SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52

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In the Matter of the Application of
SHAWN BROWNE,

DECISION & ORDER

Petitioner,

Index No.: 656133/2017

For an Order Vacating a Decision of a
Hearing Officer Pursuant to Section 3020-a (5)
of the Education Law and Article 75 of the CPLR

- against -

NEW YORK CITY DEPARTMENT OF
EDUCATION,

Respondent.

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ALEXANDER M. TISCH, J.

Petitioner Shawn Browne commenced this article 75 proceeding for a judgment vacating an arbitration award made after a disciplinary hearing held pursuant to Education Law § 3020-a. The September 19, 2017 arbitration opinion and award (Award) found petitioner guilty of disciplinary charges brought by his employer, respondent the New York City Department of Education (DOE), and terminated petitioner from his position. The DOE cross-moves to dismiss the petition, pursuant to CPLR 3211 (a)(7), CPLR § 404 (a), CPLR § 7511 and Education Law § 3020-a (5).

BACKGROUND AND FACTUAL ALLEGATIONS

Prior to being terminated on September 19, 2017, petitioner had been employed by the DOE for over 15 years and was a tenured math teacher. Petitioner had been assigned to the High School for Civil Rights, located in Brooklyn, New York.

Pursuant to Education Law 3020-a, the DOE served petitioner with "specifications," or charges, alleging that, during the 2015-2016 school year, petitioner "engaged in corporal punishment, excessive force, unnecessary physical contact, conduct unbecoming his position,

and neglected his duties . . . ." *See* DOE's exhibit 1, Award at 2. The charges stem from a March 18, 2016 incident that occurred in petitioner's classroom when petitioner forcibly removed Student A from the class. As set forth in the charges, due to his conduct during the incident, the DOE maintained that termination was warranted.

Petitioner was charged with three specifications, which are set forth, as follows:

"SPECIFICATION 1: On or about March 18, 2016, during eighth period, while assigned to High School for Civil Rights, [Petitioner], in the presence of students:
Grabbed Student A by the neck.
Put Student A in a headlock and/or a chokehold.
Used his arms to apply force to Student A's neck.
Stated to Student A in sum and substance, You think you're tough?
Pushed Student A into a desk and/or desks in the classroom.
Punched and/or struck Student A about his head and/or face with a closed fist one or more times.
Pushed and/or put Student A out of the classroom.
Locked the door of the classroom and kept Student A out of the classroom.
Refused to allow Student A back into the classroom.
Caused Student A to experience pain to his head.
Caused Student A to experience swelling and/or redness to his head.
Caused Student A to experience pain to his face.
Caused Student A to experience swelling and/or redness to his face.

"SPECIFICATION 2: By committing one, some or all of the actions described in Specification 1, [Petitioner] acted in a manner that had or would have had the effect of unreasonably and substantially interfering with a student's mental, emotional, or physical well-being.

"SPECIFICATION 3: By committing one, some or all of the actions described in Specification 1, [Petitioner] knowingly acted in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old.

"The Foregoing Constitutes:
Just cause for disciplinary action pursuant to Education Law §3020-a;
Corporal punishment;
Excessive force;
Unnecessary physical contact;
Conduct unbecoming [Petitioner's] position, or conduct prejudicial to the good order, efficiency, or discipline of the service;
Substantial cause rendering [Petitioner] unfit to perform properly his obligations to the service;

Neglect of duty;
A violation of the By-laws, Rules and Regulations of the Chancellor, School and/or District;
A violation of the rules and Regulations of the Board of Regents, 8 NYCRR 19.5(a);
Just cause for termination."

Id. at 2-3.

Pursuant to Education Law § 3020-a, a hearing began on June 28, 2017, to determine the outcome of the charges. Arbitration is compulsory in Education Law § 3020-a disputes according to petitioner's collective bargaining agreement, and the DOE's rules. Hearing Officer Dean L. Burrell, Esq., (Burrell) was appointed to preside over the proceedings. A hearing took place over four days, during which both parties were entitled to examine and cross-examine witnesses and submit evidence. Petitioner was represented by counsel and testified on his own behalf.

Burrell rendered his award on September 19, 2017. He sustained the charges and held that termination was the appropriate penalty.

In the Award, prior to addressing each specification, Burrell provided background information about the school and the people involved in the incident, a summary of the witnesses' testimony and the parties' contentions. In relevant part, Burrell indicated that the area surrounding petitioner's school is "subject to higher crime, with students coming out of jail, economic crises, homelessness, gang affiliation, gang violence, students bringing knives, scanners and fighting." *Id.* at 3. Many of petitioner's students had Individualized Education Programs (IEP), including Student A, and petitioner's classroom normally has a co-teacher. However, on the date of the incident, petitioner was the only teacher in the classroom. Student A testified that he liked petitioner's class. Similarly, petitioner described Student A as a "good student, good kid." *Id.* at 15.

Many student witnesses were interviewed, in addition to Lipon Sarker (Sarker), the school safety agent and the school's principal. Burrell noted that the witnesses presented

conflicting testimony as to what transpired. The only person who allegedly saw petitioner strike Student A was Sarker, who was in the hallway near petitioner's classroom. Sarker heard students yelling "fight, fight" from a classroom and then saw petitioner punch Student A twice outside the threshold of the classroom while the door was still open. Sarker testified that "the entire incident happened very fast, lasting less than two minutes." *Id.* at 7.

Burrell then noted petitioner's testimony that no student "corroborated this account . . . . It was a scuffle and though Student A may truly believe his account in actuality no punch happened, nor could it have happened in the contorted manner described by Student A." *Id.* at 21. Similarly, petitioner had argued that Sarker's testimony is inconsistent with Student A's and does not make sense that petitioner would wait until he brought Student A through the door and then start punching him. Petitioner testified that he made eye contact with Sarker and that his expectation was that Sarker "would use his walkie talkie to get assistance." *Id.* at 18.

Petitioner testified that his goal was to "remove Student A from the classroom because he was unsafe for the students and himself." *Id.* He stated that "the entire incident, from the time Student A hit him until [petitioner] closed the door, took a minute to a minute and a half." *Id.*

In summary, for specification one, Burrell found that the following transpired between the parties:

> "The evidence establishes that [Petitioner] instructed Student A to put away the UNO cards. When Student A failed to comply [Petitioner] took away the cards. Student A got out of his chair and stood up facing [Petitioner] and began talking to [Petitioner] in an inappropriate manner, including calling him a "faggot." During their conversation [Petitioner] raised the specter of engaging the Dean. Student A picked up the stapler from [Petitioner's] desk and threw it across the room, fortunately not hitting anyone. Immediately thereafter Student A picked up a towel with which he struck [Petitioner] in the head. [Petitioner] grabbed Student A, with Student A in front of [Petitioner] and both facing forward.
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> "[Petitioner] next walked himself and Student A to the front of the room, still holding Student A as they faced forward. They bumped into chairs and tables along the way. [Petitioner] opened the door and in the threshold [Petitioner] punched Student A twice in his face and shoved him out of the room. Student A did not fall to the floor, rather gaining his balance after being pushed. [Petitioner] closed the door which locked, and

> Student A banged on the door demanding that [Petitioner] "open the fucking door," which [Petitioner] did not. At this point [the School Safety Agent] intervened."

Id. at 29-30.

Based on the facts set forth above, Burrell sustained specification one, except he found insufficient evidence that petitioner said to Student A, "you think you're tough." *Id.* at 30. Burrell explained that the DOE had proven by the preponderance of the evidence that petitioner "put his arm around Student A's neck and body." *Id.* at 29. He noted that the pictures taken after the incident demonstrate that petitioner "held Student A with his arm in part across his neck thereby causing minor injuries." *Id.* However, Burrell found that, although Student A used the term "headlock," there was insufficient evidence "to establish that [petitioner] choked Student A." *Id.*

Burrell found that petitioner had pushed Student A into the desks while removing him from the classroom and that petitioner had "punched Student A about [sic] his head and/or face with a closed fist one more times [sic]." *Id.* at 30. After removing Student A from the classroom, the classroom door automatically locked when it was closed, and petitioner did not allow Student A to re-enter. Burrell concluded, "[t]hese acts by [petitioner] caused Student A to experience minor swelling and redness to his head, face and neck." *Id.* However, Burrell did not find that Student A experienced pain to his head or face. The Award stated, "[w]hile some level of minor discomfort could be expected in these circumstances, in the absence of any testimony by Student A of experiencing pain, I decline to so find." *Id.* at 31.

Burrell upheld specification two, on the basis that petitioner's use of force was excessive and not justified under the circumstances. Chancellor's Regulation A-420, which is the regulation defining and prohibiting the use of corporal punishment against students, provides the following exceptions permitting the use of reasonable physical force against a student:

> "• to protect oneself from physical injury;
> • to protect another pupil or teacher or any other person from physical injury (e.g. breaking up a physical altercation without using excessive force);
> • to restrain or remove a pupil whose behavior is interfering with the orderly

> exercise and performance of school district functions, powers or duties if the pupil refused to comply with a request to refrain from further disruptive acts, and alternative measures that do not involve the use of physical force cannot be reasonably employed to achieve the purposes set forth above."

Id. at 31.

According to Burrell, petitioner's conduct was appropriate up until he reached the doorway with Student A. He states, "Student A got out of his chair, began cursing at [Petitioner], threw a stapler across the room fortunately missing his fellow students, and then struck [Petitioner] in the head with a towel. This happened quickly and without warning." *Id.* at 32. Burrell then credited petitioner's testimony that "he believed it necessary to use reasonable physical force to protect himself and the class from physical injury." *Id.* Burrell found petitioner's conduct appropriate, justified and a "proper response under the circumstances." *Id.* He continued, "[a]ny injury to Student A was minor at most and merely incidental to the need he created to remove him from the classroom. It was appropriate for [Petitioner] to shove Student A, who was resisting, out of the classroom and to not allow him to return." *Id.*

However, Burrell sustained specifications two and three, based on petitioner's conduct after he reached the doorway. Burrell found that when petitioner "struck Student A with a closed fist he lost the protection of the exceptions to Chancellor's Regulation A-420 . . . . The use of a closed fist to punch Student A in the head was not reasonable and not needed for self-defense." *Id.*

Burrell then concluded with his recommendation that petitioner be terminated. Burrell acknowledged that, while petitioner denied hitting Student A, Burrell found that it took place. In relevant part, as set forth below, Burrell subsequently addressed petitioner's denial and how it impacted the penalty chosen by Burrell:

> "[Petitioner] appears to be an honest individual who 'in the heat of the moment' truly may not recall hitting Student A with a closed fist or grabbing him around the neck. Therein lies the dilemma. As a teacher there may be future occasions where [Petitioner] is called upon to defend himself or his class from a misbehaving student. However [Petitioner] has failed to convince me that under similar circumstances he would not

> again overreact and his misconduct would not be repeated. His denial precludes remorse, and therefore causes me to question whether remedial steps such as a fine or suspension and anger management training would be effective."

Id. at 33.

Shortly after receiving the Award, petitioner commenced this proceeding seeking to vacate the Award on the basis that the hearing officer exceeded his power and issued an irrational decision. In addition, petitioner claims that the penalty shocks the conscience. To begin, the amended petition notes that petitioner was criminally charged on March 21, 2016 in connection to the incident with Student A. On March 16, 2017, petitioner was acquitted of all criminal charges and the record was sealed. On June 26, 2017, petitioner had a "probable cause" hearing in front of John L. Woods Jr., Esq. (Woods) to determine whether or not petitioner committed serious misconduct under the terms of petitioner's collective bargaining agreement, thereby removing him from the payroll. Petitioner indicates that, on August 14, 2017, Woods issued a determination, concluding that he did not find probable cause to believe that petitioner committed serious misconduct. Woods summarized, in relevant part:

> "Based on the foregoing, I find that probable cause cannot be established where the serious misconduct on which it is based is no longer pending because the [petitioner] was acquitted of all criminal charges. Therefore, the [petitioner] shall not be removed from the payroll in accordance with the Agreement. Noncriminal allegations concerning corporal punishment should be addressed in the appropriate forum."

Petitioner's exhibit B at 2.

After the probable cause hearing, Woods found that petitioner did not commit serious misconduct. As a result, petitioner argues that Burrell's decision that petitioner committed serious misconduct is irrational, given that it was based on the same conduct analyzed in the probable cause hearing.

Among other things, petitioner claims that it was irrational for Burrell to terminate petitioner, given that he credited petitioner's testimony that he believed it was necessary to use physical force to restrain Student A. Petitioner also claims that other portions of the decision are

irrational and arbitrary. For instance, "[n]o explanation is offered by Burrell as to how [petitioner] could punch Student A with a closed fist yet also conclude that Student A experienced no pain." Amended petition, ¶ 17. Petitioner believes that his conduct was reasonable and necessary under the circumstances. He states that Burrell "refused to seriously consider the overall circumstances of the incidents justifying petitioner's response." *Id.*, ¶ 25.

Citing *Matter of Principe v New York City Dept. of Educ.* (2010 NY Misc LEXIS 7050, (Sup Ct, NY County 2010), *affd* 94 AD3d 431 [1st Dept], *affd* 20 NY3d 963 [2012]), petitioner argues that it was irrational for Burrell to issue the penalty of termination based on petitioner's lack of remorse. Petitioner argues that his "insistence on his innocense [sic] for the charges alleged ought not be a basis for termination." *Id.*, ¶ 20. Petitioner further maintains that the penalty shocks the conscience, given that petitioner denies striking Student A and this is the first time he has ever been charged with an offense.

In its cross motion, the DOE argues that petitioner has failed to establish any basis for vacating the Award. The DOE maintains that Burrell reviewed the evidence, listened to the testimony and ultimately determined that petitioner engaged in serious misconduct that violated the Chancellor's Regulation. The DOE does not respond to petitioner's arguments with respect to the determination made by Woods in the probable cause hearing, nor does it address *Matter of Principe*. It alleges that petitioner's "arguments largely amount to disagreements with HO Burrell's factual and credibility determinations, which are not bases to vacate the Decision." DOE's memo of law at 11. The DOE continues that the penalty is not shocking because courts "have continually upheld terminations against teachers resulting from substantiated allegations of corporal punishment." *Id.* at 12. Furthermore, the DOE alleges that it was appropriate for Burrell to consider petitioner's lack of remorse when fashioning the appropriate penalty.

In response to the DOE's cross motion, petitioner argues that collateral estoppel should apply to give "conclusive effect to the Woods determination that [petitioner] did not commit serious misconduct." Kotkes affirmation in further support, ¶ 10.

DISCUSSION

Pursuant to Education Law § 3020-a (5), CPLR § 7511 provides the procedure for reviewing a hearing officer's findings. *City School Dist. of the City of N.Y. v McGraham,* 17 NY3d 917, 919 (2011). CPLR § 7511 limits the grounds for vacating an award to "misconduct, bias, excess of power or procedural defects." *Lackow v Department of Educ. (or "Board") of City of N.Y.*, 51 AD3d 563, 567 (1st Dept 2008) (internal quotation marks and citation omitted).

However, where, as here, the parties are subject to mandatory arbitration, "the award must satisfy an additional layer of judicial scrutiny." *City School Dist. of the City of New York v McGraham,* 17 NY3d at 919. The arbitration award 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 City of N.Y.*, 51 AD3d at 567. The person "seeking to overturn an arbitration award faces a heavy burden." *Matter of Fagan v Village of Harriman*, 140 AD3d 868, 868 (2d Dept 2016) (internal quotation marks and citations omitted).

Probable Cause Hearing:

The record indicates that petitioner presented Woods' probable cause determination to Burrell and that he advised the parties that he is making his findings "de novo," and that he is "not bound to anything that may be found [in the probable cause hearing]." Petitioner's exhibit D at 432. Furthermore, during the hearing, petitioner advised that he submitted Woods' determination "for the purposes of penalty only, due to the findings in the award that it does not qualify as serious misconduct, as specifically defined by the CBA for the reasons outlined in

[Woods' award]." *Id.* at 433. However now, petitioner claims that the Award is irrational because it contradicts with Woods' probable cause determination.

The Court finds that the probable cause determination made by Woods is irrelevant for this petition and that it cannot collaterally estop Burrell's determination. In the probable cause determination, Woods specifically advises that his determination of probable cause applies to whether petitioner committed serious misconduct under the terms of petitioner's collective bargaining agreement. Woods' decision was limited to the legal standard of serious misconduct in relation to the criminal charges and whether petitioner should be removed from the payroll. Woods expressly states that any misconduct allegations regarding corporal punishment should be addressed in an alternate forum.[1]

Findings of the Hearing Officer:

An action is considered arbitrary and capricious when it is "taken without sound basis in reason or regard to the facts." *Matter of Peckham v Calogero*, 12 NY3d 424, 431, 911 N.E.2d 813, 883 N.Y.S.2d 751 (2009). An arbitration award is considered irrational if there is "no proof whatever to justify the award." *Matter of Roberts v City of New York*, 118 AD3d 615, 617 (1st Dept 2014) (internal quotation marks and citation omitted).

Petitioner argues that the decision is irrational because, among other reasons, there is no explanation offered by Burrell for how petitioner could have punched Student A with a closed fist but also not cause Student A any pain. However, the Court finds that Burrell's determination to sustain the charges involving corporal punishment based on excessive use of force is supported by adequate evidence and is not irrational. After listening to the testimony and reviewing the evidence, Burrell set forth written findings of fact for each charge, a conclusion and a recommendation to uphold the penalty of dismissal. *See e.g. Matter of Brito v Walcott*,

[1] Among other reasons for precluding collateral estoppel, as noted, petitioner did not present this argument in front of Burrell. In addition, petitioner did not argue in the amended petition that collateral estoppel should apply, but only mentioned this in his reply to the DOE's cross motion.

115 AD3d 544, 545 (1st Dept 2014) ("Here, Supreme Court erred in substituting its judgment for that of the hearing officer. The hearing officer's findings of misconduct . . . are supported by adequate evidence").

Although the witnesses provided conflicting testimony as to what occurred, it is well settled that "[a] hearing officer's determinations of credibility . . . are largely unreviewable because the hearing officer observed the witnesses . . . ." *Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 420 (1st Dept 2013) (internal quotation marks and citations omitted). Accordingly, "the Court accepts all of the arbitrator's factual findings as a true and correct rendition of the events that took place between [petitioner] and [Student A]." *See e.g. Matter of Riley v City of New York*, 2010 NY Slip Op 32540[U], * 6 (Sup Ct NY County 2010), *affd* 84 AD3d 442 (1st Dept 2011).

Penalty of Termination:

"An administrative penalty must be upheld unless it is so disproportionate to the offense as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a matter of law." *Matter of Idahosa v Farmingdale State Coll.*, 97 AD3d 580, 581 (2d Dept 2012). As set forth below, under the circumstances, the Court finds "that the penalty of termination of employment is shockingly disproportionate to petitioner's misconduct." *Matter of Brito v Walcott*, 115 AD3d at 546.

As noted by petitioner, this situation bears a striking similarity to *Matter of Principe*, where a DOE employee, in his role as dean of discipline in a middle school, was charged with two incidents of corporal punishment and was terminated after a hearing held pursuant to Education Law § 3020-a. The hearing officer had issued the penalty of termination based on three factors: the seriousness of the behavior, the lack of remorse and the lack of petitioner's credibility. Due to the three factors, the hearing officer found a likelihood that this behavior would continue. The court agreed with the DOE's contentions that there had been no violation

of any specific section of article 75 of the CPLR and that there had been a rational evidentiary basis for the hearing officer's findings.

However, while acknowledging that the court "does not support corporal punishment," the court found that the hearing officer failed to "realize that these were not in any way premeditated acts." *Matter of Principe v New York City Dept. of Educ.*, 2010 NY Misc LEXIS 7050 at *9. The court continued that the circumstances should have been taken into consideration, namely; difficult children with records of violent behavior, difficult situations and his job responsibility of maintaining order. Next, the court addressed the "difficult situation," of expecting the petitioner to "show remorse while still denying that he had done anything wrong." *Id.* at *10. Lastly, the court noted that "an individual should have a right to give his own recount." *Id.* Among other things, the court also stated that petitioner had an unblemished record and had never been warned or disciplined about aggressive behavior. Finally, the court did not agree with the hearing officer that due to the three factors, the behavior is likely to be repeated, especially after imposing a "lesser penalty such as suspension with perhaps an anger management course . . . ." *Id.* at *11. The court ultimately accepted the hearing officer's findings against petitioner but vacated the penalty of termination and remanded the matter to the hearing officer for a lesser penalty.[2]

In affirming the lower court's determination, the Appellate Division held that the penalty was excessive under the circumstances. The court also reiterated that the hearing officer placed petitioner in a difficult situation by expecting him to show remorse, when petitioner believed his conduct was appropriate to protect staff and students from two threatening situations. The Court of Appeals subsequently affirmed the Appellate Division's determination that "the penalty of

[2] The court denied the DOE's cross motion and noted that, although the DOE did not file an answer, considering the determination, an answer was not necessary.

termination imposed on petitioner was excessive in light of all of the circumstances." *Matter of Principe v New York City Dept. of Educ.*, 20 NY3d at 964.

As in *Matter of Principe,* in the instant situation, Burrell issued the penalty of termination based on the seriousness of the offense, petitioner's lack of remorse and his lack of credibility regarding the underlying incident, and found that, due to these factors, there is a likelihood that this behavior will be repeated. Taking the actions one at a time, Burrell found that, up until petitioner reached the doorway with Student A, petitioner's behavior had been justified and appropriate. However, after he reached the doorway and punched Student A, his use of force became unreasonable.

Burrell noted that petitioner acted in the "heat of the moment," in his analysis of the seriousness of the offense. However, while acknowledging that the court "does not support corporal punishment," Burrell failed to recognize that the incident was an active and ongoing situation. *Matter of Principe v New York City Dept. of Educ.*, 2010 NY Misc LEXIS 7050 at *9. The record indicates that Student A's behaviors escalated quickly and without warning, starting by calling petitioner derogatory names to throwing a stapler and then hitting petitioner. Although there is normally a co-teacher, petitioner was the only teacher in the room at the time. Student A's removal created a scuffle where the parties were in constant motion and the episode happened in under two minutes.

With respect to fashioning the penalty, Burrell specifically stated that petitioner's "denial precludes remorse, and therefore causes me to question whether remedial steps such as a fine or suspension and anger management training would be effective." Award at 33. Under the circumstances, it was unreasonable for Burrell to implement the harshest penalty of termination based on petitioner's lack of remorse and his denial of any wrongdoing. Petitioner consistently denied striking Student A and reiterated that he had an obligation to protect his classroom. Burrell then describes petitioner as an honest person and states that petitioner may not actually

even remember striking Student A because it was in the heat of the moment. By expressly indicating that petitioner's denial precludes remorse, the Court finds that Burrell "placed petitioner in a very difficult situation, when he expected petitioner to show remorse," given that petitioner denied any wrong doing. *Matter of Principe v New York City Dept. of Educ.*, 94 AD3d at 434 (internal quotation marks omitted). Moreover, while Burrell ultimately found that petitioner did strike Student A, petitioner should not be subjected to a harsher penalty because he provided his version of the incident.

In light of petitioner's unblemished record, lack of disciplinary history and the underlying circumstances, the penalty of termination is excessive and shocking. Furthermore, Burrell found that Student A did not experience any pain to his head or face. *See e.g. Matter of Riley v City of New York*, 84 AD3d at 442 (Court found penalty of termination was disproportionate when "the student admitted that she sustained no physical or emotional injury as a result of the incident, and in the 15 years preceding the incident, petitioner had received not a single formal reproach"). Therefore, here, "[l]esser sanctions are available that would deter petitioner from engaging in this conduct in the future." *Matter of Principe v New York City Dept. of Educ.*, 94 AD3d at 433. *Compare, Matter of Haubenstock v City of New York*, 130 AD3d 435, 436 (1st Dept 2015) (Penalty of termination not shocking when petitioner "committed four separate acts of corporal punishment," to non-verbal autistic children, with three of the acts occurring after petitioner had been formally warned and sent to a training workshop).

Accordingly, the DOE's cross motion is denied and the petition is granted to the extent of vacating the penalty of termination. The matter is remanded to the DOE "for the imposition of a lesser penalty." *Matter of Brito v Walcott*, 115 AD3d at 547. Under the circumstances, upon denial of the DOE's cross motion, the "service of an answer is not warranted, as the facts have been fully presented in the parties' papers and no factual dispute remains." *Matter of Applewhite v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 115 AD3d 427, 428 (1st Dept 2014).

CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is granted in part to the extent of vacating the arbitration award made by Hearing Officer Dean L. Burrell, Esq. on September 19, 2017 insofar as it dismissed petitioner from employment, and is otherwise denied; and it is further

ORDERED and ADJUDGED that respondent's cross motion to deny and dismiss the petition is denied; and it is further

ORDERED and ADJUDGED that this matter is remanded to the New York City Department of Education for assignment to a Hearing Officer to assess a new penalty consistent with this court's opinion.

This constitutes the decision and order of the court.

Dated: December 3, 2018

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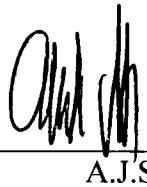

A.J.S.C.

HON. ALEXANDER M. TISCH