Werse v City of New York
2018 NY Slip Op 33390(U)
December 20, 2018
Supreme Court, New York County
Docket Number: 656880/2017
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 56EFM

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STEVEN WERSE AS SECRETARY-TREASURER OF INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Petitioner,

- v -

CITY OF NEW YORK, AND CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION,

Respondent.

INDEX NO.	656880/2017
MOTION DATE	
MOTION SEQ. NO.	001

DECISION AND ORDER

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HON. JOHN J. KELLEY:

Upon the foregoing documents, it is

The petitioner was employed by the Department of Transportation ("DOT") as a deckhand with the Staten Island Ferry. He was a "covered employee" under DOT's controlled substance and alcohol abuse policy for employees and subject to random drug and alcohol testing. The respondents terminated him after he failed an alcohol test and failed to provide a urine sample for his drug test. Following a grievance and subsequent arbitration hearing, the arbitrator ordered the petitioner reinstated. The arbitrator found that the petitioner's refusal to provide a urine sample was merely a "technical refusal" that, while worthy of punishment, did not justify his termination. The arbitrator also found that the petitioner did not commit any of the other acts of misconduct of which he was charged. The respondents have refused to follow the arbitrator's directive to reinstate the petitioner, claiming it violates public policy, and that the arbitrator exceeded his powers. The petitioner now moves to confirm the arbitration award, and the respondents cross-move to vacate it.

The petitioner was called in for a random drug and alcohol test on November 9, 2015. The tests were part of procedures the City of New York ("City") had mandated be implemented for those serving in positions such as the petitioner's. The procedures were instituted pursuant to various state and federal guidelines, as well as the respondents' internal "Zero Tolerance Policy" for positive drug and alcohol test results, which was instituted in 2003 following the Staten Island Ferry accident. The petitioner was aware of the Zero Tolerance Policy and was also on notice that he was obligated to comply with the testing procedures and guidelines as part of the terms and conditions of his employment. The guidelines direct that if a covered employee's initial alcohol test reveals an alcohol concentration of greater than 0.02 but less than 0.04, a second test will be performed to confirm the results of the initial test. A covered employee who has a confirmed alcohol concentration of greater than 0.02 but less than 0.04 will be temporarily removed from his or her position. Contrastingly, if a covered employee: (1) has a confirmed positive drug test; (2) a confirmed alcohol concentration of 0.04 or greater; or (3) refuses to take a drug or alcohol test, that employee will be removed from his or her position and the Department of Transportation is authorized to proceed to terminate employment. As relevant to this matter, the policy defines a "refusal" as occurring when a covered employee either fails to remain at the testing site until the testing process is complete or fails to provide a urine specimen for a drug test or breath for an alcohol test.

In this case, the petitioner initially tested positive for alcohol with a concentration of 0.048. He was shown the test results and informed that a confirmatory test would be administrated within 15 minutes. The petitioner became very upset and emotional and believed that he was about to be fired. He claimed that he had not been drinking that morning but that he had consumed a half a bottle of mouthwash just prior to the testing. The petitioner became

agitated, started yelling, complained of shortness of breath and chest pains, became nauseous, complained of heart palpitations and, according to the respondents, indicated a desire to take his own life. The respondents claim that they attempted to calm the petitioner and encourage him to complete the test. At some point, the testing machine shut down, either because of a malfunction or because, according to the respondents, the petitioner had delayed the confirmatory test past the fifteen-minute waiting period. Eventually the process was restarted, and the petitioner was tested twice for alcohol, resulting in concentrations of 0.036 and a confirmatory test of 0.025.

After informing the petitioner that he had tested positive for having consumed alcohol, he was told he would have to provide a urine sample for a drug test. The petitioner claimed that he had a "shy bladder" and told the testing facility that he could not provide a sample. The facility provided him with water but shortly after the petitioner again started complaining of chest pains and nausea.[1] He asked to go to the hospital. The petitioner was informed by a representative of his union that if he went to the hospital before the test was completed, the City would treat it as a refusal to complete the test and seek his termination. The petitioner continued to insist that he needed to go to the hospital and, according to the City, became more and more agitated and threatened to kill himself if he lost his job. The petitioner again insisted that he not consumed any alcoholic beverages that morning but that he had drunk half a bottle of Listerine right before work.

Eventually, an ambulance arrived, and the petitioner was taken to the hospital. At this point, he had elevated blood pressure but denied having any other physical complaints. The hospital found that he was not suffering from any serious or emergency condition and released

[1] The petitioner claims he drank several glasses of water but was still unable to provide a sample. The respondents claim that they provided the petitioner with water but that he declined to drink it. This factual dispute was apparently not resolved by the arbitrator.

him with a diagnosis of "fear complaint not found." As a result, the City found that the plaintiff's actions constituted a "refusal" to participate in the drug testing program, warranting his termination from employment.

After an arbitration proceeding, the arbitrator determined that the plaintiff was only guilty of a "technical refusal" to submit to a drug test and for testing 0.025 on the alcohol test (a result that would not mandate termination) and, therefore, that he should be reinstated without back pay effective Aug 7, 2017. The petitioner has not been reinstated, and he has now filed to confirm the award. Respondents cross-move for an order vacating the arbitration award.

The arbitrator based his finding on several factors. First, the arbitrator found that the petitioner did not refused to submit to, or materially delay, the alcohol test. This finding has not been challenged by the respondents, and it is undisputed that the respondents agreed to restart the testing process in light of the machine having prematurely shut down. Accordingly, the petitioner could not be terminated for alcohol consumption, as the concentrations resulting from the second round of testing did not rise to the level of termination.

The arbitrator did find that the petitioner refused to provide a urine sample for the drug testing. While ordinarily such a refusal would constitute grounds for termination, the arbitrator found that the refusal in this case should be classified as a "technical refusal," as distinguished from an employee who outright refuses a test, fakes an illness, or otherwise unduly subverts the testing process. The arbitrator found that the petitioner experienced a genuine panic attack, a fact supported by his elevated blood pressure, and that he genuinely believed his health was in jeopardy. The arbitrator also found that the petitioner panicked because he believed that he was about to lose his job. Finally, the arbitrator credited the petitioner's testimony that he was

inaccurately advised by medical personal that he could complete the testing process at the hospital.

In deciding that the petitioner's refusal to complete the test was a 'technical refusal," the arbitrator claimed to have relied on the testimony of the respondents' medical review officer, Bruce Kamer. According to the arbitrator, Mr. Kamer acknowledged during cross-examination that the respondents sometimes utilized a category of "technical refusal" for circumstances such as a heart attack or an epileptic fit. In such cases of technical refusal, Mr. Kamer would submit the outcome to the agency for a determination, and termination would not necessarily be the result of the refusal to complete the test process. The arbitrator found that the petitioner's panic attack did not excuse him from complying with the drug test requirement. This was not a case where an employee had an unrelated medical emergency prior to the commencement of the test that prevented him or her from complying. Rather, the petitioner's panic attack, while sincerely felt, was clearly caused by the results of the initial alcohol test and his belief that he was going to be fired. The arbitrator found this to be an insufficient justification for the petitioner's failure to provide a urine sample. Nevertheless, the arbitrator also found the petitioner's situation to be analogous to those allegedly testified to by Mr. Kamer and characterized as a "technical refusal." The arbitrator then went on to consider the nature of the petitioner's "technical refusal" as a mitigating factor weighing against the penalty of termination. Along with other mitigating factors, such as the petitioner's expressions of remorse and his expressed willingness to cooperate with any future testing directives, the arbitrator used this factor as a justification for reducing the petitioner's penalty from termination to a nineteen-month suspension without pay.

Under CPLR §7511(b)(1), an arbitration award only may be vacated if: (1) there was corruption, fraud, or misconduct in procuring the award; (2) the arbitrator exhibited bias or

partiality; (3) the arbitrator exceeded his power or so imperfectly executed it that a final and definitive award was not made; or (4) the arbitrator failed to follow the procedures set forth under CPLR Article 75. An arbitration award generally will not be vacated, even when the court finds that the arbitrator misapplied substantive rules of law, unless the award violates a strong public policy, exceeds a specifically enumerated limitation on the arbitrator's powers, or is totally irrational (*see Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 307-309 [1984]; *Lentine v. Fundaro*, 19 NY2d 382, 385 [1971]; *Intergrated Sales, Inc. v. Maxell Corporation of America*, 94 AD2d 221, 225 [1st Dept 1983]). These exceptions are to be narrowly read in light of the strong federal and state public policy favoring the resolution of labor disputes by arbitration (*see Matter of Local 333, United Mar. Div., Intl. Longshoreman's Assn., AFL-CIO v New York City Dept of Transp.*, 35 AD3d 211, 212-213 [1st Dept 2006]).

The respondents argue that the award should be set aside because it violates public policy and because the arbitrator exceeded his powers in ruling that the petitioner's refusal to complete the drug test was only a technical refusal that did not warrant the penalty of termination. The Court disagrees with the respondents' contentions and, having examined all the facts and circumstances, finds no legal basis to vacate the award. Initially, the Court finds that the award does not violate public policy. In order to vacate an arbitration award on the basis that it violates public policy, the policy must be found to 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" (*New York State Correctional Officers & Police Benevolent Assoc. v State*, 94 NY2d 321, 326 [1999]). Violations of policies that are merely general considerations of supposed public interests are not sufficient grounds for vacatur (*see Local 333*, 35 AD3d at 227).

There is no basis for concluding that the award at issue violates such a strong, well-defined public policy. The respondents' Zero Tolerance policy was not expressly embodied in constitutional, statutory, or common law; it is an internal disciplinary guideline that was adopted as a condition of the petitioner's employment (*see id.* at 228). The interpretation and application of the terms of the Zero Tolerance Policy are clearly within the scope of collective bargaining and the parties' agreement to arbitrate any disputes relating to the terms and conditions of the petitioner's employment. Additionally, there is nothing in the respondent's policies that would prohibit either an arbitrator or the respondents, themselves, from deeming certain types of refusals as "technical refusals" that would not warrant termination. The arbitrator explicitly relied on the respondents' medical review officer's testimony in concluding that in certain circumstances, a refusal or unwillingness to complete the testing process could be classified as a technical refusal.[2] The respondents have failed to show that the arbitrator's award violates public policy or even that it violated the respondent's own interpretation of its Zero Tolerance Policy. There is no statutory authority which would prohibit an arbitrator, appointed pursuant to the collective bargaining agreement, from agreeing to disciplinary sanctions short of dismissal under the facts of this case.

By the same reasoning, the arbitrator cannot be said to have exceeded a specifically enumerated limitation on his powers by determining that the petitioner was only guilty of a technical refusal that did not warrant termination under the respondents' Zero Tolerance Policy. The respondents argue that the arbitrator misinterpreted and/or misapplied the concept of a technical refusal and declined to terminate the petitioner, even though the award acknowledged that the petitioner's refusal to continue the test was without justification.

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[2] While the respondents claim that the arbitrator mischaracterized Mr. Kaman's testimony, they have not provided the Court with a transcript of the hearing. Apparently, no transcript was taken.

The flaw in the respondents' argument is that even if the arbitrator misinterpreted or misapplied the terms and conditions of the respondents' Zero Tolerance Policy, that is not a basis to find that he exceeded a limitation on his powers. Courts are bound by an arbitrator's factual findings, interpretations of contracts and internal policies, and judgment concerning remedies (*see Correctional Officers*, 94 NY2d at 326). 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 is the better one (*see* id.). Even if this court agrees that the arbitrator made errors of law or misinterpreted the testing policies and procedures, that still is not a valid basis to vacate the award (*see id.*). The Court only can vacate the award if it finds that the arbitrator clearly exceeded his mandate and determined issues that were not his to determine. In this case, the parties consented to have the arbitrator determine whether the petitioner was properly disciplined pursuant to the terms of the Zero Tolerance Policy and the collective bargaining agreement. That is exactly what the arbitrator determined. When an arbitrator decides the issue submitted to him, he does not exceed his power.

This matter is very similar to the decision of the Court of Appeals in *NYC Transit Auth. v TWU Local 100*, 6 NY3d 332 [2005]. In that case, the Court of Appeals reversed the Appellate Division's vacatur of an arbitration award that had reinstated a transit worker. The worker had been unable to furnish a urine sample for required drug testing and, therefore, did not complete the testing process. The Court of Appeals found that the arbitrator had the right to find that this did not constitute a refusal to take the test and that the failure to complete the test did not constitute grounds for termination. Similarly, in this case, the arbitrator found that while the petitioner did not provide a urine sample that allowed for the completion of the testing process, the refusal was a "technical refusal" that did not justify termination. The arbitrator was within

his purview to find a technical refusal, particularly given the undisputed testimony that the City itself had recognized certain types of refusals as technical refusals that might fall short of justifying termination. Accordingly, there is no legal grounds to vacate the award and it should be confirmed.

The petition to confirm the award is granted and the award is hereby confirmed. The cross-motion to vacate is denied.

12/20/2018
DATE

JOHN KELLEY, J.S.C.
HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
	X	GRANTED	☐ DENIED	☐ GRANTED IN PART		☐ OTHER	
APPLICATION:	☐	SETTLE ORDER		☐ SUBMIT ORDER			
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT		☐ REFERENCE	