

**Maniscalco v Board of Educ. of the City Sch. Dist. of  
the City of N.Y.**

2022 NY Slip Op 30893(U)

March 15, 2022

Supreme Court, New York County

Docket Number: Index No. 160725/2021

Judge: Lynn R. Kotler

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Rachel Maniscalco	INDEX NO. 160725/2021
- v -	MOT. DATE
The Board of Education of the City School District of the City of New York, et. al.	MOT. SEQ. NO. 001
Joan Giammarino	INDEX NO. 160829/2021
- v -	MOT. DATE
The Board of Education of the City School District of the City of New York, et. al.	MOT. SEQ. NO. 001
Athena Clarke	INDEX NO. 160787/2021
- v -	MOT. DATE
The Board of Education of the City School District of the City of New York, et. al.	MOT. SEQ. NO. 001
Crystal Salas	INDEX NO. 160821/2021
- v -	MOT. DATE
The Board of Education of the City School District of the City of New York, et. al.	MOT. SEQ. NO. 001

The following papers were read on this motion to/for vacatur

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). _____
Replying Affidavits	NYSCEF DOC No(s). _____

These four proceedings are brought by tenured teachers pursuant to CPLR Articles 75 and 78. Petitioners are Rachel Maniscalco ("Maniscalco"), Joan Giammarino ("Giammarino"), Athena Clarke ("Clarke") and Crystal Salas ("Salas" together "the petitioners"). Respondents are petitioners' employer, the Board of Education of the City School District of the City of New York a/k/a the New York City Department of Education ("DOE") and the Community School Districts in which each of the petitioners work, respectively: Community School District 31 of the Board of Education of the City of New York ("District 31"), Community School District 20 of the Board of Education of the City of New York ("District 20"), Community School District 22 of the Board of Education of the City of New York ("District 22") and Community School District 75 of the Board of Education of the City of New York ("District 75").

Petitioners seek orders directing respondents to reinstate them to the positions they previously held, declaring that respondents acted in derogation of Education Law §§ 3020 and 3020-a and denied petitioners due process of law, annulling respondents' determination which placed petitioners on leave

Dated: 3.15.22

  
\_\_\_\_\_  
HON. LYNN R. KOTLER, J.S.C.

1. Check one:  CASE DISPOSED     NON-FINAL DISPOSITION
2. Check as appropriate: Motion is  GRANTED  DENIED  GRANTED IN PART  OTHER
3. Check if appropriate:  SETTLE ORDER  SUBMIT ORDER  DO NOT POST
- FIDUCIARY APPOINTMENT  REFERENCE

without pay, awarding petitioners back salary and benefits, and vacating an arbitration decision which denied petitioners' right to grieve. Respondents cross-move pre-answer to dismiss pursuant to CPLR § 3211(a)(7). Each of the petitioners challenge the same mandate and arbitration award, and the parties largely raise the same arguments in these proceedings. Therefore, these four proceedings are hereby consolidated for the court's consideration and disposition in this single decision/order.

The relevant facts are alleged as follows. Maniscalco began teaching for the New York City public school system in 2012. During the 2015-2016 school year, she was granted the status of a tenured teacher under license as a special education teacher. Giammarino started teaching for the New York City public school system in 2007. In 2010, she was also granted the status of a tenured teacher. Clarke began teaching for the New York City public school system in 2015. She was granted status as a tenured teacher in 2019. Salas started teaching for the New York City public school system in 2007. She was granted tenured teacher status in 2016. All four petitioners remained in good standing during their time as tenured teachers.

On August 24, 2021, Mayor Bill de Blasio and NYC Commissioner of Health and Mental Hygiene, David A. Chokshi, MD, announced a "vaccine only" mandate for Department of Education employees ("DOE mandate"). This mandate was subsequently amended and later ratified by the New York City Board of Health. On September 1, 2021, the United Federation of Teachers ("UFT") filed a Declaration of Impasse with the Public Employment Relations Board, challenging the mandate's lack of medical or religious exemptions and expressing concern for the lack of due process rights permitted its members. The Declaration of Impasse led to an arbitration before Martin F. Scheinman ("the arbitrator"). On September 15, 2021, the arbitrator issued an Impact Arbitration Award ("IAA") in which he established a process for exemptions and accommodation requests.

Anyone who did not comply with the DOE mandate could choose two options: (1) opt, no later than October 29, 2021, to separate from service and receive enhanced payment of accrued paid time off and health insurance through September 5, 2022, unless they were eligible for health insurance from another source, or (2) opt, no later than November 30, 2021, to have their leave without pay extended to September 5, 2022, and maintain health coverage. Otherwise, the employees would be subject to unilateral separation from the DOE beginning December 1, 2021.

The petitioners did not take advantage of either option provided for in the IAA. Due to these decisions, petitioners are not authorized to work or permitted in their respective school buildings, cannot reach out to students and families and cannot use their annual leave or sick time. These petitions ensued.

Petitioners ask the court to grant them declaratory judgments or writs of prohibition prohibiting the DOE from placing them on unpaid leave pursuant to CPLR § 7803(2) and (3) for two reasons. First, they argue that the DOE made an error of law when it issued the DOE mandate because state education laws prevent such an order that affects teacher's rights without individual hearings. Second, they argue that the DOE mandate was irrational, arbitrary and capricious because it did not provide due process for the petitioners, and because the mandate was in contravention of state education laws.

Petitioners also challenge the IAA pursuant to CPLR Article 7511(b)(1)(iii), arguing that the arbitrator exceeded his power when he issued the arbitration award because the collective bargaining agreement ("CBA") and state education laws prevent the arbitrator from making decisions that affect teacher's rights and prevent the UFT from bargaining away teacher's rights. Second, they argue that the arbitrator's determination was also irrational, arbitrary and capricious and not supported by the evidence because he failed to provide due process to the petitioners, made a decision that was in contravention of state education laws and the CBA, and he acted against public policy by failing to guarantee the petitioners' due process rights.

In support of their motion to dismiss, respondents argue procedurally that the petitioners lack standing to challenge the arbitration award, that the petitions must be dismissed for failure to join the UFT as a necessary party and the petitioners failed to exhaust their administrative remedies. Substantively, respondents assert that the arbitrator did not exceed his authority and that both the IAA and the decision to place petitioners on leave without pay was neither irrational nor arbitrary or capricious.

## DISCUSSION

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]). The court will first consider the parties' procedural arguments.

### Standing

On the issue of standing, respondents argue that because the petitioners were not parties to the arbitration that resulted in the IAA, they have no standing to challenge that award. The court notes that this standing argument does not bar petitioners' request for relief pursuant to CPLR Article 78. This argument does not bar the Article 78 branch of the petition.

Petitioners contend that they can challenge the IAA pursuant to CPLR §7511(b)(2)(i) which states in relevant part that an "award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that... the rights of that party were prejudiced by one of the grounds specified in paragraph one..." which include "an arbitrator... exceeding his power...". Thus, petitioners assert that they have standing to challenge the arbitration because they were prejudiced by the IAA and the arbitrator exceeded his power.

Courts have routinely held that a union-represented employee cannot challenge an arbitration award rendered in proceedings between the employee's union and his or her employer (*see Matter of Jiggetts v New York City Human Resources Admin.*, 156 AD3d 552 [1st Dept 2017] ["Petitioner is collaterally estopped from arguing that he has standing to raise any challenges to the arbitration award..."]; *see i.e. Donas v. New York City Dept. of Environmental Protection*, 60 Misc3d 1221(a) [Sup Ct, NY Co 2018]). Assuming *arguendo* that petitioners even had standing to challenge the IAA, UFT is a necessary party for the reasons that follow.

### Necessary party

A court must always consider whether there has been a failure to join a necessary party (*City of New York v. Long Island Airports Limousine Serv. Corp.*, 48 N.Y.2d 469 [1979]). If the Court finds that a necessary party has not been joined, the Court may dismiss the petition without prejudice (*See CPLR §1003; CPLR 3211[a][10]*). However, dismissal for failing to name a necessary party is not favored (*Swezey v. Lynch*, 87 AD3d 119 [1st Dept 2011]).

Parties ought to be joined if their presence is necessary in order to accord full relief to persons who are already parties, or if they might be inequitably affected by a judgment in the action (CPLR § 1001[a]). The purpose of joinder is "not merely to provide a procedural convenience but to implement a requisite of due process – the opportunity to be heard before one's rights or interests are adversely affected" (*Martin v. Ronan*, 47 N.Y.2d 486, 490 [1979]). It is improper to proceed in an Article 78 proceeding without the joinder of necessary parties (*See, e.g., Mahinda v. Bd. of Collective Bargaining*, 91 AD3d 564 [1st Dep't 2012]; *Centeno v The City of New York*, 115 AD3d 537 [1st Dept 2014]). A similar ruling has been made with regards to Article 75 proceedings (*See, e.g., Matter of Schriebman v. N. Y. City Dep't of Educ.*, 2005 N.Y. Slip. Op. 30594(U) [Sup. Ct., New York County 2005]).

Here, respondents argue that the petitioners failed to add a necessary party in the form of the UFT. The court will consider this argument as to both branches of the petition, because failure to join a necessary party may warrant dismissal of one request for relief without warranting dismissal of the other. The respondents argue that the Article 75 arm of the petitions should be dismissed for failure to add the UFT because the UFT was integral in creating the Impact Arbitration Award. To support this latter assertion, the respondents point to *Centeno*. In that case, the First Department determined that it was proper to dismiss a petition for failure to add a necessary party because the plaintiffs did not include the agency that made the decision being challenged in the petition (*Matter of Centeno v. City of New York*, 115 AD3d 537 [1st Dept 2014]). Respondents argue that similarly, here, the UFT was instrumental in reaching the IAA that is challenged by the petitioners, and thus that the Article 75 petitions should be dismissed for failure to add the UFT as a necessary party. The petitioners respond that the UFT is not a necessary party because it will not be “inequitably affected” no matter how the proceedings end. They argue, in the alternative, that the court has the discretion to determine, on balance, that a somewhat incomplete resolution of a matter would be preferable to depriving the plaintiff of relief (*Red Hook/ Gowanus Chamber of Commerce v New York City Board of Standards*, 5 N.Y. 3d 452 [2005]).

The court agrees with the respondents. Petitioners request vacatur of the IAA, but such vacatur would necessarily discard the mediation and bargaining that the UFT engaged in in order to guarantee its members the opportunity to file for exemptions among other alternatives to vaccination. The Impact Arbitration Award is a direct result of the UFT’s mediation and arbitration process. Therefore, the UFT’s presence is necessary in order to accord full relief and the UFT might be inequitably affected by a judgment in the action. Since CPLR 7511(a) requires that a party seeking to vacate an arbitration award move to do so within 90 days of the delivery of the award to him or her, petitioners’ deadline to add UFT has since passed, as UFT is certainly not united in interest with respondents (*see i.e. Desiderio v. Rubin*, 234 AD2d 581 [2d Dept 1996]). Based on the foregoing, respondents have established that the petitioners failed to name a necessary party to the Article 75 proceeding and that branch of the petitions should be dismissed on procedural grounds.

As for the CPLR Article 78 arm of the petitions, respondents argue that the petition should be dismissed because UFT represents the petitioners and therefore, any decision rendered here would influence how the UFT represents its members in the future. The petitioners reply by pointing to *Phillips*, a federal case wherein an employee brought suit against her former employer for violating the Fair Labor Standards Act (*Phillips v. Carborundum Co.*, 361 FSupp 1016 [WDNY 1973]). In that case, the employer requested joinder of national and local unions on the theory that a judgment in favor of the plaintiff would effectuate similar claims from other union workers. That argument was rejected, and the court determined that the unions were not necessary parties. Petitioners argue that the respondents here rely on a similar theory as the defendants in *Phillips*, and that the argument should similarly be dismissed. The court agrees with petitioners.

The potential for influence on how non-party UFT might represent its members in the future is not the “inequitable effect” contemplated by CPLR § 1001. Indeed, respondents have failed to articulate an adverse practical effect on UFT that this action might have which would warrant dismissal (*see i.e. Hitchcock v. Boyack*, 256 AD2d 842 [3d Dept 1998] quoting Siegel, NY Prac § 132 at 199 [2d ed]). Accordingly, the respondents’ argument that the petitioners did not join a necessary party in the Article 78 arm of their petition fails.

#### Failure to exhaust administrative remedies

Nonetheless, the balance of the petition must be denied on procedural grounds because petitioners failed to exhaust their administrative remedies. It is “well established that a petitioner cannot maintain a CPLR article 78 proceeding unless he or she has exhausted the available administrative remedies” (*Matter of Derosa v. Dyster*, 90 AD3d 1470 [4th Dept 2011]; *see Frumoff v. Wing*, 239 AD2d 216 [1st Dept 1997]). Administrative remedies for UFT members include the grievance procedures available in the CBA. The CBA provides that members who complain that they have been “treated unfairly or inequitably by reason of any act or condition which is contrary to established policy or practice governing

or affecting employees” may access a grievance procedure to address the inequitable treatment (CBA Art. 22 [A][1]). Here, the petitioners complain that they have been treated inequitably because the DOE mandate is contrary to established policy and practice. Yet, none of the petitioners have grieved according to the CBA procedure.

To the extent that the petitioners argue that the Petitions are necessary because the UFT is preventing them from utilizing the CBA grievance procedure, they must argue that the UFT violated its duty of fair representation before they can sue their employer (see *Matter of Donas v. New York City Dept of Envtl. Protection*, 2018 NY Slip Op 51192[U] [Sup. Ct. New York County 2018]; *Bergamine v. Patrolman’s Benevolent Ass’n*, 202 AD2d 201 [1st Dept 1994]). None of the petitioners have asserted such an allegation. Therefore, the petitioners have not exhausted their administrative remedies and cannot properly maintain these Article 78 proceedings.

Despite the fact that the petitions should be dismissed on procedural grounds, the court will consider the parties’ substantive arguments in an exercise of discretion.

### Substantive Article 78 arguments

In an Article 78 proceeding, a reviewing court may not weigh evidence, choose between conflicting proof, or substitute its assessment of evidence or witness credibility for that of the administrative fact finder (*Edwards v. Safir*, 282 AD2d 287 [1st Dept 2001]). Rather, a court’s function in an Article 78 proceeding is to determine whether the agency acted in a manner that was arbitrary, capricious, unreasonable, inconsistent with the law, or without rational basis (*Fahey v. Toia*, 399 NYS2d 568 [Sup. Ct. Albany County 1977]).

In deciding whether there was an error of law in an administrative decision, the construction given to statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld (*Howard v. Wyman*, 28 NY2d 434 [1971]). In questions that relate to the administration’s expertise, the statutory interpretation of that administration will be given great weight and judicial deference, so long as it is not unreasonable, irrational or inconsistent with the statutory language and legislative intent (*Matter of Toys “R” Us v. Silva*, 89 NY2d 411 [1996]). In contrast, “where the question is one of pure statutory reading and analysis, dependent only upon accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency... In such circumstances, the judiciary need not accord any deference to the agency’s determination...” (*Matter of Belmonte v. Snashall*, 2 NY3d 560 [2004]).

In deciding whether a determination is arbitrary and capricious, a court should decide whether the agency acted “without sound basis in reason and... without regard to the facts” (*Lackow v. Dep’t of Educ. of City of NY*, 237 MYLJ 32 [Sup. Ct. New York County 2007] citing *Pell v. board of Education of Union Free School District*, 34 NY2d 222 [1974]). Judicial review of administrative determinations is confined to the “facts and record adduced before the agency” (*Matter of Featherstone v Franco*, 95 NY2d 550 [2000] citing *Matter of Yarbough v Franco*, 95 NY2d 342 [2000]). If there is a rational basis for the administrative determination, there can be no judicial interference (*Ramos v. O’Neill*, 2021 NY Slip Op 31269(U) [Sup. Ct. New York County 2021]). The petitioner bears the burden of establishing that an administrative determination was without a rational basis (*Kinsella v. Kelly*, 231 NYLJ 90 [Sup. Ct. New York County 2004]).

The petitioners first argue that the DOE made an error of law when it issued the DOE mandate because state education laws prevent such an order that affects teacher’s rights without individual hearings. Specifically, petitioners argue that by not permitting them to enter the building, by preventing them from performing their jobs, and by withholding pay, the DOE is constructively firing them without following the necessary procedure. Petitioners point to Education Law § 3020, which provides in relevant part as follows:

No person enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for just cause and in accordance with the procedures specified in section three thousand twenty-a of this article or in accordance with alternate disciplinary procedures contained in a collective bargaining agreement covering his or her terms and conditions of employment...

Here, the petitioners were subject to a Collective Bargaining Agreement ("CBA") which states that "Section 3020- a of the Education Law with modifications numbered 1-16 shall be the exclusive mechanism utilized by Respondent(s) for all disciplinary charges filed against tenured teachers..." Absent the delineated modifications, members bound by the CBA and subject to disciplinary action are granted the procedural due process outlined in Educ. Law § 3020-a which includes notice and an adversarial hearing.

The petitioners argue that their constructive terminations were disciplinary actions that were taken without a school district or employing board vote, without a written statement specifying the charges in detail, and without the many of the other procedural requirements of Educ. Law § 3020-a. They argue that the DOE's mandate must therefore be stricken, because it violates the Education Law.

In reply, the respondents argue that the statutes cited by petitioners do not apply because the vaccination status required by the DOE mandate and the consequences of a failure to follow that mandate are not disciplinary in nature. Rather, the respondents argue that the vaccination status is a qualification of employment. Respondents contend that the Court of Appeals has upheld the distinction between issues of "job performance, misconduct or competency" which are subject to the applicable disciplinary procedures, from a "qualification of employment" which is not subject to such procedures (*Matter of New York State Off. of Children & Family Servs. v. Lanterman*, 14 N.Y.3d 275 [2010]). Additionally, respondents argue that no hearing is necessary in this case because: 1) hearings are not required in the context of employment qualifications "unrelated to job performance, misconduct, or competency" (*Matter of O'Connor v. Board of Educ. of City School Dist. Of City of Niagara Falls*, 48 AD3d 1254 [4th Dept 2008]); and 2) due process does not always require a hearing, especially when there are no factual disputes that need to be resolved (*See Moogan v. N.Y. State Dep't of Health*, 8 A.D.3d 68 [1st Dept 2004]). Respondents state that a hearing is not necessary here because the mandate is not related to job performance, misconduct or competency, and because there is no dispute that the petitioners failed to get vaccinated against COVID-19 or provide proof of such vaccination. Thus, there is no factual question warranting a hearing.

In turn, petitioners reply that vaccination cannot be an employment qualification because it was not a requisite when they first applied for the job. They argue that whether an employee must be vaccinated is a term and condition of employment that must be bargained first before implemented, and even within the realm of the public employer's power to bargain collectively, it may do so only in the absence of "plain and clear" prohibitions in statute or controlling decision law, or restrictive public policy (*Syracuse Teachers Assn. v Board of Educ.*, 35 N.Y. 2d 743 [1974]).

The court agrees with the respondents. "The purpose of Education Law § 3020 is to protect tenured educators from arbitrary imposition of formal discipline" (*Holt v. Board of Educ.*, 52 NY2d 625 [1981] quoting *Holt v. Board of Educ. of Webutuck Cent. School Dist.*, 52 NY2d 625 [1981]) Educ. Law § 3020-a does not apply here because the DOE mandate requiring vaccination is not a disciplinary action. "Discipline" is not defined in the Education Law, and therefore the word must be understood using its "usual and commonly understood meaning" (*Yaniveth R. v LTD Realty Co.*, 27 NY3d 186 [2016]). The term "discipline" is uniformly defined, both in the legal and ordinary sense, as "punishment" (see *Black's Law Dictionary* [10th ed 2014], discipline [defining discipline as "(p)unishment intended to correct or instruct"]; *Merriam-Webster Online Dictionary*, discipline [<http://www.merriam-webster.com/dictionary/discipline>] [defining discipline as "punishment"]; *Cambridge Dictionary*, discipline [<http://dictionary.cambridge.org/us/dictionary/english/discipline>] [defining discipline as "to punish"]). Applying these definitions to Educ. Law § 3020, discipline refers not merely to an action that has

an adverse impact on a tenured teacher, but rather, an action that has an adverse impact on a tenured teacher and is motivated by a punitive intent.

Here, the COVID-19 vaccine mandate propagated by the DOE did not have punitive intent, nor were the consequences of failing to abide by that mandate designed to be punitive. The DOE mandate itself expressly states its rationale: “the New York City Department of Education serves approximately 1 million students across the City, including students in the communities that have been disproportionately affected by the COVID-19 pandemic and students who are too young to be eligible to be vaccinated.” The mandate is not designed to punish; it is designed to protect the students that the DOE serves from a highly communicable disease. The acts of not permitting petitioners to enter the building, preventing them from performing their jobs, and withholding pay are not disciplinary actions; they are designed to prevent COVID-19 exposure to a particularly vulnerable population. For these reasons, the court agrees with the respondents that employee vaccination status is not a disciplinary action, but rather an employment qualification.

Significantly, this would not be the first time that vaccination for COVID-19 was held to be a qualification of employment. The United States District Court for the Eastern District of New York recently rejected similar arguments from firefighters and EMTs regarding a vaccine mandate on due process grounds (*Garland v. NY City Fire Dep’t*, --- F.Supp.3d ----, 2021 US Dist. LEXIS 233142 [EDNY 2021]). In that case, the Hon. Kiyo A. Matsumoto held that due to the high transmissibility of COVID variants, and the fact that plaintiff’s jobs required them to interact with the public on a regular basis, making vaccination a qualification of employment was rational (*Id.*). Here, the petitioners work as schoolteachers, and their jobs require them to come into contact with the public and with a uniquely vulnerable population: children. Given the high transmissibility of COVID-19 and the fact that the petitioners’ work requires them to interact with vulnerable public populations, making vaccination a qualification of employment is consistent and rational.

Since vaccination is a qualification of employment, it is not necessary to follow the procedures outlined in Educ. Law §§ 3020 & 3020-a, as these procedures are exclusively for disciplinary actions. Therefore, the petitioners have failed to sufficiently allege that the DOE made an error of law when it issued the DOE mandate.

Next, the petitioners argue that the DOE mandate was irrational, arbitrary and capricious because it did not provide due process for the petitioners, and because the mandate was in contravention of Educ. Law §§ 3020 & 3020-a. As discussed *supra*, the mandate was not in contravention of the state education laws cited by the petitioners. The court will now examine the procedural due process claims.

The touchstones of procedural due process are notice and an opportunity to be heard. (*Matter of Prue v. Hunt*, 78 NY2d 364 [1991]; *Matter of Toolasprashad v. Kelly*, 80 AD3d 530 [1st Dept 2011].) Petitioners were provided with ample notice. On August 24, 2021, the NYC Commissioner of Health and Mental Hygiene announced the DOE mandate. The UFT filed its Declaration of Impasse on September 1, 2021, which led to arbitration. The IAA resulting from that arbitration was published on September 15, 2021. The award provided that, if employees failed to apply for exemption, they would be placed on leave without pay beginning September 28, 2021. This means that there was over one month between when the petitioners became aware or should have become aware of the DOE mandate that they challenge in their Article 78 claims, and the time that they were, or could have been, placed on leave without pay. Petitioners knew that they would be placed on leave without pay if they did not pursue the other avenues offered in the IAA and that, as a result of non-compliance with the DOE Order, they would be subject to unilateral separation from the DOE. Petitioners’ own allegations demonstrate that they had notice of these potential outcomes. They were aware of the consequences of their decisions to not choose any of the proffered courses of action, and they made that decision regardless. Therefore, the court finds that petitioners had sufficient notice.

Petitioners were also granted an opportunity to be heard regarding the DOE mandate because they were represented by their union in the mediation and arbitration around that mandate. Unions rep-

resent their members, and an opportunity for the union to be heard is also an opportunity for the members of that union to be heard (*See Long Island College Hospital v. Catherwood*, 23 NY2d 20 [1968]; *Scarlino v. Fathi*, 107 AD3d 514 [1st Dept 2013]). Here, the UFT, representing all four petitioners, engaged in a mediation and arbitration with the DOE that resulted in the IAA. If the petitioners were unsatisfied with the UFT's representation, the correct legal recourse would be to file suit against the union, not to attempt to disqualify the DOE mandate. Thus, contrary to the assertions of the petitioners, they were given notice and opportunity to be heard concerning the DOE mandate.

Finally, the court finds that petitioners have failed to sufficiently allege that the vaccine mandate was irrational or arbitrary and capricious. Mere dissatisfaction with an agency's action, is not sufficient to show that the agency's action was arbitrary, capricious, or in bad faith. (*See Mid-State Mgt. Corp. v. New York City Conciliation & Appeals Bd.*, 112 A.D.2d 72 [1st Dept 1985], *aff'd*, 66 N.Y.2d 1032 [1985]). Instead, the mandate was rationally related to the Commissioner's power to pass orders related to the protection of the public health against the imminent or existing threat of COVID-19 (*see Health Code § 3.01[d]*). Accordingly, petitioners' substantive Article 78 claims should be dismissed on the merits.

### Substantive Article 75 arguments

The court now turns to petitioners' arguments for relief pursuant to CPLR Article 75. Pursuant to CPLR § 7511(b)(1)(iii), an arbitration award shall be vacated on the application of a party who participated in the arbitration if the court finds that the rights of that party were prejudiced by an arbitrator making the award who exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made. Generally, judicial review of arbitration awards is extremely limited (*Wien & Malkin LLP v. Helmsley-Spear, Inc.* 6 NY3d 471 [2006]). An arbitration award will only be set aside if it is completely irrational, violative of a strong public policy, or exceeds a limitation on the arbitrator's power (*Obot v. New York State Dep't of Correctional Servs.*, 637 NYS2d 544 [4th Dept 1996] *aff'd* 653 NYS2d 883 [1996]). The deference given to arbitral awards is such that even a misapplication of the law will not be a sufficient basis for vacatur under CPLR § 7511 (*Matter of Douglas v. New York City Dept. of Educ.*, 34 NYS3d 340 [Sup Ct New York County 2016]; *Matter of Associated Teachers of Huntington v. Board of Educ., Union Free School Dist. No. 3, Town of Huntington*, 33 NY2d 119 [1973]).

However, when an arbitration award is the result of a compulsory arbitration, courts will review the award with closer scrutiny (*State Farm Mut. Auto Ins. Co. v. Arabov*, 767 NYS2d 905 [2d Dept 1980]; *see Furstenberg v. Aetna Casualty & Surety Co.*, 49 NY2d 757 [1980]). An award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious (*Motor Vehicle Accident Indemnification Corp. v. Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996]). The burden of proof that an arbitration award should be vacated rests on the party moving to vacate (*Matter of New Penn Motor Express, Inc. v. GEICO Gen. Ins. Co.*, 2011 NY Slip Op 32138(U) [Sup Ct Nassau County 2011]). Here, it is undisputed that the arbitration is compulsory and that it must be examined to ensure that the decision is supported by evidence and is not arbitrary and capricious,

The petitioners first argue that the arbitrator exceeded his power when he issued the arbitration award because state education laws and the collective bargaining agreement ("CBA") prevent the arbitrator from making decisions that affect teacher's rights and prevent the UFT from bargaining away teacher's rights. Petitioners argue that the due process procedure guaranteed by Educ. Law §§ 3020 & 3020-a are curtailed by the IAA. They also point to CBA Art. 22 (c) which states:

[An] arbitrator shall limit his decision strictly to the application and interpretation to the provisions of this Agreement and he shall be without power or authority to make any decision: 1. Contrary to, or inconsistent with, or modifying or varying in any way, the terms of this Agreement or of applicable law or rules or regulations having the force and effect of law...

Petitioners argue that the Impact Arbitration Award varies the CBA by providing new procedure for employees who do not follow the DOE mandate. Therefore, they argue that the arbitrator exceeded his power by making an award that is explicitly forbade by the CBA. Finally, the petitioners argue that the IAA goes against public policy because the state Education Laws demonstrate a desire to protect tenured teachers from being dismissed without a hearing once their competency has been demonstrated (*Abramovich v Board of Ed.*, 1978, 62 AD2d 252 [1978]).

As explored *supra*, Educ. Law § 3020-a does not apply here because the DOE mandate and subsequent IAA create an employment qualification, not a disciplinary action. The public policy argument also fails for this reason. Regarding Article 22 of the CBA, the New York Southern District federal court has held that “§ 3020(4)(a) authorizes the DOE and the UFT to enter into a collective bargaining agreement modifying the procedures set forth in § 3020-a” (*Adams v. N.Y. State Educ. Dept.*, No. 08 Civ. 5996 [VM] [AJP], 2010 U.S. Dist. LEXIS 15635 [SDNY 2008]; Educ. Law § 3020 [4][a]). Here, after the UFT filed a Declaration of Impasse, the UFT and the DOE mediated the exemption and due process issues and those issues were resolved via arbitration. The leave without pay and separation procedures that are challenged in these petitions are the result of collective bargaining and impasse arbitration, which are negotiated and statutorily regulated processes that can appropriately modify the procedures set forth in Section 3020-a (*Id.*). Therefore, the arbitrator did not exceed his power by making an award that is “explicitly forbade” by the CBA because the arbitration was a permissible modification of the CBA since it was agreed upon by the DOE and the UFT. Accordingly, the petitioners’ argument that the arbitrator exceeded his power when he issued the arbitration award because state education laws and the collective bargaining agreement (“CBA”) prevent the arbitrator from making decisions that affect teacher’s rights and prevent the UFT from bargaining away teacher’s rights is rejected

Finally, petitioners argue that the arbitrator’s determination was irrational, arbitrary and capricious and not supported by the evidence when he failed to provide due process for the petitioners, when he made a decision that was in contravention of state education laws, and the CBA, and when he acted against public policy by failing to guarantee the petitioners’ due process rights. The arguments concerning state education laws, the CBA and public policy have already been confronted and eschewed in this order. The court turns to the procedural due process arguments. As stated *supra*, the touchstones of procedural due process are notice and an opportunity to be heard. (*Matter of Prue v Hunt*, 78 NY2d 364 [1991]). “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner” (*Mathews v. Elridge*, 424 U.S. 319 [1976]).

With regard to notice, the IAA was published on September 15, 2021. The award gave employees of the DOE until September 20, 2021 to apply for medical or religious exemption. It provided that, if employees failed to apply for exemption, they may be placed on LWOP between September 28, 2021 and November 30, 2021. During that one-month time period between September 28, 2021 and November 30, 2021, employees had three choices. First, they could choose to voluntarily separate from the DOE and receive continued health insurance coverage through September 5, 2022. Alternatively, they could choose to extend their LWOP through to September 5, 2022 and receive the commensurate benefits, including health insurance, and maintain the possibility of returning to work during that period if the situation changed. Finally, they could choose to do nothing, but any employee that failed to elect any of the options provided for in IAA could be unilaterally separated from the DOE beginning on December 1, 2021. This means that DOE employees had two-weeks’ notice before being placed on LWOP, and 2.5 months’ notice before being unilaterally separated from the DOE. During that time, all employees had the option to return to work upon vaccination. Petitioners knew that they would be placed on LWOP if they did not pursue the other avenues offered in the IAA and that, as a result of non-compliance with the DOE Order, they would be subject to separation from the DOE. The petitioners here had ample notice of the consequences of any decision that they made. All petitioners decided to make no decision at all.

Regarding an opportunity to be heard, the Impact Arbitration Award provided an opportunity for the petitioners to apply for medical and religious exemption for the DOE mandate. It also provided for procedures to appeal any exemption denial. It provided options for employees to separate from the DOE

voluntarily or to extend their leave without pay through the full year. Petitioners had over two months to take any of the avenues provided by the IAA, an award mediated and arbitrated by the union that represented them. They had the option to bring a claim against the union if they felt that the union failed to represent their interests. They had the option to bring this petition forward via order to show cause and to ask for a preliminary injunction prior to the unilateral separation date, December 1, 2021. The petitioners did none of these things. An "opportunity to be heard" does not equate to a "hearing." (*Ezekwo v. New York City Health & Hosps. Corp.*, 940 F2d 775 [2d Cir. 1991]). An opportunity to be heard can also be procedure that permits a party to appeal a decision or to elect a course of action (*See Garland, supra*).

Petitioners here were given an opportunity to choose from multiple courses of action, some of which included appeals processes. Petitioners' decision not to avail themselves of any of the options pursuant to the IAA does not mean petitioners were denied due process. Thus, the petitioners' Article 75 claims must also be dismissed on the merits.

## CONCLUSION

In accordance herewith, it is hereby

**ORDERED** that the cross-motions to dismiss are granted, the petitions are denied, these proceedings are dismissed, and the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

3.15.22  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.