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

2011-0011

SUPREME COURT OF NEW YORK, YATES COUNTY

2011 NY Slip Op 21157; 2011 N.Y. Misc. LEXIS 1999

April 29, 2011, Decided

NOTICE:

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SUBSEQUENT HISTORY: Subsequent appeal at, Remitted by Board of Educ. of Dundee Cent. School Dist. v. Coleman, 2011 N.Y. Misc. LEXIS 2067 (N.Y. Sup. Ct., Apr. 29, 2011)

PRIOR HISTORY: Matter of Board of Educ. of the Dundee Cent. School Dist. v. Coleman, 29 Misc. 3d 1204A, 2010 N.Y. Misc. LEXIS 4689 (2010)

CASE SUMMARY:

OVERVIEW: A board of education's petition to vacate a hearing officer's (HO) decision under CPLR 7511 was granted. The HO refused to impose an additional penalty for a teacher's conduct unbecoming a teacher under Education Law § 3020-a. Some of the conduct was similar to prior misconduct for which the teacher had been warned, such as the teacher's violation of the board's film policy. The HO's decision was incorrectly based on a premise that the board had to prove that the teacher repeated the misconduct for which he had been warned before the board's penalty request could be considered.

OUTCOME: Petition granted. Matter remitted to different hearing officer regarding penalty only.

CORE TERMS: hearing officer, counseling, specifications, misconduct, formal charges, teacher, appropriate penalty, disciplinary, discipline, inappropriate, arbitration, suspension, irrational, classroom, teaching, protocol, repeated, vacate, warned, grade, film, special education, penalty imposed, public policy, arbitrary and capricious, gave rise, judicial review, citation omitted, sole basis, aforementioned

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Civil Procedure > Alternative Dispute Resolution > Judicial Review
Civil Procedure > Alternative Dispute Resolution > Mandatory ADR
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Evidence > Procedural Considerations > Burdens of Proof > Allocation
[HN1] In reviewing a hearing officer's determination under CPLR 7511, the hearing officer's determination will be upheld if it is supported by substantial evidence and is not arbitrary or capricious; and may only be vacated upon a showing of misconduct, bias, an excess of power or procedural defects. However, where the parties are subject to compulsory as opposed to voluntary arbitration, judicial review under CPLR art. 75 is more expansive. In compulsory arbitration cases, in order to affirm a hearing officer's ruling, the court must be satisfied that the hearing officer's decision was in accord with due process and supported by adequate evidence and must also be rational and satisfy the arbitrary and capricious standards of art. 75. The party challenging an arbitration determination has the burden of showing its invalidity.

Education Law > Faculty & Staff > Discipline & Dismissal > Administrative Proceedings > General Overview
Education Law > Faculty & Staff > Discipline & Dismissal > Causes
[HN2] A school district is not precluded from bringing Education Law § 3020-a charges based upon the conduct that gave rise to counseling memoranda, and to ask that an appropriate penalty be assessed if the charges are sustained.

Education Law > Faculty & Staff > Discipline & Dismissal > Administrative Proceedings > Appeals & Reviews
Education Law > Faculty & Staff > Discipline & Dismissal > Causes
[HN3] Normally, the standard for reviewing a penalty imposed after a hearing pursuant 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.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Education Law > Faculty & Staff > Discipline & Dismissal > Administrative Proceedings > Appeals & Reviews
[HN4] The standard of review of a hearing officer's decision that allegedly based an Education Law § 3020-a penalty based on an improper standard is whether the award is supported by evidence or other basis in reason, as may be appropriate and appearing in the record.

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

For Respondent: Richard E. Casagrande, Esq. - NYSUT G.C., (Timothy S. Taylor, Esq., of counsel).

JUDGES: Hon. W. Patrick Falvey, J.

OPINION BY: W. Patrick Falvey

OPINION

W. Patrick Falvey, J.

The petitioner, Board of Education of the Dundee Central School District (hereinafter, "Dundee"), has filed this application to vacate and/or modify the decision and award on remand of a hearing officer dated January 7, 2011 pursuant to CPLR section 7511. The decision and award on remand occurred following this Court's Memorandum Decision and Judgement in *Dundee Central School District v. Coleman*, docket No. 2010-0248, 29 Misc. 3d 1204[A], 2010 NY Slip Op 51684[U] dated 2010 (Ex. B) (hereinafter, "2010 Decision"). In the original proceeding, several other charges were sustained and others dismissed, which are not in issue herein and are not part of the remand. The challenge by Dundee is only to the remand penalty imposed. No challenges have been raised to the other determinations made by the hearing officer upon remand.

In this Court's 2010 Decision, Charge 1, specifications 1.1-1.3 and Charge 2, Specifications 2.1-2.3 were reinstated, and those Charges were **[**2]** remanded to the Hearing Officer for reconsideration. Basically, the specifications in Charge 1 and Charge 2 mirrored each other, except the specifications in Charge 1 were under the caption of "conduct unbecoming a teacher", and the specifications in Charge 2 were under the caption of "insubordination".

In the Remand Decision(Ex. A), the Hearing Officer dismissed Charge 2 in its entirety, including all specifications therein, finding there was insufficient evidence to support a charge of insubordination. He sustained, however, Charge 1, Specification 1.3 as conduct unbecoming a teacher, finding Coleman attempted to bypass Dundee procedure concerning the use of movies **[*2]** within the classroom. The Hearing Officer also partially sustained Charge 1, Specification 1.1, wherein Coleman administered an exam to his 12th Grade Government students that contained misspellings, was the same test as used two years previously, tested at a lower academic level than should have been presented and contained inappropriate and suggestive vocabulary terms. The Hearing Officer also found Charge 1, Specification 2.1 supported, to the extent that Coleman made inappropriate references to a special education **[**3]** student and a special education teacher on a 12th grade Government exam in a failed attempt at humor. The Hearing Officer found Coleman did not intend to demean or ridicule the special education student (Ex. A).

As noted above, Dundee does not challenge the Hearing Officer's findings as set forth; it only challenges the Hearing Officer's determination that no additional penalty should be imposed after reconsideration. The original penalty that was imposed was a suspension from all teaching duties, without pay, but with continued medical insurance benefits, for a period of six (6) consecutive months (Ex. C, page 24). This Court struck the requirement that Dundee continue the medical insurance benefits in its 2010 Decision.

Dundee alleges the Hearing Officer's decision on the issue of the appropriate penalty was excessively lenient; against public policy and was arbitrary and capricious. Further, the Hearing Officer's decision was irrational, according to Dundee, because he refused to impose additional discipline against respondent after finding him guilty of additional charges. Accordingly, the School District asks that only the determination of penalty be vacated and that this matter **[**4]** be remanded to a different hearing officer for a new determination on the appropriate penalty.

Counsel for the respondent, Douglas Coleman (hereinafter "Coleman"), opposes the application arguing vacatur is not supported by public policy; that the Hearing Officer's decision was indeed rational; that the Hearing Officer correctly applied the *Holt* [(*Holt v. Webutuck Central School District*, 52 NY2d 625, 422 N.E.2d 499, 439 N.Y.S.2d 839(1981)] standard and that the penalty of six months suspension was not lenient.

This Court notes it is clear the Hearing Officer gave considerable thought and attention in making his Remand Decision. Although he was very thorough, the question at bar is whether the penalty determination was flawed due to the Hearing Officer's interpretation of the "just cause standard", thus rendering his determination irrational.

With regard to the Dundee's request to vacate the Hearing Officer's determination, "... the standard of judicial review pursuant to CPLR section 7511 is as follows: [HN1] A hearing officer's determination will be upheld if it is supported by substantial evidence and is not arbitrary or capricious; and may only be vacated upon a showing of "misconduct, bias, an excess of power or procedural **[**5]** defects." *Lackow v. Department of Education*, 51 AD3d 563, 859 N.Y.S.2d 52(1st Dept 2008), quoting from *Austin v. Board of Education*, 280 AD2d 365, 720 N.Y.S.2d 344 (1st Dept 2001). However, where, as in the instant case, the parties are subject to compulsory as opposed to voluntary arbitration, judicial review under CPLR Article 75 is more expansive. In compulsory arbitration cases, in order to affirm a hearing officer's ruling, the court must be satisfied that the hearing officer's decision was "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 75" (citation omitted). *Denhoff v. Mamaroneck Union Free School District*, 29 Misc 3d 1207[A], 2010 NY Slip Op 51742[U] (NY Sup 2010). The **[*3]** party challenging an arbitration determination has the burden of showing its invalidity. *Lackow v. Department of Education*, 51 AD3d at 568, citing *Caso v. Coffey*, 41 NY2d 153, 159, 359 N.E.2d 683, 391 N.Y.S.2d 88 (1976).

In this case, the Hearing Officer noted that several factors need to be considered in determining an appropriate penalty. He noted many positive points about Coleman's long teaching history, including an enthusiasm for his subject matter, good classroom management, and a good **[**6]** pace for instruction (Ex. A, page 15). He also determined Coleman was not incorrigible. He then stated, "Given the former imposition of a six month disciplinary suspension for those proven offenses, there remains a question as to any further penalty or discipline as a result of this decision Remand." (Ex. A, Remand Decision, page 16). The Hearing Officer focused on the counseling memoranda Dundee gave Coleman after the underlying incidents. Specifically, there were June, 2007 memos following the inappropriate tests he gave his 12th Grade Government students, which among other things, directed Coleman to provide Dundee with "hard copies of the course syllabi...(and) lessons plans...(weekly)..." (Ex. A, page 17), and alerted him "...that the purpose of this memo is to warn you of the serious consequences of any future incident, and to instruct you as to how to avoid such problems in the future;" along with Superintendent Zimar's followup memo noting, "We've been down this road before and I sincerely hope that we do not have to travel that highway again.". The Hearing Officer noted the counseling memoranda given in September, 2007, relating to Coleman's improper attempt to have parents **[**7]** sign permission slips for students to view films in his classroom that did not comport with existing Dundee protocol (Ex. A, page 18), which informed Coleman that "The purpose of this letter is to inform you of the seriousness of these concerns and to prevent the reoccurrence of further issues. This memo should not be construed as a formal accusation, charge or disciplinary action. However, non compliance with these requests could result in formal action." After reviewing the aforementioned counseling memoranda, the Hearing Officer noted there was no proof any of the warned offenses were repeated by Coleman. He concluded, "As such, I find and conclude that these Counseling Memoranda are a crucial preface to the progressive disciplinary scheme inherent in the just cause protocol under section 3020-a." (Ex. A - pages 16-19). The Hearing Officer summarized:

> "Given the foregoing, I find and conclude that the proper consequence for those Specifications either sustained or partially sustained lies in the memoranda issued by the District as noted and discussed above. It would be inherently unfair and totally contrary to the just cause protocol to issue further discipline to the Respondent **[**8]** for actions that were never repeated and I will not do so."

The issue Dundee argues is that it believes the Hearing Officer refused to consider the imposition of a penalty for the charges he sustained upon remand, under a misinterpretation of the *Holt* (see 52 NY2d 625, 422 N.E.2d 499, 439 N.Y.S.2d 839) standard. The District submits that the Hearing Officer's ruling is that if a School District issues a counseling memo, and the warned against conduct has not re-occurred, the School District cannot seek any additional penalty within the context of a subsequent Education Law section 3020-a hearing, for the same conduct. Dundee submits this **[*4]** interpretation violates and gives an irrational construction to existing law, and more specifically, that his reasoning is contrary to *Holt* (52 NY2d at 625) and this Court's 2010 decision.

Dundee's argument is well taken. Clearly, as this Court previously ruled, [HN2] Dundee was not precluded from bringing Education Law section 3020-a charges based upon the conduct that gave rise to the aforementioned counseling memoranda, and to ask that an appropriate penalty be assessed if the charges were sustained. *Holt* at 634, *Heslop v. Bd. of Education, Newfield Central School District*, 191 AD2d 875, 877, 594 N.Y.S.2d 871(3rd Dept 1993). **[**9]** Counsel for Coleman argues that *Holt* states such counseling memoranda can only be used to "support" formal disciplinary charges, but can't be the sole basis of formal charges. This Court disagrees with counsel's interpretation of the word "support" in the *Holt* decision, and as previously ruled, the underlying conduct referenced in the counseling memoranda can be the sole basis for formal Education Law section 3020-a charges.

Counsel further submits, "If it is permissible to place a letter of criticism in a teacher's file without preferring formal charges because it relates to an incident too minor to require formal charges, than the District cannot reverse itself once the letter is in the file, alleging that the same incident is now serious enough to form the basis for formal discipline, unless the teacher has violated the warnings set forth in the memorandum or letter. It is this inconsistency that the Hearing Officer found to violate the elements of due process and fundamental fairness embodied in the statute." (Timothy S. Taylor, Esq., Memorandum of Law, page 28). The difficulty with this argument is that it is contrary to existing case law. *Holt* at 634, *Heslop* at 877. It is within **[**10]** the School District's discretion on how to proceed.

Here, Dundee started with counseling memoranda concerning the misbehaviors sustained by the Hearing Officer. Additional unrelated misconduct occurred *afterwards*, much of which was previously sustained by the Hearing Officer as part of his original decision (Ex. C). It was only logical for Dundee to bring formal charges regarding all underlying incidents, and to request a penalty based upon the totality of the circumstances. The question is not, as the Hearing Officer suggests, whether an additional penalty should be imposed for the now determined acts of misconduct, but rather, whether the penalty for the entire course of misconduct should be enhanced. The determined acts of misconduct cannot be viewed in isolation from each other. It is the history of conduct that must be considered, a fact the Hearing Officer tacitly admitted by his consideration of the positive aspects of Coleman's teaching record. Some of the conduct sustained after remand was similar to prior conduct for which Coleman had been previously warned. In 1995, Coleman signed an agreement acknowledging Dundee's film viewing policy and asserting he would comply with the **[**11]** same in the future (See 2010 Decision, page 2). Upon remand, Coleman was found to have violated the District's film policy.

[HN3] Normally, "the standard for reviewing a penalty imposed after a hearing pursuant to Education Law section 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. Department of Education*, 51 AD3d at 569 (1st Dept 2008). Here, the Court never addresses that standard, because the issue is whether the Hearing Officer's determination is based upon a flawed interpretation of the meaning of "just cause" and its purported limitations on the imposition of an Education Law section 3020-a penalty when a School District previously issued counseling memoranda. **[*5]**

[HN4] "The standard of review is "whether the award is supported by evidence or other basis in reason, as may be appropriate and appearing in the record." *Mount St. Mary's Hospital of Niagara Falls v. Catherwood*, 26 NY2d 493, 508-509, 260 N.E.2d 508, 311 N.Y.S.2d 863 (1970); *Smith v. NY City Department of Education* 29 Misc 3d 1224[A], 2010 NY Slip Op 51989[U] (NY Sup 2010).

The Court therefore finds the Hearing Officer's decision regarding penalty lacks a rational basis, **[**12]** due to his improper reliance on the premise that Dundee had to prove Coleman repeated the misconduct that gave rise to the counseling memoranda, before he would consider Dundee's request for a penalty. In light of this Finding, the Court does not reach the other arguments advanced by Dundee.

Accordingly, the petition to vacate the determination and direct the matter be remitted to a different hearing officer regarding only the issue of penalty is granted for the reasons stated herein, without costs.

This constitutes the Decision and Judgment of the Court.

April 29, 2011

Hon. W. Patrick Falvey