

**Matter of City of New York v D'Onofrio**

2011 NY Slip Op 30941(U)

April 4, 2011

Supreme Court, New York County

Docket Number: 402501/10

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN  
J.S.C.

PART 52

Index Number : 402501/2010  
CITY OF NEW YORK  
VS.  
D'ONOFRIO, ROBERT J.  
SEQUENCE NUMBER : 001  
VACATE OR MODIFY AWARD

INDEX NO. 402501/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

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

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

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

**FILED**

APR 05 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/4/11

CK  
CYNTHIA S. KERN J.S.C.  
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 52

-----X  
In the Matter of the Application of

THE CITY OF NEW YORK, MICHAEL R. BLOOMBERG as MAYOR OF THE CITY OF NEW YORK, THE NEW YORK CITY OFFICE OF LABOR RELATIONS, JAMES F. HANLEY as COMMISSIONER OF THE NEW YORK CITY OFFICE OF LABOR RELATIONS, THE NEW YORK CITY POLICE DEPARTMENT, AND RAYMOND W. KELLY as COMMISSIONER OF THE NEW YORK CITY POLICE DEPARTMENT,

Petitioners,

Index No. 402501/10

-against-

**JUDGMENT/ORDER**

ROBERT J. D'ONOFRIO, THE OFFICE OF COLLECTIVE BARGAINING OF THE CITY OF NEW YORK AND MARLENE GOLD AS CHAIR OF THE OFFICE OF COLLECTIVE BARGAINING OF THE CITY OF NEW YORK

**FILED**

**APR 05 2011**

Respondents.

**NEW YORK  
COUNTY CLERK'S OFFICE**

For a Judgment and Order Pursuant to Article 75 of the Civil Practice Law and Rules.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>          </u>
Affirmations in Opposition to the Cross-Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

In this Article 75 proceeding, the City of New York (the "City"), Michael R. Bloomberg as Mayor of the City of New York, the New York City Office of Labor Relations, James F. Hanley as Commissioner of the New York City Office of Labor Relations, the New York City Police Department ("NYPD") and Raymond W. Kelly as Commissioner of the NYPD (collectively the "petitioners") seek to vacate the November 28, 2008 Opinion and June 4, 2010 Award of Joan Ilvicky, ("Arbitrator Ilvicky" or "Arbitrator") in the matter of the arbitration between the Office of Collective Bargaining of the City of New York and The New York City Police Department v. Robert J. D'Onofrio, Case Nos. A-11162-05 and A-11-999-06. This court denies the petitioners' request for the reasons set forth below.

The relevant facts are as follows. On February 3, 1997, NYPD hired Robert D'Onofrio ("D'Onofrio") as a general supervisory building maintainer. On May 18, 1998, D'Onofrio changed positions within NYPD and became a steamfitter in the NYPD's Building Maintenance Section. D'Onofrio was terminated from his position as a steamfitter on November 7, 2005. Beginning in December 2002, NYPD charged D'Onofrio for multiple incidents allegedly requiring disciplinary action. These charges included allegations of incidents where D'Onofrio failed to perform assigned duties, screamed loudly at a supervisor, lost his NYPD beeper and master keys, arrived at work fifteen minutes late, failed to appear at a department meeting and drove the wrong way on a one-way street. In total, D'Onofrio was presented with six separate sets of disciplinary charges (dated March 26, 2003, July 14, 2003, July 20, 2004, January 24, 2005, March 24, 2005 and April 29, 2005) for alleged infractions spanning the years 2002 to 2005. The NYPD's Office of Labor Relations ("OLR") held two disciplinary conferences to address these charges, the first, Case No. A-11620-5 to address the first two sets of charges and

the second, Case No. A-11999-06 to address the remaining four sets of charges. OLR sustained all specifications in all six sets of charges. OLR initially assessed two 30-day suspension as a penalty for the first two sets of charges then ultimately terminated plaintiff's employment effective November 7, 2005 as a penalty for the remaining four sets of charges. After exhausting the internal grievance process for the two disciplinary hearings, D'Onofrio submitted requests to arbitrate the findings of both hearings. D'Onofrio also submitted for early retirement from NYPD upon being terminated from his position because he thought it would serve to preserve his health insurance benefits.

D'Onofrio's two requests for arbitration were granted and the parties were ordered to proceed to arbitration. The parties agreed to consolidate all issues in Case Nos. A-1162-05 and A-11999-06 to be heard by Arbitrator Ilvicky. The parties agreed to bifurcate the hearings where the Arbitrator would limit her rulings in the first hearing to the rendering of an Opinion determining the guilt or innocence of D'Onofrio and a second hearing to be held at a later date to determine the Award after the Opinion had been rendered. The parties stipulated that the issues to be determined by the Arbitrator were limited to: (1) whether NYPD committed a wrongful disciplinary action when its November 1, 2004 Step II decision suspended D'Onofrio for a thirty-day period. If so, what shall be the remedy? (2) whether NYPD committed a wrongful disciplinary action when it suspended D'Onofrio, on July 16, 2004, for sleeping during the course of his assignment on July 15, 2004, for a thirty-day period? (3) whether NYPD committed a wrongful disciplinary action when it terminated D'Onofrio on November 7, 2005? If so, what shall be the remedy?

Fifteen days of hearings were held between June 25, 2007 and February 8, 2008 to determine the initial issue of D'Onofrio's guilt or innocence. Arbitrator Ilvicky found D'Onofrio

guilty of just one specification of driving an NYPD vehicle the wrong way on a one way street and determined that this infraction did not merit two 30-day suspensions and termination. Following Arbitrator Ilvicky's initial determination, three additional days of hearings were held between July 10 and October 27, 2009 to determine remedies. After these hearings, Arbitrator Ilvicky determined that a verbal reprimand for driving the wrong way on a one way street was sufficient, that the two 30-day suspensions and subsequent termination were unwarranted and that D'Onofrio was entitled to a make-whole remedy in the form of having all charges of which D'Onofrio was found innocent expunged and removed from his personnel record, monetary relief for lost wages and benefits, including missed opportunities such as overtime and leave time, rescission of his retirement and his reinstatement as a steamfitter with seniority and benefits unimpaired. On September 8, 2010, petitioner commenced the instant petition seeking to vacate Arbitrator Ilvicky's award on the basis that she exceeded her powers, was biased, committed misconduct and produced an irrational decision.

CPLR Article 75 provides that an arbitrator's award may only be vacated on a showing of 'misconduct, bias, excess of power or procedural defects.'" *Lackow v. Dept. of Education of the City of New York*, 51 A.D.3d 563, 567 (1<sup>st</sup> Dept 2008). However, where arbitration is mandated by law, as here, "judicial scrutiny is stricter than that for a determination rendered where the parties have submitted to voluntary arbitration. The determination must be in accord with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR Article 78. The party challenging an arbitration determination has the burden of showing its invalidity." *Lackow*, 51 A.D.3d at 567-568 (internal citations omitted).

In the instant action, the court will not vacate Arbitrator Ilvicky's Award as petitioner has failed to provide evidence demonstrating that the Arbitrator's ruling was tainted by misconduct, bias, excess of power or procedural defects or that the decision was arbitrary or capricious or given without regard to facts. To the contrary, the record demonstrates that Arbitrator Ilvicky's decision was rational and supported by adequate evidence. In her decision, Arbitrator Ilvicky addressed each of the specifications and the testimonial evidence she considered in coming to her determination as well as the positions of the parties.

The court rejects petitioners' arguments that the Arbitrator's decision was tainted by misconduct and bias and that she exceeded her scope of authority. Petitioners' assertion that the Arbitrator committed misconduct in that she failed to sustain or dismiss all of the specifications is incorrect. Although the Arbitrator does not specifically state after addressing each charge whether she sustains or dismisses that charge, she states at the end of her discussion that she dismissed all specified charges with the exception of the specified charge for driving the wrong way on a one-way street and that her determination was based on the evidence presented by the parties. Further, petitioners' assertion that the Arbitrator was biased in making her determination is without merit. Although the Arbitrator did make extraneous comments about her theory and views of the dispute, those comments were mere dicta as the determinations she made with regard to each of the specifications were based on the evidence presented by the parties during the hearings. Moreover, the arbitrator is not barred from exploring the parties' motives. In addition, the court finds that the Arbitrator did not act outside her scope of authority in directing that D'Onofrio's retirement be rescinded as reinstating D'Onofrio to his former position, which petitioners are empowered to do, would serve to rescind D'Onofrio's retirement. Finally, petitioners' argument that D'Onofrio and his counsel procured the Award through fraud, or

misconduct is also not persuasive. Petitioner argues that D'Onofrio made misleading representations about his overtime income by submitting a pay stub which showed atypically high wages. However, this issue is irrelevant because the Arbitrator did not rely on this particular pay stub in assessing her Award.

Petitioners have also failed to demonstrate that the Arbitrator's award was arbitrary or capricious or that it was not based in reason. As discussed more fully above, the Arbitrator made her determination that D'Onofrio was guilty of just one charge of driving the wrong way on a one way street on the evidence presented by the parties. Therefore, the Arbitrator's decision to reinstate D'Onofrio to his position and grant monetary relief for lost wages and benefits in order to "make whole" D'Onofrio's position based on her finding that he was guilty of only one minor infraction is based in reason.

Accordingly, this court denies petitioner's request for relief under Article 75 of the CPLR and dismisses the proceeding in its entirety. This constitutes the decision, order and judgment of the court.

Dated: 4/4/11

Enter: CK  
J.S.C.

**FILED**

**CYNTHIA S. KERN**  
J.S.C.

**APR 05 2011**

NEW YORK  
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