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

PRESENT: Hon. MICHAEL D. STALLMAN PART 7
Justice

In the Matter of the Application of
LISA HAYES,

Petitioner,

- v -

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

INDEX NO. 100744/09

MOTION DATE 5/6/09

MOTION SEQ. NO. 001

MOTION CAL. NO. 48

The following papers, numbered 1 to 4 were read on this petition and cross motion

	PAPERS NUMBERED
Notice of Petition— Petition — Exhibits	1-2
Notice of Cross Motion—Affirmation — Exhibits A-N	3-4
Replying Affidavits — Exhibits	

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ORDERED and ADJUDGED that this petition and cross motion are decided in accordance with the annexed memorandum decision, order, and judgment.

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).

MICHAEL D. STALLMAN
J.S.C.

Dated: 11/4/09
New York, New York

J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

In the Matter of the Application of

LISA HAYES,

Petitioner,

-against-

Index No. 100744/09

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Decision, Order and Judgment

Respondent.

HON. MICHAEL D. STALLMAN, J. :

In this Article 75 proceeding, petitioner, pro se, Lisa Hayes, a teacher, seeks an order vacating and setting aside a hearing officer's (HO) decision and Award dated December 23, 2008 (the Award) terminating petitioner from her teaching position with respondent the New York City Department of Education (DOE). DOE cross-moves for an order, pursuant to CPLR 404 (a), 3211 (a) (7) and 7511, dismissing the petition.

BACKGROUND

DOE charged petitioner with six specifications concerning allegedly unsatisfactory lessons she had conducted, lateness and other conduct that DOE maintained was unprofessional.[1] Based on

[1]The specifications alleged are that Hayes:
(1) slept during class; (2) displayed poor attention to classroom attendance during the month of September 2006 and arrived to work late approximately seventeen times during the 2006-2007 school year; (3) failed to make academic needs assessments of her students in the areas of student engagement, understanding, performance and comprehension during the 2005-2006 and 2006-2007 school years; (4) failed to adapt instruction to the individual needs and capacities of her students; (5) delivered unsatisfactory lessons on eight occasions during the 2006-2007 school year; and (6) failed to implement professional development recommendations from coaching sessions, observation conferences, training seminars, and inter-visitations during

these specifications, a hearing was conducted, pursuant to Education Law § 3020-a (3020-a Hearing), on April 28, 30 and May 6, 7, 15 and June 13, 2008, after pre-hearing conferences had been conducted on April 14 and 25, 2008.

According to the Award, the HO found petitioner guilty of all of the assertions in DOE's six specifications, with the exception of specification two, which the HO dismissed as to school year 2005-2006, but sustained as to school year 2006-2007. The HO also found that the appropriate penalty was petitioner's termination.

Here, petitioner alleges that the 3020-a Hearing was tainted by corruption, fraud and misconduct, in that the HO concealed improper ex parte communications; failed to disqualify herself when challenged with bias; and has an improper relationship with DOE. Petitioner also contends that the HO was not an impartial arbitrator; exceeded her authority; failed to follow the Article 75 procedures and otherwise disregarded the law. Petitioner further maintains that she was not afforded a reasonable opportunity to defend herself.

Petitioner alleges that she was awarded tenure in 1994, and had an unblemished record during her first 14 years of service, before exercising a contractual right under her union's collective bargaining agreement (CBA) which permitted her to take a seniority transfer to Intermediate School 61 in September 2005. Petitioner claims that after the transfer, she was harassed by her new supervisor, and never given a satisfactory rating for any lesson. Petitioner also claims that after receiving an unsatisfactory rating for the 2005-2006 school year, she requested assistance from the Peer Intervention Program under the CBA, but was put on a waiting list and never received the

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the 2005-2006 and 2006-2007 school years (Petition, Exh. 10 [Amended Specifications], at 2).

contractually required support. Petitioner claims that on September 7, 2007, she was reassigned to a temporary reassignment center, and charged with incompetence and other misconduct. Petitioner was thereafter assigned counsel by the New York State United Teachers (NYSUT), with whom she met on December 18, 2007, for her upcoming 3020-a Hearing.

