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SHORT FORM JUDGMENT

INDEX No. 06-9356

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4/21/06 (#002)
MOTION DATE 5/19/06 (#003 004)
ADJ. DATES 6/2/06
Mot. Seq. # 002 - Petition Denied
Mot. Seq. # 003 - MG
Mot. Seq. # 004 - MG; CDISP

DAVID SHEEHAN, MICHAEL KERN, JOHN HELLBERG and ANDREW WALTHER, Petitioners, For a Judgment pursuant to Article 75 of the Civil Practice Law and Rules -against- SUFFOLK COUNTY SHERIFF'S DEPARTMENT, THE COUNTY OF SUFFOLK and THE SUFFOLK COUNTY DEPUTY SHERIFF'S POLICE BENEVOLENT ASSOCIATION, Respondents.	KOEHLER & ISAACS, LLP Attys. For Petitioners 61 Broadway New York, NY 10006 ROSENTHAL, CURRY & KRANZ, LLP Attys. For Resp SC Dep. Sheriff's Ben. Assn 1600 Front St. East Meadow, NY 11554 LAMB & BARNOSKY, LLP Attys. For Resps. SC Sheriff's Dept & Cty. 534 Broadhollow Rd. Melville, NY 11747

Upon the following papers numbered 1 to 17 read on this petition pursuant to Article 75 of the CPLR and motions to dismiss; Notice of Petition and supporting papers 1 - 5; Motions and supporting papers 6-8; 9-11; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other 12-13 (memorandum); 14 (memorandum); 15 (affid. of service); 16-17 (memorandum); ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this petition (#002) for a judgment pursuant to CPLR 7511 vacating and setting aside the Opinion and Award in a Compulsory Interest arbitration proceeding between the Suffolk County Deputy Sheriff's Police Benevolent Association, the Suffolk County Sheriff's Police Department and the County of Suffolk, on the grounds that the Arbitration Panel was improperly and illegally constituted and additionally, pursuant to CPLR 7511(b)(2)(i), it violated statutory law, is denied; and it is further

ORDERED that this motion (#003) by the respondent, Suffolk County Deputy Sheriff's Police Benevolent Association, for an Order pursuant to CPLR 406 dismissing the petition on the ground that the petitioners lack standing, is granted; and it is further

ORDERED that this motion (#004) by respondents, Suffolk County Sheriff's Department and the County of Suffolk, for a judgment pursuant to CPLR 404(a) and CPLR 3211(a)(3) and (7), dismissing the petition in its entirety on the grounds that the petitioners lack standing to bring this proceeding and that the petition fails to state a cause of action, is granted; and it is further

ORDERED AND ADJUDGED that pursuant to CPLR 7511(e), the arbitration award rendered by the Compulsory Interest Arbitration Panel involving the County Deputy Sheriff's Police Benevolent Association and the County of Suffolk, signed and acknowledged on January 3, 2006, is hereby confirmed.

This special proceeding was brought by four uniformed employees (hereinafter "petitioners") of the Suffolk County Sheriff's Department (hereinafter "Department"), who are members of the Suffolk County Deputy Sheriff's Police Benevolent Association (hereinafter "PBA"). Petitioners seek the vacatur of a statutorily mandated civil service arbitration award on grounds that the arbitration panel was improperly and illegally constituted under Civil Service Law § 209(4)(c)(ii) and pursuant to CPLR 7511(b)(2)(i), on grounds that the award violated statutory law. The petition is opposed by respondents, PBA, Department and the County of Suffolk (hereinafter "Suffolk").

Respondents were without a formal union contract since 1998 and, pursuant to a series of stipulated agreements, the parties extended the contract up to the year 2003. When the respondents failed to negotiate a new contract after the 2002-2003 stipulated agreement expired, the PBA filed a Petition for Compulsory Interest Arbitration with the Suffolk County Public Employment Relations Board pursuant to Civil Procedure Law §§ 209(4)(g) and 212 and according to Civil Procedure Law § 209, a three member arbitration panel was selected. The County appointed Jeffrey L. Tempera, the PBA appointed Vincent F. DeMarco (hereinafter "DeMarco") and then PBA president, who jointly selected Dr. Rosemary A. Townley, Esq. as the Chairperson and public member of the panel.

Upon being appointed as the PBA representative, DeMarco informed all parties to the arbitration of his intention to run for the elected position of Suffolk County Sheriff in the November 2005 general election. Petitioners contend in their petition that DeMarco should have resigned as the PBA representative; that upon his election in November, 2005, his interest and perspective shifted from the PBA to the respondents, which incidently included the PBA, who with the Department and County, oppose the petition; and that the alleged inference of the petitioners that DeMarco no longer represented their interests in the arbitration process, would thus be biased and impartial against the PBA.

Neither Suffolk, the Department nor the PBA raised any objection to DeMarco remaining as the PBA representative during the period the arbitration panel was considering the issues submitted for decision by the panel once this fact was made known to them. DeMarco concurred with the public and neutral arbitrators in the granting of the award except for two items in the agreement, which, because of the composition of the panel, became part of the award.

An arbitration award will not be set aside unless it is violative of a strong public policy, or is *totally irrational* (*see* ***Silverman v Benmore Coats,*** 61 NY2d 299, 473 NYS2d 774 [1984]; *reg den* 61 NY2d 299, 477 NYS2d 1026 [1984]). Given that arbitration awards are accorded great deference, "it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded" (***Goldfinger v Lasker,*** 8 NY2d 225, 230, 508 NYS2d 159 [1986]). Furthermore, any limitation in the arbitrator's powers must be expressly set forth as part of the arbitration clause itself (*see* ***Silverman v Benmore Coats,*** 61 NY2d 299, *supra*).

The general rule under CPLR 7511 is that the decision of an arbitration panel may be vacated only at the insistence of one or two parties, that is, the union and the employer, not by an individual employee. In these situations, an individual employee is not "a party" under that statute. A party must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties (*see*

Warth v Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L. Ed2d 343 [1975]). It has generally been, and historically true, that unless there are specific provisions in the collective bargaining agreement granting an employee or employees, who has been allegedly aggrieved, particular and specific rights in relation to vacating an arbitrators award (*see* ***Matter of Diaz v Pilgrim State Psychiatric Ctr.,*** 62 NY2d 693, 476 NYS2d 525 [1984]), the individual employee lacks standing to seek a vacatur of the award (*see* CPLR 7511; ***Matter of Case v Monroe Community Coll.,*** 89 NY2d 438, 654 NYS2d 708 [1997]; ***Perduyn v Consolidated Edison Co. of New York,*** 185 AD2d 766, 587 NYS2d 553 [1st Dept 1992]; ***Matter of Alva v Consolidated Edison Co.,*** 183 AD2d 713, 583 NYS2d 291 [2d Dept 1992]; ***Union Carbide Corp., Linde Div. v Local 8-215 of Oil, Chem. and Atomic Workers Intl. Union,*** 168 AD2d 967, 565 NYS2d 346 [4th Dept 1990]). The burden is on the party challenging the arbitration results to demonstrate that any of the foregoing occurred.

The contents of the collective bargaining agreement determines the standing issue and petitioners herein have presented no evidence that the collective bargaining agreement between the PBA and Suffolk grants them any individual or specific rights under the agreement that would make them a party to the arbitration. The grounds specified in CPLR 7511 for the vacatur of an arbitration award are few in number and are narrowly applied (*see* ***Matter of Domotor v State Farm Mut. Ins. Co.,*** 9 AD3d 367, 778 NYS2d 919 [2d Dept 2004]; *lv app den.* 3 NY3d 612, 788 NYS2d 668 [2004]; ***Materia v Josephthal Co.,*** 133 AD2d 146, 518 NYS2d 814 [2d Dept 1987]); Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B CPLR 7511:2 to CPLR 7511:5, pp. 771-782; Alexander, Supplementary Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, pp. 121 -123). The grounds are (1) that the rights of a party were prejudiced by corruption, fraud or misconduct in procuring the award, or by the impartiality of an arbitrator; (2) that the arbitrator exceeded his or her power or failed to make a final or definite award; or (3) that the arbitration suffered from an unwaived defect (*see* ***Azrielant v Azrielant,*** 301 AD2d 269, *supra*; ***Hackett v Milbank, Tweed, Hadley & McCoy,*** 86 NY2d 146, 630 NYS2d 274 [1995]). An arbitration award may only be vacated if it is totally "irrational or violative of a strong public policy (*id* at 155; *see also* ***City of Middletown v City of Middletown Police Benevolent Assoc.,*** 30 AD3d 597, 818 NYS2d 232 [2d Dept 2006]; ***Meehan v Nassau Community Coll.,*** 251 AD2d 415, 674 NYS2d 697 [2d Dept 1998], *lv app den* 92 NY2d 814, 681 NYS2d 475 [1998]; ***Dechamps v Sweet Home Cent. School Dist.,*** 158 AD2d 937, 551 NYS2d 431 [4th Dept 1990]). The burden is on the party challenging the arbitration results to demonstrate that any of the foregoing occurred. Petitioners have failed to sustain their burden on these grounds.

Additionally, petitioners seek to vacate the arbitration award, pursuant to CPLR 7511(b)(2)(i), on the grounds that the arbitration award shall be vacated upon the application of a party who neither participated in the arbitration or if the rights of the party were prejudiced by one of the grounds specified in CPLR 7511(b)(1)(i). They also allege that, pursuant to CPLR 7511(b)(2)(i), the arbitration award should be set aside because it violated statutory law based upon the statutory mandates in Civil Service Law § 209(4)(c)(ii). This section governs the manner in which arbitrators are selected and nothing else. An alleged violation of the statutory law is not a ground under CPLR 7511(b)(2)(i) to set aside an arbitration award nor is it a ground under CPLR 7511(b)(1).

Petitioners' attempt to graft the singular fact pattern of ***Bethlehem Steel Corp. v Fennie,*** 86 Misc2d 968, 383 NYS2d 948 (Sup. Ct. Erie County 1976); *affd* 55 AD2d 1007, 391 NYS2d 227 (4th Dept 1997) to the matter before the Court, is in effect, to create an issue of a statutory violation under Civil Service Law § 209(4)(c)(ii) for the proposition that as the arbitration panel was improperly and illegally constituted under Civil Service Law § 209 (4)(c)(ii), it did not protect or represent the petitioners' interest as tax payers and/or members of the PBA.

In ***Bethlehem Steel***, as the result of a recent election, the appointed arbitrator from the public sector lost his position as an administrator. He would now have to revert back to his permanent civil service position as a police captain. As the public sector arbitration panel member, he was vehement in opposing any increase in the contract provisions in favor of the City of the Lackawanna Police Department (hereinafter "Police Department") beyond that which had been proposed by the public employer, the City of Lackawanna

(hereinafter "City"). Upon his learning of his certainty of being returned to his civil service position with the Police Department, he switched his vote and voted with the police representative to award to the police department a significantly higher benefit package, wherein he would have individually benefitted from upon his reversion to his former position as a police captain.

The court found in ***Bethlehem Steel*** that the public sector representative "knowingly and fraudulently misrepresented his state of mind and his intentions in the City for his own personal benefit" (*id* at 969). The court also determined that because of this intentional fraudulent behavior, there should be a new arbitration panel with proper representation. The composure of the arbitration panel under Civil Procedure Law § 209(4)(c)(ii) was not found to be a violation of any statute. The "former" police captain was now the public sector arbitration panel member. He had not lost his civil service status and was on leave from the Police Department. What ended his representative status with the City was not any perceived violation of a state law in the arbitration panel initial makeup, but, rather, his own "overwhelming personal interest of far greater importance than his obligation to the City. His association in interest with the City as contemplated by section 209 of the Civil Service Law was ended" (*id* at 969). His association in interest with the City was not terminated because the arbitration panel chosen was in violation of a state statute, as petitioners would have one believe, but because his association as the City's representative was terminated because of his fraud and the need to replace him with another City representative to the panel.

In ***Bethlehem Steel***, it was the resulting action of a member of the panel, which in betraying his trust and placing his own interest above that of his status as an arbitrator, that caused the court to vacate the award based upon his actions which the court found to be fraudulent. It was the public representative, who in violating his oath by his pursuit of his pecuniary interest, procured the award by fraud, which caused the award to be vacated (*see* ***Matter of Shirley Silk Co.,*** 260 AD 572, 23 NYS 254 [1st Dept 1940]; ***Matter of Friedman,*** 215 AD 130, 213 NYS 369 [1st Dept 1926]). There was no doubt as to the fact that the public representative, because of his pecuniary interest was found to be incapable of discharging his duties as an impartial arbitrator, which caused his removal (*see* ***Western Union Tel. Co. v Selly,*** 60 NY2d 411 [Sup Ct, New York Cty 1946]; *order affd.* 270 AD 839, 61 NYS2d 911 [1st Dept 1946]; *app granted* 270 AD 894, 62 NYS2d 604 [1st Dept 1946]; *affd.* 295 NY 395 [1946]). This is not the case here. Additionally, there was no finding by the lower court of a violation of Civil Procedure Law § 209(4)(c)(ii) and petitioners' reliance on the court's dicta in its decision is totally misplaced.

The Appellate Division in ***Bethlehem Steel*** also found that the award was a fraud upon the taxpayers of the City of Lackawanna and therefore, an action could also be brought under State Finance Law § 123-b in that the award was violative of the provisions of said statute (*see e.g.* ***Matter of Aimcee,*** 21 NY 621, 289 NYS2d 968 [1968]). State Finance Law § 123-b gives any citizen/taxpayer the right to maintain an action for equitable or declaratory relief against an officer or employee of the state who in the course of his or her duties, has caused, is now causing, or is about to cause, a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property. The law does not prohibit any act but merely, grants standing to taxpayers to commence an action (*see* ***Sierra Club v Palisades Interstate Park Commn.,*** 99 AD2d 548, 471 NYS2d 633 [2d Dept 1984]; *lv app den.* 63 NY2d 604, 480 NYS2d 1026 [1984]). In order to bring an action for relief under State Finance Law § 123-b, the party bringing the action must submit proof of their claim that a party is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property (*see* State Finance Law § 123-b[1]). The party bringing an action under § 123-b has to plead and prove that the challenged action is in contravention of some rule or provision of law enunciated elsewhere (*id.*).

Here, petitioners offer no evidentiary proof that there is any indicia of fraud in the arbitration award which has been raised by either the County or the public member of the panel or for that matter, by petitioners themselves to sustain or even contemplate an action for fraud under State Finance Law § 123-b.

While the petitioners, or for that matter, any employee or member of a collective bargaining unit who may be unhappy with the decision of the arbitration board, would like to ask the Court to vacate the award, dissatisfaction does not equate to standing nor does it meet the standard under Article 75 of the CPLR for vacating an award. The petition does not set forth any fact to suggest that the arbitration award was made under any circumstance prohibited by Article 75 of the CPLR. Petitioners were not a party to either the collective bargaining agreement or the arbitration and cannot cite to a single provision in the collective bargaining agreement that would grant them standing to bring an Article 75 proceeding seeking vacatur of the arbitration award (*see* ***Matter of Wilson v Board of Ed. of the City of New York*** 261 AD2d 409, 689 NYS2d 222 [2d Dept 1999]; ***Matter of Alva v Consolidated Edison Co.,*** 183 AD2d 713, *supra*; *see also* ***Matter of Gonzalez v City of Peekskill,*** 284 AD2d 463, 726 NYS2d 874 [2d Dept 2001]).

The petitioners have failed to meet the burden, by producing competent credible evidence, necessary to overturn the arbitration award on one or more of the grounds stated in CPLR 7511(b)(1) (*see* ***Jain v New York City Tr. Auth.,*** 27 AD3d 273, 809 NYS2d 911 [1st Dept 2006]; ***Matter of Schwartz v New York City Educ. Dept.,*** 22 AD2d 622, 802 NYS2d 726 [2d Dept 2005]; ***Matter of Fine Hummel, P.C. v Mugavero,*** 5 AD3d 483, 772 NYS2d 561 [2d Dept 2004]; ***Matter of Rothman v RE/MAX of N.Y.,*** 274 AD2d 520, 711 NYS2d 477 [2d Dept 2000]; ***Artists & Craftsmen Bldrs., Ltd. v Schapiro,*** 232 AD2d 265, 648 NYS2d 550 [1st Dept 1996]; ***Matter of Hershkowitz v L.B. Kaye Assoc., Ltd.,*** 170 AD2d 272, 565 NYS2d 804 [1st Dept 1991]; *app dism* 78 NY2d 899, 573 NYS2d 458 [1991]; ***North Syracuse Cent. School Dist. v North Syracuse Educ. Assn.***, 45 NY2d 195, 408 NYS2d 64[1978]).

Further, petitioners have failed to submit any evidentiary proof to counter the fact that DeMarco's conduct, upon his appointment as the PBA representative, was anything other than one of diligently representing their interests during the period he served as the PBA arbitrator until being sworn in as the Sheriff of Suffolk County (*cf.* ***Western Union Tel. Co. v Selly,*** 60 NY2d 411, *supra).* Petitioners have also failed to offer any evidentiary proof that there was indicia of fraud in the arbitration award raised either by the County or the public member of the panel or petitioners themselves to sustain a cause of action for fraud under the provisions of State Finance Law § 123-b.

Accordingly, the petition is denied, respondents' motions are granted and the petition is dismissed. Pursuant to CPLR 7511(e), the arbitration award is confirmed and judgment is awarded as noted herein. This constitutes the Order and Judgment of this Court.

DATED: 9/27/06

THOMAS F. WHELAN, J.S.C.