SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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STELLA NUNZIATA

Plaintiff,

- v -

THE NEW YORK CITY BOARD/DEPARTMENT OF EDUCATION,

Defendant.

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INDEX NO. 101688/2019

MOTION DATE 12/04/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 75, of petitioner Stella Nunziata (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondent New York City Board/ Department of Education (motion sequence number 001) is granted and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondent shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

In this Article 75 proceeding, petitioner Stella Nunziata (Nunziata) seeks a judgment to vacate the arbitrator's "opinion and award" which terminated her employment with the respondent New York City Department of Education (DOE), and the DOE cross-moves to dismiss Nunziata's petition (motion sequence number 001). For the following reasons, the petition is denied and the cross motion is granted.

FACTS

Nunziata was employed by the DOE as a tenured teacher between 1994 and her termination on October 22, 2019. *See* verified petition, ¶ 5; exhibit A. On September 5, 2018, the DOE served Nunziata with a list of 22 disciplinary "charges and specifications" based on acts of her alleged "incompetent and ineffective service, insubordination, neglect of duty, and unwillingness and/or inability to follow procedures or carry out normal duties" during the 2015-2016, 2016-2017, and 2017-2018 school years. *See* respondent's reply mem, exhibit A. The DOE avers that it scheduled those charges and specification for compulsory arbitration, pursuant to Education Law § 3020-a, and that Hearing Officer Timothy S. Taylor, (HO Taylor) conducted hearings over 17 days between March and August, 2019. *See* respondent's mem of law at 20. On October 22, 2019, HO Taylor issued an arbitrator's opinion and award that sustained all 22 of the charges and specifications against Nunziata and recommended the penalty of termination. *See* verified petition, exhibit A. The relevant portions of HO Taylor's opinion found as follows:

> "OPINION
>
> "I must first determine whether the DOE has met its burden of proof in establishing the Respondent's guilt on the Specifications. If this burden is met, I must then address the issue of penalty. The standard of proof here is whether these Specifications have been established by a fair preponderance of the credible evidence. After a thorough and complete review of the record, I find that the DOE established by a fair preponderance of the credible evidence it has just cause to discipline Respondent.
>
> "I find AP [assistant principal] Foster and Peer Validator Spencer credible. AP Foster was credible because:
>
> 1. Her testimony was supported by detailed documentation.

2. Her low inference notes support her evaluations aligned to the Danielson Rubric.

3. Respondent failed to rebut AP Foster's evaluations.

4. Respondent's witnesses supported AP Foster's testimony.

Peer Validator Spencer was credible because she did not know Respondent and had no motive to evaluate her unfairly. She was unbiased in her appraisal and supported her conclusions with data-based evidence aligned to the Danielson Rubric.

* * *

"I find Respondent was not credible because her answers were vague and not data-based. She had little to no recall of specific lessons. Respondent offered rebuttals not submitted at the time of the classroom evaluations. The rebuttals appeared to be prepared after the charges and in anticipation of the disciplinary arbitration.

"Respondent defended her teaching practices and blamed the administration for assigning her a high level of non-English speaking students and students with IEPs. Her testimony showed little reflection on any deficiencies in her pedagogy.

"Respondent urged the Hearing Officer to judge her based on student learning outcomes, however the June 2018 TIP clearly indicates her students were not learning. Their overall performance on state exams declined from the Fall term to the Spring term.

"The DOE presented a well-documented case against Respondent. The documents recorded classroom observations with low inference notes. The data in those notes were aligned with the Danielson Rubric to assign ratings for the eight essential Domains. Domains 2a, 2d, 3b, 3c, and 3d are weighted more heavily than other Domains. In Domains 2a, 2d, 3b, 3c, and 3d Respondent was rated ineffective on October 28, 2015. On January 13, 2016, she was rated ineffective in Domains 3b, 3c, and 3d. May 10, 2016, she was rated ineffective in Domains 2a, 2b, 3c, and 3d.

