

Knox v City of New York
2014 NY Slip Op 30038(U)
January 7, 2014
Supreme Court, New York County
Docket Number: 100810/2013
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 100810/2013
KNOX, WALTER
vs
CITY OF NEW YORK
Sequence Number : 001
VACATE STAY/ORDER/JUDGMENT

PART 21

INDEX NO. _____
MOTION DATE 9/23/13
MOTION SEQ. NO. 01

The following papers, numbered 1 to Act 75, were read on this motion to/for _____
Notice of ~~Motion/Order to Show Cause~~ Petition & Petitioner Affidavits — Exhibits (2 addendums) No(s). 1-3
Answering Affidavits — Exhibits _____ No(s). 4-5, 6
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is petitioner to vacate an arbitration award and motion to dismiss/confirm (see CPLR 7511e) are decided as per the attached decision and judgment.

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

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

Dated: 1/7/14

[Signature], J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: Respi MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X
WALTER KNOX,

Petitioner,

Index No.:
100810/2013

- against-

THE CITY OF NEW YORK; NEW YORK CITY
DEPARTMENT OF EDUCATION; DENNIS
WALCOTT, CHANCELLOR of NEW YORK
CITY DEPARTMENT OF EDUCATION,

**DECISION AND
JUDGMENT**

Respondents,

To Vacate a Decision of a Hearing Officer
Pursuant to Education Law Section 3020-a
and CPLR Section 7511

-----X

HON. MICHAEL D. STALLMAN, J.:

Pro se petitioner Walter Knox moves, pursuant to CPLR 7511, for an order vacating 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 (DOE). The DOE, Dennis Walcott, Chancellor of New York City Department of Education and the City of New York¹ (collectively, DOE) cross-move to dismiss the petition, pursuant to CPLR 3211 (a) (7), 404 (a), and 7511.

¹ Petitioner incorrectly proceeds against the City of New York, which is not a proper party in this proceeding.

BACKGROUND AND FACTUAL ALLEGATIONS

Up until his termination from employment in May 2013, petitioner worked as a social studies teacher at a middle school in Brooklyn, New York. Petitioner was a tenured employee, and had been working for the DOE since 2000.

In December 2012, pursuant to Education Law § 3020-a, the DOE served petitioner with "Specifications," or charges, alleging that, within the 2009-2010, 2010-2011, 2011-2012 and 2012-2013 school years, petitioner engaged in "incompetent and inefficient service, neglect of duty, insubordination, unwillingness and/or inability to follow procedures [to] carry out normal duties, and . . . misconduct" DOE's exhibit 3 at 1. The DOE charged petitioner with seventeen specifications (Specifications), which are set forth as follows:

"1) During the 2009-2010, 2010-2011, 2011-2012 and 2012-2013 academic years, [petitioner] failed to properly, adequately and/or effectively plan and/or execute lessons, as observed on each of the following dates:

- a. January 8, 2010;
- b. March 9, 2010;
- c. September 30, 2010;
- d. November 17, 2010;
- e. November 23, 2010;
- f. January 11, 2011;
- g. February 3, 2011;
- h. March 29, 2011;
- i. April 2, 2012;
- j. April 27, 2012;
- k. May 11, 2012;
- l. September 28, 2012; and
- m. October 3, 2012.

2) [Petitioner] failed to maintain an environment conducive to student learning, in that [petitioner]

failed to timely, properly, adequately and/or effectively address students in his charge, during the 2009-2010, 2010-2011, 2011-2012 and/or 2012-2013 academic years.

3) During the 2009-2010, 2010-2011, 2011-2012 and/or 2012-2013 academic years, [petitioner] failed to timely, properly, adequately and/or effectively maintain an environment conducive to student learning.

4) [Petitioner] demonstrated a lack of professionalism, and/or neglected his duties, in that he failed to timely complete, maintain and/or submit his lesson plans, as referenced in letters-to-file dated:

- a. December 1, 2010;
- b. December 13, 2010;
- c. December 21, 2010;
- d. January 31, 2011;
- e. February 8, 2011;
- f. March 15, 2011;
- g. March 16, 2011;
- h. March 18, 2011;
- i. March 21, 2011;
- j. March 25, 2011;
- k. March 30, 2011;
- l. April 4, 2011;
- m. April 6, 2011;
- n. May 10, 2011;
- o. June 27, 2011;
- p. April 19, 2012;
- q. May 14, 2012;
- r. May 29, 2012.

5) [Petitioner] demonstrated a lack of professionalism, and/or neglected his duties, in that he failed to report to work and/or failed to follow proper procedures for absence notification on or about December 13, 2010.

6) [Petitioner] engaged in unprofessional conduct, and/or used poor judgment when he had inappropriate physical contact with a student in his charge, in that he hit a student in the chest and on the hand, on or about March 2, 2011.

7) [Petitioner] demonstrated a lack of professionalism, and/or neglected his duties, in that he failed to complete, maintain, and/or submit progress reports, as referenced in letters-to-file dated:

- a. March 10, 2011; and
- b. October 24, 2011.

8) [Petitioner] demonstrated a lack of professionalism, and/or neglected his duties, in that he failed to complete,

maintain, and/or submit grades, as referenced in letters-to-file dated:

- a. March 14, 2011;
 - b. March 31, 2012; and
 - c. April 16, 2012.
- 9) [Petitioner] engaged in unprofessional conduct, and/or used poor judgment when he made inappropriate physical contact with a student in his charge, in that he pushed and/or scratched said student, on or about April 6, 2011.
- 10) [Petitioner] demonstrated a lack of professionalism, and/or neglected his duties, in that he failed to complete, maintain, and/or submit 'intervisitation reflections,' as referenced in a letter-to-file dated May 10, 2011.
- 11) [Petitioner] demonstrated a lack of professionalism, and/or neglected his duties, in that he failed to complete, maintain, and/or submit 'late sign in sheets,' as referenced in a letter-to-file dated May 2011.
- 12) [Petitioner] engaged in unprofessional conduct, and/or used poor judgment, in that [petitioner] used inappropriate language, and/or tone, and/or manner in the presence of students, in that he stated 'stupid motherfucker,' or words to that effect, on or about February 15, 2012.
- 13) [Petitioner] demonstrated a lack of professionalism, used poor judgment, and/or neglected his duties, in that he failed to follow proper testing procedures for the New York State Math Examination, as referenced in a letter-to-file dated April 30, 2012.
- 14) [Petitioner] demonstrated a lack of professionalism, used poor judgment, and/or neglected his duties, in that he failed to attend a post-observation conference, as referenced in a letter-to-file dated May 29, 2012.
- 15) [Petitioner] demonstrated a lack of professionalism, used poor judgment, and/or neglected his duties, in that he failed to arrive for scheduled classes on time, on or about:
- a. June 4, 2012 (period three); and/or
 - b. June 4, 2012 (period 6).
- 16) [Petitioner] demonstrated a lack of professionalism, used poor judgment, and/or neglected his duties, in that he left his class unattended and unsupervised on or about:
- a. June 4, 2012 and/or
 - b. June 13, 2012.
- 17) During the 2009-2010, 2010-2011, 2011-2012 and 2012-2013 academic years, [petitioner] failed to attend and/or accept professional development and assistance meetings with supervisors, and/or accept and/or heed advice, counsel, instruction, remedial professional development and/or recommendations regarding:
- a. The elements of effective lesson planning/execution;

- b. Classroom management; and
- c. Production/maintenance of required records/documents.

THE FOREGOING CONSTITUTES:

1. Just cause for disciplinary action under Education Law § 3020-a;
2. Insubordination;
3. Incompetence and/or inefficient service;
4. Misconduct;
5. Conduct prejudicial to the good order, efficiency or discipline of the service;
6. Conduct unbecoming [petitioner's] position;
7. Substantial cause rendering [petitioner] unfit to properly perform his obligations to the service;
8. Neglect of duty; and
9. Just cause for termination."

