

Matter of Port Auth. of N.Y. and N.J. v Local Union No. 3 Intl. Brotherhood of Elec. Workers
2008 NY Slip Op 32683(U)
September 10, 2008
Supreme Court, New York County
Docket Number: 401106/08
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN B. LOUIS

PART 6

Justice

Index Number : 401106/2008
PORT AUTHORITY OF NY&NJ
VS.
LOCAL UNION NO. 3,
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

INDEX NO. _____
MOTION DATE 8/6/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

~~Notice of Motion/ Order to Show Cause~~ ~~Affidavits~~ ~~Exhibits~~
~~Answering Affidavits~~ ~~Exhibits~~
Replying Affidavits _____

PAPERS NUMBERED
Petition 14
Answer 15
10

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided
in accordance with the accompanying decision
and order.

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

Dated: 9/10/08 _____ JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
In the Matter of Arbitration of Certain
Controversies between:

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY,

Petitioner,

Index No. 401106/08

For a Judgment Pursuant to CPLR Article 75,

Decision and Order

-against-

LOCAL UNION NO. 3 INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS

Respondent

JOAN B. LOBIS, J.S.C.:

UNFILED JUDGMENT
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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

Petitioner, the Port Authority of New York and New Jersey (the "Authority"), brings this petition to modify the February 28, 2008 award of the Impartial Hearing Officer in the arbitration proceeding between the Authority and respondent, Local Union No. 3, International Brotherhood of Electrical Workers (the "Union" or the "IBEW").

The arbitration proceeding at issue concerned an Authority employee, Robert Smith, who was employed as a Tunnel Systems Controller ("TSC"). Smith was convicted of driving while intoxicated ("DWT") on December 14, 2006, which resulted in a two-year suspension of his New Jersey Driver's License and Commercial Driver's License. Smith duly notified the Authority of his DWI conviction and subsequent suspension of his licenses.

In order to be qualified as a TSC, an employee must possess a valid driver's license, as set forth in the Memorandum of Agreement ("MOA") between the Authority and the IBEW. On

December 26, 2006, the Authority told Smith that he no longer met the requirements and qualifications for his position. That day, Smith was sent home and was told he would be designated as absent without official leave. Smith was suspended effective December 26.

On or about January 3, 2007, the IBEW filed a grievance, in which it argued that the Authority's suspension of Smith was without cause because, the Union contended, Smith did not require a driver's license to perform his job as a TSC. The Authority denied the grievance. In compliance with the MOA, on March 23, 2007, the Authority commenced a disciplinary proceeding against Smith. Although the Authority requested that its disciplinary proceeding be consolidated with the IBEW's grievance proceeding, the IBEW rejected this offer. The Authority was compelled to hold Smith's disciplinary proceeding in abeyance and proceed first with the IBEW grievance proceeding.

A hearing on the IBEW grievance was conducted before Arbitrator Marlene A. Gold on July 18, 2007. The sole issue was whether Smith was "suspended for just cause, and if not, what shall be the remedy?" In a decision dated October 10, 2007, Arbitrator Gold found that one of the stated job requirements of a TSC is possession of a valid driver's license; the Union's argument that in seven months on the job, Smith had never been required to drive was unavailing. She found that there was just cause for the suspension imposed on December 26, 2006. However, the Arbitrator determined that there was no just cause for the continued suspension beyond January 9, 2007. She found that the Authority failed to comply with its own procedures, in that the Authority is only allowed to impose a temporary, two-week suspension without pay, pending the preparation of

charges and the completion of any disciplinary proceeding, absent the approval of the Executive Director. Since there was no evidence that the Executive Director had authorized an extended suspension, Smith's continued suspension beyond the two week period became disciplinary in nature, and exceeded the Authority's rights. She determined that the appropriate remedy would be an award of backpay from January 10, 2007 until March 23, 2007, when disciplinary charges were served on Smith. She further noted that any remedy after March 23, 2007 would lie within the purview of the disciplinary proceeding. The Authority brought a petition to vacate Arbitrator Gold's award.¹

After the arbitration decision was issued, the Union agreed to select an impartial hearing officer to preside over Smith's disciplinary proceeding. On or about November 5, 2007, the parties selected David Kramer, Esq., as the Impartial Hearing Officer (the "Hearing Officer") and the hearing proceeded on January 10, 2008. Meanwhile, in December 2007, the Authority formally approved Smith's extended suspension, without pay, pending resolution of the disciplinary proceedings.

The issue before the Hearing Officer was whether Smith should be disciplined for losing his license, and if so, whether he should be terminated. The Hearing Officer issued his award

¹ The Authority brought a separate proceeding with respect to this arbitration. Port Authority of New York and New Jersey v. Local Union No. 3, Index No. 400068/08. The matter was assigned to the Hon. Nicholas Figueroa. In a decision and order dated August 1, 2008, which was issued before the instant motion was fully submitted to this court, Justice Figueroa granted the petition to the extent that the matter was remanded to the arbitrator for a new determination, finding that the award of back pay was improper.

on February 28, 2008. The Hearing Officer found that Smith disqualified himself from holding the job of TSC when his driver's license was suspended as a consequence of his DWI. Thus, the Hearing Officer held that Smith's employment should be terminated as of the date of his decision, February 28, 2008.

The Hearing Officer, however, did not agree with the Authority's specified charge that Smith had been "absent [from work] without authorization." Instead, the Hearing Officer determined that the Authority sent Smith home involuntarily on December 26, 2006, and that Smith should not have been suspended beyond January 10, 2007, without the approval of the Executive Director. The Hearing Officer based his conclusion on the MOA, which states in relevant part:

VII. (A) Any employee may be temporarily suspended without pay, pending the preparation of charges and the completion of disciplinary proceedings (**but not for more than two weeks without the approval of the Executive Director**); and such temporary suspension shall not be deemed to constitute disciplinary action unless the charges are thereafter sustained.

(Emphasis added). Under the MOA, a temporary suspension without pay pending the preparation of charges and the completion of disciplinary proceedings cannot continue for more than two weeks without the approval of the Executive Director. The two week period ended on January 10, 2007, since Smith was suspended without pay on December 26, 2006. The Executive Director did not approve Smith's suspension without pay until December 26, 2007, exactly one year after Smith was suspended. Therefore, the Hearing Officer held that the Authority was "responsible for failing to properly and timely extend the suspension as set forth in the MOA." As a consequence of the Authority's failure to "properly . . . suspend Smith [in] accordance with MOA," the Hearing Officer

held that the Authority “must pay Smith backpay . . . less interim earnings and less unemployment compensation from January 10, 2007 until January 10, 2008.”

The Authority moves, pursuant to C.P.L.R. § 7511, to vacate and modify the Award, citing Article VIII(B) of Exhibit K of the MOA, the Disciplinary Proceedings procedures, which states, in pertinent part, that:

[i]f the charges are sustained and if as a result one or another of the following types of disciplinary action is taken, such disciplinary action shall be effective as of the day upon which the employee was suspended: dismissal; demotion; transfer; temporary reduction of pay; compulsory leave of absence without pay.

The Authority alleges that the language of the MOA requires Smith’s effective date of termination to be December 26, 2006 (i.e., the day of his suspension) and that the Hearing Officer did not have the authority to change the date to February 28, 2008. Furthermore, the Authority alleges the Hearing Officer lacked the power to award any backpay to Smith. Accordingly, the Authority argues that the Award should be modified and vacated because it “exceed[s] [the Hearing Officer’s] power by fashioning a remedy that contradicts the express provisions of the parties[’] MOA as well as violates public policy. . . .” The IBEW argues that the Award should be deemed final, based on the MOA. The IBEW asserts that based on the provision in the MOA: “the findings and penalty imposed by the Impartial Hearing Officer shall be final and binding upon the Authority, the Reviewing Officer, the IBEW, and the employee. . . .”

An arbitrator’s award will “not be vacated based on errors of law or fact.” In re Matter of Sprinzen v. Nomberg, 46 N.Y.2d 623, 629 (1979). Even if the arbitrator purports to adhere

to the substantive law and then misapplies it, the award will not be vacated. Schine Enters., Inc. v. Real Estate Portfolio of New York, Inc., 26 N.Y.2d 799, 799 (1970). Nor will courts set aside an award where the arbitrator's interpretation of the parties' contract misconstrues or disregards its plain meaning. Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 308 (1984). In addition to the grounds set forth in C.P.L.R. § 7511(b), which provides that an award may be vacated on the grounds of corruption, fraud or misconduct; partiality; or, when the arbitrator exceeds his or her power or imperfectly executes his or her power so that a final award upon the subject matter submitted was not made, the Court of Appeals has held that an arbitration award may be vacated if it violates strong public policy or is irrational. United Fed'n of Teachers, Local 2 v. Bd. of Educ., 1 N.Y.3d 72, 79 (2003), quoting, Matter of Bd. of Educ. of Arlington Cent. Sch. Dist. v. Arlington Teachers Ass'n., 78 N.Y.2d 33, 37 (1991). Section 7511 further provides three circumstances when an award may be modified: (1) if there was a mathematical miscalculation or a mistake in the description of any person, thing or property referred to in the award; (2) if an award was made upon a matter not submitted for arbitration and the award may be corrected without affecting the merits of the decision upon the issues submitted; or, (3) if the award is imperfect in a matter of form, not affecting the merits of the controversy.

Any limitation on the remedial power of the arbitrator or the substantive issues that he may decide must be explicitly enumerated or incorporated by reference in the arbitration clause. Silverman, 61 N.Y.2d at 307-08. Additionally, a court is prohibited from inferring any limitations on the arbitrator's power from the substantive provisions of the contract because the drawing of such inferences would involve the courts in the merits of the dispute (i.e., interpretation of the contract's provisions), which would be "in violation of the legislative mandate." Id. at 307.

Here, the Authority claims that the Hearing Officer “lacked the discretion to select a termination date – other than December 26, 2006. . . .” However, the MOA did not impose any limitations on the Hearing Officer’s ability to do so. Instead, the MOA appears to give the Hearing Officer the discretion to make whatever award he deems necessary. The MOA states that “[t]he Impartial Hearing Officer shall have all of the rights, duties, and responsibilities of a Port Authority Trial Board, as described in PAI 20-1.10.” From a review of PAI 20-1.10, there is no limitation on the Port Authority Trial Board’s ability to modify a termination date. Because the MOA did not contain an express restriction upon the Hearing Officer’s authority, there is no basis to modify the award. Cf. In the Matter of City of New York v. Davis, 146 A.D.2d 480, 482 (1st Dep’t 1989) (holding that “[w]here a collective bargaining agreement contains an express restriction upon the powers of the arbitrator, the limitation will be upheld.”).

Having found that the Authority did not suspend Smith properly in accordance with the MOA, the Hearing Officer was within his power to award Smith backpay during the period of his unlawful suspension. Indeed, Article VIII(D) of the MOA provides, under the section “Temporary Suspensions Without Pay,” that “[n]othing contained in this instruction shall be deemed to prevent suspending employees with pay, whether pending the preparation of charges and the completion of disciplinary proceedings or for other administrative purposes.” Since the MOA does not prohibit an arbitrator from awarding backpay, and, indeed, allows an employee to be suspended with pay, the Hearing Officer did not exceed his authority in awarding backpay during the suspension period.

An arbitrator "may fashion the law to fit the facts." Lentine v. Fundaro, 29 N.Y.2d 382, 386 (1972). By making Smith's termination date effective the day of his award, the Hearing Officer did not create a new contract, as the Authority argues; rather, the Hearing Officer applied the facts in this case as he deemed necessary. Because Smith was not suspended pursuant to the terms of the MOA and provided with the appropriate process, the Hearing Officer's award was not irrational. Nor is there any indication on the face of the Award that it violates a strong public policy. Metrobuild Associates, Inc. v. Nahoum, 51 A.D.3d 555 (1st Dep't 2008).

Accordingly, the petition is denied and the proceeding is dismissed.. This constitutes the decision and judgment of the court.

Dated: September 10, 2008



JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
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14-60)