

Matter of Natale v New York City Bd. of Educ.

2019 NY Slip Op 30138(U)

January 4, 2019

Supreme Court, New York County

Docket Number: 151126/2018

Judge: Andrea Masley

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NYSCEF DOC. NO. 49
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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In the Matter of the Application of RALPH NATALE,
as President and on behalf of Local 917,
International Brotherhood of Teamsters,
and SHLYOMA REYBLAT,

Petitioners, Index No. 151126/2018

For an Order and Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

— against —

NEW YORK CITY BOARD OF EDUCATION d/b/a
NEW YORK CITY DEPARTMENT OF EDUCATION,
OFFICE OF PUPIL TRANSPORTATION, OFFICE OF
APPEALS AND REVIEWS, ELIZABETH ROSE, in her
Official Capacity as Deputy Chancellor, Division of Operations
and as Designee for Carmen Fariña, and CARMEN FARIÑA,
in her official capacity as Chancellor,

Respondents.

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Masley, J:

In this CPLR Article 78 application, petitioners Ralph Natale, as President and on behalf of Local 917, the International Brotherhood of Teamsters (Union), and Shlyoma Reyblat, a member of the Union, seek an order annulling the respondents' final concurrence of the Board of Education d/b/a New York City Department of Education (DOE) and Chancellor Carmen Fariña as arbitrarily and capriciously upholding the Office Pupil Transportation's (OPT) decision to revoke Reyblat's certification to drive a school bus, permanently, without justification, and in violation of the OPT's own disciplinary guidelines.

The DOE mandates that all of its bus drivers hold a certificate of approval from OPT. On February 6, 2009, Reyblat was approved as a bus driver via OPT. On September 28, 2016, Reyblat became a bus driver for the DOE through Pride Transportation Services for students of the New York City public schools.

On May 18, 2017, Assistant Principal Daisy Perez was informed that Reyblat allowed the children on his bus to play in the park across from the Lyndon B. Johnson School (P.S. 151)

while he waited for the rest of children from P.S. 151 to come out of the building. A complaint

was called into OPT's customer service and OPT appointed Investigator Eugene O'Brien to evaluate the May 18, 2017 incident (Incident). On June 7, 2017, OPT sent Reyblat a letter notifying him that he was suspended from performing his duties and responsibilities as a DOE school bus driver pending the outcome of OPT's investigation.

The Union is the exclusive bargaining representative for New York City bus drivers employed by Transportation Services and represents Reyblat as his exclusive bargaining representative. On June 1, 2017, O'Brien interviewed Perez regarding the Incident. On June 15, 2017, O'Brien interviewed Reyblat, who was accompanied by a representative from the Union. On June 15, 2017, Reyblat provided the OPT with a written statement regarding the Incident. On that same day, OPT issued Reyblat a decertification letter and notified him of his right to submit a written request to DOE's Office of Appeals and Review (OAR) for a disciplinary appeal conference regarding OPT's findings in regard to the Incident. Without a certificate of approval from OPT, Reyblat can no longer work as a bus driver for DOE schools.

Reyblat appealed the decertification, and a hearing was held on August 17, 2017 before Disciplinary Conference Officer Joann Rabot. O'Brien was the sole witness at this hearing. Following the appeal conference, Rabot issued a written decision, wherein she recommended that the penalty imposed by OPT be upheld in its entirety. On October 11, 2017, Reyblat received an undated form letter from the Deputy Chancellor concurring with the OPT's decision to permanently revoke his certification. On February 5, 2018, petitioners filed this petition pursuant to CPLR 7803, seeking to annul the undated final concurrent decisions made by respondents.

Reyblat 's disciplinary matter before the OPT is governed by C-100 of the DOE Chancellor's Regulations. These Regulations establish the mandatory rules and procedures governing discipline by the OPT and covers "the procedures to be used when the [OPT] receives

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a complaint about the conduct and/or performance of a school bus driver, escort and/or

attendant” (NYSCEF Doc. No. 4, Howell aff, exhibit A at 1). Pursuant to those procedures, when there is a complaint, an OPT Investigator is assigned to gather facts, advise the Chancellor’s Office when an interim suspension is appropriate, and collect a written rebuttal from the driver accused of misconduct concerning the interim suspension (*id.*, section I [A] and [B]). The OPT investigator is charged with completing the investigation and makes recommendations of permanent disciplinary penalty when necessary (*id.*, section I [G]).

A driver who disagrees with the OPT’s findings may appeal to the OAR, after which time a hearing is held and a Disciplinary Officer appointed to hear evidence and review the findings and recommendations of the OPT (*id.*, section II). The OPT has the burden to prove the reasonableness of the penalty imposed (NYSCEF Doc. No. 7, Howell aff, exhibit D at 4). Once the hearing officer issues recommendations and findings, the Chancellor has fifteen days to issues her final determination based on the hearing officer’s findings (NYSCEF Doc. No. 4, Howell aff, exhibit A, section II[R]).

The OPT provided the “Driver and Escort Disciplinary Guidelines” to the Union outlining the appropriate penalties for various forms of misconduct. The charges against Reyblat are referred to in the OPT’s policies, which lists “driver allows students to exit at a non-routed stop such as a ball field or candy store” as punishable misconduct (NYSCEF Doc. No. 11, Howell aff, exhibit H at 2). While Reyblat’s decision to allow the children to play in the park near P.S. 151 might be questionable, it does not violate the Disciplinary Guidelines which applies students exiting a non-routed stop. (emphasis added). Furthermore, the disciplinable misconduct described in OPT’s policies recommends retraining as the appropriate penalty and not permanent decertification (*id.*).

“[A]n administrative agency cannot impose a penalty not provided for by statute or by its own rules or regulations and written policies” (*Matter of Gomez v N.Y.C. Dep’t of Educ.*, 50

AD3d 583, 584 [1st Dep't 2008]]. In *Gomez*, counsel for OPT stated at the administrative hearing

that there was “zero tolerance for drug use”, but no such policy was set by the Disciplinary Guidelines at that time. As a result, the court decided the penalty of permanent decertification was not provided for “by statute or by [the agency’s] own rules or regulations and written polices,” and “[t]hus, the penalty imposed on [the] school bus driver was arbitrary and capricious as a matter of law” (*id.*).

Here, OPT fails to support the charge or the penalty as legally permissible. The only charge against Reyblat is that he allowed students to exit the bus at a scheduled stop at P.S. 151 when he was in the process of picking up additional students at P.S. 151. (empahsis added). This charge is a departure from OPT’s own Disciplinary Guidelines and thus OPT could never satisfy its burden to prove the reasonableness of the penalty imposed. As such, a decision contrary to an agency’s establish precedent, without explanation, is arbitrary and capricious (*see Gomez*, 50 AD3d 583). “[I]t is incumbent on the [agency] to decide like cases the same way or explain the departure... absent an explanation by the agency, an administrative agency decision which, on essentially the same facts as underlaid a prior determination, reaches a conclusion contrary to the prior determination is arbitrary and capricious” (*Charles A. Field Delivery Serv. v Roberts*, 66 NY2d 516, 518 [1985]).

C-100 provides “procedures to be used when the [OPT] seeks to revoke or suspend the [Department’s] certification of approval of a school bus driver...who is entitled to contest or otherwise be heard if the [Department’s] action would result in the termination or suspension of his/her employment... ” (NYSCEF Doc. No. 4, Howell aff, exhibit A at 1). Reyblat was never given notice of the policy, rule or procedure he violated, nor was he informed by the Chancellor the basis for upholding the OPT’s decision to permanently decertify him from driving a school bus for the DOE. This was a violation of Reyblat’s due process.

Respondents argue that the hearing held pursuant to Chancellor's Regulation C-100 is, in

and of itself, sufficient due process, and Reyblat's "admissions" during the hearing is enough to show Reyblat breached a policy. In fact, during the hearing, when Reyblat's attorney asked OPT what policy, rule or procedure was violated by Reyblat, OPT's attorney argued that "[Petitioner] should know...because he's been a driver long enough and he has been trained, and he has been informed that it is not permissible" (NYSCEF Doc. No. 7, Howell aff., Exhibit D at 82).

At that hearing, O'Brien was unable to recall what he asked Reyblat regarding the Incident, and could not testify to critical facts, such as how many children were under Reyblat's supervision (*id.* at 32-33). Furthermore, O'Brien was unable to articulate a specific policy or procedure that was allegedly violated by Petitioner Reyblat, and he never spoke to, nor obtained the name of the witness who allegedly observed the incident (*id.* at 21-25). O'Brien testified that he was informed of Reyblat's alleged misconduct by Perez's secretary, who was informed by Perez, who was informed by an unnamed teacher (*id.* at 17, 22-23).

Respondents' reliance on *Avidiu v New York City Board of Education*, 2009 NY Slip Op. 31168(U) is misplaced because the investigative officer in *Avidiu* testified that he spoke with numerous parents who personally witnessed Avidiu's reckless driving. In this case, O'Brien never spoke to an actual witness who observed the Incident. While hearsay is admissible at an administrative hearing, here, the record contains various accounts of what was alleged to have transpired during the Incident and hearsay to the third degree (*compare* NYSCEF Doc. No. 7, Howell aff, exhibit. D at 32, 35 and NYSCEF Doc. No 8, Howell aff, exhibit E *with* NYSCEF Doc. No. 9, Howell aff, exhibit F).

In addition to reinstatement, Reyblat seeks backpay for lost wages and benefits as a result of the decertification. Pursuant to CPLR 7806, a petitioner may seek restitution or damages, which "must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the

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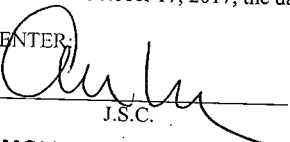
supreme court against the same body or officer in its or his official capacity” (*Gross v Perales*, 72 NY2d 231, 235 [1988] [citation omitted]). Petitioner’s request for backpay for lost wages and benefits meets these criteria. However, petitioner fails to provide sufficient information upon which the court can calculate the amount.

Accordingly, it is

ADJUDGED that the petition is granted as follows:

The determination of respondents permanently revoking Shlyoma Reyblat’s school bus driver certification is vacated and annulled and Shlyoma Reyblat is reinstated to his prior position with backpay of lost wages and benefits from October 17, 2017, the date of termination.

Dated: January 4, 2019

ENTER: 
J.S.C.
HON. ANDREA MASLEY