

**Matter of Board of Educ. of the City School Dist. of  
the City of N.Y. v Hemingway**

2012 NY Slip Op 30281(U)

January 21, 2012

Sup Ct, NY County

Docket Number: 401308/2011

Judge: Saliann Scarpulla

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

SALIANN SCARPULLA

PART 19

Index Number : 401308/2011

BOARD OF EDUCATION

vs

HEMINGWAY, TONIA

Sequence Number : 001

VACATE STAY/ ORDER/ JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

motion and cross-motion are decided in accordance with accompanying memorandum decision.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 1/31/12

*Saliann Scarpulla*  
SALIANN SCARPULLA J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 19

----- X

In the Matter of the Application of  
BOARD OF EDUCATION OF THE CITY SCHOOL  
DISTRICT OF THE CITY OF NEW YORK, and  
DENNIS M. WALCOTT, as Chancellor of the  
Board of Education of the City School District  
of the City of New York,

Petitioners,

Index No.: 401308/2011

For a Judgment and Order Pursuant to Article 75  
of the Civil Practice Law and Rules,

- against-

TONIA HEMINGWAY,

**DECISION AND ORDER**

Respondent.

----- X

For Petitioners:  
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Corporation Counsel for the City of New York  
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New York, NY 10007

For Respondent:  
Richard E. Casagrande, Esq.  
52 Broadway, 9<sup>th</sup> Floor  
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Papers considered in review of this petition and cross motion:

Amended Notice of Petition . . . . .	1
Verified Petition . . . . .	2
Cross Motion . . . . .	3
Mem of Law . . . . .	4
Aff in Support . . . . .	5
Mem of Law in Opp. . . . .	6
Reply Mem of Law . . . . .	7
Reply Aff . . . . .	8

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appear in person at the Judgment Clerk's Desk (Room  
141B).

HON. SALIANN SCARPULLA:

Petitioners The Board of Education of the City School District of the City of New  
York ("DOE" or "Department") and Dennis M. Walcott, as Chancellor of the Board of

Education of the City School District of the City of New York (“Walcott”) (collectively, “petitioners”) move for an order, pursuant to CPLR 7511, vacating or modifying an arbitration award, dated April 20, 2011, made after a disciplinary hearing held pursuant to Education Law § 3020-a, in which respondent Tonia Hemingway (“Hemingway”) received the penalty of placement of the disciplinary decision in her file as a warning. Petitioners argue that the penalty must be vacated and the matter remanded to the hearing officer for the imposition of a harsher penalty. Hemingway cross moves to dismiss the petition, to confirm the award of the hearing officer, for costs, disbursements and reasonable attorneys’ fees, and for an order imposing financial sanctions for petitioners’ frivolous conduct.

Hemingway is a tenured teacher, employed by the DOE for approximately twelve (12) years. She taught at Public School 194, in Manhattan, from 1999 through 2011. On December 2, 2009, Hemingway was “arrested and charged with violating 18 U.S.C. § 641, HUD Section 8 Housing Fraud.” On June 8, 2010, Hemingway pled guilty in federal court to fraudulently representing her income on her Section 8 housing subsidy application for the years 2005 - 2008 for the purpose of fraudulently obtaining the housing subsidy.

On December 7, 2010, Hemingway was sentenced to three years probation and ordered to make pay \$46,872 in restitution to HUD. As alleged in the verified petition, Hemingway failed to notify DOE’s Office of Personnel Investigation (“OPI”) of her

[\* 4]

arrest and the charges against her, in violation of Chancellor's Regulation C-105. On December 16, 2010, OPI received an automated computer notice of Hemingway's sentencing. OPI then requested from Hemingway, and received, copies of the federal criminal complaint against her, the indictment against her, and the federal felony judgment.

On February 3, 2011, the DOE served disciplinary charges against Hemingway, pursuant to Education Law §3020-a, alleging that during the 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010 and 2010-2011 school years, Hemingway engaged in "criminal conduct, conduct unbecoming to the profession, misconduct and neglected her duties." Specifically, the DOE alleged that Hemingway submitted fraudulent documents to allow her to obtain Section 8 housing; she fraudulently obtained \$45,948 of federal government housing monies to which she was not entitled; she pled guilty to one count of theft of government funds/embezzlement and theft of public money under 18 U.S.C. §641; she was sentenced to three years probation and restitution in the amount of \$46,8972; and she was arrested and charged with a federal crime and failed to immediately notify the OPI in violation of Chancellor's Regulation C-105. The Board asserted that as a result of her alleged actions, there was just cause for her termination.

Pursuant to Education Law § 3020-a, a disciplinary hearing on the charges was conducted by Hearing Officer Joyce M. Klein ("hearing officer"). At the disciplinary hearing, the parties stipulated to certain facts, in particular that Hemingway filed a false

[\* 5]

income statement with HUD for the years 2005, 2006, 2007 and 2008; that as a result she plead guilty to a federal felony and was sentenced to three years probation and restitution; and that she failed to report this to the DOE. In addition, the hearing officer was presented with documentary evidence and heard testimony from Charyn Koppelson Cleary, Principal of P.S. 194; Jean Horan, a specialist from OPI; Jane Montgomery, a Reading Recovery Teacher leader, and Hemingway.

Upon completion of the disciplinary hearing, the hearing office issued a written decision dated April 1, 2011, finding that Hemingway was guilty of all charges against her, that Hemingway was guilty of misconduct, and that her conduct was unbecoming a teacher. The hearing officer also found Hemingway's remorse and "her prompt compliance with the requirements of Chancellor's Regulation C-105 once she became aware of those requirements suggest[ed] that a warning [was] sufficient to insure that [Hemingway would] not repeat this conduct." The hearing officer directed that the disciplinary decision be placed in Hemingway's personnel file as a written warning, and noted that "[n]either this misconduct nor [Hemingway's] conduct unbecoming a teacher constitute just cause for termination."

In concluding that there was no just cause for termination, the hearing officer noted that Education Law 3020-a is not a punitive statute, and that to terminate Hemingway "solely on her commission of a crime related to her salary would be punitive and unrelated to her fitness to teach." The hearing officer further found that while

[\* 6]  
“[t]here is a technical connection between the issue of [Hemingway’s] salary as a teacher and her employment [] that nexus addresses the conduct for which [Hemingway] has been judged and punished.”

The hearing officer also looked to the reasoning of Judge Gardephe (S.D.N.Y.) who issued Hemingway’s criminal sentence. The hearing officer included in her decision portions of Judge Gardephe’s decision, including where he noted, in pertinent part, that

Since the age of 5, she’s been caring for younger family members. After two of her sisters died of AIDS, Ms. Hemingway raised their children as her own. She has supported her family financially and emotionally . . . . Ms. Hemingway has been gainfully employed as a teacher for ten years and aspires to be a principal. She is pursuing a second master’s degree and also works as a tutor. . . . As to the nature and circumstances of the offence, I note that Ms. Hemingway was under great economic pressure as she raised four children and earned her degrees. I further find that she did not actively seek out this crime but only committed it when given the opportunity. The motive for the crime appears to be Ms. Hemingway’s economic hardship rather than her greed.

In addition, Judge Gardephe stressed the importance of Hemingway’s continued employment. He noted that “Ms. Hemingway will be ordered to repay the amount she improperly obtained. Imprisonment would jeopardize her employment and ability to pay, as well as her family’s stability.”

Shortly after receiving the arbitrator’s award, petitioners commenced this proceeding, seeking to vacate or modify the award on the ground that the penalty is inherently inconsistent and totally irrational, and that the penalty shocks the conscience.

However, petitioners no longer seek Hemingway's termination. Hemingway cross moves to have the arbitration award confirmed, to have the petition dismissed for failure to state a cause of action, and she seeks financial sanctions including attorneys' fees for frivolous conduct.

### Discussion

"Education Law § 3020-a(5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR 7511. Under such review an award may only be vacated on a showing of 'misconduct, bias, excess of power or procedural defects.'" *Lackow v. Department of Education (or "Board") of City of N.Y.*, 51 A.D.3d 563, 567 (1<sup>st</sup> Dept 2008) (quoting *Austin v. Board of Educ. of City School Dist. of City of N.Y.*, 280 A.D.2d 365(1st Dep't 2001)). However, where, as here, the parties are subjected to compulsory arbitration, judicial scrutiny is greater than when parties voluntarily arbitrate. *Lackow*, 51 A.D.3d at 567. "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. The party challenging an arbitration determination has the burden of showing its invalidity." *Lackow*, 51 A.D.3d at 567-568 (internal citations omitted).

Petitioners assert that the hearing officer's "decision not to impose any penalty" is unconscionable and an abuse of discretion, and should be vacated on the grounds that it is totally irrational. However, I find that the hearing officer's decision to limit

Hemingway's penalty was made after careful consideration of all relevant facts and was not arbitrary, capricious or irrational.

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 N.Y.3d 424, 431 (2009). An arbitration award is considered irrational if there is "no proof whatever to justify the award." *Matter of Peckerman v D & D Associates*, 165 AD2d 289, 296 (1<sup>st</sup> Dept 1991). Here, the hearing officer undertook a thorough and thoughtful analysis of the facts and circumstances, evaluated the credibility of Hemingway and the witnesses, and arrived at the conclusion that Hemingway's misconduct "does not automatically lead to the conclusion that she can no longer be a role model to students and is unfit to continue her work as a teacher. . . . Neither this misconduct nor [Hemingway's] conduct unbecoming a teacher constitute just cause for termination . . . a warning is sufficient . . . ."

"It was rational, under the circumstances, for the hearing officer to find that respondent's actions constituted serious misconduct, but that she was remorseful and her actions were unlikely to be repeated, such that termination was not mandated. That reasonable minds might disagree over what the proper penalty should have been does not provided a basis for vacating the arbitral award or refashioning the penalty." *City School Dist. of the City of New York v. McGraham*, 17 N.Y.3d 917, 920 (2011).

Petitioners also argue that the penalty shocks the conscience. An administrative sanction, such as a written warning in Hemingway's personnel file, "must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." *Matter of Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000).

The hearing officer properly considered Hemingway's remorse and prompt compliance with Chancellor's Regulation C-105 once she became aware of its requirements, in determining that the warning was sufficient punishment. Given the record developed in the arbitration, I find that the penalty of a written warning in the form of the disciplinary hearing decision being placed in Hemingway's personnel file is not shocking to the conscience.

In an effort to "foster the use of arbitration as an alternative method of settling disputes," the Court's role in reviewing an arbitrator's award is severely limited. *Matter of Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-C10 v. Albany Hous. Auth.*, 266 A.D.2d 676, 677 (3d Dept 1999), citing *Matter of Goldfinger v. Lisker*, 68 N.Y.2d 225, 230 (1986). Courts are reluctant to disturb an arbitrator's award, and it may not be vacated except under the most extreme of circumstances – the award is irrational, violative of public policy or exceeds the power given to the arbitrator. *Civil Serv. Empls. Assn.*, 266 A.D.2d at 677. Petitioners and respondent have agreed that disciplinary disputes are to be resolved by arbitration. In consideration of my limited role and for the reasons stated above, I find that there is no basis to vacate this award. Accordingly, the

petition to vacate the award is denied in its entirety and Hemingway's cross motion to confirm the arbitration award and to dismiss the petition is granted.

I have considered and deny Hemingway's and petitioners' other contentions and requests for relief, including the applications for sanctions and attorneys' fees.

In accordance with the foregoing it is

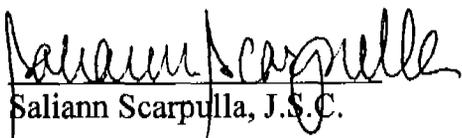
ADJUDGED that the petition of The Board of Education of the City School District of the City of New York and Dennis M. Walcott, as Chancellor of the Board of Educations of the City School District of the City of New York to vacate or modify the arbitration award is denied; and it is further

ORDERED that the cross motion of respondent Tonia Hemingway to confirm the arbitration award and to dismiss this proceeding is granted to the extent that the arbitration award is confirmed and petition is denied and dismissed, but in all other respects the cross motion is denied.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York  
January 24, 2011

ENTER:

  
Saliann Scarpulla, J.S.C.

**UNFILED JUDGMENT**

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