SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50Q

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Application of LAWRENCE SCHRIEBMAN, :Index Number 103280/04

Petitioner, :Decision, Order & Judgment

For an Order Pursuant to Article 75 and 78 of the CPLR and the Education Law Vacating In Part An Arbitration Award in Favor of :

THE NEW YORK CITY DEPARTMENT OF EDUCATION and THE CITY OF NEW YORK, :

Respondents. :

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ZWEIBEL, J.:

Petitioner Lawrence Schriebman ("Schriebman"), a former principal, now employed by the Department of Education of the City School District of New York ("BOE") as an assistant principal, commenced this proceeding, pursuant to CPLR section 7510, seeking a judgment vacating an arbitration award ("Award"). The Award found Schriebman guilty of disciplinary charges arising from his inappropriate behavior towards a student and inadequate performance as a principal. Specifically, the Award held that Schriebman had grabbed a student and pushed him into a wall; had received an unsatisfactory performance evaluation for the 2001-2002 school year; had failed to follow time and leave procedures; and had been excessively absent. Accordingly, the Award ordered Schriebman's removal as principal, and directed that he be reinstated to an assistant principal position.

Respondents oppose Schriebman's application and cross-move to dismiss. They also move to confirm the arbitral Award.

Background

Schriebman was employed by BOE as the Principal of Junior High School 82X ("JHS 82X") in the Bronx, New York. He was appointed as principal in 1997, and received tenure.

Schriebman's school was designated in 1994 as a School Under Registration Review ("SURR") based on standardized test results. As a result, Schriebman's school came under supervision of the Chancellor's District in 1999 and was administratively closed in 2002.

In December of 1999, a BOE representative spoke to Schriebman regarding student suspensions at his school, the conversation focusing on his alleged "strict enforcement of school rules" and his statistics regarding suspensions which were "too high." Schriebman's February 2001 mid-year review was satisfactory, although he was advised that he could improve his performance in a few areas. Schriebman was again criticized about his student disciplinary practices in May 2001.

Effective May 21, 2001, Schriebman was removed from his position as principal by letter dated May 18, 2001. Schriebman was reassigned to the Chancellor's Central District

Office in Brooklyn. Shortly thereafter, Schriebman received an unsatisfactory performance evaluation ("U-rating") for the 2000-2001 school year.

Schriebman was informed that he would remain in the District Office pending the investigation into allegations of misconduct based on, among other things, disciplinary incidents involving students at petitioner's school who claimed he used excessive force. Schriebman allegedly was not informed of specifics regarding the allegations against him prior to his removal.

The BOE's Office of Special Investigations ("OSI") conducted an investigation of the allegations against Schriebman. Schriebman was interviewed by the OSI investigator on October 23, 2001. On November 20, 2001, he was provided with a copy of a report issued by the OSI, dated October 29, 2001. According to Schriebman, the report and investigation by OSI on which it was based were "unfair and incomplete."

Schreibman denied the allegations to Dr. Sandra Kase, Superintendent of the Chancellor's District and provided her with additional information, purportedly seeking to disprove the allegations that had been raised against him. Schreibman was informed that the allegations were upheld, and that he "engaged in 'serious unprofessional conduct unbecoming a

principal.'" In a series of written correspondence between Schreibman and the BOE, Schreibman alleged that he was retaliated against because of his "position on school safety" and his "refusal to accept a settlement of allegations" against him.

By letter dated June 19, 2002, Schreibman was advised by Chad Vignola, then General Counsel to the Chancellor of the BOE, that:

> probable cause has been found against you on the charges preferred against you. In addition, a recommendation has been made by Dr. Sandra Kase, Superintendent of the Chancellor's District, that you be suspended pursuant to the provisions of Education Law [Sec.} 3020-a and the CSA contract.

The letter went on to say that Mr. Vignola had determined:

> that the nature of the charges against you requires your immediate removal from your assigned duties. Therefore, in accordance with Education Law 3020-1, I hereby suspend you without pay effective as of the close of business, Friday, June 21, 2002, pending the hearing and determination of the charges preferred against you.

Schreibman received his second U-rating for the 2001-2002 school year.

The BOE issued charges against Schreibman on June 19, 2002. The charges involved allegations of corporal punishment, conduct unbecoming his profession and the U-rating for the 2000-2001 school year, and being insubordinate and excessively absent during the 2001-2002 school year.

Schreibman filed a request for a hearing on June 22, 2002.

As a result of the June 19, 2002 letter from Chad Vignola, Schreibman began his 30-day removal period without pay pursuant to the provisions of the CSA contract which provides for the removal without pay or demotion during the pendency of charges against a principal. According to Schreibman, the CSA provision "contravenes the provisions of New York State Education Law which provide that suspension shall be with pay except in cases involving criminal conduct." Schreibman returned to work on July 22, 2002.

Dr. Sandra Kase informed Schreibman by letter dated September 3, 2002, that the aforementioned suspension without pay was extended pending the hearing regarding the charges preferred against him. The BOE began the arbitration process in September of 2002.

Schreibman was charged with several charges of corporal punishment, charges stemming from his U-rating for the 2000-2001 school year, abusing his discretion as principal during the 2000-2001 school year, failure to submit monthly time sheets during the 2001-2002 school year, and excessive absence during the 2001-2002 school year. Arthur A. Reigel ("Arbitrator") was appointed as arbitrator to oversee the arbitral process. Arbitrator was also appointed as the arbitrator in a related proceeding wherein Schreibman alleged

the BOE's violation of a provision of the Memorandum of Agreement ("MOA") signed on December 16, 1999, and entered into between the CSA and the BOE. The Arbitrator held in favor of the BOE's interpretation of the contract provision, and denied Schreibman payment during the arbitration of his misconduct charges at issue in the instant petition.

Schreibman submitted a motion to dismiss the charges prior to the hearing process. The motion to dismiss was based on provisions of the MOA. The Arbitrator, on October 12, 2002, denied the motion to dismiss on the grounds that the claims made were outside the scope of his authority. Specifically, the Arbitrator noted that interpretation of a section of the MOA, which petitioner alleged the BOE violated, must be resolved through the grievance process covered under the contract governing the parties, and is not a subject of arbitration. Schreibman subsequently filed a grievance alleging the BOE's violation of the MOA, which was denied after adjudication through the contract's grievance provision.

A pre-hearing conference was held on October 11, 2002. Thereafter, there was a series of hearings on the merits before the Arbitrator on October 28, November 15, 25, December 10, 12, 2002, January 27, 29, February 12, 13, May 9, 16, June 2, 4, September 23, October 15, 30, November 6, 10, and 13, 2003. On December 15, 2003, closing oral arguments were

presented.

At each of the hearings, which were open to the public, Schreibman was represented by counsel and attended the proceedings. He was represented by George Shebitz, Esq. and Steven Landis, Esq. of Shebitz, Berman & Cohen, P.C. Schreibman's counsel offered evidence and argument and examined and cross-examined witnesses as well as presented Schreibman's case. Schreibman testified on his own behalf. A transcript of the hearings was made.

Schreibman and the BOE attempted to settle this matter during the course of the proceedings, but were unable to effectuate a final settlement.

Thus, based on the evidence presented at the hearing, on February 16, 2004, a seventy-page Award ("Award") was issued. The Award, among other things, cites the charges and specifications preferred against petitioner, the pre-hearing stages of the 3020-a process, including the OSI investigation, and recounts the evidence presented by both parties at the nineteen-day hearing.

The BOE's witnesses included students in Schreibman's school who alleged that they had been subjected to inappropriate corporal punishment. Schreibman had testified on his own behalf and introduced evidence in an effort to rebut the charges against him. The Award concluded with a

finding that Schreibman was guilty of specifications 4, 5(1a), 5(2a), 5(4a, b), 5(5a), 5(6a-c), 5(7a-c), 5(11), 5(12), 7, 8 and 9, and ordered him demoted to the position of assistant principal. Specifically, Schreibman was found guilty of corporal punishment- grabbing a student and pushing him into a wall; charges relating to petitioner's U-rating for the 2000-2001 school year[1]; failure to follow instructions for submitting monthly time sheets for the 2001-2002 school year, and excessive absenteeism for the 2001-2002 school year.

Schreibman was found not guilty of the remaining charges of corporal punishment; being ineffective at maintaining the Chancellor's minimum standards regarding school performance; ineffectively managing school resources; poor staff development; limiting staff feedback; poorly communicating with the District; failing to properly maintain the school; failing to utilize District resources; being overwhelmed by workload or ineffectively prioritizing tasks; and abusing his discretion as principal.

Although Schreibman challenged the fact that he was on notice of the charges preferred against him, the Award

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[1]Specifically, with Schreibman's U-rating for the 2000-2001 school year, he was found guilty of failure to plan annually; failure to create a supporting learning environment for students as a result of poor attendance and failing to encourage student input and involvement; failure to manage human resources; failure to manage himself in his position as principal; failure to daily manage school and failure to manage pupil personnel services.

specifically rejected this argument and the Arbitrator concluded, after a careful review of the complete record before him, that Schreibman was on notice and was able to prepare a proper defense.

The Award dismissed Schreibman's contentions with respect to the standard of review used when a principal is the charged party, finding Schreibman's arguments inconsistent with the MOA, as it amends Education Law 3020-a. The Arbitrator described the difference between the old and new standard governing charges of incompetency and misconduct, and concluded that "[i]t is unnecessary to do a specific analysis of the standard of review to be applied to each of the specifications and charges since, in the view of the undersigned, the outcome of this case would be the same under either standard of review."

The Award summarized his view of Schreibman's testimony regarding the charge of corporal punishment, specifically, the allegation that Schreibman had grabbed a student by the arm and pushed that student into the wall. The Arbitrator found Schreibman guilty of this charge and noted that he credited the testimony of the student. The Arbitrator also noted that he found Schreibman's testimony to be "less than credible," and "internally inconsistent." The Arbitrator further noted that at one point during his testimony that Schreibman's

testimony "makes no sense."

In addition, the Award detailed how petitioner admitted to his knowledge of the procedures expected of him regarding time and leave for the 2001-2002 school year, and his insistence in failing to adhere to those procedures. Accordingly, Schreibman was found guilty of related charges.

Finally, Schreibman's testimony that he did not know payroll procedures for the production of medical documentation to rebut absenteeism was deemed "at best disingenuous." Accordingly, Schreibman was found guilty of the specification regarding excessive absenteeism.

The Arbitrator then turned to the issue of punishment. He noted the breadth of the proven specifications against Schreibman:

> [Schreibman} was not found guilty of a narrow band of performance functions. His areas of deficiency encompassed almost every aspect of school administration. The charges covered his dealings with pupils and parents, his utilization of personnel, his ability to engage in long term planning, his facility with identifying problems and proposing solutions for them, his willingness to follow reasonable rules and to respect the directives issued by superiors. This listing could go on. Suffice it to say that [Schreibman] was not brought up on charges because of a single incident or because of a failing in a single area.

Accordingly, on February 16, 2004, Schreibman was demoted from his position as principal to that of one as assistant

principal.

Schreibman filed this proceeding seeking to vacate the arbitration award pursuant to Article 75 and 78 of the CPLR and the Education Law on March 3, 2004. Respondents now move to dismiss the petition and to confirm the Award.

Discussion

Schreibman attempts to challenge the Arbitrator's Award under Articles 75 and 78 of the CPLR and under section 3020-a of the Education Law, as well as under constitutional law. However, as the BOE points out the only vehicle to properly challenge such an Award is under Article 75 (see Simon v. New York State Office of Parks, Recreation and Historic Preservation, 303 A.D.2d 413, 413-14 [2d Dept. 2003]. Accordingly, all the causes of action that do not arise under Article 75 are dismissed.

Schreibman seeks to vacate or modify the arbitration Award. According to the BOE, Schreibman fails to establish any factual or legal basis for vacating the Award. The general principle of law is that the award made by the arbitrator is final and conclusive (see Bay Ridge Medical Group v. Health Ins. Plan of Greater New York, 22 A.D.2d 807 [2d Dept. 1964]). Accordingly, courts are statutorily mandated to "confirm an award upon application of a party made within one year after its delivery to him, unless the award is

vacated or modified on a ground specified in CPLR section 7511" (CPLR 7510). Under Education Law § 3020-a(5), the "court's review shall be limited to the grounds set forth in" CPLR 7511 (see Hegarty v. Board of Education of the City of New York, 5 A.D.3d 771, 772 [2nd Dept. 2004]). The grounds for vacating an arbitration award are limited by CPLR section 7511 to fraud or misconduct in procuring the award, arbitrator partiality or bias, the arbitrator's abuse of power, or denial of procedural due process. These grounds are exclusive (see Integrated Sales, Inc. v. Maxell Corp. of America, 94 A.D.2d 221, 223 [1st Dept. 1983]). Recently, the Court of Appeals in United Federation of Teachers, Local 2, AFT, AFL-CIO v. Board of Education of the City School District of the City of New York, 1 N.Y.3d 72, 79 [2003] stated an arbitration award may be vacated on three narrow grounds: "it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (Id., quoting Matter of Board of Education of Arlington Cent. School Dist. v. Arlington Teachers Assn., 78 N.Y.2d 33, 37 [1991]). As a matter of public policy, the merits of an arbitration are beyond judicial review (see Integrated Sales, Inc. v. Maxell Corp. of America, 94 A.D.2d, at 223). "The CPLR arbitration provisions (CPLR 7501 et seq.) evidence a legislative intent to encourage arbitration. Certainly the

avoidance of court litigation to save the time and resources of both the courts and the parties involved make this a worthwhile goal" (Matter of Weinrott [Carp], 32 N.Y.2d 190, 199 [1973]; see Integrated Sales, Inc. v. Maxell Corp. of America, 94 A.D.2d, at 224). For these reasons judicial review is narrowly circumscribed lest the arbitration award "become the commencement instead of the end of litigation" (Integrated Sales, Inc. v. Maxell Corp. of America, 94 A.D.2d, at 224 quoting Matter of Campe Corp. [Pacific Mills], 275 App. Div. 634, 635 [1st Dept. 1949]). However, "where, as here, the parties are forced to engage in compulsory arbitration, judicial review under CPLR article 75 requires that the award be in accord with due process and supported by adequate evidence in the record" (Hegarty v. Board of Education o fthe City of New York, 5 A.D.3d, at 772 [citations omitted]). Applying this standard, this Court finds no basis for vacating the determination of the Arbitrator.

