To Be Argued By:
Jimmy F. Wagner
(*Time Requested*: 30 Minutes)

APL-2023-00079, APL-2023-00080

First Department Docket Nos. 2022-00684, 2022-00949, 2022-01398, 2022-01703, 2022-01699, 2022-01700, 2022-01701, 2022-01702
New York County Index Nos. 161040/2021, 160017/2021, 160353/2021, 161076/2021, 160787/2021, 160821/2021, 160725/2021, 160829/2021

Court of Appeals of the State of New York

Christine O'Reilly,

Petitioner-Appellant,

-against-

The Board of Education of the City School District of the City of New York, Community School District 24 of the Board of Education of the City of New York,

Respondents-Respondents.

Lucia Jennifer Lanzer,

Petitioner-Appellant,

-against-

The Board of Education of the City School District of the City of New York, Community School District 28 of the Board of Education of the City of New York,

Respondents-Respondents.

Ingrid Romero,

Petitioner-Appellant,

-against-

The Board of Education of the City School District of the City of New York, Community School District 24 of the Board of Education of the City of New York,

Respondents-Respondents.

(Continuation of caption appears on reverse)

BRIEF FOR PETITIONERS-APPELLANTS

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Dated Completed: July 19, 2023

Elizabeth Loiacono,

Petitioner-Appellant,

-against-

The Board of Education of the City School District of the City of New York, Community School District 75 of the Board of Education of the City of New York,

Respondents-Respondents.

Athena Clarke,

Petitioner-Appellant,

-against-

The Board of Education of the City School District of the City of New York, Community School District 22 of the Board of Education of the City of New York,

Respondents-Respondents.

Crystal Salas,

Petitioner-Appellant,

-against-

The Board of Education of the City School District of the City of New York, Community School District 75 of the Board of Education of the City of New York,

Respondents-Respondents.

Rachel Maniscalco,

Petitioner-Appellant,

-against-

The Board of Education of the City School District of the City of New York, Community School District 31 of the Board of Education of the City of New York,

Respondents-Respondents.

Joan Giammarino,

Petitioner-Appellant,

-against-

The Board of Education of the City School District of the City of New York, Community School District 20 of the Board of Education of the City of New York,

Respondents-Respondents.

STATEMENT OF RELATED LITIGATION

Pursuant to Rule 500.13(a) of the Rules of Practice of the Court of Appeals of the State of New York, Appellants state that, as of the date of the completion of this Brief, the following cases against Respondents the for the same relief are currently pending in the lower courts:

Hogue v. Board of Education – New York County, 159968/2021
Gonzalez v. Board of Education – Second Department, 2022-10060
Schneider v. Board of Education – Second Department, 2022-04595

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QUESTIONS PRESENTED ON APPEAL

1. Can the Respondents impose a post-hire condition/qualification of employment that would bypass Appellants' statutory due process rights under State Education Law?

Answer: No.

1a. Can an Impasse Arbitration Award impose a post-hire condition/qualification of employment that would bypass Appellants' statutory due process rights under State Education Law?

Answer: No.

1b. Can the Respondents create a post-hire condition/qualification of employment that is not expressly stated that would permit the Respondents to bypass Appellants' statutory due process rights under State Education Law?

Answer: No.

2. Was it lawful for Respondents to remove Appellants from a term of teaching in October of 2021, without any due process?

Answer: No.

3. Did the Respondents fail to perform a duty required by law and the Collective Bargaining Agreement by placing Appellants in an unpaid leave status without first providing notice and a hearing?

Answer: Yes.

4. Should an employer be permitted to deny the Appellants their statutory due process rights because the employer predetermined there will be no questions of facts at the hearing?

Answer: No.

5. Did the arbitrator exceed his power when he rendered a decision that was inconsistent with, modified, or varied from the limitations found in the Collective Bargaining Agreement, as related to State Education Law?

Answer: Yes.

5a. Did the arbitrator render a constitutionally suspect award that violated public policy and State Education Law by changing the definition of discipline, and not considering the due process protections and issues, as required by Sections 3020 and 3020-a of the Education Law?

Answer: Yes.

5b. Does a tenured teacher, whose rights were prejudiced by an arbitration award, have standing to challenge the arbitrator's award in New York State Courts?

Answer: Yes

5c. Is a tenured teacher's employee organization a necessary party to challenge the arbitration award, even though it was the individual teacher's rights that were prejudiced and not the employee organization?

Answer: No.

JURISDICTIONAL STATEMENT

Petitioners-Appellants are comprised of eight individuals who are similarly situated: Christine O'Reilly, Lucia Jennifer Lanzer, Ingrid Romero, Elizabeth Loiacono, Athena Clarke, Crystal Salas, Rachel Maniscalco, and Joan Giammarino, each of whom have brought claims related to the lower court's decision to dismiss their Article 75 and Article 78 hybrid Petitions. In the First Department, the eight individual cases were combined into two quartets of four cases, each quartet being heard before a different panel and resulting in two separate decisions [A. 5, A(c). 5[1]]. The Board of Education of the City School District of the City of New York and Community School Districts 20, 22, 24, 28, 31, & 75[2] hereinafter, all Respondents are collectively referred to as Respondents. In this Court, leave was granted to file one unifying brief but the matters remain as two separate index numbers and are properly before this Court. This Court has jurisdiction to decide this Appeal, filed by Petitioners-Appellants and opposed by Respondents-Appellees, pursuant to Article 55 of the New York Civil Practice Rules, codified as NY CPLR, §§ 5511-5532. Appellants filed their Appeals with the Court of Appeals of New York to reverse the following orders from the Supreme Court, State of New York, County of

[1] All references to the Appendix will be to the O'Reilly Appendix- APL-2023-00079, unless specified as A(c) for Clarke- APL-2023-00080.

[2] The Community School Districts reflect each of the individual school districts where the Appellants are employed. Appellants O'Reilly and Romero are both employed in Community School District 24. Appellants Salas and Loiacono are both employed in School District 75.

New York, granting Respondents' Cross-Motion for Dismissal of their Petition for an Article 75 and Article 78 hearing: O'Reilly, order dated January 20, 2022 [A. 29]; Lanzer, order dated January 21, 2022 [A. 35]; Romero, order dated January 21, 2022 [A. 38]; Loiacono, order dated March 31, 2022 [A. 40], Clarke, order dated March 15, 2022, Salas order dated March 15, 2022, Maniscalco dated March 15, 2022, and Giammarino order dated March 15, 2022 [A(c) 10-19]. These Petitions for an Article 75 and Article 78 proceeding were brought against the Respondents in New York County, which is within the judicial district where the principal office of the Respondents-Appellees is located. Thus, the Supreme Court of New York County had proper venue over the Petitions. The First Appellate Judicial Department issued two decisions upholding the dismissal of the Appellants' Petitions on February 21, 2023 [A. 5-28, A(c). 5-9].

Appellants were granted leave to appeal to the Court of Appeals on May 23, 2023 [A. 3-4, A(c) 3-4]. Appellants filed their preliminary statement within ten (10) days of the First Appellate Judicial Department's aforementioned orders granting Appellants leave to the Court of Appeals.

PRELIMINARY STATEMENT

In the year 2023, it is easy to overlook the historical importance of the 1897 New York City teacher tenure laws, which over time evolved into State Education Law §3020, now colloquially known as the "tenure law". Tenure teacher laws are

the covenant between the citizens of the State of New York and professional educators that ensures the citizens of New York will not permit a tenured teacher to be removed from a term of employment without due process. This Court should uphold New York State's long-standing tradition of safeguarding tenured teachers from arbitrary removal of teachers by the Department of Education ("DOE").

An elementary review of the underlying hybrid Article 75 and 78 Petitions would have the reader believe that these cases are about a handful of tenured teachers who refused to submit to a Department of Health ("DOH") Order that required proof of COVID-19 vaccination to enter the Respondents' buildings. However, this case is not about that DOH Order or the DOE's subsequent enforcement of that Order. The central issue pertains to whether Respondents can ignore the statutory due process tenured teachers are entitled to in the State of New York, by imposing a post-hire and post-tenure condition/qualification of employment. The law requires that tenured teachers receive due process prior to being removed from a term of teaching. The gravamen of Appellants' Appeal and their underlying Petition concerns the Respondents' failure to provide due process prior to their removal from the term of teaching. Historically, the only limited exception to this law was a pre-hire residency requirement, which was acknowledged in writing by the employee. In all other circumstances, the law and this Court have affirmed that the Appellants are entitled to their statutory due process.

To clarify the purpose of this Appeal, it is important to note that Appellants do not contest and are not seeking to overturn the Department of Health ("DOH") Order that required proof of COVID-19 vaccination for entry into the Respondents' buildings or the DOE's conversion of that Order into a "Vaccine Mandate". Instead, Appellants are specifically seeking procedural due process for themselves, with the aim of securing the protections they are entitled to under the law, rather than challenging the validity of the DOH Order itself. There is no reason the DOH Order and the Appellants' tenure rights could not have all existed simultaneously in harmony.

As tenured teachers within the New York City school system, Appellants are granted specific rights and protections under State Education Law §3020 due to their tenure status. This law states, "…no person enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for just cause…" Prior to being removed from a term of teaching, Appellants are entitled to an evidentiary hearing under §3020a. State Education Law §3020 governing the removal of tenured teachers covers a wide variety of applications and actions and is not just limited to discipline.

If Respondents had provided the legally required due process, the Appellants would have had the opportunity to present the reasons for failing to be in compliance with the DOH Order. The reasons for non-compliance vary among the Appellants,

including, but not limited to, illness, technical issues, and limited access to necessary resources. It is important to note that the Petitions were a mandamus to compel the Respondents to provide Appellants with their State Education Law §3020 and §3020-a hearing for the due process for which tenured teachers are legally entitled. The purpose of the §3020-a hearing would have been to explore and establish the underlying factual issues and assess the appropriate outcome, considering the enforcement of a now rescinded DOH work rule for tenured teachers.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Department of Health City Mandate

In the summer of 2021, the City of New York instituted a Department of Health ("DOH") Order that required all employees entering Department of Education ("DOE") buildings to provide proof of vaccination for COVID-19 on or before September 27, 2021 (A. 33). The Respondents chose to enforce this DOH Order in such a way that created a retroactive condition of employment for tenured teachers which granted Respondents the power to terminate tenured teachers without due process, in violation of State Education Law §3020. This DOH Order has since been rescinded on February 9, 2023.[3]

[3] https://www.nyc.gov/assets/dcas/downloads/pdf/guidelines/faq-vaccine-mandate.pdf

Appellants Back to Work September 2021

All Appellants started the 2021 school term and were working in their respective school buildings, except for Appellant Loiacono (Index No. 154875). Before the pandemic, Appellant Loiacono was a special remote teacher for at-home students wherein she was instructing students on a remote platform and never entered DOE buildings prior to the DOH Order. All the Appellants in DOE buildings were wearing masks and testing weekly until October 1, 2021 when they were denied entry into the school building (A.74, A(c) 50) Appellants were denied access to their in-building files and all Appellants were ready, willing and able to work, but for the Respondents excluding them from the school buildings (A.49, 456, 594, 617, A(c) 24, 434, 452, & 589). None of the Appellants were permitted any administrative or due process to question their removal from the school during a term of teaching (A.49, 456, 594, 617, A(c) 25, 434, 453, & 590). The Appellants were only provided with two emails. The first email is a directive from the Respondents to upload proof of vaccination to the Respondents' Self-Service Online Leave Application System ("SOLAS") and did not offer any opportunity for due process (A. 74, A(c)50). The second email reminded Appellants that their only option would be to "become compliant" and return to work. It did not provide Appellants with any due process (A. 76, A(c) 52).

Bargaining Over the DOH Order

The Respondents unilaterally instituted the DOH Order in a manner that violated the law. The employee organization, the United Federation of Teachers ("UFT" or "Union"), which represents the class of employees to which the Appellants belong to (tenured teachers), initiated bargaining with Respondents. The record is absent of any evidence that Appellants are members of the Union. The Respondents and UFT negotiated until they reached a stalemate, and then the UFT filed a declaration of impasse statement with Public Employee Relations Board ("PERB"), wherein it clearly acknowledges that the DOE's policy, enforcing the DOH Order that required proof of vaccination to enter school buildings as a post-hire condition of employment for tenured teachers, violates the due process rights afforded to tenured teachers under the Collective Bargaining Agreement, State Education Law, the Taylor Law, and the Constitution (A. 404-447).

Impasse Arbitration

After unsuccessful bargaining, the Respondents and the UFT then entered into an impasse arbitration subject to the rules and provision of the Taylor Law. The Taylor Law provides the legal process for handling such arbitration as it relates to Collective Bargaining Agreements ("CBA"). The Taylor Law explicitly states the issues which can be arbitrated in an impasse arbitration. The jurisdiction of the arbitration could not have superseded tenure teacher laws because tenure teacher

laws are not a valid subject of collective bargaining. The CBA limited the Respondents and the UFT's jurisdiction so that nothing in the CBA can be construed to deny a tenured teacher their tenure teacher rights (A. 380):

> "Nothing contained herein shall be construed to deny to any employee his/her rights under Section 15 of the New York Civil Rights Law or under the State Education Law or under applicable civil service laws and regulations."

The Respondents, the UFT, and the arbitrator could not enter any arbitration or issue any decision which conflicts with State Education Law because, pursuant to the CBA, nothing shall ever be construed to deny tenured teachers their State Education Law Rights.

The jurisdiction of the arbitrator was further limited by the award itself wherein he states, "My jurisdiction is limited to the issues raised during the impact bargaining and not with regard to the decision to issue the underlying 'Vaccine Only' order." (A.59). The "Vaccine Only" Order appears to be the manner in which the Respondents enforced the DOH's Order. The term of the award was for the limited time frame of the 2021-2022 school year (A. 62). The arbitration award did not deal with the underlying Vaccine Order and was only for the 2021-2022 school year, so this award was as limited as the DOH Order, which has since been rescinded.

The arbitrator's award created a process that expedited the "statutory reasonable accommodation process" (A. 62). The award then created a section called "Separation" wherein employees could receive some benefits if they signed a

waiver[4] (A. 71). The award is absent of the phrase "condition/qualification of employment".

The Respondents have unilaterally enforced the award in such a manner that Appellants were removed from their term of employment, deemed to have involuntarily resigned, and were never provided with due process of any kind, all in violation of the law.

Respondents' Unilateral Enforcement of the Arbitration Award

The Respondents have asserted the erroneous proposition that the COVID-19 vaccine was a newly imposed, post-hire, condition/qualification of employment and that the Impact Arbitration Award sanctioned the creation and enforcement of this purported retroactive condition of employment or qualification of employment. The Respondents have enforced this Arbitration Award against the Appellants with complete disregard to the Appellants' due process rights under State Education Law.

There is nothing in this record or under the law that supports the position that the Appellants lose their tenure teacher rights because of this Arbitration Award. The Impact Arbitration Award does not state it is imposing a new "condition/qualification of employment" on the Appellants. It is clear, the Respondents are attempting to institute a new post-hire condition/qualification of employment that circumvents the Appellants' statutory State Education Law rights

[4] It is undisputed that none of the Appellants ever signed a waiver.

by removing the Appellants without the typical forms of due process provided for tenured teachers in these instances.

Trial Court Litigation

The Appellants initiated a joint Article 75 and Article 78 proceeding to demand the Respondents provide them with their statutory due process hearings under State Education Law §3020 and void the Arbitration Award as to each individual Appellant. The Appellants also challenged being placed on Leave Without Pay (LWOP), in violation of the law and the Collective Bargaining Agreement.[5] The primary focus of the underlying Petitions was under Article 78 for a Mandamus To Compel the Respondents to provide the Appellants with their §3020 hearings and a vacatur of the Arbitration Award as to each of the individual Appellants. All of their claims were dismissed, and each of the decisions issued by the Supreme Court failed to provide a unified or cohesive reasoning as to why these tenured teachers should not receive their due process. It is Appellants' position that they were unjustly removed from their teaching positions without a finding of just cause and in clear violation of the due process rights guaranteed to them by New

[5] The Petitions share identical underlying concepts, with the only differences being the names of the Appellants and the number of years they have worked. They are all united by their status as tenured teachers in the State of New York and they are all protected by the legal provisions outlined in State Education Law §3020.

York State law. The lower court's decision granting Respondents' Motion to Dismiss was therefore a clear error of law.

There is no evidence in the record to support the assertion that the DOH Order, or the subsequent enforcement of that order, created a new condition of employment. The phrase "condition of employment" is absent from all eight records:

- The DOH Order (A. 378) does not mention condition of employment.
- The Arbitration Award the Appellants are looking to vacate is also silent as to the DOH Order being a condition of employment (A.31). The term "condition of employment" is absent from the entire award.
- The email dated October 2, 2021 from Respondents (A. 50), which removes the Appellants from a term of employment, does not mention the phrase "condition of employment." In fact, the email explicitly states, "you are being placed on Leave Without Pay (LWOP) because you are not in compliance with the DOE's COVID-19 Vaccine Mandate."
- The email dated October 13, 2021, from Respondents (A.76), that further extends the Appellants' removal, also does not include the phrase "condition of employment." The email states, "you are being

placed on Leave Without Pay (LWOP) because you are not in compliance with the DOE's COVID-19 Vaccine Mandate."

Eventually, each of the Appellants were placed in an unpaid leave status for insubordination in that they failed to comply by submitting a vaccine card to the Respondents' SOLAS. They never received notice or the right to a hearing to challenge this decision to remove the Appellants from a term of teaching. The Appellants filed a hybrid Article 78/Article 75 Petition before the Supreme Court, to which Respondents filed a Cross-Motion to Dismiss**.** The Supreme Courts all issued their decisions granting Respondents' Cross-Motion to Dismiss on all claims and all for different legal reasoning. This inconsistency by the lower courts was exhibited in their decisions.

The Supreme Court Decisions

The eight individual Petitions resulting in four substantially different decisions, all denied the Appellants their statutorily entitled due process. The four lower court decisions had four different reasons for why the Petitions should be denied. The four different reasons are as follows: 1. The Arbitrator's Award imposed a new condition of employment, so therefore due process does not apply[6]; 2. The Arbitrator's Award said Respondents' actions are not discipline so therefore due

[6] Judge Bluth O'Reilly v. Board of Education (Index No. 161040) (A. 29-34) (This was one of the cases that the federal court in *Broecker v. New York City Dept. of Educ.*, 585 F Supp 3d 299, 318 [ED NY 2022] relied on to establish a condition/qualification of employment.

process rights do not apply[7]; 3. The DOH Order is a condition of employment, so therefore due process does not apply[8]; and 4. The DOH Order which required the vaccine was not discipline, so therefore due process rights do not apply[9].

The lower courts were not unified in their legal reasoning to deny the Appellants' Petitions for an Article 78 Mandamus to Compel. The lower courts were united on the technical aspect of their reasons to deny the Article 75 to vacate the Award. However, full review of the lower court decisions shows no factual consistencies with each other or the law. The record was supplemental with judicial fears of COVID-19 and the truth was lost in the fog of fear.

The First Department's Majority Opinion with One Dissent

The majority opinion in this case stated that the COVID-19 vaccine was a qualification of employment unrelated to job performance, misconduct, or competency and therefore, the State Education Law §3020 does not apply. The critical deficiency in the First Department's determination is its reliance on a non-binding case, *Broecker v. New York City Dept. of Educ.,_585 F Supp 3d 299*, 318 [ED NY 2022] which, in turn, relies on the very cases being appealed in the First

[7] Judge Frank, (Lanzer and Romero) (Index Nos. 160017/2021 and 160353/2021) (A. 35-37 and A. 38-39) *Broecker* also relied on these cases.

[8] Judge Love (Loiacono v. Board of Ed) (Index No. 161076/2021) (A. 40-43) – This case cites *Broecker* for the proposition that is now a condition/qualification of employment.

[9] Judge Satler (Maniscalco, Giammarino, Clarke, and Salas) Decision combined) This case cites *Broecker* for the proposition that is now a condition/qualification of employment.

Department. This situation presents a full circle of flawed logical reasoning wherein the lower courts and the federal court reference each other's jurisprudence for the proposition that the DOH created a post-hire "condition of employment." However, the phrase "condition of employment" is absent from the DOH Order, Arbitration Award, and the record.

This First Department panel came to a conclusion that is not supported by the record, namely, that the UFT and the Respondents followed the policies and procedures of Civil Service Law §209 to enter an arbitration that superseded teacher tenure law. The First Department fails to explain how teacher tenure laws can be collectively bargained away without first providing notice to the tenured teacher and the option to exercise such new procedures as required by the law.

In the enforcement of the Arbitration Award, the Respondents ignored the law to circumvent the due process protections afforded to tenured teachers in the State of New York. The CBA clearly states that nothing in the agreement can be construed to remove a teacher's State Education rights, therefore, the Respondents, the UFT, and the arbitrator have no authority to enter into an arbitration that involves those very state education rights which those parties are not allowed to arbitrate.

This panel also created a new legal requirement to the standing requirements of CPLR 7511(b)(2) requiring the direct participation of the Appellant to make a claim against an Arbitration Award.

The First Department position that only those who participate in an award can show an arbitrator "exceed his power" defies common sense. The Appellants know the Arbitrator exceeded his power because his award is being enforced in a way that conflicts with the due process requirements of State Education teacher tenure law. Tenure teacher law is a subject that is not collectively bargained but established by the State legislature.

The First Department further stated the Appellants are not permitted to challenge the Impact Arbitration Award because the CBA does not permit Petitioner to represent themselves. The lower court is wrong, the record shows the Appellants are permitted to represent themselves. Within the same paragraph of the CBA, it also states that the Respondents and UFT may never negotiate away the Appellants' State Education Law Rights, it also states Appellants keep their rights to appeal and represent themselves in Court (A.80):

> "Nothing contained herein shall be construed to deny to any employee his/her rights under Section 15 of the New York Civil Rights Law or under the State Education Law or under applicable civil service laws and regulations."

The First Department ignores the due process mandates afforded to tenured teachers in the law, when it states (A. 16):

> "Furthermore, due process mandates only notice and some opportunity to respond (*see Matter of Beck-Nichols v Bianco*, 20 NY3d at 559).

Appellants were never given the opportunity to respond to or identify any triable issue of fact because they were never afforded any due process. Appellants were ready, willing, and able to put forth their grievance in a State Education Law §3020. Appellants either complied with the emails or were removed from a term of teaching. Appellants could have presented numerous reasons why they failed to upload their vaccine cards to the SOLAS. Appellants may have been sick with COVID-19 on the submission date or Appellant's computer may have crashed which would have prevented the Appellant from uploading the card. There is a wide body of possible scenarios why a vaccine card was not uploaded to the SOLAS and by denying the Appellants their due process, there is no way for the Court to determine if the termination was a sufficient response to Appellants' failure to upload their vaccine cards.

The Second Opinion from The First Department with No Dissent

The second decision of the First Department is fundamentally flawed like the majority's opinion in the first decision. The Court's improper reliance on *Broecker v. New York City Dept. of Educ.*, 585 F Supp 3d 299, 318 [ED NY 2022] highlights the fatal flaw of the decision's legal foundation, based on improper circular logic. The Appellants are entitled to a *de novo review*. The Appellants have been denied such a review because of the circular logic presented by the reliance on *Broecker v. New York City Dept. of Educ.*, 585 F Supp 3d 299, 318 [ED NY 2022]. This case

relies on the very cases being appealed from, which in turn rely on *Broecker*. As stated earlier, the condition of employment is absent from the record.

The First Department in this case disregards the rationale presented in the record and the decision of the lower court, ultimately arriving at a conclusion that aligns closely with the majority decision. The First Department compounds the error of the majority by erroneously equating residency requirements, which are legally established and ensure due process, with the DOH Order in question, despite the fact that the order has been rescinded. Furthermore, the baseline question of this Appeal is not the validity of the DOH Order but the legal mechanism by which the DOH Order (which has been rescinded) was allowed to supersede a state law that guarantees due process to tenured teachers.

The Dissenting Opinion

The dissenting opinion by Justice Friedman clearly recognizes Appellants' property rights in their tenured teacher status while highlighting the due process delinquency presented by the Respondents' actions. Justice Friedman explains why the law must distinguish between a work rule and a condition/qualification of employment. Justice Friedman correctly states that a new condition/qualification of employment can only be imposed by the legislature as applied to tenured teachers. Therefore, this vaccine mandate cannot be considered a condition of employment. The vaccine mandate must be seen as an ordinary work rule that affords the

Appellants the due process protections of State Education Law §3020-a. Justice Friedman sets forth the law and an unbroken chain of authority from the Court of Appeals laying the foundation of legal due process that should have been provided to the Appellants as tenured teachers. He correctly and completely illuminates the fact that the actions taken by the Respondents constituted an usurpation of the power of the State legislature and the State Education Law §3020. This includes the removal of tenured teachers from their long-term employment without following the procedures mandated by the law.

Justice Friedman recognizes that there is no merit to this position. He also notes the contradictory nature of the majority's position that a tenured teacher would be entitled to a State Educ. Law §3020 hearing if he or she submitted a fraudulent vaccination card, but a teacher accused of no wrongdoing can be removed from a term of teaching in violation of State Education law (A. 25).

Furthermore, Justice Friedman aptly highlights the distinction between a condition of employment that exists at the time of hiring, and agreed to in the employment agreement, versus a work rule that is unilaterally imposed after the teacher is hired and has obtained tenure. Every case cited by the majority stands for the proposition that conditions of employment pertain to employment eligibility requirements that were established at the inception of the teacher's employment by agreement or law. There is no case that supports the proposition that tenured teachers

lose all due process rights based on a post-hire condition of employment. This is particularly significant given that the Respondents acknowledged that the phrase, "condition/qualification of employment" is absent from the record.

A critical point emphasized by Justice Friedman in his dissent is the lack of proper precedent cited to by the majority: "the only precedent to which the majority can turn for support is a nonbinding federal court decision that – ironically - relies on three of the very decisions that are under review of this appeal (*see-Broecker v New York City Dept. of Educ*., 585 F Supp 3d 299, 316-317 [ED NY 2022][in holding that "vaccination is a lawful condition of employment for DOE employees, including, tenured teachers, the federal court cited, *O'Reilly, Lanzer, and Romero* decision of the Supreme Court, New York County, which are not before this Court on appeal])"(A. 23).

The underlying Petitions each sought a Mandamus to Compel the Respondents to provide a due process in accordance with the law, the dissenting Justice Friedman would have granted such a mandamus (A.28).

ARGUMENT

POINT I

RESPONDENTS' POST-HIRE CONDITION/QUALIFICATION OF EMPLOYMENT VIOLATED THE APPELLANTS' STATUTORY DUE PROCESS RIGHTS

Each Appellant is a tenured teacher, and a tenured teacher cannot be summarily removed from a term of teaching without a just cause hearing of charges, pursuant to Education Law §3020-a. *See* Education Law §§2509, 2573, 3012, and §3020.

- "and shall not be removable except for cause after a hearing as provided by section three thousand twenty-a or section three thousand twenty-b of this chapter." N.Y. Educ. Law § 2509
- "shall not be removable except for cause after a hearing as provided by section three thousand twenty-a or section three thousand twenty-b of this chapter" N.Y. Educ. Law § 2573
- "Such persons who have been recommended for tenure and all others employed in the teaching service of the schools of such school district who have served the full probationary period as extended pursuant to this subdivision shall hold their respective positions during good behavior and efficient and competent service, and shall not be removable except for cause after a hearing as provided by section three thousand twenty-a or section three thousand twenty-b of this article. N.Y. Educ. Law § 3012
- No person enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for just cause and in accordance with the procedures specified in section three thousand twenty-a of this article…" N.Y. Educ. Law § 3020

The law protects a tenured employee's constitutional right to due process before being deprived of a property interest:

> A tenured teacher has a protected property interest in her position and a right to retain it subject to being discharged for cause in accordance with the provisions of Education Law § 3020-a *(see, Kinsella v Board of Educ.*,378 F. Supp. 54, 59 [quoting *Perry v Sindermann*, 408 U.S. 593, 601-602]). *Matter Gould v. Board of Educ*, 81 N.Y.2d 446, 451 (N.Y. 1993)

The trial courts denied all of the Appellants a *de novo review* of whether the Respondents could impose a post-hire condition of employment that denied the Appellants their statutory due process rights under the State Education Law. Each lower court has a different incorrect reasoning for denying Appellants their due process rights. Each of those reasons ignore the law and are in stark contrast to the rule of law from this Court. The Court of Appeals has consistently held that tenured teachers are entitled to the greatest protections under the law, and even well-intentioned attempts to bypass the tenure system are prohibited.

> . . .a legislative expression of a firm public policy determination that the interests of the public in the education of our youth can best be served by a system designed to foster academic freedom in our schools and to protect competent teachers from the abuses they might be subjected to if they could be dismissed at the whim of their supervisors. In order to effectuate these convergent purposes, it is necessary to construe the tenure system broadly in favor of the teacher, and to strictly police procedures which might result in the corruption of that system by manipulation of the requirements for tenure. This is not to suggest that the school board in this instance acted with bad faith or from any improper motive. Even "good faith" violations of the tenure system must be forbidden, lest the entire

> edifice crumble from the cumulative effect of numerous well-intentioned exceptions.

Ricca v. Board of Educ, 47 N.Y.2d 385, 391 (N.Y. 1979)

New York's foundational public policy provides strong protections to tenured teachers, and it is contradictory for a locally issued order to override legislatively passed State Education Law. Even if the DOH Order was effectuated with "good intentions", it still cannot deprive the Appellants of their due process rights. Even with mayoral approval, the New York City Council could not have passed a law that conflicts with State Education Law due process requirements, therefore, the Respondents cannot unilaterally implement a policy that supersedes State Education Law.

Finally, the lower courts in these appeals ignore a long line of binding precedent that clearly states a teacher's tenure rights cannot be created or terminated, or otherwise diminished, except by an act of the state legislature:

> This result does not minimize the public policy interests that have prompted this Court to "construe the tenure system broadly in favor of the teacher, and to strictly police procedures which might result in the corruption of that system"…Nor does it undermine this Court's recognition that a tenured teacher has a "protected property interest in [his or] her position" and right to retain that position absent discharge in accordance with Education Law § 3020–a…

Springer v. Bd. of Educ. of the City Sch. Dist. of N.Y., 49 N.E.3d 1189, 1193 (N.Y. 2016) (internal citations omitted).

> We have, of course, previously recognized the importance the Legislature has accorded the status of tenure in the educational

> context as well as its attendant purpose to preserve the process by which tenured educators are to be disciplined and removed against the vagaries of collective bargaining (see *Holt v Board of Educ. of Wetbutuck Cent. School Dist*., 52 NY2d 625, 632 [1981]).

Kilduff v. Rochester City Sch. Dist., 25 N.E.3d 916, 4 (N.Y. 2014).

> A tenured teacher has a protected property interest in her position and a right to retain it subject to being discharged for cause in accordance with the provisions of Education Law § 3020-a..

Matter Gould v. Board of Educ, 81 N.Y.2d 446, 451 (N.Y. 1993).

> Since the Legislature has deemed it necessary to create a detailed system to provide security for teachers, it follows that a school district may not validly increase the requirements for tenure established by the State although it may, of course, provide teachers with greater security than that mandated by statute, at least in the absence of any violation of public policy…

Ricca v. Board of Educ, 47 N.Y.2d 385, 391-92 (N.Y. 1979).

> no act of a board of education could effect a method of bypassing the tenure statute…The "tenure terms", as the court noted, "can be changed by the Legislature but never by a board of education"

Mannix v. Bd. of Ed. of City of New York, 21 N.Y.2d 455, 459–60 (1968).

Despite this long line of precedent, the First Department determined in its decision that this line of precedent does not apply to the issues before the Court. However, that is inaccurate and inexact application of the case precedent from this Court.

In *Mannix,* this Court would not permit the Board of Education to attach additional conditions of employment to an already qualified probationary teacher

whose appointment otherwise would have been permanent. Any additional qualifying standards must be prior to appointment of tenure.

In *Ricca,* this Court would not permit the school district to deny tenure rights and due process to a teacher who was not formally granted tenure. This Court stated the tenure system must be construed broadly in favor of the tenured teacher.

In *Gould,* this Court granted tenure by estoppel to a teacher who incorrectly submitted her resignation, reasoning that a tenured teacher's property rights permit discharge only in strict accordance with Education Law §3020.

In *Kilduff*, this Court upheld a tenure teacher's rights to have the option to select any collectively bargained removal procedures or those afforded to tenured teachers under §3020.

Finally, in *Springer*[10], this Court again affirmed that tenured teachers have a protected property interest in their employment and the right to only be discharged according to §3020.

The cases referenced all deal with due process of tenured teachers, for numerous reasons, including reasons not associated with discipline or misconduct. The Court of Appeals upholds the law in affording tenured teachers their due process

[10] In *Springer*, the tenured teacher had resigned and then started working again but failed to properly follow the Commissioner's rules for resignation. Nonetheless, this Court clearly reasoned tenured teachers have a protected property right to their employment.

rights. The conclusion is a tenured teacher is entitled to due process of State Education Law prior to dismissal from their employment.

Not only does the law hold that the legislature must make affirmative changes to the tenure laws in order for them to be effective, but these changes must also be prospective in nature. *Kaplan v. Bd. of Ed. of Lakeland Cent. Sch. Dist. of Shrub Oak*, 56 A.D.2d 869, 870 (1977) (citing *Steele v. Bd. of Ed. of City of New York*, 40 N.Y.2d 456, 463 (1976)) ("Traditional tenure areas may not be radically restructured by a board of education, except in a prospective manner, and then only with reference to regulations or standards propounded by the Board of Regents or enacted by the Legislature…"):

> While the boundaries of the traditional 'areas' of tenure are not necessarily immutable, the Court of Appeals has made clear that '(r)adical restructuring of tenure areas, compatible with the purpose of the tenure statutes, should not be free of controlling regulations or express standards propounded by the Board of Regents or enacted by the Legislature', which should be 'prospective in effect' The reason is that if Boards of Education were allowed to manipulate the scope of tenure areas on an ad hoc basis, their power to do so 'could * * * become an instrument of retrenchment * * *, enabling them to subvert the purpose of the tenure statutes'…Hence, absent legislative action or prospective rule making by the Board of Regents, the settled, traditional boundaries of tenure areas must be deemed fixed.

McNamara v. Bd. of Ed., City Sch. Dist., City of Rochester, Monroe Cnty., 54 A.D.2d 467, 470–71 (1976).

A. THE IMPASSE ARBITRATION AWARD COULD NOT IMPLEMENT A POST HIRE "QUALIFICATION" OR "CONDITION" OF EMPLOYMENT THAT BYPASSES STATE EDUCATION LAW FOR TENURED TEACHERS

The Impact Arbitration Award (A. 56-73) does not reference or mention at any point the phrase, qualification, or condition of employment. The qualifications and conditions of employment for teachers are government by State Education Law §3001 which is titled "Qualifications of teachers". Notably, Educ. Law §3001 does not include any requirement for a "vaccine," let alone a COVID-19 vaccine. Furthermore, Public Health Law §2164 which governs immunizations in schools has no vaccine requirement for tenured teachers, only for the students. If the legislature intends to impose a "vaccine mandate" as a qualification/condition of employment for New York State teachers, it has the authority to do so. However, the power to impose a post-hoc "qualification/condition of employment" on a tenured teacher in New York State exists only with the legislature. Therefore, because the Respondents could not unilaterally modify the due process tenured teachers are entitled to receive under the law, the Respondents could not modify tenured teacher due process requirements based on an Arbitration Award.

The majority's decision now holds that a local government agency can unilaterally modify the "qualifications" and "conditions" of employment all to the exclusion of pre-existing state law. This ability of the local agency to issue policies

which supersede the law contradicts our fundamental system of government. (A.3, A(c)5).

First, the record is absent of any evidence that Respondents' policy is now a condition of employment or qualification of employment. Justice Friedman's dissent also highlights this lack of evidence (A. 27).

The majority fails to address that New York law definitively sets the "qualification" of all teachers in the State of New York. Therefore, it is without merit for the Courts and the parties to permit a local agency order to modify state law. The law expressly states teacher qualifications which all Appellants meet. However, even assuming arguendo, that a local government order can modify state law so that this mandate now becomes a post-hire "qualification" or condition" of employment, there is an entire body of caselaw dealing with teacher "qualifications". The failure of a teacher to meet a "qualification" entitles a teacher to the due process of §3020.

The historical precedent of this Court demonstrates that even when a tenured teacher is alleged to have violated an employment "qualification," they are still entitled to due process. This principle has been consistently upheld since the inception of tenure laws. In the case of *People ex rel. Murphy v. Maxwell*, 177 N.Y. 494 (1904)[11] it was held that a bylaw of the New York City Board of Education,

[11] This was a straightforward factual issue: whether the teacher, regardless of post-hire marital status, was entitled to her due process rights as a tenured teacher.

which required a female tenured teacher to remain unmarried as a condition of continued employment, could not result in termination without a hearing and charges being brought against her upon her marriage. This decision reaffirms the principle that tenured teachers are entitled to due process, even when faced with alleged violations of employment conditions (*Id*. at 496-497).

In *Mannix v. Bd. of Educ., City of New York*, 21 N.Y.2d 455 (1968) (cited by the Court in *Ricca*, *supra*, 47 N.Y.2d at 392) this Court established that a tenured teacher cannot be removed from their position unless there is cause shown and after a hearing on specific charges. This ruling stands firm even when a school district asserts that the tenured teacher did not meet or maintain a certain qualification or condition of employment.

The *Mannix* Court emphasized the undesirable consequences that would be visited upon the statewide system of teacher tenure if local school boards were permitted to impose such continuing qualifications in derogation of tenure rights, stating:

> It is manifest that if conditions of one sort or another could be attached to a probationary appointment, restrictions could readily be envisaged and imposed by the board which might destroy the basic protection of the teachers' tenure law. [*Id*. at 457]

This Court reiterated this concept in *Winter v. Board of Educ*, 79 N.Y.2d 1 (N.Y. 1992) where the Court determined that a school district could not suspend a tenured teacher without pay for lack of certification. Our Appellants like the tenured

teacher in *Winter,* were all "qualified" pursuant to Education Law §3001 and therefore entitled to §3020 hearings and entitled to pay while the hearing was pending.

Other non-disciplinary "causes" for removing a tenured teachers also fall with the scope of section 3020-a, including mental disability (*see, Fitzpatrick v. Board of Education of Mamaroneck Union Free School District*, 96 A.D.2d 557 (2nd Dept. 1983), *app. den.*, 61 N.Y.2d 607 (1984); and physical disability (*see, Coriou v. Nyquist,* 33 A.D.2d 580 (3rd Dep't 1969), *app. Den.*, 26 N.Y.2d 610 (1970). Certainly, teachers who are mentally or physically ill are not the subject of "discipline" or as that term is commonly understood to connote punishment, whether or not done with punitive intent. Not all hearing results are punishment, so the intent of the Respondents is not relevant. Furthermore, not all §3020 hearing must end with permanent termination the hearing officers has wide range of options. As previously stated, those tenured teachers whose qualifications deal with mental or physical issues clearly are subject to removal but are entitled to the due process protections of 3020-a prior to removal.

Failure to maintain a job qualification has always resulted in a hearing. These hearings were designed to adjudicate a teacher's competence. In *Lynch v. Nyquist*, 41 A.D.2d 363, 365 (3rd Dep't 1973), *aff'd*, 34 N.Y.2d 588 (1974), this Court adopted the opinion that the lack of qualification of certification as "legal

incompetence," and confirming that a tenured teacher cannot be removed for an alleged lack of qualification except pursuant to Education Law §3020-a.

Further, the necessity of a 3020-a hearing also permits a penalty or punishment that is correctly aligned with fairness and justice because sometimes the punishment of termination is not appropriate given the tenured teacher's protected property right. In numerous cases where it is shown that a teacher lacks a job qualification under State Education Law §3001, discharge may not be appropriate. See *Kobylski, supra*, at 37. Misc. 2d 263. Thus, in *Appeal of Bd. of Educ., of the Nanuet Union Free School Dist.*, 21 Ed. Dept. Rep. 482, 484 (1982), the Commissioner of Education imposed a one-year suspension without pay in Education Law §3020-a proceeding where the tenured teacher was charged with lack of certification, stating: "…it may not in all instances be necessary to authorize the termination of the teacher's services." The applicability a §3020 hearing officers' ability to craft a resolution for the Appellants is well-demonstrated. The hearing could have recommended punishments substantially less harsh than termination. Especially considering that the policy at issue, enforcement of a vaccine mandate through the uploading of vaccine cards to Respondents' SOLAS, has now been rescinded by the Respondents.

Therefore, in principle, it is irrelevant whether a tenured teacher is accused of misconduct, incompetence, being unqualified, or failing to adhere to new post-hire

policies, as the fundamental concept remains the same. In each situation, 3020-a is the exclusive procedure governing the removal of a tenured teacher.

B. WHEN RESPONDENTS VIOLATED THE BECK-NICHOLS RESIDENCY RULE, THEY FAILED TO BE ELIGIBLE FOR ANY EXEMPTION WHICH WOULD PERMIT THEM TO BYPASS STATE EDUCATION LAW §3020

Beck-Nichols v. Bianco, 20 N.Y.3d 540 (2013) was the only cited case that dealt with tenured teachers who lose their statutory due process rights under State Education Law §3020. That case dealt with a single carve out exception to §3020 due process rights, namely, a pre-hire residency requirement.

The residency exception to Education Law §3020's due process requirements is properly governed by the Court of Appeals' four-part rule fully elaborated in the *Beck-Nichols* case. This exception only applies when all four parts of the rule are properly met. Only upon meeting all four parts of the rule expressed in the *Beck-Nichols* case will the Court consider a school district's ability to avoid the due process requirements of §3020 for tenured teachers. The First Department did not observe the four-part rule established by *Beck-Nichols,* and for that reason they came to the wrong conclusion in this. When the *Beck-Nichols* is appropriately applied to this record, the Appellants her should be entitle to their due process since the vaccine only mandate does not properly follow all four parts of the *Beck-Nichols* rule.

The first part of the *Beck-Nichols* rule is that any school district policy looking to avoid the statutory due process requirements of §3020 must pre-date the start of

the employment, as "the regulations provide for notifying employees of the residency policy upon initial appointment and promotion." *Beck-Nichols v. Bianco*, 20 N.Y.3d 540, 558 (N.Y. 2013). All of the employees in *Beck-Nichols* case were fully aware of the residency requirement prior to commencing their position in the Niagara Falls school district. The job offer was contingent on the employee making the City of Niagara Falls their permanent home. In our instant case, there is no dispute that the requirement for tenured teachers to provide proof of vaccination to Respondents did not exist when or before they were hired, when they were tenured, and ironically, it also does not exist today. However, Appellants are still without their jobs.

The second rule of the *Beck-Nichols* case is that the policy must exhibit a legitimate purpose for the city. The residency requirement was properly found to promote and encourage city employees to live in the city where they are employed. "A residency policy for municipal workers serves "the legitimate purpose of encouraging city employees to maintain a commitment and involvement with the government which employs them by living within the city [citations omitted]" (*Felix*, 3 N.Y.3d at 505, 788 N.Y.S.2d 631, 821 N.E.2d 935, quoting *Mandelkern v. City of Buffalo*, 64 A.D.2d 279, 281, 409 N.Y.S.2d 881 [4th Dept.1978, Simons, J.])." The city wants the teachers to live within its limits to form a connection to the city that provides them with a livelihood; that is a legitimate purpose. The DOH

Order here states that the policy promotion was to prevent the spread of COVID-19 within the DOE buildings. However, the DOE converted that policy into a "vaccine only" mandate requiring all employees to be vaccinated. The DOE was also requiring remote employees to be vaccinated, which would not serve the stated purpose of the policy. Especially for employees like Appellant Loiacano, who never even taught within DOE buildings[12] even prior to the DOH Order, as she was a remote teacher. Furthermore, the DOE policy itself fails to state how the Respondents can unilaterally enact such a policy to the detriment of the tenured teacher's property rights and deny them due process.

The third rule from *Becks-Nichols* case is that the eligibility requirements must be unambiguous. The Court of Appeals meticulously went through the Niagara Falls residency requirement, noting the word "domicile" was defined and the regulation clearly articulated that the purpose was to make Niagara Falls the permanent home. "The implementing regulations, as noted earlier, define "residency" as "an individual's actual principal domicile at which he or she maintains usual personal and household effects." This definition may be criticized for redundancy or surplusage, but not ambiguity." *Beck-Nichols v. Bianco*, 20 N.Y.3d 540, 558 (N.Y. 2013)." Here the DOH Order is ambiguous and fails to state any

[12] It is important to note that through the last one hundred years of health pandemics, including measles, mumps, and the Spanish flu, teachers have never been required to be vaccinated, under Public Health Law. There still is no vaccination requirement for teachers.

conditions or qualifications of employment. Further, the Respondents' enforcement of the Order as a "vaccine only" mandate is also ambiguous because it fails to state what exactly a "vaccine only" mandate is. The alleged "vaccine only" mandate is not in this record and is referenced, in passing, in the Arbitration Award (A.58). Here everything is ambiguous as the record reflects no reference to conditions, qualifications, work rules or work eligibility. There is nothing in this record that is clear about this DOH Order and the DOE enforcement of that Order, so the Respondents fail the third part of the *Becks-Nichols* rule that requires eligibility requirement to be unambiguous to be afforded the ability to circumvent tenured teacher's due process protections under Education law §3020.

The fourth and final part of the *Beck-Nichols* rule is that only rule requirements that define eligibility for employment do not require §3020 hearing. "Next, we have held that a residency requirement defines eligibility for employment, and so is 'unrelated to job performance, misconduct or competency' (*see Felix,* 3 N.Y.3d at 505, 788 N.Y.S.2d 631, 821 N.E.2d 935; *see also Matter of New York State Off. of Children & Family Servs. v. Lanterman,* 14 N.Y.3d 275, 282, 899 N.Y.S.2d 726, 926 N.E.2d 233 [2010]). " This brings us full circle to the first rule. This DOH Order and DOE enforcement policy did not exist pre-hire, therefore it cannot be considered a job eligibility requirement. If it were a job eligibility requirement, it would have existed at the time of hire, as it did for the teachers in

Beck-Nichols. Since this DOH Order and DOE's subsequent enforcement cannot be considered a job eligibility requirement, it cannot be properly applied to our instant case and permit the Respondents the limited residency requirement exception found in *Beck-Nichols* case. This would remove it from the termination procedures found in State Education Law §3020.

Notwithstanding the previous analysis, the Appellate Division, citing *Beck-Nichols*, has stated "…due process mandates only notice and some opportunity to respond (*see)*." [A. 16][13] for the proposition that *Becks-Nichols*, permits the Respondents to deny Appellants due process. In contrast, however, it should be noted the tenured teachers in the *Beck-Nichols* were afforded some due process (not §3020 due process), including cure periods, hearings, and the ability to appear with counsel at hearings. Our Appellants have been denied all their due process rights including the opportunity to respond to the DOE policy, access to attorneys, and their legally required due process hearings. The Appellants had only two options: either comply with the Respondents' Order or be terminated. That is not due process. In addition, the failure to follow a DOH Order or a DOE mandate should be

[13] The dissenting opinion states "as a matter of New York law, petitioners are entitled to the process specified in Education Law§ 3020-a, it is irrelevant that the manner in which DOE placed them on unpaid leave may have satisfied the less stringent requirements of due process under the federal constitution.

considered insubordination, which clearly translates to misconduct, which would, by operation of the law, automatically trigger the due process requirements of §3020.

A pre-hire condition of employment regarding a residency requirement, as is the case in *Beck-Nichols*, is not analogous to a temporary post-hire DOH Order enforced by the DOE as a "vaccine only" mandate. Appellants either complied with the Order or were removed from a term of teaching, followed by the denial of their pay and their involuntarily resignation (constructive firing). In *Beck-Nichols*, the Appellants were afforded more due process than the Appellants received here, which was none.

Insofar as the Appellate Division relies on *Matter of Felix v New York City Dept. of Citywide Admin Servs.*, 3 NY3d 498,5050[2004], it missed the most important aspect of the case, which was that the law only applied to new employees hired by the City of New York after a certain date:

> "On July 30, 1986, Edward I. Koch, then Mayor of the City of New York, signed into law a bill, sponsored at his request by members of the City Council of New York City, that required all nonuniformed employees in mayoral agencies, hired on or after September 1, 1986, to establish and maintain residence within the five boroughs of New York City as a condition of employment (*see* Transcript of Stenographic Record of Public Hearing on Local Laws [Koch], July 30, 1986, at 1-6, Mayoral Bill Jacket, Local Law No. 40 [1986])."

The employee in *Felix*, was hired seven years after the City of New York signed into law the residency eligibility requirement for NYC employees. All employees who had jobs when the law was signed were grandfathered as an

exception to the residency requirement. First, in our instant fact pattern, there is no law, only the DOE policy which is enforcing the DOH order. In addition, at the time he was hired, the employee in *Felix*, signed a form stating he lived within the city limits (just like the tenured teachers signed a form in *Becks-Nichols*).

Even putting aside those relevant parts of *Felix*, the Appellate divisions in so holding hearings are not required for Appellants relying on *Felix*, erred in two major ways. First, *Felix* did *not* hold that the tenured civil servant who was removed for failure to maintain residence, pursuant to a city rule, was not entitled to due process. Quite the contrary, *Felix* held that the employee was not entitled to a Section 75 hearing, and that he received the "requisite due process" under the City's procedures. *Id.*, at 3 N.Y.3d 506.

Second, the *Felix* rationale is inapplicable to this case because under Education Law §3020-a, the Legislature has provided tenured educators significantly different, and in some respects, greater protection than those afforded to the civil servants under Section 75. These greater protections include prohibition on suspension without pay (except in isolated incidents) [3020-a(2)(b)], the ability to select a hearing officer [3020-a(3)(b)(ii)], pre-hearing discovery [3020-a(3)(c)(iii)(C), the right to avoid giving evidence against oneself [(3020-(3)(c)(i)], the right to make a pre-hearing motion challenging the sufficiency of the charges

[3020-a(3)(c)(iii)(B), and the right to seek sanctions and attorneys' fees in the event of frivolous charges [3020-a(4)(6)].

Moreover, the Courts have held that Section 75 hearing rights can be waived or altered through collective bargaining. *See Antinore v. State*, 49 A.D.2d (4th Dep't 1975), *aff'd on opinion of Appellate Division* 40 N.Y.2d 921 (1976). Under Section 3020(1), however, any alternate procedure negotiated by a tenured educator's collective bargaining representative *must* allow the tenured educator the option to select between the alternate bargained procedure and the statutory procedure afforded by Education Law §3020-a.[14] "Thus, the statute unambiguously provides that when *a CBA* is altered by renegotiation or takes effect on or after September 1, 1994, it must permit tenured employees to elect the discipline review procedures of section 3020-a, notwithstanding the availability of alternative, CBA-prescribed procedures." *Kilduff v. Rochester City Sch. Dist.*, 25 N.E.3d 916, 4 (N.Y. 2014). This embodies the legislature's recognition that the property interest protected by the tenure statutes is critical and can only be waived by the individual holder of that interest.

[14] The tenure laws and this Court's precedent require that an uncertified teacher is entitled to a hearing under 3020-a before termination. It is difficult to reconcile a *statutory* qualification, with an interpretation, such as that made by the Appellate Division (A.16), that no hearing is required where a teacher allegedly lacks a locally imposed qualification to teach which is not expressly stated.

Third, Appellants' argument is supported also by the principle of statutory construction known as *expression unius est exclusion alterius*. McKinney's Statutes §240 ("where a law describes a particular act… to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded"); *Arons v. Jutkowitz* 9 N.Y.3d 393, 418 (2007) ("the expression of one thing is the exclusion of another"). When carving out exceptions to 3020-a, the legislature has been specific. In 2008, it amended the tenure statute to require the automatic termination of employment without a further due process hearing for teachers criminally convicted of certain sex offenses. Education Law §3020-a(2)(b); Laws of 2008, Chapter 296. The legislature's amendment of the tenure statute to establish the loss of one's property interest in continued employment based on certain criminal convictions, without establishing such a loss based on a failure to comply with local board of election policy (uploading a vaccine card) shows that the legislature mandates the necessity of a due process hearing provided by 3020-a in the latter situation. *See McKinney's Statutes* § 240. Thus, if the legislature intended to require the automatic forfeiture of the tenured teachers' property interest in circumstances involving non-compliance with Respondents' policy, the legislature could have granted the governor the emergency power to suspend the due process requirements of State Education Law, just as statute of limitations were extended

and other laws were modified for emergency reasons, but that did not happen in our instant case.

Finally, *Felix* is actually distinguishable from this case. In *Felix*, the City's policy mandated *forfeiture* of employment upon failure to establish residence. *Felix*, *supra* at 3 N.Y.3d 501. Here, the record shows that the DOH Order, the DOE "vaccine only" mandate, and the Impact Arbitration Award are notably absent of any language discussing failure to comply. The Respondents maintained and exercised complete control over the enforcement of the policy ignoring the law and the CBA. Here, Appellants were never provided any opportunity to explain their failure to follow the DOE commands. A pre-hire condition of employment regarding a residency requirement, as is the case in *Beck-Nichols or Felix*, is not analogous to a temporary post-hire DOH Order being enforced by the DOE as a "vaccine only" mandate. Appellants either complied with the DOE commands or were removed from a term of teaching, denied their pay, and then involuntarily resigned (constructively fired). In *Beck-Nichols and Felix*, the Appellants were all afforded more due process than the Appellants received here, which was none.

POINT II

QUALIFICATIONS AND CONDITIONS OF EMPLOYMENT MUST BE EXPRESSLY STATED

Appellants firmly assert that there has been no imposition of any new "qualification of employment" or "condition of employment" in their case. Instead, they maintain it is the arbitrary way in which the Respondents chose to enforce the DOH Order which gives the illusion of a new post-hire, "qualification of employment" against the Appellants. Further, Appellants are not surrendering their argument that the Respondents do not have the authority to create a post-hire "qualification" or "condition" of employment that would cause the Appellants to lose their tenure rights.

However, assuming arguendo, the Appellants are wrong, and Respondents have imposed a post-hire qualification or condition of employment, that does not mean that Appellants should lose all due process rights. The Appellants would request this Court look to the persuasive case holding in *Lutz v. Krokoff*, 102 A.D.3d 146 (N.Y. App. Div. 2012). In *Lutz*, the case is about a police officer whose driver's license was temporarily revoked. Upon learning his license was revoked, the Albany police terminated the officer without any due process. In that instance, the employer determined that since possessing a valid driver's license was an eligibility requirement of being a police officer, they could terminate him without due process. However, upon a meticulous review of the police officer's eligibility requirements

to hold the job, it is evident that one of the stated requirements is "ability to operate an automobile." The Court determined that possessing a valid driver's license and having the ability to operate an automobile are significantly different and that they could not be confused. If the employer wanted the employee to have a valid driver's license, the employer must expressly state that job eligibility requirement otherwise the employee is entitled to due process rights. The denial of due process rights can only happen with expressly stated qualifications and conditions of employment.

In our case, it is undisputed that there has never been any vaccine requirement imposed on the Appellants. At the time of their hire, there was no mandate or requirement for any vaccines. In NYS Education Law §3001 governing teacher qualifications, there is no requirement for any vaccines. In Public Health Law §2164, there is no requirement that a teacher be vaccinated, only students. The record and the law are absent of the magical government incantation showing how the DOH Order morphed into a vaccine mandate that is now a post-hire qualification of employment that deprives the Appellants of their property rights and supersedes the law. The absence of the phrase "condition of employment" is undisputed by the parties. The Third Department's "due process" and "fundamental fairness" standards are an excellent threshold to be applied in our instant case. If the courts allow post-hire conditions of employment that are not explicitly stated to be retroactively applied to employees, then it is crucial for the agency to adhere to the due process

protections provided by the law before terminating an employee. This ensures that employees are given a fair and just opportunity to be heard before any adverse actions are taken against them.

A. THE APPELLATE DIVISION INCORRECTLY RULED THAT THE PUBLIC HEALTH CRISIS PERMITTED RESPONDENTS TO CONSTRUCTIVELY TERMINATE APPELLANTS AND DENY APPELLANTS THEIR EDUCATION LAW§ 3020 DUE PROCESS

The Appellate Court's position that the public health crisis permitted the Respondents and the UFT to amend the CBA to modify the tenure laws is incorrect and without merit under NYS jurisprudence (A. 14).

The State Education Law is explicitly outside the realm of what can be collectively bargained by the Respondents and the UFT (A.80). Therefore, legally it follows any arbitration agreement, impact or otherwise cannot adversely affect the Appellants' State Education Law rights. The law permits the UFT and Respondents to collectively bargain expedited manners in which to effectuate §3020 hearings, however, a tenured teacher always retains the right to choose between the collectively bargained modifications to tenure teacher law or to select the due process provisions outlines in §3020.

> "Thus, the statute unambiguously provides that when *a CBA* is altered by renegotiation or takes effect on or after September 1, 1994, it must permit tenured employees to elect section 3020-a's discipline review procedures, notwithstanding the availability of alternative, CBA-prescribed procedures." *Kilduff v. Rochester City Sch. Dist.*, 25 N.E.3d 916, 4 (N.Y. 2014)

The lower courts have held that the Appellants' failure to upload a vaccine card to Respondents' system was not disciplinary in nature but is an "employment qualification" that Appellants do not meet, and thus they are not entitled to due process in the form of notice and an evidentiary hearing under 3020 because of a public health crisis. There is no reason why the due process rights of the Appellants and the Respondents' policy could not have coexisted in a harmonious manner. Instead of enforcing the policy in a way that violates the law and infringes upon the Appellants' property rights, the Respondents could have taken measures to ensure that both the policy and the due process rights of the Appellants were respected and upheld. As explained in Point *I Supra* at length, even alleged violations of conditions/qualifications of employment entitle tenure teachers to the due process requirements of §3020.

A careful review of the record of these cases reveals that Respondents are alleging the Appellants failed to obey a DOH Order, which was enforced by the DOE in the form of an email (A. 74). The DOE email uses for the first time the words "vaccine mandate" (A. 74). According to Black's Law Dictionary 11th edition, the term "mandate" is specifically reserved for orders "from an appellate court to take a specified action." There was no vaccine mandate directed by the court; instead, it was the Respondents enforcing a DOH Order while operating under the color of law. The term "mandate" is commonly defined outside of the legal sphere

as an “authoritative command” or an “order.” A vaccine mandate does not pertain to conditions of employment but rather refers to commands and orders issued by Respondents to the tenured teachers. At most, Respondents allegedly gave an “order” and Appellants allegedly did not comply with this “order”. This can be seen as a classic case of alleged insubordination and misconduct rather than a failure to meet a qualification of employment and thus would trigger the protections provided by § 3020-a.

In *Becks-Nichols* & *Lutz,* the Courts both reasoned that qualifications and requirements for employment must be expressly stated. The Court determined that when the employer is going to deprive an employee of a protected property right, it must be clear and unambiguous. In our record, there is nothing that states vaccination is a qualification of employment. Instead, the record states to enter Respondents’ buildings, they must upload a vaccine card (A.57). The emails state failure to follow the DOE vaccine mandate (A.74 & 76). There is no express provision that a teacher must be physically present in the school building to teach. In fact, the prior year showed that teachers can teach remotely. Remote teaching is acceptable when management demands it, such as in the case of a pandemic, but when tenured teachers have their own valid reasons for requesting this, remote teaching is suddenly no longer an available option. That is not a contractual relationship, that is coercion by management with threat of termination, in violation of the law.

Under settled rules of construction, words having a "precise and well settled legal meaning in the jurisprudence of the state" are to be understood in such sense when used in statutes, unless a different meaning is plainly indicated. *Aronsky v. Bd. Of Educ.* 75 NY2d 997 (Ct. App. 1990; (*Matter of Moran Towing & Transp. Co. v New York State Tax Commn*., 72 NY2d 166, 173; McKinney's Cons Laws of NY, Book 1, Statutes § 233).

No tenured teacher shall "…be disciplined or removed during a term of employment except for just cause…". The Appellate Division completely ignored the plain and precise meaning of NYS Education Law §3020 and instead relied on a narrow Court of Appeals exemption related to pre-hire residency requirements that were acknowledged by the teacher at the time of hire. The only exemption referenced by the Appellate division for tenured teachers in any case law.

In *Ricca v. Board of Educ*, 47 N.Y.2d 385 (N.Y. 1979), this Court predicted that the entire strength and glory of New York State's treasured tenured teacher laws would collapse and "crumble" under the collective effect of "numerous well-intentioned exceptions". This alleged "condition/qualification of employment" only applied to tenured teachers within New York City (was not applied statewide to tenured teachers) and lasted less than two years, but all the Appellants were terminated even after the "condition/qualification of employment" had been rescinded. The Appellate Divisions have twisted this Court's limited residency

exemption to the due process requirements into coercing a tenured teacher to accept lifelong medical procedure. While the vaccine mandate lasted less than two years, the tenure laws remain the same.

Furthermore, there is no exemption in statutory law or case law regarding due process for any vaccination that can be applied to tenured teachers, including the Appellants, upon which the Respondents can rely. In fact, every case cited by the majority stands for the proposition that conditions of employment pertain to employment qualifications and requirements that were established at the inception of the employee's employment. There is no case that supports the proposition that tenured teachers lose all statutory due process rights based on a post-hire condition of employment. This is particularly significant given that the Respondents acknowledge that the phrase, "condition of employment" is absent from the record.

POINT III

APPELLANTS WERE ENTITLED TO DE NOVO REVIEW OF THEIR CASES

The First Department decisions have held the Appellants, all of whom possess tenured status as New York City teachers, to a fictional "condition of employment" under the color of law. The Respondents' argument is based on one lone decision, *Broecker v New York City Dept. of Educ.*, 585 F Supp 3d 299, 316-317 [ED NY 2022] (holding that "vaccination is a lawful condition of employment"). The Court's reliance on this decision is in error for several fundamental reasons.

First, *Broecker* is a non-binding precedent and relies on three cases here in its finding. Second, this non-binding decision pivots on three court cases which are now pending appeal and cites no other state case law bearing on the validity of the assertion that the vaccine mandate is a qualification of employment.[15] Third, and as correctly noted in the dissenting opinion of the First Appellate Court decision , "this manner of proceeding fails to fulfill this Court's obligation, in deciding an appeal, to consider questions of law de novo, rather than deferring to the resolution of those questions by the tribunal from which the appeal is taken." (A.23).

De novo review occurs when a court decides an issue without deference to a previous court's decision, as if the case was being heard for the first time. The court's decisions are involved in a faulty circular logic depriving the Appellants of a judicial review. The First Department was required to review the issue of whether the vaccine mandate was a retroactive "condition of employment" which eviscerated the Appellants' tenured teacher rights as a matter of first impression. The First Department failed and was alerted to this issue in the dissent by Justice Friedman.

The concept of *de novo* review was recently addressed by this Court in *City of Long Beach v. N.Y. State Pub. Emp't Relations Bd*., 2022 N.Y. Slip Op. 5939 (N.Y. 2022). The Court was required to rule on legislative history and decided the

[15] The O'Reilly, Lanzer and Romero decisions are currently at bar for adjudication before the New York Court of Appeals.

"issue de novo…". Just as that issue was one of statutory construction in *Long Beach*, the issue here is also construction. The First Department instead of fleshing out the record and engaging in the appeal *de novo*, relied on the persuasive authority of a federal decision that relied on three of the very cases under review by the Court. A classic example of flawed circular logical reasoning.

This Court recently held that in times of crisis, a strict adherence to the laws is what is required. *See Seawright v Bd. Of Elections in the City of N.Y.*, 35 NY3d 227, 235 [2020] ("During the most difficult and trying of times, consistent enforcement and strict adherence to legislative judgments should be reinforced-not undermined."). In New York State there is nothing more fundamental than the due process rights in the Appellants' property interests.

> We do not gainsay the importance of these standards both in terms of their role in protecting the rights of individual teachers whose years of satisfactory service have earned them this security and in fostering an independent and professional corps of teachers. It follows that the shield of section 3020-a is not lightly to be put aside.

Abramovich v Board of Educ, 46 NY2d 450, 455 [1979]

POINT IV

RESPONDENT FAILED TO PERFORM A DUTY ENJOINED UPON IT BY LAW WHEN IT FAILED TO PROVIDE NOTICE AND EVIDENTIARY HEARING PURSUANT TO 3020 AND 3020-A BEFORE PLACING A TENURED TEACHER ON UNPAID LEAVE

Appellants are tenured teachers, and they have a clear legal right to notice and hearing prior to removal from a term of teaching, suspension without pay, and termination. See Education Law 3020 and 3020-a. The Respondents have a corresponding nondiscretionary duty to comply with State Education Law. The Appellants were entitled to an Order of Mandamus to Compel the Board to provide Appellants with a full hearing on the issue of their removal from a term of teaching and denial of pay as demanded in the petitions (A.46). CPLR §7803, McKinney's Consolidated Laws (1981); *Scherbyn v. Wayne- Finger Lakes Ed. Serv.* 77 N.Y. 2d 753, 757, 570 N. Y. S. 2d 562 (1991).

This Court has held that section 3020-a, otherwise known as "Tenure Law", and the hearing process codified within the statute must comport with the dictates of procedural due process because it is necessary to safeguard tenured teachers from "official or bureaucratic caprice" and to operate as a form of job security which ensures stability in the educational system. *Holt v. Bd. of Ed. of Webutuck Cent. Sch. Dist.*, 52 N.Y.2d 625, 632 (1981) (citing *Abramovich v. Board of Ed.*, 46 N. Y. 2d 450, 414 N.Y.S 2d 109, 386 N.E. 2d 1077 (1979), cert. den., 444 U.S. 845 (1979).

The Appellate Division, 2nd Department has held that even under the most severe circumstances, a tenured teacher is entitled to notice and a hearing pursuant to Education Law 3020-a. *Morgan v. Board of Education of The City Of New York*, 201 A.D. 2d 482, 606 N.Y.S. 2d 132 (1994) by operation of law. In that case, the Petitioner was a tenured teacher whose employment was terminated by the Respondent following his arrest, conviction, sentencing and imprisonment on charges of possession and the sale of a controlled substance. He was not given his due process notice or rights under 3020-a. There was no dispute of the tenured teacher's guilt, yet he was still entitled to a §3020 hearing as an operation of law. The Appellate Division, 2nd Department referred to Education Law 3020-a and stated,

> That statute, generally known as the Tenure Law, provides that prior to any disciplinary action being taken against a tenured teacher, all charges must be submitted in writing and filed with the clerk or secretary of the school district or employing board (Education Law Section 3020-a (1)). Thereafter, the school district or employing board, in executive session, must vote on whether probable cause for the charges does, in fact exist (Education Law Section 3020-a(2}). If the determination of the district board is affirmative, a written statement specifying the charges in detail, and outlining the accused employees' rights shall immediately be forwarded to him. The accused employee may then request a hearing (Education Law Section 3020-a{2}). Upon receipt of a request for a hearing the Commission of Education shall schedule a hearing (sec Education Law Section 3020-a (3)(a).
>
> Since Petitioner did not receive the procedural protections pursuant to Education Law Section 3020-the matter is remitted to the

> respondent Board of Education for further proceedings in accordance herewith.

Morgan v. Board of Education of The City of New York, 201 A.D. 2d 482, 482-483 (1994).

In the instant case we have the same due process issues but with Appellants who broke no law and did no wrong. The Appellants were removed in violation of the due process protections of 3020-a.

The First Department, in contrast to every lower court decision, stated the condition of employment was obtained through Civil Service Law §209 process. None of the lower court decisions reference §209 in any context. There is a very simple reason that none of those Courts reference Civil Service Law 209, which is that the Respondents and the UFT cannot negotiate tenured teacher law, except where explicitly authorized.

The First Dept. states the Arbitration Award is governed by Civil Service Law § 209 but fails to explain at what point did tenure teachers' due process requirements become a matter for collective bargaining.

> With that in mind, we believe the statute must be understood to sunset CBA provisions depriving tenured employees of the § 3020-a recourse to which they are otherwise entitled. Respondents object that the phasing out of these provisions would deprive the CBA parties of a bargained for benefit or detriment, but it is manifest that the 1994 amendment of Education Law § 3020 (1) was intended precisely to render a tenured employee's right to elect the statutory process in the event of discipline generally non-negotiable.

Kilduff v. Rochester City Sch. Dist., 25 N.E.3d 916, 3-4 (N.Y. 2014).

In *Kilduff*, the school district suspended the tenured teacher for thirty days for misconduct without any due process, as was allowed and set forth in the CBA. However, the law grants a tenured teacher the individual choice between any negotiated removal terms founds in the CBA and the provisions found in the §3020-a. The teacher in *Kilduff*, selected the provisions of §3020-a and this Court upheld that selection. Even assuming arguendo, the Court maintains the lower court's position that the Appellants' removal and leave without pay was all done subject to arbitration, the law permits the Appellants to exercise the removal procedure of their own choice. In our instant case, the Appellants only wish to exercise their statutory rights to §3020-a and not be bound to the Impact Arbitration Award terms and conditions for removal.

The original focus of the Respondents' papers and of every lower court decision, was that State Education Law §3020 does not apply to this case since the teacher's termination and the Respondents' policy itself were not considered disciplinary actions. At the lower court level, the Respondents argued, and the judges acknowledged, that the Respondents and the UFT were permitted to modify State Education Law §3020, pursuant to §3020(4)(a). However, just as Judge Friedman pointed out in his dissent (A.27), the First Department failed to mention § 3020(a)(4) in its final decision. This omission exhibits that the First Department realized that

acknowledging § 3020(a)(4) would concede that this was, in fact, a disciplinary action taken by the Respondents.

The First Department, in an attempt to salvage the legally and logically deficient decisions of the lower courts, ignores Respondents' own previous references to the non-disciplinary nature of the actions taken against the teachers under § 3020(a)(4).

Instead, the First Department asserts that it is a new condition of employment obtained after a Civil Service 209 arbitration.

The Appellate Division's position is that the controlling rule of law is the Declaration of Impasse, citing Civil Service Law section 209(2) and (3). A review of the record will reflect, however, that at no point did any lower court cite Civil Service Law section 209(2)(3). The Respondents also never cite to Civil Service Law § (209(2) and (3); therefore, it is perplexing why the First Department resorted to Civil Service Law §209(2)(3) as a basis for their decisions:

> Public employers are hereby empowered to enter into written agreements with recognized or certified employee organizations setting forth procedures to be invoked in the event of disputes which reach an impasse in the course of collective negotiations. Such agreements may include the undertaking by each party to submit unresolved issues to impartial arbitration.

Civ. Serv. Law § 209.

The record is clear that the Arbitration Award dealt with medical and religious accommodations only, not the vaccine mandate itself (A.59). The Arbitration Award

did not provide a mechanism for tenured teachers who failed to upload a card to the SOLAS. The Arbitration Award did not create a condition of employment. Disregarding the fact that anyone reading the Arbitration Award can see the award did not establish a condition of employment, this very position is further supported by the arbitrator's own statements in the case cited by Justice Friedman, *Board of Educ. Of City School Dist. Of City of New York v United Fedn. Of Teachers*, 2022 NY Slip Op 33351[U] [Sup Ct, NY County Oct. 4, 2022] (Index No. 451995/2022), NYSCEF Document # 2, the arbitrator makes the following two statements:

- "According to the Department, the Courts have held compliance with the Commissioner Chokshi's Order is a 'condition of employment.'" (Pg. 6-7)
- "To be clear, nothing in my Award was intended to abrogate any due process rights the parties otherwise maintained with regard to employment status." (Pg. 11).

What remains unclear from the record is the procedure by which the Respondents can ignore the necessary elements of due process required for tenured teachers under State Education Law. Civil Service Law §209(f) explicitly outlines that the legislative body is responsible for making recommendations when the public employer is a school district. The record in our instant case is completely void of the Civil Service Law §209(3) fact-finding board. This is further compounded by the fact that the Appellants CBA demands no agreement which requires legislative approval be finalized prior to such legislative approval. Furthermore, the CBA in Article 30 states that:

> "It is agreed by and between the parties that any provision of this Agreement requiring legislative action to permit its implementation by amendment of law or by providing the additional funds therefor, shall not become effective until the appropriate legislative body has given approval." (A. 30).

Civil Service Law §209(f) states that only a legislative body may take such action as is necessary and appropriate. The CBA clearly states when legislative action is required, nothing in the CBA shall become binding until the legislative body gives it approval. The record is absent of any legislative body action or approval. The Appellants are left to speculate whether an impasse arbitration actually occurred as delineated by the procedures in §209(2) & (3) and as stated by the First Department or something else occurred.

However, Appellants' position remains unchanged whether Respondents obeyed the procedures found in the Taylor Law or they ignored those procedures like they ignored State Education Law, the record is barren of any legal mechanism by which a tenured teacher could lose their statutorily guaranteed due process rights in an arbitration related to issues that need to be collectively bargained because teacher tenure law is not an issue that is collectively bargained. The record reflects that the Arbitration Award, which Respondents-Appellees and the First Department maintain grants authority for the loss of Appellants' due process rights, required the Appellants to sign a waiver to access the benefits of the award (A. 71). This clearly

shows that any tenured teacher who did not sign the waiver still retains their due process rights.

Because Respondents have failed to perform a duty it was required to perform, namely the provision of a notice and a hearing *prior to* Petitioner's removal from a term of teaching, an Article 78 proceeding is warranted. CPLR 7803(1) states specifically that under an Article 78 proceeding, a petitioner may raise "whether the body or officer failed to perform a duty enjoined upon it by law." This action mirrors a mandamus to compel as it seeks a court order compelling the respondent to take certain actions that he alleges are required by law. *Velez v. Dennehy*, 55 Misc. 3d 1205(A), 57 N.Y.S.3d 677 (N.Y. Sup. Ct. 2017).

A mandamus to compel is appropriate where the right to relief is clear and the action sought to be compelled is an act commanded to be performed by law involving no exercise of discretion. *Jurnove v. Lawrence*, 38 A.D.3d 895, 896 (2007) (A proceeding pursuant to CPLR Article 78 in the nature of mandamus is an appropriate vehicle by which "to compel acts that officials are duty-bound to perform, regardless of whether they may exercise their discretion in doing so"). In effect, a proceeding in the nature of mandamus may be utilized to review administrative determinations made without a hearing. Here, the Respondents are under a duty to enforce Education Law, 3020, which holds that tenured teachers are protected from arbitrary imposition of formal discipline or adverse action without

first receiving notice and an evidentiary hearing. *Holt*, 52 N.Y.2d, at 632–33. This is the very relief the dissent would have provided to the Appellants (A.28).

POINT V

RESPONDENTS SHOULD NOT BE PERMITTED TO SUMMARILY TERMINATE APPELLANTS BECAUSE THE EMPLOYER PREDETERMINES THERE WILL BE NO "TRIABLE ISSUE OF FACT"

Part of the due process provided for by State Education Law §3020 is the ability to select a hearing officer, pre-hearing discovery, the right to avoid giving evidence against oneself, the right to make a pre-hearing motion challenging the sufficiency of the charges and the right to attorneys' fees in the event of frivolous charges, and fact finding.

Part of the lower court's argument that Appellants were not denied due process is that neither the Appellants nor the dissenting judge identify any "triable issues of fact" (A.16) that could be raised in a hearing, that have not already been decided by the Impact Award.[16] There is no merit to this assertion, however. The Impact Award did not provide any of the Appellants with any opportunity to discuss or raise any issue of fact. Further, as stated previously in *Morgan v. Board of*

[16] The First Department's reliance on *Mathew v Coler Goldwater Specialty Hosp. & Nursing Facility*, 960 NYS2d 383 (1st Dept 2013), (dealt with a pre-hire driver's license requirement), In *the Matter of Moogan v N.Y. St. Dept. HLT*, 8 AD3d 68 (1st Dept 2004), (dealt with a pre-hire EMT certification), and *Matter of Naliboff v Davis*, 133 AD2d 632 (2d Dept 1987) (dealt with pre-hire EMT Certification) is misplaced. These cases concern pre-hire requirements, not an alleged post-hire DOH Order, which is the case here.

Education and *People ex rel. Murphy v. Maxwell*, even when the outcome is known §3020 due process was still required. As the dissenting opinion noted:

> We do not deny a person his or her procedural rights just because, as a practical matter, there is little or no doubt about the outcome of the proceeding. Needless to say, a person who is observed committing a crime in public, and whose act is recorded on videotape, is still not adjudicated a wrongdoer until after he has been afforded due process. The majority seems to suggest that my use of this analogy "conflat[es] the procedural rights of a criminal defendant ... with the more limited due process rights available in the administrative context." On the contrary, the purpose of the analogy is to illustrate the principle that, where a person is entitled to due process (of whatever kind) before receiving a negative sanction, his or her entitlement to that due process is not affected by the circumstance that, as a practical matter, the outcome of the proceeding may be a forgone conclusion. [A.20]

It is worth noting that each of these cases was dismissed on a pre-answer motion. The standard to be applied on a pre-answer motion requires that everything be viewed in a light most favorable to the non-moving party. *Alden Glob. Value Recovery Master Fund, L.P. v. KeyBank Nat'l Ass'n*, 159 A.D.3d 618, 621–22 (2018). Therefore, the lower courts agreeing with the Respondents' attorney statement that no issues of fact exist that could have been heard by an arbitrator at a §3020 hearing, is inconsistent with the applicable legal standard. Additionally, the record is clear that Appellants were ready, willing, and prepared to defend their positions at the §3020 hearings, going so far as to petition the Court to compel Respondents to provide the hearings. However, the lower courts denied the Petition, thus never giving Appellants the opportunity to due process.

Moreover, the question of fact to be resolved at the legally mandated hearing was why these Appellants did not upload a vaccine card to the SOLAS as required by the email (A. 74-75). This was a question of fact that would have been heard, determined, and decided at Appellants' §3020 hearing. The record in this case is void of any indication as to whether the Appellants are vaccinated or not. The only information available is that the Appellants did not upload a vaccine card to the SOLAS and as a result, the Appellants were removed from a term of teaching. There could be many factual reasons for why the Appellants did not upload a vaccine card such as technical difficulties, illnesses, or other unforeseen circumstances. Unfortunately, none of the factual reasons were explored because Appellants were denied due process and a meaningful opportunity to be heard through an evidentiary hearing.

The Impact Award did not establish an avenue for employees who do not have medical or religious exemptions therefore, it cannot be considered a sufficient pre-deprivation remedy to the unilateral taking of Appellants' tenure rights. Appellants' post-deprivation remedy would be an Article 78 proceeding, but that has been denied by the court as well. The very case cited by the lower courts, *Broecker v. New York City Dep't of Educ.*, No. 21CV6387KAMRLM, 2021 WL 5514656, at *8 (E.D.N.Y. Nov. 24, 2021) reveals that the court found that those who wanted to challenge the

failure of the Respondents to provide due process, had recourse through an Article 78 proceeding:

> … Plaintiffs had, and continue to have, multiple avenues available to them to challenge and address the actions taken against them as a result of the Vaccination Mandate through the procedures established in the CBAs governing the terms of Plaintiffs' employment, including the Impact Arbitration Award procedures, which provide grievance and arbitration procedures, and undisturbed, well-established [Article 78] state court procedures…

Broecker v. New York City Dep't of Educ., No. 21-CV-6387(KAM)(LRM), 2022 WL 426113, at *6-7 (E.D.N.Y. Feb. 11, 2022).

In a sense of irony, when Appellants bring an Article 78, they are still denied their due process. The majority completely disregards the fact that the Appellants were deprived of their due process rights. In fact, Appellants would have received due process rights and still have their jobs if they had engaged in actions such as uploading fraudulent vaccine cards, *Kamboris v. New York City Dept. of Educ. Of City of New York*, 2022, NY Slip Op 22400, *[Sup, Ct. Kings County Dec 19, 2022], selling cocaine to students, *Morgan v. Board of Education Of The City Of New York*, 201 A.D. 2d 482, 482-483 (1994), engaged in teacher-student misconduct, *City School District of New York v. McGraham*, 17 N.Y.3d 917 (2014), or committing any other egregious act. It is undisputed, the Appellants were all upstanding tenured teachers without a blemish on their records. All the Appellants demand is that their statutorily due process rights be upheld.

The integrity of our entire legal system depends on adhering to the plain meaning and language of the laws, which the courts, in this case, have ignored, to deny these eight tenured teachers their statutory due process rights. The bigger concern here is that the First Department and lower courts have now established a precedent where an agency can declare an emergency, impose conditions to allegedly alleviate that emergency, and once those conditions are in place, every employee is expected to unquestioningly comply with management's orders, with no regard for their CBA and the law.

Imagine a scenario where the DOH decides that all DOE employees must live within walking distance of their city jobs in order to combat the spread of diseases, assuming arguendo it is scientifically true and done with good intentions. Once they impose this mandate, management gives employees three weeks to relocate or be terminated. According to the First Departments' current jurisprudence, such a decision would be deemed valid and enforceable, and the tenured teacher would not be entitled to any due process.

Or the reverse scenario, the DOH decides that all DOE employees must have a New York driver's license to enter any DOE building to help stop the spread of communicable diseases on mass transit. Under current jurisprudence, the DOE could now unilaterally terminate all tenured teachers who failed to provide proof of their New York driver's licenses without any due process.

The far-ranging negative consequences created by the First Department's failure to interpret the law based on its plain meaning will have long-lasting and significant effects on tenured teachers. These two First Department decisions completely eviscerate teacher tenure law. This is why strict compliance with the four-part rule the Court of Appeals has given us in *Beck-Nichols* as discussed supra is so important to avoid this type of outcome.

It is evident that all the Petitions were dismissed on a logically corrupt concept, as they were based on findings that did not reflect the facts in the record and never considered the protected property rights of the Appellants. It is undisputed that each Appellant was denied their administrative § 3020 hearing, which is a statutory requirement when a tenured teacher is "removed" from their term of employment during a school year. The basis for the Respondents' actions was that the Appellants did not upload vaccination cards to the Respondents-Appellees' SOLAS. Since there are still unresolved material issues of fact related to why these cards were not uploaded, dismissing the case on the grounds that Appellants did not raise triable issues of fact was improper. It is further improper to put Respondents in such a position to make a declaration that they are the sole arbiters of questions of fact and get to decide when due process is required for those questions of fact.

POINT VI

THE IMPACT ARBITRATION AWARD IS VOID TO PUBLIC POLICY BECAUSE THE ARBITRATOR EXCEEDS EXPLICIT LIMITATIONS FOUNDS IN THE COLLECTIVE BARGAINING AGREEMENT

Tenure teacher laws codified by State Education Law §3020 and §3020(a) cannot be "collectively bargained" away without written notice and agreement by the Appellants, which did not happen in our record. The CBA explicitly states:

> "Nothing contained herein shall be construed to deny to any employee his/her rights under Section 15 of the New York Civil Rights Law or under the State Education Law or under applicable civil service laws and regulations."

In short, the CBA does not permit any negotiation or collective bargaining to ever deny a tenured teacher's rights under State Education law or Civil Rights Law. Therefore, it is legally nullity for an arbitrator to issue an award which would deny the Appellants their State Education Law rights.

The Arbitration Award recognizes this shortcoming when it requires Appellants to sign a waiver to their State Education Law rights to receive the benefit of the award. The signing of the waiver is in violation of N.Y. Educ. Law § 3108 which states a tenured teacher never needs to sign a waiver for any pay or employee benefit. The law is clear that if the Appellants had signed a waiver knowingly, they would not have been able to make a claim for their State Education Law rights. New York State's legislature has clearly addressed this issue and the Courts should have enforced the same. *Newman v. Board of Ed of City School Dist, of NY,* 544 F.2d 299

(2d Cir. 1979) (“ … under New York Law a tenured teacher may not be removed from office without a hearing.”); see also See *Naum v. City of New York*, No. 94 CIV. 5747 (DAB), 1997 WL 539947, at *2 (S.D.N.Y. Aug. 28, 1997) (“Plaintiff alleges that the City Defendants’ reduction of his wages was illegal and without due process of law. Because the reduction in Plaintiff’s wages resulted from actions by local government officials, Plaintiff could have used Article 78 to challenge the City Defendants’ actions in state court. N.Y. C.P.L.R. § 7803(2), (3).”).

The fact that the Respondents required tenured teachers to sign a waiver relinquishing these State Education Law rights and placed them in unpaid leave, withholding their paychecks, without the benefit of notice and a hearing, was clearly a violation of law and a denial of their due process (A.71).

The lower court’s reliance on the idea that the DOH Order is analogous to a pre-hire residency requirement is without foundation or case law. In fact, the case law actually aligns itself with the Appellants. The case law and PERB have stated any residency requirement Respondents attempted to enforce as to their current employees would require collective bargaining. *City of Mount Vernon, 18 PERB 3020 (1985); Bd. Of Educ., N.Y. City, 13 PERB 3006(1980); City of Niagara Falls v. N.Y. State Pub. Emp't Relations Bd. & the Niagara Falls Police Club, Inc.*, 950 N.Y.S.2d 607 (N.Y. Sup. Ct. 2012)

Any modification to the procedures of State Education Law §3020 requires written notice to the tenured teacher and acceptance by the tenured teacher, which did not happen with our Appellants.

> In any case, it is the language of the statute that is the best evidence of the Legislature's intent (Riley v County of Broome, 95 NY2d 455, 463 [2000]), and Education Law § 3020-a plainly provides that, in any CBA taking effect on or after September 1, 1994, tenured employees must be permitted to elect the discipline procedures set forth in Education Law § 3020-a.

Kilduff v. Rochester City Sch. Dist., 25 N.E.3d 916, 5 (N.Y. 2014).

The Respondents had the non- discretionary statutory obligation to provide Appellants with notice of their due process protections. Respondents willfully disregarded this obligation and failed to notify Appellants in any manner. Additionally, it is clear the Respondents arbitrarily and capriciously asserted this post-hoc "condition of employment," which resulted in the removal of the Appellants from a term of teaching. As a result, Appellants were deprived of a valuable property right without prior notice and an opportunity to be heard, violating their constitutional right to due process.

Whether the omission of Appellants' due process rights in the arbitrator's decision was intentional or accidental is irrelevant, as it renders the decision void. The rights which the legislature sought to protect were ignored and taken away by the Respondents' enforcement of the arbitrator's decision, therefore the decision must be vacated if the "award itself violates a well-defined connotational, statutory,

or common law of New York State." *In re United Federation of Teachers v. B.O.E.*, 1 N.Y.3d 72 (N.Y. 2003).

A. THE ARBITRATOR'S DECISION IS VOID TO PUBLIC POLICY FOR FOUR REASONS

1. THE ARBITRATION AWARD'S ACCOMMODATION POLICY WAS ADMITTED BY RESPONDENTS TO BE CONSTITUTIONALLY SUSPECT

The Arbitrator's Award has been challenged by tenured teachers in federal courts for the expedited religious accommodation procedures as being insufficient to meet basic religious accommodation procedures that will protect the first amendment rights of the tenured teachers. *Kane v. de Blasio*, No. 21-2678, at *11 (2d Cir. Nov. 28, 2021). In fact, in the cited case, the Respondents admitted the accommodation policy found in this Arbitrator Award, which handled only religious accommodations, was "constitutionally suspect". The Court further found the religious accommodation process was "constitutionally infirm" as applied to the tenured teachers in the *Kane* case. The Court went on to vacate the Arbitration Award as it applied to the plaintiff tenured teachers in the *Kane* case.

The only due process offered by the entire arbitration award was an expedited due process for religious and medical accommodations from the DOH Order. The portion of the award offering religious accommodations was admitted by the Respondents to be "constitutionally suspect" and found by the Court to be "constitutionally infirm" so therefore any arbitration award which violates our

Federal and State Constitution should be deemed void as to public policy and vacated in the entirety or, at a minimum, to these Appellants.

2. THE ARBITRATOR'S AWARD VIOLATES EDUCATION LAW §3108

The impact arbitration award stated anyone who wanted the benefit of the award would have to sign a waiver. "Employees who elect this option shall be deemed to have resigned involuntarily, effective on the date contained in the general waiver as determined by the DOE, for non-disciplinary reasons." (A.71). A review of the award will notice the definition of waiver was left untouched and unaltered. The law makes it illegal for the Respondents to demand the Appellants to sign or execute a waiver as a precondition for the payment of a "…salary, compensation, or other emolument to which he is entitled;" N.Y. Educ. Law § 3108.

Therefore, because the award required tenured teachers to sign waivers for health care for their own saved sick days, benefits which they already were entitled to receive under the contract, this arbitration agreement was in violation of the law and void as to public policy for requiring the Appellants to sign waivers.

3. THE ARBITRATOR'S AWARD CHANGED THE DEFINITION OF DISCIPLINE TO AVOID THE CONSEQUENCES OF THE LAW

The single most offensive action to public policy conducted by the arbitrator and the Award was the actual redefining of the word discipline so as to avoid the consequence of the law and the CBA. "Placement on leave without pay for these

reasons shall not be considered a disciplinary action for any purpose." (A. 68). In addition to being placed on leave without pay (LWOP), the Appellants were no longer allowed to work anywhere else (A.67), the Appellants were not permitted to file grievances (A.21), the Appellants were not permitted to talk to their students, and the Appellants were not permitted to retrieve their files or personnel file numbers from their schools (A.74). With one email Respondents eviscerated over one hundred years of tenure teacher protections in the City of New York simply because the award changed the definition of the word discipline. The arbitrator and Respondents disciplined the Appellants, yet they claimed that it was not disciplinary action.

While "discipline" is not defined in the statute, it has been defined with over one hundred years of case law. Section 3020–a (4)(a) states that placing an employee in an unpaid status can be considered a "penalty" or punitive in nature. *Hickey v. New York City Dep't of Educ.*, 17 N.Y.3d 729, 731–32 (2011) ("While discipline is not defined in the statute, section 3020-a(4)(a) authorizes a hearing officer to impose as a penalty "a written reprimand, a fine, suspension ... without pay, or dismissal."). The CBA supports this suggestion, noting that even disciplinary actions such as suspension are to be "with pay" until a hearing is conducted.

> It is well settled that compensation is a matter of such substantive right on the part of the teacher that it cannot be taken away except pursuant to explicit statutory or collective bargaining authorization *(see, Matter of Board of Educ. v Nyquist,* 48 N.Y.2d

> 97; *Matter of Jerry v Board of Educ.*,35 N.Y.2d 534, 541-542; *see also, Matter of Derle v North Bellmore Union Free School Dist.*,77 N.Y.2d 483, 488; *Matter of Adlerstein v Board of Educ.*,64 N.Y.2d 90, 98).

Winter v. Board of Educ, 79 N.Y.2d 1, 5 (N.Y. 1992).

Furthermore, the arbitrator's self-serving action in redefining the word discipline to avoid the consequences of the law is void to public policy. The arbitrator did not state DOH Order was a condition of employment or qualification of employment. The arbitrator exceeded his authority by creating his own interpretation of the law, which is not within the purview of an arbitrator. The Respondents never had the authority to enter into an arbitration that alters the Appellants' State Education Law rights. The City Council and the mayor cannot pass any law that conflicts with State Education Law §3020, but the Respondents would have us believe the arbitrator can issue a decision that voids and ignores teacher tenured rights.

As expressed previously, any modification of the Appellants' State Education Law rights requires the express written agreement and acknowledgement of the tenured teacher. The Appellants never agreed to leave without pay. The Appellants were entitled to full pay while their 3020 hearings were pending.

4. THE ARBITRATOR'S AWARD ALLOWED RESPONDENTS TO WORK AROUND DUE PROCESS PROTECTIONS OF TENURED TEACHERS

The Respondents should not be allowed to circumvent the mandatory requirements of State Education Law 3020-a through an arbitrator's decision that disregards the due process rights contained in the State Education Law and the Collective Bargaining Agreement. The arbitrator's ruling effectively rewards the Respondents for intentionally disregarding the requirements of 3020-a and for denying the Appellants proper notice of their rights.

Insofar as the lower courts state this was all collectively bargained and modified by the arbitrator, they would be wrong, because §3020 clearly states the tenured teacher gets to select the process which deprives them of their tenured rights, either the new CBA method or §3020.

The law states an arbitration award can only be vacated if it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power. *Matter of Board of Educ. v. Arlington Teachers Assn.*, 78 NYS 2d 33, 37, citing CPLR 7511(b)(1). The award violates a strong public policy in that the arbitrator was able to take away the collective tenure rights of all tenured teachers but cannot do that individually, and the arbitrator exceeded the express limitations of their own powers outlined in the award.

Pursuant to the CBA, an arbitrator appointed at an individual arbitration can never "deny to any employee his/her rights under section 15 of the New York Civil Rights Law or under the State Civil Rights Law or under the State Education Law or under applicable Civil Service Laws and regulations" (A.396). Clearly, an individual arbitrator lacks the authority to make any decisions contrary to the CBA and the State Education Law. Hence, the question arises: when an arbitrator is chosen to preside over tenured teachers as a collective, how can the arbitrator possibly issue a decision that contradicts the very laws and regulations they were never empowered to oversee in the first place? By failing to consider the merits of the case in relation to the State Education Law and the terms of the CBA, the arbitrator violated their obligation to adhere to those clauses and provisions, as well as the Education Law itself. The notion that the arbitrator cannot render a decision against an individual tenured teacher that violates their due process rights under the State Education Law but an arbitrator being appointed to render a decision for the collective body of tenured teachers can ignore all State Education and due process requirements undermines the principles of due process and lacks legal justification.

> The arbitrator is not empowered to issue any ruling that fails to consider the provisions of State Education Law §3020 and §3020(a). Additionally, the Collective Bargaining Agreement explicitly states that the UFT cannot negotiate away any rights of a teacher under the State Education Law because tenured teacher rights are not an item subject to collective bargaining (A. 380). Therefore, the entire arbitration decision must be dismissed and vacated as it pertains to Appellants, since the award itself violates well-established

> connotational, statutory, or common law principles of New York State. *In re United Federation of Teachers v. B.O.E.*, 1 N.Y.3d 72 (N.Y. 2003) (quoting *N.Y.C. Transit Auth. I*, 99 N.Y.2d at 11, 780 N.E.2d at 495, 750 N.Y.S.2d at 811).

B. THE LOWER COURT'S RULING THAT APPELLANTS LACK STANDING IS IN ERROR

As a procedural matter, the Supreme Court and First Appellate Court have ruled that even if Appellants' arguments seeking to vacate the Arbitrator's Award and restore them to paid status were meritorious, they would nonetheless fail because they purportedly do not have standing to pursue this matter. The lower courts are co-mingling the concept of standing with joinder. On the issue of standing, both the lower court and the Appellate Division have said Appellants do not have standing, but the plain meaning of CPLR 7511(2)(i) would clearly provide standing to the Appellants on the grounds that Appellants' rights were prejudiced by an arbitrator who exceeded his power and who issued an award upon the subject matter that was not made.

The legal precedent in this jurisdiction clearly states that CPLR 7511 gives rise to a cause of action for a tenured teacher who did not participate in arbitration to challenge the ruling of that arbitration. See *Case v Monroe Community College*, 89 NY2d 438, 442-43 (1997) (in the event the agent declines to pursue further proceedings, such as an appeal, the individual grievant is not foreclosed from pursuing such relief in his or her individual capacity."). Not only does the legal

precedent from this Court support this conclusion, the teacher's Collective Bargaining Agreement also states that all teachers reserve their right to further litigate any arbitration award in the Courts [A.380].

It is undisputed that the Appellants never participated in any arbitration, and the same is recognized by the First Department [A. 7], much less the very arbitration that took away their due process rights. The lower court made no substantive rebuttal to the holding in *Case v. Monroe Cmty. Coll.*, 89 N.Y.2d 438 (1997), except to incorrectly state that the Appellants' CBA does not permit the Appellants to pursue legal action on their own. This is wholly incorrect and not reflected in the record. The Court's docket is filled with numerous cases where tenured teacher Appellants challenge arbitration awards without naming the UFT as a party.

The Collective Bargaining Agreement (A. 380) clearly states no tenured teacher surrenders their rights. Under Civil Rights Law §15 states the following:

> Notwithstanding the provisions of any general or special law to the contrary, a citizen shall not be deprived of the right to appeal to the legislature, or to any public officer, board, commission or other public body, for the redress of grievances, on account of employment in the civil service of the state or any of its civil divisions or cities. (N.Y. Civ. Rights Law § 15)

The First Department incorrectly stated: "Neither, as in the cases cited by Petitioners, does any provision of the CBA allow petitioners to represent themselves" (*see Matter of Case v Monroe Community Coll.*, 89 NY2d 438, 442-

443 [1997]; *Matter of Diaz v Pilgrim State Psychiatric Ctr. of State of N.Y.*, 62 NY2d 693, 695 [1984])."

As previously stated, the CBA clearly empowers a tenured teacher to protect their right and represent themselves. Therefore, because the First Department missed that portion of the CBA which permits the Appellants to continue litigating on their own, that portion of the decision must be revoked. There should be no legal dispute that the Appellants in this matter have standing.

1. UFT IS NOT A NECESSARY PARTY TO THIS DISPUTE

The First Department decision clearly equates standing with joinder which are two separate and distinct legal provisions with different legal standards. Standing is a fundamental issue for Courts whereas joinder is not to be maintained under such strict scrutiny. The drastic remedy of denying Appellants' Article 75 for failure to join the UFT does not follow the caselaw or legal standard of New York State. It is not since the UFT is not a necessary party to the Petition before this Court.

> Pursuant to CPLR 1001(a), a person should be joined in an action or proceeding where necessary "if complete relief is to be accorded between the persons who are parties" thereto or where the person to be joined "might be inequitably affected by a judgment" therein (*see City of New York v. Long Isl. Airports Limousine Serv. Corp.*,48 N.Y.2d 469, 475 (1979)).

Mahinda v Bd. of Collective Bargaining, 938 N.Y.S. 2d 505, 507 (1st Dept 2012).

The UFT will not be "inequitably affected" no matter how this proceeding ends. In fact, as previously discussed, the second circuit in the *Kane* decision already

vacated the award as to the fifteen tenured teachers in that case. Therefore, it is not abstract or unwarranted to vacate the award as to the Appellants here. In addition, there is no outcome of this proceeding that would require the UFT to do anything at all. The UFT did not suffer any financial loss or negative consequences apart from the Arbitration Award that Appellants are looking to vacate. In fact, the UFT and its members will find themselves in a substantially better position, both equitably and legally, if this award is vacated. The interest of the Appellants and the UFT can be seen as being aligned. Vacating this award will ensure that tenured teachers are entitled to the due process protections provided by the CBA and the law. The UFT and its members would benefit from the actions of these eight teachers who are seeking to hold the Respondents accountable to the provisions of the CBA. The arbitration award can be deemed void if it violates public policy, regardless of whether the UFT is named as a respondent in this case. This Court has time and time again stated, an arbitrator's award is void to public policy when it violates a statute or embodied decisional law. In *re N.Y.C. Transit Auth. v. Transport Workers U*, 99 N.Y.2d 1 (N.Y. 2002). As stated previously, the entire decision ignores the law and creates its own law.

If the Court was going to extend the concept of "inequitably affected" to UFT members, a decision in favor of the Appellants would provide all UFT members with reparations from this "constitutionally suspect" Arbitration Award. The entire

underlying Petition requires action or inaction from this Court and Respondents. There is no relief of any kind that the UFT can offer or be involved with. If Appellants lose this suit and are thus bound to abide by DOH's Order with no due process, the absence of UFT as a party will not affect the Respondents' ability to be accorded complete relief. Moreover, the relief being sought in Appellants' Petition is not something that the UFT could grant to the Appellants. The UFT cannot restore Appellants' jobs, grant them backpay, or vacate the Arbitration Award in question.

The Court of Appeals found itself in a similar situation in *McNamara v. Bd. Of Educ*, 54 A.D.2d 467 (N.Y. App. Div. 1976) which dealt with teacher seniority in a tenure setting. The petitioners were required to name, as necessary parties, teachers with less seniority. The Court ruled in the negative. In our instance, the Court could issue a ruling to vacate the Arbitration Award just to tenured teachers who desire it to be vacated. In *McNamara*, teachers with less seniority would have been inequitably affected but the Court did not find them to be necessary parties as a reason to grant dismissal on joinder. If this Court vacates the Arbitration Award to just the Appellants or to every tenured teacher, it will equitably benefit every tenured teacher, and it will not inequitably hurt the union.

The law makes clear that it is an extraordinary course of action for the Court to terminate a case merely because of nonjoinder and should be avoided. *Fed. Ins. Co. v. SafeNet, Inc.*, 758 F. Supp. 2d 251, 258–59 (S.D.N.Y. 2010) ("…very few

cases should be terminated due to the absence of nondiverse parties unless there has been a reasoned determination that their nonjoinder makes just resolution of the action impossible."). Finally, the last paragraph of the Arbitrator's Award, paragraph "C", permits Petitioner Article 75 and 78 relief, stating: "Except for the express provisions contained, herein, all parties retain all legal rights at all times relevant, herein."

The Court should therefore vacate the award, as requested by Appellants, and establish a clear legal precedent that tenured teachers may move to vacate any arbitration award that prejudices their tenured teacher's rights, threatens these protections, and exceeds the arbitrator's authority, is void on public policy grounds. The failure of the employee organization to vacate collective arbitration is not relevant, as tenured teachers in the State of New York have their own statutorily protected rights that they can independently protect and defend.

In addition, as the case law suggests, while an employee organization may be an interested party, under the law that doesn't automatically convert it into a necessary party.

> Consequently, Special Term erred in concluding that the respondent union was the real party in interest and in dismissing this proceeding for petitioner's failure to properly serve it. Furthermore, although the union may be an interested party, it is not necessary or indispensable to a proper determination of this proceeding (see CPLR 1001; see also, *Henshel v. Held*, 13 A.D.2d 771).

New York State Office of Mental Health (South Beach Psychiatric Center) v. Civil Service Employees Ass'n, 88 A.D.2d 587, 588 (N.Y. App. Div. 1982).

CONCLUSION

The underlying issue at hand is that even in health emergencies, the law should be strictly followed and due process maintained. *Seawright v Bd. of Elections in the City of N.Y.*, 35 NY3d 227, 235 (2020) ("During the most difficult and trying of times, consistent enforcement and strict adherence to legislative judgments should be reinforced-not undermined.").

In this case, however, the law was not followed and the reasoning as to why the lower courts issued their decision it did the way they did, is in doubt, as there is a clear dichotomy between the record, the law, the lower court decisions, the two First Department decisions, and the First Department dissent relating to the vaccine mandate. If the lower courts had provided an honest and accurate review of the record while aligning itself with the plain meaning of the law, the constitutionally suspect Arbitration Award would have been vacated and Appellants would have received their State Education Law §3020 hearings. Instead, the Appellants are being held to a purported "condition of employment" that is absent from the record, the CBA, State Education Law, and the Impact Arbitration Award. Justice Friedman's dissent reinforces this point.

The Appellants did not sign any waiver and did not relinquish their due process rights. As tenured teachers, the Appellants are entitled to the protections

afforded by State Education Law §3020. Since they did not waive these rights, there is no evidence in this record to justify the denial and withholding of those rights. The underlying Petitions should have been granted in their entirety, and the previous decisions should be overturned completely.

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WORD COUNT CERTIFICATION

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