DOE's exhibit 3 at 2-5.

Pursuant to Education Law § 3020-a, a hearing began on March 5, 2013, to determine the outcome of the charges. Hearing Officer James McKeever, Esq. (McKeever) was appointed to preside over the proceedings.

A hearing took place over six days, where both parties were entitled to examine and cross-examine witnesses and submit evidence. In his 53-page opinion and award (Award), McKeever systematically addressed and explained the parties' contentions with respect to the Specifications. McKeever described the exhibits that the parties testified to, including petitioner's U ratings and petitioner's filed grievances with the DOE. He included a thorough discussion of every one of petitioner's classroom observations and every letter that went into petitioner's file. He noted in his Award that petitioner received a U rating for each of the 2009-2010, 2010-2011 and

2011-2012 school years.

McKeever started his Award with a factual background and explained the positions of the parties. As set forth in the Award, among other things, the DOE described petitioner during the hearing as an "incompetent and ineffective teacher who has performed poorly for several years and who does not have any potential to improve." Petitioner's exhibit A, Award at 25. Petitioner argued that he was an effective teacher who was retaliated against for running for the United Federation of Teachers (UFT) union Chapter Leader at his school.² Petitioner argued that, although he may have missed certain administrative deadlines, he "exceeded" the minimum standards of teacher performance and provided his students with a "valid educational experience." *Id.* at 26.

McKeever then addressed petitioner's contentions that the observations were flawed since Principal Frederick Underwood (Underwood) did not conduct pre-observation meetings prior to conducting the actual observations. McKeever explained that the petitioner grieved this issue and that this grievance was denied. He then concluded, "[a]s such I find that this is not an appropriate forum in which to address this complaint and I find that it is not relevant to my analysis with respect to

² The record indicates that after running for the position in 2010 and 2011, petitioner was elected to this position in June 2012.

determining the merits of the within Specifications." *Id.*

McKeever sustained or dismissed the Specifications. For each Specification, he went through the facts as presented to him by both parties. A summary of McKeever's evaluation of the Specifications is as follows:

Specification One:

Specification one addressed petitioner's failure to properly execute lesson plans on 13 different dates. McKeever concluded that on 10 of the 13 dates, petitioner executed an unsatisfactory lesson plan. For instance, McKeever explained that on September 30, 2010, Underwood observed petitioner and gave petitioner a U rating for this lesson. Underwood, who testified at the hearing, alleged that three students were sleeping in class and claimed that "the class objective lacked rigor and that [petitioner] failed to differentiate instruction and failed to included a lesson summary." *Id.* at 28. McKeever sustained this allegation and stated that he found "the evidence shows that [petitioner] did not adequately plan or execute this lesson." *Id.*

For the lesson plan dated September 28, 2012, Underwood reported that the students were waiting for petitioner to post the work to the board and that petitioner did not "use the blackboard configuration that specifies the Common Core Learning Standards." *Id.* at 31. Underwood further alleged that the

lesson was not differentiated to meet the needs of the students. In response, petitioner testified that this observation lasted less than 10 minutes and it was conducted the day after he and Underwood had a conflict at a school leadership team meeting. After listening to testimony, McKeever concluded with the following:

"Nevertheless, assuming the observation was only 10 minutes, nothing in the record suggests that the lesson plan was appropriate or that [petitioner] used the appropriate blackboard configuration. Accordingly I find that the evidence shows that on this date the [petitioner] did not adequately plan or execute the lesson."

Id.

McKeever not only sustained the Underwood's unsatisfactory observations of petitioner, but also observations that were rated unsatisfactory by Assistant Principal Rooney (Rooney). For instance, on February 3, 2011, Rooney observed petitioner and concluded that "the environment was not conducive to learning . . ." since the students were engaged in conversations or were distracted. There was no set routine for assessing progress for the students. McKeever sustained this Specification and noted that the evidence in the record did not rebut Rooney's findings. He further stated that, even though this unsatisfactory rating pertained to classroom management, "the evidence shows that [petitioner] did not adequately plan or execute this lesson."

Id. at 29.

However, McKeever did not sustain all of the subparts of this Specification. For example, McKeever dismissed the allegation of an unsatisfactory lesson plan dated January 8, 2010, when he noted that the Assistant Principal who observed petitioner did not testify at the hearing and petitioner was not able to cross examine him with respect to the allegations in the observation report.

Specification Two:

McKeever dismissed this Specification which alleged that petitioner failed to address students in his charge. He summarized that there was no testimonial or documentary evidence to support this charge.

Specification Three:

In this sustained Specification, which relates to classroom management, McKeever concluded, among other things, that petitioner did not actively monitor his students.

Specification Four:

Specification four is a compilation of petitioner's failure to submit lesson plans in advance on 18 different dates. McKeever explained that petitioner filed a grievance with respect to Underwood's directive regarding the submission of his lesson plans in advance of the lessons. This grievance was denied.

By way of example, for the date of December 21, 2010, which correlates to Specification 4 (c), petitioner failed to submit

his lesson plans in advance. McKeever concluded that there was no evidence in the record to rebut the DOE's contention. As such, "petitioner demonstrated a lack of professionalism and neglected his duties in that he failed to timely submit lesson plans." *Id.* at 34.

Specification 4 (l) pertains to an allegation that on April 4, 2011, pursuant to a letter, petitioner was advised that, although Underwood received his lesson plans in advance, the lesson plans were deficient. Evidently, Underwood had directed that petitioner's lesson plans adhere to the "Madeline Hunter" lesson plan format. Petitioner complained, via letter, that Underwood assigned him "several lesson plan formats or versions of the Madeline Hunter Model." *Id.* at 38. McKeever noted that, during the hearing, Underwood testified that he had given petitioner the correct template and that the template had all the elements of the lesson plan. McKeever found that petitioner's rebuttal letter was "insufficient" to rebut the DOE's evidence. He concluded that petitioner demonstrated a lack of professionalism and neglected his duties in that he failed to timely complete his lesson plans.

By way of another example, Specification 4 (o) pertained to letters in the file stating that petitioner had failed to submit lesson plans by the prescribed due dates of May 5, May 12, May 19, May 26, June 2, June 9, June 16 and June 23, 2011.

Petitioner and his UFT Representative met with Underwood on June 2, 2011 to discuss the May 2011 lesson plans. Petitioner believed that it was an "insurmountable task" to submit 10 lesson plans a week in advance. Nevertheless, McKeever found that petitioner demonstrated a lack of professionalism and neglected his duties when he failed to submit these lesson plans by the prescribed due dates.

Specification Five:

McKeever sustained this Specification, which refers to petitioner's failure to follow proper procedures including those which relate to being absent from school.

Specification Six:

This Specification alleging corporal punishment was dismissed when McKeever found that only incidental contact occurred between the petitioner and the student.

Specification Seven:

McKeever sustained part of this Specification, regarding petitioner's failure to submit his students' progress report grades by the due date. Petitioner had conceded that he did not submit the student progress reports on time.

Specification Eight:

After petitioner conceded that he did not submit his grades on time, McKeever sustained this Specification relating to late submission of report card grades.

Specification Nine:

McKeever did not find enough evidence to sustain this Specification that petitioner pushed a student.

Specification Ten:

This Specification was dismissed when McKeever found that petitioner "substantially" complied with the DOE's request to attend the intervisitation.

Specification Eleven:

McKeever dismissed this Specification, which alleged petitioner failed to maintain "late sign in sheets."

Specification Twelve:

This Specification, alleging petitioner's use of inappropriate language in the presence of students, was dismissed. McKeever noted that Underwood did not observe the incident and the subject students did not testify at the hearing.

Specification Thirteen:

Since one student was found sleeping while petitioner was proctoring a New York State math examination, McKeever sustained this Specification.

Specification Fourteen:

Petitioner was alleged to have used poor judgment when he did not attend a post observation conference. McKeever sustained this Specification and stated "[b]ased on the [petitioner's] equivocating responses and my assessment of [petitioner's]

demeanor during the hearing, I do not credit [petitioner's] assertion that he attended the post observation conference"
." *Id.* at 46.

Specification Fifteen:

McKeever found that petitioner arrived late for two classes and sustained this Specification.

Specification Sixteen:

This Specification was dismissed when McKeever did not find evidence to support these allegations that petitioner left his class unsupervised.

Specification Seventeen:

McKeever sustained this Specification, which alleged that petitioner failed to accept assistance with his professional development. He stated that the DOE provided petitioner with the following professional development plan for the 2009-2010 school year: "submit his lesson plans at the beginning of each week; write the aim on the chalkboard and keep it on the chalkboard at all times; attend common planning meetings to help plan and manage a lesson, and visit with other teachers to view their classroom management styles and lesson preparation." *Id.* at 48. However, according to the DOE, petitioner failed to implement the professional development assistance with respect to effective lesson plans and classroom management. McKeever found that petitioner refused to accept the professional development offered

by the DOE.

For the 2010-2011 school year, McKeever found that petitioner also failed to comply with his supervisor's directive of submitting lesson plans a week prior to the lesson so that he could be provided with feedback. McKeever further found that petitioner did not implement the suggestions for his lesson plans for the 2012-2013 school year, including failing in his lesson plan template and blackboard configuration. The record indicates that Underwood suggested that petitioner utilize PD360, which is an online professional development program. McKeever noted that "the evidence shows that despite having access to a computer at the school, [petitioner] failed to ever utilize this professional development tool." *Id.* at 50. Petitioner did not deny that he never accessed this computer program.

Before delivering the penalty, McKeever summarized that "[a]lthough not all of the charges against [petitioner] are sustained, the charges that were proved are substantial and are directly related to [petitioner's] competency to teach and his ability to provide a valid educational experience." *Id.* at 50. McKeever believed that petitioner was a teacher who could not develop an appropriate lesson plan and effectively manage his classroom. He found that petitioner was unfit to perform his duties and could not be rehabilitated.

According to McKeever, DOE made substantial efforts to

remediate petitioner and petitioner rejected those efforts. McKeever noted that although the new Peer Intervention Program (PIP) program was not made available to petitioner, McKeever believed that other remediation efforts were made available to petitioner.

During the hearing, in addition to providing other case law for McKeever to review, petitioner requested that McKeever assess his ability to teach pursuant to the standard articulated in *Board of Educ. v Arrak*, 28 Ed Dept Rep 302 (1989). In his award, McKeever summarized with the following with respect to this request:

I find that even under the *Arrak* criteria the [DOE] has proven [petitioner's] incompetence. Specifically, the evidence shows that [petitioner] failed to adequately communicate content facts, failed to motivate and interest his students, failed to maintain a classroom environment reasonably conducive to learning, and failed to adequately assess and evaluate student performance. Significantly, *Arrak* requires that the [petitioner] provide a 'valid educational experience' for the students assigned to his classroom . . . [petitioner] has failed to do so.

Id. at 51.

McKeever found that the appropriate penalty for the sustained charges was termination from employment.

Shortly after receiving the award, petitioner filed this proceeding under Article 75, seeking to vacate the Award and annul any action taken as a result of the Award.

Petitioner contends that the charges of incompetency are

subjective and also stem from Underwood's personal vendetta against petitioner. Petitioner claims that his unsatisfactory reviews started to occur only after Underwood became principal. He states that he is an advocate for teachers and students as part of his job as the UFT chapter leader. He alleges the following:

"Much of [Underwood's] continued papering of [p]etitioner's personal file is in retaliation for [p]etitioner's union activities in filing grievances on behalf of fellow teachers, issuing newsletters and notices on their contractual rights, and representing the interest of special and general education students for the supplying of books and other mandated services.

Petition, ¶ 13.

Petitioner describes how he filed a special complaint of harassment (SCOH) against Underwood, and this complaint, among other complaints, were testified to during the hearing. He argues that McKeever did not appropriately credit the severity of the allegations as against Underwood.

With respect to the incompetency charges, petitioner further asserts that DOE's allegations of inadequacy are subjective. He alleges that "[n]ot one of the charges involving any mistreatment of students were sustained." *Id.*, ¶ 17. Petitioner further maintains that much of the alleged remediation was in the form of observations, and this, according to petitioner, is a method of evaluation that cannot be considered professional development instruction. He states that he did try to improve.

Petitioner further believes that McKeever's impartiality should be questioned since he was allegedly influenced by remarks made by DOE's counsel. Evidently, McKeever is a newly appointed hearing officer and during the closing arguments, counsel for DOE stated, "[t]he decision in this case before you is a very important one because it will determine what kind of Arbitrator you are going to be. Are you going to terminate an employee who refuses to follow the instructions and directives of his supervisors?" DOE's exhibit 2, tr at 668.

Petitioner alleges several due process violations, including the allegation that his due process rights were violated since he was subject to the compulsory Education Law proceedings. He further argues that he was admittedly denied the ability to participate in the PIP program to assist his alleged shortcomings. He states that the process by which he was terminated is in violation of statutory laws since "the fate of the tenured teacher's employment [is] adjudicated by a single arbitrator/decisionmaker with no required experience in education or pedagogy, of whom the teacher has no selection in the process of such decisionmaker." Petition, ¶ 37.

Lastly, given the conduct charged, petitioner maintains that the punishment of termination shocks the conscience. For instance, according to petitioner, McKeever irrationally faults petitioner because a few students were sleeping over a three-year

period, "even though no such student is specifically cited"
." *Id.*, ¶ 26. Focusing on these two students, for example, ignores the reality of teaching in a challenging environment and also neglects to focus on the 28 or 30 other students who are meaningfully engaged. Petitioner alleges that the penalty of termination is not consistent with a few hearing officers "who have not terminated tenured teacher's [sic] employment under similar circumstances." *Id.*, ¶ 35.

DISCUSSION

Pursuant to Education Law § 3020-a (5), CPLR 7511 provides the basis of review of an arbitrator's findings. *Lackow v Department of Educ. (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 voluntarily arbitrate. *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 person challenging the award shoulders the "heavy burden" of vacating the award. *Lehman Bros., Inc. v Cox*, 10 NY3d 743, 744 (2008).

Alleged Due Process Violations:

Many of petitioner's problems with the determination stem from alleged due process violations. For example, petitioner believes that the process by which he was terminated is not in accord with due process. He cannot understand why he was appointed a hearing officer with allegedly "no experience" in education. As such, petitioner requests a trial and an oral argument on this petition.

After reviewing the record, the court finds that petitioner's due process rights were not compromised. Prior to petitioner's termination, he was accorded a full hearing whereby he testified, presented evidence and was represented by counsel. His allegations that he was deprived of due process simply due to a hearing officer's alleged inexperience, are unfounded. As held by the Appellate Division, First Department, a petitioner's due process rights were not violated when the "DOE held a full hearing pursuant to Education Law 3020-a and presented testimony from the complainant and other witnesses; petitioner also presented evidence, including his own testimony." *Harris v Department of Educ. of the City of N.Y.*, 67 AD3d 492, 493 (1st Dept 2009); see also *Sullivan v Board of Educ. of Eastchester Union Free School Dist.*, 131 AD2d 836, 838 (2d Dept 1987) ("[The Supreme Court] determined that the Education Law provided more than adequate procedural safeguards to satisfy the plaintiff's

due process rights under the Fourteenth Amendment since he could not be removed from his tenured position before being given an opportunity to defend himself against the charges").

Other allegations that his due process rights were compromised include the fact that he attempted to attend a PIP program but was denied. Additionally, petitioner contends that his contract rights were violated when he was not given pre-observation meetings prior to being observed. The record indicates that McKeever was very much in tune with petitioner's contentions and all of them were addressed during testimony. For instance, at the beginning of the Award, McKeever explained that petitioner grieved the issue of the lack of preobservation meetings and was denied. Regardless, according to McKeever, this was irrelevant to his analysis.

Similarly, with respect to the PIP program, McKeever did acknowledge that, while petitioner was not entitled to attend PIP, the DOE made significant efforts to improve petitioner's deficiencies. However, petitioner was unwilling to improve. And, as alleged by the DOE, the PIP program is a voluntary, not mandatory, program that may be offered to teachers with an unsatisfactory rating. Upon review of the record, the court does not find that McKeever compromised petitioner's due process rights with respect to the pre-observation hearings, PIP program or other allegations. Moreover, "courts must defer to an

administrative agency's rational interpretation of its own regulations in its area of expertise." *Matter of Peckham v Calogero*, 12 NY3d 424, 431 (2009).

Allegations of Bias:

Petitioner alleges that McKeever was biased in that McKeever felt threatened by comments made by DOE's counsel during closing arguments. Petitioner believes that McKeever terminated petitioner in part due to McKeever's concern about future job security.

"A party seeking to set aside an arbitration award for alleged bias of an arbitrator must establish his claim by 'clear and convincing proof [internal citation omitted].'" *Matter of Infosafe Sys. (International Dev. Partners)*, 228 AD2d 272, 272-273 (1st Dept 1996). While the comments made by DOE's counsel were unseemly and inappropriate, the record does not indicate that McKeever was influenced by counsel's comments. As such, petitioner does not "meet the high burden of showing" alleged bias. *Batyreva v N.Y.C. Dept. of Educ.*, 95 AD3d 792, 792 (1st Dept 2012).

The Findings Were Rational and Were Not Arbitrary and Capricious:

Petitioner claims that McKeever's determination was irrational and arbitrary and capricious. Specifically, petitioner contends that the principal was biased against petitioner due to petitioner's union activities. Petitioner

further maintains that his unsatisfactory lessons were all subjective. According to petitioner, the wholly subjective standard of being an inadequate teacher made it impossible for petitioner to rebut the DOE's case.

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 at 431. An arbitration award is considered irrational if there is "no proof whatever to justify the award" *Matter of Peckerman v D & D Assoc.*, 165 AD2d 289, 296 (1st Dept 1991).

After McKeever reviewed the record and listened to testimony, he determined that petitioner was guilty of some Specifications but not others. In his lengthy determination, McKeever went through every Specification and sub part and explained both parties' arguments and why he believed they could be substantiated or not. He carefully described every letter to petitioner's file and, as a major part of his Award, discussed and addressed all of petitioner's concerns. McKeever was aware of petitioner's allegations that Underwood was biased against petitioner, and listened to testimony about the SCOH complaint and other complaints which were filed against Underwood. He understood petitioner's issue with having the onerous task of preparing lesson plans in advance and considered petitioner's attempts at remediation. The transcript indicates that counsel

for petitioner also provided McKeever with relevant case law that she wanted him to consider.

After the hearing, McKeever sustained the charges of incompetency and upheld charges proffered by DOE personnel other than Underwood. McKeever noted that petitioner did not submit his lesson plans in advance, pursuant to the supervisor's directive. He stated that the evidence presented demonstrated petitioner's lack of ability to manage the classroom and develop a lesson plan to motivate his students. Although the PIP program was not offered to petitioner, McKeever stated that there were other significant efforts made to help remediate petitioner. According to McKeever, petitioner was unwilling to improve and petitioner was unfit to properly perform as a teacher. McKeever even addressed petitioner's request that he follow the standard set forth in *Arrak*. McKeever, when using this standard that the teacher provide a "valid educational experience for students," found that petitioner failed to do so.

As such, it was not irrational for McKeever to terminate petitioner based on the testimony and evidence. As set forth in *Batyreva v N.Y.C. Dept. of Educ.* (95 AD3d at 792), "[t]he award was made in accord with due process, is supported by adequate evidence, is rational and is not arbitrary and capricious. Each of the sustained specifications was well supported by both documentary evidence and witness testimony [internal citation

omitted]."

Moreover, although the petitioner may believe that Underwood is biased against him and that his unsatisfactory evaluations are all wholly subjective, it is well settled that "[a] hearing officer's determinations of credibility . . . 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]." *Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 420 (1st Dept 2013). In addition, "even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 (1st Dept 2007, *affd* 11 NY3d 859 (2008)). Accordingly, McKeever's determination with respect to the credibility of the witness and their testimony with respect to the charges, is sustained.

Termination Appropriate and Not Shocking:

"The standard for reviewing a penalty imposed after a hearing pursuant to Education Law § 3020-a is whether the punishment of dismissal was so disproportionate to the offenses

as to be shocking to the court's sense of fairness." *Lackow*, 51 AD3d at 569. Petitioner argues that the penalty of termination is shocking since, prior to Underwood becoming principal, petitioner had always received satisfactory ratings. He reiterates that he provided a "valid educational experience" for the students in his classroom.

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. McKeever was aware of petitioner's prior service and petitioner's contentious relationship with Underwood. Nevertheless, he concluded that petitioner's failure and/or unwillingness to improve, warranted termination. 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 Cent. School Dist.*, 17 AD3d 823, 824-825 (3d Dept 2005).

Petitioner is mistaken when he alleges that this court should vacate this penalty in accordance with prior precedent. Courts have routinely upheld the penalty of termination when the teacher was found to have been incompetent. See e.g. *Matter of Faville v Ambach*, 124 AD2d 367 (3d Dept 1986) (petitioner terminated after 10-year tenure for serious deficiencies in

performance such as preparing disorganized lesson plans and exhibiting an inability to control his class); see also *Matter of Bell v New York City Dept. of Educ.*, 30 Misc 3d 1224(A), 2010 NY Slip Op 52380(U) (Sup Ct, NY County [2010]) (petitioner had been working for the DOE for over 20 years and was then terminated for incompetence); see also *Mongitore v Regan* 133 AD2d 815, 815 (2d Dept 1987) (Court did not find the penalty shocking to one's sense of fairness when petitioner terminated for "inability to control her class and to effectively plan and teach lessons").

September SCOH Complaint:

Petitioner attaches the September 2013 results of his SCOH hearing to his reply papers. Although there was testimony about the upcoming SCOH hearing, the hearing was not held, nor the determination given, until after the present arbitration occurred. Since the result was not a part of the original record, it cannot be considered at this time.³ 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 Div. of Hous. & Community Renewal*, 6 NY3d

³ Similarly, petitioner attaches a report dated June 2013 to his reply papers, entitled, "Excellence without Excuses: Demanding 'Superman' Teachers and Tolerating 'Peter Pan' Principals in the DOE." Although he claims that the issues referenced in this report were testified to during the course of the March 2013 hearing, the court cannot consider this report, also attached as part of reply papers, as part of the record.

104, 110 (2005).

Award Upheld:

For the reasons stated, petitioner has not set forth a valid basis for vacating the Award. Accordingly, petitioner's request to vacate the Award is denied in its entirety, and the DOE's cross motion to dismiss the petition is granted.

Petitioner's request for a hearing is denied. Pursuant to CPLR 7511 (e), the Award is confirmed.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

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

ADJUDGED that the cross motion of the respondents The City of New York, New York City Department of Education, Dennis Walcott, Chancellor of New York City Department of Education, is granted in its entirety and the award is confirmed.

Dated: January 7, 2014
New York, New York

ENTER:

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).



J.S.C.