Matter of Captain's Endowment Assoc. of the City of N.Y. v City of New York
2014 NY Slip Op 30729(U)
March 20, 2014
Sup Ct, New York County
Docket Number: 651428/13
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

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In the Matter of the Application of

CAPTAINS' ENDOWMENT ASSOCIATION OF THE CITY OF NEW YORK,

Petitioner,

DECISION/ORDER
Index No. 651428/13
Seq. No. 001

-against-

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, THE OFFICE OF COLLECTIVE BARGAINING OF THE CITY OF NEW YORK and MARLENE A. GOLD as CHAIR OF THE OFFICE OF COLLECTIVE BARGAINING OF THE CITY OF NEW YORK,

Respondents..

For a Judgment and Order Pursuant to Article 75 of the CPLR Vacating an Arbitration Award.

---X

KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THESE MOTIONS:

PAPERS	NUMBERED
Seq. No. 001	
NOTICE OF PETITION AND PETITION...	1, 2 (Exs. A-L)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED...........	....
NOTICE OF CROSS-MOTION..	...........3............
REPLYING AFFIDAVITS..	....
EXHIBITS..	....
OTHER...............((Memoranda of Law)	.........4,5,6........

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE PETITION IS AS FOLLOWS:

Petitioner Captains' Endowment Association of the City of New York ("CEA") moves,

pursuant to CPLR Article 75, for a judgment vacating a March 20, 2013 Opinion and Award of Arbitrator Mark Grossman in the *Matter Between Captains' Endowment Association and City of New York and the New York City Police Department*, Case No. A-13541-10, and directing respondents The City of New York ("the City"), New York City Police Department ("the NYPD"), The Office of Collective Bargaining of the City of New York, and Marlene A. Gold as Chair of the Office of Collective Bargaining of the City of New York to issue a lump sum payment to Deputy Chief Jay I. Kopstein ("Kopstein") for his unused compensatory time and annual and terminal leave. The respondents cross-move to dismiss the petition for failure to state a cause of action. For the reasons set forth below, the petitioner's motion is **denied** and the respondents' cross-motion is **granted.**

Factual and Procedural Background:

Deputy Chief Jay I. Kopstein became a member of the NYPD in 1973. Pursuant to New York City Administrative Code § 14-124, Kopstein was required to retire when he reached age 63 on March 18, 2010.

On June 18, 2009, the Police Pension Fund notified Kopstein that he had to take all vacation, accrued time, and terminal leave before his retirement. Ex. "A".[1] NYPD Patrol Guide § 205-42 also advised that:

> uniformed members of the [NYPD] are required, by law, to retire no later than midnight of the eve of their 63rd birthdate" and that "the member concerned MUST apply for and take all leave, including vacation and terminal leave, PRIOR TO THAT DATE." Any leave NOT TAKEN prior to the member's 63rd birthdate WILL BE FORFEITED; the member will receive NO COMPENSATION WHATSOEVER for time so forfeited. (*emphasis in original*). *See* Ex. "L".

[1]All references are to the exhibits annexed to the petition.

Kopstein retired from the NYPD on March 18, 2010 upon reaching the age of 63. Ex "K", at 2. As of that time, he had accrued 29 days of annual leave, 1851 hours of compensatory time, and 3 months and 21 days of terminal leave. Ex. "K", at 2. Upon retiring, Kopstein requested a lump sum cash payment equaling the balance of unused leave he had accumulated. Ex. "K", at 2.

On June 2, 2010, the petitioner, Kopstein's union, filed a grievance on his behalf seeking the lump-sum payment of his accumulated leave time. Exs. "G" and Ex. "K", at p. 1. This request was denied by a June 7, 2010 letter by John Beirne, Deputy Commissioner of Labor Relations for the NYPD . Ex. "G". The petitioner then appealed to the Commissioner of the NYPD on June 14, 2010 and the appeal was denied. Ex. "H".

