Matter of Berkley v New York City Dept. of Educ.
2016 NY Slip Op 31210(U)
June 27, 2016
Supreme Court, New York County
Docket Number: 650648/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

In the Matter of the Application of
NOAH BERKLEY,

Index No. 650648/2016

Petitioner,

DECISION/ORDER

For an Order Vacating a Decision of a Hearing Officer pursuant to Section 3020-a(5) of the Education Law and Article 75 of the CPLR,

Mot. Seq. 001

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION

Respondent.

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

Petitioner Noah Berkley ("Petitioner") is a formerly-tenured teacher with Respondent New York City Department of Education (the "DOE"). The Petition seeks, pursuant to CPLR 7511, to vacate the January 28, 2016 Decision and Award (the "Decision") of Hearing Officer Gloria Johnson (the "Hearing Officer"), which found, after a seven-day hearing, just cause to terminate Petitioner. DOE cross-moves, pursuant to Education Law 3020-a(5) and CPLR 404(a), 3211(a)(7), and 7511 to dismiss the Petition and/or confirm the Decision.

BACKGROUND FACTS

Petitioner was employed at P.S. 33 (Timothy Dwight Elementary) in the Bronx since September 2005, when he was hired by the DOE. During Petitioner's time at P.S. 33, he received "satisfactory" ratings each year until 2013-2014, when he received an "effective" rating.[1]

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[1] The "HEDI" 4-tier system, which rates teachers, in decreasing order of competence, as highly effective, effective, developing, and ineffective replaced the previous rating system ("unsatisfactory" and "satisfactory") in 2010 (Education Law §3012-c [2] [a] [1]; *see* 2010 Sess. Law News of N.Y. Ch. 103 [A. 11171] [McKinney's]).

[* 2]

In 2015, the DOE asserted two sets of specifications (or "charges") under "SED 27,285" (*Exh D-1;* the "Group 1 Specifications") and "SED 27,977" (*Exh D-5;* the "Group 2 Specifications")[2] against Petitioner.[3] The Group 1 Specifications alleged that "[Petitioner] engaged in indecent exposure, inappropriate touching, corporal punishment, conduct which could constitute a crime, conduct unbecoming his profession, misconduct and neglected duties." The Group 2 Specifications alleged that "[Petitioner] engaged in corporal punishment, conduct which could constitute a crime, conduct unbecoming his profession, excessive lateness, misconduct and neglected his duties."

After respondent's request for a hearing, the Hearing Officer convened a pre-conference hearing on August 10, 2015, and full evidentiary hearings were held on October 5, 6, 26, and 27, November 17 and 20, and December 4, 2015, comprising a transcript of approximately 2000

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[2] Exhibits prefaced with "D" refer to those filed by the DOE in the hearing, and those prefaced with "R" refer to those filed by Petitioner (designated as "Respondent" during the hearing).

[3] The references to "Student A," "B", etc., in the charges and exhibits to identify the varying students (*see e.g. Decision* at 6; *Pl Exh D-3*) create confusion in that they relate to separate incidents that were later consolidated for hearing purposes. Petitioner utilizes several students' full names, and includes an unredacted copy of the transcript, which lists the childrens' names (*see e.g. Tr* at 1404). To balance clarity against the need to maintain the children's privacy, the Court will refer to the names of the children by their initials. The Court also notes 22 NYCRR 202.5, which directs that

> "(1) . . . *whether or not a sealing order is or has been sought, the parties shall omit or redact confidential personal information in papers submitted to the court for filing*. . .[C]onfidential personal information ("CPI") means:
>
> * * *
>
> (iii) *the full name of an individual known to be a minor, except the minor's initials*;
>
> (2) *The court sua sponte* . . . may . . . order the clerk to seal the papers or a portion thereof containing CPI in accordance with the requirement of section 216.1 of this Title that any sealing be no broader than necessary to protect the CPI. . . .(emphases added).

pages (*Pet'r Exh B*; "*Tr*").[4] After the parties provided post-hearing submissions, the record closed on December 28, 2015. On January 28, 2016, the Hearing Officer issued the 60-page Decision, which made the following findings:

I. Group 1 Specifications

a. Group 1, Specification 1: The Auditorium Incident ("Student A"/J.R.)

> **Specification 1**: On or about January 30, 2015, [Petitioner] inappropriately pinched and/or placed his hand on Student A's thigh.

On or about January 30, 2015, Petitioner approached J.R., an 8 year-old male student, during indoor recess in the auditorium because, unlike the other children, J.R. was not dancing. Leoncia Martinez ("Martinez"), a school aide who was monitoring a group of children in the auditorium seated a few rows behind J.R., observed Petitioner's hand make contact with J.R.'s leg (*Decision* at 7). Martinez approached J.R. and asked him, in Spanish, to clarify what Martinez had just witnessed (*id.* at 7). J.R. confirmed that Petitioner had placed his hand on the student's thigh, and demonstrated the nature of the contact, subsequently recounted at the hearing and characterized by the Hearing Officer as "stretching out [the] hand on [] mid-thigh and [pressing] into the flesh visibly" (*Tr* at 171). New York City Special Investigator Vincent J. Pellizzi ("Investigator Pellizzi") subsequently confirmed the contact by interviewing J.R. on February 12, 2015, noting that J.R. demonstrated a pinching motion with his thumb and index finger and stated that Petitioner's contact "hurt a little bit" (*Exh D-3* at 5).

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[4] Two transcripts were submitted together in the same exhibit, *i.e.*, the hearing on October 10, 2015 terminates at page 404, is interrupted by a 55-page, separately-paginated transcript of the October 15, 2015 hearing consolidating the two sets of specifications, then resumes at page 405, which transcribes the October 26, 2015 hearing. Unless otherwise noted, this decision references only the main transcript.

Petitioner had several defenses to Specification 1: first, that the specification could not be sustained because there was no direct evidence regarding the nature of the physical contact with J.R., including J.R.'s testimony; and second, that the contact was innocuous. The Hearing Officer rejected both arguments, finding by a preponderance of the evidence that there was sufficient evidence to sustain the specification (*Decision* at 33-37). The Hearing Officer held that hearsay was permissible when corroborating direct testimony and credited the testimony of Martinez that the contact occurred, finding that the testimony was corroborated and supplemented by the written statements of Investigator Pellizzi regarding the precise nature of the contact (*Decision* at 35, citing *Tr* at 122).

b. Group 1, Specification 2: The Bathroom Incident

> <u>**Specification 2**</u>: On or about January 29, 2015, [Petitioner] while inside of a student Bathroom:
>
> (a) Exposed his penis to numerous students.
> (b) Urinated in the student bathroom while in the presence of numerous students
> (c) [sic] Immediately next to students whom were urinating.

On or about January 29, 2015, Petitioner entered a students' bathroom, while students were present, despite the availability of a faculty bathroom about 20 feet away (*Decision* at 40-41; *Tr* at 365, 1454, 1520; *Exh D4a-g*). Petitioner walked past several enclosed stalls to the final stall on the right (*Exh D-4d*), and urinated at an unshielded urinal in such a manner that nearby students could see his penis. The Hearing Officer credited the testimony of Eneida Vielman ("Vielman") who, after hearing several boys laughing and yelling in the student bathroom, warned the bathroom's occupants of her impending entry verbally and with a whistle, and then entered (*Tr* at 103-04, 344-45). Once inside the bathroom, Vielman personally witnessed the

students standing within line of sight of Petitioner's exposed penis, including a student next to him (*Decision* at 43; *Tr* at 103-05, 350, 356-57). Investigator Pellizzi and "Student D", one of the students present in the bathroom on that date, corroborated Vielman, confirming that several of the students saw Petitioner's penis (*Decision* at 44-46; *Tr* at 250, 262-263; *Exh D-3* at 5).

The Hearing Officer also credited the testimony of Principal Lynette Santos ("Principal Santos"), who testified to personally advising Petitioner not to use the students' bathroom in November of 2013, over Respondent, who acknowledged having received verbal notice of the policy on separate occasions, albeit from other sources (*Decision* p. 39; *Tr* at 1070-1072; 1440-1442).

Ultimately, the Hearing Officer rejected both Petitioner's factual defenses and legal defenses—in sum and substance, that the students could not have seen his penis, and that Vielman's testimony could not be credited because she misidentified one of the students and was biased against Petitioner for comments he had previously made to her (*Decision* at 45-46). In rejecting those arguments, the Hearing Officer noted the substantial corroboration of Vielman's observations (*id.* at 46). The Hearing Officer also found that Petitioner had been warned not to use the students' bathroom (*id.* at 39-40). In light of the prior warnings and the nature of the act itself, the Hearing Officer found Petitioner's conduct so egregious that progressive discipline was not required (*id.* at 39-40).

c. ***Group 1, Specification 3***

> <u>**Specification 3**</u>: As a result of committing one, some, or all of the actions as specified within Specifications 1-2 above, [Petitioner] knowingly acted in a manner likely to be injurious to the physical, mental and/or moral welfare of the children less than seventeen years of age.

The Hearing Officer sustained Specification 3, notwithstanding Petitioner's jurisdictional objection that the specifications effectively charged and sought adjudication of a Penal Code violation (*Decision* at 46-47). The Hearing Officer disagreed, holding that the determinations made during the hearing may have relied upon similar definitions, but did not rely upon the Penal Code itself (*id.* at 47-49). Though Petitioner challenges the underlying determinations, this specification is not challenged here.

II. Group 2 Specifications

a. Group 2, Specification 1 (The Corporal Punishment Incident, "Student 2B"/I.O.)[5]

Specification 1: On or about and in between September 9, 2014 until April 20, 2015, [Petitioner];
(a) kicked [I.O.] in the leg.
(b) Punched [I.O.] in the stomach.
(c) Slapped [I.O.] in the face.
(d) Stated words to the effect of: I don't care.

The Hearing Officer rejected Petitioner's argument that the charges were unconstitutionally vague for failure to set forth specific dates of the incidents. The Hearing Officer found the lack of specificity a "significant weakening factor", but ultimately found that the record contained additional relevant facts which prevented the charges from being unconstitutionally vague (*Decision* at 50). The Hearing Officer upheld specifications 1 (a) and (b), but did not find any evidence to substantiate specifications 1 (c) and (d) (*id.* at 52).

The Hearing Officer cited the direct testimony of two students: the student victim, I.O., and an eyewitness classmate, Student X. At the hearing, I.O. testified only that the allegations she had recounted to her mother, the basis for the four allegations in Specification 1, were the

[5] Student 2B is identified as "Student A" in the transcript (*Tr* at 567).

truth (*Decision* at 52; *Tr* at 515).[6] Because I.O. did not specify what she told her mother, the Hearing Officer concluded that there was no direct evidence that Petitioner slapped I.O. or told her "I don't care."

However, the Hearing Officer found corroboration for Specifications 1 (a) and (b), crediting Student X's testimony that Respondent "grabbed I.O.'s arm softly and put her back on the rug" (*Decision* at 51, *citing Tr* at 591) and finding that the record contained evidence that Petitioner physically contacted I.O.'s leg with his foot (*Decision* at 52; *Tr* at 516-18). The Hearing Officer also credited the statements taken by Assistant Principal Ceara of Student Y, who did not testify at the hearing.[7] Student Y's statement asserted that Petitioner sometimes "grabs the arms of students hard and they say 'ouch'" and that Student Y observed Petitioner grab I.O.'s arm, and punch her on her stomach (*Decision* at 51, *citing Exh D-13*).

The Hearing Officer also found that progressive discipline was not required in the case of corporal punishment. However, though specifications 1 (a) and (b) were upheld, the Hearing Officer found that the relatively vague timeframe, lack of direct evidence and "less than strong level of hearsay" corroboration "does not rise to the substantial level of evidence that would support a termination" (*Decision* at 50).

b. Group 2, Specification 2 (The Corporal Punishment Incident, "Student 2B")

> <u>**Specification 2**</u>: As a result of committing one, some, or all of the actions specified within Specifications [sic] 1 above, [Petitioner] knowingly acted in a manner likely to be injurious to the physical, mental and/or moral welfare of a child less than seventeen

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[6] The Decision actually cites page 575, but this appears to have been an error because the relevant portion of "Student 2B"/I.O.'s testimony (identified as "Student A" in the transcript) take place on page 515. Page 575 transcribes the testimony of a different witness.

[7] Assistant Principal Castro prepared the report containing those statements, and concluded that the allegations were substantiated (*Tr* at 872; *Exh D-13*).

[* 8]

years of age.

The Hearing Officer decided this specification identically to Group 1, Specification 3, finding that criminal statutes could be used to guide the drafting and decision of specifications, and that teachers could be disciplined for conduct that could be considered a crime (*Decision* at 55). Petitioner challenge the underlying determination made on this specification.

c. Group 2, Specification 3 (2012-2013 Lateness)

> **Specification 3:** During the 2012-2013 school year, the [Petitioner] was excessively late on ten (10) occasions[.]

The Hearing Officer credited the testimony of Debra Ianiello, PS 33's payroll secretary, who verified the accuracy of Petitioner's time cards (*Decision* at 56; *Tr* at 647, *et seq.*). Based on this determination, the Hearing Officer upheld this specification, "with the exception of" the lateness on February 5, 2013. (*id.*). The Hearing Officer found that petitioner was unfairly charged as late on February 5, 2013, and should have been permitted to use leave time, because although he called in sick, he was asked to come in later if he felt better, and he did (*id.*).[8]

d. Group 2, Specification 4 (2013-2014 Lateness)

> **Specification 4:** During the 2013-2014 school year, the [Petitioner] was excessively late on eleven (11) occasions[.]

Of the eleven allegations of lateness, the Hearing Officer upheld nine and dismissed two for November 6, 2013, and January 24, 2014 (*Decision* at 57 [dismissing sub-specification 6 and stating "Number 5 is also dismissed"; *Tr.* 707-708]). Specifically, as to the November 6, 2013 alleged lateness, both numbers, "7" and "2," were noted on the timecard, and petitioner argued

[8] The Award section of the Decision sustains Specification 3, however, without mention of the exception of the lateness on February 5, 2013 (*id.* at 60).

that he was two, not seven, minutes late (after 8:00 a.m.). According to respondent's payroll secretary, "Someone clocked over it, but it's a 2." (*Tr.* at 707-708). Further, the January 24, 2014 lateness was "due to transit' (*Tr.* at 806).[9] Notwithstanding, the Hearing Officer subsequently stated that Petitioner was absent *10* times during the 2013-2014 school year, and the subsequent Conclusion/Award section sustains the entirety of Specification 4 with only *one* exception: sub-specification 6 (*Decision* at 58, 60).

e. Group 2, Specification 5 (2014-2015 Lateness)

> **Specification 5**: During the 2014-2015 school year, the [Petitioner] was excessively late on fifteen (15) occasions[.]

The Hearing Officer upheld thirteen of fifteen instances of lateness; the dates he was late on May 18 and May 27, 2015, when Petitioner had meetings with school administrators, were dismissed (*Decision* at 58, *citing Exh R-5*).

III. Hearing Officer Award

Based on the findings detailed in the Decision, the Hearing Officer denied Petitioner's motion to dismiss Specification 3,[10] and found just cause for Petitioner's termination.

IV. Petition and Cross-Motion to Dismiss

Petitioner subsequently filed this Petition, stating three causes of action: first, that the Hearing Officer exceeded her power and issued a decision that was irrational, arbitrary, and capricious; second, that the Hearing Officer violated Petitioner's constitutional and statutory rights to due process of law; and third, that the Hearing Officer imposed a penalty that shocks the

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[9] According to the Hearing Officer, ten instances of lateness constitute a violation of the Chancellor's regulations (*Tr* at 639).

[10] The Hearing Officer did not specify whether she was referring to Group 1 or 2, but that omission does not appear to have been challenged by Petitioner.

conscience and is excessively harsh.

Petitioner supplements these causes of action in his memorandum of law, arguing: first, that DOE's failure to specify the date of the alleged corporal punishment in Group 2, Specification 1 deprived him of due process; second, that the Hearing Officer's reliance upon hearsay testimony to support her findings in the corporal punishment incident violated Petitioner's right to confront and cross-examine witnesses; and third, that the Hearing Officer's findings as to the bathroom incident, the corporal punishment incident, and Petitioner's alleged pattern of tardiness were not supported by adequate evidence. With respect to Petitioner's alleged tardiness, Petitioner argues that the Decision's discussion does not match its conclusion, *i.e.*, the discussion concludes that certain instances of lateness should be dismissed, but factors them into the conclusion nonetheless, to Petitioner's detriment. Petitioner also argues that the Hearing Officer's findings are arbitrary and unclear, or ignored Petitioner's arguments, and attacks the Hearing Officer's conduct during the hearing.[11]

In support of its cross-motion to dismiss the Petition, the DOE argues: first, that the limited standard for review of arbitration awards, even in the case of mandatory arbitration, requires only that an arbitrator's decision be rational; second, that the Decision was rational, and that Petitioner's arguments to the contrary fail to demonstrate that the Decision was not rational insofar as Petitioner challenges only the unreviewable credibility findings made by the Hearing Officer; third, that administrative proceedings permit hearsay, and that in any event, the Hearing Officer's findings used hearsay only to corroborate direct testimony; fourth, that the failure of the Specifications to list a specific date for the corporal punishment allegation did not deny

[11] Petitioner does not directly challenge Group 1, Specification 3 and Group 2, Specification 2.

Petitioner due process because they were sufficiently specific, and that even if they were not, an arbitrator's misapplication of the law is not a basis for reversal; and fifth, that the penalty did not shock the conscience.

In reply, Petitioner argues: first, that the DOE mischaracterized certain testimony as providing adequate notice of the corporal punishment incident's date; second, that the Decision lacked, and that the DOE has still not provided, sufficient non-hearsay evidence supporting the corporal punishment allegations; third, that the Hearing Officer mischaracterized the Petitioner's conduct in the bathroom; fourth, that the DOE does not address Petitioner's argument as to the tardiness specifications; and fifth, that no Answer is necessary if the DOE's cross-motion to dismiss is denied.

In further reply, the DOE argues: first, that Petitioner has still failed to meet his burden of demonstrating that the Hearing Officer's decision was not rational, particularly because of its reliance on certain undisputed facts such as the existence of a separate faculty bathroom nearby and Petitioner's choice to forego closed stalls in favor of unobstructed urinals; second, that the Hearing Officer's finding that Petitioner's misconduct in the bathroom could, by itself, merit termination render any other errors (including the corporal punishment or tardiness specifications) irrelevant to the Award's validity; third, that Petitioner fails to demonstrate, by clear and convincing evidence, any misconduct by the Hearing Officer; and fourth, that the Hearing Officer's findings were rational and supported by the record.

DISCUSSION

I. Petition to vacate arbitration award

"Education Law § 3020–a[5] provides that review of a hearing officer's decision and

award is limited to the grounds set forth in CPLR" § 7511" (*Roberts v Department of Educ. of City of N.Y.*, 45 Misc 3d 1206(A), 3 NYS3d 287 [Sup Ct, NY County 2014]; *see also Abreu v N.Y.C. Dept. of Educ.*, 43 Misc 3d 1215(A), 990 NYS2d 436 [Sup Ct, NY County 2014] *citing Lackow v Department of Educ. of City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008]). "Under CPLR 7511, an award may be vacated only if (1) the rights of a party were prejudiced by corruption, fraud or misconduct in procuring the award, or by the partiality of the arbitrator; (2) the arbitrator exceeded his or her power or failed to make a final and definite award; or (3) the arbitration suffered from an unwaived procedural defect" (*Roberts*, 45 Misc 3d 1206(A), *citing Hackett v Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 154-55 [1995]). The Court turns first to the due process violations alleged by Petitioner, because they allege defects that go to the heart of the proceedings themselves.

Where, as here, the parties are subject to compulsory arbitration, "judicial scrutiny is stricter than that for a determination rendered where the parties have submitted to voluntary arbitration" (*Asch v N.Y.C. Board/Department of Educ.*, 104 AD3d 415, 960 NYS2d 106 [1st Dept 2013] *citing Lackow*, 51 AD3d at 567). "The determination 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" (*Lackow*, 51 AD3d at 567). A § 3020-a decision is supported by adequate evidence when "there is a rational basis in [the whole record] for the findings of fact supporting the [hearing officer's decision]" (*Carroll v Pirkle*, 296 AD2d 755, 756 [3d Dept 2002]; *see also Principe v N.Y.C. Dept. of Educ.*, 94 AD3d 431, 437 [1st Dept 2012], *affd*, 20 NY3d 963 [2012] [decision must be in accord with due process, have adequate evidentiary support, and cannot be arbitrary, capricious or irrational]).

A. Alleged Due Process Violations/Hearing Deficiencies

1. Failure to Provide Adequate Notice of Corporal Punishment Incident

Petitioner cites to *Ronga v New York City Dept. of Educ.* (114 AD3d 528 [1st Dept 2014]) to argue that the corporal punishment specification is deficient because it provided inadequate notice of the charge, and therefore deprived him of the opportunity to prepare an adequate defense. However, *Ronga*'s factual recitation on this issue is sparse, and the *Wolfe v Kelly*, (79 AD3d 406, 407-08 [1st Dept 2010]) decision cited by the court in *Ronga*, explains the contours of the notice requirement in administrative hearings as broader than Petitioner's interpretation. In *Wolfe v Kelly*, the First Department found that certain specifications against the petitioner, a police officer, were impermissibly vague because they each alleged multiple, discrete disciplinary violations over a period of 2 years, but did not specify the dates of the violations. This violated the petitioner's due process rights because the charges were not "reasonably specific, *in light of all the relevant circumstances*" to allow the petitioner to prepare an adequate defense (*id., distinguishing Matter of Block v Ambach*, 73 NY2d 323 [1989] [emphasis added]). Notably, however, the First Department did not find that the third specification, which alleged one instance of perjury "on or about and between April 23, 1998 and December 17, 1998" – an 8-month window, similar to the one alleged here – violated the petitioner's due process rights (*Wolfe*, 79 AD3d at 408).

The *Wolfe* decision (and, by extension, the *Ronga* decision) is illuminated further by *Block*, (73 NY2d 323), wherein a registered nurse faced administrative proceedings alleging various forms of professional misconduct. The Court of Appeals noted that the respective guarantees of due process in criminal and administrative proceedings are not identical;

specifically, fair notice to the respondent in the context of Education Law and Administrative Procedure Act proceedings does not require the same specificity as those under the Criminal Procedure Law (*see Block*, 73 NY2d 332-33, *comparing* CPL § 200.50, 200.30 *with* Administrative Procedure Act § 301 [2] [d] and Education Law § 6510 [1] [c]). Stated another way, the graver consequences of criminal proceedings, as well as the added consideration of double jeopardy, demand greater specificity in the criminal charging document (*id.*). Conversely, "in the administrative forum, the charges need only be *reasonably specific, in light of all the relevant circumstances*, to apprise the party whose rights are being determined of the charges against him" (*Block*, 73 NY2d at 333 [emphasis added]).

Thus, the use of "general time periods" *alone* does not violate due process, provided that the charges apprise the respondent of the allegations and allow for the preparation of an adequate defense (*Block*, 73 NY2d at 333; see also *Arroyo v City of N.Y.*, 245 AD2d 186, 187 [1st Dept 1997] [failing to provide more precise dates not in bad faith where numerous and extensive investigations occurred before charges were finally filed and where one complaining witness delayed filing a formal complaint]). When an alleged time period is not facially unreasonable, the required degree of specificity is to be determined by reference to several factors: whether a more precise date was known or should have been known, the age and intelligence of the victims and witnesses, and the nature of the offense, including whether it is likely to occur at a specific time or be discovered immediately (*Block*, 73 NY2d at 333 [1989], *citing People v Morris*, 61 NY2d 290, 295-296 [1984]; *People v Keindl*, 68 NY2d 410, 419 [1986]).

Applying those principles to the facts here, petitioner failed to establish that the charges violated his due process rights, as they contained the requisite specificity in light of the relevant

circumstances, to place Petitioner on notice of the allegations and allow for the adequate preparation of the defense. Specification 1 of Group 2 alleged several instances of corporal punishment and a verbal statement approximating "I don't care" toward a student between September 9, 2014 until April 20, 2015 – approximately the same length as the upheld charge in *Wolfe* (79 AD3d at 411).

Petitioner also received, sometime before the hearing, an investigative report which contained several relevant documents that should have apprised Petitioner of the conduct alleged: student statements regarding the alleged corporal punishment, a "corporal punishment intake form" noting that on April 20, 2015, the mother of I.O. reported that Petitioner had "pinched and punched" I.O. in class within the prior week (*Tr* at 1498:18; 1501:18; *Exh D-13* at 10 ["I understand that the statements have been provided for the limited purpose of responding to an allegation that was made against me"]).[12]

These documents inject additional "relevant circumstances" that, combined with the age and intelligence of the victims and witnesses (young children) and nature of the offense, support the conclusion that the charges were as specific as possible under the circumstances, and that Petitioner had sufficient time and knowledge of the allegations to prepare a defense (*see e.g. Downes v Klein*, 15 Misc 3d 1141(A) [Sup Ct, NY County 2007] ["From the exchange of materials prior to the hearing, it was clear what the issues were"]).

[12] A document that appears to have been signed by Petitioner on June 5, 2015 acknowledges receiving student statements, but it is unclear which statements, or whether Petitioner received the full investigative report on June 5 (*Exh D-13* at 10). In any event, the Hearing Officer ordered the production of these documents at the pre-hearing conference on August 20, 2015, nearly two months before the initial hearing date on October 5, 2015 (*Tr* at 7, *et seq.*). DOE did not object to producing those documents, Petitioner does not deny receiving them, and Petitioner did not object to their introduction at the hearing (or their use now). Indeed, Petitioner filed all of the exhibits relied upon here by both parties, including those with a "D" prefix denoting "Department of Education" exhibits.

Accordingly, the Court finds that the Corporal Punishment specification (Group 2, Specification 1), and the hearing that eventually substantiated a portion of it, did not deprive Petitioner of due process.

2. *Hearsay*

Where specifications are supported by consistent student statements (even unsworn statements) and corroborated by administrative investigation including consultation with those students, hearsay evidence can be the evidence of an administrative determination (*Colon v City of N.Y. Dept. of Educ.*, 94 AD3d 568 [1st Dept 2012]). This is particularly true where a petitioner has acknowledged the incidents, while offering differing, uncorroborated exculpatory accounts (*id.*). A hearing officer's decision to credit the corroborated hearsay statements amounts to a credibility finding, which is entitled to deference (*id.*, citing *Douglas v N.Y.C. Bd./Dept. of Educ.*, 87 AD3d 856, 857 [1st Dept 2011]). Accordingly, to the extent that Petitioner argues that the Decision is invalid because many of the findings rest exclusively on hearsay, that argument is rejected. The sufficiency and particular facts of each finding are addressed further below.

3. *Martinez Testimony*[13]

To the extent that Petitioner also argues that the Hearing Officer improperly compelled school aide Leoncia Martinez to testify in English (*Pet'r Memo of Law* at 4), Petitioner improperly raises this issue here for the first time (*Adolphe v New York City Bd. of Educ.*, 89 AD3d 532, 533 [1st Dept 2011]). In any event, where a witness displays a sufficient ability to understand and speak the English language, the lack of an interpreter (or sporadic interpretation) does not constitute a lack of due process—especially where the challenge is belated (*Sirota v*

[13] The Court addresses this argument as it is raised in Petitioner's discussion of the facts.

Hammons, 264 AD2d 343 [1st Dept 1999], *citing People v Ramos*, 26 NY2d 272, 309 NYS2d 906 [1970]).

There is also insufficient evidence that the Hearing Officer, as Petitioner asserts, "insisted that Martinez deliver her testimony in English" (*Pet'r Memo of Law* at 4, *citing Tr* at 168). Given that none of Petitioner's objections below related to interpretation concerns, that Petitioner's counsel questioned Martinez in English (*Tr* at 166:3), and that Martinez spoke to the investigator in English (*Tr* at 175:4-8), it appears – and evidently appeared to those at the Hearing – that Martinez was proficient in the English language. Where Martinez had difficulty, the interpreter was there to assist her (*Tr* at 166). Accordingly, the failure of Martinez to testify in Spanish did not deprive Petitioner of due process.

B. Hearing Officer Impartiality[14]

A petitioner seeking to prove arbitrator misconduct or partiality must do so by "clear and convincing proof" (*Moran v N.Y.C. Tr. Auth.*, 45 AD3d 484 [1st Dept 2007]). "The mere inference of impartiality . . . is not sufficient to warrant interference with the arbitrator's award" (*Rose v J.J. Lowrey & Co.*, 181 AD2d 418, 419 [1st Dept 1992]).

Petitioner fails to meet his burden. There is inadequate support, for example, for Petitioner's contention that the Hearing Officer fell asleep or, if that occurred, any objection by counsel at that juncture (*Tr* at 797).

Petitioner's remaining challenges to the Hearing Officer's determination are *ad hominem* attacks upon the Hearing Officer's credibility, and by extension her credibility findings. Petitioner characterizes the Decision as "smug" (*Pet'r Memo of Law* at 19); sarcastically suggests

[14] This is also not a discrete argument, but referenced throughout Petitioner's memorandum of law.

– in response to the Hearing Officer's rejection of Petitioner's argument that an urgent need to urinate necessitated his entry into the bathroom – that "[Petitioner] should have stopped by his urologist to measure his bladder capacity" (*id.* at 19-20); and makes various other flippant remarks that address the quality of the Hearing Officer's writing (*id.* at 2, fn 2). Whatever the merit of these contentions, Petitioner cites no authority establishing that such actions may act as the basis for reversal of an arbitrator's decision, or that they demonstrate partiality on the part of the Hearing Officer. More importantly, Petitioner's attacks ignore a more important point, and one which weighs more heavily here: the Hearing Officer's findings are supported by the extensive record.

C. Arbitrator's Substantive Findings

With respect to fact and credibility findings, courts cannot substitute their judgment for that of a hearing officer who had the opportunity to hear and see witnesses (*see City School Dist. of the City of N.Y. v McGraham*, 75AD3d 445, 450 [1st Dept 2010], *affd*, 17 NY3d 917 [2011]). Thus, the credibility determinations of a hearing officer are entitled to deference, even where a party seeking to vacate a § 3020-a decision claims that there is evidence which conflicts with the hearing officer's determination (*see Cipollaro v N.Y.C. Dept. of Educ.*, 83AD3d 543, 544 [1st Dept 2011]; *Tasch v Bd. of Educ.*, 3 AD3d 502, 770 [2d Dept 2004]).

Ultimately, the party challenging an arbitration determination has the burden of showing its invalidity (*Caso v Coffey*, 41 NY2d 153, 159, 391 NYS2d 88, 359 NE2d 683 [1976]). Based on the submissions, Petitioner fails to establish a basis to vacate the Hearing Officer's Decision.

1. Auditorium Incident (Group 1, Specification 1)

The Hearing Officer's findings substantiating this specification are based rationally upon

the record. School aide Martinez testified that she observed Petitioner's hand contact J.R.'s thigh on the date in question (*Tr* at 171). Investigator Pellizzi also testified that he confirmed the nature of Petitioner's actions by interviewing J.R., noting that J.R. demonstrated a pinching motion with his thumb and index finger and stated that Petitioner's contact "hurt a little bit" (*Tr* at 122; *Exh D-3* at 5). Accordingly, the Court finds that the Hearing Officer's findings as to this specification were rational and not arbitrary or capricious.

2. *The Bathroom Incident (Group 1, Specification 2)*

Ample evidence existed to support the Hearing Officer's findings and conclusion that Petitioner acted inappropriately by entering a student bathroom, where students were present, and urinating within view of the children in such a manner that his penis was exposed (*Decision* at 39-46).

Petitioner testified to having been admonished regarding the use of student bathrooms (*Tr* at 1445), and admitted that an adult bathroom was about 20 feet away (*Decision* at 40, *citing Tr* at 1520), a fact corroborated by subsequent investigation (*Decision* at fn 9, *citing Exh D-3* at 2). The Hearing Officer rejected Petitioner's explanation for his alleged emergent use of the bathroom, that the adult bathroom was always locked (*Decision* at 41, *citing Tr* at 1519). The Hearing Officer noted that Petitioner could not recall verifying that the adult bathroom was locked on the day in question, and that Petitioner did not dispute walking past several enclosed stalls before using an unobstructed urinal (*Decision* at 42, *citing Tr* at 1471-72).

Additionally, school aide Eneida Vielman described the scene in the bathroom: that, as relevant here, there were five students present in the bathroom when she entered, at least some of whom who could see Petitioner's penis (*Tr* at 355-57). At least one of those students testified to

seeing Petitioner's penis (*Tr* at 262), and multiple students confirmed the same to an investigator (*Exh D-3* at 2).

More importantly, the Hearing Officer's choice to credit the testimony of others over Petitioner are not subject to reversal under CPLR 7511 so long the record demonstrates that the Hearing Officer's decision was rational (*see Cipollaro*, 83 AD3d at 544, *citing Lackow v. Department of Educ. (or "Board") of City of N.Y.*, 51 AD3d 563, 568, 859 NYS2d 52 [1st Dept 2008]). Based on the above, the Court finds that the Hearing Officer's decision as to this specification was rational and not arbitrary or capricious.

3. Corporal Punishment Incident (Group 2, Specification 1)

For similar reasons, the Court finds that the Hearing Officer's substantive findings upholding sub-specifications 1 (a) and (b) – that Petitioner kicked I.O. in the leg and punched her in the stomach – also find sufficient support in the record.[15]

With respect to sub-specification 1 (a), I.O. testified that Petitioner used his foot to "forc[e] me to go to the end of the cubby and sit down" (*Tr* at 515:20). With respect to sub-specifications 1 (a) and (b), the Hearing Officer noted that Assistant Principle Castro's report, prepared after Assistant Principle Ceara interviewed student witnesses, substantiated the allegations (*Decision* at 51, *citing* Tr at 855, 932). For example, another student interviewed by Assistant Principal Ceara witnessed Petitioner punch I.O. in the stomach (*Exh D-13*).[16] Accordingly, the Court also finds that the Hearing Officer's findings as to this specification were

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[15] Petitioner's due process arguments regarding hearsay and notice were addressed and rejected above.

[16] The Court also notes that though Petitioner was not specifically charged with grabbing students' arms, the Hearing Officer found support for those actions as well (*Decision* at 51, *citing Tr* at 591).

rational and not arbitrary or capricious.

4. Tardiness Specifications (Group 2, Specifications 3-5)

Though the timecard entries justifying the tardiness specifications were verified by payroll secretary Ianniello (*Decision* at 56, *citing Tr* at 644, *et seq.*), the Hearing Officer's findings with respect to these specifications are inconsistent—a fact which the DOE does not substantively deny (*Pet'r Reply* at 6; *DOE reply* at 7). Although the Decision does not precisely state which policy this violates, there are several mentions of excessive lateness: one in the annual handbooks provided to teachers (*Exhs D-18* at 100; *D-22* at 109), and in Chancellor's Regulation 601 [4] [c] and [2] [b] (*Exh D-6*). Petitioner does not explicitly challenge the Hearing Officer's designation of 10 instances of lateness as "excessive."

With respect to Specification 3, the Hearing Officer confirmed 9 of 10 instances of lateness with the exception of February 5, 2013, for which the Hearing Officer found that Petitioner should have been permitted to use leave time. This was inconsistent, however, with the Award section of the Decision, where the Hearing Officer sustained the entirety of Specification 3 (*Decision* at 60).

For Specification 4, the Hearing Officer upheld nine of eleven instances of tardiness with the exception of two on November 6, 2013, and January 24, 2014 (*Decision* at 57 [dismissing sub-specification 6 and stating "Number 5 is also dismissed"]). However, this is inconsistent with the Hearing Officer's subsequent statement that Petitioner was absent 10 times during the 2013-2014 school year, and the subsequent Conclusion/Award section sustaining the entirety of Specification 4 with only one exception: sub-specification 6 (*Decision* at 58, 60). The discrepancy is noteworthy, in that the Hearing Officer acknowledged that ten instances of

lateness violates the Chancellor's regulations (*Tr* at 639).

With respect to Specification 5, the Hearing Officer upheld thirteen of fifteen instances of lateness, upholding two challenges by Petitioner as to lateness on May 18 and May 27, 2015, when Petitioner had meetings with school administrators (*Decision* at 58, *citing R-5*). However, Petitioner correctly notes that he challenged 5, not 2, sub-specifications (*Tr* at 1739).

Nevertheless, and for the reasons below, however, the Court finds that these errors do not merit a vacatur of the ultimate award.

c. Appropriateness of Penalty

The proportionality of a petitioner's penalty should be examined "in light of all the circumstances", and should be affirmed unless it is "shocking to one's sense of fairness" (*Principe*, 94 AD3d at 433, 434 [penalty excessive where the petitioner had a "spotless" record for five years and was promoted to dean two years prior to the incidents at issue, and where the hearing officer demonstrated clear bias against the petitioner and failed to consider the disciplinary histories of the students involved and threatening environment in which the incidents took place], *citing Pell*, 34 NY2d at 233):

> "[A] result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed.

The sanctions must also reflect the standards of society to be applied to the offense involved (*Brito v Walcott*, 115 AD3d 544, 546, 547 [1st Dept 2014] [termination for sexual

conduct with a colleague on school property, a 'one-time mistake' unwitnessed by students, inappropriate where the petitioner was a tenured teacher who had made many positive contributions to the school, had an unblemished disciplinary record, and was described by her supervisor as one of the best teachers she had ever worked with], *citing Pell*, 34 NY2d at 234).

While no bright-line rule exists, the termination of petitioners with otherwise-unblemished records has been upheld even for a single instance of misconduct (*see Matter of Patterson v City of N.Y.*, 96 AD3d 565, 566 [1st Dept 2012] [upholding a penalty of termination for a petitioner with 10 years of no disciplinary history who used a false address to avoid paying New York City income taxes]; *see also Matter of Rogers v Sherburne–Earlville Cent School Dist.*, 17 AD3d 823 [3d Dept 2005] [upholding termination for falsifying time sheets and a pattern of excessive leave time usage and abuse of leave time benefits despite "a long and previously unblemished record"]; *Matter of Ebner v Board of Educ. of E. Williston Union Free School Dist. No. 2, N. Hempstead*, 42 NY2d 938, 397 NYS2d 1008 [1977] [teacher terminated for dragging a student by the hair from one class to another]; *Matter of Saunders v Rockland Bd. of Coop. Educ. Servs.*, 62 AD3d 1012, 879 NYS2d 568 [2d Dept 2009] [teacher terminated for allowing a student to be strapped to a chair without cause and for striking a student in the chest and jaw]; *Matter of Giles v Schuyler–Chemung–Tioga Bd. of Coop. Educ. Servs.*, 199 AD2d 613, 604 NYS2d 345 [1993] [teacher terminated for striking a student on the hands with a book and for throwing a car jack through a window]; *compare Riley v City of N.Y.*, 84 AD3d 442 [1st Dept 2011] [termination of petitioner with unblemished 15-year career shocked the conscience where unspecified offense did not cause "physical or emotional injury" to student]; *compare Matter of Weinstein v Department of Educ. of City of N.Y.*, 19 AD3d 165, 798 NYS2d 383 [1st

Dept 2005] [termination for single incident of improper use of physical force shocked the conscience where petitioner was carrying out assigned duty of denying access to locker room to all but gym class students], *lv den* 6 NY3d 706, 812 NYS2d 35, 845 NE2d 467 [2006]).

Less severe behavior can also justify termination of a long-standing employee if the behavior is part of a pattern, particularly where warnings about inappropriate behavior have been issued (*Roman v N.Y.C. Dept. of Educ.*, 128 AD3d 590, 591 [1st Dept 2015] [upholding termination despite long, otherwise satisfactory tenure and absence of progressive discipline where the petitioner had been warned about inappropriate conduct, had taken no responsibility for his actions, denied the incidents despite corroborating evidence, and showed no remorse]; *Matter of Robinson v City of N.Y.*, 33 Misc3d 1228(A), 2011 NY Misc LEXIS 5669 at *13, *20 [Sup Ct, NY County 2011] [dismissal warranted, notwithstanding petitioner's 23 years of satisfactory performance, for pattern of abusive behavior]; *Roberts v Dept. of Educ. of City of N.Y.*, 45 Misc 3d 1206(A) [Sup Ct, NY County 2014] [dismissal warranted despite 11 years of satisfactory performance upon numerous instances of "performing unsatisfactory and inappropriate lessons, repeatedly failing to implement administrative directives, engaging in unwanted and unreciprocated physical and verbal contact with co-workers, and engaging in inappropriate conduct with students in and outside of the classroom"]; *Mazzella v Bedford Cent. School Dist.*, 49 Misc 3d 675, 683 [Sup Ct, Westchester County 2015] [termination of 18-year employee justified for recent pattern of incompetence]; *compare Polayes v City of N.Y.*, 118 AD3d 425, 426 [1st Dept 2014] [Supreme Court's confirmation of petitioner's termination reversed, despite prior warnings to petitioner not to engage in non-sexual touching of students, when latest incident involved only innocuous conversation which did not offend students]).

Applying those principles here, the Hearing Officer's award is justified by the record, which contains evidence of at least three instances of inappropriate conduct—specifically, the Hearing Officer's findings that Petitioner: engaged in inappropriate physical contact with a student (Group 1, Specifications 1 and 3); despite prior warnings, entered into a student bathroom and, at minimum, negligently created a situation where multiple students saw his penis (Group 1, Specifications 2 and 3); and engaged in corporal punishment (Group 2, Specifications 1 and 2) despite policies against such behavior (*see e.g. Exh D-21; D-23*).[17] Notably, the first two incidents occurred within a day of each other.

Moreover, even crediting Petitioner's challenges to the tardiness specifications (Group 2, Specifications 3 to 5), the record still contains 27 unchallenged instances of tardiness in three years (9 in 2012-2013, 8 in 2013-2014, and 10 in 2014-2015). Petitioner was also warned about his repeated tardiness at least once (*Exhs D-15*; *D-16*), but did not subsequently alter his behavior.[18]

Coupled with the other behavior confirmed by the Hearing Officer, there is sufficient evidence in the record to justify termination.

II. DOE's Cross-motion to Dismiss

In determining whether a pleading should be dismissed pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which, taken together, manifest any cause of action

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[17] The Hearing Officer noted – correctly – that the corporal punishment finding alone could merit termination.

[18] The same exhibit also notes that several other conferences were held on November 7, 2013, January 8, 2014, and February 12, 2014.

cognizable at law, a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]).

On a motion made pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund*, 104 AD3d at 403 *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). Utilizing this standard would prove problematic, however, because accepting Petitioner's facts and affording her every possible inference under CPLR 3211 would clash with the deference afforded to the Hearing Officer's credibility findings under CPLR 7511.

Accordingly, when documentary evidence is submitted by the parties, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *see Abreu*, 43 Misc 3d 1215(A) [granting DOE's cross-motion brought pursuant to CPLR 3211 to dismiss an Article 75 petition seeking to vacate an arbitration award terminating petitioner]). Therefore, given the extensive record discussed at length above, sufficient documentary evidence exists to support the Hearing Officer's findings and conclude that Petitioner has no cause of action.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the application of Petitioner Noah Berkley for an Order pursuant to CPLR 7511 vacating the January 28, 2016 Opinion and Award (the "Award") of Hearing Officer

CPLR 7511 vacating the January 28, 2016 Opinion and Award (the "Award") of Hearing Officer Gloria Johnson is denied in all respects; and it is further

ORDERED that the application of Respondent New York City Department of Education for an Order to confirm the Award pursuant to CPLR 7511 and/or to dismiss the Petition pursuant to CPLR 3211(a)(7) is granted to the extent that the award is confirmed; and it is further

ORDERED that this Petition is hereby dismissed with prejudice; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that counsel for Respondent shall serve a copy of this Order with notice of entry upon all parties within 20 days.

This constitutes the decision and order of this court.

Dated: June 27, 2016

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.