Matter of Board of Educ. of the City Sch. Dist. of the City of N.Y. v United Fedn. of Teachers
2014 NY Slip Op 31588(U)
June 19, 2014
Sup Ct, New York County
Docket Number: 451028/2013
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK- Part 5

----------X

In the Matter of the Application of

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK ("DOE"), and DENNIS M. WALCOTT, as Chancellor of the DOE,

Petitioner,

-against-

DECISION/ORDER
Index No. 451028/2013
Seq. No. 001

UNITED FEDERATION OF TEACHERS, LOCAL 2, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, MICHAEL MULGREW, as President of UNITED FEDERATION OF TEACHERS, LOCAL 2, AFL-CIO,

Respondents.

For a Judgment and Order Pursuant to Article 75 of the Civil Practice Law and Rules.

----------X

KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF PETITION AND PETITION	.1,2.(Exs. A-K)
ANSWER TO PETITION	.....3.....
NOTICE OF CROSS-MOTION AND AFF. IN SUPPORT	.4,5.(Exs. A-B)
REPLY AFFIRMATION	....6.(Exs. A-B)
OTHER.(Memoranda of Law)	.....7,8,9.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

In a proceeding commenced pursuant to CPLR article 75, The Board of Education of the City School District of the City of New York and Dennis M. Walcott, as Chancellor of the New York City Department of Education (hereinafter collectively "petitioner") seek to vacate a "Clarification of Award to Resolve Issues Relating to the Implementation of the Remedy" dated March 12, 2013 (hereinafter "the supplemental award") in connection with an arbitration between the parties in the captioned action on the grounds that the arbitrator exceeded his authority and that the award was irrational. By notice of cross-petition,[1] United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO, Michael Mulgrew, as President of United Federation of Teachers, Local 2, AFL-CIO (hereinafter collectively "respondent"), a teachers' union, seeks an order dismissing the petition and confirming the supplemental award. After hearing oral argument, and reviewing the papers submitted and the applicable statutes and case law, this Court **grants the petition and denies the cross-petition**.

Factual and Procedural Background:

Petitioner and respondent entered into collective bargaining agreements ("CBAs") governing the terms of employment for certain employees of the petitioner, including hearing education teacher, vision education teacher, speech teacher, special education teacher, general education teacher, guidance counselor, speech teacher, occupational therapist, physical therapist, psychologist, social worker, and paraprofessional. Exs. C-G.[2] The CBAs contained grievance clauses permitting

---

[1]The notice of cross-petition appears to have been inadvertently denominated a "Notice of Cross-Motion to Dismiss Petition and Cross-Motion to Confirm Arbitration Award."

[2]Unless otherwise noted, all references are to exhibits annexed to the petition. The classroom teachers' agreement is annexed as Ex. C. The other agreements annexed are for social

arbitration in the event a grievance was unsuccessful. Ex. C, at Art. 22; Ex. D, at Art. 16; Ex. E, at Art. 16; Ex. F, at Art. 22, and Ex. G, at Art. 18. The teachers' agreement prohibited an arbitrator from making a decision regarding, inter alia, petitioner's discretion or "limiting or interfering in any way with the powers, duties and responsibilities of the [petitioner]." Ex. C, at Art. 22 (C). Similar limitations on an arbitrator's authority were contained in the corresponding agreements. Ex. D, at Art. 16; Ex. E, at Art. 16; Ex. F, at Art. 22; Ex. G, at Art. 18. The teachers' agreement also provided that an arbitrator "shall have no authority to grant a money award as a penalty for a violation of this Agreement except as a penalty expressly provided for in this agreement." Ex. C, at Art. 22(C). The CBAs did not permit arbitrators to issue supplemental awards except under limited circumstances involving grievances related to class size and group size. Ex. C, at Art. 22; Ex. D, at Art. 16, Ex. E, at Art. 16; Ex. F, at Art. 22; Ex. G, at Art. 18.