"On October 25, 2016, Respondent was rated ineffective. The peer validator rates her as ineffective in 3b, 3c, and 3d. On January 17, 2017, she is rated ineffective in Domains 2a, 2d, 3b, 3c, and 3d. On December 13, 2016, and March 8, 2017, she was rated ineffective in Domains 3b, 3c, and 3d. On March 23, 2017, she is rated ineffective in 3b, developing in 3c and 3d. On May 5, 2017, Respondent was rated ineffective in Domains 3b, 3c, and 3d. On May 10, 2017, she is rated Developing in Domains 2a, and 2d, ineffective in Domains 3b, 3c, and 3d. On May 22, 2017, she was rated ineffective in Domains 3c and 3d and developing in Domains 2a, 2d, and 3b. On May 31, 2017, Respondent is rated developing in Domains 2a, 3b, 3c, and 3d.

"On October 5, 2017, a TIP was imposed. On November 1, 2017, Respondent is rated ineffective in Domains 3b and 3c, developing in 3d and effective in 2a and 2d. On December 21, 2017, Respondent rated developing in Domains 2a, 2d, and ineffective in Domains 3b, 3c, and 3d.

"On March 28, 2018, Respondent was rated ineffective in Domains 3c and 3d, developing in Domains 2a, 2d, and 3b. On April 27, 2018, Respondent was rated ineffective in Domains 3b, 3c, and 3d. She was rated developing in Domains 2a and 2d. On May 31, 2018, Respondent was rated ineffective in Domains 3b, 3c, and 3d and effective in Domains 2a and 2d.

"Despite three years of ongoing and substantial efforts to remediate her pedagogy, Respondent could not deliver competent classroom instruction. I find Respondent guilty of Specifications 1.a-p, and Specifications 2.a-f. Respondent's failure to provide

competent instruction constitutes just cause for disciplinary action and constitutes incompetent and or inefficient service, and neglect of duty. Respondent was unable to follow procedures and carry out normal duties during the 2015-2016, 2016-2017, and 2017-2018 school years. Substantial cause exists, rendering Respondent unfit to perform obligations to the service properly.

"PENALTY

"In addressing the issue of penalty, I have considered the totality of the circumstances. The factors in my consideration are the Respondent's length of service with the DOE, the scope and quality of that service, her prior disciplinary record, and any mitigating factors. I have also considered the Respondent's recognition of wrongdoing, her genuine remorse, and how she has embraced efforts to remediate her behavior.

"In assessing any penalty, I must also ensure that the penalty imposed fit the Respondent's offense. The penalty must be proportional. The penalty must also further the DOE's mission, discourage similarly egregious behavior in the future, and be suited to mitigate the impact of the Respondent's misconduct on students' personal development, as well as on the integrity of the public education system. *See*, *Matter of Bolt v. City of New York Department of Education*, 30 NY3d 1065, (2018), Slip Op 00090, Rivera, J. (concurring memorandum).

"Respondent has been employed as a tenured teacher with the DOE for 25 years. She has no prior disciplinary record. She has been provided substantial remediation. Despite these efforts, Respondent cannot provide direct instructional services to the Department.

"I do not believe that she lacks good character or has engaged in conduct unbecoming of a teacher. She does lack insight into her shortcomings and deficiencies in her teaching abilities. Without this insight, it is unlikely that the necessary changes in her pedagogy would occur. I find termination is the appropriate penalty."

Id.

Nunziata subsequently commenced this Article 75 proceeding pro se on October 29, 2019; however, she later obtained counsel who consented to converting this matter into an e-filed proceeding on January 28, 2020. Shortly thereafter, the Covid-19 national pandemic forced the court to suspend most of its operations indefinitely, which unfortunately appears to have impacted the conversion of this matter. Nunziata's petition was eventually re-filed electronically on August 28, 2020 along with a request for judicial intervention. *See* verified petition. Rather than answer, the DOE filed a cross-motion to dismiss the petition on August 31, 2020. *See* notice of cross motion. This matter is now fully submitted (motion sequence number 001).

DISCUSSION

As previously mentioned, the DOE commenced its disciplinary proceeding against Nunziata pursuant to Education Law § 3020-a. Education Law § 3020-a (5) provides that an employee may file a petition pursuant to CPLR § 7511 to vacate or modify a hearing officer's decision within 10 days of his/her receipt of that decision. CPLR § 7511 (b) sets forth four exclusive grounds on which an arbitrator's award may be vacated:

> "1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:
> (i) corruption, fraud or misconduct in procuring the award; or
> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
> (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
> (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection."

The Appellate Division, First Department, has observed that:

> "Where . . . the parties are subjected to compulsory arbitration, the arbitration award must be 'in accord with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78.' 'A hearing officer's determinations of credibility, however, are largely unreviewable because the hearing officer observed the witnesses and was able to perceive the inflections, the pauses, the glances and gestures - all the nuances of speech and manner that combine to form an impression of either candor or deception.'"

Matter of Brito v Walcott, 115 AD3d 544, 545 (1st Dept 2014), quoting *Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567 (1st Dept 2008) (additional citations omitted). The First Department also holds that "[t]he party challenging an arbitration determination has the burden of showing its invalidity." *Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 419 (1st Dept 2013), citing *Caso v Coffey*, 41 NY2d 153, 159 (1976).

Here, Nunziata's original pro se petition set forth five claims, which she denominated as separate "causes of action," that all nevertheless contained the same assertion that HO Taylor's

October 22, 2019 opinion was arbitrary and capricious. *See* verified petition, ¶¶ 36-50. The DOE's cross motion hewed closer to the requirements in the precedent cited above, and asserted that: 1) Nunziata failed to satisfy the grounds for vacatur set forth in CPLR 7511 (b); 2) HO Taylor's October 22, 2019 opinion was not arbitrary and capricious; and 3) the penalty of termination was not so disproportionate to the charges and specifications against Nunziata as to shock the conscience. *See* respondent's mem of law at 20-32. The reply filed by Nunziata's counsel did not address those arguments, but instead: 1) took issue with the DOE's application of Education Law § 3020-a; 2) disagreed with HO Taylor's finding that sustained a "charge and specification" of "incompetence"; and 3) asserted that the penalty of termination was unwarranted. *See* petitioner's reply mem at 12-32. The DOE's sur-reply disputed those assertions and additionally contended that Nunziata's right to due process had not been violated. *See* respondent's reply mem at 2-9. After reviewing all of the foregoing arguments, the court makes the following determinations.

First, Nunziata did not establish any of the grounds for overturning HO Taylor's award that are specified in CPLR § 7511 (b). The court notes that her petition contains no allegations regarding the grounds of "corruption" (CPLR § 7511 [b] [1] [i]) or "failure to follow the procedure" (CPLR § 7511 [b] [1] [iv]).

With respect to "impartiality" (CPLR § 7511 [b] [1] [ii]), the petition alleges that HO Taylor "showed bias and prejudice in his decision" by "administering a double standard on the issue of the admissibility of documents, progressive discipline, credibility of testimony, as well as ignoring the lack of evidence to support termination." *See* verified petition, ¶¶ 58-59. However, these are conclusory statements. CPLR § 7511 (b) requires a petitioner to demonstrate a hearing officer's bias by clear and convincing evidence. *See e.g.*, *Matter of Telemaque v New*

York City Bd./Dept. of Educ., 148 AD3d 503, 503-504 (1st Dept 2017), citing *Matter of Moran v New York CityTr. Auth.*, 45 AD3d 484, 484 (1st Dept 2007). Conclusory allegations are not sufficient to do so.

Two of the five "causes of action" in the original pro se petition allege that HO Taylor "exceeded his power" (CPLR § 7511 [b] [1] [iii]); however, they both claimed that he did so by recommending the penalty of termination. *See* verified petition, ¶¶ 51-52, 60-63. As recently as this year, the First Department has held that the penalty of termination is appropriate where a HO has found "a long-term pattern of inadequate performance." *Matter of Jackson v Department of Educ. of the City of N.Y.*, 184 AD3d 500, 501 (1st Dept 2020). Because HO Taylor made that determination, the court cannot find that he "exceeded his power," as a matter of law, by recommending the penalty of termination. Therefore, the court concludes that Nunziata failed to satisfy any of the four criteria for vacatur of the HO's determination that are set forth in CPLR 7511 (b).

