

# *State of New York Court of Appeals*

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Wednesday, March 30, 2016

## **No. 63 Matter of Kent v Lefkowitz**

This case arises from a decision by the chairman of the State Racing and Wagering Board (the Board) to reduce per diem pay rates for seasonal employees at the state's horse tracks by 25 percent in 1996. The seasonal track workers are exempt from civil service classification and their compensation is set each year by the Board's chair, subject to the approval of the state budget director. The Public Employees Federation, AFL-CIO (PEF) filed an improper practice charge with the Public Employment Relations Board (PERB), alleging that the unilateral reduction in wages for track workers violated the Taylor Law, specifically Civil Service Law § 209-a(1)(d), which makes it an improper practice for a public employer to refuse to negotiate the terms and conditions of employment with the collective bargaining representative of its employees. In 2010, PERB's assistant director found the wages of track workers were "a mandatory subject of bargaining" and, therefore, the unilateral pay cut violated the statute.

PERB reversed the decision and dismissed the improper practice charge in 2012, finding the Board satisfied its obligation to negotiate wages in October 1995 when it executed a side letter agreement with PEF regarding their 1995-99 contract. The side letter addressed the track employees' eligibility for lump-sum payments, pay raises and holiday pay, and addressed how their wages would be raised to conform with a potential increase in the federal minimum wage, among other things.

PEF filed this article 78 proceeding against PERB, the Board, and the Governor's Office of Employee Relations (GOER) to annul the determination. Supreme Court dismissed the suit, deferring to "PERB's experience with the subtleties of how parties negotiate" a contract.

The Appellate Division, Third Department reversed and annulled PERB's determination on a 3-2 vote, saying the side letter "covered discrete compensation issues" and "does not evidence the intent of the parties ... to address any and all situations under which the Director of the Budget could unilaterally adjust wage rates for the affected employees. In other words, the side letter agreement is not ... sufficiently broad to demonstrate that the subject matter that formed the basis for the improper practice charge, i.e., the unilateral 25% reduction in wages, was negotiated to completion, and PERB's determination to the contrary was arbitrary and capricious."

The dissenters said the side letter "was comprehensive and covered a broad range of issues regarding the compensation to be paid to seasonal personnel.... Notably, aside from the negotiated raises for 1997-1998 and 1998-1999, the agreement neither sets forth any limitation on the chair's discretion to set the seasonal employees' per diem compensation rates nor indicates that it was intended to be anything less than a comprehensive agreement as to such employees. Thus..., it was reasonable for PERB to determine that the side letter agreement constituted the full agreement between the Board and PEF as to any limitations on the Board's wage-setting discretion."

For appellants GOER et al: Assistant Solicitor General Julie M. Sheridan (518) 776-2029

For appellants PERB et al: David P. Quinn, Albany (518) 457-2678

For respondent PEF and Kent: Lisa M. King, Albany (518) 785-1900 ext. 241

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## **No. 64 Jiannaras v Alfant**

On2 Technologies, Inc., a Delaware Corporation that developed video compression technology at its headquarters in New York, announced an agreement to merge with Google, Inc. in August 2009. Google agreed to exchange 60 cents worth of its Class A common stock for each share of On2 common stock, a transaction valued at \$106.5 million. Three days later, Michael Jiannaras brought this putative class action in New York on behalf of On2 shareholders against On2, its board of directors and Google, alleging the On2 directors breached their fiduciary duty by failing to ensure that shareholders received the best price. Other shareholders commenced similar actions in Delaware.

The New York and Delaware plaintiffs reached a settlement with On2 in February 2010, and the parties to the New York action sought certification of a settlement class of all who held shares since the merger was announced. The proposed settlement, which did not permit shareholders to opt out, provided for dismissal of the New York and Delaware actions, with prejudice, and release of "any and all" claims related to the merger. Objections were filed by 226 shareholders, who claimed the settlement was inadequate and contained "an astonishingly broad" release that would "unlawfully restrict" their rights to pursue individual damages. They argued out-of-state residents must be allowed to opt out of the settlement under Matter of Colt Industries Shareholder Litigation (77 NY2d 185 [1991]).

Supreme Court refused to approve the non-opt-out settlement after a fairness hearing, although it found the settlement class "is properly defined" and the proposed settlement "is fair, adequate, reasonable and in the best interests of the proposed Settlement Class." It said a non-opt-out settlement "is not appropriate because those proposed class members who are non-residents of New York State must be afforded the opportunity to opt out ... so that they can preserve their right to assert claims for damages, if any such claims exist." It said New York residents need not be afforded an opportunity to opt out.

The Appellate Division, Second Department affirmed in a 3-1 decision. The court said it was bound by Matter of Colt, in which "the Court of Appeals held that the Supreme Court erred in approving a settlement that purported to extinguish the rights of out-of-state class members to litigate damages claims, without giving them a chance to opt out of the class. The Court of Appeals emphasized that the mere fact that the relief initially demanded was largely equitable should not permit a court to bind litigants to a settlement that eliminated constitutionally protected property interests without due process.... [I]f there is to be any shift in that precedent, the change in the law is for the Court of Appeals to pronounce."

The dissenter said, "Since I conclude that the damages at issue here are merely incidental to the equitable relief sought, I conclude that the court was not required to afford any class members the opportunity to opt out.... Moreover, I disagree with the practice of affording only out-of-state class members the opportunity to opt out, while denying that opportunity to in-state class members." He said, "[A] distinction that has arisen in the years since Colt was decided leads me to conclude that..., where any claim for money damages is incidental to the equitable relief sought, and requires no individualized adjudications, class members, whether in-state or out-of-state, do not have a due process right to exclusion from the class."

For appellants Alfant, On2 Technologies et al: Frederick Liu, Washington, DC (202) 637-5600  
For respondents Ackerman et al: Martin E. Karlinsky, Manhattan (646) 437-1430

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**No. 65 People v Quanaparker Howard**

*(papers sealed)*

Quanaparker Howard and his girlfriend were arrested in August 1998 for severely abusing the girlfriend's eight-year-old son in Buffalo. Police found the boy in an upstairs bedroom, where he had been tied in a standing position for five days and repeatedly beaten with a plastic bat, belt, and extension cord. The boy's injuries included a collapsed lung, lacerated liver, bruised intestines, and there was pooled blood in his abdomen. There were no allegations of sexual abuse. Howard was convicted of first-degree assault and first-degree unlawful imprisonment, among other charges, and was sentenced to 12½ to 25 years in prison.

Although Howard was not convicted of a sex crime, he was required to register as a sex offender under Correction Law § 168-a(2), which includes unlawful imprisonment (Penal Law § 135.10) in the definition of "sex offense" when the victim is less than 17 years old and is not the child of the defendant. As Howard approached his release date in 2013, the Board of Examiners of Sex Offenders prepared a risk assessment instrument (RAI) which, including points assigned for inflicting physical injury, would have made him a Level I (low risk) offender. However, it recommended that he be designated a Level III (highest risk) offender based on its Risk Assessment Guidelines, which include a presumptive override to Level III for offenders who inflict serious physical injury. The Board noted that his "offense was not sexually driven."

Erie County Court designated Howard a Level III offender based on the override, rejecting defense counsel's argument that Level I was more appropriate because Howard had no history of sex crimes and posed little risk of committing a future sex offense. The court said, "[B]ecause of the extensive serious injury inflicted upon the victim here, essentially the torture inflicted, I agree ... that he poses a serious risk to public safety that is not captured by the scoring instrument and, therefore, I will employ the Presumptive Level 3 with no special designation." The Appellate Division, Fourth Department affirmed "for reasons stated" by County Court.

Howard says he was not convicted of a sex crime in this case and has no history of convictions or arrests for sex offenses, and he argues County Court erred in failing to weigh those mitigating factors against the aggravating factor of serious physical injury when it designated him a Level III offender. He says, "Forcing him to register [as Level III] in no way is rationally related to the governmental purpose of protecting the public from sexual crimes."

For appellant Howard: Kathryn Friedman, Buffalo (716) 912-3699

For respondent: Erie County Assistant District Attorney Nicholas T. Texido (716) 858-2424

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## **No. 99 People v Elliot Parrilla**

Elliot Parrilla was driving in upper Manhattan in February 2011, when police pulled him over for traffic and equipment violations. They frisked him and found a "Husky" brand utility knife, which an officer opened with a flick of his wrist, locking the blade in place. They arrested Parrilla for possession of a gravity knife. He was indicted on a charge of third-degree criminal possession of a weapon under Penal Law § 265.02(1).

At trial, Supreme Court instructed the jurors, over defense objection, that they could convict Parrilla if they found he was aware that he possessed a knife, not necessarily a gravity knife. "A person does not have to know that the knife is specifically a gravity knife or that it fits the legal description of a gravity knife in order to knowingly possess it," the court said. "The People are only required to prove that the defendant ... knowingly possessed a knife." During deliberations, a juror sent out a note expressing concern that one of the locations mentioned in testimony "may affect my judgment" because she lived nearby. The court questioned her twice, telling her "you can't let it influence the verdict you reach in the case.... Can you do that?" The juror replied, "I want to say yes, it is just in my mind." The court said, "In terms of evaluating the evidence, the fact that you have ever lived in the area or know the area cannot be one of the factors.... Can you follow that?" The juror said, "I can follow that, yeah." The court declined to discharge the juror. Parrilla was convicted as charged and sentenced to 2½ to 5 years in prison.

The Appellate Division, First Department affirmed, saying, "The court properly instructed the jury that the knowledge element would be satisfied by proof establishing defendant's knowledge that he possessed a knife in general, and did not require proof of defendant's knowledge that the knife met the statutory definition of a gravity knife...." It said the trial court made "sufficient inquiry" of the concerned juror and, when "the juror unequivocally confirmed that she would follow the court's instructions," there was no basis to disqualify her.

Parrilla argues the jury instruction requiring only proof he knew he possessed "a knife" misinterpreted the statute and deprived him of due process. He was convicted "simply because the jury found he possessed a common workman's utility knife that he bought legally and openly at Home Depot in 2009....," he says. "[T]he utility knife here had none of the outward thug-and-brute qualities that would justify equating it with firearms, blackjacks, or 'Kung Fu Stars'.... Nothing in its outward appearance would put the possessor on notice of potential regulation, nor was Home Depot required to provide notice to the tens of thousands of customers to whom it had sold the knives that the District Attorney's office began to criminalize in June 2010." He also argues the concerned juror "gave no unequivocal assertion of impartiality" and should have been disqualified.

For appellant Parrilla: Robert S. Dean, Manhattan (212) 577-2523

For respondent: Manhattan Assistant District Attorney Andrew E. Seewald (212) 335-9000