No. 221

In the Matter of the Arbitration
between Barbara Kowaleski,
Appellant,
and
New York State Department of
Correctional Services,
Respondent.

Lewis B. Oliver, Jr., for appellant.
Frank K. Walsh, for respondent.
Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, amicus curiae.

CIPARICK, J.:

Petitioner Barbara Kowaleski began her employment with the State Department of Correctional Services (DOCS) as a correction officer in 1981, and was assigned to the Hale Creek Correctional Facility (Hale Creek) in 1996. In October 2004, she was served with a Notice of Discipline (Notice) charging her with

violating provisions of the employees' manual on three separate occasions in September and October 2004:[1] (1) in September 2004, she allegedly "made inappropriate comments of a personal nature about another staff member in the presence of staff and inmates"; (2) in October 2004, she allegedly argued with a fellow employee; and (3) also in October 2004, she allegedly was "disrespectful and insubordinate" when she ignored a superior's order to stop interrupting another employee. The Notice called for her termination and the loss of any accrued leave. Kowaleski filed a grievance and, pursuant to a collective bargaining agreement (CBA), a hearing was held before an arbitrator.

At the start of the hearing, Kowaleski argued that the disciplinary action was only being brought to retaliate against her for reporting a fellow officer's misconduct in 2002, and that she was entitled to raise this as an affirmative defense pursuant to Civil Service Law § 75-b, which prohibits public employers from retaliating against employees for reporting their coworkers'

[1] In 2003, Kowaleski had received two notices of discipline, both with dismissal from service as the proposed penalty. In the resulting arbitration, she testified that she had reported a fellow correction officer's misconduct in 2002, and was frequently harassed at work. While noting that it was "not within [his] authority to make a determination of whether harassment occurred," the arbitrator observed that Kowaleski was "the object of animosity and/or harassment" by some of her fellow officers, and that the harassment "may have originated when CO Kowaleski informed her supervisor of the [2002] incident." He found her guilty of some of the disciplinary charges and imposed a 60 day suspension.

improper conduct.[2] The arbitrator determined that because the CBA limited his authority "to determinations of guilt or innocence and the appropriateness of proposed penalties," he lacked authority to consider Kowaleski's retaliation defense. He noted, however, that he would consider evidence of retaliation when determining witness credibility and "in the larger context of guilt or innocence."

In January 2007, the arbitrator found Kowaleski guilty of two of the three charges and determined that termination was appropriate. He found that Kowaleski had, in the presence of inmates, asked if a fellow officer's son had been shot, potentially endangering the officer and his family, and that she had insubordinately ignored a superior's instructions. The arbitrator noted that, under the CBA, an employee can only be disciplined for "just cause," which requires, among other things, that the employer made a "fair and objective investigation," that "the employer's action was non-discriminatory," and that "the penalty is reasonably related to the seriousness of the offense."

[2] Kowaleski testified that, in 2002, she observed a fellow officer use excessive force on an inmate, and she refused to sign a report that she had witnessed the inmate assault the officer. The sergeant who was supposed to be supervising when the incident occurred told Kowaleski to "keep [her] mouth shut or else [she] would be escorted off the premises." A group of her co-workers began harassing her, and the harassment escalated after she reported the incident to the administration. A retired correction sergeant who had last worked at Hale Creek in 2005 testified that Kowaleski "couldn't make a move without getting blamed for something."

After finding Kowaleski guilty, the arbitrator concluded that there was "just cause" for the penalty of discharge, which was not "arbitrary, capricious, unreasonable, or excessive."

Kowaleski filed this CPLR 7511 petition seeking a declaration (1) vacating the arbitrator's opinion and award, and (2) directing that the charges in the Notice be dismissed or remanded for a new hearing before a different arbitrator. DOCS moved to dismiss the petition. Supreme Court found that the arbitrator exceeded his power by ignoring Civil Service Law § 75-b, but concluded that because this was an error of law, the award should not be vacated. The court further reasoned that § 75-b only precludes disciplinary action "taken solely in retaliation," and here witness testimony provided a "separate and independent" basis for the action. Supreme Court found that the arbitrator's findings and award were rational.

The Appellate Division affirmed, with two Justices dissenting. The majority found that although the arbitrator "incorrectly stated that it was beyond his jurisdiction to consider petitioner's claim of retaliation, this error of law does not warrant vacating the award under the circumstances," given the arbitrator's rational and supported finding that Kowaleski was guilty of two of the charges (Matter of Kowaleski [New York State Dept. of Correctional Servs.], 61 AD3d 1081, 1083 [3d Dept 2009]). Moreover, the majority reasoned, the arbitrator did consider "evidence of retaliation in weighing witness

credibility and assessing petitioner's guilt" (id.). Two Justices dissented on the grounds that Kowaleski was "deprived of her right to have the arbitrator determine . . . the specific factual issue of whether the disciplinary charges were, in the first instance, initiated and pursued to retaliate for the prior matters" (id. at 1085 [internal quotation marks omitted]). Kowaleski appealed as a matter of right pursuant to CPLR 5601 (a). We agree with the dissenting Justices and now reverse.

Under CPLR 7511 (b) an arbitration award must be vacated if, as relevant here, a party's rights were impaired by an arbitrator who "exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made" (CPLR 7511 [b] [1] [iii]). It is well-settled that an arbitrator "exceed[s] his power" under the meaning of the statute where his "award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO, 6 NY3d 332, 336 [2005]; see also Matter of Falzone [New York Cent. Mut. Fire Ins. Co.], __ NY3d __, 2010 NY Slip Op 07417 [2010]). Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where "an arbitrator has made an error of law or fact" (Falzone, 2010 NY Slip Op 07417 at *3).

Here, the arbitrator clearly exceeded a "specifically

enumerated limitation" on his power. As the courts below found, and DOCS concedes, the arbitrator not only had authority to consider Kowaleski's retaliation defense, but was required to do so. Civil Service Law § 75-b prohibits a public employer from taking disciplinary action to retaliate against an employee for reporting "improper governmental action" (Civil Service Law § 75-b [2] [a]). If "the employee reasonably believes dismissal or other disciplinary action would not have been taken but for" the whistleblowing, the employee "may assert such as a defense before the designated arbitrator or hearing officer" (Civil Service Law § 75-b [3] [a]). Whatever the terms of the CBA, "[t]he merits of such defense shall be considered and determined as part of the arbitration award or hearing officer decision" (id. [emphasis added]). In short, the statute requires the arbitrator to consider and determine the merits of an employee's retaliation defense where such a defense is raised (cf. Matter of Obot (New York State Dept. of Correctional Servs., 89 NY2d 883, 885-886 [1996] [award not vacated where an employee failed to raise the retaliation defense in the arbitration and the arbitrator did not consider it]). If the arbitrator or hearing officer finds that "the dismissal or other disciplinary action is based solely" on the employer's desire to retaliate, the disciplinary proceeding must be dismissed (Civil Service Law § 75-b [3] [a]). Therefore, the arbitrator's finding here that he did not have authority under the CBA to consider Kowaleski's retaliation defense was not

only incorrect as a matter of law, but also in excess of an explicit limitation on his power. Because he failed to consider and determine the defense, the award must be vacated.

Contrary to DOCS position, it was not enough for the arbitrator to hear evidence of retaliation in the context of making determinations as to witness credibility and deciding Kowaleski's guilt. A disciplinary action may be retaliatory even where an employee is guilty of the alleged infraction. Under Civil Service Law § 75-b (3), an arbitrator is required to dismiss a disciplinary action based solely on retaliatory motive, regardless of the employee's guilt or innocence (see Civil Service Law § 75-b [2] [a], [3] [a]). This separate retaliation inquiry is critical. In order to be effective, whistleblower protections like those embodied in Civil Service Law § 75-b must shield employees from being retaliated against by an employer's selective application of theoretically neutral rules. Thus, a separate determination regarding the employer's motivation in bringing the action is necessary if § 75-b is to truly "establish[] a major right for employees -- the right to speak out against dangerous or harmful employer practices" (Mem filed with Senate Bill, Bill Jacket, L 1984, ch 660, at 5).

Because we find that the arbitrator's failure to separately consider and determine Kowaleski's affirmative defense of retaliation on the merits requires the award to be vacated, we decline to reach Kowaleski's other arguments. We note, however,

that she has requested that any rehearing be before a different arbitrator. That request should be ruled on by Supreme Court in the exercise of its discretion.

Therefore, the order of the Appellate Division, insofar as appealed from, should be reversed, with costs, petitioner's application to vacate the arbitration award granted, and the matter remitted to Supreme Court for further proceedings in accordance with this opinion.

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Order, insofar as appealed from, reversed, with costs, petitioner's application to vacate the arbitration award granted and matter remitted to Supreme Court, Albany County, for further proceedings in accordance with the opinion herein. Opinion by Judge Ciparick. Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott and Jones concur.

Decided December 21, 2010