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

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,	Motion Seq. 001 Index No. 451995/2022 Hon. Arlene P. Bluth, J.S.C.
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.	

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER

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Respondents United Federation of Teachers ("UFT") and Michael Mulgrew, as President of the UFT, submit this Memorandum of Law in opposition to Petitioners' Order to Show Cause for a Temporary Restraining Order ("TRO"). Although this brief addresses Petitioner's TRO application, Respondents note that the Verified Petition ("Petition") – which is based on the same erroneous arguments – is meritless as well.

PRELIMINARY STATEMENT

After availing themselves of the arbitral process, Petitioners now seek to vitiate an adverse decision by improperly lodging jurisdictional and public policy arguments.[1] As to the former argument – Petitioners cannot now raise jurisdictional objections after having engaged in the very arbitration they now challenge. As to the latter – public policy exceptions to the general rule that arbitral decisions are not to be disturbed are narrow, and ring especially hollow here. The public health is not at issue, for the award in question does not order these employees back to schools, or even back on payroll; it orders only that a process be implemented to determine the veracity of their submitted proof of vaccination prior to adverse pay determinations. In contrast, the due process rights and livelihoods of 82 pedagogues are at stake.

A party seeking arbitration must only demonstrate "a reasonable relationship between the subject matter of the dispute and the general subject matter of the [Collective Bargaining Agreement ("CBA")]." Matter of Bd. of Educ. of Watertown City Sch. Dist. v. Watertown Educ. Ass'n, 93 N.Y.2d 132, 143 (1999). If a reasonable relationship exists, the merits of the dispute must be left to the arbitrator. See Id.

[1] Petitioners also allege that the award at issue is irrational, but plead no facts or arguments in support of that contention.

In the First Award,[2] Arbitrator Scheinman (1) created the concept of leave without pay ("LWOP") as a mechanism for addressing unvaccinated employees specifically during the Vaccination Mandate implementation process; and (2) explicitly retained jurisdiction over future disagreements stemming from that Award. Thereafter, in the instantly-contested Second Award,[3] he engaged in a distinct and well-reasoned analysis regarding his continuing jurisdiction, reasoning:

> While the Department claims its action is unconnected with the [First] Award, it is the [First] Award itself that created a new leave without pay. Absent the [First] Award, the Department was without the authority to remove these employees from the payroll without providing a due process hearing."

See Second Award at 10.

Moreover, Petitioners have impliedly conceded that the matter falls under the First Award, in that Petitioners invoke the LWOP provisions in the First Award as the basis – albeit a misplaced one – for suspending these employees without pay when Petitioners merely question the veracity of their provided vaccination proof. Indeed, as noted above, Petitioners failed to seek a stay of arbitration or otherwise challenge Arbitrator Scheinman's jurisdiction, and *fully participated* in this second arbitration. The purpose of the second arbitration – of which Petitioners were well-aware – was to determine whether due process protections are implicated when UFT members are summarily placed on LWOP following unspecified and unsubstantiated allegations of falsifying vaccination documentation. Petitioners have therefore conceded that this issue has more than a "reasonable relationship" or nexus with the general subject matter of the CBA; indeed, it falls squarely within it.

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[2] Board of Education of the City School District of the City of New York and United Federation of Teachers (Impact Bargaining), Arbitration Award (Sept. 10, 2021), Petition Ex. D.

[3] Board of Education of the City School District of the City of New York and United Federation of Teacher (Re: Proof of Vaccination), Arbitration Award (June 27, 2022), Petition Ex. A.

Petitioners cannot have it both ways: the First Award cannot provide ostensible authority for Petitioners to place these employees on LWOP, yet simultaneously be inapplicable when DOE's actions – purportedly taken *pursuant to the Award* – are challenged pursuant to the Arbitrator's retained jurisdiction.

While Petitioners suggest otherwise, this grievance ***does not*** implicate the Vaccination Mandate or the health and safety of children. Put directly, it does not challenge the DOE's existing ability to suspend with pay or reassign educators to responsibilities that do not require in-person contact with students, pending charges regarding their alleged conduct. Rather, it seeks to properly apply existing contractual and statutory procedures *to those who submitted proof of vaccination* pursuant to the Mandate and First Award, but whose proof is now questioned by Petitioner on the basis of undisclosed "evidence."

It defies logic that DOE could properly agree to submit its implementation of the Mandate to binding arbitration – producing the very award they now rely upon to place these individuals on LWOP – and then assert that it would be against public policy for an arbitrator to determine whether they have properly applied the language of the First Award. It was lawful for the First Award to be *issued* by an arbitrator; accordingly, it is lawful for it to be *interpreted* by an arbitrator – especially when that arbitrator explicitly retained jurisdiction over that Award and engaged in a subsequent, reasoned analysis regarding that jurisdiction.

More broadly, even presuming Petitioners' argument reaches an actual public policy question, the "public policy" exception to the arbitrability of a dispute is narrow and does not support a categorical exclusion. Only in instances where law or public policy are directly in conflict with the terms of a CBA are those terms precluded by public policy. DOE has identified no such direct conflict here that would prevent it from, for example, suspending the accused

employees ***with pay*** pending a factual hearing to determine whether they actually submitted fraudulent vaccination cards. There is no statute or public policy which places factual determinations regarding alleged fraud, even to do with vaccination, in the sole discretion of Petitioners such that resort to a neutral factfinder is prohibited. To the contrary, there is an entire statutory and contractual structure that specifically applies to alleged and disputed employee misconduct *designed to determine such factual issues*. At bottom, Petitioners' position is that anything to do with vaccinations, even alleged misconduct, is somehow excluded from all existing procedures, thereby rending DOE's fiat as law. That is not the case.

Finally, DOE grasps at straws, alleging that the Second Award is "irrational," yet providing no basis for that assertion. The Second Award contains reasoning consistent with the First Award (which DOE relies on for myriad employment decisions) and the law. That DOE laments its failure to challenge Arbitrator Scheinman's jurisdiction prior to engaging in arbitration and receiving an adverse decision does not render the Second Award irrational. Rather, it renders the instant application frivolous.

The TRO should be denied.

ARGUMENT

I. PETITIONERS FAIL TO SATISFY THE STANDARD FOR A TRO

To succeed on their application for a TRO, Petitioners must show: (1) likelihood of success on the merits, (2) immediate and irreparable harm absent injunctive relief, and (3) that the equities balance in Petitioners' favor. See, e.g., Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 N.Y.3d 839, 840 (2005); Doe v. Axelrod, 73 N.Y.2d 748, 750 (1988); see also CPLR 6301 ("A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had."). Injunctive relief

"substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing." See 1234 Broadway LLC v. West Side SRO Law Project, 86 A.D.3d 18, 23 (1st Dep't 2011) (citing Margolies v. Encounter, Inc., 42 N.Y.2d 475, 479 (1977)); Free Country Ltd v. Drennen, 235 F. Supp. 3d 559 (S.D.N.Y. 2016) (applying New York law, and noting that the standard for a TRO is essentially identical to that for a preliminary injunction). Importantly, "[c]onclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction." See 1234 Broadway, 86 A.D.3d at 23-24 (holding that motion court erred in granting injunctive relief absent a hearing, in light of questions of fact regarding actual risk of harm).

As explained in greater detail, infra, (1) Petitioners have waived any challenge to Arbitrator Scheinman's jurisdiction; (2) the Second Award does not fall into any category of Article 75 vacatur grounds; and (3) Petitioners have manufactured any purported harms.

Pivotally, despite more than six weeks between the final submission to Arbitrator Scheinman and the issuance of the Second Award, Petitioners *never sought a stay challenging* Arbitrator's Scheinman's jurisdiction or the arbitrability of the matter. Accordingly, their failure to abide by the Second Award's July 5 deadline is a self-inflicted harm. Moreover, public health is not at issue. Petitioners allege no requirement that DOE place these employees in physical classrooms or in DOE facilities with students. DOE may reassign them to perform duties virtually, or suspend them with pay and order them to stay home. Thus, invocation of the public health and concern for students is an attempt to distract from the real issue.

Finally, the balance of the equities tips decidedly in favor of the 82 employees who have been illegally removed from payroll for two months, and who – per Petitioners – will remain so indefinitely. Injunctive relief should not issue.

II. AS A THRESHOLD MATTER, PETITIONERS HAVE WAIVED ANY OBJECTION TO ARBITRAL JURISDICTION

Petitioners' participation in the arbitration resulting in the Second Award, and Petitioners' failure to move to stay that arbitration on jurisdictional grounds, waives any ability to challenge Arbitrator Scheinman's jurisdiction now. United Federation of Teachers, Local 2, AFT, AFL-CIO v. Bd. of Educ. of City Sch. Dist. of City of New York, 1 N.Y.3d 72, 79 (2003). As stated by the Court of Appeals:

> Because arbitrability is a threshold question going to the arbitrator's power to resolve the dispute, a party can seek judicial intervention to determine whether the dispute is arbitrable before consenting to arbitration. Moreover, the CPLR requires that in order to raise the "did-they-agree-to-arbitrate" prong of arbitrability in a motion to vacate, a party must move to stay before participating in arbitration (compare CPLR 7511[b][1] with CPLR 7511[b][2]). Of course, a party may choose not to move to stay arbitration for a variety of legitimate economic or tactical reasons. ***But with forbearance comes risk: a party that participates in the arbitration may not later seek to vacate the award by claiming it never agreed to arbitrate the dispute in the first place*** (*see Rochester City School Dist. v. Rochester Teachers Assn.*, 41 N.Y.2d 578, 583 [1977]).

See id. (emphasis added). See also Allstate Ins. Co. v. New York Petroleum Ass'n Compensation Trust, 104 A.D.3d 682, 682 (2d Dep't 2013) (affirming denial of vacatur, and noting "that since the petitioner failed to apply for a stay of arbitration prior to arbitration, the petitioner waived its contention that the arbitrator exceeded its jurisdiction in making the award."); DeMartino v. New York City Dept. of Transp., 67 A.D.3d 479 (1st Dep't 2009) (holding that City department waived claims that the arbitrator lacked jurisdiction to decide a dispute over a terminated highway worker by proceeding to arbitration without moving for stay).

Petitioners submitted themselves to Arbitrator Scheinman's jurisdiction, and cannot challenge it *post facto* because they are disappointed with his decision.

III. PETITIONERS' ARGUMENTS ARE MERITLESS AND LACK ANY LIKELIHOOD OF SUCCESS

A. Petitioners Cannot Satisfy the Article 75 Vacatur Standard

Courts are loathe to vacate arbitration awards, and may only do so if the award violates a strong public policy, is irrational, or clearly exceeds the specifically enumerated limitations on an arbitrator's power. See, e.g., New York City Transit Auth. v. Transport Workers' Union of America, Local 100, AFL-CIO, 6 N.Y.3d 332, 336 (2005) ("Courts may vacate an arbitrator's award only on the grounds stated in CPLR 7511(b)"); United Federation of Teachers, 1 N.Y.3d at 82-83 (refusing to vacate an award concerning teacher qualifications on public policy grounds, and deferring to arbitrator's finding that the dispute fell within the scope of the applicable CBA); New York State Correctional Officers and Police Benev. Ass'n, Inc. v. State, 94 N.Y.2d 321, 328 (1999) (arbitral reinstatement of correctional employee who flew Nazi flag did not fall under public policy exception to upholding award, and State's invocation of Corrections Law provision concerning security risks to prisons did not warrant "reject[ing] the specific factual findings made by the arbitrator"); City of Long Beach v. Long Beach Professional Firefighters Ass'n, 143 A.D.3d 710, 710 (2d Dep't 2016) ("Judicial review of an arbitrator's award is extremely limited" (citations omitted)).

Outside of these narrowly circumscribed exceptions, courts may not review arbitral decisions, even where an arbitrator has made an error of law or fact. See Eastman Assocs., Inc. v. Juan Ortoo Holdings, Ltd., 90 A.D.3d 1284, 1284-85 (3d Dep't 2011) (refusing to vacate award on grounds of irrationality and bias). Furthermore, "[a]n arbitration award may be vacated on public policy grounds only where it is clear on its face that public policy precludes its enforcement. That is not the case here." Jaidan Industries, Inc. v. M.A. Angeliades, Inc., 97

N.Y.2d 659, 661 (2001) (award regarding window design, implicating statute regarding unlicensed practice of engineering or architecture, did not necessarily violate public policy).

Provided an arbitrator's interpretation of a CBA is not completely irrational, it falls beyond a court's power of review. See Monroe Cnty. Deputy Sheriff's Ass'n, Inc., 155 A.D.3d 1616, 1617 (4th Dep't 2017) (Arbitrator did not exceed enumerated limitation on power in fashioning award directing county and county sheriff to provide qualified retirees and future retirees from county sheriff's office with same health insurance as they provided to active employees, pursuant to CBA).

United Federation of Teachers, 1 N.Y.3d 72, is particularly instructive. There, UFT sought to confirm an award against DOE, ruling that an employee had been arbitrarily denied a position for which she was the most qualified. DOE argued (1) that the parties had not agreed to arbitrate disputes regarding this specific employment program; and (2) that the award ran afoul of public policy and other enumerated vacatur grounds under Article 75. The Court of Appeals disagreed on both counts. With regard to arbitrability, the court held that "by failing to move to stay and participating in the arbitration, the Board waived its right to seek vacatur of the award on the basis that the parties did not agree to arbitrate disputes arising out of [this employment project]." See id. at 78. With regard to DOE's second argument, the Court noted that the public policy exception is narrow, and "judicial restraint . . . is particularly appropriate in arbitrations pursuant to public employment [CBAs]." See id. at 80. Furthermore,

> the Board argues that this award should be vacated because public policy prohibits it from bargaining away its vested responsibility to determine if a candidate is qualified for a teaching position. **We have never held, however, that an award violates public policy if it affects teacher qualifications. Moreover, even if we had, this 'policy' is not triggered by the facts here, as the award did not force the Board to hire or select a nonqualified candidate for a teaching position.**

See id. at 80-81 (emphasis added; internal citations omitted). The same logic applies here: (1) Petitioners failed to move to stay proceedings on arbitrability grounds; and (2) the public policy exception is narrow and inapplicable here, as nothing in the Second Award forces Petitioners to run afoul of the Mandate or any law.

The Court of Appeals also disagreed with DOE's contention (and the First Department's below ruling) that the arbitrator exceed the scope of her authority under the CBA, reasoning:

> It is not for the courts to interpret the substantive conditions of the contract or to determine the merits of the dispute. . . . The arbitrator determined that the dispute fell within the scope of article twenty of the CBA. She found that the principal's decisionmaking process was arbitrary and capricious. These interpretations and factual findings appear highly debatable on this record; however, whether we agree with the arbitrator is beside the point. **Further, the Board may not revive what is, in actuality, a challenge to arbitrability in another guise**.

See id. at 82-83 (emphasis added; citations omitted).

Petitioners cannot satisfy any of the Article 75 factors, and the Second Award should stand.

B. Notwithstanding the Fact that Petitioners Have Waived Jurisdictional Arguments, Arbitrator Scheinman Has Jurisdiction to Issue the Second Award

Arbitrator Scheinman, interpreting the UFT CBA as modified by the First Award, found that he had jurisdiction over the issue of summary LWOP for employees accused of falsifying vaccination records. See Petition Ex. A at 10. Regardless, where – as here – a CBA's arbitration clause is broad in scope, the arbitrator may exercise commensurately broad powers. See In re National Coverage Corp. (Kulesh), 202 A.D.2d 368, 368 (1st Dep't 1994) ("The arbitrator did not exceed his authority, as limited by a provision of the arbitration clause forbidding him from modifying the parties' contract, in ordering termination of the contract on the ground of respondent's misconduct, although the contract was silent on the subject of termination for cause.

Such a limitation in a broad arbitration clause does not prevent the arbitrator from fashioning a just remedy not provided for in the contract"); Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 308-309 (1984) ("Nor will an arbitration award be vacated on 'the mere possibility' that it violates an express limitation on the arbitrator's power.") (citations omitted).

Indeed, there is a "reasonable relationship" between the subject matter of this dispute and the general subject matter of the parties' CBA, which incorporates the First Award. The CBA itself contains a broad arbitration clause. Accordingly, a party seeking arbitration must only demonstrate "a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA." Watertown, 93 N.Y.2d at 143. If a reasonable relationship exists, the merits of the dispute must be left to the arbitrator. Id.

Reaffirming earlier decisions, the Watertown framework asks two questions: (1) *can* the parties agree to arbitrate the issue; and (2) *did* the parties agree to arbitrate the issue. Parties may arbitrate unless there is a statutory, constitutional or public policy prohibition against arbitration of the issue. Matter of City of Johnstown v. Johnstown Police Benevolent Ass'n, 99 N.Y.2d 273, 278 (2002) (citing Watertown, 93 N.Y.2d at 143).

Under a broad arbitration clause, what matters only is the existence of a "reasonable relationship": the *merits* of a grievance are not a court's concern. As long as the subject matter is arbitrable, the fact that one party has a strong case does not affect the court's role. See Watertown, 93 N.Y.2d at 142-43; see also Matter of Union-Endicott Cent. Sch. Dist. (Union-Endicott Maintenance Workers), 85 A.D.3d 1432, 1435 (3d Dep't 2011) (citing Matter of Bd. of Educ. of Deer Park Union Free Sch. Dist. v. Deer Park Teachers Ass'n., 50 N.Y.2d 1011, 1012 (1980)) ("The fact that the substantive clauses of the contract might not support the grievances put forth by the union is irrelevant on the threshold question of arbitrability. It is for the

arbitrator, and not the courts, to resolve any uncertainty concerning the substantive rights and obligations of the parties"). Without "clear exclusionary language," a broad arbitration clause covers all disputes arising under the contract. Matter of Alden Cent. Sch. Dist. v. Watson, 56 A.D.2d 713, 713-714 (4th Dep't 1977). Interpretation of the terms of the CBA is reserved for the arbitrator even where one party argues that statutory or regulatory provisions in place at the time of the agreement would have rendered the agreement unlawful, which is not the case here. See City of Johnstown, 99 N.Y.2d at 276-80 (holding that whether the parties agreed to a CBA term concerning retirement calculations which was, at the time of agreement, unlawful still constitutes contractual interpretation and is thus arbitrable).

Here, the grievance clause in the UFT CBA is undeniably broad. Under Article 22 of the CBA, the term "grievance" is defined as "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[.]" See Petition Ex. M at 167.

This language is similar to other contractual language treated as "broad" under the Watertown standard. For example, in Matter of Tioga Central Sch. Dist. v. Tioga Teachers Ass'n, the CBA at issue defined a grievance as "…any alleged violation of this agreement or any dispute with respect to its meaning or application." The court treated the provision as a typical example of a "broad" arbitration clause. See No. 45659, 2015 WL 5728246, at *3 (Sup. Ct. Tioga Cnty. 2015) (citing Windsor Cent. Sch. Dist. v. Windsor Teachers Ass'n, 306 A.D.2d 669 (3d Dept 2003); Johnson City Prof. Fire Fighters v. Village of Johnson City, 75 A.D.3d 805 (3d Dep't 2010)).

Petitioners contend that "the Arbitrator has revised the First Award without DOE's consent and without jurisdictional authority[,]" Petition ¶44, but that mischaracterizes the CBA (which incorporates the First Award) and the law. It is of no import that the First Award and the CBA's arbitration provisions do not explicitly account for the substantive issues underlying the Second Award. Indeed, the lack of such language "is irrelevant on the threshold question of arbitrability. It is for the arbitrator, and not the courts, to resolve any uncertainty concerning the substantive rights and obligations of the parties." See Matter of Union-Endicott Cent. Sch. Dist., 85 A.D.3d at 1435.

Furthermore, Petitioners' assertion that the instant dispute is "prescribed by law," and therefore falls outside this definition, is a smokescreen. There is no express contractual prohibition on arbitration regarding policies implementing a public health order, and such an express exclusion is generally required where – as here – the contract contains a broad arbitration clause. See Matter of Alden Cent. Sch. Dist, 56 A.D.2d at 713-14. Additionally, nothing in the Second Award is contrary to law or the Vaccination Mandate. The instant employees have – pursuant to the Mandate and the First Award – *submitted proof of vaccination*, the veracity of which DOE now questions. Yet, the First Award does not provide for LWOP in the event of Petitioners' conclusory accusations of fraud. Accordingly, the Second Award holds only that DOE may not summarily place these employees on leave *without pay* until such time as the veracity of DOE's accusations is sorted through due process.

The Second Award goes on to provide a period of time for the parties to discuss, and potentially voluntarily agree on, some form of expedited process to make at least preliminary factual determinations regarding vaccination status that would support either return to pay status or suspension without pay. Barring some agreement, the arbitrator will further rule. Thus, per

the Second Award, the DOE will (at most) ultimately need to pay these employees pending due process – and even *that* has yet to occur. No one is forcing DOE to return these employees to schools. Suspension *with pay* pending resolution of alleged misconduct is the norm for UFT-represented DOE employees. It is DOE's indefinite suspension of these employees without pay that is unusual and contrary to established policy and practice.

Moreover, DOE's argument that the instant issue is non-arbitral is belied by the fact that they arbitrated these related issues *twice*.

Although Petitioners harp on litigation concerning termination of *unquestionably unvaccinated* employees, those cases are inapposite. As recognized by Arbitrator Scheinman: "[t]hose 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." See Petition Ex. A at 11.

Finally, while Petitioners attempt to limit the First Award's explicit jurisdictional retention to issues concerning medical and religious accommodation, the specific language relied upon is, at best, ambiguous. The First Award states:

> 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.**

See Petition Ex. D. at 13 (emphasis added). The emphasized section in no way limits arbitral jurisdiction specifically to the religious and medical exemption issues.

Regardless, Petitioners admit that the First Award is incorporated into the CBA, and thus all of the Award falls under the ambit of the CBA's broad arbitration clause. At most, the issue here reduces to a choice of arbitrator under the CBA – which Petitioners have waived by participating in the now-contested arbitration and failing to seek a stay of same.

C. Petitioners Misrepresent the Initial Award and "Decisional Law" to Fabricate a "Public Policy" Preclusion to an Arbitration in Which They Voluntarily Engaged

Public policy constitutes a "narrow exception to the otherwise broad power of parties to agree to arbitrate all of the disputes arising out of their juridical relationships." See New York City Transit Auth. v. Transp. Workers Union of Am., 99 N.Y.2d 1, 6-7 (2002). "Judicial restraint under the public policy exception is particularly appropriate in arbitrations pursuant to public employment [CBAs]." See id. at 7. For a court to find a public policy exception, it "must be able to examine an arbitration agreement or an award on its face…and conclude that public policy precludes its enforcement." See id.

Here, Petitioners argue the logical inconsistency that the First Award – produced through arbitration – is incorporated into the CBA, yet arbitration of related questions would be against public policy. Petitioners voluntarily agreed with UFT and other unions to binding interest arbitration to determine the pay and personnel policies associated with implementation of the Mandate. In UFT's case, those policies took the form of an arbitration award modifying the existing CBA. To now say that an arbitrator's interpretation of this very same award – and its impact on the parties' CBA – would be contrary to public policy is absurd. Unless Petitioners mean to argue that the very arbitration award they agreed to and rely upon in previously terminating UFT's members or placing certain undisputedly unvaccinated members on LWOP is illegal, there is no conflict with law or public policy that would place implementation of the Mandate outside the scope of arbitration.

Petitioners cannot both rely upon the First Award for its authority to place these employees on LWOP summarily, and at the same time claim that arbitrating anything about the Mandate is contrary to public policy. If public policy was not violated when the arbitrator created the First Award implementing personnel policies relating to the Mandate, a narrower inquiry interpreting the Award's precise boundaries and effect on pre-existing contractual provisions cannot violate public policy.

Moreover, Petitioners egregiously misrepresent Mandate-related caselaw in hopes of misleading this Court regarding what Petitioners call "decisional precedent." DOE attempts to conflate decisions concerning vaccination as a condition of employment in the context of *unquestionably unvaccinated* employees, with the instant dispute – which concerns employees whose submitted proof of vaccination is merely *questioned*. Accordingly, those decisions are inapposite and DOE's reliance thereon is misplaced. See, e.g., 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); 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); 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); 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); O'Reilly v. Bd. of Educ., Index No. 161040/2021, 2022 N.Y. Misc. LEXIS 246, at * 3 (Sup. Ct. N.Y. Cnty. Jan. 20, 2022).

Arbitrator Scheinman himself saw through this smokescreen, rejecting as inapposite DOE's reliance on precedent concerning LWOP and *unquestionably unvaccinated* employees. See Petition Ex. A at 11 ("Unlike this matter, in those cited cases, there was no claim the employees at issue were vaccinated.").

Likewise, Petitioners misrepresent both caselaw and the First Award in stating that their "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." See Petition ¶ 61.

This is false. **There is no legal decision or provision in the First Award allowing Petitioners to place employees, who have submitted proof of vaccination, on LWOP based on the subsequent, unconfirmed suspicion of vaccination record falsification.** That law or arbitral ruling does not exist.[4]

Petitioners' logic on this point is circular. Essentially, because Petitioners deem the instant employees unvaccinated – despite the lack of any produced evidence or a hearing on that score – they contend that those employees fall into the category of *unquestionably unvaccinated* who may be placed on LWOP under the First Award. Yet, neither the Mandate, the First Award, nor the law permit DOE to appoint itself judge and jury with regard to the factual question of whether these employees are, in fact, unvaccinated.

Moreover, Petitioners' claim that this matter is unrelated to misconduct, Petition ¶¶46, 48, 61-62, despite being investigated by a "law enforcement agency," Petition ¶61, is illogical. UFT's members are accused of falsifying vaccine documentation, an allegation inseparable from

[4] Respondents also note that Petitioners have selectively quoted from other key provisions in the First Award in order to imply that their authority *vis-à-vis* employment decisions is greater than it actually is. Petitioners allege that Section III of that Award "provides that, beginning December 1, 2021, **the DOE shall 'unilaterally separate** employees who have not opted into'" either separation or extended LWOP. See Petition at ¶28 (emphasis added). The text of the First Award is far more limited, and instead states that DOE "shall seek to unilaterally separate" such employees. See Petition Ex. D at 17.

the assertion that their documentation is invalid on the basis of that supposed falsification. DOE does not allege and cannot prove that Petitioners are unvaccinated without proving fraud, and – as fraud is misconduct, see, e.g., Mirenberg v. N.Y.C. Dep't of Educ., 59 Misc.3d 1223(A) (Sup. Ct. N.Y. Cnty. 2018) – it must be substantiated at a hearing prior to suspension without pay. DOE cannot escape this conclusion no matter how much it mischaracterizes the facts or applicable legal standards.

IV. ALLEGATIONS OF IMMINENT IRREPARABLE HARM ARE UNFOUNDED

Petitioners must prove irreparable harm that is "imminent, not remote or speculative." See Golden v. Steam Heat, 216 A.D.2d 440, 442 (2d Dep't 1995) ("The record merely indicates that the plaintiffs are concerned that [Respondent's] presence will have an adverse effect[.]"); see also Tesone v. Hoffman, 84 A.D.3d 1219, 1220-1221 (2d Dep't 2011) (holding that TRO was improper where petitioners had not shown danger of immediate and irreparable injury in the absence of injunctive relief). They have not met this burden.

Rather, Petitioners argue nightmarish hypotheticals regarding the health and safety of students and their families to distract from the true infirmity here – Petitioners' arguments. See Petition ¶64 and Aff. of Emergency ¶7. These harms are entirely within Petitioners' control, as Petitioners can transfer employees into positions without in-person student interaction, or suspension *with* pay. The Second Award did not order or threaten the return of any employee to a school.

Nothing in the record suggests that the employees at issue would attempt to enter Petitioners' facilities or come into physical contact with students or Petitioners' employees if they were instructed against such actions while on payroll. See White v. F.F. Thompson Health System, Inc., 75 A.D.3d 1075, 1077 (4th Dep't 2010) (injunction inappropriate where there was "no indication in the record" that health aides would refuse to comply with senior living

facility's rules); Elghanayan v. Iannucci, 145 A.D.2d 345, 346 (1st Dep't 1988) ("From this record it does not appear that defendant [ ] intends to proceed in a manner other than [ ] good-faith"); Gill v. Mallory, 274 A.D. 84, 87 (1st Dep't 1948) ("It does not appear that defendants acted in bad faith (if that were to be the test), with sufficient certainty to warrant the granting of a temporary injunction").

Moreover, Petitioners express fear of running afoul of the July 5 deadline in the Second Award (despite taking a week to file the instant "emergency" application). However, Petitioners could have inquired regarding an extension of that deadline. They did not.

Therefore, these "harms" should be disregarded.

V. THE EQUITIES DO NOT FAVOR PETITIONERS

While Petitioners raise the specter of endangered children and the spread of COVID, the Second Award contains no requirement that Petitioners place these employees in classrooms. Rather, the Award only requires that "[t]he parties shall meet within seven (7) calendar days of the date of this Award to attempt to agree on a procedure to review an employee's claim they have submitted proof of vaccination." See Petition Ex. A at 11-12. If the parties cannot agree, then Arbitrator Scheinman "shall immediately schedule a hearing and issue an expedited Award establishing the proper protocol to provide the employees the appropriate due process procedure." See id. at 12.

Thus, Petitioners may reassign these employees to other facilities without students present or have them perform duties virtually, or suspend them *with pay* and order them to stay home, eliminating the harms Petitioners identified. Without these harms, Petitioners are left with the complaint that they must pay employees who are suspected of misconduct during the pendency of an investigation and any subsequent disciplinary process. Suspension *with* pay is the normal practice under state law and the CBA, and is thus no burden at all for Petitioners.

Conversely, these employees suffer a deprivation of their constitutionally protected right to employment and wages, along with mounting economic and reputational harms, which are exacerbated by the fact that Petitioners have informed them that they cannot seek other temporary or part-time employment, lest they lose their remaining benefits.

CONCLUSION

For the reasons set forth herein, Respondents respectfully request that the Court deny Petitioners' application for a temporary restraining order, and grant such other and further relief as the Court may deem appropriate.

Dated: New York, New York
July 7, 2022

Respectfully submitted,

/s/ DINA KOLKER

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WORD COUNT CERTIFICATION

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Date: New York, New York
July 7, 2022

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