

**Garner v City of New York**

2016 NY Slip Op 30589(U)

April 1, 2016

Supreme Court, New York County

Docket Number: 653662/2015

Judge: Joan B. Lobis

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
ANDREW GARNER,

Petitioner,

-against-

Index No. 653662/2015

**Decision, Order, and  
Judgment**

THE CITY OF NEW YORK; NEW YORK CITY  
DEPARTMENT OF EDUCATION; CARMEN FARINA,  
CHANCELLOR of NEW YORK CITY DEPARTMENT  
OF EDUCATION,

Respondents.

-----X  
**JOAN B. LOBIS, J.S.C.:**

In this proceeding, petitioner seeks to vacate the October 26, 2015 decision of Hearing Officer Doyle Pryor, which resulted in a fine of \$2,400 payable over the course of six months. Respondents oppose the petition and cross-move to dismiss the proceeding. For the reasons below, grants the cross-motion and dismisses the petition.

Petitioner Andrew Garner, an English teacher, worked for respondents for twenty-four years and, except for the incidents in question, concededly had a good reputation as a teacher and no infractions. In 2014, however, several occurrences resulted in disciplinary conferences. Among other things, petitioner was accused of stating to an assistant principal that if he had to explain his preparation to the principal again, he would “fucking kill her.” In addition, between September 1, 2014 and November 24, 2014, he allegedly, in the presence of one or more of his eighth grade students, used the phrases “fucking idiots,” “dumb ass kids,” “this damn kid is annoying,” “it’s the same shit over and over again with the same kids,” “damn,” and “hell.”

Respondent Department of Education (D.O.E.) filed disciplinary charges against petitioner around February 27, 2015. As a penalty, the D.O.E. sought termination.

The hearing officer held a conference on May 12, 2015 and conducted nine days of hearings between June 3 and September 22, 2015. Petitioner, who was represented by counsel, did not testify but submitted evidence on his own behalf. In his thirty-three-page decision, the hearing officer described the proceedings in great detail. As to the first specification, involving the abusive language concerning the principal, he concluded that the assistant principal's testimony was credible and unrebutted by sworn testimony. He agreed with petitioner that, as to a September 9, 2014, meeting, petitioner's rights were violated when he was denied forty-eight-hours written notice, including notice of his right to bring a union representative. Rather than dismissal, however, he stated, the proper remedy would be to disregard the evidence relating to the September 9 meeting. Because petitioner did bring a union representative to the meeting and because the hearing officer concluded that if anything the meeting benefitted petitioner, however, he considered the evidence. He found that petitioner's statement about the principal was not a "true threat," but a "crude outburst" which the principal and assistant principals viewed as such. He considered the remark nonetheless to be sanctionable misconduct.

As for the second specification, which related to the statements petitioner allegedly made in front of his students, the hearing officer found that the original draft of the specification should not have been placed in petitioner's employment file, but that the proper remedy for this was to remove the document from the personnel file, and the school already had done so. The hearing officer further concluded that the investigation into this specification violated procedural

regulations, particularly in that Assistant Principal Vasquez, who conducted the investigation, did not interview Dean Orr, an adult witness or determine whether the paraprofessional was in the classroom, took written statements from only six of the ten students she interviewed, did not describe all of the alleged unprofessional comments in dispute to petitioner, did not provide petitioner with the opportunity to review the student statements, and her investigation report only mentioned that one of petitioner's six allegedly unprofessional comments was substantiated because the remainder of her investigation took place after the ten days she had to prepare her report. He concluded, however, that the evidence compiled during the investigation could still be considered because petitioner had not demonstrated that any of these violations denied him of his right to a fair hearing or in any way caused him prejudice. He dismissed the first two charges in the specifications, concerning petitioner's use of profanity, but found that credible evidence, including the comments of the students whom petitioner told the D.O.E. to interview, showed that he had stated, "this damn kid is annoying," "it's the same shit over and over again," "damn," and "hell." The hearing officer stated that because petitioner did not choose to testify at the hearing, his denial that he stated these things carried less weight. He found that the failure of the D.O.E. to obtain evidence from Dean Orr was "troubling," but concluded that the lack of evidence from him was not critical because petitioner could have, and did not, get him to make a statement or testify in petitioner's favor.

Finally, the hearing officer found that the penalty of termination was disproportionate. He analogized the situation at hand to one that resulted in the imposition of a \$5,000 fine, payable over six months. He considered all the mitigating factors including petitioner's unblemished prior record and the absence of clear negative impact on the students.

Nonetheless, determining the remarks were “crude, unprofessional, insensitive, disruptive and inappropriate,” he determined that a \$2,400 fine was sufficient to “send him a clear message that his conduct was unacceptable” and would have more serious consequences in the future. The Chancellor accepted the recommendation of the fine and additionally transferred petitioner to the absent teacher replacement (ATR) pool for one academic year.

In his petition, petitioner argues that the decision to consider evidence relating to the September 9, 2014 meeting and to the investigation despite procedural violations denied him his due process rights. He challenges the hearing officer’s conclusion that the meeting was not harmful to petitioner and contends that the hearing officer should have dismissed specification one on the basis of the violation. Additionally, he states respondents’ failure to interview Dean Orr was damaging because it impaired his ability to obtain rebuttal evidence and the hearing officer should have dismissed specification two also. He concludes that his penalty is shocking to the conscience.

Respondents’ cross-motion states that the hearing officer’s decision to consider the evidence was rational and fully supported in the record. They argue that petitioner has not shown any of the bases for vacating the award. As for the first specification, they state that it was rational to consider evidence relating to the September 9, 2014 meeting, and that in addition the hearing officer relied primarily on other evidence in sustaining the specification. As for the second specification, respondents state that the hearing officer rationally sustained only those charges supported by more than hearsay evidence, and that petitioner’s failure to contact Dean Orr and to call him as a witness undermines his argument that he viewed Dean Orr’s testimony as critical or useful to him. Further, they contend that the penalty does not shock the conscience. The

recommended fine was lesser than a suspension or termination, they point out, and respondents had sought termination. Moreover, by merely citing cases in which other fines were found to be disproportionate, they continue, petitioner has not shown that the \$2400 penalty is disproportionate here. Finally, they contend that under Education Law §§ 2566(6), 2590-h(19), and 2590-j(8), it had the power and discretion to transfer or reassign petitioner because the specifications were sustained in part and resulted in a penalty.

In opposition to the cross-motion and further support of his petition, petitioner argues first that there was no basis for a cross-motion and it should be summarily denied. He states that both specifications should have been dismissed as a matter of law, and that because there was no merit to the charges the penalty was shocking to the conscience as a matter of law. In reply, respondents claim that petitioner merely “repackages” the inadequate arguments he sets forth in the petition and they reiterate the same opposition, including that they found the hearing officer’s determinations valid but regardless there were additional, independent, evidentiary bases for his conclusions. Moreover, they state, because the hearing officer properly sustained the specifications to a large extent, the penalty of a fine and placement in the ATR pool were not shocking to the conscience, and were well within their discretion,

Education Law Section 3020-a sets forth the procedures and penalties for disciplinary actions against tenured teachers. Subsection five of that statute authorizes judicial review of a hearing officer’s decision. That review is limited to grounds set forth in Section 7511(b) of the Civil Practice Law and Rules: a party’s rights were prejudiced by corruption, fraud or misconduct in procuring the award, by partiality of the arbitrator, by an arbitrator exceeding his

power or “so imperfectly” executing it that a “final and definite award” was not made, or by failure to follow the procedure of Article 75. Id. § 7511(b)(1)(i)-(iv). Where, as here, the parties have submitted to compulsory arbitration, this Court applies a stricter standard of review than it does in voluntary arbitrations. See, e.g., Lackow v. Dep’t of Educ., 51 A.D.3d 563, 567 (1st Dep’t 2008). The arbitrator’s decision must accord with due process, be supported by adequate evidence, and be rational and satisfy the arbitrary and capricious standards under Article 78 of the Civil Practice Law and Rules. Id. A hearing officer’s credibility determinations, however, are “largely unreviewable.” Id. at 568. Petitioner bears the burden of proof in challenging the arbitrator’s decision under these standards. Id.

In light of this standard, the Court grants the cross-motion and dismisses the petition. Petitioner has not satisfied his burden of showing that the hearing officer exceeded his discretion, decided the matter irrationally, or violated petitioner’s due process rights. Instead, the record shows that the hearing officer conducted a thorough hearing and issued a decision that explicitly addressed the issues petitioner raises in this proceeding. The hearing officer’s rulings that the procedural violations that respondents committed did not require dismissal of the charges are rational. The Court notes that the hearing officer did not show bias, rejecting several of respondents’ contentions, finding violations, and dismissing several charges in the specifications. With respect to respondents’ failure to interview Dean Orr, respondents correctly note that petitioner did not seek to interview or call on Dean Orr and that he does not address this point in either his petition or his reply papers. Petitioner’s argument that the penalty is disproportionate because all specifications should have been dismissed in their entirety, his argument has no merit where, as here, the hearing officer’s determination was rational. Moreover, the Court agrees with

respondents that, in addition, the penalty is not shocking to the conscience and is within respondents' discretion.

Accordingly, it is

ORDERED that the cross-motion is granted and the petition is dismissed. The Clerk shall enter judgment accordingly.

Dated: *April 1*, 2016

ENTER:



---

**JOAN B. LOBIS, J.S.C.**