SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application of the
BOARD OF EDUCATION OF THE MINEOLA UNION FREE SCHOOL DISTRICT,

Petitioner,

For an Order and Judgment pursuant to Article 75 of the CPLR staying arbitration of a certain controversy,

-against-

MINEOLA TEACHERS ASSOCIATION,

Respondent.

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SCAN

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 7359/11
Motion Seq. Nos.: 01 & 02

DECISION AND ORDER

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In motion sequence number one, the petitioner Board of Education of the Mineola Union Free School District (School District) moves for an order pursuant to CPLR §7503(b) to permanently stay arbitration in the matter.

In motion sequence number two, respondent Mineola Teachers Association (MTA) moves to compel arbitration.

BACKGROUND

In this proceeding, petitioner School District seeks to stay arbitration demanded by respondent MTA on or about April 28, 2011 in connection with a grievance arising from the School District's denial of the right of a union member to utilize paid leave for purposes of religious observance in violation of Article XXV, §§ 25.01 and 25.02 of the parties' collective bargaining agreement covering

the period July 1, 2007 to June 30, 2011 which governs the terms and conditions of employment of union members.

The religious observance clause (Article XXV, §§ 25.01 and 25.02 collectively) provides, in pertinent part, that:

> § 25.01 "Teachers will be entitled to full salary for non-attendance in the amounts for, and resulting from causes listed below.
>
> * * *
>
> § 25.01(d) Absence for not more than five single days in any school year for observance of religious holidays will be allowed. Religious holidays as herein used will be those established by the Commissioner of Education as days for religious observance on which pupils may be excused upon the written request of the parent or guardian."

§§ 25.02(a) and 25.02(b) which govern personal illness days, provide unit members with 15 personal illness days annually and allow unit members to accumulate any unused days to a maximum of two hundred days.

Although the Commissioner of Education no longer establishes, by rule or regulation, the particular days on which pupils may be excused from attendance for religious observance at the request of a parent, the language of the religious observance clause has not been amended. Currently 8 NYCRR 109.2(a) of the Commissioner's Regulations, provides that:

> "[a]bsence of a pupil from school during school hours for religious observance and education . . . will be excused upon the request in writing signed by the parent or guardian of the pupil."

Notwithstanding this change, the School District continued to permit union members who requested time off for religious observance to utilize the contractually provided five days of paid religious observance leave until the practice was terminated by the School District upon advice of counsel in or

about October 2010. By letter dated October 20, 2010, counsel for the School District advised the MTA that the religious observance clause contained in the collective bargaining is violative of the Establishment Clause in that it provides a monetary benefit (paid leave) to those employees who claim to be religiously observant while failing to provide a similar benefit to those who are not. Further, the School District opined that providing paid leave to employees without charging any of their accrued leave acts to discriminate against those individuals who are not religiously observant.

By email dated October 25, 2010, the School District notified all employees that "it is impermissible for the District to grant any leave for religious observance pursuant to the unlawful contract provisions" contained within the collective bargaining agreement. The School District noted, however, that it recognized its obligation to provide reasonable accommodation for religious observance on an individual basis.

In response, on November 17, 2010, the president of the MTA filed a grievance claiming that the School District's position *vis-a-vis* religious observance leave set forth in the e-mail was violative of Article XXV of the collective bargaining agreement. The grievance was denied by the Superintendent of the School District by memorandum dated November 17, 2010 based on the grounds that the religious observance clause is unlawful. After a hearing conducted by the School District on January 20, 2011, at which the decision was reviewed, the MTA was advised by the President of the Board of Education, in a letter dated March 29, 2011, that the grievance was denied. On April 28, 2011, the MTA served a Demand for Arbitration based on the School District's alleged violation of the leave provisions of the collective bargaining agreement.

The School District's instant application seeks to permanently stay arbitration of its refusal to allow MTA members to have days off for religious observance without charge to leave credits predicated on the grounds that arbitration is precluded on public policy grounds where, as here, the

arbitration award would violate well defined constitutional, statutory or common law. *Matter of Mineola Union Free School District v Mineola Teachers Ass'n*, 37 AD3d 605, 606 [2d Dept 2007]. In this regard, the School District contends that the contract language of Article XXV creates the impermissible impression that the School District favors certain religions over others in violation of the Establishment Clause pursuant to which neither the state nor federal government may influence a person's religious affiliations nor punish an individual for his or her religious beliefs or non-beliefs. *Eberson v Board of Ed. of Ewing Tp.*, 330 U.S. 1, 8 [1947]. Moreover, the School District argues that, inasmuch as paid religious observance leave is violative of the Establishment Clause of the United States Constitution, it is a prohibited subject of collective bargaining.

The provision, at issue in this matter, both as it exists and is practiced, is not subject to arbitration.

ANALYSIS

As a general matter, any subject with respect to the terms and conditions of employment in controversy between a board of education and its teachers may be a subject of a collective bargaining agreement under Civil Service Law § 204[1] [the Taylor Law] and of consequent arbitration under a broad arbitration clause. *Matter of Union Free Dist. #15, Town of Hempstead v Lawrence Teachers Ass'n*, 33 AD3d 808 [2d Dept 2006]. As a general rule, public policy favors arbitral resolution of public sector labor disputes. *City of Long Beach v Civil Service Employees Ass'n, Inc.*, 8 NY3d 465, 470 [2007]. Thus, a dispute between a school district and a teacher's union relative to a collective

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[1] § 204. Recognition and certification of employee organization
1. Public employers are hereby empowered to recognize employee organizations for the purpose of negotiating collectively in the determination of, and administration of grievances arising under, the terms and conditions of employment of their public employees as provided in this article, and to negotiate and enter into written agreements with such employee organizations in determining such terms and conditions of employment.

bargaining agreement can be subject to arbitration. The court's role in reviewing an application to stay arbitration is a limited one. *Matter of Union-Endicott Cent. School Dist.* (*Union Endicott Maintenance Workers' Ass'n*), 85 AD3d 1432, 1433 [3rd Dept 2011]. The threshold determination with respect to whether a dispute is arbitratable involves a two-part test enunciated by the Court of Appeals in *Matter of Acting Supt. of Schools of Liverpool Cent. School Dist.* (*United Liverpool Faculty Ass'n*) 42 NY2d 509, 513 [1977].

The first inquiry is whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance. *Matter of City of Johnstown* (*Johnstown Police Benevolent Ass'n*), 99 NY2d 273, 278 [2002]. This is a very narrow exception to arbitrability, however, which applies only where strong and well defined policy considerations, embodied in constitutional statutory or common law, prohibit a particular matter from being decided or certain relief being granted by an arbitrator. *Matter of City of New York v Uniformed Fire Officers Ass'n*, 95 NY2d 273, 286 [2000]. If no prohibition exists in this regard, the second inquiry is whether the parties, in fact, agreed to arbitrate the particular dispute by examining their collective bargaining agreement. If there is a prohibition, the inquiry ends and an arbitrator cannot act.

The court will not consider whether the claim sought to be arbitrated is tenable or otherwise pass upon the merits of the dispute. *Matter of Board of Educ. of Watertown City School Dist.* (*Watertown Educ. Ass'n*), 93 NY2d 132, 142 [1999].

A dispute is not arbitratable if the court can conclude, without engaging in extended fact finding or legal analysis, that a law prohibits in an absolute sense the particular matter to be decided by arbitration. *Mineola Union Free School Dist. v Mineola Teachers' Ass'n, supra.* A dispute is not arbitrable when the subject matter of the dispute violates a statute, decisional law or public policy.

Matter of Patrolmen's Benevolent Assn. of City of New York v New York State Public Employment Relations Bd., 6 NY3d 563, 573 [2006].

As stated by the Court of Appeals in *Matter* of *Griffin v Coughlin*, 88 NY2d 674, 686 [1996], the Establishment Clause is violated by any governmental action, whether subtle or overt, which coerces, pressures or influences a person's choices regarding religious belief or practice.

Notwithstanding the practice adopted by the School District of permitting all MTA members who request paid leave, premised on a sincerely held religious belief, to utilize the contractually provided five days of paid religious observance leave, the provision contained within the collective bargaining agreement herein provides that the Commissioner of Education designates the specific religious holidays for which paid leave might be permitted. As stated by the court in *Matter of Port Washington Union Free School Dist. v Port Washington Teachers Ass'n*, 268 AD2d 523, 524 [2d Dept 2000], *appeal dismissed* 95 NY2d 790 [2000], *lv den.* 95 NY2d 761 [2000], the religious observance clause similar to that contained in the collective bargaining agreement at issue herein, as well as the practice developed thereunder, rewards those members of the MTA who claim to be religiously observant with more paid days off than those members who are not observant. As such, it is violative of the Establishment Clause of the First Amendment of the United States Constitution which requires strict governmental neutrality with respect to religion.

To withstand an Establishment Clause attack, a state action must have a secular legislative purpose, a primary effect that neither advances nor inhibits religion and must not foster an excessive government entanglement with religion. *Lemon v Kurtzman*, 403 U.S. 602, 612-613 [1971].

While the court in *Matter of Maine-Endwell Teachers' Ass'n v Board of Educ. of Maine-Endwell Cent. School Dist.*, 3 AD3d 685, 686 [3rd Dept. 2004] (citations omitted) declined to follow

Port Washington, in so doing it distinguished the religious observance clause at issue in *Port Washington* from that in its own case by pointing out that the Port Washington religious observance clause "went beyond reasonable accommodation and instead rose to a level of '[g]overnment pressure to participate in a religious activity [,] . . . an obvious indication that the government [was] endorsing or promoting religion.' "

Given that a trial court must follow appellate division precedent in its own department (*Brown v Village of Albion*, 128 Misc2d 586, 588 [N.Y.Sup. May 29, 1985]), the arbitration sought herein must be stayed and MTA's motion to compel arbitration is, therefore, ***denied***. MTA's reliance on *Maine-Endwell Teachers Ass'n* is unavailing under the circumstances extant. As such, it is hereby

ORDERED, that the District's application is granted in its entirety and the Arbitration matter is permanently **STAYED**.

This constitutes the Decision and Order of the Court.

DATED: October 7, 2011
Mineola, N.Y. 11501

ENTER:

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

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ENTERED
OCT 17 2011
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