[*2] In the Matter of the Disciplinary Charges CARLOS GARCIA, Petitioner, vs. THE NEW YORK CITY DEPARTMENT OF EDUCATION, Respondent. Index No. 113595/10

113595/10

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2011 NY Slip Op 31045U; 2011 N.Y. Misc. LEXIS 1908

April 20, 2011, Decided
April 25, 2011, Filed

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

CORE TERMS: hearing officer, cono, arbitrary and capricious, specification, respondent's request, verbal abuse, abuse of discretion, monthly installments, administrative agency's, interpreter, misconduct, terminated, classroom, shit, penalty imposed, mental distress, belittle, ridicule

COUNSEL: [**1] For petitioner: Sergio Villaverde, Esq., Sergio Villaverde, PLLC, New York, NY.

For respondent: Gail M. Mulligan, Of Counsel, Michael A. Cardozo, New York, NY.

JUDGES: Barbara Jaffe, JSC.

OPINION BY: Barbara Jaffe

OPINION

DECISION & JUDGMENT

By notice of petition dated October 15, 2010, petitioner moves pursuant to CPLR 7801 for an order vacating portions of an arbitration award. Respondent opposes and cross-moves for an order dismissing the petition.

I. FACTS

Following a hearing held pursuant to Education Law § 3020-a and by decision dated September 23, 2010, a hearing officer sustained specifications advanced by respondent, finding, based on the testimony of three students, that petitioner directed profanity at them during 2008 to 2009, and thereby violated Chancellor's Regulation A-42 1 which prohibits misconduct and verbal abuse in the classroom. At the hearing the three students testified in English and used a Spanish word, "cono" when describing "curse words in Spanish" or "bad'' words leveled by [*3] petitioner at students in the classroom. The hearing officer also received from the parties submissions concerning the meaning of Spanish word "cono," and found that in the context used, it constituted an obscenity. [**2] He thus found petitioner guilty of misconduct under departmental specifications 2(c), 2(e), and 2(f) for using the words "shit kids," "fuck," and "shit," found him not guilty of specifications 2(b) and 2(d), specification 1 having been withdrawn by respondent, rejected respondent's request that petitioner be terminated, and imposed a penalty in the form of a fine in the amount of $15,000, payable over 18 equal monthly installments. (Affirmation of Sergio Villaverde, Esq., dated Oct 15, 2010 [Villaverde Aff.], Exh. 1).

II. CONTENTIONS

Petitioner maintains that the hearing officer exceeded his power in violation of CPLR 7511(b)(1)(iii) by improperly using the court interpreter as an expert on the meaning of the word cono, and rendering an award which is arbitrary and capricious. (Villaverde Aff.).
Respondent denies that the interpreter was employed as an expert but that he provided a literal translation of the word "cono," and that based on the context with which it was used, it could only have been understood as "insulting, provocative or profane." It argues that there is no evidence that the award was irrational and that the hearing officer properly determined the credibility of the witnesses [**3] and resolved all factual issues. It thus moves, pursuant to Rules 404(a) and CPLR 3211(a)(7) and 7511, for an order dismissing the petition. (Affirmation of Gail M. Mulligan, ACC, dated Dec. 15, 2010).
III ANALYSIS
Judicial review of an administrative agency's decision is limited to whether the decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and [*4] capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." (CPLR § 7803 [3]). In reviewing an administrative agency's determination as to whether it is arbitrary and capricious, the test is whether the determination "is without sound basis in reason and is generally taken without regard to the facts." (Matter of Pell v. Bd. of Educ. of Union Free School Dist. No, 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231, 313 N.E.2d 321, 356 N.Y.S.2d 833 [1974]; E. W Tompkins Co., Inc. v. State Univ. of New York, 61 AD3d 1248, 1250, 877 N.Y.S.2d 743 [3d Dept 2009], lv denied 13 N.Y.3d 701, 885 N.Y.S.2d 715; Matter of Munkurios v. New York City Taxi and Limousine Commn., 49 AD3d 316, 317, 853 N.Y.S.2d 69 [1st Dept 2008]; Matter of Soho Alliance v. New York State Liquor Auth., 32 A.D.3d 363, 363, 821 N.Y.S.2d 31 [1st Dept 2006]; [**4] Matter of Kenton Assocs. Ltd. v. Div. of Hous. & Community Renewal, 225 A.D.2d 349, 639 N.Y.S.2d 16 [1st Dept 1996]). Moreover, courts generally do not second-guess the decisions of educational institutions, as they "involve the exercise of highly specialized professional judgment and these institutions are, for the most part, better suited to make relatively final decisions concerning wholly internal matters." (Maas v Cornell Univ., 94 NY2d 87, 92, 721 N.E.2d 966, 699 N.Y.S.2d 716 [1999]; see also Mutter of Altman v New York City Dept. of Educ., 2006 NY Slip Op 30521[U], 2006 WL 6158084 [Sup Ct, New York County 2006] applied to termination of Department of Education teacher).
Chancellor's Regulation A-421 defines verbal abuse as, inter alia, "language that tends to cause fear or physical or mental distress [or l]anguage that tends to belittle or subject students to ridicule."
Although I doubt that petitioner's use of the word "cono" tended to cause fear or physical or mental distress or belittle or subject the students to ridicule, there is an insufficient legal basis for finding that the hearing officer's determination is arbitrary and capricious, or that his [*5] determination of the meaning of the word "cono" was arrived at improperly. [**5] However, while the hearing officer properly rejected respondent's request that petitioner be terminated, the penalty imposed was disproportionate. Consequently, I reduce the penalty to $1,000, payable in two equal monthly installments on or before August 1, 2011.
IV. CONCLUSION
Accordingly, it is hereby
ORDERED, that the petition is granted solely to the extent of reducing the penalty imposed to $1,000, payable in two equal monthly installments on or before August 1.
This constitutes the decision and order of the court.
/s/ Barbara Jaffe, JSC
Barbara Jaffe, JSC
DATED: April 20, 2011
New York, New York