To commence the statutory (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Arbitration between

MUNICIPAL HOUSING AUTHORITY OF THE CITY OF YONKERS,

Petitioner,

LOCAL 456, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondent.

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INDEX NO. 62818/2021
(Shannon Stewart)

DECISION/ORDER

Mot. Seq. 1
Motion Date 11/10/21

ECKER, J.

Upon consideration of the papers filed in NYSCEF [NYSCEF Docs. No. 1-28], relative petitioner's motion, made by Order to Show Cause signed September 28, 2021, seeking an order permanently enjoining and restraining any arbitration of the grievance between petitioner and respondent relating to Shannon Stewart, the court determines as follows:

BACKGROUND

Petitioner and respondent are parties to a Collective Bargaining Agreement (the CBA) effective January 1, 2017 through December 21, 2023. Shannon Stewart (grievant), an employee of petitioner and a member of the respondent, alleges she was wrongfully denied promotion to Housing Assistant II, in derogation of the CBA and the applicable Civil Service Law (CSL). Stewart claims she placed first on the certificate of eligibility list as a result of her qualifying examination. However, she discovered on or about June 15, 2021 that she was not hired for the Housing Assistant II, as petitioner had filled the position with another individual. Respondent, on her behalf, filed a grievance

on June 24, 2021. She now contends she complied with the CBA requirements for the arbitration of the dispute.

Petitioner argues she is not entitled to invoke the arbitration provisions of the CBA because (1) the grievance is not arbitrable, (2) the grievance was not presented in accordance with the requirements of the CBA, (3) the CBA does not authorize the resolution of a dispute regarding entitlement to a promotion, (4) the form of the grievance does not provide specific allegations as to how the CBA was violated, and (5) the demand to arbitrate fails to include the notice language required by CPLR 7503 (c).

Article XIII of the CBA is entitled "Grievance Procedure". As pertinent to this proceeding, Section 2 addresses "the Grievance Process". Subdivision A requires a written statement to be submitted to the other party within ten (10) calendar days of the date the complaining party knew, or should have known, of the alleged contract violation. The CBA then outlines the steps to be taken to resolve the dispute: Subdivision B (Step 1) the presentation of the employee grievance shall be made to his/her immediate supervisor for adjustment within five (5) working days; and Subdivision C (Step 2) if the grievance is not satisfactorily resolved in Step 1, it is then submitted to the Secretary/Director or his/her designee for settlement. Subdivision D provides that if the grievance remains unresolved, then the aggrieved party may initiate the arbitration process within thirty (30) days of the alleged contractual violation, in the manner as therein provided. [NYSCEF Doc. No. 2, pp. 37-38].

Petitioner does not deny that a "Grievance Form", dated June 24, 2021, on respondent's letterhead, was delivered via email from Stewart's attorney, to Joan Magoolaghan, counsel for MHACY, citing Article VIII, Section 6 and Article XIII, alleging the failure to promote Stewart to Housing Assistant II, without having undertaken Step 1 or Step 2 *supra*. Petitioner argues Ms. Magoolaghan is "outside counsel", not a supervisor, thus constituting non-compliance with the prerequisite of Step 1 of Article XIII that the grievance be presented to an immediate supervisor first. Petitioner next argues the Demand for Arbitration was not referred to arbitration within thirty (30) days of the alleged contractual violation.

In opposition, respondent argues Stewart did not know she had been passed over until June 15 or 16, 2021 when it was learned the position had been filled by someone else, which led to the

filing of the grievance with Ms. Magoolaghan, as petitioner's general counsel, on June 24, 2021, which was within ten (10) days of when she learned of the facts triggering the grievance. Respondent references an email communication from Ms. Magoolaghan to its attorney, dated July 1, 2021, [NYSCEF Doc. No. 21] wherein she wrote:

> "In truth, I confess I am not actually that familiar with the actual policy because in years past the union did not file so many formal grievances; calls were made to me and I addressed the issues as they arose. You take a different approach, which is perfectly acceptable; it's just different. The formal policy requires that the grievance be filed with the ED [Executive Director], which you did not do, and which I noticed. BUT you correctly observe that the other grievances you have filed were served on me and I did not object. So I withdraw any issue raised as to that issue."

Ms. Magoolaghan, in reply to the present motion, by affirmation dated November 9, 2021, addressing the quoted language, at ¶ 6 stated, "In accepting service upon the President and CEO [the title formerly labeled executive director], Ms. Magoolaghan stated:

> "In accepting service upon the President & CEO I specifically noted that I was not waiving any defenses that were otherwise available to the Authority. Subsequently, I agreed to toll the union's time to file for arbitration upon the agreement by the union to stay the Authority's time to answer its discovery demand."

Further, in her affirmation, at ¶ 7, Ms. Magoolaghan states:

> "Simultaneously to my agreement to the arbitration filing deadline I welcomed the opportunity to speak informally with the union regarding both grievances [Stewart and Harris], as positions in dispute were filed by experienced and capable employees of the Authority and the contract terms, including Article VIII, Section 6, and the civil service law have been adhered to by the Authority during the hiring process."

Respondent's present counsel, who is the same attorney who emailed back and forth with Ms. Magoolaghan, did not seek to file a sur-reply.

DISCUSSION

There are three threshold questions to be resolved by the court: whether the parties made a valid agreement to arbitrate; if so, whether the terms of the agreement have been complied with; and

whether the claim sought to be arbitrated would be barred by limitation of time had it been asserted in a court of the State (*Matter of County of Rockland v Primiano Constr. Co.*, 51 NY2d 1, 6 [1980]). Here, the first question and the third question are not disputed. As to the second question, the issue of compliance hinges on whether the procedural requirements of Article XIII of the CBA are conditions precedent that preclude the right to arbitrate if not satisfied.

Petitioner first argues that respondent waived its right to arbitration because the steps required by Article XIII were not taken, which is a condition precedent that must be satisfied. If so, is that an issue for the court, or for the arbitrator? In *United Nations Development Corp. v Norkin Plumbing* (45 NY2d 358, 363 [1978], *cited in Primiano supra* at 7), the Court stated:

> "Unlike statutory conditions precedent, however, contractual conditions are not governed by a rule given to facile application. Of critical importance in this area is the nature of the arbitration agreement: that is, whether it contains a broad or narrow arbitration clause. Where the agreement contains a broad clause, compliance with contractual notice provisions as well as time requirements in the grievance procedure are issues to be determined by the arbitrator."

In *R.C. Metell Construction, Inc. v Sandler* (189 AD3d 1415, 1417 [2d Dept 2020]), modified in part and affirmed in part, the Court, affirming the motion court that declined to dismiss the arbitration proceeding involving a residential construction contract that required intervention by an architect prior to demanding arbitration, stated: "The parties' agreement does not expressly provide that compliance with certain procedures and limitations set forth therein concerning correction of work are conditions precedent to arbitration", citing *United Nations* supra, at p. 364, ruling that whether the homeowners complied with those provisions of the contract does not present a ground upon which to stay arbitration (see also *Board of Ed. Of Enlarged Ogdensburg City School Dist. v Wager Const. Corp*, 37 NY2d 283, 289 [1975]; *Matter of Dobbs Ferry Union Free School Dist. (Dobbs Ferry United Teachers)*, 74 AD2d 924 [2d Dept 1980]).

This court finds the time requirements included in the CBA in this action do not rise to the level of statutory condition precedent. Thus, it is within the purview of the arbitrator to determine to what extent the course of conduct here affects the right of the grievant to have her claim resolved by arbitration. The quasi-informal nature of the prior dealings between her counsel and Ms. Maghoolaghan, and the effect thereof, relative to the issue of her promotion, are well within the

power of the arbitrator to resolve, without the intervention of the court (see *Matter of Teamsters Local 445 v Town of Monroe*, 188 AD3d 896 [2d Dept 2020]).

As to petitioner's argument that the Notice to Arbitrate did not contain the statutory twenty (20) day language, the court rejects that claim, upon a finding that this proceeding has moved along without unnecessary delay, agreed to by petitioner, as evidenced by Ms. Magoolaghan's affirmation, ¶ 6 *supra* (*see Egol v Egol*, 118 AD2d 76 [1st Dept 1986]) (omission of CPLR 7503 (c) provision within the demand for arbitration did not render it ineffective).

Petitioner next argues that this dispute is not the proper subject for arbitration because respondent has alleged a violation of the CSL, "a subject which is not subject to grievance arbitration if it requires the waiver or limitation of the Civil Service Law's promotion requirements." The CBA includes Article VIII, Section 6 ("Transfers and Promotions"), which includes multiple subsections that address the issue that is the very subject of this grievance. The Taylor Act (CSL Article 14) was enacted to provide guidance and direction in area of governmental employer/employee relations, including the favored status of collective bargaining agreements (see CSL 200 and CSL 204). Where the court is called upon to determine whether a grievance is subject to arbitration, there is a two-level test to be employed, namely (1) does the Taylor Act authorize the claim to be arbitrated, and (2) if the answer is yes, did the parties include the subject matter of the claim within the CBA (see *Matter of Blackburne (Governor's Off. of Empl. Relations)*, 87 NY2d 660 [1996]). "If a statute, decisional law or public policy precludes the governmental employer and employee from referring the dispute to arbitration, then the answer to this inquiry is no and the claim is not arbitrable (internal citations omitted)". (*id.* at 665.)

As stated in *Mineola Union Free School Dist. v Mineola Teachers' Ass'n* (37 AD3d 605, 606 [2d Dept 2007]):

> "Arbitration is precluded on public policy grounds where a court can conclude, without engaging in any extended fact-finding or legal analysis, that a law prohibits in an absolute sense the particular matters to be decided by arbitration or, where "the award itself [would] violate a well-defined constitutional, statutory or common law of this State" (internal citation omitted)."

Here, petitioner cites *Matter of Enlarged City Sch. Dist. Of Middletown N.Y. v Civil Serv. Empls. Ass., Inc.* (148 AD3d 1146 [2d Dept 2017]), where the union member was terminated for

more than one year on workers' compensation leave. The Court, referencing CSL 71 ("Reinstatement after separation for disability"), reversed the motion court and denied arbitration, finding upon "public policy and in effect, decisional law", the provisions of that statute, and CSL 73 ("Separation for ordinary disability; reinstatement") pre-empted the arbitration provisions of the CBA, and for the further reason that an arbitrator would not be able to fashion a remedy that would not violate public policy in this matter." (*id.* at 1148-1149). Respondent does not refer the court to a specific section of the Civil Service Law that arguably preempts consideration by an arbitrator of respondent's claim of "MHACY improperly [having] failed to promote Shannon Stewart to the position of Housing Assistant II in violation of both the contract between the parties and applicable civil service law...Article VIII, Section 6; Article XIII." [NYSCEF Doc. No. 3].

This court is cognizant of the two step analysis argued by petitioner, as enunciated in *Matter of Acting Supt. of Schools of Liverpool Cent.School Dist. (United Liverpool Faculty Assn.)*, 42 NY2d 509 [1977]. The Court of Appeals, in *Matter of Board of Ed. of Watertown City School Dist. (Watertown Educ. Assn.)*, 93 NY2d 132, 138-139 [1999] stated:

> "In the 22 years following *Liverpool,* however, this Court has overwhelmingly rejected contentions by public employers that particular issues fall outside the scope of permissible arbitration. This is not to say that the concept of public policy (or statutory or constitutional) restrictions on public sector arbitration are extinct. To be sure, there are instances in which arbitration has been prohibited. Moreover, our courts have vacated arbitral awards or portions thereof as having been against public policy." (internal citations omitted) (see also *Matter of Cohoes City School Dist. v Cohoes Teachers Assn.*, 40 NY2d 774 [tenure decisions]) (dispute specifically governed by the Education Law with power vested solely in school board to make tenure determinations).

In *Matter of Teamsters Local 445 v Town of Monroe* (*supra* at 897 [2d Dept 2020]), the dispute involved the termination of an employee and tenure protection under the CBA, which the Town argued was not arbitrable. The Court stated: "Contrary to the Town's contention, there is no statutory, constitutional, or public policy prohibition against arbitrating this dispute regarding the termination of an employee in an 'exempt class' under the Civil Service Law (internal citations omitted)." Finding that "a reasonable relationship exists between the subject matter of the dispute and the general subject matter of the CBA" (*id.* at 898), the Court denied the petition to stay

arbitration. This court finds that there is no constitutional or statutory impediment, or public policy prohibition, to the arbitration here proceeding (*see Matter of Board of Educ. v Yonkers Fedn. of Teachers*, 188 AD3d 422 [2d Dept 2020]).

CONCLUSION

Here, it is clear, pursuant to Article VIII ("Employeee Status and Rights"), Section 6, that transfers and promotions were included in the CBA, which properly addressed the subject matter of arbitration, both as to the procedural background and the substantive issue to be determined. Accordingly, it is

ORDERED that the petition of the MUNICIPAL HOUSING AUTHORITY OF THE CITY OF YONKERS, for an order permanently enjoining and restraining petitioner and respondent LOCAL 456, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, from prosecuting, defending or otherwise participating in any arbitration of the grievance of Shannon Stewart, is dismissed; and it is further

ORDERED that the temporary restraining order signed on September 28, 2021 is vacated as null and void effective the date of this decision/order, and respondent may proceed to arbitration.

The foregoing constitutes the Decision/Order of the Court.

Dated: White Plains, New York
January 10, 2022

ENTER

HON. LAWRENCE H. ECKER, J.S.C.