In the spring of 2010, petitioner began implementing the Special Education Student Information System ("SESIS"), a computerized system capable of recording important data regarding services provided to special education students. SESIS was introduced after a 2005 study commissioned by the petitioner recommended that a computer system which tracked factors such as referral information, date and nature of evaluation, and program placement would enable petitioner to better manage these students, who often needed to be seen by several providers, including, inter alia, teachers, speech and other therapists, and psychologists. Whereas a student's individualized education plan ("IEP") had previously been maintained in hard copy form, SESIS was designed to serve as a central repository for all information related to a student's IEP. Ex. B, at 5.

---

workers and school psychologists (Ex. D), guidance counselors (Ex. E), paraprofessionals (Ex. F) and nurses and therapists (Ex. G). Exhibits D-G will be referred to as "the corresponding agreements."

Each teacher, therapist, or other individual involved in a student's IEP became responsible for entering his or her own data into SESIS and each student's IEP could thus be reviewed or modified by anyone with access to the system. Ex. B, at 5.

By June of 2011, SESIS had been introduced in all of petitioner's schools. Ex. B, at 5. When the 2011-2012 school year began, petitioner implemented the "encounter attendance" function of SESIS and required each of its employees providing special education services to enter into the system information regarding attendance and details regarding a particular special education session. Ex. B, at 7-8. At or about this time, some of petitioner's special education providers began to complain to the respondent about difficulties with SESIS. These complaints included insufficient training, inaccessibility to computers, and insufficient bandwith. Ex. B, at 8. Since numerous "clicks" were required to enter data for a particular student, it took several minutes to complete a SESIS entry and petitioner's employees began to express frustration about their ability to enter data into the system during the school day. Ex. B, at 8.

On or about June 27, 2011, respondent filed a grievance against petitioner, alleging that petitioner "extended the teacher (and other titles) work day by failing to provide adequate training, equipment, access to equipment, support, etc. for SESIS related work, in violation of Articles 6A and 20 of the [teachers' CBA] (and corresponding articles). Ex. H.

Article 6 of the teachers' CBA, entitled "Hours," provided, inter alia, that:

> A. School Day
>
> 1. The school day for teachers serving in the schools shall be six hours and 20 minutes and such additional time as provided for below and in the by-laws. The gross annual salary of employees covered by this Agreement will be increased in accordance with the salary schedules herein.
>
> 2. The parties agreed, effective February, 2006, to extend the teacher work day in "non

> Extended Time Schools" by an additional 37 ½ minutes per day, Monday through Thursday following student dismissal. Friday's work schedule is 6 hours and 20 minutes. The 37 ½ minutes of the extended four (4) days per week shall be used for tutorials, test preparation and/or small group instruction and will have a teacher to student ratio of no more than one to ten. In single session schools, the day will start no earlier than 8:00 a.m. and end no later than 3:45 p.m.

Ex. C, at 15; and corresponding agreements Ex. D, at Art. 6; Ex. E, at Art. 6; Ex. F, at Art. 4, Ex. G, at Art. 7.

Article 20 of the teachers' agreement, entitled "Matters Not Covered," provided, inter alia, that:

> With respect to matters not covered by this Agreement which are proper subjects for collective bargaining, the Board agrees that it will make no changes without appropriate prior consultation and negotiation with [respondent]."

Ex. C, at 110; and corresponding agreements Ex. D, at Art. 14; Ex. E, at Art. 45; Ex. F, at Art. 32; Ex. G, at Art. 21.

A grievance hearing was held on October 5, 2011. The grievance was denied at Step II of the grievance process on the grounds that there was no evidence to support respondent's claim that its employees were directed to work beyond their contractual work day, and because respondent's claim that petitioner unilaterally increased the workload of certain titles without negotiating the impact with respondent was not proper for adjudication through the grievance and arbitration process set forth in the CBAs. Ex. I.

On or about November 14, 2011, respondent filed a demand for arbitration in accordance with Article 22 (C) of the teachers' CBA and the corresponding agreements, alleging that petitioner had violated Articles 6 and 20 of the teachers' CBA and the corresponding agreements by extending the

workdays of teachers and other employees of petitioner by "implementing SESIS related work." Ex. J.

In accordance with the CBAs, Jay M. Siegel was designated to serve as the arbitrator of the dispute, and he conducted hearings on 19 dates from December, 2011 until October, 2013. Ex. B.

On or about January 1, 2013, the arbitrator issued an award ("the award"), finding that respondent met its burden of establishing a violation of Article 6A of the teachers' agreement and the similar provisions in the corresponding agreements "because the evidence establishes that the implementation of SESIS duties required thousands of bargaining unit members to work beyond their contractual work day on a regular basis." Ex. B, at 46. He reasoned that the "common theme" of the witnesses was that "the computers were working so slowly that they could not complete [their required SESIS] work in a timely manner." Ex. B, at 50. The arbitrator stated in the award that a "long-term solution to SESIS must be mutually [agreed upon by the parties] so that SESIS does not require employees to work beyond their workday or compensates them for doing so, consistent with this award." Ex. B, at 61.

The arbitrator further stated that a remedy must be based on the data itself, so that respondent's employees will receive a "greater remedy for the time period when Encounter Attendance was first implemented and less of a remedy for the time period after some improvements to SESIS were made by [petitioner] that allowed employees to become more efficient in using SESIS. Ex. B, at 57. Since the arbitrator was concerned that petitioner's employees "should not be required to work on SESIS during their duty-free lunch period" but felt that a monetary remedy for this time spent would be "nearly impossible to determine," he ordered petitioner to "expressly inform its employees that they [were] not required to work during this time." Ex. B, at 60.

The arbitrator found no violation of Article 20 of the CBA and the corresponding agreements. He reasoned that petitioner did not need to negotiate with respondent before implementing SESIS because "it [was petitioner's] management prerogative to determine how it wishe[d] to deliver services" and was not a "proper subject of bargaining." Ex. B, at 58.

The award issued was as follows:

1. The grievance is arbitrable.

2. [Petitioner] violated Article 6A of the teachers' CBA and corresponding [agreements] when it mandated the use of SESIS to perform Encounter Attendance and other IEP-related work.

3. [Petitioner] did not violate Article 20 of the teachers' CBA and corresponding articles of other contracts when it unilaterally implemented SESIS without negotiating with [respondent].

4. [Petitioner] is directed to conduct impact negotiations with [respondent] over all relevant issues related to the implementation of SESIS.

5. For the months of September 2011 through December 2012, employees in the titles of paraprofessional, hearing education teachers, ESL [English as a Second Language] teachers, special education teachers, general education teachers, guidance counselors, speech teachers, occupational therapists, physical therapists, psychologists and social workers shall receive compensation at a pro rata rate for all time spent outside their regular workday working on SESIS, i.e., time when they were logged in to SESIS. All time spent by employees working on SESIS outside of their workday shall be added up and compiled for [petitioner] to provide appropriate pro rata compensation for each affected employee. [Petitioner] shall provide [respondent] with the relevant data regarding remedy no later than February 8, 2013 and payment shall be provided to the affected employees no later than March 15, 2013.

6. The arbitrator shall retain jurisdiction to address any and all questions which may arise regarding [petitioner's] implementation of the remedy provided herein.

Ex. B, at 62-63.

The arbitrator further stated that:

The parties spent an extensive amount of time and resources on this case and on educating the arbitrator about SESIS. If SESIS disputes arise in the near term that are related to this case, the issues should be able to be disposed of by this Arbitrator in an efficient manner due to his knowledge of the SESIS issues. However, the Arbitrator will not order his continued

> involvement in SESIS. He is willing to remain involved only if the parties mutually agree to have the Arbitrator work in this capacity.

Ex. B, at 62 (*emphasis supplied*).

After he issued the award, the Arbitrator conducted two conference calls and two in-person meetings with the parties regarding the implementation of the award. Ex. A, at 2. Although the arbitrator found that petitioner had failed to meet the February 8, 2013 deadline for providing respondent with relevant financial data and that petitioner would not meet the March 15, 2013 deadline for paying the affected employees, he rejected respondent's request that he award interest payments to the said employees. Ex. A, at 2-3. However, the arbitrator also noted that some "issues regarding implementation of the remedy have been more problematic", specifically that, as of February 22, 2013, petitioner had not complied with the requirement that it inform its employees that they need not work on SESIS during their duty-free lunch period. Ex. A, at 3. He further noted that, since the January, 2013 award was issued, petitioner had not commenced negotiations with respondent. Ex. A, at 3. The arbitrator expressed his belief that such negotiations would have commenced "immediately" after his award. Ex. A, at 3. The foregoing prompted respondent to request that the arbitrator "take additional action to resolve certain issues related to implementation of the award", including:

> 1. That [petitioner's] employees [represented by respondent] be compensated for SESIS work outside their workday from January 1, 2012 until such time as [petitioner] has completed negotiations with [respondent] over the impact of SESIS;
>
> 2. That interest be paid on delayed payments beginning on March 15, 2013; and
>
> 3. That [petitioner] be prohibited from adding any additional functionalities to SESIS until

such time as [it had] completed[d] negotiations with [respondent].

Ex. A, at 3-4.

During a conference call on February 22, 2013, the arbitrator rejected respondent's request that petitioner be prohibited from adding any functionalities to SESIS because this would exceed the scope of the original arbitration and because he had already ruled in his January, 2013 award that petitioner's implementation of SESIS was a management prerogative. Ex. A, at 4.

In late February of 2013, petitioner issued a memorandum to its staff stating, inter alia, that:

> In light of the recent arbitration decision regarding the use of SESIS, please remind [petitioner's] service providers and other [petitioner] staff that while they must continue to enter their information in SESIS they may not do so outside of their regular work hours or during their lunch break, without prior approval from their supervisor.
>
> In order to ensure that all [respondent-represented] staff have sufficient time to perform SESIS-related work (i.e., entering information on a student's IEP, Encounter Attendance, etc.), for the 2012-2013 school year only, you should provide such employees with the time and guidance set forth below.
>
> * * *
>
> Staff members may be allotted more time if needed at the discretion of the principal and/or supervisor. In addition, please remind staff that if they need assistance in prioritizing work or identifying time in their schedules to perform their SESIS-related work that you are available to review their schedule and work with them to address this issue.

Ex. A, at 5; Ex. K.

The memorandum issued by petitioner contained specific instructions as to how different employees of the petitioner were to allocate and prioritize their time in an attempt to avoid performing SESIS-related work outside of their workday. For example, the memorandum stated that "speech teachers shall be given time allocated for the extended day (i.e., 150 minutes per

week/four 37.5 minute periods) or equivalent amount of time if the school has an alternative configuration." Ex. K. With respect to occupational and physical therapists, the memorandum stated that such employees "shall be advised to prioritize SESIS among the tasks normally done during administrative time." Ex. K.

After the memorandum was issued, respondent requested a meeting with the arbitrator. Respondent maintained that the memorandum violated the award and asked the arbitrator to supplement and clarify the award. Ex. A, at 6. There is no indication that this request was in writing. Petitioner objected to respondent's request for a "clarification" of the award on the ground that respondent was seeking to relitigate the issues raised at the arbitration as well as allegations not raised in the award and that respondent was seeking a supplemental award which the arbitrator lacked the authority to issue. Ex. A, at 7.

