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

**PRESENT:** HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

*Justice*

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CYNTHIA FEASTER,

Plaintiff,

- v -

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK

Defendant.

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**INDEX NO.** 156147/2020

**MOTION DATE** 08/06/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 75, CPLR Article 78 and Education Law 3020-a of petitioner Cynthia Feaster (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondents Department of Education of the City of New York and Board of Education of the City School District of the City of New York (motion sequence number 001) is granted and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall severe a copy of this order, along with notice of entry, on all parties within twenty (20) days.

In this proceeding, petitioner Cynthia Feaster (Feaster) seeks a judgment to vacate the arbitrator's opinion and award which terminated her employment with the respondent Department of Education of the City of New York (DOE), and the respondents cross-move to dismiss Feaster's petition (together, motion sequence number 001). For the following reasons, the petition is denied and the cross motion is granted.

FACTS

Feaster was employed both as a tenured teacher and in several administrative positions by the DOE for 45 years until she was terminated on August 5, 2020. *See* verified petition, ¶¶ 9-13. For the past five years she has been a teacher in the "Absent Teacher Reserve" at PS 627 in Kings County. *Id.*, ¶ 9. Feaster states that she sustained a slip and fall injury in 2014 which required her to undergo two surgeries that year and subjected her to ongoing pain and mobility issues. *Id.*

At some point during the 2018 school year, the DOE served Feaster with six "charges and specifications," four of which alleged that she had made false entries in her time, leave, attendance and payroll records, one of which alleged that she had supplied her DOE supervisors with false or forged doctors notes, and one of which alleged that she engaged in this activity in order to obtain financial benefits from the DOE that she was not entitled to. *See* verified petition, ¶ 14. The parties held a hearing Pursuant to Education Law §3020-a on June 13, 2019, as a result of which the charges and specifications against Feaster were referred to compulsory arbitration with DOE hearing officer Daniel McCray (HO McCray). *Id.*, ¶¶ 10-11. HO McCray conducted six days of hearings in 2020 during which he received evidence and heard testimony. *Id.*, ¶ 12. Both Feaster and the DOE were represented by counsel at those hearings. *Id.*, ¶ 13. On July 29, 2020, HO McCray issued an opinion and award that sustained the first five charges

and specifications against Feaster but dismissed the sixth, and found that termination was the appropriate penalty (the HO's award). *Id.*; exhibit A. The DOE thereafter confirmed that award and terminated Feaster as of August 5, 2020. *Id.*, ¶ 15; respondent's mem of law at 6-10.

As will be discussed, Feaster does not contest HO McCray's findings regarding the charges and specifications against her, but merely challenges his decision to recommend the penalty of employment termination. *See* verified petition, ¶¶ 16-40. The portion of the HO's award that discussed that penalty stated as follows:

> "I now turn to the appropriate penalty in this case. I have found Respondent guilty of submitting falsified doctor's notes on three separate occasions to cover four absences with the intent to defraud the Department. In addition, one of these instances follows her telling the school she was sick with a migraine and was going to the doctor's, but she instead went to Human Resources in downtown Brooklyn to argue for a change in supervisor; and never went to the doctor, although according to Respondent, it was nearby. Under principles of Just Cause, discipline must be progressive and corrective in nature, not punitive. In addition, even in situations where the appropriate penalty would be termination, a Hearing Officer can still reduce the penalty if mitigating factors are present. However, there are some offenses that are so egregious, like stealing, that termination is the appropriate first step, notwithstanding the presence of mitigating factors. The Department argues that forging and submitting false doctor's notes fall into that category and no mitigating factor should be allowed to reduce discipline.
>
> "However, I need not decide this issue because I find insufficient mitigating factors are present in this case. Therefore, even if the penalty for forging doctor's notes could be mitigated, it would not change the result based on the evidence produced here. A key necessary mitigating factor is the employee is contrite as a result of their behavior. This is more than just saying sorry and promising not to do it again, which Respondent does; but also coming clean as to what the employee did, which Respondent does not. Much of Respondent's testimony regarding why she was sorry focused on the financial repercussions to herself and her family if she were terminated. While I am sympathetic to this consideration and have factored it into my analysis, it is not sufficient under the facts proven in this case.
>
> "A review of the entire record evidence demonstrates Respondent did not fully come clean in her testimony in two important respects. First, as discussed above, Respondent failed to acknowledge she was, in fact, submitting the notes to obtain some advantage, instead claiming it was 'an irrational act,' with no purpose. As stated above, one benefit she received was to avoid the possibility of being disciplined for being absent on those days. The other benefit was to substantiate her story about why she left the school during fifth period on January 25.
>
> "Second, Respondent did not come clean as to why she left on this day, insisting that it was primarily because of a migraine and to get a school reassignment to

> accommodate her mobility and standing limitations. However, the record evidence demonstrates it was to get a new supervisor following a bad observation. Respondent also did not admit she had been untruthful to the school as to why she left or that she was sorry for doing so. Rather, Respondent continued to justify her actions during her testimony. These failures to admit what she did undermines Respondent's argument she is contrite and sorry for her misconduct.
>
> "As a result, I find even if the penalty could be mitigated for forging and submitting false doctors' notes, the record produced in this case lacks sufficient mitigating factors. As a result of all of the above and upon review of the complete record evidence in this case, I find the appropriate penalty is termination."

*Id*., exhibit A. Feaster thereafter initiated this proceeding to vacate the HO's award on August 6, 2020. *See* verified petition. Rather than file an answer, respondents submitted a cross-motion to dismiss the petition on October 8, 2020. *See* notice of cross motion. Both parties have filed reply papers, and this matter is now fully submitted (together, motion sequence number 001).

DISCUSSION

Education Law § 3020-a (5) provides that a disciplined DOE employee may file a petition pursuant to CPLR 7511 to vacate or modify an HO's decision within 10 days of his/her receipt of that decision. CPLR 7511 (b) sets forth the four exclusive grounds on which an arbitrator's award may be vacated:

> "1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:
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> (i) corruption, fraud or misconduct in procuring the award; or
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> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
>
> (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
>
> (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection."

The Appellate Division, First Department, further holds that:

> "Where . . . the parties are subjected to compulsory arbitration, 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.' 'A hearing officer's determinations of credibility, however, are largely unreviewable because

> the hearing officer observed the witnesses and was able to perceive the inflections, the pauses, the glances and gestures - all the nuances of speech and manner that combine to form an impression of either candor or deception.'"

*Matter of Brito v Walcott*, 115 AD3d 544, 545 (1st Dept 2014), quoting *Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567-568 (1st Dept 2008) (additional citations omitted). The First Department also holds that the penalty of employment termination will not be upheld in circumstances where that penalty "is shockingly disproportionate to petitioner's misconduct," which requires the following review:

> "'[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 the element that the sanctions reflect the standards of society to be applied to the offense involved.'"

*Matter of Brito v Walcott*, 115 AD3d at 546, quoting *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222-234 (1974). Finally, the First Department holds that "[t]he party challenging an arbitration determination has the burden of showing its invalidity." *Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 419 (1st Dept 2013), citing *Caso v Coffey*, 41 NY2d 153, 159 (1976).

Here, as was mentioned earlier, Feaster's sole argument is that the HO's award violated CPLR § 7511 (b) (1) (iii) because the penalty of termination which HO McCray recommended "shocks one's sense of fairness." *See* verified petition, ¶¶ 16-40.[1] The DOE disagrees. *See*

[1] The court notes that although Feaster's papers discuss both the "arbitrary and capricious" standard and the applicable principles of due process review at length, they are devoid of any argument regarding those issues. *See* verified petition, ¶¶ 16-20; petitioner's mem of law in opposition at 3-6. Instead, it is clear that Feaster only chose to argue the issue of whether the penalty of employment termination was so "disproportionate" as to be "shocking." *Id.*, verified petition, ¶¶ 20-40; petitioner's mem of law in opposition at 6-12.

respondent's mem of law at 11-19. After careful consideration, the court finds for the DOE. Feaster's petition argued the HO's recommendation of termination was disproportionate because: 1) HO McCray "failed to take into consideration [her] 45 years of service to the DOE"; 2) she did not deny the charges and specifications against her; 3) she was not required to provide the forged doctor's notes which she submitted to PS 627's human resources department; 4) she had apologized for submitting the falsified doctor's notes; 5) she did not have an excessive number of absences on her record and would not have faced disciplinary charges for taking excessive absences; and 6) she had expressed remorse. *See* verified petition, ¶¶ 29-30, 34, 37-39. The DOE responds that HO McCray did consider all of these factors, but found that they did not mitigate her behavior, which he opined was "like stealing," and constituted "acts of moral turpitude." *See* respondent's mem of law at 12-16. The parties respective reply papers merely restate these arguments without adding anything further. *See* petitioner's mem of law in opposition at 3-12; Ernst reply affirmation, ¶¶ 24-37. The court finds that the text of the HO's award plainly sets forth HO McCray's consideration of all six of the factors that Feaster identified, which flatly contradicts her argument. *See* verified petition, exhibit A. Thus, the court concludes that there was "a rational basis in the administrative record" to support HO McCray's findings which satisfies the requirements of CPLR 7511, CPLR 7803 and Education Law § 3020-a. The court also rejects Feaster's argument that the penalty of employment termination in her case is so disproportionate as to shock one's sense of fairness. In *Matter of Beatty v City of New York*, one of the three cases that the Court of Appeals reviewed together with the case of *Matter of Bolt v New York City Dept. of Educ.* (30 NY3d 1065 [2018]), the Court specifically found that the penalty of employment termination was not disproportionate or shocking as applied to a tenured teacher who had submitted falsified daily logs and time sheets to

the DOE, even where she did not derive any financial benefit from doing so. 30 NY3d at 1074-1077 (Rivera, J., concurring). The Court particularly repeated the principle "[t]hat reasonable minds might disagree over what the proper penalty should have been does not provide a basis for vacating the arbitral award or refashioning the penalty." 30 NY3d at 1068. In view of the *Bolt* holding, the court concludes that there is nothing shocking or disproportionate, as a matter of law, in HO McCray's recommendation that Feaster's employment be terminated for submitting falsified doctor's letters and time sheets to the DOE. Therefore, the court rejects her sole argument that the HO's award should be vacated.

The DOE's cross motion asks the court to dismiss Feaster's petition, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action. *See* respondent's mem of law at 9-14. Since the court has found that Feaster's petition fails as a matter of law, the court also finds that the DOE's cross motion should be granted, and that this proceeding should be dismissed.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 75, CPLR Article 78 and Education Law 3020-a of petitioner Cynthia Feaster (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondents Department of Education of the City of New York and Board of Education of the City School District of the City of New York (motion sequence number 001) is granted and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall severe a copy of this order, along with notice of entry, on all parties within twenty (20) days.

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1/21/2021
DATE

CAROL R. EDMEAD, J.S.C.

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