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

PRESENT: MADDEN Justice PART 11

COUNCIL OF SCHOOL SUPERVISORS AND ADMINISTRATORS

-v-

NYC DEPT OF EDUCATION

INDEX NO. 112483/09

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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~~ Article 75 petition and cross-petition are determined in accordance with the annexed decision, order and judgment.

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: June 24, 2010

HON. JOAN A. MADDEN J.S.C.

Check one: ~~☒~~ FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 11
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In the Matter of the Arbitration Between the

COUNCIL OF SCHOOL SUPERVISORS AND ADMINISTRATORS, Local 1, AMERICAN FEDERATION OF SCHOOL ADMINISTRATORS, AFL-CIO, by its President ERNEST LOGAN,

Index No. 112483/09

Petitioner,

For an Order and Judgment Pursuant to CPLR Article 75 to Confirm an Arbitration Award

- against -

NEW YORK CITY DEPARTMENT OF EDUCATION, and JOEL KLEIN, as Chancellor of the New York City School District, and the City of NEW YORK, by its Mayor MICHAEL BLOOMBERG,

Respondents.

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JOAN A. MADDEN, J.:

In this CPLR Article 75 proceeding, petitioner, the Council of School Supervisors and Administrators (CSA), Local 1, American Federation of School Administrators, AFL-CIO, by its president, Ernest Logan, seeks to confirm the arbitration award contained in an "Opinion and Award," dated August 7, 2009, that required respondents to restore parking permits to CSA bargaining-unit members, and to negotiate with CSA prior to reducing the number of such parking permits. The arbitration award was issued in the arbitration entitled *Council of School Supervisors and Administrators, Association and New York City Department of Education, Employer*, Case No. 13 390 02352 08.

Respondents, the New York City Department of Education (DOE), Joel Klein, as

Chancellor of the New York City School District, and the City of New York (City), by its Mayor Michael Bloomberg (Mayor), cross-petition for an order vacating the arbitration award on the grounds that it (1) violates strong public policy, (2) the arbitrator vastly exceeded his authority, and (3) the arbitration award is irrational.

Background

CSA is a labor organization certified pursuant to Article 14 of the Civil Service Law as the bargaining representative for school principals, assistant principals, and other supervisors and administrators in the City's school system. Respondent DOE (also known as the Board of Education) is a municipal agency that administers the City's public education system, and is the employer of the CSA-represented employees (Petition, ¶¶ 2, 3).

The City's Department of Transportation (DOT), the agency responsible for regulating vehicular traffic within the City, has designated approximately 10,000 parking spaces on City streets for DOE use, and DOE has approximately 15,000 available spaces for parking on DOE property. The parking permits do not make any distinction between those parking spaces located on City streets and those located on DOE property (Cross Petition, ¶¶ 2, 25, 27).

Prior to the 2008-09 school year, any CSA-represented employee who requested a parking permit for use of parking spaces reserved for DOE employees was granted one, although having the permit did not guarantee a parking space (Petition, ¶ 6). According to respondents, during the 2007-08 school year, DOE issued approximately 63,000 parking permits that were purportedly available for the 25,000 DOE-designated parking spaces, thereby causing each permit to offer "only the vaguest possibility of actually obtaining parking," and the "proliferation of such parking permits at DOE and at City agencies invited misuse and outright abuse" (Cross

Petition, ¶¶ 29, 30).

Under a new policy beginning in the 2008-09 school year, the number of parking permits for use by employees of the various City agencies was reduced because, as stated by the office of the Mayor, the issuance of parking permits "far in excess of the available parking spaces encourages vehicle congestion and increases the ills attendant to that congestion including air pollution, global warning, and dependence on foreign oil" (Cross Petition, ¶ 34). In implementing the City-wide plan to reduce parking permits, the City centralized the issuance of permits within the DOT, and DOE (as well as other agencies) was no longer authorized to issue parking permits for use on City streets (as opposed to use on DOE property). Additionally, DOT did not issue permits "on demand" as DOE had done (Cross Petition, ¶¶ 36, 37).

Thus, the number of parking permits for DOE employees was substantially reduced, and DOE denied issuing permits for many CSA-represented employees who had previously held permits (Petition, ¶ 7). For the 2008-09 school year, DOE was limited to approximately 10,000 on-street parking permits for use by DOE employees, but this did not affect DOE's authority to issue parking permits for the parking spaces located on DOE's premises (Cross Petition, ¶¶ 39, 40).[1]

DOE and CSA entered into a collective bargaining agreement, dated April 20, 2007 (CBA), covering the period from July 1, 2003 to March 5, 2010. The CBA contains a grievance procedure for the resolution of disputes. In August 2008, CSA filed a grievance against DOE pursuant to this procedure, contending that any reduction of parking permits that DOE previously

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[1]DOT issued an additional 650 permits to DOE for teachers and staff whose work required them to visit multiple sites during their workdays (Cross Petition, ¶ 39).

issued to CSA members violated Article XVIII of the CBA (Cross Petition, ¶ 44). Article XVIII of the CBA provides:

> With respect to matters not covered by this Agreement which are proper subjects for collective bargaining, the DOE agrees that it will make no changes without appropriate prior negotiation with the CSA.
> The DOE will continue its present policy with respect to sick leaves, sabbatical leaves, vacations, holidays and injury in the line of duty, except insofar as change is commanded by law.

As a result of the filing of the grievance, pursuant to Article X of the CBA, an arbitration was held in Brooklyn, New York on January 13, February 5, March 6, March 11, and April 28, 2009. As set forth in the opinion and award, the parties stipulated to the determination of the following issue: "Did the Department of Education violate Article XVIII of the collective bargaining agreement when as part of an overall parking placard reduction program, parking placards to CSA represented employees were reduced in August 2008. If so, what, consistent with the Agreement, is the appropriate remedy?" As remedies, CSA sought to have the arbitrator "restore the status quo ante and to require the Department to negotiate with the Association prior to implementing a change in the parking permit policy."

According to the opinion and award, at the arbitration, DOE argued that the mere issuance of a parking permit, without the guarantee of a parking space, is not a mandatory subject of bargaining. DOE also contended that, even if the reduction of parking permits constituted a proper subject of bargaining, CSA failed to demonstrate that the changes imposed were done without "appropriate prior negotiation" with CSA.

Notwithstanding these arguments, the arbitrator concluded that "the Department violated Article XVIII of the CBA when as part of an overall parking placard reduction program, parking placards to CSA represented employees were reduced in August 2008," and sustained the

grievance. The arbitrator also found that CSA established that DOE implemented the change without prior negotiation with the CSA. In reaching this determination, the arbitrator found that "these changes constituted a significant and adverse alteration of bargaining unit members' working conditions and therefore a 'proper subject of bargaining,' as that term is used in Article XVIII of the Agreement." As remedies, the arbitrator directed that DOE "(1) immediately restore the status quo ante for all CSA bargaining unit members by returning all parking permits previously held by CSA bargaining unit members during the 2007-2008 school year; and (2) negotiate with the Association prior to reducing the number of parking permits made available to CSA bargaining unit members."

CSA then brought this petition to confirm the arbitration award, and respondents cross-petitioned to vacate the arbitration award. The petition states that, on August 24, 2009, representatives of CSA, DOE, the City and the Mayor met to discuss the implementation of the arbitration award, and that DOE, the City and the Mayor collectively represented that they would not comply with the arbitration award, and would not restore parking permits to CSA members as per the arbitration award.

Discussion

An arbitration award must be upheld when the arbitrator offers an "even barely colorful justification" for the arbitrator's determination, even if the arbitrator made errors of law and fact (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479, *cert dismissed* 548 US 940 [2006]). CSA has satisfied this standard on its petition to confirm the arbitration award. The arbitrator heard testimony, construed the relevant provisions of the CBA, and provided a reasoned analysis of the basis for the remedy he fashioned which was consistent with the issues

presented and relief sought.

As for the cross-petition, "[a]n arbitration award may be vacated on three narrow grounds: 'it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power [citation omitted]'" (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79 [2003]). Respondents are seeking to vacate the arbitration award on all three grounds, but none is persuasive.

As to the public policy ground, whether an arbitration award violates public policy is based on a two-prong test (*id.* at 80). First, where a court can conclude, without engaging in any extended fact-finding or legal analysis, that a law prohibits, in an "absolute sense," the particular matters that the arbitration is to decide, an arbitrator cannot act; and second, an "arbitrator cannot issue an award where the award itself violates a well-defined constitutional, statutory, or common law of this State" (*id.* at 80, quoting *Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100, AFL-CIO*, 99 NY2d 1, 6-7 [2002]).

Respondents contend that the arbitration award violates public policy "to the extent that the Award requires the DOE to issue on-street parking permits, a power it does not lawfully possess, it should be annulled because the authority to regulate and permit on-street parking is in the exclusive control of the City and is vested by the New York City Charter in the City's Department of Transportation ('DOT')." Specifically, respondents argue that the Vehicle and Traffic Law vests power over parking on City streets to the legislative body of that city, citing Vehicle and Traffic Law § 1640 ("Traffic regulations in all cites and villages") and § 1642 ("Additional traffic regulations in cities having a population in excess of one million").

Respondents also cite the New York City Charter (§ 2903), which has vested the power to govern and regulate parking on the City streets to the DOT, as well as the common law, in that "Courts have long recognized and given precedence to DOT's vested power to regulate vehicular traffic and parking on New York City streets."

Respondents argue that the arbitration award seeks to override or preempt the aforementioned authority of the DOT to regulate the issuance of parking permits on City streets, and assert that "neither the City nor the DOT were parties to the subject CBA between CSA and the DOE" nor was "the City or DOT a party to the arbitration that resulted in the Award at issue here." These assertions fail to overcome the settled doctrine that the "scope of the public policy exception to an arbitrator's power to resolve disputes is extremely narrow" (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d at 80; *Matter of City of New York v Uniformed Fire Officers Assn., Local 854, IAFF, AFL-CIO*, 95 NY2d 273, 286 [2000]) and, as discussed below, resort to such narrow exception is unwarranted here.

The arbitration award has no direct bearing on the issuance of parking permits by the DOT, and no bearing on the regulation of parking on New York City streets. The arbitrator decided only the limited issue of the issuance of the approximately 10,000 on-street parking permits by DOE to DOE employees, including those that are CSA-represented members. Hence, the arbitration and the resulting arbitration award were limited to the issue of entitlement to parking permits within the DOE, a subject that is beyond the scope of any authority granted to the DOT to regulate traffic and parking on the City streets. The arbitrator's interpretation of the issues and the scope of his authority is entitled to substantial deference (*Matter of Roffler v*

Spear, Leeds & Kellogg, 13 AD3d 308, 310 [1st Dept 2004]). Because there is support for his determination, as set forth in the opinion and award, his award should not be overturned (*id.*). At the arbitration, the arbitrator heard the testimony and cross-examination of several witnesses on behalf of CSA as well as respondents, and considered Article XVIII of the CBA, and several related arbitration decisions cited by the parties to the arbitration. The arbitrator incorporated his findings of this evidence in his opinion and award.

Respondents contend that CSA has not taken into account that there are other unions whose members were affected by the reduction in the number of parking permits available to DOE employees. DOE issued approximately 63,000 permits during the 2007-08 school year, but only 25,000 permits were available in the 2008-09 school year after the City implemented its plan. Respondents emphasize that in addition to CSA, Local 891 (representing school custodians) and District Council 37 (representing school aides and health service aides) have also filed parking permit grievances, and the United Federation of Teachers represents 90,000 teachers, a number of whom had previously received parking permits. This contention only serves to further show that the arbitration award primarily impacts the DOE, and not DOT.

Respondents acknowledge that whether the reduction of parking permits violated Article XVIII was a key issue at the arbitration and quote the stipulated issue to be decided at the arbitration, namely: "Did the Department of Education violate Article XVIII of the collective bargaining agreement." Yet respondents' Memorandum of Law in Support of the Cross Petition does not discuss why the arbitration award is inconsistent with the terms of Article XVIII of the CBA. This is telling in that "[j]udicial restraint under the public policy exception is particularly appropriate in arbitrations pursuant to public employment collective bargaining agreements"

(*Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100, AFL-CIO*, 99 NY2d at 7). The "Legislature in the Taylor Law explicitly adopted a countervailing policy 'encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes'" (*id.*, quoting Civil Service Law § 200 [c]). Thus, public policy actually militates in favor of confirming the arbitration award, not vacating it.

Controlling here, among other appellate authority, is *Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100, AFL-CIO* (99 NY2d 1, *supra)*, which consolidated two appeals of separate arbitrations where the New York City Transit Authority had imposed the penalty of dismissal on employees for violating safety rules. After the arbitrators modified the penalty of dismissal and imposed less severe sanctions, the agency brought Article 75 proceedings to vacate the awards. In both instances, the Appellate Division held that the arbitrators' awards violated public policy, in light of the agency's statutory duty to operate the transit system for the safety of the public. The Court of Appeals reversed, holding that the public policy consideration failed to meet the strict standards for overturning arbitration awards on such grounds, stating that "[t]he narrowness of the public policy exception, as applied to the arbitration process under collective bargaining agreements, is designed to ensure that courts will not intervene in this stage of the collective bargaining process in pursuit of their own policy views, or because they simply disagree with the arbitrator's weighing of the policy considerations." Here, the issue is not safety, but the delegation of parking permits.

Respondents further argue that the loss of parking permits is not a significant and adverse alteration of bargaining unit members' working conditions, as a parking permit does not guarantee a parking spot. The arbitrator found that the very fact that the City's parking spaces

are so limited and sought after, made it especially beneficial to have the opportunity to park in a free DOE-designated spot. The arbitrator also found that the evidence presented at the arbitration indicated that the CSA members were able to make good use of the parking permits when they had them. After hearing the testimony of several witnesses, including CSA members who had been formerly issued permits, the arbitrator made factual findings and concluded that "these changes constituted a significant and adverse alteration of bargaining unit members' working conditions" and therefor a proper subject of bargaining pursuant to Article XVIII of the CBA (*id.* at 20). The factual determination by the arbitrator should not be disturbed (*Matter of Roffler v Spear, Leeds & Kellogg*, 13 AD3d at 311).

As to the other grounds for vacating the award, respondents argue that the arbitrator exceeded his powers because the ruling would "effectively reverse the City's governance of its own streets and the City's right to regulate the issuance of parking permits." This is essentially the same argument as the public policy argument addressed above.

Similarly, respondents argue that the arbitration award is irrational because, in essence, it attempts to issue a directive to the City, the DOT and the City's police department – non-parties to the CBA and the arbitration – that they allow DOE to issue permits for parking on City streets regardless of legal authority to do so, and in numbers that far exceed the number of parking spaces designated by DOT for DOE use. Although respondents note that DOT was not party to the arbitration, implying that DOT was a necessary party, they do not claim that DOE ever sought to include DOT in the arbitration. In any event, it does not appear that DOT was a necessary party to the arbitration, or is DOT necessary to the enforcement of the arbitrator's remedies, since the number of the parking permits that DOT has allocated to DOE exceeds the number of CSA

members relevant to this proceeding.

As a practical matter, DOE states that it is willing to negotiate with CSA regarding the method of allocating the 25,000 permits that DOE has available for DOE permits. This is substantially consistent with the arbitrator's remedy, i.e., "negotiate with the Association prior to reducing the number of parking permits made available to CSA bargaining unit members." However, CSA seeks negotiation prior to the reduction of permits issued to CSA members, whereas DOE seeks negotiation after such reduction. Pursuant to settled appellate authority, as discussed above, and the grievance procedure and other terms of the CBA, the resolution of that issue belongs to the arbitrator and not the judiciary.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted and the Arbitration Award rendered in favor of petitioner and against respondents is confirmed; and it is further

ORDERED that respondents' cross-petition to dismiss petition and vacate the Arbitration Award is denied.

DATED: June 24, 2010

ENTER:

J.S.C.