SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **59**

Justice

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ROSLYN WARD-BOURNE,

Petitioner,

For a Judgment pursuant to Article 78 Civil Practice Law & Rules.

- v -

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK

Respondents.

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INDEX NO. 652697/2015

MOTION DATE 01/13/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 3, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 30, 32

were read on this application to/for VACATE – ARBITRATION AWARD.

ORDER

Upon the foregoing documents, it is

ORDERED and ADJUDGED that cross motion of respondents is granted, the petition is denied and the proceeding is dismissed.

DECISION

Petitioner Roslyn Ward-Bourne commenced this article 75 proceeding for a judgment vacating an arbitration award made after a disciplinary hearing held pursuant to Education Law § 3020-a.

The July 23, 2015 arbitration Opinion and Award (Award) found petitioner guilty of some of the disciplinary charges brought by her employer, respondents The Department of Education of the City of New York (the DOE) and The Board of Education of the City School District of the City of New York, and the hearing officer directed petitioner to serve an unpaid suspension of not less than nine months. In addition, during the period of suspension, petitioner was ordered to complete additional training at the discretion of, and paid for by, the DOE. Among other things, petitioner is seeking to be immediately restored to her tenured teaching position and requests a judgment expunging the specifications from her record. The DOE answers and opposes the petition.

Background and Factual Allegations

DOE employed Petitioner, who is a tenured teacher licensed to teach biology and general science, for over thirty years. For the last thirteen years of her career, she had been assigned to John Dewey High School (Dewey), located in Brooklyn, New York. Petitioner also served as a Dean at Dewey for ten years.

In June 2014, pursuant to Education Law § 3020-a, the DOE served petitioner with "specifications," or charges, alleging that, between the 2012-2013 and 2013-2014 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 3 specifications, which are set forth as follows:

> "1. During the 2012-2013 and 2013-2014 school years, [petitioner] failed to properly, adequately, and/or effectively plan and/or execute lessons, as observed on each of the following dates:
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> a. September 12, 2012;
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> b. October 1, 2012;
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> c. January 8, 2013;
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> d. February 8, 2013;
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> e. April 5, 2013;
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> f. June 10, 2013;
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> g. November 21, 2013;
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> h. December 11, 2013;
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> i. January 23, 2014;
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> j. March 18, 2014.
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> 2. During the 2013-2014 school year, [petitioner] neglected her duties, failed to follow school policy and procedure, failed to fulfill her professional responsibilities and/or engaged in unprofessional conduct when she failed to properly maintain required documents and data;
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> 3. During the 2012-2013 school year and the 2013-2014 school year, [petitioner] repeatedly failed to accept and/or implement directives, recommendations, counsel, instruction, and/or remedial professional development from observation conferences and one-to-one meetings with school administrators, peer administrators, mentors and/or coaches regarding:

a. The elements of differentiated instruction;

b. Effective instructional management;

c. Effective time management and/or organizational techniques;

d. Effective use of instructional time;

e. Effective handling of duties and responsibilities;

f. Effective classroom instruction;

g. Effective classroom management;

h. Effective delivery of lessons using proper methodology; and

j. Effective lesson construction and planning.

The foregoing constitutes:

1. Just cause for disciplinary action under Education Law § 3020-a;

2. Neglect of duty;

3. Misconduct;

4. Incompetent and/or inefficient service;

5. Conduct unbecoming [petitioner's] position;

6. Conduct prejudicial to the good order, efficiency or discipline of the service;

7. Substantial cause rendering [petitioner] unfit to properly perform her obligations to the service; and

8. Just cause for termination."

Pursuant to Education Law § 3020-a, a hearing began on February 3, 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 Doyle O'Connor (the Hearing Officer) was appointed to preside over the proceedings. A hearing took place over ten days, where both parties were entitled to examine and cross-examine witnesses and submit

evidence. Petitioner was represented by counsel, testified, and called multiple witnesses to testify on her behalf.

In his Award, prior to discussing each specification, The Hearing Officer provided some background information on the history of Dewey. The Hearing Officer stated that, in March 2012, a new principal, Kathleen Elvin (Elvin), was appointed as the new principal of Dewey. Among other things, he summarized that the DOE believed that, while Dewey had previously been recognized as a "flag-ship school," recently, it had been considered a failing school that was on the verge of being shut down. The DOE thought that "the educational performance of some of the staff at Dewey had long suffered from a failure of supervision." The DOE continued that the new leadership, effective 2012, turned around the "failures in performance and supervision" of some staff.

Petitioner did not see Dewey as a failing school, and attributed Dewey's poor performance to the reduced graduation rates, not due to its staff. In any event, petitioner continued that, prior to the arrival of Elvin, she had consistently received satisfactory ratings throughout her entire career. She argued that Elvin, in addition to the other new administrators, were trying to prove themselves. As a result, Elvin was "overly aggressive in forcing out any teacher she concluded was less than stellar." Petitioner also argued that any deficiencies in

her teaching performance were the fault of DOE because she was offered no remediation.

In the detailed and comprehensive 35-page Award, The Hearing Officer found that the DOE had proven specifications 1a, 1b, 1d, 1e, 1f, 1g, specification 2, and specification 3 with respect to the 2012-2013 school year only. Violations were not established as to specifications 1c, 1h, 1i, 1j, and specification 3, with respect to the 2013-2014 school year. The Hearing Officer discussed each of petitioner's unsatisfactory observations and addressed the relevant competence and remediation issues. He also separately discussed the charge for neglect of duty. By way of example, the court will discuss some of the specifications below, and how they were addressed by The Hearing Officer in his Award.

Lesson Plans

Specification 1(a) - September 12, 2012 observation

This specification charges petitioner with inadequately preparing lesson plans. On this date, Assistant Principal Honora Dash (Dash) conducted a formal observation of petitioner's class and gave her an unsatisfactory rating for this lesson. Prior to this lesson, Dash had instructed petitioner to observe Lisa Scacalossi (Scacalossi), an experienced teacher, as a model for ideas to improve her teaching skills. Dash had also instructed petitioner to

incorporate Scacalossi's techniques into the specific lesson being observed.

Dash stated that petitioner did not follow her instructions and "did not engage the students in any meaningful learning." Dash continued that petitioner asked inappropriately low-level questions. Dash advised petitioner that the lesson was unsatisfactory and directed petitioner to observe Scacalossi and to show Dash the next lesson plan. Petitioner did not provide Dash with the requested lesson plan. Although petitioner filed a rebuttal to the observation report, it was not filed until several years later. As a result, the Hearing Officer "discounted that rebuttal, and similar related rebuttals, as being without evidentiary value [that] were prepared years after the facts and in immediate anticipation of the hearing in this litigation."

The Hearing Officer concluded by sustaining this sub-specification, stating that the observation was done fairly and that petitioner demonstrated incompetent teaching during that lesson. The Hearing Officer found that, although petitioner was provided with "individually tailored and appropriate remedial help," she "without good cause refused to follow through on the offered remediation."

Specification 1(c) - January 8, 2013 observation:

On this date, Dash conducted an informal observation of petitioner's class and gave the lesson an unsatisfactory rating. Dash noted that many students were late and that most of them were not even minimally engaged. During the hearing, the parties discussed how Dash was "apparently unaware, or failed to take into account, that the majority of the students in that class were special education students." As a result, the Hearing Officer found that the DOE did not meet its burden to prove that the lesson was unsatisfactory on this date. The Hearing Officer found that the observation was flawed, given the lack of awareness of the class composition and how this could have affected petitioner's performance.

Specification 1(e) - April 5, 2013:

Prior to this lesson, petitioner had two pre-observation conferences with Dash for assistance in creating an effective lesson plan. Dash had also instructed petitioner to observe another science teacher who already successfully implemented the lesson, and to also meet weekly with Scacalossi. Despite such assistance, Dash found that petitioner did not incorporate any of the discussions into her lesson. Dash noted that the students were confused and that petitioner made an "incoherent effort" to "introduce the concepts of heat and temperature." Among other things, Dash stated that the lesson was disorganized, did not follow a logical sequence and that

petitioner did not model the conduct she expects of students when they perform experiments. Dash concluded by providing petitioner with specific steps to take to improve her teaching. In this instance, petitioner wrote an immediate rebuttal to the observation report. In pertinent part, the Hearing Officer found that petitioner's rebuttal "refused to acknowledge any deficiencies in her efforts, deflected blame on others . . . did not substantively address the concern with her actual planning and execution, and instead ascribed the adverse observation report to intentional discrimination by the Science Department." The Hearing Officer found that petitioner's rebuttal was "troublingly incoherent," contained grammatical errors, and "supports Dash's central conclusion that [petitioner] was ineffective at communicating ideas to her students." The Hearing Officer sustained this sub-specification and found that the observation was fairly done, provided appropriate remedial help and established incompetent teaching during that lesson.

Petitioner argued that Dash changed her outlook regarding petitioner's job performance based on Elvin's expectations. However, the Hearing Officer found Dash to be a credible witness who had no animosity towards petitioner. He found that Dash's concerns about petitioner's ineffective teaching pre-dated Elvin's arrival to Dewey. The Hearing Officer further found that Dash "took substantive and

appropriate remedial steps regarding the deficiencies she identified in [petitioner's] performance."

Specification 1(f) - June 10, 2013 observation:

Elvin conducted an informal observation on this date and found that the lesson was unsatisfactory. She noted that petitioner allowed the students to call out the answers, even though petitioner "had repeatedly been counseled that allowing students to call-out answers rather than calling on students, was inappropriate, deprived some students of the opportunity to participate, and deprived the teacher of any real chance at assessment". Among other things, Elvin found that petitioner was skipping among topics, answering questions herself, and that none of the students were taking notes. In the post-observation conference, petitioner's "stunning assertion," was that she did not have a curriculum for the course she was teaching because no one had given her one. The Hearing Officer stated that this was false, given that Dash had previously given her a curriculum. Petitioner's answers during the post-observation conference "directly contradicted school policy and training and evidenced bad pedagogy or a lack of concern with classroom management and instruction." In the post-observation memo provided to petitioner, Elvin listed a "litany" of specific and appropriate corrective steps that petitioner should take to improve her teaching.

The Hearing Officer sustained this specification, stating that the observation was fairly done, established incompetence on that occasion and offered immediate and ongoing assistance for improvement.

The Hearing Officer addressed how, after conducting walk-through of the classrooms, Elvin had an initial impression that petitioner was in ineffective teacher. Petitioner had argued that Elvin's initial impressions "led to a pre-ordained outcome of adverse observation reports and evaluation to support a later termination." The Hearing Officer found Elvin's testimony to be a little "outcome-drive," yet truthful. He also found that while Elvin wanted to "clean up a long-neglected school," this would not have been inappropriate, given that Dewey was labeled as a failing school. The Hearing Officer summarized that "[t]he real question before me is whether Elvin's administration sought to get rid of ineffective teachers, as that was an obvious and appropriate goal of Elvin, rather the question really is was [petitioner] ineffective and was her treatment appropriate."

The Hearing Officer considered petitioner's contentions that she had been unfairly targeted by Elvin. For example, the Hearing Officer noted petitioner's belief that it was inappropriate to observe her in certain elective classes that could be "outside the boundaries of her licensure." The

Hearing Officer found no issue with the classes observed, each was a science class and each class was one that she requested to teach. The Hearing Officer added that most of the criticism was directed at petitioner's ineffectiveness in the classroom, not with her lack of knowledge on the topic, and that her ineffective teaching was not limited to an isolated incident.

The Hearing Officer acknowledged the fact that almost half of Dewey's teachers left or retired within two years of Elvin's arrival. He stated that the "multiple employees who left Dewey are not before me for review. While an aggressive housecleaning does appear to have been undertaken, the narrower question before me is whether or not the [DOE] has adequately established that [petitioner] was an incompetent teacher." He further noted that most of the teachers retired or left at the time the school was slated to close.

Specifications 1(g), 1(h), 1(i) and 1(j):

For the 2013-2014 school year, petitioner was observed four times by assistant principal Eunice Chao (Chao) and given an unsatisfactory rating for these four lessons. Petitioner had argued that Chao merely followed Elvin's directives and gave her unsatisfactory ratings so that petitioner would be terminated.

The Hearing Officer did not sustain three out of four of these sub-specifications. In pertinent part, The Hearing Officer noted that Chao did not provide petitioner with concrete

improvement techniques in the observation reports. In addition, petitioner did not receive an observation report for a January 2014 lesson until March 18, 2014, which was also the date for the last observation for the year. The Hearing Officer found that the "extraordinary delay between the observation and the report renders the process without pedagogical value." He continued that the fact that the written report was issued on the same day as the final classroom observation "leads to the unavoidable conclusion that Chao belatedly realized that she needed to 'catch up' on her observations of [petitioner] in order to have sufficient score-keeping evidence done to support the intended and pre-determined recommendation to terminate [her]."

The Hearing Officer found Chao's testimony to be "of little value in objectively assessing [petitioner's] performance," regardless of whether Chao was simply trying to satisfy Elvin's agenda. The Hearing Officer explained how Chao was untruthful regarding the "November 2013 'Action Improvement Plan' issued to [petitioner] and utilized to support the [DOE's] claim that good-faith remediation efforts had occurred. I find that untruthfulness to have been knowing and deliberate." The Hearing Officer described the November 2013 Action Plan as "merely a memo which said, in sum, become a much better teacher or you will be fired." It was not a "custom tailored effort to

help [petitioner] with her particular deficiencies." Chao "testified falsely" that she had crafted the plan with input from petitioner.

The Hearing Officer further noted that Chao had testified that she had conducted six informal observations but the documentary evidence established that only four had been done. "Given Chao's penchant for recording adverse information, I find that there were only four informal observations, and that Chao's assertion to the contrary was willfully untruthful." He found that "something triggered Chao to hurry up in mid-March and pile on adverse evaluations." The Hearing Officer found that the DOE did not meet its burden to demonstrate incompetence in delivering those lessons, as the reports were "without weight or evidentiary value as to [petitioner's] performance and that instead it is strongly indicative of outcome-driven evidence".

Specification 2 - Neglect of Duty:

In brief, petitioner advised a parent that her child was failing health class because of chronic absenteeism. After an investigation, the records demonstrated that the child was not absent and that petitioner took inaccurate records. The Hearing Officer sustained this specification, stating that "[t]he unavoidable conclusion is that [petitioner] had been profoundly sloppy in recording attendance, and that she simply lied about it when asked." The Hearing Officer found that

petitioner's sloppiness was consistent with her attitude that she just needed to "show up" to work and not much more. The Hearing Officer concluded that, "[w]hile she may have been conditioned under the prior administration to believe such a level of performance adequate, the new administration, and more importantly her students, were entitled to demand better."

Specification Three - Remediation:

The Hearing Officer found that, under Dash's supervision, petitioner received appropriate and adequate remediation for the 2012-2013 school year. He stated that Dash tried to help petitioner be a better teacher, but that petitioner "did little to avail herself these resources" and made no effort to arrange visits to observe other teachers' classes. However, the Hearing Officer found that petitioner did try to incorporate some of Dash's suggestions into her teaching and that she made some improvements. Nonetheless, for the most part, petitioner made minimal effort and the Hearing Officer sustained specification 3 with respect to the 2012-2013 school year.

Nonetheless, the Hearing Officer did not sustain the portion of the specification alleging that petitioner failed to accept remediation for the 2013-2014 school year. He concluded that petitioner had essentially been "written off." Among other things, the Hearing Officer explained that, while petitioner was

issued a formal action plan in November 2013, this plan did not have any substantive value but merely warned her that she would be terminated if she did not improve. The Hearing Officer did note, however, that the DOE offered petitioner participation in the "PIP Plus program," an appropriate effort at remediation, but that petitioner declined this offer.

Penalty

The Hearing Officer found that petitioner was an ineffective teacher during the charged period and that her deficiencies "were not of a sudden onset." The Hearing Officer surmised that either her performance declined or the new administration was less willing to tolerate unsatisfactory teachers. Regardless, petitioner was not effective. In addition, for the 2012-2013 school year, petitioner received appropriately tailored remediation, yet was unwilling or unable to significantly improve her classroom performance. Petitioner was unable to accept guidance and "treated the remediation efforts in a perfunctory and obligatory fashion."

On the other hand, the Hearing Officer found that, at the outset, Elvin concluded that petitioner was incompetent and unsalvageable. While Elvin may have been right, petitioner was not provided with remediation efforts for the 2013-2014 school year. The evaluations conducted that year were done primarily to support the outcome of petitioner's termination.

While the Hearing Officer found petitioner to be at fault for ineffective teaching, he considered mitigating factors. For example, the Hearing Officer discussed how petitioner's teaching practices were tolerated "and thereby affirmed" for many years. "It was appropriate of the new regime to demand significant change, but change should not be expected to occur overnight."

The Hearing Officer found petitioner's performance to be "below par and even abysmal." He noted that the students "deserved far better than they received." Despite this, contrary to the DOE's contentions, the Hearing Officer did not believe that the appropriate penalty was termination. He advised that he had strong concerns about both petitioner's performance as a teacher and the adequacy of the DOE's obligatory remediation efforts. The Hearing Officer considered suggestions from the parties for an alternative penalty to termination.

Petitioner argued that all the charges should be dismissed and that, at a minimum, she could take a course while continuing her employment. The Hearing Officer found petitioner's suggestion to be inadequate, given the substantial established deficiencies in petitioner's teaching. The Hearing Officer 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. However, the Hearing Officer dismissed petitioner's reliance on Board of Educ. v Arrak for the "proposition that an employee not be the best possible teacher, but only a minimally competent teacher to avoid penalty." On the other hand, contrary to the DOE's contentions, the Hearing Officer did not believe that the appropriate penalty was termination. The Hearing Officer found the DOE's "proposed approach of a long suspension with course work to be successfully complete prior to the return to the classroom to be an approach more fitting to the facts as found above." Petitioner was directed to serve an unpaid suspension of not less than nine months. During that suspension, at the DOE's expense, petitioner was instructed to complete multiple hours of course work in the areas of lesson planning and execution, among other areas approved by the DOE. Petitioner was not to be restored to paid employment until she successfully completed the course work.

Petitioner's Contentions in the Proceeding at Bar

Shortly after receiving the Award, petitioner commenced this proceeding. Petitioner argues that the Award is arbitrary and capricious because the DOE was unable to meet its burden to demonstrate that she was incompetent. According to petitioner, as her supervisors were predisposed to find fault with her, the Hearing Officer should have rendered all

observations invalid prior to issuing the Award. Petitioner explains that she was targeted, as Elvin pressured supervisors to give teachers unsatisfactory ratings, regardless of their performance. She states, "[d]ue to the campaign to target older and minority teachers, the administrators who evaluated [petitioner] were subjectively predisposed to find fault."

In addition, petitioner claims that she was unfairly observed while teaching classes that were outside of her teaching license. Citing Board of Educ. v Arrak, petitioner alleges that the specifications regarding incompetence should not be based on a supervisor's expectations, but whether petitioner fell below the "minimum level of competency expected of a reasonable teacher." Petitioner continues that, in assessing competency, the Hearing Officer improperly considered observations and should have focused on whether a teacher is generally able to educate her students.

Further, petitioner argues that, contrary to the DOE's rules and regulations, she was not provided with an adequate number of formal observations for the 2012-2013 school year. She claims that she was only given two formal observations, and, as she was in danger of receiving an unsatisfactory end of the year rating, was entitled to more. Further, these observations were not done in good faith, were biased and only included negative comments. She notes that, although Dash criticized her

for having low level questions, "[i]ronically, on cross examination, the witness could not distinguish questions that were higher level questions, [from] the alleged lower level questions".

In addition, petitioner argues that the penalty of a nine-month suspension shocks one's sense of fairness because, even if there were deficiencies in her teaching, she was not provided with remediation to assist her. Petitioner alleges, "[h]ere, the award rendered by the Hearing Officer already held that there was no remediation and that it was in fact calculated and deliberate." Further, petitioner argues that the penalty is shocking, given that the observations were biased and were conducted to bolster the decision to terminate, rather than to assist petitioner with teaching. Petitioner reiterates that she is a long-standing teacher with an unblemished record. She argues that, at most, the penalty should have only been for her to receive professional development.

In response, the DOE argues that petitioner has not established any basis to vacate the Award and that the Award is rational and supported by adequate evidence in the record. According to the DOE, the Hearing Officer already provided a thorough analysis of the evidence and arguments, and petitioner is improperly asking the court to re-weigh the evidence and the credibility determinations. The DOE further argues that here,

considering incompetent teaching and attempted remediation, the penalty of a nine-month suspension without pay does not 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).

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).

Many of petitioner's problems with the Award stem from her allegations that her observations were biased and should have been invalidated, thereby leaving no support for the incompetency charges. However, applying both standards above to the present case, the Hearing Officer's determination of incompetency is rational and the Award cannot be considered arbitrary and capricious. In his Award, the Hearing Officer addressed and acknowledged all of petitioner's concerns regarding the observations. For instance, he found no basis for discounting adverse observations made in classes that were allegedly outside of her teaching license as those observations were primarily directed at her teaching efforts, not at her content knowledge.

On the other hand, the Hearing Officer did not sustain an unsatisfactory observation based on an observation of a

special education class when the supervisor was unaware of the makeup of the class. He acknowledged petitioner's assertions that she, along with other older and minority teachers, were targeted. However, he found that for the 2012-2013 school year, petitioner was found to be incompetent on several occasions. Her lessons did not engage the students in any meaningful learning and were incomprehensible. He noted that petitioner was provided with appropriate and individually tailored remediation, which included meeting with supervisors and observing other experienced teachers. Petitioner did not follow through with the remediation efforts and did not genuinely attempt to improve. After carefully reviewing the entire testimony and every observation, the Hearing Officer sustained some specifications and dismissed others.

It is well settled that 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").

Petitioner argues that the observation reports from 2012-2013 should be invalidated because, inter alia, Dash was biased against her and had trouble answering questions during

the testimony. Petitioner further claims that she was not offered any remediation for the 2012-2013 school year and that the DOE did not do enough to support her that year.

However, the Hearing Officer found Dash to be a credible witness and noted that the same problems with petitioner's lessons existed in Dash's observations prior to Elvin's arrival. The Hearing Officer also credited Dash's testimony that Dash offered petitioner substantive and appropriate remediation but that petitioner made little effort to complete the remediation. For example, petitioner made no effort to arrange classroom visits to observe her colleagues and she declined to participate in the PIP program that was offered to her. On the other hand, the Hearing Officer found that some witnesses were not credible, and, therefore not reliable in assessing petitioner's teaching.

Although petitioner disagrees with the Hearing Officer's credibility determinations, the Award cannot be vacated on those grounds, as it is within the purview of the hearing officer to assess 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).

The Hearing Officer emphasized that the only relevant question was whether the DOE adequately established that petitioner was an incompetent teacher, regardless of whether Elvin's goal was the "aggressive housecleaning" of Dewey. Moreover, the Hearing Officer was not concerned with the capabilities of the other teachers who had left or retired, but objectively focused solely on petitioner's effectiveness and its impact on the students. The Hearing Officer found that the students, as well as the administration, were entitled to demand that petitioner improve her level of teaching.

Although the Hearing Officer did provide petitioner with an explanation of how her situation was not analogous to the teacher in Arrak, he was not obligated to do so. As arbitrator, the Hearing Officer 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).

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 [petitioner's] credibility and arrived at a reasoned conclusion

that a 90-day suspension and reassignment was the appropriate penalty").

Penalty Appropriate and Not Shocking

Petitioner argues that the nine-month suspension and the requirement for her to attend professional development training at the DOE's discretion is excessive and shocking. She reiterates that, when issuing the penalty, the Hearing Officer failed to take into consideration the lack of remediation on the part of the DOE. She further alleges that the penalty is shocking, given that she has been teaching for almost thirty years and has an unblemished record.

Pursuant to Education Law § 3020-a (4) (a), a hearing officer is vested with the authority to issue a determination of penalty after a hearing has been held, with a suspension being one such penalty. In addition, the hearing officer may also impose remediation, which is what The Hearing Officer did. Education Law § 3020-a (4) (a) states, in pertinent part:

> "In those cases where a penalty is imposed, such penalty may be a written reprimand, a fine, suspension for a fixed time without pay, or dismissal. In addition to or in lieu of the aforementioned penalties, the hearing officer, where he or she deems appropriate, may impose upon the employee remedial action including but not limited to leaves of absence with or without pay, continuing education and/or study, a requirement that the employee seek counseling or medical treatment or that the employee engage in any other remedial or combination of remedial actions." Id.

"The standard for reviewing a penalty imposed after a hearing pursuant to Education Law § 3020-a is whether the punishment of dismissal was so disproportionate to the offenses as to be shocking to the court's sense of fairness." Lackow, 51 AD3d at 569. Given the record and the petitioner's conduct, this court concludes that the penalty of a suspension and mandatory remediation is not shockingly disproportionate to the offenses committed. The Hearing Officer did consider the DOE's remediation efforts and found that for the 2012-2103 school year, petitioner was offered remediation but did little to follow through. He also noted petitioner's long history with teaching and considered it to be a mitigating factor in rendering his penalty.

The Hearing Officer did determine that petitioner was guilty of being an incompetent teacher who, on several occasions, failed to adequately plan and execute lessons. In addition, petitioner was charged with neglecting her duty when she inaccurately recorded attendance and then inexcusably lied about it. The Hearing Officer found the incident to be demonstrative of petitioner's attitude that she just needed to "show up" to her job. It is well settled that, "[h]aving seen and heard the witnesses, [the Hearing Officer] 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.

Accordingly, given the record and the petitioner's conduct, this court concludes that the penalty of a suspension and mandatory remediation is not shockingly disproportionate to the offenses committed. The Hearing Officer's detailed penalty, acting as a forced remediation, was "well-tailored" to the charges of which petitioner was found guilty. Matter of Facey v New York City Dept. of Educ., 105 AD3d 547, 547 (1st Dept 2013), lv denied 22 NY3d 861, cert denied 134 S Ct. 2887 (2014); see also Matter of Addoo v New York City Dept. of Educ., 2009 NY Slip Op 32534[U], *11-12 (Sup Ct, NY County 2009) ("the penalty imposed, a semester suspension and the requirement that petitioner undergo a course of study, does not shock the conscience, and is not so irrational as to warrant vacatur, but appears calculated to attempt to help to ensure that petitioner returns to the classroom with skills that will enable her to better manage teaching situations that appear to be extremely trying").

In the alternative, petitioner argues that, at most, she should have been offered professional development only. However, petitioner's contention that the penalty is excessive, is unpersuasive. 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). In many situations where a penalty is vacated and remanded for a lesser one, the charges were unrelated to deficiencies in teaching. 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 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 Jean-Baptiste v Department of Educ. of the City Sch. Dist. of the City of N.Y., 2017 NY Slip Op 31565(U), *5 (Sup Ct, NY County 2017) (citation omitted). Here, the penalty of suspension and remediation is not disproportionate to the offense, because the charges against petitioner are directly related to her deficiencies in the classroom.

Moreover, although the DOE sought to terminate petitioner, the Hearing Officer issue such a penalty, but directed a less harsh penalty. In fact, in cases of incompetence, courts have routinely upheld the penalty of

termination. For example, 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. Moreover, the penalty of termination has been upheld, regardless of a long-standing unblemished career. See e.g. 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).

Award Upheld and Confirmed

Pursuant to CPLR 7511 (e), upon denial of a motion to vacate or modify an arbitration award, the court "shall confirm the award." Due to this decision denying the petition, the

Award should be confirmed and a "judgment shall be entered upon the confirmation of an award." CPLR 7514 (a).

The court has considered petitioner's remaining contentions and finds them to be without merit.

5/24/2018
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	DO NOT POST		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE