

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

MATTER OF DOURDOUNAS,

Appellant,

-against-

NO. 24

CITY OF NY,

Respondents.

20 Eagle Street
Albany, New York
February 12, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN
ASSOCIATE JUSTICE LISA FISHER

Appearances:

BRYAN D. GLASS, ESQ.
GLASS & HOGROGIAN LLP
Attorney for Appellant
85 Broad Street @ Wework
New York, NY 10004

REBECCA L. VISGAITIS, ESQ.
NEW YORK CITY LAW DEPARTMENT
Attorney for Respondent
100 Church Street
New York, NY 10007

Chrishanda Sassman-Reynolds
Official court Transcriber



1 CHIEF JUDGE WILSON: The last case on the
2 calendar today is Matter of Dourdounas v. City of New York.

3 MR. GLASS: Good afternoon. May it please the
4 court. My name is Bryan Glass for George Dourdounas. I'd
5 ask for three minutes in rebuttal.

6 CHIEF JUDGE WILSON: Sure.

7 MR. GLASS: Whatever the outcome of this case, I
8 really appreciate the court taking the time to try to help
9 clarify the law, so I can advise my clients going forward.
10 Teacher-clients in New York State about what their options
11 are when they come with these very compelling fact patterns
12 about their job situations. And this is just one of a
13 series of cases I'm going to walk you through to show how
14 complicated this area has become. I know that there's a
15 lot of procedural things in this case, but the reality of
16 what's happening to these clients is they're coming in and
17 they have this - - - they're governed by a contract. But
18 it's not so clear where their statutory rights fall versus
19 their contractual rights.

20 JUDGE RIVERA: Why isn't it where your opponent
21 argues they are, which is you're going to have to show that
22 the union acted in bad faith?

23 MR. GLASS: Well, I think before we even get
24 there, there's been a series - - -

25 JUDGE RIVERA: Let's get there. Let's get there.



1 MR. GLASS: Well, these clients are in a dilemma
2 by - - - that this is a new area of law that they didn't
3 even argue until after the fact. And the reality is, if
4 you're asking someone who's trying to seek help from the
5 union, how to sue the union - - - so this is a new
6 procedural sophistry I think the City has come up with now,
7 recently in cases, that was never really the law before - -
8 -

9 JUDGE RIVERA: But your client did - - - did
10 proceed before the PERB, correct?

11 MR. GLASS: This has - - - we've taken an option
12 to try it through the PERB as well. And we are still
13 pursuing that, actually.

14 JUDGE RIVERA: Thank you.

15 MR. GLASS: We're waiting for the PERB board
16 decision.

17 CHIEF JUDGE WILSON: But the - - -

18 JUDGE SINGAS: But why isn't this Ambach? I'm
19 sorry.

20 CHIEF JUDGE WILSON: Go ahead.

21 JUDGE SINGAS: Why isn't this squarely Ambach?

22 MR. GLASS: Because what's happened - - - because
23 there's a series of cases that developed with the teachers
24 as to where - - - for example, I'd like to go through six
25 cases just to show how this has gotten confusing.

1 JUDGE RIVERA: Wants to go through six cases.

2 MR. GLASS: I'm going to be very quick about it.

3 So for example, the probationary teachers. It's
4 been settled now that a probationary teacher, regardless of
5 whatever rights they have under the contract, and they do
6 have rights to pursue this, have to come within four
7 months. And there's no Ambach aspect to this. You go,
8 within four months you can challenge it. I've been
9 successful in challenging probationary teacher cases within
10 four months. So that's very simple. It seems to be clear.
11 We have a simple rule from Katz that the court decided in
12 2012. Kahn, I'm sorry. Kahn. And that's very, very clear
13 for everyone, and we could follow that. Now what if you
14 get a U-rating? There's also a contractual procedure to
15 challenge that. The courts have made very clear in Brown,
16 which is a First Department case, that you have to exhaust
17 your administrative remedies. And then if you lose, you
18 can go to court and challenge that as arbitrary and
19 capricious. And we've been successful on that as well.
20 Again, there's no union, Ambach, none of this is applying
21 to these situations.

22 Now, we get these nuanced cases that are in the
23 briefs like Katz? What about a substitute teacher, who,
24 all of a sudden, is told you - - - you can't be used
25 anymore because there's been a false allegation of corporal

1 punishment? What do you have to do here? Can you go to
2 court right away? Do you have to exhaust your
3 administrative remedies? The City is arguing you have to -
4 - - you have to go - - - you have to wait to exhaust your
5 administrative remedies, you can't go to court.

6 JUDGE TROUTMAN: So how about we focus here? We
7 have a union, and we have the city, the employer. How does
8 that change things?

9 MR. GLASS: Well, all these cases are in the
10 exact same - - - all these cases I'm mentioning are the
11 exact same situation. They're all governed by a collective
12 bargaining agreement. But at times the City - - -

13 JUDGE GARCIA: But Counsel, I'm sorry. You're
14 not challenging the fact that in any case you have to
15 exhaust your administrative remedies, right?

16 MR. GLASS: Well, I am. I - - - I - - -

17 JUDGE GARCIA: Is that what this case is about?
18 Failure to exhaust administrative remedies?

19 MR. GLASS: Well, when we - - - we've - - -

20 JUDGE GARCIA: But don't go back to the cases
21 just yet. Right here, is - - - is there an argument that
22 there was a failure to exhaust administrative remedies,
23 given that the last step of this process wasn't taken by
24 the union? Or is that not relevant to your argument today?

25 MR. GLASS: Well, we believe we did exhaust the

1 remedies to the point that - - - that's why we started the
2 case at the time we did. Because we did go through every
3 possible step Mr. Dourdounas could follow to get to - - -
4 to get to a remedy through the contract. And that's what
5 we understand is that we - - - some of these cases are - -
6 - seem - - - in certain situations, other than the
7 probationary teachers or some of the things I mentioned,
8 you have to go through these steps.

9 CHIEF JUDGE WILSON: So the steps that you
10 exhausted were the steps in the collective bargaining
11 agreement?

12 MR. GLASS: Yes.

13 CHIEF JUDGE WILSON: Right? And you got to the
14 last step. And that's - - - then the union decided not to
15 go forward. Right? So at least in federal law, the way
16 that would work is you would then allege, at least, that
17 the union breached its duty of fair representation. That
18 would be a necessary element to your claim under the LMRA,
19 and you sue the employer. Why wouldn't that be the same
20 here?

21 MR. GLASS: Well, but why would that not happen
22 with a U-rating appeal as well, where - - - why would you -
23 - -

24 CHIEF JUDGE WILSON: That's a good question.
25 That's a good question. But if you have a collective

1 bargaining agreement, you have a contract. And you - - -
2 the employees, not you personally. The employees are the
3 beneficiaries of the agreement. The union stands in their
4 shoes if it sues, right? If it chooses not to sue, then
5 you allege they've breached their duty, and you go forward.
6 Why isn't - - - why wouldn't that be true for anything that
7 is based on a breach of the collective bargaining
8 agreement?

9 MR. GLASS: Because ultimately they're being
10 deprived of any remedy to ever be heard on the merits.
11 What's happening in these cases is because of the sheer
12 number of - - -

13 CHIEF JUDGE WILSON: Why would that deprive you
14 of a remedy on the merits?

15 MR. GLASS: Well, did George Dourdounas ever get
16 a hearing on the merits in eight years, now? He's never
17 had anyone - - - that the issue in this case simply was the
18 man was offered a retirement incentive, and he was - - - no
19 one - - - they never - - - no court has ever asked the DOE
20 to answer this complaint at any point in this. He's gone
21 through the union. The union didn't take it to
22 arbitration. He has never gotten to the point to here,
23 maybe someone just changed the code - - -

24 CHIEF JUDGE WILSON: What happened in the PERB
25 proceeding?

1 JUDGE TROUTMAN: Right.

2 MR. GLASS: The PERB proceeding, the court has
3 just said - - - again, we didn't get to the merits because
4 no - - - no - - - no person testified for the DOE. We've
5 never gotten a sworn affidavit or anything from any from
6 any - - - anyone from the DOE, how that problem - - - that
7 code got changed. The standard - - -

8 CHIEF JUDGE WILSON: I was just asking - - -

9 MR. GLASS: - - - the PERB proceeding was - - -

10 CHIEF JUDGE WILSON: I'm sorry. I was asking for
11 the result. What - - -

12 MR. GLASS: The PERB proceeding at the first
13 level - - -

14 CHIEF JUDGE WILSON: You started the PERB
15 proceeding - - -

16 MR. GLASS: - - - the court said - - - the court
17 said, look, the City can be negligent, but at the end of
18 the day, we're not deciding the merits of whether - - - the
19 question was simply whether it should go to arbitration.
20 They weren't getting into the merits of what happened to
21 George Dourdounas. In this particular case, George
22 Dourdounas is saying that someone changed the code on me,
23 and I had no idea. So when I took this incentive, I
24 believed that I was an ATR, and after the fact, they're - -
25 - now they're telling me they took away the incentive.

1 We're hearing this in the federal government now, too.

2 They took away the incentive, and he's never had
3 anyone - - - the City has never responded on the merits to
4 how that code got changed. We don't have a sworn affidavit
5 from anybody. We don't have - - -

6 JUDGE RIVERA: But that's the point of the CBA.
7 The union represents him. If the union then, in his
8 opinion, right - - - in your client's opinion, has failed
9 in its duty, he has an action for that.

10 MR. GLASS: And he has tried to pursue that.
11 It's still pending.

12 JUDGE RIVERA: Yes. That's what the - - - that's
13 the point.

14 MR. GLASS: But the reality is in other types of
15 areas, like a probationary teacher who's - - - who's
16 cheated, they - - - we can go right to court. So why do we
17 have this dichotomy now that certain types of teachers and
18 certain types of - - -

19 CHIEF JUDGE WILSON: When you say - - - I'm
20 sorry. When you say, "go right to court", you don't mean
21 that the probationary teacher doesn't have to exhaust any
22 remedies that are in the collective bargaining agreement?

23 MR. GLASS: Yes. And they're - - - but they're
24 governed by that same collective bargaining agreement that
25 George Dourdounas is.

1 JUDGE GARCIA: But they do have to exhaust their
2 administrative remedies?

3 MR. GLASS: Not at all.

4 JUDGE GARCIA: They don't?

5 MR. GLASS: Not at all.

6 JUDGE GARCIA: They can just - - -

7 MR. GLASS: The court - - - the court has said -
8 - -

9 JUDGE GARCIA: - - - go bring what?

10 MR. GLASS: - - - the court says you can - - -
11 you can go - - - you can challenge that for six years.
12 It's - - - it's an optional remedy.

13 JUDGE GARCIA: And what case is that?

14 MR. GLASS: That's the Kahn - - - that's the
15 Kahn case. That's the Fraser case.

16 CHIEF JUDGE WILSON: Well, sorry. But that's an
17 interpretation of the collective bargaining agreement there
18 that those procedures were optional, isn't it?

19 MR. GLASS: Well, what do you do with the teacher
20 who has tenure by estoppel, for example? Tenure by a
21 teacher who has - - - was cheated out of their tenure. Is
22 that a - - - is that - - -

23 JUDGE TROUTMAN: But - - -

24 MR. GLASS: - - - again, that could be governed
25 by the collective bargaining agreement.

1 JUDGE TROUTMAN: But is that this case, though?

2 MR. GLASS: Well, these are - - - these are types
3 of - - - yes. They're similar in the sense that these are
4 all in the same framework of being governed by a collective
5 bargaining agreement. And you could argue in every one of
6 these cases that there should never be an Article 78
7 remedy. But the courts are hearing tenure by estoppel
8 cases - - -

9 JUDGE RIVERA: Well, it depends on the nature of
10 the collective bargaining agreement and what the - - -

11 MR. GLASS: It's all the same collective
12 bargaining agreement. So I - - - I don't understand the
13 difference. I mean, we're - - -

14 JUDGE RIVERA: I'm sorry. In your case - - - in
15 the cases you cited, there was mandatory arbitration?

16 MR. GLASS: I'm sorry?

17 JUDGE RIVERA: There was mandatory arbitration in
18 - - - there was a step that said go to the union, and the
19 union then will decide whether or not to go to arbitration?

20 MR. GLASS: It's not even clear whether this is
21 mandatory or voluntary in each case. Because each - - -
22 each - - - if you read these decisions, Katz and Campbell-
23 Lui. I mean, Campbell-Lui was a case where the woman
24 wanted to rescind her resignation and the courts - - - the
25 DOE said - - - we brought it as an Article 78. And they

1 said, well, you have to go through your contractual
2 remedies. So she did that. She went through all these
3 contractual remedies. And then, she - - - and we had - - -
4 and then, when she came back, they said, well, you were
5 time-barred because you didn't bring it four months ago.
6 They're getting into these traps that are very, very
7 confusing.

8 All we would really like to do is set a rule
9 that's very clear. I think the rule should be something to
10 the effect that these teachers should be allowed to bring
11 these valid - - - assuming it's a valid case. And they
12 have to spend resources on it, so not everyone is going to
13 be filing. But if they feel like they have a very strong
14 case, perhaps the better rule - - - and some court - - -
15 some judges have done this where you could file within four
16 months, and then it could be put on hold while the
17 collective bargaining process takes effect. So there's no
18 issue of statute of limitations.

19 So perhaps, for example, when you have U-rating
20 appeal and a probationary termination, you could file the
21 case together. You could wait for the probation - - - the
22 probation, it could be put on hold while you see what
23 happens with the U-rating appeal, because it could affect
24 the probationary termination.

25 So I think we're really just asking for a clear

1 rule. This is just one of many - - -

2 JUDGE RIVERA: I'm a little confused. Is that
3 the rule you're proposing? Or are you saying this is the
4 way some courts have handled it? And if that's what - - -
5 if you're saying the latter, then what's - - -

6 MR. GLASS: Some - - - yes. Some - - -

7 JUDGE RIVERA: - - - the rule that you're looking
8 for?

9 MR. GLASS: I think we need clarity to know that
10 if someone - - - it's not clear under the collective
11 bargaining agreement how it's going to be governed, whether
12 it falls within the collective bargaining agreement. There
13 should be some rule that perhaps you have to bring it
14 within four months, but the judge could have discretion if
15 they felt that the other processes of finality would - - -
16 would help resolve the case. They can put the case on hold
17 and not worry about the statute of limitations. And so - -
18 -

19 CHIEF JUDGE WILSON: If you're suing an employer
20 for breach of a collective bargaining agreement, whether
21 it's the union suing or the union's refused, and the
22 employee can go forward, why is that an Article 78 at all?
23 Why isn't that just a breach of contract against the union?

24 MR. GLASS: Well, we're - - - we're not really -
25 - - our beef is not really with the union in these cases.

1 We're - - -

2 CHIEF JUDGE WILSON: No, no. This is a suit
3 against you. Now, let's say the union decided to pursue a
4 suit against the employer, right? Say.

5 MR. GLASS: Yeah.

6 CHIEF JUDGE WILSON: Why is that not a
7 contractual case? Why is that an Article 78?

8 MR. GLASS: Because the - - - I think Article 78
9 allows for the option from arbitrary, capricious review
10 under facts. And that's why you should bring it as - - -

11 CHIEF JUDGE WILSON: But it's a breach of
12 contract. I mean, you have a better standard, I think,
13 under regular breach of contract law. If they agree to it,
14 they agree to it.

15 MR. GLASS: I think there's a - - - an ambiguity
16 as to what's really a breach of contract versus what's just
17 simply arbitrary, capricious actions. I mean, we're
18 getting fact patterns where people clearly seem to - - - I
19 mean, I think - - -

20 CHIEF JUDGE WILSON: The court could find - - -

21 MR. GLASS: - - - you could feel for Mr.
22 Dourdounas - - -

23 CHIEF JUDGE WILSON: - - - it is a contract,
24 right? The collective bargaining agreement?

25 MR. GLASS: Yes. But does it govern everything



1 that possibly could happen to a teacher? And I think
2 that's the - - -

3 CHIEF JUDGE WILSON: Well, it governs what it
4 says it governs. Right?

5 MR. GLASS: Well, the contracts are ambiguous.
6 Does it say that you have to - - -

7 CHIEF JUDGE WILSON: Well, then you have trouble
8 enforcing an ambiguous contract, I would think.

9 MR. GLASS: It's just - - - it just raises the
10 possibility that everything would have to - - -

11 JUDGE TROUTMAN: Well, let me ask you this.

12 MR. GLASS: - - - go to that contract and there
13 would be no judicial review.

14 JUDGE TROUTMAN: What your - - - what your client
15 is complaining of, it's a right he says he was denied.
16 Where did the - - - where did it come from? Was - - -
17 wasn't there a contract, an agreement that this benefit
18 would be provided to certain persons?

19 MR. GLASS: He - - - there was a - - - there was
20 an ATR incentive for teachers that was created under the
21 contract.

22 JUDGE TROUTMAN: Yes.

23 MR. GLASS: Yes, it was created - - -

24 JUDGE TROUTMAN: So it was a contractual - - -

25 MR. GLASS: Yes. And he - - - he has pursued

1 that remedy. But then the question is, does he have a
2 separate remedy, perhaps to pursue this as arbitrary and
3 capricious? Are you limited to one remedy? I think
4 sometimes - - -

5 JUDGE TROUTMAN: Okay. So you want a plenary
6 action and you also - - - you're not saying you don't want
7 to give up that right, but you think he should have the
8 right to pursue it through an Article 78?

9 MR. GLASS: I think there could be more than one.
10 You know, you can pursue - - - frequently what happens is
11 somebody may have a discrimination case, they might pursue
12 it under the State Division of Human Rights. They may have
13 a PERB case because they were retaliated against.

14 CHIEF JUDGE WILSON: Well, when we think
15 somebody's - - -

16 MR. GLASS: You can have multiple - - -

17 CHIEF JUDGE WILSON: - - - filed a contractual -
18 - -

19 MR. GLASS: You can have multiple forums.

20 CHIEF JUDGE WILSON: When we think somebody's
21 brought a contractual claim incorrectly, it's an Article
22 78, we can convert them, right? We don't let you proceed
23 both ways.

24 MR. GLASS: We - - - sometimes it could. But
25 could you have the possibility of a contractual claim and



1 also - - - let's say you're claiming - - - it's based on
2 discrimination, that this is - - - that he was cheated out
3 of this provision. There - - - is he precluded from - - -
4 there's a contract covering everything that he can't bring
5 a state Division of Human Rights claim based on the same
6 thing?

7 CHIEF JUDGE WILSON: What the contract says, I
8 guess.

9 MR. GLASS: The contract doesn't talk that - - -
10 that broadly. And so you - - - you're basically precluding
11 perhaps any kind of other litigation on someone.

12 JUDGE RIVERA: What - - - what's the lack of
13 clarity here? And just talk about this case. What's the
14 ambiguity on certainty here?

15 MR. GLASS: Well, I think - - - I think in this
16 case we would just ask that - - - you know, once he did
17 exhaust, and we believe that - - - that would give us an
18 opportunity once we exhausted. Our reading of the law is
19 that - - - that we are allowed, at that point, to bring a
20 case. And that's cases like Katz and other cases of that
21 nature. We talked about exhaustion of remedy. Now the
22 City has been adding this new requirement now for the first
23 time. They didn't even argue in the briefs below, as you
24 see. And so they - - - they even concede that this wasn't
25 even argued really. And now they're saying, well, you have

1 to implicate your union. Which puts the teacher in an
2 incredible dilemma.

3 Now you have to implicate your union now, to -
4 challenge something. It's a very simple decision.

5 CHIEF JUDGE WILSON: Sympathetic to that as a
6 public policy matter, because that's the way federal law
7 works, right? You're bringing claim under the LMRA. You
8 have to allege that your union breached its duty of fair
9 representation when it decided not to go forward on your
10 behalf.

11 MR. GLASS: Well, we'd be - - - we'll be creating
12 a new rule because - - - you know, the probationary teacher
13 never had to give up - - -

14 CHIEF JUDGE WILSON: No. I'm not taking issue
15 with that. I'm just saying when you say, oh, this puts you
16 in a very - - - employee is a very difficult position
17 because they got to sue their union; that's federal law.

18 MR. GLASS: Yes. I believe in the right case
19 that could be because you have this alternative option.
20 When the beef is not really with the union at all here, you
21 know, really just the challenging. We want to have - - -
22 we want to know why the DOE changed the code, you know.
23 And so the union's interest is really other than deciding
24 how many cases it can take to arbitration, and that's one
25 of the - - -

1 JUDGE GARCIA: If this went to arbitration, what
2 remedy would you have if you lost in arbitration?

3 MR. GLASS: Well, that does change the standard,
4 I believe. There would be a hearing, at least on the
5 merits at that point of having - - -

6 JUDGE GARCIA: In the arbitration?

7 MR. GLASS: Yeah.

8 JUDGE GARCIA: And then you lose?

9 MR. GLASS: You - - - you - - - well, you could
10 bring an Article 75 to challenge that arbitration if you
11 feel - - -

12 JUDGE GARCIA: Very limited, right?

13 MR. GLASS: It's very limited, but at least you'd
14 have a chance at the merits. The way the - - -

15 JUDGE GARCIA: So going back to the Chief Judge's
16 point. What - - - why should you then get this other type
17 of review because the union refuses to bring that
18 proceeding, which - - -

19 MR. GLASS: The union - - -

20 JUDGE GARCIA: - - - that's the process under the
21 CBA, but you would have an action potentially against the
22 union if you fail in - - -

23 MR. GLASS: The reality is the union - - - the
24 union has like 200 arbitrations a year that they can only
25 bring. If you have 10,000 cases and you have - - - you're

1 going to have a lot of meritorious claims that are never
2 going to be heard on the merits.

3 JUDGE HALLIGAN: But - - -

4 MR. GLASS: The - - - the union didn't - - -

5 JUDGE HALLIGAN: - - - but isn't - - - isn't that
6 a function of what the CBA requires, even if so?

7 MR. GLASS: But it's getting to the point that a
8 - - - a person is never going to get to the merits of their
9 claim, if you have this - - - if you have 10,000 cases and
10 the union can only - - - 200 - - -

11 JUDGE HALLIGAN: I don't mean to be unsympathetic
12 to that - - -

13 MR. GLASS: Yeah.

14 JUDGE HALLIGAN: - - - point. I'm just asking if
15 - - - if the CBA requires something, then it seems to me -
16 - -

17 MR. GLASS: But that's the question. Does - - -
18 does the CBA require it or not in these circumstances? Are
19 they pointing to a specific provision that says these
20 particular kind of claims must be litigate - - - you know,
21 must be heard in arbitration? Where our argument is that
22 it's not always so clear that the contract governs
23 everything under - - - in the world. And that's what I
24 think the concern is, is - - -

25 JUDGE RIVERA: Oh, wait. So now I'm really

1 unclear. Are you saying that this CBA did not provide for
2 this arbitration?

3 MR. GLASS: It - - - it - - - it's ambiguous. It
4 does not talk about this particular situation. It doesn't
5 say that anything regarding the - - -

6 JUDGE RIVERA: Well, it wasn't ambiguous to your
7 client because he did seek the union to - - -

8 MR. GLASS: Well, if you have a union - - -

9 JUDGE RIVERA: - - - pursue arbitration. Yes?

10 MR. GLASS: Like, he's - - - he's in a union. He
11 has nothing - - - he doesn't want to pay a private lawyer.
12 What else? Is he going to turn to his union and say what
13 happened?

14 JUSTICE FISHER: Well, that's exactly the point.
15 That's why they enter into the collective bargaining
16 agreement, because they can't afford litigation. So they
17 have the union here to pursue the grievance on their
18 behalf. And if they don't like it, then they could bring
19 the proceeding. Like the Chief said, they could bring a
20 federal action.

21 MR. GLASS: But I think the law - - - how could
22 they bring a federal action? I - - - I'm not clear what -
23 - -

24 JUSTICE FISHER: So I forgot what - - - the
25 action we were talking about earlier.

1 JUDGE TROUTMAN: PERB?

2 JUDGE FISHER: There you go.

3 MR. GLASS: I mean, that's a very, very limited
4 review that basically says - - - you know, the union is
5 acting without - - - they're not getting to the merits of
6 them. That's the situation they're just asking if - - -
7 they don't get into the merits of what the case is about.

8 JUDGE TROUTMAN: But it then allows you - - -

9 JUDGE RIVERA: Understood. But that's - - -
10 there are benefits to being in a union shop and having a
11 CBA. And sometimes those things, perhaps to an individual,
12 seem not to be as beneficial as they wish they could be.

13 MR. GLASS: Because the union - - -

14 JUDGE RIVERA: But that's part of the tradeoff.
15 The benefits you're getting for these other tradeoffs and
16 has already been commented - - -

17 MR. GLASS: So in - - -

18 JUDGE RIVERA: - - - as you say yourself, an
19 individual might not otherwise be able to afford any
20 representation - - -

21 MR. GLASS: Let me ask you this as a - - -

22 JUDGE RIVERA: - - - is getting some protections
23 from the union. And if they feel the union is not
24 complying with their duties to the union member, they have
25 recourse against the union.

1 MR. GLASS: Let me ask this hypothetically then.
2 So let's say, let's - - -

3 JUDGE RIVERA: I didn't know we were working in
4 that direction - - -

5 MR. GLASS: - - - let's say - - - let's say - - -

6 JUDGE RIVERA: - - - but I'm open.

7 MR. GLASS: - - - let's say choose not to become
8 a member. Let's say you're covered by the CBA, but you
9 choose not to like, pay the dues for the union. Would you
10 be entitled to bring an Article 70 under that scenario?
11 Because you're opting out - - - you're saying - - - you're
12 saying that you - - - you know, you're - - - as part of the
13 bargain you're drawing when you - - - when you join the
14 union. What if - - - now a lot of teachers are - - - you
15 know, not paying dues in the union because they feel like
16 they're not getting help in these circumstances. So would
17 that person have the right to an Article 78 without
18 exhausting any remedies because they didn't buy the union?
19 The - - - they're still entitled to that provision of the -
20 - - of this incentive, but they're not members of the
21 union. Would they have an option - - - opportunity now to
22 just challenge this in court as a - - - under Article 78 as
23 arbitrary and capricious?

24 And you could see why this could be considered
25 arbitrary and capricious. You know, the fact that whether



1 it was created by the contractor, it was created by any
2 other source - - -

3 CHIEF JUDGE WILSON: Is Mr. Dourdounas a member
4 of the union?

5 MR. GLASS: By default he was a member of the
6 UFT, yes. So - - - but again, I do think the law does
7 allow. And I think if you look at these other scenarios
8 where tenure by estoppel, those people are member of the
9 union. They don't have this - - - this - - - have to sue
10 the union if they - - - if they disagree with what happened
11 in the contract. You know, the probationary teacher
12 doesn't like the result, they don't have to go to the - - -
13 to the union. So there is this uncertainty in the law
14 about when you can go to court and when you cannot go to
15 court.

16 And I think we do need some clarity one way or
17 another, you know. Let's say a paraprofessional, just
18 another - - - one - - - one of the last examples I was
19 going to say, was a paraprofessional. They don't have the
20 rights of a teacher, but they're told they have to go
21 through the process of - - - a due process consideration
22 hearing under the contract before they can come back to
23 court.

24 And so the courts have actually allowed - - -
25 I've never heard the City argue in one of those cases that,

1 you know, you have to implead the union. They - - - they
 2 exhaust this process and then there is - - - there is an
 3 Article 78 review. So again, I think we just need a clear
 4 rule here, one way or another, regardless of the outcome of
 5 this case, to understand, you know. And the City didn't
 6 even come up with this argument till after the fact. And
 7 because the decisions coming out are suggesting you can go
 8 to court. And when can you go to court on these cases?
 9 And when are you governed by the collective bargaining
 10 agreement? And I can give you multifarious fact patterns.

11 CHIEF JUDGE WILSON: Your time is actually up - -
 12 -

13 MR. GLASS: So - - -

14 CHIEF JUDGE WILSON: - - - so - - -

15 MR. GLASS: I appreciate it. Thank you.

16 CHIEF JUDGE WILSON: You have that for your
 17 rebuttal.

18 MS. VISGAITIS: Good afternoon, and may it please
 19 the court. Rebecca Visgaitis for the New York City
 20 Department of Education.

21 This court - - -

22 JUDGE TROUTMAN: What do you believe the
 23 petitioner was trying to enforce here? Where did the right
 24 come from? Did it come from the CBA? And if it came from
 25 the CBA, how does that impact what - - - how he can



1 proceed?

2 MS. VISGAITIS: It absolutely came from the CBA.
3 That's very clear from the Article 78 petition, which
4 specifically sought to obtain a benefit that was granted
5 under the CBA. And the - - - that is the only cause of
6 action that petitioner put forth in the Article 78
7 petition. And it is because of that, under Ambach, this
8 court's very clear precedent that he could not bring a
9 claim directly against DOE.

10 JUDGE GARCIA: Does the arbitration provision
11 matter at all in your analysis? The fact that there was a
12 potential arbitration step that wasn't taken here, or is
13 that irrelevant to you?

14 MS. VISGAITIS: I mean, I think that it is
15 relevant in that because it wasn't taken that is - - - that
16 is why he still has an alleged injury to pursue. But then
17 his - - - his remedy is - - -

18 JUDGE GARCIA: But what would that injury be? Is
19 that his original injury, or is that an injury because the
20 union didn't bring an arbitration?

21 MS. VISGAITIS: I mean, in his view, that is the
22 original denial of the retirement benefit. But in order to
23 - - - he's incorrect that that has never been looked at on
24 the merits. Because what the issue is here is that the
25 union concluded that he didn't have a meritorious claim on



1 that issue. And - - -

2 JUDGE TROUTMAN: So how could he get the merits
3 addressed?

4 MS. VISGAITIS: I mean, that is - - - that was
5 the union addressing the merits. And now his remedy - - -

6 CHIEF JUDGE WILSON: Well, if the union - - - the
7 union can decide not to proceed to arbitration even with a
8 meritorious claim, right?

9 MS. VISGAITIS: Uh-huh. Right. But the - - -
10 that's where his - - - his remedy now has to involve the
11 union and their decision not to pursue that arbitration.

12 CHIEF JUDGE WILSON: So what - - -

13 JUDGE GARCIA: That's - - - the answer to my
14 question is, it does depend on whether or not there's this
15 potential other step. Because let's say the process ended
16 at the step right before that and he gets this decision,
17 and he loses. Would your position be - - - and there's no
18 arbitration provision in the CBA, would your view then be
19 he couldn't bring an Article 78 at that point?

20 MS. VISGAITIS: So by the step before this, do
21 you mean the steps in the grievance process - - -

22 JUDGE GARCIA: Yeah. The grievance process.

23 MS. VISGAITIS: - - - before that?

24 JUDGE GARCIA: Yeah.

25 MS. VISGAITIS: I think that - - -

1 JUDGE GARCIA: But - - - and there's no other
2 potential to get arbitration. It's that's not in a
3 contract. It's a different contract. Hypothetical. Could
4 he go to Article 78 from there?

5 MS. VISGAITIS: I think I - - - I have to think
6 about that. So he - - - if he took it to the union and
7 they - - -

8 JUDGE GARCIA: Were briefed. They followed the
9 entire CBA procedure, but there's no union determination.
10 Arbitration or not, it's over. Like, we've taken it to
11 whatever official we need to take it to, you've lost.
12 That's the end of the game in terms of grievance
13 proceedings. Can that person now bring and - - - that
14 employee now bring an Article 78?

15 MS. VISGAITIS: I mean, I think that he would
16 still be - - - be alleging a breach of the collective
17 bargaining agreement at that point and would potentially be
18 arguing that the union need to argue and prove that the
19 union breached its duty of fair representation in - - - in
20 not - - -

21 JUDGE TROUTMAN: But not - - -

22 JUDGE GARCIA: But what would the breach be?
23 What would the breach be at that point? They represented
24 him. They zealously represented him. And they made these
25 arguments all through the chain.

1 MS. VISGAITIS: Right.

2 JUDGE GARCIA: So at that point, what's the
3 breach?

4 MS. VISGAITIS: I - - - no. I think that's - - -
5 that is the end of the road. And that's what this court
6 said in Ambach.

7 JUDGE GARCIA: But Ambach did have an arbitration
8 provision, right?

9 MS. VISGAITIS: I - - - yes. But I mean, that's
10 - - - if there is no arbitration, it's because the union
11 and the employer did not negotiate.

12 JUDGE RIVERA: I'm a little unclear here what
13 you're saying when you say, "the end of the road." You're
14 saying that the CBA only allows - - - in this hypothetical
15 - - - you would read it as only allowing the grievance, but
16 not any judicial review. Is that what you're saying?

17 MS. VISGAITIS: I - - - I mean, I suppose so. I
18 - - - I think that would not be a very good agreement
19 between - - - between a union and an employer. And so I
20 think that that's - - - that's pretty far afield from what
21 we have here. Because there's no dispute that in cases
22 involving DOE, the CBA has these arbitration procedures.
23 And all of the examples that the petitioner's counsel is
24 bringing up, these are all situations that are largely
25 governed by the CBA, or there are alternative claims that

1 employees may bring that might not be based on the CBA,
2 that may be based on statutory - - -

3 JUDGE GARCIA: But what about some of the
4 examples he gave where he claims you don't need to - - -
5 you can bring an Article 78? You don't need to employ the
6 union.

7 MS. VISGAITIS: Right. So in cases like Kahn,
8 the reason why it was not necessary to - - - why the
9 grievance procedure was optional there was because the
10 alleged violation was not a violation of the collective
11 bargaining agreement. It was of statutory law. And so
12 that is still - - - in that situation, I think an Article
13 78 would be available, and it may be that there are - - -

14 CHIEF JUDGE WILSON: Right. Because - - - and
15 that's, I think, important because there you're not
16 bringing a breach of contract action for the - - - breach
17 of the collective bargaining agreement, because the
18 collective bargaining agreement, as you said, didn't reach
19 the conduct that was being challenged, it was statutory.
20 And that then makes sense to me why you'd bring an Article
21 78.

22 But here, where he's alleging, I think he's - - -
23 you - - - and you both agree. He's alleging a breach of
24 the collective bargaining agreement. I fail to understand
25 why this is an Article 78 at all.

1 MS. VISGAITIS: I agree, Your Honor. And I think
2 that that's - - - I realize that the City has probably been
3 complicit in this - - - that I think we have been putting -
4 - - putting some of these cases in the Article 78 box sort
5 of by default because they involve a public employer. When
6 a lot of these cases are - - - should be brought as breach
7 of contract cases and would require impleading the union
8 and alleging and proving that they breached their duty of
9 fair representation.

10 CHIEF JUDGE WILSON: Yeah, so I think it's an
11 open question, I think, in New York whether you have to
12 implead the union or simply allege that the union breached
13 its duty of fair representation and then prove that. In
14 federal law, you have to do the latter, you don't actually
15 have to join the union. But I don't think we've ever
16 decided that question.

17 MS. VISGAITIS: I think that just in the O'Reilly
18 decision just last year, that the implication of that was
19 that the union does have to be joined. But in any event,
20 at a minimum a - - -

21 CHIEF JUDGE WILSON: You still have to plea - - -
22 prove a breach by the union, whether the - - - yes.

23 MS. VISGAITIS: Exactly. Yes. And - - - and
24 that's something that - - - that Mr. Dourdounas has never
25 alleged. In fact, he has disclaimed that he is arguing

1 that his duty - - -

2 CHIEF JUDGE WILSON: Well, and to my mind, has
3 used the wrong procedural vehicle in the first place.

4 MS. VISGAITIS: I agree. That is the conclusion
5 that we have come to, and we regret that it was a
6 conclusion we came to belatedly. Although, I will point
7 out that we did preserve this argument in Supreme Court and
8 - - - and under this court's precedent, that is enough for
9 this court to reach the issue. But after taking a step
10 back and looking at this, we are very much in agreement
11 with Your Honor that - - - that a lot of these cases should
12 be brought as breach of contract actions. They would
13 require pleading and proving that allegation involving the
14 union as well.

15 JUDGE HALLIGAN: So which one shouldn't be? You
16 said a lot of these cases.

17 MS. VISGAITIS: I - - - by a lot of these cases,
18 I mean any case that is alleging a violation of the
19 collective bargaining agreement. And the only cases that
20 would not fall into that would be ones that are also
21 alleging some other statutory violation or something else
22 that does not directly involve interpreting the CBA.

23 But here, that's the only issue. That's the only
24 claim that petitioner has ever put forth.

25 If there are no further questions, we would ask -

1 - - we would ask this court to affirm on that basis. Thank
2 you.

3 CHIEF JUDGE WILSON: Thank you.

4 MR. GLASS: Just a couple of - - -

5 CHIEF JUDGE WILSON: Let me just start with a
6 question. Wouldn't that provide you a lot of clarity?

7 MR. GLASS: I - - - I just - - - I believe the
8 Honorable Judge - - - Judge said that, you know, if there's
9 - - - if it gets to the merits, if there is an arbitration,
10 I do believe that the person has a very limited review.
11 They've had their day in court. They've had a chance to
12 contest the merits. What I think the City is saying is
13 that the union gets to decide we're - - - we're - - - the
14 union gets to decide what they think has merit or not. And
15 that's the end of the inquiry.

16 And so that's the problem. It's the City is
17 never coming forth to give an answer. They're just kind of
18 pushing - - -

19 JUDGE GARCIA: Bu isn't that kind of - - -

20 MR. GLASS: - - - pushing it on the union.

21 JUDGE GARCIA: - - - the bargain that was struck
22 on the collective bargaining agreement? That they agreed
23 to this process where these - - - if they're going to get a
24 hearing, go to arbitration, which has a very limited
25 judicial review. If they don't do that, the point there is

1 the union decided not to do that. And if they did that in
2 bad faith or whatever, then there's an action against the
3 union?

4 MR. GLASS: As we know, none of the individual
5 teachers are - - - are in part of that bargain. That's
6 done on a global basis. So they don't have any say in
7 that. But again, I still - - - I don't understand the - -
8 -

9 JUDGE HALLIGAN: That's the nature of a
10 collective bargaining agreement, isn't it?

11 MR. GLASS: But again, how do we distinguish
12 between the probationary teacher, the para, the sub teacher
13 - - - the substitute teacher? All who don't have any,
14 like, tenure rights. And the probationary teacher gets to
15 fly right to court and bring an Article 78. It's the same
16 issue. Corporal punishment. I was violated - - - you
17 know, they violated my rights for whatever issue
18 potentially subject to collective bargaining agreement. Go
19 - - - can go to right to court. We've always recognized
20 probationary teachers can bring an Article 78 as arbitrary,
21 capricious, bad faith. Why can the para who has the same -
22 - - same argument not be able to do that? Why do they have
23 to exhaust this remedy, then get stuck and are trying to
24 argue that the union didn't take my case to arbitration.

25 CHIEF JUDGE WILSON: I'll go - - -

1 MR. GLASS: Why should the substitute teacher do
2 that?

3 CHIEF JUDGE WILSON: - - - I'll go - - - I mean,
4 you've said that before. And I'll go back to the question
5 I asked you at first. It seems to me you're saying the
6 state of the law is kind of incomprehensible. There are a
7 lot of things that don't make a lot of sense to you. And
8 my question was, why doesn't the process that the City
9 described give you the clarity you want?

10 MR. GLASS: What - - -

11 CHIEF JUDGE WILSON: It might mean some of these
12 decisions are going to now come out differently than they
13 came out before, but at least you'll have a clear rule.

14 MR. GLASS: I believe we do need a clear rule.
15 And whether that's - - - you know, I do think you could
16 still have this - - - because of the probationary teacher
17 and the U-ratings and the cases you'll look at in the past
18 that have - - - that have been decided on this Article 78
19 standard, I think that standard should be allowable for
20 these very similar kind of cases like Mr. Dourdounas'.
21 Which is - - - it's arbitrary and capricious, the part - -
22 - independent of the contract. And by tossing them into
23 this contract realm, you're making the standard almost
24 impossible for anyone to challenge a merit-based system and
25 never get to the hearing.

1 JUDGE RIVERA: Because if I - - - if I understand
2 you, you agree the - - - that you want a clear rule, but
3 the rule should be you get to do your Article 78? You get
4 judicial review regardless of what the union decides?

5 MR. GLASS: I think there needs to be something -
6 - -

7 JUDGE RIVERA: And regardless of this contract,
8 the CBA?

9 MR. GLASS: I think there needs to be some rule
10 that Article 78 should allow some relief when the DOE
11 never comes to the table and explains their interests.
12 They're passing it on to the union, knowing that the union
13 is not going to take it to arbitration because they only
14 have 200 a year when there's 10,000 cases. And so you're
15 depriving people who have very, very serious and real
16 claims from having any kind of judicial review at all.
17 Because they're just saying, we know the union's not going
18 to do it because they can only 200 - - -

19 JUDGE RIVERA: Sounds - - - it sounds very much
20 like the union members may want to talk to the union shop
21 leaders about this CBA, and this part of the CBA.

22 MR. GLASS: Yeah. But I - - - I do think that an
23 Article 78 review would not - - - you know, we do it on
24 selective cases, and it's been working fine until - - -
25 now, all of a sudden, we're changing the rules. And so

1 we'd like a clear rule. So at least, when a client comes
2 in I can at least understand, you know, if there is a
3 possibility of Article 78 review because I don't know now.
4 Because sometimes it is allowed with probationary teachers,
5 sometimes it is rated with U-ratings, and sometimes it's
6 not. And I can't tell someone, you know, what's going to
7 happen when every case comes out different.

8 So I appreciate you looking at this again. Thank
9 you.

10 CHIEF JUDGE WILSON: Thank you.

11 (Court is adjourned)

12

13

14

15

16

17

18

19

20

21

22

23

24

25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Dourdounas v. City of NY, No. 24 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: February 15, 2025