On July 21, 2010, the petitioner submitted a Request For Arbitration ("RFA") to the City's Office of Collective Bargaining ("OCB"). Ex. "I". The RFA was submitted with a waiver, signed by Kopstein and petitioner CEA's President, Roy Richter, stating that, pursuant to New York City Administrative Code § 12-312(d) and § 1-06(b) of the Rules of the OCB, Kopstein and the CEA:

> waive[d] the right, if any, to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award. Ex. "I"

A collective bargaining agreement ("CBA") entered into between the Commissioner of Labor Relations, on behalf of the City, and the petitioner in March of 2009 provided, inter alia, that arbitration between the parties "shall be limited to the interpretation of the [CBA]" or other rule applicable to a grievance, and that "[a]n arbitrator's award shall be final and binding and enforceable in any appropriate tribunal in accord with [CPLR Article 75]." Ex. "F", at p. 25.

Arbitration hearings were conducted before Arbitrator Mark Grossman on April 1, 2011 and February 3, 2012, at which time the arbitrator heard the testimony of Kopstein, Beirne, and Richter

Exs. "J" and "K". At the hearings, the parties were represented by counsel and had the opportunity to submit evidence. "Exs. "J" and "K". In a stipulation of facts submitted in connection with the arbitration, the parties agreed, inter alia, that "no retiring member of the [CEA], or any of the other uniformed unions, has ever received a lump-sum payment of accrued leave balances or terminal leave." Ex. K, at 2. The issue to be determined at the arbitration was "whether or not [Kopstein] had the right to receive a lump sum payment for unused leave (annual leave and terminal leave) upon his retirement." Ex. "K", at 2.

The Arbitrator's Award

In a 22-page award dated March 20, 2013, Arbitrator Grossman concluded that "[the City] and the NYPD did not violate the collective bargaining agreement, or other law, when it failed to pay Deputy Chief Kopstein a lump sum payout on any remaining accrued annual leave, compensatory time, or terminal leave, upon reaching age sixty-three." In rendering his award, the arbitrator analyzed, inter alia, Article XIV, section 9 of the CBA. That section of the CBA provides, in pertinent part, that

> Where an employee has an entitlement to accrued annual leave and/or compensatory time, and the City's fiscal condition requires employees who are terminated, laid off, or who choose to retire in lieu of layoff to be removed from the payroll on or before a specific date, or where an employee reaches the mandatory retirement age, [the City] shall provide the monetary value of accumulated and unused annual leave and/or compensatory time allowances standing to the employee's credit in a lump sum. Such payments shall be in accordance with the provisions of Executive Order 30, dated June 24, 1975.
>
> Where an employee has an entitlement to terminal leave and the City's fiscal situation requires that employees who are terminated, laid off, or who choose to retire in lieu of layoff to be removed from the payroll on or before a

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> specific date, or where an employee reaches the mandatory retirement age, [the City] shall provide a lump sum payment for terminal leave in accordance with the provisions of Executive Order 31, dated June 24, 1975.

Ex. "F", at 18-19.

Executive Order No. 30 provided, inter alia:

> Whereas, Certain employees and officers of [the City] have unused accrued annual leave and/or compensatory time; and
> Whereas, [t]he economic situation of the City requires that there be a reduction in the workforce of the City; and
> Whereas, [t]he laws governing retirements require that certain employees be retired upon reaching age 65 except where extensions are granted... ; and
> Whereas, [s]ome employees and officers will be unable to use their accrued annual leave and compensatory time by the date required;
> ...it is hereby ordered that:
>
> Section 1. Employees and officers with unused creditable annual leave and/or compensatory time allowances standing to their credit consistent with existing rules, regulations and/or orders governing them, who retire due to reduction of staff or due to reaching the mandatory retirement age and not being granted extension for economic reasons may be paid the monetary value of accumulated and unused annual leave and/or compensatory time allowances standing to their credit. Ex. "E".

Section 1 of Executive Order No. 31 providesd, inter alia, that:

> Monetary lump sum payments for terminal leave granted prior to final separation or retirement for employees and officers of [the City] who are unable to use all or part of such leave prior to termination, lay-off or retirement from City service due to economic reasons are hereby authorized for those employees and officers who are entitled to such leave by the rules, regulations and/or orders governing them. Ex. "G".

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The arbitrator reasoned that, although Article XIV, section 9 of the CBA provides for the a lump sum payment of accrued benefits "where an employee reaches the mandatory retirement age", this language cannot be read without considering Executive Order 30 (addressing accrued annual leave and/or compensatory time) and 31 (addressing terminal leave), which are incorporated into the CBA by reference. With respect to Executive Order 30, the arbitrator determined that:

> In its "Whereas" clauses, Executive Order No. 30 refers to employees who are affected by a reduction in the workforce and who are unable to use their accrued leave and compensatory time prior to being removed from active employment. The last "Whereas" clause suggests that the Order only applies [to] employees who are unable to use their accrued annual leave and compensatory time. Then, the Order goes on to provide that these employees, as well as employees reaching mandatory retirement age, "may" be paid a monetary value for their leave balance. However, the Order goes on to limit the payment to employees who are not granted [an] extension for economic reasons. This does not appear to include [Kopstein's] situation. Ex. "K", at 18.

The arbitrator further stated that:

> Executive Order No. 30 seems intended to apply to an employee who is unable to take leave. It does, however, specifically mention an employee required to retire. It is clear that an employee who is required to retire due to reaching the mandatory retirement age has plenty of notice [of his impending retirement date] and nothing prevents him/her from taking leave in the form of paid time off while still on the payroll prior to retirement. Ex. "K", at 18.

The arbitrator further determined that, since Executive Order 31 "did not have similar

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language ... applying to employees who have reached a mandatory retirement age", it did not support the petitioner's claim that Kopstein was entitled to a payout for terminal leave unused as of the date he reached mandatory retirement age. Ex. "K", at 18.

Since the arbitrator found that Article XIV, Section 9 "has some ambiguity" since it appeared to conflict with Executive Order No. 30 (Ex. "K", at 19), he referred to the past practice of the parties in order to interpret the CBA. In doing so, he considered the parties' stipulation that "every single bargaining unit employee forced to retire due to reaching a stated mandatory age ha[s] been required [to] take his/her leave prior to going off the payroll." Ex. "K", at 20. He also stated that "Section 9 has been applied in a consistent manner to require employees to use their leave prior to mandatory retirement, or forfeit it." Ex. "K", at 20. The parties' practice, noted the arbitrator, was "consistent with the Patrol Guide" which, since "at least 1981", has "advise[d] all uniformed members of the [NYPD] that they will lose any leave not taken when they go off the active payroll and begin retirement." Ex. "K", at 20. Based on the foregoing, the arbitrator concluded that, "[b]ased on the clear, continuous, and long-term practice of the parties, [he determined that Kopstein] had to use his leave prior to commencing his retirement and had no right to a lump sum in lieu of using the leave." Ex. "K", at 20.

As a final point, the arbitrator noted that Kopstein did not use his leave balance prior to retirement because he thought that the law regarding mandatory retirement might change and he did not want to return to the NYPD after an extended leave because he might be subject to derision by his co-workers. However, noted the arbitrator, Kopstein admitted that he knew that the NYPD "would deem his leave balances forfeited if he did not take the leave prior to retiring" and "his speculation about the possibility of a change in the law [did] not provide him [with] a basis for being treated differently than all other bargaining unit members." Ex. "K", at 21.

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After the issuance of the award, petitioner filed the instant petition seeking to vacate the award pursuant to CPLR Article 75 and the respondents cross-moved to dismiss the petition.

Positions of the Parties:

The petitioner argues that the award must be vacated as completely irrational because the arbitrator relied on the parties' past practice in determining that Kopstein was not entitled to a lump sum payout despite the fact that the CBA unambiguously entitled him to the same. The petitioner further asserts that the award was irrational and that the arbitrator exceeded his power by improperly re-writing Article XIV, Section 9 of the CBA. The petitioner also maintains that the award violated public policy because it resulted in the unjust enrichment of the City and the NYPD.

In opposition to the petitioner's motion and in support of its cross-motion to dismiss the petition, the respondents assert that the petition fails to state a cause of action and must be dismissed. The respondents also argue that the award should not be vacated since it was not the product of corruption, fraud or misconduct, it was not irrational or violative of public policy, and because the arbitrator did not exceed the scope of his powers. The respondents maintain that the arbitrator did not re-write the terms of the CBA and that, according to Executive Orders Nos. 30 and 31, Kopstein was only entitled to a lump sum payment under the CBA if "[t]he economic situation of the City requires that there be a reduction in the workforce of the City."

In its reply memorandum of law in opposition to the respondents' cross-motion to dismiss and in further support of its motion to vacate, the petitioner again asserts that the arbitrator "irrationally nullified and re-wrote" Article XIV, Section 9 of the CBA "by relying on the past practice of the parties." The respondents further contend that the respondents mischaracterized the arbitrator's findings by stating that an employee is entitled to a lump sum payout only when the City

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is having a fiscal crisis.

Conclusions of Law:

As a matter of procedure, the motion to vacate the award must be denied and the cross-motion dismissing the petition granted. As noted above, the petitioner annexed to its RFA a waiver, pursuant to Administrative Code of the City of New York § 12-312(d) and § 1-06(b) of the rules of the City's OCB, of "the right, if any, to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award. Ex. "I". Here, since the petitioner seeks to vacate, and not enforce, the arbitrator's award, the waiver prohibits the petitioner from seeking the relief demanded in its petition. *See, Matter of Roberts v Bloomberg*, 83 AD3d 457 (1st Dept 2011). In *Roberts*, the Appellate Division, First Department held that a waiver, executed by the petitioners in connection with an arbitration and containing unambiguous language identical to that in the waiver executed by the petitioner and Kopstein, barred the petitioners from commencing an Article 78 proceeding against the respondents with whom they had agreed to arbitrate.

In addition to the waiver, Article XVIII, Section 9 of the CBA provided that "[a]n arbitrator's award shall be final and binding and enforceable in any appropriate tribunal in accord with [CPLR Article 75]." Ex. "F", at p. 25. This, too, bars the petitioner from seeking to vacate the award.

In any event, even if this Court were to consider the merits of the parties' arguments, the petitioner's motion would be denied and the respondents' cross-motion granted. In reviewing an arbitration award, the court is bound by the arbitrator's findings of fact and interpretation of the agreement in question. *See United Fed'n of Teachers, Local 2 v Bd. of Educ.*, 1 NY3d 72, 83 (2003). This court cannot examine the merits of the award or substitute its own judgment for that of the

arbitrator based on a belief that its own interpretation would be more appropriate. *New York State Correctional Officers and Police Benevolent Ass'n. v State*, 94 NY2d 321, 326 (1999). Rather, this Court must give deference to the arbitrator's decision. *See New York City Transit Auth. v Transport Workers' Union of Am., Local 100*, 6 NY3d 332, 336 (2005). Even in cases where an arbitrator made an error of fact or law, this Court cannot tailor the award to reflect its own sense of justice. *See Correctional Officers, supra* at 326; *Transit Auth., supra* at 336.

An arbitration award may be vacated only upon three narrow grounds: 1) it violates a strong public policy; 2) it is irrational; or 3) it clearly exceeds a specific enumerated limitation on the arbitrator's power. *United Fed'n of Teachers, supra* at 79; *Transit Auth., supra* at 336; *Correctional Officers, supra*, at 326.

While it is true that an arbitrator will be deemed to have exceeded his powers where he irrationally construes an agreement to the point that his construction effectively creates a new agreement between the parties (*see Eighty Eight Bleecker Co., LLC v 88 Bleecker Street Owners, Inc.*, 51 AD3d 507, 507-08 [1st Dept 2008]), this did not occur here. Contrary to the petitioners' contention, the arbitrator explained his interpretation of the CBA in a meticulously detailed and well-reasoned award. The arbitrator stated that, although Article XIV, section 9 of the CBA provides for the a lump sum payment of accrued benefits "where an employee reaches the mandatory retirement age", this language must be read in conjunction with Executive Order 30, which is incorporated into the CBA by reference. Executive Order No. 30, ruled the arbitrator, "limits the [payment of a lump sum] to employees who are not granted [an] extension for economic reasons...[which] does not appear to include [Kopstein's] situation." Ex. "K", at 18. This finding is reasonable since there is no indication that Kopstein was refused an extension of time to collect his benefits "for economic reasons."

The arbitrator determined that, given the foregoing language, Article XIV, Section 9 "has some ambiguity." Ex. "K", at 19. Here, the CBA clearly provides for arbitration of disputes regarding interpretation of the language of the agreement. Ex. "F", at p. 25. Thus, "[a]ny alleged ambiguity in the collective bargaining agreement regarding the coverage of any applicable provision [was]...a matter of contract interpretation for the arbitrator to resolve." *Matter of Bd. of Educ. of Deer Park Union Free Sch. Dist. v Deer Park Teachers' Ass'n*, 77 AD3d 747, 749 (2d Dept 2010) (*citation omitted*).

Contrary to the petitioner's contention, "the arbitrator did not modify the [CBA] by relying on past practices" in reaching his decision that Kopstein was not entitled to a lump sum payment. *Matter of Romaine v New York City Transit Auth.*, 82 AD3d 986 (2d Dept 2011). Pursuant to Article XVIII, Section 9 of the CBA, the arbitrator had the authority to consider any "rule, regulation [or] procedure" in interpreting the CBA. The arbitrator considered such a procedure, which was set forth in the parties' stipulation: that no officer who was forced to retire due to reaching mandatory retirement age was ever paid a lump sum for accrued time. Ex. "K", at 3, 19. This, found the arbitrator, was consistent with the NYPD Patrol Guide, which warned, as far back as 1981, that no lump sum payment would be made to one reaching mandatory retirement age. Ex. "K", at 20, Ex. "L". Thus, the arbitrator found that a past practice of the parties was that no lump sum payment for accrued time was to be made to an NYPD officer upon reaching mandatory retirement age. Since such practice "did not negate or bypass an express provision of the CBA," "the arbitrator did not exceed his authority." *Romaine v New York City Transit Auth., supra* at 987.

Nor did the award violate public policy. The scope of a court's ability to vacate an arbitration award on public policy grounds is extremely narrow. *United Fed'n of Teachers*, 1 NY3d *supra*, at 80, *citing New York City Transit Auth. v Transp. Workers Union of Am., Local 100, AFL-*

CIO, 99 NY2d 1, 6-7 (2002). Heightened judicial restraint is especially important in connection with a public employment collective bargaining agreement such as that in question here. *Id.*, at 7. The public policy exception applies only in:

> cases in which public policy considerations, embodied in statute or decisional law, prohibit, *in an absolute sense*, particular matters being decided or certain relief being granted by an arbitrator. Stated another way, the courts must be able to examine an arbitration agreement or an award *on its face* without engaging in extended factfinding or legal analysis, and conclude that public policy precludes its enforcement." *Matter of Sprinzen*, 46 NY2d 623, 631 (1979) (*emphasis supplied*).

Here, there is no basis for setting aside the award on public policy grounds. There is nothing in the papers submitted that establishes, or even suggests, that the arbitrator was prohibited in any way from deciding the issues before him. Indeed, the CBA specifically provided for arbitration between the parties (Ex. "F", at 25) and the petitioner itself requested the arbitration of this matter. Ex. "I". Moreover, public policy concerns do not warrant vacating the award since Kopstein's inability to receive a lump sum payment for his accrued time results in the same treatment received by every other officer forced to retire from the NYPD at the mandatory retirement age.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the petitioner's motion to vacate the arbitration award is denied; and it is further,

ORDERED that the respondents' cross-motion to dismiss the petition is granted; and it is further,

ORDERED that the proceeding is dismissed in its entirety: and it is further,

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ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further,

ORDERED that this constitutes the Decision and Order of the Court.

DATED: March 20, 2014
MAR 20 2014

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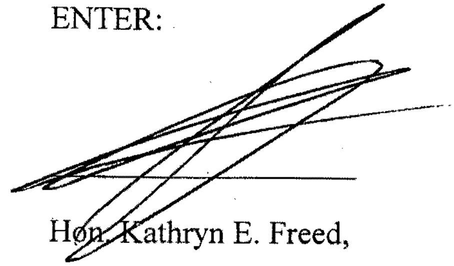

Hon. Kathryn E. Freed,

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT