

FEB 11 2010

FERRARA, FIORENZA,  
LARRISON, BARRETT & REITZ, P.C.STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ONTARIO

BOARD OF EDUCATION, PHELPS-CLIFTON SPRINGS  
CENTRAL SCHOOL DISTRICT,**DECISION AND  
ORDER**

Petitioner

-against-

Index. No. 103465

MICHAEL NICOT

Respondent.

Present: Hon. Frederick G. Reed  
Acting Justice of Supreme CourtAppearances: Ferrara, Fiorenza, Larrison, Barrett & Reitz P.C. by  
Henry F. Sobota, Esq., of counsel for the PetitionerJames R. Sandner, Esq. by Frederick K. Reich, Esq. and Paul Clayton,  
Esq. of counsel for the Respondent

The Petitioner Phelps-Clifton Springs Central School District originally sought an Order and Judgment, pursuant to Education Law §3020-a(5) and CPLR 7511 (1) Vacating a decision by Hearing Officer Dennis J. Campagna, Esq. dated August 20, 2009, to that extent that it (a) determined that a penalty of a suspension for six months without pay was appropriate and (b) required that the District pay for the Respondent's health insurance coverage during the suspension without pay; (2) Staying any requirement that the District make any payments toward the cost of the Respondent's health and dental coverage, pending the hearing and determination of this proceeding; (3) Ordering the Respondent to reimburse the District for any contributions made by the District toward the Respondent's health and/or dental insurance coverage on or after August 26, 2009; and (4) Remitting the matter for the determination of a different, appropriate penalty and awarding the District the costs and disbursements of this

proceeding, and such other and further relief the Court may deem to be just and proper. Pursuant to amendment to the original Petition as granted by Order of this Court, Petitioner seeks to vacate the Decision of the Hearing Officer finding the Respondent not guilty of Disciplinary Charge Number 4 (misusing a school district laptop to engage in online gambling) on the basis of corruption, fraud or misconduct in procuring the award (CPLR §7511(b)(1)(i)) based on proof that the Respondent perjured himself before the Hearing Officer.

The Respondent is a tenured math teacher at Petitioner School District. He was appointed as a probationary teacher effective September 2001 and was granted tenure in September 2004. Petitioner asserts at paragraph 7 of its Petition that "During 2007, the District became aware that the Respondent may have committed various acts of misconduct in connection with District-owned computer equipment". The District Superintendent of Schools, Mike Ford, filed Charges and Specifications against the Respondent, pursuant to Section 3020-a of the Education Law. On May 23, 2007, the Board voted to find probable cause to proceed with the charges against Respondent. The Respondent was suspended pending the hearing and determination of the charges. As required by Education Law §3020-a, the suspension was without pay.

Dennis J. Campagna, Esq. was appointed to serve as the Hearing Officer, under the rules and procedures of the State Education Department. The hearing took place over multiple dates during 2008 and 2009. After the hearing was completed, the Hearing Officer issued his decision on August 20, 2009. The District received a copy of the Hearing Officer's decision for the State Education Department on August 24, 2009. The Hearing Officer concluded that the Respondent was guilty of conduct unbecoming a teacher, neglect of duty and insubordination. The Hearing Officer concluded that the Respondent was guilty of downloading pornographic images onto District-owned computer equipment, and sending pornography using the District computer system. The Hearing Officer dismissed certain other aspects of the Charges and Specifications including Charge Number 4 alleging misuse of a school district laptop to engage in online gambling.

The Hearing Officer did not impose the penalty of dismissal requested by the District. Instead, he concluded that a six-month suspension without pay was an appropriate penalty. He

directed that the suspension be served on a consecutive basis on dates determined by the District. The Hearing Officer also directed the District to provide the Respondent with health insurance coverage during the suspension. The amount of the District's contribution would be on the same basis as it provided to the Respondent during his suspension with pay, with the District's maximum obligation governed by the collective bargaining agreement between the District and the Phelps-Clifton Springs Faculty Association.

Education Law §3020-a requires that the Board implement the Hearing Officer's decision within fifteen days after its receipt. Accordingly, on August 26, 2009, the Board voted to approve a resolution implementing the decision of the Hearing Officer, and suspending the Respondent without pay for six months, effective September 8, 2009, the first required day of attendance for teachers during the 2009-2010 school year. The August 26, 2009 resolution of the School Board authorized counsel for the District to apply to New York State Supreme Court to vacate or modify the Hearing Officer's Decision.

The Petitioner originally asserted two grounds for vacating the Hearing Officer's Decision. First, the Petitioner asserts that "the Hearing Officer's Decision on the issue of appropriate penalty was excessively lenient", was against public policy, and "exceeded his power, within the meaning of CPLR 7511(b)(1)(iii)". As a second ground, the Petitioner asserts that Education Law §3020-a(4)(a) authorizes a hearing officer to impose a penalty of either a written reprimand, a fine, suspension for a fixed time without pay, or dismissal or to impose remedial action upon an employee. It is argued that requiring the District to pay health insurance premiums does not constitute a "remedial action" and is not included within the remedies authorized under that section.

CPLR 7511(b) sets forth the limited grounds on which a petitioner can seek to vacate an award, namely misconduct, partiality, exceeding powers, or procedural error. Judicial review of arbitration awards is extremely limited (Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 NY3d 471, 479 [2006], citing United Paperworkers Intl. Union AFL-CIO v. Misco, Inc., 484 U.S. 29 [1987] ). Where the arbitration hearing is conducted pursuant to Education Law § 3020-a, "the court's review shall be limited to the grounds set forth in [CPLR 7511]." However, where the parties are required to engage in compulsory arbitration, as occurred in the instant matter,

judicial review under CPLR article 75 requires that the award “must have evidentiary support and cannot be arbitrary and capricious” (Motor Vehicle Acc. Indmn. Corp. v. Aetna Cas. & Sur. Co., 89 N.Y.2d 214, 223 [1996] ).“The determination must be 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 78” ( Lackow v. Department of Educ. ( or “ Board ”) of the City of NY, 51 AD3d 563, 567 [1st Dept.2008] ). The test of whether a decision is arbitrary or capricious is “determined largely by whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.” “ Matter of Pell v. Board of Education of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester Co., 34 N.Y.2d 222, 232 [1974] ). Where a party to an arbitration claims that the arbitrator exceeded his or her powers, such an excess of power occurs only where the arbitrator’s award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator’s power (see Garcia v. Department of Educ. Of City of New York, 18 Misc 3d 503 (Supreme Court, NY County, New York 2007) citing New York City Transit Authority vs. Transport Worker’s Union of America Local 100 AFL-CIO, 6 NY 3d 332 (2005)).

At the outset, it is clear that the portion of the Arbitrator’s determination requiring the Petitioner to provide health insurance for the Respondent during his period of suspension is illegal and in excess of his power. Education Law §3020-a(4) sets forth the sanctions available to the Arbitrator. Under that section, penalties are limited to “written reprimand, a fine, suspension for a fixed time without pay, or dismissal”. In addition or in lieu of the stated penalties, the Arbitrator, “where he deems it appropriate, may impose upon the employee *remedial action* including, but not limited to, leaves of absence with or without pay, continuing education and/or study, a requirement that the employee seek counseling or medical treatment or that the employee engage in any other remedial or combination of remedial actions”. Requirement that the District provide medical insurance during the period of the Respondent’s suspension is not specifically authorized by the Education Law and can not be considered to be “remedial”. Therefore, that portion of the arbitrator’s determination must be vacated. The direction that the Petitioner provide respondent’s health insurance during his suspension is

stayed and the respondent is Ordered to reimburse the Petitioner for any expense it has incurred for his medical insurance during the suspension period.

The First Department in Lackow at 569, supra, citing Matter of Harris v. Mechanicville Central School District, 45 NY 2d 279 (1978), held that the standard for reviewing a penalty imposed after hearing pursuant to Education Law 3020-a is whether the punishment was so disproportionate to the offenses as to be shocking to the court's sense of fairness. In Harris at 284, the Court of Appeals stated that judicial review of administratively imposed sanctions is available "only when the sanction is, under the circumstances, so disproportionate to the offense as to "shock the conscience of the court ... At this time, it may be ventured that a result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual , or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. *There is also an element that the sanctions reflect the standards of society to be applied to the offense involved*". (Emphasis added).

Consideration of "public policy" is necessary in the court's evaluation of the instant arbitration determination. The United States Supreme Court in United Paperworkers, supra, at 44, citing Muschany v. US, 324 US 49 (1945), noted that public policy must be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. The Children's Internet Pornography Act (CIPA) sets forth that clear statement of public policy in attempting to block students' exposure to pornographic materials through the school's internet access. As stated by the Petitioner in its Memorandum of Law "although the District has fully complied with CIPA by implementing web filtering and adopting strong policies against misuse of the computer system, the respondent intentionally circumvented these efforts by bringing pornography into the school on his laptop and through the e-mail system".

The Third Department in In re Binghamton City School District (Peacock), 33 AD 3d 1074 (3d Dept 2006) app dismd 8 NY 3d 840 (2007) held that it was New York's explicit and

compelling public policy to protect children from the harmful conduct of adults ( see e.g. Social Services Law § 384-b; Family Ct. Act art. 10), particularly in an educational setting ( see e.g. Education Law art. 23-B; Executive Law § 296 [4] ). When an educator's conduct is involved, this policy gives the highest priority to protecting the welfare of the students. Further, in light of a school's liability and the adverse effect on its students if such misconduct were to recur, this policy prohibits an award in a disciplinary proceeding which would not adequately protect students from the teacher in the future. The potential that students could get access to pornography, not to mention the fact that the respondent was using school equipment and services to access pornography during his workday when students are present in the building is violative of public policy and is sufficient to justify penalties far in excess of those awarded by the arbitrator.

The Court finds that the arbitrator's determination, that a six-month suspension from respondent's position constituted sufficient discipline for this series of offenses, should shock the conscience of any reasonable person and certainly shocks the Court's conscience. At pages 12-13 of his decision, the arbitrator states that "upon review of these "saved" files, while not properly categorized as 'pornographic in nature' there is no doubt that any reasonable person would consider them 'inappropriate'". He noted that the "video" folder contained images including a man's bare buttock and anus exposed; that the "still images" folder contained naked images of naked females and a naked female standing in front of a golf cart; and that the "temporary internet" files included obscene images and a number of images depicting sexual acts between men and women, women and women, and men and men, including acts of fellatio and cunnilingus. There is no doubt that these images constituted pornography. The respondent also sent these images on to others via the District's email system. The respondent was aware of the District's policy regarding use of its computers. His unsuccessful effort to delete files upon learning of the District's investigation, clearly indicates that he knew that his actions were inappropriate and in violation of District policy. Finally, any rational individual in the respondent's position, trusted with the safety of children, should have realized the gravity of and potential harm occasioned by this behavior. It is unclear to the court how a six month suspension is corrective of the violations or could serve in any way to repair the breach of trust

experienced by both the District and the parents and students as a result of the respondent's actions. The sanction also wholly fails to serve as a deterrent to any other teacher tempted to replicate the respondent's actions.

The Court also finds that Respondent was acquitted of Charge Number 4, misuse of a District-owned computer by engaging in on-line gambling, as charged in the District's original Petition based on the Respondent's assertions that another individual, Tom McWilliams, and not the Respondent had so used the computer. Petitioner had no notice of this "alibi" defense and was unable to counter the Respondent's testimony given on the last day of the hearing. Petitioner has subsequently uncovered evidence that the Respondent committed perjury and did, in fact, use, the computer for on-line gambling.

The Petitioner has been able to obtain an Affidavit from Tom McWilliams that indicates that in February 2005, he accompanied Respondent to a conference at the Turning Stone Casino, and that at the conference the Respondent was in possession of a District computer that "already had software downloaded for the purposes of on-line poker" and that the Respondent used Mr. McWilliams' account and withdrew money to play poker while McWilliams was "logged on" to an on-line gambling account. The McWilliams Affidavit also indicates that the Respondent had contacted him at some point after Petitioner discovered the misuse of the computer and had asked McWilliams to "take the blame for him", which McWilliams refused to do. [The McWilliams Affidavit is annexed, as exhibit A, to the Supplemental Affidavit of Miles G. Lawlor, Esq.]

In this case, the Petitioner has demonstrated, by clear and convincing evidence, that the Respondent perjured himself before the Hearing Officer, that his perjured testimony materially related to an issue involved in the arbitration in that it resulted in his acquittal on Charge Number 4, and that Petitioner's due diligence would not have prompted the discovery of the fraud during or prior to the arbitration. Based on the Affidavit of Tom McWilliams, that part of the Hearing Officer's decision acquitting the Respondent on Charge Number 4 is vacated based on "corruption, fraud or misconduct in procuring the award" (see CPLR §7511(b)(1)(i)) and remand to the Hearing Officer for reconsideration of Charge Number 4 is ordered.


Punishment of dismissal, as advocated by the District, would not be shocking to this

court. However since the arbitrator, and not the court, must properly determine the sanction to be imposed (see In Re Binghamton City School District (Peacock) 46 AD 3d 1042 (3d Dept 2007); Board of Educ. of East Hampton Union Free School District v. Yusko, 269 AD 2d 445 (2d Dept 2000)), the Court must remit the matter of the proper sanction to the arbitrator for determination. The respondent's suspension shall continue pending reconsideration by the arbitrator.

All requirements that the District make payments toward the cost of the Respondent's health and dental coverage are hereby vacated and the Respondent is ordered to reimburse the District for any contributions made by the District toward the Respondent's health and/or dental insurance coverage on or after August 26, 2009. Pursuant to CPLR §404, the Respondent is ordered to serve and file his Answer to the Amended Petition within twenty days of service of this Decision and Order with Notice of Entry.

This constitutes the Findings of Fact, Conclusions of Law and Order of the Court.

Signed this 8th day of February 2010 at Canandaigua, New York

A handwritten signature in black ink, appearing to read 'F. Reed', written over a horizontal line.

Hon. Frederick G. Reed  
Acting Supreme Court Justice