Next, the court finds that Nunziata did not demonstrate that HO Taylor's October 22, 2019 opinion was an arbitrary and capricious ruling. The First Department holds that DOE arbitrator's decisions may be considered arbitrary and capricious if they are "without sound basis in reason and ... generally taken without regard to the facts." *Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 856, 858 (1st Dept 2011), quoting *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974). However, determinations which have a "rational basis" in the administrative record are not deemed to be arbitrary and capricious. *See e.g.*, *Jennings v Walcott*, 110 AD3d 538, 538-539 (1st Dept 2013), citing *Matter of Pell*, 34 NY2d at 231. Here, the DOE argues that HO Taylor based his decision on the evidence that he received over 17 days

of hearings, which included witness testimony, evaluators' reports, peer reviews and other DOE documents. *See* respondent's mem of law at 35-36. The DOE notes that Nunziata did "not argue that the [foregoing] observations, . . ., were inaccurate, or that any of the observation was based on something "unseen." *Id*. As a result, the DOE argues that Nunziata failed to meet her burden of proving that HO Taylor's opinion was arbitrary and capricious. *Id*. The court agrees.

As can be seen from the portion of the decision reproduced above, HO Taylor did indeed review copious testimony and evidentiary submissions. *See* verified petition, exhibit A. As can be seen from the text of the petition, Nunziata did not argue that any of that material was inaccurate or improper. *Id*., verified petition. Instead, her entire argument consisted of assertions that the penalty of termination was improper, as a matter of law. *Id*., ¶¶ 36-50. The court has already rejected that contention. The court also notes that Nunziata's reply papers, which were prepared by counsel, did not challenge the veracity of the evidence that HO Taylor received at the hearing. Rather, as previously observed, counsel disputed HO Taylor's conclusion that that evidence was sufficient to sustain a charge of "incompetence." *See* petitioner's reply mem at 19-20. However, given the ample record that HO Taylor relied on, Nunziata's personal assessment of her own performance was not sufficient, by itself, to overcome the HO's determination. *See e.g.*, *Matter of Ferraro v Farina*, 156 AD3d 549 (1st Dept 2017). Therefore, in the absence of any viable evidentiary challenges from Nunziata, the court concludes that HO Taylor's opinion had a rational basis in the administrative record.

The other inquiry which is part of traditional "arbitrary and capricious" analysis, and is also used when reviewing penalties imposed after Education Law § 3020–a hearings, is "whether the punishment of dismissal was 'so disproportionate to the offenses as to be shocking to the court's sense of fairness.'" *Matter of Esteban v Department of Educ. of the City Sch. Dist. of the*

City of N.Y., 131 AD3d 880, 881 (1st Dept 2015), quoting *Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 569 (1st Dept 2008). Nunziata raised the argument that her termination "shocked the conscience" in both her petition and her reply papers.[1] *See* verified petition, ¶¶ 53-55, petitioner's reply mem at 20-29. However, as was indicated earlier, there are numerous First Department decisions holding that the dismissal of a teacher against whom the DOE has proven disciplinary specifications of, e.g., incompetence, inefficient service, failure to follow procedures and/or carry out normal duties does not shock the judicial sense of fairness. *See e.g.*, *Matter of Jackson v Department of Educ. of the City of N.Y.*, 184 AD3d at 501; *Matter of Ferraro v Farina*, 156 AD3d at 549; *Matter of Benjamin v New York City Bd./Dept. of Educ.*, 105 AD3d 677 (1st Dept 2013). Based on that precedent, the court finds that Nunziata has failed to show that her termination was such a disproportionate penalty. Therefore, because HO Taylor's opinion was rationally based, and because the penalty of termination that he recommended was not excessive, the court concludes that Nunziata has failed to meet her burden of proof that that HO Taylor's opinion was arbitrary and capricious.

Finally, the court finds that Nunziata has failed to demonstrate that her due process rights were violated during the arbitration which resulted in HO Taylor's award. In the context of DOE arbitrations, "due process . . . requires that the charges be 'reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges

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[1] In the reply papers, Nunziata's counsel particularly raises the argument that HO Taylor had a range of possible penalties to choose from other than termination, any of which he could have imposed on Nunziata after he sustained the DOE's charges and specifications against her. *See* petitioner's reply mem at 20-29. However, as the Court of Appeals has recently held, "[a] difference of opinion as to the appropriate penalty, . . . 'does not provide a basis for vacating the arbitral award or refashioning the penalty.'" *Matter of Bolt v New York City Dept. of Educ.*, 30 NY3d 1065, 1079 (2018), quoting *City School Dist. of the City of N.Y. v McGraham*, 17 NY3d 917, 920 (2011). Therefore, the court discounts counsel's argument.

against him - and to allow for the preparation of an adequate defense.'" *Matter of Berkley v New York City Dept. of Educ.*, 159 AD3d 525, 526 (1st Dept 2018), quoting *Matter of Block v Ambach*, 73 NY2d 323, 333 (1989). Here, the 22 disciplinary charges and specifications that the DOE served on Nunziata plainly identified the time, date, place and nature of every incident of her behavior or performance that the DOE objected to. *See* notice of cross motion, exhibit A. The due process objection that Nunziata raised in her petition was that the DOE "failed to provide a preponderance of the evidence to substantiate the charges against [her] and overcome the many violations of law and procedure cited herein." *See* verified petition, ¶¶ 56-57. However, this is clearly just another evidentiary argument. It does not address "specificity of charges," as a valid due process argument must. Therefore, the court discounts it.[2] In light of this failing, the court concludes that Nunziata has failed to establish that there were any due process violations during the subject arbitration proceeding.

At the beginning of this decision, the court noted that judicial review of an award that was rendered through compulsory arbitration requires analysis of whether the aggrieved petitioner satisfied any of the grounds for vacatur set forth in CPLR § 7511 (b), as well as "strict scrutiny" to ensure that the award was not arbitrary and capricious and comported with the requirements of due process. *See Matter of Brito v Walcott*, 115 AD3d at 545. After conducting

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[2] Although the reply papers submitted by Nunziata's counsel do not raise a due process argument as such, they do assert that it was procedurally improper for the DOE to have commenced the arbitration proceeding by serving Nunziata with a "Notice of Determination of Probable Cause Pursuant to Education Law 3020-a" without the DOE's Panel for Educational Policy having first met in an executive session to vote on the issue of probable cause. *See* petitioner's reply mem at 12-19. However, this argument is based on Education Law § 2573 (1) (a), which was superceded in New York City by Education Law § 2590, and the First Department has long held that the executive session voting requirement does not apply to the DOE. *See Matter of Munoz v Vega*, 303 AD2d 253 (1st Dept 2003). Therefore, the court discounts this argument too.

a thorough review of Nunziata's petition, the court concluded that she failed to failed to establish a violation of CPLR § 7511 (b), failed to establish that either the findings or the recommendation in HO Taylor's decision were arbitrary or capricious, and failed to show that her due process rights were violated during the arbitration. Accordingly, the court finds that Nunziata's Article 75 petition should be denied as meritless, and that the DOE's cross motion to dismiss it should be granted.

CONCLUSION

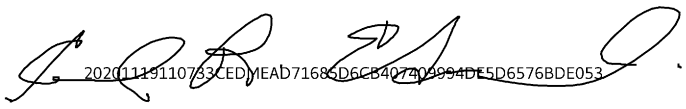
ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 75, of petitioner Stella Nunziata (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondent New York City Board/ Department of Education (motion sequence number 001) is granted and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondent shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.



11/18/2020
DATE

CAROL R. EDMEAD, J.S.C.

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