

<b>State of New York - Unified Ct Sys. v Cullen</b>
2022 NY Slip Op 30525(U)
February 15, 2022
Supreme Court, New York County
Docket Number: Index No. 451069/2021
Judge: Laurence L. Love
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE LOVE PART 63M

Justice

-----X

STATE OF NEW YORK - UNIFIED COURT SYSTEM

Petitioner,

- v -

PATRICK CULLEN,

Respondent.

-----X

INDEX NO. 451069/2021
MOTION DATE 07/23/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for STAY

Upon the foregoing documents, Petitioner's Petition and Respondent's Cross-Petition are resolved as follows:

Petitioner, The State of New York Unified Court System ("Petitioner" or "UCS"), commenced the instant Petition by filing same on April 21, 2021, seeking pursuant to CPLR 7503 (b) to permanently stay arbitration of a grievance filed by a labor union, New York State Supreme Court Officers Association ("SCOA"). On June 24, 2021, Respondent filed a Cross-Petition seeking to compel Petition to proceed to arbitration.

The relationship between UCS and SCOA is governed by a Collective Bargaining Agreement ("CBA") with respect to salaries, wages, hours, and other terms and conditions of employment for employees represented by SCOA for the period 2011 - 2021. On March 1, 2021, UCS received a letter from SCOA dated March 1, 2021, giving notice of an intent to arbitrate its grievance entitled Matter of the Grievance of SCOA members whose start date is September 6, 2018. (Labor Relations File No. 20/72) ("SCOA grievance"). Said contract grievance, received by the Office of the Deputy Chief Administrative Judge on October 21, 2020 alleges that Petitioner

violated Sections 13.2 and 21.3 of the CBA as “After 9/6/2020, the above captioned and affected trainees were not officially notified of an extension of their two (2) year probationary period. This extension delays promotion to the title of Court Officer and the increase in rate of compensation that accompanies said promotion. Failure to notify affected employees within the determinate period clearly violates this clause. Additionally, as per 21.3 of 2011-2021 CBA, SCOA should have been notified of this policy/procedure in writing upon its promulgation.” A further non-contract grievance received by the Office of the Deputy Chief Administrative Judge on October 26, 2020 argues that “Due to Covid-19 health emergency, days that affected employees were instructed to remain home, despite their willingness and ability to report to work, were totalled up and added to their probationary terms. Circumstances beyond the control of employees caused their forced excusal by management and should not be deemed an absence, authorized or unauthorized, during the pandemic.” In a letter dated October 29, 2020, Respondent’s Step 1 contract grievances were denied and passed up to step 2. Said grievances were moved to Step 2 by a letter dated November 9, 2020. On December 9, 2020, UCS held a Step 2 meeting with SCOA where SCOA presented its grievances, ultimately resulting in the March 1, 2021 Notice of Intention to Arbitrate (Step 3).

At issue in the instant matter is whether the extension of probationary periods of employment with UCS based upon absences from work caused by the Covid-19 pandemic may be reviewed via arbitration. Pursuant to Section 15.1(a) of the CBA, “A contract grievance is a dispute concerning the interpretation, application or claimed violation of a specific term or provision of this Agreement.” Pursuant to Section 15.1(b) of the CBA, “A non-contract grievance is a dispute concerning: (as it relates to this matter) (3) A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the State.” Contract

grievances are subject to arbitration and non-contract grievances are specifically excluded from arbitration pursuant to Section 15(b)(2).

In order to determine whether a dispute between a public sector employer and employee is arbitrable, the Court must engage in a two-prong analysis, *Matter of County of Rockland v. Correction Officers Benevolent Ass'n of Rockland County, Inc.*, 126 A.D.3d 694, 695 (2d Dep't 2015); see *Matter of Board of Education of Watertown City School District [Watertown Educ. Ass'n]*, 93 N.Y.2d 132 (1999). "Initially, the court must determine whether there is any statutory, constitutional, or public policy prohibition against arbitrating the grievance...If there is no prohibition against arbitrating, the court must examine the parties' collective bargaining agreement and determine if they in fact agreed to arbitrate the particular dispute." *Rockland v. COBA, supra* at 695. Courts "must stay arbitration where it can conclude, upon examining the parties' contract and the implicated statute on their face, 'that the granting of any relief would violate public policy.'" *Matter of County of Chautauqua v. Civil Service Employees Ass'n*, 8 N.Y.3d 513, 519 (2007); see also *Matter of County of Broome (New York State Law Enforcement Officers Union, Dist. Council 82, AFSCME, AFL-CIO)*, 80 A.D.3d 1047, 1049-50 (3d Dep't 2011) (public policy prohibits arbitration of grievance when inherent authority of administrative judges to ensure orderly administration of courts is at issue).

Pursuant to the Rules of the Chief Judge, Section 25.22(a), nonjudicial employees must serve a probationary term upon appointment to a position. The probationary term is subject to extension based upon both authorized and unauthorized absences from work under Section 25.22 (f), entitled Absence during probationary term, which provides:

Any periods of authorized or unauthorized absence aggregating up to 10 workdays during the probationary term, or aggregating up to 20 workdays if the maximum term exceeds 26 weeks, may, in the discretion of the appointing authority, be

considered as time served in the probationary term. When the probationary term for a trainee appointment exceeds one year, any periods of authorized or unauthorized absence in such probationary term aggregating up to 20 workdays multiplied by the number of years, including a fraction of a year, constituting the probationary term, may in the discretion of the appointing authority, be considered as time served in the probationary term. Any such periods of absence not so considered by the appointing authority as time served in the probationary term, and any periods of absence in excess of periods considered by the appointing authority as time served in the probationary term pursuant to this subdivision, shall not be counted as time served in the probationary term. The minimum and maximum periods of the probationary term of any employee shall be extended by the number of workdays of absence which, pursuant to this subdivision, are not counted as time served in the probationary term.

It is undisputed that the Court Officer Trainees (“COT”) that are the subject of the potential arbitration were placed on paid excused leave during the early parts of the Covid-19 pandemic because of the limited in-person operation of the courts, and the need to restrict courthouse density in order to protect employee and public health. Under the Rules of the Chief Judge (22 NYCRR §§ 1-81), Section 25.22(f), the probationary term of employees are extended by both authorized and unauthorized absences.

Petitioner contends that extension of the COTs probation is not subject to review under Step 3 of the Contract Grievance Procedures in the Collective Bargaining Agreement between UCS and SCOA, but that disputes over the interpretation or application of the Chief Judge’s Rules are subject to judicial review under Article 78 of the CPLR, only. Pursuant to the CBA, only contract grievances, defined in the CBA as “a dispute concerning the interpretation, application or claimed violation of a specific term or provision of this Agreement” may be arbitrated.

Section 13.2 of the CBA provides: “**Notification of Change in Title or Compensation.** Any employee who is promoted or who is affected by an individual change in title or rate of compensation of an adverse nature shall be notified in writing no later than two weeks after the

effective date if such promotion, change in title or rate of compensation.” Section 21.3 provides: “**Statements of Policy or Procedure.** All statements of policy or procedure which are applicable to employees shall upon promulgation be made known and delivered in writing to the Union.”

Respondent’s contention in framing its objections to the extension of probation periods for certain COTs is not that Petitioner was not clearly required to extend the relevant probationary periods by the Rules of the Chief Judge, Section 25.22(a), but that the individual COTs and the SCOA should have been notified of same. Neither Section 13.2 nor Section 21.3 are applicable here. The **required** extension of the affected COTs probationary periods is not an individual change in title or rate of compensation of an adverse nature nor is it a newly promulgated policy or procedure. The duties and responsibility of the COT title unambiguously require the successful completion of a two-year probationary term, which is unambiguously required to be extended in the instant unprecedented circumstances created by no fault of anyone due to COVID. The actions taken by Petitioner do not implicate either referenced section of the CBA, solely requiring an interpretation of the Rules of the Chief Judge and as such, may not be arbitrated as contract disputes.

Respondent further argues, citing *County of Chautauqua v. Civil Serv. Empls. Assn.*, 8 N.Y.3D 519 (2007) that Petitioner prematurely assumes that an arbitrator would render an award that is contrary to public policy and award relief that would make the award impermissibly in conflict with the policies, rules and statutes cited and that an arbitrator could fashion a remedy which addresses the lack of notice to the union and bargaining unit members consistent with public policy, the Chief Judge’s Rules and the law. Even if the lack of notice were applicable to the current facts, which it is not, it is impossible for an arbitrator to fashion a remedy addressing the alleged lack of notice as Respondent’s grievance form specifically lists the remedy sought as “

Immediate and retroactive invalidation of the probation extension for all, based on the failure to notify affected employees. Each such affected trainee should be promoted to Court Officer as of 9/6/2020 with all compensation and benefits of that title attached as of that date of promotion.” Such relief would be in direct inescapable conflict with the Rules of the Chief Judge, Section 25.22(a).

Respondent further contends that CBA Section 15.7, which provides “In the event the Union appeals a Step 2 decision to Step 3 and the parties cannot agree as to whether it constitutes an arbitrable grievance, the issue of arbitrability shall be preliminarily submitted to arbitration prior to the resolution of the dispute on the merits in accordance with the procedures for arbitration set forth in Step 3” requires that the issue of arbitrability itself be arbitrated. Section 15.7 only applies to disputes concerning the arbitrability of contract grievances — which are authorized by CBA § 15.2 (c) (1) to proceed to arbitration at Step 3, which is not the case here. Further, even if said issue were arbitrable, there remains a statutory and public policy prohibition against arbitrating the grievance. As such, arbitration must be stayed.

The Court further notes that Section 25.22(f) is not in place to penalize probationary employees for their authorized or unauthorized absences, but rather to ensure that Court System is provided a full and sufficient opportunity to observe and evaluate a probationary employee’s performance prior to a permanent appointment. This opportunity is necessary to protect the public interest in the safe and orderly operation of State judicial functions, *See, Marshall v. Simon*, 160 A.D.3d 648, 649 (2d Dep’t 2018).

ORDERED that the Petition is GRANTED in its entirety; and it is further

ORDERED that the arbitration of the grievance entitled Matter of the Grievance of SCOA members whose start date is September 6, 2018. (Labor Relations File No. 20/72) is permanently stayed; and it is further

ORDERED that the Cross-Petition is DENIED in its entirety.

2/15/2022

DATE



LAURENCE LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE