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

Kornreich

0101045/2003

PART 54

UNITED FEDERATION
vs
BOARD OF EDUCATION

SEQ 1

COMPEL OR STAY ARBITRATION

INDEX NO. 101045/03

MOTION DATE 4/10/03

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to/for Compel arbitration

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision.

SCANNED
MAY 15 2003

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 5/6/03

SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART **54**

…… **X**

In the Matter of Arbitration between

UNITED FEDERATION OF TEACHERS, LOCAL 2, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Petitioner,

Index No.: 101045/03

-against-

DECISION, ORDER and JUDGMENT

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, and JOEL KLEIN, as Chancellor of the New York City Public Schools,

Respondents

…… **X**

HON. SHIRLEY WERNER KORNREICH, J.:

I. BACKGROUND:

In 2000, the State Legislature enacted the Safe Schools Against Violence in Education Act ("SAVE'), now codified in, inter alia, N.Y. Educ. Law 2801 et seq. In order to comply with SAVE, respondents Board of Education et al. ("BOE") developed a system-wide Code of Conduct setting forth rules for the maintenance of order in the schools and on school property.

The Code of Conduct is divided into two parts. The first part provides a description of student behavioral standards as well as disciplinary measures and procedures to be used in the event of different kinds of student infractions.' The second part describes the policies and

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'The three subsections of Part I are broken down as follows: i. Standards of Behavior (including a City-wide Discipline Code, Students' and Parents' Rights and Responsibilities, and Anti-Discrimination Policies); ii. Disciplinary Measures and Procedures as Provided by Regulation of the Chancellor A-443; and iii. Related Processes, such as criminal complaints, juvenile

procedures established by respondents to provide a safe and orderly environment for learning and for ensuring the safety of students and school staff, including disaster and fire drills, building entry (e.g., search and seizure) procedures, and emergency communications.

The issue before the Court is whether Part I, Section ii of the Code of Conduct – the subsection dealing with Student Disciplinary Procedures within the school -- is subject to the parties' Collective Bargaining Agreement ("CBA"). UFT has maintained that all sections of the Code of Conduct are arbitrable, while the BOE contends that only Part II is arbitrable. In its Petition, UFT asks the Court to order enforcement of the Code by arbitration where, as here, teachers allege that their school administrators have failed to adequately enforce the Code "against students who were abusive to the teaching staff, thereby threatening the safety of ... students and teachers."

A. UFT's Position:

The UFT relies on Article 10B of the parties' CBA, which provides in pertinent part:

> The principal is charged with the responsibility of maintaining security, safety and discipline in the school. To meet this responsibility he/she shall develop in collaboration with the Union chapter committee and the parents' association of the school a comprehensive safety plan, subject to the approval of the Executive Director of School Safety.
>
> The safety plan will be updated annually using the same collaborative process, and reports of any incidents shall be shared with the Chapter Leader.
>
> A complaint by a teacher or the Chapter Leader that there has been a violation of the safety plan may be made to the principal as promptly as possible. He/she will attempt to resolve the complaint within 24 hours after receiving the complaint. If

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delinquency petitions, PINS petitions, Human Services Referrals, Corporal Punishment Policy, and Regulation of the Chancellor A-420. Part I thus addresses the spectrum of student behavior within the school, and analyzes, in ascending order of gravity: i. proper behavior (including standards therefor); ii. misbehavior (including in-school penalties therefor); and iii. criminal behavior or behavior beyond remedy by school authorities (including when and how recourse should be had to external agencies).

> the teacher or chapter is not satisfied, an appeal may be made to the Executive Director of School Safety who will arrange for a mediation session within 48 hours. If the teacher/chapter is not satisfied with the results of the mediation, an appeal may be made by an expedited arbitration process, to be developed by the parties. [Emphasis supplied.]

UFT also invokes an "On-line School Safety Plan" issued by the BOE to help individual school administrators update their school safety plans for the 2001-2002 school year to ensure compliance with N.Y. Education Law 2801-a ("School Safety Plans"). Section 100.1 of the On-line School Safety Plan is entitled "School Safety Plan Addenda," and reads in relevant part as follows:

> The School Safety Plan that you have just completed is intended to provide authorized personnel at the New York City Board of Education, New York City Police and Fire Departments, as well as other city agencies with information that is critical to an emergency response, and to ensure that schools operate in a safe manner in accordance with all governing laws and Board of Education policies. All parties to the development of the plan have therefore agreed that Education Law, Board of Education Policies, including but not limited to the Code of Conduct, and Chancellor's Regulations and Circulars pertaining to safety and security in schools are considered to be part of the School Safety Plan. It is therefore not necessary to append any of the aforementioned documents to the plan. [Emphasis supplied.]

B. BOE's Position:

It is BOE's position that this last provision was clearly intended "to eliminate voluminous attachments to the individual school safety plans, and not to make every section of the Education Law and every Board of Education policy subject to the arbitration provision of Article 10B of the Agreement." It is also BOE's contention that by the "expedited arbitration process" provided for in Article 10B, the parties did not intend the full-fledged, "formal American Arbitration Association-sponsored proceeding with all the accoutrements such a hearing would entail." See Letter dated October 15, 2002 from UFT's *Gary* Rabinowitz to New York City Department of

Education's Robert Waters, appended to Petition as Exhibit **3,** cited at greater length below, in which UFT admits subscribing to such an informal, ad hoc, non-AAA form of arbitration.

BOE further supports its position by reference to an April **8,2002** Decision by the Public Employment Relations Board (PERB) in a case entitled Matter of Impasse Between the UFT and the BOE (hereinafter "Matter of Impasse"), in which PERB decided various differences that had hindered the two sides from agreeing on a new CBA to replace the one that had expired in September-November 2000. See Exhibit B to BOE's Answer, at pp. 100-102. Among the issues analyzed by the three-man Fact-Finding Board was the instant dispute regarding whether or not a particular school's alleged non-compliance with student disciplinary aspects of the SAVE legislation was intended to be encompassed by the collective bargaining agreement. In its Decision, the PERB panel wrote, in relevant **part,** as follows:

> Although the City/BOE and the UFT agree that school safety is a primary concern, the UFT's proposal that the Safe Schools Against Violence in Education Act ('SAVE') would be incorporated within the collective bargaining agreement must be rejected. It would place a burden on the collective bargaining process with issues that do not impact on bargaining unit members. Thus, the subject is a non-mandatory one that cannot be recommended by the Panel. Moreover, [BOE] argues that the UFT proposal is a prohibited subject of bargaining, as public policy prohibits the bargaining away of any school district obligation concerning proper standards in the classroom. It is a very expansive statute to improve school safety throughout the State which was achieved through the amendment of five Separate State statutes....
>
> The City/BOE points out that in order to be in compliance with SAVE, it was required to develop and complete a system-wide Code of Conduct which covers the rights, responsibilities and protections of a variety of constituents, and that the 'vast majority' of these constituents are outside the scope of the UFT's bargaining unit.... Only one section of the Code of Conduct, Chancellor's Regulation A 443,[2] deals with a teacher's role in the student disciplinary process in terms of removing a student from the classroom who is 'substantially disruptive' or 'substantially interferes' with the teacher's authority....

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[2] I.e., Part I, Section ii of the Code of Conduct. See Footnote 1, supra.

> Incorporation of the Code of Conduct into the contract would no doubt result in giving all UFT-represented employees the right to file grievances over matters that strictly pertain to school supervisors and/or students.... The City/BOE maintains that even if the proposal were a mandatory subject of bargaining, the Panel should not consider its recommendation because a majority of the issues covered in the Code of Conduct have no relation to the UFT's bargaining units. It also points out that Chancellor's Regulation A-443 already provides teachers with the right to appeal to the Chancellor a principal's decision concerning the length of time that a student is removed from a classroom and/or the decision to set aside a removal. Therefore, the teachers already have an appeal process to use if they have concerns....

The PERB Panel concluded:

> The Union proposed to incorporate the Board's regulations implementing the SAVE legislation into the [CBA]. Considerable written submissions were introduced addressing whether this proposal is a mandatory subject of bargaining. Without in any way determining that legal question, we believe that there is no persuasive reason for the proposal at this time. Accordingly, this proposal is rejected.... Id. at p. 128.

C. Relevant Education Law/Regulation of the Chancellor A-443 Provisions:

Finally, also of relevance to the instant proceeding is **N.Y.** Education Law $3214-a ("3214-a"), governing "Teacher Removal of a Disruptive Pupil" from the classroom, which is essentially a restatement of Regulation of the Chancellor A-443 ("A-443").[3] See Exhibit A to Respondents' Answer. According to 3214-a/A-443, a teacher has the power to remove from the classroom any pupil who is substantially disruptive of the educational process or who substantially interferes with the teacher's authority over the classroom. The procedures set out in Education Law 3214-a and A-443 (i.e., Code of Conduct, Part I, Section ii) require that: a) Before removing a disruptive pupil, the teacher must provide the student with an explanation of the reason for the removal and allow the student to informally present his version of events – unless

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[3] A-443, in turn, forms the basis of Code of Conduct I.ii. See Footnote 1, supra.

the pupil poses a continuing danger or ongoing threat of disruption. See N.Y. Educ. Law 3214.3-a (a); A-443, at p. 21. b) The teacher must inform the principal of the removal and submit a completed Student Removal Form. Id. c) Thereafter, the principal must review with the teacher the circumstances leading to the removal, and the standards used in deciding that both the removal and its duration were appropriate. Conventional removals were usually for one to four days, as determined by the principal in consultation with the teacher, with consideration to the student's age, maturity, previous record, the circumstances of the incident, disability, etc. Id.; A-443 at p. 21. d) The principal must notify the student's parent(s) (or person in a parental relationship with the child) within 24 hours. If the parent requests an informal conference, one must be held within two school days, and the student must be allowed to present his/her version of events. See N.Y. Educ. Law 3214.3-a (b); **A-443,** at p. 22. e) The principal "shall not set aside the removal" unless s/he determines that the facts do not support the conclusion that the student committed the act or that the act substantially disrupted the class or substantially interfered with the teacher's authority over the classroom, or that the removal violates the law, or that the behavior warrants a suspension instead. See N.Y. Educ. Law 3214.3-a (c); A-443, at p. 22. f) A-443, at p. 23, goes on to provide that, if the teacher objects to the principal's setting aside of his "removal," and returns the removed student to class,

> [t]he teacher may appeal to the Chancellor or his/her designee the length of the removal or the principal/designee's determination to set aside the removal. Such appeal must be made within three school days of the principal's decision and may be filed by facsimile. The Chancellor/designee will make a determination within four school days of receipt of the appeal and appropriate records and arrange for notification to the principal, teacher and the student's parent. The decision of the Chancellor/designee is final. Regardless of the outcome of the appeal, the student shall remain in the classroom and shall not be subject to additional days of removal for the precipitating incident.

II. THE INSTANT DISPUTE:

In June 2002, five grievances were filed under CBA Article 10B on behalf of members of the UFT bargaining unit concerning, inter alia, the alleged failure of various school principals to adequately discipline students who had been reported as abusive and as threatening the safety of teachers and fellow-students, in violation of the Code of Conduct, Part I, Section ii.

In accordance with Article 10B of the CBA, representatives of the UFT and BOE participated in grievance mediation. In each of his five Memorandum Decisions, all dating from June 2002, Mediator James Liptack, of BOE's Division of Student Safety and Prevention Services, reported to the UFT that he would not address UFT's claims that the Principal had not properly enforced the Code of Conduct "and that [proper] disciplinary sanctions were not being imposed upon students, thus violating the School Safety Plan." Liptack went on to explain this refusal as follows:

> I have been advised that the UFT demanded in collective bargaining negotiations that the Code of Conduct be incorporated into all UFT collective bargaining agreements. That demand was rejected by a fact finding panel and is not included in the agreement tentatively agreed upon by the parties. I informed the UFT that any issue related to the application of the Code of Conduct would not be addressed at this mediation, and that this was not the appropriate forum for such an issue. The UFT requested that this issue remain 'open' and that they reserve the right to take additional action in an effort to address this issue.[4]

On September 11, 2002, the UFT filed a formal Demand for Arbitration with the AAA, seeking "[a] finding that Article(s) 10B and 20 have been violated and, further, a directive ordering the Board to enforce the Code of Conduct and to adhere to the School Safety Plan."

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[4]In three of these Mediations, other issues were raised and successfully resolved. In the two remaining Mediations, the alleged failure by a principal to adequately discipline a disruptive student, in purported violation of the School Safety Plan, was the only issue raised.

See Petition, Exhibit 2. Also in September 2002, the parties engaged in discussions regarding an expedited arbitration process for dealing with School Safety Grievances.

In the above-quoted October 15,2002 letter from UFT Grievance Department Special Representative *Gary* Rabinowitz to Department of Education Supervising Attorney Robert Waters, Rabinowitz acknowledged that the two sides had already agreed on September 23,2002 "that it was not in the interest of either party to hold a formal [AAA] sponsored proceeding with all the accoutrements such a hearing would entail" with respect to the School Safety grievances. In the same letter, Rabinowitz set out certain UFT-proposed rules for the informal "Expedited School Safety Arbitrations" that the two sides had agreed "would be most beneficial to all parties." However, a fair reading of Rabinowitz's proposed rules would have permitted an interpretation that a teacher's objections to a principal's implementation of Code of Conduct rules should be subject to the proposed expedited arbitration. Rabinowitz indicated that two arbitrators had already been selected for the informal process, and he invited Waters to "call... with any feedback."

On November 5, 2002, Waters wrote back that he considered Rabinowitz's proposed expedited arbitration procedures to be generally acceptable, but he insisted that they "be amended to specifically recognize that non-delegable Department responsibilities, such as its decisions regarding the suspension and discipline of students, are excluded from the scope of the procedure and are not subject to any arbitral review." See Exhibit 4 to Petition.

By letter to the parties dated November 22, 2002, the AAA suspended administration of the UFT's Demand for Arbitration, following a telephone call from a BOE official advising it that "the Board has not agreed to the procedures for this case, and therefore said matter cannot be

scheduled."

The instant proceeding to compel arbitration ensued.

III. DISCUSSION:

It is well established that a grievance may be submitted to arbitration only where the parties have agreed to arbitrate that kind of dispute and where it is lawful for them to do so. Matter of the Arbitration Between City of Johnstown v. Johnstown PBA, 99 N.Y.2d 273, 278 (2002) ("Johnstown"). In determining whether a grievance is arbitrable, the Court must engaged in a two-part inquiry. Id.; see also Matter of Board of Educ. of Watertown City School Dist., 93 N.Y.2d 132, 143 (1999) ('Watertown"); Matter of Acting Supt. of Schools of Liverpool Cent. School Dist., 42 N.Y.2d 509 (1977) ("Liverpool"). As a first step, the Court must decide the "may-they-arbitrate" prong – i.e., it must determine whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance. See Johnstown at 278; Liverpool at 513. If there is no prohibition against arbitrating, the court then examines the CBA to determine if the parties have agreed to arbitrate the dispute at issue – the "did-they-agree-to-arbitrate" prong. See Johnstown at 278; Watertown at 140; Liverpool at 513-514.

A. Whether there is a public volicv, statutory or constitutional prohibition against the arbitration sought by the UFT (Prong 1):

1) Public policv bar:

The power and responsibility of School Districts to establish and maintain classroom standards is nondelegable and nonnegotiable. Any attempt to infringe upon or bargain away the public school system's responsibility for the maintenance of educational standards in the classroom is violative of public policy. See Honeove Falls-Lima Central School Dist. v. Honeoye

Falls-Lima Education Association., 49 N.Y.2d 732 (1980) ("Honeoye Falls") [public policy prohibits arbitrator from assuming school district's nondelegable duties by substituting his judgment for that of school district regarding substantive decisions concerning maintenance of adequate standards in classroom]; Matter of UFT, Local 2 v. Board of Education, 298 A.D.2d 60 (1st Dept. 2002), lv. granted 99 N.Y.2d 508 (2003) [same]. A principal's decision as to whether to sustain a teacher's removal of a student from the classroom, and as to the length of that removal, is precisely the sort of "substantive" determination – i.e., one that has an immediate impact on the maintenance of standards in the classroom, and so directly affects the learning process – that has been found to be nonarbitrable on public policy grounds by the Courts. See Matter of Meehan v. Nassau Community College, 152 A.D.2d 313 (2nd Dept. 1989), appeal dismissed 75 N.Y.2d 1005 (1990); Matter of Monroe-Woodbury Central School District v. Monroe-Woodbury Teachers Assoc., 105 A.D.2d 786 (2nd Dept. 1984), appeal denied 65 N.Y.2d 604 (1985).

Accordingly, petitioner's application must be denied as violative of public policy.

2) Statuto? bar:

As indicated above, several provisions of the N.Y. Education Law require that principals of individual schools exercise authority over their teachers, and that they review their teachers' decisions regarding the removal of students from classes for disciplinary reasons. See N.Y. Educ. Law 3214(3-a)(a), (b). Among other things, the principal is endowed by statute with the authority to overrule the teacher on such a matter by performing an independent assessment of the propriety of the student's removal and the correctness of its duration. The teacher's recourse, if s/he is overruled, is to appeal the principal's decision to the Chancellor. See Chancellor's

Regulation A-443, p. 23. These supervisory duties, imposed upon a school principal by statute, cannot be limited or bargained away in a CBA. See Honeoye Falls at 734. Where the Education Law vests authority in respondents to make certain decisions, "it is beyond the power of the board to surrender this responsibility as part of any agreement reached in consequence of collective bargaining." Matter of Cohoes City School District v. Cohoes Teachers Assn., 40 N.Y.2d 774, 777-778 (1976).

Accordingly, petitioner's application must be denied as violative of statutory law as well as of public policy.

3) Constitutional bar:

Under the statutory framework set out in the Education Law and the Code of Conduct/A-443, as summarized above, a student who has been removed from class by a teacher has the right to due process. That is, the student and his/her parents have the right to a hearing before the principal. The principal's ultimate determination is based at least in part on his/her consideration of the student's version of events. UFT's proposal that the overruling of a teacher by a principal is subject to AAA arbitration under the terms of the teachers' CBA would deprive the student of his/her due process rights, because an issue of "student discipline" would ultimately be decided as a matter of "employment fairness," without input from the student and his/her parents. As PERB pointed out in Matter of Impasse, quoted above, classroom discipline involves the rights and responsibilities of children and of supervisory personnel whose conduct is outside the compass of the teachers' CBA -- notwithstanding the undeniable impact of "student discipline" on the quality of the teachers' working life in the classroom.

Accordingly, petitioner's application must be denied as violative of the due process rights

of parties not covered by the teachers' CBA.

B. Whether the parties agreed to arbitrate (Prong 2):

Although UFT's application must be denied for the foregoing reasons, a consideration of Prong *2* of the above-articulated test for arbitration -- i.e., whether the parties agreed to arbitrate the dispute for which arbitration has been demanded – would also necessitate denial.

The law requires that in the absence of an "express, direct and unequivocal" agreement to arbitrate a dispute, a Court reviewing the question or whether a matter is arbitrable must stay arbitration. See Matter of South Colonie School Dist. v. South Colonie Teachers Assoc., 46 N.Y.2d 521, 525 (1979); Liverpool at 510-511; see also Matter of Board of Education of Port Jefferson Union Free School District v. Port Jefferson Teachers' Assn., 243 A.D.2d 468,469 (2d Dept. 1997), leave den. 91 N.Y.2d 814 (1998).

It is clear from the history outlined above that the parties never agreed that Part I of the Code of Conduct was covered by the CBA. Indeed, as that history shows, UFT has repeatedly tried to have Part I of the Code "declared" part of the CBA in, e.g., proceedings before PERB – an effort that would have been unnecessary had the parties in fact agreed to arbitrate all disputes relating to enforcement of the Code. Meantime, BOE has steadfastly maintained that it will not arbitrate issues relating to student discipline, and PERB has sided with BOE – although it has not issued a definitive decision on the issue.

The Court finds that UFT has failed to identify any "express, direct, and unequivocal" provision of the CBA obligating BOE to arbitrate disputes arising from disagreements over the Part I, Section ii of the Code of Conduct. Moreover, the extra-CBA evidence it has pointed to does not rise to the level of establishing that the parties ever arrived at the requisite agreement to

arbitrate issues of student discipline. For example, an on-line instruction designed to relieve individual schools of the need to submit voluminous attachments to their updated building-based school safety plans is not persuasive evidence any such arbitration agreement. Accordingly, it is

ORDERED that the petition is denied and the proceeding is dismissed, with prejudice.

The foregoing constitutes the Decision, Order and Judgment of the Court.

Dated: May 6,2003
New York, New York

SHIRLEY WERNER KORNREICH