Matter of City of New York v Local 1549, Dist. Council 37, A.F.S.C.M.E., AFL-CIO
2009 NY Slip Op 30908(U)
April 17, 2009
Supreme Court, New York County
Docket Number: 402689/08
Judge: Shirley Werner Kornreich
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 4/21/2009

[* 1]

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Justice

Index Number : 402689/2008

CITY OF NEW YORK

VS.

LOCAL 1549, DISTRICT COUNSEL 37

SEQUENCE NUMBER : # 001

VACATE ARBITRATION AWARD

INDEX NO. 402689-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3,4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision/order/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 141B).

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

Dated: 4/17/09

JUSTICE SHIRLEY WERNER KORNREICH

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-- X

In the Matter of the Application of
THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT,

Petitioners,

INDEX No.: 402689/08

-against-

DECISION & ORDER

LOCAL 1549, DISTRICT COUNCIL 37, A.F.S.C.M.E., AFL-CIO,

Respondent.

For Judgment Pursuant to Article 75 of the Civil Practice Law and Rules.

-- X

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 141B).

KORNREICH, SHIRLEY WERNER, J.:

Motion Sequences 001 and 002 are hereby consolidated for disposition.

In this Article 75 proceeding, petitioners seek a judgment vacating the August 2, 2008, award of Arbitrator Richard C. Gwin in the arbitration between the parties entitled *Local 1549, District Council 37, A.F.S.C.M.E., AFL-CIO v. The City of New York, The New York City Police Department*. Petitioners the City of New York (City) and the New York Police Department (NYPD) are parties to a collective bargaining agreement with respondent entitled the Citywide Collective Bargaining Agreement (CBA), which governs the terms and conditions of employment for Police Communication Technicians (PCT's) and Supervising Police Communications Technicians (SPCT's). In his decision, Arbitrator Gwin found that petitioners violated the CBA by prohibiting PCT's and SPCT's from requesting sick leave. Petitioners now seek to: (i) vacate the award, pursuant to CPLR § 7511(b)(1)(iii), on the grounds that Arbitrator Gwin exceeded his power and that the award violates public policy; and (ii) amend the caption of the petition.

Respondent opposes.

I. Background

Respondent Local 1549, District Council 37, A.F.S.C.M.E., AFL-CIO is a labor union which represents the PCT's and SPCT's who work in the NYPD's Communication Center. PCT's are responsible for answering and directing all emergency 911 calls that come into the NYPD's 911 call intake and dispatch center (Call Center). SPCT's supervise the PCT's. The Call Center receives approximately 30,000 911 calls a day. PCT's and SPCT's are assigned to cover three eight hour tours: 11:00 p.m. to 7:00 a.m.; 7:00 a.m. to 3:00 p.m.; and 3:00 p.m. to 11:00 p.m. The NYPD has determined that the Call Center is adequately staffed if between 80 and 90 percent of assigned technicians are available to cover each tour.

In 2005, PCT and SPCT absenteeism caused the NYPD difficulty in staffing the Call Center. In particular, many PCT's and SPCT's routinely called in sick during holidays and "emergency" situations. If an NYPD Platoon Commander observed low attendance at the Call Center, he would first attempt to recruit volunteers to provide adequate coverage. In the event volunteers could not be found, the NYPD and respondent had an "Emergency Overtime Contingency Plan" in place which authorized certain employees to be held over from their previous shifts. These employees would then be paid overtime for their additional shifts.

On days when the contingency plan failed to solve these attendance issues, the Platoon Commander would inform a Duty Captain. The Duty Captain would then suspend sick leave approval for all PCT's and SPCT's who called in sick on the day they were scheduled to work. Instead, the NYPD required all employees requesting sick leave to show up for work as scheduled. Any employee who did not show up for work would be marked absent without leave or "AWOL." This action would be taken regardless of the employee's sick leave balance or history of abuse.

[* 4]

Some PCT's who could provide adequate medical documentation supporting their sick leave claim were reimbursed for any wages that were docked and had their AWOL status rescinded. However, several hundred sick leave reports were never adjudicated resulting in lost wages to the affected employees.

Article V of the CBA covers employee sick leave. In pertinent part, Section 5 provides:

> (a)(i) Except as provided in Section 5(a)(ii), sick leave shall be used only for personal illness of the employee. Approval of sick leave in accordance with the Leave Regulations is discretionary with the agency and proof of disability must be provided by the employee, satisfactory to the agency within five (5) working days of the employees return to work. However, the employer may request proof of disability when an employee has been on sick leave for five or more consecutive working days. Such proof satisfactory to the agency must be submitted within five working days of such request.
>
> (a)(ii)(3) Approval of such leave is discretionary with the agency and proof of disability must be provided by the employee satisfactory to the agency within five (5) working days of the employees return to work.
>
> (b) The provisions of Section 5(a) above notwithstanding, the agency may waive the requirement for proof of disability unless:
> (i) An employee requests sick leave for more than three (3) consecutive work days; or
> (ii) An employee uses undocumented sick leave more than five (5) times in a "sick leave period."...or
> (iii) An employee uses undocumented sick leave more than four (4) times in a "sick leave period" on a day immediately preceding or following a holiday or a scheduled day off...
>
> (f) It is not the intent of Section[] 5(b)...for an agency to regularly require proof of disability under normal circumstances.

Two regulations issued by the NYPD also are relevant. NYPD Administrative Guide Procedure No. 319-14 (Procedure 319), entitled "Civilian Member Reporting Sick"provides, *inter alia*, that:

> Approval of sick leave is discretionary. If abuse of sick leave provisions are indicated, the commanding officer concerned may request the sick/injured member to submit proof of such illness/injury. The commanding officer may then approve/disapprove the leave based on documentation provided.

In addition, the Department of Citywide Administrative Services Personnel Bulletin 410-2

(Bulletin 410), entitled "Use of Sick Leave During Emergency Situations" states:

> In the case of an emergency situation, such as a major transportation disruption, emergency, or some other similar event, all employees who are assigned to activity related to the emergency, who are absent due to illness, should be required to provide satisfactory medical documentation prior to being granted sick leave. Lack of medical documentation will result in a loss of pay.

On or about May 5, 2006, respondent filed a request for arbitration on behalf of the PCT's and SPCT's, claiming that the NYPD's suspension of sick leave approval was in violation of the CBA and its related regulations. Hearings were held before Arbitrator Gwin on January 16, 2007, March 7, 2007, February 13, 2008, and March 6, 2008. The issue before the arbitrator was whether the NYPD violated the CBA and its rules and regulations by canceling the PCT's and SPCT's use of sick leave.

In a decision dated August 2, 2008, Arbitrator Gwin held that the NYPD's cancellation of sick leave violated the CBA and its pertinent regulations. In his decision, Arbitrator Gwin noted the "serious" and "chronic" absenteeism at the Call Center. However, despite the abuse of sick leave taking place, Arbitrator Gwin held that the CBA did not give NYPD authority to arbitrarily cancel sick leave. In pertinent part, he stated:

> The meaning of Article 5 Section 5 as it relates to an agency's exercise of discretion in approving sick leave requests is clear. The Agency retains the discretion to satisfy itself that the illness is genuine by requiring and evaluating proof of the disability...
>
> The City argues that the plain meaning of Article V Section 5 authorized the NYPD to disapprove sick leave to satisfy staffing needs...
>
> In both Section 5(a)(i) and 5(a)(ii)(3) the "discretion to approve" appears in the same sentence with "proof of disability," which in my view contextualizes the City's use of discretion. To accept the City's argument would transform the meaning of Article V Section 5 from permitting an agency the discretion to satisfy itself that an employee's sick leave request is supported by adequate proof of disability, to forbidding an employee from making any sick leave request at all. I find no support in the [CBA] or related rules and regulations for such an interpretation...

> The [CBA] and related regulations and rules all grant the NYPD the discretion to approve sick leave requests based on its satisfaction with the proof of disability submitted by its employees. There is no provision in the contract, rule or regulation, however, that authorizes an agency to deny sick or injured employees the right to request sick leave. On the occasions that the City suspended sick leave, it was not exercising discretion to approve or disapprove the leave. It was instead denying its employees the right to request it.

II. Conclusions of Law

In reviewing an arbitration award, the court is bound by the arbitrator's findings of fact, interpretation of the agreement and judgment regarding remedies. *United Fed'n of Teachers, Local 2 v. Bd. of Educ.*, 1 N.Y.3d 72, 83 (2003); *New York State Correctional Officers and Police Benevolent Ass'n v. State*, 94 N.Y.2d 321, 326 (1999). The court may neither examine the merits of the award nor substitute its own judgment for that of the arbitrator due to a belief that its own interpretation would be more appropriate. *Correctional Officers*, 94 N.Y.2d at 326. In fact, the court is obligated to give deference to the arbitrator's decision. *New York City Transit Auth. v. Transport Workers' Union of Am., Local 100*, 6 N.Y.3d 332, 336 (2005). Even in cases where the arbitrator has made errors of law or fact, the court cannot assume the role of overseer to harmonize the award to its sense of justice. *Correctional Officers*, 94 N.Y.2d at 326; *Transit Auth.*, 6 N.Y.3d at 336.

An arbitration award may be vacated only upon three narrow grounds: (1) it violates a strong public policy; (2)it is irrational; or (3)it clearly exceeds a specific enumerated limitation on the arbitrators power. *United Fed'n of Teachers,* 1 N.Y.3d at 79; *Transit Auth.*, 6 N.Y.3d at 336; *Correctional Officers*, 94 N.Y.2d at 326.

Petitioners first argue that the arbitrator exceeded the powers given him in the CBA. They contend that the award effectively eliminated the NYPD's discretionary authority to approve or disapprove of sick leave. In essence, they claim that the effect of the award modifies not only the

CBA, but Procedure 319 and Bulletin 410 as well. Consequently, petitioners contend the award exceeds the powers granted the arbitrator under Article VI, Section 2 of the CBA which states "[t]he arbitrator's decision, order or award (if any) shall be limited to the application and interpretation of the Agreement, and the arbitrator shall not add to, subtract from or modify the Agreement."

It is true that an arbitrator will be deemed to have exceeded his powers where he irrationally construes an agreement to the point that his construction effectively creates a new agreement between the parties. *Eighty Eight Bleecker Co., LLC v. 88 Bleecker Street Owners, Inc.*, 51 A.D.3d 507, 507-08 (1st Dept 2008); *Matter of Riverbay Corp.*, 91 A.D.2d 509, 510 (1st Dept 1982). However, this did not happen here. Arbitrator Gwin never removed from the NYPD its discretionary authority to disapprove sick leave. He merely stated that if it wished to do so, it had to follow the agreed upon rules and regulations. He correctly noted that neither the CBA nor Procedure 319 authorize the NYPD to deny its employees the right to request sick leave. In emergency situations, pursuant to Bulletin 410, the NYPD may request that the employee provide documentation to buttress his sick claim *prior to* being granted sick leave (emphasis added). However, the NYPD may not arbitrarily cancel or deny an employee's right to *request* sick leave (emphasis added). The effect of this award was to hold the NYPD accountable to the rules and regulations to which it agreed. The mere fact that the agreement could have been construed differently and an alternate outcome reached does not mean that the arbitrator acted in such a fashion as to empower the court to set aside the award. *Eighty Eight Bleecker*, 51 A.D.3d at 508. Therefore, it cannot be said that Arbitrator Gwin exceeded his power.

Petitioners next argue that the award violates public policy. The scope of the public policy exception to vacate an arbitration award is extremely narrow. *United Fed'n of Teachers,* 1 N.Y.3d

at 80 citing *New York City Transit Auth. v. Transp. Workers Union of Am., Local 100, AFL-CIO*, 99 N.Y.2d 1, 6-7 (2002) ("Judicial intervention on public policy grounds constitutes a narrow exception to the otherwise broad power of parties to agree to arbitrate all of the disputes arising out of their judicial relationships, and the correlative, expansive power of arbitrators to fashion fair determinations of the parties' rights and remedies"). This restraint is of particular importance in regard to a public employment collective bargaining agreement. *Id.*

A two-part test exists to determine if an arbitration award violates public policy. *Id.* First, where the court concludes, without extended fact-finding or legal analysis, that the law absolutely prohibits the matter from being decided by arbitration, the arbitrator may not act. *Id.* Second, an arbitrator is prohibited from issuing an award where such issuance violates "well-defined" New York State constitutional, statutory or common law. *Id.*

Petitioners contend that the award effectively removed from the NYPD its power to determine its own staffing needs, make determinations regarding sick leave abuse and invoke discipline where necessary. This argument misconstrues the breadth of the award. Arbitrator Gwin stated that the NYPD has discretionary authority to discipline any employee deemed to have abused sick leave but that authority must be exercised pursuant to the CBA and relevant regulations. Thus, discipline may be instituted on an *ad hoc* basis after the employee has had an opportunity to submit proof of illness. Absent a Bulletin 410 emergency, the NYPD cannot institute a policy which unconditionally prohibits its employees from requesting sick leave. This ruling is consistent with the terms outlined in the CBA, Procedure 319 and Bulletin 410.

Finally, petitioners argue that the award violated County Law §300 and 21 NYCRR § 5202.2. They contend Arbitrator Gwin substituted his own judgment for that of petitioners regarding effective management of governmental operations. The essence of this contention is that

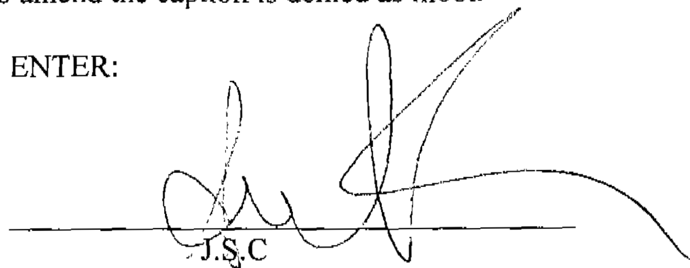
each statute gives petitioners a legal duty to provide a functional 911 Call Center so that the public can obtain vital emergency services. There is no question that petitioners have this duty. Arbitrator Gwin did not usurp it. He merely required the NYPD to exercise its legal obligation in accordance with the CBA and agreed to rules and regulations. These regulations do not prevent discipline, but rather require that certain procedures be followed. The arbitration decision did not violate County Law §300 and 21 NYCRR §5202.2 by interpreting the negotiated CBA and relevant regulations as written.

The court is cognizant of the abuse that took place here by the PCT workers and, frankly, recognizes the cost and the danger to the public caused by this abusive conduct. The court further agrees that the PCT workers are deserving of sanctions. However, unless and until the CBA is renegotiated, such sanctions must be imposed pursuant to the present contract. Accordingly, it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that petitioners' motion to amend the caption is denied as moot.

ENTER:



J.S.C

Date: April 17, 2009
New York, New York

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 141B).