Onwukwe-Nwagwu v City of New York
2017 NY Slip Op 32549(U)
November 28, 2017
Supreme Court, New York County
Docket Number: 651050/2016
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17
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NNENNA ONWUKWE-NWAGWU,

Petitioner,

Index No.: 651050/2016

- against-

THE CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF EDUCATION; CARMEN FARIÑA, CHANCELLOR of NEW YORK CITY DEPARTMENT OF EDUCATION,

DECISION/ORDER

Respondents,

To Vacate a Decision of a Hearing Officer Pursuant to Education Law Section 3020-a and CPLR Section 7511.

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HON. SHLOMO S. HAGLER, J.S.C.:

Petitioner Nnenna Onwukwe-Nwagwu commenced this Article 75 proceeding seeking a judgment vacating an arbitration award made after a disciplinary hearing held pursuant to Education Law § 3020-a. The February 15, 2016 arbitration decision and award ("Award") found petitioner guilty of various disciplinary charges brought by her employer, respondent New York City Department of Education, and the hearing officer terminated petitioner from her position. Respondents DOE, the City of New York, and Carmen Fariña, Chancellor of the New York City Department of Education,

(collectively, "DOE"), answer and oppose the petition.[1]

BACKGROUND AND FACTUAL ALLEGATIONS

Prior to being terminated on February 15, 2016, petitioner was a tenured teacher who had been employed by the DOE for approximately fifteen years. Petitioner holds a license in Biology. For all relevant years, petitioner was assigned to teach high school Biology and General Science courses at the Cobble Hill School of American Studies, in Brooklyn, New York.

In January 2015, pursuant to Education Law § 3020-a, the DOE served petitioner with "specifications," or charges, alleging that, between the 2011-2012, 2012-2013, 2013-2014 and 2014-2015 school years, petitioner, among other things, neglected her duties and engaged in incompetent and inefficient service. The DOE alleged that the charges constituted just cause for termination. Petitioner was charged with the following four specifications:

> "1. [Petitioner] failed to properly, adequately and/or effectively plan and/or execute lessons during the 2011-2012, 2012-2013, 2013-2014, and 2014-2015 school years, as observed on or about:
> a) June 4, 2012;
> b) October 16, 2012;
> c) February 6, 2013;
> d) February 25, 2013;
> e) November 8, 2013;

[1] On May 3, 2016, respondents cross-moved to dismiss the petition for failure to state a cause of action. During oral argument held on November 14, 2016, this Court denied the cross-motion and ordered respondents to submit an answer.

f) October 7, 2014; and
g) November 24, 2014.

2. [Petitioner], on or about December 16, 2013, failed to follow supervisory directives and/or failed to fulfill her professional responsibilities, in that she did not share and/or provide her lesson plan to her co-teacher.

3. [Petitioner], on or about December 16, 2013, failed to follow supervisory directives and/or failed to fulfill her professional responsibilities, in that she did not plan lessons with her co-teacher.

4. [Petitioner] failed, during the 2011-2012, 2012-2013, 2013-2014, and/or 2014-2015 school years, to fully and/or consistently implement directives and/or recommendations for pedagogical improvement and professional development, provided in observation conferences, instructional meetings, action plans, one-on-one meetings with school administrators and/or outside observers, school based coaches, as well as school-wide professional development, with regard to:

a) Proper planning, pacing, and execution of lessons;
b) Proper classroom management and classroom environment;
c) Using appropriate methods and techniques during lessons;
d) Proper assessment of students' progress; and
e) Providing academically rigorous lessons.

THE FOREGOING CONSTITUTES:

1. Just Cause for disciplinary action under Education Law § 3020-a;
2. Incompetent and/or inefficient service;
3. Conduct unbecoming [petitioner's] position;
4. Conduct prejudicial to the good order, efficiency or discipline of the service;
5. Misconduct;
6. Insubordination;
7. Neglect of duty;
8. Substantial cause rendering [petitioner] unfit to properly perform his [sic] obligations to the service;

and;
9. Just cause for termination."

DOE's Exhibit "31" at 2-3.

Pursuant to Education Law § 3020-a, a hearing began on September 21, 2015 to determine the outcome of the charges. Arbitration is compulsory in Education Law § 3020-a disputes according to petitioner's collective bargaining agreement, and the DOE's rules. Hearing Officer James A. Conlon, Esq. ("Conlon") was appointed to preside over the proceedings. The hearing took place over 5 days, in which both parties were entitled to examine and cross-examine witnesses and submit evidence. Petitioner was represented by counsel and testified on her own behalf. The DOE presented three witnesses on its behalf.

In his Award, Conlon summarized the positions of the parties and the testimony of the witnesses prior to discussing each specification. Among other things, he indicated that the DOE believed petitioner was not an effective or capable teacher. Although efforts were made to help petitioner improve her pedagogy, there was no evidence of improvement. Moreover, the DOE claimed that, each time petitioner was informed about her specific deficiencies, petitioner refused to improve. As a result, the DOE argued that petitioner "displayed a wanton disregard for school policies and her pedagogical duties, which denied her students the opportunity of a valid education." DOE's Exhibit "2," Award at 4. According to the DOE, termination is

the only appropriate remedy, as petitioner is incapable of being an effective teacher.

Petitioner argued that, up until the 2011-2012 school year, she had consistently received satisfactory ratings. Petitioner stated that she did not "receive a fair shake" in the remaining years, because, among other things, her observations were conducted while she was teaching classes that were out of compliance with students' Individualized Education Programs ("IEPs"). Further, petitioner claimed that she had to wait months before she received feedback from her observations. Petitioner argued that, although she did accept DOE's offer to receive peer support, the DOE never followed through with this program. Petitioner concluded that she is a dedicated and capable teacher, who provided her students with a valid educational experience.

Petitioner alleged that Anna Maria Mulé ("Mulé"), the school's principal, retaliated against petitioner by giving her the first U rating, due to petitioner's filing of a complaint with the DOE's Office of Equal Employment Opportunity & Diversity Management ("OEO"). Petitioner believed that Mulé discriminated against petitioner based on her accent, and in the complaint filed on June 20, 2011, alleged that Mulé had discriminated against petitioner on the basis of race and ethnicity. On April 12, 2012, the OEO issued a report that petitioner's allegations

could not be substantiated.

Petitioner also testified about a subsequent complaint she filed with the New York State Division of Human Rights ("NYSDHR") on July 27, 2012, alleging that Mulé had discriminated and retaliated against her on the basis of race and ethnicity. Petitioner stated that she filed this subsequent complaint because she had never received any negative evaluations prior to filing her OEO complaint. After an investigation, the NYSDHR found no probable cause that the DOE engaged in an unlawful discriminatory practice.

The Award noted petitioner's testimony that she had received negative critiques of her performance on her May 5, 2011 observation, which was prior to the filing of her complaint with the OEO. Petitioner received U ratings for the 2011-2012 and 2012-2013 school years.[2] Although she appealed the ratings with the DOE's Office of Appeals and Review ("OAR"), the appeals were

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[2] The hearing transcript indicates that petitioner also received a U rating for the 2013-2014 school year. Starting in the 2013-2014 school year, evaluations were performed in a different manner, and could be partially based on classroom observations performed by independent trained evaluators, classroom observations by trained peer teachers, and evidence of student development, among other criteria. In the APPR reviews, teachers are rated either as highly effective, effective, developing or ineffective. Evidently, petitioner was out on maternity leave from February 2014 until June 2014, and was unable to be evaluated under the "Danielson" rubric, which consisted of 4 different observations. DOE's Exhibit "32," tr of arbitration hearing at 218.

denied.[3]

Mulé testified about petitioner's performance during the years in question. For instance, for the 2011-2012 school year, Mulé testified that she gave petitioner a U rating because, "despite intensive coaching and professional development and support, she did not see enough growth in terms of [petitioner's] performance moving from unsatisfactory to satisfactory, to be able to give her a satisfactory for the year." *Id.* at 6. As a way to try and improve petitioner's teaching that year, Mulé hired several different consultants to work with petitioner. These consultants provided recommendations and support to petitioner. Mulé "hoped to see improvement in the area of classroom environment, but did not see any improvement." *Id.* With respect to her teaching practices, although petitioner did implement some of the recommendations from the coaches, they were not implemented effectively.

As part of her 2012-2013 action plan, petitioner was supposed to submit weekly lesson plans to Mulé for feedback. However, petitioner did not submit her plans. Mulé further testified about an action plan that she put in place for petitioner for the 2013-2014 school year. According to Mulé, petitioner ignored several requests to take the action plan from

[3] After her appeals were denied, petitioner brought an Article 78 proceeding seeking to annul the U ratings. *See* Index #100797/2014.

her mailbox and sign it.

Conlon addressed each specification and subspecification, relating them back to the pertinent testimony and submitted documentation prior to sustaining or dismissing the specification. Petitioner submitted written rebuttals to three observations, which Conlon also addressed in the Award. Prior to determining the appropriate penalty for the sustained charges, Conlon provided a written review of the case law that petitioner had submitted on her behalf.

In his detailed and comprehensive 32-page Award, Conlon sustained all of the subspecifications in specification 1, which consisted of unsatisfactory lesson observations. He sustained all of the subspecifications in specification 4, except for 4 (e), which he dismissed. Conlon further dismissed specifications 2 and 3. Conlon found that the DOE met it burden of proving by a preponderance of the evidence that petitioner was guilty of the allegations, and that she had been given the opportunity to improve, but had been unwilling or unable to do so. As a result, Conlon found that the specifications provided just cause for termination. By way of example, this Court will discuss some of the specifications below, and how they were addressed by Conlon in his Award.

Specification 1(b)-October 16, 2012 observation:

As set forth above, this subspecification charged petitioner

with inadequately preparing lesson plans. On this date, Mulé conducted a formal observation of petitioner's class and gave her an unsatisfactory rating for this lesson. Conlon noted Mulé's opinion, stating, in pertinent part, "students were calling out to one another and using inappropriate language. There was a general sense of disorder . . . [and] problems with higher order critical thinking questions and lack of rigor." *Id.* at 7. Although most of the students were on track during the lesson, a few were completely unengaged. Mulé found that petitioner should have been monitoring for this and getting those students back on track. Mulé testified that she had previously addressed this issue with petitioner, but did not see any progress.

In her verbal and written rebuttals, petitioner testified about the number of students with IEPs in her class, and how this unfairly impacted the observation of her lesson. Petitioner believed that the students were not appropriately placed in her class and that she was not provided with the "support and resources the students needed," as "required" by the IEPs. *Id.* at 17. She noted that, during the October 16, 2012 observation, one student was eager to go to the bathroom, one was on medication, and another, who read at a first grade level, was reading a magazine. Petitioner testified "as to how she taught the class and stated she felt like it should have been rated satisfactory." *Id.* at 14. Petitioner further argued that this

observation had been misrepresented as a full period observation, when Mulé did not stay for the entire class.

In sustaining all of the subspecifications regarding unsatisfactory observation reports, Conlon stated that he "carefully weighed the testimony of the [DOE's] witnesses who substantiated the observation reports," and that he found these witnesses to be credible. *Id.* at 18. He further noted that he credited the "administrators' extensive and detailed findings that [petitioner] presented unsatisfactory lessons on the dates set forth in specification 1." *Id.* at 20-21.

Specification 1(g) - November 24, 2014 observation:

Mulé conducted an observation of petitioner's class on this date and petitioner received an ineffective rating for all of the categories except for one, in which she received a rating of developing. Mulé testified that petitioner was unable to produce a lesson plan when requested to do so. She continued that there was "little instruction that took place. There were problems with assessment as there were no questions asked to check for student understanding." *Id.* at 10. Mulé testified that, for three years, she had been recommending that petitioner check for student understanding. The classroom was still described as chaotic.

Petitioner testified that she believed the lesson went well. Petitioner described how the lesson was taught, and claimed that

she gave the students a self-assessment.

In sustaining this subspecification, among other things, Conlon noted that, for this lesson, students were off task and not following directions. He also concluded that no lesson plan had been produced.

