| **Matter of Barrella v State of N.Y. Off. of Mental Health** |
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| 2017 NY Slip Op 31183(U) |
| May 31, 2017 |
| Supreme Court, Queens County |
| Docket Number: 13325/16 |
| Judge: Allan B. Weiss |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **ALLAN B. WEISS** IA PART_2_

In the Matter of the Application of
YANIE BARRELLA,

Petitioner,

-against-

STATE ON NEW YORK OFFICE OF MENTAL HEALTH, CREEDMOOR, P.C.,

Respondent.

Index No.: 13325/16

Motion Date: 1/23/17

Motion Seq. No.: 1

This is an application, pursuant to CPLR 7511 (b), by self represented petitioner Yanie Barrella to vacate the Arbitration Opinion and Award issued by Thomas Reinaldo, Esq., dated October 3, 2016. Respondents State Office of Mental Health (OMH) and Creedmoor Psychiatric Center (Creedmoor) oppose, and request that said award be affirmed pursuant to CPLR 7511(e).

Yanie Barrella, a registered nurse, was employed by the OMH as a Nurse Psych 2 (RN2 Psy) at Creedmoor Psychiatric Center in Queens, New York, at which time she was represented by the Public Employees Federation, AFL-CIO (PEF). Ms. Barrella was served in person with a Notice to Employee of Suspension, dated October 13, 2015, informing her that she was suspended from her position at Creedmoor, without pay, effective October 13, 2015; a PEF Suspension Cover Letter, dated October 13, 2015; and a Suspension Notice of Discipline (NOD), dated October 13, 2015, specifying three charges of "misconduct/incompetence",

involving separate incidents that occurred on December 14, 2014, with regard to a patient identified as R.M.; and two incidents on April 21, 2015, with regard to a patient identified as A.T. As regards patient A.T., the statement of charges state, in essence, that on April 21, 2015, between the hours of 7:00 a.m. and 9:00 a.m. on Ward 5B, she failed to administer an 8:00 a.m. dosage of Clotrimazole 1% to said patient, and that on the same date, she falsified the Medication Administration Records by documenting that said patient had received an 8:00 a.m. dosage of Clotrimazole 1% . Said NOD set forth a proposed penalty of termination from State service. Notification of said suspension and disciplinary action was also mailed to PEF. It is undisputed that Ms. Barrella filed a timely grievance with respect to the October 13, 2015 charges and suspension from her employment, and said grievance proceeded to arbitration.

While Ms. Barrella was suspended without pay based upon the October 13, 2015 NOD, she received in the mail a Notice To Employee of Suspension dated December 24, 2015, stating that she was suspended from her position at Creedmoor, without pay, effective December 24, 2015. Included in this mailing was a PEF Suspension Cover Letter and a NOD, dated December 24, 2015, which specified two charges of "misconduct/incompetence", involving separate incidents that occurred on April 21, 2015, regarding a patient identified as "B.B.". The first charge stated, in pertinent part, that she had failed to apply Bacitracin 500 Unit Ointment to both of the patient B.B.'s legs and cover them with a dressing, and the second charge stated, in pertinent part, that she had falsified the Medication Administrative Record for patient B.B. by documenting that she had applied the wound dressing as documented in the first charge. The December 24, 2015 NOD stated that the proposed penalty was termination from State service. Said NOD set forth a proposed penalty of termination from State service.

Creedmoor's December 24, 2105, PEF Suspension Cover Letter stated, in pertinent part, that:

"In accordance with the provisions of Article 33 of the Agreement between the State of New York and the Public Employees Federation, AFL-CIO, you are hereby informed that a disciplinary proceeding against you is hereby instituted. The reason(s) for the disciplinary action and the penalty I am proposing are contained in the Attachment to this letter."

"The proposed penalty will take effect fourteen (14) calendar days from the date of service of this Notice subject to the provisions of Article 33.5(d) of the Agreement. If you wish to grieve this Notice of Discipline, you may do so by completing a Disciplinary Grievance Form (BER - 16) and filing it within fourteen (14) calendar days from the date of service of this Notice, in person or by certified mail, return receipt requested, with the Director, Bureau of Employee Relations, Office of Mental Health, 44 Holland Avenue, Albany, New York 12229."

"This disciplinary action if appealed to arbitration, shall be appealed to an arbitrator appointed from the Select Panel of Arbitrators".

"Since you have been notified that you are suspended without pay pending resolution of this disciplinary matter and such notice is indicated on the Attachment to this letter, you have the right to waive the agency level meeting and to appeal this Notice of Discipline directly to final and binding arbitration with the American Arbitration Association office for your region, within fourteen (14) calendar days of service of this Notice of Discipline. A copy of your appeal to arbitration must also be sent to the Director, Bureau of Employee Relations, Office of Mental Health, 44 Holland Avenue, Albany, New York 12229."

The December 24, 2015 PEF Suspension Cover Letter also stated that Ms.

Barrella was provided with two copies of the NOD, so that she could furnish one to her union representative, a Statement of Rights and a copy of Article 33 of the collective bargaining agreement (CBA) between the OMH and PEF. Ms. Barrella was advised to "read carefully the attached statements relating to the disciplinary grievance procedure and to the rights provided to you by the State/PEF Agreement." She was further advised that she and her representative should contact the facility's Department of Human Resources within the next seven days to arrange a meeting to discuss the possibility of settling the NOD.

OMH, in a letter dated January 29, 2016, informed Ms. Barella that as she had failed to appeal the December 2015 NOD in a timely manner, the proposed penalty of termination from State service was implemented effective January 29, 2016, at the close of the business day. Lisa Quarles, Ms. Barrella's union field representative, filed a grievance on her behalf on February 4, 2016. The grievance challenged the OMH's decision to suspend Ms. Barrella without pay and to terminate her base on the December 25, 2015 NOD. The grievance noted that Ms. Barrella had waived her right to an agency level hearing and had elected to proceed directly to arbitration, in accordance with Article 33 of the CBA.

On June 5, 2016 and June 30, 2015, an arbitration hearing was held before Thomas Rinaldo, Esq., regarding the NOD dated December 24, 2015. At said hearing PEF's counsel appeared on behalf of Ms. Barrella, and the OMH (Creedmoor) was represented by Michael F. Donegan, Esq., the Director of Employee Discipline, Justice Center for the Protection of People With Special Needs. Witnesses testified on behalf of OMH's Bureau of Employee Relations, and Ms. Barrella and her union representative Ms. Quarles also testified on her behalf.

The arbitrator in his opinion and award dated October 3, 2016, stated that although the parties did not stipulate to issues, there was no disagreement regarding the scope of the controversy, and found that the following issues framed the scope of the dispute:

"1. Was the disciplinary grievance filed untimely?

2. Did the State comply with its obligations under Article 33 of the Parties' Agreement regarding the Notice of Discipline and other documents/information on the Grievant and the Union?

3. Did the State comply with its obligations under Article 33 of the Parties' Agreement regarding the content of the documents and information it served on the Greivant and the Union?"

The arbitrator, in his decision and award set forth the contents of the December 24, 2015 NOD and the provisions of Article 33 of the CBA; and set forth the positions of the Union and the State, and summarized the relevant testimony of the witnesses. The arbitrator discussed in detail the provisions of Article 33 pertaining to the contents of a NOD; the methods of service of a NOD; the documents required to be served on the employee; the notice required to be given to the Union.

The Arbitrator found that the December 24, 2015 NOD complied in format with Section 33.5(a) of the CBA, and rejected the Union's contentions in this respect.

The Arbitrator found that the service of the subject NOD complied, in format, with the CBA, and credited the testimony of the State's witness Jeffrey Williams as to what was served on the grievant. Mr. Williams, a labor relations employee at Creedmoor, testified that he had prepared the packet of papers that were mailed to Ms. Barrella by certified mail, return

receipt requested.

The arbitrator found that Ms. Barrella "was served with the required documents under Section 33.5-two copies of the Notice of Discipline; a copy of Article 33; and a written statement that Grievant had the right to object by filing a disciplinary grievance and the right to have the disciplinary action reviewed by an independent Arbitrator along with the right to be represented by PEF. The Arbitrator rejects the Union's arguments that the written statement did not sufficiently inform the Grievant of what is required under the Parties' Agreement. Under 33.5(c)(1), the employee is to be notified of the "right to object by filing a disciplinary grievance within fourteen calendar days". In the first page of the "PEF Suspension Cover Letter" sent to Grievant, Grievant was notified that the "proposed penalty will take effect fourteen (14) calendar days from the date of service of this Notice" and "[i]f you wish to grieve this Notice of Discipline, you may do so by completing Disciplinary Grievance Form...and filing it within fourteen (14) calendar days of service of this Notice". Clearly, this language, even in a hypertechnical sense, complies with the contract requirement. 33.5 (c)(2) requires that the employee be notified of "the right to have the disciplinary action reviewed by an independent arbitrator". The language on the first page of the "PEF Suspension Cover Letter" stated that Grievant could "appeal this Notice of Discipline directly to final and binding arbitration with the American Arbitration Association Office for your region, within fourteen (14) calendar days of service of this Notice of Discipline." This language complies with the requirement that a right to have a disciplinary action reviewed by an independent arbitrator exists, even based on a hyper- technical reading. In the first page of the Cover Letter, Grievant was also notified that she had been provided with two copies of the Notice of Discipline "so that you can furnish one

to your Union representative (employees in your negotiating unit are represented by the Public Employees Union/PEF), a Statement of Rights, and a copy of Article 33". Again, the contractual requirement was fulfilled by this language, even based on a hypertechnical reading of the contractual language and the language of the letter."

The Arbitrator found that Ms. Barrella was served with the required documents by certified mail, return receipt requested, and that as the parties' agreed that Article 33 service can be made by personal service or by certified mail, the failure to personally serve Ms. Barrella "cannot be considered availing". The arbitrator also noted that the union was advised by certified mail, return receipt requested, of the Notice of Discipline.

The Arbitrator therefore found that the NOD and its service, including service on the Union, was made in conformity with Article 33.5, and that the grievant "simply did not act upon the Notice of Grievance when it was served on her and, because of this fact, the disciplinary grievance was filed beyond the 14-day period called for in the Parties' Agreement. In view of this conclusion, the Arbitrator finds that the penalty of termination must be sustained.

The Arbitrator, in his award found that the first issue presented is answered in the affirmative, in that the grievance was not timely filed; that the second issue is answered in the affirmative in that the State complied with its obligations under Article 33 of the CBA regarding the service of the NOD and related documents; and that the third issue is answered in the affirmative in that the State complied with the obligations under Article 33 of the CBA regarding the content of the documents and the information served on the grievant and the union. The Arbitrator therefore denied Ms. Barrella's grievance.

Petitioner Yanie Barrella commenced the within proceeding on November 18,

2016, and seeks to vacate the decision and award of arbitrator Thomas N. Reinaldo on the following grounds:

"a) the arbitrator accepted the service of the NOD as valid, even though the testimony of the respondent's witness contradictory even per arbitrator"; that sufficient proof that she was served with two copies of the NOD and that the union was served was not established by the evidence.

"b) the arbitrator ignored fact that I notified Creedmoor that I received a packet but was confused as to what it represented as I previously had received a packet and believed that it was the same thing that I was given in person. I never received a response back from him, nor did the union".

"c) Arbitrator erred when he found that contents regarding the documents it served on me were sufficient. His argument that PEF suspension letter cover meets the requirement of Section 33.5 (c)(2) of our union agreement even if notice of discipline does not is in error/ Even arbitrator refers to it as hypertechnical (page 22 line 14)."

"D) arbitrator erred by accepting punishment meted out in letter/NOD without at least requiring respondent to establish that said punishment is fair. In 28 years, this was first notice of discipline and very limited personnel history of problems."

Respondents have served a verified answer and interposed three affirmative defenses.

It is well settled that the decision of an arbitrator concerning the timeliness of the filing of the grievance is not subject to judicial review (*see Miller v NY State Dep't of Mental Hygiene*, 70 AD2d 938 [2nd Dept 1979]; *Matter of Three Vil. Teachers Assn. v Three Vil. Cent. School Dist. No. 1*, 56 AD2d 604 [2d Dept 1977] ). To the extent that petitioner seeks judicial

review of the procedural matters pertaining to the notices provided to her by the respondents and the mailing of the NOD and other documents, "[c]ourts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies," and a court may not "examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes that its interpretation would be the better one" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]; *see Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530, 534, [2010]; *Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]; *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479-480 [2006], *cert dismissed* 548 US 940 [2006]; *Matter of Miro Leisure Corp. v Prudence Orla, Inc.*, 83 AD3d 945 [2d Dept 2011]). Indeed, even where an arbitrator makes errors of law or fact, "courts will not assume the role of overseers to conform the award to their sense of justice" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d at 326; *see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d at 479-480).

Although "judicial review of arbitration awards is extremely limited" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d at 479), a court may vacate an arbitrator's award where the applicant's rights were prejudiced by (i) corruption, fraud or misconduct in procuring the award; or (ii) the partiality of a neutral arbitrator; (iii) the arbitrator exceeded his or her power so that a final or definitive award was not made; (iv) the arbitrator failed to follow the procedures set forth in CPLR Article 75 (CPLR 7511[b][1]; *Matter of Wieder v Schwartz*, 35 AD3d 752, 753 [2d Dept 2006]). An arbitrator exceeds his or her power only where his or her award violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated

limitation on the arbitrator's power (*see Matter of Falzone* [*New York Cent. Mut. Fire Ins. Co.*], 15 NY3d at 534; *Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d at 336; *Matter of Westchester County Corr. Officers' Benevolent Assn. v County of Westchester*, 100 AD3d 644, 645 [2nd Dept 2012]; *Matter of Susan D. Settenbrino, P.C. v Barroga-Hayes*, 89 AD3d 1094, 1095 [2d Dept 2011]).

There is, however, a strong public policy in favor of the binding authority of an arbitration award (*Hackett v Millbank, Tweed, Hadley & McCloy*, 86 NY2d 146,154 [1996]). The purpose of arbitration is to allow final, binding resolution of the parties' claims without resorting to the courts. Thus, judicial review of an arbitration award is extremely limited and great deference is given to an arbitration award (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d at 479; *Allstate Ins. Co. v Geico*, 100 AD3d 878 [2d Dept 2012]). A party seeking to overturn an arbitration award pursuant to CPLR 7511(b)(1) bears a heavy burden, and must establish a ground for vacatur by clear and convincing evidence *(David v Byron*, 130 AD3d 772 [2d Dept 2015]; *Matter of Denaro v Cruz*, 115 AD3d 742, 742-743 [2d Dept 2014]). A court shall not engage in "judicial second guessing" of the arbitrator's determination of those issues of fact or law presented (*Hackett v Millbank, Tweed, Hadley & McCloy*, 86 NY2d at 155). An arbitrator is not bound by principles of substantive law or rules of evidence and may do justice as he or she sees fit (*Matter of Erin Constr. & Dev. Co. v Meltzer*, 58 AD3d 729, 730 [2d Dept 2009]). Indeed, an arbitration award will not be vacated even though the court concludes that the arbitrator's interpretation of the agreement misconstrues its plain meaning or misapplies substantive rules of law (*Matter of Silverman v Benmor Coats, Inc.*, 61 NY2d 299, 308 [1984]; *Matter of Wicks Constr.* [*Green*], 295 AD2d 527, 528 [2d Dept 2002]). Even where an

arbitrator has made an error of law or fact, courts generally may not disturb the decision of the arbitrator ( *see Matter of Falzone* [*New York Cent. Mut. Fire Ins. Co.*], 15 NY3d at 535).

Here, petitioner has not met her burden of establishing any valid grounds for overturning the arbitrator's decision and award. Accordingly, petitioner's request to vacate Arbitrator Thomas Rinaldo's decision and award of October 3, 2016 is denied, and said award is hereby confirmed, pursuant to CPLR 7511(e).

Settle judgment.

Dated: May 31, 2017

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J.S.C.