NEW YORK STATE EDUCATION DEPARTMENT
UNIVERSITY OF THE STATE OF NEW YORK

In the Matter of the Disciplinary Proceeding between

SED File No.
27,657

NEW YORK CITY DEPARTMENT OF EDUCATION,

Complainant,

and

OPINION AND AWARD ON REMAND

DAVID P. SUKER

Respondent,

Pursuant to EducationLaw Section 3020-a

Before **SUSAN SANGILLO BELLIFEMINE, Esq.,** Hearing Officer

APPEARANCES:

For the Complainant
Courtenaye Jackson-Chase, Esq., General Counsel, New York City Department of Education
Alice Tam Tien, Esq., Of Counsel
Krishna O'Neil, Esq., Of Counsel

For the Respondent
Eisner & Associates, P.C.
Eugene G. Eisner, Esq.
Maria L. Chichendantz, Esq.

On remand from the New York Supreme Court, Appellate Division, First Department decision, *In re Matter of Suker v. New York City Board/Dept. of Educ,* 129 A.D.3d 502 (1st Dep't 2015) ("Appellate Division Decision') and pursuant to the provisions of New York State Education Law Section 3020-a, this hearing officer was appointed to hear and decide on the appropriate penalty, less than termination, to be imposed by New York City Department of Education ("Department") against David P. Suker ("Respondent").

BACKGROUND

The Department preferred three sets of charges pursuant to Education Law Section 3020-a against Respondent. The matters were assigned to Hearing Officer Eleanor E. Gladstein, Esq., who consolidated the charges and held hearings on April 3, 5, 20, 2012, and May 2, 8, 11, 15, 2012. Closing arguments were heard on May 23, 2012. In her Opinion and Award, dated August 14, 2012, Arbitrator Gladstein determined that Respondent was guilty of Specifications 1 and 3, and not guilty of Specification 2 of the first set of charges; guilty of Specifications 1, 2 a, 2c, 2d, 2e, 2g, 4, 5 and 6, and not guilty of Specifications 2b, 2f, 2h, and 3 of the second set of charges; and guilty of Specifications 1, 2 and 3 of the third set of charges. Arbitrator Gladstein ordered that Respondent's service with the Department be terminated.

Respondent challenged Arbitrator Gladstein's decision in the Supreme Court of the State of New York County First Department, and Justice Alice Schlesinger granted Respondent's petition to vacate the award "to the extent of annulling those portions of [Arbitrator] Gladstein's decision which sustained Charge 3 and imposed the penalty of termination." *Suker v. City of New York City Board/Dept. of Educ.*, 2013 WL 3948422 (N.Y.Sup. Ct., 2013) p. 17 ("Schlesinger Decision"). She remanded the matter to the Department for the imposition of an appropriate lesser penalty in accordance with the terms of her decision. On June 11, 2015, the Appellate Division unanimously affirmed Justice Schlesinger's decision. On September 8, 2015, I was selected to decide an appropriate penalty consistent with the courts' decisions.

A telephonic conference was held on this remand on October 2, 2015, and continued in person on October 28, 2015. Further telephonic discussion concerning the information to be considered in this matter was held on November 5, 2015. Oral argument on the remand was heard before me on November 6, 2015, and both parties placed their oral arguments concerning the issue of penalty on the record and provided supporting case law. The Respondent submitted his written rebuttal on November 16, 2015 ("Respondent Rebuttal") and the Department submitted its written rebuttal on November 23, 2015 ("Department Rebuttal"). Upon receipt of the Department's written rebuttal the record was closed.

Since the court had annulled a portion of Arbitrator Gladstein's decision, and dismissed the third set of charges, prior to oral argument on the penalty, the parties conferred and with one exception agreed upon the record testimony and evidence which pertained to the remaining charges and which should be considered by me in this remand proceeding. Respondent asked that I consider a portion of the transcript of the oral argument before Justice Schlesinger and the Department objected. The Department contended that: i) this particular item was not before the Arbitrator in the underlying 3020-a hearing that has been remanded here; ii) it is improper for Respondent to use this item to indicate that there is information that Justice Schlesinger may have used in reaching her decision, because what Justice Schlesinger may or may not have considered in her decision is different from what is currently before me in this remand proceeding; and iii) the specific issue was not addressed in the Appellate Division's decision

which only decided whether or not Justice Schlesinger was correct in dismissing the third set of charges, and remanding the proceeding for an appropriate lesser penalty. Thus, the Department maintained that since the Appellate Division agreed that the matter should be remanded there is no reason for me to consider what they may have considered in reaching their determination. Respondent argued that in reaching her decision that termination would be an unduly harsh penalty for the remaining Specifications, Justice Schlesinger considered information that came forth in the Article 75 proceeding in questions that she asked the Respondent that he maintains were not considered before. Respondent urges that in affirming Justice Schlesinger, the Appellate Division specifically rejected the argument that she exceeded her authority and therefore anything that Justice Schlesinger considered pertaining to the charges that are currently before me is relevant to the issue of Respondent's ability to mitigate penalty. I have considered the arguments of the parties and reject the contention that oral argument before Justice Schlesinger is relevant to this remand proceeding. Her opinion is clear and unequivocal, as is the affirming opinion from the Appellate Division, and I am bound to do as ordered. Accordingly I will not consider the portion of the transcript identified by Respondent as evidence in this proceeding.

Both parties were represented by counsel in this proceeding and had a full opportunity to present record evidence, arguments and cases in support of their respective positions. Except as noted *supra*, the record evidence, arguments, and legal authorities presented by the parties have been fully considered in rendering this Opinion and Award on Remand, whether or not specifically addressed herein.

THE SPECIFICATIONS:

The following sets of charges and remaining specifications are to be considered in this penalty proceeding[1]:

David Suker (hereinafter referred to as "Respondent") under file #0749566, is a tenured teacher formerly assigned to GED Plus@ Bronx Regional Referral Center in the Bronx. During the 2011-2012 school year, Respondent engaged in inappropriate conduct and conduct unbecoming his profession.

In Particular:

SPECIFICATION 1: On or about and September 16, 2011 Respondent followed teacher Yanira Rodriquez into the guidance office saying, in a manner causing her to feel threatened, words to the effect of may it be the last time you talk about me behind my back.

[1] I have excluded the Specifications which Arbitrator Gladstein dismissed (Specifications 2 of the first set of charges; Specifications 2b., 2f, 2h, and 3,of the second set of charges) as well as those dismissed by the court (Specifications 1, 2 and 3 of the third set of charges.)

SPECIFICATION 3: Respondent was arrested on November 2, 2011 and failed to report the arrest in a timely manner as required by Chancellor's Regulation C-105.

The foregoing constitutes:

- Just cause for disciplinary action pursuant to Education Law §3020-a;
- Conduct unbecoming Respondent's position, or conduct prejudicial to the good order, efficiency, or discipline of the service;
- Substantial cause rendering Respondent unfit to perform properly his obligations to the service;
- Violation of Chancellor's Regulation C-105;
- Just Cause for termination.

[Department Ex.1A]

David Suker (hereinafter referred to as "Respondent") under file #0749566, is a tenured teacher formerly assigned to GED Plus@ Bronx Regional Referral Center in the Bronx. During the 2008-2209 and 2011-2012 school years, Respondent engaged in excessive absenteeism, inappropriate conduct and conduct unbecoming his profession.

In Particular:

SPECIFICATION 1: Respondent was excessively absent in that he was absent on the following dates:

a. September 15, 2011 Thursday
b. September 21, 2011 Wednesday
c. September 22, 2011 Thursday
d. September 23, 2011 Friday
e. October 5, 2011 Wednesday
f. October 17, 2011 Monday
g. October 25, 2011 Tuesday
h. October 27, 2011 Thursday
i. October 31, 2011 Monday
j. November 3, 2011 Thursday
k. November 4, 2011 Friday

SPECIFICATION 2: On or about October 24, 2011 Respondent , at Town Hall meetings held in the auditorium of the Bronx Regional High School:

a. Acted in an unprofessional and disruptive manner by causing students to make excessive noise and be uncooperative during a presentation provided by the New York City Police Department.
c. Publicly noted his dislike of the police.
d. Said that he had been arrested and beaten by the police.
e. Showed a scar on his head that he claimed came from being beaten by the police.
g. Exchanged high-fives and raised fist gestures with students.

SPECIFICATION 4: On or about February 13, 2009, Respondent threw Student LGs* GED test application into the garbage can and directed her to leave the room when she refused to participate in a game of Jeopardy.

SPECIFICATION 5: On or about February 15, 2009, Respondent refused to allow student LG to enter his classroom requiring her to work alone.

SPECIFICATION 6: On or about the dates below, Respondent directed Student EB* to work independently and did not permit her to remain in his class:

a. February 27, 2009:
b. March 3, 2009.

The foregoing constitutes:

- Just cause for disciplinary action pursuant to Education Law §3020-a;
- Conduct unbecoming Respondent's position, or conduct prejudicial to the good order, efficiency, or discipline of the service;
- Substantial cause rendering Respondent unfit to perform properly his obligations to the service;
- Violation of Chancellor's Regulation C-105;
- Violation of Chancellor's Regulation A-421;
- Excessive absenteeism;
- Just Cause for termination.

* Students' names to be provided prior to trial.

[Department Ex. 1B]

HEARING OFFICER AWARD

In finding Respondent guilty of Specification 1 of the first set of charges, Arbitrator Gladstein found that Respondent: i) followed Ms. Rodriquez into the guidance office after first attempting to speak with her in the hallway near the office; ii) was upset when he entered the room; iii) raised his voice saying to Ms. Rodriquez, "If you have something to say, say it to my face don't talk about me behind my back;" and iv) was never closer than five feet from Ms. Rodriquez. She credited Ms. Rodriquez's testimony who, along with three other witnesses described Respondent's tone as aggressive, his voice loud, and his face red and angry. She noted that Ms. Rodriquez felt that Respondent's body language was aggressive and that therefore she contacted Principal Robert Zweig, called the police and never spoke to Respondent after the incident.

In finding Respondent guilty of Specification 3 of the first set of charges, Arbitrator Gladstein found that Respondent did not "immediately" notify the Department of his November 2, 2011, arrest as required by Chancellor's Regulation C-105 since he did not send his notification until November 8, 2011. [Department Ex. 7; Respondent Exs. 5 and 6]

In finding Respondent guilty of Specification 1 of the second set of charges Arbitrator Gladstein noted that Respondent was on notice of the consequences of excessive absenteeism because he'd been fined $1,000 for excessive absence for the 2010-1011 school year. Nevertheless she noted that he was absent on eleven days between September 15, 2011 and November 4, 2011. She noted that Respondent "was not charged for authorized FMLA absences during this time period," and although Respondent testified that he called in his absences on several of the dates in question, the record did not support that claim. [Gladstein Opinion and Award, at p.16] She further noted that although he testified that his father had been sick with Parkinson's disease, he had eye surgery and his fiancé was pregnant; he was not able to "state that any of the dates in the charged absences corresponded to the eye surgery, his father or his fiancé." [*Id.*]

In finding Respondent guilty of Specifications 2 a, c, d, e, and g of the second set of charges Arbitrator Gladstein concluded that the credible evidence demonstrated: i) that students and teachers were all required to attend a Town Hall Meeting where police officers were scheduled to speak; ii) at that meeting Respondent publicly noted his dislike of the police, said that he had been arrested and beaten by the police, showed a scar on his head; exchanged high fives and raised fist gestures with students; and that this conduct caused the students to "make excessive noise and be uncooperative" as alleged. [*Id.* at p. 21]

In finding Respondent guilty of Specification 4 of the second set of charges Arbitrator Gladstein noted that Respondent did not deny that he threw Student L.G.'s GED test application into the garbage and told her to leave the room, but maintained that he did not do so on purpose. She found, however, that "the weight of the credible evidence [did] not support his testimony." [*Id.* at p. 24] She noted that Student L.G. testified that she and Respondent were arguing, he told her he was going to throw out her application, that he took it out of a manila folder, crumpled it up in front of the class and threw it in the garbage. Arbitrator Gladstein further noted that two student statements taken at the time of the incident also indicated that Respondent threw the form into the garbage. Finally, she noted that Principal Zweig testified that when interviewed, Respondent told him that a "student's behavior is one of the criteria of whether a student should sit for an exam and he acknowledged that he threw L.G.'s paper in the garbage," and that even Respondent acknowledged that he did not tell his principal that he thew it out accidentally with the scrap paper. [*Id.*] She further credited Principal Zweig's testimony that there are procedures to be followed to remove an unruly or disrespectful student from the classroom but Respondent had not followed them.

In finding Respondent guilty of Specification 5 of the second set of charges, Arbitrator Gladstein noted that Respondent did not dispute that he refused to allow Students L.G. to enter his classroom. He maintained, however, that the problems he was having with her were not being resolved and that he told the guidance counselor that she would have to work independently with the paraprofessional until there was a meeting with the guidance counselor. Arbitrator Gladstein credited the testimony of Principal Zweig, who testified that at the time Respondent barred L.G. from the classroom there was no appointment scheduled with the guidance counselor, that there are procedures to be followed before a student can be barred from the classroom, that Respondent failed to follow those procedures, and given the circumstances here, Respondent did not handle the matter in the appropriate way.

In finding Respondent guilty of Specification 6 of the second set of charges, Arbitrator Gladstein noted that Respondent did not dispute the allegation in the charge but testified that he told Student E.B. to leave the class and work with the paraprofessional because she made profane remarks towards homosexuals. She found, however, that Respondent once again failed to follow the proper procedures to address the behavior before the student could be barred from the class.

As for penalty, Arbitrator Gladstein summarized these charges as follows:

> Respondent has been found guilty of a number of charges including excessive absenteeism, unprofessional conduct towards a colleague, inappropriate and disruptive behavior at a school assembly, inappropriate behavior in the manner he dealt with Students L.G. and E.B. and failure to report an arrest in a timely manner.

[Gladstein Opinion and Award, at p. 32] She then focused upon the Specifications contained the third set of charges, before concluding:

> Given all the facts and circumstances of this case the Department of Education has just cause to terminate the services of Respondent, David Suker, upon receipt of this Award.

