[* 1]

SHORT FORM ORDER

INDEX NO. 40364/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

In the Matter of the Application of the BOARD OF EDUCATION OF THE SACHEM CENTRAL SCHOOL DISTRICT,

Petitioner,

For an Order and Judgment pursuant to Article 75 of the CPLR staying arbitration of a certain controversy,

-against-

UNITED PUBLIC SERVICE EMPLOYEES UNION and HAROLD MARRERO,

Respondents.

ORIG. RETURN DATE: DECEMBER 16, 2008
FINAL SUBMISSION DATE: JANUARY 29, 2009
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: DECEMBER 16, 2008
FINAL SUBMISSION DATE: JANUARY 29, 2009
MTN. SEQ. #: 002
CROSS-MOTION: XMG

PLTF'S/PET'S ATTORNEYS:
INGERMAN SMITH, L.L.P.
150 MOTOR PARKWAY - SUITE 400
HAUPPAUGE, NEW YORK 11788
631-261-8834

DEFT'S/RESP ATTORNEYS:
RICHARD M. GREENSPAN, P.C.
220 HEATHERDELL ROAD
ARDSLEY, NEW YORK 10502
914-478-2913

Upon the following papers numbered 1 to 13 read on this petition TO STAY ARBITRATION AND CROSS-PETITION TO COMPEL ARBITRATION. Order to Show Cause and supporting papers 1-3; Memorandum of Law 4; Notice of Cross-Petition and supporting papers 5-7; Verified Reply and supporting papers 8, 9; Reply Memorandum of Law 10; Verified Reply in Support of Cross-Petition and supporting papers 11-13; it is,

ORDERED that this verified petition for an Order and judgment staying the arbitration of a certain dispute between the petitioner BOARD OF EDUCATION OF THE SACHEM CENTRAL SCHOOL DISTRICT ("petitioner" or "Board") and the respondents UNITED PUBLIC SERVICE EMPLOYEES UNION ("Union") and HAROLD MARRERO ("Marrero"), upon the ground that, pursuant to the collective bargaining agreement, this dispute is not subject to arbitration, is hereby **DENIED** for the reasons set forth hereinafter; and it is further

ORDERED that this verified cross-petition for an Order and judgment, pursuant to CPLR 7503 (a), denying and dismissing petitioner's application to stay arbitration, and ordering petitioner to proceed to the arbitration commenced by respondents, is hereby **GRANTED** for the reasons set forth hereinafter.

By Order dated November 13, 2008 (Blydenburgh, J.), the Court granted petitioner a temporary restraining Order to the extent that "pending the hearing and determination of this proceeding, the Respondent and its representatives, officers, agents, members, employees, and all persons known or unknown acting in their behalf or in concert with them are hereby enjoined and restrained from taking any action in furtherance of a certain dispute embodied in the Demand for Arbitration dated October 23, 2008 and received on October 27, 2008, filed against Petitioner by Respondents, UNITED PUBLIC SERVICE EMPLOYEES UNION and HAROLD MARRERO, on October 27, 2008, and from proceeding to process the referenced Arbitration Demand before a contractually designated arbitrator, and from participating in the selection of an arbitrator or participating in an arbitration proceeding."

Petitioner informs the Court that the Union is a duly-recognized employee organization pursuant to Article 14 of the Civil Service Law, and has been engaged to act as the servicing representative for the Sachem School District Employees Union ("SSDEU"). The Union represents, for purposes of collective bargaining and negotiation, the unit composed of the positions of Custodial Worker, Groundsmen, Automobile Mechanic, Athletic Groundskeeper, and Cook, among others. A collective bargaining agreement was entered into by petitioner and SSDEU, and covered the period from July 1, 2004 through June 30, 2007 ("CBA"); however, petitioner indicates that this CBA currently remains in effect while a new agreement is being negotiated. Marrero was a member of the Union, holding the position of Custodial Worker I.

Petitioner alleges that pursuant to Section 75 of the Civil Service Law, only certain covered employees, as defined therein, have the right to a full due process hearing prior to the imposition of discipline, including termination, by a public employer. In addition, petitioner alleges that pursuant to Section 76 (4) of the Civil Service Law, public employers and employee organizations may, as in the instant matter, negotiate an alternative discipline and discharge procedure to that set forth in Section 75, and in such a case, the Section 75 procedure no longer applies to the covered employees. Petitioner indicates that the CBA provides a three-step grievance procedure which culminates in binding arbitration

(CBA, Article XXVI [B]). Petitioner alleges that pursuant to Section A of Article XXVI, "grievance" is defined as "a claimed violation of a provision of [the CBA]." As such, petitioner argues that the three-step grievance procedure is only applicable to resolve a claimed violation of the CBA. Further, the CBA contains provisions relative to discipline and discharge, as the parties negotiated an alternative procedure pursuant to Section 76 (4) of the Civil Service Law, which also culminates in binding arbitration (CBA, Article XI [A]).

Petitioner informs the Court that Marrero is a former employee of the School District, having been hired in August of 2004 as a Custodial Worker I. Petitioner alleges that the position of Custodial Worker I is classified in the Labor Class, not the Competitive Class, under the Civil Service Law and the Suffolk County Civil Service Department classifications. Accordingly, petitioner claims that Marrero had no rights under Section 75, and thus Marrero was not a covered employee under Article XI of the CBA and had no right to arbitration thereunder.

Based upon alleged misconduct by Marrero on or about September 17, 2008, as well as a poor evaluation prior thereto, the Board terminated his employment as of October 22, 2008. After the alleged misconduct, Marrero was given an opportunity to be heard, but the Board ultimately determined the Marrero engaged in misconduct and was incompetent in his position as Custodial Worker. On or about October 23, 2008, Marrero received a letter informing him of his termination. Thereafter, petitioner received a Demand for Arbitration from the Union, dated October 23, 2008, seeking arbitration relative to the termination of Marrero, pursuant to Article XI of the CBA and utilizing the provisions set forth in Article XXVI of the CBA.

In opposition, respondents have filed a cross-petition seeking denial and dismissal of petitioner's application to stay arbitration, and ordering petitioner to proceed to the arbitration commenced by respondents. Respondents argue that as Marrero was a member of the bargaining unit represented by the Union and a Custodial Worker no longer within his probationary period, he was covered by the terms of the CBA. As the parties agreed to negotiate an alternative discipline and discharge procedure to that set forth in Section 75, respondents contend that Marrero had no other legal procedures available to him apart from the contractual arbitration procedure. Respondents allege that as the sole issue sought to be arbitrated is respondents' claim that Marrero's discharge violated the CBA, it is within the "broad scope" of the contractual arbitration clause, and a reasonable relationship exists between the discharge and the "general subject matter of the CBA." Moreover, respondents inform the Court that the issue of

which employees are covered by the CBA's arbitration provisions was arbitrated and decided in a similar matter, wherein the arbitrator found that Article XI (A) of the CBA entitled every bargaining unit employee the right to contest a discharge under the CBA's arbitration provisions irrespective of Section 75's application to the employee (Decision and Award, March 26, 2008 [Howard C. Edelman, Esq., Arbitrator]).

In support thereof, respondents have submitted, among other things, an affidavit of Kevin E. Boyle, Jr., the president of the Union since 1992. Mr. Boyle avers that as the result of an election held among petitioner's employees who had been in the SSDEU represented bargaining unit, the Union was selected as bargaining representative for the bargaining unit, which unit included the position of Custodial Worker. Mr. Boyle indicates that as president of the Union, he received copy of the Edelman Decision and Award of March 26, 2008, wherein the arbitrator specifically rejected the argument now being raised by petitioner in the instant petition, to wit: that employees who are not entitled to the protections of Section 75 are not entitled to the arbitration provisions of the CBA relative to discipline and discharge. Therefore, respondents argue that petitioner should be equitably estopped from asserting that the arbitration sought herein is improper.

As stated by the Court of Appeals in *City of Johnstown v Johnstown Police Benevolent Ass'n*, 99 NY2d 273 (2002):

> A grievance may be submitted to arbitration only where the parties agree to arbitrate that kind of dispute, and where it is lawful for them to do so. In determining whether a grievance is arbitrable, courts follow the two-part test by first asking whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance. This is the "may-they-arbitrate" prong. If there is no prohibition against arbitrating, courts then examine the collective bargaining agreement to determine if the parties have agreed to arbitrate the dispute at issue. This is the "did-they-agree-to-arbitrate" prong

(*City of Johnstown v Johnstown Police Benevolent Ass'n*, 99 NY2d 273, 278).

The Taylor Law empowers and, in fact, requires a public employer to bargain with employee organizations and to enter written agreements governing

the terms and conditions of employment (*see* Civil Service Law § 204 [1], [2]; *see also Prof'l, Clerical, Tech. Emples. Ass'n v Buffalo Bd. of Educ.*, 90 NY2d 364 [1997]). An employer has wide latitude to negotiate such terms and can agree to submit disputes to arbitration subject, however, to "the absence of 'plain and clear' prohibitions in statute or controlling decision[al] law, or restrictive public policy" (*Matter of Board of Educ. of Yonkers City School Dist. v Yonkers Fedn. of Teachers*, 40 NY2d 268 [1976] [citations omitted]; *see Matter of County of Chautauqua v Civil Serv. Emples. Ass'n, Local 1000*, 8 NY3d 513 [2007]). Moreover, "[i]t is well settled that a contract provision in a collective bargaining agreement [CBA] may modify, supplement, or replace the more traditional forms of protection afforded public employees, for example, those in sections 75 and 76 of the Civil Service Law" (*Dye v New York City Tr. Auth.*, 88 AD2d 899 [1982], *affd* 57 NY2d 917 [1982]; *see* Civil Service Law § 76 [4]; *Matter of Grippo v Martin*, 257 AD2d 952 [1999]).

As discussed, petitioner argues that as Marrero was not an employee covered by Section 75 of the Civil Service Law, he was therefore not an employee entitled to the benefits of Article XI of the CBA. However, the Court notes that petitioner has not cited any authority directly on this issue. Petitioner does not dispute that Marrero's discharge is the proper subject matter for arbitration, and has not argued that there are any statutes, case law or public policy that prohibit this matter from being arbitrated (*Matter of Board of Educ. of Yonkers City School Dist. v Yonkers Fedn. of Teachers*, 40 NY2d 268, *supra*). As such, the Court must focus its analysis on the second prong of the aforementioned two-prong test, by examining the CBA to determine whether the parties agreed to arbitrate the dispute at issue.

Initially, the Court notes that Article I of the CBA, entitled "recognition and union status," provides that the School District recognizes the Union as the exclusive bargaining agent for all permanent full and part-time employees in certain job classifications, including Custodial Worker (CBA, Article I). Article I goes on to state that "[e]xcluded from the unit are all other employees of the DISTRICT not employed in any of the categories expressly set forth above" (CBA, Article I). The CBA does not otherwise define or limit the definition of the members of the bargaining unit. As such, the Court finds that Marrero, as a Custodial Worker I, was a member of the bargaining unit represented by the Union and subject to the provisions of the CBA.

Next, subdivision (A) of Article XI, entitled "discipline and discharge," provides in its entirety, "[i]n lieu of any procedure at law available to members of

the bargaining unit, and pursuant to Section 76(4) of the Civil Service Law, the parties have negotiated the following procedure, *which shall be the sole and exclusive procedure pursuant to which members of the bargaining unit shall be discharged and disciplined*" (CBA, Article XI [A] [emphasis supplied]). A review of the foregoing section reveals that it twice indicates that the section applies to "members of the bargaining unit," without limitation or mention of "covered employees," and indicates that it is the "sole and exclusive procedure pursuant to which members of the bargaining unit shall be discharged and disciplined." Thus, notwithstanding the applicability of Section 75 of the Civil Service Law to only certain employees, the Court interprets Article XI of the CBA, as drafted, to be applicable to *all* members of the bargaining unit. The Court notes that other collective bargaining agreements have included provisions that specifically indicate that the disciplinary procedure found in the CBA would "apply in lieu of Sections 75 and 76 of the Civil Service Law *for the employees who would otherwise be covered by those sections*" (*see Morris v Lindau*, 196 F 3d 102, 115 [2d Cir 1999] [emphasis supplied]), or have enlarged the scope of covered employees under Section 75 to include provisional and probationary competitive class employees (*see Cruz v N.Y. City Hous. Auth.*, 2004 US Dist LEXIS 17793 [SDNY Sept. 1, 2004]).

Even assuming, *arguendo*, that petitioner's position is correct, the CBA further provides that "discipline or discharge of unit members shall be based upon the standard of *just cause*" (CBA, Article XI [A] [5] [emphasis supplied]). This clause gives rise to Marrero's property interest in his continued employment, and thus the protections of due process. Property interests are not created by the Constitution; rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits" (*Bd. of Regents v Roth*, 408 US 564, 577 [1972]). In order to have had a property interest in the Custodial Worker position, Marrero must have had "a legitimate claim of entitlement to it" (*Id.*; *Economico v Pelham*, 50 NY2d 120 [1980]; *Matter of Voorhis v Warwick Val. Cent. School Dist.*, 92 AD2d 571 [1983]). A public employee has a property interest in continued employment if the employee is guaranteed continued employment absent "just cause" for discharge (*Ciambriello v County of Nassau*, 292 F 3d 307 [2d Cir 2002]; *Moffitt v Town of Brookfield*, 950 F 2d 880 [2d Cir 1991]). Moreover, it has been repeatedly recognized that a collective bargaining agreement may give rise to a property interest in continued employment (*see Horvath v Westport Library Ass'n*, 362 F 3d 147 [2d Cir 2004]; *Moffitt v Town of Brookfield*, 950 F 2d 880 [2d Cir 1991]; *Dobosz v Walsh*, 892 F 2d 1135 [2d Cir

1989]; *cf. Goetz v Windsor Cent. School Dist.*, 698 F 2d 606 [2d Cir 1983] [finding that the requirement in a collective bargaining agreement to notify an employee of the reasons for discharge did not create a property interest in continued employment]). Therefore, the Court finds that the CBA vested Marrero with a property interest in his continued employment, which would entitle him to the benefit of due process such as notice and a hearing.

Accordingly, in view of the foregoing, this verified petition for an Order and judgment staying the arbitration sought by respondents is **DENIED**, and this verified cross-petition for an Order and judgment denying and dismissing petitioner's application to stay arbitration, and ordering petitioner to proceed to the arbitration commenced by respondents, is **GRANTED**.

The foregoing constitutes the decision and Order of the Court.

Dated: December 30, 2009

HON. JOSEPH FARNETI
Acting Justice Supreme Court