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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 407245/2007

CITY OF NEW YORK

VS.

DISTRICT COUNCIL 37 AFSCME,

SEQUENCE NUMBER : 001

VACATE OR MODIFY AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this ~~motion~~ Petitioner is deceased for abated

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

Dated: 11/25/08

EMILY JANE GOODMAN, 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 17
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In the Matter of the Application of

THE CITY OF NEW YORK; COMMISSIONER JAMES F. HANLEY, as Commissioner of the New York City Mayor's Office of Labor Relations; and COMMISSIONER THOMAS R. FRIEDEN, as Commissioner of the New York Department of Health and Mental Hygiene,

Petitioners,

For an Order and Judgment Pursuant to Article 75 of the CPLR,

Index No. 407245/07

-against-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO; LILLIAN ROBERTS, as the Executive Director of DISTRICT COUNCIL 37, AFSCME, AFL-CIO; DARRYL RAMSEY, as President of LOCAL 768, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondents.

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Emily Jane Goodman, J.S.C.:

This proceeding arises out of an arbitration to determine the rights of certain parties employed by respondent the City of New York (City) as Public Health Advisers (PHAs) wishing to be compensated for being compelled to perform out-of-title duties. Petitioners appeal to this court to vacate so much of an arbitration award (Award)(Petition, Ex. Q) as granted the PHAs back pay, which petitioners say violates the parties' collective

bargaining agreement (CBA).[1]

I. Background

Respondent DC 37 AFSCME, AFL-CIO (DC 37) is a party to the CBA, which was, as relevant, in effect from 2000 through 2002. The CBA sets forth the terms of the employment of the PHAs and other health service titles.

A grievance was brought by a group of PHAs working for the Bureau of Sexually Transmitted Diseases at the Department of Health and Mental Hygiene, as permitted under the CBA. The PHAs complained that they were being compelled to perform out-of-title-work, to wit, counseling persons with regard to HIV testing. The PHAs, represented by Barbara Henderson (the Henderson PHAs), claimed specifically that they had been assigned to "duties substantially different from those in their job specifications." Henderson PHAs Grievance, Petition, Ex. C. A second group of PHAs (the Pavez PHAs) commenced a separate grievance on the same grounds. *Id.*, Ex. F. The relief sought by the Henderson PHAs was " [s]alary appropriate for duties performed" (*Id.*, Ex. C), while the Pavez PHAs sought "[t]o cease and desist the work of Public Health Educator and to pay the

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[1]The parties have agreed, per stipulation dated January 23, 2008, that respondents the New York City Office of Collective Bargaining and Marlene A. Gould, as Chairman of the New York City Office of Collective Bargaining, are dismissed as parties not necessary for the proceeding, pursuant to CPLR 1001. The caption has been changed to reflect this fact.

[* 4]

difference of Senior/Sup. Public Health Advisors to Public Health Educator retroactive to the date of grievance." *Id.*, Ex. F.

The two grievances proceeded through the contractual grievance process until each was ripe for arbitration, at which time they were consolidated for that purpose.

Hearings proceeded over approximately four days between June 2003 and July 2005, and included the submission of post-hearing briefs. The Arbitrator issued an order (Order) on November 22, 2005. November 2005 Order, Petition, Ex. K.

In the November 2005 Order, the Arbitrator held that the PHAs were performing out-of-title duties in counseling HIV patients. In an attempt to ascertain a pay rate that would compensate the PHAs for the performance of these duties, the Arbitrator compared the work that the PHAs were doing with that of three other job titles, provided to her by DC 37, but found that these titles did not provide a match from which to approximate an adequate pay rate. The Arbitrator stated that:

> I find myself unable to agree with [DC 37] that any of the three other titles offered by [DC 37] ... is an appropriate title from which to derive a pay rate for the PHAs. Nor do I possess the expertise to myself identify an appropriate title even if I had the jurisdiction to do so.

Order, at 4. As a result, the Arbitrator directed the parties to negotiate an appropriate pay rate.

The parties commenced negotiations, and submitted further briefs to the Arbitrator outlining their positions as to how the

pay rate might be calculated. It is notable that, while DC 37 argued for a formula upon which to base an acceptable pay rate, as well as for a cease and desist order, petitioner Office of Labor relations (OLR) advised that the only proper award was a cease and desist order.

In an order dated July 26, 2007 (the July 2007 Order) (Petition, Ex. N) the Arbitrator rejected the suggestions of both parties as to the calculation of an appropriate pay rate, and ordered that negotiations resume. The July 2007 Order concluded thus: "[i]f the parties are still unable to reach agreement" by September 7, 2007, "each of them will submit to me its Last Best Offer [LBO] in this dispute, postmarked no later than Friday September 14, 2007. I will accept as my award the more reasonable of the two LBO's [sic]." *Id.* at 2.

DC 37 presented the Arbitrator with its Last Best Offer in a letter dated September 14, 2007. Petition, Ex. O. DC 37 proposed that each grievant be awarded $1,800 per year since the filing of the grievance, and that a cease and desist order be effectuated. DC 37 proposed that this amount was "fair and reasonable" (*id.* at 1), although it was not based on any particular job title.

OLR responded vehemently to DC 37's Last Best Order, in a letter to the Arbitrator dated September 21, 2007. Petition, Ex. P. OLR stated that it would not make a Last Best Offer, because,

by comparing Last Best Offers, the Arbitrator would impermissibly be acting as a mediator instead of an arbitrator. OLR argued that, in so doing, the arbitrator was exceeding the limitations imposed upon her by the CBA, and that the only remedy which she could fashion thereunder was a cease and desist order. Regardless, the Arbitrator, in the Award, dated September 28, 2007, accepted DC 37's Last Best Offer as reasonable, and directed the City to pay each grievant $1,800 per year since the filing of the grievance, and ordered the City to cease and desist assigning out-of-title duties to the grievants. This petition ensued.

II. Discussion

In petitioners' first cause of action, they claim that the Arbitrator exceeded her powers by fashioning an award which does not comport with the constraints of the CBA. In their second cause of action, petitioners allege that the Award violates public policy.

An arbitration award may be vacated upon a showing that "an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award ... was not made ... ." CPLR 7511 (b) (1) (iii). "An arbitration award may not be vacated unless it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power." *Matter of*

Board of Education of the Arlington Central School District v Arlington Teachers Association, 78 NY2d 33, 37 (1991).

The CBA notes that an arbitrator's decision, under the CBA, "shall be limited to the application and interpretation of the [CBA] and the arbitrator shall not add to, subtract from or modify the [CBA]." CBA, at 51. Petitioners claim that "[i]mplicit in the CBA's limiting language is that the Arbitrator cannot add a term of compensation to the agreement, which is exactly what the Arbitrator did in this case ..." by relying not on the compensation called for in an established title, but on DC 37's LBO. Reply Brief, at 4. Petitioners specifically note, with reference to *Matter of Kocsis* (*New York State Division of Parole*) (41 AD3d 1017, 1019 [3d Dept 2007]), that an arbitrator may exceed his or her powers "by granting a benefit not recognized under a governing collective bargaining agreement."

Petitioners argue that bargaining over compensation is "mandatory" under the CBA, making the award of compensation to respondents not based on a negotiated salary a "benefit not recognized" under the CBA. *See Matter of Village of Lynbrook v New York State Public Employment Relations Board*, 48 NY2d 398, 402 n 1 (1979)("[i]n public employment law ... 'Mandatory' subjects [in a collective bargaining agreement] are those over which employer and employees have an obligation to bargain in good faith to the point of impasse"). However, nothing in this

language requires that compensation may not be the subject of arbitration after the point of impasse has been reached; indeed, there is no other recourse set forth in the CBA.

Petitioners maintain that the CBA explicitly prohibits an arbitrator making an award that is not based on a negotiated salary, such as would have been the case had the arbitrator herein based the Award on a comparison between the grievants pay rate, and that of another specific employment title. According to this reasoning, it is only the lack of a comparable line that bars the respondents from receiving a pay award. To support this contention, petitioners offer two arbitration awards in which an award for out-of-title work was based on a comparison of the grievant's actual title and another negotiated title. *See* Petition, Ex. R and S.

This reasoning is irrational, and not backed by the language of the CBA, which expressly allows for arbitration of compensation issues after "the point of impasse." *Matter of Village of Lynbrook v New York State Public Employment Relations Board*, 48 NY2d at 402 n 1. In the context of collective bargaining, "[i]t is well settled that, absent a plain and express contractual limitation to the contrary, an arbitrator may grant any relief reasonably fitting and necessary to a final determination of the matter submitted to him, including equitable and legal relief [internal quotation marks and citation

omitted]." *Matter of North Colonie Central School District v North Colonie Teachers Association*, 60 AD2d 496, 498 (3d Dept 1978), *affd* 46 NY2d 965 (1979); *see also Matter of East Ramapo Central School District v East Ramapo Teachers' Association*, 116 AD2d 645, 485 (2d Dept 1986), *affd* 69 NY2d 630 (1986) (quoting *North Colonie, supra*). "Parties who agree to refer contract disputes to arbitration must recognize that '[a]rbitrators may do justice' and the award may well reflect the spirit rather than the letter of the agreement." *Matter of Local Division 1179, Amalgamated Transit Union, AFL-CIO v Green Bus Lines, Inc.*, 50 NY2d 1007, 1009 (1980), quoting *Rochester City School District v Rochester Teachers Association*, 41 NY2d 578, 582 (1977).

This court finds that the arbitrator, after the parties had reached "the point of impasse" in their negotiations, rendered a reasonable and equitable award in favor of the grievants. To deny them an award merely because the extra duties they had been compelled to perform do not fit into a precise niche would be an inequitable result, and would violate the spirit of the CBA, which calls for compensation for work performed. The two arbitration awards offered by petitioners fail to alter this determination.

For the same reason, the award does not violate public policy. "[A] court may vacate an arbitral award where strong and well-defined policy considerations embodied in constitutional,

statutory or common law prohibit a particular matter from being decided or certain relief from being granted ... ." *Matter of New York State Correctional Officers and Police Benevolent Association, Inc. v State of New York*, 94 NY2d 321, 327 (1999). The Award herein does not violate any such policy considerations. Under the decisional law cited above, the Arbitrator had the right to fashion such an equitable award. No public policy issues are presented.

Accordingly, it is

ORDERED that the petition to vacate the monetary award granted to respondents by the Arbitrator on September, 28, 2007 is denied; and it is further

ORDERED that the arbitration award is confirmed in its entirety; and it is further

ORDERED that Respondents submit a proposed judgment on notice.

This Constitutes the Decision and Order of the Court.

Dated: November 25, 2008

ENTER: