

Dmitriyev v City of New York
2019 NY Slip Op 30509(U)
February 27, 2019
Supreme Court, New York County
Docket Number: 653078/2018
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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ANDREY DMITRIYEV,

Petitioner,

- against -

Index No.
653078/2018

**DECISION
and ORDER**

Mot. Seq. #001

The CITY OF NEW YORK; NEW YORK CITY
DEPARTMENT OF EDUCATION; RICHARD
CARRANZA, CHANCELLOR of NEW YORK CITY
DEPARTMENT OF EDUCATION

Respondents,

To Vacate a Decision of a Hearing Officer Pursuant to
Education Law Section 3020-a and CPLR Section
7511

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HON. EILEEN A. RAKOWER, J.S.C.

Petitioner Andrey Dmitriyev (“Petitioner”) brings this action, pursuant to Article 75 of the New York Civil Practice Laws and Rules (“Article 75”), seeking to vacate Hearing Officer Stuart Bauchner’s (“Hearing Officer Bauchner”) decision dated June 10, 2018 (the “Decision”) terminating Petitioner’s employment as a physical education teacher with Respondent New York City Department of Education (“DOE”). Petitioner also seeks to annul any action taken in reliance on Petitioner’s termination. Respondents cross-moves to dismiss the petition pursuant to CPLR §3211(a)(7). The parties appeared for oral argument on February 26, 2019.

Background/Factual Allegations

Petitioner has been employed by the DOE as a physical education teacher for grades 9-12 for 16 years. In 2014, Petitioner was assigned to the Absent Teacher Reserve pool. In or about March 2016, Petitioner was assigned to Liberty High School Academy for Newcomers (“Liberty”) for four weeks to cover a physical education teacher on leave. Petitioner was hired as a physical education teacher at Liberty during the summers of 2016 and 2017.

The charges against Petitioner arose from the incident on August 2, 2017 (the "incident"). On the date of the incident, one of the social studies teachers was absent from Liberty, and the social studies class was combined with Petitioner's gym class. The Guidance Counselor offered to escort Petitioner and the students because of the large class size, but Petitioner declined, and Petitioner took the combined classes to the local park. Petitioner testified that at the park Student A and Student X started fighting but five seconds later the fight was broken up by other students. Petitioner testified that as they were exiting the park to go back to school, Student X ran towards Student A and started throwing punches.

At the hearing before Hearing Officer Bauchner, Petitioner and Student C disputed what had happened during the incident. Student C testified that Petitioner had been wearing earphones and was on his phone at the time of the accident. Student C testified that Student X stabbed Student A with a kitchen knife on the left arm and he gave Student A his shirt to try and stop the bleeding. Student C testified that he ran to Petitioner and told him the students were fighting and Petitioner's response was, "I don't care. Let's go back to school." Student C and Student H testified that students were left in the park when Petitioner went back to school. Petitioner testified that when Student C approached him, he had a little blood on his fingertips and only said "look". Petitioner testified that he was not wearing headphones or on his phone. It is undisputed that Petitioner did not approach Student A or Student X to determine the extent of the injuries. It is undisputed that during one of the fights Student X stabbed Student A. Petitioner testified that he did not see the stabbing and was not aware that Student A had serious injuries.

When Petitioner returned to the school, he stopped to speak with Safety Agent Barbara Oliver ("Safety Agent Oliver"). Safety Agent Oliver testified that Petitioner told her that there was an incident in the park and continued walking to the gym and did not answer Safety Agent Oliver when she asked what had happened. Student C informed Safety Officer Oliver that a student was stabbed and showed her the blood on his hands. About two and half minutes after Petitioner entered the school, Student A entered the building and approached Safety Officer Oliver without a shirt and a cut above his left elbow and advised Safety Officer Oliver that he was stabbed by Student X. Safety Officer Oliver testified that she immediately contacted the Principal. The Principal sent Student A and Student C to the nurse. The nurse was unable to stop the bleeding and an ambulance was called.

A Section 3020-a formal disciplinary proceeding before Hearing Officer Bauchner took place on February 8, 2018, February 27, 2018, March 9, 2018, March

16, 2018, March 22, 2018 and March 26, 2018. The Charges and Specifications brought by the DOE against Petitioner are as followed:

Specification 1: On or about August 2, 2017 [Andrey Dmitriyev]:

- a. Failed to notify police and/or emergency services after a student was stabbed during an altercation during class.
- b. Failed to notify the principal and/or administrators after a student was stabbed during an altercation during class.
- c. Failed to supervise students.

Specification 2: By committing one, some or all of the actions described in Specification 1, [Andrey Dmitriyev] acted in a manner that had or would have had the effect of unreasonably and substantially interfering with a student's mental, emotional or physical well-being.

Specification 3: By committing one, some or all of the actions described in Specification 1, [Andrey Dmitriyev] knowingly acted in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old.

On June 10, 2018, a decision was issued by Hearing Officer Bauchner substantiating Specification 1(c), 2 and 3 against Petitioner, and Petitioner was terminated.

Petitioner commenced this action on June 20, 2018 by filing a Petition as an Article 75 special proceeding. Respondents filed a cross-motion on August 8, 2018. Petitioner opposed Respondents' cross-motion on September 11, 2018.

Petitioner's Petition

Petitioner contends that Hearing Officer Bauchner's Decision was irrational, arbitrary and capricious, excessive, and shocking to the conscience, and should be vacated and remanded. Petitioner argues that termination was "wholly disproportionate to the misconduct" and that Hearing Officer Bauchner did not provide him with the chance to remediate. Petitioner argues that Hearing Officer Bauchner did not properly consider Petitioner's 16 years of employment by the DOE

as a physical education teacher with no prior discipline and instead relied on the “90 minute” incident.

Respondents’ Cross-Motion

Respondents argue in their cross-motion that the penalty is rational and does not shock the conscience. Respondents argue that there was not one mistake in judgment, “rather, it was a parade of mistakes that permitted an entirely avoidable catastrophe to occur during petitioner’s class”. Respondents contend that after the first fight between Student A and Student X, Student C approached Petitioner to tell him about the fight and that one of the student’s was “spattered” with blood. Respondents contend that Petitioner did not approach the students in the fight and did not separate them, and a second fight ensued, which resulted in the stabbing. Respondents argue that Petitioner could have taken precautions to prevent the second fight. Respondents contend that Petitioner was “entirely ignorant” that one of the students was stabbed and was bleeding profusely and did not alert the school nurse, the Principal, or emergency services, instead Petitioner left the two students that were in the fight, along with other students at the park. Respondents further contend that at the hearing before Hearing Officer Bauchner, Petitioner showed a “complete lack of understanding if his neglect”. Respondents argue that Petitioner does not understand the scope of his duty as a teacher and did not identify his constant failure to take any notice of the serious physical threat to his students.

Furthermore, Respondents argue that the penalty imposed is appropriate. Respondents contend that Hearing Officer Bauchner took into consideration Petitioner’s 16 years with the DOE with no prior discipline, but it was outweighed by the severity of the conduct that occurred on August 2, 2017. Respondents argue that Petitioner does not have a cause of action and the Petition should be dismissed because the termination does not shock one’s sense of fairness. Respondents contend that Petitioner’s argument for opportunities for remediation instead of termination are without merit. Respondents argue that the Decision determined that Petitioner should not have a further opportunity to endanger the children based on what was presented at the hearing. Respondents argue that Petitioner had been warned on two different occasions about “the importance of closely and vigilantly” watching all of the students and received a letter to his file for not closely supervising his students.

In opposition to the cross-motion, Petitioner argues that Hearing Officer Bauchner “heavily relied” on Student C’s credibility over Petitioner’s credibility and two other students’ credibility. Petitioner argues that at the hearing the Principal testified that she did not see any blood on the student. Petitioner further argues that

he followed the protocol for an emergency and contacted security about the fight. Petitioner contends that he did not fail to respond to the fight and as soon as he became informed of the incident he brought the students back to the school. Petitioner contends that termination was disproportioned.

Legal Standard

The standard of review governing the court's analysis in this proceeding was succinctly stated by the First Department in *Lackow v. DOE*, (2008 NY Slip Op 4744, *3 [1st Dept. 2008]),

Education Law § 3020-a (5) provides that judicial review of a hearing officer's findings must be conducted pursuant to *CPLR 7511*. Under such review an award may only be vacated on a showing of 'misconduct, bias, excess of power or procedural defects' (*Austin v Board of Educ. of City School Dist. of City of N.Y.*, 280 AD2d 365, 365, 720 NYS2d 344 [2001]). Nevertheless, where the parties have submitted to compulsory arbitration, judicial scrutiny is stricter than that for a determination rendered where the parties have submitted to voluntary arbitration (*see Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223, 674 NE2d 1349, 652 NYS2d 584 [1996]; *Cigna Prop. & Cas. v Liberty Mut. Ins. Co.*, 12 AD3d 198, 199, 783 NYS2d 810 [2004]). The 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* (*Motor Vehicle Mfrs. Ass'n v State*, 75 NY2d 175, 186, 550 NE2d 919, 551 NYS2d 470 [2002]). The party challenging an arbitration determination has the burden of showing its invalidity (*Caso v Coffey*, 41 NY2d 153, 159, 359 NE2d 683, 391 NYS2d 88 [1990]).

Further, when reviewing an arbitration award, "[a] hearing officer's determinations of credibility ... 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 *4) (*citing Berenhaus v. Ward*, 70 N.Y.2d 436 [1987]). Lastly, a court may only overturn the penalty imposed by the

arbitrator it if is “so disproportionate to the offense[] so as to be shocking to the court’s sense of fairness” (*Lackow* at *4).

Discussion

Applying those standards to the Petition herein, the Court finds that Petitioner fails to set forth a basis for disturbing the Decision. The Court rejects Petitioner’s argument concerning the penalty imposed. A review of Hearing Officer Bauchner’s determination demonstrates no indication that the Decision rendered was arbitrary, capricious, or in bad faith. Furthermore, the penalty of termination is not “so disproportionate to the offense[] so as to be shocking to the court’s sense of fairness”. (*Lackow* at *4). The Decision found that Petitioner showed a gross indifference to the health, safety and welfare of his students. The extreme seriousness of the Petitioner’s offense warranted a severe disciplinary penalty.

Wherefore it is hereby

ORDERED that Respondents’ cross-motion to dismiss is granted; and it is further

ADJUDGED that the Petition to vacate the Decision issued by Hearing Officer Stuart Bauchner on June 10, 2018 is denied and the proceeding is dismissed; and it is further

ADJUDGED that the Decision issued by Hearing Officer Stuart Bauchner on June 10, 2018 is confirmed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: February 27, 2019



Eileen A. Rakover, J.S.C.