| **Matter of Jandrew v County of Cortland** |
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| 2010 NY Slip Op 34021(U) |
| February 24, 2010 |
| Supreme Court, Cortland County |
| Docket Number: 2009-0717 |
| Judge: Ferris D. Lebous |
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[*1]

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, 92 Court Street, Binghamton, New York, on the 2nd day of February, 2010.

PRESENT: HON. FERRIS D. LEBOUS
Justice, Supreme Court.

STATE OF NEW YORK
SUPREME COURT : : CORTLAND COUNTY

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IN THE MATTER OF THE PETITION TO CONFIRM AN ARBITRATION AWARD PURSUANT TO ARTICLE 75 OF THE CIVIL PRACTICE LAW AND RULES OF

BRYON JANDREW,

PETITIONER,

-vs-

COUNTY OF CORTLAND, DEPARTMENT OF BUILDINGS & GROUNDS, BRIAN PARKER, COMMISSIONER,

RESPONDENTS.

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DECISION AND ORDER

Index No. 2009-0717
RJI No. 2009-0378

APPEARANCES:

PETITIONER: D. JEFFREY GOSCH, ESQ.
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RESPONDENTS: HOGAN, SARZYNSKI, LYNCH, SUROWKA & DeWIND, LLP
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DECISION AND ORDER
Elizabeth Larkin, County Clerk

**FERRIS D. LEBOUS, J.S.C.**

Petitioner, Bryon Jandrew, filed this Notice of Petition and Petition seeking to confirm an arbitrator's decision dated October 20, 2009 (CPLR § 7511). The Petition seeks an order, consistent with the terms of said decision, restoring petitioner to his job retroactive to October 8, 2008 with full back pay and benefits, plus interest, as well as attorney's fees, costs and disbursements.

Respondents, County of Cortland, Department of Buildings & Grounds, Brian Parker, Commissioner (hereinafter collectively referred to as "the County"), filed an "Answer and Motion to Vacate" with supporting papers seeking to vacate the arbitrator's decision.[1]

## BACKGROUND

On November 29, 1993, petitioner was hired as a Recycling Attendant for Cortland County. During the ensuing years petitioner progressed to the position of Building and Grounds Cleaner, then ultimately to Building Maintenance Worker as of April 16, 2001.

On March 6, 2001, unbeknownst to the County, petitioner pled guilty in Federal Court to a misdemeanor for Misappropriation of Postal Funds.

In September 2005, petitioner applied for a promotion to the position of Building

[1]Respondents failed to file and serve a "Notice of Cross-Motion" as required by CPLR § 2215. The failure to comply with CPLR § 2215 may be a basis, in and of itself, for denial. The court, however, will reach the merits of the issues presented.

Maintenance Mechanic. Petitioner did not disclose his 2001 plea on this job application.

At some point in 2008, petitioner received a summons for failing to wear a seat belt.[2] Petitioner failed to appear in court to answer the summons. On August 31, 2008, the County was notified by the New York State Department of Motor Vehicles of the possible suspension of petitioner's license for his failure to so appear. The County did not, in turn, notify petitioner of this notification.

On October 6, 2008, petitioner's driver's license was suspended and the County received notification thereof. Despite this information, the County permitted petitioner to operate a County vehicle on October 7, 2008.

On October 8, 2008, the County terminated petitioner by way of written memorandum stating, in its entirety, as follows:

> RE: Article 7 - Disciplinary and Discharge
>
> *Pursuant to Article 7 of the Collective Bargaining Agreement*, you are hereby terminated from your employment as Building Maintenance Worker with Cortland County, effective immediately.
>
> On or about September 2, 2008 you failed to answer a summons resulting in the pending suspension of your driver's license on October 6, 2008. On October 7, 2008 the County was notified by the State of New York that you[r] driver's license was indeed suspended due to your failure to answer the summons. A valid driver's license is a term and condition of your employment.

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[2]The court was not provided with the date or other details of the summons.

> By failing to maintain the required driver's license, you have violated the terms and conditions of your employment and can not perform essential functions of the position of Building Maintenance Worker. As of October 6, 2008, you no longer meet the minimum qualifications/special requirements as set forth in the job description of Building Maintenance Worker (attached). You are directed to turn in all County issued property and keys immediately.
>
> You have until noon on October 15, 2008 to providence evidence to refute the suspension of your driver's license. This evidence must show that you satisfied the requirements of the summons prior to the suspension of your driver's license. Only if such evidence is presented, you will be reinstated to your position with no lost time.

(Petition, Exhibit A; emphasis added).

Petitioner filed a grievance dated October 15, 2008 relating to his termination. The County responded to said grievance in a letter dated October 17, 2008 stating:

> [t]his is in response to your grievance filed in my office on October 15, 2008, under Article 7 of the Agreement between Cortland County and CSEA, Local 1000 AFSCME, AFL-CIO.
>
> Your failure to maintain a valid New York State driver's license violates a term and condition of employment and therefore the discharge is warranted. We will not be convening a Level II meeting. The grievance is not applicable and therefore denied.

(Surowka Supporting Affidavit, Exhibit B, p 4).

In November 2008, after his discharge, petitioner reapplied for the position of Building Maintenance Worker. Again, petitioner did not disclose his 2001 plea of guilty on his job application.

On November 19, 2008, the County deemed petitioner disqualified and issued a determination denying petitioner's request for reinstatement finding that "[t]he grievance, in so much as none of the actions of the Department Head or the Personnel Director fall within the terms and conditions of the Collective Bargaining Agreement, is deemed inappropriate and is therefore denied" (Surowka Supporting Affidavit, Exhibit B, p 6).

Petitioner's grievance was submitted to binding arbitration through the Cornell Labor Arbitration & Mediation Services ("Cornell ADR"). The parties selected Sheila Cole as the arbitrator. On January 7, 2009, Cornell ADR sent a Notice of Hearing to the parties advising that the hearing would commence on March 10, 2009. The County did not seek an order to stay the arbitration pursuant to CPLR § 7503.

On March 10, 2009, and continued on July 1, 2009, Arbitrator Sheila Cole conducted a hearing.

On October 20, 2009, Arbitrator Cole rendered her decision finding that: (1) the grievance was arbitrable; (2) petitioner's termination was without cause because the County did not have authority to summarily discharge an employee who fails to meet the minimum qualifications of a position and the County had a long-standing practice of notifying employees that they face possible suspension of their driver's license, but did not notify petitioner; and (3) directed petitioner to be reinstated with full back pay and benefits.

On October 29, 2009, the County advised petitioner's counsel that it was going to appeal the award by seeking to vacate the same and, as such, directed petitioner not to show up for work pending the appeal. The County did not restore petitioner to the payroll or make the payments for back pay and benefits as directed by the Arbitrator. The County never filed an appeal until responding to this Petition.

On December 10, 2009, this Notice of Petition and Petition were filed in the Cortland County Clerk's Office.

On December 31, 2009, the County Legislature, for efficiency and economy reasons, abolished a number of positions effective January 1, 2010, including petitioner's former position.[3]

## DISCUSSION

### I. Arbitrability

In January 2005, the Union and the County entered into a Collective Bargaining Agreement covering January 1, 2005 through December 31, 2009 which, among other things, designates binding arbitration as the final step in the "discipline and discharge" process set forth in Article 7 thereof (Petition, Exhibit B).[4] Notwithstanding this provision, the County now argues that the Union's grievance relating to petitioner's discharge is inappropriate for arbitration

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[3]During oral argument, counsel agreed that the County's elimination of petitioner's former position was not in issue before the court nor, for that matter, the consequences said elimination would have in the event this petition were granted.

[4]The Civil Service Employees, Inc. AFSCME, AFL-CIO, Cortland County Local is the duly recognized collective bargaining agent for petitioner.

as Article 7 of the CBA deals with discharge for disciplinary purposes whereas the finding of ineligibility based upon petitioner's failure to disclose his criminal history on two job applications involves a management right.

In the first instance, the court finds that the County was a willing participant throughout the arbitration process. For instance, after petitioner grieved his termination and the matter was unable to be resolved at the administrative level, the arbitrator was jointly selected by the parties. The County did not seek an order to stay the arbitration pursuant to CPLR § 7503 upon receipt of the Notice of Hearing. Additionally, as noted, the parties agreed that the arbitrator would decide the threshold issue of the arbitrability of the grievance.

Where a party has failed to seek a stay of arbitration and has participated in the arbitration, such participation constitutes a waiver of any argument that the matter is not subject to arbitration (*Matter of Meisels v Uhr*, 79 NY2d 526, 538 [1992]; *Matter of Silverman (Benmor Coats)*, 61 NY2d 299, 307 [1984]; *Rochester City School Dist. v Rochester Teachers Assn.*, 41 NY2d 578, 583 [1977]). Here, the County did not seek a stay of arbitration and fully participated in the arbitration. As such, the court finds that the County is bound by the arbitrator's determination that this matter was arbitrable (*Matter of American Ins. Co. (Messinger–Aetna Cas. & Sur. Co.)*, 43 NY2d 184, 189-190 [1977]).

**II. <u>Public Policy Argument</u>**

Next, the County argues that the Arbitrator's Decision was violative of the strong public

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policy in New York that an employer may establish minimum job qualifications and summarily discharge an employee for failure to satisfy such a requirement. Petitioner argues that a civil service personnel officer's authority is delegable.

It is well-settled that courts may overturn an arbitration award that violates a strong public policy (CPLR § 7511 [b] [1] & [5]). There are very limited grounds for vacating an arbitration award including "[a]n arbitrator, or agency or person making the award *exceeded his power* or so *imperfectly executed* it that a final and definite award upon the subject matter submitted was not made" (CPLR § 7511 [b] [1] [iii]). Additionally, it is an accepted tenet that "[a] court cannot examine the merits of an arbitration award and substitute its judgment for that of an arbitrator simply because it believes its interpretation would be the better one. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice [citations omitted]" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]).

A review of Arbitrator Cole's Decision reveals a detailed and well-reasoned analysis of all the issues presented. In fact, Arbitrator Cole went to great lengths to distinguish the case law relied upon by the County, namely *Matter of Felix v New York City Dept. of Citywide Admin. Servs.*, 3 NY3d 498 (2004), and *Mandlekern v City of Buffalo*, 64 AD2d 279 (4th Dept 1978). Arbitrator Cole deemed the cases distinguishable because the municipalities in those cases, unlike here, relied upon statutes for their authority to summarily discharge an employee.

Arbitrator Cole found that since the County had cited no statutory basis for summarily discharging petitioner, it must rely on Article 7 of the parties' CBA. Additionally, the court notes that to the extent the County argues that the Arbitrator was without authority to disturb the Personnel Officer's determination regarding petitioner's job qualifications, the court finds that a civil service personnel officer's authority is indeed delegable (*Matter of Pishotti v New York State Thruway Auth.*, 38 AD3d 1122 [3rd Dept 2007]). Here, the personnel officer, Annette Barber, was involved in the referral of this matter to arbitration, as well as a witness in the hearing itself. Additionally, the court finds compelling that the County's own termination memorandum specifically referenced Article 7 of the CBA (Petition, Exhibit A). In sum, the court finds that the personnel officer deferred to the grievance and arbitration process.

For the reasons stated, the court finds that the Arbitrator's Decision dated October 20, 2009 is not contrary to public policy and should be confirmed.

Finally, the court finds that petitioner is entitled to an award of interest from the date of the award through tender of payment, together with costs (*Matter of County of Westchester v Doyle*, 43 AD3d 1055 [2nd Dept 2007]; CPLR § 8108).

## CONCLUSION

In view of the foregoing, the court finds that :

1. The Petition seeking to confirm the Arbitrator's Decision dated October 20, 2009, restoring petitioner to his job retroactive to October 8, 2008, with full back pay

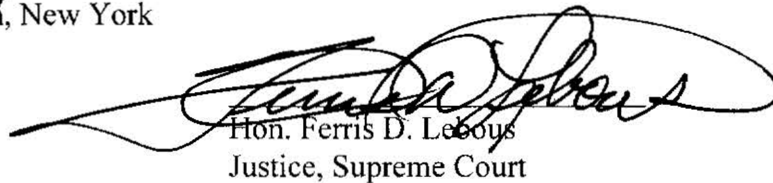
and benefits, plus interest, as well as attorney's fees, costs and disbursements is GRANTED; and

2. The County's cross-motion seeking to vacate the Arbitrator's Decision is DENIED.

This decision constitutes an order of the court. A Judgment should be submitted on notice. The mailing of a copy of this Decision and Order by this court shall not constitute notice of entry.

It is so ordered.

Dated: February 24, 2010
Binghamton, New York



Hon. Ferris D. Lebous
Justice, Supreme Court

ALL PAPERS SUBMITTED IN CONNECTION WITH THIS MOTION HAVE BEEN FILED, ALONG WITH THE ORIGINAL DECISION AND ORDER, WITH THE CORTLAND COUNTY CLERK