Matter of City of New York v Wells
2014 NY Slip Op 32970(U)
November 20, 2014
Supreme Court, New York County
Docket Number: 450286/13
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5

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In the Matter of the Application of
THE CITY OF NEW YORK, MICHAEL R. BLOOMBERG as MAYOR OF THE CITY OF NEW YORK, et al.,

Petitioners,

-against-

ANTHONY WELLS, as President of SOCIAL SERVICE EMPLOYEES UNION LOCAL 371, DISTRICT COUNCIL 371, American Federation of State County and Municipal Employees, AFL-CIO, and GEORGE MILLER,

Respondents.

For a Judgment and Order Pursuant to Article 75 of the Civil Practice Law and Rules.

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DECISION AND ORDER
Index No.: 450286/13
Seq. No. 001

In the Matter of the Arbitration of Certain Controversies Between
SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, on behalf of its member GEORGE MILLER,

Petitioner,

-against-

CITY OF NEW YORK and CITY OF NEW YORK HUMAN RESOURCES ADMINISTRATION,

Respondents,

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Index No.: 651930/13
Seq. No. 001

KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THESE MOTIONS:

PAPERS	E FILING DOCUMENT NUMBER
Index No. 450286/13	
PETITION, AMENDED PETITION, NOTICE OF PETITION	1, 5, 6 (Exh. A-R)
ANSWER	9 (Exh. A-H)
MEMORANDUM OF LAW	23
Index No. 651930/13	
PETITION, NOTICE OF PETITION	1 (Exh. A, B), 5
ANSWER, APPENDIX	13 (Exh. A-R), 14
MEMORANDA OF LAW	17, 19

UPON THE FOREGOING PAPERS, THE DECISION/ORDER ON THE PETITIONS IS AS FOLLOWS:

In these consolidated Article 75 proceedings, the Social Service Employees Union, Local 371 ("the Union"), on behalf of its member, George Miller, petitions, under Index Number 651930/13, to confirm an arbitration award dated November 19, 2012 ("the award") which, inter alia, found that Miller had been improperly discharged from his employment. The City of New York petitions, under Index Number 450286/13, to vacate the award on the grounds that it is irrational, offends the well-defined public policy against sexual harassment in the workplace, and exceeds the limits of the arbitrator's authority by failing to comply with the parties' collective bargaining agreement ("CBA").[1] Upon oral argument, and upon a review of the parties' papers and the relevant statutes and case law, **the petitions are granted in part and denied in part.**

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[1]The City petitions along with Michael R. Bloomberg, as Mayor of the City of New York, The New York City Office of Labor Relations, James F. Hanley as Commissioner of the New York City Office of Labor Relations, The New York City Human Resources Administration ("the HRA"), and Robert Doar as Commissioner of the New York City Human Resources Administration. Unless otherwise noted, these parties shall hereinafter be collectively referred to as "the City."

FACTUAL AND PROCEDURAL BACKGROUND:

In 2001, Miller was hired as a caseworker by the HRA, in which capacity he provided services to individuals and families. Prior to 2005, the HRA suspended Miller for stating that he was going to shoot up his workplace, using racial slurs and displaying unprofessional behavior when dealing with the public. In October of 2005, HRA brought misconduct charges against Miller, pursuant to Civil Service Law ("CSL") § 75,[2] for threatening a male co-worker and approaching him as if preparing to strike him on July 25, 2005 ("the Track 4 Charges").

In April of 2006, the HRA terminated Miller for sexually harassing a female co-worker from late 2004 through June of 2005, and for disobeying his supervisor's orders to stop such behavior. At an arbitration arising from this conduct, Miller and the HRA stipulated to reduce the penalty to a 30-day suspension. In 2007, Miller became a caseworker in the HRA's Division of Voluntary and Proprietary Homes for Adults.

In December of 2008, Miller was arrested for trespassing and harassing store personnel at a Macy's Department Store (Macy's). The arrest prevented Miller from returning to work that afternoon and until approximately 4 p.m. the next day. On April 15 and June 18, 2009, Miller appeared in criminal court in connection with the arrest but falsified his HRA time records to reflect that he had worked full days.[3] Miller admitted that, during a September, 2009 investigation regarding his arrest and the falsification of his time records, he provided incorrect

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[2] CSL § 75, entitled "Removal and other disciplinary action", provides that those covered under the section "shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section."

[3] Miller pleaded guilty to disorderly conduct in the criminal court case.

information concerning the said arrest. Miller's arrest and false timekeeping formed the basis of misconduct charges brought against him by the HRA on January 25, 2010 ("the Track 5 Charges").

During January and February of 2010, Miller was hospitalized at Bellevue Hospital Center and another facility for psychiatric treatment. On January 26, 2010, in accordance with the requirements of CSL § 72, which permits the City to place an employees on a medical leave of absence,[4] Miller was examined by a psychiatrist, Dr. Arthur Perlman, who diagnosed him with a psychiatric disorder and opined that he was not fit to perform his work duties. By letter dated February 4, 2010, the HRA proposed placing Miller on a medical leave of absence, pursuant to CSL § 72, effective February 19, 2010, and notified Miller of his right to object and to request a hearing. Miller objected to the leave, and followed the CSL § 72 statutory procedures to request a hearing, which was scheduled at the New York City Office of Administrative Trials and Hearings ("OATH").

On March 5, 2010, Miller grabbed a female HRA co-worker tightly around the waist and refused to release her. While the co-worker struggled to escape, Miller grabbed her breast. When Miller's female supervisor walked by and told him to stop, he touched the supervisor's chest. When the supervisor pushed Miller away and told him not to do that to her, he touched her chest again. Within the hour, Miller approached the co-worker from behind, touched her on the shoulder, and, when she turned around, she saw him exposed from the waist down,

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[4] CSL § 72 provides that "[a]n employee placed on leave of absence pursuant to this section shall be given a written statement of the reasons" for the determination and the proposed date of commencement of the leave. The employee is permitted to object to the proposed leave within ten working days from service of the notice, personally or by mail, and, upon objection, is to be afforded a hearing within thirty days thereafter.

masturbating. Although the co-worker ran away, Miller continued to expose himself in front of her, two other women, and additional staff. As a result of the incident, the criminal court issued the co-worker an order of protection against Miller. Miller, who was also charged with forcible touching and public lewdness, pleaded guilty to disorderly conduct.

On March 23, 2010, plaintiff appeared for an OATH hearing concerning the CSL § 72 leave. Miller, by counsel, withdrew his request for the hearing, and the parties stipulated that his CSL § 72 leave would commence that day.[5]

In April of 2010, the HRA brought misconduct charges against Miller for his March 5, 2010 actions ("the Track 6 Charges"). Miller availed himself of the CBA, which sets forth a grievance procedure culminating in impartial arbitration. At earlier stages of the grievance process, Miller was found guilty of all of the charges and received a 60-day suspension for the Track 4 Charges (although the HRA had recommended termination when the incident occurred in 2005). The HRA terminated Miller based on the Track 5 and Track 6 charges. Miller sought arbitration under the CBA, filing a waiver of his right to appear before another tribunal, such as OATH, regarding the misconduct charges. Arbitration was held in early 2012 before Arbitrator Josef Sirefman, who was charged with hearing and deciding the following issues:

> "1. Did HRA violate Article VI, Section 1(e) of the [CBA] when it suspended Grievant George Miller for sixty days? If so, what shall the remedy be?
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> 2. Did HRA violate Article VI, Section 1(e) of the [CBA] when it discharged Grievant George Miller? If so, what shall the remedy be?"

See Award, Exhibit A to City's Petition, at 1.

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[5]The Union asserts that Miller was placed on leave in January of 2010. This representation appears to be based on a January 26, 2010 letter in which the HRA informed Miller that his CSL § 72 leave was to be effective as of February 19, 2010.

With respect to the Track 4 Charges, Miller admitted at the arbitration that he had approached his co-worker in a threatening manner. Arbitrator Sirefman determined that the City's proffered reason for the substantial delay in processing the Track 4 Charges against Miller was not persuasive and that, based on the doctrine of laches, the suspension was wrongful and violated CBA Article VI, Section 1(e). As a remedy, the arbitrator dismissed the suspension.

Miller also admitted the facts underlying the Track 5 (falsification of time entries) and Track 6 (sexual misconduct) Charges and the parties stipulated that the false time entries charge reflected that Miller had been at the office for part of the day on April 15 and June 18, 2009. Arbitrator Sirefman dismissed the discharge penalties imposed pursuant to the Track 5 and Track 6 Charges, awarded Miller reinstatement upon the proper authorities' determination of fitness for duty, and remanded the back pay and benefits issues to the parties.

