[* 1]

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

PRESENT: Lobis Justice PART 6

Evelyn Terry

-v-

N.Y.C. Dept. of Education

INDEX NO. 114832/10

MOTION DATE 6/7/11

MOTION SEQ. NO. 001

MOTION CAL. NO. 0

The following papers, numbered 1 to _____ were read on this motion to/for Petition Vacate arbitration award

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	x mot: 5-20
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

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).

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION, order + Judgment

Dated: 8/17/11

JBL 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
NEW YORK COUNTY: IAS PART 6

----------X

EVELYN TERRY,

Petitioner,

-against-

NYC DEPARTMENT OF EDUCATION,

Respondent,

----------X

Index No. 114837/10

Decision, Order and Judgment

JOAN B. LOBIS, J.S.C.:

Petitioner Evelyn Terry, proceeding pro se,[1] bring this proceeding by order to show cause, pursuant to Education Law § 3020-a and Article 75 of the C.P.L.R., seeking to annul an arbitrator's opinion and award (the "Award") terminating her from her position as a tenured public high school special education teacher. Respondent the Department of Education of the City of New York ("DOE") s/h/a NYC Department of Education cross-moves for an order, pursuant to C.P.L.R. Rule 3211(a)(7), dismissing the petition and, upon dismissal, an order, pursuant to C.P.L.R. § 7511(e), confirming the Award. For the reasons set forth below, the cross motion is granted, the petition is denied, and the Award is confirmed.

Petitioner worked at Belmont Preparatory High School ("Belmont") in the Bronx until her termination in 2010. Sometime after the 2008-2009 school year, pursuant to Education Law § 3020-a, DOE served petitioner with specifications of incompetence and other misconduct that allegedly occurred from 2005 through 2009. DOE claimed, inter alia, that petitioner

[1] After she filed the petition, petitioner was briefly represented by counsel. After numerous adjournments of the petition, petitioner reported to the court on June 7, 2011 that she would continue the case pro se.

rendered unsatisfactory lessons on four occasions and, on one occasion, acted inappropriately towards a paraprofessional. DOE also alleged that petitioner's absences during the school years spanning 2005 through 2009 were cumulatively excessive. These charges were apparently brought pursuant to Chancellor's Regulation C-601(1)(c) which sets forth that "absences which are so numerous as to limit the effectiveness of service may lead to disciplinary action for incompetent service or unfitness to perform obligations properly to the service or unfitness to perform obligations properly to the service." DOE eventually withdrew all charges relating to absences during the 2005-2006 school year, because those charges were the subject of a previous hearing that took place on November 12, 2006 (the "2006 Hearing"). At the 2006 Hearing, petitioner was fined $5,000 on substantiated charges that she was excessively absent during the school years spanning 2004 through 2006 and excessively late from 2003 through 2006.

A hearing on the instant charges was held before Hearing Officer Paul Zonderman. DOE offered testimony from the paraprofessional; Belmont's payroll secretary; and Stephen Gumbs, Belmont's principal. Petitioner testified in her own defense and offered two witnesses on her behalf, both staff members of Belmont. During the hearing and on the record, Hearing Officer Zonderman dismissed three of the charges related to unsatisfactory lessons due to insufficient evidence.

On or about October 25, 2010, Hearing Officer Zonderman issued the Award dismissing the charges related to petitioner's conduct with a paraprofessional; the remaining unsatisfactory lesson charge; and three other charges related to her conduct at Belmont. The remainder of the Award focused on petitioner's absences. With regard to absences during the 2006-

2007 school year, Hearing Officer Zonderman found that of the thirty (30) days that petitioner was absent, twenty-nine were medically excused and one was not. With regard to absences during the 2007-2008 school year, Hearing Officer Zonderman found that fifty-nine (59) absences were medically excused and sixty-eight (68) were not. For the 2008-2009 school year, Hearing Officer Zonderman found that five of six absences were not excused.

The Award set forth that even though medically excused absences are not considered misconduct per se, the "cumulative negative effect" of numerous absences, even excused, can affect the ability to teach. Hearing Officer Zonderman set forth that Chancellor's Regulation C-601(1)(c) "clearly contemplates and specifically addresses" the charges of cumulatively excessive absenteeism against petitioner. He also quoted Principal Gumbs who testified that excessive absences deprive special education students of needed structure and can cost the school $150 a day to obtain substitute teachers. Hearing Officer Zonderman asserted that petitioner failed to apply for protection under the Family Medical Leave Act ("FMLA"), but that it had been established at the 2006 Hearing that petitioner aware of her rights under that law. Hearing Officer Zonderman determined that although petitioner was a skilled teacher, her absences violated Chancellor's Regulation C-601(1)(c) and were grounds for dismissal.

In her petition, petitioner argues that her absences were medically approved or should have been medically approved, and therefore, ostensibly, are not grounds for termination. Petitioner argues that the Award violates her rights under state law, her collective bargaining agreement, and the FMLA, and that she was never informed of her FMLA rights. Petitioner further sets forth that

the arbitrator was biased and improperly allowed the 2006 Hearing to be offered into evidence.

Respondent cross-moves for an order dismissing the petition for failing to state grounds to vacate the Award under C.P.L.R. § 7511(b) and seeks an order confirming the Award. Respondent argues that petitioner fails to identify any evidence of bias or misconduct by Hearing Officer Zonderman. Respondent sets forth that given petitioner's excessive absences, termination was justified.

Under Education Law § 3020-a(5), an arbitration determination pursuant to disciplinary charges can only be vacated under the grounds listed in C.P.L.R. § 7511 (that the arbitrator was biased, committed misconduct, or exceeded his or her power), or if the determination is not supported by adequate evidence, is irrational, or otherwise fails to meet "the arbitrary and capricious standards of CPLR article 78." In re Lackow v. Dep't of Educ., 51 A.D.3d 563, 567-68 (1st Dep't 2008).

On a motion to dismiss a special proceeding, the court must "determine only whether the facts as alleged fit within any cognizable legal theory.'" In re Yan Ping Xu v. New York City Dep't of Health, 77 A.D.3d 40, 43 (1st Dep't 2010) (citation omitted); see also, In re Y & O Holdings (NY), Inc. v. Bd. of Mgrs. of Exec. Plz. Condo., 278 A.D.2d 173 (1st Dep't 2000). Accordingly, "the court must afford the pleadings a liberal construction." EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 19 (2005). However, the petition must not consist of only a "conclusory assertion" of the wrong; it must contain factual allegations. Goldin v. Engineers Country Club, 54

A.D.3d 658, 659-60 (2d Dep't 2008), app. denied, 13 N.Y.3d 763 (2009); see also Chappo & Co., Inc. v. Ion Geophysical Corp., 83 A.D.3d 499, 500 (1st Dep't 2011). Furthermore, the court may examine the evidence presented to determine if "a material fact as claimed by the [petitioner] . . . is not a fact at all." Rietschel v. Maimonides Med. Ctr., 83 A.D.3d 810 (2d Dep't 2011), citing Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); see also Katebi v. Fink, 51 A.D.3d 424, 425 (1st Dep't 2008).

Here, petitioner's allegations are conclusory and unsupported by the facts in the record. Her conclusory claim of bias is not supported by any factual allegations. Moreover, the simple fact that Hearing Officer Zonderman ultimately ruled against petitioner is not evidence of bias. See In re County of Niagara v. Bania, 6 A.D.3d 1223, 1225 (4th Dep't 2004); In re Palencia v. New York City Bd./Dep't of Educ., 31 Misc. 3d 1229(A) (Sup. Ct. N.Y. Co. 2011). Furthermore, Hearing Officer Zonderman dismissed a number of DOE's charges on the merits, suggesting that his approach was even-handed. Petitioner's bare allegations that her dismissal violated federal and state law and her collective bargaining agreement are also conclusory and fail to make out a cognizable claim for vacating the Award. Petitioner failed to demonstrate at the hearing nor allege facts herein suggesting that she was entitled to or sought FMLA protection.

Contrary to petitioner's claim that she cannot be terminated for medically excused absences, excessive absenteeism may warrant termination "even though the validity of the reasons for the absences was not contested." McKinnon v. Bd. of Educ. of North Bellmore Union Free Sch. Dist., 273 A.D.2d 240, 241 (2d Dep't 2000); see also Cicero v. Triborough Bridge & Tunnel Auth.,

264 A.D.2d 334, 336 (1st Dep't 1999) lv to appeal dismissed 94 N.Y.2d 931 (2000); Chancellor's Regulation C-601(1)(c). Turning to petitioner's claim that Hearing Officer Zonderman committed misconduct by considering charges that were resolved in the 2006 Hearing, the Award reveals that the 2006 Hearing was not used to bolster the charges of misconduct, but rather establish that petitioner could not deny that she was unaware of her FMLA rights. Since petitioner has failed to sufficiently allege cognizable causes of action in this petition, the petition is denied and, upon denial of the petition, the Award is confirmed. See C.P.L.R. § 7511(e). Accordingly it is hereby,

ORDERED that the cross motion to dismiss the petition is granted; and it is further

ORDERED and ADJUDGED that the petition is dismissed; and it is further

ADJUDGED that, upon dismissal of the petition, the Award dated October 25, 2010 is confirmed in all respects.

Dated: August 17, 2011

JOAN B. LOBIS, J.S.C.