Specification 4-Failure to Implement Recommendations:

In the discussion regarding specification 4, Conlon addressed petitioner's claims regarding the composition of her class, and how the students with IEPs negatively impacted her observations. Conlon stated the following:

> "[Petitioner] testified and noted in her rebuttals to some of the observations that she handled students in a particular way, or the students with IEPs should be in another classroom setting, or that the student was unable to handle the work because of their reading level, however many of the issues raised in the observations and noted above were not addressed. [Petitioner] cannot ignore the professional development and advice of administrators and needs to request assistance with implementation of their recommendations and training. The observations conducted by the administrators had consistent recommendations for her observations which were not implemented."

Id. at 24.

Penalty

In discussing the proper penalty, Conlon stated that the DOE "offered a very strong case for termination based on observation reports, letters to [petitioner's] file, and other documentary evidence. It also presented the testimony of one Principal, a Director of Achievement and a Consultant. The appraisals of

[petitioner's] pedagogy were consistently negative." *Id.* at 24. Conlon did not find that Mulé or any other administrator was "out to get" petitioner. *Id.*

Conlon found that, over the four years in question, petitioner failed to engage in effective teaching, in accordance with the school's methods. Petitioner did not manage or control her class effectively, and the classroom was described as chaotic. Petitioner did not pose higher level questions to her students during lessons. Petitioner was "consistently advised that she needed to improve classroom routine and management, effective student engagement, including opportunities for students to engage in critical thinking, effective grouping of students, include scaffolding and student assessment." *Id.* at 25. Although petitioner received remediation in an attempt to improve the areas of deficiency, she showed minimal improvement.

According to Conlon, instead of implementing recommendations, petitioner noted difficulties with the composition of students in her class. He stated the following:

> [Petitioner] did not take responsibility for the repeated failure to implement recommendations in grouping, differentiation, student feedback and assessment, meeting lesson goals, problems with class routines, dealing with disruptive students, managing the classroom, keeping students on task, asking higher order questions, stopping students from calling out, coming in late and other incidences causing classroom chaos and not conducive to a learning environment for students in her care."

Id. at 26.

Conlon explained why there was just cause for termination.[4] In pertinent part, he noted that the DOE gave petitioner notice of the procedures with which she was expected to comply. However, these procedures were not implemented.

After reviewing the cases presented to him by petitioner in support of a penalty lesser than termination, Conlon advised that these cases are different than the instant situation. He noted, in pertinent part, here, petitioner "has not shown that there is a likelihood that she could improve her classroom control and quality of instruction." *Id.* at 27.

Conlon specifically reviewed *Board of Educ. v Arrak*, 28 Ed Dept Rep 302 (1989), where the charges were dismissed against the teacher because the teacher had met the minimal level of competency. The hearing panel had considered various factors, such as the ability to communicate facts and motivate students, and found, based on the assessment of the factors, that the teacher "met the minimum level of competency which should be expected from a reasonable teacher." Award at 17. However, Conlon found that "[i]n the instant case, the [petitioner] has not demonstrated a minimal level of competency to communicate facts, [that she] could motivate and interest students, and

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[4] Education Law § 3020 (1) states that "[n]o 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 . . . ."

maintain a classroom environment reasonably conducive to learning. I do not believe the [petitioner] has met the minimum level of competency, which should be expected of a reasonable teacher." *Id.* at 28.

Conlon recommended the penalty of termination, stating that, "no reason exists to believe that any amount of additional remediation would transform [petitioner] into a competent teacher who could effectively deliver instructions to her students." *Id.* at 31.

Shortly after receiving the Award, petitioner commenced this proceeding. In her sole cause of action, petitioner claims that the penalty of termination should be vacated and remanded for either a lesser or no penalty. Petitioner provides numerous reasons why the penalty should be vacated. For example, petitioner argues that the penalty is shocking to the conscience because petitioner is a dedicated teacher with 15 years of service to the DOE. She states, "[t]he Hearing Officer provided no justification for why a penalty less than termination would not have served its purpose." Petition, ¶ 27.

Further, petitioner argues that Conlon provided no justification, in accordance with *Arrak*, to support the conclusion that petitioner was unable to educate her students at a minimally acceptable level. Conlon allegedly failed to consider petitioner's arguments in support of her ability to

teach and, without any explanation, credited the DOE's arguments over petitioner's. For example, she alleges that statistics from her students' passing rate on the Regents exam effectively demonstrate that learning did take place.

According to petitioner, she is not resistant to changing her pedagogy and acknowledges that teachers need to engage in professional development. Petitioner states that Conlon "failed to consider that [she] was in a doctoral teaching program," and that this "is independent evidence of my competence and willingness to continuously improve my performance." Onwukwe-Nwagwu Aff, ¶ 3.

Among other things, petitioner further argues that the Award neglected to mention that petitioner was routinely "set up to fail." According to petitioner, she was placed in a class where half the students had IEPs, and she was observed on dates where a co-teacher was absent and no substitute teacher was provided. Petitioner claims that she had to wait months to receive her observation reports, and, as a result, was unable to implement the changes immediately.

Noting that Conlon dismissed specifications 2 and 3, petitioner states that these are "baseless." She continues that "Mulé was determined to go to any extent to end my career. I believe that was because I complained to the OEO against her previously." *Id.*, ¶ 9.

Petitioner alleges that Conlon made mistakes in his Award, such as failing to note that petitioner did not receive any individualized support following the February 25, 2014 observation report, despite the written report indicating this would follow.

The DOE argues that petitioner cannot establish any grounds to vacate the Award, as, among other things, it is supported by an extensive factual record. In addition, the DOE contends that the Award is rational and not arbitrary and capricious. According to the DOE, Conlon had sufficient evidentiary bases to conclude that petitioner's performance was ineffective based on observation reports and testimony, coupled with the feedback offered to petitioner by outside consultants.

Furthermore, the DOE claims that case law supports termination of an incompetent teacher, specifically, where, like here, the teacher is unable to improve her pedagogy. Although petitioner was afforded extensive professional development over the course of four years, she was unable to improve her teaching. As a result, the penalty of termination cannot be said to shock the conscience.

DISCUSSION

Pursuant to Education Law § 3020-a (5), CPLR 7511 provides the procedure for reviewing a hearing officer's findings. *City School Dist. of the City of N.Y. v McGraham*, 17 NY3d 917, 919

(2011). CPLR 7511 limits the grounds for vacating an award to "misconduct, bias, excess of power or procedural defects." *Lackow v Department of Educ. (or "Board") of City of N.Y.*, 51 AD3d 563, 567 (1st Dept 2008) (internal quotation marks and citation omitted).

However, where, as here, the parties are subject to mandatory arbitration, "the award must satisfy an additional layer of judicial scrutiny." *City School Dist. of the City of New York v McGraham*, 17 NY3d at 919. 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." *Lackow v Department of Educ. (or "Board") of City of N.Y.*, 51 AD3d at 567. The person "seeking to overturn an arbitration award faces a heavy burden." *Matter of Fagan v Village of Harriman*, 140 AD3d 868, 868 (2d Dept 2016) (internal quotation marks and citations omitted).

Credibility and Factual Determinations

The majority of petitioner's arguments involve her contention that the Award is unsubstantiated because Conlon allegedly failed to credit or acknowledge petitioner's version of events. For example, petitioner believes that the DOE acted in bad faith, and that this led to her termination. Petitioner claims that too many students with IEPs were placed in her class, that she had to wait months to receive her observation reports,

that she was retaliated against because she filed a discrimination complaint and that, in actuality, she was amenable to remediation. Petitioner believes that she is a good teacher, as evidenced by her students' high passing rate on the Regents exams.

An arbitration "award must be upheld when the arbitrator offer[s] even a barely colorable justification for the outcome reached." *Dedvukaj v Parlato*, 136 AD3d 733, 733 (2d Dept 2016) (internal quotation marks and citation omitted). Here, Conlon issued a detailed justification for the outcome. Conlon addressed petitioner's contentions in the Award and found that they did not impact his determination regarding the unsatisfactory observations or her teaching ability. Among other things, Conlon found no evidence that Mulé or any administrator had targeted petitioner or "was out to get her," noting that her complaints of discrimination had been dismissed after fair and objective investigations. It is well settled that the court is not permitted to "second guess[]" the "factual or legal determinations of the arbitrator." *Azrielant v Azrielant*, 301 AD2d 269, 277 (1st Dept 2002).

Further, Conlon specifically addressed petitioner's claims regarding the number of students with IEPs in her class. Nevertheless, Conlon found that, despite the number of students with IEPs in her class, petitioner failed to take responsibility

for her ineffective teaching; he also found that her classroom was not conducive for learning. Although petitioner believes that her level of teaching should have been evaluated differently or under different circumstances, a hearing officer has the authority to determine what weight, if any, to give to the evidence. *Matter of Board of Educ. of Byram Hills Cent. School Dist. v Carlson,* 72 AD3d 815, 815 (2d Dept 2010)("the hearing officer did not err in refusing to give substantial weight to the tape recording and the documents which had been submitted by the petitioner into evidence").

Moreover, Conlon found the testimony of the DOE's witnesses, who substantiated the observation reports, to be credible. Although petitioner disagrees with Conlon's credibility determinations, the Award cannot be vacated on those grounds, as it is within the purview of the hearing officer to determine the credibility of the witnesses. *Matter of Asch v New York City Bd./Dept. of Educ.,* 104 AD3d 415, 420 (1st Dept 2013). Furthermore, even "where from the evidence either of two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests solely upon the [administrative agency]." *Id.* at 421 (internal quotation marks and citation omitted).

Petitioner alleges that Conlon provided no justification for why petitioner does not meet the standards in *Arrak*. In

addition, petitioner claims that Conlon made factual errors in his Award. As set forth above, Conlon explicitly addressed *Arrak* in the Award and distinguished that case from petitioner's. Based on his assessment of the factors in *Arrak*, Conlon found that petitioner did not meet the minimum level of competency which should be expected from a reasonable teacher. Unlike the teacher in *Arrak*, petitioner could not, for example, maintain a classroom environment reasonably conducive to learning.

Conlon was not obligated to provide petitioner with an explanation of how or why her situation was not analogous to the teacher in *Arrak*. As arbitrator, Conlon was entitled to apply his own "sense of law and equity to the facts." *Matter of Erin Constr. & Dev. Co., Inc. v Meltzer*, 58 AD3d 729, 730 (2d Dept 2009). Nevertheless, Conlon did provide petitioner with a reasoned analysis. Furthermore, even if Conlon did make mistakes in the law or the facts, this is not a basis to vacate the Award. *See e.g. Structure Tek Constr., Inc. v Waterville Holdings, LLC*, 140 AD3d 1151, 1152 (2d Dept 2016) (internal quotation marks and citations omitted) ("An arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator . . . .").

Penalty Appropriate and Not Shocking

Petitioner argues that the penalty of termination is shocking, given that she was a capable and dedicated teacher who had no prior disciplinary history. She argues that, in

accordance with similar § 3020-a hearing decisions, this Court should vacate and remand the penalty of termination for a lesser penalty.

However, petitioner's contention, that the penalty is excessive, is unpersuasive. "Having seen and heard the witnesses, [Conlon] was in a far superior position than the motion court to make a determination as to an appropriate penalty to impose." *Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d at 421. Moreover, none of the cases offered by petitioner are analogous to the instant situation. In those cases where the penalty of termination was vacated and remanded for a lesser one, the teachers' charges were unrelated to deficiencies in teaching.[5] *See e.g. Matter of Riley v City of New York*, 84 AD3d 442, 442 (1st Dept 2011) (Court vacated and remanded penalty of termination that arbitrator issued to teacher for allegedly slapping a student, when student was not injured and petitioner had no prior disciplinary history). As one court recently noted, an unblemished record, "while always relevant, becomes a more important factor when the charges are unrelated to the educator's ability to perform in the classroom." *Matter of*

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[5] During oral argument, petitioner presented *Matter of Beriguete v New York Dept. of Educ.*, 53 Misc 3d 347, 359 (Sup Ct, NY County 2016), where the penalty of termination was vacated because, among other things, the conduct of the rating officer brought into question the objectivity of the ratings. However here, there is no substantiated lack of objectivity or improper conduct by the DOE.

Jean-Baptiste v Department of Educ. of the City Sch. Dist. of the City of N.Y.,), *5 (Sup Ct, NY County 2017) (citation omitted).

An administrative penalty may not be remanded for a lesser penalty, unless it "is so disproportionate to the offense . . . as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a matter of law." *Matter of Kreisler v New York City Tr. Auth.*, 2 NY3d 775, 776 (2004) (internal quotation marks and citation omitted). Here, the penalty of termination is not disproportionate to the offense, because petitioner's charges are directly related to her deficiencies in the classroom. Conlon found that petitioner was unable to establish a positive classroom experience for her students, and that, despite receiving adequate remediation, she was incapable of improvement.

Courts have upheld the penalty of termination when the teacher was found to have been incompetent. As held in *Matter of Morales v New York City Bd./Dept. of Educ.* (150 AD3d 468, 469 [1st Dept 2017]), the penalty of termination did not shock the court's sense of fairness when petitioner demonstrated teaching deficiencies over the course of three years, a lack of improvement despite remediation and a refusal to acknowledge deficiencies. *See also Matter of Davis v New York City Bd./Dept. of Educ.*, 137 AD3d 716, 717 (1st Dept 2016) (Penalty of termination was found not to be excessive when petitioner was

provided with assistance to improve her teaching skills, but was unwilling or unable to adjust her teaching methods to comply with a supervisor's directives); *see also Matter of Russo v New York City Dept. of Educ.*, 25 NY3d 946, 948 (2015), *cert denied* ___US___, 136 S Ct 416 (2015)(when a teacher is found to be incompetent, even one with a long-standing, unblemished career, termination is not a shocking penalty).

The Findings Were Rational and Were Not Arbitrary and Capricious

An action is considered arbitrary and capricious when it is "taken without sound basis in reason or regard to the facts." *Matter of Peckham v Calogero*, 12 NY3d 424, 431 (2009). An arbitration award is considered irrational if there is "no proof whatever to justify the award . . . ." *Matter of Roberts v City of New York,* 118 AD3d 615, 617 (1st Dept 2014) (internal quotation marks and citation omitted).

Applying both standards to the present case, it was not irrational for Conlon to find that there was just cause to terminate petitioner. The record demonstrates that Conlon weighed the arguments and analyzed the evidence for every specification. After doing so, Conlon determined that petitioner had failed to engage in effective teaching and could not manage her class. At least two witnesses testified regarding petitioner's unsatisfactory lessons, noting that the students were not engaged and petitioner's instruction was not rigorous.

Although petitioner was provided with multiple forms of remediation, she did not show any improvement over a four-year period. Conlon addressed petitioner's allegations that she was teaching too many students with IEPs, and concluded that petitioner's failures did not relate to the class composition.

As a result, petitioner provides no basis to disturb the Award. *See e.g. City School Dist. of the City of New York v McGraham,* 17 NY3d at 920 ("Nor is the award arbitrary and capricious or irrational. The hearing officer engaged in a thorough analysis of the facts and circumstances, evaluated respondent's credibility and arrived at a reasoned conclusion that [termination] was the appropriate penalty").

This Court has considered petitioner's remaining contentions and finds them to be without merit.

<u>Award Upheld</u>

Accordingly, petitioner's request to vacate the arbitration award is denied in its entirety, and pursuant to CPLR 7511 (e), the arbitration award dated February 15, 2016 is confirmed.

CONCLUSION

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is denied, the proceeding is dismissed, and arbitration award dated February 15, 2016 is confirmed.

Dated: November 28, 2017

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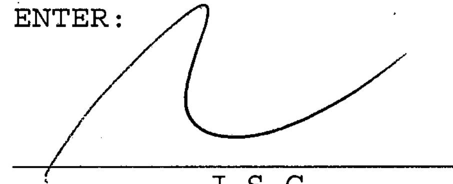

J.S.C.

Shlomo Hagler
J.S.C.