

**Beals v New York City Tr.**

2011 NY Slip Op 30281(U)

January 18, 2011

Sup Ct, NY County

Docket Number: 108825/10

Judge: Barbara Jaffe

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

PRESENT: JAFFE  
*Justice*

BARBARA JAFFE  
J.S.C.

PART 5

Index Number : 108825/2010  
BEALS, THOMAS  
vs.  
NEW YORK CITY TRANSIT  
SEQUENCE NUMBER : 001  
VACATE OR MODIFY AWARD  
CAL # 8

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

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

PAPERS NUMBERED  
1, 2  
3, 4  
5, 6

~~notice of motion~~ <sup>Petition</sup> Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits Cross-motion  
Replying Affidavits opp to cross-motion, reply

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION ORDER

**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  
141B).

Dated: 1/18/11  
JAN 18 2011

[Signature]  
BARBARA JAFFE, J.S.C.

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

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 5

-----X  
THOMAS H. BEALS,

Petitioner,

-against-

Index No. 108825/10  
Motion Date: 11/16/10  
Motion Seq. No.: 001  
Calendar No.: 8

**DECISION & JUDGMENT**

NEW YORK CITY TRANSIT,

Defendants.

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BARBARA JAFFE, JSC:

For petitioner:  
Fausto E. Zapata, Jr., Esq.  
Law Offices of Fausta E. Zapata, Jr., P.C.  
277 Broadway, Suite 501  
New York, NY 10007  
212-766-9870

For respondent:  
Baimusa Kamata, Esq.  
Martin B. Schnabel  
New York City Transit Authority  
130 Livingston Street  
Room 1209g  
718-694-3897

**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 141B).*

By notice of petition dated July 1, 2010, petitioner moves pursuant to CPLR 7511 for an order and judgment vacating a decision of an arbitrator dated April 4, 2010 sustaining his termination as a surface line dispatcher (dispatcher) with respondent and denying his grievance on the grounds that the decision violates public policy and is irrational, was rendered in excess of his powers, and constitutes misconduct. Respondent opposes, and by cross-motion dated September 15, 2010, cross-moves to dismiss the petition. For the reasons that follow, the petition is denied and the cross-motion is granted.

I. FACTS

Petitioner had been employed by respondent for over 20 years, and it is undisputed that, before the incidents that prompted investigations of him and his eventual termination, he had received satisfactory performance ratings. However, these investigations reveal, and the

3] arbitrator confirms, a pattern of intolerable and abusive behavior toward petitioner's colleagues and subordinates.

A. Employee history

Respondent is a public benefit corporation, organized and existing under Public Authorities Law § 1201, *et seq.*, providing bus and subway services throughout New York City. (Cross-Motion to Dismiss Petition, dated Sept.15, 2010 [Cross-Motion], Affirmation of Leonard Postiglione, Esq., dated Sept. 15, 2010 [Postiglione Aff.], ¶ 2). It maintains a zero tolerance policy against discrimination and harassment, and reminds its employees by way of frequent letters and postings explaining that it is “committed to maintaining a work environment free from discriminatory and harassing language and activities.” (Cross-Motion, Exh. 2). Unacceptable activities include discriminatory and sexist language, profanity and language meant to demean or embarrass others, and jokes about race, religion, national origin, sexual orientation, gender, and other protected classes. (*Id.*). These communiques expressly warn that such language does not constitute acceptable shop talk. (*Id.*). Respondent has also made it clear to its employees that it does not tolerate any kind of workplace violence, including threats to inflict injury, harassment, and intimidation. (*Id.*).

On November 7, 1998, petitioner commenced his employment as a bus operator and on November 15, 1993, was promoted to dispatcher. (Pet. Mem. of Law in Support of Verified Petition, dated July 2, 2010 [Mem.]). Dispatchers directly supervise respondent's employees and buses. (Cross-Motion, Postiglione Aff., ¶ 4).

Petitioner's employment is governed by a collective bargaining agreement (CBA) between respondent and petitioner's labor organization, effective October 1, 1994. (Postiglione

[\* 4]

Aff., ¶ 7; Pet., Exh. D). Article I, section seven of the CBA provides an exclusive procedure for resolving disputes and disciplinary grievances. (*Id.*) Pursuant to the procedure, an employee aggrieved by a management decision may proceed in two steps whereby the employee, accompanied by a union representative, may be heard by his department head, and if the matter is not satisfactorily resolved, may submit the dispute to respondent's deputy vice-president of labor disputes resolution. (Pet., Exh. D).

Then, if the employee remains dissatisfied with the result, he is entitled to an arbitration before a mutually agreed-upon arbitrator, who must conduct a hearing and render an opinion and award "strictly limited to the interpretation and application" of the agreement. (*Id.*) Where respondent submits a disciplinary grievance seeking dismissal, the two-step procedure supersedes the hearings required by Civil Service Law §§ 75 and 76. (*Id.*) If the grievance is not resolved at the second step, the employee may appeal to the Office of Labor Relations and seek an arbitration hearing, with an arbitrator selected by mutual agreement. (*Id.*) The arbitrator is bound by the Civil Service Law. (*Id.*)

A disciplinary proceeding must be commenced no more than 30 working days after the employee's responsibility center manager or immediate supervisor "has knowledge" of the alleged misconduct, unless the misconduct was the subject of investigation or constitutes a crime. (*Id.*)

Petitioner's history of verbally abusing co-workers and subordinates commenced in March 2009, when he insulted an employee with derogatory comments about his Indian heritage. Then, in April 2009, he made anti-Semitic comments about another employee. (Postligione Aff. ¶ 20; Pet., Exh. L). On May 6, 2009, he angrily threw a radio transmitter at another co-worker,

enraged that he had not complied with petitioner's demand that he carry one. (Pet., Exhs. B, L).

On June 27, 2009, an employee of Yemeni descent called petitioner to find out his assignment for the following day. Petitioner hung up on him after insisting that he was unable to understand him. (Pet., Exhs. B, L). When the employee called back, petitioner angrily responded with obscenities and demeaning exhortations. (Pet., Exhs. L, M). On another occasion, the employee attempted to give petitioner the required information, and petitioner told him, using an obscenity, to go back where he came from. (*Id.*). The employee memorialized the incident on June 29, 2009, in a letter to his general manager mistakenly dated May 29, 2009. (Pet., Exhs. B, N).

B. EEO Investigation

The Yemeni employee's June 29 letter was received by respondent's internal office of equal employment opportunity (EEO) on July 16, 2009, and an investigation was promptly initiated. (Postiglione Aff. ¶¶ 17, 18). The EEO interviewed the employee on July 23 and July 31, 2009, and thereafter interviewed at least nine other colleagues and subordinates, including several who later testified about petitioner's conduct. (*Id.* ¶ 20; Pet., Exh. L). The investigation revealed a pattern of prohibited behavior, including racist comments, racial slurs, and threatening language and actions.

Dispatcher Brian Sohtz, interviewed on August 5, 2009, told the EEO that in March 2009, petitioner slammed his dispatcher's window on an employee of Indian descent, after pretending to speak on the telephone to his management, saying "send me someone who speaks English." (Pet., Exh. L). Sohtz also said that in July 2009, petitioner blamed him for the EEO investigation. (*Id.*).

[\*6]

A bus operator, interviewed on August 6, 2009, told the EEO that on May 6, 2009, he saw petitioner throw a radio transmitter at another employee. (*Id.*).

Dispatcher Leticia Gomez-Scott, interviewed on August 7, 2009, told the EEO that following an argument with petitioner, she found four obscenities apparently written by petitioner in dust on her car, which was parked next to the dispatcher's office where petitioner was on duty. (*Id.*).

Employees reported to the EEO of instances where petitioner made a variety of derogatory ethnic remarks, inappropriately addressed employees with offensive and juvenile references to their ethnicity, and routinely slammed his dispatcher's window on bus operators. One of the 10 interviewed employees did not recall petitioner uttering any racial or ethnic slurs. (*Id.*).

On July 27, 2009, petitioner denied having made the comments to the Yemeni employee or having thrown a radio. (*Id.*).

Although petitioner alleges that he sought treatment from the employee assistance program for alcoholism on August 17, 2009, there is no reference to it in the EEO report or in any subsequent findings. (Pet., Exh. A; Affidavit of Thomas H. Beals, dated July 2, 2010 [Beals Affid.]).

EEO issued a report on August 24, 2009, finding that the evidence strongly supports the version of the June 27, 2009 incident as related by the Yemeni employee, and recommending corrective action. (Postiglioine Aff. ¶ 21, Exh. L).

#### C. SIR investigation

On August 14, 2009, respondent's Special Investigation and Review Unit (SIR), which

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investigates violations of respondent's policies, rules, and regulations, received an e-mail from assistant general manager Louis Derrico, informing of the EEO investigation and the incidents and allegations revealed therein. (Cross-Motion, Exh. 9; Postiglione Aff. ¶¶ 24-25;). Derrico also informed SIR that petitioner had been doing "strange" things, such as moving the dispatcher lockers, painting windows in the locker rooms, tampering with equipment and destroying documents. (*Id.*).

In a letter dated August 7, 2009, general superintendent Anthony Zanatta relates that on August 6, 2009, a brick was thrown at his house. (Cross-Motion, Exh. 10; Postiglione Aff. ¶ 26). SIR also received a written statement from dispatcher Michael Savarese, describing an incident occurring in August 2009 where petitioner threatened to smash Sohtz's car windows and slash his tires, stating that he knew where Sohtz lived and would find anybody else's residence who might be responsible for his termination or demotion. (*Id.*). And in a written statement dated August 14, 2009, Savarese referenced documents he believes were destroyed by petitioner. (*Id.*).

Petitioner initially denied having threatened to damage Sohtz's car, although he subsequently acknowledged that it was possible and that he did not mean it. (Pet. Exh. M; Postiglione Aff. ¶ 27). He acknowledged painting the lunch room windows, taping over a slot through which bus operators slid their trip sheets to force them to submit them directly to him, disconnecting the road control computer, and discarding chairs. (*Id.*).

SIR's investigation resulted in its September 21, 2009 determination that petitioner, out of anger about his EEO investigation, threatened to vandalize Sohtz's car in retaliation, and that petitioner's other admitted acts of vandalism were also inappropriate. However, there was insufficient evidence upon which to find that petitioner had thrown a brick at Zanatta's house.

SIR recommended that respondent “take appropriate action with respect to” petitioner. (*Id.*).

D. The two hearings

On August 31, 2009, respondents issued disciplinary action notice (DAN) #09-3722-0219, containing the following charges:

Spec 1: Using profane, disrespectful statements to a Yemeni employee on June 27, 2009.

Spec 2: As found by the EEO, routinely using racial and ethnic slurs and profanity over an extended period of time, creating an “unacceptable hostile workplace.”

Spec 3: Threatening an employee by making hand gestures as though he was going to strike her, repeatedly slamming the crew office’s windows on bus operators, and angrily throwing a radio at an employee.

(Cross-Motion, Exh. 11[D]).

On September 24, 2009, respondent initiated DAN #09-3722-0247 against petitioner, seeking his dismissal, charging hostile and threatening behavior, gross misconduct and/or conduct unbecoming a transit employee that is a serious detriment to the operation and service of responden, in the form of two charges:

Spec 1: In August 2009, making threatening comments to Sohtz that he would break the windows and slash the tires of his car, in retaliation for Sohtz’s cooperation with the EEO’s investigation.

Spec 2: Between July 23, 2009, and August 31, 2009, damaging respondent’s equipment and interfering with its business without authorization.

(Cross-Motion, Exh. 11[D]).

All of these charges were sustained following a Step I hearing on September 24, 2009 and dismissal was recommended. (Postiglione Aff. ¶ 29). On the advice of his counsel, petitioner did not testify at his Step II hearing, and the charges and penalty were again sustained. (*Id.*).

### E. The arbitration hearing

Petitioner appealed to the Tripartite Arbitration Board, and an arbitrator was selected. (Pet. Exh. B; Postiglione Aff. ¶ 31). Both parties were represented by counsel, and hearings were conducted on October 23, and December 16, 2009 and February 11, 2010 on the DAN charges. (*Id.*).

Eight witnesses testified to petitioner's use of racial and ethnic slurs, menacing behavior, and threatening statements. (Pet., Exh. B). Petitioner was provided with a full and fair opportunity to cross-examine each. (*Id.*). Petitioner and colleague David Morales testified as to his alcoholism and treatment which respondent alleges was sought by petitioner only after he was charged with misconduct. (Beals Affid. ¶¶ 59-65; Pet., Exh. P at 8). Petitioner sought to have other employees testify on his behalf, but the parties stipulated that if called, they would all testify that petitioner never used profanity, that other employees used profanity, that he always treated others with respect, and that the uncalled witnesses comprise an ethnically diverse group. (Pet., Exh. B).

Petitioner argued that no action could be taken against him, because the DANs were issued more than 30 days from knowledge of the incidents, in violation of the CBA. (*Id.*).

In an opinion dated April 4, 2010, the arbitrator addressed petitioner's objection that pursuant to the requirements of the CBA, disciplinary actions must be brought within 30 days after a supervisor learns of the misconduct. (*Id.*). First, he credited the Yemeni employee's explanation that the actual date of his letter was June 29, 2009, and that the May 29, 2009 date was a typographical error. (*Id.*). The complaint was forwarded to the EEO on July 16, which issued a report on August 24, 2009. (*Id.*). The arbitrator explained how each of the specifications

were timely although he apparently and inadvertently reversed the specifications of the first and second DANs.

The arbitrator also credited the Yemeni employee's testimony that petitioner racially taunted him, and disregarded petitioner's assertion that many others used the same language. He thus confirmed specification one of DAN # 09-3722-0219. (*Id.*)

The arbitrator also confirmed specification two, crediting the testimony of three witnesses that petitioner used racist language routinely, pervasively, and over a long period of time, often at subordinates, and rejected petitioner's defense that it constituted harmless "shop-talk." (*Id.*)

Two of the three allegations in specification three were confirmed. (*Id.*) The arbitrator credited testimony that on several occasions, petitioner made threatening physical gestures to a female employee, and found that she, a subordinate, had not reported the harassment out of fear of losing her job. (*Id.*) He also credited testimony that petitioner threw a radio at an employee, and did not credit petitioner's testimony, given his previous denial of the incident and subsequent acknowledgment of it at the hearing. The allegation that petitioner had slammed his window on bus operators was rejected by the arbitrator. (*Id.*)

As to DAN # 0247, the arbitrator credited the witnesses' testimony, as well as the SIR report, that petitioner threatened to break the windows and slash the tires of Sohtz's car, and threatened him. (*Id.*) Petitioner's testimony, that he was referring to his wife's car and not Sohtz's was discredited. (*Id.*) The second specification, alleging instances of vandalism and tampering with respondent's equipment was dismissed. (*Id.*)

Based on the confirmed specifications, the arbitrator confirmed the penalty of dismissal, noting that the breadth of petitioner's misconduct was "startling," that petitioner was not

credible, and that he was unwilling to assume responsibility for his actions. (*Id.*).

## II. CONTENTIONS

Petitioner argues that the decision of the arbitrator must be vacated due to the arbitrator's misconduct. (Mem.). The misconduct alleged is the arbitrator's refusal to enforce subpoenas, thereby proceeding without testimony from investigators who drafted the reports, from employees who made statements in the reports, and from those who would have testified on his behalf. This evidence was critical, petitioner argues, because it is relevant to the 30-working-day requirement, and could have established that the investigations were unfairly conducted. Thus, petitioner alleges that he was deprived of due process. (*Id.*).

Petitioner also maintains that the arbitrator's award was irrational, violates public policy, and exceeded the arbitrator's authority, because the arbitrator disregarded the requirement that disciplinary actions be brought within 30 working days of knowledge of the conduct giving rise to the action, and that it violates public policy because the arbitrator ignored petitioner's defense based on his alcoholism and depression and that he was enrolled in a rehabilitation program, thereby violating New York State Human Rights Law. (*Id.*).

Respondent argues that the arbitrator's decision is entitled to deference, and that petitioner suffered no prejudice as a result of the arbitrator's decision not to compel testimony from additional employees, as the witnesses fully testified as to the charges in the DANs, and additional testimony would have been either duplicative or irrelevant. (Memorandum of Law in Support of Respondent's Cross-Motion to Dismiss the Petition, dated Sept. 15, 2010 [Resp. Mem.]). In any event, respondent maintains that petitioner waived his right to object by acquiescing in the hearing. (*Id.*).

According to respondent, the 30-working-day period does not commence or is tolled where the alleged misconduct is the subject of an ongoing investigation, and petitioner does not allege that he was discriminated against based on his disabilities, having enrolled in treatment after having been confronted by the EEO about his misconduct, and that he was terminated for his misconduct and not because of his disability or respondent's alleged failure to accommodate it. (*Id.*).

### III. ANALYSIS

#### A. Article 75

The exclusive grounds for vacating an arbitration decision are set forth in CPLR 7511, which require that the party seeking to vacate the decision was prejudiced, and include misconduct, bias, excess of the arbitrator's authority, and "failure to follow the procedure" of Article 75, "unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection." The scope of judicial review of an arbitration proceeding is extremely limited. (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471 [2006], *cert denied* 548 US 940; *Matter of Campbell v New York City Tr. Auth.*, 32 AD3d 350 [1<sup>st</sup> Dept 2006]). The court must defer to the arbitrator's decision (*Matter of New York City Tr. Auth. v Transp. Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332 [2005]), and is bound by the arbitrator's factual findings and interpretations of the agreement at issue (*Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368 [1<sup>st</sup> Dept 2004]). It may not "examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one." (*Matter of New York State Correctional Officers and Police Benev. Assn. v State of New York*, 94 NY2d 321 [1999]).

The arbitrator determines admissibility of evidence and testimony, and even where the decision conflicts with procedural requirements, a petitioner must “prove by clear and convincing evidence . . . that doing so constituted misconduct,” and that the alleged error was prejudicial. (*In the Matter of GEICO General Ins. Co. v Sherman*, 307 AD2d 967, 968 [2d Dept 2003]).

B. Was petitioner prejudiced by the arbitrator’s failure to apply the 30-working-day requirement?

Although not addressed by the parties, the arbitrator apparently and inadvertently reversed the specifications and applied incorrect DAN dates to each. Petitioner was charged with the three specifications in DAN # 0219 on August 31, 2009, and the two specifications of DAN # 0247 on September 24, 2009. (Pet., Exh. B). Although he erred when he considered the 30-working-day requirement, the error does not warrant relief. (*In the Matter of New York State Correctional Officers and Police Benvolent Assoc., Inc. v State of New York*, 726 NY2d 321 [1999] [in interpreting a collective bargaining agreement “a court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one”]; *see also Barbalious v Exterior Wall Systems, Inc.*, 14 AD3d 508 [2d Dept 2005] [“provision requiring submission of claims. . . within 21 days, although termed a condition precedent, is a matter of contract interpretation for the arbitrator to resolve”]; *In the Matter of the Arbitration Between Calvin Klein, Inc. v G.P. Winter Assocs., Inc.*, 204 AD2d 149 [1<sup>st</sup> Dept 1999] [issue of failure to file within 21 days as required by agreement is related to contract performance, and therefore issues for arbitrator]). There is no discernible prejudice.

The arbitrator correctly noted that this 30-working-day requirement does not apply where the alleged misconduct was the subject of a continuing investigation or when the misconduct

would constitute a crime if tried in a court of law. The EEO received the letter from the Yemeni employee on July 16, and issued a report on August 24. The arbitrator permissibly credited respondent's contention that it first learned of the specifications in DAN # 09-3722-0219 when it received the EEO report, and thus none of them was issued more than 30 working days thereafter. Likewise, although the record does not precisely establish whether DAN # 09-3722-0247 was issued within 30 working days of petitioner's threats to Sohtz, the arbitrator did not dispute respondent's contention that its responsibility center first learned of the misconduct on August 14, 2009, and that the SIR report was issued on September 21, 2009. Thus, the arbitrator's finding that the DAN was issued within 30 working days of respondent's knowledge cannot be challenged and in any event, it was the subject of an investigation. The allegations set forth in specification two were dismissed and are thus irrelevant.

C. Was petitioner prejudiced by the arbitrator's failure to produce witnesses?

Although an aggrieved party may not challenge an arbitration decision after submitting to the arbitration without objection (*Matter of Commerce and Industry Ins. Co. v Nester*, 90 NY2d 255 [1997]), or raise objections to it after failing to do so at the hearing (*Matter of J.P. Stevens & Co., Inc. and Rytex Corp.*, 34 NY2d 123 [1974]), here, the arbitrator indicated that he considered petitioner's request to compel the production of witnesses and it is undisputed that petitioner objected to the introduction of evidence.

However, an award may not be vacated for failure to enforce subpoenas. (*Asiatic Petroleum v Corp. v New England Petroleum Corp.*, 65 AD2d 708 [1<sup>st</sup> Dept 1978], *lv denied*, 47 NY2d 705 [1979]). Although petitioner was entitled to issue subpoenas (CPLR 7505), the admissibility of evidence is within the arbitrator's exclusive province. (*See Matter of Sobel and*

*Charles Schwab & Co., Inc.*, 37 AD3d 877, 878 [3d Dept 2007] [arbitrator refused to admit evidence]; *GEICO General Ins. Co.*, 307 AD2d at 968 [arbitrator's decision to allow testimony of witnesses, although procedurally incorrect, not reviewable]).

The arbitrator's decision was based on the testimony of numerous witnesses who were either victims of or witnesses to petitioner's abusive and improper conduct, and they were available for cross-examination. Testimony of those contributing or drafting reports, even if successfully challenged, has no bearing on the arbitrator's discretion to base his decision on a proven pattern of prohibited conduct. Although the arbitrator considered that many employees would have testified favorably for petitioner, he acted within his discretion in holding that the evidence as a whole was sufficient to warrant dismissal. Therefore, even if the arbitrator's decisions on evidence were wrong, petitioner has not shown by clear and convincing evidence that he has been prejudiced. (*GEICO*, 307 AD2d at 969 [any error in admitting testimony harmless, non-prejudicial]; see also *Matter of Thompson*, 245 AD2d 911, 913 [3d Dept 1997] [arbitrator based decision on evidence "not beyond the bounds of rationality," relevant issues addressed at hearing]).

D. Was petitioner prejudiced by the arbitrator's failure to recognize his disability discrimination defense?

Alcoholism qualifies as a mental disability, and those who suffer from it are protected under the New York State Human Rights Law (NYSHRL). (Executive Law § 292[21][a]; *McEniry v Landi*, 84 NY2d 554, 558-559 [1<sup>st</sup> Dept 1999]). An employee may not be terminated "solely because of . . . alcohol-related chronic absenteeism," so long as he is recovering at the time of termination and is capable of performing his job satisfactorily. (*McEniry*, 84 NY2d at 559-560). However, an employee may not seek the "safe haven" of a recovery program as a

“pretext for avoiding otherwise legitimate disciplinary action” (*id.* at 561), and he is not thereby immunized against legitimate non-discriminatory legal action (*Riddick v City of New York*, 4 AD3d 242, 245 [1<sup>st</sup> Dept 2004]).

No evidence was presented that respondent was aware of petitioner’s problems with alcohol and depression before it recommended dismissal, and consequently, the arbitrator did not commit misconduct by rejecting petitioner’s argument that he was terminated due to his disability. (*See In re Flores v Doherty*, 71 AD3d 405, 406 [1<sup>st</sup> Dept 2010] [petitioner failed to establish that respondent was aware of substance abuse prior to termination]). The arbitrator was also entitled to find that there was no causal connection between petitioner’s alcoholism and his misconduct. (*Cf McEniry*, 84 NY2d 554 [absences solely related to alcoholism]), and that the decision to terminate petitioner was based on a long record of egregious misconduct that violated respondent’s policies, which conduct may not be tolerated or accommodated (*see Flores*, 71 AD3d at 406 [terminated for time and leave violations, not substance abuse]; *Riddick*, 4 AD3d at 246 [terminated for “violent, assaultive behavior,” not alcoholism]; *Hagmaeir v Bratton*, 245 AD2d 147 [1<sup>st</sup> Dept 1997] [police officer who twice slid down hotel banister nude and discharged fire extinguisher in hotel without cause, was fired for misconduct, not alcoholism]).

Moreover, although the arbitrator heard and considered petitioner’s argument that he had entered a treatment program, he was entitled to find that petitioner sought rehabilitation in response to the disciplinary action, and that he had not established that he is capable of performing without further incident. (*Compare Riddick*, 4 AD3d at 246 [petitioner failed to establish rehabilitation at time of termination], *with McEniry*, 84 NY2d at 559 [petitioner established that he had been rehabilitated and was capable of performing satisfactorily]).

That the arbitrator did not discuss these issues in his opinion is immaterial absent any dispute that petitioner presented evidence of his alcoholism and treatment. The arbitrator, having heard the evidence presented to him, was not obliged to acknowledge explicitly every argument. (*Wabst v Scoppetta*, 56 AD3d 399 [1<sup>st</sup> Dept 2008] [arbitrator not required to address all of petitioner's defenses]; *In the Application of Solow Building Company, LLC v Morgan Guaranty Trust Co. of New York*, 6 AD3d 356 [1<sup>st</sup> Dept 2004], *lv denied*, 3 NY3d 605, *cert denied*, 543 US 1148 [2005] [because arbitrators not obligated to give reasons, decision cannot be attacked on basis of evidence it "failed to appreciate"]; *cf Matter of the Arbitration between Kowaleski and New York State Dept. of Correctional Svcs.*, \_\_ NY2d \_\_, 2010 NY Slip Op 09379 [2010] [arbitrator exceeded authority by refusing to hear retaliation defense altogether on incorrect basis that he lacked authority to consider it]).

#### IV. CONCLUSION

Having failed to show that the arbitrator acted in any manner that was not within his discretion, or that he was prejudiced by any of the arbitrator's omissions, petitioner has not demonstrated that the award confirming his termination was irrational or that it violated public policy, or that the arbitrator exceeded his authority. Accordingly, it is hereby


ADJUDGED and ORDERED, that the petition for an order vacating the award is denied; it is further

ADJUDGED and ORDERED, that respondent's cross-motion for an order dismissing the petition is granted and the proceeding is dismissed, with costs and disbursements to respondent; and it is further

ADJUDGED and ORDERED, that respondent, having an address at 130 Livingston

Street, Brooklyn, NY, 11201, do recover from petitioner, costs and disbursements in the amount of \$ \_\_\_\_\_, as taxed by the Clerk, and that respondent have execution therefor.

This constitutes the decision and order of the court.

  
Barbara Jaffe, JSC

**BARBARA JAFFE**  
J.S.C.

DATED: January 18, 2011  
New York, New York

**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 1218).