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

PRESENT: HON JOAN A. MADDEN Justice

PART 11

Index Number : 101057/2010
LOCAL UNION NO. 3
VS.
TIME WARNER CABLE OF NYC
SEQUENCE NUMBER : 001
CONFIRM AWARD

INDEX NO. ~~56~~

MOTION DATE 3-18-10

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~~ petition and cross motion are decided in accordance with the annexed Memorandum Decision Order + Judgment.

Dated: July 12, 2011

J.S.C.

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

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: IAS PART 11

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APPLICATION OF LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner,

-against-

TIME WARNER CABLE OF NEW YORK CITY,
Respondent.

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Index No. 101057/2010

Joan A. Madden, J.

Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO (together the "Petitioner") moves, pursuant to CPLR 7510, for an order confirming an arbitration opinion and award (the "Award") rendered in its favor by Robert T. Snyder (the "Arbitrator") on November 24, 2009, against Time Warner Cable of New York City ("TWC"). The Award reinstated David A. Lewis, ("Lewis"), a cable technician and member of Local Union No. 3. TWC cross moves to vacate the Award on the grounds that the Arbitrator exceeded his power and the Award violates public policy. For the reasons below the petition is granted and the cross-motion is denied.

BACKGROUND

Lewis worked as a cable technician at TWC. On June 3, 2009, while on a service call, he was arrested for possession of cocaine and shortly thereafter TWC terminated his employment. Lewis was in his twenty-fifth year of employment at the time of the arrest.

During the relevant period, a Collective Bargaining Agreement (the "CBA") was in effect between Petitioner and TWC. Of relevance here, Section 35 of the CBA, titled "Management Rights" allows TWC to establish reasonable rules and regulations as long as they are not inconsistent with other provisions of the CBA. Section 48 of the CBA

gives TWC the right to put into effect a drug and alcohol policy. Clause F of this section states that all discipline imposed will be subject to the Grievance and Arbitration procedures of the CBA.

At the time of Lewis' arrest, TWC had in effect a Drug Free Workplace Policy (the "Policy"). The Policy states that "the...possession...of a Controlled Substance [such as cocaine]...while conducting Company business off Company property, or while on Company time, is prohibited. Violation of this policy will result in discipline up to and including termination." Section 6 of the Policy restates that possession of a controlled substance while conducting company business is prohibited.

Under Section 9 of the Policy, titled "Consequences for Violation of the Drug-Free Workplace Policy," a violation of the Policy, "even a first time offense, may serve as the basis for discipline, up to and including termination. The level of discipline chosen will depend on the circumstances of each case." Section 9 also provides that "[i]n addition to, or as part of, any disciplinary action for violation of the Policy, or while such action is held in abeyance, [TWC] may, in its sole discretion refer the employee for assessment, counseling, and/or treatment.[1] " Finally, possession of illegal drugs or a controlled substance while on duty is included in the list of offenses defined under the section "Major Work Rule Violations." This section states, "Major Work Rule Violations are of such a serious nature that a violation could result in immediate suspension or termination."

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1 In the Award, the Arbitrator wrote that the assessment, counseling and/or treatment program referred to in section 9 is not available to members of Lewis' bargaining unit but that the Petitioner has access to drug treatment facilities for its unit employees.

On June 10, 2009, a meeting with Lewis was held by TWC to determine what disciplinary action should be taken. After this meeting, TWC produced a "Disciplinary Action Form," which stated:

> David Lewis was found to be in possession of an illegal substance, cocaine, while on Company time, while wearing a Company uniform and driving a Company vehicle. It was during his arrest (while on Company time) that [the] cocaine was discovered by [the] arresting officer. Possession of an illegal substance is a major work rule violation. A violation of TWC's Drug Free Workplace Policy and our Standards of Business Conduct....Due to the Severity of the violation, David Lewis is terminated effective immediately." (Id. at 6)

On behalf of Lewis and pursuant to the CBA, the Petitioner requested the American Arbitration Association to arbitrate the dispute arising out of Lewis' termination (Id. 2). The parties stipulated that the issue for determination at the Arbitration was whether "Lewis [was] discharged for just cause, and, if not, what shall be the remedy?" Id.

A hearing was held on November 4, 2009. Each party was represented by counsel and called witnesses. The Arbitrator heard evidence regarding TWC's interpretation of the Policy and disciplinary actions taken against other employees in Lewis' collective bargaining unit for violations of the Policy.

The Arbitrator found that Lewis violated TWC's Policy "by possessing on his person a tin foil of cocaine while conducting company business and while on Company time [and] thus subjected himself to the discipline called for under that policy." (Award, 11). However, the Arbitrator also concluded that Lewis was not terminated for just cause and restored him to his prior position as a technician without loss of seniority but without backpay.

In reaching this conclusion, the Arbitrator found that the rules set forth in the Policy had not been uniformly applied among employees who had violated the Policy. (Id. 11-12). For example, the Arbitrator noted that in the past, employees charged with drug use were given the opportunity to enter drug treatment programs and after successful completion return to work, whereas no such opportunity had been accorded to employees charged with possession.

The Arbitrator also found that TWC applied the Policy in an inconsistent manner by misinterpreting the provision as requiring, instead of permitting, the suspension or termination of employees. The Arbitrator wrote that TWC's interpretation conflicted with the language of the Policy indicating that "a violation [of a Major Work Rule, including possession of illegal drugs] could result in immediate suspension or termination" (emphasis supplied). The Arbitrator also found that TWC's interpretation of the Policy conflicts with Section 9, which states that "a first offense may serve as a basis for discipline up to an including termination... depending on the circumstance of each case" (emphasis supplied).

The Arbitrator further found that TWC did not take into account the circumstances surrounding Lewis' arrest and that the conduct cited by TWC in its written disciplinary form – possession of an illegal substance, cocaine, while on company time and wearing a company uniform and driving a company vehicle - did not provide a basis for discharge upon a first offense under the Policy. In reaching this conclusion, the Arbitrator credited Lewis' testimony over the arresting officer's claims that Lewis cursed him, intentionally moved his car forward, or that the officer was required to remove him from his vehicle.

The Arbitrator also based his determination on Lewis' "lengthy and unblemished work history of twenty-five years," and testimony that Lewis "had never once used cocaine or any other drug while at work," and that since completing a drug treatment program Lewis had "ceased to use cocaine." (Id. at 13-14).

Petitioner now seeks to confirm the Award. TWC opposes the petition and cross moves to vacate the Award on the grounds that: (1) the Arbitrator exceeded his authority by issuing the Award and relief set therein by rewriting the CBA and the Policy which provide for termination for possession of illegal drugs, (2) the Arbitrator acted irrationally in granting the award and the relief therein, and (3) the Award violates public policy by endangering public safety.

Petitioner opposes the cross-motion, arguing that the Award should be confirmed as there is no basis for finding that the Arbitrator's interpretation of the CBA and the Policy were irrational or beyond the scope of the Arbitrator's authority. Petitioner also argues that the reinstatement of Lewis does not violate public policy so as to warrant vacating the Award.

DISCUSSION

Under Article 75 of the CPLR, judicial review of an arbitration award is narrowly circumscribed. See Wien & Malkin LLP v. Helmsley Spear, Inc., 6 NY3d 471, 479, cert dismissed 127 S Ct 34 (2006). When parties voluntarily agree to submit their disputes to arbitration, as in the instant case, the courts will not easily disturb the results of such arbitration. See, Maross Constr., Inc. v. Central New York Regional Transp. Auth., 66 NY2d 341, 346 (1985).

"In interpreting an agreement, 'an excess of power occurs only where the

arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power.' Most importantly, courts are obligated to give deference to the decision of the arbitrator." Matter of Henneberry v. ING Capital Advisors, LLC, 10 NY3d 278, 284 (2008), quoting Transport Workers' Union of Am., Local 100, 6 NY3d 332, 336 (2005); see also Wien & Malkin LLP, 6 NY3d at 480 (stating that "the courts should not assume the role of overseers to mold the award to conform to their sense of justice"). Moreover, when reviewing an arbitration award, "any inquiry into the factual or legal interpretation of the arbitrators is prohibited." Sims v. Siegelson, 246 AD2d 374, 376-377 (1st Dept 1998) (citation omitted); see also, CPLR 7501 (providing that the "the court shall ... not pass on the merits of the dispute" raised in an arbitration proceeding).

However, if a party who has participated in award can show that "an arbitrator . . . making the award exceeded his power," CPLR 7511, subdiv. (b)(1)(iii), then the award will be vacated. See Matter of New York City Tr., Auth. v. Transport Workers' Union of Am., Local 100, AFL-CIO, 6 NY3d at 336. Thus, an award can be overturned as irrational when "the arbitrator exceeded [their] powers by changing the contract between the parties," (City of Watertown v. Watertown Professional Firefighters' Assn., 280 AD2d 893, 8942001 N.Y. Slip Op. 01179 [4th Dept 2001], lv denied, 96 NY2d 711 [2001]), "the conclusion reached by the arbitrators was a perverse misconstruction,"(Coletti v. Mesh, 23 AD2d 245, 248 [1st Dept], aff'd, 17 NY2d 460 [1965], or if an interpretation of a contract provision resulted in "an entirely new contract for the parties." Riverbay Corp. v. Local 32-E, 91 AD2d 509, 510 (1st Dept 1982). On the other hand, "'the mere fact that a different construction could have been accorded the

provisions concerned and different conclusions reached does not mean the arbitrators so misconstrued the provision as to empower the court to set aside the award.'" Eighty Eight Bleeker Co. LLC v. 88 Bleeker Owners, Inc., 51 AD3d 507, 508 (1st Dept 2008) quoting, National Cash Register Co. v. Wilson, 8 NY2d 377, 383 (1960).

TWC contends that the Award should be vacated because the Arbitrator rewrote the CBA "to provide a new, and enhanced benefit to Lewis – the right to possess cocaine on duty without fear of termination...[and] an added layer of job protection that was not agreed to by the parties...." (Cross Petition to Vacate, 10), and that under the Policy it has the "sole discretion" as to whether to hold any disciplinary action in abeyance pending rehabilitation.

In this case, it cannot be said that the Arbitrator exceeded his powers by changing or rewriting the CBA or the Policy. Instead, the Award was the result of the Arbitrator's rational interpretation of the CBA, the Policy, and a finding that Lewis' termination was the result of TWC's disparate treatment of employees found in possession of illegal substances and its misinterpretation of the Policy to require it to suspend or terminate violators of the Policy. Furthermore, the record reveals that the Arbitrator's interpretation was not a "perverse misconstruction" of the Policy since the Policy permits, but does not require, termination for a first drug offense and expressly provides that the type of discipline for such an offense depends "on the circumstances of each case." In addition, that the Policy gives TWC's "sole discretion" as to whether to offer rehabilitation to violators is not contrary to the Award since the Award did not impose any obligation on TWC to put Lewis in a rehabilitation program. Under these circumstances, the Arbitrator's interpretation of the Policy was a reasonable one, and the

Award should not be vacated as irrational. Eighty Eight Bleeker Co. LLC v. 88 Bleeker Owners, Inc., 51 AD3d 507 (upholding the arbitrator's award as a reasonable construction of the provisions of the subject lease).

Next, while the CBA permits TWC to establish "reasonable rules and regulations," it also allows the Arbitrator to determine whether a discharge was for just cause. In determining that Lewis was not terminated for just cause the Arbitrator relied on testimony given during the arbitration and the other evidence in the record to find that circumstances of the case did not warrant Lewis' termination. The Arbitrator, therefore, acted within the scope of his power.

Furthermore, the Appellate Division cases relied on by TWC are not to the contrary. See e.g., Matter of Regional Transit Services, Inc. v. Amalgamated Transit Union, Local 282, 267 AD2d 941 (4th Dept 1999) and Riverbay Corp., 91 AD2d at 509. In Regional Transit Services Inc., the Court upheld the trial court's decision vacating an arbitrator's finding that the respondent, Regional Transit Services, did not have just cause to terminate an employee who had failed a drug test and thus violated the relevant substance abuse policy, which provided that "an employee who tests positive for drugs or alcohol shall be subject to discipline up to and including discharge." 267 AD2d at 941. The arbitrator found that Regional Transit Services did not have just cause to terminate the employee because it "had not provided the employee with progressive discipline." Id. In affirming the trial court, the Fourth Department found that the arbitrator extended unnegotiated rights to a discharged employee, and thus rewrote the contract when it allowed an "on duty" drug policy violator to enter drug rehabilitation when the contract only afforded this opportunity to "off duty" violators.

In Riverbay, the First Department found that the arbitrator gave a "totally irrational construction" to an employment contract and exceeded the scope of his power when he required the employer to give a "clear and unequivocal warning of its revised standards" before discharging an employee, even though no such provision existed in the contract. 92 AD2d at 509-10. Accordingly, the court reversed the trial court's decision to confirm the award.

In contrast to these cases, it cannot be said in the instant case that the Arbitrator's finding that Lewis was not terminated for just cause was based on rewriting the provisions at issue or adding requirements to an employer's ability to discharge. Instead, as indicated above, the Arbitrator's determination was based on his finding that TWC's enforcement of the Policy resulted in the unfair treatment of employees found in possession of drugs when compared with those using drugs, that Lewis' termination was the result of TWC's misinterpretation of the Policy to require suspension or termination for every violation without considering the nature of the violation and other circumstances, and that based on the record, TWC incorrectly found that the circumstances of Lewis' case warranted his termination.

The remaining issue is whether the Award should be vacated as against public policy. The power to overturn an arbitrator's award based on public policy is "extremely narrow." Matter of New York City Tr. Auth. v. Transport Workers Union of Am., Local 100, AFL-CIO, 99 NY2d 1, 6-7 (2002). "[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 by an arbitrator." New York State Correctional Officers and Police Benevolent

Association, Inc. v. State of New York, 94 NY2d 321, 327 (1999)(citations omitted). "The focus of the inquiry is the result, the award itself." Id. Furthermore, the analysis "cannot change because the facts or implications of a case might be disturbing, or because an employee's conduct is particularly reprehensible." Id.

Accordingly,"[b]efore a court may intervene with an arbitration award on policy grounds, it 'must be able to examine . . . an award on its face, without engaging in extended fact-finding or legal analysis, and conclude that public policy precludes its enforcement.'" Cohoes Police Officers Union v. City of Cohoes, 263 AD2d 652, 654 [3d Dept 1999] quoting, Sprizen v. Nomberg, 46 NY2d 623, 631 [1979]. For example, in St. Mary Home, Inc. v. Service Employees Inter. Union Dist. 1199, 116 F.3d 41 [2d Cir. 1997], a worker was found to be in possession of marijuana and drug-related paraphernalia while at work. The arbitrators required the employer to reinstate the worker after a seven-month suspension without pay or benefits, and the employer moved to vacate the award on public policy grounds. In finding that the motion should be denied, the Second Circuit noted that the public policy issue was not whether the employee's drug use was illegal but whether there existed "a policy against the reinstatement of a long term employee after a seven month suspension without pay or benefits following an arrest for possession to sell marijuana." Id., at 45; see also, E. Associated Coal Corp. v United Mine Workers of Am., 531 US 57 (2000) (reinstating an employee truck driver who twice tested positive for marijuana); Matter of New York City Transit Auth. v. Transport Workers Union of Am. Local 100, AFL-CIO, 99 N.Y.2d 1 (2002) (arbitration award reducing penalty imposed on Transit Authority employee may not be vacated on public policy grounds).

Thus, the issue here is not whether the laws and policies of this State prohibit possession of cocaine while on duty as a cable technician. Rather, the question is whether there is a public policy against the result of the award, i.e. whether reinstating an employee "with a lengthy and unblemished work history of twenty-five years," (Award at 13) who has been convicted of cocaine possession while on the job and has then attended rehabilitation violates public policy. As there is no strong or well-defined policy consideration against such an Award, it must stand.

TWC contends that Lewis' crime is distinguishable from other cases where drug possessors have been reinstated because Lewis "brought illegal drugs into the homes of unsuspecting customers" and thus jeopardized public safety and the right of customers to exclude dangerous drugs from their homes. However, the Petitioner correctly points out that the "[TWC] presented no evidence that the cocaine in David Lewis' pocket endangered any customer. Lewis had entered the homes of thousands of customers during his twenty-five year employment with no complaint from any of them." (Petitioner Reply Memorandum, 4).

TWC relies on two Federal Appeals Court cases in which, based on public policy, arbitration awards have been vacated because the reinstated employees had violated safety rules while employed in a "safety-sensitive position[s]." (Cross Petition to Vacate, 15). See Iowa Elec. Light and Power Co. v. Local Unin 204 of the Int'l Brotherhood of Elec. Workers, 834 F.2d 1424, 1429 (8th Cir. 1987) (employee broke rules in a power plant); Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l, 861 F.2d 665, 671-72 (11th Cir. 1988) (pilot flew airplane intoxicated). These cases are distinguishable. First, there is no evidence that Lewis ever endangered customers by bringing the drugs into their

houses, while in Iowa Elec. and Delta the records indicated that the employees endangered hundreds of people by their actions. Notably, in St. Mary Home, supra, the Second Circuit refused to extend the "safety-sensitive exceptions" to a job where the employee was not responsible for making "split-second" decisions that could affect the safety of hundreds of people. 116 F.3d at 46. Here, Lewis was not in a position to instantly endanger hundreds of people, nor does the record show that Lewis caused even a single person danger by his conduct.

Thus, the Award cannot be vacated on public policy grounds.

CONCLUSION

In the view of the above, it is

ORDERED and ADJUDGED that the petition is granted and the Award rendered in favor of Petitioner Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO and against Respondent Time Warner Cable of New York City is confirmed; and it is further

ORDERED that the cross-motion by Time Warner Cable of New York City to vacate the Award is denied.

Dated: July 6, 2010

J.S.C.