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

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In the Matter of the Application of

MARK HODGE and LOCAL 100, TRANSPORT WORKERS UNION OF AMERICA,

Petitioners,

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

- against -

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

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Index No. 655191/2018

DECISION and ORDER

Mot. Seq. #001

HON. EILEEN A. RAKOWER, J.S.C.

Petitioners Mark Hodge ("Mr. Hodge") and Local 100, Transport Workers Union of America ("Local 100") (collectively, "Petitioners") bring this action, pursuant to Article 75 of the New York Civil Practice Laws and Rules ("Article 75"), seeking to vacate the Opinion and Award of Arbitrator Earl Pfeffer ("Arbitrator Pfeffer") dated November 8, 2018 (the "Award") upholding Respondent New York City Transit Authority's ("Respondent") termination of Mr. Hodge. Petitioners also seek the Court to reinstate Mr. Hodge to his employment with Respondent with full back pay and to award Petitioners costs and attorney's fees. Respondent opposes.

Background/Factual Allegations

Mr. Hodge was hired by Respondent on April 28, 2008, as a Road Car Inspector. Mr. Hodge was represented by Local 100 for collective bargaining purposes. Respondent and Local 100 are both parties to the Collective Bargaining Agreement ("CBA"), which provides a disciplinary grievance step procedure that results in arbitration. Respondent's employees are required to follow the Respondent's Rules and Regulations. Petitioners contend that from March 1999 to December 2016, Mr. Hodge collected Social Security checks and Veterans benefits checks made out to his mother, Lucille Hodge, to be deposited in a joint bank

account. Petitioner contends that $154,104.98 had been deposited by December 2016, but no money had ever been withdrawn. Respondent asserts that Lucille Hodge was interred in March 1999.

On March 29, 2018, Mr. Hodge was arrested and the United States Attorney charged him with grand larceny. Petitioner asserts that he paid the full amount back to the United States. On March 30, 2018, Mr. Hodge notified Respondent of his arrest and he was suspended without pay. Mr. Hodge entered into a plea agreement and plead guilty to a violation of 18 U.S.C. § 641, a misdemeanor punishable by up to 10 years in prison. On June 24, 2018, Mr. Hodge was sentenced to one-year probation and 80 hours of community service.

On May 1, 2018, Mr. Hodge was served a Disciplinary Notification ("DAN") for "conduct unbecoming a Transit Authority employee, in violation of Rules 4(a), 10(a), and 11(f) of the Rules and Regulations". On May 1, 2018, a Step I hearing was held and the DAN was sustained. On May 9, 2018, a Step II hearing was held, and again the DAN was sustained. Pursuant to the CBA, Mr. Hodge was provided a "full fair arbitration hearing before a neutral arbitrator". On August 8, 13 and 16, 2018, Mr. Hodge participated in an Arbitration Hearing, before Arbitrator Pfeffer, disputing Respondent's termination of Mr. Hodge's employment. On September 5, 2018, Arbitrator Pfeffer issued a Preliminary Opinion and Award, holding Respondent had cause to terminate Mr. Hodge.

On November 8, 2018, Arbitrator Pfeffer issued an Opinion and Award, holding Respondent had cause to terminate Mr. Hodge. Arbitrator Pfeffer determined pursuant to Section 2.1(C)(19)(c) of the contract that Mr. Hodge "is culpable of charged felonious misconduct". Therefore, Arbitrator Pfeffer sustained Respondent's penalty of termination because it was not "excessive in light of the employee's record and past precedent in similar cases" does not apply. Arbitrator Pfeffer stated that Mr. Hodge committed unlawful acts for 18 years during the entire course of his employment with Respondent and he did not stop his unlawful conduct until he was caught.

Petitioner commenced this action on October 18, 2018 by filing a Petition as an Article 75 special proceeding. Respondent filed its Answer on December 10, 2018.

Parties' Contentions

Petitioners contend the Award should be vacated because it violates a clear public policy. Petitioners argue that §§ 752 and 753 of the New York State

Correction Law state that there is a violation of public policy in New York State and New York City where an employee is terminated for a criminal offense unrelated to one's employment. Petitioners argue that Arbitrator Pfeffer upheld the termination because of Mr. Hodge's guilty plea to a misdemeanor criminal offense, which Arbitrator Pfeffer determined created a felony. Petitioners contend that Arbitrator Pfeffer applied part of the contract between Local 100 and Respondent in upholding Mr. Hodge's termination, which requires the termination of an employee of Respondent if the charge is a felony unless it can be shown that the "action of the Authority is clearly excessive in light of the employee's record and past precedent in similar cases." Petitioners argue that this section of the contract is "unlawful *per se*". Furthermore, Petitioners argue that the Award violates § 8-107(a) of the New York City Human Rights Law. Petitioners argue that the offense and the work he performed for Respondent had no relationship. Petitioners assert that Mr. Hodge had performed his job with Respondent for 10 years "in an exemplary manner" and there is no evidence of inappropriate behavior.

In opposition, Respondent argues that judicial review of an arbitration award is limited to the four grounds pursuant to CPLR § 7511. Respondent contends that Article 23-A of the NY Corrections Law, NYSHRL § 296(15) and NYCHRL § 8-107(10) do not apply because Mr. Hodge's criminal conviction occurred during his employment with Respondent and not before he was hired. Respondent argues that Section 2.1(C)(19)(c) of the contract is not "unlawful *per se*" because it was agreed upon by Respondent and Local 100 and was clear and unambiguous. Respondent further argues that Petitioner does not provide any legal basis that Section 2.1(C)(19)(c) of the contract is "unlawful *per se*". Respondent contends that Mr. Hodge was served with a DAN on May 1, 2018 for inappropriate conduct of a Transit Authority employee in violation of Rules 4(a), 10(a), and 11(f) of the Rules and Regulation. Respondent further argues that it has the discretion in making employment decisions and Petitioners fail to demonstrate how it abused its discretion.

Legal Standard

CPLR §7511(b) provides four grounds on which an application to confirm an arbitration award may be denied: fraud; partiality by the arbitrator; the arbitrator exceeding his or her authority; and a failure to follow the procedures of CPLR Article 75.

Judicial disturbance of an arbitration award on the grounds that an arbitrator exceeded his powers is appropriate "only if the award violated a strong public policy, was totally irrational, or the arbitrator in making the award clearly exceeded a

limitation on [his] power specifically enumerated under CPLR 7511(b)(1)." *Rice v. Jamaica Energy Partners, L.P.*, 13 A.D.3d 255 [1st Dept. 2004] (*citing New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 N.Y.2d 321, 326 [1999]).

"Assessment of the evidence presented at an arbitration proceeding is the arbitrator's function rather than that of the court." *Fitzgerald v. Fahnestock & Co., Inc.*, 48 A.D.3d 246, 247 [1st Dep't 2008] (quoting *Peckerman v. D & D Assoc.*, 165 A.D.2d 289, 296 [1st Dep't 1991]). "Absent provision to the contrary in the arbitration agreement, arbitrators are not bound by principles of substantive law or rules of evidence." *Lentine v. Fundaro*, 29 N.Y.2d 382, 385 [1972]. Nor can an arbitration award "be overturned merely because the arbitrator committed an error of fact or law." *Matter of Motor Veh. Accident Indem. Corp.*, 89 N.Y.2d at 223. A court may only overturn the penalty imposed by the arbitrator it if is "so disproportionate to the offense[] so as to be shocking to the court's sense of fairness" *Lackow v. DOE*, 2008 NY Slip Op 4744, *4 [1st Dept. 2008].

Discussion

Applying those standards to the Petition herein, the Court finds that Petitioner fails to set forth a basis for disturbing the Decision. The Court rejects Petitioner's argument concerning the penalty imposed. Furthermore, the penalty of termination is not "so disproportionate to the offense[] so as to be shocking to the court's sense of fairness". *Lackow* at *4. The Decision found that Petitioner committed "egregious acts of fraud" by stealing from government agencies an enormous amount of money over a long period of time.

Wherefore it is hereby

ORDERED and **ADJUDGED** that the Petition is denied and the proceeding is dismissed and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: March 6, 2019

Eileen A. Rakower, J.S.C.