

**Matter of Social Serv. Empl. Union v New York City  
Bd. of Corr.**

2010 NY Slip Op 33784(U)

July 19, 2010

Sup Ct, New York County

Docket Number: 100208/2010

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN, Justice

PART 21

Index Number : 100208/2010

**SOCIAL SERVICE EMPLOYEES**

VS.

**N.Y.C. BOARD OF CORRECTION**

SEQUENCE NUMBER : 001

CONFIRM AWARD

INDEX NO. 100208/10

MOTION DATE 6/16/10

MOTION SEQ. NO. 001

MOTION CAL. NO. 83

The following papers, numbered 1 to 6 were read on this petition to confirm interim arbitration award; cross petition to vacate an interim arbitration award

	<u>Papers Numbered</u>
Notice of Petition— Petition — Exhibits A-B	<u>1-2</u>
Notice of Cross Petition—Verified Answer and Cross Petition— Exhibits 1-14	<u>3-4</u>
Petitioner's Verified Reply and Verified Cross Petition— Exhibit A	<u>5</u>
Verified Reply to Respondent's Cross-Petition—Exhibit 15 [Affirmation in Further Support]	<u>6</u>

**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 1002).

Cross-Motion:  Yes (Cross Petition)  No

Upon the foregoing papers, It is ADJUDGED that the petition to confirm an interim arbitration award and the cross petition to vacate the award and to disqualify the arbitrator are decided in accordance with the annexed memorandum decision and judgment.

Dated: 7/19/10  
New York, New York

 , J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  SETTLE/SUBMIT ORDER/JUDG.

FOR THE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

100208/10 MICHAEL D. STALLMAN

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 21**

-----X  
In the Matter of the Arbitration of Certain Controversies  
Between

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, on  
behalf of its member, SHERIE BROWN,

Index No. 100208/2010

Petitioner,

Decision and Judgment

- against -

NEW YORK CITY BOARD OF CORRECTION

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This judgment has not been entered by the County Clerk  
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obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
14 Respondent)

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**HON. MICHAEL D. STALLMAN, J.:**

A union petitions to confirm an Interim Award rendered by an arbitrator from the New York City Office of Collective Bargaining, directing that a member of the union be reinstated to her employment with the New York City Board of Correction. The Board of Correction cross-petitions to vacate the Interim Award and to disqualify the arbitrator on the ground of bias.

**BACKGROUND**

Petitioner Social Service Employees Union, Local 371 requested arbitration with the New York City Office of Collective Bargaining over two sets of disciplinary charges sustained against its member, Sherrie Brown, then an employee of the Board of Correction in the title of Correctional Standards Review Specialist II. The two sets of charges were consolidated for an arbitration hearing, *Matter of the Arbitration between Social Service Employees Union Local 371 and Board of Correction*, Case Nos. A-12679-08 and A-12697-08.

According to respondent, the second set of charges concerned Brown's alleged violation of

Department of Correction policy, by giving and permitting her Board of Correction cell phone to be used by an inmate, alleged insubordination, and allegedly falsely representing that reports to her supervisors were her own work product, i.e., Brown initialed two memos to her supervisors that she allegedly did not author.

According to petitioner, Brown was interviewing a prisoner regarding complaints of alleged corruption and criminal activity of the staff at the Otis Bantum Correctional Center. Verified Reply ¶ 129. Petitioner claims that, after consultation with a supervisor, Brown used her cell phone to call the New York City Inspector General (IG), and that Brown gave her cell phone to the prisoner because an IG representative said that he wanted to speak with the prisoner. *Id.*

The parties mutually selected Jane Morgenstern as the arbitrator pursuant to the Office of Collective Bargaining rules. Hearings were held before Morgenstern on September 22, 2008, and continued in 2009 on January 14 and 22, September 16, and October 1. Petitioner claims that counsel for respondent informed Morgenstern that respondent had fully presented all evidence it had intended to present on the second set of disciplinary charges, and that respondent relied exclusively on the second set of charges as the basis for Brown's discharge. Respondent admits that, "during an off-the-record discussion in the course of the hearing, Morsillo [Assistant General Counsel for the City of New York Office of Labor Relations] indicated that respondent had finished presenting direct evidence of the facts of Brown's conduct, but had not concluded presenting evidence or testimony relating to the penalty of discharge." Verified Reply ¶ 19.

By an "Interim Award" dated October 1, 2009, Morgenstern directed the Board of Correction to restore Sherrie Brown to her position, with full pay and benefits, by October 8, 2009. Petition, Ex B. The Interim Award also provides that, "In the event that the grievant is not restored to her

position by October 8, 2009, she shall be restored to payroll with full pay and benefits of her title, Correctional Standards Review Specialist, Level II, no later than that date.” *Id.*

By letter dated November 5, 2009 to Morgenstern, Morsillo requested Morgenstern to withdraw as the arbitrator. Verified Answer, Ex 13. By letter dated November 9, 2009, Morgenstern denied the application. Her letter states, in pertinent part:

“As I observed above, the City stated that the sole termination offense among the several offenses with which the Grievant was charged was the cell phone incident. I specifically advised counsel for the City and the Union that if they were unable to settle the matter, I would issue an Interim Award restoring Grievant to her position because I had concluded that discharge was an excessive penalty even assuming for sake of argument that I would find her guilty not only of the cell phone incident charge (which she admitted and on which the City had already concluded its case in chief,) but also of each and every other disciplinary charge specified in Joint Exhibits 1 and 2. On these, as the City notes, additional testimony is yet to be taken and documentary evidence presented.”

Verified Answer, Ex 14, at 2.

Petitioner seeks to confirm the Interim Award. Respondent cross-petitions to vacate the award on the grounds that the arbitrator exceeded her authority and that the award is non-final.

Respondent also seeks to remove Morgenstern as the arbitrator on the ground of bias.

“[B]efore the court may intervene or even entertain a suit seeking court intervention, there must be an ‘award’ within the meaning of the statute. The ‘awards’ of arbitrators which are subject to judicial examination under the statute--and then only to a very limited extent--are the final determinations made at the conclusion of the arbitration proceedings.”

*Mobil Oil Indonesia v Asamera Oil (Indonesia)*, 43 NY2d 276, 281 (1977). “An award is deficient in this regard and subject to vacatur only if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy.”

*Matter of Meisels v Uhr*, 79 NY2d 526, 536 (1992).

Here, the Interim Award is not final. On its face, it states, "This Interim Award is issued pending the issuance of a full Opinion and Award at such time as hearings in these matters are closed or they are otherwise resolved." Petition, Ex B. In her letter denying the Board of Correction's application to remove herself as arbitrator, Morgenstern stated that the Interim Award did not grant the ultimate relief sought because back pay and benefits retroactive to the date Brown's employment was terminated "remains to be determined." Verified Answer, Ex 14, at 2. Because the Interim Award is not final, it may not be confirmed and must be vacated. *Sands Bros. & Co. v Generex Pharms.*, 279 AD2d 377, 378 (1st Dept 2001).

As petitioner indicates, the Appellate Division, First Department affirmed a lower court's decision denying a motion to vacate an interim arbitration award in *Matter of Steven Kessler Motor Cars, Inc. v Ferrari North America* (245 AD2d 211 [1<sup>st</sup> Dept 1997]). However, no other cases have followed *Matter of Kressler* for the proposition that a non-final arbitration award may be confirmed, and it is contrary to more recent appellate decisions. See e.g. *Board of Educ. of Amityville Union Free School Dist. v Amityville Teacher's Assn.*, 62 AD3d 992 (2d Dept 2009); *Sands Bros & Co.*, 279 AD2d 377, *supra*.

As to the branch of respondent's cross petition to remove Morgenstern as arbitrator, CPLR Article 75 provides no mechanism for the removal of an arbitrator during the pendency of an arbitration. However, the Court of Appeals has held that, "in an appropriate case, the courts have inherent power to disqualify an arbitrator before an award has been rendered." *Matter of Astoria Medical Group (Health Ins. Plan of Greater N.Y.)*, 11 NY2d 128, 132 (1962).

"While 'in an appropriate case, the courts have inherent power to disqualify an arbitrator before an award has been rendered,' that extraordinary relief should only be employed where 'there exists a real possibility that injustice will result.' An

application to disqualify an arbitrator during the course of the arbitration must be based on misconduct on the part of the arbitrator. And, while the appearance of bias may suffice, that bias must be clearly apparent based upon established facts, not merely supported by unproved and disputed assertions.”

*Bronx-Lebanon Hosp. Ctr. v Signature Med. Mgmt. Group, L.L.C.*, 6 AD3d 261 (1st Dept 2004).

Morgenstern thoroughly and cogently explained her rationale in issuing an Interim Award, intended as means to remove the main obstacle—“the cell phone incident”—to the parties’ settlement of the arbitration. However well-intentioned, the Interim Award was issued even though respondents had not finished its direct case as to the remaining disciplinary charges, and before the close of the hearing.<sup>1</sup> As indicated in her letter denying the application to remove herself as arbitrator, Morgenstern concluded that the penalty of termination was excessive even before she had heard evidence on the other disciplinary charges. She was apparently indicating that the remaining charges, even if proven, would not persuade her that the penalty of termination was excessive. In prejudging Brown’s termination to be excessive, Morgenstern had the appearance of bias, i.e., that she would be either “deaf to the testimony or blind to the evidence presented.” *Matter of Excelsior 57th Corp. (Kern)*, 218 AD2d 528, 530 (1<sup>st</sup> Dept 1995). Indeed, although couched in terms of an Interim Award, Morgenstern essentially gave a large part of the ultimate relief sought, because the reinstatement of Brown was not on an interim basis, i.e., during the pendency of the arbitration. Thus, the branch of the cross petition to disqualify Morgenstern as arbitrator is granted.

### CONCLUSION

Accordingly, it is hereby

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<sup>1</sup> Insofar as a non-final award may not be confirmed, it is not necessary to determine whether the rules of the New York City Office of Collective Bargaining permitted an arbitrator to issue interim awards.

ADJUDGED that the petition to confirm an interim award dated October 1, 2009 issued by arbitrator Jane Morgenstern in the Matter of the Arbitration between Social Service Employees Union Local 371 and Board of Correction, Case Nos. A-12679-08 and A-12697-08 is denied; and it is further

ADJUDGED that the cross petition is granted, the interim award is vacated, and Jane Morgenstern is disqualified as arbitrator. The parties are directed to agree upon a new arbitrator in accordance with 61 RCNY § 1-06 (e).

Dated: July 19, 2010  
New York, New York

ENTER:   
\_\_\_\_\_  
J.S.C.

**HON. MICHAEL D. STALLMAN**

**UNFILED JUDGMENT**  
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