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SHORT FORM ORDER

INDEX NO. 3857/2010

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

In the Matter of the Arbitration Between Local 342, Long Island Public Service Employees, United Marine Division, International Longshoremen's Association, AFL-CIO (Grievant WILLIAM T. PERKS),

Petitioner,

-against-

THE TOWN OF HUNTINGTON,

Respondent.

ORIG. RETURN DATE: MARCH 17, 2010
FINAL SUBMISSION DATE: OCTOBER 13, 2011
MTN. SEQ. #: 013 (001; 003; 005; 007; 009; 011)
MOTION: MG

ORIG. RETURN DATE: APRIL 15, 2010
FINAL SUBMISSION DATE: OCTOBER 13, 2011
MTN. SEQ. #: 014 (002; 004; 006; 008; 010; 012)
CROSS-MOTION: XMD

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Upon the following papers numbered 1 to 10 read on this petition TO CONFIRM ARBITRATOR'S AWARD AND CROSS-PETITION TO VACATE AWARD. Notice of Petition and supporting papers 1-3; Notice of Cross-Petition and supporting papers 4-6; Affirmation in Opposition to Cross-Petition and supporting papers 7, 8; Memorandum of Law in Support of Motion to Confirm 9; Reply Memorandum of Law in Further Support of Cross-Petition 10; it is,

ORDERED that this petition by Local 342, Long Island Public Service Employees, United Marine Division, International Longshoremen's Association, AFL-CIO (Grievant WILLIAM T. PERKS) ("petitioner" or "Perks"), for an Order:

(1) confirming the Decision and Award of the Arbitrator, Professor David L. Gregory, dated February 16, 2009 ("Award"), in the arbitration

RHR

proceedings between the parties, which determined that the issues under grievance PERB Number A200-280 were valid and that respondent THE TOWN OF HUNTINGTON ("Town") breached Article 19, Section C of the Collective Bargaining Agreement between petitioner and the Town ("CBA");

(2) directing that the bifurcated arbitration agreed upon by the parties reconvene forthwith to determine the monetary liability of the Town with regard to Article 19, Section C, including the amount of reasonable attorney's fees, and to determine any other unresolved matters within the scope of PERB Number A200-280; and

(3) directing that judgment be entered thereon confirming the Award pursuant to CPLR 7510,

is hereby **GRANTED** as set forth hereinafter; and it is further

ORDERED that this cross-petition by the Town for an Order vacating the Award on the grounds that it allegedly violates public policy on the following bases:

(1) the finding of the Arbitrator in the Award that the Town is required to pay the fees of petitioner's counsel with respect to a criminal proceeding absent an express specific agreement to do so violates public policy and requires that the Award be vacated;

(2) the finding of the Arbitrator in the Award that a department director can bind the Town to pay for petitioner's legal fees violates public policy and requires that the Award be vacated; and

(3) the finding of the Arbitrator in the Award that the Town is required to pay the legal fees of his attorney when the request for payment of fees was made after the fact is a retroactive payment of attorney's fees which constitutes a gift of public funds which violates public policy and requires that the Award be vacated,

is hereby **DENIED** for the reasons set forth hereinafter.

This matter has a lengthy underlying factual history. Grievant Perks was previously the Harbor Master and Oil Spill Response Manager for the Town, and was a member of petitioner Local 342. Perks allegedly had a personal relationship with Susan Scarpati-Reilly ("SSR"), a former councilwoman for the

Town, although she denies that there was ever such a relationship. Perks alleges that after he terminated the relationship, SSR engaged in a pattern of sexual harassment against him, culminating in the evening of February 28, 1999. On that date, while Perks was at work monitoring an oil transfer at the Mobil Oil Terminal located in Cold Spring Harbor, SSR arrived at the transfer station and confronted Perks. SSR allegedly accused Perks of, among other things, being out of uniform. Perks claims that during the confrontation, SSR, without provocation, struck Perks on the left side of his head and then grabbed his arm. In contrast, SSR claims that Perks struck her just below her right shoulder on her upper arm. Later that evening, SSR reported to the Suffolk County Police Department and a Town attorney that she had been struck on the right arm by Perks. Also that same evening, Perks reported the incident to Joseph J. Anastasia, the then-Director of the Department of Maritime Services for the Town, whom Perks regarded as his supervisor. Perks contacted Mr. Anastasia by telephone and stated that he was "in trouble," and that he had hit SSR and SSR had also hit him. In response, Mr. Anastasia allegedly told Perks "not to say anything more" and to "get a lawyer."

As a result of the incident of February 28, 1999, the Town, by Resolution dated March 7, 2000, engaged an independent fact finder to investigate the allegations that Perks, while working in the scope of his employment, assaulted SSR. In his report, the fact finder concluded that the precise facts of the subject incident may never be susceptible of absolute determination, as Perks and SSR, the only known witnesses, tell irreconcilable versions of the events.

The Town also began an immediate investigation into Perks' conduct, which investigation was allegedly still ongoing as of October 2010. Consequently, Perks requested, on or about November 1, 1999, that the Town provide him legal representation to defend him in connection therewith. By correspondence dated November 16, 1999, the then-town attorney denied Perks' request. Perks then filed a grievance with the Town on or about December 7, 1999, contending that the Town failed to provide him legal counsel in violation of Article 19, Section C, of the parties' CBA in effect on February 28, 1999. The grievance was denied by the Town. Thereafter, Perks served demands for arbitration, dated August 29, 2000 and September 7, 2000, and the grievance was submitted to arbitration pursuant to the Rules of the New York State Public Employment Relations Board. In accordance therewith, Professor David L. Gregory was appointed to hear and determine Perks' grievance.

The arbitration hearing commenced on December 14, 2000, and twelve additional hearings were held between December 27, 2000 and May 8, 2001. Upon consent of the parties, the arbitration was then held in abeyance pending the resolution of a federal lawsuit commenced by Perks in the Eastern District of New York captioned, *William T. Perks v. Town of Huntington and Susan Scarpati-Reilly, as Councilwoman for the Town of Huntington and Individually*. The federal case resulted in a jury verdict in favor of the defendants and Perks' suit was dismissed. Thus, the arbitration hearing resumed on May 19, 2006, and continued for three more sessions until it was completed on September 11, 2008. However, prior to reconvening the arbitration hearing on May 14, 2008, the parties agreed to bifurcate the arbitration. As such, the arbitrator was to first decide whether or not the grievance was timely and arbitrable, and if so, whether or not the Town breached Article 19, Section C of the CBA. If those questions were answered in the affirmative, then the arbitration was to reconvene to determine the extent of the Town's liability with respect to the legal fees incurred by Perks, as well as any other outstanding claims pursuant to Perks' demands for arbitration.

The arbitrator issued the subject Award on or about February 16, 2009, which petitioner alleges that it received on February 18, 2009. Within the Award, the arbitrator found that: (1) the grievance was timely and arbitrable; and (2) Perks met his burden of proving that the Town breached Article 19, Section C of the CBA. Accordingly, the arbitrator directed that the arbitration be convened forthwith to determine the monetary liability of the Town under Article 19, Section C of the CBA.

On or about February 24, 2010, petitioner filed the instant application to confirm the Award, which was served on the Town's counsel on February 15, 2010. In response, the Town filed the instant cross-petition to vacate the Award. After numerous justices recused themselves herein, the undersigned was assigned to hear the matter.

CPLR 7511 (b) sets forth the exclusive grounds upon which an arbitration award may be vacated (*see State Farm Mut. Auto. Ins. Co. v Motor Vehicle Accident Indemnification Corp.*, 25 AD3d 740 [2006]; *Boggin v Wilson*, 14 AD3d 523 [2005]; *Kwasnik v Willo Packing Co.*, 61 AD2d 791 [1978]). Under CPLR 7511 (b) an arbitration award must be vacated if a party's rights were impaired by an arbitrator who exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made (*see* CPLR 7511 [b] [1] [iii]). It is well-settled that an arbitrator exceeds his power under the meaning of the statute where his award violates a strong public policy,

is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power (*Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85 [2010]). Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where an arbitrator has made an error of law or fact (*Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85, *supra*; *Matter of Eastman Assoc., Inc. [Juan Ortoo Holdings, Ltd.]*, 90 AD3d 1284 [2011]).

Moreover, as a matter of public policy, the merits of an arbitration are beyond judicial review (*see* CPLR 7511 [b] [1]; *Berman v Congregation Beth Shalom*, 171 AD2d 637 [1991]; *Integrated Sales v Maxell Corp. of Amer.*, 94 AD2d 221 [1983]). An arbitrator's award will not be set aside even though the arbitrator misconstrues or disregards the proof or misapplies substantive rules of law, unless it violates strong public policy or is totally irrational (*see Hegarty v Bd. of Educ.*, 5 AD3d 771 [2004]; *Wicks Constr., Inc. v Green*, 295 AD2d 527 [2002]; *Curley v State Farm Ins. Co.*, 269 AD2d 240 [2000]).

As discussed, the Town argues that the Award must be vacated as violating public policy on three grounds, to wit: (1) the finding that the Town is required to provide counsel to an employee in a criminal proceeding absent an express specific provision of the CBA requiring it to do so violates public policy; (2) the determination that a department director can bind the Town to pay for Perks' legal fees violates public policy; and (3) Perks' request for payment of fees after the fact is a retroactive payment of attorney's fees which constitutes a gift of public funds and violates public policy. The Court will address each argument *seriatim*.

Section C of Article 19 of the CBA, which is entitled "Protection of Employees," provides in its entirety:

> The EMPLOYER shall provide legal counsel to defend any employee as a result of an assault while acting on behalf of the EMPLOYER within the scope of their employment.

Initially, the Court finds unavailing the Town's argument that directing the Town to provide counsel to an employee in a criminal proceeding absent an express specific provision of the CBA requiring it to do so violates public policy. The Court notes that the CBA is silent as to whether the assault need be in the context of a civil or criminal proceeding, and it is undisputed that there have never been criminal charges filed against Perks with respect to the subject incident.

Therefore, any argument that objects to the Town providing counsel to Perks in a criminal proceeding is misplaced. The agreed-upon language of Article 19, Section C simply states that the Town must provide legal counsel to an employee in any instance where the employee has to "defend" against an accusation of an assault committed while acting on behalf of the Town within the scope of their employment.

Next, with respect to whether a department director can bind the Town to pay for Perks' legal fees, the arbitrator found that, "[i]n light of all the facts and circumstances, I find that the Grievant's effective supervisor, Director Anastasia, had sufficient authority to advise and instruct the Grievant to 'get a lawyer,' and to legally bind the Town, as the supervisory agent of the Town, to comply with Article 19, Section C" of the CBA. The arbitrator further found that "the Grievant reasonably relied upon Director Anastasia's instruction to him on the evening of February 28, 1999 to 'get a lawyer.' " The arbitrator based his determination upon, among other things, the fact that Director Anastasia signed Perks' payroll sheets.

Article 19, Section C, which was agreed to by the Town, sets forth the Town's contractual obligation to provide legal counsel to defend any employee as a result of an assault while acting on behalf of the Town within the scope of their employment. However, the Court notes that the CBA is silent as to the procedure an employee must follow in order to successfully obtain legal counsel pursuant to that section. In the instant application, the Town relies upon Town Law § 64, which delineates the general powers of a town board and in particular the power of a town board to approve and execute contracts on behalf of the town (*see* Town Law § 64 [6]). The Town alleges that Director Anastasia did not have such power. While is it uncontroverted that Director Anastasia was not a member of the Town Board, the contractual obligation of the Town to provide legal counsel under the appropriate circumstances was created by the CBA, not by anything Director Anastasia said to Perks on that fateful night.

Furthermore, petitioner alerts the Court that on October 19, 1999, the Town Board authorized the Town to pay for a private attorney for SSR to represent her in connection with the various lawsuits stemming from February 28, 1999. Perks claims that the Town Board could have passed a similar resolution on his behalf pursuant to Article 19, Section C. Perks contends that because of the "nature of the allegations and the resources of the town, counsel was required immediately in order to properly defend himself during this ongoing and still unresolved investigation" (emphasis in original).

Finally, the Court finds similarly without merit the Town's contention that the request for payment of attorney's fees after the fact is a retroactive payment of fees which constitutes a gift of public funds and violates public policy. Although such reimbursement would constitute an impermissible donation from the public purse in instances where there is no prior legal obligation on the part of the Town to provide reimbursement (*see* NY Const, art VIII, § 1), the reimbursement is proper where there is a prior legal obligation (*cf. Corning v Village of Laurel Hollow*, 48 NY2d 348 [1979]; *Zimmer v Town of Brookhaven*, 247 AD2d 109 [1998]), and a contrary result is not mandated in the instant case merely because the Town's prior obligation was contractual rather than statutory (*Antonopoulou v Beame*, 32 NY2d 126 [1973]; *Security and Law Enforcement Employees, District Council 82, American Federation of State, County and Municipal Employees, AFL-CIO v County of Albany*, 96 AD2d 976 [1983]; *cf. Piro v Bowen*, 76 AD2d 392 [1980], *mot for lv to app den* 52 NY2d 702 [1980]).

Based upon the foregoing, it cannot be said that the Award violated any strong public policy or was totally irrational (*see Hegarty v Bd. of Educ.*, 5 AD3d 771, *supra*). As such, the Court finds that the Town failed to establish vacatur pursuant to CPLR 7511 (b) (1) (iii), or any other ground in CPLR 7511.

Accordingly, the Town's cross-petition to vacate the Award is **DENIED**, and petitioner's application to confirm the Award is **GRANTED**. Petitioner may submit judgment thereupon on notice pursuant to CPLR 7514.[1]

The foregoing constitutes the decision and Order of the Court.

Dated: May 9, 2012

HON. JOSEPH FARNETI
Acting Justice Supreme Court

__X__ FINAL DISPOSITION **_____ NON-FINAL DISPOSITION**

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[1] This Court has issued an Order of even date in a related proceeding entitled, *In the Matter of the Town of Huntington v. Local 342, Long Island Public Service Employees, United Marine Division, International Longshoremen's Association, AFL-CIO, and Arbitrator David L. Gregory*, under Index No. 23474/2010, which grants the Town's application for a preliminary injunction enjoining the continuation of the subject arbitration pending a decision by the courts on Perks' request to disqualify the Town's current counsel from participating in the damages phase of the arbitration.