On March 12, 2013, the arbitrator issued a "Clarification of Award to Resolve Issues Relating to the Implementation of the Remedy." ("the supplemental award") Ex. A. Although the arbitrator noted that "there is some precedent for the principle that a clarification may only be issued if both parties consent", he also stated that he had the authority to supplement his award "only insofar as it relate[d] to resolution of issues related to implementation of a remedy." Ex. A, at 7. The arbitrator then stated that, since petitioner had not commenced negotiations as directed in the award, he would "supplement and update" that portion of his award compensating employees for time spent working on SESIS outside of their workday by changing the period for which they would be compensated from September 2011 through December 2012 to "September 2011 through March 22, 2013." Ex. A, at 9. The arbitrator further stated that the award needed to be "clarified and supplemented" by ordering [petitioner] to "rescind its memorandum regarding SESIS." Ex. A, at 10. He reasoned that,

by attempting to change the workday for petitioner's employees, the memorandum sought to implement "ideas [which he had] rejected and found to be contractual violations." Ex. A, at 9. Further, the arbitrator directed that petitioner begin "impact negotiations" with respondent and provide remedial payments to its affected employees no later than March 22, 2013. Ex. A, at 12.

On or about June 10, 2013, petitioner filed a notice of petition and petition seeking to vacate the supplemental award pursuant to CPLR 7511(b) on the grounds that the Arbitrator exceeded his authority and that the award was irrational. On or about October 11, 2013, responded answered the petition and filed a notice of cross-petition seeking to dismiss the petition and to confirm the supplemental award.

Positions of the Parties

Petitioner asserts that the supplemental award must be vacated since the arbitrator exceeded the scope of authority conferred upon him by the CBAs, modified the CBAs, violated public policy, and was irrational.[3]

In addition, petitioner asserts that the arbitrator exceeded the scope of his authority by modifying the award since it failed to meet the requirements of CPLR 7509 and 7511(c). It further asserts that the teachers' CBA and the corresponding agreements do not provide for supplemental

---

[3]Petitioner submitted a memorandum of law in support of its petition and in opposition to respondent's cross-petition. Respondent objected to petitioner's submission of the memorandum of law on the ground that it was not served by November 12, 2013, the date by which petitioner was to have served it pursuant to a stipulation between the parties. However, since oral argument of these applications was adjourned by this Court until March 11, 2014, both petitioner's memorandum of law dated December 16, 2013 and respondent's reply memorandum of law dated January 17, 2014 will be considered in deciding the pending applications.

arbitration other than for class size and group size grievances. Ex. C, at Art. 22 (G); Ex. D, at Art. 16; Ex. E, at Art. 16; Ex. F, at Art. 22; and Ex. G, at Art. 18. Petitioner also maintains that the arbitrator exceeded the scope of his authority by penalizing it for its alleged failure to comply with the initial award. Additionally, petitioner asserts that, since the supplemental award extended the period of back pay for its employees by almost three months, changing it from September, 2011 through December, 2012 to "September 2011 through March 22, 2013", this was not a mere clarification but a punitive and substantive change in the remedy which was violative of Article 22 (C) of the CBA. In so revising the award, argues petitioner, the arbitrator improperly considered facts and evidence not considered in relation to the initial award, including petitioner's failure to conduct negotiations and its direction to its employees not to engage in SESIS-related work during non-working hours.

Petitioner further asserts that, to the extent the supplemental award undermines petitioner's right to manage its workforce, the supplemental award modifies the CBAs, violates public policy and should be vacated.

Further, petitioner argues that the supplemental award was irrational because it required petitioner to rescind its memorandum, which, in accordance with the award, directed its employees not to perform SESIS-related work during non-working hours. Further, petitioner maintains that the supplemental award was irrational because, whereas the arbitrator stated in his award that it was petitioner's "management prerogative to determine how it wishes to deliver services," he contradicted this finding by stating in the supplemental award that petitioner "was not supposed to implement any changes to the workday regarding the SESIS functions involved in this arbitration" prior to good faith negotiations.

In opposition to the petition and in support of its cross-petition seeking to confirm the supplemental award, respondent asserts that there are no grounds upon which to vacate the supplemental award. Respondent argues that the supplemental award does not violate public policy, is not irrational, does not exceed the arbitrator's authority, and was not the result of misconduct, bias, or procedural defects.

Respondent further asserts that CPLR 7511(c) does not apply herein because respondent did not request that the arbitrator modify the initial award and because the arbitrator did not modify the initial award. Rather, respondent maintains that the arbitrator addressed only issues relating to the implementation of the initial award and stated that he would "retain jurisdiction to address any and all questions which may arise regarding [petitioner's] implementation of the remedy provided herein." It also argues that the arbitrator did not violate Article 22 (C) of the teachers' agreement by directing petitioner to pay its employees additional back pay. Respondent further asserts that the supplemental award was not irrational because it directed petitioner to withdraw its memorandum, which, inter alia, directed its employees to perform certain changes to their workday which had been rejected by the arbitrator.

Conclusions of Law

"Under prior law, the arbitrator's authority ceased upon making an award, and he or she could not thereafter change or clarify it in any manner." Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 7509. Now, a modification may be made pursuant to CPLR 7509, which provides that:

On written application of a party to the arbitrators within twenty days after delivery of the

> award to the applicant, the arbitrators may modify the award upon the grounds stated in subdivision (c) of section 7511. Written notice of the application shall be given to other parties to the arbitration. Written objection to modification must be served on the arbitrators and other parties to the arbitration within ten days after receipt of the notice. The arbitrators shall dispose of any application made under this section in writing, signed and acknowledged by them, within thirty days after either written objection to modification has been served on them or the time for serving said objection has expired, whichever is earlier. The parties may in writing extend the time for such disposition either before or after its expiration.

CPLR 7511(c) provides as follows:

> (c) Grounds for modifying. The court shall modify the award if:
>
> 1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award;
>
> 2. The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
>
> 3. The award is imperfect in a matter of form, not affecting the merits of the controversy.

The arbitrator's "power of modification is strictly limited." Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 7509, *supra*. "CPLR 7509 does not authorize the arbitrator to reconsider or alter the decision. If the arbitrator exceeds the scope of permissible modification allowed by CPLR 7509, the award, as modified, can be vacated. *See, e.g. Outback Steakhouse, Inc. v Contracting Management, Inc.*, 58 AD3d 855 (2d Dept 2009) (vacating modified award where arbitrator exceeded his authority by modifying original award to render wholly new determination on matters not addressed in original award.). *See also Silber v Silber*, 204 AD2d 527 (2d Dept 1994) (after rendering award, arbitrator lacks power to render new award or to modify original award 'except as prescribed in CPLR 7509')." *Id.* "The intent of CPLR 7509 is 'not to permit the arbitrator to re-examine the grounds of the award or to alter the decision, but to permit

modification only on the limited grounds set forth in CPLR 7511(c).'" *Matter of New Paltz Cent. Sch. Dist. v New Paltz United Teachers*, 99 AD2d 907 (3d Dept 1984) (*citation omitted*).

Here, since neither party followed the steps required by CPLR 7509, the arbitrator was without authority to modify his award. *See Matter of Bianchi v Katz*, 111 AD3d 1012 (3d Dept 2013). Although the arbitrator notes in the supplemental award that respondent requested that he take "additional action" to help implement the award, there is no indication these requests were written or made within 20 days after "delivery" of the initial award. *See* CPLR 7509. In any event, the grounds set forth in CPLR 7511(c) have not been met. First, there was no miscalculation or incorrect reference to any person, thing, or property set forth in the award. *See* CPLR 7511 (c) (1). Next, the modification, which extended the award to petitioner's employees for work performed outside of their workday, "constitute[d] a substantial change in the remedy... [which] "cannot be considered a mere correction" and thus CPLR 7511 (c) (2) is inapplicable. *Matter of New Paltz Cent. Sch. Dist. v New Paltz United Teachers*, 99 AD2d *supra* at 908; *see also Avamer Assocs., L.P. v 57 St. Assocs., L.P.*, 67 AD3d 483 (1st Dept 2009). Finally, CPLR 7511(c) (3) does not apply herein since the modification did not address an imperfection in the form of the supplemental award.

Asserting that the arbitrator properly retained jurisdiction to issue a supplemental award insofar as it addressed implementation of the initial award, respondent relies on *Matter of Bd. of Educ. of Dover Union Free School Dist. v Dover-Wingdale Teachers' Ass'n.*, 95 AD2d 497 (2d Dept 1983), affd 61 NY2d 913 (1984). At issue in that case was whether the arbitrator exceeded the scope of his authority in setting forth a formula providing for the receipt of additional pay by teachers faced with oversized classes in violation of the class-size provisions of the parties' collective bargaining agreement after several failed attempts by the parties to negotiate the issue. "The

[* 16]

arbitrator reserved jurisdiction over the issue for a period of 30 days from...the date of the award, during which time either party was afforded the right to appeal for a determination and award in the event that the parties failed to reach an agreement." *Id.*, at 500. The parties then engaged in negotiations and, when they were unsuccessful, "the union, within the appropriate time period, requested that the arbitrator finally determine the issue." *Id.*, at 500. The arbitrator then held a hearing, as a result of which he rendered a supplemental award directing that teachers be awarded additional pay if certain conditions regarding class size were met. The Appellate Division held that the arbitrator did not exceed his jurisdiction in rendering the supplemental award.

Dover is distinguishable from this matter, however. First, although the Arbitrator conducted two conference calls and two in-person meetings with the parties regarding the implementation of the award between the dates of issuance of the initial and supplemental awards (Ex. A, at 2), and afforded the parties an opportunity to make arguments regarding whether the initial award should be supplemented or clarified (Ex. A, at 6), the parties' papers are devoid of any indication that a formal hearing was held during that period. Thus, the arbitrator made a substantial change to his initial findings without a further hearing.

Additionally, the arbitrator in this matter, unlike his counterpart in *Dover*, did not state that he would retain jurisdiction for a finite time period during which either party was afforded the right to seek a final award. Rather, he issued an initial award which was, in effect, a final award. He, then went on to state in that award that, "[i]f SESIS disputes arise in the near term that are related to this case, the issues should be able to be disposed of by this [a]rbitrator in an efficient manner due to his knowledge of the SESIS issues" but that he declined to order his continued involvement in SESIS issues unless "the parties mutually agree[d] to have [him] work in this capacity." Ex. B, at

62 (*emphasis supplied*). The arbitrator stated in his initial award that he "shall retain jurisdiction to address any and all questions which may arise regarding [petitioner's] implementation of the remedy provided herein" (Ex. B, at 62-63). However, this Court finds that, by increasing the period for which petitioner's employees would be compensated for SESIS-related work from September 2011 through December 2012 to "September 2011 through March 22, 2013" (Ex. A, at 9), the arbitrator was not implementing the remedy set forth in the initial award but rather was impermissibly attempting to effectuate a substantial alteration to the initial award. Therefore, the supplemental award must be vacated.

This Court notes that, although it does not disagree with the arbitrator's finding that additional back pay should be awarded, it finds that such relief should have been pursued in a new proceeding.

In light of the foregoing, this Court need not address petitioner's contention that the arbitrator's award was irrational.

Therefore, in accordance with the foregoing, it is hereby:

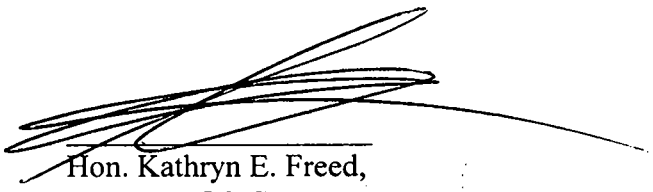
ORDERED that the petition is granted, and the Clarification of Award to Resolve Issues Relating to the Implementation of the Remedy, dated March 12, 2013, is vacated in all respects; and it is further,

ORDERED that the cross-petition is denied in all respects; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: June 19, 2014

ENTER:



Hon. Kathryn E. Freed,
J.S.C.