[*Id.* at p. 33]

SUPREME COURT AND APPELLATE DIVISION DECISIONS

Respondent appealed this decision pursuant to Article 75 of the C.P.L.R. On July 25, 2013, Justice Alice Schlesinger found that all of the acts alleged in the third set of Specifications were time-bared under Section 3020-a of the Education law, and annulled Arbitrator Gladstein's decision to the extent it sustained the third set of charges. Having annulled the third set of charges Justice Schlesinger reviewed the remaining Specifications upon which Respondent was found guilty and concluded that they did not "even in the aggregate" constitute conduct warranting termination of his employment with the Department. [Schlesinger Decision, at p.15] Accordingly, she remanded the matter to the Department "for the imposition of an appropriate lesser penalty in accordance with the terms of [her] decision." [*Id.* at 17]

The Department appealed Justice Schlesinger's decision. By decision dated June 11, 2015, the Supreme Court of the State of New York, Appellate Division, First Department, unanimously affirmed Justice Schlesinger's decision that the third set of charges was time-barred. It then noted "[a]s the DOE essentially conceded at the disciplinary hearing, the first and second set of charges against petitioner do not support the penalty of terminating petitioner's employment with DOE. Accordingly, Supreme Court correctly remanded the matter to DOE for the imposition of an appropriate lesser penalty." [Appellate Division Decision, at p. 3]

POSITIONS OF THE PARTIES

Position of the Department

The Department notes that the school in which Respondent taught was a special alternate program for 17 to 21 year old students pursuing a GED who were already at risk or troubled. It argued that given its unique nature it struggled with student attendance, resilience, and retention and that continuity and stability were crucial. It maintained that there was only one classroom and Respondent, the only teacher at the site. The Department urged that this fact never seemed to effect Respondent who did not follow proper protocols, and acted as if the rules did not apply to him. It notes that Arbitrator Gladstein found him guilty of being absent 11 times in the span of just two months at the beginning of the 2011 to 2012 school year; and that in addition to being

absent he failed to either call in his absences or report them as required. It notes that he had been on notice that this conduct would not be tolerated since he had been found guilty of excessive absenteeism the previous school year, and had been fined $1000 by the hearing officer who heard those charges. It urges that Respondent's absences had a tremendous impact on the students at the site since he was the only teacher. Further it argues that Respondent's argument that he cannot be terminated for medically excused absences, or that the fact that some of the absences were medically validated is somehow a mitigating factor is incorrect, and that the court has recognized that excessive absenteeism may warrant termination even if the validity of the reason for the absences was not contested.

With respect to Specifications 4, 5 and 6 of the second set of charges the Department maintains that in dealing with Students L.G and E.B, Respondent failed to follow protocols in documenting student misbehavior by either filing occurrence reports or writing anecdotal. It argues that instead of following protocols when Student L.G refused to participate in the game of Jeopardy, he took it upon himself to throw away Student L.G's test predictor, embarrassed and belittled her in front of her peers, and refused to allow her to go back into the classroom. It highlights the fact that Student L.G credibly testified: i) that she had a history of trouble but that Respondent's actions made her feel like her opinion and feelings did not matter; ii) that she believed that her academic performance warranted a test date and that Respondent had no right to deprive her of that opportunity; iii) that in addition to throwing the test predictor in the garbage Respondent told her it was his when she tried to retrieve it but that she wanted to earn her GED so badly that she went through the garbage can to retrieve it. It notes that Student L.G. felt so strongly about what Respondent did to her that she returned to testify at the §3020-a hearing even though she was no longer a student at the school. Likewise, with respect to Student E.B the Department maintains that Respondent failed to follow procedure when he told Student E.B to leave the class, which it maintains is essentially telling him to leave the site. In doing so it argues that Respondent did not follow the processes designed to uphold students' progressive discipline rights.

The Department argues that Respondent's failure to follow protocols was also evident in his failure to immediately notify the Department of his November 2, 2011 arrest. It maintains that the evidence showed that he was released from prison on November 4, 2011, but did not notify the DOE until 3 days later in clear violation of Chancellor's Regulation C-105.

The Department argues that Respondent's guilt of Specification 2 of the second set of charges also clearly demonstrates that he does not believe that the rules apply to him. It argues that Principal Zweig, Assistant Principal De Ceclet and two teachers all testified regarding the town hall incident. While Respondent claimed that he was exerting his right of free speech and that he was just giving students something to think about, it maintains that this town hall was not the right forum and Respondent's conduct was inappropriate in that he went about it the wrong way. The Department argues that Respondent has failed to present any evidence at the 3020-a hearing in support of an argument that his conduct was somehow constitutionally protected and that the record is clear that his actions involved his private concerns and that neither the New

York Supreme Court nor the Appellate Division dismissed this charge. The Department urges that the proven Specification shows that he incited students to "boo" the presenters from the NYPD, that he created a disorderly situation in which presenters were disrespected and it was only fortuitous that no actual violence erupted. The Department maintains that Respondent failed to return to his seat despite being asked to do so, went back to the front of the auditorium, raised his fists which led the students to do the same, he sat on the stage pumping his fists while presenters spoke, and that his conduct not only riled up the students so that they were clapping, cheering and chanting but also ultimately led to the administrators losing control of the town hall and closing the meeting. This conduct was disrespectful, unprofessional and without regard to his profession, and it also caused some students to become upset and cry.

Finally, the Department argues that Respondent's guilt of following a fellow teacher into the guidance office and yelling in an aggressive tone, "If you have something to say, say it to my face," is a further indication of his clearly unprofessional conduct. They argue that the record demonstrated that his face was red, his voice loud, and that his conduct caused his fellow teacher to be nervous and feel threatened.

The Department argues that a penalty of a lengthy suspension of at least six to nine months is required to act as a deterrent to future misconduct and to impress upon educators that inappropriate behavior is unacceptable and will result in harsh discipline. It argues that the proven specification show that Respondent did not conduct himself in a manner that he was expected to as a role model and that he used poor judgment. It notes that Respondent's argument that I consider that Respondent was somehow already punished because he was assigned to a reassignment center is inapt and inconsistent with the collective bargaining agreement between the Department the UTF, which provides to the contrary in a side letter. Likewise it notes that what has happened to Respondent during the pendency of this matter should also not be considered because the only issue before me is a determination of the appropriate penalty given the proven charges. It maintains that if I were to make a "decision that does not encompass the whole time, [Respondent] would be entitled to back pay." [Tr.103:18-20] The Department submitted cases which they argued supported their position that the proven charges warrant a lengthy suspension.

Position of the Respondent

The Respondent for his part argues that he had served as a teacher with the Department for over 17 years, the majority of which was spent teaching troubled, at risk students ages 17 to 21, some of whom had just been released from prison. He notes that over the years the majority of his students have been "Black and Latino and have come from communities plagued by crime and heavy police presence due to the New York Police Department's controversial stop and frisk program." [Tr. 66:13-16] He further notes that he has a spotless record as a teacher and was granted tenure at the earliest possible time.

Respondent argues that the suspension sought by the Department is too severe and that although a fine of $2,650 and a reprimand is more aligned with the logic used in cases discussed in his rebuttal, a fine of $5000, would be acceptable. In the alternative, he argues that if I were to consider the punishment he has already faced (his three years of unemployment while raising a newborn baby as a single father, the loss of professional development, the hardship experienced by his daughter during the DOE's investigation of the now time-barred third set of charges, and the one and a half years in 2009 that he was removed from his duties while his conduct was investigated), I would find that the interests of justice dictate that no penalty be imposed upon Respondent.

Specifically, Respondent maintains that the Department's contention that he engaged in insubordination and verbal abuse is inapt since Arbitrator Gladstein did not make such a finding, nor could she have done so, since he was never charged with insubordination or verbal abuse and it is a matter of well settled law that a teacher cannot be found guilty of charges not contained in the specifications against him. Rather, he maintains that the nature of the conduct for which he is subject to penalty consists of:

> 1. A single act of unprofessional conduct towards a colleague characterized by Justice Alice Schlesinger as an 'incident of rudeness to another teacher.'
> 2. Failure to follow procedures for dealing with student misbehavior in 2009;
> 3. Failure to report an arrest within 24 hours;
> 4. Eleven absences; and
> 5. Acting in an unprofessional manner during a Town Hall Meeting.

[Respondent's Response to Complainant's Penalty Request, at p. 2 (footnotes omitted)] He maintains that I should not be persuaded by the Department's attempts to recast or supplant Arbitrator Gladstein's plainly stated finding into insubordination and verbal abuse in a thinly veiled effort to maximize his penalty.

Respondent notes that Arbitrator Gladstein found him guilty of Specifications 4, 5 and 6 of the second set of charges which involve his inappropriate way of dealing with behavioral issues involving two students in February and March of 2009. He maintains, however, that there are mitigating factors that should be considered in this penalty determination. Specifically, he asked that I consider that: i) while Arbitrator Gladstein found him guilty of failing to follow protocols in documenting student misbehavior, Principal Zweig testified that there is no specific policy for dealing with day-to-day student misbehavior; ii) the Students L.G and E.B. were indisputably insubordinate and disruptive on the days in issue as well as other days; iii) Student L.G.'s mother testified that her daughter considered him to be a "great teacher;" iv) the student population consists of troubled adolescents with a turnover rate of 8,000 students per year; and v) Respondent was alone as the only teacher at the site. He argues that *Polito v. New York City Dep't of Educ.*, 104 A.D. 3d 4604 (2013) is instructive on the issue of penalty. In *Polito* the court reduced the arbitrator's imposition of a $7,500 fine to a $2,500 fine upon a "special education

teacher who threw a book at a disruptive student and, in front of the entire class, stated 'Here Mr. Smarty Pants, let's see if you can read!'" [Respondent's Response To Complainant's Penalty Request, at p. 3] He argues that the severity of Polito's conduct far exceeded his in the instant matter and that therefore a significantly lesser penalty is appropriate. He urges that the cases that the Department cited are not similar to the conduct at issue here and therefore provide no real guidance on the issue of penalty in this matter.

With respect to Specification 1 of the second set of charges, Respondent notes that his absenteeism consists of 11 absences, four of which the Department classified as "medically certified," one classified as "self-treat" and the remaining six "unauthorized." *Id.* at 7. He argues that the case cited by the Department in support of its requested penalty is distinguishable because the teacher in that case had accumulated an incredible number of absences during a multi-year period, including sixty-eight unexcused absences in one school year and had not established any entitlement to FMLA leave. He argues that of his six unauthorized absences, two were because he was in jail for his arrests related to his Occupy Wall Street activity, and four would have been covered by his FMLA leave request, if he had followed the correct procedural formalities. While he acknowledges that he did not follow the correct procedure to have the four days he cared for his father covered by his authorized FMLA leave, he maintains that at the time he actually believed that he had followed the proper procedures, which is relevant to his state of mind. Accordingly, while he had been previously fined for excessive absenteeism for the 2010-2011 school year, here he has presented a valid reason for each of the absences. In addition, he points out that although the Department has argued that his absences were even more disruptive because he was the only teacher, he maintains that the record demonstrates otherwise.

Respondent argues that Specification 1 of the first set of charges involves conduct that, "simply does not rise to the level of penalty under 3020-a, as it consists of what the DOE characterizes, as 'one instance of discourtesy to a colleague.'" [Tr.76:20-22] He notes that while Ms. Rodriquez testified that she felt threatened by his conduct because "his face was red and his eyes were bulging" when he said, "I don't appreciate you talking behind my back," the entire transaction was verbal and he never came within five feet of Ms. Rodriquez. He maintained that in her remand decision Justice Schlesinger correctly characterized this conduct as merely "an incident of rudeness to another teacher" [Schlesinger Opinion, at p.11.]

Respondent noted that in sustaining parts of Specification 2 of the second set of charges, Arbitrator Gladstein determined that he: i) acted in an unprofessional and disruptive manner by causing students to make excessive noise and be uncooperative during a presentation provided by the New York police department, ii) publicly noted his dislike of the police by saying that he had been arrested and beaten by the police and showing a scar on his head that he claimed was received from a police beating; and iii) exchanging high fives and fist gestures with students. He argues that his comments concerning police violence and his arrest at a public protest constituted matters of public concern, and while he cannot now dispute the Arbitrator's findings that his

conduct was "unprofessional" and "disruptive," he cannot be penalized for the content of his speech, which was constitutionally protected.

Finally Respondent acknowledges that it is undisputed that he failed to report his arrest at an Occupy Wall Street demonstration within the 24-hour window required by the Chancellor's Regulations. However, he urges that I consider as mitigating the fact that it was impossible for him to comply since he was in jail for two days after his arrest.

Respondent distinguished the cases submitted by the Department in support of a lengthy suspension and provided a number of arbitral and court decisions in support of his position.

PENALTY

This matter has been remanded to me to determine the penalty, which the court ordered must be less than termination, that will be imposed upon the Respondent based upon the already proven Specifications. The Department argues that Respondent must receive "a penalty that will impress upon him that the behavior that he engaged in will not be tolerated or condoned by the Department." [Department Rebuttal, at p.2] It maintains that therefore the appropriate penalty for the proven Specifications must be a lengthy unpaid suspension of at least six months to nine months. Respondent counters that the Department's request for a lengthy suspension would be punitive — at his salary level a nine month suspension would amount to a penalty of $60,000, plus the added value of lost pension credit accumulation.[2] Respondent maintains that "[a]lthough a fine of "$2,650 ($1650 for absenteeism, $1000 for unprofessionalism regarding two unruly students) and a written reprimand is more aligned to the logic used by Judges and Arbitrators...[he] accepts a fine of $5000 as a penalty for all of the charges sustained against him." [Respondent's Response to Complainant's Penalty Request, at p.12]

The courts have long recognized that §3020-a hearings are not criminal proceedings and their primary function is not punitive. Rather they are designed to elicit a "determination of the fitness of the teacher against whom they may be brought to continue to carry on their professional responsibilities." *Bott v. Bd of Educ*, 41 N.Y.2d 265, 268 (1977). In assessing Respondent's fitness, I observe as an initial matter that the proven Specifications, in the aggregate, demonstrate that Respondent has failed to conform his conduct to the standards set by his administration and required of a teacher entrusted with the education of students. Indeed, as the Department has aptly argued, a recurring theme underlying Respondent's misconduct is his failure to follow the rules, his unprofessionalism and his inappropriate substitution of his judgment over that of his administrators. Specifically, Respondent was found guilty of:

[2] This calculation is an extrapolation from that contained in Respondent's Response To Complainant's Penalty Request which set his annual salary at approximately $80,000.

- Excessive absenteeism (11 absences) in the span of just two months at the beginning of the 2011 to 2012 school year, despite the fact that he had just been fined $1000 on August 9, 2011, for excessive absenteeism in the previous school year.
- Violating Chancellor's Regulation C-105 by failing to report his arrest in a timely manner.
- Unprofessional conduct by following a fellow teacher into the guidance office and saying in a manner that caused her to feel threatened, "If you have something to say, say it to my face don't talk about me behind my back."
- At a Town Hall meeting held in the auditorium of his school, acting in an unprofessional and disruptive manner by causing students to make excessive noise and be uncooperative during a presentation by the NYC police department; by: i) questioning publicly why the police were in the building, noting his dislike of the police and stating that he had been arrested and beaten by the police; ii) showing a scar on his head that he claimed came from being beaten by the police; and iii) exchanging high-fives and raised fist gestures with students.
- Throwing Student L.G.'s GED test predictor into the garbage and directing her to leave the room when she refused to participate in a game of Jeopardy and refusing to allow her to enter his classroom requiring her to work alone; and
- Directing Student E.B. to work independently and not permitting her to remain in his class on two occasions.

While Respondent argues that these charges are of not much consequence, and has attempted to minimize and/or excuse his misconduct, it is clear that while not justifying termination, the remaining charges are nevertheless serious. Moreover, much of the information he has presented to mitigate his penalty does not do so. For example, Respondent argues that his personal circumstances should mitigate the penalty that he should be assessed for his excessive absenteeism. I do not agree. His arguments were considered by the hearing officer in her determination and rejected as unproven.[3] Justice Schlesinger did not modify the hearing officer's findings with respect to that charge, nor did the Appellate Division. Equally clear is the fact that Respondent violated Chancellor's Regulation C-105 by failing to notify the Department of his first arrest as set forth in Specification 3 of the second set of charges. While I accept Respondent's excuse that he could not call within the 24 hour time frame because he was incarcerated for two days, I do not agree that this is a mitigating factor because as the

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[3]Specifically, she said:

> Respondent did not dispute that he was absent on the dates listed but stated his father had been sick with Parkinson's disease; he had eye surgery and his fiancé was pregnant. However, he could not state that any of the dates in the charged absences corresponded to the eye surgery, his father or his fiancé. Respondent did testify that he was absent on November 3 and 4, 2011 because he was in jail after his November 2, 2011, arrest.
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> Respondent testified that he called in his absences on several of the dates in the charges. The record does not support Respondent's claim to have called to advise he was absent. Respondent was not charged for authorized FMLA absence during this time period.

[Gladstein Opinion and Award, at p. 16]

Department noted, Respondent waited three more days before he notified the Department. While Respondent has offered various explanations for his proven unprofessional and disruptive conduct, the record clearly demonstrates that in each instance he crossed a line that resulted in: i) a teacher feeling threatened by him (Specification 1of the first set of charges); ii) students being removed from the classroom without the benefit of proper protocol, which in the case of Student L.G. left her feeling humiliated, disrespected and defeated (Specifications 4, 5 and 6 of the second set of charges); and iii) the disruption and discontinuance of a school sponsored Town Hall (Specifications 2 a, c, d, e, and g).[4]

Nor do I agree with Respondent's position that the proven charges are deserving of a lesser penalty because he has been found guilty of an assortment of unrelated conduct. While I appreciate as instructive Respondent's approach of proposing separate penalties for each individual charge, even if I were to agree that the charges are unrelated or that a charge, standing alone, may only warrant a reprimand, each of his acts of misconduct may nevertheless have a cumulative effect in setting a penalty. I must therefore assess the appropriate penalty based upon what the totality of the proven charges demonstrate about his fitness to teach.

I have also given serious consideration to Respondent's argument that he has already been penalized because he was unemployed for three years while raising a newborn baby as a single father, he lost professional development, and his daughter had to endure hardship during the DOE's investigation of a charge that was ultimately determined to be impermissibly brought. While I appreciate the amount of time that has elapsed as he defended and appealed these charges, these issues may not be properly considered by me in setting the penalty for the remaining proven charges. As the Department appropriately noted, the Arbitrator should simply consider the case on the merits in determining the appropriate penalty and if the penalty does not encompass the entire time Respondent was off payroll, he would be entitled to back pay.

What I do accept as mitigating is Respondent's lengthy career as an effective teacher in a special alternate program, with high turnover, where the students ranged in age from 17 to 21, who for various reasons were no longer students at traditional high schools, and were troubled or at risk. In addition, other than the prior charge for excessive absenteeism during 2010 to 2011 school year, there is nothing in the record or arguments of counsel that indicates that Respondent

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[4] Respondent's argument that he should not receive any penalty because he was engaged in protected speech under the First Amendment of the United States Constitution was presented at the §3020-a hearing (Gladstein Opinion, at p. 9); he was nevertheless found guilty of this charge. This finding was not overturned by either the Supreme Court or the Appellate Division, which remanded this matter for a penalty based upon the remaining charges. As he noted in his rebuttal argument, "[R]espondent cannot now dispute the Arbitrator's findings that his conduct was 'unprofessional' and 'disruptive'"..., [Respondent's Rebuttal at p. 10] Arbitrator Gladstein's opinion states that she based his guilt of this charge upon his disruptive and unprofessional conduct which she found caused the students to make excessive noise and be uncooperative. Therefore any penalty assessed, herein, is based solely upon the arbitrator's finding that he engaged in unprofessional and disruptive conduct and not based upon any protected speech in which he argues he may have been engaged.

had prior a disciplinary record. Also, as Justice Schlesinger noted, his classroom pedagogy has not been called into question.

Therefore, based upon the record I am not convinced that his proven misconduct warrants an unpaid suspension as the appropriate penalty. Furthermore, the cases cited by the Department in favor of a lengthy suspension are distinguishable from the instant case in several significant ways.

First, the precedents cited by the Department as demonstrating that suspension is a proper penalty in a remand proceeding for a lesser penalty, involved cases where the court had not disturbed the hearing officer's underlying findings or dismissed any of the underlying specifications. In other words the conduct that formed the basis for the hearing officer's initial penalty was the same as the conduct that had to be assessed by the hearing officer who was charged with determining the remanded lesser penalty. In the instant case, however, the Appellate Division affirmed Justice Schlesinger's dismissal of the third set of charges which found Respondent guilty of the serious charges concerning his submission of false documents so his daughter could attend school in district. Therefore, as Justice Schlesinger noted, the charges upon which this remand penalty is based are significantly different that than those upon which Arbitrator Gladstein based her original determination. Simply put, this is not a case where the court affirmed the hearing officer's findings, but concluded that the penalty of termination was so disproportionate as to shock one's sense of fairness. Rather, it is one where the court dismissed a portion of the charges and noted that if the hearing officer had ordered termination based solely upon the remaining charges, "it truly would have shocked the judicial conscious as being too harsh." [Schlesinger Opinion, at p.12] Second, the cases cited by the Department supporting its call for a lengthy suspension involved significantly different, and in most cases

more serious, misconduct that that found here.[5] Accordingly, while I agree with the Department's argument that these cases clearly show that lengthy suspensions may be upheld as appropriate by the courts, I do not agree that the proven Specifications justify that penalty here.

Thus, in assessing Respondent's fitness I find that the proven Specifications clearly demonstrate that he was excessively absent, he violated a chancellor's regulation, he exhibited unprofessional and disruptive conduct, he flouted procedures, and he failed to treat his co-worker and students with the respect expected in a professional environment. He has engaged in misconduct in which he acted without regard to his position and failed to act as a role model. He has continued to deny and/or minimize his culpability and I am not convinced that he truly accepts that any of his behavior was inappropriate or unacceptable. While I accept that one who denies events in a defensive litigation posture may not be expected to admit the misconduct or remorse for same; here, Respondent's misconduct has been determined by an arbitrator and upheld by the courts. It is time for Respondent to accept the seriousness of the remaining proven charges. In the full expectation that a monetary penalty will be sufficient to assure that Respondent will appreciate the seriousness of the charges and the need to avoid this type of conduct in the future, I make the following:

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[5] For example: *In the Matter of DOE v. C.R,* SED No. 17116 (Arb. R. E. Lowitt 2012) the hearing officer imposed a two year suspension without pay on remand, after her recommended five-year suspension was vacated on appeal. The hearing officer determined that CR not only made terribly offensive Facebook comments that ended up creating a media firestorm, but also lied, obfuscated her lie during the investigation and hearing process, and showed no remorse for her conduct. While Respondent's treatment of his students is implicated here, none of the proven Specifications involve dishonesty, obfuscation or negative publicity to the Department. *Sarro v New York City Bd of Educ, 47 N.Y.2d 913(1979)* upheld the five year suspension of a teacher who had been previously disciplined for sustained charges of corporal punishment, who without provocation, grabbed a student's jacket from him, physically blocked him from leaving the room, and challenged him by saying, if he were a man, he would step into the hallway. While Respondent has been found guilty of inappropriate conduct with respect to a colleague and inappropriate behavior in disciplining two student, none of the proven Specifications involve charges of corporal punishment or physical contact of any kind. *In the Matter of DOE v. C.M.*, SED No. 15,580 (Arb. M. Lazan 2015) and *In the Matter of DOE v. W.B.*, SED No. 17149 (Arb. E. Gladstein 2011) both concern teachers who were suspended for on-premises, on-duty sexual conduct or the consumption of alcohol. In *the Matter of C.M,* the hearing officer on remand for a penalty less than termination, imposed a two-year suspension as a penalty for the teacher who was found guilty of being inebriated and engaging in sexual activity with a fellow teacher in her classroom while the students and their families participated in an evening event in the school auditorium, the publication of which brought widespread notoriety to the Department. In *Matter of W.B.,* Arbitrator Gladstein, the same hearing officer as in Respondent's 3020-a proceeding, ordered a one year suspension and successful completion of a treatment program for an admitted alcoholic teacher, who was found to have consumed alcohol inside the school during school hours, on four separate occasions, as well as attempting to involve a fellow teacher to take the blame if he got caught. Here, none of the proven Specifications involve inebriated sex with a colleague, the consumption of alcohol, or the self protective acts of an alcoholic. Finally, *In the Matter of DOE v C.M.,* SED No. 26,624 (Arb. L. Murphy 2015) involves a teacher who was found to be incompetent due to unsatisfactory observations over the course of a three year period, whose termination was overturned and on remand was given a penalty of a two year suspension. Here, Respondent is not alleged to be an incompetent teacher.

AWARD ON REMAND

Respondent is ordered to pay a penalty of $7000 to be deducted in equal payments over a twelve-month period.

Dated: December 22, 2015
Cedar Grove, New Jersey

Susan Sangillo Bellifemine, Esq.
Hearing Officer

I, Susan Sangillo Bellifemine, Esq., affirm that I am the individual described in and who executed the foregoing instrument which is my Opinion and Award on Remand.

Susan Sangillo Bellifemine, Esq.