In his opinion, the arbitrator briefly discussed Dr. Perlman's January, 2010 report concluding that Miller was not fit for duty, and a document that the HRA provided to Dr. Perlman which contained a narrative concerning Miller's behavior from 2007 through December 2009. The arbitrator also discussed the report of Dr. Alexander S. Bardey, a psychiatrist engaged by the Union, who opined that, at the time of the March, 2010 offensive conduct, Miller "was in the throes of the acute symptoms of his mental illness . . . acutely manic and psychotic [and] . . . lost any and all internal control over his behavior." Award, at 10. Arbitrator Sirefman also noted that Dr. Bardey opined that Miller had been suffering from the acute manic symptoms of bipolar disorder.

Arbitrator Sirefman concluded that Miller had been suffering from a long-term psychiatric disability that was directly connected to his behavior. He found that the psychiatrists'

reports detailed the relationship of their evaluations and diagnoses to Miller's conduct in and outside of work during the relevant time period. The arbitrator, relying on OATH and other decisions, opined that, where misconduct is demonstrated to have been caused by a disability, the employer's available remedy is CSL § 72 disability leave, and not disciplinary action pursuant to CSL § 75. The arbitrator also stated that the HRA acted "within the letter and spirit of public policy when it initiated the [CSL §] 72 process" and that it was his reading of authority that, upon the commencement of this process, the State's disability policy became paramount and provided Miller with an affirmative defense of an absence of intent.[6]

In setting forth a remedy, Arbitrator Sirefman noted Dr. Bardey's evaluations and testimony about Miller's more recent participation in a court-ordered treatment program and progress towards stability, contrasting this to Miller's history of failing to comply with treatment. The arbitrator stated that the parties agreed that the question of whether or not Miller was fit to work was beyond his authority. The arbitrator also deemed the core of the dispute to be HRA's attempt to proceed with discipline despite the "mental disability dimensions present," opined that nothing in the record supported a finding that Miller had waived his rights to assert the mental disability defense, and concluded that CSL § 75 discipline was improper. *Id.*, at 13.

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[6] The arbitrator declined to rely on a Third Department decision which, he stated, "appears to hold that [CSL §] 75 remains in force even if an employee is placed on [CSL §] 72 leave," as "laconic and terse as to raise concerns about the extent of its reach" (Award, at 12). The arbitrator stated that OATH decisions contained "extensive and consistent explications of the purpose, history and operation of [CSL §] 72, and its paramount status here; and are cogent." *Id.*

LEGAL CONCLUSIONS:

For this Court to vacate the arbitrator's award pursuant to CPLR 7511 (b) (l) (iii), the City must demonstrate that the award "violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power." *Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 (2005). Arbitration awards are entitled to considerable judicial deference and "[e]ven where an arbitrator has made an error of law or fact, courts generally may not disturb the arbitrator's decision." *Matter of Falzone (New York Cent. Mut. Fire Ins. Co.)*, 15 NY3d 530, 534 (2010).

Regarding the Track 4 Charges, the arbitrator opined that the City did not provide a compelling reason why, over the course of five years, it could not have taken steps to prosecute the charges. Since the City failed to provide any basis upon which to vacate this portion of the award, Miller's petition is granted to the extent that the Track 4 Charges are confirmed.

Regarding the Track 6 Charges (sexual misconduct), the City argues that the award disregards the strong public policy against sexual harassment and violence in the workplace and prevents it from carrying out its affirmative legal duty to prevent such activity. This, asserts the City, is because the award forces the City to reinstate a known sexual harasser, with a history of threatening and intimidating coworkers. The City cites to New York State and City statutes which prohibit sexual harassment and violence in the workplace and Equal Employment Opportunity Commission ("EEOC") guidelines which indicate that an employer should develop appropriate sanctions for such conduct. The Union argues that the City has not identified a statute or other authority providing that an employee found not guilty of charges due to mental

disability may not be reinstated upon a finding of present mental fitness, and asserts that such a policy does not exist.

> "A public policy whose violation warrants vacatur of an arbitration award must entail strong and well-defined policy considerations embodied in constitutional, statutory or common law [that] prohibit a particular matter from being decided or certain relief from being granted by an arbitrator. Alleged policies that are merely general considerations of supposed public interests are not sufficient grounds for vacatur"

Matter of Local 333, United Mar. Div., Intl. Longshoreman's Assn., AFL-CIO v New York City Dept. of Transp., 35 AD3d 211, 213 (1st Dept 2006) (internal quotation marks and citation omitted).

The Appellate Division has noted that there is a "strong public policy against sexual harassment in the workplace, and [a] well-defined, dominant public policy favoring voluntary employer prevention" but also that courts must balance policy concerns with "the necessity of exercising due restraint in vacating arbitration awards." *Matter of New York City Tr. Auth. v Transport Workers Union of Am.*, 215 AD2d 561, 561 (2d Dept 1995) (citation omitted) (upholding reduction of penalty to suspension where arbitration board found no prior warnings about or history of similar misconduct and that employee "should now know (as a result of discipline) that he must refrain from similar misconduct").

In *Newsday, Inc. v Long Island Typographical Union, No. 915, CWA, AFL-CIO*, 915 F2d 840, 844 (2d Cir 1990), *cert denied* 499 US 922 (1991), the Court stated that "[t]he public policy against sexual harassment in the work place is well-recognized" and that such conduct is prohibited under Title VII of the Civil Rights Act of 1964. The Court also stated that:

> "Title VII places upon an employer the responsibility to maintain a work place environment free of sexual harassment. The EEOC Guidelines make employers liable for sexual harassment between fellow employees of which it knew or should have known, 'unless it can show that it took immediate and appropriate corrective action.' 29 C.F.R. § 1604.11(d)."

Id.

The court noted that the "EEOC Compliance Manual further provides that employers should create a procedure for resolving sexual harassment complaints that [should] provide effective remedies, including protection of victims and witnesses against retaliation." *Id.* The court further stated that the EEOC issued a policy statement providing that the "[u]nwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII." *Id.* (internal quotation marks omitted). The Court noted that New York State has similar legislation and rules. Of course, State and City laws prohibit sexual harassment in the workplace. *See* Executive Law § 296(1)(a); Admin. Code of City of N.Y. § 8-107(1)(a).

In *Newsday*, where the employee had a history of sexual harassment and had previously been disciplined and warned regarding his conduct, the Court found that reinstating him to his position ran afoul of established public policy and prevented the employer "from carrying out its legal duty to eliminate sexual harassment in the work place." *Id.*, at 845. In *Matter of New York City Tr. Auth. v Transport Workers Union of Am.*, 159 Misc 2d 1003, 1008 (Sup Ct, Kings Co. 1993), the trial court distinguished *Newsday* as involving a chronic sexual harasser, as opposed to

a first offender who warranted a lesser penalty.[7] The First Department recently stated that "[w]ell-established precedent demonstrates that the New York State Human Rights Law does not immunize disabled employees from discipline or discharge for incidents of misconduct in the workplace." *Hazen v Hill Betts & Nash, LLP*, 92 AD3d 162, 170 (1st Dept 2012) (internal quotation marks and citation omitted) (discussing cases finding that an "employer is not required to endure misconduct simply because the employee is disabled" and that an employer is not "required to retroactively excuse the misconduct as an accommodation under the Americans with Disabilities Act of 1990." *Id.*, at 171.

In this case, the arbitrator's determination that Miller is a person with a mental illness is supported by ample medical evidence. However, Miller's admitted sexual conduct during March of 2010 was egregious, as it involved abusive sexual contact and physical restraint of a co-worker, inappropriate physical contact with another woman, and wildly inappropriate and unacceptable sexual behavior in the presence of co-workers. This conduct resulted in a criminal conviction and a lawsuit against the City for sexual harassment.[8] As discussed above, Miller was previously disciplined for sexual harassment, receiving a reduced penalty, from termination to suspension, in 2006. In *Newsday*, the Court deemed punishment short of termination insufficient. Here, the arbitrator imposed no discipline at all for Miller's March, 2010 conduct, not even as a deterrent to similar future behavior, despite Miller's prior discipline, and the fact he

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[7] *Matter of New York City Tr. Auth.* involved the City's motion to vacate an arbitration award. The confirmation of that award was later upheld by the Second Department in *Matter of New York City Tr. Auth.*, 215 AD2d 561 (2d Dept 1995).

[8] Another employee filed a lawsuit against the City that includes allegations concerning Miller's conduct toward women at the workplace and the March, 2010 incident.

has historically been noncompliant with the treatment prescribed for his illness.

This Court finds that, under the facts of this matter, ordering Miller to return to work if he were to be deemed mentally sound under CSL § 72 would be insufficient protection against future occurrences of sexual harassment, would disregard the employer's obligations under the law, and would contravene public policy. For this reason, the award must be vacated and this matter remanded to Arbitrator Serifman for further proceedings regarding the Track 6 Charges.

