to crisis situations and;
- c. Properly and adequately maintaining required documentation.

The Hearing Officer acknowledged that this charge was identical to Specification 19 in the first set of charges. However, these accusations were for the following school year. Therefore, Hearing Officer Flame made the same findings as she did on Specification 19. She sustained (a) and (c) and dismissed (b).

The Hearing Officer then recapitulated her findings and commented: "Although not all of the charges against Mr. Fox are sustained, those that the Department has proven are substantial and go to the core of Mr. Fox's ability to provide a valid educational experience as a guidance counselor, for his students" (pp 44-45 of decision). She does elaborate on this point.

But are her comments valid? I find they are not. First, Hearing Officer Flame merely makes passing reference, at best, to the significance of the testimony of the two parent/witnesses who spoke on Mr. Fox's behalf. Second, she fails to acknowledge that no actual harm to anyone was noted as flowing from any of the proven charges; in other words, no actual harm to any individual child was shown. Also, she fails to acknowledge that the basis for virtually all of the charges was a clear personality conflict between a new interim principal who wanted to assert her authority and an experienced guidance counselor who believed he was being unfairly treated with the Principal's aim to get him to leave.

Hearing Officer Flame's almost four page discussion of penalty is more a

repetition of her earlier findings. First, she reviews all of the efforts testified to by Ms. Bradley to “assist Mr. Fox in correcting his deficiencies” which “were largely ignored by him” (p 46 of decision). He was given an annual Faculty Handbook that contained policies and regulations applicable to his duties. He attended many meetings of a disciplinary nature, some with the Principal and others with staff members. Since a meeting with Bradley followed each of the Specifications, this part of the decision is largely repetitious of the earlier discussions.

The Hearing Officer then appears to recognize, or at least she says she does, the “seriousness of upholding the termination of a tenured employee with seven years of employment as a guidance counselor with the Department.” Therefore, she states that she has considered “whether there are mitigating factors that would call for a penalty short of termination” (p 47). However, by what follows, she apparently could find none. But this conclusion, in my opinion, could only be reached by someone who ignored important evidence. Considering the nature of the duties of a guidance counselor, one would think that connecting with children and helping them would be an important item. Arguably, it is as important, if not more, than documenting precisely when the counseling sessions occurred.

In this regard, two parents of troubled children attended the hearing to testify on behalf of Fox. The first was Shawanna Shakia Hamilton Yancey, the mother of the child who was discussed in Specification 10. She spoke about meeting with Mr. Fox, her son’s guidance counselor, “dozens of times”. She would ask how her son was doing and “he would be doing fine because when my son was with Mr. Fox, [he] was great. His behavior was great. Now he’s declining since he hasn’t been his guidance

counselor.” (p 718). In fact, she added that when Mr. Fox was counseling him, “they were not calling me that much because, you know, like I say, he was a great counselor with him” (p 722).

As noted earlier, this was the child who had threatened to jump out of a school window. Therefore, when his mother was being cross-examined by the attorney for the Department, he asked her about this incident. This was the ensuing Q&A on pages 723 -24. The question was premised on Fox’s refusal to see the boy because he, Fox, was having lunch.

Q. Does that change your opinion of Mr. Fox at all?

A. No.

Q. No? You still think he’s a good guidance counselor?

A. I still think he’s a great counselor.... Yeah. I think he’s a great guidance counselor.

Then on pages 724-725, the cross-examination continued with the Department attorney inquiring how many counseling sessions Ms. Hamilton-Yancey had actually attended. She answered none because they were during school hours and she was at home with her other children. Then this exchange:

Q. Okay. And have you ever observed him counsel any other children?

A. No, but when I came up to the school I seen him with my son and other kids he counseled.

Q. And he interacts with them well?

A. Yes, very well.

Q. Okay.

A. All the children at the school love Mr. Fox.

Q. Okay, thank you.

Then there was a second mother, Janice Thomas, who knew Mr. Fox though her son “Ja”. He had attended P.S.150 for four years and Mr. Fox had been his counselor. Ms. Thomas had met Mr. Fox “about six times.” What were the occasions? (pp 938-39):

A. Oh, my son Ja, whenever he is bullied at school Mr. Fox interfered.

Q. And what happened when you saw him? What were you talking to Mr. Fox about?

A. Like he talked about Ja and we talked what he could have done for Ja because Ja didn't want to come to school. He didn't – he didn't like coming to school until Mr. Fox, you know. And he said whenever – like for example time for Mr. Fox to teach, like he's his guidance counselor. And he said "Today is Mr. Fox day," you know. And he goes to school, you know, and then I said, "I want to meet Mr. Fox." That's when I went there and I met him. And sometimes on certain occasions I called him and there were times when – I remember when Ja was – the most – part was when Ja was leaving to go to high school. I didn't know what to do. And I called Mr. Fox and said I wasn't sure what school to send him because I was nervous. And then he told me – he sit with me and talk with me and help me to get a school for him, and he's happy now.

The Department's attorney simply clarified when her son was at P.S. 150. And then Ms. Thomas was excused. But before she left, she said: "And, for the record, I took the day off from work without pay just to come because this man was there for my kid" (p. 941).

Additionally, there was the testimony of Assistant Principal Pamela Bridges-Price, a Department witness, who supported Fox's testimony as to the June 1st meeting and as to the incident that occurred on March 9, 2012 involving BR who resisted walking with Mr. Fox. It was at that point that she and the Dean intervened. This is Specification 9, for which Fox was found guilty of having failed to tell Ms. Bridges-Price and the Dean, Fox's supervisors, that Principal Bradley had earlier told him to take BR to his office.

This witness also attested that Fox performed the duties that were required of him (p 527). She added "whether he performed them to the required specifications of the principal, he performed the duties to the best of his ability". Further, "anything I ever requested him to do, he's done" (p 528).

A further deficiency in Hearing Officer Flame's decision was her failure to comment on or even mention that Bradley's first annual year end evaluation of Fox simply contained a rating of "Unsatisfactory". In other words, all of the other boxes on the evaluation elaborating on the employee's performance were left blank. Why? Bradley explained that it was her "first year" and that she called for assistance. She added: "I didn't get the information that I needed to do. I was new and I, they said put the U there and I put the U there, but I didn't know about the boxes and how to go about doing that." (p 106). When asked by DOE counsel, she indicated that the rating had been upheld on appeal (p 108).

One would think that such failure by Principal Bradley to document her findings, coming at the end of her first year, a year in which she insisted on documentation above all else, would at least be noted as an element of irony. Or be considered in evaluating how serious Fox's deficiencies in this same area actually were. Such was not the case.

In determining the severity of a punishment in a situation such as this one, with termination being the ultimate penalty, the Hearing Officer clearly understood that one consideration must be the harm, if any, to a student. In this regard, on page 48 of her decision, Hearing Officer Flame first notes that Mr. Fox did apologize for several incidents, none of which resulted in injury to anyone. An example of this is his leaving a

professional development session early, without getting permission, to attend to his own sick daughter. Another was giving Principal Bradley the wrong ACS contact name when first asked for that information. Neither of these incidents resulted in harm to anyone.

As to the incidents for which the Hearing Officer found that Fox did not take responsibility, incidents that resulted in alleged harm, the examples she gives include Fox turning the child BR over to his supervisors, the Dean and the Assistant Principal, instead of following the Principal's directive to take BR to his own office, despite the child's clear, physical resistance to Fox's efforts. Yet there is nothing in the record to show that such a change had bad consequences for BR.

On page 47, other examples are given. The Hearing Officer finds fault with Fox's insufficient documentation to support transferring the child Sh B. However, the motives of the Principal here are questionable since the transfer involved a clearly troubled and troubling girl who lived in another school zone and therefore could be sent there if the notes were complete. But despite Bradley's testimony that the transfer would be best for the child, that conclusion is far from clear. What is clear, however, is that the Principal's efforts to transfer a difficult child failed.

With regard to Jo. Y, he did not in fact jump out of any window for lack of on the spot counseling, and he was the child whose mother repeatedly testified that Fox was a great guidance counselor to him. As far as Fox not being in the cafeteria to prevent a fight, that lapse was for one day only, and it is speculative as to what would have happened if he had been there.

Certainly there are times when a tenured teacher or guidance counselor should be terminated. *In Matter of Haas v. New York City Dept. of Educ.*, 106 AD3d 620, 621 (1st Dep't. 2013), a penalty of termination was upheld "in light of petitioner's egregious misconduct of kicking a kindergarten student with special needs and then directing her other impressionable students not to discuss what they had observed." Also, according to the record, the teacher showed a lack of remorse.

Termination was also upheld in *Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 856 (1st Dep't. 2011). There a teacher was found guilty of two specifications involving acts of "moral turpitude committed in the course of public employment." *Id.* at 857. These involved things that Douglas had said and actions he had taken of a sexual nature towards students, who testified and were found credible.

In *Cipollaro v New York City Dept. of Educ.*, 83 AD3d 543 (1st Dep't. 2011), a teacher's termination was upheld because the Hearing Officer found that the teacher had "knowingly defrauded respondent of \$98,000 over a two-year period by enrolling two of her children in New York City public schools when she and her family lived in Westchester County ..." *Id.* at 544, citations omitted. The conduct by Mr. Fox at issue here in no way compares to the conduct in any of these cases.

The case here is far more similar to *Matter of Guzman v City of New York, et al.*, 110 AD3d 581 (1st Dep't 2013). *Guzman* involved a school teacher who allegedly gave a false address so that her granddaughter could attend the City public school at which she taught. The Appellate Division upheld the finding that the teacher had filed a false statement of the child's address, but it nevertheless vacated the penalty of termination as too harsh, and remanded for a lesser penalty, because the DOE had failed to offer

proof that the child was not a City resident entitled to a tuition-free education. Thus, there was no showing of actual harm to the City, nor proof of a scheme by the teacher to defraud the DOE out of non-resident tuition. Similarly here, as previously noted by this Court, the DOE failed to introduce any evidence at the hearing that any action or inaction by Fox caused actual harm to any child.

It must be clear by my decision up to this point that I find the penalty imposed here to be shockingly severe and unwarranted. I am not disturbing the findings on the various Specifications even though I believe the findings with regard to the June 1, 2011 meeting, Specification 3, were not supported by the record. I also find some of the other proven charges are petty in the extreme or at least questionable. This would include Fox's leaving a professional workshop 20 minutes early to tend to his own sick child, yielding a resistant student to his supervisors, or making a judgment call to counsel a troubled child after lunch as previously scheduled upon confirming that the child was then in a safe place. The findings regarding lack of documentation and conduct vis-a-vis his Principal's instructions do have some support.

But again, the penalty does not. When the Hearing Officer began the Discussion part of her decision on page 17, she said that her decision would rest largely on her assessment of the credibility of the witnesses' testimony. This is certainly fair. She then proceeds to say that she found all the witnesses on both sides credible (p 18) — except for Glen Fox. She bases this conclusion in large part, I believe, on petitioner's thought that he was being discriminated against and of having the temerity to file a complaint with the New York State Division of Human Rights. In that complaint, Fox accused Principal Bradley of rating his work unsatisfactory because he was a 48 year old white,

Jewish male. The complaint was dismissed, not on the merits, but rather on a finding that Fox had not yet been subjected to an adverse employment action.

But this complaint by Fox, I find, was given far too much importance by Hearing Officer Flame. She began her discussion on page 18 with this essentially unrelated lawsuit and ended her discussion on page 49 with reference to it once again. She used it to maintain that Fox always blamed others, refused to accept responsibility, refused to comply with supervisors' instructions, and ultimately was not credible. Thus, he deserved to be terminated. But certainly, another more benign interpretation could be that in light of his consistent history of doing a "satisfactory" job, he was now being unfairly discriminated against.

In Matter of Principe v New York City Dept. of Educ., 94 AD3d 431, 432 (2012), *aff'd* 20 NY3d 963, the First Department agreed with this Court that the Hearing Officer "had an apparent bias against petitioner when he discredited petitioner's entire testimony based, in part, upon respondent's mischaracterization of a portion of petitioner's testimony in addition to petitioner's testimony that he had once filed for bankruptcy." The appellate court also agreed with this Court in *Principe* that "by discrediting petitioner's entire testimony, the Hearing Officer failed to consider all the circumstances ..." *Id.*

A similar, unfair evaluation occurred here, very possibly motivated by the Hearing Officer's strong adverse feelings toward Mr. Fox for bringing the complaint with the State Commission. This complaint may have had some small relevance to the matters at hand. But for reasons unclear, it played a far more significant role in the Hearing Officer's mind when weighing Fox's credibility.

It also resulted in her failure to properly weigh all of the testimony, which included not only Fox's consistently satisfactory work in the years before Ms. Bradley's arrival, but also the testimony of two mothers that Fox was a great guidance counselor. The Hearing Officer also gave little weight, if any, to the testimony of Assistant Principal Bridges-Price that Fox always did what he was instructed to do, at least from her stand point.

Finally, I believe the Hearing Officer failed to acknowledge that no actual harm came to any student as a result of Fox's actions. He may have had a problem with the new Principal and her rules, but there was no proof that any of these charges, in a real way, compromised his ability to be a "great guidance counselor" to his students.

For all of these reasons, I am vacating the penalty and remanding the matter to a different Hearing Officer to determine a lesser punishment. The DOE's cross-motion to dismiss for failure to state a cause of action is denied, as Fox undeniably has a "cause of action cognizable at law," (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001]), and the DOE at oral argument withdrew its defense of statute of limitations as erroneous. Under the circumstances here, the service of an answer is not warranted upon the denial of the motion, as the facts have been fully presented in the parties' papers and no factual dispute remains. *Applewhite v Board of Educ. of City School Dist. of City of New York*, 115 AD3d 427 (1st Dep't 2014), citing *Nassau BOCES Cent. Council of Teacher v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d 100, 102 (1984); *Matter of Camacho v Kelly*, 57 AD3d 297. 298-99 (1st Dep't 2008).

Accordingly, it is hereby

ORDERED that respondent's motion to dismiss is denied; and it is further

ADJUDGED that the petition is granted to the extent of vacating the penalty of termination and remanding the matter for a determination by a different Hearing Officer of a lesser penalty consistent with the terms of this decision.

Dated: April 23, 2014

APR 23 2014

Alice Schlesinger

J.S.C.
ALICE SCHLESINGER

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).

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 16
-----X

IN THE MATTER OF THE APPLICATION OF
GLEN FOX,

Plaintiff,

FOR A JUDGMENT PURSUANT TO ARTICLE 75
OF THE CPLR

-against-

THE NEW YORK CITY DEPARTMENT
OF EDUCATION,

Defendant.

-----X

Index # 101263/13 Proceedings
60 Centre Street
New York, New York
March 26, 2014

B E F O R E:

HONORABLE ALICE SCHLESINGER,
Justice.

A P P E A R A N C E S:

GLEN FOX, PRO SE
7 Center Avenue
Keansburg, New Jersey 07734
Plaintiff

NEW YORK CITY LAW DEPARTMENT
100 Church Street
New York, New York 10007
BY: JOSEPH DANIEL LOCKINGER, ESQ.
Attorney for Defendant

DEBORAH A. ROTHROCK, RPR
Official Court Reporter

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We are going to go on the record.

At this point Mr. Fox is not represented by counsel, so it's best to do this on the record.

The first thing I want to ask Mr. Lockinger, I think maybe you have a misprint or something. At one point you say that you're moving to dismiss under 3211(a)5, which is statute of limitations; is that withdrawn?

MR. LOCKINGER: Yes, that is withdrawn, your Honor.

THE COURT: I thought so, but I wanted to clarify.

3211(a) (7) it is really.

MR. LOCKINGER: Yes.

THE COURT: Good.

Let me tell you what I have done and not done. I have read Mr. Lipton's post hearing memo, I read that; I read the ALJ 49 page, almost 50 page decision, I read that; I have not read the transcript, but what I am intending to do is read certain parts of the transcript and let me tell you where I'm coming from. I have had, you know, a reasonable number of these cases and, you know, one gets a certain feel for what the court's function is, maybe Mr. Lockinger feels I should know it, clearly what my function is, but I'm still learning and the issue of due process I have learned already that its extraordinarily difficult to find that there was a deprivation of due process. And, so, Mr. Fox, I have to tell you, because I don't want you to

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-Proceedings-

leave here with any unrealistic hopes, although I want to add all is not lost, not at all, I think it will be highly, highly, highly, unlikely that I will find that there was that you were deprived of your due process, I have to tell you that. The reason I say that is because you had a competent attorney, a very competent attorney who represented you, that is very important. And, also, because the issuing of these missing documents, so to speak, or the documents that were in the possession of the Department of Education and were not given to you, at least according to the ALJ, with no request was made before her at the hearing for those documents she says that in the course of her decision; is that your recollection Mr. Lockinger?

MR. LOCKINGER: Yes, your Honor.

THE COURT: Okay. And so, that is a problem. You have competent counsel and you have a failure to preserve an argument or preserve an issue. And you did have the opportunity to call witnesses and the like. So, what I want to really focus really on here, I'm not going to make a decision, so I want to tell you that too is the penalty. Because I think I have to give serious thought to whether or not the penalty was inappropriately, harsh and that is really what I will be concentrating on. That is why, for example, I want to read the testimony of your witnesses where I must say Mr. Lockinger, the ALJ refers that there

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2 were witnesses but as to the content of their testimony I
3 don't get a word I think that is a problem. So I will read
4 it myself and see what they testified to. Because that is,
5 I think, important, that is a judicial function. If I am
6 shocked by the harshness of the penalty, then I do have a
7 right and I have done it in the past to say that there has
8 to be a lesser penalty. Having said that, a couple of
9 things concern me, Mr. Fox, so let me ask you.

10 MR. FOX: Yes.

11 THE COURT: I think, and I understand your
12 position, that most of the stuff, you know, was --I don't
13 want to use the word I wrote down, but not particularly
14 significant stuff, as far as documenting certain things and
15 keeping files the best way. I can't get terribly excited
16 about them but there is the comment or part of her rationale
17 about causing harm to children to the kids and you are a
18 guidance counselor, that is your training, that is what you
19 were doing.

20 MR. FOX: Absolutely.

21 THE COURT: So there are two parts of this that
22 bother me. Your position, the kids loved you, you were
23 really doing your job well. Let me interrupt myself for a
24 second.

25 For the approximately six or seven years before
26 this Principal Bradley came, did you ever get unsatisfied

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ratings?

MR. FOX: Never. Never.

THE COURT: That is one of the problems Mr. Lockinger I have also in the decision that there's no mention of that. All of a sudden, apparently, Mr. Fox went into a closet and then became a monster. I don't know when he walked out of the closet. I don't know anyway, that bothers me, I have seen this before where there has been a change of personality like in the leadership and that person doesn't seem to get on with the teacher or the guidance counselor, whatever everything changes. According to Mr. Fox -- and I don't think I'll ask you and I'm get back to Mr. Fox.

Mr. Lockinger, are you disputing that until Bradley came to the school and first became an interim, or acting principal, and then was officially designated that, that there was ever a problem with Mr. Fox as guidance counselor?

MR. LOCKINGER: There's nothing on the record.

THE COURT: No disciplinary things.

MR. LOCKINGER: We think he regressed as guidance counsel.

THE COURT: How or why?

MR. LOCKINGER: He was put in a situation where he was told you have these deficiencies as guidance counsel. Principal Bradley communicated ways to change his

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performance.

THE COURT: And she also said, early on, and only deserving a footnote in the decision, "you're finished" raising her voice. This is early on. If someone said to me early on "you're finished," I wouldn't exactly think that that person was in my corner trying to give me good advice so that I could really pull through and do well. Doesn't that seem to suggest to you, early on, I'm talking maybe 2010 that happened, early on, that may be there is something to be said about her attitude towards Mr. Fox?

MR. LOCKINGER: Her attitude towards Mr. Fox may have been to put him under higher scrutiny than he had been under previously. But Mr. Fox was very resistant to any instruction or guidance given to him and he seemed to become more and more indifferent as time passed. The incident where children were put in serious harms way or potentially put at risk --

THE COURT: That is what I wanted to get to. That to me is the end all and be all here. When teachers were being disciplined or terminated it is the welfare of the children I think that is more important than anything. Mr. Fox there's the issue --two issues -- I want you to focus on.

First one is, I think his name is JO or JO -- I don't know how he's identified -- he's a child who you were

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2 counseling and who then was talking about throwing himself
3 or jumping out of a window and was kind of curled up in a
4 safe room or lunch room, or something like that, and that is
5 the incident where you said I have a session with him after
6 lunch and it can wait until after lunch. And that you
7 didn't actually even see him, you sort of made that
8 assessment -- you may have went over there but you didn't
9 actually see him and that arguably he was at risk and that
10 your lunch hour was secondary to that. Why don't you
11 respond to that first.

12 MR. FOX: Yes. Jancey, I believe it was. I see
13 him quite often, almost on a daily basis. I've seen him in
14 the lunch room, in the morning, and we had a tremendous
15 relationship and he had a lot of issues. And I think that
16 that particular day I was called to the Deans office. I
17 made the judgment that he was in the safe care of the Dean
18 for a few more moments and if I made a mistake, perhaps, I
19 did, but I --I believe that his parent came up to testify on
20 my behalf --

21 THE COURT: Yes, I know that and I would have
22 mentioned that on the record. But we know that he then
23 didn't, thank God, jump out of the window and he was
24 ultimately safe. But it does seem problematic or maybe as
25 far as your judgment --

26 MR. FOX: Okay.

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2 THE COURT: --that was poor judgment. Not to at
3 least look in on him and seen him before deciding that he
4 could wait.

5 MR. FOX: That's a fair statement. I did see him
6 on numerous occasions for similar --

7 THE COURT: He had made other statements--

8 MR. FOX: I did counsel him and there were other
9 numerous times where I did address those issues. There was
10 a few other incidents like that and --

11 THE COURT: How old was he when this happened?

12 MR. FOX: Well he was, if I recall my recollection
13 -- he was like in third grade.

14 THE COURT: All right. About eight years old
15 maybe.

16 MR. FOX: Maybe fourth great.

17 THE COURT: He was under ten.

18 MR. FOX: Yes, he was certainly under ten.

19 THE COURT: Like a little kid?

20 MR. FOX: Yes. Yes.

21 THE COURT: And his mother testified on your
22 behalf.

23 MR. FOX: She certainly did. She certainly did.

24 THE COURT: Good. That is one of the reasons I
25 want to read that testimony.

26 Second thing. The second child was --I forgot how

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2 he was designated -- I have it somewhere -- anyway this is a
3 kid who was wanting to punch out another kid.

4 MR. FOX: Yes.

5 THE COURT: And really insistent on punching out
6 this other kid and he was involved in counseling with you
7 and he kept insisting that he was going to punch out this
8 other kid and, obviously, you were trying to dissuade him
9 from doing that, of course, but he was, obviously, and he
10 punched a wall or something or something like that. And
11 then with all of this you let him go back to the same class
12 where the other kid was, you know, the one who was
13 presumably in some kind of danger. What about that.

14 MR. FOX: I remember that. I remember that
15 afternoon distinctly. It was distinctly-- the whole event
16 was very odd. The principal was in the office with her
17 laptop open in the middle of my -- like unbeknownst to me,
18 if I remember, but it was a very awkward counseling session,
19 where the safety and the comfort of the guidance office I
20 felt was violating in some ways. Where children come to
21 confide in me and feel safe and not feel insecure from an
22 administrator or disciplinary's presence, who was just right
23 at my counseling desk with her laptop open typing and
24 awkward, uncomfortable, counseling session.

25 THE COURT: Was it with this child or other
26 children involved as well.

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MR. FOX: That day, that incident was -- there was another child that there was the conflict, but I was scheduled or I was asked to see him.

THE COURT: The one who kept saying he wanted to punch out the other kid?

MR. FOX: Right. Right. I saw him on a regular basis for conflict resolution.

THE COURT: The issue is, if this is a kid who insisted that he wanted to punch out another kid and was really angry and punched a wall or something, why would you put him back in the classroom where the other kid was and presumably in danger and as it turned out he did punch him?

MR. FOX: Well, with this particular child, he had frequent outbursts of aggression, it was very hard to predict. I do remember that he was calm and coherent when I brought him back to the class and it was at the end of the day. And I spoke to the teachers who had him in a secure -- they had a very good relation with him and they knew how to pacify him and it was very soon going to be dismissal. And I felt in my judgment that he was okay. He was calm enough to turn him over to his teachers and prepare him for dismissal.

THE COURT: Did he ever say --did this little boy say, okay, I'm not going to punch him or suggest to you that his attitude had changed about punching the other kid?

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2 MR. FOX: I would be lying if I told you I
3 remembered every word he said, but I remember he was fine
4 when I brought him, when I walked him back to the class.

5 THE COURT: Did anyone --I know this is all hearsay
6 at this point, I don't want to sound like a judge or lawyer,
7 did you ever get information as to how the actual assault or
8 the punching had happened?

9 MR. FOX: After the fact?

10 THE COURT: Yes, sure.

11 MR. FOX: Well, I know I certainly got that letter
12 that followed that incident. I did -- again it happened
13 close to dismissal.

14 THE COURT: Did the teacher, for example, was she
15 present when it accident happened?

16 MR. FOX: Absolutely.

17 THE COURT: Did she tell you what happened?

18 MR. FOX: I don't recall. I don't recall what
19 happened after the fact. It was a --

20 THE COURT: Do you know anything more about how the
21 actual punching out happened? Do you remember?

22 MR. LOCKINGER: The reason the principal was there
23 to clear that up, that was actually --

24 THE COURT: An observation.

25 MR. LOCKINGER: Observation.

26 MR. FOX: I want to say one last thing. I'm sorry

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2 Mr. Lockinger --

3 THE COURT: Yes.

4 MR. FOX: If I had known in any way, shape, or form
5 that I was putting anyone in danger, I would not have done
6 that, you know --

7 THE COURT: So much of these decisions are made on
8 the judgment of the person, you know, and teachers, guidance
9 counselors are supposed to have good judgement. And both of
10 these incidents seem to indicate a lapse of that good
11 judgment and also the possibility or the reality of harm
12 coming to a child.

13 Mr. Lockinger, or Mr. Fox, either of you know
14 whether the other child was hurt? Obviously nobody enjoys
15 being punched in the face, whether there were any real
16 injuries? Did he have a broken nose or anything like that?
17 Anybody know?

18 MR. LOCKINGER: I didn't see anything.

19 MR. FOX: No. No. Like I said, this particular
20 student had a lot of unpredictable outbursts --

21 THE COURT: Wasn't that more the reason why you
22 wouldn't or shouldn't have put him back in the class?

23 MR. FOX: I don't remember if there was, uhm, a
24 safe room open at that time. I don't remember all the
25 circumstances. I know the day was coming to a close and
26 when I did bring him back he was calm at that point and the

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2 teachers were fine with it. They didn't have any problem,
3 whatsoever they, welcomed him back in the class, it was
4 secure specialized classroom, keep that in be mind, it
5 wasn't like regular-- these were children that had these
6 types of behaviors frequently and specialized trained
7 teachers in that classroom, probably three of them --

8 THE COURT: Did the teacher know that this boy had
9 threatened to punch out the other boy, I assume it is
10 another boy?

11 MR. FOX: Yes, I'm pretty certain it was another
12 boy and-- I'm sorry could you repeat that?

13 THE COURT: The question is, did the teacher know
14 the first boy had threatened or kept insisting that he
15 wanted to punch out the other boy? Do the teachers know
16 about that?

17 MR. FOX: Do the teachers know about that?

18 THE COURT: You say they welcomed him back.

19 MR. FOX: That's a good question. I'm not certain
20 what I discussed with the teachers when I brought him back.

21 THE COURT: Let me ask you the second question.

22 Was the first boy sent to you because he had made
23 these threats to the second boy or another reason, or was
24 this your normal counseling session or what?

25 MR. LOCKINGER: I believe there's a fight that lead
26 to this counseling session, there had been a fight between.

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2 THE COURT: The two boys?

3 MR. LOCKINGER: Yes, the two boys and one boy had
4 been taken out --

5 MR. FOX: I'm not so sure about that. I think he
6 was scheduled for counseling.

7 MR. LOCKINGER: He had been brought in for
8 counseling as a result of the fight between the two boys and
9 I believe Mr. Fox was supposed to talk him down in this
10 session.

11 THE COURT: What are you readying from Mr.
12 Lockinger?

13 MR. LOCKINGER: I have a digest of the transcript.
14 BRP was the other boy.

15 THE COURT: What page did you --give us the page.

16 MR. LOCKINGER: Yes, transcript 257 to 261, 267 to
17 268.

18 MR. FOX: I don't have a copy of it.

19 THE COURT: You don't have the transcript?

20 MR. FOX: I don't have that.

21 THE COURT: I have it, pursuant to the CPLR, you
22 had to serve him.

23 MR. LOCKINGER: He had a copy that I sent in, this
24 was all received by you, you remember that?

25 MR. FOX: Right.

26 THE COURT: You might not have it here.

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2 MR. FOX: Yes, I do have it. I didn't bring it
3 with me.

4 THE COURT: There's no need to bring it. Anyway,
5 so, continue, Mr. Lockinger, you're saying.

6 MR. LOCKINGER: There was another boy, I just have
7 the initials here but BRP was the one put back in the
8 classroom. And KED had hit BRP earlier in the day. And
9 that is why BRP was taken out of the classroom, was to talk
10 to him. And during the time he was talking to him, he said,
11 he didn't like getting hit, whatever he said, and I want to
12 hit him back.

13 THE COURT: He was the victim.

14 MR. FOX: Does it say Mrs. Bread was present in my
15 session during the counseling session?

16 THE COURT: Yes.

17 MR. LOCKINGER: Yes.

18 THE COURT: Let me say, folks, those are the things
19 that concern me. I guess I'm going to repeat what I said
20 before. I take these things extremely seriously. To me Mr.
21 Fox is a professional with very very serious training in
22 this field. He says that he loved his work, he feels that
23 he was good at his work and it seems that for a period of
24 six or seven years or so, that there was never any problem
25 about how he did his work and now all of a sudden he
26 metamorphosized to somebody who is incompetent and

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2 insubordinate and unfit and all kinds of really bad things
3 leading to his termination. I am concerned about that.

4 And it also bothers me that the ALJ did not, in any
5 way, discuss the substance of the witnesses who testified on
6 behalf of Mr. Fox. She alluded to them very briefly. But
7 in her discussions she doesn't talk about them at all. So I
8 am going to seriously consider the issue of penalty. I am
9 going to read at least those portions of the transcript,
10 possibly others as well, that deal with these witnesses and
11 what exactly they had to say. I will point out to you that
12 there was a recent decision by the Appellate Division and
13 pointed out that at a hearing before an ALJ, a supervisor of
14 a teacher testified that this is one of the best teachers
15 that she had ever supervised. The Appellate Division
16 pointed that out to show why her termination was perhaps not
17 called for, because she was such a good teacher. So these
18 things matter. And all I could do is give it my best
19 judgment, speaking about judgment, and that's about it.

20 Mr. Fox, did you want to say anything more?

21 MR. FOX: Well, I have a statement here if I could
22 read and file it.

23 THE COURT: Sure.

24 MR. FOX: Your Honor, thank you for this
25 opportunity to speak about my wrongful termination in the
26 matter of Glen Alan Fox versus New York State Supreme Court,

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2 in that AD2d department have ruled lesson observation
3 reports consist solely of advise, criticism, evaluations,
4 and recommendations prepared by the school assistant
5 principal regarding lesson preparation and classroom
6 performance. Therefore, for the purpose of these
7 proceedings, observations, conclusions, statements, memos
8 and other reports are hearsay. The issue of incompetence
9 for a guidance counselor is, however, a difficult one.

10 In a class situation incompetence in its simplest
11 terms means that a teacher is unable to provide a valid
12 education experience for those students assigned to his
13 classroom. For a guidance counselor incompetency or
14 misconduct may refer to any number of perceived acts by the
15 employee or actual documented harm to a child. It is the
16 ladder category which must be criminalized or which the
17 person must be disciplined, not the hearsay and subjective
18 opinions of a supervisor. Here no documented harm that
19 could justify termination occurred or is in evidence.
20 Therefore, the specifications should have been dismissed and
21 the decision of the arbitrator vacated.

22 Under Education Law 3020(a)(3)(c) where a
23 respondent must sustain its statutory burden at a hearing to
24 set forth fully and fairly the evidence against the employee
25 in more stringent standard; respondent must, thus, present
26 more hearsay than initiated by the disciplinary action.

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2 In fact, my attorney Steward Licton (phonetic),
3 post hearing dated May 28, 2013, in which he stated none of
4 the charges show that Fox acted in any way other than in the
5 best interest of the children. Characteristic of this case,
6 in general, however, is this feeble attempt to validate per
7 se to the procedure. Indeed we could not prove even these
8 minor charges -- See attached respondent's post respondent
9 brief Exhibit 1, Page 19 -- the rule for termination, a
10 school district must prove that a teacher is so incompetent
11 that he or she is unable to further the educational
12 development of students assigned to his or her classroom and
13 that there is no likelihood that the teacher's competence
14 will improve; Matter of Board of Education of Grundy Center
15 School District 21, Education Department 731, 738, 1982
16 clearly indicates the department failed to show any facts
17 supporting this standard and failed to meet their burden at
18 3020(a).

19 I am competent. And the decision to terminate me
20 is arbitrary and capricious. I am asking for you to decide
21 my life and career. I am not a person described by the
22 arbitrator. I am able and ready to be the caring helpful
23 and excellent counselor that I was before the charges were
24 filed.

25 Just speaking from my heart, which I didn't do on
26 the last day of the arbitration, which I was not allowed to

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2 by my lawyer, I just want to say that I'm here because I'm
3 standing for the truth of these charges and brought me to
4 tears during the 2011 and 2012 school year. I was called
5 into disciplinary meetings that I was accused of not being
6 competent. All my naivety was gone when I realized that
7 there was no honesty in what was being said about me and it
8 hurt me deeply when in one of the U Ratings, it was said,
9 that the kids didn't like me, which was far from the truth.
10 I went to night school for eight years to find this career
11 of my dreams, I loved it, and I still love it and --

12 THE COURT: Mr. Fox, let me ask you this and Mr.
13 Lockinger, if you have any information about it, please, was
14 any attempt made to transfer you to another school? Did you
15 ever ask --it should be noted that Mr. Fox is shaking his
16 head in the negative -- did you ever ask for transfer what
17 about that? How does that work?

18 MR. Fox: I begged for a transfer. I, you know, I
19 was very confused. First of all, in the Spring of 2011,
20 when I was told, after coming back from my mother's funeral,
21 that I was being excised out of my position, it didn't make
22 sense to me, I didn't understand it. And then June 1st of
23 2011, after I was being accused of not doing a task which I
24 did perfectly for seven years, I got a little emotional in
25 the principal's office when she said I'm finished. Up until
26 that point the whole school year I didn't get one

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2 disciplinary letter from Ms. Bradley and after that threat
3 was made on June 1st, I got approximately one and a half per
4 month.

5 THE COURT: But did you make any formal request to
6 be transferred or anything of that sort?

7 MR. FOX: I went to the union, I tried everything.
8 I tried everything.

9 THE COURT: Did you actually do that? Did you ask
10 to be transferred?

11 MR. Fox: Yes, I did.

12 THE COURT: In writing?

13 MR. Fox: I -- I used the channels available to me.
14 I filed the union's instruction. I went to them very early
15 in 2011 and asked for help. And --

16 THE COURT: Let me ask you this. Mr. Lockinger,
17 this will be really the final thing:

18 When you have a situation like this, which seems to
19 be such a drastic change in how a professional is acting,
20 does the school --doesn't the school have some obligation
21 to, maybe, diagnosis as a personality conflict perhaps and
22 seek maybe to transfer him somewhere?

23 MR. LOCKINGER: The school tried to work with him
24 in the position he was in. I think in part because he had
25 been there so long, they attempted to provide him with
26 instruction and guidance.

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2 THE COURT: What about transfer?

3 MR. LOCKINGER: I'm not sure a request for transfer
4 was ever submitted. I had never seen record of transfer.

5 THE COURT: Are you telling me that a principal
6 can't initiate that kind of thing? It has to come --I don't
7 know.

8 MR. LOCKINGER: Another principal would say, yeah,
9 sure, we would like to take --

10 THE COURT: That would be final. Does it have to
11 emanate from the teacher or guidance?

12 MR. LOCKINGER: This is based on my personal
13 experience, principal a will sometimes reach agreements with
14 people that they are having trouble with, okay, maybe we
15 could arrange for a transfer in a situation.

16 THE COURT: Right.

17 MR. LOCKINGER: Those are unofficial. Those are
18 typically not --

19 THE COURT: That is why best to talk about the
20 things off the record.

21 At this point I'm going to close the record. I
22 would rather you talk off the record and I am remembering
23 it.

24 (Off the record conversation took place.)

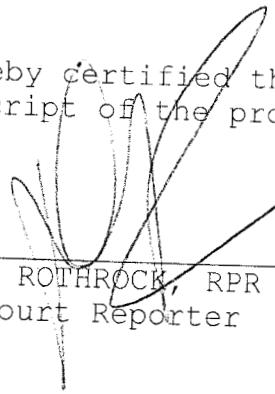
25 (Whereupon, the proceedings concluded.)

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It is hereby certified that the foregoing is a true and accurate transcript of the proceedings.



DEBORAH A. ROTHROCK, RPR
 Official Court Reporter