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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF TEAMSTERS LOCAL 445,

Respondent,

-against-

TOWN OF MONROE,

Appellant.

NO. 40

20 Eagle Street
Albany, New York
April 20, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Amanda M. Oliver
Official Court Transcriber

1 CHIEF JUDGE WILSON: Good afternoon, everyone. I
2 am delighted to be able to tell you that we can offer you a
3 full bench. We are joined by our wonderful colleague,
4 Caitlin Halligan. The first of many, many wonderful
5 sessions as a member of this bench.

6 I would also like to welcome the students from
7 Judge Stein's class at the Albany Law School, the Chapter
8 of the Historical Side of the US Courts. The students are
9 from the classes of 2023 and 2024 and include several
10 government law fellows. And also welcome Judge Stein, my
11 long-lost very heavy editor. So all of you can benefit
12 from her red pen the way I did.

13 First case on our calendar is Matter of Teamsters
14 Local 445 versus Town of Monroe.

15 Counsel?

16 MR. NUGENT: May it please the court, good
17 afternoon, distinguished judges. My name is Brian Nugent,
18 with the law firm of Feerick Nugent MacCartney,
19 representing the Respondent Appellant Town of Monroe in
20 this proceeding. Here with me, to my left, is my
21 colleague, Matthew Lizotte, who was on the brief. And to
22 his left, partner Alex Shaw from our firm.

23 First, congratulations, Chief Judge, on your
24 appointment, and Associate Judge Halligan on your
25 appointment.

1 I would like to request to reserve one minute for
2 rebuttal?

3 CHIEF JUDGE WILSON: Of course.

4 MR. NUGENT: Thank you.

5 Your Honors, why is this case important? If the
6 Second Department decision below is allowed to stand as the
7 law of this state, it will effect a significant change to
8 the law by allowing municipal and state officials to
9 appoint an exempt class employee who need not demonstrate
10 any qualifications and need not pass an examination to then
11 be converted into a permanent class employee without comp -
12 - - which is in violation of this state's public policy - -
13 -

14 JUDGE RIVERA: Is it - - - is there no manner for
15 removal?

16 MR. NUGENT: I'm sorry, Your Honor?

17 JUDGE RIVERA: Is there no manner for removal?
18 No path for removal? When you say a permanent employee.

19 MR. NUGENT: Their only path would be, under the
20 respondent's argument, though a demonstration of
21 incompetency or misconduct under Section 75 of the Civil
22 Service Law.

23 And we believe because of the at-will nature of
24 the exempt class, that they cannot be brought into the
25 coverage of Section 75 of the Civil Service Law.

1 JUDGE TROUTMAN: And why should exempt classes be
2 treated differently?

3 MR. NUGENT: Well, the main reason is, in the
4 first place, Section 75, the legislature's legislate - - -
5 the legislature body in New York State excluded the exempt
6 class from Section 75. So all of the cases in this state
7 that concern modifying or supplementing the provisions of
8 Section 75 and 76 concern those employees in the classes
9 that are protected, the competitive class, the non-
10 competitive class.

11 But the decision and law of this State has never
12 conferred the Section 75 benefits onto the exempt class.
13 And that is for good reason. The main one being that you
14 can't accomplish that without contravening Civil Service
15 Law, Section 20, that delegates the authority exclusively
16 to - - -

17 JUDGE RIVERA: Why - - - why isn't all of that
18 arbitrable?

19 MR. NUGENT: I'm sorry?

20 JUDGE RIVERA: Why doesn't that just go to the
21 arbitrator? What public policy would it violate to have an
22 arbitrator?

23 MR. NUGENT: Well - - -

24 JUDGE RIVERA: I hear your argument on this. Put
25 aside any other questions about ambiguity in the CBA

1 itself.

2 MR. NUGENT: Yeah, so the main public policy, and
3 I think it was set forth well in a Third Department case of
4 Martin v. Hennessy where this exact situation happened,
5 except the difference is there was no collective bargaining
6 agreement. There was a designation of exempt class
7 employee placed and granted by resolution 75 protection.
8 And the court there set forth the public policies and the
9 contravention of statute, which was - - - it was a
10 reclassification of the exempt class employee to confer the
11 protections of section 75 and essentially convert that
12 exempt class employee to one that was protected.

13 JUDGE CANNATARO: But that was a slightly
14 different factual scenario, right? That was - - - this is
15 a situation where the hiring authority and the union got
16 together and agreed to do this. It was more unilateral in
17 that case, wasn't it?

18 MR. NUGENT: Well, in the Thruway Authority case,
19 in Martin, it was a resolution of - - - of the board there.
20 Whether there was agreement, I - - - I'm not aware in the
21 background.

22 But you're correct that this situation arose from
23 a collective bargaining negotiation. But the public policy
24 of this State as - - - as been expressed, for example, in
25 this court's decision in Chautauqua, that that favoring the

1 policy for arbitration is not without limits.

2 JUDGE CANNATARO: Is it absolutely unprecedented
3 that exempt class employees are ever afforded article 75
4 protections? Are you - - - are you saying that that's just
5 unheard of if the structure is followed correctly?

6 MR. NUGENT: The exempt class, as such, has never
7 been protected by section 75. The only distinction is that
8 there are, which have long been the case in New York State,
9 preference for veterans and volunteer firefighters, where
10 that statute just says, anybody in the classified service
11 that is a veteran or a volunteer firefighter could achieve
12 protection.

13 But to allow this case to stand actually
14 undermines that legislative intent and that statute that
15 granted that specific protection onto those classes, and
16 now says that any exempt employee could be a political
17 appointment that is brought in without qualification and
18 examination, gets converted to a protected class. And then
19 we have the issue of now-binding successor boards that no
20 longer have the ability to remove that at-will employee
21 that they would have had, and they should have had, and
22 it's taken away.

23 JUDGE HALLIGAN: Are you asking - - -

24 JUDGE SINGAS: What about the labor class - - -
25 I'm sorry, Judge Halligan.

1 JUDGE HALLIGAN: Well, thank you.

2 Are you asking us to look only at the removal
3 protection specifically? For example, could there be a
4 different result with respect to a notice provision?

5 MR. NUGENT: No. In our view, we are looking to
6 have the arbitration permanently prevented because the - -
7 - there is no relief here that could be granted that would
8 not violate public policy, that would not violate those
9 provisions 20 and 41(c) of the Civil Service Law.

10 And while 76 in the seven - - - Civil Service
11 Law, subdivision 4, does allow for modification or
12 supplementation of collective bargaining agreements, it
13 does not allow the modification of Civil Service Law 20
14 regarding reclassification and appointment. And it doesn't
15 allow modification of section 41, which declares this
16 position - - -

17 JUDGE GARCIA: But if - - -

18 MR. NUGENT: - - - statutorily exempt.

19 JUDGE GARCIA: - - - just if I could follow up on
20 Judge Halligan's question.

21 I think the question is, what if you had just
22 bargained for notice - - -

23 JUDGE HALLIGAN: Yes.

24 JUDGE GARCIA: - - - prior to termination? Not
25 for any procedural rights, not for a just cause

1 termination, but just for notice.

2 JUDGE CANNATARO: Just two weeks' notice,
3 something like our determination.

4 MR. NUGENT: Well, I think in the first place,
5 obviously, notice would be given to tell somebody that - -
6 - that they're terminated. Whether they could bargain for
7 a two-week notice, you know, to make them aware, I can't
8 say that that violates the public policy as long as it
9 doesn't interfere with the termination. It slightly
10 interferes with the at-will nature of the termination by
11 putting a timeframe on it.

12 But in this case, we're dealing with having to
13 provide a hearing, and demonstrating competency and
14 misconduct - - -

15 CHIEF JUDGE WILSON: Can the exempt employee be a
16 member of the bargaining unit?

17 MR. NUGENT: Yeah, the town is not disputing, and
18 I think in this state, there are plenty of examples of
19 exempt class employees being within a bargaining unit. The
20 only exception being those that might be defined as
21 managerial or confidential, which is not the case in the
22 Town of Monroe's situation.

