SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** IAS MOTION 59EFM

Justice

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JULIE LALLO,

Petitioner,

- v -

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

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INDEX NO.	653352/2016
MOTION DATE	03/09/2018
MOTION SEQ. NO.	001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 35, 37, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57

were read on this motion to/for VACATE OPINION and AWARD.

ORDER

Upon the foregoing documents, it is

ORDERED that the petition is DENIED; and it is further

ORDERED and ADJUDGED that the Arbitrator Opinion and Award, dated June 14, 2016, is hereby CONFIRMED.

DECISION

Petitioner was employed by Respondent as a tenured teacher at P.S. 163, Bronx, New York, for about fourteen years. Then, on or about November 18, 2015, Respondent proffered one set of charges against Petitioner for the 2012-2013, 2013-2014, and 2014-2015 school years for "incompetent and ineffective service, neglect of duty, and failure to follow procedures and carry out normal duties." Under Education Law 3020-a, an arbitrator

was appointed, who conducted a hearing governed by the procedures set forth in the applicable collective bargaining agreement. At the hearing both parties were represented by counsel and had the opportunity to present evidence, including cross examination of the other parties' witnesses, in support of their respective positions.

Petitioner filed a petition pursuant to CPLR 7511(b) to vacate the Opinion and Award of the Arbitrator dated June 14, 2016, which upheld certain charges and rejected others of the Respondent that Petitioner failed to adequately plan and execute lessons during the period from 2012 to 2015 and found the termination was an appropriate penalty for the sustained specifications. Petitioner seeks an order granting a rehearing or, in the alternative, reducing the penalty. Respondent opposes the application.

Petitioner argues that the Award is arbitrary and capricious because it was based on incompetency charges related to the 2014-2015 school year brought in contravention of the collective bargaining agreement provision that bars such charges during the period when a teacher is enrolled in the Peer Intervention Program ("PIP") Plus. In addition, Petitioner argues that the Award is irrational as it determines that Petitioner was an ineffective teacher, despite the evidence that

only in 2014-2015 school years did Respondent rate Petitioner as ineffective, which was the evaluation that the arbitrator was not to consider on consent, while for school years 2012-2012 and 2013-2014, the Respondent rated her as "satisfactory" and "developing", respectively. She also contends that the Award was arbitrary and capricious in that it assessed a termination penalty, while rejecting the charges of Respondent for school years 2012-2013, 2013-2014, and 2014-2015 that Petitioner failed to implement and accept training with respect to lesson planning, plan pacing and execution, and/or failed to establish a culture of learning, the arbitrator contradictorily found Petitioner guilty of failing to implement coaching and professional development for such school years. Finally, Petitioner argues that Respondent meted out the most drastic and ultimate penalty of termination, which under such circumstances, was excessive and shocks the conscience.

Respondent counters that, as for the evaluation that the arbitrator did not consider on consent, there were only two observations with respect to Petitioner's execution of lesson plans in that school year, i.e. March 4 and 30, 2015, and that the remaining evaluations amply support the Award. Respondent urges that the ultimate penalty was justified in that for a total of thirteen observations, including during the prior two

school years, when Petitioner had likewise enrolled in and completed the PIP process, Petitioner demonstrated an inability to sustain improvement of her pedagogical practices, with à "satisfactory rating" followed by a lesser "developing" rating in the subsequent year. Such observations included, but were not limited to (1) November 9, 2012, failure to (a) align her stated lesson objective to the work actually assigned to the students, (b) properly question students to engage them in the lesson, (c) use technology available to her, and (d) plan the lesson in general; and (2) October 7, 2013, failure to (a) align her lesson objective with the work actually assigned to the students and (b) ask proper questions or get students to explain their answers.

Discussion

Where the determination of the arbitrator is in accord with due process, is rational, and supported by adequate evidence in the record, the court will not disturb the findings (see Broad v New York City Bd./Dept. of Educ., 150 AD3d 438 [1st Dept 2017]). In addition, an arbitrator's "determination of credibility" is "largely unreviewable [by the court] because" the arbitrator "observed the witnesses . . . and was able to perceive the nuances of speech and manner that combine to form an impression of either candor or deception" (Lackow v New York City Dept. of Educ.,

51 AD3d 563, 568 [1st Dept 2008]). Moreover, in contrast to the court's decision in Beriguete v New York City Dept. of Educ., 53 Misc3d 347, 358 (Sup Ct, NY County 2016), the record here, as cited by the arbitrator, sets forth that the Petitioner was provided with feedback and notice about the inadequacy of the ways in which she drafted and executed her lesson plans, but she failed to adjust her teaching methods in response to such directives. See Davis v New York City Bd./Dept. of Educ., 137 AD3d 716, 717 (1st Dept 2016).

Petitioner's argument, raised for the first time in reply, that the arbitrator violated her due process rights by considering a performance evaluation that Respondent agreed would not be considered, fails because there was sufficient evidence in the record to support the arbitrator's findings independent of the evaluation. See Duncan v New York City Bd./Dept. of Educ., 124 AD3d 463 (1st Dept 2015). Nor does Broad v New York City Bd.,/Dept. of Educ., 150 AD3d 438 (1st Dept. 2017) support Petitioner's position that the penalty of termination shocks one's sense of fairness. In that decision the appellate division unanimously reversed the trial court's order granting the petition and setting aside the arbitrator's determination as excessive, reasoning that the penalty of termination was warranted where the teacher was found deficient

for two years based on the observations and ratings of the school principal and two assistant principals.

03/31/2020
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
APPLICATION:	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE