No. 31
In the Matter of New York State
Office of Children and Family
Services, et al.
Respondents,
v.
Lauren Lanterman, et al.
Appellants.

No. 32
In the Matter of New York State
Office of Alcoholism and
Substance Abuse Services et al.,
Appellants,
v.
Victor Ortiz et al.,
Respondents.

Case No. 31:
Edward J. Aluck, for appellants.
Julie M. Sheridan, for respondents.
Civil Service Employees Association; New York State United Teachers, amici curiae.

Case No. 32:
Julie M. Sheridan, for appellants.
Edward J. Aluck, for respondents.
Civil Service Employees Association, amicus curiae.

SMITH, J.:

In these two cases, state employees who were dismissed because they lacked the credentials required for their jobs seek to arbitrate the question of whether their dismissals were

disciplinary actions. Under our decision in Matter of Felix v New York City Dept. of Citywide Admin. Servs. (3 NY3d 498 [2004]), the dismissals clearly were not disciplinary, and the employees' assertion that they were does not have a relationship with their collective bargaining agreement sufficient to justify arbitration of the issue.

I

Lauren Lanterman was a teacher employed by the Office of Children and Family Services (OCFS); Victor Ortiz was a counselor employed by the Office of Alcoholism and Substance Abuse Services (OASAS). Though they worked for different agencies, Lanterman and Ortiz belonged to the same union, the New York State Public Employees Federation (PEF), and their rights were governed by the same collective bargaining agreement (CBA).

Both Lanterman and Ortiz needed credentials for the jobs they held. A civil service classification standard, promulgated pursuant to Education Law § 112 (1) and 8 NYCRR 116.3 (b), required Lanterman to have a teaching certificate appropriate to her specialty. OASAS regulations, promulgated pursuant to Mental Hygiene Law § 19.07 (d), required Ortiz to have a credential as a Credentialed Alcoholism and Substance Abuse Counselor (CASAC). Before the events leading to this litigation, Lanterman had a provisional teaching certificate, and Ortiz had a CASAC credential good for three years. Both of these credentials expired, and both Lanterman and Ortiz failed to

obtain new ones. As a result, both were dismissed.

PEF filed grievances for Lanterman and Ortiz, claiming that their dismissals violated their rights under Article 33 of the CBA. That article is entitled "DISCIPLINE" and begins with the following words:

> "33.1 Applicability
>
> "The disciplinary procedure set forth in this Article shall be in lieu of the procedure specified in Sections 75 and 76 of the Civil Service Law and shall apply to all persons currently subject to Sections 75 and 76 of the Civil Service Law."

The stated purpose of Article 33 is "to provide a prompt, equitable and efficient procedure for the imposition of discipline for just cause." It prescribes a detailed "disciplinary procedure," beginning with a "notice of discipline," which may be followed by a "disciplinary grievance," which, if not otherwise resolved, may in turn become the subject of a "disciplinary arbitration."

OCFS and OASAS rejected the grievances and the Governor's Office of Employee Relations upheld the rejections. The position of these agencies is that the grievances are not subject to arbitration because Lanterman's and Ortiz's dismissals were not for disciplinary reasons, but for the employees' failure to have the qualifications necessary for their jobs. PEF, Lanterman and Ortiz respond, in substance, that this itself is an arbitrable question. Under Article 34 of the CBA, a "contract grievance," defined as "a dispute concerning the interpretation,

application or claimed violation of a specific term or provision of this Agreement," is an arbitrable dispute. PEF, Lanterman and Ortiz argue that, since they say that Article 33's disciplinary procedures are available in their case, and the employers say they are not, a "dispute concerning the interpretation, application or claimed violation" of a provision of the CBA exists. They thus seek an arbitration about what the contract means, to be followed, if they prevail, by a disciplinary procedure and perhaps a second, disciplinary, arbitration.

PEF filed notices of intention to arbitrate on Lanterman's and Ortiz's behalf, and the state agencies brought these proceedings under CPLR Article 75 to stay the arbitrations. Both employees prevailed in Supreme Court. In the Appellate Division, the cases were decided by the same panel on the same day (Matter of New York State Off. of Children & Family Servs. [Lanterman], 62 AD3d 1109 [3d Dept 2009]; Matter of New York State Off. of Alcoholism & Substance Abuse Servs. [Ortiz], 62 AD3d 1118 [3d Dept 2009]). The judgment in Lanterman's favor was reversed, but that in Ortiz's favor was affirmed, with two Justices dissenting in each case. The reason for the contrasting results is that one Justice was persuaded by the state agencies' argument, made as to Lanterman but not as to Ortiz, that the proposed arbitration would violate public policy.

In each case, the unsuccessful parties appeal to us as of right, pursuant to CPLR 5601 (a). We affirm in Lanterman and

reverse in Ortiz. Because we conclude that neither grievance is arbitrable under the CBA, it is unnecessary for us to decide the public policy issue raised in Lanterman.

II

The question Lanterman and Ortiz seek to arbitrate is essentially the same question we decided in Felix. There, a New York City employee was dismissed for failing to establish City residence, which was a prerequisite to his employment under a local law. The employee sought a hearing under Civil Service Law § 75 ("Removal and other disciplinary action"), but we rejected his claim, holding that the disciplinary provisions of the Civil Service Law did not apply to him. We explained that "while an act of misconduct invokes Civil Service Law § 75 disciplinary procedures," an employee's failure to meet a residence requirement "is separate and distinct from an act of misconduct" (3 NY3d at 505). We approved the distinction made in Mandelkern v City of Buffalo (64 AD2d 279, 281 [4th Dept 1978] [Simons, J.]) between issues of "job performance, misconduct or competency," which are subject to Civil Service Law disciplinary procedures, and "a qualification of employment," which is not.

In Felix's terms, the dismissals of Lanterman and Ortiz were plainly not disciplinary, but were for failure to meet qualifications of employment -- a teaching certificate in Lanterman's case, a CASAC credential in Ortiz's. The State does not claim that the employees have forfeited their jobs by

misconduct. It claims that they do not have the qualifications that they must have to hold those jobs.

PEF, Lanterman and Ortiz try to distinguish Felix by arguing that these cases involve contractual, not statutory, disciplinary procedures. The argument is without merit, because the relevant contract clause, on its face, is made applicable to exactly those cases to which the statute would otherwise apply: the contractual disciplinary procedure is "in lieu of the procedure specified in Sections 75 and 76 of the Civil Service Law" and is applicable "to all persons currently subject to Sections 75 and 76 of the Civil Service Law." Felix squarely holds that Sections 75 and 76 are inapplicable to the grievances of Lanterman and Ortiz.

PEF, Lanterman and Ortiz argue, in substance, that however weak their claim to be accorded disciplinary hearings may be, the claim is for an arbitrator, not a court, to decide. It is generally true that we distinguish "between the merits of grievances and the threshold question of whether courts or arbitrators have the authority to decide the merits" (Matter of City of Johnstown [Johnstown Police Benevolent Assn.], 99 NY2d 273, 279 [2002]) and that "[e]ven an apparent weakness of the claimed grievance is not a factor in the court's threshold determination" (Matter of Board of Educ. of Watertown City School Dist. [Watertown Educ. Assn.], 93 NY2d 132, 142 [1999]). These rules are applicable as long as a contractual interpretation is

at least colorable, but it is not true that any claim, no matter how insubstantial, may be arbitrated. Under Watertown, the test is "whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA" (93 NY2d at 143). We hold here, as we did in Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v City of Cohoes (94 NY2d 686, 694-695 [2000]) that the "reasonable relationship" test is not met: "despite the breadth of the arbitration clause in the CBA, it cannot be construed to extend to arbitration of grievances which, as a matter of law, do not effectively allege any breach of the collective bargaining agreement."

Accordingly, in Lanterman, the order of the Appellate Division should be affirmed with costs. In Ortiz, the order of the Appellate Division should be reversed with costs and the petition to stay arbitration granted.

M/O New York State Office of Children and Family Services
v Lanterman

M/O New York State Office of Alcohol and Substance Abuse
v Ortiz

Nos. 31 & 32

CIPARICK, J.(dissenting):

Because the parties' collective bargaining agreement (CBA) may be interpreted to manifest a clear intent to arbitrate the question of whether an employee who lacks the requisite credentials for employment can be terminated under the CBA's contract grievance and discipline procedures, I respectfully dissent and would compel arbitration.

In both of these cases the majority permanently stays arbitration, holding that the parties to the CBA did not agree to arbitrate their disputes involving termination of employees who did not maintain professional credentials. The effect of this ruling is to deny the employees disciplinary due process, as established in the CBA, and permit their summary termination. It has long been settled that a dispute is arbitrable if the arbitration is not barred by "any statutory, constitutional or

public policy" and the parties "in fact agreed to arbitrate the particular dispute" (Matter of County of Chautauqua v Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO, County of Chautauqua Unit 6300, Chatauqua County Local 807, 8 NY3d 513, 519 [2007] [internal quotations omitted]). We have read the second of these requirements broadly; if there is a "reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA," the dispute is arbitrable (Matter of Board of Educ. of Watertown City School Dist. [Watertown Educ. Assn.], 93 NY2d 132, 143 [1999]). The arbitrator can then "make a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them" (id.).

Under the CBA at issue here between New York State and the New York State Public Employees Federation (PEF), it would not be unreasonable for an arbitrator to conclude that the parties agreed to arbitrate this dispute. As the majority notes, Article 34 of the CBA defines a "contract grievance" as "a dispute concerning the interpretation, application, or claimed violation of a specific term or provision of this Agreement." Because PEF, Lanterman, and Ortiz claim that the employers violated the procedural mandates of Article 33 of the CBA, their claims fall under this definition. Notably, prior to these two matters, the state and PEF had a long-standing practice of following the disciplinary process set forth in Article 33

whenever state agencies sought to terminate employees for lack of credentials. Whether Article 33's disciplinary procedure applies here is undoubtably a dispute over the application of a term of the CBA and, therefore, it should be resolved by the arbitrator, not a court.

This result is buttressed by our traditionally expansive reading of CBA arbitration clauses as a means of resolving public sector labor disputes. Generally, if a court "determine[s] that the arbitration clause is broad enough to encompass the subject matter of the dispute, '[t]he question of the scope of the substantive provisions of the contract is itself a matter of contract interpretation and application, and hence it must be deemed a matter for resolution by the arbitrator'" (Matter of Board of Educ. of Watertown City School Dist. v. Watertown Educ. Assn., 74 NY2d 912, 913 [1989], quoting Board of Educ. of Lakeland Cent. School Dist. of Shrub Oak v Barni, 49 NY2d 311, 314 [1980]). This is true even where the substantive merits of a claim are weak (Matter of Franklin Cent. School [Franklin Teachers Assn.], 51 NY2d 348, 357 [1980]).

The Office of Alcoholism & Substance Abuse Services (OASAS), the Office of Children and Family Services (OCFS), and the Governor's Office of Employee Relations (GOER) argue that Ortiz and Lanterman's terminations were not based on "misconduct or incompetence" and, thus, were not disciplinary actions. However, this "incompetency or misconduct" language comes from

Civil Service Law § 75, which article 33 of the CBA supplants. Instead, the CBA provides that discipline may be imposed for "just cause." It would certainly be reasonable for an arbitrator to determine that, as Lanterman and Ortiz argue, failure to maintain a license constitutes "just cause" for discipline under the CBA. Because addressing this claim requires an interpretation of the CBA and the arbitrator alone has the power to determine the scope of the contract provisions, the dispute should be arbitrable.

In holding otherwise, the majority's reliance on Matter of Felix v New York City Dept. of Citywide Admin. Servs. (3 NY3d 498 [2004]) is misplaced, since that case did not involve a CBA or any language of comparable breadth to that used in Article 34. In Felix, we interpreted a provision of the Administrative Code of the City of New York requiring a municipal employee to maintain a residence within the City and the statutory language of Civil Service Law § 75. The majority asserts that because Article 33 replaces the procedure of Civil Service Law § 75, the contract language should be interpreted as we interpreted section 75 in Felix, where we distinguished between failure to comply with requirements that define eligibility and acts of misconduct or incompetence. In these cases, however, we are interpreting contractual language, including a provision specifying that any disputes regarding the interpretation of that language are themselves arbitrable. Moreover, section 12-120 of the New York

City Administrative Code -- the employment requirement at issue in Felix -- expressly provides that failure to maintain residency constitutes a forfeiture of employment (id. at 502, quoting New York City Administrative Code § 12-120). Here, because no specific statutory provision calls for automatic forfeiture of employment upon the loss of certification, the arbitrator would have discretion to fashion a remedy. Furthermore, the notice and opportunity to contest procedures contained in the Administrative Code satisfied due process concerns in Felix, but are not available here.

Since I believe that the parties agreed to arbitrate these disputes, it is necessary to consider whether any public policy precludes the arbitration. I know of no such policy and, contrary to the Appellate Division's dispositive finding in Lanterman, do not think that the public policy of having well qualified, certified teachers precludes arbitration here. A dispute is nonarbitrable if a court can "conclude, without engaging in any extended factfinding or legal analysis that [a law or policy] prohibits, in an absolute sense, the particular matters to be decided" by arbitration (County of Chautauqua, 8 NY3d at 519, quoting Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100, AFL-CIO, 99 NY2d 1, 8-9 [2002] [internal quotations omitted]). "Put differently, a court must stay arbitration where it can conclude, upon examining the parties' contract and the implicated statute on their face,

'that the granting of any relief would violate public policy'" (id., quoting Matter of City of New York v Uniformed Fire Officers Assn., Local 854, IAFF, AFL-CIO, 95 NY2d 273, 284 [2000]). Here, although the law clearly prohibits the parties' continued employment in their current positions without the requisite licensing, it does not require their termination; other remedies may be available.

In Lanterman's case, OCFS and GOER argue that arbitration of Lanterman's termination was barred by public policy,[1] but they fail to demonstrate that any relief granted by the arbitrator would violate public policy (see Matter of Committee of Interns & Residents [Dinkins], 86 NY2d 478, 484 [1995]; County of Chautauqua, 8 NY3d at 519). For example, in keeping with the expansive powers of an arbitrator, Lanterman could have been suspended without pay[2] until she received her certification or she could have been reassigned to a non-teaching

[1] OASAS and GOER do not press a public policy argument in the Ortiz case, but merely contend that the dispute is not arbitrable as a contract grievance under Article 34 of the CBA.

[2] OCFS maintains that article 33 of the CBA prohibits the suspension of Lanterman without pay pending the resolution of a disciplinary proceeding. Article 33 provides that OCFS may suspend an employee pending a full hearing before an arbitrator where OCFS determines that probable cause exists that the employee's "continued presence on the job . . . would severely interfere with operations." Of course, an arbitrator can address whether the lack of professional certification constitutes "severe interference" with operations and what, if any, remedy is appropriate.

position.[3] Although the regulations of the Education Department provide that "[a]ll professional instructional personnel shall have the required certificates as set forth in Part 80 of this Title" (8 NYCRR 116.3 [b]), the law nowhere expresses that a lapsed certificate will result in immediate termination.[4]

Indeed, in previous cases where we have found that public policy favors termination of a tenured civil servant without a hearing, the applicable statute or regulation has made that policy clear. For example, the federal Hatch Act expressly provides that an employee employed in connection with a program financed by federal funds is subject to discharge if he or she becomes a candidate for partisan elected office (5 USC §§ 1505-1506). Similarly, Public Officer Law § 30 provides for the forfeiture by law of employment for conviction of a felony, and section 12-120 of the New York City Administrative Code expressly provides that failure to maintain residency constitutes a forfeiture of employment (see Felix, 3 NY3d 502). Here, in stark contrast, no specific statutory provision calls for the automatic

[3] Article 33 of the CBA contemplates this remedy and provides that: "Where the appointing authority has determined that an employee is to be temporarily reassigned pursuant to this Article, the employee shall be notified in writing of the location of such temporary reassignments and . . . such reassignment may involve the performance of out-of-title work."

[4] Similarly, OASAS' automatic dismissal of Ortiz from service for failure to maintain a required credential may not be appropriate under the circumstances and there may be other available remedies for an arbitrator to fashion.

forfeiture of employment upon a loss of certification. Thus, the public policy exception to arbitrability of a dispute should not apply here and we should maintain our clear policy of discouraging judicial interference with public sector arbitration, as contemplated by the Taylor Law (Civil Service Law art 14).

Therefore, in Lanterman, I would reverse the order of the Appellate Division, dismiss the petition to stay arbitration, and grant the cross-motion to compel arbitration. In Ortiz, I would affirm the Appellate Division order that dismissed the petition to stay arbitration and granted the cross-motion to compel arbitration.

* * * * * * * * * * * * * * * *

Case No. 31: Order affirmed, with costs. Opinion by Judge Smith. Judges Graffeo, Read, Pigott and Jones concur. Judge Ciparick dissents and votes to reverse in an opinion in which Chief Judge Lippman concurs.

Case No. 32: Order reversed, with costs, and petition to stay arbitration granted. Opinion by Judge Smith. Judges Graffeo, Read, Pigott and Jones concur. Judge Ciparick dissents and votes to affirm in an opinion in which Chief Judge Lippman concurs.

Decided March 25, 2010