

Beruh v New York City Dept. of Educ.

2023 NY Slip Op 32451(U)

July 11, 2023

Supreme Court, New York County

Docket Number: Index No. 654417/2021

Judge: Alexander M. Tisch

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ALEXANDER M. TISCH

PART 18

Justice

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WILLIAM BERUH,

Petitioner,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

-----X

INDEX NO. 654417/2021

MOTION DATE 08/03/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, petitioner William Beruh files a petition pursuant to CPLR Article 75 seeking review of a hearing officer’s decision in an Education Law Section 3020-a proceeding. Petitioner is a tenured teacher employed by respondent New York City Department of Education (the Department). Petitioner was found guilty of pushing a student and fined \$2,500. Petitioner does not seek review of the penalty but seeks a reversal of the finding of guilt, and dismissal of the charges against him. Respondent cross-moves to dismiss the petition and for a grant of costs, fees, and disbursements.

Petitioner has been employed as a teacher in New York City for 15 years and has no other disciplinary record. At the time of the incident, he was assigned to the Bronx Alternative Learning Center, which serves as a "long-term suspension site for students who have violated the Chancellor's Regulations with respect to their conduct in school." After an altercation with one of his students, Student A, the Department brought three specifications against petitioner. Specification 1 states that “on or about December 3, 2018, [Beruh] pushed Student A on or about his neck and/or back” (NYSCEF 10, Specifications). Specification 2 states that by committing

the actions described in Specification 1, [Beruh] unreasonably and substantially interfered with a student's mental or emotional well-being. Specification 3 states that by committing the actions in Specification 1, [Beruh] acted in a manner which substantially interfered with a student's ability to participate in an educational program. Additionally, "The foregoing constitutes corporal punishment, excessive force" and other offenses listed therein (*id.*).

The "Opinion and Award," dated July 6, 2021, by Hearing Officer James McKeever sustained Specification 1, finding that Beruh pushed Student A on his back or head, dismissed the other Specifications, rejected the Department's recommendation that Beruh be terminated, and fined him as a penalty.

The hearing on the charges against Beruh was conducted via Zoom on December 10 and 14, 2020 and January 6, 12, and 13, 2021. The principal, the assistant principal, and a community associate at the school testified for the Department. As petitioner states, none of the individuals who stated that they witnessed him punching the student testified at the hearing. The principal testified about the investigation conducted by himself and the assistant principal and the statements made as part of that investigation. The principal testified that Student A stated that the teacher punched him, as did Students B and C, who were in the classroom at the time and who stated that they witnessed the incident. Students B and C refused to make written statements. The principal testified about the statements that he took from two school safety officers and the community associate. One school safety officer, who provided a written statement, said that, in the hallway Student A grabbed a folder from Beruh, and while Student A was walking back into the classroom, Beruh pushed Student A in the back of the head. The other school safety officer, who did not make a written statement, told the principal that Student A and Beruh were arguing in the hallway, that the student pushed the teacher and grabbed a folder from

him, and that the teacher then “chased” the student into the classroom. The community associate provided a written statement and told the principal that he saw the teacher push the student while they were in the hallway. He testified to that effect at the hearing. The Hearing Officer did not credit this evidence, “because the video evidence clearly does not show that this occurred” (NYSCEF 4, at 10).

Beruh provided a written statement stating that he followed Student A into the classroom after the student took the folder from him in the hallway and that, in the classroom, Student A told Beruh to stop following him and punched him. At the hearing, Beruh testified that he never touched the student and “that although the video showed him running after Student A (as Student A was walking into the classroom), [Beruh] claims that he was only trying to regain his balance after Student A had pushed him in the hallway” (NYSCEF 4 at 6).

The Hearing Officer found that the video evidence, showing petitioner “lunging after Student A as Student A walked into the classroom, supports Student A’s version of what occurred, which is that [Beruh] lost his composure and pushed Student A in his back, or his head, when they were in the classroom because [Beruh] was irate that Student A had pushed [him] in the hallway just moments before” (NYSCEF 4 at 9). The statements of the witnesses who were in the classroom at the time that the “alleged conduct occurred, which included Student A, Student B, Student C, SS Piguero and SS Rivera, all support the allegation that [Beruh] pushed Student A before Student A punched” him (*id.*).

The principal also testified that after the classroom incident, teacher and student came back into the hallway, where the student punched Beruh in the face more than once. Beruh fell to the floor and was taken to the hospital.

The Hearing Officer opined that “there is no dispute that Student A’s conduct toward Beruh was appalling” (NYSCEF 4, at 11). Nevertheless, the hearing officer found that, while in the classroom, Beruh pushed Student A and that the push was not recorded as it took place in the classroom where there are no cameras.¹ The Hearing Officer stated that Beruh’s “assertion that after he chased Student A into the classroom, Student A, who was walking, and whose back was to [Beruh] suddenly stopped, turned around, and punched [Beruh], without [Beruh] touching Student A first, is implausible” (NYSCEF 4, at 9).

Education Law § 3020-a sets forth the procedures for disciplinary actions against tenured teachers. Subsection five of the statute authorizes judicial review of the arbitrator's decision pursuant to the grounds listed in CPLR 7511 (b) (1): 1) corruption, fraud or misconduct in the award's procurement, 2) bias on the part of the arbitrator, 3) a decision which shows that the arbitrator exceeded his/her power or failed to clearly resolve the case, and 4) failure to follow the procedure in CPLR 7511.

Where parties, as these here, have submitted to compulsory arbitration, the standard of review is stricter than that applied in cases of voluntary arbitrations (*Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 418-419 [1st Dept 2013]). Where arbitration is compulsory judicial review must find evidentiary support for the award (*Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]). To be upheld, the determination under review must be in accord with due process, supported by adequate evidence, rational, and not arbitrary and capricious (*Matter of Gongora v New York City Dept. of Educ.*, 98 AD3d 888, 889–890 [1st Dept 2012]).

¹ There are cameras only in the hallways.

Beruh seeks to overturn the Hearing Officer's finding because, one, he was denied due process of law in that he was not given the opportunity to confront and cross-examine the witnesses; two, because the witnesses testified on Zoom, the Hearing Officer was not able to properly assess their credibility; three, out of the witnesses who testified, none claimed to have seen the push inside the classroom; four, the Hearing Officer improperly considered hearsay recitals of statements and written documents; five, the Hearing Officer wrongly interpreted the evidence; and six, petitioner's conduct did not constitute corporal punishment within the meaning of Chancellor's Regulation A-420 (NYSCEF 28).

The Education Law "lays out extensive litigation procedures for hearings, including motion practice, bills of particulars, mandatory disclosure, discovery, subpoena power, right to counsel, cross-examination, testimony under oath, and a full record" (*Burkybile v Board of Educ. of Hastings on Hudson Union Free School Dist.*, 411 F3d 306, 312 [2d Cir 2005], citing Education Law § 3020-a [3] [c]; *see* CPLR 7506 [c]). Should subpoenas be necessary, any arbitrator or attorney of record of a party can issue them (CPLR 7505, 2302 [a]). Petitioner could have subpoenaed the witnesses who did not appear at the hearing to appear at the hearing and cross-examined them. The fact that the Hearing Officer did not subpoena those individuals is not a reason to vacate the award (*see Henegan Constr. Co. v Bettinger & Leech*, 196 AD2d 763, 764 [1st Dept 1993]).

Petitioner does not put forth any explanation for his contention that the hearing, because it was virtual, was a violation of his due process rights or untrustworthy for any reason. It appears that virtual or remote arbitrations have become common in New York (Sandra D. Grannum & Janice Sued Agresti, Practice Pointers for Virtual Arbitrations, Mediations and Depositions (Outline), City Bar Center for Continuing Legal Education, New York City Bar,

Mar. 4, 2021 [Westlaw citation: 20210304A NYCBAR 465]). The website of the American Arbitration Association posts “Orders and Procedures for a Virtual Hearing via Videoconference.” JAMS also presides over remote arbitrations. In fact, this Court has presided over bench trials on TEAMS and assessed witness credibility. Petitioner’s argument that conducting a hearing on Zoom in itself prevented him from obtaining due process is not credited.

Under Education Law § 3020-a (3) (c), it is not required that hearings comply with the technical rules of evidence, and a hearing officer may accept hearsay testimony (*Austin v Board of Educ. of City School Dist. of City of N.Y.*, 280 AD2d 365, 365 [1st Dept 2001]). An arbitrator's determination may be based on hearsay (*Matter of Noralez v New York City Dept. of Educ.*, 187 AD3d 475 [1st Dept 2020]; *Matter of Smith v New York City Dept. of Educ.*, 109 AD3d 701, 702 [1st Dept 2013]; *Matter of Colon v City of N.Y. Dept. of Educ.*, 94 AD3d 568 [1st Dept 2012]).

A hearing officer's determinations of credibility are largely unreviewable because the hearing officer watches the witnesses testifying and is “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” (*Lackow v Dept. of Educ. [or Board] of City of N.Y.*, 51 AD3d 563, 568 [1st Dept 2008], quoting *Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). When reviewing compulsory arbitrations in education proceedings, the court should accept the arbitrators' credibility determinations, even if there is conflicting evidence and room for a different conclusion (*Matter of Saunders v Rockland Bd. of Co-op. Educ. Servs.*, 62 AD3d 1012, 1013 [2d Dept 2009]). The court may not reevaluate the evidence or replace the arbitrator’s credibility determinations with its own (*Noralez*, 187 AD3d at 476). Beruh offers no

basis for disturbing the Hearing Officer's determinations of credibility or the manner in which he weighed the witness statements or the video evidence.

The specifications in this case were supported by consistent witness statements, though unsworn, and corroborated by the principal's and assistant principal's investigation which included consultation with those witnesses. The record does not support the inference that the witness testimony and statements were unreliable. The hearing officer issued a detailed decision in which he analyzed the facts, evaluated credibility, and arrived at a reasoned conclusion. The hearing officer was entitled to resolve any inconsistencies in favor of the students and to assess and reject petitioner's explanations (*see Matter of Berkley v New York City Dept. of Educ.*, 159 AD3d 525, 526 [1st Dept 2018]; *Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 856, 856 [1st Dept 2011]).

Petitioner states that the conduct of which he was found guilty does not constitute corporal punishment and that nowhere in the Hearing Officer's opinion is there a finding that petitioner engaged in corporal punishment.

The "Regulation of the Chancellor" Number A-420 addresses corporal punishment of students, "defined as any act of physical force upon a pupil for the purpose of punishing that pupil" (NYSCEF 28, at 3). Specification 1 is that petitioner "pushed Student A on or about his neck and/or head." As petitioner was found guilty of the specification, it follows that he engaged in corporal punishment. Pushing constitutes an "act of physical force." Petitioner contends that there is no evidence of any intent to punish in the record, that it strains rationality to think that a push such as described could have been meant as punishment, and that it easily could have been a flawed attempt at self-defense, or a spontaneous act undertaken in the heat of the moment without any intent to punish. However, the definition of corporal punishment does not require

intent and the petitioner did not contend at the hearing that his act was in self-defense, which in fact is excepted from the definition of corporal punishment.

The document entitled Specifications states that petitioner “engaged in misconduct, corporal punishment,” and other offenses (NYSCEF 10). The three specifications are then listed and underneath, the document states that “the foregoing constitutes . . . corporal punishment” along with several other listed offenses. The Hearing Officer’s decision states “Summary of the Charges: Petitioner is charged with committing an act of corporal punishment against a student” (NYSCEF 4, at 2). There is no other mention of corporal punishment. The transcript of the hearing shows that the principal testified that he had to notify OSI (Office of Special Investigations) about the allegation of corporal punishment (NYSCEF 25 at 59, 61).


The one mention of corporal punishment in the Hearing Officer’s opinion and the failure to explicitly address the offense therein does not mean that petitioner was not found guilty of the offense. While the hearing officer could have been more explicit in stating that petitioner engaged in corporal punishment, the offense is sufficiently put forth in the specifications and the opinion.

In conclusion, it is hereby ORDERED and ADJUDGED that the petition to vacate the Hearing Officer’s opinion and award is denied; and it is further

ORDERED that respondent’s cross motion to dismiss the petition is granted; and it is further

ORDERED and ADJUDGED that the Hearing Officer’s opinion and award dated July 6, 2021 is confirmed pursuant to CPLR 7511 (e) and the Clerk is directed to enter judgment accordingly. This constitutes the decision, order, and judgment of the Court.

7/11/2023
DATE


ALEXANDER M. TISCH, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE