SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
PRESENT: HONORABLE E. LOREN WILLIAMS

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In the Matter of the Arbitration Claim of Certain Controversies Be

DECISION AND ORDER
Index # EF002886-2022

CHRISTA O'NEILL,

Petitioner,

for Judgment pursuant to Art. 75 and 78 of the CPLR and Education Law 3020-a

-against-

NEWBURGH ENLARGED CITY SCHOOL DISTRICT,

Respondent.

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The following documents were read on petitioner's Articles 75 and 78 petition and respondent's cross-motion to dismiss the petition:

Petition, Notice, Exhibits	NYSCEF Doc # 1-7
Respondent's Memorandum of law for Cross-Motion, Notice, Affirmation, Exhibits	NYSCEF Doc # 11-18
Petitioner's Memorandum of Law in Opposition of Cross-Motion and in Further support of petition	NYSCEF Doc # 20-21
Respondent's Reply Memorandum of Law in support of Cross-Motion	NYSCEF Doc # 22

Petitioner Christa O'Neill moves for an order, pursuant to Articles 75 and 78 of the CPLR, to vacate or remand an arbitration award made after a disciplinary hearing held pursuant to Education Law § 3020-a, in which petitioner was terminated from her employment with respondent Newburgh Enlarged City School District ("District"). The District cross-moves to dismiss the petition, pursuant to pursuant to CPLR §§ 404(a), 3211(a)(5), and 3211(a)(7).

BACKGROUND

Petitioner worked for the District as a speech and pathology teacher for more than nineteen years. Petitioner was a tenured teacher and a member of the New York State United Teacher's Union

(Teacher's Union) and the terms and conditions of her employment are subject to a Collective Bargaining Agreement between the District and the Teachers' Union.

As a Speech and Language Pathologist, petitioner was tasked with providing speech and language services to students who have been identified as needing those services and whose Individual Education Programs ("IEPs") require such services. As part of her responsibilities, petitioner was required to document her speech sessions via the IEP Direct platform.

Petitioner previously had been charged with misconduct that included allegations of failing to document her speech sessions for the school years 2016-2017 and 2017-2018. The previous charges were resolved by a July 15, 2019 Stipulation of Settlement ("Stipulation"). Pursuant to the Stipulation, petitioner admitted to certain conduct, was fined $40,000, and agreed to a last chance agreement which was to expire at the end of the 2021-2022 school year ("Last Chance Agreement"). The Last Chance Agreement states the following:

> If at any time prior to the last day of the 2021-22 school year, additional Education Law 3020-a disciplinary charges are preferred against Ms. Christa O'Neil and she is determined by the appointed hearing officer to have engaged in neglect of duty substantially similar to that reference in Paragraph 1 and/or for the failure to deliver recommended IEP Speech and Language services to the students in her caseload and/or failure to accurately and contemporaneously document (within 30 days of service delivery) Speech and Language services she delivers or is required todeliver to the students on her caseload, as defined by and subject to law and regulation, and she is determined by the appointed hearing officer to have engaged in this conduct, the Employee expressly agrees that the penalty will be her termination from employment as a teacher in the District. Whether the Employee has engaged in conduct substantially similar to that set forth in Paragraph 1 and/or fails to deliver recommended IEP Speech and Language services to the student on her caseload and/or fails to accurately and contemporaneously document (within 30 days of service delivery) Speech and Language services she delivers or is required to deliver to the students on her caseload, as defined by and subject to law and regulation, will be determined solely by the Hearing Officer appointed pursuant to the procedures of New York State Education Section 3020-a. Ms. O'Neill shall be provided all of the due process rights afforded to a tenured teacher at the hearing. Prior to invoking this Last Change Agreement and claiming a violation thereof, the District agrees to provide Ms. O'Neill with a single notice of 45 days so as to provide her with an opportunity to cure the alleged violation.

(NSYSCEF doc #6).

During the 2020-2021 school year, the District was in the throes of the COVID-19 pandemic and the students started the school year fully remote and then moved to hybrid remote and in person sessions. During this time, petitioner's duties increased and she struggled to keep up with documenting her speech sessions. The District held meetings with petitioner in attempts to address this issue. After further non-compliance, the District provided petitioner with a letter dated April 5, 2021 detailing the administration's expectation of her going forward. Another meeting was held with petitioner on June 10, 2021 to address her non-compliance with the terms of the letter and her required duties. Thereafter, petitioner continued failing to keep up on her required speech logs and on June 23, 2021, the District filed disciplinary charges against her.

Pursuant to Education Law § 3020-a, the District filed charges against petitioner alleging that during the 2020-2021 school year, she neglected her duty and/or was incompetent, and performed conduct unbecoming of a professional and was insubordinate. The charges stated the following:

> CHARGE 1- MISCONDUCT AND/OR NEGLECT OF DUTY AND/OR CONDUCT UNBECOMING A TEACHER AND/OR INCOMPETENCE AND/OR INSUBORDINATION
> In that during the 2020-2021 school year, between September 2, 2020 through May 21, 2021, Christa O'Neill, a tenured speech and language teacher failed to contemporaneously complete speech session logs and/or IEP direct service logs for approximately 869 sessions of recommended speech and language therapy sessions for approximately 47 students in accordance with said students' Individualized Education Programs ("IEPs") as recommended by the District's CSE on said students' 2020-2021 IEPs.
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> CHARGE II - MISCONDUCT AND/OR NEGLECT OF DUTY AND/OR CONDUCT UNBECOMING A TEACHER AND/OR INCOMPETENCE AND/OR INSUBORDINATION
> In that on or about May 20, 2021, Christa O'Neil, a tenured speech and language teacher failed to comply with a written directive from Building Principal, Chante Brooks dated April 5, 2021, to bring current attendance and service logs for students receiving Speech and Language services on her caseload.

(NYSCEF doc #6).

A hearing pursuant to Education Law § 3020-a was held on January 7, 2022, January 25, 2022, January 26, 2022, and January 31, 2022. Hearing Officer Haydee Rosario, Esq. ("Hearing Officer") was

appointed to preside over the proceedings. A hearing took place over 4 days where both parties were entitled to examine and cross-examine witnesses and submit evidence.

The Hearing Officer issued his Opinion and Award on May 9, 2022 ("Award"). The Hearing Officer found that the "preponderance of the credible record established [petitioner] engaged in the charged misconduct and just cause exists for disciplinary action" (NYSCEF doc #6). The Hearing Officer found petitioner guilty of both charges and the penalty was termination of her employment.

By verified petition dated May 18, 2022, petitioner seeks an order pursuant to Education Law § 3020–a(5)(a) and CPLR § 7511, vacating and/or modifying the Award of the Hearing Officer which found petitioner guilty of insubordination and terminated petitioner's employment with the District. This petition is also filed pursuant to CPLR Article 78 to prohibit the District from enforcing the Award as far as it ruled against petitioner.

The petition seeks to vacate the Award on the grounds that it was not supported by substantive evidence and was arbitrary and capricious, violated due process, and the penalty in light of the circumstances is shocking to ones' sense of fairness.

The District filed a cross-motion seeking to dismiss the verified petition pursuant to CPLR §§404(a) and 3211(a)(5) and (7).

Petitioner filed opposition to the cross-motion.

The District filed a reply in further support of its motion to dismiss the petition.

DISCUSSION

The courts review of an arbitration award is limited to the grounds set forth in CPLR § 7511 (*see* Education Law § 3020-a[5]). Under CPLR § 7511, an award shall be vacated if the court finds that the rights of the party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award; or

> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
>
> (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
>
> (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

(*see* CPLR § 7511[b][1]).

It is well settled that judicial review of arbitration awards is extremely limited in scope (*see Blamowski v. Munson Transp., Inc.* 91 NY2d 190, 194 [1997]). Thus, "disagreement... with the way the arbitrator resolves a dispute... is not a statutory ground upon which an award may be vacated" (*Bldg. Materials Corp. v. Int'l Bhd. Of Teamsters,* 18 NY2d 556, 558 [1996]). A court may "not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute" (*Silverman v. Benmore Coats, Inc.*, 61 NY2d 299, 307 (1984); *see also N.Y. State Corr. Officers & Police Benevolent Ass'n. v. State of N.Y.*, 94 NY2d 321, 326 [1999] ["A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one"]). "[A]n arbitrator's factual or legal determination is an evaluation of the competing labels and claims offered by the parties, and as such is not subject to judicial second-guessing, but only to a review to determine whether the award is on its face prohibited by public policy considerations" (*Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 155 [1995]; *see Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 631 [1979]).

"[T]he burden to show invalidity of any arbitral award is upon the party who brings a proceeding to set it aside" (*Caso v. Coffey*, 41 NY2d 153, 159 [1976]; see *Lehman Bros., Inc. v. Cox*, 10 NY3d 743, 744 [2008]).

"Where . . . the parties are subject to compulsory arbitration, the award must satisfy an additional layer of judicial scrutiny - it 'must have evidentiary support and cannot be arbitrary and capricious'" (*City School Dist of the City of NY v McGraham*, 17 NY3d 917, 919 [2011] quoting *Matter of Motor Veh. Acc.*

Indem. Corp. v Aetna Cas. & Sur. Co., 89 NY2d 214, 223 [1996]). "[J]udicial review under CPLR article 75 requires that the 'award be in accord with due process and supported by adequate evidence in the record'" (*Hegarty v Board of Education of the City of New York*, 5 AD3d 771, 772 [2d Dept 2004] quoting *Matter of Bernstein [Norwich City School Dist. Bd. of Educ.]*, 282 AD2d 70, 73 [3rd Dept 2001]).

Petitioner's charges are based on her failure to contemporaneously complete speech session logs and/or IEP direct service logs. The Hearing Officer relied on the testimony of Director Orwick who introduced a report, that Director Orwick created herself, from the IED Direct/Frontline system that the school utilizes for tracking services. The report was entitled RS Attendance Summary, and was created by selecting petitioner's name, a date range, and service type of speech. The report only shows sessions that are considered to be recorded units. Petitioner testified that this report is not an accurate record of sessions that she provided during the 2020-2021 school year. Petitioner testified that if a student was attending remotely and had not completed a consent form the student would be marked as "student not available" in the IEP system, even though she provided the service. The sessions that were marked as "student not available" are not included in the RAS Attendance Summary. Due to the Covid pandemic, all of her students attended remotely. Petitioner stated that she only received seven or eight consent forms back out of 52 students. Petitioner submitted evidence of logs entitled Summary of Related Service Session Notes, consisting of 143 pages, showing her session notes for the completed services. Petitioner testified that these session notes were entered into the IEP system around the time the service was provided.

The Hearing Officer stated that he considered these claims by petitioner and found that they were not supported by the "totality of the documents" presented by the District. The Hearing Officer relied on the number of documents in evidence, rather than the substance of the documents. The Hearing Officer fails to state how he resolved petitioner's contentions that Director Orwick's report did not accurately reflect what petitioner entered into the IEP system. Since the Hearing Officer disregarded facts presented

by petitioner, his decision is arbitrary and capricious (*see generally Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cnty.*, 34 NY2d 222 [1974]).

The second charge against petitioner is based on a letter dated April 5, 2021, provided to her by Principal Brooks. The purpose of this letter was to serve as the 45 day notice under the Last Chance Agreement. Petitioner was given 45 days to bring attendance and service logs current. Petitioner contends that the provisions of the Last Chance Agreement should not have been enforced due to the impossibility of complying with the Last Chance Agreement. "Impossibility excuses a party's performance [of a contract] when . . . the means of performance makes performance objectively impossible" and was due to "an unanticipated event that could not have been foreseen or guarded against in the contract" (*Kel Kim Corp. v Central Markets, Inc.*, 70 NY2d 900, 902 [1987]). Contractual performance has been excused when the surrounding circumstances were due to Covid (*see Lord v. Ltd. Liab. Co.*, 71 Misc. 3d 1228(A) [NY Sup Ct 2021] [contract found to be cancelled when event could not be held due to Covid].

The 2020-2021 school year was during the beginning of the Covid pandemic. Covid was an unanticipated event and the working conditions it caused could not have been foreseen. The classes during the 2020-2021 school year were being held remotely or as a hybrid in person/remote for the first time. Since the classes were being held remotely the assistant principal, Vincent Brancato, instituted a requirement that a google attendance document had to be completed, which was in addition to logging attendance into the IEP system[1]. This task had not been a requirement prior to Covid. During this time, petitioner was also often asked to cover classes, hall duty, and supervisory duties for teachers who were out due to Covid. Often petitioner would be notified last minute to cover for another class and would have to rearrange her scheduled sessions. The amount of her daily work doubled during Covid. She was required to keep attendance in multiple formats, conduct therapy secessions, attend IEP meetings, write

[1] Petitioner was the only speech pathologist in the district required to complete the google attendance document and as a result was the subject of a grievance filed by her union.

IEPs, evaluations, and coverages. An additional task that she was given, was to mentor another speech therapist. Petitioner stated that she assisted the speech therapist at another school for approximately five months. Prior to Covid, petitioner was allowed a 45 minute prep time each day and given a lunch break every day. During Covid, petitioner worked through her prep time, lunch breaks, and after hours to in attempts to keep up with all of her work. The unforeseen challenges due to Covid and the additional duties that were given to petitioner made performance under the Last Change Agreement impossible.

Petitioner also contends that the circumstances were not "substantially similar" as defined under the Last Chance Agreement to trigger the penalty. Under her Last Chance agreement, if "she is determined by the appointed hearing officer to have engaged in neglect of duty substantially similar" to her charges in her previous case, of not accurately documenting speech services, the penalty will be termination from her employment. The circumstances of her prior case relating to the 2016-2017 and 2017-2018 school years could not have been substantially similar to the circumstances during the 2020-2021 school year due to Covid. The documenting process for the speech sessions during Covid was different than prior years. The additional duties and workload created by Covid were not substantially similar to her work duties when she entered into the Last Chance Agreement in 2019. The Hearing Officer stated that the contention that the "extraordinary circumstances" created by Covid "is compelling and might have served as grounds to justify finding the circumstances in this case were different" (NYSCEF doc #6). The Hearing Officer then considers petitioner's past conduct of failing to properly document her sessions, including in January 2020, to discount the petitioner's compelling contention. However, the past performance by petitioner prior to Covid cannot determine the circumstances of the current charges, for the 2020-2021 school year.

Arbitrators may overturn discharges under last-chance agreements where they are persuaded that enforcing the agreement would be unfair under the circumstances (*see* Matter of the Arbitration Between Interface Solutions, Inc., Workers United Service Employees International Union Rochester

Regional Joint Board, Local 701T., 2011 WL 1111771 (NDNY 2011); *see also Bd. of Educ. of Dover Union Free Sch. Dist. v. Dover-Wingdale Teachers' Ass'n*, 95 A2d 497, 502 [2d Dept 1983] *aff'd* 61 NY2d 913, [1984] ["arbitrators may do justice and the award may well reflect the spirit rather the letter of the agreement"]). Enforcing the exact terms of the Last Chance Agreement would be unfair given the extraordinary circumstances imposed by the Covid pandemic, which could not possibly have been foreseen when petitioner entered into the agreement in 2019.

Due Process

Due process is satisfied where a hearing was held pursuant to Education Law § 3020-a and petitioner was given an opportunity to defend herself against the charges, prior to any removal of a tenured position (see *Sullivan v Bd. of Education*, 131 AD2d 836, 838 [2d Dept 1987]; Education Law § 3020-a). Here, petitioner participated in a hearing and was afforded the opportunity to submit evidence, present witness testimony, and cross-examine the District's witnesses and evidence for the 2020-2021 school year. However, evidence from January 2020 was presented during the hearing. January 2020 is not within the time frame that petitioner has been charged with. The Hearing Officer relied on this evidence in making his decision. The Hearing Officer states:

. . .

> I considered Respondent's contention that the circumstances involved in this case are_not_substantially similar to the prior disciplinary case because of the Covid-19 pandemic required her to provide the speech and language services remotely and to learn new skills in extraordinary circumstances. Such contention is compelling and might have served as grounds to justify finding the circumstances in this case were different than the one involved in the prior case. However, . . . Director Orwick credibly testified that in January 2020, before the pandemic, and only a couple of months after returning to work from the prior disciplinary charges, her review of Respondent's entries in IEP Direct showed the records were not up to date and information was missing in IEP Direct about the services provided by Respondent. Director Orwick and the documentation presented by the District shows that by January 2020, the matter was serious enough to schedule a disciplinary meeting . . .

(NYSCEF doc #6).

By finding petitioner guilty of conduct that she was not charged with and using this information to support her termination, petitioner's due process rights were violated (see *Abramovich v Board of Ed. of Ed. of Cent. Sch. Dist. No. 1 of Towns of Brookhaven & Smithtown*, 91 Misc. 2d 481, 485 [Suffolk County 1977] aff'd 46 NY2d 450 [2d Dept 1979]; Cf. *Matter of Arb. Between Bender & Lancaster Cent. Sch. Dist.*, 175 AD3d 993, 996 [4th Dept 2019] [the arbitration award was confirmed where the record establishes the findings were not based on uncharged conduct, improper, or arbitrary and capricious]).

Petitioner's remaining contentions are not compelling. Petitioner argues that the District's rebuttal case was improper and should be excluded. This argument is without merit as the rules governing hearing procedures do not require compliance with technical rules of evidence (*see* Education Law § 3020-a [3][c]) and is not a proper reason to vacate the Award. Petitioner argues that the Hearing Officer exceeded his authority because the Award was not timely pursuant Education Law 3020-a (4)(a). "[A] hearing office shall render a written decision within thirty days of the last day of the final hearing" Education Law § 3020-a [4][a]). However, CPLR § 7507 states, "[a] party waives the objection that an award was not made within the time required unless he notifies the arbitrator in writing of his objection prior to the delivery of the award to him." Petitioner has not provided any evidence that she had objected to the delay in writing to the Hearing Officer prior and therefore has waived any such objection; additionally, petitioner has not shown any prejudice that resulted from the twelve-day delay (see *New York Merchants Protective Co. v. United Textiles, Inc.*, 23 Misc. 3d 39, 41 [App. Term 2009]; *Jones v. Progressive Cas. Ins. Co.*, 237 AD2d 358, 358 [2d Dept 1997]). An arbitration award will not be vacated without a showing of prejudice that resulted from the delay (*see Scollar v. Cece*, 28 AD3d 317 [1st Dept 2006]; *Matter of Westminster Const., Inc. v. Peconic Bay Golf, LLC*, 288 AD2d 231, 232 [2d Dept 2001]).

Penalty

Petitioner argues that the penalty of termination, in light of the circumstances, is shocking to one's sense of fairness. An award may be set aside if "'the measure of punishment or discipline imposed

is so disproportionate to the offense, in the light of all of the circumstances, as to be shocking to one's sense of fairness'" (*Pell*, 34 NY2d at 233 quoting *Matter of Stolz v Board of Regents*, 4 AD2d 361, 364 [3rd Dept 1957]).

Termination of a teacher's employment has not been found to shock the court where the conduct has been extreme (*see Douglas v New York City Bd./Dep't of Educ.*, 87 AD3d 856, 857 [1st Dept 2011] [finding termination did not shock sense of fairness where teacher performed acts of moral turpitude]; *Haubenstock v City of New York*, 130 AD3d 435, 435-436 [finding penalty did not shock sense of fairness where teacher committed acts of corporal punishment]; *Carlan v. Bd. of Educ. of Lawrence Union Free Sch. Dist.*, 128 AD2d 706, 706 [2d Dept 1987] [finding penalty not so excessive to shock the conscience where teacher had multiple charges including manipulating student's test scores]).

The penalty of termination will shock the conscious of the court where it is excessive and disproportionate in light of all of the circumstances (*see Principe v. New York City Dep't of Educ.*, 94 AD3d 431, 435 [1st Dept 2012] *aff'd*, 20 NY3d 963, 982 [2012] [finding that even though teacher was charged of misconduct by use of corporal punishment, in light of all of the surrounding circumstances, termination shocked the conscious of the court]; *Riley v City of New York*, 84 AD3d 442 [1st Dept 2011] [finding most severe penalty was not warranted when considering other facts such as fifteen years of past performance]; *Matter of Solis v Department of Educ. Of City of NY*, 30 AD3d 532 [2d Dept 2006] [finding termination was shocking considering all factors including twelve-year record as a teacher]).

Here, petitioner's conduct is not analogous to offenses of corporal punishment, moral turpitude, or cheating to invoke the penalty of termination. Petitioner was only charged with failure to bring her recordkeeping logs current. During this time, she performed all of her teaching duties as she has for the past nineteen years. She has never been disciplined for failing to provide speech services to her students. Considering all of the relevant factors, especially the working conditions during Covid, the penalty of termination is shocking to this Court.

Cross-Motion

The District filed a cross-motion seeking to dismiss the verified petition pursuant to CPLR §§404(a) and 3211(a)(5) and (7). CPLR §404(a) provides that "The respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition" (CPLR §404[a]).

CPLR §3211(a) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of arbitration and award. . . or the pleading fails to state a cause of action" (CPLR §§ 3211[a][5], [7]).

CONCLUSION

Since the parties were subject to compulsory arbitration, the award must have "evidentiary support and cannot be arbitrary and capricious, and it must be in accord with due process" (*Powell v New York City Dep't of Educ.*, 144 AD3d 920 921 [2d Dept 2016] [internal quotation marks omitted]; *Matter of Denhoff v. Mamaroneck Union Free Sch. Dist.*, 101 AD3d 997, 997–998 [2d Dept 2012]). The Hearing Officer's award was not supported by evidentiary support, was arbitrary and capricious, and was not in accord with due process.

Accordingly, it is hereby

ORDERED that respondent's cross-motion to dismiss the petition is DENIED; and it is further

ORDERED that the petitioner's petition is GRANTED and the arbitration award is vacated,

Dated: Goshen, New York
February 24, 2023

Honorable E. Loren Williams, J.S.C

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