

August v New York City Dept. of Educ.

2011 NY Slip Op 33186(U)

December 5, 2011

Sup Ct, NY County

Docket Number: 112315/10

Judge: Saliann Scarpulla

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: _____
Justice

PART 19

Index Number : 112315/2010

AUGUST, COLLIS

VS.

NYC DEPT OF EDUCATION

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

the cross motion was denied for the reasons set forth on May 25, 2011, and it is further ordered that the petition is determined in accordance with the accompanying decision and order.

FILED
DEC 12 2011
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/5/11

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
COLLIS AUGUST,

Petitioner,

Index No.: 112315/10
Submission Date: 8/10/2011

For an Order and Judgment under and pursuant
to Article 78 of the CPLR and for other relief,

- against-

THE NEW YORK CITY DEPARTMENT OF
EDUCATION and JOEL I. KLEIN,
CHANCELLOR,

DECISION AND ORDER

Respondents.

-----X

For Petitioner:
Cooper, Sapir & Cohen, P.C.
560 Broadhollow Road, Suite 210
Melville, NY 11747

For Respondents:
Michael A. Cardozo, Esq.
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007

Papers considered in review of petition:

Notice of Petition	1
Verified Petition	2
Mem of Law	3
Verified Answer	4
Mem of Law	5

HON. SALIANN SCARPULLA, J.:

In this special proceeding, petitioner Collis August (“August”) moves pursuant to Article 78 of the CPLR to annul the determination of respondent New York City Department of Education (“DOE”) which resulted in the revocation of August’s school bus driving certification.

August was employed as a bus driver by USA United Transit, and was certified by DOE as a school bus driver. In 2009, August's assigned bus route included driving special education students for Public Schools ("PS") 52, 277 and 198. For PS 52, August was assigned to drive twelve (12) special education students from PS 52, including N.B., who was disruptive on the bus. On November 20, 2009, August wrote an incident report to the Office of Pupil Transportation ("OPT") regarding N.B.'s behavior, specifically that he had hit another student, and attempted to hit that student with a seatbelt. August also contacted N.B.'s mother regarding the incident, and asked whether N.B. had been given his medication that day.

That same day, the matron assigned to the bus also wrote three incident reports regarding N.B.'s behavior. The reports indicate that N.B. attempted to hit another student with a seat belt, threatened that student and spit at him. The matron indicated that August had to stop the bus repeatedly to address N.B.'s behavior and to "seat him."

Also on the same day, N.B.'s mother filed a complaint with the OPT stating that her child is always fighting on the bus, and August and the matron have done nothing about it. In her OPT complaint, N.B.'s mother stated that August curses in front of the students, "tells the children that he is not there [sic] father and sit the f down."

And also on November 20, 2009, Ellen Quigley, the Assistant Principal of P.S. 52 ("Quigley") spoke to Peter English, an OPT investigator ("English"). Quigley informed English that she received a complaint that August and the bus escort were seen by others "acting inappropriately" in front of the students, and that August threw the escort off the

bus. On November 24, 2009, after English began his investigation, Quigley informed English that she had received the complaint from N.B.'s mother, and that N.B. reported that August slammed N.B. into his seat. As a result of this complaint, and at N.B.'s mother's request, Quigley asked the other students on the bus about the incident, and two students reported that August lifted N.B. and slammed him into a seat. Pursuant to DOE policy, August was then immediately suspended, pending the outcome of the investigation.

As part of his investigation, English interviewed Quigley on December 2, 2009. English also spoke with N.B.'s mother regarding her November 20, 2009 complaint. In addition, English spoke with the manager of USA Untied Transit, August's employer. On December 23, 2009, English interviewed August.

August asserts in his verified petition that English asked him only about the language he uses with the students, and not about physically moving N.B., nor about his dealings with bus matrons or escorts. DOE asserts that August was apprised of the accusations against him and that August denied each one, claiming that his actions were in response to student misbehavior. August then submitted a handwritten statement, which states: "I Collis August didn't curse at [N.B.] or any other students on the bus. I didn't say to [N.B.] I'm not your f[] father. [N.B.] is verbally and physically abusive too [sic] the driver and escorts, also out of control."

At the conclusion of the investigation, OPT notified August by letter dated December 28, 2009 that the allegations against him were “founded,” and that as a result OPT revoked August’s certification of approval as a DOE bus driver.

August appealed this determination to the Office of Appeals & Review (“OAR”), pursuant to Chancellor’s Regulation No. C-100, and on May 12, 2010 a disciplinary appeal conference was held before hearing officer Joanne Rabot (“Officer Rabot”). At the hearing, OPT called English and Quigley to testify, and introduced supporting documents into evidence, including the complaints and incident report. August, represented by counsel, called the parents of two students to testify, testified on his own behalf, and also introduced documentary evidence. Neither N.B. nor his mother was called to testify by either party.

Officer Rabot issued an undated three-page decision, affirming OPT’s decision to permanently revoke August’s bus driver certification. By letter dated May 25, 2010, Deputy Chancellor Kathleen Grimm notified August that DOE accepted OPT’s recommendation as affirmed by Officer Rabot.

August then commenced this Article 78 proceeding by filing of a notice of petition and verified petition. On or around December 7, 2010, DOE cross-moved to dismiss the petition. On May 25, 2011, this Court dismissed DOE’s cross-motion and required DOE to answer the petition.

Discussion

It is well settled that judicial review of an administrative determination pursuant to CPLR Article 78 is limited to a review of the record before the agency and the question of whether its determination was arbitrary or capricious and has a rational basis in the record. *See* CPLR §7803(3); *Gilman v. N.Y. State Div. of Hous. & Community Renewal*, 99 N.Y.2d 144 (2002); *Nestor v. New York State Div. of Hous. & Community Renewal*, 257 A.D.2d 395 (1st Dep’t 1999). “In short, ‘[j]udicial review of an administrative determination is limited to the grounds invoked by the agency.’” *Matter of Rizzo v. DHCR*, 6 N.Y.3d 104, 110 (2005) (quoting *Matter of Aronosky v. Board of Educ., Community School Dist. No. 22 of City of N.Y.*, 75 N.Y.2d 997, 1000 (1990)). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken ‘without sound basis in reason and without regard to the facts.’” *Matter of Rohan v. New York City Housing Authority*, 2009 NY Slip Op 30177U, at *6-*7 (Sup. Ct. N.Y. Co. Jan. 23, 2009) (quoting *Matter of Pell v. Board of Education*, 23 N.Y. 2d 222,231 (1974)).

August argues that the OPT’s determination was not supported by substantial evidence. *See* CPLR 7803(4). “However, substantial evidence review under CPLR §7803(4) applies to full trial-type hearings compelled by law. Because the disciplinary conference was conducted pursuant to Chancellor’s Regulation C-100, which is in the nature of mandamus to review and not compelled by law, the appropriate standard of review is the ‘arbitrary and

capricious' standard." *Avdiu v. New York City Dept. of Education*, 2009 N.Y. Misc. LEXIS 5651, at 6 (Sup. Ct. N.Y. Co. 2009) (internal citations omitted). *See also Duncan v. Klein*, 38 A.D.3d 380 (2d Dep't 2007) (OPT disciplinary conference "properly reviewed under arbitrary and capricious rather than substantial evidence standard"); *Foggie v. City of New York*, 2011 N.Y. Misc. LEXIS 1983, at 3 (Sup. Ct. N.Y. Co. 2011) ("CPLR 7303(4) is inapplicable to OPT determinations").

August also argues that the permanent revocation of his bus driver certification was arbitrary and capricious. He bases this argument in large part on English's investigation, and the fact that Quigley, and not English, interviewed the students. August asserts, without basis, that Quigley was not trained to investigate allegations of misconduct, and that English's findings were based solely on his conversation with Quigley.

However, August admits that he was interviewed by English as part of the investigation. English also testified that as part of his investigation, he interviewed the manager of USA United Transit. Moreover, the determination to revoke August's certification was not based solely on English's investigation. At the hearing, both English and Quigley testified against August. Moreover, August testified on his own behalf, and introduced the testimony of the mother's of two students on the bus, and had the opportunity to introduce other testimony if he wished.

August also argues that the determination was arbitrary and capricious because it was based, in part, on hearsay testimony. “However, it is well established that hearsay evidence is admissible in an administrative hearing, and that hearsay alone may constitute substantial evidence.” *Avdiu*, 2009 N.Y. Misc. LEXIS 5651 at 8.

August’s arguments are unavailing. Based on the evidence in the record, there was a rational basis for the determination. “Courts have found that evidence of a bus driver’s inability to safely supervise children is sufficient to form a rational basis for revoking certification.” *Avdiu*, 2009 N.Y. Misc. LEXIS 5651 at 7 (citing *Robbins v. Malone Cent. School Dist.*, 182 A.D.2d 890, 892 (3d Dep’t 1992)). Quigley testified that she observed August using inappropriate and vile language with the students, and that she received a complaint from N.B.’s mother that August lifted N.B. out of his seat and off the ground. Quigley further testified that she interviewed N.B. and the other students on the bus at the time who all provided the same account. The testimony and complaints and other documents submitted provides ample evidence upon which to uphold the determination as not being arbitrary and capricious.

Last, August argues that the penalty of permanent revocation is shocking to one’s sense of fairness. “A penalty determined by the agency is ‘not to be disturbed unless it is clearly disproportionate to the offense and completely inequitable in light of the surrounding circumstances.’” *Webster Parking, LLC v.*

City of New York, 2008 N.Y. Misc. LEXIS 1229, 239 N.Y.L.J. 32, 38 (Sup. Ct. N.Y. Co. 2008) (quoting *Kostika v. Cuomo*, 41 N.Y.2d 673, 676 (1977)).

Moreover, “[j]udicial review of administratively imposed sanctions is limited in that only when the sanction is, under the circumstances, so disproportionate to the offense as to ‘shock the conscience of the court’ may it be revised.” *Webster Parking*, 239 N.Y.L.J., at 38 (quoting *Harris v. Mechanicville Central School Dist.*, 45 N.Y.2d 279 (1978)).

Here, the determination to permanently revoke August’s bus certification does not shock the Court’s conscience. While there is support in the record for August’s claim that N.B. was often disruptive on the bus, and posed a threat to other students, to August, and to the matron and escort, there is also evidence that August in the past used inappropriate language and had at least one other incident with an escort. In light of all of the circumstances, the Court does not find that the penalty imposed, permanent revocation of August’s bus certification, is so fundamentally unfair as to be disproportionate to the offense.

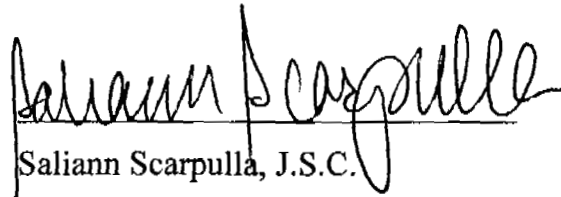
In accordance with the foregoing, it is hereby

ORDERED and ADJUDGED that the petition of Collis August to vacate the decision of respondents New York City Department of Education and Joel I. Klein, Chancellor is denied and dismissed, and the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
December 5, 2011

ENTER:


Saliann Scarpulla, J.S.C.

FILED

DEC 12 2011

COUNTY CLERK'S OFFICE
NEW YORK