

**Matter of City of New York v Social Serv.
Empls. Union, Local 371**

2008 NY Slip Op 32273(U)

August 12, 2008

Supreme Court, New York County

Docket Number: 0407301/2007

Judge: Nicholas Figueroa

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. NICHOLAS FIGGIERA

PART _____

Justice _____

Index Number : 407301/2007

CITY OF NEW YORK

vs.

SOCIAL SERVICE EMPLOYEES UNION

SEQUENCE NUMBER : # 001

VACATE ARBITRATION AWARD

INDEX NO. 407301-07

MOTION DATE 4/25/08

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2, 3, 4

5, 6

7

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

See accompanying decision, orders and attachments

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be entered hereon. To obtain entry, counsel or a licensed representative must appear in person at the Judgment Clerk's Desk (Room 1419).

Dated: August 12, 2008



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

In the Matter of the Application of
THE CITY OF NEW YORK, and THE NEW YORK
CITY HUMAN RESOURCES ADMINISTRATION,

Index No. 407301/07

Petitioners,

**DECISION,
ORDER AND
JUDGMENT**

- against -

SOCIAL SERVICE EMPLOYEES UNION, LOCAL
371, and KIMBERLY WILLIAMS,

Respondents,

For a Judgment and Order Pursuant to Article 78
of the Civil
Practice Law

Nicholas Figueroa, J.:

Petitioner seeks to vacate an arbitration award dated October 4, 2007 that converted a disciplinary procedure into a medical leave application and granted respondent Williams a medical leave of absence. Respondents cross-move to confirm the award.

Petitioners sought to terminate Williams's employment with the New York City Human Resources for sixty days for several acts of misconduct. Petitioners alleged that Williams committed fraud, engaged in intimidating behavior and improper physical contact with other employees.

Petitioners assert that Williams committed fraud by applying for and collecting unemployment benefits, while she was under suspension, by submitting false documents in support of her claim.

According to petitioners, Williams struck, “elbowed”, a colleague, tripped a pregnant fellow employee, causing her to fall on her stomach, was insubordinate to a superior, was discourteous to other employees, abused punctuality and attendance regulations, failed to follow supervisors’ instructions and otherwise acted in a manner detrimental to the City of New York.

Petitioners argue that the agreement between petitioners and the respondent union provides that disciplinary matters may be determined by arbitration. However, medical leave matters are not disciplinary and are not subject to arbitration (Civil Service Law §§ 72, 75). Petitioners terminated Williams because of her misconduct (Civil Service Law §75). Williams had never applied for medical leave under Civil Service Law §72; nor had petitioners attempted to place her on medical leave.

The collective bargaining agreement, between petitioners and respondent union defines the term grievance in Article VI Section 1e. The section states that a grievance is

“A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law...upon whom the agency head has served written charges of incompetence or misconduct while the employee is serving in the employee’s permanent title or which affects the employee’s permanent status.”

The collective bargaining agreement gives an affected employee the right to arbitrate his or her grievance.

A decision placing an employee on medical leave, or denying medical leave, is not subject to arbitration. Moreover, the decision to place an employee on medical leave is discretionary.

Despite the fact that medical leave questions are not arbitrable under the collective bargaining agreement, the arbitrator permitted respondents to offer testimony about Williams’s mental health. The arbitrator concluded that petitioners knew or should have known that Williams “Had mental

health issues warranting an evaluation for fitness of duty, pursuant to Sec. 72 of the Civil Service Law; such an evaluation should have been ordered, and based on the evidence in the record, would have resulted in her being placed on a medical leave of absence.”

“The Grievances are sustained in part and denied in part. With respect to the sixty-day suspension and first termination, they are converted to medical leaves of absence, based upon the Grievant’s history of psychiatric illness. The leave shall be deemed to have commenced on the first date arbitral determination of the asserted wrongfulness of the disciplinary action was possible, August 4, 2006.


Upon successful completion of the above-cited medical leave of absence, certified by appropriate medical authority, pursuant to Sections 72 and 73 of the Civil Service Law, an arbitrator chosen by the parties shall determine whether her termination for U.I.B. fraud was ‘wrongful’. If it is found to be ‘wrongful’, the Grievant shall be reinstated with no back pay.”

Under Civil Service Law §72, the appointing authority, the governmental employer, has the discretion to compel the employee to undergo a medical examination to determine whether the employee must go on medical leave. While an employee may seek a hearing to determine whether that exercise of discretion was proper, the employee may not arbitrate the medical leave determination. Moreover, petitioner, under Civil Service Law §72, has the power to choose the physician who will conduct the medical examination.

The arbitrator exceeded his authority by awarding relief Williams was not entitled to under the arbitration agreement or by statute. Therefore, the award must be vacated and the matter remanded for a new hearing and award solely on the disciplinary action petitioner took against her, without the question of medical leave being the subject of the hearing and award.

Accordingly, it is
ADJUDGED that the petition is granted and the award vacated, and it is further
ORDERED that the matter is remanded for proceedings consistent with this decision, order
and judgment, and it is further
ORDERED that the cross motion to confirm the award is denied.
This constitutes the decision, order, and judgment of the court.

Dated: August 12, 2008

ENTER


J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notices of entry cannot be served based hereon. To
obtain entry, counsel or a qualified representative must
appear in person at the Judgment Clerk's Desk (Room
1412).