

**Matter of Simons-Koppel v New York City Bd./Dept.  
of Educ.**

2011 NY Slip Op 32160(U)

August 5, 2011

Supreme Court, New York County

Docket Number: 113333/10

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE *Jaffe*  
J.S.C. Justice

PART 5

Index Number : 113333/2010

SIMONS-KOPPEL, ESTHER

VS.

NYC BOARD/DEPT OF EDUCATION

SEQUENCE NUMBER : 001

VACATE OR MODIFY AWARD

*CAL # 90*

INDEX NO.

113333/10

MOTION DATE

5/24/11

MOTION SEQ. NO.

001

MOTION CAL. NO.

90

this motion to/for vacate arbitration award

PAPERS NUMBERED

1

2

34

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

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**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 E-File certificate requesting Entry of Judgment with a copy of the order and/or judgment attached.

Dated: 8/5/11

AUG 05 2011

*[Signature]*  
**BARBARA JAFFE** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
In the Matter of the Application of:  
ESTER SIMONS-KOPPEL,

Petitioner,

Index No. 113333/10

Motion Date: 5/24/11

Motion Seq. No.: 001

Motion Cal. No.: 90

**DECISION & JUDGMENT**

For a Judgment pursuant to Article 75  
of the Civil Practice Law and Rules

-against-

THE NEW YORK CITY BOARD/DEPARTMENT OF  
EDUCATION,

Respondent.

-----X  
BARBARA JAFFE, JSC:

**For petitioner, self-represented:**

Ester Simons-Koppel  
137-64 70<sup>th</sup> Avenue  
Kew Gardens Hills, NY 11367  
917-359-8411

**For respondent:**

Kuuku Minnah-Donkoh, ACC  
Michael A. Cardozo  
Corporation Counsel  
100 Church Street  
New York, NY 10007  
212-788-0879

By notice of petition dated October 11, 2010, petitioner moves pursuant to CPLR 7511 for an order vacating the hearing officer's award in the disciplinary proceeding brought by respondent against her. By notice of cross-motion dated December 21, 2010, respondent moves pursuant to CPLR 404(a), 3211(a)(7), and Education Law § 3020-a(5) for an order dismissing the petition and affirming the award. Petitioner opposes.

I. FACTUAL BACKGROUND

In 1997, petitioner began working at John Bowne High School (JBHS) in Queens, New

York in 1997. (Pet.). Prior to the charges giving rise to the instant petition, she was a tenured mathematics teacher employed by respondent New York City Department of Education.

Pursuant to Education Law § 3020(a), respondent charged petitioner with corporal punishment, verbal abuse, incompetence, and unprofessional conduct for the 2006 to 2007 and 2007 to 2008 academic years as follows:

SPECIFICATION 1: On or about December 19, 2006, [petitioner] said to her class, words to the effect of the following:

- a. You don't have a father in your life.
- b. You are Section 8 and scamming the government.
- c. You are on welfare.

SPECIFICATION 2: On or about March 6, 2007, [petitioner] failed to appear for a tenth period coverage she had accepted.

SPECIFICATION 3: On or about November 7, 2007, respondent failed to follow school policy in that she:

- a. left her class without a licensed teacher present;
- b. escorted approximately six female students to a bathroom that was unsupervised by an aid
- c. left the approximately six students unsupervised in the bathroom area while she went to the staff bathroom.

SPECIFICATION 4: On or about November 9, 2007, [petitioner] arrived late for her class.

SPECIFICATION 5: On or about between the Thanksgiving break and winter recess in 2007, [petitioner] told Student B, during class, words to the effect that if you are going to dress like that you belong working at a strip club on a stripping pole.

SPECIFICATION 6: On or about December 7, 2007, [petitioner] left a student unattended in a classroom.

SPECIFICATION 7: [Petitioner] failed to comply with the directive of Principal Howard Kwait to sign copies of letters to her file and/or observation reports on or about the following dates:

- a. February 4, 2008
- b. January 14, 2008
- c. November 30, 2007
- d. June 9, 2008
- e. April 2, 2008

SPECIFICATION 8: On or about January 11, 2008, [petitioner]:

- a. directed a female student to leave her classroom without following proper school procedures;
- b. failed to have a system in place to record outreach efforts.

SPECIFICATION 9: On or before January 11, 2008, [petitioner] took pictures of a student without obtaining a signed waiver/release from the student's parents/guardian.

SPECIFICATION 10: On or about January 15, 2008, [petitioner] pulled Student A by the wrist.

SPECIFICATION 11: On or about January 16, 2008, [petitioner] instructed two female students to leave her classroom without following proper school procedures.

SPECIFICATION 12: On or about February 27, 2008, [petitioner] rendered an unsatisfactory lesson as detailed in a report from Assistant Principal Mary Gahn, in that [petitioner] failed to:

- a. use proper classroom management techniques;
- b. engage the students through instruction;
- c. properly pace the lesson;
- d. have a lesson plan available during the lesson;
- e. assess student mastery of the lesson.

SPECIFICATION 13: On or about March 14, 2008, [petitioner] rendered an unsatisfactory lesson as detailed in a report from Principal Howard Kwait, in that [petitioner] failed to:

- a. properly plan for the lesson;
- b. effectively manage the class;
- c. appropriately prepare and/or administer an exam;
- d. use appropriate incentives for student work

SPECIFICATION 14: On or about March 29, 2008, [petitioner]:

- a. told students they were acting like monkeys;

b. told a female student to go to her corner, implying that she was a prostitute.

SPECIFICATION 15: On or about May 29, 2008, [petitioner]:

- a. failed to report to John Bowne High School on time;
- b. lied about her whereabouts to Principal Kwait.

(Affirmation of Kuuku Minnah-Donkoh, ACC, dated Dec. 21, 2010 [Minnah-Donkoh Aff.], Exh. A).

On February 25, 2009, a prehearing conference was held; the hearing in issue here was held on December 15, 18, and 22, 2009, and January 5, 7, 14, 19 and February 2, 4, and 24, 2010.

(Id.).

On the first day of the hearing, DOE moved to consolidate the charges for the 2006 to 2007 and 2007 to 2008 academic years with new charges preferred against petitioner for the 2008 to 2009 academic years:

SPECIFICATION 1: On or about November 20, 2008, during work hours, at the reassignment center, [petitioner]:

- a. was seated in the restroom with a facial mask on;
- b. dyed and/or treated her hair.

SPECIFICATION 2: On or about May 7, 2009, [petitioner]:

- a. submitted a Comprehensive Injury Report with the forged signature of Marc Einsohn;
- b. failed to follow the proper protocol for submitting a Comprehensive Injury Report.

SPECIFICATION 3: On or about May 9, 2009, [petitioner] failed to resubmit a completed Comprehensive Injury Report in accordance with the specified instructions for completion of the report as directed by supervisor Marc Einsohn.

SPECIFICATION 4: On or about the following dates, [petitioner] was late for work:

- a. March 20, 2009      31 minutes

|                   |                   |
|-------------------|-------------------|
| b. March 25, 2009 | 1 hour 20 minutes |
| c. March 26, 2009 | 30 minutes        |
| d. April 1, 2009  | 15 minutes        |
| e. April 2, 2009  | 13 minutes        |
| f. April 3, 2009  | 20 minutes        |
| g. April 6, 2009  | 14 minutes        |
| h. April 7, 2009  | 26 minutes        |
| I. April 20, 2009 | 7 minutes         |
| j. April 21, 2009 | 21 minutes        |
| k. April 22, 2009 | 22 minutes        |
| l. April 23, 2009 | 22 minutes        |
| m. April 24, 2009 | 17 minutes        |
| n. April 27, 2009 | 23 minutes        |
| o. May 1, 2009    | 6 minutes         |
| p. May 4, 2009    | 10 minutes        |
| q. May 6, 2009    | 15 minutes        |
| r. May 7, 2009    | 8 minutes         |
| s. May 8, 2009    | 6 minutes         |
| t. May 11, 2009   | 18 minutes        |
| u. May 12, 2009   | 14 minutes        |
| v. May 13, 2009   | 12 minutes        |
| w. May 14, 2009   | 25 minutes        |
| x. May 15, 2009   | 15 minutes        |
| y. May 18, 2009   | 15 minutes        |
| z. May 20, 2009   | 17 minutes        |
| aa. May 21, 2009  | 7 minutes         |
| bb. May 22, 2009  | 17 minutes        |
| cc. May 26, 2009  | 19 minutes        |
| dd. May 27, 2009  | 16 minutes        |

(*Id.*).

Petitioner’s counsel objected to consolidation, arguing that although petitioner may have been served with the new charges, he had never seen them and was thus unprepared to defend petitioner against them, and asked that he be given time to review them. (Pet., Exh. 3). The hearing officer granted respondent’s motion to consolidate, holding that the first set of charges would be presented first to allow petitioner’s attorney time to prepare a defense. (*Id.*).

Respondent presented the testimony of Michele Kearse, Assistant Principal of Guidance

at JBHS; Mary Gahn, Assistant Principal at JBHS; Marc Einsohn, a site supervisor for the Queens Teacher Reassignment Center; Maria Alpers, a coverage coordinator at JBHS; Howard Kwait, Principal of JBHS; petitioner's former students; Patrick Beath, former employee of respondent's Office of Equal Opportunity; Lorraine Hayes, deputy director of human resources at Queens Integrated Service Center; and Maureen Roach, security guard at the Queens Teacher Reassignment Center. (*Id.*). Petitioner presented no testimony. (*Id.*).

Closing arguments were held on June 3, 2010, during which petitioner's counsel renewed his objection to consolidation, claiming that the two sets of charges were heard simultaneously and that his client was prejudiced thereby, as he did not have adequate time to prepared defenses to the second set. (*Id.*). The hearing officer issued her 40-page findings on September 20, 2010, sustaining specifications 1a, c; 2; 3; 4; 5 (in part); 6; 7a, b, c, d; 8a; 9; 10; 11; 12; 13a, b; 14a; and 15a of the first set of charges and 2b; 3; and 4 of the second set. (Minnah-Donkoh Aff., Exh. A).

Kearse testified that students came into her office on December 19, 2006, told her that petitioner said they did not have fathers and were on section 8 and welfare, and completed written statements to that effect. (*Id.*). A student corroborated her and Kwait testified that a meeting was held in his office on January 5, 2007 during which respondent was presented with the students' written statements. (*Id.*). Absent evidence to the contrary, the hearing officer sustained specifications 1a and c. (*Id.*).

The hearing officer sustained specification 2 on the basis of unrefuted testimony that petitioner had completed a form requesting coverage assignments, was given and accepted an assignment for tenth period on March 6, 2007, and failed to appear for her assignment, and testimony that Gahn discovered the unsupervised class. (*Id.*).

As no evidence was presented refuting Kwait's testimony that he was told petitioner left her class to escort female students to an unsupervised bathroom and watched petitioner do so on video thereafter, that this video is no longer available, that petitioner admitted during a disciplinary meeting to leaving her class with a paraprofessional while she took students to the bathroom, and that school policy prohibits students from going to the bathroom in groups, the hearing officer sustained specification 3. (*Id.*) She also found support in the record for specification 4, as Kwait stated that on November 8, 2007, he was notified that petitioner was late to her eighth period class and that petitioner admitted to being late and failing to call for coverage during a November 14, 2007 disciplinary conference. (*Id.*)

The hearing officer found specification 5 supported to the extent that multiple students credibly testified that petitioner mentioned strip clubs in commenting on the revealing nature of female students' clothing. (*Id.*) As petitioner admitted during a December 13, 2007 disciplinary meeting to leaving a student unattended in a classroom while making copies for a future lesson, the hearing officer sustained specification 6. (*Id.*) The hearing officer found specifications 7a, b, c, and d amply supported by the record, as DOE introduced memoranda detailing petitioner's refusal to sign Kwait's letters to file. (*Id.*)

As multiple students credibly testified that petitioner ordered a student to leave the classroom, locked the door, and did not let her back in when she knocked, and as petitioner admitted to doing so without ensuring that Gahn was in her office to receive the student, the hearing officer sustained specification 8a. (*Id.*)

Taking judicial notice of Chancellor's Regulation A-640, which prohibits teachers from photographing students without a signed waiver or release from their parents, and finding

credible a student's testimony that petitioner took pictures of students with her cellular phone and Kwait's testimony that he never received signed releases or waivers, the hearing officer sustained specification 9. (*Id.*).

Three students testified that petitioner grabbed a student's wrist and pulled her to the chalk board to do a math problem after the student refused to do so. (*Id.*). Absent evidence to the contrary, the hearing officer sustained specification 10. (*Id.*).

As with specification 8a, the hearing officer sustained specification 11 on the basis of unrefuted testimony that petitioner failed to follow school procedures in ordering students to leave her classroom. (*Id.*).

The hearing officer determined that she had no basis on which to disagree with evaluation of the lesson as set forth in specifications 12 and 13a and b, as no evidence refuted it. (*Id.*). As no evidence refuted students' testimony and written statements that petitioner told her class that they were acting like monkeys, the hearing officer sustained specification 14a. (*Id.*).

Kwait testified that on May 29, 2008, petitioner, who was required to report to work before 9:00 a.m., did not arrive until 10:11 a.m.. (*Id.*). As petitioner's time card reflects her 10:11 a.m. arrival, and no evidence was presented to the contrary, the hearing officer found specification 15(a) amply supported by the record. (*Id.*).

The hearing officer sustained specifications 2b, 3, and 4 of the second set of charges on the basis of petitioner's timecard, which reflects her repeated lateness, and Einsohn's unrefuted testimony that he instructed petitioner on how to complete the injury form, that she failed to do so correctly, and that she was supposed to report to work by 7:40 a.m.. (*Id.*).

Although the hearing officer sustained a majority of the specifications, she declined to

terminate petitioner in light of the fact that she has not been shown to be an incompetent teacher. She instead suspended her for one year without pay and ordered her to attend sensitivity and remediation training. (*Id.*). In explaining her choice of penalty, the hearing officer did not refer to the second set of charges. (*Id.*).

## II. PERTINENT PROCEDURAL BACKGROUND

Petitioner commenced the instant action by filing her petition on October 12, 2010, which designated November 23, 2010 as its return date. (Pet.). By stipulation of adjournment dated November 22, 2010, the parties agreed that the return would be adjourned to January 24, 2011, that respondent would serve its papers on or before December 23, 2010, and that petitioner would serve her reply papers, if any, on or before January 20, 2011. (Stipulation of Adjournment, dated Nov. 22, 2010).

The affirmation of service annexed to respondent's cross-motion, which is dated December 23, 2010, provides that respondent mailed to petitioner a copy of the cross-motion that day.

## III. CONTENTIONS

Petitioner claims that the hearing officer was biased and that her decision resulted from corruption, fraud, and misconduct, as the record does not support the penalty. (Pet.). She also argues that the hearing officer exceeded her authority in sustaining charges against her, as the New York City Board of Education (Board) had not voted on them and they were not specific enough to provide her with notice, and that her due process rights were violated by consolidation of the charges. (*Id.*). Petitioner additionally alleges that the hearing officer violated the procedures set forth in Article 75. (*Id.*).

In opposition, and in support of its cross-motion, respondent argues that petitioner has shown neither bias nor corruption, fraud, or misconduct on the part of the hearing officer, as she provides only conclusory assertions of bias and the record shows that the hearing officer weighed witness credibility and grounded her decision in the evidence presented. (Mem. of Law in Support of Respondent's Cross-Motion to Dismiss the Petition). It also contends that she has failed to demonstrate a denial of due process, as the charges were specific, the hearing officer had the discretion to consolidate the two sets of charges, and her allegation regarding the Board's failure to vote on the charges is without merit, and that she has failed to specify any procedure with which the hearing officer failed to comply. (*Id.*).

In reply, and in opposition to respondent's cross-motion to dismiss, petitioner claims that respondent did not timely serve its cross-motion, as she received it on December 24, 2010, after the date specified in their stipulation. (Affidavit of Ester Simons-Koppel in Opposition to Respondent's Cross-Motion to Dismiss, dated Jan. 17, 2011). She also maintains that the hearing officer's decision was not supported by adequate evidence, as she overlooked inconsistencies in testimony and relied on hearsay, and that the penalty is shocking to one's sense of fairness, as she was not given an opportunity to conform her behavior to respondent's expectations before charges were preferred against her. (*Id.*).

In sur-reply, and in reply to petitioner's opposition, respondent contends that it timely served its cross-motion in compliance with the parties' November 22, 2010 stipulation. (Respondent's Reply Mem. of Law). It also claims that the hearing officer was permitted to consider hearsay in making her decision, that petitioner was not prejudiced by consolidation of the charges, as the majority of the sustained charges came from the first set, and that the penalty

is not shocking to one's sense of fairness in light of the fact that multiple meetings and conferences were held to discuss petitioner's behavior before the charges were preferred against her. (*Id.*).

#### IV. ANALYSIS

##### A. Timeliness of cross-motion

Pursuant to CPLR 2103(b)(2) and (c), a party not represented by an attorney may be served via mail, and service is considered complete upon mailing. Here, as respondent mailed to petitioner its cross-motion on December 23, 2010, the date by which it was required to serve its papers pursuant to the November 22, 2010 stipulation, the cross-motion was timely served.

##### B. Applicable law

When a hearing is held pursuant to Education Law § 3020-a, a party who was subject to the hearing may apply to vacate the hearing officer's decision pursuant to CPLR 7511, and the court's review is limited to grounds set forth therein. An award may be vacated on the application of a party who participated in the arbitration

- (i) corruption, fraud or misconduct in procuring the award;
- (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession;
- (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter was not made; or
- (iv) failure to follow the procedures of this article.

(CPLR 7511[b][1]).

Where arbitration is mandatory, the arbitrator's decision is subject to closer judicial scrutiny. The arbitration award "must be in accord with due process and supported by adequate evidence, and must [ ] be rational and satisfy the arbitrary and capricious standards of CPLR

article 78.” (*Lackow v Dept. of Educ. of the City of New York*, 51 AD3d 563, 567 [1<sup>st</sup> Dept 2008]). The party challenging the arbitration award bears the burden of proving that it is invalid. (*Id.*).

The scope of judicial review of an arbitration proceeding is extremely limited (*Matter of Campbell v New York City Tr. Auth.*, 32 AD3d 350, 351 [1<sup>st</sup> Dept 2006]), giving deference to the arbitrator’s decision (*Matter of New York City Tr. Auth. v Transp. Workers’ Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]). In reviewing an award, the court is bound by the arbitrator’s factual findings and interpretations (*Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368, 372 [1<sup>st</sup> Dept 2004]), and may not “examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one” (*Matter of New York State Correctional Officers & Police Benev. Assn., Inc. v State of New York*, 94 NY2d 321, 326 [1999]). And, if the motion to vacate is denied, the court must confirm it. (CPLR 7511[e]).

### C. Did petitioner prove that her rights were prejudiced?

#### 1. Corruption, fraud, or misconduct

Petitioner contends that the hearing officer’s decision resulted from corruption, fraud or misconduct in that it is unsupported by the record. As the hearing officer based her decision on the evidence and carefully weighed the relative credibility of the witnesses (*see infra* IV.E.), absent any facts even indicating that she was corrupt or engaged in fraud or misconduct, there is no ground for vacatur of the award pursuant to CPLR 7511(b)(1)(i).

#### 2. Bias

An allegation of bias against an arbitrator must be established by clear and convincing

evidence showing more than a mere inference of partiality. (*Matter of Infosafe Sys., Inc. v Int. Dev. Partners, Ltd.*, 228 AD2d 272, 272 [1<sup>st</sup> Dept 1996]). Partiality may be established by proof of actual bias or the appearance of bias, from which the arbitrator's conflict of interest may be inferred. (*New York Rest. Exch., Inc. v Chase Manhattan Bank, N.A.*, 226 AD2d 312 [1<sup>st</sup> Dept 1996], *lv denied* 89 NY2d 861 [1996]).

Here, petitioner conclusorily claims that the hearing officer's decision itself evidences her bias against petitioner, maintaining that the record does not support so harsh a penalty. As petitioner provides no other evidence of actual or apparent bias, she has failed to sustain her burden. (*See Matter of Mays-Carr v State Farm Ins. Co.*, 43 AD3d 1439, 1440 [4<sup>th</sup> Dept 2007] [allegations of bias were wholly speculative and fact that adverse determination was made did not indicate that arbitrator was partial]; *Matter of County of Niagara v Bania*, 6 AD3d 1223, 1225 [4<sup>th</sup> Dept 2004] [same]; *Matter of Schwartz v New York City Dept. of Educ.*, 22 AD3d 672, 673 [2d Dept 2005] [as petitioner offered no evidentiary proof of actual or apparent bias, she failed to sustain her burden]). In any event, the penalty is not so harsh (*see* IV.G.) as to permit an inference of bias.

### 3. Scope of arbitrator's power

To show that an arbitrator exceeded the scope of his power, a petitioner must demonstrate that the "arbitrator's award violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power." (*Transp. Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d at 336 [2005]).

#### a. Failure of Board to vote on charges

Pursuant to Education Law § 3020-a(2)(a), the Board must vote on charges against a

teacher to determine “whether probable cause exists to bring a disciplinary proceeding against [her] pursuant to this section.” However, Education Law § 2590-h(38) permits the Chancellor to “exercise all of the duties and responsibilities of the [Board] as set forth in [§ 3020-a] of this chapter” and provides that he “may delegate the exercise of all such duties and responsibilities to all of the community superintendents, and section 2590-f(1)(c) specifically endows community superintendents with the authority to discharge all employees. Therefore, as the Board properly delegated to DOE the ability to prefer charges and to determine whether probable cause exists to bring a disciplinary proceeding against petitioner, the hearing officer did not exceed her authority in sustaining them.

b. Specificity of charges

“In the administrative forum, [ ] charges need only be reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against him to allow for the preparation of an adequate defense.” (*Matter of D’Ambrosio v Dept. of Health of the State of New York*, 4 NY3d 133, 140 [2005]; *Matter of Block v Ambach*, 73 NY2d 323, 333 [1989]; *Matter of Heisler v Scappaticci*, 81 AD3d 954, 955 [2d Dept 2011]).

Petitioner alleges that the charges against her were not specific enough to provide her with notice. However, she fails to identify how they lacked specificity. As the charges provided her with the dates on which or date ranges during which she allegedly engaged in misconduct and detailed the misconduct, and as she attended multiple disciplinary meetings during which her misconduct was discussed, there is no basis for finding that the charges were insufficiently specific. (*Matter of Studley v Bd. of Educ. of the Kingston City School Dist.*, 53 AD2d 974 [3d Dept 1976] [where petitioner teacher charged with neglect of duty, charges describing specific

acts allegedly constituting neglect of duty provided him with notice]; *Sperling v Bd. of Educ. of Poughkeepsie City School Dist.*, 150 AD2d 584 [2d Dept 1989] [same]; *Matter of Root v Bd. of Educ. of the Fulton Consol. School Dist.*, 59 AD2d 328 [4<sup>th</sup> Dept 1977] [charges not unconstitutionally vague, as petitioner was notified prior to preference of charges that he needed to correct behavior that formed basis for charges]).

#### 4. Article 75 procedures

The procedures for an Article 75 arbitration hearing are set forth in CPLR 7506, pursuant to which an arbitrator must provide the parties at least eight days notice of the time and place of the hearing. At the hearing, the parties have the right to representation by an attorney and are “entitled to be heard, to present evidence, and to cross-examine witnesses,” and the arbitrator must be sworn in before they do so. (CPLR 7506). “A defect in procedure is waived where the party applying to vacate the award based thereon continues with the arbitration with notice of the defect and without interposing objection to it.” (5 NY Jur Arbitration and Award § 225).

Here, petitioner fails to identify the specific procedures with which the hearing officer did not comply, and there is no evidence in the record demonstrating that the hearing officer violated any procedure or that petitioner objected thereto. Therefore, there is no ground for vacatur of the award pursuant to CPLR 7511(b)(1)(iv).

#### D. Was the proceeding conducted in accordance with due process rights?

A court will not “concern itself with the form or sufficiency of the evidence before the arbitrator or some departure from formal technicalities in the absence of a clear showing that statutory grounds exist for vacatur of the award.” (*Matter of Travelers Ins. Co. v Job*, 239 AD2d 289, 292 [1<sup>st</sup> Dept 2007]).

Here, petitioner's attorney objected to consolidation on the ground that he had never seen them and had not prepared a defense against them. Although the hearing officer granted respondent's motion over his objection, she agreed that the first set of charges would be heard first in order to afford petitioner's attorney time to review the second set of charges. Regardless of petitioner's contention that the charges were heard simultaneously, as she had an opportunity to cross-examine the witnesses who testified to the second set and as she presented no testimony, she has failed to show that consolidation prejudiced her. (*See Matter of Smith v New York City Dept. of Educ.*, 2010 NY Slip Op 51989[U], 29 Misc 3d 1224[A] [Sup Ct, New York County 2010, Jaffe, J.] [where petitioner had an opportunity to cross-examine witnesses who testified to consolidated charges and to examine their evidence, argument that hearing officer should not have consolidated charges without merit]).

In any event, even assuming that the hearing officer should not have consolidated the charges, her findings as to specifications 2b, 3, and 4 of the second set are insignificant, as the majority of the sustained charges came from the first set, and she explained her choice of penalty by reference to the first set only. (*Id.*).

E. Was the award supported by adequate evidence and was neither arbitrary nor capricious?

1. Generally

A review of the evidence presented at the hearing shows that the specifications sustained against petitioner were supported by testimony from multiple witnesses as well as documentary evidence. For each specification she sustained, the hearing officer not only reviewed the supporting evidence but also noted that the evidence was unrefuted, and she otherwise declined to sustain those specifications unsupported by the record. As the hearing officer grounded her

decision in the record, absent any demonstration to the contrary, the award was supported by sufficient evidence. (See *Wien & Malken v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006] [“An arbitration award must be upheld when the arbitrator ‘offer[s] even a barely colorable justification for the outcome reached.’”]; *Lackow*, 51 AD3d at 568 [hearing record supported hearing officer’s conclusions]).

As the hearing officer’s determination is supported by the evidence and is rationally based, it was neither arbitrary nor capricious. (See *City School Dist. of the City of New York v McGraham*, 75 AD3d 445 [1<sup>st</sup> Dept 2010], *app denied* 16 NY3d 735 [2011] [finding award neither arbitrary nor capricious where arbitrator took into account entirety of record and made credibility determinations regarding petitioner teacher]; *Country-Wide Ins. Co. v May*, 282 AD2d 298 [1<sup>st</sup> Dept 2001] [award neither arbitrary nor capricious where rational view supported it]).

## 2. Hearsay

As an arbitrator need not comply with the technical rules of evidence (Education Law § 3020-a[3][c]), she may consider hearsay evidence (*Austin v Bd. of Educ. of the City School Dist. of the City of New York*, 280 AD2d 365 [1<sup>st</sup> Dept 2001]). Therefore, petitioner’s claim that the hearing officer’s decision is unsupported by the record and arbitrary and capricious by virtue of her consideration of hearsay evidence is without merit.

## 3. Credibility determinations

To the extent that petitioner is challenging the hearing officer’s credibility determinations, this does not constitute a ground for vacatur of an arbitration award. (See *Saunders v Rockland Bd. of Co-Op Educ. Servs.*, 62 AD3d 1012, 1013 [2d Dept 2009] [“When reviewing compulsory arbitrations in education proceedings . . . the court should accept the

arbitrator's credibility determinations, even where there is conflicting evidence and room for choice exists."]). Moreover, petitioner offers no reason for rejecting the testimony.

G. Was the discipline imposed excessive?

The standard for reviewing a penalty imposed after a hearing held pursuant to Education Law § 3020-a is whether the punishment imposed "is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." (*Bd. of Educ. of Union Free School Dist. No. 1 of the Towns of Scarsdale, et al v Mayor of Syracuse, et al.*, 34 NY2d 222, 233 [1974]). A result is shocking to one's sense of fairness when:

the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct . . . of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved.

(*Id.* at 234).

Here, although she found petitioner guilty of a majority of the specifications, the hearing officer rejected termination, the penalty sought by DOE. Rather, noting that petitioner had not been found to be an incompetent teacher, she suspended petitioner for a year without pay and ordered her to undergo sensitivity and remediation training, a punishment not shown to be disproportionate to her offenses in light of their severity and the fact that she attended multiple disciplinary meetings and conferences addressing her conduct before being charged. (*Cf. Matter of Addoo v New York City Dept. of Educ.*, 2009 NY Slip Op 32534[U] [Sup Ct, New York County 2009] [where petitioner found guilty of certain teaching deficiencies, semester-long

suspension and requirement that she attend teaching courses does not shock one's sense of fairness]; *Matter of Gabriel v New York City Dept. of Educ.*, 2009 NY Slip Op 32249[U] [Sup Ct, New York County 2009] [where petitioner, who had unblemished record, found guilty of using excessive force, brief suspension and anger management courses proportional to offense]; *Nreu v New York City Dept. of Educ.*, 2009 NY Slip Op 52007[U] [Sup Ct, New York County 2009] [where petitioner, who had unblemished record, found guilty of repeated inappropriate communications with student, one year suspension without pay does not shock one's sense of fairness]).

#### V. CONCLUSION

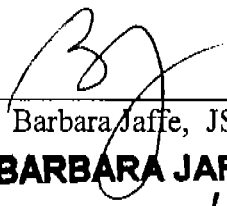
Accordingly, it is hereby

ADJUDGED, that the petition for an order vacating the award is denied; it is further

ADJUDGED, that respondent's cross-motion for an order dismissing the petition is granted to the extent that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondent; it is further

ADJUDGED, that respondent, having an address at 100 Church Street, New York, New York 10007, does recover from petitioner, having an address at 137-64 70<sup>th</sup> Avenue, Kew Gardens Hills, New York 10007, costs and disbursements in the amount of \$ \_\_\_\_\_, as taxed by the Clerk, and that respondent has execution therefor.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

**BARBARA JAFFE**  
J.S.C.

DATED: August 5, 2011  
New York, New York

AUG 05 2011