Matter of Department of Educ. of the City of N.Y. v Canick

2018 NY Slip Op 30725(U)

April 24, 2018

Supreme Court, New York County

Docket Number: 651432/2016

Judge: Carmen Victoria St. George

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 34

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In the Matter of the Application of

The Department of Education of the City of New York ("DOE"),
And Carmen Farina, as Chancellor of the DOE,

Petitioners,

Index No. 651432/2016

-against-

Decision and Order

Michael Canick, United Federation of Teachers, Local 2,
American Federation of Teachers, AFL-CIO, and New York
State United Teachers ("NYSUT"),

Respondents.

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Carmen Victoria St. George, J.S.C.:

In this Article 75 proceeding, the Department of Education of the City of New York (the "DOE") petitions to vacate the March 6, 2016 arbitration award rendered by Hearing Officer Doyle O'Connor, pursuant to New York State Education Law § 3020-a. Respondent Michael Canick ("Canick") in his verified answer seeks the denial and dismissal of the Article 75 petition.[1]

Canick is a tenured teacher who has been employed by the DOE for over eleven years. In 2014, Canick was in the Absent Teacher Reserve with the DOE when he sought and was hired for a vacancy teaching English at Cascades High School in Manhattan. On or about April 13, 2015, the DOE preferred four disciplinary charges against Canick stemming from the 2014-2015 school year. Canick was charged with making sexually inappropriate comments to female students,

[1] By stipulation dated December 7, 2017, the petitioners agreed to dismiss and discontinue this proceeding as against respondents United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO, and New York State United Teachers ("NYSUT").

engaging in misconduct, neglect of duty, and conduct unbecoming of a teacher.[2] As a penalty, the DOE sought termination.

In accordance with Education Law § 3020-a, Hearing Officer Doyle O'Connor ("H.O. O'Connor") was assigned as an arbitrator for Canick's disciplinary proceeding which was conducted over the course of seven days during the fall of 2015. Canick was represented by counsel throughout his § 3020-a hearing, had an opportunity to cross-examine witnesses, and testified on his own behalf. The DOE was represented by Jordana Shenkman ("DOE's counsel" or "DOE Counsel Shenkman"). The DOE presented several witnesses including: three of Canick's students (KM, AR, and AA), two of Canick's supervisors, and an investigator from the Office of the Special Commissioner of Investigation. Canick also called Student KM's mother as a witness. On November 23, 2015, the second day of evidentiary hearings, the DOE moved to recuse and disqualify H.O. O'Connor claiming he had exhibited bias in favor of Canick and inappropriate conduct during the hearing. H.O. O'Connor denied the DOE's motion. Thereafter, on March 6, 2016, having found that the DOE failed to meet its burden, H.O. O'Connor issued his Opinion and

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[2] The specifications were as follows:

Specification 1: On or about and between September 1, 2014 and November 21, 2014, respondent, in sum and substance:

1. Told Student KM that she was cute while looking at KM's identification card and/or her image on a computer screen after her identification card had been swiped.
2. Whispered to Student KM that "she had a good mother," causing her to feel uncomfortable.
3. Told Student KM, words to the effect of, "you can't run away from me its ok," causing said student to feel uncomfortable;

Specification 2: On or about and between September 1, 2014 and November 21, 2014, respondent, in the presence of at least one other student, on more than one occasion, stared at Student KM's buttocks/backside/behind when said student walked away from respondent;

Specification 3: On or about and between September 1, 2014 and December 8, 2014, respondent, on one or more occasions, touched and or/slapped and/or groped and/or made physical contact with Student AA's buttocks/backside/behind; and

Specification 4: On or about and between September 1, 2014 and December 8, 2014, respondent, in sum and substance:

1. Told Student C that she was beautiful on one or more occasions
2. Told Student C words to the effect of, you're beautiful, with a lot of potential and your looks will help you get a good job.

Award dismissing all charges against Canick. As a result, the DOE commenced the instant Article 75 proceeding.

Petitioners' Position

The DOE herein seeks to vacate the Hearing Officer's Opinion and Award. The DOE argues the Award was irrational on the grounds that H.O. O'Connor demonstrated bias against the DOE's case, which in the DOE's opinion, permeated the proceedings evidencing a showing of open hostility toward the DOE, its attorneys, and the DOE students who were proffered as witnesses.

Motion to Recuse H.O. O'Connor

The DOE asserts that H.O. O'Connor's bias towards the DOE began on the first day of evidentiary hearings on November 10, 2015 and continued throughout the proceeding. First, the DOE alleges that H.O. O'Connor engaged in *ex parte* substantive discussions with Canick's attorney on the first day of evidentiary hearings. The DOE claims that during a break, after Student KM's direct examination, DOE's counsel entered the hearing room and O'Connor told DOE's counsel off the record that Canick's attorney had a motion to make. DOE's counsel allegedly asked H.O. O'Connor what the substance of the motion was, to which he responded, "I'll let respondent's counsel tell you." This response, in the DOE's view, suggested that Canick's attorney and H.O. O'Connor had engaged in a substantive *ex parte* discussion about Canick's motion while DOE's counsel was not in the room. The second incident of alleged impropriety on the part of H.O. O'Connor stems from the relief sought in Canick's motion. Student KM, one of the students who made allegations against Canick, was called as the DOE's first witness. Student KM's mother accompanied her to the hearing. According to the DOE, Student KM's mother was not listed as a witness on the DOE's witness list, was not under subpoena, and there was no prior notice from

Canick that KM's mother might be called as a witness to testify. KM's mother was simply present because she had brought her daughter in to provide testimony. After a break between direct examination and cross-examination of Student KM, counsel for Canick made a motion to call Student KM's mother as witness for Canick, stating he had reason to believe that the mother was still in the building, and that he wished to take her testimony out of turn and in the middle of the DOE's case-in-chief. The DOE objected on several grounds including: (1) there was no basis to believe KM's mother would be unavailable or otherwise uncooperative in coming back, pursuant to subpoena, at the proper time during respondent's case-in-chief; (2) the proper procedure to compel any witness to testify was to issue a legal subpoena and neither Canick's counsel nor the H.O. O'Connor had one; and (3) given that KM's mother was not under subpoena, H.O. O'Connor did not have a legal right to force a lay person to stay in the building against her free will to give testimony at that particular time. The DOE notes that Student AR was also present at the hearing and was scheduled to give testimony after Student KM. DOE's counsel expressed concern that delaying Student AR's testimony might dissuade her from testifying.

H.O. O'Connor granted the motion and ruled that Canick would be permitted to call Student KM's mother out of turn on the first day of hearings before KM finished testifying. Additionally, H.O. O'Connor requested that DOE's counsel direct KM's mother to stay in the building. According to the petition, DOE's counsel did not agree to H.O. O'Connor's request as she claimed she had no authority to do so. Instead, DOE's counsel asked for a break to speak with her supervisor about the issue. After further deliberations, the parties agreed to continue with the cross-examination of Student KM. The DOE stresses that despite not agreeing to H.O. O'Connor's directives regarding KM's mother, DOE's counsel intended to ask KM's mother to remain on the premises until she had an opportunity to confer with her supervisors regarding the issue. However,

after the completion of Student KM's testimony, KM informed DOE's counsel that her mother had already left the building earlier that afternoon to go to a doctor's appointment. The DOE maintains that at no time prior to that did KM or anyone else inform DOE's counsel that the mother would be leaving before the completion of her daughter's testimony.

The petition states that DOE's counsel informed H.O. O'Connor as soon as she was made aware of the mother's departure. Counsel for the DOE explained to H.O. O'Connor that KM's mother had left, unbeknownst to her, and before she had a chance to speak with the mother about being called as a witness. H.O. O'Connor's reaction to the news is what allegedly prompted DOE counsel's motion to recuse. The DOE describes H.O. O'Connor making "baseless assertions suggesting DOE counsel had either known of the mother's departure and hid that from [H.O.] O'Connor, or had conspired with or otherwise encouraged KM's mother to leave the building in order to evade giving testimony" (petitioner's brief at 8). The DOE alleges that H.O. O'Connor and Canick's counsel cooperated with each other to subject DOE counsel to a cross-examination concerning KM's mother, thereby casting doubts on DOE counsel's representations to O'Connor regarding the mother's departure. According to the petition, H.O. O'Connor was not satisfied with DOE counsel's answers and suggested that Canick's counsel re-call Student KM in order to attempt to impeach DOE counsel's representation concerning the actions and whereabouts of KM's mother. The DOE argues that H.O. O'Connor conducted Canick's case for him in an effort to discover some evidence to contradict DOE's counsel. The DOE further alleges that H.O. O'Connor threatened to go get Student KM himself when DOE's counsel objected to re-calling her for a second cross-examination. The DOE claims that H.O. O'Connor and Canick's counsel conducted a "joint cross-examination" of Student KM. Notably, when Student KM testified she corroborated DOE counsel's representations concerning her mother in that she testified that her

mother left to go a doctor's appointment and neither KM nor her mother mentioned to anyone that she had to leave early. Additionally, Student KM testified that there were no discussions between DOE's counsel and her mother about being called as a potential witness.

The DOE contends that at this point in the hearing H.O. O'Connor allowed (over DOE counsel's objection) further questioning of Student AR, regarding her understanding of KM's mother's whereabouts and her knowledge of any conversation that occurred between DOE's counsel and the witnesses regarding this matter. Student AR corroborated DOE counsel's representations in that Student AR testified that as far she knew, KM's mother had simply left to go to a doctor's appointment and never spoke to DOE's counsel about her departure.

Additionally, the DOE notes that Canick's original motion to call KM's mother as his witness out of turn should have been rendered moot because she was no longer present in the building. However, the DOE states that H.O. O'Connor improperly ruled that Canick was still entitled to call KM's mother out of turn on a future date and the DOE was prohibited from speaking to KM or her mother in the interim. H.O. O'Connor further ruled that Canick's counsel would be allowed to question KM's mother first and that the DOE was prohibited from calling KM's mother as a witness in the DOE's case.

On November 23, 2015, the second day of evidentiary hearings, DOE's counsel moved to recuse and disqualify H.O. O'Connor claiming he had exhibited bias and inappropriate conduct on the first day of hearings. DOE's counsel laid out several grounds in support of their belief that H.O. O'Connor's biased conduct would improperly color the rest of the proceedings and as such warranted recusal. DOE's counsel argued that "H.O. O'Connor allowed the record to be tainted by consistent and repeated accusations of misconduct against DOE's counsel as well as assertions

that the DOE witnesses were incredible and not to be trusted, all within the first day of hearing on a case" (tr at 216). However, O'Connor refused to recuse himself.

Hostility Against DOE's Counsel

The DOE maintains that H.O. O'Connor continued to demonstrate his bias and hostility against the DOE and DOE's counsel throughout subsequent points in the hearings. Of note, the DOE alleges that H.O. O'Connor cursed at DOE's counsel on the third day of evidentiary hearings. The alleged exchange between H.O. O'Connor and DOE's counsel occurred off the record. According to the petition, H.O. O'Connor asked DOE's counsel if she had called Canick's witness Dr. Garcia, to "compel" him to appear on behalf of Canick.[3] The DOE alleges that H.O. O'Connor then proceeded to reprimand DOE's counsel for failing to secure Dr. Garcia's compliance with the subpoena. The petition states that DOE's counsel explained to H.O. O'Connor that she never agreed to call Dr. Garcia for the reasons she articulated on the last hearing date. This allegedly provoked H.O. O'Connor to raise his voice at DOE's counsel during which he stated words to the effect of "[d]o whatever the fuck you want to do!" (affirmation of Jordana Shenkman at 17). The DOE claims that H.O. O'Connor then threatened to give the DOE an adverse inference if Dr. Garcia didn't show up. Upon DOE counsel's objection, they allege that H.O. O'Connor raised his voice again and stated, "I don't give a shit what you're saying defense counsel should do, I'm telling you to do it!" (affirmation of Jordana Shenkman at 18). Subsequently, the DOE alleges, that H.O. O'Connor yelled at DOE's counsel to "get out of the room!" (affirmation of Jordan

[3] Dr. Garcia is the Assistant Principal of Cascades High School and was proffered as a witness for the DOE. According to the petition, Dr. Garcia was examined by both sides on November 23, 2015. On November 25, 2015, Canick's counsel indicated his intention to re-call Dr. Garcia as a witness for respondent in order to question him about an alleged inconsistency between Dr. Garcia's testimony and the testimony of Student AA. The alleged inconsistency had to do with whether Dr. Garcia asked Student AA what happened first, or whether Student AA told him what happened without asking. Canick's counsel indicated that they had sent a subpoena to Dr. Garcia for him to appear on December 1, 2015. H.O. O'Connor, asked that DOE's counsel to call Dr. Garcia to follow-up on the subpoena respondent had sent and to secure Dr. Garcia's appearance on behalf of respondent on December 1, 2015.

Shenkman at 18). DOE's counsel allegedly left the room and informed her supervisors regarding what had just transpired in the hearing room. According to the petition, DOE's counsel did not return to the room because of H.O. O'Connor's order and because his hostility made it impossible to continue working.

Thereafter, DOE counsel's supervisor Laura Brantley appeared at the hearing. The DOE maintains that H.O. O'Connor admitted to Ms. Brantley on the record that he did in fact order DOE's Counsel Shenkman to leave the room. The DOE asserts that H.O. O'Connor repeatedly refused to answer Ms. Brantley's question about whether he had cursed at DOE's counsel. Additionally, the DOE notes that H.O. O'Connor later apologized for his "inappropriate" and "intemperate" behavior toward Ms. Brantley. H.O. O'Connor expressed regret for "repeatedly interrupting her," being "entirely louder than he should have been," and for showing a "lack of professional demeanor." Notably, however, H.O. O'Connor did not apologize to DOE's Counsel Shenkman for cursing at her and later in his Award accused her of fabricating the fact that he cursed at her.

Biased Rulings and Instructions

In addition to allegedly cursing at DOE's counsel, the DOE maintains that H.O. O'Connor's partiality manifested itself in other ways throughout the proceeding. The DOE claims that H.O. O'Connor exhibited bias by giving improper instructions to witnesses that were one-sided and prejudicial. For example, H.O. O'Connor repeatedly emphasized that Canick's job was at stake (i.e., "The career of a teacher is at stake so it's a very important matter. It's important that you tell the truth").

Further, the DOE asserts that H.O. O'Connor's ruling were often infused with hostility toward DOE's counsel. For example, the DOE points to O'Connor's ruling on December 15, 2015

when he ruled that DOE's counsel had failed to timely introduce the decision from Canick's prior disciplinary case. The DOE maintains that DOE's counsel had attempted to do so on two prior hearing dates, including the first day of evidentiary hearings. The DOE asserts that H.O. O'Connor deferred his ruling on admissibility of the §3020-a decision until such time as the DOE intended to use it and cites to record in support thereof (tr at 18, 31-33). The DOE claims that it properly renewed the application before Canick's direct testimony based on H.O. O'Connor's previous instructions (tr at 18, 31-33, 569-586). The DOE notes that the Award inaccurately stated, "I have very limited information on the prior claim, in substantial part as the Employer had the Opinion and Award marked as an exhibit prior to trial but then inexplicably failed to timely move its admission during its case in chief" (Award at 22, fn 13*)*.

In sum, the DOE maintains the Award must be vacated as the DOE's rights were prejudiced throughout the proceeding by H.O. O'Connor bias.

Respondent's Position

Canick opposes the motion, arguing that petitioners failed to establish a basis for vacating the Award. Canick maintains that the Award was based on H.O. O'Connor's thorough review of the record, with determinations for each specification regarding the sufficiency and weight of evidence. Canick argues that the DOE's assertions have no bearing on the findings and determinations contained in the Award. In addition, Canick emphasizes the highly deferential standard of review applicable in Article 75 proceedings.

Canick argues that petitioners have failed to meet their heavy burden to establish by clear and convincing evidence that H.O. O'Connor was biased. Instead, Canick states that the allegations of bias set forth by the DOE are merely the subjective opinions of DOE's Counsel Shenkman regarding matters that are either not subject to judicial review, incapable of being proven, or

contradicted by the record. For example, Canick asserts the DOE's allegations constitute nothing more than disagreement by the losing party with the arbitrator's credibility determinations. Canick stresses that an arbitrator's credibility determinations cannot support a claim of bias and are immune from judicial review. He contends that H.O. O'Connor properly exercised judgment as to the credibility of the witness testimony. Canick adds that H.O. O'Connor had the benefit of seeing live testimony and observing witnesses' tones and mannerisms contemporaneously to the testimony.

Canick dismisses the DOE's allegations of hostility and inappropriate conduct exhibited by H.O. O'Connor. Canick claims that DOE's Counsel Shenkman purposefully neglected H.O. O'Connor's orders and conducted herself in an unprofessional manner. Canick maintains that even if H.O. O'Connor became upset with DOE counsel's conduct, it was with good reason. Canick argues that DOE counsel's actions and H.O. O'Connor's purported reactions, were immaterial to the Award. Canick emphasizes that H.O. O'Connor's Award was based solely upon the DOE's failure to meet their burden of proof in the underlying proceeding.

Further, Canick asserts that petitioners waived their right to seek to vacate the Award on the ground that H.O. O'Connor was biased. While Canick acknowledges that DOE's counsel made a motion to disqualify H.O. O'Connor for alleged bias, he states that the DOE never sought judicial intervention to remove H.O. O'Connor during the pendency of the proceeding. Notably, he adds that before the issuance of the Award, the DOE assigned new Education Law § 3020-a matters to H.O. O'Connor without objection to his appointment in those matters on the basis that H.O. O'Connor was biased.[4] In sum, Canick maintains that the DOE has not met its burden in

[4] H.O. O'Connor was no longer serving on the permanent panel of arbitrators when the parties appeared before this Court for oral argument on December 7, 2017 (tr of oral argument at 4, lines 14-17; at 7, lines 16-26).

establishing by clear and convincing proof that H.O. O'Connor was biased and he is entitled to confirmation of the Award pursuant to CPLR § 7511(3)(e).

Discussion

Education Law § 3020-a sets forth the procedures and penalties for disciplinary actions against tenured teachers. Subsection five of that statute authorizes judicial review of a hearing officer's decision. That review is limited to grounds set forth in Section 7511 (b) of the Civil Practice Law and Rules. CPLR § 7511(b) limits the grounds for vacating an award to misconduct, bias, excess of power or procedural defects (CPLR § 7511 [b][1][i]-[iv]). However, where, as here, the parties have submitted to compulsory arbitration, this Court applies a stricter standard of review than it does in voluntary arbitrations. (*see Lackow v Dept. of Educ. City of NY*, 51 AD3d 563, 567 [1st Dept 2008]). The arbitration award must be "in accord[ance] with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78" (*Id.*).

As a general matter, "a party seeking to set aside an arbitration award for alleged bias of an arbitrator must establish its claim by 'clear and convincing proof'" (*Matter of Infosafe Sys. v Int'l. Dev. Partner*, 228 AD2d 272, 272-273 [1st Dept 1996]). In doing so the petitioner must be aware that merely pointing to an adverse ruling does not support a claim of bias because that is nothing more than an example of the hearing officer doing exactly what he is supposed to do in rendering a decision (*Matter of Moro v Mills*, 70 AD3d 1269 [3d Dept 2010]). Indeed, mere allegations of bias absent specific references is not sufficient to vacate an administrative determination (*Id.* at 1270). With regard to fact and credibility findings, courts cannot substitute their judgment for that of a hearing officer who had the opportunity to hear and see witnesses (*see City School Dist. of the City of N.Y. v McGraham*, 75 AD3d 445, 450 [1st Dept 2010]). Thus, the

credibility determinations of a hearing officer are entitled to deference, even where a party seeking to vacate a § 3020-a decision claims that there is evidence which conflicts with the hearing officer's determination (*see Cipollaro v N.Y.C. Dept. of Educ.*, 83 AD3d 543, 544 [1st Dept 2011]).

Here, the Court finds that there is clear and convincing evidence of bias and misconduct on the part of H.O. O'Connor to warrant a vacatur of this Award. The Court comes to this conclusion after a thorough review of the 3020-a hearing transcript, the Award, and the parties' papers. Indeed, this Court notes the primary focus of the 965-page transcript was not about Canick, but rather the questionable conduct of H.O. O'Connor. Moreover, this is not an unsupported allegation of arbitrator bias with unspecified examples. To the contrary, this record is plagued with examples of bias. This is precisely why, when the parties appeared for oral argument, this Court strongly encouraged remanding this matter to a new arbitrator for reconsideration. However, the parties declined to agree to stipulate to a remand.

As stated above, a hearing officer's credibility determinations are largely unreviewable. However, Canick's contention, that most of the DOE's allegations against H.O. O'Connor stem from his credibility determinations, is unpersuasive. Even if this Court examined and accepted H.O. O'Connor's credibility determinations, the record is infused with other forms of bias towards the DOE and DOE's counsel. In particular, H.O. O'Connor was openly verbally unprofessional and discourteous towards DOE's counsel throughout various portions of the proceedings. It is clear to this Court that H.O. O'Connor exhibited hostility against DOE's counsel by raising his voice, interrupting counsel, and refusing to allow counsel to make a record. The Court notes the following exchanges as examples:

> **The Hearing Officer:** I've already advised Counsel that I can't stay as late as we need to.
> **Ms. Shenkman:** Here's the other thing I also have—
> **The Hearing Officer:** (Interposing) Sssshhh.

(tr at 75-76).

The Hearing Officer: (Interposing) Now address—I've interrupted you three times, Counsel, that means I intend to interrupt you.
(tr at 177).

The Hearing Officer: Don't talk over me. You knew that you hadn't carried out the task that I asked you to carry out, which was to tell the witness, tell the mother to stay. You didn't do it. Fine, she was gone. You couldn't have. But you didn't tell me that. He goes through questioning the student not realizing that the mother hadn't been told. So my question to you is very specifically what do you propose we do with this witness.
Ms. Shenkman: First of all, I'd like to defend myself—
The Hearing Officer: (Interposing) Don't, please.
(tr at 184).

The Hearing Officer: (Interposing) I'm going to interrupt you, Ms. Brantley. That is false. Ms. Brantley don't interrupt me.
Ms. Brantley: I'm not interrupting you—
The Hearing Officer: (Interposing) Ms. Brantley—
Ms. Brantley: -- you interrupted me.
The Hearing Officer: Ms. Brantley—that's right. I am.
(tr at 480).

Ms. Brantley: Why are you raising your voice? I am sitting talking to you calmly. Why are you raising your voice?
The Hearing Officer: Because you have repeatedly interrupted me which you know prevents the making of an accurate record of what's being said. It's unprofessional of you, it's improper of you and your attorney's conduct was improper this morning. It was improper last week. I instructed her to call a witness to facilitate his being here today.
(tr at 482-483).

Further, the record reveals that H.O. O'Connor exceeded his role as a neutral arbitrator on several occasions by assisting Canick in his defense. For example, H.O. O'Connor improperly alerted Canick's counsel to an area of cross-examination that he could use in his potential cross of a future witness when he stated, "there was significant divergence as to the testimony of the [two]

students as to the mother's departure, and that is fodder for cross examination" (tr at 192). Even if there was a variation in testimony, H.O. O'Connor overstepped his bounds as an impartial arbitrator by drawing Canick's attention to it. Equally inappropriate was the seemingly collaborative efforts of H.O. O'Connor and Canick's counsel in their cross-examination of DOE's counsel regarding KM's mother's whereabouts. The Court points to the following exchange wherein in H.O. O'Connor **and** counsel for Canick asked DOE's counsel the same questions repeatedly and in different ways (emphasis added):

> **The Hearing Officer**: But you also represented before you walked out of the room that you were prepared to put the mother on the stand, indicated she was willing to return and would return—
> **Ms. Shenkman:** [Interposing] Yes, which I gladly would have done. I had no idea –
> **The Hearing Officer:** [Interposing] Had you discussed that with the mother before you made that representation, or are you just pulling that out of the air, Counsel?
> **Ms. Shenkman:** Wait, had I discussed what?
> **The Hearing Officer:** Had you discussed with the mother the representation you made that she was prepared to return if necessary?
> **Ms. Shenkman:** No, no, no, what I told you during our discussion is that if you wanted to call the mother into the room and talk to her, as I think you've done with other witnesses in other cases and say we need to continue this on another day. We want to make sure that you return on such and such date that I would be happy to do that, but that hadn't been done.
> **The Hearing Officer:** Okay.
> **Ms. Shenkman:** At this point I did not know that she was going to leave at all, but at this point I understand that defense Counsel wants to call her. I thought it was going to happen today, but at this point I would be happy to get in touch with the mother. I believe I had her cellphone number and secure her appearance for testimony.
> **Mr. Cavallaro:** Again, had she been told that there was a possibility she would be testifying?
> **Ms. Shenkman:** No.
> **Mr. Cavallaro**: You hadn't even broached the topic with her.
> **Ms. Shenkman:** I didn't say anything to her about this at all. I was in here making all these representations on the record. I was anxious about finishing the student's testimony first, and assuming that - - I thought her mother was staying here until she was done to take her

home. When I went back to the other room to get the student her mother in the room. I don't know if she was in the bathroom at that point or if she had already left for a doctor's appointment, but I didn't ask. I assumed she was in the bathroom. We would finish with the cross-examination, and then when the student was done I would talk to the mother about you have to stay for the testimony, and I was going to break to talk to my Counsel and my boss. So I didn't do anything, of course, intentionally, and I had no idea that she even had a doctor's appointment. Her daughter just told me - -I was like why did your mom leave without saying anything. She just told me that her mom was actually looking for me to try to tell me while we were in here with the door closed that she had to go. I guess she didn't knock or open the door.

Mr. Cavallaro: How would Student A[5] know that if she was in here with the door closed?

Ms. Shenkman: What do you mean? Well, at some point - -

The Hearing Officer: [Interposing] That's a curious story. What you're indicating is that Student A just in the hallway right now told you that her mother left to go to the doctor's appointment, and before her mother left her mother was looking for you. How would Student A know what since Student A was in here with us?

Ms. Shenkman: What must have happened, I suppose, is that her mom was looking for me when we were in here arguing about this issue. When I came out to Student A - - but couldn't find me so just left. When I went out to get Student A back in the room nobody told me, nobody said anything that her mom had left to go to a doctor's appointment. I didn't see her mom in the room and just assumed that she was in the bathroom so that I could talk to her when we were done.

Mr. Cavallaro: My apologies, but there's a lot of gyrations going on right now about what did and didn't happen and why didn't Student A tell you when you went out to get her that this occurred? Why are we just hearing about this now? I mean I am beyond furious at this point in time, and I'm not – I don't want to case asperations on Counsel for the Department, but I am beyond furious because there is a reason why I made a somewhat unusual request to the Hearing Officer, and I explained why that reason was. To at this point run into this issue under the circumstances as being explained is strange credulity. Let me put it that way.

Ms. Shenkman: Well, I, um - -,

The Hearing Officer: I granted a motion to take a witness out of order, and I instructed you to tell that witness to remain here, and when you came back in you did not tell me you couldn't find her. That concerns me deeply. I would have anticipated if you couldn't find her that you would come and tell me I don't know where she is

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[5] In the transcript Student KM is referred to as Student A.

> because everyone in the room would have turned to Student A and said where is your mom.
> (tr at 112-122).

The Court notes that H.O. O'Connor further exceeded his role as arbitrator when he suggested that Canick recall Student KM for a second cross-examination regarding her mother's apparent suspicious disappearance (tr at 118). This Court is unwilling to speculate as to whether this was done for the purposes of impeaching DOE counsel's representations regarding the mother's departure. Regardless of his motives, H.O. O'Connor's suggestion was highly improper because he was essentially conducting Canick's case for him.

Additionally, H.O. O'Connor and Canick's counsel continued their concerted efforts in conducting a "joint cross-examination" of Student KM. First, Canick asked Student KM a series of questions including: "when did you find out your mom left?" "[d]id you know that we were going to ask her to testify here today?" "[s]o nobody tried to tell her before she left that she was going to be testifying?" "[d]id your mom know about the doctor's appointment beforehand?" "[d]id Ms. Shenkman ask you where your mother was when she came to get you?" '[s]o you didn't tell Ms. Shenkman when she came to get you before continued questioning that your mom had left, and you're saying that [she] didn't ask you where your mom was when she walked into get you?" "[s]he didn't say that she had to talk to your mom about anything?" (tr at 122-125). H.O. O'Connor followed up with questions of his own:

> **The Hearing Officer:** Do you know who the doctor is?
> **Student KM:** What?
> **The Hearing Officer:** The doctor. Your mom went to see a doctor.
> **Student KM:** No, I don't know her doctor.
> **The Hearing Officer:** What kind of doctor?
> **Student KM:** I don't know what kind of doctor.
> **The Hearing Officer:** Do you know where the doctor--
> **Student KM:** [Interposing] On 32rd Street and Madison.

> **The Hearing Officer:** So that's how we try to figure things out sometimes, ask a different question. So the doctor is on 32rd and Madison. Alright. Nothing further for me. Counsel?
> **Ms. Shenkman:** Nothing.
> (tr at 125-126).

In sum, H.O. O'Connor acted as co-counsel to Canick when he should have been acting as a fair and neutral hearing officer.

The DOE's contention that H.O. O'Connor inappropriately questioned the professional integrity of DOE counsel is also supported by the record. For example, H.O. O'Connor asked DOE's counsel, "[h]ad you discussed that with the mother before you made that representation, or are you just pulling that out of the air, Counsel?" (tr at 112-113). Likewise, in response to an assertion made by DOE's counsel, H.O. O'Connor stated "[t]hat's a curious story" (tr at 115). H.O. O'Connor also stated "[y]ou just made all of that up, Counsel, to be very blunt" (tr at 174). These statements coupled with O'Connor's rulings and conduct surrounding KM's mother as discussed above, are improper and at the very least represent an appearance of bias. Indeed, this Court is amazed how much time H.O. O'Connor spent questioning the credibility of DOE's counsel when his role as arbitrator was to assess the credibility of the witnesses.

Additionally, of import, are the inconsistences and misrepresentations of testimony between the Award and the hearing transcript. The Court points to the Award and specifically the fact section wherein H.O. O'Connor states that the DOE's witness Principal Rotundo had "volunteered in his direct testimony a comment evidencing seemingly considerable doubt about KM's allegations" (Award at 12). However, the transcript reads as follows:

> **Ms. Shenkman:** Did you have any reason to disbelieve what Student [KM] was telling you?
> (objection omitted)
> **Principal Rotundo:** No, no reason to disbelieve her.
> **Ms. Shenkman**: Lets start with Student [KM]. Did she have any disciplinary incidents in your school?

> **Principal Rotundo**: In the school, no. Student KM can be a bit emotional. I've had to speak with her on two separate occasions about anxiety and dealing with stress better than she does, but we haven't had a discipline issue in my school.
> (tr at 268-269).

For one thing, H.O. O'Connor's description of Principal Rotundo's testimony is unsupported by the record. Even more troublesome is the considerable weight that H.O. O'Connor allegedly attributed to his unsubstantiated conclusion that Principal Rotundo harbored misgivings about KM's allegations. For example, the Award states:

> "[m]oreover my view of KM was strongly influenced by the Principal's wariness in taking her at her word and his description of her inappropriate anxiety responses. Rotundo seemingly made a point of expressly noting that he was obliged to act on the accusations in face of [Canick's] failure to deny (occasioned by the UFT representative's advice not to comment). I was left with the firm sense that the Principal was very leery of KM's veracity, or perhaps more precisely, of her ability to accurately perceive and report events" (Award at 13).
> ---
> "The observation by Principal Rotundo that KM poorly handled anxiety and stress was well-taken. The events that occurred were objectively innocuous. It was KM's reaction, not Canick's conduct, which was inappropriate. Her embellishments on the original charges were of the sort not surprising for an especially anxious and seemingly more troubled than average teenager amongst a peer group of teenagers with troubled backgrounds seeking to re-establish themselves as successful high school students" (Award at 17).

In essence, H.O. O'Connor came to the irrational conclusion that it was more plausible that Student KM exaggerated and overreacted to Canick's actions because she suffers from anxiety. Ironically, H.O. O'Connor's sweeping and uninformed assumption is based on his own misrepresentation of Principal Rotundo's testimony.

Another notable misrepresentation involves the events surrounding the mother's departure. Despite spending an inordinate amount of time on who knew what regarding the mother's

whereabouts, H.O. O'Connor eventually ruled that he believed the mother's departure was inadvertent (tr at 200). In the Award, however, H.O. O'Connor states that "a calculated effort was made to interfere with or deter the presentation of [the mother's] testimony to the tribunal" referring to DOE's counsel (Award at 21, fn 11). Not only is this statement wholly unsupported by the record, it amounts to accusing DOE's counsel of suborning perjury. Further, H.O. O'Connor's baseless descriptions of the student witnesses in the Award is indicative of his partiality against the DOE and its students. For example, H.O. O'Connor described the DOE student witnesses as "fairly hardened former flunk-out urban high school girls who are trying to appear tough, and are worried about flunking out of their 'last chance high school'" (Award at 12). This description is also unsupported by the record.

With regard to the allegation that H.O. O'Connor yelled profanities at DOE's counsel, this Court acknowledges that this alleged exchange is not supported by the record. However, this taken in conjunction with everything else that is on the record including: H.O. O'Connor's prejudicial witness instructions, overt acts of hostility towards DOE's counsel, misrepresentations of witness testimony, and inappropriately questioning the professional integrity of DOE's counsel, is not the type of behavior that this Court can turn a blind eye to. Moreover, there is significant evidence in the record that shows H.O. O'Connor acting not as a neutral arbitrator but, rather, as a second advocate for Canick. Given the circumstances here, the Court finds that based on the totality of the allegations made against H.O. O'Connor by the DOE, it cannot be said that this Award was not motivated by H.O. O'Connor's bias against the DOE and DOE's counsel.

Based on the foregoing, this Court concludes that there is clear and convincing evidence of bias on the part of H.O. O'Connor against the DOE necessitating the vacatur of the Award. Accordingly, it is

ORDERED that the petition is granted, the Award is vacated, and the matter is remanded to a new arbitrator for a new hearing.

This constitutes the Decision and Order of the Court.

Dated: April 24, 2018

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.