SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
---------- x

In the Matter of the Application of

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, operating as the New York City Department of Education, and DAVID C. BANKS, as Chancellor of the New York City Department of Education,

Petitioners,

For an Order and Judgment Pursuant to Article 75 of the Civil Practice Law and Rules,

- against -

UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO, and MICHAEL MULGREW, as President of the United Federation of Teachers,

Respondents.
---------- x

VERIFIED PETITION

Index No.

Petitioners, Board of Education of the City School District of the City of New York, operating as the New York City Department of Education ("DOE"), and DOE Chancellor David C. Banks (collectively, "Petitioners"), by and through their attorney of record, the Honorable Sylvia O. Hinds-Radix, Corporation Counsel of the City of New York, as and for their Verified Petition herein, respectfully allege as follows:

PRELIMINARY STATEMENT

1. This special proceeding is brought pursuant to Sections 7502(c), 7503(b), and 7511(b)(1)(iii) of the New York Civil Practice Law and Rules, whereby Petitioners seek an order: (1) vacating the Opinion and Award issued by Arbitrator Martin F. Scheinman ("Arbitrator") on June 27, 2022, in the arbitration captioned "Board of Education of the City School District of the City of New York and United Federation of Teachers, Local 2, AFT, AFL-CIO, re: Proof of

Vaccination" ("the Second Award"), and (2) both preliminarily and permanently staying and enjoining any further proceedings therein. A copy of the June 27, 2022, Opinion and Award is attached hereto as Exhibit "A."

2. The grounds for seeking this relief are that the Arbitrator exceeded his power and jurisdiction in issuing the Second Award, that the Second Award violates public policy, and that the Second Award is irrational.

3. As discussed more fully below, the United Federation of Teachers, Local 2, AFT, AFL-CIO ("UFT"), represents approximately eighty-two employees of the DOE who were placed on leave without pay, with benefits, based on information that they had failed to comply with an order issued by former Commissioner of the New York City Department of Health and Mental Hygiene ("DOMHM") Dave A. Chokshi on August 24, 2021, requiring all employees of the DOE to submit proof of at least one dose of vaccination by September 27, 2021 ("the DOE Vaccine Mandate"). A copy of the DOE Vaccine Mandate is attached hereto as Exhibit "B."

4. These employees were provided with notice of this potential action, via an e-mail that was sent to each of their DOE-issued e-mail accounts on April 19, 2022, informing them that they would be placed on leave without pay, with benefits, effective April 25, 2022, based on information that the DOE had received from an independent law-enforcement agency that their proof of COVID-19 vaccination was fraudulent, and offering them an opportunity to respond by contacting the DOE if they believed that the allegation that they had submitted fraudulent proof of vaccination was incorrect. A copy of one of the April 19, 2022, e-mails, with all personally identifying information therein redacted, is attached hereto as Exhibit "C."

5. In the Second Award, the Arbitrator opined that the DOE's decision to place these employees on leave without pay, with benefits, was "inconsistent with the language and

underpinnings" of his prior arbitration award, which was issued on September 10, 2021, in a proceeding captioned "Board of Education of the City School District of the City of New York and United Federation of Teachers, Local 2, AFT, AFL-CIO, re: Impact Bargaining" ("the First Award"). See Exhibit "A" at p. 10. A copy of the September 10, 2021, Award is attached hereto as Exhibit "D."

6. Asserting jurisdiction over the DOE's placement of the approximately eighty-two employees on leave without pay, with benefits, the Arbitrator proceeded to direct the parties to meet and confer by July 5, 2022, "to attempt to agree on a procedure to review an employee's claim that they have submitted proof of vaccination." Exhibit "A" at pp. 11–12.

7. Yet, by the express terms of the First Award, the Arbitrator retained limited jurisdiction in only one section of the three-part award and specifically only over matters involving the "administrative process for the review and determination of requests for religious and medical exemptions to the mandatory vaccination policy and accommodation requests where the requested accommodation is the employee not appear at school." Exhibit "D" at ¶ I(L).

8. Consequently, the Arbitrator, by his Second Award, issued a decision on an issue over which he did not retain jurisdiction and for which the DOE has not agreed to arbitrate—namely, the unilateral placing of an employee on leave without pay, with benefits, when the DOE has reason to believe that such employee has failed to submit proof of vaccination and is now in violation of the DOE Vaccine Mandate.

9. Additionally, the Arbitrator directed the parties to meet no later than July 5, 2022, to negotiate "a procedure to review an employee's claim that they have submitted proof of vaccination"; thus, an immediate stay of the Second Award is necessary so that the DOE is not in violation of it. Exhibit "A" at pp. 11–12.

10. What is more, the Second Award, if not immediately stayed and enjoined by this Court, will undermine the DOE's ability to ensure compliance with the DOE Vaccine Mandate and thereby jeopardize the health and safety of students and their families, DOE staff, and the broader community.

PARTIES

11. Petitioner Board of Education of the City School District of the City of New York, operating as the New York City Department of Education, is a school district organized and existing under the laws of the State of New York.

12. Petitioner David C. Banks is the Chancellor of the DOE.

13. Respondent United Federation of Teachers, Local 2, AFT, AFL-CIO, is an unincorporated labor organization that is the recognized bargaining agent for all nonsupervisory pedagogical personnel and classroom paraprofessionals employed by the DOE, including those holding the title of paraprofessional, hearing education teacher, vision education teacher, English as a second language teacher, special education teacher, general education teacher, guidance counselor, speech teacher, occupational therapist, physical therapist, psychologist, and social worker.

14. Respondent Michael Mulgrew is the President of the UFT.

JURISDICTION AND VENUE

15. This Court has jurisdiction to hear this special proceeding based on Article 75 of the New York Civil Practice Law and Rules ("CPLR").

16. Venue is proper in New York County under CPLR § 7502(a)(i), in that the DOE has its principal place of business in New York County.

FACTS

A. The DOE Vaccine Mandate

17. On August 24, 2021, DOHMH issued an order announcing that DOE employees would be subject to a vaccine-only mandate, as opposed to a vaccination-or-testing requirement. See Exhibit "B."

18. Under this policy, all employees of the DOE were required to submit proof that they had received a single-dose COVID-19 vaccine or the first dose of a two-dose COVID-19 vaccine by September 27, 2021, with, in the latter case, the additional requirement to provide proof of the second dose thereafter.

19. It is beyond debate that the DOE Vaccine Mandate is both lawful and enforceable against UFT's members. See, e.g., Maniscalco v. N.Y.C. Dep't of Educ., 563 F. Supp. 3d 33, 38–40 (E.D.N.Y. 2021), aff'd, No. 21-2343, 2021 U.S. App. LEXIS 30967 (2d Cir. Oct. 15, 2021), cert denied, 142 S. Ct. 1668 (2022); N.Y.C. Mun. Labor Comm. v. City of New York, 156 N.Y.S.3d 681, 686–87 (Sup. Ct. N.Y. Cnty. 2021).

20. In addition, both this Court and the United States District Court for the Southern and Eastern Districts of New York have repeatedly and consistently held that the DOE Vaccine Mandate is a "lawful, enforceable condition of employment" and that, consequently, either terminating or placing employees who do not comply with the DOE Vaccine Mandate on leave without pay does not trigger the statutory or contractual disciplinary procedures covering DOE employees, including those in the New York Education Law, the New York Civil Service Law, and the applicable collective-bargaining agreements. Broecker v. N.Y.C. Dep't of Educ., No. 21-CV-6387(KAM)(LRM), 2022 U.S. Dist. LEXIS 25104, at *22 (E.D.N.Y. Feb. 11, 2022); see also Marciano v. De Blasio, No. 21-cv-10752 (JSR), 2022 U.S. Dist. LEXIS 41151, at *25–26 (S.D.N.Y. Mar. 8, 2022) (stating that the plaintiff-employee "had failed to satisfy a condition of

his employment, that is, that he be vaccinated against COVID-19, and the termination of a public employee based on the employee's failure to satisfy a qualification of employment unrelated to job performance, misconduct, or competency does not implicate the [relevant] disciplinary procedures" (internal quotation marks and citation omitted)); Maniscalco v. Bd. of Educ., Index No. 160725/2021, 2022 N.Y. Misc. LEXIS 1367, at *24 (Sup. Ct. N.Y. Cnty. Mar. 15, 2022) (finding that the disciplinary procedures of the Education Law did not apply to tenured teachers whom the DOE placed on leave without pay because the vaccine-only mandate and the Arbitrator's September 15, 2022, Impact Arbitration Decision between the DOE and the Council of Supervisors and Administrators, which contains almost identical language to the First Award, "create an employment qualification, not a disciplinary action"); O'Reilly v. Bd. of Educ., Index No. 161040/2021, N.Y. Misc. LEXIS 246, at *4 (Sup. Ct. N.Y. Cnty. Jan. 20, 2022) (in the context of a challenge by a tenured teacher who was placed on leave without pay by the DOE when she failed to show proof that she had received a vaccination or that she had tried to get an exemption, reasoning that "placing petitioner on leave without pay was not discipline under the Education Law and instead was merely a response to petitioner's refusal to comply with a condition of employment").

B. The Arbitrator's First Award

21. On September 1, 2021, UFT filed a Declaration of Impasse with the Public Employment Relations Board over the impact of the DOE Vaccine Mandate. A copy of the Declaration of Impasse is attached hereto as Exhibit "E."

22. After hearings on September 6 and September 7, 2021, on September 10, 2021, the Arbitrator issued a binding award, which contained three sections: Section I (Exemption and Accommodation Requests and Appeal Process), Section II (Leave), and Section III (Separation).

23. Section I of the First Award sets forth a process that applies to requests for an exemption or accommodation from the DOE Vaccine Mandate based on medical or religious grounds. Specifically, the First Award provides that:

> This process shall only apply to (a) religious and medical exemption requests to the mandatory vaccination policy, and (b) medical accommodation requests where an employee is unable to mount an immune response to COVID-19 due to preexisting immune conditions and the requested accommodation is that the employee not appear at school.

Exhibit "D" at ¶ I.

24. The First Award also provides that:

> The process set forth, herein, shall constitute the exclusive and complete administrative process for the review and determination of requests for religious and medical exemptions to the mandatory vaccination policy and accommodation requests where the requested accommodation is the employee not appear at school. The process shall be deemed complete and final upon the issuance of an appeal decision. **Should either party have reason to believe the process set forth, herein, is not being implemented in good faith, it may bring a claim directly to [Scheinman Arbitration and Mediation Services] for expedited resolution.**

Id. at ¶ I(L) (emphasis added).

25. Section II of the First Award provides that "[a]ny unvaccinated employee who has not requested an exemption pursuant to Section 1, or who has requested an exemption which has been denied, may be placed by the DOE on leave without pay effective September 28, 2021, or upon denial of appeal, whichever is later, through November 30, 2021." Id. at ¶ II(A). Section II then states that "[s]uch leave may be unilaterally imposed by the DOE" and that "[p]lacement on leave without pay for these reasons shall not be considered a disciplinary action for any purpose." Id.

26. Employees also had the option to extend their leave without pay through September 5, 2022. Id. at ¶ III(B).

27. While on leave without pay, employees continue to be eligible for health insurance, and employees who become vaccinated and submit proof of vaccination are eligible to return to the same school following notice and submission of documentation to the DOE. See id. at ¶¶ II(D), III(B).

28. Section III of the First Award provides for a separation option if employees did not choose to extend their leave without pay. See id. at ¶¶ III(A). This section further provides that, beginning December 1, 2021, the DOE shall "unilaterally separate employees who have not opted into" either separation or extension of leave without pay and clarified that, "[e]xcept for the express provisions contained, herein, all parties retain all legal rights at all times relevant, herein." See id. at ¶ III(C).

29. Notably, there is no language in Section II or Section III of the First Award specifying that a party can bring a claim related to an employee's placement on leave without pay directly to Scheinman Arbitration and Mediation Services for expedited resolution; the retention-of-jurisdiction language quoted above in paragraph 24 relates only to Section I of the First Award, namely, the accommodation and exemption process.

C. The Instant Dispute

30. On April 19, 2022, the DOE informed approximately eight-two employees, via an e-mail to their DOE-issued e-mail accounts, that they would be placed on leave without pay, with benefits, effective April 25, 2022, based on information that they had failed to comply with the DOE Vaccine Mandate. Specifically, the notification stated:

> Dear _____,
>
> We have received information that the proof of vaccination that you uploaded to the DOE Vaccine Portal, pursuant to the New York City Health Commissioner's Order requiring vaccination of all NYCDOE staff, was fraudulent. Compliance with that Order is a condition of NYCDOE employment. Since we have reason to

> believe that you have not complied with that Order, effective Monday, April 25, 2022, **you are being placed on Leave Without Pay** with benefits until further notice. You should not report to your school/work location after the April vacation and your school/office will be notified of this change in your status.
>
> If you believe you are receiving this notice in error, please contact DOEVaccineCompliance@schools.nyc.gov.

A copy of this e-mail is attached hereto as Exhibit "C."

31. On April 21, 2022, the UFT demanded that the DOE rescind its letters to these employees and desist its efforts to unilaterally place them on leave-without-pay status, without the benefit of an evidentiary hearing under Education Law § 3020-a. A copy of the UFT's April 21, 2022, letter is attached hereto as Exhibit "F."

32. On April 22, 2022, the DOE responded to the UFT's demand, setting forth its position that it placed the employees on leave without pay, with benefits, because it received information from an independent law-enforcement agency that their proof of vaccination was fraudulent and that, therefore, the employees were not in compliance with the DOE Vaccine Mandate, which is a condition of employment. The DOE stated that it "cannot permit unvaccinated employees, absent an exemption or accommodation, to perform work for DOE" and further took the position that "[t]hese employees' placement on LWOP does not constitute discipline and is not related to misconduct—rather, the placement is related to the employees' eligibility status—and therefore does not implicate disciplinary procedures." A copy of the DOE's April 22, 2022, letter is attached hereto as Exhibit "G."

33. By letter dated May 3, 2022, UFT requested that the Arbitrator assert jurisdiction over this matter. Specifically, the UFT cited to the portion of the First Award stating that, "[s]hould either party have reason to believe the process set forth, herein, is not being implemented in good

faith, it may bring a claim directly to [Scheinman Arbitration and Mediation Services] for expedited resolution." A copy of the UFT's May 3, 2022, letter is attached hereto as Exhibit "H."

34. The next day, on May 4, 2022, the DOE wrote in opposition to the UFT's request, arguing that it was in full compliance with the First Award. The DOE further argued that its action comported with the applicable due-process procedures, citing for authority the Eastern District of New York's decision in Broecker and this Court's decision in New York City Municipal Labor Commission v. City of New York, Index No. 151169/2022, 2022 N.Y. Misc. LEXIS 1467 (Sup. Ct. N.Y. Cnty. Apr. 21, 2022). Finally, the DOE insisted that the matter was not properly before the Arbitrator. A copy of the DOE's May 4, 2022, letter is attached hereto as Exhibit "I."

35. Thereafter, on May 6, 2022, the UFT submitted another letter in support of its position, to which the DOE responded on May 10, 2022. A copy of the UFT's May 6, 2022, letter is attached hereto as Exhibit "J." A copy of the DOE's May 10, 2022, letter is attached hereto as Exhibit "K."

36. The UFT submitted a final letter in support of its position on May 11, 2022. A copy of the UFT's May 11, 2022, letter is attached hereto as Exhibit "L."

D. The Arbitrator's Second Award

37. On June 27, 2022, the Arbitrator improperly asserted jurisdiction over the instant dispute and determined that the DOE's decision to unilaterally place the approximately eighty-two employees on leave without pay, with benefits, was "inconsistent with the language and underpinnings" of the First Award. See Exhibit "A" at p. 10. Consequently, the Arbitrator found that the DOE had failed to properly implement the due-process protections of the First Award.[1]

[1] The Council of School Supervisors and Administrators ("CSA"), a collective-bargaining unit for principals, assistant principals, supervisors, and education administrators who work for the DOE, brought a petition in New York State Supreme Court on June 21, 2022, to challenge the

38. The Arbitrator then went on to disagree with the two cases cited by the DOE, reasoning that: "Those court decisions confronted an entirely different factual scenario. Unlike this matter, in those cited cases, there was no claim the employees at issue were vaccinated." Id. at p. 11. The Arbitrator further attempted to distinguish Justice Kim's April 2022 decision in Municipal Labor Committee, claiming that she "specifically found the absence of that factual issue in her determination. Here, of course, the employees assert they are in fact vaccinated. This raises a factual issue that is ripe for adjudication pursuant to my [First] Award." Id.

39. The Arbitrator directed the parties to meet by July 5, 2022, "to attempt to agree on a procedure to review an employee's claim they have submitted proof of vaccination" and further explained that, "[i]f the parties are unable to agree on such a procedure, I shall immediately schedule a hearing and issue an expedited Award establishing the proper protocol to provide the employees the appropriate due process procedure." Id. at pp. 11–12.

40. An arbitration award may be vacated if it "violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" United Fed'n of Teachers, Local 2 v. Bd. of Educ., 1 N.Y.3d 72, 79 (N.Y. 2003) (quoting Bd. of Educ. of Arlington Cent. Sch. Dist. v. Arlington Teachers Ass'n, 78 N.Y.2d 33, 37 (N.Y. 1991)). All three grounds are implicated here.

---

placement of four of the approximately eighty-two employees on leave without pay, with benefits. See Council of Sch. Supervisors and Adm'rs v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y., Index No. 155220/2022 (Sup. Ct. N.Y. Cnty. July 1, 2022). Notably, the Arbitrator issued an Impact Arbitration Decision on September 15, 2022, between the DOE and the CSA, which contains nearly identical language to the First Award (and precisely the same jurisdictional language at issue here). A copy of the Impact Arbitration Decision is attached hereto as Exhibit "O." No decision has yet been rendered on CSA's petition.

41. The Arbitrator improperly retained jurisdiction over this dispute. The Arbitrator only retained jurisdiction as to disputes that arose under Section I of the First Award. Indeed, the only language in the First Award that speaks to the Arbitrator's retained jurisdiction is the last sentence of Section I(L), which states that, "[s]hould either party have reason to believe the process set forth, herein, is not being implemented in good faith, it may bring a claim directly to [Scheinman Arbitration and Mediation Services] for expedited resolution." Exhibit "D" at ¶ I(L). "[T]he process set forth herein" is the "administrative process for the review and determination of requests for religious and medical exemptions to the mandatory vaccination policy and accommodation requests where the requested accommodation is the employee not appear at school." Id.

42. It is readily apparent, then, that the Arbitrator retained jurisdiction only with respect to issues arising under Section I of the First Award, which is entirely dedicated to the process applicable to requests for a medical- or religious-based exemption or accommodation from the DOE Vaccine Mandate, which is not at issue here because none of the aforementioned employees is seeking review of a request for an exemption or accommodation. Indeed, Section I(L) does not even mention leave-without-pay status.

43. The Arbitrator did *not* retain jurisdiction with respect to any claim by either the DOE or the UFT that Section II or III of the First Award was not being implemented in good faith. This analysis flows naturally from well-established principles of interpretation. In particular, relying on the standard canon of construction of *expressio unius est exclusio alterius*, which means that "the mention of one thing implies the exclusion of the other," Hardy v. N.Y.C. Health & Hosps. Corp., 164 F.3d 789, 794 (2d Cir. 1999), it can be inferred that the First Award, by including jurisdictional language in Section I(L), concerning the process to be afforded to employees who

request an accommodation or exemption for medical or religious reasons, and omitting such language from the other sections, did not confer upon the Arbitrator residual jurisdiction over issues arising under those other sections.

44. Furthermore, the Second Award contains additional remedies that were not in the First Award—namely, extra-contractual and extra-statutory restrictions on the DOE's ability to place employees on leave without pay, with benefits, who have not requested an exemption or accommodation and are deemed to be not in compliance with the DOE Vaccine Mandate. Accordingly, the Arbitrator has revised the First Award without the DOE's consent and without jurisdictional authority.

45. In sum, because this matter does not involve the process due to employees who seek a medical- or religious-based exemption or accommodation from the DOE Vaccine Mandate, and because the DOE has not agreed to submit the instant dispute to arbitration, the Arbitrator exceeded his power and jurisdiction in issuing the Second Award.

46. In addition, the Arbitrator's reasoning is not supported by decisions of this Court, which have repeatedly and consistently held that "receiving a vaccination against COVID-19 is a condition of employment for NYC DOE employees" and, therefore, "the NYC DOE need not pursue the disciplinary procedures contained in New York Education Law Section 3020-a or Civil Service Law Section 75 prior to terminating NYC DOE employees due to their noncompliance with the Vaccination Mandate." Broecker, 2020 U.S. Dist. LEXIS 25104, at *33.

47. The Arbitrator also misread Justice Kim's decision, which held that:

> The clear purpose of the DOE Order and the City Order is to prevent the spread of a deadly disease that has ravaged New York City and the world. Neither is an attempt to regulate the conduct of City employees in performing their jobs. By contrast, all of the statutes which plaintiffs point to prescribe the procedures for removal of a protected employee charged with delinquencies in the performance of

> his or her job. Since the Terminated Employees' failure to be vaccinated is unrelated to the performance of their job, these statutes simply do not apply.

Mun. Labor Comm., 2022 N.Y. Misc. LEXIS 1467, at *7–8 (alterations, internal quotation marks and citations omitted).

48. Notwithstanding the above-excerpted language, the Arbitrator relied on dicta from Justice Kim's opinion concerning the process due to an employee against whom a disciplinary action is initiated. See id. at *7 n.2 (observing that, "even *assuming that the failure to get vaccinated was a disciplinary issue*, a disciplinary hearing for a tenured City employee is not required when there is 'no factual issue to be determined at a hearing.'" (emphasis added) (citing Moogan v. N.Y. State Dep't of Health, 8 A.D.3d 68, 69 (1st Dep't 2004))). However, as noted above, it is well-settled law that compliance with the DOE Vaccine Mandate is a condition of employment and not a disciplinary issue; as such, no disciplinary hearing was required, regardless of whether the employees at issue claim to be in compliance. That these employees have been allowed to retain their health coverage while they are on leave without pay is a distinction without a difference.

49. Alternatively, even assuming that the employees were entitled to an evidentiary hearing prior to their being placed on leave without pay, with benefits, because of a factual dispute as to whether they are, in fact, in compliance with the DOE Vaccine Mandate, the Arbitrator did not retain jurisdiction under the First Award to determine what the process for resolving this dispute should be, nor was this issue submitted to the Arbitrator for his consideration. In addition, there are other avenues of recourse available to these employees.

50. Similarly, the Arbitrator's claim that, "[a]bsent the [First] Award, the Department was without the authority to remove these employees from the payroll without providing a due process hearing" is incorrect. Exhibit "A" at p. 10. It is clear from the cases cited herein that the

DOE has the authority to place employees on leave without pay (or, for that matter, terminate them) for failing to comply with a condition of employment, including non-compliance with the DOE Vaccine Mandate. Such authority is not traceable to the Arbitrator's First Award. Indeed, the DOE has implemented leave without pay under certain circumstances well before the issuance of the First Award. Rather, such authority is traceable to decisional law, as explained more fully below.

E. Collective Bargaining Agreements

51. The DOE and UFT are parties to collective bargaining agreements ("CBAs") that cover a wide-range of employment-related issues, including compensation, benefits, disciplinary action, and grievance procedures. A copy of the Collective Bargaining Agreement for Teachers ("Teachers CBA") is attached hereto as Exhibit "M."

52. These collective bargaining agreements have been supplemented by the 2018 Memorandum of Agreement ("MOA"), effective February 14, 2019, which covers all collective bargaining agreements between the DOE and the UFT. A copy of the 2018 MOA is attached hereto as Exhibit "N."

53. The MOA has a multi-step grievance and arbitration provision culminating in arbitration as the final step. See Exhibit N at pp. 53–61.

54. This provision expressly limits an arbitrator's authority as follows:

> With respect to grievances which involve the application or interpretation of the provisions of this Agreement the arbitrator shall be without power or authority to make any decision:
>
> 1. Contrary to, or inconsistent with, or modifying or varying in any way, the terms of this Agreement or of applicable law or rules and regulations having the force and effect of law;
>
> 2. Involving Board discretion or Board policy under the provisions of this Agreement, under Board by-laws, or under applicable law, except that the arbitrator

> may decide in a particular case that such policy was disregarded or that the attempted application of any such term of this Agreement was so discriminatory, arbitrary or capricious as to constitute an abuse of discretion, namely whether the challenged judgment was based upon facts which justifiably could lead to the conclusion as opposed to merely capricious or whimsical preferences or the absence of supporting factual reasons.
>
> 3. Limiting or interfering in any way the powers, duties and responsibilities of the Board under its by-laws, applicable law, and rules and regulations having the force and effect of law.
>
> With respect to grievances which involve the application or interpretation of the provisions of this Agreement the decision of the arbitrator, if made in accordance with his/her or her jurisdiction and authority under this Agreement, will be accepted as final by the parties to the dispute and both will abide by it.

Id. at p. 59.

55. The Teachers CBA defines a "grievance" as follows:

> A "grievance" shall mean a complaint by an employee in the bargaining unit (1) that there has been as to him/her a violation, misinterpretation or inequitable application of any of the provisions of this Agreement or (2) that he/she has been treated unfairly or inequitably by reason of any act or condition which is contrary to established policy or practice governing or affecting employees, except that the term "grievance" shall not apply to any matter as to which (1) a method of review is prescribed by law, or by any rule or regulation of the State Commissioner of Education having the force and effect of law, or by any bylaw of the Board of Education or (2) the Board of Education is without authority to act.

See Exhibit "M" at p. 167. The other CBAs contain substantively the same definition of a grievance.

56. Pursuant to Article 27 of the Teachers CBA:

> A. If any provision of this Agreement is or shall at any time be contrary to law, then such provision shall not be applicable or performed or enforced, except to the extent permitted by law and any substitute action shall be subject to appropriate consultation and negotiation with the Union.
>
> B. In the event that any provision of this Agreement is or shall at any time be contrary to law, all other provisions of this Agreement shall continue in effect.

See id. at p. 191. The other CBAs contain substantively the same language.

57. It is well-settled law that "an arbitrator exceeds his or her authority by granting a benefit not recognized under a governing collective bargaining agreement." Matter of Kocsis v. N.Y. State Div. of Parole, 41 A.D.3d 1017, 1019 (3d Dept. 2007) (citing In re N.Y. State Corr. Officers, 13 A.D.3d 961, 962–63 (3d Dept. 2004)).

58. The instant issue raised by UFT before the Arbitrator is not a grievance, as defined in the CBAs–and, in fact, is omitted from the definition of grievance in that there is a method of review prescribed by law–and not within an arbitrator's authority according to the terms of the CBAs. As such, the Arbitrator exceeded his authority by, in derogation of the CBAs, granting employees who are found to be in non-compliance with a condition of employment the right to an as-of-yet-to-be determined process to challenge this finding prior to their being placed on leave without pay, with benefits.

59. Additionally, the Second Award violated public policy.

60. An arbitration is precluded as a matter of public policy where "public policy considerations, embodied in statute or decisional law, prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator." Matter of City of Troy (Troy Uniformed Firefighters Ass'n, Local 86 IAFF, AFL-CIO), 203 A.D.3d 1523, 1525 (3d Dep't 2022).

61. The DOE's authority to unilaterally place employees on leave without pay for whom the DOE has received information from a law-enforcement agency that they have failed to meet the COVID-19-related eligibility requirements for continued employment with the DOE is established via decisional law, which deems the DOE Vaccine Mandate to be a condition of employment that does not trigger any contractual or statutory disciplinary proceedings or procedures applicable to DOE employees.

62. Nor was there any language in the First Award that restricts the DOE's authority to take action against employees who are not in compliance with the DOE Vaccine Mandate and have not requested an exemption or accommodation therefrom. The First Award recognizes that the DOE would take unilateral action against employees who have failed to comply with the DOE Vaccine Mandate. See Exhibit D at p. 13 (recognizing that leave without pay "may be unilaterally imposed by the DOE"). And, even if there was such restrictive language, for the reasons explained above, the Arbitrator would still not have had the retained jurisdiction to consider the instant dispute between the DOE and the UFT.

63. Stated differently, the DOE's ability to terminate or place non-compliant employees on leave-without-pay status was not negotiated between the parties, but was instead established by decisional law.

64. Under these circumstances, it was not consistent with public policy for the Arbitrator to have interpreted the First Award to create due-process rights that have heretofore not existed and contradict decisional law, and which additionally undermine the DOE's obligation to ensure a safe learning and working environment for its students and staff, respectively.

AS AND FOR A FIRST CAUSE OF ACTION

65. The Arbitrator exceeded his power and jurisdiction in issuing the Second Award.

AS AND FOR A SECOND CAUSE OF ACTION

66. The Second Award violates public policy and should be vacated and annulled.

AS AND FOR A THIRD CAUSE OF ACTION

67. The Second Award is irrational and should be vacated and annulled.

AS AND FOR A FOURTH CAUSE OF ACTION

68. The Arbitrator exceeded his power and jurisdiction when he ordered the DOE to confer with the UFT by July 5, 2022, "to attempt to agree on a procedure to review an employee's claim that they have submitted proof of vaccination." Exhibit "A" at pp. 11–12.

69. No prior application for the relief requested herein has been made

WHEREFORE, Petitioners respectfully request that the Court, pursuant to CPLR §§ 7502(c), 7503(b), and 7511(b)(1)(iii), enter an order: (1) vacating the Opinion and Award issued by Arbitrator Martin F. Scheinman on June 27, 2022, in the arbitration captioned "Board of Education of the City School District of the City of New York and United Federation of Teachers, Local 2, AFT, AFL-CIO, re: Proof of Vaccination," and (2) both preliminarily and permanently staying and enjoining any further proceedings therein.

Dated: New York, New York
July 5, 2022

Respectfully submitted,

/s/
Zachary T. Ellis
Assistant Corporation Counsel

To: Alan M. Klinger
Attorney for Respondent United Federation of Teachers, Local 2, AFT, AFL-CIO
Stroock & Stroock & Lavan, L.L.P.
180 Maiden Lane, 33rd Floor
New York, New York 10038
(212) 806-5818
aklinger@stroock.com

Beth Norton
Attorney for Respondent President of United Federation of Teachers Michael Mulgrew
General Counsel, United Federation of Teachers
52 Broadway, 14th Floor, New York, New York 10004
(212) 701-9420
bnorton@uft.org

VERIFICATION

KAREN SOLIMANDO, an attorney admitted to practice in the State of New York, affirms, pursuant to CPLR Rule 2106, that she is the Director of the Office of Labor Relations for the Board of Education of the City School District of the City of New York, operating as the New York City Department of Education ("DOE"); that she has read the foregoing **VERIFIED PETITION**; that its contents are true to her knowledge; and that the source of her knowledge is information obtained from the books and records for the DOE and/or statements made to her by certain employees or agents of the DOE and/or the City of New York.

Dated: July 7, 2022

KAREN SOLIMANDO, ESQ.

Index No.

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

In the Matter of the Application of

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, operating as the New York City Department of Education, and DAVID C. BANKS, as Chancellor of the New York City Department of Education,

Petitioners,

For an Order and Judgment Pursuant to Article 75 of the Civil Practice Law and Rules,

- against -

UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO, and MICHAEL MULGREW, as President of the United Federation of Teachers,

Respondents.

ORDER TO SHOW CAUSE AND VERIFIED PETITION

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel of the City of New York
Attorney for Petitioners
100 Church Street, Room 2-109(a)
New York, New York 10007

Of Counsel:
Zachary T. Ellis
Assistant Corporation Counsel
(212) 356-0839
zellis@law.nyc.gov

Law Manager No. 2022-038208

Due and timely service is hereby admitted.

New York, New York ..... , 2022

..... Esq.

Attorney for.....