

Index No. 655458/2017

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

JOHN LEFTRIDGE,

Petitioner,

-against-

THE CITY OF NEW YORK; NEW YORK CITY
DEPARTMENT OF EDUCATION; CARMEN
FARINA, CHANCELLOR of NEW YORK CITY
DEPARTMENT OF EDUCATION,

Respondents,

To Vacate a Decision of a Hearing Officer Pursuant to
Education Law Section 3020-a and CPLR Section 7511

**MEMORANDUM OF LAW IN SUPPORT OF
RESPONDENTS' CROSS-MOTION TO DISMISS
THE PETITION**

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Matter No.: 2017-049933*

PRELIMINARY STATEMENT

Respondents respectfully submit this memorandum of law in support of their cross motion to dismiss the petition on grounds that the petition fails to show that the limited grounds for vacatur under Education Law § 3020-a(5) and N.Y. C.P.L.R. § 7511(b) have been met.

Petitioner is a former tenured teacher, who was most recently assigned to P.S. 93 in Brooklyn, New York. He commenced this proceeding pursuant to Article 75 of the Civil Practice Law and Rules (“CPLR”) to vacate Hearing Officer Michael A. Lendino’s Opinion and Award, dated August 6, 2017, which resolved disciplinary charges preferred against Petitioner, pursuant to New York State Education Law § 3020-a by Respondent the Board of Education of the City School District of the City of New York, operating as the New York City Department of Education (“DOE”).

Hearing Officer Lendino, a designated impartial hearing officer under Education Law § 3020-a, found petitioner guilty of: (1) failing to properly, adequately, and/or effectively plan and/or execute lessons on eight occasions and (2) failing to implement recommendations in six pedagogical areas. Hearing Officer Lendino found the appropriate penalty to be termination, on the grounds that Petitioner took no steps toward improving his pedagogy and there was no indication that Petitioner’s performance would improve if given another opportunity.

In that the petition fails to show that this award is the result of corruption, fraud or misconduct, partiality of an arbitrator or that the arbitrator exceeded his power, the petition should be dismissed.

STATEMENT OF FACTS¹

A. Charges and Specifications

Pursuant to Education Law § 3020-a, Petitioner was served with Charges and Specifications alleging failure to properly plan and/or execute lessons on eight occasions and failure to implement pedagogical recommendations. See Opinion and Award of Hearing Officer Michael A. Lendino (“Decision”), a copy of which is annexed to the Mildner Aff. as Exhibit 1.

In all, DOE preferred two specifications against Petitioner, as follows:

1. During the 2014-2015, 2015-2016, and 2016-2017 school years, [Petitioner] failed to properly, adequately and/or effectively plan and/or execute lessons as observed on or about the following dates:
 - a. October 31, 2014;
 - b. January 9, 2015;
 - c. March 12, 2015;
 - d. March 31, 2015;
 - e. April 23, 2015;
 - f. June 22, 2015;
 - g. October 7, 2015;²
 - h. November 17, 2015.
2. [Petitioner] failed, during the 2014-2015, 2015-2016, and 2016-2017 school years, 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

¹ This statement of facts is derived from the material factual allegations set forth in the verified amended petition and annexed exhibits. Those facts will be assumed to be true solely for the purpose of this Cross-Motion to Dismiss. In addition, this statement of facts is derived from documents referred to or otherwise incorporated into the petition which are annexed to the Mildner Aff., pursuant to CPLR § 3211(c). All references to exhibits contained herein, unless otherwise specified, refer to those exhibits (“Ex.”) annexed to the Mildner Aff.

² Specification 1(g) initially referred to the observation as having taken place on October 17, 2015. Hearing Officer Lendino noted that the initial reference to October 17th was a typographical error and that Petitioner was on notice that DOE intended to introduce evidence regarding his October 7th observation.

meetings with administrators, school-based coaches and/or outside observers, as well as, school wide professional development with regard to:

- a. Proper planning, pacing, and/or execution of lessons;
- b. Using appropriate methods and/or techniques during lessons;
- c. Designing coherent instruction;
- d. Using assessment in instruction;
- e. Student engagement; and/or
- f. Using appropriate questioning and discussion techniques.

See Ex. 1.

B. The Administrative Hearing

Pursuant to Education Law § 3020-a, a hearing was convened on the charges preferred against Petitioner. A pre-hearing conference was conducted on April 26, 2017, and full evidentiary hearings were held before Hearing Officer Michael A. Lendino on June 1, 6, 7, 27, and 28, 2017 at DOE's offices at 100 Gold Street, New York, New York. See Ex. 1. The record before Hearing Officer Lendino consisted of five days of transcribed testimony, the transcripts of which are annexed to the Mildner Aff. as Exhibit 2. Throughout the hearing, Petitioner was represented by his attorney, Gregory Ainsley. All parties were afforded a full and fair opportunity to offer testimonial and documentary evidence, cross-examine witnesses, and make arguments in support of their respective positions. See generally Ex. 2. Numerous exhibits were offered into evidence by Petitioner and the DOE. Annexed to the Mildner Aff. as Exhibit 3 and Exhibit 4 are, respectively, copies of DOE's exhibits and Petitioner's exhibits which Hearing Officer Lendino received into evidence. Closing oral arguments were made on June 28, 2017. See Ex. 2 at 640 – 689.

DOE presented as witnesses P.S. 93 Assistant Principal Janeice Bailey (“AP Bailey”) and Principal Sandra Philip (“Principal Philip”), as well as Peer Validator Patricia Hanley. See generally Ex. 2. Petitioner testified on his own behalf and did not call any additional witnesses. Id.

C. Hearing Officer Lendino’s Opinion and Award

On August 6, 2017, Hearing Officer Lendino rendered an exhaustive forty-four (44) page Opinion and Award. See Ex. 1. As mandated by Education Law § 3020-a, Hearing Officer Lendino’s decision contains detailed findings of fact and conclusions with regard to each charge brought against Petitioner. Id. Hearing Officer Lendino found Petitioner guilty of Specifications 1(a) through 1(h) and 2(a) through 2(f). Id. at 44. Based upon the finding of Petitioner’s guilt with respect to the aforementioned Specifications, Hearing Officer Lendino found just cause for discipline and found termination to be the appropriate penalty. Id.

Specification 1(a) addressed Principal Philip’s October 31, 2014 observation of Petitioner’s fifth-grade class. Principal Philip testified that Petitioner asked rapid-fire questions with single correct answers. Ex. 1, p. 15; Ex. 2, p. 331. Principal Philip noted that students were not aware of the assessment criteria. Ex. 1, p. 15; Ex. 2, p. 337. The principal further testified that Petitioner appeared confused during the lesson and did not correct students’ errors. Ex. 1, p. 15. DOE presented into evidence Principal Philip’s contemporaneous Evaluator Form, which Petitioner signed on December 1, 2014. Ex. 3 at DOE 171 – 73. Petitioner testified on direct examination that he did not have a general recollection of observations from the 2014 - 2015 school year, and that he could only strongly recall the June 2015 observation referenced in Specification 1(f). Ex. 2, p. 479; Ex. 1, p. 15. Petitioner offered no testimony concerning this particular lesson. Ex. 1, p. 15. Petitioner’s sole rebuttal to Principal Philip’s testimony consisted of two emails from Petitioner to Principal Philip, dated September 2, 2014 and September 8,

2014, in which Petitioner requested additional classroom materials. Ex. 1, p. 15; Ex. 4 at R 047 – 48. Petitioner did not testify if issues in obtaining supplies at the beginning of the school year impacted his performance on October 31, 2014. Ex. 1, p. 15. Hearing Officer Lendino found that there was insufficient evidence to refute Principal Philip’s credible testimony and sustained Specification 1(a).

Specification 1(b) concerned an observation of Petitioner’s classroom by AP Bailey on January 9, 2015. AP Bailey testified that Petitioner’s lesson plan indicated that the lesson would include students performing skits in groups. Ex. 1, p. 16. AP Bailey observed students performing skits individually, with no feedback from Petitioner. Ex. 1, p. 16. AP Bailey could not ascertain if students understood the “essence” of the skits. Ex. 1, p. 16; Ex. 2, p. 57. Petitioner did not ask higher-order questions or promote student conversation. Ex. 1, p. 16. DOE also presented into evidence AP Bailey’s contemporaneous Evaluator Form, which Petitioner signed on January 20, 2015. Ex. 3 at DOE 004 – 07. Petitioner had no recollection of this lesson and offered no testimony regarding this observation. Ex. 1, p. 17. Hearing Officer Lendino sustained Specification 1(b).

Specification 1(c) concerned Principal Philip’s observation of Petitioner’s class on March 12, 2015. Principal Philip testified that she observed Petitioner’s classroom for approximately 45 minutes. Ex. 1, p. 17. She testified that Petitioner’s lesson plan did not match what was happening in the classroom. Id. It appeared that Petitioner was doing an “off-the-cuff” reading lesson. Id. Principal Philip noted that Petitioner was reading from an iPad with his back to the students. Id. Petitioner provided students with limited, poor-quality feedback. Id. Principal Philip stated that students were well-behaved, but there was no evidence that the students were learning anything. Id. DOE also offered into evidence Principal Philip’s

contemporaneous Evaluator Form, which Petitioner signed on March 13, 2015. Ex. 3 at DOE 174 – 78. As with the previous two observations, Petitioner could not recall this lesson. Ex. 1, p. 18. Petitioner offered no testimony regarding this lesson and Hearing Officer Lendino sustained Specification 1(c).

Specification 1(d) addressed an observation that AP Bailey conducted on March 31, 2015. AP Bailey testified that Petitioner’s lesson involved using a rubric for students to improve their writing. Ex. 1, p. 18. AP Bailey testified that Petitioner gave students limited feedback and never modeled what students were supposed to do. Id. DOE presented into evidence AP Bailey’s contemporaneous Evaluator Form, which Petitioner signed on April 12, 2015. Ex. 3 at DOE 008 – 11. Additionally, DOE presented into evidence Petitioner’s lesson plan for the March 31, 2015 lesson. Ex. 3 at DOE 014. AP Bailey testified that Petitioner’s lesson plan was scant, poorly put together, and that it was “an abomination.” Ex. 1, p. 19; Ex. 2, p. 130. AP Bailey testified that she had previously provided Petitioner with a lesson planning template, but that his lesson plan did not match the template. Ex. 1, p. 19. See also Ex. 3 at DOE 014 (Petitioner’s lesson plan) and DOE 012 – 13 (template provided by AP Bailey). AP Bailey noted that it is completely unacceptable for a teacher to come to school unprepared to teach students. Ex. 1, p. 19. Once again, Petitioner could not recall this lesson and offered no testimony regarding this observation. Id. Hearing Officer Lendino sustained Specification 1(d).

Specification 1(e) addressed an observation of Petitioner’s classroom on April 23, 2015. Principal Philip testified that she observed Petitioner teaching a mathematics lesson on triangles. Ex. 1, p. 20. Only a few students participated in the lesson and Petitioner provided students with poor feedback. Id. at 20 – 21. Principal Philip noted that Petitioner did not correct a student’s wrong answers. Id. at 20. Principal Philip testified that instruction was not

differentiated to accommodate students at varying comprehension levels. Id. Principal Philip testified that Petitioner did not respond to a student who stated that she did not understand how to classify triangles. Id. at 21; Ex. 2, p. 382. DOE also presented into evidence Principal Philip's contemporaneous Evaluator Form, which Petitioner signed on June 22, 2015. Ex. 3 at DOE 190 – 93. Petitioner could not remember this lesson and offered no testimony regarding this observation. Hearing Officer Lendino sustained Specification 1(e).

Specification 1(f) concerned an observation that occurred on June 22, 2015. AP Bailey testified that she observed Petitioner's third period class on June 22, 2015. Ex. 1, p. 21. AP Bailey testified that Petitioner's lesson plan indicated that he would be teaching a math lesson. Id. DOE also presented into evidence a document that AP Bailey identified as a lesson plan that Petitioner gave her. Ex. 3 at DOE 164 – 65. AP Bailey testified that Petitioner instructed students to create a game based on what they had learned during the year. Ex. 1, p. 21. AP Bailey testified that Petitioner did not provide students with guidance and that Petitioner asked simple questions. Id. AP Bailey noted that although it was Petitioner's first day back from an extended absence,³ it was Petitioner's responsibility to be prepared to teach students. Ex. 1, p. 22. DOE also presented into evidence AP Bailey's contemporaneous Evaluator Form, which Petitioner signed on June 22, 2015. Ex. 3 at DOE 158 – 60.

Petitioner testified that he strongly recalled the June 22, 2015 observation. Ex. 2, p. 480. He testified that he wanted students to create games that were similar to games used in physical education classes.⁴ Ex. 2, p. 489; Ex. 1, p. 22. Petitioner testified that because this was

³ Petitioner injured his back and was granted Line of Duty Injury ("LODI") leave from April 27, 2015 to May 29, 2015. Ex. 1, p. 20. Petitioner requested an extension of leave, which was denied, yet Petitioner did not return to P.S. 93 until June 22, 2015. Id.

⁴ Petitioner taught physical education for approximately ten years before he became a classroom teacher during the 2013-2014 school year. During the 2014-2015 school year, Petitioner taught fifth grade. Petitioner was assigned to a third grade class for the 2015-2016 school year.

a math lesson, he added a math component, which was, “ten jumping jacks, or 20 jumping jacks or we can do pushups.” Ex. 2, p. 489. Petitioner testified that he asked what he perceived to be higher-level thinking questions, such as, “What kind of game can you create?” Ex. 2, p. 497; Ex. 1, p. 22. Petitioner testified that this observation occurred two days before school ended and that it was his first day back at P.S. 93 after a two-month absence. Ex. 2, p. 492. He testified that his classroom was “crazy” and that substitute teachers had boxed up his classroom materials during his absence. Ex. 2, pp. 492 – 93; Ex. 1, p. 22. On cross-examination, Petitioner testified that the lesson plan that DOE presented into evidence was not his actual lesson plan from June 22, 2015, and that he could not locate his actual lesson plan from that day. Ex. 2, p. 570; Ex. 1, p. 23.

Hearing Officer Lendino credited AP Bailey’s testimony that the lesson plan that DOE presented into evidence was the lesson plan that Petitioner gave to AP Bailey on June 22, 2015. Ex. 1, p. 23. Hearing Officer Lendino credited AP Bailey’s testimony that Petitioner seemed unprepared for this lesson. Id. Hearing Officer Lendino noted that evaluative observations are not typically conducted in late June, but that Petitioner’s extended leave made it impossible for administrators to observe Petitioner earlier in the school year.⁵ Id. at 24. Further, Hearing Officer Lendino credited AP Bailey’s testimony that teachers must always be prepared to teach and that Petitioner was not prepared on June 22, 2015. Id. Therefore, Hearing Officer Lendino sustained Specification 1(f).

⁵ At the pre-hearing conference, Petitioner’s attorney made a motion to dismiss Specification 1(f) on the grounds that DOE’s Advance Guide for Educators specifies that teacher observations must be completed by June 5, 2015. Ex. 2, pp. 8 – 9. Petitioner selected to receive six informal observations during the 2014-2015 school year. Hearing Officer Lendino noted that Petitioner’s absence made it impossible for administrators to observe Petitioner for a sixth time before June 5, 2015. Ex. 1, p. 23. Additionally, Hearing Officer Lendino noted that there is nothing in the collective bargaining agreement between Petitioner’s bargaining unit and DOE stating that observations cannot occur in late June. Therefore, Hearing Officer Lendino did not grant Petitioner’s motion to dismiss this specification. Ex. 1, p. 5.

Specification 1(g) addressed an observation conducted by AP Bailey on October 7, 2015. Petitioner was assigned to teach third grade for the 2015-2016 school year. AP Bailey testified that Petitioner's lesson plan indicated that he would be teaching a mathematics lesson to review place-values and bar diagrams. Ex. 1, p. 24. AP Bailey found that the lesson plan was neither clear nor coherent. Id. See also Ex. 3, at DOE 055 – 057 (Petitioner's lesson plan). AP Bailey described Petitioner's instruction as a "ping pong effect", with Petitioner asking questions, students providing answers, and no opportunities for students to elaborate on their responses or question their peers' answers. Ex. 1, p. 24; Ex. 2, pp. 156 – 57. AP Bailey noted that it took thirteen minutes for Petitioner to realize that students did not understand how to complete a task. Ex. 1, p. 24; Ex. 2, p. 160. DOE also presented into evidence AP Bailey's contemporaneous Evaluator Form, which Petitioner signed on October 14, 2015. Ex. 3, DOE 051 – 54.

Petitioner testified that he modeled during this lesson and that he used a "Read it, Draw it, Write it" chart. Ex. 1, p. 26. He testified that he thought the lesson went well, and that he was not expecting AP Bailey to find the lesson ineffective. Id. Hearing Officer Lendino credited AP Bailey's testimony. Ex. 1, p. 27. Hearing Officer Lendino further found that a review of Petitioner's lesson plan confirmed AP Bailey's testimony regarding Petitioner's deficiencies in lesson planning. Ex. 1, p. 28; Ex. 3, at DOE 055 – 57. Hearing Officer Lendino sustained Specification 1(g).

Specification 1(h) concerned an observation that AP Bailey conducted on November 17, 2015. AP Bailey testified that Petitioner was using a lesson planning template that she had provided, but that his lesson plans were still incomplete. Ex. 1, p. 27. For example, AP Bailey testified that Petitioner wrote, "need time", instead of specifying how much time to

devote to a particular lesson activity. Id. AP Bailey testified that Petitioner's lesson plan was "atrocious" and "an abomination". Ex. 1, p. 28; Ex. 2, pp. 178, 190. AP Bailey also testified regarding issues with the lesson's execution. AP Bailey testified that Petitioner showed some slight improvement with questioning and discussion techniques, but his questions were not thought provoking. Ex. 1, p. 28. Additionally, Petitioner taught a teacher-dominated lesson and used whole-class instruction. Id. AP Bailey noted that this was problematic because it did not allow Petitioner to assess what individual students were learning. Id. Further, Petitioner made no attempt to awaken a sleeping student. Id. DOE also presented into evidence AP Bailey's contemporaneous Evaluator Form, which Petitioner signed on December 24, 2015, and Petitioner's lesson plan. Ex. 3 at DOE 064 – 70.

Petitioner could barely recall the November 17, 2015 observation. Ex. 1, p. 29. Petitioner recalled AP Bailey discussing the lesson planning template at a post-observation conference, but he did not remember any discussion regarding classroom management or the sleeping student. Id. Hearing Officer Lendino credited the testimony of AP Bailey and found that Petitioner offered little to no testimony to refute AP Bailey's testimony. Hearing Officer Lendino sustained Specification 1(h).

Specification 2 concerned Petitioner's failure to improve his pedagogy. AP Bailey and Principal Philip testified that after each classroom observation, Petitioner attended a post-observation conference. Ex. 1, p. 29. At the post-observation conferences, administrators provided Petitioner with feedback. Id. AP Bailey and Principal Philip testified that Petitioner took notes at meetings but did not say much. Id. at 30. AP Bailey testified that she provided Petitioner with a template for lesson planning, and that Petitioner began using the template but wrote minimal notes in the template. Id. Hearing Officer Lendino found that Petitioner's scant

lesson planning “reflects an individual who was either incapable of formulating a lesson plan or who had no interest in doing so.” Ex. 1, p. 30.

Principal Philip testified that Petitioner had been provided with opportunities for “intervisitations” to observe other teachers’ effective practices. Ex. 1, p. 30. Principal Philip and AP Bailey testified that Petitioner was given a non-evaluative observation, through which Petitioner was given feedback that did not factor into his Annual Professional Performance Review. Id. DOE also presented into evidence a letter from AP Bailey to Petitioner, dated February 25, 2015, that contained AP Bailey’s notes and “next steps” from Petitioner’s non-evaluative observation on February 23, 2015. Ex. 3 at DOE 155 – 56. Additionally, Principal Philip testified that P.S. 93 held professional development sessions every Monday and Tuesday. Ex. 1, p. 30. Principal Philip testified that she felt that she was often giving Petitioner repetitive feedback, as he had failed to improve. Id.

Peer Validator Patricia Hanley testified that she observed Petitioner’s classroom on October 13, 2015.⁶ Hanley noted that Petitioner asked questions in rapid succession and that each question had a single correct answer. Ex. 1, p. 31. Hanley testified that only a few students participated in the lesson and that Petitioner gave poor quality feedback to his students. Id. Hanley found that the interactions between teacher and students, as well as the interactions between students, were mostly negative. Id. Hearing Officer Lendino found that Hanley’s observation demonstrated that by mid-October 2015, Petitioner had failed to implement the administrators’ recommendations. Id.

⁶ Petitioner initially objected to Peer Validator Hanley’s testimony. The parties agreed that Peer Validator Hanley’s testimony would be permitted only with respect to Specification 2 to show whether Petitioner had implemented directives from administrators by mid-October 2015. Ex. 1, p. 31, fn. 9.

Petitioner testified that he taught physical education for ten years prior to becoming a classroom teacher for the 2013-2014 school year. Ex. 1, p. 30. At the beginning of the 2013-2014 school year, Petitioner was transferred from his position as a physical education teacher to a classroom teaching position due to changes in licensing requirements for physical education teachers. Ex. 2, p. 640. Petitioner testified that during the 2013-2014 school year, he was temporarily reassigned to another school due to pending disciplinary charges, which were later dismissed.⁷ Ex. 1, p. 30; Ex. 2, pp. 463 – 65. Petitioner testified that he experienced some personal problems during the 2014-2015 school year and that he took two leaves of absence due to line of duty injuries (LODI).⁸ Ex. 1, p. 30.

Hearing Officer Lendino noted that the record reflected that Petitioner was provided with ample remediation during the time he was in the classroom. Ex. 1, p. 30. Hearing Officer Lendino found that Petitioner had failed to implement this remediation, and sustained Specification 2 in its entirety.

Hearing Officer Lendino also considered Petitioner's allegations of discrimination and retaliation. Petitioner testified that he had been the subject of a prior disciplinary proceeding, in which charges were dismissed, and that he had previously served as a UFT chapter leader. Ex. 1, p. 32. Petitioner testified that he believed that the administrators had intentionally assigned him to teach students who did not behave well together. Id. Hearing Officer Lendino found that there was nothing in the record to indicate that Petitioner was given a

⁷ Principal Philip testified that the previous 3020-a proceeding concerned an incident in which one of Petitioner's third grade students was missing, and an investigation revealed that the student left the school building. Ex. 2, pp. 415 – 16.

⁸ Petitioner was approved for LODI leave from April to May 2015, and returned to P.S. 93 on June 22, 2015. Petitioner was on a second LODI leave from November 2015 until February 2017.

particularly difficult class. Id. Hearing Officer Lendino noted that the administrators' concerns about Petitioner's performance were unrelated to student behavioral issues. Id.

Hearing Officer Lendino also considered Petitioner's testimony that he had filed complaints regarding employment discrimination. Hearing Officer Lendino found that Petitioner "seemed confused in his statements," as he was unable to recall whether he had complained of gender discrimination until he was shown a document related to his complaint, and he testified that the discrimination occurred in September and October of 2015, even though the complaint was dated July 2015. Ex. 1, p. 34. Hearing Officer Lendino also noted that a previous employment discrimination lawsuit had been resolved. Id. at p. 33. Hearing Officer Lendino found that Petitioner's allegations of discrimination were "accusations without supportive evidence" and that there was nothing in the record to conclude that AP Bailey or Principal Philip discriminated against Petitioner. Id.

Hearing Officer Lendino also considered Petitioner's potential for remediation. Hearing Officer Lendino noted that AP Bailey and Principal Philip had provided Petitioner with detailed feedback after each observation. Ex. 1, p. 35. Further, AP Bailey testified that Petitioner was given opportunities for "intervisitations" to observe Ms. Pulliam, an effective teacher at P.S. 93. Id. DOE also entered into evidence letters memorializing "debrief" sessions that AP Bailey held with Petitioner after the intervisitations. Ex. 3, at DOE 148 – 51. Additionally, DOE placed into evidence Petitioner's Teacher Improvement Plan ("TIP"). Ex. 3, at DOE 146 – 47. AP Bailey testified that Petitioner did not offer any suggestions for areas of improvement that should be added to his TIP. Ex. 1, pp. 36 – 37. Hearing Officer Lendino concluded that DOE made a good faith effort to provide Petitioner with various remediation opportunities. Id. at 37.

Hearing Officer Lendino's decision also contains detailed credibility findings. In making his credibility determinations, Hearing Officer Lendino considered Petitioner's testimony regarding his November 2015 line of duty injury ("LODI"). Petitioner alleged that a student tripped him in November 2015 and that he took a leave of absence from November 2015 to February 2017. Ex. 1, p. 37. Petitioner testified that this was a serious injury, and that he could not stand or sit for long periods of time. Ex. 1, p. 38. On cross examination, Petitioner was presented with pictures from his Facebook account that depicted Petitioner sitting and standing at football games in November of 2016, when he was on LODI leave. Id. When questioned about these photos, Petitioner stated that during his LODI leave, he volunteered at a Catholic school's football games. Id.; Ex. 2, pp. 621 – 22. Petitioner testified that his role as a volunteer included opening doors. Ex. 1, p. 38; Ex. 2, p. 618. Hearing Officer Lendino found that Petitioner's role as a volunteer at football games, during a time when he claimed he was in too much pain to teach, casted doubt on Petitioner's credibility. Id. at 39.

In determining the appropriate penalty, Hearing Officer Lendino noted that AP Bailey and Principal Philip repeatedly observed the same deficiencies in Petitioner's pedagogy. Ex. 1, p. 40. Hearing Officer Lendino found that Petitioner did not engage in meaningful discourse with administrators during post-observation conferences. Ex. 1, p. 42. Petitioner resisted feedback and appeared unable or unwilling to improve. Id. at 42 – 43. Petitioner presented into evidence certificates of completion from two professional development courses. Ex. 1, p. 43. Hearing Officer Lendino found that Petitioner's attendance at two workshops did not address Petitioner's failure to implement his supervisors' recommendations. Id. Hearing Officer Lendino found that there was no basis in the record to indicate that Petitioner would

improve if given additional opportunities. Id. Therefore, Hearing Officer Lendino determined that termination was the appropriate penalty.

On August 19, 2017, Petitioner commenced this Article 75 proceeding against respondents the City of New York, DOE, and Carmen Fariña, Chancellor.

ARGUMENT

POINT I

AS PETITIONER FAILS TO ESTABLISH ANY BASIS FOR VACATING THE AWARD THE PETITION SHOULD BE DISMISSED

A. Standard Of Review

Education Law § 3020-a(5) limits the grounds for vacating an arbitration award to those found in N.Y. C.P.L.R. § 7511(b). See Blamowski v. Munson Transp., Inc., 91 N.Y.2d 190, 194 (1997) (stating that “an arbitrator’s award may be vacated only upon the grounds specified in CPLR 7511”). Thus, an arbitrator’s award may be vacated only if the court finds that the petitioning party’s rights 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.

See N.Y. C.P.L.R. § 7511(b).

In addition to the statutory limitations, the Court of Appeals instructs that courts may not vacate the award “unless the court concludes that it is totally irrational or violative of a strong public policy” and thus in excess of the arbitrator’s powers. Hackett v. Milbank, Tweed, Hadley & McCloy, 86 N.Y.2d 146, 155 (1995) (quoting Silverman v. Benmour Coats, Inc., 61 N.Y.2d 299, 308 (1984)). Nor will an arbitration award be vacated on “the mere possibility” that it violated an express limitation on the arbitrator’s power. See Tilbury Fabrics, Inc. v. Stillwater, Inc., 56 N.Y.2d 624, 627 (1982). In a compulsory arbitration, such as a 3020-a hearing, the award must be “supported by evidence or other basis in reason, as may be appropriate, and appearing in the record.” Matter of Gongora v. New York City Dept. of Educ., 98 A.D.3d 888, 889 (1st Dep’t 2012). Additionally, “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.’” Id. at 889-90, quoting Lackow v. Dept. of Educ., 51 A.D.3d 563, 567 (1st Dep’t 2008).

Further, “a hearing officer’s determinations of credibility . . . 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 perform an impression of either candor or deception’.” Lackow v. Dept. of Educ., 51 A.D.3d 563, 568 (1st Dep’t 2008) (quoting Berenhaus v. Ward, 70 N.Y.2d 436, 443 (1987)).

Here, under this narrow standard of review, Petitioner fails to allege facts sufficient to warrant vacatur of the Award. Accordingly, the petition fails to state a cause of action and must be dismissed.

B. Petitioner Fails to Establish that the Penalty of Termination was Irrational, Arbitrary and Capricious, Excessive, or Shocking to the Conscience

Petitioner alleges that the penalty of termination is irrational, arbitrary and capricious, excessive, and shocking to the conscience. See Verified Petition at ¶ 31. An arbitrator's award may be vacated or modified only if the "punishment is so disproportionate to the offense, in light of the circumstances as to be shocking to one's sense of fairness." Pell v. Bd. of Educ., 34 N.Y.2d 222, 233 (1974). A penalty 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." Id.

In the instant matter, Petitioner was found to have engaged in poor lesson planning and execution, as well as failure to implement pedagogical recommendations. Hearing Officer Lendino found that despite repeated attempts from administrators to help Petitioner improve his lesson planning, Petitioner failed to implement remediation. Id. Even after AP Bailey provided Petitioner with a lesson planning template, Petitioner's plans consisted of "only scant comments, some scribbling, and nothing of pedagogical value." Id. See also Ex. 3 at DOE 069 – 70.

Petitioner provided little evidence that he was attempting to improve his performance. Petitioner presented into evidence two certificates of completion from professional development programs that were held in the spring of 2017. Ex. 1, p. 43; Ex. 4 at R 057 – 58. Hearing Officer Lendino noted that these certificates were issued following the service of disciplinary charges. Ex. 1, p. 43. Hearing Officer Lendino found that Petitioner's attendance at two courses did not address Petitioner's poor observation reports and his failure to implement his supervisors' suggestions. Id. Additionally, when asked on direct examination about additional

efforts to improve his pedagogy, Petitioner spoke of his enrollment in a master's degree program in sports management, which bore little relevance to his role as a classroom teacher.⁹ Ex. 2, pp. 552 – 55. Hearing Officer Lendino concluded that there was no evidence that Petitioner would improve his performance if he were given another opportunity. Id.

Petitioner alleges that Hearing Officer Lendino issued a penalty of termination without providing Petitioner with an opportunity to remediate his deficiencies. Verified Petition at ¶ 32. However, Hearing Officer Lendino's opinion contains a detailed analysis of the remediation opportunities provided to Petitioner and Petitioner's failure to incorporate this remediation into his pedagogy. Ex. 1, pp. 35 – 37, 41 – 43. Hearing Officer Lendino found that DOE established that 1) there were deficiencies in Petitioner's pedagogy; 2) Petitioner was on notice of these deficiencies; 3) DOE attempted to remediate these deficiencies and; 4) despite DOE's efforts, Petitioner remained incompetent. Ex. 1, p. 41. Therefore, Petitioner's assertion that the penalty of termination shocks the conscience because Petitioner was not provided with an opportunity to remediate his deficiencies is in sharp contradiction to the record.

Courts have upheld the penalty of termination in situations where teachers failed to implement remediation. See Eilenberg v. City of New York, Index No. 654780/2016, 2017 N.Y. Misc. LEXIS 223 (Sup. Ct. N.Y. Cnty. Jan. 18, 2017) (upholding penalty of termination when a hearing officer found that a guidance counselor had no desire to remediate her poor performance); Matter of Bell v. New York City Dept. of Educ., 30 Misc. 3d 1224(A) (Sup. Ct.

⁹ Petitioner stated, "Sports management gave me another lens of how to structure things and—and say even materials, getting sponsorship, and how to get sponsorship; because some of the things that I want to do, it's going to take money, and it's going to—it may take a little bit of money, but there's people that, in fact, will sponsor some of the things, and have my—I want my room to look—I want to be competitive. I want to—I don't want to—I don't want to ever look at my class room and say I don't have space, I don't this, I don't have that. And with sports management, it gave me that for the sports that I do, but it also gave me the building of a class room, a building of a school building, and looking at them from an administrator's standpoint, and a different lens so that I can say, okay, this is what she wants to see. This is the colors, or they're going to like this, they're going to like that, and that's why I thought it was a win win." Ex. 2, p. 555.

N.Y. Cnty. 2010) (termination did not shock the conscience when hearing officer found that teacher was provided with sufficient remediation opportunities and continued to provide incompetent service). In the instant matter, Hearing Officer Lendino found that Petitioner was either unwilling or unable to improve his performance. Therefore, it does not shock the conscience that Hearing Officer found termination to be the appropriate penalty, as there was no evidence that Petitioner's teaching performance would improve if given another chance.

Further, Petitioner's sixteen-year employment with DOE does not prohibit the penalty of termination. "[E]ven a 'long and previously unblemished record does not foreclose dismissal from being considered as an appropriate sanction.'" Rogers v. Sherburne-Earville Cent. Sch. Dist., 17 A.D.3d 823, 824-825 (3d Dep't 2005), quoting Keith v. New York State Thruway Authority, 132 A.D.2d 785, 786 (1987). Hearing Officer Lendino found that Petitioner's length of service had no bearing on the penalty, as Petitioner had not demonstrated that his performance would improve. Ex. 1, p. 43.¹⁰

In that Petitioner fails to establish that the penalty was irrational, arbitrary and capricious, excessive, or shocking to the conscience, the petition must be dismissed.

C. Petitioner's Remaining Assertions Do Not State a Basis for Relief Under CPLR § 7511

Petitioner asserts that Hearing Officer Lendino made conclusions about the veracity of Petitioner's medical conditions and that this prejudiced the hearing officer. Verified Petition at ¶ 33. Additionally, Petitioner asserts that Principal Philip retaliated against Petitioner and that Hearing Officer Lendino, "completely discounted the false previous charges" from a

¹⁰ Petitioner taught physical education for the majority of his career. Due to changes in licensing requirements for physical education teachers, Petitioner became a classroom teacher at the beginning of the 2013-2014 school year. Ex. 2, p. 640. Petitioner testified that he has a Common Branches certification, which permits him to teach any elementary grade above first grade. Ex. 2, p. 581.

prior disciplinary proceeding. Verified Petition at ¶ 33 – 35. Petitioner fails to tie any of these allegations to the limited grounds for vacatur of an arbitration award.

Petitioner's bare allegation that Hearing Officer Lendino's credibility determination "prejudiced [Lendino's] view of [Petitioner]" is not a ground for vacatur of the award. At times, Petitioner's testimony conflicted with that of AP Bailey or Principal Philip. It is the role of the hearing officer to assess witness credibility and determine whose testimony to credit. Lackow v. Dept. of Educ., 51 A.D.3d 563, 568 (1st Dep't 2008). Hearing Officer Lendino explicitly noted that Petitioner was not charged with leave abuse, and that he would make no findings in that regard. Ex. 1, p. 39. Hearing Officer Lendino found that Petitioner's testimony that he volunteered at football games at a time when he told DOE that he was physically incapable of teaching, "is reflective of [Petitioner's] veracity and mindset. It weighs heavily concerning his overall credibility." Id.

A claim of arbitrator bias must be proven by clear and convincing evidence. Brezski v. Rockville Ctr. Union Free School Dist., Index No. 277/12, 2012 N.Y. Misc. LEXIS 2114 at *21 (Sup Ct. Bronx Cnty. Apr. 18, 2012). Petitioner's assertion that Hearing Officer Lendino's credibility determinations "prejudiced" the hearing officer's opinion of Petitioner is insufficient to demonstrate bias. See Matter of Benjamin v. City of New York, Index No. 104905/2011, 2012 N.Y. Misc. LEXIS 6604, at *7 – 8 (Sup. Ct. N.Y. Cnty. Apr. 2, 2012) ("The fact that [the hearing officer] made credibility determinations that were adverse to the petitioner does not constitute bias on his part."). Therefore, Petitioner has failed to state a claim regarding partiality of the hearing officer.

Further, Petitioner alleges that Hearing Officer Lendino ignored Petitioner's prior 3020-a charges, which were dismissed, and Principal Philip's alleged "retaliatory history."

Verified Petition at ¶ 34 – 35. In contrast to Petitioner’s assertions, Hearing Officer Lendino’s decision contains a detailed analysis of Petitioner’s allegations of discrimination and retaliation. Ex. 1, pp. 32 – 35. Hearing Officer Lendino concluded that the evidence in the record supported that P.S. 93 administrators wanted Petitioner to succeed and provided him with professional development opportunities. *Id.* at 33. Additionally, Hearing Officer Lendino found that there was not sufficient evidence to support Petitioner’s assertion that administrators purposely assigned him a roster of students with behavioral difficulties. *Id.* at 32. Hearing Officer Lendino considered Petitioner’s allegations of discrimination, but found that they were “accusations without supportive evidence.” Ex. 1, p. 35.

The award in a 3020-a decision must be “supported by evidence or other basis in reason, as may be appropriate, and appearing in the record.” Matter of Gongora v. New York City Dept. of Educ., 98 A.D.3d 888, 889 (1st Dep’t 2012). Petitioner has failed to demonstrate that Hearing Officer Lendino’s decision was not based on the evidence in the record. Therefore, the petition should be dismissed.

POINT II

THE CITY OF NEW YORK IS NOT A PROPER PARTY TO THIS ACTION AND ALL CLAIMS AGAINST RESPONDENT CITY OF NEW YORK SHOULD BE DISMISSED

Despite well-established law that the City and the DOE are distinct legal entities and the City is not responsible for employment decision by the DOE, Petitioner nonetheless named the City as a respondent. See Perez v. City of New York, 41 A.D.3d 378, 379 (1st Dep’t 2007). All of the allegations in the petition concern actions taken by DOE and not the City of

New York. See generally Verified Petition. Therefore, the City of New York is not a proper party to this action and all claims against the City of New York should be dismissed.

CONCLUSION

For the foregoing reasons, respondents respectfully requests that the Court grant their cross-motion to dismiss the petition and deny the relief requested therein in its entirety, with such other and further relief as this Court deems just and proper.

Dated: New York, New York
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