

**Troeller v Department of Educ. of the City School  
Dist. of the City of N.Y.**

2010 NY Slip Op 33217(U)

November 12, 2010

Sup Ct, NY County

Docket Number: 600699/10

Judge: Alexander W. Hunter Jr

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

PRESENT: Alexander W. Hunter, Jr.

PART 33

Index Number : 600699/2010  
**TROELLER, ROBERT**  
VS.  
**DEPT OF EDUCATION OF THE CITY**  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

**PAPERS NUMBERED**

1-14, 15-16  
17-18  
19

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

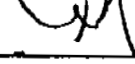
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*See memorandum decision  
and judgment annexed hereto.*

NYS SUPREME COURT  
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**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
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appear in person at the Judgment Clerk's Desk (Room  
141B).

Dated: November 12, 2010 

*CASEDISP*

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 33**

-----X  
Robert J. Troeller, as President and Business Manager  
of Local 891, International Union of Operating  
Engineers, AFL-CIO, and Steven Fricione,

Index No.: 600699/10

Petitioners,

-against-

Department of Education of the City School District  
of the City of New York, and Joel I. Klein, as  
Chancellor of the Department of Education of the  
City School District of the City of New York,

Respondents.

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appear in person at the Judgment Clerk's Desk (Room  
141B).

-----X  
**HON. ALEXANDER W. HUNTER, JR.**

The application by petitioners for an order pursuant to C.P.L.R. §7511, vacating the arbitration award, is denied. The cross-motion by respondents for an order dismissing the petition on the ground that it fails to state a cause of action, confirming the arbitration award pursuant to C.P.L.R. §7511(e) and directing the Clerk of the Court to enter judgment for respondents and granting respondents costs, fees and disbursements, is granted.

Petitioner Robert J. Troeller has been the President and Business Manager of Local 891 since 2003. Local 891 is a labor union that represents school custodian engineers employed by respondent the New York City Department of Education City School District of the City of New York (hereinafter "DOE"). Petitioner Steven Fricione is a custodian engineer employed by the DOE and he is currently assigned to Public School 460R in Staten Island, New York.

By way of background, petitioners assert that the DOE's Division of School Facilities is responsible for overseeing the provision of cleaning, heating and maintenance services for the New York City public schools. There are approximately 940 custodian engineers who personally employ between 5,000 and 6,000 helpers in over 1,000 DOE facilities. Petitioners contend that each custodian engineer is a competitive class civil service employee of the DOE. They provide cleaning, heating, air conditioning and minor maintenance of the DOE school or administrative building to which each is assigned. However, they are permitted and expected to use a portion of their building allocations to hire their own staff to help them perform their jobs.

Petitioners contend that DOE does not pay custodian engineers either a salary or wage. Instead, they are given a building allocation that is dependent on the size of the facility to which they are assigned and its physical characteristics. The custodian engineers are permitted to retain what is left over from their building allocation at the end of the calendar year after they have paid the wages of and Workers' Compensation Insurance for their own workers and other costs of running the building. Petitioners assert that the custodian engineers pay themselves and their compensation is known as "retainage," with a maximum permissible retainage cap at each school.

Custodian engineers are allowed to make expenditures from their building allocations for

both the usual and constant expenses required to maintain their schools as well as the miscellaneous items that are sometimes necessary. However, expenditures that exceed certain amounts must be substantiated by bills, vouchers, sales slips, and the like, and are subject to audit by DOE. If an expenditure is audited by the DOE, through a DOE employee called a Custodial Net Retained Unit ("CNRU") auditor, and it is determined that the expenditure has not been satisfactorily proven, the expenditure is disallowed by DOE. If the disallowance goes undisputed or if it is disputed but ultimately upheld in arbitration, the custodian engineer is required to reimburse the DOE for the expenditure.

The DOE and Local 891 have been parties to a series of Collective Bargaining Agreements (hereinafter "CBA") since 1964. The most recent CBA, the terms of which are currently in effect run from April 24, 2002 to December 31, 2007. The CBA immediately preceding the 2002-2007 CBA was the January 1, 2000 to April 23, 2002 CBA. The CBA immediately preceding the 2000 -2002 CBA was the 1995-1999 CBA which petitioner contends is applicable herein.

The CBA's have provided for a procedure to review disallowances. However, the procedure for reviewing disallowances set forth in the 1995-1999 CBA was not working and a large number of backlogged disallowances had accumulated. In the CBA for the period of 2000-2002, DOE and Local 891 created a revised procedure for reviewing disallowances and established the position of "Disallowance Arbitrator." The Disallowance Arbitrator is the individual who would clear up the backlog of disallowance cases. The 2000-2002 CBA mandated that there be a joint preparation of a backlog list of 308 cases and the DOE created a list of what it considered to be the backlogged cases and presented it to Local 891. Local 891 accepted that list as complete. Larry Biblo was selected by the parties to serve as Disallowance Arbitrator. He began hearings in 2006 and heard and disposed of all 308 cases on the backlog list, completing them in December of 2009.

Petitioners assert that on July 9, 2003, petitioner Fricione received a revised audit determination from CNRU notifying him that he had overpaid the DOE \$1,740.30 in return of his excess retainage in the year 2000. However, DOE did not issue a refund check to Fricione until 2005. On September 30, 2004, CNRU auditor, George Buddy, issued a disallowance to Fricione for exceeding the maximum allowance for gasoline in the year 2001 in the amount of \$520.54. On February 25, 2005, CNRU auditor, Sunny Narain issued a disallowance to Fricione for exceeding the maximum allowance for gasoline in the year 2003 in the amount of \$444.97. However, petitioner's gasoline disallowances were not included in the backlog list and were not a part of the 308 cases that had to be disposed of by the Disallowance Arbitrator. Therefore, petitioners contend that the disallowances of Fricione's 2001 and 2003 gasoline expenditures were void because the DOE did not identify and list them as part of the backlog.

When the DOE finally issued a refund check to petitioner Fricione in 2005, it had deducted the amounts of the disallowances for gasoline for the year 2001 and the year 2003. Petitioners argue that when CNRU made the disallowances of Fricione's gasoline expenditures for 2001 and 2003, the 1995-1999 CBA was in effect. Petitioners objected to the DOE's deductions and argued that the DOE did not have the right to make such a deduction. Fricione never received a report of final audit adjustment for the disallowances made of his gasoline expenditures in 2001 and 2003 nor did the Chief Executive or his designees ever conduct a review of his disallowances which were conditions precedent to him having to file a grievance under the 1995-1999 CBA. Moreover, petitioners contend that the disallowance of Fricione's

gasoline expenditures should have been on the backlog list by the DOE if it believed that the disallowances were proper.

Moreover, petitioners argue that Fricione's first and second line managers permitted him to exceed the maximum permissible expenditures for gas for 2001 and 2003 because Fricione had 22 acres of grass and concrete to care for at his school and required the gasoline to operate grass-cutting and snow-blowing equipment. A memorandum was sent to the Director of School Facilities Audits notifying him of same. Petitioners contend that CNRU ignored the memorandum.

Petitioners contend that at the hearing on Fricione's disallowances, petitioner Fricione was represented by Local 891 Exceptions Chairman Jeffrey Bilek. Mr. Bilek attempted to put into evidence the fact that Fricione's case could not properly be treated as a backlog list case and that it did not have to be grieved by Fricione because he never received a final audit adjustment or a hearing by the Executive Director or his designees. However, the arbitrator only admitted evidence on the time line of the events leading up to the filing of the grievance. The arbitrator heard testimony that it existed, but refused to admit the memorandum to the Director of School Facilities Audits that Fricione's expenditures were proper. Petitioners contend that Mr. Bilek showed the arbitrator a folder full of exhibits that he wanted to enter into evidence but the arbitrator refused to look at them or admit them into evidence.

By letter dated December 14, 2009, the arbitrator issued his decision wherein he stated that on the merits, Fricione's expenditures were reasonable and necessary and properly documented but the disallowances were upheld because the grievance filed on Fricione's behalf was not timely and was required to have been filed within 30 days of the initial disallowance. Petitioners assert that the arbitrator "invented" and applied to Fricione a 30 day filing requirement that the CBA does not contain with respect to the pre-August 23, 2005 disallowances or Fricione's grievances.

Petitioners then filed the instant Article 75 proceeding to vacate the award of the arbitrator. They argue that the arbitrator exceeded the authority and jurisdiction granted to him by the parties' CBA when he placed Fricione's disallowances on the backlog list. Moreover, even if the arbitrator had the authority to place Fricione's disallowances on the backlog list, he exceeded his authority and jurisdiction by creating and imposing a time requirement that does not exist in the relevant CBA.

Petitioners contend that pursuant to C.P.L.R. §7511(b)(1)(iii), an arbitration award shall be vacated if the rights of a party have been prejudiced where an arbitrator making the award exceeded his power. Additionally, they contend that the arbitrator engaged in misconduct when he excluded documentary evidence which Mr. Bilek attempted to admit at the hearing that Fricione's superiors approved and allowed his expenditures as proper. Petitioners cite to case law in support of their contention that vacatur of an arbitration award is justified where the arbitrator has refused to consider pertinent and relevant evidence. Therefore, petitioners assert that this matter should be returned to the arbitrator to make a ruling consistent with Local 891-DOE CBA.

Respondents oppose the application to vacate the arbitrator's award and cross-move to dismiss the petition. Respondents contend that the petition fails to state facts sufficient to support vacating the arbitrator's decision. Respondents cite to C.P.L.R. §7511(b), which states

that an arbitration award can only be vacated under very limited circumstances and petitioners do not meet any of the grounds herein. Respondents argue that judicial review of an arbitrator's award is extremely limited and great deference is owed to the arbitrator's determination even if the arbitrator has misapplied relevant substantive law. In addition, respondents cite to case law which holds that an arbitration award will not be vacated unless the party seeking vacatur of the award can demonstrate that the award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power.

Respondents also cite to case law wherein the Appellate Division, First Department annulled an award because the arbitrator failed to enforce the same 30 day limitation on filing grievances that existed in the case at bar. Respondents argue that petitioners did not deny that there is a requirement that a grievance be filed within 30 days and that petitioners herein did not file a grievance within 30 days after the final audit disallowance. Petitioners did not file the grievance until more than a year after the disallowances had already been paid to the DOE.

Although petitioners contend that the arbitrator created and imposed a time requirement that does not exist in the relevant CBA and thereby exceeded his authority and jurisdiction, respondent asserts that same is incorrect on its face. Petitioners have asserted that the 1995-1999 CBA is the relevant CBA in the case at bar. However, the 2000-2002 contract states that it covers the period during which the expenses were incurred. Nevertheless, respondent cites to Article XVII, Section 2 of the 1995-1999 CBA which states that the custodian engineer and/or Local 891 representing the custodian engineer shall present the grievance to the Chief Executive of the Division of School Facilities within thirty (30) days after the occurrence thereof. Therefore, contrary to petitioners' assertion that neither Fricione nor Local 891 on his behalf had an obligation to file a grievance on Fricione's disallowances within a particular time, a 30 day time limitation to file a grievance existed in the 1995-1999 CBA and was continued in the 2000-2002 CBA. Moreover, petitioners' argument concerning which CBA was applicable and which time limitations applied, was made to the arbitrator and was rejected.

Respondents also argue that petitioners have failed to prove arbitral misconduct on the ground that the arbitrator refused to consider pertinent and relevant evidence. Respondents cite to case law in support of their contention that petitioners must prove misconduct or partiality by clear and convincing proof. However, in the case at bar, petitioners' allegation of misconduct is conclusory and without any facts which might tend to support bias or prejudice. Therefore, petitioners have not met their burden of proof on that ground and the petition should be dismissed.

C.P.L.R. § 7510 states that arbitration awards shall be confirmed unless there are grounds to vacate or modify the awards pursuant to C.P.L.R. § 7511. The limited grounds for vacating an arbitration award include fraud or misconduct in procuring the award, partiality of an arbitrator appointed as a neutral, an arbitrator exceeding his power or authority or failure to follow the procedure of Article 75. C.P.L.R. § 7511(b).

In New York City Transit Authority v. Transport Workers' Union of America, Local 100, AFL-CIO, 6 N.Y.3d 332 (2005), the Court of Appeals held that, "An arbitrator is charged with the interpretation and application of the agreement...Courts may vacate an arbitrator's award only on the grounds stated in CPLR 7511(b). The only such ground asserted here is that the arbitrator 'exceeded his power'...Such 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...Moreover, courts are obligated to give deference to the decision of the arbitrator..." (citations omitted). **Id.** at 336.

In, **Henneberry v. ING Capital Advisors, LLC**, 37 A.D.353 (1<sup>st</sup> Dept. 2007), the court ruled that, "Petitioner failed to show that the award confirming termination of her employment was 'violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on [the arbitrator's ] power'...' [A]n arbitrator is not bound by principles of substantive law or by rules of evidence,' but 'may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement'..."(citations omitted). **Id.**

In the case at bar, petitioners contend that arbitrator Biblo exceeded the authority and jurisdiction granted to him by the parties' CBA by considering Fricione's disallowances and imposing a time requirement on the filing of a grievance. However, case law is clear that, "...courts are obligated to give deference to the decision of the arbitrator...This is true even if the arbitrator misapplied the substantive law in the area of the contract..." (citations omitted). **New York City Transit Authority v. Transport Workers' Union of America, Local 100, AFL-CIO**, 6 N.Y.3d 332 at 336. Moreover, courts have annulled arbitration awards where there was a failure to enforce a 30 day statute of limitations that existed in the CBA. **In the Matter of Local 832 Terminal Employees of the City of New York v. Department of Education of the City of New York**, 60 A.D. 36 567 (1<sup>st</sup> Dept. 2009).

Since petitioners herein have failed to demonstrate that the arbitration award should be vacated under one of the grounds enumerated under C.P.L.R. §7511(b), it is hereby,

ADJUDGED, that the application by petitioner to vacate the arbitration award is denied and the cross-motion by respondents for an order dismissing the petition and confirming the arbitration award is granted, with costs and disbursements to respondents; and it is further

ADJUDGED, that respondents having an address at \_\_\_\_\_, do recover from petitioners, having an address at \_\_\_\_\_, costs and disbursements in the amount of \$ \_\_\_\_\_, as taxed by the Clerk, and that respondent have execution therefor.

Dated: November 12, 2010

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
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).

ENTER:

  
\_\_\_\_\_  
J.S.C.