23 So we aren't - - -

24 CHIEF JUDGE WILSON: If the town - - -

25 MR. NUGENT: - - - taking the position - - -



1 CHIEF JUDGE WILSON: - - - if the town had wanted
2 to - - - the town found really this should be a non-exempt
3 classification, what should - - - what could they do about
4 that, anything?

5 MR. NUGENT: I'm sorry, Your Honor, I didn't - -
6 -

7 CHIEF JUDGE WILSON: Sure. If they decided, you
8 know, this isn't really an exempt position, we want to
9 reclassify the position itself as a non-exempt one, how do
10 they go about doing that, if at all?

11 MR. NUGENT: So if there was going to be a
12 reclassification, it would follow the provisions of Civil
13 Service Law section 20, which would be the local municipal
14 civil service commission. Typically, they would send a job
15 description and say, we wish to reclassify this, for
16 example, to a competitive clerk position or a, you know,
17 standard clerk position.

18 JUDGE GARCIA: But in fact, isn't there an - - -
19 an additional layer here in section 41? As I read section
20 41(2), whenever one of these positions becomes open, there
21 has to be an assessment done in terms of whether or not it
22 should continue as exempt; is that right?

23 MR. NUGENT: I believe that's what the statute
24 says. In this case, there wasn't an opening at the time.

25 JUDGE GARCIA: No, no, I'm talking about this

1 case, with the opening. But it seems to me that that is
2 required for any position, not just what we're talking
3 about here. But in general, 41 provides for a process to
4 reexamine each of these positions to determine if it should
5 continue exempt under the criteria for exempting positions;
6 is that right?

7 MR. NUGENT: Yeah. I believe the statute
8 provides for that reexamination, and - - -

9 JUDGE SINGAS: In 2018 - - - here, counsel.

10 In 2018, the tenure protections were extended to
11 labor-classified jobs before it was altered in 75. So if
12 they could do it, the leg. could do it then, for them, why
13 not for these exempt employees?

14 MR. NUGENT: Your Honor, I think the legislature
15 could, if they chose to do so, confer protections by
16 legislative act. But I think that's something different
17 than a collective bargaining agreement performing the same
18 task merely by signing an agreement and now bringing the
19 exempt class within the provisions of the statute also
20 because, even if this court were to agree that you could
21 bring in exempt class into Civil Service 75, you still run
22 into the roadblock of reclassification in - - - in section
23 41, which do not allow that statutory contravention to
24 protect the exempt class.

25 I see my time is up. Were there any other

1 questions?

2 CHIEF JUDGE WILSON: Thank you, counsel.

3 MR. NUGENT: All right. Thank you.

4 MR. NIKOLAIDIS: May it please the court, Louie
5 Nikolaidis for the firm Lewis, Clifton, Nikolaidis. I
6 represent the union in this matter.

7 And I guess it's important to remember that this
8 is a voluntary act of the employer. The employer wasn't
9 forced to do this. They did it not only once, but they did
10 it in more with the one collective bargaining agreement.

11 In collective bargaining, there's always plusses
12 and minuses when you negotiate - - -

13 JUDGE TROUTMAN: What exactly are you saying they
14 did that tied their hands?

15 MR. NIKOLAIDIS: What exactly - - - what was
16 that, Judge?

17 JUDGE TROUTMAN: What is it that they exactly did
18 that tied - - -

19 MR. NIKOLAIDIS: They negotiated - - -

20 JUDGE TROUTMAN: - - - their hands?

21 MR. NIKOLAIDIS: - - - this position specifically
22 and put it in the collective bargaining agreement. And
23 gave this position certain rights.

24 And they didn't do that for every exempt
25 employee. There was another exempt employee, the

1 bookkeeper, and they specifically excluded that position
2 from the due process just cause provisions. They could
3 have done it here, and they didn't. And when they do - - -

4 JUDGE SINGAS: Do you have any other authority,
5 can you cite any case or any other authority that allows
6 exempt employees to be affected by the CBA?

7 MR. NIKOLAIDIS: There - - - there are three
8 cases we cited in the brief, Ruiz, Day, and Lake Grove, all
9 of which said that you could extend rights under a
10 collective bargaining agreement the classifications of
11 employees that are not particularly covered by section 75
12 and 76. They don't specifically, in those decisions, say
13 exempt employees, but exempt employees by definition are
14 outside of those protections. All three of those cases say
15 that.

16 There is no case that we are aware of where it
17 does the reverse, which takes the petitioner's position
18 that it cannot be done.

19 JUDGE CANNATARO: Counsel, go - - -

20 MR. NIKOLAIDIS: There is no case that I'm aware
21 of in any court in New York that says once you've signed a
22 collective bargaining agreement and you've given certain
23 rights to people, they can just willy-nilly be taken away.

24 JUDGE CANNATARO: Going back to your first
25 statement about how the employer chose to do this along

1 with the union, what gives the employer the right to act
2 arguably extra statutorily?

3 MR. NIKOLAIDIS: They don't have a right to
4 explicitly contradict a statute. But there is no statute
5 in this case that is explicitly contradicted. This issue
6 of whether exempt employees can be covered by a collective
7 bargaining agreement is not - - - is not specifically - - -

8 JUDGE GARCIA: But that's not really - - -

9 MR. NIKOLAIDIS: - - - addressed in cases.

10 JUDGE GARCIA: - - - our standard. Our standard
11 is legislative intent to remove the issue from mandatory
12 bargaining, right? I mean, it's not that it has to say you
13 can't bargain this. There - - - I think our approach, this
14 court, is you look at the statutes and say, is there room
15 for bargaining here given what the legislature has set out?
16 And again, to go back to these provisions, the exempt
17 provision is classified this way because of certain
18 criteria, right, the nature of the position. And under the
19 section governing that, section 2, there is this provision
20 that provides for this review periodically of whether these
21 should remain exempt. It seems to me that provision now is
22 going to mean nothing, because you've taken - - - there's
23 not going to be this, you've taken it out, and there
24 doesn't need to be any - - - you've made it essentially a -
25 - - a permanent position?

1 MR. NIKOLAIDIS: Judge, I think the point you
2 said that's most pertinent is voluntary. This was a
3 voluntary decision of the employer - - -

4 JUDGE GARCIA: We've overturned voluntary - - -

5 MR. NIKOLAIDIS: - - - to - - -

6 JUDGE GARCIA: - - - decisions before. And
7 particularly in this case, where a - - - you're binding a
8 future employee in an exempt position that's designed to be
9 something for that individual, based on again those
10 criteria that lead it to be exempt, and you're binding that
11 future employer to not be able to fill that with the person
12 contemplated under an exempt-type position?

13 MR. NIKOLAIDIS: But you are not. Each time a
14 collective bargaining round comes up, the employer has the
15 right to say if it's a voluntary subject of bargaining,
16 we're not going to bargain over it. In the context of the
17 existing collective bargaining agreement - - -

18 JUDGE GARCIA: I come in; I get one of these
19 positions. Now you come and you tell me I can't replace
20 this exempt position that I want to; I have to wait until
21 the next round of collective bargaining - - -

22 MR. NIKOLAIDIS: What - - -

23 JUDGE GARCIA: - - - to see if I can get a
24 provision out?

25 MR. NIKOLAIDIS: - - - what - - - what you can do

1 is you can go to the legislative agency that's - - - has
2 the expertise in the area and file a - - - a petition for
3 unit clarification. If they want to exclude that person
4 from the contract, exclude them from any rights under the
5 contract, they can do that any time they want to. There's
6 no restrictions on doing that.

7 JUDGE CANNATARO: Counsel, my - - -

8 MR. NIKOLAIDIS: The - - -

9 JUDGE CANNATARO: Go ahead.

10 JUDGE HALLIGAN: Do you have a view, Counsel,
11 about whether the town's position would affect collective
12 bargaining agreements beyond the one at issue before us
13 today?

14 MR. NIKOLAIDIS: No, it - - - it will not. When
15 there is a renewal of agreement, like I said, you can - - -
16 you can - - - you - - - they can take the choice - - - they
17 can take the position that it's a voluntary subject of
18 bargaining and not bargain over it and say, we're not going
19 to include that position in the collective bargaining
20 agreement.

21 It's - - -

22 CHIEF JUDGE WILSON: So suppose - - -

23 JUDGE HALLIGAN: Are you aware - - -

24 MR. NIKOLAIDIS: - - - this - - - this whole
25 situation happened during the term of an agreement. During

1 the term of agreement, they can't just violate the
2 agreement. They have a statutory - - -

3 CHIEF JUDGE WILSON: So suppose - - -

4 MR. NIKOLAIDIS: - - - remedy if they want to - -
5 -

6 CHIEF JUDGE WILSON: - - - suppose - - -

7 MR. NIKOLAIDIS: - - - exclude that person - - -

8 CHIEF JUDGE WILSON: - - - suppose the employee -
9 - -

10 MR. NIKOLAIDIS: - - - from the agreement.

11 CHIEF JUDGE WILSON: - - - had been management
12 confidential instead of exempt, could you still say this is
13 voluntary; the employer can include the - - - the employee?

14 MR. NIKOLAIDIS: In fact, yes, they have done
15 that in the - - - in the remedy to exclude that person is
16 to file that petition with PERB. If an employer thinks it
17 made a mistake by including a position that should not have
18 been in the agreement - - -

19 CHIEF JUDGE WILSON: Well, what if - - -

20 MR. NIKOLAIDIS: - - - they can't just take - - -

21 CHIEF JUDGE WILSON: I'm sorry - - -

22 MR. NIKOLAIDIS: - - - it out, they have to - - -

23 CHIEF JUDGE WILSON: - - - what if the employer
24 doesn't - - -

25 MR. NIKOLAIDIS: - - - go through the process.



1 CHIEF JUDGE WILSON: - - - what if the employer
2 doesn't think that they made the mistake because they
3 agreed to it? I mean, isn't there a public policy that at
4 least, as to management confidential personnel, that you
5 shouldn't be - - -

6 MR. NIKOLAIDIS: Yes.

7 CHIEF JUDGE WILSON: - - - able by contract to
8 agree to exclude?

9 MR. NIKOLAIDIS: There's a public policy, and
10 there's a procedure for enforcing that public policy. They
11 go together; they're hand-in-hand. You can't just
12 unilaterally make the decision to include them and then
13 pull them out without going through that procedure. And
14 that procedure is well laid out, employers know how to deal
15 with it. You file a petition with PERB; they've got the
16 expertise - - -

17 JUDGE RIVERA: Even - - - even - - -

18 MR. NIKOLAIDIS: - - - and they can exclude - - -

19 JUDGE RIVERA: - - - if the exclusion is contrary
20 to the statute?

21 MR. NIKOLAIDIS: It hasn't - - - we - - - if it's
22 contrary to the specific language of the statute, you may
23 have a point. But there's no specific language - - -

24 JUDGE RIVERA: If it's contrary - - -

25 MR. NIKOLAIDIS: - - - to the statute - - -

1 JUDGE RIVERA: - - - to the scheme, the actual
2 classification scheme? I understand your position about an
3 expressed statement. If that was indeed the standard, if
4 that's what we were going to decide, we all wouldn't be
5 here, because it's not expressed.

6 But the question is whether or not it violates
7 what is - - - a - - - the scheme that the legislature has
8 chosen?

9 MR. NIKOLAIDIS: Well, that's kind of a broad
10 definition in terms of the scheme.

11 JUDGE RIVERA: Um-hum.

12 MR. NIKOLAIDIS: Especially when you're dealing
13 with a matter of labor law, the Taylor Act, where there is
14 a strong public policy to support employees and their
15 rights to collective bargaining, or to join or not to join
16 a union. That's a strong public policy - - -

17 JUDGE TROUTMAN: But there are exclusions - - -

18 MR. NIKOLAIDIS: - - - I don't know if that can
19 be violated by a - - -

20 JUDGE TROUTMAN: Counsel?

21 MR. NIKOLAIDIS: - - - quote, scheme.

22 JUDGE TROUTMAN: But there are instances where
23 not all are included within the collective bargaining unit.

24 MR. NIKOLAIDIS: Absolutely. Employers have - -
25 - that's - - - that's a voluntary subject to bargaining.

1 If it's a voluntary subject, an employer says, no, I'm not
2 going to do it, the union can't do anything about it.

3 JUDGE TROUTMAN: So a predecessor here can bind a
4 successor?

5 MR. NIKOLAIDIS: No. When the new contract comes
6 up for negotiations, it's all square one again. The
7 employer, in that new negotiation, can say, we are not
8 going to agree to continue to have this - - - this title in
9 the contract. They have a right to do that.

10 JUDGE CANNATARO: But my understanding of the
11 scheme, with respect to these exempts and confidential
12 types of classifications, is that when a new hiring
13 authority comes in, when there's a regime change, we have a
14 new town board, a new mayor, that they might want to put
15 their own person in that position. And what - - - what I
16 hear you saying is, you may be stuck with that person for
17 two years, or - - - or two years and ten months. And your
18 opportunity to put your own person in is lost until you
19 renegotiate. Is that really what the scheme intended?

20 MR. NIKOLAIDIS: No, you can go to PERB and try
21 to do it in - - - in the terms of a collective bargaining
22 agreement to have them excluded. PERB has the authority to
23 say that position was mischaracterized; it should not have
24 been in the collective bargaining agreement. They have a
25 right to do that. And they can do that. The employer has

1 a right.

2 In this case, the employer didn't exercise any of
3 those rights.

4 JUDGE HALLIGAN: But the time frame for the
5 hiring authority, you might have a new hiring authority, I
6 take it, even though the collective bargaining agreement is
7 still running for some - - -

8 MR. NIKOLAIDIS: Yes.

9 JUDGE HALLIGAN: - - - period of time?

10 MR. NIKOLAIDIS: But that's the nature of
11 collective bargaining agreements. When there's a new
12 administration that comes to power, they can't say, oh, we
13 don't like the terms of the agreement; we think you're
14 getting paid too much. We want to change that. It doesn't
15 run - - - due to the term of the elected office, it runs
16 for a specific numerical term. And they're just stuck with
17 it. That's the nature - - -

18 JUDGE SINGAS: Yeah, but isn't that contrary - -
19 -

20 MR. NIKOLAIDIS: - - - of collective bargaining.

21 JUDGE SINGAS: - - - to public policy? You're
22 stuck with someone in a position where you need trust, you
23 need confidentiality, you need to put your own people
24 there. Like, isn't your whole argument contrary to public
25 policy if you say, sorry, you have to wait until next time



1 around?

2 MR. NIKOLAIDIS: No. Because I said they don't
3 have to wait until next time. They have a statutory way of
4 getting rid of that person.

5 And they didn't have to negotiate in the first
6 place. As he was talking about earlier; there's two issues
7 here.

8 One is the procedural rights to know what they're
9 doing and the reason why they're doing that. That
10 contracts says all employees have to be given a written
11 explanation of why they're being terminated.

12 And then there's the second question about how do
13 you determine whether they can be terminated or not. We
14 say, they have to show just cause. But those are the two
15 aspects of it - - -

16 JUDGE RIVERA: But why - - -

17 MR. NIKOLAIDIS: - - - both which they - - -

18 JUDGE RIVERA: - - - why - - - why - - -

19 MR. NIKOLAIDIS: - - - voluntarily negotiated.

20 JUDGE RIVERA: Counsel, why should the PERB
21 process be exclusive? Why can't they just go directly, as
22 they've done to court, and have the judges decide that
23 issue?

24 MR. NIKOLAIDIS: Because - - -

25 JUDGE RIVERA: I think we can interpret statutes



1 - - -

2 MR. NIKOLAIDIS: - - - in labor law - - -

3 JUDGE RIVERA: - - - just as well.

4 MR. NIKOLAIDIS: - - - we've developed a
5 statutory framework that does not allow employers to
6 unilaterally make those kinds of changes. If there was now
7 Taylor Law, if there was no labor law, yeah, they could do
8 that.

9 JUDGE GARCIA: But in saying - - -

10 MR. NIKOLAIDIS: If everyone here was an employee
11 at will, of course, they could do that. But that's the
12 whole nature of collective bargaining.

13 JUDGE GARCIA: In the City of Long Beach - - -

14 MR. NIKOLAIDIS: It takes unions - - -

15 JUDGE GARCIA: Counsel?

16 MR. NIKOLAIDIS: - - - it takes individuals - - -

17 JUDGE GARCIA: Counsel?

18 MR. NIKOLAIDIS: - - - out of that situation.

19 JUDGE GARCIA: In City of Long Beach - - -

20 MR. NIKOLAIDIS: What's that?

21 JUDGE GARCIA: City of Long Beach provisional
22 employees - - -

23 MR. NIKOLAIDIS: Oh, that's a completely
24 different case. That's a case where you're talking about
25 pro - - - provisional employee. And there's specific

1 language - - -

2 JUDGE GARCIA: Oh, so it's a provisional employee
3 - - -

4 MR. NIKOLAIDIS: Yeah.

5 JUDGE GARCIA: - - - but they're covered by the
6 CBA, right, that - - - in that case?

7 MR. NIKOLAIDIS: Well, they're probably not,
8 because the - - - in the sense that they're probationary
9 and they're never going to get past probation based on the
10 length of terms of probation.

11 JUDGE GARCIA: Well, they were attempting to
12 cover them?

13 MR. NIKOLAIDIS: Because it's very - - - you
14 could only - - -

15 JUDGE GARCIA: Okay, let me - - -

16 MR. NIKOLAIDIS: - - - serve very - - -

17 JUDGE GARCIA: - - - let me rephrase.

18 MR. NIKOLAIDIS: - - - in a very limited period.

19 JUDGE GARCIA: They attempted to cover them in
20 the CBA in City of Long Beach, right?

21 MR. NIKOLAIDIS: Yeah, they did.

22 JUDGE GARCIA: Did they - - -

23 MR. NIKOLAIDIS: Yeah.

24 JUDGE GARCIA: - - - follow this procedure you're
25 talking about first?



1 MR. NIKOLAIDIS: In this - - - in this procedure,
2 what the court had said was, there was specific language in
3 civil service law that put a restriction on how long a
4 provisional could stay in the job. There has to be a quick
5 testing for it. And when there's a testing, then that
6 provisional - - -

7 JUDGE GARCIA: So if it's clear enough - - -

8 MR. NIKOLAIDIS: - - - has no right to stay in
9 the position.

10 JUDGE GARCIA: - - - if it's - - -

11 MR. NIKOLAIDIS: That was different - - -

12 JUDGE GARCIA: - - - if it's clear enough - - -

13 MR. NIKOLAIDIS: - - - from here.

14 JUDGE GARCIA: - - - then you don't have to
15 follow this other procedure? But if it's not that clear,
16 then you have to follow the other procedure?

17 MR. NIKOLAIDIS: Well, if there's a very specific
18 legislative procedure, then it takes precedence unless it's
19 unconstitutional, of course. It could be challenged on
20 that grounds. But if there is a specific legislative
21 procedure, you follow it. But if there's not specific
22 legislative procedure, and there's a strong public policy
23 supporting the right of unions to form and members to join
24 or not join the unions, you have to balance that strong
25 public policy.

1 And in this case, we say there is no language
2 that they have pointed to in civil service law that says
3 that an exempt employee cannot be given protections under
4 the collective bargaining agreement. And the three - - -

5 CHIEF JUDGE WILSON: Thank you, counsel.

6 MR. NIKOLAIDIS: - - - cases I cited for you - -
7 -

8 CHIEF JUDGE WILSON: Thank you.

9 MR. NIKOLAIDIS: - - - were all three cases that
10 said exactly that.

11 CHIEF JUDGE WILSON: Counsel, thank you. Your
12 time's up.

13 MR. NIKOLAIDIS: Thank you.

14 JUDGE RIVERA: So why is any right that PERB is
15 the exclusive path?

16 MR. NUGENT: As far as the - - -

17 JUDGE RIVERA: Exclusive path to resolve the
18 problem.

19 MR. NUGENT: Yeah. So first of all, the, you
20 know, unit clarification, are you referring to that
21 process, or going to have the - - -

22 JUDGE RIVERA: Well, that was his response when I
23 asked about the - - - is that the exclusive path, and he
24 said, yes. So I'm asking you. Unless you - - - you can't
25 possibly agree with that. Why is that wrong?



1 MR. NUGENT: No. And I think that - - - that the
 2 first thing, you know, is obviously you can't, this concept
 3 of a voluntary act, is meaningless. Because that would
 4 just say that a collective bargaining unit and a town can
 5 violate statute as long as they volunteered to do it.

6 And so the only path, when there's a violation of
 7 public policy and the contravention of statute, is to
 8 prevent arbitration, not to follow some other path, because
 9 there is no path other than that's the end of the story.
 10 They're exempt; they cannot be protected.

11 And secondly, this point about the collective
 12 bargaining agreement that - - - that it could be changed
 13 down the road is also not accurate, because an outgoing
 14 town supervisor puts an exempt employee into a protected
 15 class, gets them a collective bargaining agreement, a new
 16 agreement, that may go four to five years. And that
 17 supervisor's term might be two years. He has no ability to
 18 replace or have his choice put in, and he can't remove the
 19 person that the former supervisor put in.

20 So that concept that we can renegotiate later is
 21 not - - - is problematic.

22 JUDGE RIVERA: And am I correct - - -

23 MR. NUGENT: And also this path - - -

24 JUDGE RIVERA: - - - you might also very well - -
 25 - sorry.



1 MR. NUGENT: Sorry.

2 JUDGE RIVERA: Am I correct, you might also very
3 well be taking some time to renegotiate the CBA, and the
4 old CBA will stay in place during that period of time, so
5 it might actually be a quite a long time; am I correct?

6 MR. NUGENT: To renegotiate?

7 JUDGE RIVERA: If that is possible - - - correct,
8 yes.

9 MR. NUGENT: It would be a long time, yes.

10 JUDGE RIVERA: It could possibly be a - - - quite
11 a long time.

12 MR. NUGENT: It could be up to an average, I
13 would say - - -

14 JUDGE RIVERA: You may continue under the old
15 CBA until you enter a new CBA?

16 MR. NUGENT: Well, under the Taylor Law, and that
17 was the next point I was going to make - - -

18 JUDGE RIVERA: Yeah.

19 MR. NUGENT: - - - is that even if that
20 collective bargaining agreement expires, the Taylor Law
21 requires those terms and conditions to continue until the
22 successor is negotiated. And then you have to negotiate,
23 and the union may not agree, to - - - to remove that title
24 from the union.

25 So this court's decision in Chautauqua, I think,

1 makes this very clear, that if you can look at this
2 collective bargaining agreement, and you can look at these
3 statutes that we've cited in the Civil Service Law, and
4 conclude that any relief would violate public policy, then
5 there cannot be arbitration on the exempt employee in a - -
6 - in a union like this.

7 CHIEF JUDGE WILSON: Thank you.

8 MR. NUGENT: Thank you, Your Honors.

9 MR. NIKOLAIDIS: Thank you.

10 (Court is adjourned)

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C E R T I F I C A T I O N

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of Town of Monroe v. Teamsters Local 445, No. 40 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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