SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD** **PART** **IAS MOTION 35EFM**

Justice

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NORRIS CHERRINGTON, LOCAL 100, TRANSPORT WORKERS UNION OF AMERICA

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

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INDEX NO. 654270/2020

MOTION DATE 09/29/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 11, 12, 13, 14

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

ORDERED that the petition of Petitioners Norris Cherrington and Local 100 Transport Workers Union of America (Motion Seq. 001) is denied in its entirety; and the "Opinion and Award" dated February 11, 2020 issued by Arbitrator Earl Pfeffer is confirmed; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that counsel for Respondent shall serve a copy of this order, along with notice of entry, on all parties within 20 days of entry.

MEMORANDUM DECISION

In this Article 75 action, the issue before this Court is whether the "Opinion and Award" dated February 11, 2020 (the "Final Award") issued by Arbitrator Earl Pfeffer (the "Arbitrator") - finding that Respondent New York City Transit Authority had cause to discipline Petitioner Norris Cherrington ("Mr. Cherrington") and that the proper penalty therefor was a twenty five-day suspension – is irrational and violative of this State's public policy against unlawful discrimination.

BACKGROUND FACTS

Mr. Cherrington is employed by Respondent as a Station Cleaner. On March 11, 2019, he was served with a "Disciplinary Notification" (the "Notice") under which Respondent charged him with misconduct and recommended his dismissal.

The impetus for Respondent's discipline of Mr. Cherrington was the physical altercation that occurred on January 29, 2019 (the "January 29, 2019 Incident") between Mr. Cherrington and a Maintenance Supervisor, Mr. Mark Battaglia ("Mr. Battaglia"). The Notice states that:

> "On 1/29/19, while you were working at Rockaway Blvd. "A Line", you were involved in a physical altercation with a Maintenance Supervisor in the employee bathroom. You attempted to take a picture of the Supervisor while he was utilizing the bathroom. After the Supervisor knocked your phone out of your hand, you punched him in the face causing lacerations to the Supervisor's mouth. Police were summoned to the scene and you were arrested. Therefore, you are charged with Altercation with a Supervisor, Assault of an Employee, Verbal Altercation with a Supervisor, Gross Misconduct, Rude and Inappropriate Behavior, and Radio, TV Cell Phone. Your actions constitute Conduct Unbecoming of an Authority Employee which has proven to be detrimental to the operations of the Authority."

The reports and the parties' statements attached to the Notice (collectively the "Notice's Supporting Documents"; NSYCEF doc No.2), portions of which Petitioners themselves quote in their papers[1], corroborate the above statement of fact.

[1] Petitioners quoted the following reports/statements:

In addition to the facts set forth in the Notice, Mr. Cherrington's statement recounted that he had a prior encounter with Mr. Battaglia two days earlier on January 27, 2019 (the "January 27, 2019 Incident"). On this date, according to Mr. Cherrington:

> "I met him for the first time. I was in the facility room this time when he entered and proceeded to the bathroom without saying anything or identifying who he was. Finding this unusual, I went to the booth and asked the agent if he had given a key to anyone. I was told no. Realizing then that he must be an employee with a key, I told him that he still needs to identify himself in such situations. His short fuse immediately surfaced and expressed itself with him rubbing one hand against the back of the other and asking me how am I able to live with myself, by him referencing my mother, and most importantly, by him implying threats by telling me I should see him after the clock is up..."

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fn[1] cont'd:

(a) Report of Louis Lanfair to Michael Reynolds:
"Mr. Cherrington told me that Mr. Battaglia has been harassing him for two days. His first day on his new pick, Mr. Cherrington was in the EFR [the employee's bathroom] and Mr. Battaglia walked in. Mr. Cherrington asked him for identification because he didn't know if he was an employee or not. Mr. Battaglia refused. He became verbally abusive and threatened him to "take it outside". The next day Mr. Cherrington found his locker turned upside down. He believes this was done by Mr. Battaglia. Today he was preparing a bleach/water mixture in the bathroom to perform his duties and he said Mr. Battaglia came into the bathroom and started to use the urinal. He asked him to please wait until he was finished with his work but Mr. Battaglia wouldn't leave and became abusive. Mr. Cherrington took out his phone to document any verbal threats and Mr. Battaglia took the phone from him and slammed it up against the wall. He then picked up the phone and threw it into the toilet. Mr. Cherrington walked towards him and was punched in the chest. Mr. Cherrington then said he punched Mr. Battaglia in the face." (NYSCEF doc No. 1, p. 3)

(b) Report of Mr. David Mclennon:
"CTA N. Cherrington stated that this is an ongoing issue with this particular MS1 employee starting from Sunday morning. Mr. Cherrington stated that he was in the employee restroom preparing his chemical to perform his duty to clean feces and disinfect the unmanned area of the station. While preparing the chemical the MS1 walk into the restroom and proceed towards the urinal attempting to use the restroom but the MS1 refuse, the CTA then pulled out his p[hone to snap a picture of the MS1 as was told to him SS1 [Subway Supervisor Level 1] Doad to be able to identify the mischievous employee, at that' point the MS1 slap the phone out of the CTA hand slammed it against the wall and dropped it into the toilet. When the CTA bend down to pick up his phone he was attacked by MS1 Battaglia. The CTA stated that he was in fear for his life so he retaliated." (NYSCEF doc No. 1, pp. 3-4)

(c) Mr. Cherrington's own statement:
"His short fuse immediately surfaced and expressed itself with him rubbing his hands on the back of the other, and ask[ed] me how I am able to live with myself, by him referencing my mother, and most importantly by telling me I should see him after the clock is up...He verbally noted that he knows which was my locker and that he was going to mess with it." With respect to the day in question, Cherrington wrote (and testified in a similar manner): "based on the fact that he, with all the aggression he could muster, knocked my phone out of my hand (I had reached for my phone because my supervisor had instructed me to take a picture of him the next time I saw him and based on the fact that as I was reaching for the phone, he threw a punch at me which caught me on the chest, fearing for my life, fearing he could in the rage he was going to do me serious physical injury, I responded by swinging at him which it seems caught him on the side of his face." (NYSCEF doc No. 1, p. 4)

Respondent's narrative is largely based on the later findings of the Arbitrator. Respondent alleges that:

> "On Sunday, January 27, 2019, Cherrington was cleaning an employee restroom at the Rockaway location when track supervisor Mark Battaglia entered the bathroom. xxx Cherrington and Battaglia had a verbal exchange in which the arbitrator, after hearing sworn testimony from both Cherrington and Battaglia, found that Battaglia had been "aggressive and threatening." xxx Two days later, on January 29, Cherrington was once again cleaning the bathroom when Battaglia entered and proceeded to the urinal. xxx According to the arbitration award and other reports, despite the prior encounter, Cherrington did not leave the bathroom but, instead, asked Battaglia to leave, and Battaglia refused. xxx Cherrington apparently intended to use his cell phone to take a picture or videotape of Battaglia. Battaglia knocked the cell phone from Cherrington's hand and punched him in the chest. The arbitrator found that Battaglia was "motivated by" and "overtly communicated racial animus." xxx Cherrington responded by hitting Battaglia in the face and according to the report from Louis Lanfair, he inspected the facility he "found blood on the bathroom floor, wall, breakroom floor and wall."

Based on the record, both Mr. Cherrington and Mr. Battaglia were sanctioned. Mr. Battaglia "accepted a 30-day fine" and "has since elected to retire" (see NYSCEF doc No. 4, footnote 1). Mr. Cherrington, however, appealed the Notice through the contractual grievance procedure but the same was denied. Thus, he proceeded to appeal through arbitration (NYSCEF doc No. 1).

The Arbitration

An arbitration hearing was held on June 6, 2019, during which the parties each presented evidence and argument in support of their respective positions. At the arbitration, Respondent sought Mr. Cherrington's dismissal, while the Union demanded he be reinstated without any loss in pay (NYSCEF doc No. 5).

After hearing, the Arbitrator found that:

> "[Mr.] Cherrington on January 29, 2019, did participate in an escalating altercation with Battaglia which he knew or should have known could turn violent, given Battaglia's prior aggressive and threatening conduct on January 27, 2019. Even allowing that Battaglia was the physical aggressor on January 29, 2019, first by

> knocking Cherrington's cell phone out of his hand and then by striking him in the chest, I find Cherrington had an opportunity to retreat before he retaliated by hitting Battaglia on the side of his face.
>
> xxx
>
> ... I am not unaware of the overarching importance of the Authority's workplace violence prohibition, nor do I minimize the gravity of Cherrington's decision, albeit one made impulsively and possibly under duress, to strike Battaglia in the face. The record evidence, however, persuades me there are powerful mitigating factors which weigh against continuing Cherrington's current suspension pending the filing of briefs and the preparation of my final Opinion and Award.
>
> Most prominent is my determination that Battaglia engaged in conduct motivated by and which overtly communicated racial animus that was hostile and grossly offensive to Cherrington, and it was Battaglia who struck the first blow. It is my present judgment that although Cherrington did violate the Authority's zero tolerance policy, he was provoked by Battaglia in a manner and to an extent which leaves me persuaded, preliminarily, it would be unjust to uphold his dismissal."

In view of the above findings, the Arbitrator concluded in his "Preliminary Opinion and Award" dated June 7, 2019 (the "Preliminary Award"; NYSCEF doc No. 4) that "[Mr.] Cherrington [was] culpable of a serious violation of the Transit Authority's Workplace Violence Prevention Program (P.I. 1.20.0), which clearly states its "zero tolerance" for acts of violence in the workplace." However, the Arbitrator held that "factors such as [Mr.] Cherrington's longevity and his history of non-violence, along with Battaglia's aggressive, hostile and racially motivated provocations, mitigate against his dismissal." The Arbitrator accordingly imposed the penalty of a twenty five-day suspension.

At Respondent's request, the Arbitrator left the record open to reconsideration following the filing of briefs by both parties.

On February 11, 2020, the Arbitrator issued the Final Award, holding that after reviewing the parties' briefs and fully considering the arguments raised therein, he remained persuaded that the determinations in his Preliminary Award was correct.

This Proceeding

Petitioners now seek to vacate the Final Award. In support, Petitioners advance two arguments. *First*, according to Petitioners, the Final Award is irrational as it "does not explain where, in a bathroom, [Mr.] Cherrington was supposed to retreat" and does not recognize the rule that "[t]here is no affirmative duty to retreat [if] someone is physically attacked [and] perceives that more attacks will occur." (NYSCEF doc No. 1, ¶¶ 16-17) *Second*, Petitioners contend that the Final Award violates public policy as it "punish[es] an employee for acting in self-defense to fend off a racially motivated physical attack," thereby promoting "racial discrimination in the workplace" (*Id.*, ¶¶ 18-29).

In its Answer, Respondent insists that the finding of misconduct and determination of the appropriate penalty were entirely within the province of the arbitrator to resolve and that "[Mr.] Cherrington [wa]s not excused from his misconduct and the arbitrator was not required to dismiss the disciplinary charges or impose no penalty because [Mr.] Battaglia harbored racial animosity." (NYSCEF doc No. 10).

DISCUSSION

The arbitration proceeding at issue on this appeal was consensual in nature, as it was conducted pursuant to the parties' collective bargaining agreement (*see Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321 [1999]).

In this kind of situation, the Court of Appeals explained that judicial review of the resulting arbitral award is limited in scope, thus:

> "Collective bargaining agreements commonly provide for binding arbitration to settle contractual disputes between employees and management. In circumstances when the parties agree to submit their dispute to an arbitrator, courts generally play a limited role. Courts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies. A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply

> because it believes its interpretation would be the better one. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice." (*Id.*)

Despite this deference, courts may vacate arbitral awards if "it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on [the arbitrator's] power" (*See Matter of Isernio v Blue Star Jets, LLC*, 140 AD3d 480, 480, 31 N.Y.S.3d 884 [1st Dept 2016]).

Here, Petitioners are seeking vacatur of the Award on the grounds of irrationality and public policy.

Rationality of the Award

The Court finds that vacatur of the Award on the ground that it was irrational is unwarranted. The record reflects that the Arbitrator reviewed the evidence and came to the reasonable conclusion that Mr. Cherrington violated Respondent's "Zero Tolerance" policy.

While Petitioners raise here the merits of self-defense, Petitioners do not allege that this argument was not considered by the Arbitrator. In fact, the discussion of "opportunity to retreat" in the Award was presumably made by the Arbitrator to address Petitioner's self-defense argument. As to the question of whether retreat was indeed possible, this is a factual issue that this Court cannot revisit. This Court cannot reassess the evidence supporting the Arbitrator's conclusion that Mr. Cherrington had the opportunity to retreat before he retaliated by hitting Mr. Battaglia.

In any event, this Court notes that "the perceptions, the state of mind, of the participants to the encounter are critical to a claim of justification [of self-defense]." (*People v Miller*, 29 NY2d 543 [1976]) Here, the Arbitrator had the opportunity to hear the testimony of both Mr. Cherrington

and Mr. Battaglia and was therefore in the best position to judge the merits of Mr. Cherrington's claim of self-defense.

This Court also finds that the penalty of 25-day suspension was rational. The record shows that Respondent sought to dismiss Mr. Cherrington. The Arbitrator, however, rejected this request for relief, holding that Mr. Battaglia's racially-motivated provocations should mitigate the penalty. In a further showing of rationality, the Arbitrator held that "because delay in [Mr.] Cherrington's reinstatement could result in a significant backpay award, [] it is appropriate to order [Mr.] Cherrington's immediate return to duty." This Court finds that the penalty imposed neither "shocks the conscience" nor was disproportionate to the misconduct committed.

Violation of Public Policy

Petitioners next argue that the Final Award violates this State's public policy against unlawful discriminatory practice, as embodied in Section 296(1)(a) of the Executive Law[2] and New York City Administrative Code § 8-107(1)(a)(3).[3]

According to Petitioners, "by seeking to punish and punishing an employee for acting in self-defense to fend off a racially motivated physical attack" Respondent "act[ed] in a manner contrary to the purposes of the above statutes." Petitioners' argument has no merit.

First, based on the record, Respondent disciplined Mr. Cherrington for violations of various provisions of what seems to be an employee code of conduct (*i.e.*, Altercation with a

[2] Section 296(1)(a) of the Executive Law states that it shall be an unlawful discriminatory practice "[f]or an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

[3] New York City Administrative Code § 8-107(1)(a)(3) states that it shall be an unlawful discriminatory practice "[f]or an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or alienage or citizenship status of any person" "[t]o discriminate against such person in compensation or in terms, conditions or privileges of employment."

Supervisor [Rule 10C, 11F, PR LTR]; Assault of an Employee [Rule 10C, 11F]; Conduct Unbecoming [Rule 2A, B, D, 10A]; Gross Misconduct [Rule 2A, B and D]; Use of Radio/TV/Phone [Rule 11E]; Rude Behavior [Rule 10A and C] and Verbal Altercation with a Supervisor [Rule 10C, D, P/I 1.2 PR LTR]). It is important to highlight that none of the Notice's Supporting Documents, which included Mr. Cherrington's own statement, show that the January 27, 2019 and January 29, 2019 incidents had any racist overtones. Rather, the documents supporting the disciplinary action was tied solely to what Respondent perceived to be a misconduct in the workplace.

Second, while the Arbitrator found that Mr. Battaglia was "motivated by" and "overtly communicated racial animus", he did not find any reason to impute Mr. Battaglia's racial motivations to Respondent. Neither can this Court do so as there is nothing in the record which shows that Respondent's discipline of Mr. Cherrington was a mere pretext for unlawful discrimination. This Court notes that Respondent disciplined both Mr. Cherrington and Mr. Battaglia for the January 29, 2019 Incident. Moreover, to hold that Respondent disciplined Mr. Cherrington with no reason other than to discriminate against him on the basis of his race, this Court would have to reject the specific factual finding made by the Arbitrator that Mr. Cherrington committed a workplace policy violation warranting disciplinary action. Courts cannot reject the factual findings of an arbitrator simply because they do not agree with them (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321 [1999]), *citing United Paperworkers Intl. Union v Misco, Inc.*, 484 US 29 [1987]).

Third, Petitioner's reliance on *New York City Transit Authority v Philips* (162 Ad3d 93 [1st Dept 2018]) is misplaced. In *Philips*, the arbitrator found that an employee committed sexual harassment but ruled that such misconduct did not warrant his discharge. The arbitrator further

made remarks that it was incumbent on the victim to take appropriate actions if she felt the harasser's comments were inappropriate. The lower court confirmed the award. On appeal, the First Department reversed, holding that: (i) *first*, the arbitrator's "blame the victim" mentality violates public policy as it "effectively prevents [employers] from [] fulfilling their legal obligations to protect against workplace sexual harassment" and "emboldens future harassers to engage in pernicious misconduct…"; and (2) *second*, "it is unfathomable that the arbitrator could find that [the harasser's] conduct did not violate the workplace policy against sexual harassment" "given [his own] findings" and that this "disjunction between the arbitrator's findings and his summary conclusion that [the harasser's] behavior nonetheless did "did not rise to the level" of sexual harassment is fundamentally irrational."

The facts of *Philips* are distinguishable. *Philips* involves an employee who commenced arbitration against her co-employee on the ground of sexual harassment. While the arbitrator in *Philips* credited testimonies in support of the sexual harassment allegation, he penalized the offender with just a meager 10-day suspension and proceeded to malign the victim. Here, the issue submitted to the Arbitrator was not whether Mr. Battaglia acted in racial discrimination; Mr. Battaglia was not a party to the arbitration. The issue resolved by the Arbitrator was whether Respondent - who was not shown to have any racial animus against Mr. Cherrington - had cause to discipline him in view of the January 29, 2019 Incident. Had this case been about penalizing Mr. Battaglia's behavior, the pronouncements of the First Department in *Philips* would have been on point. This case, however, is about an employer's right to discipline its employees for workplace violence. Moreover, contrary to Petitioners' allegations, there was nothing in the Final Award which blames Mr. Cherrington for said incident. At the end of the day, both Mr. Cherrington and Mr. Battaglia were penalized for their actions.

While Petitioners insist that the Final Award punishes an employee for defending himself from a racially motivated attack, this argument is flawed for two reasons: (i) it assumes that Mr. Cherrington acted in self-defense although the Arbitrator made no such factual finding; and (ii) it assumes that Respondent's discipline of Mr. Cherrington was racially-motivated despite the evidence showing that Respondent did what any employer would do to address a report of misconduct in the workplace.

As a final note, this Court does not condone the reprehensible behavior of Mr. Battaglia. Without belaboring the point, this Court reiterates that the arbitration did not involve an investigation into his conduct. The arbitration was about whether Respondent had cause to discipline Mr. Cherrington. Despite Petitioners' insistence, this Court cannot impute Mr. Battaglia's racial motivation to Respondent, especially in light of the fact that the reports and statements relied upon by Respondent, which included Mr. Cherrington's own statement, did not at all mention any racial overtones of the January 29, 2019 Incident. It appears that at the time Respondent disciplined Mr. Cherrington and Mr. Battaglia, Respondent may not have even been aware that there was a racial element in their altercation.

Therefore, this Court denies Petitioners' application to vacate the Final Award on the basis of irrationality and violation of public policy. Under CPLR 7511(e), "upon the denial of a motion to vacate or modify, [the Court] shall confirm the award." Accordingly, the Final Award is confirmed.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the petition of Petitioners Norris Cherrington and Local 100 Transport Workers Union of America (Motion Seq. 001) is denied in its entirety; and the "Opinion and Award" dated February 11, 2020 issued by Arbitrator Earl Pfeffer is confirmed; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

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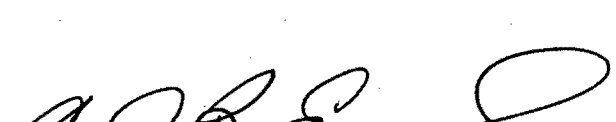

3/22/2021
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CAROL R. EDMEAD, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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