SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 9

NASSAU COUNTY

NASSAU HEALTH CARE CORPORATION,

Plaintiff,

-against-

MOTION DATE: 7/6/07

Motion Seq. NO.: 001, 002

INDEX NO.: ~~**6089/06**~~ 6931/07

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., A.F.S.C.M.E., LOCAL 1000, A.F.L.-C.I.O., by its LOCAL 830, ON behalf of JANET HENSELDER,

Defendants.

The following papers read on this motion (numbered 1-4):

Notice of Verified Petition to Vacate an Arbitration Award.....1
Verified Answer.....2
Notice of Cross-Petition to Confirm Arbitrator's Award.....3
Answer to Cross-Petition.....4

Petitioner, Nassau Health Care Corporation ("NHCC"), brings this proceeding, pursuant to CPLR 7511 for a judgment vacating an arbitration award in the matter of CSEA, Local 830 and the Nassau Health Care Corporation (Henselder, Janet) wherein Arbitrator Michael Alonge sustained a grievance filed by the respondent, Civil Service Employees Association, Inc., A.F.S.C.M.E., Local 1000, A.F.L.-C.I.O., by its Local 830 ("CSEA" or "Union") on behalf of NHCC employee, Janet Henselder.

Respondent, CSEA on behalf of Janet Henselder, opposes NHCC's petition to vacate the arbitrator's award and, alternatively, cross petitions this Court, pursuant to CPLR 7510, to confirm said arbitration award.

On February 10, 2006, nurse Janet Henselder was assigned to the surgical

intensive care unit at NHCC. On that date, NHCC's nursing department supervisor, Kevin Gleason, received a complaint from two sisters, Clara Milgin and Ronti Bines, that Nurse Henselder had been rude to them throughout the night when they attempted to stay by the bedside of their mother in critical condition from a car accident which had also killed their father the same day. At the end of her night shift, at approximately 7:00 a.m. on the following morning, the Deputy Director of Patient Care Services (Nursing), Bill Torio, met with Nurse Henselder to discuss the incident in the nursing office. No union representative was present at this meeting. In this meeting, which, according to Janet, lasted only a few minutes, Torio asked her what had occurred during the night. Janet recounted her version of the story. Torio asked her if she wanted to submit a written statement and informed her that she would be on suspension with pay while NHCC initiated an investigation. Torio took no disciplinary action at the meeting.

On or about February 10, 2006, NHCC served upon Nurse Henselder a Notice of Personnel Action (NOPA) which detailed the allegations of misconduct and further advised her that she was being placed on suspension with pay pending an investigation, effective February 10, 2006.

Kevin Gleason, the nursing supervisor, conducted an investigation into the complaints and made the decision to suspend Nurse Henselder. Gleason interviewed and obtained written statements from the two sisters. Gleason also obtained a statement from Nurse Henselder. Gleason claims that he did not consider Torio's conversation with Janet in making his decision to suspend her because Torio never told him of his meeting with Janet prior to Gleason making his decision to suspend her. Torio also did not provide any written statement to Gleason as part of Gleason's investigation into the events of February 10, 2006. On February 15, 2006,

Gleason met with Janet to give her the discipline. Union representative, Ken Nicholson, accompanied Janet to this meeting.

Subsequent to the investigation, on or about February 16, 2006, Nurse Henselder was served another NOPA imposing a penalty of suspension of 15 days.

Nurse Henselder timely filed a disciplinary review challenging her 15 day suspension. The Disciplinary Review Procedure (DRP) outlined in the collective bargaining agreement (CBA) between the parties provides for, *inter alia*, the right to arbitrate the review with the consent of the Union.

An arbitration hearing was held on October 4, 2006. At the outset of the hearing, the Union notified the arbitrator that it intended to move to dismiss the charges against Nurse Henselder because NHCC had denied her the opportunity to have Union representation at her meeting with Bill Torio. At the conclusion of the arbitration hearing, the parties submitted briefs in support of their respective positions. Specifically, NHCC argued that Torio's interview did not result in any discipline because he suspended her with pay while Gleason conducted the investigation. NHCC also argued that, as prescribed in the CBA §10-4.3, the appropriate remedy for a violation of CBA §10-4 was to preclude any evidence obtained from the allegedly inappropriate conversation with Bill Torio.

On January 26, 2007, Arbitrator Michael Alonge issued his decision wherein he sustained the Union's grievance and dismissed the charges against Janet Henselder relating to her actions on February 10, 2006. More specifically, Arbitrator Alonge determined that CBA §10-4 provides that a Union representative must attend all meeting with employees that may result in discipline. The arbitrator held that Torio's meeting with Janet on the morning of February 11, 2006, could have resulted in discipline and accordingly, NHCC was obligated to provide Union

representation on that date. Arbitrator Alonge did not reach the issue of whether Torio's meeting with Janet resulted in discipline because he stated that CBA §10-4 through §10-4.3 applied to situations that may result in discipline and that the Union did not need to prove that actual discipline occurred.

CBA §10 provides disciplinary review procedures for any member of the bargaining unit represented by the CSEA to avail themselves of if the member chooses, as in this case, to challenge any charges preferred against her. Specifically, CBA §10-4 provides:

> When an employee is being interviewed by a departmental representative under circumstances which may lead to the imposition of a disciplinary penalty against the employee other than a reprimand, the employee shall be given an opportunity to have a Union representative present during such interview (CBA §10-4).

NHCC petitions this Court to vacate Arbitrator Alonge's award. The Union opposes and moves to confirm the award.

Pursuant to CPLR 7510, an arbitration award is confirmed unless it is vacated or modified upon a ground specified in CPLR 7511 (CPLR 7510). Courts may vacate an arbitrator's award only on the grounds stated in CPLR 7511(b). The only such ground asserted in this case is that the arbitrator "exceeded his powers" (CPLR 7511[b][1][iii]). Such an excess of power occurs only where the arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v. Board of Educ. of City School District of City of N.Y.*, 1 NY3d 72, 79 [2003]; *Matter of New York State Correctional Officers &*

Police Benevolent Assn. v. State of New York, 94 NY2d 321, 326-328 [1999]).

An arbitrator is charged with the interpretation and application of the agreement (*Matter of Town of Callicoon [Civil Serv. Empls. Assn., Town of Callicoon Unit]*, 70 NY2d 907, 909 [1987]). Courts are obligated to give deference to the decision of the arbitrator (*Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 629 [1979]). This is true even if the arbitrator misapplies the substantive law in the area of the contract (*Matter of Associated Teachers of Huntington v. Board of Educ., Union Free School Dist. No. 3, Town of Huntington*, 33 NY2d 229, 235 [1973]; *see also Rochester City School Dist. v. Rochester Teachers Assn.*, 41 NY2d 578, 581[1977]). Thus, a party seeking to vacate an arbitration award has a heavy burden in establishing that the award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power (CPLR 7511[b][1][iii]; *Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 NY2d 321, 326 [1999]; *Matter of Board of Educ. of Arlington Cent. School Dist. v. Arlington Teachers Assn.*, 78 NY2d 33, 37 [1991]). An arbitrator exceeds his or her authority by granting a benefit not recognized under a governing collective bargaining agreement (*Matter of New York State Correctional Officers & Police Benevolent Assn., Inc. [State of New York]*, 13 AD3d 961, 962-963 [3rd Dept. 2004]).

NHCC argues in its petition to vacate the arbitrator's award that Arbitrator Alonge ignored an express limitation on his authority to add to, or modify the CBA between the parties by dismissing the charges against Nurse Henselder. Specifically, NHCC argues that the CBA between the parties specifically restricted the powers of the arbitrator in that it stated that:

"The arbitrator shall have no authority to add to, subtract from, modify or

change in any way the provisions of this Agreement or any expressly written amendment or supplement thereto, or to extend its duration, unless the parties have expressly agreed, in writing to give the arbitrator specific authority to do so, or to make an Award which has this effect. . .The Award of the Arbitrator so made shall be final and binding on the parties" (CBA §10-9.4).

Further, NHCC submits that according to the CBA, the only appropriate remedy for a violation of CBA §10-4 is to preclude any evidence of the allegedly inappropriate conversation. Specifically, CBA §10-4.3 provides:

Statements made by an employee after notice of an investigation related to charges which may be brought against such employee, which statements are made in the absence of an opportunity to exercise the employee's rights pursuant to this section, shall not be admissible in the Disciplinary Review Procedure.

NHCC argues that Arbitrator Alonge entirely disregarded this provision, without analysis, and ordered that the charges against Nurse Henselder be dropped. By ignoring the remedy specified in §10-4.3, NHCC claims that Arbitrator Alonge, in essence, wrote a new CBA between the parties. His decision excised and made irrelevant the language contained in CBA §10-4.3 in direct violation of the contractual limitation contained in CBA §10-9.4.

While it is certainly true that an arbitration award will be vacated when the arbitrator has ruled on issues not presented to him by the parties (*Matter of Arbitration Between Melun Industries, Inc. and Strange*, 898 F. Supp. 990 [SDNY 1990]), in this case, it is abundantly clear that the parties endowed the arbitrator

with broad powers of fashioning a remedy. NHCC and the Union broadly framed the issues for arbitration in the papers submitted on the Union's motion to dismiss the charges against Nurse Henselder. In fact, NHCC in its opposition to CSEA's motion to dismiss recited that the issue presented for arbitration was: "Is the employee liable for the charges in the [NOPA] dated February 16, 2006? If so, what shall the remedy be?" The Arbitrator granted the Union's motion to dismiss the charges and awarded her full back pay and benefits and the charges against her were dropped. A complete reading of CBA §10-9.4 states that "[t]he arbitrator shall have no authority to add to, subtract from, modify or change in any way the provisions of this Agreement or any expressly written amendment or supplement thereto, or to extend its duration, *unless the parties have expressly agreed, in writing to give the arbitrator specific authority to do so, or to make an Award which has this effect.*" By framing the issue presented for the arbitrator as "what shall be the remedy", the parties, including NHCC, consented to give the arbitrator broad authority on the issue.

Moreover, while the CBA clearly stated that the arbitrator had no authority to add, subtract from, modify or change the provisions of the CBA (CBA §10-9.4), NHCC in its petition to vacate, has not sustained its heavy burden of showing that the Arbitrator *in fact* subtracted from, modified or changed the provisions of the CBA. With the exception of the general proviso of §10-9.4, the CBA did not, in any way, restrict the powers of the arbitrator to fashion a remedy. Certainly, there is no express limitation to the *arbitrator's* authority to fashion a remedy in CBA §10-4.

NHCC's argument, that the Arbitrator's Award should be vacated because the only appropriate remedy for a violation of CBA §10-4 was to preclude the evidence of the allegedly inappropriate conversation, is unavailing. While CBA

§10-4.3 provides that "statements... made in the absence of an opportunity to exercise the employee's rights pursuant to this section, shall not be admissible in the Disciplinary Review Procedure," there is no evidence on this record that these statements were ever considered by Kevin Gleason when he made the decision to suspend her in the first place. This Court takes particular note of the fact that the statements that were to be "disregarded" were to be deemed inadmissible in the *disciplinary review procedure.* There is no implication that such statements were also to be deemed inadmissible in the *arbitrator's review* of the facts. The disciplinary procedures outlined in CBA §10 were "exclusive for all persons in the negotiating unit and shall be in lieu of any and all other statutory or regulatory disciplinary protections" (*CBA §10-1*).

The fact that Arbitrator Alonge may have entirely disregarded this provision in ordering that the charges against Nurse Henselder be dropped, does not provide a grounds for vacatur of his decision. "[I]t is not for the courts to interpret the substantive conditions of the contract or to determine the merits of the dispute" (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72 [2003] *citing Board of Educ., Lakeland Cent. School Dist. of Shrub Oak v Barni*, 51 NY2d 894, 895 [1980]). This is true "even where 'the apparent, or even the plain, meaning of the words' of the contract has been disregarded" (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y*, supra). "A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one. Indeed, *even in circumstances where an arbitrator makes errors of law or fact,* courts will not assume the role of overseers to conform the award to their sense of

justice" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York,* 94 NY2d 321, 326 [1999] [Emphasis Added]). Thus, the arbitration award can not be disturbed in this case.

Finally, in the absence of any evidence that the arbitration award was beyond bounds of rationality or was violative of a strong public policy, NHCC's petition to vacate the Arbitrator's Award is denied (*Matter of Board of Educ. Of Arlington Cent. School Dist. v. Arlington Teachers Assn.*, 78 NY2d 33, 37 [1991]) and the Union's cross petition to confirm is granted (*Local 295-295C, IUOE v. Phoenix Environmental Services Corp.*, 21 AD3d 901 [2nd Dept. 2005]; *White v. Department of Law*, 184 AD2d 229, 230 [1st Dept. 1992] ***appeal denied*** 80 NY2d 759 [1992]).

Settle Judgment on Notice.

Dated: 10/26, 2007

ENTER:

J.S.C.