The City also argues that the award is irrational. An arbitration award is considered irrational if there is "no proof . . . to justify the award." *Matter of Peckerman v D & D Assoc.*, 165 AD2d 289, 296 (1st Dept 1991). HRA brought three separate sets of charges against Miller. The Track 5 Charges concerned multiple acts of misconduct that occurred well before the City's 2010 commencement of CSL § 72 proceedings.[9] To support a defense based on absence of intent due to an illness or disability, evidence must demonstrate the existence of the illness or disability and its manifestations. That an employer put an employee on medical leave in 2010, deeming him to be unfit to perform his job at that time is not proof of the employee's ability to form intent, or the absence such ability, at a much earlier date, as in the Track 5 Charges.

It is evident from the motion papers that Miller has a mental illness. However, the arbitrator's conclusion, without supporting evidence, that such mental illness rendered Miller incapable of forming intent was irrational, as it could only rest upon generalizations and/or

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[9] The City cites to *Brockman v Skidmore*, 39 NY2d 1045 (1976) to support the proposition that a CSL § 72 leave and CSL § 75 discipline are not mutually exclusive. The City also argues that the arbitrator was collaterally estopped by the criminal convictions from finding no intent. However, a mistake of law alone is not a basis for vacatur. *Falzone*, 15 NY3d, *supra* at 535 ("[I]f an arbitrator erred in not applying collateral estoppel, the general limitation on judicial review of arbitral awards precludes a court from disturbing the decision").

stereotypes about people with such illnesses.[10] No proof has been submitted to this Court reflecting that Miller's illness caused him to lie to investigators about the Macy's incident because he was incapable of doing otherwise. Further, the Track 5 Charges concern Miller's conduct on several occasions during 2008 and 2009, including his falsification of time records, and each instance of such misconduct must be separately analyzed for intent. Consequently, the award is vacated as to the Track 5 Charges and is remanded to the arbitrator for further proceedings consistent with this decision.

The City argues that the arbitrator exceeded his authority by modifying the CBA's grievance procedure, which provides for arbitration of disciplinary matters, by inserting the requirements of the non-disciplinary process afforded by CSL § 72. "[A]n [arbitration] award may be set aside . . . only where the arbitrator exceeded the express limitations of his or her powers, as set forth in the agreement itself." *Matter of Merrick Union Free School Dist. v Merrick Faculty Assn., Inc.*, 87 AD3d 536, 539 (2d Dept 2011). "To exclude a substantive issue from arbitration, therefore, generally requires specific enumeration in the arbitration clause itself of the subjects intended to be put beyond the arbitrator's reach." *Matter of Silverman (Benmor Coats)*, 61 NY2d 299, 308 (1984).

Article VI of the CBA concerns various types of grievances, and Article VI, Section 1(e) defines a "grievance" as:

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[10] For example, if an employee has a long-term illness which prevents him or her from doing a job in September, leading to an CSL § 72 leave, a determination that the employee's embezzlement of funds the year before is therefore also excused due to an absence of intent caused by the illness, without evidence specifically relating such conduct to the illness, would be irrational.

> "[a] claimed wrongful disciplinary action taken against a permanent Employee covered by Section 75(1) of the [CSL] . . . upon whom the agency head has served written charges of incompetence or misconduct while the Employee is serving the Employee's permanent title or which affect the employee's permanent status."

Exhibit O to City's Petition, at 43.[11]

Article VI of the CBA, Section 2 (Step IV), provides that the arbitrator's decision/award: "shall be limited to the application and interpretation of the Agreement, and the arbitrator shall not add to, subtract from or modify the [CBA]." *Id.*, at 45. It also provides that "[t]he arbitrator may provide for and direct such relief as the arbitrator deems necessary and proper, subject to the limitations set forth above and any applicable limitations of law" *Id.*

The City argues that Miller waived his right to a disciplinary (OATH) hearing under CSL § 75, and that CSL § 72 is not a disciplinary procedure and is thus not subject to the grievance and arbitration process under the CBA. The City contends that Miller admitted the misconduct charged and that the arbitrator should have limited the scope of his review to whether Miller's conduct violated HRA's code of conduct and the appropriate penalty for such violations, but instead, without authority, the arbitrator focused on the interplay between CSL § 72 and § 75.

In support of its petition, the City relies on *Matter of the City of New York (Social Service*

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[11] Article VI, Section 3 requires as a condition of impartial arbitration a written waiver of the employee's right to submit the dispute to another tribunal except to enforce the arbitrator's award. Article VI, Section 14 provides that the grievance and arbitration procedures in the agreement are the exclusive remedy for resolution of disputes described as grievances in the CBA, but that this may not be construed to limit the rights and obligations of the employer under CSL Article XIV.

Employees Union, Local 371, 2008 WL 3886934, 2008 NY Misc Lexis 9010, *4, 2008 NY Slip Op 32273[U] (Sup Ct, New York County 2008), in which the court vacated the award on the ground that the arbitrator exceeded his authority. The City quotes the court's statement that the arbitrator should decide the matter "without the question of medical leave being the subject of the hearing and award." *Id.* In *Williams*, the court held that the arbitrator improperly converted a disciplinary suspension and termination to a medical leave of absence based on the grievant's history of psychiatric illness. The court stated that, under CSL § 72, an employee may seek a hearing to determine whether the employer's discretionary exercise of compelling a medical examination and leave was proper, but may not arbitrate the medical leave determination. In this case, the City, and not the arbitrator, placed Miller on CSL § 72 leave, and the arbitrator declined to make a determination as to whether or not Miller was fit to return to work.

The City does not cite to a specifically enumerated limitation in the CBA on the arbitrator's power to entertain an affirmative defense or consider the reasons for the employee's conduct. Nor does it cite to a requirement that the arbitration be conducted in a manner proposed by the City. The arbitrator answered the question of whether the City's discipline of Miller was wrongful. Furthermore, the language of Section 1(e) of the CBA concerning remedies is extremely broad and "[t]he arbitrator did not exceed his powers in issuing the award, since the parties' [CBA] contains a broad arbitration clause which covers disputes such as this disciplinary matter, arising under the agreement, allows the arbitrator to provide or direct such relief or remedy as he sees fit, and is silent" regarding the defenses that may be asserted. *Matter of Local 333, United Mar. Div., Intl. Longshoreman's Assn., AFL-CIO v New York City Dept. of Transp.,*

35 AD3d 211, 214 (1st Dept 2006) (citations omitted).[12]

Pursuant to CPLR 7511 (3) (d) "[u]pon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed." *East Ramapo Cent. School Dist. v East Ramapo Teachers Assn.*, 108 AD2d 717, 717 (2d Dept 1985) (court has the discretion to remand the matter to the same or different arbitrator). Because Arbitrator Sirefman already heard evidence presented, the matter should be remanded to him. *See Johnston v Johnston*, 161 AD2d 125, 129 (1st Dept 1990) ("since there was no misconduct, and due to the protracted and complex nature of the testimony, there is no reason the remand should be to a different arbitrator"). Arbitrator Sirefman is not required to perform a full hearing de novo, but "may reconsider the matter on the basis of the prior hearing and such additional evidence as he may require." *Matter of Livingston (Banff, Ltd.)*, 13 Misc 2d 766, 767 (Sup Ct, New York County 1958), citing *Matter First Nat. Oil. Corp. (Arrieta)*, 2 Misc 2d 225, 234 (Sup Ct, Queens County), *affd* 2 AD2d 590 (2d Dept 1956).

Therefore, in accordance with the foregoing, it is hereby:

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[12] The City cites to *Matter of Professional Trade Show Servs. v Licensed Ushers & Ticket Takers Local Union 176 of Serv. Empls., Intl. Union, AFL-CIO*, 262 AD2d 42, 44 (1st Dept 1999), in which the agreement also limited the arbitrator's "power to add to or subtract from or modify any of the terms of this agreement." In that case, the Court determined that the arbitrator exceeded his authority because he effectively read into the agreement an additional obligation of a party to guaranty that a different, separate, employer use union members for work.

ORDERED and ADJUDGED that the Union's petition is granted to the extent that Arbitrator Josef Sirefman's findings regarding the Track 4 Charges is confirmed, and the Union's petition is otherwise denied; and it is further,

ORDERED and ADJUDGED that the City's petition is granted to the extent that Arbitrator's Josef Sirefman's determinations regarding the Track 5 and Track 6 Charges are vacated, and the matter is remanded to Arbitrator Sirefman for further proceedings consistent with this decision, and the City's petition is otherwise denied; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: November 20, 2014

ENTER:

KATHRYN E. FREED, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT