SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY, PART 52

Index Number: 651892/2013

DECISION/ORDER

HON. MARGARET CHAN

Justice, Supreme Court

ERIC HAUBENSTOCK,

Petitioner,

-against-

CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF EDUCATION; DENNIS WALCOTT, CHANCELLOR of NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

Petitioner brought this Article 75 proceeding seeking an order to vacate a hearing officer's opinion and award in a disciplinary proceeding against him. Respondents cross-moved pursuant to CPLR§§ 404(a), 3211(a)(7), and 7511 for an order dismissing the petition. Respondents also moved to dismiss this matter against the City of New York as it is not a proper party. The decision and order is as follows:

Petitioner was charged with the following five Specifications:

1. On or about December 23, 2009, Respondent:
   a: Twisted Student A's arm in the air.
   b. Twisted Student A's arm behind said student's back.
2. On or about December 1, 2011, Respondent:
   a. Squeezed Student B's hand tightly.
   b. Caused Student B to scream as a result of the Respondent's conduct as described in Specification 2(a).
3. On or about December 2, 2011, Respondent:
   a. Bent Student C's hand.
   b. Pushed Student C's fingers back toward his wrist.
   c. Twisted Student C's arm.
4. On or about December 5, 2011, Respondent:
   a. Squeezed Student D's arm.
   b. Caused physical marks, injury and/or scratches to Student D's arm as a result of the Respondent's conduct described in Specification 4(a).
5. Respondent engaged in one, some, or all of the acts described in Specifications 1, 2, 3 and/or 4 despite prior warnings and/or instruction against engaging in acts of corporal punishment and/or verbal abuse.

(Hearing and Award, p 1)

Petitioner was appointed as a special education teacher by the New York City Department of Education (DOE) in 2002 and was previously employed elsewhere as a special education teacher since 1986. At the time of the underlying disciplinary hearing held in April 2012, petitioner was assigned to P.S. 176X in the Bronx, New York, where most of the students are designated special education and are autistic. Petitioner was a tenured teacher with an otherwise unblemished record and who at one point served as Interim Assistant Principal for the school. The students involved in the instant Specifications were all non-verbal autistic students.

Regarding Specification 1, a paraprofessional educator at the school observed petitioner in the cafeteria approach a student from behind and aggressively twist the student's arm behind his back. There was also testimony that petitioner grabbed the student by the back of his neck. Petitioner walked the student to a lunch room table and sat down with the student. The student began to hit a different paraprofessional educator. A short time later, the student was evaluated by the school nurse and a scratch a bruise were observed on his neck. Petitioner claimed that he guided the student away from a potentially dangerous and distracting object in the cafeteria. He did this while carrying the student's lunch tray in one hand and guiding him to a table with his other hand. School administration testified that petitioner improperly and excessively used force in this incident. The school principal, Rita Ritholtz, testified that petitioner's conduct caused the student physical pain. Petitioner was directed to attend a professional workshop on behavior intervention strategies, which he did.

The facts surrounding Specification 2 occurred approximately 2 years later. Petitioner was on a school trip to the Bronx Zoo. A student did not want to leave a particular exhibit. Other educators heard that student scream and one observed the petitioner push the student's hands downwards. Another educator observed petitioner holding the student's hand. Those educators then had to assist calming down the student for several minutes. Petitioner did not recall this incident and described the trip to the Bronx Zoo as uneventful. However, as a result of the incident, petitioner was directed to take another professional workshop on anger management, take a Therapeutic Crisis Intervention (TCI) training, and meet with the administration monthly to review appropriate behavior intervention techniques, which he did. One of the teachers that was involved in this incident testified that she did not find the actions by petitioner remarkable until she observed him handling a student the following day in school.

The next day in school petitioner was observed forcefully handling a student; these facts made up the charges in Specification 3. Petitioner was observed bending a student's hand and pushing that student's fingers back towards his wrist while the student was on the floor. Petitioner was responding to the student's tantrum. Petitioner released the student when another educator intervened. The intervening educator described the student as biting, kicking, throwing his shoe off,

and that another professional was needed to assist her in calming the student. There was also testimony that petitioner was escorting the student from the lunch room where he had just had an outburst. There was further testimony that this particular student had a total of four outbursts that day. The petitioner testified that he did not recall how the student fell on the floor but that his only physical contact with the student was touching him on the elbow to help him stand.

As to Specification 4, the incident occurred on the next school day – a Monday. A teacher in a hallway heard a student, who is usually very quiet, yell. The teacher entered the classroom where petitioner was instructing the class and observed petitioner holding that student by the hand. Upon further inspection, the teacher saw nail marks on the student's arm. The student was evaluated by the school nurse, who found that the student had an abrasion. Petitioner again testified that he did not recall this incident and argued it was possible that the nail marks occurred from another student in the class.

The last Specification, Specification 5, was a finding that petitioner committed at least one of the specifications listed here despite prior warnings and instruction against engaging in acts of corporal punishment. Petitioner attended anger management training once in January 2010 and also completed additional training while these disciplinary charges were pending against him.

The hearing officer found that petitioner's termination was justified in light of the totality of the circumstances. The hearing officer noted that several different sources reported misconduct. She also found that the collective incidents were significant even if each individual incident appeared less than egregious. The hearing officer, in sum, found that petitioner "engaged in repeated acts of corporal punishment by using excessive force against vulnerable non-verbal students despite prior admonitions by the administration and despite having received anger management and TCI training as a corrective measure." (Hearing and Award, p 39).

The standard for reviewing a penalty imposed after a hearing held pursuant to Education Law § 3020–a is whether the punishment imposed "is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." (*Matter of Pell*, 34 NY2d 222, 233 [1974]). Petitioner, in challenging the award, has the burden of showing an award is invalid (*see Lackow v Department of Education of City of New York,* 51 AD3d 563, 568 [1st Dept 2008]). As the arbitration here was compulsory, "[t]he determination must be in accord with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78" (*id* at 567). Additionally, the hearing officer's determinations are "largely unreviewable because the hearing officer observed the witnesses and was 'able to perceive the inflections, the pauses, the glances and gestures—all the nuances of speech and manner that combine to form an impression of either candor or deception' " (*id* at 568, *quoting Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]).

The hearing officer credited petitioner's claim that the force used was not meant to deliberately hurt students (*id* at 38). However, she found that the lack of intent did not mitigate the penalty of termination. The penalty of termination is reserved by courts where the force used was deliberate and the conduct was egregious (*see Matter of Ebner v Board of Educ. of E. Williston Union Free School Dist. No. 2, N. Hempstead*, 42 NY2d 938 [1977] [teacher terminated for dragging a student by the hair from one class to another]; *Haas v New York City Dept. of Educ.*, 106 AD3d 620 [1st Dept 2013] [a special needs teacher terminated after she kicked a kindergartener and directed a cover up of her actions]; *Riley v City of New York*, 84 AD3d 442 [1st Dept 2011][teacher slapped a student, the court did not consider it egregious and the teacher was not terminated]).

Here, the petitioner's conduct in its totality was not egregious. Considering the incidents involving Specifications 1, 2, and 3, petitioner was using physical contact as a corrective measure to direct special needs students. In the incident involving Specification 4, no force or contact was observed, but a non-verbal student who is usually quiet, yelled. It cannot be said in the face of petitioner's ten year tenure, that his actions discussed here constituted egregious behavior deserving termination.

Moreover, the hearing officer here reasoned that termination was justified because petitioner engaged in acts of corporal punishment even after receiving training. After the first Specification occurred in December 2009, petitioner took one professional training soon afterwards. All of the other specifications resulted from incidents occurring in December 2011. The hearing officer also determined that additional training, which petitioner welcomed, would not have made a difference because the training given to him two years prior did not prevent the events in 2011 (Hearing and Award, p 39). Such reasoning failed to properly consider the climate of autistic students where, as described by the teaching staff, outbursts, tantrums, and violent behavior are not atypical and petitioner otherwise had a stellar record. Indeed, an evaluation of petitioner in 2009 by the school principal stated that he exhibited the "highest degree of professionalism with his students" (Resp's Cross-Mot, Exh D).

Moreover, the hearing officer faulted petitioner for failing to recall the particular incidents in December 2011. She reasoned that petitioner's failure to provide context or explanation of the events indicated that further training on proper techniques would not assist him in the future (*id* at pp 39 - 40). However, petitioner testified that the one training he received after December 2009 was helpful. He further testified that a second training he received while the charges against him were pending was also helpful. Notably, petitioner remained teaching while the charges were pending for almost a year without incident.

Accordingly, it is hereby

ORDERED, that the petition is granted to the extent that the penalty of termination is vacated and the matter is remanded to the DOE to determine a lesser punishment; it is further

ORDERED, that the cross-motion to dismiss is granted to the extent that no facts were alleged against the City of New York, and it is not a proper party to the action. Thus, the cross-motion is granted only in favor of respondent the City of New York, and it is further

ORDERED, that the cross-motion to dismiss as against respondent the DOE is denied. 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' submissions to the court and no factual dispute remains (*see Applewhite v Board of Educ. of City School Dist. of City of New York*, 115 AD3d 427 [1st Dept 2014]); *Matter of Camacho v Kelly*, 57 AD3d 297 [1st Dept 2008]).

This constitutes the decision and order of the court.

Dated: June 16, 2014

MARGARET A. CHAN
J.S.C.