In the absence of fraud, corruption or other misconduct, an arbitration award may not be impeached because of the arbitrator error as to the law or the facts (see Hackett v. Milbank, Tweed, Hadley & McCloy, 86 N.Y.2d 146, 155 [1995]; Integrated Sales, Inc. v. Maxell Corp. of America, 94 A.D.2d, at 224). Moreover, "disagreement ... with the way the arbitrator resolves a dispute... is not a statutory ground

upon which an award may be vacated" (Burt Bldg. Materials Corp. v. International Brotherhood of Teamsters, 18 N.Y.2d 556, 558 [1966]).

In the instant case, Schreibman contends that the arbitrator's award must be vacated because the arbitrator misapplied the relevant law and the award is irrational. "It is well settled that judicial review of an arbitration award is severely limited and may not be vacated unless 'it is violative of a strong public policy, is totally irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power'" (Matter of New York State Dept. of Taxation & Fin. [Public Empls. Fedn.], 241 A.D.2d 780, 781 [3rd Dept. 1997], quoting Matter of Town of Callicoon [Civil Serv. Empls. Assn., Town of Callicoon Unit], 70 N.Y.2d 907, 909 [1987]; see United Federation of Teachers, Local 2, AFT, AFL-CIO v. Board of Education of the City School District of the City of New York, 1 N.Y.3d 72, 79 [2003]; Matter of Board of Education of Arlington Cent. School Dist. v. Arlington Teachers Assn., 78 N.Y.2d 33, 37 [1991]; Arbitration between Gleason v. Michael Vee Ltd., 284 A.D.2d 666 [3rd Dept. 2001]). An award is irrational if there is "no proof whatsoever to justify the award" (Peckerman v. D & D Assoc., 165 A.D.2d 289, 296 [1st Dept. 1991]) or "the award gave a 'completely irrational construction to the provisions in dispute and, in

effect, made a new contract for the parties'" (Matter of Pine Plains Cent. School Dist. v. Kimball, 272 A.D.2d 332, 333 [2nd Dept. 2000] quoting Matter of National Cash Register Co. [Wilson], 8 N.Y.2d 377, 383 [1960]; Rockland County Board of Cooperative Educational Services v. BOCES Staff Association, 308 A.D.2d 452, 453 [2nd Dept. 2003]). However, the mere fact that a different construction could have been accorded the provisions concerned and a different conclusion reached does not mean that the arbitrator so misread those provisions as to empower a court to set aside the award (see Rockland County Board of Cooperative Educational Services v. BOCES Staff Association, 308 A.D.2d, at 453-4; see United Federation of Teachers, Local 2, AFT, AFL-CIO v. Board of Education of the City School District of the City of New York, 1 N.Y.3d, at 82). The Court notes that "an arbitrator is not bound by principles of substantive law .... He may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be..." (Matter of Silverman [Benmore Coats, Inc.], 61 N.Y.2d 299, 308 [1984]; see Arbitration between Gleason v. Michael Vee Ltd., 284 A.D.2d 666). It cannot be set aside for an error of fact or law unless the award comes within CPLR 7511.

In the instant case, the Arbitrator determined that the dispute fell within the scope of the CBA and upheld several of

the charges. Even were this Court to hold that the arbitrator's interpretations and factual findings appear highly debatable on this record, it is irrelevant whether this Court agrees with the arbitrator. Once the arbitrator reached its conclusion, the arbitrator had the authority to fashion an appropriate remedy (see United Federation of Teachers, Local 2, AFT, AFL-CIO v. Board of Education of the City School District of the City of New York, 1 N.Y.3d, at 83).

Petitioner has failed to show that the arbitrator's award violated a strong public policy. Furthermore, the award was not irrational and clearly did not exceed the arbitrator's authority. The record is devoid of any evidence of bias or misconduct. Stating facts that merely infer partiality of the arbitrator does not create a sufficient claim to merit review or vacating an arbitration award (see Infosafe Systems v. International Development Partners, 228 A.D.2d 272 [1st Dept. 1996]). The Court notes that it is not impossible, nor improbable, for the arbitrator to determine that petitioner was on notice of the charges, nor that the correct standard of proof was used, and even if it were not, the testimony and evidence presented would still result in guilty findings. The Court agrees with the BOE that such determinations are for the arbitrator to make and "[t]he path of analysis, proof and persuasion by which an arbitrator reaches a conclusion is

beyond judicial scrutiny" (Infosafe Systems v. International Development Partners, 228 A.D.2d, at 273).

Schreibman's allegation that the arbitrator evidenced bias because he was involved in facilitating the settlement during the course of the hearings and then heard the union's grievance on his behalf with respect to whether Schreibman was to be suspended with or without pay in a separate arbitration are without merit. As BOE points out, Schreibman cannot point to any facts that show "actual bias" (see Kalfus v. Kalfus, 270 A.D.2d 41 [1st Dept. 2000]). Moreover, this Court does not see how the involvement by the impartial arbitrator who had knowledge of the circumstances surrounding the settlement that arose during the course of the hearings he was presiding over, evidences bias. In fact, the arbitrator's involvement is logical considering he is the authority who is most familiar with the parties and their positions. Furthermore, there is no reason to believe that the arbitrator was biased from his involvement in the settlement proceedings as all parties were involved in the proceedings, including BOE and Schreibman (see Roberts v. Stolzenberg, 202 A.D>2d 854 [3rd Dept. 1994]). Thus, there is no impartiality on the arbitrator's part (see Artists & Craftsmen Builders, 232 A.D.2d 265, 266 [1st Dept. 1996]). Indeed, it appears to this Court that the various negotiations and arbitrations are really but part of one

whole arbitration and were separated merely because the union had to raise the pay issue as opposed to Schreibman in his individual capacity.

Moreover, that the arbitrator conducted the proceedings in a way which one side or the other did not like is not a ground for the charge of bias. That he ruled that certain evidence was inadmissible is no basis for the charge of bias. That he believed one witness and not another gives no warrant to the charge of prejudice. It was the arbitrator's function to administer the hearings, to decide questions, to arrive at conclusions. "He should not be expected (any more than should a judge) to look-Janus-faced-in both directions at once" (Arbitration between Nadalen Full Fashion Knitting Mills, Inc. v. Barbizon Knitwear Corp., 206 Misc. 757, 758 [N.Y. Sup. Ct. 1954]). In any event, the Court notes that even though Schreibman contends that the arbitrator was prejudiced against him, the arbitrator dismissed several of the counts against Schreibman. The Court further notes that the arbitrator was selected based upon the mutual consent of the parties, and Schreibman does not allege that he objected at the appropriate time to having Riegel as the arbitrator for each of the disputes.

Similarly, Schreibman's argument that the arbitrator's interpretation of the contract between the parties implicated

his own interest also fails. The arbitrator issued a decision interpreting Section 7 of the Contract- a provision stating that the arbitrator's decision should be rendered within 30 days of the charged parties' notice of the charges. He decided that BOE, who was a party to the underlying arbitration was not responsible for any delay, and that the arbitrator could not be held to issuing a decision fourteen days after the completion of the hearing given the length of the proceeding which included 19 days of testimony. Thus, there appears to be no basis in the record before this Court to support Schreibman's speculation that the arbitrator issued this decision knowing that he was overseeing the disciplinary hearing in an effort to buy more time.

Also without merit, is Schreibman's argument that the penalty of demotion is shocking to the conscience and that by imposing it, the arbitrator exceeded his powers. The Court notes that Arbitrator Riegel, in the award, set forth his reasoning regarding specifications relating to grabbing a student and pushing that student into a wall, Schreibman's inability to effectively run his school, his insubordination relating to time and leave procedures and excessive absence. The arbitrator found petitioner guilty, crediting the student's account and finding Schreibman's testimony to be "less than credible," and "internally inconsistent."

Similarly, the arbitrator found Schreibman guilty of insubordination upon his admission of knowledge of the procedures expected of him regarding time and leave for the 2001-2002 school year, and his failure to adhere to those procedures.

As to the arbitrator finding Schreibman guilty of excessive absenteeism, the arbitrator notes that Schreibman's testimony that he did not know payroll procedures for the production of medical documentation to rebut absenteeism was "at best disingenuous."

Having found Schreibman guilty of these specifications, the arbitrator turned to the issue of punishment. The extremely lengthy 70-page award did not make light of any of the charges against Schreibman, and the punishment imposed was reasonable. Schreibman's behavior was far from commendable. Based on the complete record, the arbitrator considered the circumstances and returned Schreibman to the school setting and demoted him from his position of principal to that of assistant principal. In doing so, the arbitrator noted that Schreibman's deficiency "encompassed almost every aspect of school administration" and that it was necessary for Schreibman to be supervised and not remain in position of principal. There is nothing shocking or unmeritorious about the penalty considering Schreibman's two U-ratings, his guilty

finding of grabbing a student and throwing the student into a wall and his overall inability to manage a school. Clearly, Schreibman's demotion did not violate his due process rights and was warranted by his persistent pattern of unacceptable, unjustifiable behavior. The penalty was well within the arbitrator's discretion to issue and he had sufficient evidence on which to base such a penalty. Indeed, since the penalty of dismissal, a much harsher penalty than a demotion, was used in cases where the teacher was found guilty of less serious charges than corporal punishment and found not to be shocking, this Court does not find the punishment of demotion to be shocking (see Hegarty v. Board of Education of the City of New York, 5 A.D.3d, at 772-73).[2]

With respect to the issue of back-pay, Schreibman suggests that the arbitrator improperly refused to grant it to him while the arbitration was proceeding. First, the arbitrator's decision on back-pay is entitled to great deference by this Court. Second, the issue of back-pay was litigated by Schreibman in a separate arbitration, which he lost and which he does not now directly challenge (see Award,

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[2]Petitioner argues that the demotion was "permanent." However, the Court can find nothing in the record which even suggests that Schreibman is precluded from ever obtaining a principal position.

date October 7, 2003, Appendix A, at 6-13).[3] Petitioner was not improperly denied back pay during the course of his disciplinary proceedings because he was not acquitted of all the charges brought against him. Although Education Law § 3020-a provides for suspension of a teacher, or in this case a principal, with pay during the pendency of a disciplinary hearing, § 3020-a(4)(b) provides that a teacher shall receive back pay for any period of suspension only if acquitted of the charges (see Elmore v. Mills, 296 A.D.2d 704, 706 [3rd Dept. 2002]). Additionally, this Court finds that Schreibman's present claims addressing the issue of non-payment alleged to be in violation of the MOA, are not properly before this Court now (see National Union Fire Ins. Co. v. Bieco Petroleum, 88 F.3rd 129 [2d Cir. 1996]).

As to Schreibman's claims of procedural defects in the Award, they are also baseless. To the extent that Schreibman alleges that the arbitration was inconsistent with procedures established in the collective bargaining agreement, it is well settled that any alleged violations of the contract are the

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[3]Arbitrator Riegel issued an award in a related arbitration, finding for the BOE. The Award held that pursuant to the MOA agreed upon by BOE and CSA, there is a 30-day period during which a principal who is involved in a misconduct case proceeding will not be paid. The Award determined that although the arbitrator should strive to complete the proceeding within 30 days, if there is no delay caused by the BOE, the principal will not receive payment during the course of the proceedings.

province of arbitrators and not of the Courts. Thus, an alleged failure to follow the contract's procedures does not warrant vacating or modifying an arbitration award (see Rockland Community College Federation of Teachers v. Board of Trustees, 142 A.D.2d 732 [2d Dept. 1988], app. den. 73 N.Y.2d 974 [1989]). Specifically, with respect to Schreibman's claim that the arbitrator exceeded the statutory and contractual time limitations- for example, by completing the final hearing more than 60 days after the pre-hearing conference- does not take into account the lengthy duration of the disciplinary hearing, which was conducted on 19 separate days, exclusive of the pre-hearing conference and presentation of closing arguments. This is cause for considering the statute's language need not be strictly interpreted when justifying circumstances exist to extend the duration of the hearing process (see Matter of Guilderland Cent. Sch. Dist., 45 A.D.2d 85, 87 [3rd Dept. 1974]).

With respect to Schreibman's claims arising under CPLR Article 78, namely that the record as a whole was not supported by substantial evidence, the decision was arbitrary and capricious, was an abuse of discretion and in violation of law and that the penalty was improper, they are not properly before this Court.

With respect to Schreibman's claims based on the

collective bargaining agreement between the BOE and the CSA, Schreibman alleges that BOE breached its contract with the CSA when the BOE disciplined Schreibman; that the collective bargaining agreement improperly modified the Education Law; that the collective bargaining agreement violates Schreibman's constitutional rights and that the MOA between Schreibman's union and the BOE improperly modifies the Education Law. Schreibman admits that his union, CSA, has a contract with the BOE. Contrary to Schreibman's arguments, a union representing an employee can agree to grievance procedures in a collective bargaining agreement and the employee is not free to disregard these procedures (see Cantres v. Board of Education, 145 A.D.2d 359, 360 [1st Dept. 1988]; see also Board of Education v. Ambach, 70 N.Y.2d 501 [1987]).

So far, Schreibman has attempted to bring claims relating to the disciplinary procedures as set forth under that contract to the arbitrator in a motion to dismiss submitted prior to the pre-hearing conference. Specifically, the motion to dismiss was based on provisions of the MOA signed on December 16, 1999, and entered into between the CSA and the BOE. Arbitrator Riegel, on October 12, 2002, denied the motion to dismiss on the grounds that the claims made were outside the scope of the arbitrator's authority. Specifically, the arbitrator noted that interpretation of a

section of the MOA, which Schreibman alleged the BOE violated, must be resolved through the grievance process covered under the contract governing the parties, and is not a subject of arbitration. Subsequently, a grievance alleging the BOE's alleged violation of the MOA was filed by Schreibman, and was denied after adjudication through the contract's grievance provision. Significantly, Schreibman did not challenge that decision prior to this proceeding, and he cannot challenge it at this juncture.

Schreibman argues that he was deprived of notice requirements set forth in the contract, and that the contracts's provision regarding a 30-day suspension without pay during the pendency of charges against a principal contradicts a similar provision under the Education Law. Schreibman alleges that the contract is therefore void and that the BOE violated the contract provisions. Once again, because this matter has already been litigated in a separate arbitration, which is not directly challenged here, Schreibman's claim is not properly before this Court.

In any event, Schreibman's contract based claims must be dismissed for failure to join a necessary party. CSA, the union representing principals such as Schreibman is not a party to this action. CSA is a party whose rights will be affected by the outcome of this proceeding. Because the

contract's interpretation is an issue raised in the petition, this Court would have to analyze and potentially modify CSA's Agreement with the BOE. Accordingly, CSA should have been named as a respondent in this action along with the BOE, since both parties' rights might change, and both parties should be afforded procedural due process. As CSA was not a named party, those portions of the petition that purport to assert contract based claims are dismissed (see Matter of 27th Street Block Ass'n v. Dormitory Authority of the State of New York, 302 A.D.2d 155 [1st Dept. 2002]).

The Court also finds that Schreibman fails to state a claim of violation of his right to free speech under the federal or state constitutions or a violation of Education Law § 3028-C. In each of these claims, Schreibman contends that he was impermissibly retaliated against for speaking out about criticisms subsequent to his December 1999 reprimand for "strict enforcement of school rules" and high statistics regarding suspensions in his school. He was not removed from his position as principal until May 21, 2001, a year and a half after his speech. "A State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech" (Rankin v. McPherson, 483 U.S. 378, 383 [1987]; see Matter of Berry v. Perales, 195 A.D.2d 926, 928 [3rd Dept. 1993]). However, because the State

has a more legitimate interest as employer in regulating the speech of its employees than its interest in regulating the speech of its general citizenry, whether the employee's speech is constitutionally protected entails balancing "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" (Pickering v. Board of Education, 391 U.S. 563, 568 [19 ]; see Matter of Berry v. Perales, 195 A.D.2d, at 928).

Thus, when a governmental employee allegedly has been demoted for exercising his or her 1st Amendment right to freedom of expression, a two-step process is involved in determining whether a judicial remedy is available. First, it must be established that the speech was on a matter of public concern, as "determined by the content, form, and context of a given statement, as revealed by the whole record" (Connnick v. Myers, 461 U.S. 138, 147-148 [1983]; Matter of Berry v. Perales, 195 A.D.2d, at 928). Then, it must be further determined whether the nature of the employee's speech on a matter of concern, in content form and context, outweighed the State's interest in removing employees whose conduct hinder effective and efficient fulfillment of its responsibility to the public, as involved in the particular case (Connnick v.

Myers, 461 U.S., at 150-151; Matter of Berry v. Perales, 195 A.D.2d, at 928).

Here, Schreibman claims that the questioned exercise of his free speech came up in the context of his professional duties. In the free speech context, "[t]he fundamental question is whether the employee is seeking to vindicate personal interests or bring to light a matter of political, social, or other concern to the community" (Cahill v. O'Donnell, 75 F.Supp.2d 264, 272-73 [S.D.N.Y. 1999]). Here, there is no allegation that the petitioner was attempting to bring to the public's attention any problems in the BOE, and petitioner alleges only that he was performing his job in an allegedly appropriate manner by imposing suspensions for disciplinary purposes. The Court believes that Schreibman's alleged exercise of free speech was nothing more then to vindicate his personal interests since as principal he was the ultimate disciplinary authority in the school, and his reports about school discipline techniques do not merit the status of protected speech. Schreibman has failed to establish that his expression of opinion were constitutionally protected, even assuming that they pertained to matters of public concern.

Moreover, given the amount of time between the statements and Schreibman's demotion, he has failed to establish that they causally contributed to his demotion from principal to

assistant principal (see Traglia v. Town of Manlius, 313 F.3d 713, 720 [2d Cir. 2002]). Again, Schreibman was reprimanded in December of 1999, and subsequently spoke out about the subject of school safety and discipline procedures. No action is alleged to have been taken against him until he was removed from his position in May 2001, nearly a year and one-half later. Stripped to their essential, when considered in their form, content and context, the expression of opinions upon which Schreibman relies to establish a retaliatory demotion for his exercise of 1st Amendment rights represent nothing more than disagreements with his superiors on either school policy or professional judgments or both regarding the handling of discipline in the school.

Additionally, the record contains clear documentation of specific instances of unsatisfactory performance on Schreibman's part, casting doubt on whether it played any part in his being demoted. Indeed, the prime motivation for Schreibman's removal appears to be his U-rating in the 2000-2001 school year and allegations of corporal punishment of which he was found guilty after a hearing. Thus, Schreibman has failed to meet his burden of showing that BOE acted in bad faith when it removed him as principal and subsequently acted upon the Arbitrator's recommendation that Schreibman be demoted.

Similarly, Education Law § 3028-c (2004) provides that school employees who report acts of violence in good faith cannot lawfully be retaliated against for such reports. While there is no case law involving this section, it appears to this Court that the same analysis that applies to Schreibman's free speech claim applies here and fails for the same reasons.

Schreibman's final group of claims is that he was allegedly denied due process. Arbitration procedures provide all the process that is due a tenured principal under the Due Process Clause of the Constitution (see Giglio v. Dunn, 732 F.2d 1133 [2d Cir.], cert. denied 469 U.S. 932 [1984]). In the instant case, Schreibman had his choice of attorney, was represented by counsel throughout the disciplinary process, received ample notice of the charges and ample time to prepare for the hearing, had a hearing before a neutral officer, was permitted to cross-examine witnesses, as well as to testify and present witnesses and evidence of his own. Indeed, Schreibman admits that he himself testified and submitted evidence from his colleagues. The 70-page Award is extremely detailed and well thought out. Clearly, Schreibman's due process rights were not violated.

The Court notes that in December of 1999, Schreibman was spoken to regarding the discipline process at his school. He was told that his statistics regarding suspensions were "too

high," in comparison to similarly situated schools. Schreibman's February 2001 review was satisfactory even though he was advised that he could improve his performance in several areas. Additionally, petitioner was criticized by his superiors in May 2001 for his disciplinary reporting practices.

Also, in May of 2001, Schreibman was removed from his position as principal, was placed in the Chancellor's Central District Office in Brooklyn and given a U-rating for the 2000-2001 school year. He was informed that he would remain in the District Office during the investigation into allegations of misconduct based on, amongst other things, students at Schreibman's school who claimed that he used excessive force. Schreibman claims that he was not informed of specifics regarding the allegations against him prior to his removal from the school.

At his arbitration hearing, Schreibman raised his claims that he was denied notice of the charges that were later investigated by the BOE's OSI, and based on the complete record before him, ruled that Schreibman was, in fact, provided with adequate notice, knew the nature of the charges against him and was able to prepare a proper defense.

Additionally, petitioner's challenge to the standard of review applied by the arbitrator as provided for under the MOA

that amended the CSA and BOE Contract and Education Law § 3030-a was rejected by the arbitrator. After describing the difference between the old standard and the new standard governing charges of incompetency and misconduct, the arbitrator concluded that "[i]t is unnecessary to do a specific analysis of the standard of review to be applied to each of the specifications and charges since, in the view of the undersigned, the outcome of this case would be the same under either standard of review."

Moreover, Schreibman is not entitle to a new arbitration simply because of an allegation of a violation of the contract. Claims of contract violation must be submitted to the grievance and arbitration processes provided for by the CSA Contract and cannot be brought directly to court (see Board of Education, 70 N.Y.2d, at 501; Cantres, 145 A.D.2d, at 360. Contract violations are, as the BOE argues, the reason for arbitration clauses in the first place (see General Accident Ins. v. Aetna Casualty, 149 A.D.2d 706 [2d Dept. 1989]). Moreover, Schreibman should have raised such arguments at his hearing and not here for the first time (see Obot v. New York State Dep't. of Correctional Servs., 89 N.Y.2d 883, 885 [1995]). Since Schreibman does not allege that he ever sought to introduce these "due process" arguments at the hearing, other than the notice allegations which were

considered and dismissed by the arbitrator, these claims are unexhausted and cannot be reviewed by this Court.

Similarly, any complaints Schreibman had with how the investigation was conducted should have been raised before the arbitrator. In any event, this Court does not perceive any inadequacies in the investigation based on what is in front of the Court.

"The path of analysis, proof and persuasion by which the arbitrator reached [his] conclusion is beyond judicial scrutiny. The issue[s] resolved having been the issue[s] tendered, and the resolution not being wholly irrational, there is no occasion for judicial intervention" (Central Square Teachers Association v. Board of Education of the Central Square Central School District, 52 N.Y.2d 918, 919 [1981]; Matter of Guetta [Raxon Fabrics Corp.], 123 A.D.2d, at 45). In sum, a distinction must be drawn between an arbitrator's failure on the one hand, to dispose of the controversy submitted, and his failure, on the other hand, to consider all of the issues of fact and law that a court would have to consider in order to properly dispose of the same controversy (see Matter of Guetta [Raxon Fabrics Corp.], 123 A.D.2d, at 45). While the former renders an award not final and definite, and thus subject to vacatur under CPLR 7511(b)(1)(iii); the latter amounts to a mere error of fact or

law not judicially reviewable. Schreibman, at best, shows no more than the latter. Clearly, the arbitrator's determination was not so irrational as to warrant vacatur of the award on the record before this court.

Accordingly, respondent's cross-motion to dismiss the petition and to confirm the arbitral Award is granted; petitioner's motion to vacate the award is denied; and the petition is dismissed.

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

ENTER:

Hon. Ronald A. Zweibel, J.S.C.

Norman Goodman
CLERK

Dated: March 29, 2005