Petitioner alleges that in January 2008, she joined an activist group, Teachers4Action (T4A), to deal with what she alleges were conditions that allowed her, and other colleagues, to be reassigned to temporary reassignment centers and subjected to disciplinary hearings. Petitioner avers that T4A commenced an action in federal court during 2008 (the Federal Action), challenging the 3020-a Hearing process, and seeking a stay of the 3020-a Hearings scheduled for the plaintiffs-teachers involved in the Federal Action. Among the defendants to the Federal Action was the HO, who had been previously selected to preside over petitioner's 3020-a Hearing.

T4A filed an amended complaint in the Federal Action, naming petitioner's union, the United Federation of Teachers (UFT), as a defendant, and alleging its breach of fiduciary duty to its members concerning their rights in 3020-a Hearings. Petitioner contends that commencing March 14, 2008, NYSUT, which is affiliated with the UFT, began withdrawing legal representation from T4A members engaged in 3020-a Hearings, claiming conflict of interest. By letter dated March 17, 2008, NYSUT, by James R. Sandner, withdrew legal representation for petitioner's 3020-a Hearing. As the reason for the withdrawal, among other things, Sandner states that petitioner's involvement as a plaintiff in the Federal Action created a conflict of interest (Petition, Exh. 11).

Petitioner maintains that she and other T4A members, who were dependent on NYSUT counsel, challenged the propriety and legality of its withdrawal, as NYSUT was not, as of the time of its withdrawal, named as a party in the Federal Action or served with process. Petitioner further

maintains that she and most of the other affected teachers could not afford to retain private counsel, and lacked the experience to cross-examine witnesses and address other procedural issues that might arise in a 3020-a Hearing.

There is no dispute that the HO sent petitioner notice of the April 14, 2008 pre-hearing conference as, according to petitioner, she asked for an adjournment of the original April 1, 2008 date for the conference, which was granted by the HO, with the conference adjourned to April 14, 2008 (Petition, ¶ 106). Although petitioner attended the first pre-hearing conference on April 14, 2008, accompanied by T4A counsel from the Federal Action, she stated on the record that she was unrepresented for purposes of the 3020-a Hearing. According to petitioner, knowing that she had no counsel, DOE's attorneys, Michael Best, appearing by Dennis DaCosta, Florrie Chapin and Theresa Europe, the latter three of whom all appeared at the April 14, 2008 pre-hearing conference (Tr., at 2), insisted that the hearing proceed.

Petitioner avers that during the preliminary stage of the Federal Action, certain e-mail correspondence between the involved plaintiffs and their counsel, proposing a litigation strategy designed to halt 3020-a Hearings, was intercepted and forwarded to DOE's counsel and some of the panel of hearing officers that conduct 3020-a Hearings (April 3, 2008 E-mails). At the April 14, 2008 pre-hearing conference, Europe read these e-mails into the record (Tr., at 22-29).

Petitioner maintains that in response to learning of T4A's litigation strategy through the April 3, 2008 E-mails, DOE's attorneys and the hearing officers colluded against the teachers, and engaged in a cover up to maintain the appearance that they were not doing so. Petitioner further maintains that Europe read the April 3, 2008 E-mails into the record, over the objection of T4A counsel, at 3020-a Hearings for other T4A members, each time maintaining, as she did in the Federal Action,

that she had received the e-mails by anonymous fax.

Petitioner asserts that on May 1, 2008, during the Federal Action, counsel for DOE reported that she had checked Europe's fax machine, and that fax logs and related records for the date of the April 3, 2008 E-mails were no longer available. Petitioner asserts that Europe committed perjury concerning the source of T4A's confidential materials, and that Europe and her staff colluded with various hearing officers to cover up the source of those same materials, and to force T4A plaintiffs to proceed with their 3020-a Hearings without NYSUT legal representation. Petitioner further contends that the April 3, 2008 E-mails were also circulated or forwarded to most of the hearing officers conducting 3020-a Hearings against T4A members with a subject line that read "please keep the source anonymous." Petitioner contends that at the Federal Court's bidding, copies of the April 3, 2008 E-mails were given to T4A counsel, and that examination of the e-mail messages revealed that they were forwarded to DOE by an attorney, Richard Krinsky, who was then engaged in representing a teacher.

