[*1] In the Matter of the Application of the Board of Education of the Dundee Central School District, Petitioner, against Douglas Coleman, Respondent.

2010-0248

SUPREME COURT OF NEW YORK, YATES COUNTY

2010 NY Slip Op 51684U; 29 Misc. 3d 1204A; 2010 N.Y. Misc. LEXIS 4689

October 1, 2010, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

SUBSEQUENT HISTORY: As Corrected October 4, 2010.
Appeal after remand at, Remitted by Board of Educ. of the Dundee Cent. School Dist. v. Coleman, 2011 N.Y. Misc. LEXIS 1999 (N.Y. Sup. Ct., Apr. 29, 2011)

CORE TERMS: suspension, counseling, teacher, film, school district, disciplinary, remitted, health insurance, favoritism, disciplinary proceedings, penalty imposed, formal charges, classroom, teaching, vacated, warnings, dick, nicknames, suspension period, insurance benefits, period of suspension, public policy, school year, aforementioned, inappropriate, utilization, reinstated, exhibited, regular, annexed

HEADNOTES

[**1204A] Schools--Teachers--Disciplinary Proceedings.

COUNSEL: [***1] Ferrara, Fiorenza, Larrison, Barret & Reitz, P.C., (Eric J. Wilson, Esq., of counsel), Attorneys for the Petitioner.

New York State United Teachers, (Timothy S. Taylor, Esq., of counsel), Attorneys for the Respondent.

JUDGES: HON. W. PATRICK FALVEY, Acting Supreme Court Justice.

OPINION BY: W. PATRICK FALVEY

OPINION

W. Patrick Falvey, J.

The petitioner, Board of Education of the Dundee Central School District (hereinafter "Dundee") brought charges against the respondent, Douglas Coleman (hereinafter "Coleman"), a tenured social studies teacher employed by Dundee, pursuant to Education Law § 3020-a. Following a lengthy hearing, the Administrative Hearing Officer found the respondent guilty of some of the charges and dismissed others. He imposed a penalty of suspension from all teaching duties without pay, but with continued medical insurance benefits for a period of six consecutive months. The dates associated with the disciplinary suspension were to be determined by Dundee which set the suspension period from June 2, 2010 through February 1, 2011.

Dundee thereafter commenced this hybrid application, pursuant to Articles 75 and 78 of the CPLR, seeking a partial vacation of the Hearing Officer's decision. In accordance [***2] with CPLR § 7511(b)(1)(iii), Dundee asserts the Hearing Officer exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made. Pursuant to the Article 78 review, Dundee alleges that certain of the determinations made [*2] by the Hearing Officer were arbitrary and capricious and/or beyond his powers.

Coleman was hired as a regular substitute for Dundee for the 1980-1981 school year. He has taught there ever since, having received tenure in 1985. He appears to have had a fairly quiet teaching record until the mid-nineties. However, in 1995, he entered into a Memorandum of Agreement with Dundee, agreeing to an unpaid five day suspension for using excessive disciplinary force against a student (Ex. 24). In 1997, a prior Education Law § 3020-a hearing concluded against him, wherein the Hearing Officer's decision directed Coleman's suspension from teaching for the balance of the school year and he was directed to undertake several courses and programs (Ex. 27). In addition, Coleman received counseling memos in 1995(Ex. 23), 1996(Ex. 25 and 26), and 2004(Ex. 29). All of which raise concerns about Coleman's behavior that are similar [***3] in nature to the concerns raised in the current proceeding.

The 1995 memo addressed a film that Coleman had shown his students concerning the Attica uprising. Dundee's Superintendent received a complaint from a parent and after viewing the film, stated she found the film to be "vulgar, graphic and totally inappropriate for a school setting." The Superintendent stated that she expected only G-rated films to be shown in the future, and that if a deviation was necessary, the film was to be first principal-approved. Coleman signed a memo indicating he would fully comply with the film policy (Ex. 23). Two of the charges against Coleman in the current proceeding allege he attempted to bypass established District procedure in 2007 with respect to utilization of movies within his class (Specifications 1.3 and 2.3).

The 1996 counseling memos resulted from a series of behaviors exhibited by Coleman that caused Dundee concerns. On March 2, 1996, the Superintendent urged Coleman to cease and desist from using any self-created nicknames for students (Ex. 26). Further, the Superintendent specifically instructed Coleman "…to refrain from touching any student, anywhere. Any future incident will result [***4] in an immediate suspension." (Ex. 26). In the current proceeding, the Hearing Officer sustained Charge 1, Specification 1.7 and Charge 2, Specification 2.7, that alleged he had given students nicknames (Speedy, Yummy, Zebby) and that he also touched the hair, chest and/or necklace of at least one of the female students in the class (Ex. A, annexed to the Petition, Hearing Officer's Decision and Award, pages 17-19).

The 2004 memo also warned against the use of nicknames for students, and additionally, against favoritism in the classroom (Ex. 29).

The 1997 § 3020-a hearing resulted in a finding that Coleman exhibited favoritism in the classroom by helping certain students answer questions while they were taking tests. Specifically, the Hearing Officer noted, Coleman "on an ongoing and regular basis, walked around his classrooms, helping them to enter the correct answer on tests…" The Hearing Officer also noted, "That he showed favoritism to certain students makes this conduct all the more unacceptable." (Ex. 27, Hearing Officer's Decision, pages 48-49). In the current proceeding, the Hearing Officer sustained Charge 1, Specification 1.8, favoritism in Coleman's grading practices (Ex. A, [***5] annexed to the Petition, Hearing Officer's Decision and Award, pages 19-20).

DISMISSAL OF CERTAIN SPECIFICATIONS

Dundee challenges the Hearing Officer's dismissal of Specifications 1.1-1.3 and 2.1-2.3 of the amended charges. Dundee seeks to have the charges reinstated pursuant to CPLR § 7511, [*3] alleging the Hearing Officer's decision is irrational and violates an established and important public policy. The Specifications are similar except that the charges under 1.1-1.3 fall under the category of "conduct unbecoming a teacher" and the charges 2.1-2.3 fall under the category of "insubordination." Charges 1.1 and 2.1 deal with an improper test being given by Coleman for his 12th grade Participation in Government class including poor and/or confusing instructions containing misspellings, being a duplicate of a test used two years previously, testing the students at a lower academic level than should have been utilized for 12th grade students and containing inappropriate and suggestive vocabulary words including "yu dick", "grandma dick" and "Mrs. Dick" (Record, Exhibits 1 & 10). The second group of charges is that one of the students in the aforementioned class was a student with a disability [***6] of high-functioning Asperger's Syndrome, and on her test, Coleman had captioned two cartoon figures of aliens, with the student's name by one figure and her personal tutor's name by the other (Record, Exhibit 10). The third group of charges is that in September of 2007, Coleman attempted to bypass the established District procedure with respect to the utilization of movies within his class.

In dismissing these charges, the Hearing Officer noted Dundee had given Coleman counseling memos concerning the underlying conduct that gave rise to them.

The Hearing Officer concluded:

"…There is nothing in the record demonstrating that any of the actions that gave rise to the foregoing counseling memorandum were repeated. Therefore, without more, it is apparent that the path chosen by the District in its counseling actions serves their stated purpose. As a result, it would be both improper and unfair under the just cause protocol to permit and entertain formal charges, identical in nature to those at issue in the foregoing counseling memoranda, since by all accounts, the matters have not been repeated. Accordingly, respondent's motion to dismiss Charge 1, Specifications 1.1, 1.2 and 1.3, as well [***7] as Charge 2, Specifications 2.1, 2.2 and 2.3 is hereby granted." (Exhibit A, Petition, p. 14, Hearing Officer's decision)

The Court finds the Hearing Officer erred. There is no support for the premise that if a School District gives a counseling memo in the first instance, rather than immediately proceeding to bring formal charges, that it has somehow waived its right to do so at a future date. It is clear from case law that the school district is not precluded from including incidents giving rise to counseling memoranda as part of formal charges in a Education Law § 3020-a proceeding. *Holt v. Board of Education of the Webuttuck Central School District*, 52 NY2d 625, 631, 422 N.E.2d 499, 439 N.Y.S.2d 839 (1981);*Cohn v. Board of Education of the City School District of the City of New York*, 74 AD3d 457, 901 N.Y.S.2d 640 (1st Dept 2010); see also *Employment History and Disciplinary Action* by Harvey Randall, 2001 No. 2 Pub. Emp. L. Notes 27, citing *Patterson v. Smith*, 53 NY2d 98, 423 N.E.2d 23, 440 N.Y.S.2d 600 (1981). The gist of the foregoing cases stands for the proposition that teachers are not entitled to have Education Law § 3020-a disciplinary protections just because a counseling memo issues. Rather, the courts note that the teachers are given an opportunity to [***8] file their written responses to the counseling memos and further action may never be taken against them. However, in the event formal disciplinary proceedings ensue the teachers are entitled to their full panoply of rights and protections under Education Law § 3020-a. Clearly, based upon the foregoing case law, it is anticipated that school districts may choose to seek disciplinary charges against teachers based upon the totality of the circumstances the school districts are reviewing. Accordingly, the Hearing Officer's dismissal of [*4] Charge 1, Specifications 1.1, 1.2 and 1.3, as well as Charge 2, Specifications 2.1, 2.2 and 2.3, is vacated.

PAYMENT OF COLEMAN'S HEALTH INSURANCE EXPENSES DURING HIS SIX MONTH SUSPENSION

Dundee also challenges the Hearing Officer's determination that it must continue to pay the health insurance costs of Coleman during his 6-month suspension, arguing "a suspension without pay" pursuant to Education Law § 3020-a(4)(a) necessarily involves a suspension of all payments by Dundee for Coleman's benefit. Coleman submits the statute says the penalty "may" be a suspension without pay and is not mandatory; it is inclusive not exclusive. Coleman further argues that [***9] if the Court finds the arbitrator's decision was improper, then the matter should be remitted to the Hearing Officer to fashion a different penalty.

The Hearing Officer's direction that Dundee pay for Coleman's health insurance benefits during his period of suspension is vacated. The statutory scheme clearly contemplates suspension of all financial benefits upon a suspension without pay. See *Appeal of the Board of Education of the Carthage Central School District re: Rosintoski*, 33 Educ. Dept Rep. 693(1994), citing *Adrian v. Board of Education of the East Ramapo Central School District*, 60 AD2d 840, 400 N.Y.S.2d 570(2d Dept1978); see also, *McSweeney v. Board of Education of Johsburg Central School District*, 138 AD2d 847, 849, 525 N.Y.S.2d 956(3rd Dept 1988).

Further, Coleman is directed to reimburse Dundee for any such costs already advanced on Coleman's behalf and Dundee is immediately stayed from making any further contributions during the suspension period.

THE PROPRIETY OF THE PENALTY IMPOSED

Dundee argues that the penalty imposed, to wit: a six-month suspension, was excessively lenient and contrary to public policy. Dundee seeks Coleman's dismissal. "The standard for reviewing a penalty imposed after a hearing pursuant [***10] to Education Law § 3020-a is whether the punishment of dismissal was so disproportionate to the offenses as to be shocking to the court's sense of fairness (citations omitted.)" *Lackow v. The Department of Education of the City of New York*, 51 AD3d 563, 859 N.Y.S.2d 52(1st Dept 2008).

The concern, of course, is the pattern of behavior that Coleman continues to exhibit, despite previous warnings and disciplinary proceedings. See generally, *Lackow v. The Department of Education of the City of New York, supra* ("…a continued pattern of offensive behavior…" despite previous warnings, at page 569); *Auxier v. Town of Laurens*, 23 AD3d 912, 804 N.Y.S.2d 134(3rd Dept 2005) (" …repeatedly disregarded the instructions of his supervisor" and that "this pattern of insubordinate behavior would have continued…" at page 914) and *Jones v. NYC Board of Education*, 189 AD2d 818, 592 N.Y.S.2d 441(2d Dept 1993) ("…Significantly, the hearing panel found that the petitioner had failed to improve his performance despite many warnings and opportunities to do so and that he would not improve his skills if permitted to return to work…" at page 818).

This application is premature as to the issue of the appropriate penalty, because the matter is necessarily remitted [***11] to the Hearing Officer to reconsider Specifications 1.1-1.3 and 2.1-2.3. If the Hearing Officer finds the aforementioned charges are substantiated, the same may impact the Hearing Officer's determination of the appropriate penalty.

Accordingly, the petition is granted to the extent this matter is remitted to the same Hearing Officer for a review, of Specifications 1.1-1.3 and 2.1-2.3, and a review of the penalty [*5] to be imposed. CPLR § 7511(d); *Board of Education of East Hampton Union Free School District v. Yusko*, 269 AD2d 445, 446, 703 N.Y.S.2d 219(2d Dept 2000).

In making this ruling, the Court notes that Coleman's suspension shall continue in accordance with the Hearing Officer's existing decision, subject to any modification following the remitter herein. All other requested relief is denied.

Based upon the foregoing, it is hereby

ORDERED, ADJUDGED AND DECREED, that Charge 1, Specifications 1.1-1.3, and Charge 2, Specifications 2.1-2.3, are reinstated. Those charges are hereby remitted to the same Hearing Officer for a review pursuant to CPLR § 7511(d). Further, the issue of penalty is also remitted, and it is further

ORDERED, ADJUDGED AND DECREED, that the directive requiring Dundee pay for Coleman's [***12] health insurance during the period of suspension is vacated. Coleman is hereby ordered to reimburse Dundee for any such costs, upon submission to him by Dundee of an itemization of such costs. Payment is to be made within sixty (60) days of the date of Dundee's invoice, unless the parties agree to a different repayment schedule, and it is further

ORDERED, ADJUDGED AND DECREED that Dundee is hereby immediately stayed from making any further payments for Coleman's health insurance during the suspension period.

This Decision and Judgment is made without an award of costs to either party.

DATED: October 1, 2010

/s/

HON. W. PATRICK FALVEY

Acting Supreme Court Justice
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