

**City of New York v District Council 37, American
Fedn. of State, County, and Municipal Workers
("AFSCME")**

2016 NY Slip Op 30937(U)

May 19, 2016

Supreme Court, New York County

Docket Number: 450075/2016

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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CITY OF NEW YORK and the NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION,

Petitioners,

**Decision, Order, and
Judgment**

-against-

Index No. 450075/2016

DISTRICT COUNCIL 37, American Federation of
State, County, and Municipal Workers (“AFSCME”),
And the AFL-CIO (“DC 37”, LOCAL 461 of DC 37),
And FRANCISCO LORENZO,

Respondents.

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JOAN B. LOBIS, J.S.C.:

This petition arises out of an arbitration proceeding conducted on April 29, 2015 and May 26, 2015 before Arbitrator John Crotty to determine whether respondent Francisco Lorenzo (respondent) was wrongfully dismissed from his position as a seasonal Lieutenant Lifeguard. Petitioners terminated respondent’s employment on the grounds that on July 4, 2013 he

unlawfully permitted an after-hours party with alcohol and controlled substances where minors were present at a pool without the requisite number of lifeguards. Arbitrator Crotty found respondent guilty of misconduct but issued an award reinstating him to his job. Petitioners now seek to vacate the award to the extent it reinstates Mr. Lorenzo, or alternatively to remand the case to a different arbitrator for a new penalty. Respondents cross-move to dismiss the petition. For the reasons that follow, the petition is dismissed.

Petitioners argue that the award is irrational and in violation of public policy. They contend that it permits Mr. Lorenzo to continue violating City and Department of Parks and Recreation rules and endangering the welfare of children. Additionally, they argue the award is unsubstantiated by the evidence. In support of their arguments, petitioners cite to Campbell v. City School District of the City of New York, 20 A.D.3d 313 (1st Dep't 2005). In Campbell, the First Department determined the arbitrator acted irrationally when he permitted the reinstatement of a teacher who administered a program for children with substance abuse problems and who was found with marijuana and cocaine, on the condition that he complete a drug treatment program. Petitioners argue that because Arbitrator Crotty found that Mr. Lorenzo knowingly permitted the use of controlled substances in the presence of minor children that it was irrational to reinstate him to a position where he is responsible for supervising the safety of others. Petitioners also argue that Mr. Lorenzo's conduct was so severe that it was not rational of Arbitrator Crotty to use Mr. Lorenzo's twenty plus unblemished years as a lifeguard as a reason to reinstate him. Further, they argue that Mr. Lorenzo lied about his misconduct, has not shown remorse for his conduct, and does not appear to recognize the dangers of allowing children to be around controlled substances or to swim without adequate supervision. They argue that the award violates public policy because

it is contrary to the law on endangering the welfare of children. They state that the only possible justification for the award is the arbitrator's sympathy for Mr. Lorenzo, but that the award is legally impermissible.

Respondents cross-move to dismiss the petition, arguing that petitioner did not establish grounds to vacate the award. Specifically, they state the award was rational and within the arbitrator's authority. Respondents contend that petitioner impermissibly asks the Court to re-litigate the merits of the case. They assert that Arbitrator Crotty demonstrated a rational basis for his award based on Mr. Lorenzo's lack of disciplinary record, and length of employment with the Parks Department, the lack of evidence that he organized or planned the party or supplied controlled substances, and the City's decision not to terminate the employment of similarly-situated Parks Department employees. Respondents distinguish the cases on which petitioners rely, arguing that in those cases the employees' positions had a direct nexus with their criminal convictions. Respondents assert that contrary to petitioners' arguments, the award does not violate any law.

In opposition to the cross-motion, petitioners reiterate that a long unblemished record does not preclude dismissal for serious misconduct. They assert that even if Mr. Lorenzo did not plan the party, his compliance threatened public safety and the integrity of the Parks Department. Additionally they assert that the three other lifeguards at the party were all fired. They state that respondents incorrectly attempt to distinguish the cases to which they cited as there is no standard which requires the misconduct have a direct nexus to the employees' primary job function or criminal convictions. Instead they argue the Court should focus broadly on the nature of the nature of the grievant's misconduct and his position.

The scope of judicial review of arbitration awards is narrowly limited to whether the award “is violative of a strong public policy, is totally irrational, or exceeds a specifically enumerated limitation on the arbitrator’s power.” Kaminsky v. Segura, 26 A.D.3d 188, 189 (1st Dep’t 2006). It does not include errors of law or fact. See Colletti v. Mesh, 23 A.D.2d 245, 248 (1st Dep’t 1965). The arbitrator has great discretion and “[u]nless the arbitration agreement provides otherwise, the arbitrator is not bound by principles of substantive law or rules of evidence.” Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Benjamin, 1 A.D.3d 39, 43 (1st Dep’t 2003). Courts will not interfere if there is “even a barely colorable justification for the outcome reached.” Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 N.Y.3d 471, cert. dismissed, 548 U.S. 940 (2006).

Here, petitioner has not established that Arbitrator Crotty’s award was irrational or in violation of public policy. The award demonstrates that Arbitrator Crotty fully considered the facts before rendering his decision and did not exceed the scope of his authority. It is not the Court’s role to weigh evidence and come to an independent determination. Petitioner correctly states that there is no requirement that to be reversible an award must concern misconduct that has a direct nexus to an employee’s primary job function, but the Court does not find Arbitrator Crotty’s determination that dismissal was too harsh to be unreasonable given the circumstances. While the award does not discuss the termination of other lifeguards’ employment, it states that other supervisory employees were treated less harshly than petitioner for their involvement. Further, it distinguishes their penalties based on their positions. Although petitioners state that the

award is not supported by the evidence, they do not provide any pertinent support for that position. The Court has considered the remainder of the parties' arguments and they do not change the result.

It is therefore

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: *May 19*, 2016

ENTER:



JOAN B. LOBIS, J.S.C.