

Matter of Gunderson v MTA N.Y. City Tr.

2010 NY Slip Op 31174(U)

May 7, 2010

Supreme Court, New York County

Docket Number: 403102/09

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Gundersen

INDEX NO.

403 102/09

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

- v -

MTA NYC-TRANSIT

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

*Motion & petition denied as per
annexed decision + 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 141B).

Dated: 5/07/10

HON. JUDITH J. GISCHE

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
COUNTY OF NEW YORK: PART 10

-----X
In the matter of the Arbitration between

ARLENE GUNDERSON

Petitioner,

-against-

MTA NEW YORK CITY TRANSIT

Respondent.

DECISION/ORDER

Index No.: 403102/09

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C.

-----X

Recitation, as required by CPLR § 2201(a) of the papers considered in the review of this (these) motion(s):

Papers

Notice of Pet and Pet w/AG affid, exhs

X-motion confirm award w/BK affirm, AEA affirm, exhs

FILED JUDGMENT
and notice of entry cannot be served by the County Clerk
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
Numbered
1
2

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

Petitioner Arlene Gunderson, ("Ms. Gunderson") *pro se*, moves for an order vacating an arbitration award, which was entered against her at the conclusion of a multi-step grievance-to-arbitration procedure agreed to by the parties. Petitioner also requests that the court reinstate her employment with the MTA New York City Transit ("MTA"), or at least have the termination changed to early retirement or resignation. The MTA opposes the motion and cross moves to dismiss the petition and confirm the award.

Petitioner, a former employee of the MTA was dismissed following hearings on August 6, 2009 and August 25, 2009 before an arbitrator at which Petitioner was

represented by counsel and the Transport Workers Union of America, Local 100 ("Local 100"). Local 100 is the labor organization that represents Transit Authority employees, including Station Agents, for collective bargaining purposes, as well as for the processing and settlement of disciplinary disputes arising out of a collective bargaining agreement ("CBA") between the MTA and Local 100.

The CBA sets forth benefits to which Local 100 represented Transit Authority employees may be entitled during the term of the CBA; it also specifically provides for an exclusive method in which all disputes, including disciplinary grievances must be resolved. The CBA defines a disciplinary grievance as a "complaint on the part of any covered employee that there has been a violation of the employee's contractual rights with respect to a disciplinary action of a warning, reprimand, fine, suspension, demotion and/or dismissal...." The arbitration and award in this case is the product of the disciplinary multi-step grievance-to-arbitration procedure set out by the parties – the Transit Authority and Local 100 – in the CBA (Article II, Section 2.1[C]), as amended by their 2002 Memorandum of Understanding ("2002 MOU").

Disciplinary Charges

The MTA initiated disciplinary charges against Ms. Gunderson, seeking her dismissal after a finding that she improperly sold Single Ride Tickets and a two dollar Metrocard from her booth. Based on the forgoing Petitioner was charged with improper performance, false records, theft of revenue and gross misconduct.

The Arbitration Hearing

The Arbitrator was Stephen F. O'Bierne ("O'Bierne"). Counsels for both the MTA and Ms. Gunderson were afforded a full and fair opportunity to present testimony, examine and cross-examine witnesses, and to proffer documents supporting their respective cases. At the conclusion of the hearing on August 25, 2009, the parties and the Arbitrator agreed

that closing briefs could be submitted. September 4, 2009 was set for the submission of Ms. Gunderson's and the MTA attorney's briefs.

On September 10, 2009, Arbitrator O'Bierne faxed a copy of a preliminary award to the parties that was dated August 28, 2009, and which stated that "the Union's Grievance is denied. The Employer does have cause to discharge Grievant Arlene Gunderson." O'Bierne further stated that he would "issue a full Opinion and Award within the time prescribed by the Collective Bargaining agreement."

The full Opinion and Award were in fact issued on September 18, 2009; wherein O'Bierne denied Local 100's grievance on behalf of Ms. Gunderson and held that the:

"MTA has shown that Grievant [Ms. Gunderson] violated a number of policies and procedures put in place, at least in part, to protect against theft and fraud. She improperly sold Single Ride Tickets and a two dollar Metrocard from her booth. She filed inaccurate and/or incomplete reports. Moreover, she was not truthful in her interview with the Investigators or in her testimony at arbitration. She has a substantial record of prior disciplinary infractions. That she has no previous conduct of this nature is immaterial. Under the circumstances of this case, I am constrained by the CBA and by generally accepted standards of progressive discipline to sustain the charges and the proposed penalty of dismissal from service."

In response to the September 18, 2009 Opinion and Award, Petitioner's attorney sent a letter to Arbitrator O'Bierne, on September 21, 2009, requesting that O'Bierne either reconsider his decision or, in the alternative, that O'Bierne recuse himself and grant Ms. Gunderson a new hearing. The basis for the request was that the preliminary award faxed to the parties was dated August 28, 2009, even though the parties had until September 4, 2009 to submit closing arguments.

