Matter of Shenendehowa Cent. Sch. Dist. Bd. of Educ. v Civil Serv. Empls. Assoc., Inc., Local 1000, AFSCME, AFL-CIO, Local 864

2010 NY Slip Op 34020(U)

November 8, 2010

Supreme Court, Saratoga County

Docket Number: 20102883

Judge: Thomas D. Nolan, Jr.

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This opinion is uncorrected and not selected for official publication.

ORIGINAL

STATE OF NEW YORK

SUPREME COURT COUNTY OF SARATOGA

In the Matter of the Application of
SHENENDEHOWA CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION,

Petitioner,

DECISION, ORDER AND JUDGMENT
RJI No. 45-1-2010-1246
Index No. 20102883

For an Order and Judgment Vacating the Determination of an Arbitrator Pursuant to CPLR 7511

-against-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, LOCAL 864 AND CYNTHIA DIDOMENICANTOINIO

Respondents.

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SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY
FILED

PRESENT: HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

APPEARANCES: WHITEMAN OSTERMAN & HANNA LLP
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This CPLR Article 75 proceeding arises from an arbitrator's decision setting aside the termination of respondent, Cynthia DiDomenicantonio, a school bus driver for 10 years for petitioner Shenendehowa Central School District (District). Respondent's public employment is

governed by a collective bargaining agreement between respondent Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Local 864 (CSEA) and the District. Respondent is subject to random drug and alcohol screening testing pursuant to the Federal Omnibus Transportation Testing Act of 1991 (49 USC § 31306) and implementing U.S. Department of Transportation regulations (49 C.F.R. parts 40 and 382). On October 21, 2009, her urine tested positive for marijuana.[1] The District placed her on paid administrative leave and on November 10, 2009 terminated her employment. Respondent grieved that determination and filed for arbitration. Following a hearing, the arbitrator determined, although respondent tested positive for marijuana and despite rejecting respondent's claim of improprieties in the testing procedure and discounting respondent's proffered explanations for the positive results,[2] that the penalty of termination was inappropriate, violated the agreement's provision requiring graduated discipline, and directed respondent be reinstated without back pay.

The District seeks to vacate the award pursuant to CPLR 7511 (b) (1) (iii) on the principal assertion that the arbitrator exceeded his authority and rewrote rather than interpreted Section 47 (c) (4) of the CBA by applying a "just cause" standard that would call for progressive discipline before termination.

Respondents oppose and cross-move for judgment confirming the award. They contend that the arbitrator appropriately interpreted section 47 (c) (4) and did not exceed his authority when he vacated the determination and that the award was not irrational or against pubic policy.

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[1]The urine sample was split and, at respondent's request, the second sample was analyzed and also tested positive.

[2]Second hand smoke or her unwitting ingestion of marijuana laced food prepared by her daughter.

[* 3]

It is "the settled law in New York that it is 'not for the courts to interpret the substantive conditions of the collective bargaining agreement or to determine the merits of the dispute' (citations omitted)". Matter of New York City Transit Auth. v Transport Workers Union of America, Local 100, 14 NY3d 119, 124 (2010). Arbitration awards are "afforded judicial deference and will not be disturbed by the court absent those limited circumstances where the award 'is totally violative of a strong public policy, is totally irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power' (citations omitted)". Matter of Local 2841 New York State Law Enforcement Officers Union AFSCME, AFL-CIO [City of Albany], 53 AD3d 974, 975 (3rd Dept 2008). Moreover, courts may not vacate an award when the collective bargaining agreement is "'reasonably susceptible of the construction given it by the arbitrators' (citations omitted)." Matter of Albany County Sheriff's Local 775 [County of Albany], 27 AD3d 979, 980 (3rd Dept 2006).

Article IV Section 47 in pertinent part, provides as follows:

Section 47
Employee Rights

A. The parties subscribe to the concept of progressive discipline, except for the most serious offenses. Any employee subject to disciplinary action shall have the right to union representation. An employee may not be removed from service, or otherwise disciplined, except for acts of incompetency, insubordination or misconduct.

***

C. Discipline

1. Except as set forth in paragraph C(4), below, the first formal disciplinary step shall be a written warning from an employee's supervisor describing the specific deficiencies and the steps necessary to return to a satisfactory level of performance. A copy of the warning shall be placed in the employee's personnel folder.

[* 4]

2. After the employee receives two (2) written warnings during an eighteen (18) month period, the employee may be suspended, without pay, for up to a maximum of three (3) days.
3. Additional written warnings may result in further disciplinary action, including suspension without pay or discharge.
4. Suspension, without pay or discharge may be invoked with less than two (2) written warnings where the employee's conduct creates a danger to the health, safety or welfare of staff, students and/or the general public or creates a danger to property. A positive result in any required drug or alcohol test is considered such a danger to health, safety or welfare of staff and/or the general public or creates a danger to property.
5. Suspension without pay in excess of three (3) days of discharge may be imposed only by the decision of the Assistant Superintendent for Human Resources.

Here, as the District advocates, the construction the arbitrator ascribed to § 47 (C) (4) is simply not reasonable. That section affords the District the power to suspend or terminate an employee whose conduct "creates a danger to the...safety or welfare of...students" and further denominates that a positive drug test is considered such a "danger".

To be sure, the District was not compelled to terminate an employee who failed a drug test but it had the option to do so under § 47 (C) (4). The arbitrator, by ruling to the contrary, "in effect made a new contract for the parties" as opposed to interpreting it, Matter of Albany County Sheriff's Local 775 [County of Albany], supra, and thus clearly exceeded his power.

The petition is granted and that portion of the award dated May 25, 2010 directing reinstatement of Cynthia DiDomenicantonio as a school bus driver is vacated and the award modified to confirm the District's termination of respondent's employment, all without costs.

[* 5]

The cross petition is dismissed, without costs.

This constitutes the decision, order and judgment of the court. The original decision, order and judgment is returned to counsel for the petitioner. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for petitioner is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry, and notice of entry of the decision, order and judgment.

So Ordered and Adjudged.

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SARATOGA COUNTY
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ENTERED

DATED: November 8, 2010
Ballston Spa, New York

HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

ENTERED
Kathleen A. Marchione

Saratoga County Clerk