Matter of Potocki v Mahoney
2016 NY Slip Op 32831(U)
December 12, 2016
Supreme Court, Onondaga County
Docket Number: 2016EF1110
Judge: Spencer J. Ludington

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

In the Matter of the Application of

GEORGINA POTOCKI and CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Petitioners,

For a Judgment pursuant to Article 75 of the Civil Practice Law and Rules,

-against-

JOANNE M. MAHONEY, AS COUNTY EXECUTIVE, COUNTY OF ONONDAGA; WILLIAM J. FITZPATRICK, AS ONONDAGA COUNTY DISTRICT ATTORNEY; and COUNTY OF ONONDAGA

DECISION

Index No. 2016EF1110
RJI No. 33-16-0946

Petitioners commenced this special proceeding for an Order and Judgment confirming an arbitrator's award, pursuant to CPLR §7510, together with costs and attorney fees. Petitioner, Georgina Potocki, is employed by Respondent, County of Onondaga, as a Victim Assistance Coordinator working in the District Attorney's Office. Petitioner, Civil Service Employees Assoc. (CSEA), is the collective bargaining unit representing Potocki. CSEA and the County of Onondaga entered into a Collective Bargaining Agreement governing the Unit in which Potocki is employed. The Agreement includes provisions covering disciplinary and discharge matters for all employees and procedures for grievance and arbitration of disputes in

Articles 26 and 27.

On July 15, 2014, Potocki's employer served upon her a Notice and Charges containing eight allegations of misconduct, suspending her from her employment without pay and seeking her termination. In accordance with the Collective Bargaining Agreement, Petitioners filed a demand for arbitration on July 25, 2014. An arbitrator was selected, and hearings were held on various dates in 2015. The arbitrator was required to determine whether Potocki was guilty of the conduct as alleged in the Notice and Charges, and, if so, whether suspension and termination were appropriate remedies. The arbitrator issued his Opinion and Award on January 20, 2016, sustaining Potocki's grievance, dismissing the charges against her and ordering Respondents to reinstate her and make her whole for all lost time and wages. Respondents refused to comply with the arbitrator's Opinion and Award. Petitioners seek confirmation of the Award pursuant to CPLR 7510 and reimbursement for all costs and actual attorney fees under Section 130 of the Rules of the Unified Court System.

Respondents served an Answer to the Petition with two Objections in Point of Law and a Cross-Petition to vacate the Arbitration Award. Petitioners served a Reply to the Cross-Petition. The Objections and Cross Petition contend that the arbitrator exceeded his power by violating a clearly enunciated public policy and ignoring the specific authority conferred upon him in Article 26 of the Agreement. At the conclusion of Respondents' case in the arbitration proceeding, Petitioners moved for dismissal of five of the eight charges under the legal theory of double jeopardy. Petitioners argued that those charges had been the subject of a prior disciplinary proceeding against Potocki, that Potocki had previously been punished for them, and that the employer should not be permitted to punish her a second time for the same

conduct. Respondents opposed the motion, contending that, under the terms of Article 26 of the Collective Bargaining Agreement and pursuant to the agreed statement of the issues, the arbitrator was limited to determining guilt or innocence and the appropriateness of the penalty, and double jeopardy was not a proper subject for the arbitrator's consideration. The arbitrator reserved his decision on the motion and continued the proceeding.

In his Opinion and Award, dated January 20, 2016, the arbitrator rejected Respondents' arguments and applied the legal rule of double jeopardy in his decision to dismiss Specifications 1, 2, 3, 5, and 6 of the Notice and Charges. The arbitrator found that, on November 14, 2013, Potocki was given an "Inter Office Letter" by her employer listing several items of misconduct and suspending her for three days without pay. By this letter, Potocki's employer also terminated her computer access to Central New York Law Enforcement Analysis and Database Systems. Months after Potocki served the suspension, her employer reinstated the pay that had been withheld. According to the findings of the arbitrator, the reinstatement of pay was for "procedural reasons". While reinstating her pay, Potocki's employer affirmed that "the findings and conclusion with regard to the allegations against her will stand." Therefore, the charges made against Potocki in the Inter-Office Letter of November, 2014 remained a part of her personnel file. When Potocki was ultimately terminated on July 15, 2014, the Notice of Charges filed against her leading to the subject arbitration proceeding contained, *inter alia,* the same misconduct alleged against her in the November, 2013 charges. Only three specifications in the July, 2014 Notice of Charges (numbers 4, 7 and 8) were not previously charged in the November, 2013 Inter-Office Letter.

The arbitrator determined that specifications 1, 2, 3, 5 and 6 in the July 14, 2014

Notice of Charges were the subject of prior disciplinary action against Potocki for which she had received "written reprimand" as a permanent part of her employment record, and that such "written reprimand" constituted discipline previously imposed. Citing the treatise *How Arbitration Works* (Elkouri & Elkouri) for the premise that "once discipline for a given offense is imposed and accepted, it cannot thereafter be increased, nor may another punishment be imposed, lest the employee be subjected to double jeopardy'", the arbitrator found that Potocki should not be subjected to a second punishment for the same conduct for which she was previously punished. Specifications 1, 2, 3, 5, and 6 of the charges were dismissed on that basis. As to the remaining specifications, numbers 4, 7, and 8, the arbitrator found that there was not a preponderance of the evidence that Potocki was guilty of misconduct. Therefore, five of the eight disciplinary charges against Potocki were dismissed on the basis that she had been previously disciplined for her alleged misconduct on those charges, and the other three disciplinary charges were dismissed for insufficient proof. (It is noted that, with regard to Specifications 2 and 3, the arbitrator stated that, if he had to decide them on the merits, he would decide in favor of Potocki, and as to Specification 1, he found some serious credibility issues with the testimony).

Respondents ask the Court to vacate the arbitration award because Article 26 of the Collective Bargaining Agreement limits the arbitrator to a determination of guilt or innocence and the arbitrator's reliance on the legal concept of "double jeopardy" exceeded his authority under that Article. "An arbitration award may be vacated on three narrow grounds: 'it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power'" (*Matter of United Fed'n of Teachers v Board of Education,* 1 NY3d

72, 79; *see, Matter of Board of Educ. v Arlington Teachers Assn*, 78 NY2d 33, 37; CPLR 7511(b)[1]). "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'" (*In re Kowaleski v NYS Dept. of Correctional Servs,* 16 NY3d 85, 91). The question before the Court is whether the arbitrator's application of the rule of "double jeopardy" in this case is irrational or exceeds *a specifically enumerated limitation* of his power.

Public policy in New York State favors arbitration as the preferred means for resolving public sector labor disputes (*see, Board of Educ v Bellmore-Merrick United Secondary Teachers, Inc.*, 39 NY2d 169, 171; *Assoc. Teachers of Huntington v Bd. of Education.*, 33 NY2d 229, 236). "Even where an arbitrator has made an error of law or fact, courts generally may not disturb the arbitrator's decision" (*Matter of Falzone [NY Cent. Mutual Fire Ins. Co.],* 15 NY3d 530, 534). Indeed, "an arbitrator's rulings, unlike a trial court's, are largely unreviewable" (*Matter of Falzone [NY Cent. Mutual Fire Ins. Co.], supra.*, at 534). "[I]t is not for the courts to interpret the substantive conditions of the contract or to determine the merits of the dispute" (*Board of Educ., Lakeland Cent. School Dist. v Barni,* 51 NY2d 894, 895). Even where the plain meaning of the words of the contract seems to have been disregarded, "an arbitrator's interpretation of the parties' contract is impervious to judicial challenge" (*Maross Constr. v Cent. N.Y. Regional Transp. Auth.*, 66 NY2d 341, 346). "A Court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role overseers to conform the award to their sense of justice" (*New York State*

Correctional Officers & Police Benevolent Assn. v State of New York, 94 NY2d 321, 326).

Double jeopardy is a constitutional due process protection against a second prosecution and/or multiple punishments for the same offense (*North Carolina v Pearce*, 395 US 711, 717; US Const, 5th Amendment; US Const, 14th Amendment). The prohibition against double jeopardy has been applied, as a matter of substantive law, in the civil context and particularly in the context of punishment by employers for workplace misconduct by employees (*see, e.g. Norwalk Police Union v City of Norwalk*, 2014 WL 7745875 (Sup.Ct., Conn., 2014); *State of Florida Dept. of Transportation v State of Florida Career Service Comm.*, 366 So.2d 473 (Fla. Dist.Ct.App. 1979); *Cope v Tenn Civ. Serv. Comm'n.*, 2009 WL 1635140 (Tenn. Ct Ap. 2009); *Jackson v Sewerage and Water Bd. of New Orleans*, 503 So2d 634 (La.App. 4th Cir. 1987). "The fundamental fairness principle emanating from the Fifth Amendment's prohibition against a defendant in a criminal case being put in jeopardy twice for the same offense has long been incorporated into arbitral due process jurisprudence." (*Durham School Services / Laborer's Int'l Union of North America, Arbitrator Submitted Award*, 2011 WL 11562924 at 5). The key to the application of double jeopardy in the context of arbitration is found in a broad concept of "fundamental fairness" where there is nothing in a collective bargaining agreement that would give the employer the right to discipline multiple times, on separate occasions, for the same offense (*see*, Elkouri & Elkouri, *How Arbitration Works*, Ch. 15, at 981 [6th ed.]; *Norwalk Police Union v City of Norwalk, supra*.).

"All contracts, including collective bargaining agreements, are executed in the context of the common law and legislation which govern the rights and duties of the contracting

parties" (*Timken Co. V Local Union No. 1123, United Steelworkers of America,* 482 F2d 1012, 1015, [6th Cir. 1973]). "Unless the parties specifically limit the powers of the arbitrator in deciding various aspects of the issue submitted to him, it is often presumed that they intend to make him the final judge on any questions which arise in the disposition of the issue, including not only questions of fact but also questions of contract interpretation, rules of interpretation, and questions, if any, with respect to substantive law" (*Richmond, Fredericksburg & Potomac R. Co. v Transportation Communications Int'l,* 973 F2d 276, 279, *citing How Arbitration Works,* Elkouri & Elkouri, *supra.).* Although "a specifically enumerated restriction upon arbitral authority will be upheld by the courts...no such limitation will be inferred from a broadly worded contractual provision expressly calling for arbitration of all disputes arising out of the parties' contract" (*Maross Constr. v CNY Regional Transp. Auth.*, 66 NY2d 341, 346). In the instant case, there is no "specifically enumerated" limitation on the arbitrator's power to examine the question of whether the grievant has already been charged and punished for the same conduct. The arbitrator's interpretation of the parties' contract, insofar as it permitted him to apply the legal rule of "double jeopardy", is entitled to deference. The arbitrator's alleged error in applying the principal of double jeopardy "falls squarely within the category of claims of legal error courts generally cannot review" *(Matter of Falzone [NY Cent. Mutual Fire Ins. Co.], supra.*, at 534.) Moreover, the arbitrator's findings that Potocki had previously received a "written reprimand" constituting disciplinary action, and that the prior disciplinary action had been "accepted", are factual findings also not subject to review in this proceeding (*see, Matter of Falzone [NY Cent. Mutual Fire Ins. Co.],* 15 NY3d 530; *New York State Correctional Officers & Police*

Benevolent Assn. v State of New York, 94 NY2d 321).

The arbitrator's decision on Specifications 1, 2, 3, 5, and 6, of the Notice and Charges is not irrational and does not clearly exceed a "specifically enumerated limitation on the arbitrator's power" (*see, Matter of Falzone, supra.).* Respondents also argue that there is a strong public policy in favor of trustworthiness and integrity in employees in the District Attorney's Office and the Arbitrator's award violated some vague obligation "to the ethical administration of justice". "The scope of the public policy exception to an arbitrator's power to resolve disputes is extremely narrow" (*Matter of United Fed'n of Teachers v Board of Education,* 1 NY3d 72, 80, *citing Matter of New York City Tr. Auth. v Transport Worker's Union of Am., Local 100,* 99 NY2d 1, 6-7). "Judicial intervention on public policy grounds constitutes a narrow exception to the otherwise broad power of parties to agree to arbitrate all of the disputes arising out of their juridical relationships, and the correlative, expansive power of arbitrators to fashion fair determinations of the parties' rights and remedies" (*Matter of New York City Tr. Auth. v Transport Worker's Union of Am., Local 100,* 99 NY2d, *supra.* at 6-7). Moreover, "judicial restraint under the public policy exception is particularly appropriate in arbitrations pursuant to public employment collective bargaining agreements" (*Id.* at 7).

An arbitration award violates public policy where a court can conclude "without engaging in any extended factfinding or legal analysis" that a law "prohibits, in an absolute sense, [the] particular matters [to be] decided...by arbitration" (*Matter of New York City Tr. Auth. v Transport Worker's Union of Am., Local 100, supra.,* at 6-7) or the award itself "violates a well-defined constitutional, statutory or common law of this State" (*Id.* at 11). There is no prohibition of this arbitrator's award "in the absolute sense", nor does the award

violate a well-defined constitutional, statutory or common law of this State. The alleged "public policy" advanced by Respondents is not one found in the constitutional, statutory or common law of this State, and its application to this case relies upon allegations of untrustworthiness that have not been substantiated. "A court...may not vacate an arbitration award on public policy grounds when vague or attenuated considerations of a general public interest are at stake" (*Matter of NYS Correctional Officers and Police Benevolent Assoc. v State*, 94 NY2d 321, 327). The Court of Appeals has warned that mere "incantations" of public policy may not be raised every time one seeks to overturn an arbitration award (*see, Matter of Port Jefferson Station Teacher's Assoc., Inc. v Brookhaven-Comsewogue Union Free School Dist.*, 45 NY2d 898, 899).

In accordance with the foregoing, the arbitrator's award must be confirmed. The Cross Petition to vacate the award is denied and the Cross Petition is dismissed. Petitioners' request for costs and attorney's fees pursuant to Part 130 of the Uniform Rules of the Chief Administrator is denied, as the Court does not find the Respondents' conduct to be frivolous. Petitioner is entitled to costs of this court proceeding under CPLR 8101 and CPLR 8102 and those costs are granted (*see, Meehan v Nassau Community College*, 242 AD2d 155, 159; *City of Buffalo v J.W. Clement Co.*, 28 NY2d 241, 262). Petitioners shall submit Judgment in accordance herewith.

DATE 12/12/16

Hon. Spencer J. Ludington, AJSC

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