SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application of NASSAU COMMUNITY COLLEGE,

Petitioner,

For an Order, Pursuant to Article 75 of the Civil Practice Law and Rules, Vacating an Arbitration Award

-against-

CHARLES LOIACONO, as President of the ADJUNCT FACULTY ASSOCIATION OF NASSAU COMMUNITY COLLEGE; and the ADJUNCT FACULTY ASSOCIATION OF NASSAU COMMUNITY COLLEGE,

Respondents.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 1928/11
Motion Seq. Nos.: 01 & 02

DECISION AND ORDER

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In motion sequence number one, the attorneys for the petitioner Nassau Community College move for an order pursuant to Article 75 of the CPLR vacating the award of the Grievance Board in the arbitration proceedings between the petitioner Nassau Community College and the respondent Charles Loiacono, as President of the Adjunct Faculty Association of Nassau Community College, and the Adjunct Faculty Association of Nassau Community College on the ground that the award is contrary to public policy and the Grievance Board acted in excess of its authority. In motion sequence number two, the attorneys for the respondents cross-move for an order pursuant to Article 75 of the CPLR confirming the award.

Petitioner Nassau Community College (the College) is a community college sponsored by

Nassau County and is part of the State University of New York. The respondent Adjunct Faculty Association of Nassau Community College (the Union) is an unincorporated association and is the certified collective bargaining representative of the part-time adjunct faculty of the College. The respondent Charles Loiacono is President of the Adjunct Faculty Association. The College and the Union were the parties to a collective bargaining agreement for the period of October 1, 2005 through September 30, 2010. The grievance procedure set forth in the parties' collective bargaining agreement provides for the adjudication of unresolved grievances by a three-member Grievance Board (the Board) comprised of one member designated by the College Administration, one member designated by the Adjunct Faculty Association and a third member selected by mutual consent of the parties from a list of New York State Public Employment Relations Board Arbitrators.

Hearings in the subject arbitration were held on April 6, 2010, May 7, 2010 and June 9, 2010, before the Board. All parties had the opportunity to present evidence and arguments in support of their respective positions. The Chairperson of the Board delivered the award of the Board on November 10, 2010 in favor of the Union. The award included a dissenting opinion of the College's representative on the Board. The decision of the Board could be appealed by either party to the County Executive of Nassau County. Pursuant to Section 23.2(e) of the parties' collective bargaining agreement, the failure of the County Executive to act within fifteen (15) days of his receipt of the Board's award renders the Board award final. The petitioner appealed the initial award to the County Executive on or about November 16, 2010. The County Executive failed to act within the prescribed fifteen (15) day period. The award of the Board became final on or about December 2, 2010 and the College's application is timely made.

The Grievance Board had jurisdiction to hear and determine all issues before it. There was no

argument at the arbitration hearing on the College's position that the Board did not have jurisdiction, due to, questions of substantive arbitrability, or regarding the propriety of possible deferral to PERB. Subsequently, the College expressly waived its procedural arguments: ". . . the College's brief does not address the questions of substantive arbitrability or deferral to PERB which were raised by the College during the April 6, 2010 grievance hearing. The College withdraws the above arguments and is arguing the WRITE grievances solely on the merits." (July 15, 2010 letter from Mr. John H. Gross to the Step III Grievance Board, accompanying the College's post hearing brief of the same date.)

The award addressed a dispute under the parties collective bargaining agreement (CBA). The respondent grieved the petitioner's practice of administering the WRITE course, a remedial preparation course for entering freshman, outside the parameters of the parties CBA, selecting whomever it wanted to teach the WRITE course and paying those individuals, at rates not in conformity with the CBA. WRITE is an intensive, one week long course, offered in the months of January, June, July and early August preceding the College's regular academic calendar to accommodate incoming students. The WRITE course is a one week test preparation course with 13 hours of instructional time over four days, and including 1.5 hours devoted to the final placement essay. The WRITE course is open only to invited students who received a 3 or 3.5 score (6 maximum) on the initial English placement essay. The English placement essay determines whether the student can proceed directly to English 101 (which carries academic credit and counts toward a degree) or whether the student must first take English 001, (a remedial, no-credit [but credit valued] course taught over one semester) a mandatory course in order to qualify to subsequently take English 101. Somewhat more than 10% of the invited students (approximately 350 of 3,000 scoring a 3 or 3.5) affirmatively respond to the invitation. In short, by passing the WRITE course, the student does not have to spend a semester in a no-credit

remedial course, but goes right into English 101.

The College operated 174 English 101 sections and 98 English 001 sections, in the fall semester of 2009, and 24 sections of WRITE during the summer session. Petitioner contends that students needing remedial English – to learn those skills that should have been taught, and acquired, in primary school – "is growing." Petitioner asserts that if left unremedied, students needing remediation could otherwise inexorably rise to as much as 85% of the student population.

The issue before the Grievance Board was whether the instruction of the WRITE program course were solely for adjunct assignment subject to the CBA terms and conditions. Article 14 of the parties' CBA agreement provides:

> All course offerings at Nassau Community College, except those run under the community service budget and apart from those which constitute full time faculty programs in the fall and spring semesters, are to be designated for adjunct assignment and assigned in compliance with this agreement. (Notice of Petition, Exhibit 1, Article 14, p. 21)

The Grievance Board made the following determination:

> We find that the WRITE courses are Article 14 courses for adjunct assignment. We find, correspondingly, that the WRITE courses are not within the narrow exception of courses run under the community service budget and apart from those which constitute full time faculty programs in the fall and spring semesters.
>
> We find that WRITE courses are exclusively bargaining unit work and are most properly taught in the English Department – as had historically been the case.
>
> The WRITE course is not, by any stretch of imagination, "run under the community service budget." The latter course stand independent from academic degree requirements.
>
> Of course, taken to a semantic, hyperbolic, rhetorical extreme, every course in every institute of higher education could be considered in the service of the community. Labor contracts, however, are grounded in the

> real world, not in abstractions and hypotheticals ad nauseam without any coherent nexus to the daily world of work. The College essentially admitted that it unilaterally situated the WRITE course in what had formerly been classified as "Continuing Education".
>
> The WRITE course would have no meaning or purpose – no raison d'etre – if it purportedly stood independent and apart from other Article 14 courses. The WRITE course has only one purpose – to serve as a viable stepping stone to facilitate student progression in the College's degree programs. WRITE is a propaedeutic, a prolegomenon, to the next rung on the academic ladder – it is nothing more, and nothing less. The students taking the WRITE course are those who wish to, or who have, matriculated at the College. By its own "goals" document regarding continuing education, the College summarizes, accurately and aptly: "Continuing Education is designed for students who do not wish to accumulate credit toward a final degree." These, manifestly, as a matter of fact are not the WRITE students.
>
> The inherent contractual protection of bargaining unit work does not have meaning and influence only when bargaining unit is lost through, for example, outsourcing and subcontracting in their myriad forms, or when bargaining unit employees lose their employment as a consequence thereof. Rather, contrary to the College's position, Section 14 of the labor contract operates to protect bargaining unit work in good, expansionary times as well; as the volume and quantity of bargaining unit work increases, the enhanced employment opportunities naturally flow to the benefit of the bargaining unit members. Thus, the College's assertion – that no bargaining unit member has been adversely affected through any loss of employment opportunities as a result of the College's unilateral action, and that, *ipso facto*, there is no evidence of any harm to any bargaining unit member – cannot be well taken.

It is well settled that arbitrators are accorded broad discretion in determining matters pursuant to agreement among the parties (*see Matter of Sprinzen* [*Nomberg*], 46 NY2d 623 [1979]). The resulting award, therefore, may not be set aside unless, insofar as is relevant, it is violative of a strong public policy (*see Matter of Town of Callicoon*, 70 NY2d 907 [1987]). The Court of Appeals has repeatedly cautioned that the public policy exception is narrow (*see Matter of Professional, Clerical, Technical Employees Ass'n* [*Buffalo Bd. of Educ.*], 90 NY2d 364 [1997]) and the courts must exercise restraint in

this area (*see Matter of Sprinzen* [*Nomberg*], *supra* at 630). "[T]he preservation of the arbitration process and the policy of allowing parties to choose a nonjudicial forum, embedded in freedom to contract principles, must not be disturbed by courts, acting under the guise of public policy, wishing to decide the dispute on its merits." (*Id.* at 630). A court may vacate an arbitral award where "strong and well-defined policy considerations embodied in constitutional, statutory or common law prohibit certain relief from being granted by an arbitrator" (*Matter of New York State Correctional Officers and Police Benev. Ass'n, Inc. v State of New York*, 94 NY2d 321 [1999]). The court cannot vacate an arbitration award on public policy grounds when vague or attenuated considerations of a general public interest are at stake *(see Matter of New York State Correctional Officers and Police Benev. Ass'n, Inc. v State of New York*, *supra* at 327). Courts are to direct the focus of their inquiry to the result, that is, the award itself (*see id.; International Broth. of Elec. Workers, Local 97 v Niagra Mohawk Power Corp.*, 143 F3d 704, 416 [2d Cir.1998]). Specifically, the court "must be able to examine [the] arbitration award on its face, without engaging in extended fact finding or legal analysis, and conclude that public policy precludes its enforcement" (*Matter of Sprinzen* [*Nomberg*], *supra* at 631; *see Matter of New York State Nurses Ass'n* [*Mount Sinai Hosp.*], 275 AD2d 538 [3d Dept 2000]; *Matter of Troy Police Benev. and Protective Ass'n* [*City of Troy*], 271 AD2d 926 [3d Dept 2000]).

The petitioner argues that the arbitration award should be vacated because it violates public policy and the Grievance Board exceeded its authority. More specifically, petitioner asserts the award violates public education policy interfering with the College's non-delegable duty to serve the needs of its students, the College's non-delegable duty to maintain academic standards in the classroom, and the College's non-delegable duty to create new programs and organize the College in violation of Education Law § 6303(1) and (3) and Part 601.2 of the Regulations of the State University of New

York.

There is nothing in the award that would require the College to offer WRITE as a full-semester program rather than the five day crash course preceding the semester thereby infringing on the College's authority to establish academic programs. Adjunct courses assigned pursuant to the CBA are offered on many different schedules and over different periods of time. Adjunct courses run from one contact hour to ten contact hours. Mini-semester courses are all offered on an intensive schedule over a three-week period in January. Other remedial courses, like the WRITE course at issue here, are sometimes offered by the petitioner as an intensive one week class and represent one or one and one-half contact hours. Many physical education courses are offered over half a semester. Some courses, in the Sciences, Business, Hospitality and Marketing are taught intensively over a period of between two days and three weeks. For example, one course entitled HTL 177, is a fifteen classroom hour, one contact hour course, and has been taught in various configurations between two and five days. Therefore, there is no impediment in either the award or the CBA to the petitioner offering the WRITE course over the same four or five day period during which it has been offered in the past. The award only affects the manner in which the WRITE instructors will be assigned and what they will be paid, not when, how, or whether the course is taught.

The College now argues that the award leaves it with only two costly alternatives; transferring the program to the English Department, or to cease operating the program altogether. Dr. Cathy E. Fagan, the English Writing Placement Committee Coordinator who originated the program and who wrote the textbook and curriculum for WRITE, testified as follows regarding the cost of the WRITE program to the College:

"I think because it's not a part of the college curriculum, because it's

completely voluntary, because having it in Lifelong Learning means that it's available to students at a low cost, it made sense to have it there.

Mr. Loiacono: If we put aside for the moment the cost–

The Witness: Well, that's a very important thing because students who are coming to this college very often are hard pressed financially. And the difference between paying $75 for a brush-up course and paying for three credits in a noncredit course – for a three-credit cost in a course where it doesn't generate credits is significant.

Mr. Loiacono: Would you say that's the major motivation for doing it?

The Witness: No, I wouldn't say it's major. They want to get into a credit-bearing course. They don't want to sit in a course where they are stigmatized because they know that it's a remedial course.

Mr. Loiacono: If it were done at the college – I think you did testify last time that this course is taught by English professors –

The Witness: Yes.
Mr. Loiacono: – full time and adjunct.

The Witness: Mostly adjunct, yes.

Mr. Lioacono: Okay. If the adjunct faculty were to say, "We will teach that course free; it will be *pro bono*," would that remove the major motivation for having it in Continuing Ed? Could it then be part of the college?

The Witness: Not really, because having it in Lifelong Learning means that Lifelong Learning takes care of all the ancillary aspects of this program. They register the students, they set up the rooms. They keep the attendance, they do all of it.

Moreover, by letter dated June 15, 2011 without conceding the WRITE course constitutes bargaining unit work, the College advised the Union that it intended to offer the WRITE course during the summer of 2011, with sections assigned and paid in accordance with the Adjunct Faculty Association CBA. In doing so, the respondent argues that the College acknowledges there is no merit

to its public policy concerns.

The same students will be served whether the course is assigned pursuant to the CBA, or as it has been assigned in the past. The award has no impact on academic standards. Section 10/1 of the CBA expressly provides that "[t]he College has the unilateral right to set, and reset, the academic qualifications necessary to teach a course." The petitioner (not the AFA) determines which faculty members are qualified to teach a course and only those persons can teach it. The award does not interfere with the College's ability to create programs such as WRITE, but rather upholds the College's contractual obligation to assign teachers and instructors pursuant to the CBA. *See Trudeau v South Colonie Cent. School Dist.*, 73 NY2d 736 (1988). The award does not require the College to hire or select a non-qualified candidate for a teaching position in the WRITE course (*see United Federation of Teachers Local 2 Bd. of Educ.*, 1 NY3d 72 [2003]) but only that the assignment and payment of instructors conform to the CBA. Other than bald conclusory allegations by the petitioner, there is no indication that the award compels the College to make the academic interests of the students subservient to the rights of the adjuncts.

The College's arguments constitute nothing more than vague consideration of a general public interest that are not sufficient to support vacatur of an arbitration award based on public policy. The arbitrator's decision was consistent with the overwhelming weight of decisional authority. *See Meehan v Nassau Community Coll.*, 243 AD2d 12 (2d Dept 1998); *Meehan v Nassau Community Coll.*, 251 AD2d 415 (2d Dept 1998); *Meehan v Nassau Community Coll.*, 251 AD2d 416, 417 (2d Dept 1998); *Meehan v Nassau Community Coll.*, 242 AD2d 155, 159 (2d Dept 1998).

The petition to vacate the award is ***dismissed***. The cross-petition to confirm the award is ***granted***. It is hereby

ORDERED, that all proceedings under index no. 1928/2011 are terminated.

This constitutes the Decision and Order of the Court.

DATED: September 21, 2011
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.
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