

**Matter of United Federation of Teachers v Board of  
Educ. of City School Dist. of City of N.Y.**

2008 NY Slip Op 32052(U)

July 15, 2008

Supreme Court, New York County

Docket Number: 0114427/2007

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. Midden

PART 11

Index Number : 114427/2007

UNITED FED OF TEACHERS

VS.

BOARD OF EDUCATION

SEQUENCE NUMBER : 001

CONFIRM AWARD

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for confirming arbitrator  
award + cross-motion  
to Justice

PAPERS NUMBERED \_\_\_\_\_

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits \_\_\_\_\_

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion, motion and cross-motion are decided in accordance with the unopposed Memorandum Decision, order + Judgment

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1408).

Dated: July 15, 2008

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

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In the Matter of the Arbitration Between the

Index No. 114427/07

UNITED FEDERATION OF TEACHERS,

Petitioner,

- and -

THE BOARD OF EDUCATION OF THE CITY  
SCHOOL DISTRICT OF THE CITY OF NEW YORK

Respondent,

For an Order and Judgment Pursuant to CPLR Article 75  
to Confirm an Arbitration Award.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

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**JOAN A. MADDEN, J.:**

Petitioner, the United Federation of Teachers (UFT), moves for an order confirming the Opinion and Award of Arbitrator Rosemary A. Townley, Esq., Ph.D (Arbitrator), dated August 28, 2006 (Award), rendered in the arbitration entitled *United Federation of Teachers v Department of Education of the City of New York*, Case No. A-079-C14376, and the subsequent Clarification of Award, dated August 24, 2007 (Clarification of Award), also rendered by the Arbitrator (together, Awards), and for an order directing that judgment be entered thereon.

Respondent, The Board of Education of the City School District of the City of New York, referred to in the Arbitration as Department of Education (DOE), cross-moves, pursuant to CPLR 3211 (a) (2), (a) (5), and (a) (7), for an order dismissing the petition on the ground that the petition is time-barred, and cross-petitions for an order vacating the Awards on the grounds that (1) the Arbitrator exceeded her authority in rendering the Awards; (2) the Awards are irrational; and (3) the Awards violate public policy.

For the reasons that follow, the petition to confirm the Awards is granted and the cross-petition to vacate the Awards is denied.

### **Background**

The UFT and DOE entered into a collective bargaining agreement (CBA) covering the period November 16, 2000 to May 31, 2003, which agreement was amended to cover the period from June 2, 2003 to October 31, 2009 (Petition, ¶ 3). On October 3, 2005, the UFT and DOE entered into a Memorandum of Agreement (MOA), which, among other things, amended Article 6 of the CBA pertaining to the hours that comprise the teachers' school day. As is relevant here, Section 7 of the MOA provides, in part:

“7. ADDITIONAL TIME

1. Teacher contract Article 6 shall be replaced and amended as follows:

**A. School Day**

1. The school day for teachers serving in the schools shall be six hours and 20 minutes and such additional time as provided for below and in the by-laws. The gross annual salary of employees covered by this agreement will be increased in accordance with the salary schedules herein.
2. The parties agree, effective February 2006, to extend the teacher work day in “non Extended Time Schools” by an additional 37 ½ minutes per day, Monday through Thursday following student dismissal. Friday’s work schedule will be 6 hours and 20 minutes. *The 37 ½ minutes of the extended four (4) days per week shall be used for tutorials, test preparation and/or small group instruction and will have a teacher student ratio of no more than one to ten.* In single session schools, the day will start no earlier than 8:00am and end no later than 3:45pm (emphasis added).

\* \* \*

4. In District 75 buildings and District 75 self-contained classes in

[\* 4 ]

other school sites, the school day will be 6 hours and 50 minutes unless the principal and chapter leader agree to schedule the time as set forth in paragraph 2 above; however, in this event the teacher to student ratio will be no more than 1 to 5. Non-District 75 self contained classrooms shall have either a 6 hour and 50 minute day, a 6 hour and 57 ½ minute day Monday through Thursday and 6 hour and 20 minute day on Friday, or if the time is utilized as set forth in paragraph 2 above the teacher to student ratio should be no more than one to five.”

According to the Petition, in January 2006, the UFT discovered that DOE speech teachers in the Bronx were being directed to serve “mandated” students (i.e., special needs students) during the extra 37.5-minute period, and to complete required reports for these students during that time period (Petition, ¶ 9). Therefore, these teachers were performing the same duties that they performed during the rest of the school day, allegedly in violation of section 7.1 (A) (2) of the MOA. According to the UFT, this section of the MOA provides that the 37.5-minute period can be used only for tutorials or test preparation, thereby causing the teachers to be teaching an additional period without proper compensation (Petition, ¶¶ 10-11).

The UFT filed a grievance, which was denied at “Step 2”; i.e., the final stage of the grievance process. Subsequently, the UFT filed a Demand for Arbitration (on April 7, 2006), pursuant to Article 22 (C) of the CBA (Petition, ¶ 12). Arbitration hearings were held on May 10, 2006, June 6, 2006, June 7, 2006, and June 21, 2006 at the New York City offices of the American Arbitration Association. The Arbitrator formulated the following issue for resolution, as set forth on page 3 of the Award:

“Did the Department violate Articles 6 and 20 of the collective bargaining agreement and Section 7 of the October 2005 Memorandum of Agreement when it ordered Speech Improvement Teachers in non-District schools to provide the same type of services to mandated students during the 37.5 minutes of additional time, as would have been provided during the regular school day, including the completion of the required reporting for mandated student instruction, thereby

constituting an additional teaching period? If so, what shall be the remedy?"

The Arbitrator sustained the grievance, and directed that:

"The Department is to cease and desist from making such assignments to Speech Improvement Teachers in the future. Any 'original' work performed by these teachers with mandated students between February and June of 2006, as evidenced by the submission of the required mandated reports, is to be reimbursed on a pro-rata basis."

(Award, at 36). The Arbitrator found that the matter turned on the meaning of the third sentence in Section 7.1.A2 of the MOA, namely: "The 37 ½ minutes of the extended four (4) days per week shall be used for tutorials, test preparation and/or small group instruction and will have a teacher student ratio of no more than one to ten." In her written decision, the Arbitrator explained that the phrase "small group instruction" was the key to determining the meaning of this provision, because the parties do not dispute the meaning of what constitutes "tutorial" or "test preparation," and stated in detail the manner in which she interpreted the meaning of this phrase.

Nearly one year after the Award, DOE requested a conference with the Arbitrator for a clarification of the Award to enable it to fully understand the parameters of its implementation. As stated by the Arbitrator, DOE queried: (1) what proof is to be submitted so that a speech teacher may establish that it performed "original" work with mandated students during the 37.5-minute time period between February and June of 2006; and (2) the meaning of the phrase in the Award that affected speech teachers are to be "reimbursed on a pro-rata basis," because Article 705, which contains the only contractual basis for such reimbursement, deals with per session reimbursement, a circumstance not present here in that no teacher lost any preparation periods, and the CBA does not authorize a penalty or windfall (Clarification of Award, at 2-3).

[\*6]

By decision of August 24, 2007, the Arbitrator stated that the intent of the Award was to reimburse those speech teachers in non-District 75 schools who were performing “original” work with mandated students because, in so doing, they were expected to prepare lessons and report progress on a regular basis, so that they were, in effect, teaching an extra period entitling them to reimbursement.

As for the production of proof, the Arbitrator determined that, because of the lateness of the request for clarification, and the fact that the reports filed by speech teachers are kept by DOE, the burden is on DOE to produce the necessary reports so that a speech teacher may file a claim. As for the appropriate pro-rata amount of payment, the Arbitrator noted that DOE never raised the lack of a contractual basis for any pay remedy as an issue during the original arbitration. Moreover, Article 70 provides the appropriate contractual basis for the payment of speech teachers who teach extra classes, which sets forth the per session payment schedules.

Thereupon, the UFT sought an order confirming the Awards on the grounds that the Arbitrator had not exceeded her authority, nor acted beyond the scope of her authority, and had not engaged in any conduct justifying vacatur or modification of the Awards as set forth in CPLR 7511.

In seeking dismissal of the petition, DOE argues that (1) the motion to confirm the Petition is time-barred; (2) the Arbitrator exceeded her authority; (3) the Awards are irrational; and (4) the Awards violate public policy.

### **Discussion**

Judicial review of arbitration awards is extremely limited (*Wien & Malkin LLP v Helmsley Spear, Inc.*, 6 NY3d 471, 479, *cert dismissed* 127 S Ct 34 [2006]). Thus, “an

arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice"(*id.*, at 480 [citations omitted]). A court may vacate an arbitration award, however, where the arbitrator exceeded the arbitrator's power (*Matter of New York City Tr., Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332 [2005]). In interpreting an agreement, "an excess of power occurs only where the arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of Henneberry v ING Capital Advisors, LLC*, 10 NY3d 278 [2008], quoting *Matter of New York City Tr., Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, *supra*). DOE has not made such showing.

DOE first argues that the petition is untimely, because the Award was decided on August 28, 2006. The Petition was served on October 25, 2007 (and filed shortly thereafter), beyond the one-year statute of limitations within which to file a petition seeking a confirmation of an arbitration award. The petition is timely because the request for clarification of the Award tolled the statute of limitations (*Matter of Warner-Chappell Music [Aberbach de Mexico]*, 224 AD2d 301 [1<sup>st</sup> Dept 1996]). The Clarification of Award was issued on August 24, 2007, approximately two months prior to the filing of the Petition.

DOE next argues that the Arbitrator exceeded her authority by deleting the term "and/or," thus making the "small groups" qualification subject to the preceding two other qualifications (i.e., "tutorials" and "test preparation"). DOE asserts that the only limitation that the MOA places upon the additional time is that the instruction be given to small groups. In this context, DOE asserts further, teachers could spend the additional time: (1) teaching tutorials to a small

to term it as a “supplemental” or “buttressing” form of teaching .. or “interventional” work whereby teachers focus upon the reinforcement or remediation of work that a student is already familiar with, because such work was originally taught to him or her during a regular classroom period.

(Id., at 31-32).

Regarding pre-contract negotiations and bargaining history, the Arbitrator took testimony from numerous persons including (1) Mindy Karten Bornemann, UFT’s Chapter Leader for Speech Improvement Teachers; (2) UFT President Randi Weingarten; (3) DOE’s Executive Director of Labor Policy, Dan Weisberg; and (4) DOE’s Senior Internal Manager of Instruction in Special Education, Linda Wernikoft.

The Arbitrator also considered a memorandum by DOE’s Executive Director of Labor Policy, Dan Weisberg, dated November 29, 2005 (Weisberg Memorandum), which was a “guide to UFT contract changes,” and which included a discussion of how to implement the “Additional Time” language contained in the MOA. The Arbitrator noted that the Weisberg Memorandum states that the primary goal of the 37.5-minute session is to provide intensive instruction to support struggling students.

In addition to considering this extrinsic evidence to ascertain the meaning of the provision at issue, the Arbitrator’s reasoned and detailed analysis of the sentence structure, supports the conclusion that, because the words “tutorials,” “test preparation,” and “small group instruction” are all included in the same sentence, that fact implies that the parties contemplated a form of teaching that is something less than what might occur during a regular classroom period (*see Award*, at 31). Thus, the rationale of the Arbitrator was proper in that the arguably ambiguous provision was supported by extrinsic evidence (*Local 1199, Drug, Hosp. and Health*

*Care Empls. Union, RWDSU, AFL-CIO v Brooks Drug Co.*, 956 F2d 22 [2d Cir 1992]).

Moreover, the Arbitrator buttressed her conclusion by analyzing other factors such that the 37.5 minutes of time is added on four days a week after the students are dismissed, thereby indicating that the extra time was not intended to be treated as “original” teaching time while all students may not be present (Award, at 33). Hence, the Arbitrator met her paramount responsibility to reach an equitable result, and the courts are not to assume the role of overseers to mold the award to conform to their sense of justice, even if the Arbitrator made an error of law and fact (*Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 629 [1979]) which, in any event, has not been shown to have occurred here. The Arbitrator did not exceed her authority in that it is not disputed that she had the authority to interpret the contractual provision at issue. The real complaint is a disagreement with the manner in which the Arbitrator interpreted the contract, and not whether she had the authority to do so. This argument fails, however, because it is not for the courts to interpret the substantive conditions of the contract or to determine the merits of the dispute (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 82 [2003]).

DOE argues that the Awards are irrational because there is nothing in the record that stands for the proposition that DOE agreed to limit the use of the 37.5 minutes to the delivery of instruction that is only remedial in nature, i.e., non-original work, or that either party ever intended that small group instruction meant an instruction unlike any other instruction given during the day. This argument is unavailing for the reasons discussed above. The assertion that there is nothing in the record to demonstrate that either party ever intended that small group instruction means instruction unlike any other instruction given during the rest of the day (DOE’s

Memorandum of Law, at 22) is without merit, because DOE has not shown that test preparation or tutorials do not constitute types of instruction that are never given during the rest of the school day. Furthermore, as discussed above, the conclusion by the Arbitrator – that the 37.5 minutes of time is added on four days a week after the students are dismissed, thereby indicating that the extra time was not intended to be treated as “original” teaching time while all students may not be present – establishes that the Awards are rationally-based.

DOE argues that it is irrational for the Arbitrator to apply the “special per session” payment to speech teachers, contending that this payment represents compensation to teachers who are teaching five additional classes per week and likely spending additional time outside their regular workday to prepare for their regular class schedule. In contrast, speech teachers do not forfeit any preparation time. DOE argues that it is contrary to logic that speech teachers should be paid twice for teaching the curriculum required by the “Individualized Educational Plans” (IEP) to children with special needs, the “very students the additional 37.5 minutes was intended to benefit” (Memorandum, at 23). Accepting DOE’s assertion – that the 37.5 minutes was intended to help special needs students – supports the Arbitrator’s interpretation that it was intended for use as tutorials and test preparation.

DOE also argues that the Awards violate public policy by (1) unlawfully limiting the powers of DOE to promulgate and authorize educational standards and curriculum; (2) imposing the penalty of document production on the DOE for legitimately seeking clarification; (3) requiring DOE to pay certain members of the UFT twice what the contract allows, thereby granting them a gift of public monies in violation of Article VIII § I of the New York State Constitution.

As explained by the Court of Appeals, there is a two-prong test for determining whether an arbitration award violates public policy. First, where a court can conclude, without engaging in any extended fact-finding or legal analysis that a law prohibits, in an “absolute sense,” the particular matters that the arbitration is to decide, an arbitrator cannot act. Second, an arbitrator cannot issue an award where the award itself violates a well-defined constitutional, statutory, or common law of this State (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d at 80, quoting *Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100, AFL-CIO*, 99 NY2d 1, 6-7 [2002]). DOE has not satisfied this two-prong test.

The assertion that the “DOE cannot relinquish its ultimate responsibility of maintaining adequate standards in the classroom” (Memorandum, at 24) is the type of “general responsibility” that does not prohibit, in an “absolute sense,” an arbitrator from determining what the parties agreed would comprise the 37.5-minute additional period (*see Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d at 80). DOE cites Education Law § 2590-h (8) and Education Law § 2554 (11) for the proposition that the Arbitrator cannot usurp DOE’s power to promulgate and authorize educational standards and curriculum.

Contrary to this assertion, the Awards do not establish curriculum or set educational standards. DOE cites Education Law § 2590-h (8), but this pertains to the power of the chancellor to promulgate “minimum clear educational standards, curriculum requirements and frameworks, and mandatory educational objectives applicable throughout the city district.” DOE also cites Education Law § 2554 (11), and this pertains to the power of DOE to “authorize the

general courses of study which shall be given in the schools and to approve the content of such courses before they become operative.” The Awards do not conflict with the mandates of these provisions of the Education Law, and do not create the required “explicit conflict” necessary to vacate the arbitration result on public policy grounds (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 327 [1999]). DOE has also not satisfied the second prong by demonstrating that the Awards violate a well-defined constitutional, statutory, or common law of this State.

DOE asserts that the Arbitrator imposed the penalty of document production on DOE for legitimately seeking a clarification. The Arbitrator found that, for a speech teacher to prove that original teaching occurred during the 37.5-minute time frame, the most logical documents to support such a claim would be the special attendance book and either the “Confidential Speech/Language Recorder Folder” or the student’s IEP which would be within the custody of the DOE (Clarification of Award, at 9). Although the Arbitrator placed the burden on DOE to produce the necessary reports so that a speech teacher may file a claim, she did not do so only “because of the lateness of the request for the clarification,” but also because of “the fact that the reports filed by speech teachers when working with mandated students are maintained by the Department, which was evidenced at the arbitration hearing” (Clarification of Award, at 8).

Finally, DOE argues that public policy prohibits DOE from paying certain members of the UFT twice what the contract allows, thereby granting them a gift of public monies in violation of Article VIII § 1 of the New York State Constitution which reads, in part:

“No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association . . . .”

For the reasons discussed by the Arbitrator, which do not appear to be without merit, the

directive that performance of the “original” work during the 37.5-minute period be reimbursed on a pro-rata basis has not been rendered a gift, but is contractually-based. Indeed, in its answer (¶ 84), DOE states that the effect of the Awards is that the DOE will be required to pay speech teachers twice for time that they are to be teaching anyway. However, as found by the Arbitrator, the MOA did not intend for the speech teachers to be performing such work during the additional 37.5-minute period.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted and the Awards rendered in favor of petitioner and against respondent are confirmed; and it is further

ORDERED that the cross motion by respondent to dismiss the petition and vacate the Awards is denied.

Dated: July ,2008

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J.S.C.


directive that performance of the "original work" during the 37.5-minute period be reimbursed on a pro-rata basis has not been rendered a gift, but is contractually-based. Indeed, in its answer (¶ 84), DOE states that the effect of the Awards is that the DOE will be required to pay speech teachers twice for time that they are to be teaching anyway. However, as found by the Arbitrator, the MOA did not intend for the speech teachers to be performing such work during the additional 37.5-minute period.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted and the Awards rendered in favor of petitioner and against respondent are confirmed; and it is further

ORDERED that the cross motion by respondent to dismiss the petition and vacate the Awards is denied.

Dated: July 15, 2008

  
\_\_\_\_\_  
J.S.C.

**UNFILED JUDGMENT**  
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