

Matter of New Roots Charter Sch. v Ferreira
2019 NY Slip Op 30137(U)
January 16, 2019
Supreme Court, Tompkins County
Docket Number: EF2018-0611
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 5th day of November, 2018.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding
STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

In the Matter of the Arbitration between

NEW ROOTS CHARTER SCHOOL,
Petitioner,

Index No. EF2018-0611
RJI No. 2018-0463-M

-vs-

DAVID FERREIRA and NEW ROOTS CHARTER
SCHOOL INSTRUCTIONAL STAFF ASSOCIATION,

Respondent

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court upon New Roots Charter School's (Petitioner's) verified petition which seeks a permanent stay of arbitration pursuant to CPLR §7503(b). This Court signed an Order to Show Cause in which Petitioner obtained a temporary restraining order restraining Respondents, David Ferreira and the New Roots Charter School Instructional Staff Association, from prosecuting, defending or otherwise participating in any arbitration proceeding against Petitioner. Respondents submitted a verified answer and a cross motion seeking to compel arbitration pursuant to CPLR §7503(a).

Respondent David Ferreira ("Ferreira") was a music teacher with Petitioner and a member of Respondent New Roots Charter School Instructional Staff Association ("NRCSISA"); the recognized bargaining unit for Petitioner employees. On March 30, 2018, Ferreira was placed on paid administrative leave while Petitioner investigated allegations of misconduct. Following the investigation, on April 30, 2018, school superintendent, Tina Nilsen-Hodges ("Nilsen-Hodges"), sent Ferreira a letter terminating his employment. The superintendent found that, among other things, Ferreira sent inappropriate messages to a former student, offered alcohol to an underage former student, engaged in non-consensual physical contact with a former student, and made false representations on his resume and to school administrators. Ferreira commenced the grievance process under the collective bargaining agreement by meeting with Nilsen-Hodges on May 7, 2018. On May 23, 2018, Ferreira submitted a "Step 2" grievance pursuant to the collective bargaining agreement between Petitioner and NRCSISA. Ferreira alleges a violation of Article 10 of the collective bargaining agreement which provides that "[no] employee shall be disciplined or dismissed...without just cause".

On April 30, 2018, Ferreira, individually, commenced an Article 78 proceeding¹ in Madison County Supreme Court seeking, among other things, reinstatement to his position as a music teacher. Respondent filed a verified answer and certified record on May 14, 2018. On June 22, 2018, Nilsen-Hodges issued a supplemental letter of termination to Ferreira adding, among other things, smoking marijuana with students and soliciting students to live with him upon graduation to the bases for termination. On June 22, 2018, Ferreira commenced a grievance regarding the supplemental letter of termination². On September 6, 2018, Ferreira submitted a notice of intent to arbitrate.

Following oral argument and additional submissions, Madison County Supreme Court (Cerio, J) issued a Judgment dated September 18, 2018 which found, *inter alia*, and as relevant here, that Petitioner herein had a rational basis for terminating Ferreira.

Petitioner filed the instant verified petition seeking to permanently stay arbitration on September 24, 2018. Petitioner argues that Ferreira has waived his right to pursue arbitration by the commencement and amendment of an article 78 proceeding which, at least in part, raises the same issues regarding his termination. Respondent asserts that the Article 78 claim of bad faith termination is separate and distinct from Ferreira's grievance under the collective bargaining agreement. The collective bargaining agreement requires that a termination be for "good cause".

"Determining whether the subject matter of a dispute is arbitrable involves a two-step inquiry, the first issue being 'whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance.'" *Catskill Central School District v. Catskill Teachers Assoc.*, 130 AD3d 1287, 1288 (3rd Dept. 2015); *citing City of Ithaca v. Ithaca Paid Fire Fighters Assn., IAFF, Local 737*, 29 AD3d 1129, 1130 (3rd Dept. 2006) [internal quotation marks and

¹By motion dated June 8, 2018, Ferreira sought and ultimately obtained leave to amend his petition to include a claim of bad faith regarding his termination.

²By agreement of the parties, Ferreira's grievances were consolidated.

citations omitted]; see *Union-Endicott Cent. School Dist. v. Endicott Teachers' Assn.*, 59 AD3d 799, 800 (3rd Dept. 2009). Absent any statutory, constitutional or public policy prohibition, “courts must then examine the collective bargaining agreement to ascertain whether the parties have agreed to arbitrate the particular dispute at issue.” *Cortland County v. CSEA, Inc. Local 1000*, 140 AD3d 1344, 1345 (3rd Dept. 2016).

In the present matter, there is no dispute as to the arbitrability of the issue of Ferreira’s termination. There are no statutory, constitutional or public policy prohibition against arbitrating issues of termination. Moreover, the collective bargaining agreement has a broad arbitration clause which provides that a grievance may be pursued regarding “the interpretation, application or claimed violation of any provision” of the agreement. The collective bargaining agreement specifically provides that “no employee shall be disciplined or dismissed...without just cause”. The broad arbitration clause certainly encompasses the termination of employees. Thus, the dispute centers upon whether the Article 78 proceeding commenced and amended in Madison County precludes arbitration of Ferreira’s termination.

“A party can waive his right to arbitration by deliberate election to proceed with a court action for the determination of his claim” *East Ramapo Cent. School Dist. v. East Ramapo Teachers Assoc.*, 91 AD2d 969, 970 (2nd Dept. 1983). However, where “the grounds urged for relief” and remedies sought in each forum are separate and distinct, a party may vigorously pursue both avenues concurrently. *Matter of City School Dist. v. Poughkeepsie Pub. School Teachers Assn.*, 35 NY2d 599, 606 (1974).

In his Article 78 proceeding, Ferreira sought review of the decision to terminate his employment alleging, among other things, that it was arbitrary and capricious and taken in bad faith. The Court determined that there was a rational basis for the Petitioner’s decision. However, nowhere in the earlier petition, nor in the Court’s decision, is an analysis of “just cause”. The “just cause” standard is a creature of the collective bargaining agreement between the Petitioner and NRCSISA. Absent the just cause language in the collective bargaining agreement, Ferreira’s

only recourse would have been an Article 78 challenge to the determination. However, Ferreira neither sought judicial review of a potential contract violation, nor did the Court address, any such claim.³ Moreover, the parties clearly and unambiguously agreed to arbitrate alleged violations of the collective bargaining agreement.

Additionally, Ferreira has vigorously pursued both his legal and contractual remedies. There is no indication that his right to arbitration was abandoned in favor of a Court proceeding. Both claims have been timely processed and pursued, and it cannot be said that they were waived or abandoned. *See e.g. Matter of City School Dist. v. Poughkeepsie Pub. School Teachers Assn.*, 35 NY2d 599.

Further, although there is some risk of different outcomes, this can largely be attributed to the different standards by which the claims are assessed. In the Article 78 proceeding, the issue was whether the Petitioner's determination was arbitrary and capricious or an abuse of discretion. In such matters, the Court need only determine whether there was a rational basis for the determination and not whether it would have reached a different conclusion. *See Arrocha v. Board of Educ.*, 93 NY2d 361 (1999). In contrast, in an arbitration under the collective bargaining agreement, the arbitrator is empowered to evaluate all evidence and make credibility determinations to reach a determination whether the contract provision was violated.

Petitioner also alleged in the instant Petition that Ferreira's notice to arbitrate was defective because it did not contain Respondent's address or the notice that Petitioner would have 20 days to apply for a stay. Petitioner did not address that argument in its post-hearing memorandum of law, but to the extent it is preserved, the failure to include the 20 day limitation period actually prevents Respondents from arguing that Petitioner's motion for a stay is untimely. The demand to arbitrate is not defective due to the omission of the 20 day limitation, but it renders the

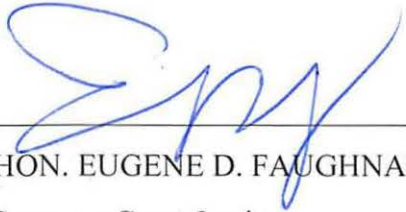
³The Taylor Law reflects New York's strong policy in favor of arbitration. Arguably, even if Ferreira had sought a ruling regarding an alleged contract violation, this policy may have barred consideration by the Court.

demand ineffective against a party raising threshold issues after the 20 day limit. *Cooper v. Bruckner*, 21 AD3d 758 (1st Dept. 2005).

For the reasons set forth herein, Petitioner's application to permanently stay arbitration is **DENIED** and the Respondents' cross-motion to compel arbitration is **GRANTED**.

This constitutes the **Decision and Order** of the Court.

Dated: January 16, 2019
Ithaca, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice