| **Cesani v City of New York** |
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| 2021 NY Slip Op 32562(U) |
| December 2, 2021 |
| Supreme Court, New York County |
| Docket Number: Index No. 657008/2020 |
| Judge: Carol R. Edmead |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. CAROL EDMEAD **PART** 35

***Justice***

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ALEXIS CESANI,

Petitioner,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, RICHARD CARRANZA

Respondent.

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**INDEX NO.** 657008/2020

**MOTION DATE** 7/15/2021

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 5, 8, 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR Article 75, of Petitioner Alex Cesani (Motion Seq. 001) is denied; and it is further

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

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Respondent shall serve a copy of this order along with Notice of Entry on all parties within ten (10) days.

## MEMORANDUM DECISION

In this Article 75 proceeding, Petitioner Alex Cesani seeks a judgment to vacate an arbitrator's opinion and award that terminated his employment with the respondent New York City Department of Education (DOE), and the DOE cross-moves to dismiss the petition in its entirety (collectively, Motion Seq. 001). For the following reasons, the petition is denied, and the cross-motion is granted.

## BACKROUND FACTS

Petitioner is a former tenured teacher employed by the DOE for over 22 years. Petitioner was assigned to P.S. 4, a school located in Washington Heights, Manhattan, for his entire tenure (NYSCEF doc No. 2 at 2).

The DOE asserts that Petitioner's job performance at P.S. 4 declined over time to the point where it became unacceptable. In June 2018, the DOE filed the following four "charges and specifications" against Petitioner for incompetent and inefficient service during the 2015-2016, 2016-2017, and 2017-2018 school years ("the Charge Period"):

(1) "failure to properly, adequately, and/or effectively plan and/or execute separate lessons" during 13 classroom observations on dates ranging from November 13, 2015 to March 19, 2018 ("Charge One");

(2) "demonstrating lack of professionalism, and/or poor use of judgment" when Petitioner allegedly screamed and/or repeatedly screamed at a student and/or approached a student in an aggressive manner on November 20, 2017 ("Charge Two");

(3) being "excessively absent" during the 2017-2018 school year ("Charge Three"); and

(4) failure during all three years of the Charge Period "to fully and/or consistently implement directives and/or recommendations for pedagogical improvement and professional

development provided in observation conferences with administrators and/or outside observers; instructional meetings; teacher improvement plans; one-on-one meetings with administrators, school based coaches, and/or outside observers, as well as schoolwide professional development" ("Charge Four").

(*id.* at 4-5).

Pursuant to Education Law § 3020-a, the above charges were referred to DOE impartial hearing officer Marc Adelman, Esq. (H.O. Adelman), who conducted 12 days of hearings in early 2020, during which he received evidence and heard testimony from Petitioner and from P.S. 4 officials including principal Adam Stevens (Principal Stevens), current assistant principal Luisa Martin (AP Martin), former assistant principal Gilberto Batiz (AP Batiz), former principal designee Pamela Russell (Principal Russell), current assistant principal Suzana Williams ("AP Williams"), and regional bilingual special education coach Daliz Vasquez (Ms. Vasquez) (*id.* at 3). Both Petitioner and the DOE were represented by counsel at the hearings (*id.* at 1).

On December 1, 2020, H.O. Adelman issued a 50-page opinion and award (the "H.O.'s Award") that sustained 11 of the 13 specifications in Charge One, all specifications in Charge Four, and partially sustained Charge Two against Petitioner[1] (*id.* at 48). H.O. Adelman found that termination was the appropriate penalty for Petitioner's culpability under the sustained charges (*id.*). The bulk of the H.O.'s Award consisted of review of the documents and the testimony that the DOE presented regarding the various occasions on which Petitioner received "ineffective" scores during his classroom observations, which led H.O. Adelman to sustain most of the specifications under Charge One, and the instances when Petitioner declined to employ the teaching strategies that his P.S. 4 supervisors requested that he utilize, which led H.O. Adelman

[1] Charge Three was withdrawn (NYSCEF doc No. 2 at 40).

to sustain Charge Four. H.O. Adelman partially sustained the misconduct incident detailed in Charge Two as he found that while it was not established that Petitioner put the student in danger, the record demonstrated that Petitioner exhibited a lack of professionalism and/or poor judgment in yelling at the student (*id.* at 40).

H.O. Adelman concluded his award as follows:

> "The Department has proven many of the charges preferred against the Respondent[2], which was demonstrated through the observations and testimony of four credible and certified supervisors and two other administrators, and absent documented proof to the contrary, this Hearing Officer must defer to the academic judgment of the educational professionals. Collectively, their ultimate conclusion is that the Respondent was not an effective teacher during the Charge Period and also demonstrated poor judgment and/or a lack of professionalism during the documented misconduct incident. Consequently, this Hearing Officer finds that the proven charges are substantial, and are directly related to the Respondent's competency to teach and his ability to provide his students with a valid educational experience to which that (sic) are entitled and which is the Respondent's duty to provide. Specifically, this Hearing Officer finds that although the Respondent was not necessarily unwilling to follow the suggestions of his supervisors in order to improve his pedagogy, the record shows that he did not make the requisite effort or actually do enough to implement these recommendations and, therefore, was unable to deliver effective lessons during the Charge Period on numerous documented occasions. As a result, this Hearing Officer concludes there the Department has met its burden and proven the elements of just cause for disciplinary action against the Respondent."

(*id.* at 47).

H.O. Adelman further found that termination was the appropriate penalty for Petitioner, notwithstanding his tenured employment and the fact that no complaints were filed against him prior to the Charge Period:

> "[W]hile this Hearing Officer understands that the Respondent is a long-term employee, who is a nice and respectful person with a pleasant demeanor, which are significant mitigating factors when considering the penalty of termination, there is very little evidence in the record to demonstrate that the Respondent is capable of improving his pedagogy to return to an "effective" level of teaching. To the contrary, based on the substantial evidence presented, particularly the testimony of the Respondent himself and his actions during the Charge Period when he knew or should have known that his job was at risk, it is highly unlikely that further remediation efforts would improve the Respondent's competency to that level. Therefore, based on the entire record, the

[2] Petitioner herein was the Respondent in the underlying § 3020-a proceeding.

judgment of the experienced educational professionals at P.S. 4, whose academic judgment carries considerable weight, and the recommendation of the Department, which the Hearing Officer must give serious consideration to as required under New York State Education Law Section 3020-a, this Hearing Officer must conclude, notwithstanding the Respondent's contentions to contrary, that there is just cause to terminate the Respondent's employment with the Department for incompetent and/or inefficient service and that is the appropriate penalty in this case."

(*id.* at 48).

*The Instant Proceeding*

On December 14, 2020, Petitioner commenced the Article 75 proceeding now before this Court against Respondents DOE, its chancellor Richard Carranza, and the City of New York[3]. arguing that the decision to terminate Petitioner's employment was irrational, arbitrary and capricious, excessive, and shocking to the conscience. Petitioner further contends that the H.O.'s Award should be remanded for a lesser penalty and/or remediation given Petitioner's longstanding history of employment with the DOE.

On May 24, 2021, the DOE cross-moved to dismiss the petition in its entirety, arguing that Petitioner failed to establish a basis for invalidating the H.O.'s Award under Education Law § 3020-a (5). The DOE argues that that the H.O.'s Award was rationally based on the comprehensive evidentiary record before him, and the penalty of termination does not shock the conscience as it has been consistently upheld by the First Department in cases involving a record of professional incompetence for sustained periods of time.

On June 24, 2021, Petitioner filed a reply affidavit wherein he argued that the penalty of termination should be set aside given that he received no professional complaints prior to the arrival of Principal Stevens at his school in September 2015 (NYSCEF doc No. 14). Petitioner

[3] Petitioner does not set forth a basis for why the City of New York is named as a Respondent. As the DOE notes in its cross-motion, the City of New York is a distinct and separate legal entity from the DOE and thus is not a proper party to this proceeding (*See* Education Law §2554).

also argued, for the first time, that the § 3020-a charges were filed against him in retaliation for an age discrimination complaint that he filed against members of P.S. 4's administration, including Principal Stevens, on April 23, 2018 (*id.* at 2).

On July 24, 2021, the DOE filed a reply in further support of its cross-motion, reiterating its position that Petitioner failed to establish a basis for vacatur of the H.O.'s Award, and arguing that Petitioner's post-hearing retaliation argument is without merit and should be disregarded by the Court.

**DISCUSSION**

As noted above, the DOE commenced its disciplinary proceeding against Petitioner pursuant to Education Law § 3020-a. Education Law § 3020-a (5) provides that the grounds for vacatur of an arbitration award are akin to those found in CPLR 7511(b):

> "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:
>
> > (i) corruption, fraud or misconduct in procuring the award; or
> > (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, has held 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 [1st Dept 2008] [additional citations omitted]).

The First Department has also held 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]). The Court of Appeals has held that even under review of compulsory arbitrations, "as long as arbitrators act within their jurisdiction, their awards will not be set aside" even if the arbitrator "erred in judgment either upon the facts or the law" (*Goldfinger v Lisker*, 68 NY2d 225, 230 [1986]). The exception to this general rule is when an arbitrator's misapplication of the law is included in the limited grounds for vacatur set forth in CPLR 7511 (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 480 [2006]).

*Review of the H.O.'s Award*

Petitioner argues that the H.O.'s Award violated CPLR § 7511(b)(1)(iii) as H.O. Adelman "exceeded his power" by issuing a decision that lacks a sufficient evidentiary basis and is thus arbitrary and capricious. Petitioner specifically argues that H.O Adelman acted irrationally by failing "to recognize the overt basis in which Petitioner's administrators observed and evaluated him" and deciding "to substantiate many of the specifications based solely on the testimony of these incredible witnesses, without any further corroborative evidence" (NSYCEF doc No. 1 at 8).

The Court first finds that Petitioner has not demonstrated that the H.O.'s Award was arbitrary and capricious. The First Department has made it clear that that a DOE arbitrator's decisions may be considered arbitrary and capricious if they are "without sound basis in reason

and ... generally taken without regard to the facts" (*Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 856, 858 [1st Dept 2011], 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, 231 [1974]). However, determinations which have a "rational basis" in the administrative record are not deemed to be arbitrary and capricious (*see e.g.*, *Jennings v Walcott*, 110 AD3d 538, 538-539 [1st Dept 2013], citing *Matter of Pell*, 34 NY2d at 231).

Here, as discussed, Petitioner argues that H.O. Adelman improperly deemed the testimony of his supervisors to be credible without seeking additional corroboration. In opposition, the DOE argues that this allegation as pled, does not advance a plausible argument regarding how H.O. Adelman's credibility determinations lack a rational basis and are thus arbitrary and capricious.

Following its review of the record herein, the Court finds that the DOE is correct. H.O. Adelman compiled and reviewed a substantial body of testimonial and documentary evidence over the 12 days of hearings on the charges against Petitioner, which is amply reflected in the 50-page Award rendered on those charges. Petitioner does not cite to any specific testimony or documents that H.O. Adelman failed to take into consideration. Instead, Petitioner argues that H.O. Adelman erred in sustaining the majority of the specifications against him in reliance on "incredible" witnesses. However, the First Department consistently holds that a reviewing court in an Article 75 proceeding must defer to an H.O.'s credibility determinations, which are "largely unreviewable" (*Matter of Brito v Walcott*, 115 AD3d at 545; *see also Matter of Ghastin v New York City Dept. of Educ.*, 169 AD3d 507, 507 [1st Dept 2019] ["The fact that the hearing officer found [respondents'] testimony more credible than petitioner's is not a basis to find that his determinations were arbitrary and capricious"]; *Matter of Martin v Department of Educ. of*

*the City of N.Y.*, 167 AD3d 545 [1st Dept 2018]; *Matter of Brizel v City of New York*, 161 AD3d 634 [1st Dept 2018]. Furthermore, a review of the H.O's Award reflects that, contrary to Petitioner's assertions, H.O. Adelman's findings with respect to each specification were supported by documentary evidence, such as observation reports and formal evaluation reports, in addition to witness testimony (NYSCEF doc No. 2 at 34-39). As a result, Petitioner's arguments that H.O. Adelman made improper determinations regarding witness credibility and relied on the same in sustaining the majority of the specifications do not support grounds for vacatur of the H.O.'s Award.

The Court further finds that Petitioner's argument that the H.O.'s Award is irrational on the ground that H.O. Adelman failed to recognize or consider the potential bias of P.S. 4's administrators is without merit. A review of the H.O.'s Award reflects that H.O. Adelman addressed Petitioner's concerns and acknowledged that "some evidence in the record that could potentially support" Petitioner's allegations of bias (NYSCEF doc No. 2 at 45). However, H.O. Adelman found that the allegations were "mostly circumstantial and [did] not provide enough support to contradict not only an overwhelming record of consistently sub-standard teaching practice in multiple areas" (*id.*). In the context of a hearing officer's decision, a reviewing court exceeds its authority by reweighing the evidence and substituting its judgment for that of the hearing officer (*Matter of Bolt v. N.Y.C. Dep't of Educ*., 30 N.Y.3d 1065, 1069 [2018]). Therefore, it is of no moment whether this Court would have come to a different conclusion regarding the differing accounts presented by Petitioner and his supervisors.

As the record herein reflects that H.O. Adelman considered the entirety of the documentary and testimonial evidence before him and each of his findings were adequately

supported by the same, the Court finds that Petitioner has failed to demonstrate that the H.O's Award was biased, irrational, or otherwise arbitrary and capricious.

*The Appropriateness of the Termination Penalty*

Petitioner further argues that even if this Court does not find the H.O's Award to be irrational, the Award should still be remanded for a lesser penalty as H.O. Adelman did not offer an "adequate explanation" for why Petitioner was not given "progressive discipline" in lieu of termination so that he could improve his performance (*id.*).

The Court finds that Petitioner has not demonstrated that the penalty of termination that H.O. Adelman awarded was so disproportionate as to shock the conscience. In support of his argument, Petitioner cites the decision of this Court (Jaffe, J.) in *Beriguete v The New York City Department of Education* (Index No. 654272/2015), which held that the termination of a teacher with eleven years of satisfactory ratings prior to the charged years shocked the conscience and was unwarranted. However, *Beriguete* is distinguishable as in that case, the Court found that the educator was not provided copies of the observation reports until the end of each school year, leaving him no time to improve his performance and skills each year (*id.* at 13). The Court further found that there was no evidence the educator did not attend professional development classes or did not avail himself of the assistance provided by his school (*id.* at 15). Here, Petitioner did not allege that P.S. 4 failed to provide with his observation reports and feedback in a timely, proper manner, and H.O. Adelman explicitly found that Petitioner continually failed to utilize or implement the resources that administrators made available to him ("[T]he record shows that [Petitioner] did not make the requisite effort or actually do enough to implement these recommendations and, therefore, was unable to deliver effective lessons during the Charge Period on numerous documented occasions" [NYSCEF doc No. 2 at 47]).

As the DOE correctly asserts in its cross-motion to dismiss, numerous First Department decisions have found that the termination of long serving tenured teachers on the grounds of inefficiency and/or incompetence over a sustained period is not shocking to the conscience. (NYSCEF doc No. 12 at 18-20; *see also e.g.., Matter of Johnson v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 171 AD3d 548 [1st Dept 2019]; *Matter of Denicolo v Board of Educ. of the City of N.Y. and/or N.Y. City Dept. of Educ.*, 171 AD3d 565 [1st Dept 2019]; *Matter of Broad v New York City Bd./Dept. of Educ.,* 150 AD3d 438 [1st Dept 2017]). In reliance on the First Department's holdings, this Court recently upheld the termination of a similarly situated long tenured educator in *Barlow v. N.Y.C. Dep't of Ed.,* 2021 N.Y. Misc. LEXIS 123 *10-11 (Sup. Ct. NY Cty. 2021) ("The court finds that the law did not compel [the H.O.] to impose a lesser penalty than termination because of Barlow's mostly lengthy and mostly positive employment history. Therefore, the court rejects Barlow's 'disproportionate' argument").

The Court further observes that here, H.O. Adelman specifically noted that both the length of Petitioner's employment and Petitioner's "pleasant demeanor" were "mitigating factors" that supported a lesser penalty (NYSCEF doc No. 2 at 48). However, H.O. Adelman still found that termination was the appropriate penalty given that there was insufficient evidence in the record to demonstrate that the Petitioner was "capable of improving his pedagogy to return to an 'effective' level of teaching" (*id.*). As with H.O. Adelman's determinations regarding witness credibility and other evidence presented, this Court is precluded from assessing whether it would have come to a different determination regarding the proper penalty. The penalty imposed herein is rationally based on the evidentiary record before H.O. Adelman, and therefore the fact that "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" (*Matter of Bolt v. N.Y.C. Dep't of Educ.*, 30 NY3d 1065, 1069 [1st Dept 2018]).

Therefore, the Court rejects Petitioner's argument that the penalty of termination "shocks the conscience" and declines to remand this matter for a lesser penalty.

*Petitioner's Retaliation Argument*

The Court writes separately to address Petitioner's argument that the charges rendered against him were issued in retaliation for an age discrimination complaint that Petitioner filed against P.S. 4's administration, including Principal Stevens, on or about April 23, 2018. Petitioner argues that the evidence relied on by H.O. Adelman was "issued on a subjective basis" and does not comport with his actual teaching performance (NYSCEF doc No. 14 at 2).

As a preliminary matter, the Court finds that this argument is not properly before it, as it is well settled that petitioners in Article 75 proceedings are precluded from raising arguments not before the arbitrator in the underlying proceedings (*See Telemaque v N.Y.C. Bd./Dept. of Educ.*, 148 AD3d 503, 504 [1st Dept 2017] [petitioner educator waived argument regarding charges filed against her by principal after failing to raise it during arbitration]; *see also Matter of Stergiou v. New York City Dep't of Educ.*, 106 AD3d 511, 511 [1st Dept 2013]. Given that Petitioner's allegation here directly pertains to the motive behind the charges sustained against him, the allegation should have been raised before H.O. Adelman when he made his findings of fact in the underlying disciplinary proceeding, and this Court is precluded from considering it at this juncture.

The Court further notes that *assuming arguendo* Petitioner's retaliation argument was properly before it, the argument as pled does not appear to establish a basis for vacatur of the H.O.'s Award. While the charges and specifications were filed against Petitioner in June 2018,

after Petitioner's April 2018 complaint, the instances of ineffective teaching performance detailed in the charges date back to the 2015-2016 school year. H.O. Adelman reviewed observation reports from the fall of 2015, nearly three years prior to Petitioner's discrimination complaint, that detailed Petitioner's ineffective teaching performance and led to his "Developing" rating for the 2015-2016 school year (NYSCEF doc No. 2 at 43). "[A]n employer's continuation of a course of conduct that had begun before the employee complained does not constitute retaliation because, in that situation, there is no causal connection between the employee's protected activity and the employer's challenged conduct" (*Melman v. Montefiore Med. Ctr.*, 98 AD3d 107, 129 [1st Dept 2012]). As the evidentiary record before H.O. Adelman was mainly comprised of documentary evidence establishing Petitioner's ineffective performance in the years prior to his discrimination complaint, Petitioner's retaliation argument is without merit.

The Court concludes that Petitioner has failed to demonstrate that the H.O's Award should be subject to vacatur pursuant to Education Law § 3020-a, as Petitioner has not demonstrated that HO Adelman violated CPLR § 7511(b) by rendering an Award that was arbitrary and capricious or otherwise irrational. Accordingly, the Court finds that Petitioner's Article 75 petition should be denied as meritless, and that the DOE's cross-motion to dismiss it should be granted.

## CONCLUSION

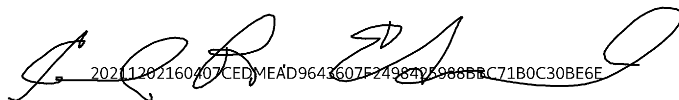
ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR Article 75, of Petitioner Alex Cesani (motion sequence number 001) is denied; and it is further

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

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Respondent shall serve a copy of this order along with Notice of Entry on all parties within ten (10) days.




| 12/2/2021 | | | | | |
|---|---|---|---|---|---|
| **DATE** | | | | **CAROL EDMEAD, J.S.C.** | |
| **CHECK ONE:** | X | **CASE DISPOSED** | | ☐ **NON-FINAL DISPOSITION** | |
| | ☐ | **GRANTED** | X **DENIED** | ☐ **GRANTED IN PART** | ☐ **OTHER** |
| **APPLICATION:** | ☐ | **SETTLE ORDER** | | ☐ **SUBMIT ORDER** | |
| **CHECK IF APPROPRIATE:** | ☐ | **INCLUDES TRANSFER/REASSIGN** | | ☐ **FIDUCIARY APPOINTMENT** | ☐ **REFERENCE** |