[* 1]

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

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE PART 61

Index Number : 116376/2010

EBEWO, MICHAEL

VS

NYC DEPARTMENT OF EDUCATION

Sequence Number : 001

VACATE OR MODIFY AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | 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 is decided in accordance with the annexed 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 appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 8/31/11

HON. ANIL C. SINGH J.S.C.
SUPREME COURT JUSTICE

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: IAS PART 61

----------X

In the Matter of the Application of
MICHAEL EBEWO,

Petitioner,

DECISION AND ORDER

For an Order Pursuant to Article 75 and 78 of the CPLR

Index No. 116376/10

- against-

NEW YORK CITY DEPARTMENT OF EDUCATION a/k/a THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondent.



----------X

**ANIL C. SINGH, J.:**

Petitioner Michael Ebewo moves for an order, pursuant to CPLR 7511, vacating or modifying an arbitration award made after a disciplinary hearing held pursuant to Education Law § 3020-a, in which petitioner was terminated from his employment with respondent The New York City Department of Education a/k/a The City School District of the City of New York (the DOE).[1] The DOE cross-moves to dismiss the petition, pursuant to CPLR 3211(a)(7), 404(a), and 7511. The DOE also seeks an order confirming the award, pursuant to CPLR 7511(e).

## BACKGROUND AND FACTUAL ALLEGATIONS

Up until his termination from employment in December 2010, petitioner worked as a

[1]Petitioner also incorrectly moves pursuant to Article 78 as a way to enjoin the DOE from implementing the arbitrator's award.

Special Education teacher at Isaac Newton Middle School for Math and Science in Manhattan. Petitioner was a tenured employee and had been working for the DOE since 1990.

In 2009, pursuant to Education Law § 3020-a, the DOE served petitioner with "specifications," or charges, alleging that, between the 2005-2006 and 2006-2007 school years, among other things, petitioner was "incompetent" and "unfit to perform his obligations to the service." DOE's Exhibit A, Hearing Officer's Opinion and Award, at 2. The DOE charged petitioner with nine specifications. Five out of the nine specifications alleged that petitioner did not conduct a satisfactory lesson while being observed. The ninth specification charged petitioner with not making any improvements despite attempted remediation. The remaining charges, which related to the absence policy and whether or not petitioner created a proper binder for the students, were not upheld by the hearing officer and are not relevant at this time. However, by way of example, two of the charges alleging an unsatisfactory lesson plan, which are indicative of the remainder of the charges, state the following:

> Specification 1: On or about December 5, 2005, as detailed in an observation report signed by Principal Lisa Nelson, Respondent rendered an unsatisfactory lesson in that:
>
> a) The objective of the lesson, how to multiple and divide integers, was not met.
> b) Respondent failed to follow the workshop model.
> c) There was an absence of focused instruction on the rules to be followed, or an explanation of why the rules made sense.
> d) The majority of the lesson was spent on the "Do Now" activity.
> e) The worksheet utilized was superficial and even if the students had an opportunity to complete the worksheet that would not have demonstrated that

the students understood the concepts outlined in the objective.
f) During the execution of the lesson only a small percentage of students in the class were actually working.
g) Some students never took out their notebooks.
h) Other students never took out a writing instrument.
i) Some students did no class work whatsoever.
j) Although there was some attempt to relate division to multiplication, the connection was never made, as the answers provided by the students did not relate to this mathematical concept.
k) Product and quotient were never clearly defined.
l) There was no review of the recent study of sums and differences.
m) The format of the lesson did not follow the workshop model, although Respondent stated in the pre-observation conference that he would utilize the workshop model to organize the lesson.
n) There was no evidence of procedures in place that:

1. Establish productive classroom management.
2. Support productive work habits of students.
3. Provide clear expectations of the students.

o) There was scant evidence that Respondent had worked with the two paraprofessionals in the classroom to develop clear norms and/or procedures for what the paraprofessionals need to do to support student learning and foster student productive behavior in the classroom
p) Students were allowed to go off task and the Respondent did not address or attempt to correct the off-task behavior, including the following:

1. Student A was reading a newspaper;
2. Student B was flipping through a science test book;
3. Student C was drawing.

***

Specification 6: On or about May 10, 2006, as detailed in an observation report by former Local Instructional Superintendent Jill Myers, Respondent rendered an unsatisfactory lesson in that :

a) There was no evidence of rituals and routines that would support student learning and/or structuring of the lesson.
b) Very few students were engaged in the lesson.
c) Respondent asked few questions of the students.
d) Respondent did not incorporate an assessment component in the lesson.
e) The lesson did not follow a clear direction.
f) The aim of the lesson did not relate to the activities conducted during the lesson.

g) There was no connection between previous learning and the lesson taught.
h) There was no evidence of classroom work displayed that related to the concepts attempted to be taught during the lesson.
i) There was very little evidence of student math work in the classroom.
j) Students were off task during most of the lesson.
k) Respondent rarely tried to engage the students during the lesson.
l) The agenda was never referred to during the lesson to support student understanding during transitions in the lesson.
m) Respondent and the paraprofessionals were not working as a team to provide instruction to the students.
n) It was unclear as to the role assigned to the paraprofessionals for some of the activities made part of the lesson.
o) Respondent did not allow time for students to complete the task Respondent had assigned to them.
p) Little and/or no feedback was provided to the students.
q) Respondent did not demonstrate mathematical understanding of the topic: using probability to estimate large numbers.

DOE's Exhibit Q, at 1-3.

The ninth specification, which alleges that petitioner failed to implement any improvement to his lesson plans, is as follows:

During the 2005-2006 and 2006-2007 school years, Respondent failed to implement the recommendations for improvement made to Respondent in prior observation reports and/or conferences with supervisors.

*Id.* at 4.

The nine charges were listed to constitute:

1) Just cause for disciplinary action under Education Law § 3020-a;
2) Incompetent and inefficient service;
3) Insubordination;
4) Conduct unbecoming Respondent's position, or conduct prejudicial to the good order, efficiency or discipline of the service;
5) Neglect of duty;
6) A violation of the By-laws, rules or regulations of the Chancellor, Department School or District;
7) Substantial cause rendering Respondent unfit to perform his obligations to the service; and

8) Just cause for termination.

*Id.*

Pursuant to Education Law § 3020-a, a hearing began on December 7, 2009, to determine the outcome of the charges. Arbitration is compulsory in Education Law § 3020-a disputes according to petitioner's collective bargaining agreement, and the DOE's rules. Hearing Officer Howard Edelman, Esq. (Hearing Officer Edelman) was appointed to preside over the proceedings. A hearing took place over 15 days, where both parties were entitled to examine and cross-examine witnesses and submit evidence. Many witnesses testified, including the paraprofessionals who were in the classroom with petitioner, and a student in petitioner's classroom. Petitioner asserted that the charges against him were without merit.

Hearing Officer Edelman sustained most of the charges set forth in the five specifications with respect to unsatisfactory lessons. Hearing Officer Edelman also sustained the ninth specification which summarized that petitioner did not show any improvement despite attempted remediation. For each specification, Hearing Officer Edelman went through the facts as presented to him by both parties.

For instance, as set forth above, in specification one, petitioner is charged with delivering an unsatisfactory lesson plan on November 30, 2006. Principal Lisa Nelson (Nelson) observed petitioner on that day and gave petitioner an unsatisfactory rating. During the hearing, Nelson testified that the day before the lesson, which was about the multiplication and division of integers, she discussed the objectives with petitioner. However, according to Hearing Officer Edelman, Nelson criticized the lesson and testified

that the students were unable to "articulate what products, factors and quotients were." DOE's Exhibit A, at 14. Among other things, Nelson alleges further that the lesson was chaotic, that the worksheet prepared by petitioner that was handed out to students was disorganized, that the paraprofessionals in the classroom did not have defined roles and that petitioner did not meet the individual needs of the students. Nelson concluded that, after the lesson was over, she suggested that petitioner meet with Barbara Fields (Fields), who was the Faculty Math Coach.

In response, petitioner testified that the students met their learning objectives and that they did understand the concepts. He explained that the paraprofessionals were working with the more difficult children in the classroom. Petitioner denied that the classroom was chaotic and claimed that the students were engaged in the lesson.

As another example, in specification six, petitioner was charged with rendering an unsatisfactory lesson plan on May 10, 2006. On that date, Local Instructional Superintendent Jill Myers (Myers) observed petitioner. Myers testified that her job is to support and supervise principals. Myers explained that while she was observing petitioner's lesson, less than half of the students seemed engaged. According to Hearing Officer Edelman, Myers alleged further that the "lesson did not follow a clear direction, and that there was no connection to previous learning." *Id.* at 23. She also noted that petitioner did not circulate around his classroom. Myers commented that the paraprofessional was not involved in the lesson plan. Although Myers concluded that the lesson had been unsatisfactory, she did praise petitioner for planning the lesson and having a good

relationship with his students.

Petitioner did not agree with Myers' assessment and maintained that the students were engaged in the lesson. Petitioner further claimed that his paraprofessionals were assigned to different groups of students and were familiar with the lesson.

In specification nine, petitioner is charged with failing to implement suggestions for improvement. During the hearing, the DOE contended that despite being offered substantial support, petitioner did not improve. Fields testified that the petitioner had let the students' behaviors get out of control and that petitioner was not teaching math effectively. Fields also testified that the paraprofessionals were not being used effectively in the classroom. Nelson also stated that, although urged to meet with an instructional specialist in special education, petitioner met with this person only once or twice.

Petitioner alleged that he did follow the suggestions for improvement. The guidance counselor testified that the students in petitioner's classroom were generally hard to control. One of the students testified that petitioner was a "great teacher." *Id.* at 30 .

Hearing Officer Edelman found that the DOE was able to prove the charges of "incompetent and inefficient service." *Id.* at 31. He noted that all of the observers had similar criticisms of petitioner's performance and that their testimony was persuasive. More specifically, Hearing Officer Edelman noted that the petitioner's classroom management style was "poor" and that he "had difficulty conveying the substantive material to his students." *Id.* at 31. He further concluded that the petitioner was not able to "differentiate among the different skill levels of his students." *Id.* at 34.

The paraprofessionals were also not utilized efficiently, according to Hearing Officer Edelman. Hearing Officer Edelman noted that one of the paraprofessionals testified that she was not provided with a lesson plan on a daily basis.

Despite acknowledging that petitioner's students were difficult to control, Hearing Officer Edelman concluded that the petitioner "did not manage his class effectively." *Id.* at 36. Hearing Officer Edelman found that the DOE met its obligation to provide sufficient remediation to petitioner, and that petitioner did not improve. Hearing Officer Edelman found the testimony of Fields significant in that she saw little improvement. In response to her testimony, Edelman concluded with the following:

> Though Ebewo cares about his students and has made attempts to comply with suggestions, the record conclusively establishes he continued to render incompetent service. Moreover, he was given substantial assistance, particularly from Fields. Her assessment that she saw little improvement is significant ... the chances of him becoming a satisfactory teacher are remote ... Ebewo tried to do his best ... his efforts were simply not successful.

*Id.* at 40-41.

The other unsatisfactory lessons were similarly fleshed out by Hearing Officer Edelman in his award and opinion, and will not be addressed at this time, as the two specifications addressed here are sufficiently indicative of all of the specifications.

On November 24, 2010, Hearing Officer Edelman determined that petitioner should be terminated from his teaching position as a result of the charges.

Shortly thereafter, petitioner filed this instant proceeding, seeking to vacate the award and returning the petitioner to his teaching position. Among other things, petitioner contends that the decision should not be upheld by the DOE as it was rendered to him after the 30 day

time limit as set forth in Education Law § 3020-a (4) (a). Petitioner alleges further that Hearing Officer Edelman disregarded relevant evidence and incorrectly gave weight to certain testimony. Allegedly petitioner was not able to sufficiently defend himself at the hearing since the school purportedly threw out some of his belongings. Petitioner also contends that the penalty for termination just for incompetence is not founded in the law and is also shocking. Finally, petitioner claims that Hearing Officer Edelman is biased against incompetency hearings and has a "history of disregarding the fundamental requirements of due process that has led to a reversal in another case." Reply Affirmation of Nicholas Penkovsky (Penkovsky), ¶ 10.

Pursuant to a cross-motion, the DOE seeks to have the arbitration award confirmed, and also seeks to have the petition dismissed for failure to state a cause of action.

**DISCUSSION**

In an effort to "foster the use of arbitration as an alternative method of settling disputes," the court's role in reviewing an arbitrator's award is severely limited. *Matter of Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO (Albany Hous. Auth.)*, 266 AD2d 676, 677 (3d Dept 1999), citing *Matter of Goldfinger v Lisker*, 68 NY2d 225, 230 (1986). Pursuant to Education Law § 3020-a (5), CPLR 7511 provides the basis of review of an arbitrator's findings. *Lackow v Department of Education (or "Board") of City of N.Y.*, 51 AD3d 563, 567 (1st Dept 2008). CPLR 7511 limits the grounds for vacating an award to "misconduct, bias, excess of power or procedural defects [internal quotation marks and citation omitted]." *Id.*

However, where, as here, the parties are subjected to compulsory arbitration, the Appellate Division, First Department, has held that judicial scrutiny is greater than when parties arbitrate voluntarily. *Id.* The arbitration award must be "in accord with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78." *Id.* The burden of showing an invalid award is on the person challenging the award. *Id.*

The Award Was Supported by Adequate Evidence

The bulk of petitioner's arguments centers around his allegations that Hearing Officer Edelman "disregarded" all testimony by petitioner's witnesses and improperly gave weight to the DOE's witnesses. He claims that there is "simply no mention" of his witnesses' testimony in the decision. Penkovsky Reply Affirmation, ¶ 15. However, petitioner is mistaken.

Petitioner called Dennis Ortiz, a guidance counselor, and "I.B.," a student, as witnesses. Contrary to petitioner's contention, the hearing officer clearly did not "disregard" their testimony. In his Opinion and Award, the hearing officer wrote:

> He [Ebewo] relied on the testimony of the School's Guidance Counselor, Dennis Ortiz, ("Ortiz") who indicated that the students in Respondent's class were difficult to control, became involved in physical altercations and were frequently disruptive.

(Opinion and Award of Hearing Officer Edward C. Edelman, p. 30, lines 12-16).

Likewise, the Opinion and Award describes I.B.'s testimony in detail. The hearing officer wrote:

> Respondent [Ebewo] also relied on the testimony of I.B., a student who called

> Ebewo a "a [sic.] great teacher" who did what he could to help diffuse conflict between the boys and girls in the classroom. I.B. described Ebewo's teaching method as: 1) start with an aim; 2) continue with the "Do Now"; 3) discussion; and 4) work on the aim question.

(Opinion and Award, pp. 30 - 31).

The hearing officer specifically relied upon the testimony of petitioner's witnesses regarding certain issues. The Opinion and Award states:

> While I have concluded that the Department has met its overall burden of demonstrating Respondent's lack of competence, I note that not every sub-specification has been proven. For example, Myers was critical of the Respondent for separating boys from girls from the class. Based on the testimony of I.B.[,] I conclude that Ebewo properly responded to the concerns of the girls that the boys were bothering them. His decision to separate the students appears to have been a correct response to a difficult to classroom situation.

(Opinion and Award, p. 38, lines 2 - 10).

Hearing Officer Edelman wrote:

> I also reject the Department's contention that the Respondent failed to post appropriate charts in the classroom. The testimony of Ebewo, Smith, Copeland and I.B. sufficiently rebut that contention.

(Opinion and Award, p. 38, lines 15-18).

The hearing officer references the testimony of Ortiz at yet another point, stating:

> While I recognize that the record contains much evidence that the Respondent's students were difficult and frequently required intervention from Ortiz and other members of the administration, I am forced to conclude that Ebewo did not manage his class effectively.

(Opinion and Award, p. 36, lines 14-18).

In light of the above quotations from the hearing officer's Opinion and Award, petitioner's contention that the hearing officer's decision makes "no mention" of the

testimony of petitioner's witnesses is meritless.

Notwithstanding such testimony, Hearing Officer Edelman believed that petitioner could not control his class and that he was incompetent. Hearing Officer Edelman set forth in detail why he had reason to believe that the petitioner, despite the testimony on his behalf, could not effectively manage his classroom. It is well settled that, in reviewing an administrative determination, "courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists." *Matter of Jenkins v Novello*, 50 AD3d 381, 382 (1st Dept 2008).

Although petitioner disagrees with Hearing Officer Edelman's credibility determinations, the award cannot be vacated on those grounds since it is within the purview of the hearing officer to determine the credibility of witnesses. As the Court stated in *Lackow v Department of Education (or "Board") of City of N.Y.* (51 AD3d at 568), "[a] hearing officer's determinations of credibility, however, are largely unreviewable because the hearing officer observed the witnesses and was able to perceive the inflections, the pauses, the glances and gestures – all the nuances of speech and manner that combine to form an impression of either candor or deception [internal quotation marks and citation omitted]."

Moreover, the award would not be vacated even if Hearing Officer Edelman did not address the positive testimony in his discussion. Arbitrators do not have to provide a reason for their decisions. *Matter of Solow Building Company, LLC v Morgan Guaranty Trust Company of New York,* 6 AD3d 356, 356-357 (1st Dept), *lv denied* 3 NY3d 605 (2004), *cert*

*denied* 543 US 1148 (2005).

In this case, Hearing Officer Edelman determined that, despite the fact that petitioner was trying his "best," based on upholding the charges for incompetency and inefficient service, petitioner must be terminated. DOE's Exhibit A, at 40-41. Moreover, even though petitioner may claim, among other things, that the students "had problems with authority and some would just choose not to participate in class," and that the DOE's observations of him were brief, Hearing Officer Edelman did not believe that he should be restored to service. Penkovsky Reply Affirmation, ¶ 34.

Accordingly, adequate evidence exists to support the arbitrator's award, and the Court will not disturb the award on this basis.

The Findings Were Rational and Were Not Arbitrary and Capricious

An action is considered arbitrary and capricious when it is "taken without sound basis in reason or regard to the facts." *Matter of Peckham v Calogero*, 12 NY3d 424, 431 (2009). An arbitration award is considered irrational if there is "no proof whatever to justify the award" *Matter of Peckerman v D & D Associates,* 165 AD2d 289, 296 (1st Dept 1991).

Applying both standards to the present case, it was not irrational for Hearing Officer Edelman to terminate petitioner's employment based on deficiencies in his teaching. After Hearing Officer Edelman reviewed the record and listened to testimony, he determined that petitioner's lesson plans were unsatisfactory over the course of two years. Hearing Officer Edelman noted that at least five different people, who conducted five different observations, all had similar criticisms of petitioner's classroom. He continued that the students were not

on task during the lessons. Hearing Officer Edelman also considered the testimony of a paraprofessional who claimed that petitioner did not provide her with a lesson plan on a daily basis. And, as previously discussed, Hearing Officer Edelman also determined that the DOE met its statutory requirement to provide remediation, yet petitioner showed no improvement. Accordingly, the arbitrator's award cannot be considered arbitrary and capricious.

Termination Appropriate and Not Shocking

Petitioner argues that, "the charged offense, incompetence over two academic years, teaching a particularly rough and over-aged class of students shocks one's sense fairness." Petitioner's Memorandum of Law, at 3. Petitioner notes that he has been teaching since 1978. Petitioner alleges further that he was unable to defend himself against an incompetence charge since there is allegedly no "statutory definition of incompetence that measures a teacher's effectiveness." Petition, ¶ 21.

In this case, Hearing Officer Edelman determined that, based on upholding the charges for incompetency, the appropriate penalty was termination. Hearing Officer Edelman went so far as to comment that he does not "believe that restoring [petitioner] to service would result in Ebewo becoming an effective or even marginally satisfactory teacher." DOE's Exhibit A, at 41.

Under Education Law § 3020-a (4)(a), a hearing officer is empowered to determine that termination is an appropriate penalty. As such, Hearing Officer Edelman did not exceed his authority when he rendered his decision to terminate petitioner. Moreover, Hearing Officer Edelman is free to apply his own sense of law and equity to the facts of the case and

determine if petitioner was incompetent and what the proper punishment should be. *See Matter of NFB Investment Services Corp. v Fitzgerald* (49 AD3d 747, 748 [2d Dept 2008]) (holding, "[a]n arbitrator is not bound by principles of substantive law or rules of evidence, and may do justice and apply his or her own sense of law and equity to the facts as he or she finds them to be").

An administrative sanction, such as petitioner's punishment, "must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." *Matter of Featherstone v Franco,* 95 NY2d 550, 554 (2000). The Court has determined that the arbitrator's award was not arbitrary and capricious. Hearing Officer Edelman was aware of petitioner's lengthy prior service before issuing his decision that petitioner should be terminated. Hearing Officer Edelman also concluded that the DOE provided sufficient remediation pursuant to its statutory requirements. Finally, Hearing Officer Edelman also determined that petitioner did not teach competently and, if he were to return to teaching, would not be an effective teacher. As one court noted, "even a long and previously unblemished record does not foreclose dismissal from being considered as an appropriate sanction [internal quotation marks and citations omitted]." *Matter of Rogers v Sherburne-Earlville Central School District*, 17 AD3d 823, 824-825 (3d Dept 2005). Given the record and the unsuccessful attempts at remediating petitioner, this Court does not conclude that the penalty of termination shocks one's sense of fairness.

Lack of Due Process

Petitioner argues that he was deprived of due process in that, among other things, he

could not produce some of his records, lesson plans and materials, since the school allegedly destroyed them. The record indicates that a hearing spanned over fifteen days in which petitioner, who was represented by counsel, was able to testify, produce witnesses and present evidence. The Court does not find the arbitrator's decision – which heavily relied on the classroom observations of petitioner – would be significantly different with the extra evidence. As such, the Court finds that petitioner was not prejudiced in any way when he could not introduce this alleged material.

Award Will Not Be Vacated For Delay

Petitioner argues that, since he received his decision after 30 days from the last date of the hearing, the decision does not comply with Education Law § 3020-a (4) (a), and must not be considered by the DOE. Education Law § 3020-a (4) (a) states, in pertinent part, "[t]he hearing officer shall render a written decision within thirty days of the last day of the final hearing ... ."

Section 7507 of the CPLR, which governs the arbitrator's award in question, states in pertinent part:

> the award shall be in writing, signed and affirmed by the arbitrator making it within the time fixed by the agreement, or, if the time is not fixed, within such time as the court orders. The parties may in writing extend the time either before or after its expiration. A 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.

In the present case, the hearing concluded on October 12, 2010. Hearing Officer Edelman rendered his decision on November 24, 2010. Petitioner received this award on December 24, 2010.

Petitioner does not provide evidence, nor even allege, that he notified Hearing Officer Edelman of his objection prior to the delivery of the award pursuant to CPLR 7507. As such, the award cannot be vacated on this premise.

Petitioner's analysis under CPLR 78 is mistaken. However, even under Article 78, the Court of Appeals has held that a lapse of time in rending an administrative decision, alone, cannot "constitute prejudice as a matter of law." *Matter of Louis Harris and Associates v deLeon*, 84 NY2d 698, 702 (1994) (holding that more than a seven-year delay in the processing of a discrimination complaint against petitioner did not prejudice petitioner as a matter of law). Petitioner was not prejudiced as a result of the short delay, so the DOE may enforce the arbitrator's award.

Award Will Not Be Vacated for Bias

Petitioner argues that Hearing Office Edelman was biased against incompetency hearings. Petitioner provides newspaper articles which allegedly quote Hearing Officer Edelman as saying that he does not prefer incompetency hearings. Additionally, petitioner sets forth that other awards rendered by Hearing Officer Edelman have been remanded.

Newspaper articles and unrelated court proceedings do not show that a hearing officer is biased. As argued by the DOE, these mere allegations fail to allow petitioner "to meet his heavy burden of showing arbitrator misconduct or partiality by clear and convincing proof." *Matter of Moran v New York City Transit Authority*, 45 AD3d 484, 484 (1st Dept 2007).

Moreover, this addition to the record was not part of the hearing before Hearing Officer Edelman. It is well settled that "[j]udicial review of administrative determinations is

confined to the facts and record adduced before the agency [internal quotation marks and citation omitted]." *Matter of Rizzo v New York State Division of Housing and Community Renewal*, 6 NY3d 104, 110 (2005). As such, the Court cannot consider petitioner's additions to the record at this time.

Award Upheld

Accordingly, petitioner's request to vacate the award is denied in its entirety, and the DOE's cross-motion to dismiss the petition and confirm the arbitration award is granted.

The Court has considered petitioner's other contentions with respect to the individual specifications and finds them without merit.

**CONCLUSION, ORDER AND JUDGMENT**

Accordingly, it is hereby

ADJUDGED that the petition is denied, and the proceeding is dismissed; and it is further

ORDERED that the cross-motion of respondent The New York City Department of Education is granted in its entirety, dismissing the petition and confirming the arbitration award.

Dated: August 31, 2011

ENTER:

ANIL C. SINGH

HON. ANIL C. SINGH
SUPREME COURT JUSTICE