In response to the request, O'Bierne, in a letter dated September 25, 2009, explained that it was his practice to prepare draft outlines of the Award, the Opinion and Award, the cover letter, and invoice. Then, after reviewing the parties briefs, he filled in

the remaining portion of the Award and faxed it to the parties. In this case he followed this practice but neglected to change the date on the preliminary draft. O'Bierne also pointed out that in his final Award and Opinion (dated September 18, 2009) he addressed arguments raised by both Ms. Gunderson's attorney and the MTA's attorney in their closing submissions.

Ms. Gunderson now claims that an early decision dated prior to the submission of the closing briefs demonstrates a clear bias on O'Bierne's part and that O'Bierne prejudged the case. It is on this basis that Ms. Gunderson seeks vacatur at this time.

Discussion

CPLR § 7511 [b] sets forth the narrow grounds upon which an arbitrator's award may be vacated. An award may be vacated by the court only if the petitioner can prove: it was procured by corruption, fraud, or misconduct, the arbitrator was not impartial, the arbitrator exceeded his or her power, or executed it so imperfectly that the award is indefinite or not final. It may also be vacated if there was a complete failure to adhere to required arbitration procedures.

Although in certain extraordinary circumstances, an award may be vacated if the petitioner can prove it is "utterly arbitrary or violative of public policy," this is a difficult burden to meet, and an award will not be vacated by the court merely because the arbitrator may have committed an error of law or fact. Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 NY3d 471 (2006). The court should not assume the role of overseer to mold an award to conform to its sense of justice. In the matter of Sprinzen v. Nomborg, 46 NY2d 623, 629. Therefore, judicial review of an arbitration award is extremely limited and it must be upheld when the arbitrator has offered "even a barely colorable justification for the outcome reached." Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 NY3d at 479.

"An application seeking vacatur of an arbitration finding for bias may be granted only 'if the court finds the rights of that party were prejudiced by . . . partiality of an arbitrator appointed as a neutral.'" Rose v. J.J. Lowrey, 181 A.D.2d 418, 418-419 (1st Dep't 1992) (quoting CPLR 7511[b][1][ii]). Indeed, the party seeking vacatur "must meet a heavy burden" and the mere inference of partiality is not sufficient to warrant interference with an arbitration award. Id. at 419 (internal citations omitted). See also Povenzano v. Motor Vehicle Accident Indemnification Corporation, 28 A.D.2d 528, 528 (1st Dep't 1967) ("The mere suggestion of partiality is not sufficient to warrant interference with the arbitrators award"). Nor may the court "examine the merits of an arbitration award and substitute its judgement for that of the arbitrator simply because it believes its interpretation would be the better one." (Matter of New York State Correctional Officers & Polices Benevolent Assn. v State of New York, 94 NY2d 321, 326 [1999])

The August 28, 2009 date on the preliminary award was merely a clerical error that did not affect the merits of the case, and was an error that O'Bierne subsequently corrected. Thus, Ms. Gunderson has not met the heavy burden in connection with her petition to vacate the award issued in favor of the MTA. Although Petitioner makes a claim that the award is tainted because the arbitrator had prejudged the case and was not neutral, the record makes it clear that the misdated award was a clerical error and nothing more. It does not satisfy her heavy burden.

In addition, the parties had a collective bargaining agreement in place which laid out a roadmap to addressing and settling a dispute. Following this roadmap, Ms. Gunderson was afforded full access to a multi-step grievance-to-arbitration procedure in which she failed to prevail. It is not in the court's purview to modify the arbitration award, neither with respect to the Arbitrators decision or the method of termination as determined by the MTA. Therefore, Ms. Gunderson's application under Article 75 is denied and the cross-motion

is granted.

Conclusion

In accordance with the foregoing, *It is hereby*

ORDERED AND ADJUDGED that the petition of Ms. Arlene Gunderson, vacating the award by Arbitrator Stephen F. O'Bierne in the matter of the arbitration between Transport Workers Union of Greater New York, Local 100 v. MTA, New York City Transit, DAN Number 09-2773-0074 is hereby **DENIED**; and it is further

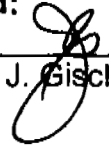
ORDERED AND ADJUDGED that the cross-motion of Respondent/Cross Petitioner MTA to dismiss the petition is hereby **GRANTED**, and it is further

ORDERED AND ADJUDGED that the cross-motion of Respondent/Cross Petitioner MTA, New York City Transit seeking confirmation of the award by the Arbitrator Stephen F. O'Bierne in the matter of the arbitration between Transport Workers Union of Greater New York, Local 100 v. MTA, New York City Transit, DAN Number 09-2773-0074 is hereby **GRANTED**; and it is further

ORDERED AND ADJUDGED that any relief requested that has not been addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED AND ADJUDGED that this constitutes the decision, order and judgment of the court.

Dated:
New York, New York
May 7, 2010

So Ordered:


Hon. Judith J. Gische, JSC

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).