Petitioner has also submitted an exhibit, which contains a copy of a document dated April 7, 2008, in which Europe thanks Krinsky for "the heads up" in response to an e-mail message from Krinsky to Europe and others with case law concerning arbitration (Petition, Exh. 16, at 4-10 [the Krinksy E-mail]). The Krinsky E-mail also reveals that in response to Europe's thanks, Krinsky stated that his client was a litigant in the T4A lawsuit, had been trying to get out of the Federal Action for some time, and did not condone T4A's tactics (*id.*, at 4). Petitioner maintains that it is apparent that DOE entered into a deal favorable with Krinsky's client in return for information that could be used against T4A, and that it is irrefutable that DOE struck a deal with another T4A member, whom petitioner contends informed on T4A in exchange for a financial settlement and

withdrawal by DOE of the charges against him.

Petitioner asserts that Europe entered into deals with some T4A plaintiffs and the UFT in order to undermine other T4A plaintiffs in their hearings. Petitioner also asserts that the UFT "seduced a number of [T4A] plaintiffs into withdrawing from the [Federal Action] with the promise that their NYSUT representation would be restored," and that these teachers were subsequently exonerated or restored to service with a moderate fine, while other T4A plaintiffs, including petitioner, have been terminated [Petition, ¶ 56]. Petitioner further contends that teachers with charges similar to those against T4A members have fared better in their 3020-a Hearings. Petitioner alleges that it was in this context that she was forced to defend herself.

Petitioner argues that she was not afforded a reasonable opportunity to defend herself for several reasons. The first is that Europe read the April 3, 2008 E-mails at the April 14, 2008 pre-hearing conference. The second is that the HO scheduled an additional pre-hearing conference during a holiday week for petitioner, but did not appear at the designated site for that conference, instead conducting the conference later in the day, by telephone, with DOE only.

Petitioner asserts that having been denied NYSUT representation, and on the advice of her T4A counsel, Edward Fagan, she did not attend the 3020-a Hearings on April 28, 30 and May 6, 2008, during which time the hearings proceeded. The court notes that during the underlying proceeding, Fagan represented that he was also petitioner's counsel in a state court action that T4A filed against a group of hearing officers (State Action).

The transcript of the 3020-a Hearing reveals that at the April 14, 2008 pre-conference, petitioner stated that she was there without counsel (Tr., at 4), and Fagan argued for a stay of the hearing, and that the April 3, 2008 E-mails were privileged. The record further reveals that

petitioner agreed that she previously had been given a two-week adjournment to obtain counsel, and had been advised in writing that the hearing would proceed whether or not she had counsel (*id.*, 30-31). At the conference, the HO also informed petitioner that she had an additional two weeks before the hearing would begin on April 28, 2008.

The record indicates that hearings continued on April 28, 2009 and May 6, 2008 without petitioner attending. According to the transcript, at the May 7, 2008 hearing, petitioner appeared and stated that she was there without her NYSUT lawyer because the UFT declared that NYSUT had a conflict between representing her and the UFT, which it had refused to waive. Petitioner also objected that her NYSUT lawyer had been allowed to withdraw over her objection, and to being compelled to attend without counsel, to which she had never waived her right. Petitioner further objected to the HO on the grounds of bias, conflict of interest, ex parte communication and other, unspecified, matters that she stated her attorney could further address with the HO. Petitioner then stated that she declined "to answer any questions with regard to these or any other issues that relate to my claims in the New York Federal or New York State Court which also relate to this 3020-a hearing" (*id.*, at 911). Petitioner remarked that she was there because of fear of further retaliation from her employer, which was forcing her to be there, but that she was not a lawyer and was not representing herself. Among other things, petitioner demanded that the hearing be stayed or adjourned until the issues she discussed were resolved in a court of law and that the HO immediately recuse herself and stop convening hearings without notice to her. The transcript of the hearing reveals that the HO found no basis to recuse herself in the absence of a court-ordered stay (Tr., at 916).

At the May 15, 2008 hearing, petitioner stated on the record that, upon advice of counsel, she

was declining to subject herself to, and to participate in, the hearings until there had been compliance with "Article 21-6" and New York State Education Law procedures, thereafter directing the HO to Mr. Fagan (*id.*, at 1209). Petitioner did not attend the May 28, 2008 hearing date, but the HO read into the record the contents of a letter that the HO stated she was sending to petitioner advising petitioner that she had until 4:30 P.M. on June 5, 2008 to notify the HO as to whether or not she was putting on a case, which would commence on the next scheduled hearing date, June 13, 2008. The HO also stated that, as a courtesy, she would permit petitioner to submit a written closing, regardless of whether or not petitioner chose to put on a case.

On June 13, 2008, the HO read into the record e-mail correspondence that she stated she had received from Fagan on June 5, 2008. The e-mail stated that petitioner had not received all of the transcripts, and wanted to "respond" based on new facts and new evidence (*id.*, at 1289). The e-mail also stated that June 13, 2008 was not a convenient date due to pre-existing conflicts, and asked that the HO schedule the hearing for the week of June 23, 2008. The record reflects that the HO stated that she responded to petitioner, by letter dated June 6, 2008, that as petitioner was required to appear at the reassignment center each day, June 13, 2008 would remain the hearing date, and that if petitioner wished to present a case she should be prepared to then do so. The HO further stated that she received an e-mail from petitioner on June 12, 2008, at 3:56 P.M., reiterating petitioner's position concerning NYSUT counsel and the HO, and stating that petitioner was in the process of retaining counsel to put in a special appearance and to put on a three- to four-day limited case, either toward the end of the next week or the beginning of the following week. The HO read into the record her response that she had granted petitioner an adjournment to obtain counsel in March, that petitioner had chosen not to appear with counsel, and that there would be no further adjournments.

DISCUSSION

Education Law § 3020-a (5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR 7511. CPLR 7511 (b) provides that a court may vacate an arbitral award when the rights of a party in an arbitration were prejudiced by corruption, fraud, or misconduct in procuring the award or the partiality of an arbitrator (*see also Lackow v Department of Educ. (or "Board") of City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008] ["(u)nder such review an award may only be vacated on a showing of 'misconduct, bias, excess of power or procedural defects (citation omitted)'"]). CPLR 7511 (b) further permits vacatur of an award where an arbitrator exceeded his or her power, or failed to follow the procedures of the article, unless the party seeking to vacate the award continued with the arbitration without objection and with notice of the defect. Petitioner has the burden of establishing that the hearing officer's determination was based on misconduct or bias (*id.*, at 568), and, to succeed, allegations of misconduct, including bias, must be supported by clear and convincing evidence (*Matter of Infosafe Sys. [International Dev. Partners]*, 228 AD2d 272, 272-273 [1st Dept 1996]). In cases in which the parties are compelled by law to arbitrate, the courts must also consider whether "the award [is] in accord with due process" (*Matter of Bernstein [Norwich City School Dist. Bd. of Educ.*], 282 AD2d 70, 73 [3rd Dept] [citation and internal quotation marks omitted], *lv dismissed* 96 NY2d 937 [2001]).

Petitioner contends that the arbitration was tainted by corruption, fraud and misconduct because the April 3, 2008 E-mails were shared with DOE's attorneys and the hearing officers and the Krinsky E-mail was forwarded to hearing officers and DOE's counsel, and the HO failed to reveal to petitioner ex parte communications, instead engaging in a cover up concerning knowledge of and culpability in disseminating these communications. Petitioner argues that the HO's bias and

misconduct are also demonstrated by her failure to disqualify herself when challenged with bias, despite that petitioner was a plaintiff in the Federal Action, filed in June 2008, and the State Action, filed in April 2008, in which the HO was one of a group of hearing officers named as defendants.

Addressing the April 3, 2008 E-mails, DOE submits the order of the Federal Court Magistrate in the Federal Action, in which he states that the court determined at the parties' prior conference that the subject e-mails were not privileged. Assuming, arguendo, that the HO had received and read the April 3, 2008 E-mails prior to the hearing, petitioner does not suggest how the HO's failure to reveal to her what she may have already known about them prejudiced petitioner in the arbitration. Regarding the Krinsky E-mail,[2] petitioner does not demonstrate how a hearing officer's mere receipt of an e-mail message with legal citation concerning recusal demonstrates misconduct attributable to the hearing officer. In any event, petitioner does not provide evidence to demonstrate that the HO received copies of any of the e-mails discussed here prior to the hearing, or that DOE sent them to the HO. In fact, petitioner's accusation that DOE and the HO engaged in a cover up, concerning her case, is unsupported by evidence and is thus unavailing.

Petitioner also has not demonstrated how the April 3, 2008 E-mails, incidents of the lawsuit against the HO, would be a basis to disqualify the hearing officer where petitioner has not demonstrated that the court actions against the HO would have provided cause for disqualification. According to petitioner, the HO accepted the appointment in December 2007, and T4A sued various hearing officers, including the HO, in 2008. Accordingly, "any resultant cloud on [the HO's] neutrality would thus be a self-inflicted injury on petitioner's part" (*see Matter of Hollander v New*

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[2]DOE states that the Krinsky E-mail was not one of the e-mails entered into evidence in the proceeding.

York City Dept. of Educ., 2009 NY Slip Op 31399[U] [Sup Ct, NY County 2009] [citing to *Robert Marini Bldr. v Rao*, 263 AD2d 846 (3d Dept 1999)]). T4A made claims against many hearing officers, and petitioner points to nothing specific to the HO that would have required her disqualification, but merely makes generic, unsupported claims of bias. Were the Court to accept petitioner's view, essentially that disqualification is necessary when a hearing officer is sued or threatened with suit, without more, would merely serve to encourage an easy method of disqualification (*cf. Matter of New York State Assn. of Criminal Defense Lawyers v Kaye*, 95 NY2d 556, 561 [2000]; *Oakes v Muka*, 56 AD3d 1057, 1059 [3d Dept 2008]).

Petitioner argues that the HO's bias and misconduct are further demonstrated by the HO's failure to follow rules and procedures of the American Arbitration Association (AAA) for responding to a challenge of bias. This contention is unavailing, as petitioner points to nothing in the CBA that requires the HO to follow such rules and procedures, and the court does not find that Education Law § 3020-a contains such a requirement.

Petitioner also argues that the HO exceeded her authority by proceeding with the 3020-a Hearings at the direction of DOE counsel, and over petitioner's objections that she was not represented by NYSUT counsel to which she was entitled. Petitioner maintains that the HO engaged in misconduct because she did not agree to adjourn the proceeding, leaving petitioner to defend herself without the benefit of the free legal representation theretofore provided to teachers by their union. Petitioner alleges that this conduct contributed to the adverse decision against petitioner, and demonstrates that the HO was not neutral or impartial.

DOE submissions in opposition include the order of Justice Abdus-Salaam in a T4A action against DOE, in which T4A sought to stay various 3020-a hearings. In the order, Justice Abdus-

Salaam notes that the stay of the 3020-a hearings was not continued after April 24, 2008. The first scheduled date of petitioner's hearing was April 28, 2008. DOE submissions also include the decision and order of Justice Kibbie F. Payne, denying T4A's application for a judgment declaring the respondent hearing officers, which included the HO, disqualified to serve as arbitrators due to, among other things, bias, prejudice, conflicts of interest and concealment of evidence.

The record reveals only that the HO stated that she was continuing on with the hearings because she had not received notice of a stay of the proceeding, but does not suggest that the HO did this because she was following the directives of DOE, as petitioner alleges. Moreover, an arbitrator's decision to grant or deny an adjournment generally rests within the sound discretion of the arbitrator (*see Harwyn Luggage, Inc. v Henry Rosenfeld, Inc.*, 90 AD2d 747, 747-748 [1st Dept 1982], *affd* 58 NY2d 1063 [1983]; *see Matter of Chawki v New York City Dept. of Educ., Manhattan High Schools, Dist. 71*, 39 AD3d 321, 323-324 [1st Dept 2007] [stating that "CPLR 7506 (c) provides, 'Notwithstanding the failure of a party duly notified to appear, the arbitrator may hear and determine the controversy upon the evidence produced'" and finding that Hearing Officer's denial of adjournment for unrepresented petitioner to confer with counsel was appropriate where petitioner had six weeks from notice of the charges against her and date proceedings commenced]). Refusal to grant an adjournment constitutes sufficient misconduct to vacate the award where such refusal results in the foreclosure of the presentation of material and pertinent evidence (*Matter of Bevona [Superior Maintenance Co.]*, 204 AD2d 136, 139 [1st Dept 1994]). Petitioner was given ample opportunity to obtain counsel, as she had notice that her union counsel had withdrawn as of March 17, 2008, and the HO initially granted petitioner an adjournment for such purposes, adjourning the first pre-conference hearing to April 14, 2008. Thereafter, petitioner had an additional two weeks

to obtain counsel before the hearing commenced on April 28, 2008. In addition, petitioner certainly was not precluded from retaining counsel for the hearing during the two-month period from the time of the first pre-hearing conference until the hearing culminated.[3] While NYSUT, and the UFT, did not provide counsel to petitioner, petitioner was free to obtain counsel herself, or to represent herself in the hearings.[4] That she did not do so, and that NYSUT withdrew, does not demonstrate that the HO engaged in misconduct. Petitioner also has not made a showing that she was precluded, by the HO's conduct, from presenting pertinent, material evidence concerning the validity of the charges, as petitioner makes no showing of the existence of such evidence, and does not indicate that she brought to the HO's attention concrete information about the existence of such evidence.

Petitioner's allegation that the HO had improper ex parte communications with DOE is also unsupported. Petitioner shows no contact between the HO and DOE, other than that which occurred during the second pre-hearing conference and the hearing sessions that petitioner chose not to attend. While a teacher is entitled to a reasonable opportunity to testify and to defend herself (*see* Education Law § 3020-a [3] [c] [i]), hearings may continue regardless of whether a party chooses not to attend (CPLR 7506(c); *see Matter of Chawki*, 39 AD3d at 323-324). Petitioner chose not to attend the hearing on certain dates. Consequently, by necessity, communications between DOE and the hearing officer would have been in petitioner's absence on those dates. This does not constitute cause to

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[3]Education Law § 3020-a (3) (c) (i) provides that "(t)he employee shall have a reasonable opportunity to defend himself or herself and an opportunity to testify in his or her own behalf" and that "[e]ach party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses."

[4]NYSUT is not a party here, and in making this determination the court need not address DOE's implicit assertion that NYSUT met its professional obligations to petitioner (*see* Resp. Memo. of Law, at 24).

vacate the Award. Arguably, the HO should have appeared for the scheduled second pre-hearing conference, regardless of the representations of T4A counsel that petitioner would not attend the conference, or of his intention to serve the HO with a subpoena. As petitioner does not allege that she appeared for the conference, however, the HO and DOE were not precluded from continuing proceedings in petitioner's absence. That the conference was thereafter conducted by telephone, without petitioner, is not alone a basis to invalidate the award.[5]

Petitioner also asserts that the panel of arbitrators maintained by DOE and UFT makes the hearing officers beholden to DOE for their continuing lucrative assignments, and that this has created an improper relationship between DOE attorneys and the hearing officers, as DOE offices and the hearing rooms are in the same location. Petitioner also contends that, in at least one case known to her, a hearing officer's contract was not renewed because he was deemed too even-handed.

Pursuant to the CBA, hearing officers are picked from a rotational panel of permanent hearing officers, the members of which are either agreeable to both DOE and the UFT, or, where there is no agreement, picked by resort to AAA procedures (*see* Petition, Exh. 28 [UFT Contract Article 21G]). Essentially, petitioner's contention is that the system by which hearing officers are chosen is flawed, but petitioner cannot, in this proceeding, obtain the relief she requests by arguing that a system negotiated and agreed to by petitioner's union on petitioner's behalf is inadequate or flawed. In addition, petitioner does not claim that the HO received remuneration other than that generally provided to other hearing officers doing the same time of work. Furthermore, while it

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[5]In the Award, the HO states that she held a telephonic conference with DOE counsel after petitioner, having been notified of the April 25, 2008 conference, failed to appear at DOE offices where DOE's counsel was present. The teleconference was conducted on the record (Tr., at 201-202).

might be advisable for petitioner's union, and DOE, to provide for hearings at a location other than the building in which DOE's offices are housed, petitioner does not provide evidence that she objected to the location of the hearing or of any specific misconduct on the part of the HO in relation to these arrangements. Petitioner's assertions suggest her suspicion of partiality, but even inferences of partiality are "not sufficient to warrant interference with [an] arbitrator's award" (*Matter of Infosafe Sys. [International Dev. Partners]*, 228 AD2d at 273 [citation and internal quotation marks omitted]). Accordingly, mere suspicion, without more in support, can also not be enough.

In summary, the record does not suggest misconduct or bias on the part of the HO. Indeed, the record reveals that petitioner received notice of every hearing session and pre-hearing conference, and was afforded an opportunity to be heard, but chose not to participate in the hearing process to any significant extent.

Petitioner argues that the HO failed to follow procedures of CPLR 7507, which sets forth that an award shall be made within the time fixed by the agreement, and failed to follow the procedures prescribed under the applicable provisions of the Education Law and the CBA by not rendering a timely award.[6] While petitioner is correct that Education Law § 3020-a (4) (a) and the CBA require that a hearing officer render a written decision within 30 days of the last day of the hearing, and that the HO did not meet this deadline, petitioner did not object timely to these technical flaws, and such failure to do so must be deemed a waiver of such constraints (*see* CPLR 7507 ["party waives the objection that an award was not made within the time required unless he notifies the arbitrator in writing of his objection prior to the delivery of the award to him"]; *Scollar v Cece*, 28 AD3d 317 [1st

[6]CBA Article 21G (2) (e) provides that a written decision must be rendered within 30 days from the final hearing date.

Dept 2006] ["CPLR 7507 does not render a late arbitration award unenforceable in the absence of prejudice arising out of such delay"]; *compare Rosario v Carrasquillo*, 88 AD2d 874 [1st Dept 1982] [vacating award upon showing of express objections made *before* award was acknowledged]). Petitioner's contention that the HO was served notice of petitioner's concerns regarding the 3020-a hearing and CBA timing violations through the Federal Action and the State Action is unsupported and, accordingly, unavailing.

Petitioner further contends that the HO's failure to meet deadlines in the Education Law for, among other things, conducting the pre-hearing conference constituted manifest disregard of the law. While courts have stated that an arbitration award may be vacated if the court finds that it exhibits a manifest disregard of the law, this standard "gives extreme deference to arbitrators," and the occasions for vacating awards on this ground are "rare" (*see Duferco Intl. Steel Trading v T. Klaveness Shipping S/A*, 333 F3d 383, 389 [2d Cir 2003]). In order to vacate an award on this ground, the reviewing court must find "both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit and clearly applicable to the case" (*Wallace v Buttar*, 378 F3d 182, 189 [2d Cir 2004] [citations and internal quotation marks omitted]). In other words, an arbitrator acts in manifest disregard of the law when there is record evidence that in making his or her determination on the merits of the case, the arbitrator was apprised of an applicable, generally substantive, law yet chose to disregard it. That is not the situation described by petitioner.

Finally, in cases in which the parties are compelled by law to arbitrate, the courts must also consider whether "the award [is] . . . supported by adequate evidence in the record" (*Bernstein*, 282 AD2d at 73; *see Matter of Hegarty v Board of Educ. of City of N.Y.*, 5 AD3d 771, 773 [2d Dept

2004]). An arbitration award is only considered irrational if there is "'no proof whatever to justify the award'" (*Matter of NFB Inv. Servs. Corp. v Fitzgerald*, 49 AD3d 747, 748 [2d Dept 2008], quoting *Matter of Peckerman v D & D Assoc.*, 165 AD2d 289, 296 [1st Dept 1991]). While a court may vacate an award that is arbitrary and capricious, petitioner has the burden of establishing that the award was arbitrary and capricious (*see Hegarty*, 5 AD3d at 773).

Petitioner contends that her termination will affect her life adversely in many ways and has submitted much information about her personal life circumstances. The court is aware of the detrimental financial impact and other adverse consequences that the termination of a person's position may have on that person's life. The court has carefully reviewed the transcript and the exhibits. The testimony of the fact witnesses was not in favor of petitioner, and included testimony that she was sleeping on a desk through an entire classroom period (Tr., at 275-281). In addition, the HO credited DOE witness testimony about petitioner's inadequate performance in instructing students, and failure to maintain records of assessments conducted of students. "It is basic that the decision by an Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts, who are disadvantaged in such matters because their review is confined to a lifeless record" (*Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]; *Lackow,* 51 AD3d at 568). Witnesses also testified that remediation efforts were made, but that petitioner did not carry through in implementation. In addition, the exhibits admitted at the hearing include unsatisfactory observation reports for many lessons that petitioner conducted, as well as letters to petitioner from her school's principal about the occasions that she was late to work during the school year. As this evidence was provided solely by DOE, it is one-sided, and due to petitioner's minimal participation in the hearing, also unrebutted. In any event, it cannot be said that there is no proof in the record to

justify the Award, and therefore, the Award cannot be deemed arbitrary and capricious, and must be upheld under the law.

CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied, the cross motion is granted, and the proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order with notice of entry within 20 days of entry on petitioner.

Dated: November 24, 2009
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN
J.S.C.

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).