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)

REPLY BRIEF FOR PETITIONERS-APPELLANTS

Joseph H. Aron, Esq.
Appellate Counsel
3692 Bedford Avenue, Suite P2
Brooklyn, New York 11229
(718) 635-9500
jaron@aronlawpllc.com

Jimmy F. Wagner, Esq.
Attorney for Petitioners-Appellants
2055 Flatbush Avenue
Brooklyn, New York 11234
(929) 477-8889
jimmy013@gmail.com

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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.

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PRELIMINARY STATEMENT

The law, public policy, and the needs of the people of the State of New York all support the Appellants' position. However, the Respondents' Opposition Brief fails to address how the law, public policy, or the needs of the people favor their position.

The legal issues in this appeal are highly specific, and the Respondent's Brief underscores the limited scope of these issues. The two fundamental legal issues presented in this case are:

1. Can the Respondents retroactively impose a post-hire condition of employment that supersedes or sidesteps the legislative due process protections of State Education Law §3020 afforded to tenured teachers before being terminated?
2. Do the Appellants have the legal standing to vacate an arbitration award under CPLR §7511 if they did not participate in the arbitration that led to the award, and if the award was not obtained through the Collective Bargaining Agreement ("CBA")?

The Respondents and Appellants agree that, under this Court's current jurisprudence, "conditions of employment" do not entitle a tenured teacher to the legislative due process protections legally required under State Education Law §3020. However, the Appellants and Respondents disagree on the legal distinction

in the application of the term "condition of employment" as opposed to a "work rule" and the assertion that a "condition of employment" cannot exist post-hire.

The Appellants' position is that the vaccine mandate was a work rule, and any alleged violation of this new work rule would have entitled the Appellants to their statutory due process under State Education Law §3020. It is fundamental logic that you cannot impose a condition of employment on an employee who is already hired. While the Respondents argue:

> "There is no logical connection between the stage of an employment relationship when a requirement is introduced, on the one hand, and the question whether the requirement serves a disciplinary purpose, on the other. It is thus clear that the time-of-hiring rule that petitioners propose doesn't exist." (Respondents Brief, Pg 30.)

The Respondents' argument is incorrect. There exists a logical connection to the timing when a condition is imposed on an employee by the employer. It's important to note that the Appellants are not at-will employees. The Appellants are tenured teachers, and their tenure is regulated by State Education Law §3020. Neither the Collective Bargaining Agreement ("CBA") Nor an arbitration award obtained from Public Employees Relationship Board ("PERB") can modify the Appellants' tenure protections.

If the Appellants did not consent to a "condition of employment" in the contract at the time of their hiring, there is no legal mechanism through which the Appellants could forfeit their tenure rights and protections, except for the methods

and procedures outlined in State Education Law §3020.The Respondents have failed to point to any case where Respondents could unilaterally terminate a tenured teacher without following the statutory protection of §3020 based on the introduction of a new condition of employment after the teacher had already been granted tenure.

This Court has acknowledged and recently held that "During the most difficult and trying of times, consistent enforcement and strict adherence to legislative judgments should be reinforced – not undermined." *Seawright v Bd. of Elections in the City of N.Y.*, 35 NY3d 227, 235 [2020]. "Strict adherence" to the law during times of emergency is what society demands.

Notwithstanding the calamity of the COVID-19 pandemic, there was no reason why the statutory due process protections in State Education Law §3020 afforded to tenured teachers could not be followed. The Respondents had a remote process in place for conducting §3020 hearings so there was no reason the §3020 hearings could not have been provided to the Appellants. The Respondents' reasoning for failing to provide the Appellants with their §3020 hearing was that it may have created too much of a burden on Respondents, so they should be exempt from fulfilling their statutory §3020 legal duty:

> "This approach would have burdened DOE with likely thousands of absentee teachers for extended periods, and the prosecution of an equal number of hearings that involved no disputed facts, all to avoid COVID sweeping through DOE's schools as they reopened for full in-person instruction." (Respondent's Brief 31).

A "condition of employment" cannot retroactively apply to a tenured teacher in a way that undermines their legislative entitlement to §3020 due process. This entitlement, earned by the Appellants upon obtaining tenure, is bestowed upon them by the people of New York through the legislature. The Respondents, the arbitrator, and the lower courts lack any legal authority to modify teacher tenure protections, except as expressly outlined in §3020. The Respondents cannot enforce any conditions or mandates that conflict with state tenure laws. Even during the COVID-19 pandemic, when the legislature suspended numerous statutes, State Education Law §3020 remained in effect without suspension.

Lastly, the plain meaning of the CPLR §7511(b)(2) law is clear. A person has standing to challenge an arbitration award if they did not participate in the arbitration, were not served with the notice of intent to arbitrate and have been aggrieved by any of the CPLR §7511(b)(1) factors. The lower courts and Respondents have focused solely on CPLR §7511(b)(1) for standing, overlooking the Appellants' argument based on §7511(b)(2). Regardless of whether the impact award is vacated or not, the Appellants should still be entitled to their State Education Law §3020 hearings.

ARGUMENT

A. RESPONDENTS FAIL TO PROPERLY DISPUTE AND DISTINGUISH THE *BECK-NICHOLS* FOUR-PART RULE AND WHY IT SHOULD NOT BE APPLIED

Appellants and Respondents agree that *Matter of Beck-Nichols v. Bianco*, 20 NY3d 540 (2013) is good law and controlling. Respondents' entire argument is predicated upon there being no legal distinction between this fact pattern and *Beck-Nichols* fact pattern. While the Respondents assert that *Beck-Nichols* did not establish a rule, the Appellants contend that it did indeed establish a rule which Appellants meticulously parse out to present to this Court the substantial legal distinction between what happened in *Beck-Nichols* and what happened in this instance. The Appellants believe they can legally distinguish their fact pattern from *Beck-Nichols* based on the four factors derived from the *Beck-Nichols* decision. The Respondents' rejection of the four-part rule outlined in *Matter of Beck-Nichols v. Bianco*, 20 NY3d 540 (2013), lacks consideration for the four specific factors delineated in *Beck-Nichols*. The *Beck-Nichols*' fact pattern differs substantially from the fact pattern in our record regarding a post-hire vaccine mandate that has since been rescinded. The Respondents have failed to address the striking legal distinction between *Beck-Nichols* and the present record.

The four-part rule established in *Beck-Nichols* offers the only logical framework through which employers can enforce conditions of employment,

potentially avoiding the necessity for the Respondents to initiate §3020 hearings for tenured teachers.

The Respondents contend that they can bypass the statutory due process requirements of §3020 for the Appellants, as long as they can characterize the termination of the Appellants as being based on a condition of employment. The Respondents' Brief maintains that there are no legally distinguishing factors between *Beck-Nichols* and the current case. However, the Appellants have explicitly listed and emphasized a material difference between *Beck-Nichols* and the facts in this case, alleging that the Respondents violated the four-part *Beck-Nichols* rule. The Respondents argue that these material differences lack legal distinctions, asserting that the rule was not violated. However, the Appellants argue that the Respondents' position is incorrect.

1. Part One Of The *Beck-Nichols* Rule – The Condition Of Employment Must Be Imposed At The Time Of Hire

Beck-Nichols asserts that a condition of employment must be imposed at the time of hire. However, the Respondents argue that there is no material distinction between a condition of employment at the time of hire and the imposition of a condition of employment after the employee has been hired:

> "There is no logical connection between the stage on employment relationship when a requirement is introduced, on the one hand, and the question whether the requirement serves a disciplinary purpose on the other. It

> is thus clear that the time-of-hiring rule that petitioners propose doesn't exist." (Respondents Brief, Pg 30.)

The vaccine mandate could not be a condition of employment given that the Respondents already employed the Appellants. The Respondents' argument that the stage of Appellants' employment is irrelevant is fundamentally flawed. This idea that a condition of employment can be imposed at any time contradicts the first factor expressed in *Beck-Nichols*. In *Beck-Nichols*, this Court explicitly highlighted that the residency policy was established when the teachers were hired, and the teachers had agreed to the residency requirement in writing. In contrast, the Appellants in our case never agreed in writing to the mandate at any point. This legal distinction alone should be sufficient to differentiate our record from the *Beck-Nichols* record.

If the appellants in *Beck-Nichols* had been hired before the residency requirement imposed by the city and had not agreed to it in writing, they would have been entitled to their traditional due process protections before termination, whether under State Education Law or Civil Service Law. This highlights the significance of the timing and agreement in distinguishing the legal obligations. The Respondents' position that it is irrelevant when the condition of employment was imposed is a paradox. The vaccine mandate cannot be deemed a condition of employment because the Appellants were already employed prior to this condition being placed.

2. Part Two Of The *Beck-Nichols* Rule – The Condition Of The Employment Must Serve A Legitimate Purpose

The second part of the *Beck-Nichols* rule states that the condition of employment must serve a legitimate purpose for the employer to bypass §3020 due process. However, the Respondents' enforcement of this factor in our case had no legitimate purpose. In the case of Appellant Loiacono, a remote teacher, there was no need for her to ever enter the Respondents' building, raising questions about the legitimacy of applying this condition of employment to her. The enforcement of this work rule for all employees, including those who never entered the Respondents' building, defies any legitimate purpose.

The Appellants understand that the pandemic created a new and unique scenario, however, this was not the first time the New York City schools have faced pandemics, but it was the first pandemic which cause tenured teachers to lose the protections of §3020.

3. Part Three Of The *Beck-Nichols* Rule – The Condition Of Employment Must Be Clear And Unambiguous

The third part of the *Beck-Nichols* rule states that a condition of employment must be unambiguous.

The Respondents claim that the Commissioner's Health Order was unambiguous. However, the record in this case suggests that the Commissioner's Order was unclear, as the courts disputed the origin of the Respondents' authority to

impose a condition of employment. The various lower courts held different views on where the authority to impose a condition of employment originated, creating ambiguity in the interpretation of the Commissioner's Order.

A. Judge Bluth stated the condition of employment was "imposed by the arbitrator's decision" (A.33)[1];

B. Judge Frank did not address the condition of employment. (A.35-36);

C. Judge Love stated that "a vaccine mandate is a condition of employment" (A.42);

D. Judge Kotler said "… the COVID-19 vaccine mandate propagated by the DOE…" (A(c).16);

E. The Clarke and O'Reilly panel used the term "…qualification of employment…" obtained from Arbitration. (A.7);

F. Judge Friedman's dissent states "given that the vaccine mandate was not enacted by legislature… [it] cannot lawfully be enforced against petitioners as a condition of employment..." (R.25).

The records indicate that the Commissioner's Order was far from unambiguous. If it were clear, all lower court judges would have easily aligned their

[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.

decisions by stating that the condition of employment was clearly directed by the Order. The fact that different judges in lower courts had varying interpretations suggests ambiguity in the Commissioner's Order.

The Health Commissioner's Order explicitly applies to individuals entering or working in-person in DOE buildings (A.400-403), even going so far as to define "Works in-person" (A.403). This clearly suggests that employees not working in-person would not be required to be vaccinated. Moreover, the absence of the phrase "condition of employment" in the Order is a crucial element. The Respondents, therefore, lack legal authority to enforce this Health Commissioner's Order in a manner that transforms it into a new condition of employment, subsequently denying the Appellants their §3020 rights.

The Respondents have not addressed or attempted to counter the persuasive case of *Lutz v. Krokoff*, 102 A.D.3d 146 (N.Y. App. Div. 2012), where the third department did not interpret the work qualification "ability to operate an automobile" to mean the job that requires a driver's license. The condition of employment, "the ability to operate an automobile," existed at the time of hire for the police officer in *Lutz*. In our fact pattern, it is undisputed that no "vaccine mandate" existed for the Appellants at the time of hire. As stated in *Beck-Nichols*, the condition of employment must be clear and unambiguous. *"*This definition may be criticized for redundancy or surplusage, but not ambiguity." *Beck-Nichols v Bianco*, 20 NY3d

540, 558 [2013] In *Lutz,* the court persuasively reinforced the rights of workers by stating the conditions of employment must be expressly stated:

> While cases in this realm have not specifically addressed the issue of notice, in our view, both due process and fundamental fairness require that a qualification or requirement of employment be expressly stated in order for an employer to bypass the protections afforded by the Civil Service Law or a collective bargaining agreement and summarily terminate an employee. Indeed, such notice and specificity was provided by the Municipal Civil Service Commission of the City of Albany in the class specification for a City of Albany firefighter, which explicitly requires the possession of a valid New York State driver's license at the time of employment and throughout the duration thereof.

Lutz v Krokoff, 102 AD3d 146, 149-50 [3d Dept 2012]

Respondents acknowledge that the Health Commissioner never stated his order was a condition of employment (Res. Br. 32-33). *Beck-Nichols* is explicit in stating that any condition of employment must be clear and unambiguous if an employer is to bypass §3020 hearings.

4. The Fourth Part Of The *Beck-Nichols'* Rule Is That Only Issues Regarding Eligibility For Employment That Are "Unrelated To Job Performance, Misconduct, Or Competency" Don't Require 3020 Hearings

The fourth part of the *Beck-Nichols* rule states that only eligibility requirements do not require §3020 hearings. Eligibility requirements are defined as follows:

> 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])

Beck-Nichols v Bianco, 20 NY3d 540, 558 [2013]

Respondents argue that there is no difference in Appellants' parsing of *Beck-Nichols* between Appellants' first factor (the condition of employment must in place at the time of hire) and the fourth factor which states that the disputed factor cannot be related to "job performance, misconduct or competency." The Respondents do not make a distinction of how, if Appellants uploaded a fraudulent vaccine card, the issue becomes misconduct, while failing to upload any card at all is considered a condition of employment. This is discussed in Respondent's Brief on pages 51-52, referencing *Kambouris v. N.Y.C Dept's of Educ.,* 78 Misc. 3d 260 (Sup. Ct. Kings. Cnty. 2022).

A tenured teacher is obligated to fulfill specific position requirements annually, which can be likened to submitting a vaccine card to the SOLAS system. Similar responsibilities include filling out incident reports, report cards, and maintaining lesson plans. If a teacher fails in any of these tasks, it warrants an investigation, and §3020 charges may be initiated. The same should have been applied to the Appellants' conduct for failing to upload a vaccine card to the SOLAS system.

To reiterate, when analyzing a fact pattern against the *Beck-Nichols* rule, we must consider:

1. Did the condition of employment exist at the time of hire?
2. Does the condition of employment have a legitimate purpose?
3. Is the condition of employment clear and unambiguous?
4. Is the condition of employment an eligibility requirement?

Under the Respondents' logic, they could hypothetically impose a post-hire condition of employment requiring tenured teachers to move within two blocks of their school, live in an odd-numbered house, and provide proof within seven days, or face termination. The failure to upload proof of the new residency would not grant teachers an opportunity to respond; they must either upload proof of new the new residency requirement or be terminated.

In our hypothetical scenario, much like our real-life scenario, the *Beck-Nichols* rule fails. There would be no legitimate purpose to this condition of employment, even if we assumed that it existed at the time of hire. This emphasizes the importance of properly instituting all four parts of the *Beck-Nichols* rule to prevent Respondents s from randomly instituting a condition of employment whenever they want against tenured teachers.

The Respondents failed to follow the law, failed to properly apply *Beck-Nichols* rule, and failed to account for the strong public policy that New York state

residents have in protecting tenured teachers. The First Department's decision destroys protections for tenured teachers across the entire state of New York and allows School Districts to remove tenured teachers by qualifying any work rule as a condition of employment.

B. RESPONDENTS INCORRECTLY INSINUATE THAT *MANNIX, RICCA, GOULD, & SPRINGER* ARE OUTDATED AND NOT VALID PRECEDENTS

The Respondents, in addressing the Appellants' Brief and Justice Friedman's dissent, argue that the holdings found in *Matter of Mannix v Board of Educ*, 21 NY2d 455 [1968], *Ricca v Board of Educ*, 47 NY2d 385 [1979], *Matter of Gould v Board of Educ*, 81 NY2d 446 [1993], and *Springer v Bd. of Educ. of the City Sch. Dist. of N.Y.,* 49 NE3d 1189 [2016] are not valid law. The Respondents boldly state, "All but one of these decisions pre-dated not just *Beck-Nichols,* but also *Felix*, and thus cannot be understood to control over the more recent rulings." (Respondents Brief Pg. 38). This implies that *Mannix, Ricca, & Gould* are no longer valid law in New York State because of the date they were issued. However, even the First Department did not take that position, acknowledging these cases as good law but deeming them inapplicable and distinguishable when applied to these teachers, a stance with which Appellants disagree.

The Respondents' position that the date of a court's decision underscores its relevance fails because *Springer* postdates *Beck-Nichols*, while citing both *Ricca* and

Gould, thereby reaffirming all three cases as good law in New York State. *Springer* states:

> 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" (*Ricca v. Board of Educ. of City School Dist. of City of N.Y.,* 47 N.Y.2d 385, 391, 418 N.Y.S.2d 345, 391 N.E.2d 1322 [1979]; *see Matter of Gould v. Board of Educ. of Sewanhaka Cent. High School Dist.,* 81 N.Y.2d 446, 454, 599 N.Y.S.2d 787, 616 N.E.2d 142 [1993]). 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 (*Gould,* 81 N.Y.2d at 451, 599 N.Y.S.2d 787, 616 N.E.2d 142).

Springer v Bd. of Educ. of the City Sch. Dist. of N.Y., 49 NE3d 1189, 1193 [2016]

A slightly deeper dive into teacher tenure case law reveals that *Ricca* cites to *Mannix*:

> 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 (see *Matter of Mannix v Board of Educ.,* 21 N.Y.2d 455), 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 (see *Matter of Schlosser v Board of Educ.,* 47 N.Y.2d 811.

Ricca v Board of Educ, 47 NY2d 385, 391-92 [1979]

The Respondents' argument that an old case has no precedential value is incorrect. The *Springer* case, being the most recent among those cited, affirms that *Mannix, Ricca,* and *Gould* are still considered good law. This aligns with Justice Friedman's dissenting quote based on an "unbroken line of authority." The First Department did not assert that Judge Friedman was wrong; rather, they acknowledged that the cases were distinguishable. Therefore, Respondents' position, suggesting that these cases are no longer valid law, is incorrect.

All parties can agree and concede that COVID-19 presented a unique scenario. However, even in its uniqueness, there was no justification for not adhering to the law. The New York State legislature had the authority to suspend the statute of limitations and could have also suspended §3020 tenure teacher rights, but it chose not to do so. Therefore, the Respondents were obligated to comply with the same. As stated in *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."

C. DUE PROCESS IS ALWAYS RELEVANT AND THE APPELLANTS HAD A STATUTORY RIGHT UNDER §3020 TO CHOOSE THE DUE PROCESS THEY WOULD RECEIVE UNDER THE LAW

The Appellants' Brief at Point V, pages 60-65, expressly addresses why the First Department's decision is wrong when it states that due process is irrelevant if the employee fails to "identify any triable issues of fact that could be raised in a

hearing that have not already been decided by the Impact Award…" (A.16). A full review of the Respondents' Opposition reveals this argument is not addressed. Therefore, Appellants are only left to conclude that Respondents concede that Appellants' §3020 due process rights do not hinge on "triable issues of fact" or because "there is little or no doubt about the outcome of the proceeding." (A.20). The Respondents and the lower courts are without the legal authority to unilaterally state there were no triable issues of fact. The Appellants' Brief at page 62 explains many various reasons why the Appellants did not upload a vaccine card to the SOLAS system. Therefore, to say there are no triable issues of fact on this record is incorrect, because Appellants never received the opportunity to address the same.

State Education Law §3020 states that a tenured teacher's due process rights cannot be changed or modified without the individual tenured teacher's express written approval.

> 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 or in accordance with alternate disciplinary procedures contained in a collective bargaining agreement covering his or her terms and conditions of employment that was effective on or before September first, nineteen hundred ninety-four and has been unaltered by renegotiation, or in accordance with alternative disciplinary procedures contained in a collective bargaining agreement covering his or her terms and conditions of employment that becomes effective on or after September first, nineteen hundred ninety-four;

> provided, however, that any such alternate disciplinary procedures contained in a collective bargaining agreement that becomes effective on or after September first, nineteen hundred ninety-four, must provide for the written election by the employee of either the procedures specified in such section three thousand twenty-a or the alternative disciplinary procedures contained in the collective bargaining agreement and must result in a disposition of the disciplinary charge within the amount of time allowed therefor under such section three thousand twenty-a

Educ. Law § 3020

The law clearly states that if a tenured teacher's conditions of employment are modified post-1994, then the tenured teacher must be provided with a "written election" to select the hearing procedures under §3020-a or the new procedures.

Triable issues of fact are not factors expressed or to be considered when determining a tenured teacher's §3020 rights under the law. The decision of the First Department, specifically concerning State Education Law §3020 due process, is in conflict with the law, diverges from New York State's public policy of providing individuals an opportunity to be adequately heard, and weakens tenure protections for teachers statewide. This outcome is not in line with the will of the people of the State of New York.

In refuting the §3020 due process, the Respondents' reliance on *Matter of Koutros v. Dep't of Educ of N.Y.* 129 A.D.3d 434, 435 (1st Dep't 2015), *Matter of O'Connor v. Bd. Of Educ. Of City Sch. Dist. Of Niagara Falls*, 48 A.D.3d 1254, 1255

(4th Dep't 2008), *Matter of Sorano v. City of Yonkers*, 37 A.D.3d 839, 840 (2d Dep't 2007), is misguided because all parties agree that conditions of employment do not entitle an employee to full statutory due process protections.

A closer analysis of *Sorano,* supports the Appellants' argument that there is a constitutional requirement for due process:

> Although the petitioner was not entitled to a pre-termination hearing pursuant to Civil Service Law § 75, she was still entitled to be notified of the allegation that she had changed her domicile from the state of New York to the state of Maryland, and to have an opportunity to respond to the allegation prior to her termination (*see Matter of Felix v New York City Dept. of City wide Admin. Servs., supra*).

In re Matter of Sorano, 37 AD3d 839, 840 [2d Dept 2007]

The Appellants in this case contend that they received no real notice and no opportunity to be heard. As previously established, the Commissioner's Order, the arbitrator's award, and emails directing the Appellants to upload a vaccine card were all ambiguous and provided no notice. The Appellants were entitled to §3020 due process, but the record indicates that they were not provided with their constitutional due process either.

The Respondents' position is that "petitioners received notice of the impending requirement multiple times" (Respondents' Brief 46). The Respondents allege that the Health Commissioner's Order and the Impact Award were all the notice the Appellants are entitled to receive. However, as argued in Point A(3) of

this reply, the Health Commissioner's Order and the Impact Award were vague and ambiguous, lacking any mention of the phrase “condition of employment”. It's crucial to recognize that the due process entitlements for religious and medical accommodations are separate and distinguishable from the Appellants’ due process entitlements under the Constitution and §3020, prior to termination.

The Appellants were instructed to upload their vaccine cards to the Respondents' SOLAS system, and failure to do so would lead to termination. The Appellants were not given an opportunity to explain why their cards were not uploaded before facing termination. The Respondents unilaterally assert that the only reason for not uploading a vaccine card was non-vaccination, but the record does not reflect the Respondents’ position.

Furthermore, the Respondents’ reliance on *Prue v Hunt*, 78 NY2d 364 [1991] is misplaced. The court actually held the following:

> “We hold that to meet the minimum demands of Federal due process petitioner should at least have been given an explanation of the grounds for the discharge and an opportunity to respond prior to his discharge.”

The court in *Prue* did list relevant factors to help the courts determine how much opportunity should be provided to be heard before termination of the employee. These factors included the “interest that may be lost”, “the hardship imposed by the loss”, and “availability of subsequent proceedings”. *(see, Loudermill, supra,* at 545; *Boddie v Connecticut,* 401 U.S. 371, 378).” *Prue v Hunt*, 78 NY2d 364, 369

[1991]. Neither the lower courts nor the Appellate Division made an attempt to correctly apply the *Prue* factor to arrive at a legal finding regarding the level of constitutional due process owed to the Appellants.

When properly analyzed, the Prue factors demonstrate that the Appellants were denied their constitutional due process. It is uncontested that the Appellants suffered significant losses, including their statutory tenure protections, careers, healthcare, pensions, accumulated vacation time, and sick days. The hardship experienced is immeasurable, and the collective loss of one's entire livelihood within a matter of days, without the opportunity to explain why they failed to upload a card to the SOLAS system, constitutes a grave injustice. Additionally, the court in *Prue* expressly addressed "discharged employees":

> The Court decided that since the discharged employees were entitled to a full-scale post termination hearing, at which the propriety of their discharges would be finally determined, due process could be satisfied by a pretermination showing that "there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. See *Bell* v. *Burson,* 402 U.S., at 540." *(Id.,* at 546.) This, the Court stated, demands no more than that the employees be given an explanation of the charges against them and an opportunity to present their side of the story either in writing or in person *(id.,* at 546).

Prue v Hunt, 78 NY2d 364, 369 [1991]

It is uncontested that the Appellants never received any post-termination hearings and were never afforded the opportunity to "tell their side of the story" either in writing or in person before or after termination.

The Respondents' attempt to align the constitutional due process standard of *Prue* with what was provided to the Appellants is inconsistent with the law. Their effort to address the factors found in *Prue* from the employer's standpoint contradicts the essence of the case, which suggests that the factors must be evaluated from the perspective of the employees. The Respondents fail to address any of the factors found in *Prue* from the employee's position, similar to their omission in addressing the four-part rule found in *Matter of Beck-Nichols v. Bianco*, 20 NY3d 540 (2013).

D. APPELLANTS HAVE STANDING TO PURSUE THEIR CLAIMS

The plain reading of the CPLR §7511(b)(2) in this unique instance would grant standing to the Appellants:

> "2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate…"

The Respondents continue to neglect addressing the Appellants' standing under CPLR §7511(b)(2), as argued by the Appellants. Notably, in a nearly identical petition in Queens County Supreme Court (where I also serve as counsel), a lower court ruling found that the appellant, a tenured teacher, did have standing under CPLR §7511(b)(2) in the case Schneider vs. The Board Of Education, et al., Index

No. 724580/2021, Queens County, dated May 23, 2022. This case is currently under appeal in the Second Department with the same caption and an appellate index number 2022-04595, as referenced in the statement of related litigation.

The First Department and the Respondents attempt to overlook the law, New York State public policy, and the will of all the residents of New York State by framing Appellants' standing argument within CPLR §7511(b)(1). However, as evident from the record and the submitted papers, the Appellants consistently asserted standing under CPLR §7511(b)(2). The Respondents, in their papers, and the First Department, in its decisions, failed to address this argument. Consequently, the Respondents have tacitly conceded that the plain meaning of CPLR §7511(b)(2) grants the Appellants standing to challenge and vacate the arbitrator's award properly. However, even if the Appellants are mistaken and the Respondents are accurate in asserting that CPLR §7511(b)(1) should be applied, the Appellants still maintain standing.

If the Court does not find the plain language of CPLR 7511(b)(2) sufficient to satisfy the standing requirement for Appellants to move to vacate the award under Article 75, the Appellants will assert standing under CPLR §7511(b)(1). In *Case v Monroe Community College*, 89 NY2d 438 (1997) the Court clearly stated an individual is not foreclosed from pursuing further proceedings if the union declines to pursue the proceedings.

In *Case*, it was clearly established that a party does have standing to challenge an arbitration award, even in instances where the union opts not to contest the same. The Appellants' rights under the CBA are preserved with reference to Civil Rights Law §15 in the CBA. The CBA clearly grants the Appellants the right to bring a claim in the instance when they believe they have been injured by the employer, such as in the current instance.

Furthermore, a distinguishing point is that this arbitration explicitly dealt with issues outside the CBA. This Court has historically recognized that "Perhaps most importantly, it is not the PERB or the arbitration panel but the local governments and their employees who are the real parties in interest" *Caso v. Coffey*, 41 NY2d 153, 157 [1976].

Moreover, since a teacher's tenure rights, granted by the state legislature, are not subject to union negotiation, it is unclear how the Union and the Respondents could enter into any arbitration that would undermine those tenure rights. Any arbitration process that could potentially deprive a tenured teacher of those rights without due process would confer standing to that tenured teacher under Civil Rights Law §15.

Civil Service Law §209 is mandatory for certain first responders but is not obligatory for those employed in school districts, as per Civil Service Law §209. Therefore, the Respondents cannot declare that the Appellants lack standing to

challenge the Impact Arbitration Award simply because they did not allege that the UFT breached a duty of fair representation or because the CBA did not permit the petitioners to represent themselves. The Respondents must first establish the legal authority of how an arbitration award obtained against a tenured teacher became "mandatory" in violation of the law and without the involvement of the legislature, as the law mandates: "thereafter, the legislative body may take such action as is necessary and appropriate to reach an agreement." Civ. Serv. Law § 209 [3](f). Defined in Civil Service Law §201:

> 12. The term "agreement" means the result of the exchange of mutual promises between the chief executive officer of a public employer and an employee organization which becomes a binding contract, for the period set forth therein, except as to any provisions therein which require approval by a legislative body, and as to those provisions, shall become binding when the appropriate legislative body gives its approval.

Furthermore, a crucial distinction is that neither Case nor Matter of Diaz, nor any case referenced by the Respondents, or any case I can locate, resulted from impasse arbitration under Civil Service Law §209. This record does not reflect that any of these Appellants are in the union.

E. THE UFT IS NOT A NECESSARY PARTY AS IT WILL NOT BE INEQUITABLY AFFECTED BY A JUDGMENT IN FAVOR OF THE APPELLANTS

Any decision in favor of the Appellants in this matter will benefit tenured teachers across the entire state of New York. The Respondents' position that the

Impact Award cannot be vacated is not true, as it has already been vacated as to fifteen (15) tenured teachers for failing to meet their legally required religious accommodation due process claims.

In *Kane v De Blasio*, 19 F.4th 152 [2d Cir 2021], the United States Court of Appeals granted relief from the Impact Award to fifteen (15) individuals:

> We nevertheless vacate the district court's orders of October 12 and 28, 2021, denying preliminary relief, and we concur with and continue the interim relief granted by the motions panel as to these fifteen individuals. For the present, Plaintiffs have established their entitlement to preliminary relief on the narrow ground that the procedures employed to assess their religious accommodation claims were likely constitutionally infirm as applied to them.

Kane v De Blasio, 19 F4th 152, 159 (2d Cir. 2021).

Although the UFT may be an interested party, they are not necessary to afford the Appellants any relief in this action. *New York State Office of Mental Health (South Beach Psychiatric Center) v Civil Service Employees Ass'n*, 88 AD2d 587 [2d Dept 1982] was a similar case where the Second Department clearly distinguishes between a potentially interested party and one that is not necessary or indispensable to the proceeding. Respondents have failed to state one item of relief requested by the Appellants that the UFT could grant, because none exists. If the Appellants prevail, all injured union members will benefit from their litigation. The UFT's strength would be reinforced if the Appellants succeed, bringing mutual

benefits. While the UFT's participation is not imperative, its interests align with the Appellants, as the relief sought by the Appellants mirrors the very remedy the UFT sought during arbitration. (A.406-418).

F. RESPONDENTS' RELIGIOUS ACCOMMODATION DUE PROCESS ALLEGATIONS ARE NOT RELEVANT FOR THIS APPEAL

In a strange twist, Respondents reference the religious accommodation procedure and due process (Respondents Br. Pg 12.). I cannot speculate why they reference the religious and medical accommodation procedures. This is not an issue in this Appeal. Moreover, it's worth noting that the Respondents' religious accommodation process, specifically concerning tenured teachers, has previously been deemed "constitutionally infirm" in *Kane v de Blasio*, 575 F Supp 3d 435 [SDNY 2021].

CONCLUSION

The law favors the Appellants. The law states that for the Respondents to evade the Appellants' statutory due process protections of §3020, the Respondents were required to follow the four-part rule of *Beck-Nichols*. The Court of Appeals rule in *Becks-Nichol*, as Judge Cardozo would say, "fills in the gaps."

Public policy favors protecting tenured teachers, intentionally placing them in a class of civil service employees with their own protections under §3020. The tenure protections are only to be modified by the legislature, never by the Respondents, the union, or an arbitrator. Tenure laws, as public policy demands, are not subject to the CBA.

The needs of the people of New York State favor granting the Appellants their statutory due process under §3020. While the Appellants are just eight (8) teachers who work for the City, the §3020 tenured teacher rules apply equally across the entire state. If these decisions stand, it will allow school districts statewide to start imposing post-hire “conditions of employment” to fire and discharge any tenured teacher without ever having to answer to the New York State laws enacted to protect tenured teachers from being terminated at the whim of the school district.

The record is absent of any formal order, law, or contract where the phrase “condition of employment” is found. The purported "condition of employment" has been revoked, yet all the Appellants, with the exception of Loiacono, remain

unemployed. Loiacono regained her position after succeeding in her Article 78 case concerning the denial of her religious accommodation, which the Respondents have not appealed. *Matter of Loiacono v. Bd. Of Educ. of N.Y.,* Index No. 154875/2022, 2022 N.Y. Misc. LEXIS 5801 (Sup Ct. N.Y. Cnty. Sept. 2, 2022).

Appellants did not challenge the vaccine mandate but rather demanded that the Respondents provide them with a State Education Law §3020 hearing. Appellants' compliance, non-compliance, or alleged insubordination with any real or imagined "condition of employment" should be handled at the Respondents' school district level. Effectively, the Respondents have transformed state courts into venues for State Education Law §3020 hearings, sidestepping the procedural requirements mandated by the law under the belief that compliance would be overly burdensome.

The notion that the New York City Board of Health can issue an order modifying State Education Law §3020, ignoring the terms of the Appellants' Collective Bargaining Agreement, and doing so without a single legislative vote, defies our entire institution of democracy.

Moreover, the Respondents would like to assert that the New York City Department of Health can achieve all these modifications without ever explicitly including the term "condition of employment" in the Order.

The Respondents acknowledge they failed to follow the four-part rule of *Beck-Nichols*. The *Beck-Nichols* rule has to exist because if it did not exist, Appellants would have received their statutory §3020 due process without any question. The only reason a school district can ever discharge a tenured teacher without following §3020 is because of *Beck-Nichols.* The Respondents' desired unfettered expansion of the *Beck-Nichols* rule is why these cases are in litigation. Expanding the *Beck-Nichols* rule would be an absolute disaster which would constitute a clear violation of the law, conflict with public policy, and run contrary to the needs of the people of the State of New York.

The Respondents lack legal support, fail to identify any public policy benefits in denying tenured teachers their State Education Law §3020 hearings, and have not presented evidence to substantiate that their proposed expansion of *Beck-Nichols* aligns with the needs of the citizens of New York.

In stark contrast, Appellants put forth clear laws which support their position, clear public policies which support their position, and have clearly established how the needs of the people of all of New York State are properly served, not just those in New York City. In short, Appellants have provided the Court with proper legal reasoning to grant their Appeal in the entirety.

For the foregoing reasons, the First Departments' decisions should be reversed, and judgment entered for Appellants. Thank you.

Dated: Brooklyn, New York
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Respectfully Submitted,

Jimmy Wagner, Esq.
Law Office of Jimmy Wagner
Attorneys for Petitioners-Appellants
2055 Flatbush Avenue
Brooklyn, New York 11234
(929) 477-8889
jimmy013@gmail.com

Aron Law, PLLC
Joseph H. Aron, Esq.
Of Counsel
3692 Bedford Avenue, Suite P2
Brooklyn, New York 11229
(718) 635-9500
jaron@aronlawpllc.com

WORD COUNT CERTIFICATION

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Dated: January 17, 2024

/s/ Jimmy Wagner
Jimmy Wagner, Esq.
Attorney for Petitioners-Appellants