[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ROBERT D. LIPPMANN Justice

PART 21

Unified Court System

INDEX NO. 400988/06

MOTION DATE

- v -

MOTION SEQ. NO. 001

NYS Court Clerks Assoc.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/22/06

RDL

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 21

----------X

In the Matter of the Application of the UNIFIED COURT SYSTEM OF THE STATE OF NEW YORK,

Petitioner,

INDEX NO. 400988/06

-against-

NEW YORK STATE COURT CLERKS ASSOCIATION,

Respondent.

For an Order and Judgment Staying Arbitration Pursuant to CPLR 7503

----------X

ROBERT D. LIPPMANN, J.:

Petitioner Unified Court System of the State of New York ("UCS") moves pursuant to CPLR 7503 to stay an arbitration demanded by respondent union ("the union") based on the termination of one of its members, Sean Sullivan ("Sullivan").

The union cross-moves to compel arbitration.

The dispositive questions before the court are whether the union may bring a contract grievance over the alleged breach of a stipulation entered into by the parties after negotiations based on the union's collective bargaining agreement (rather than a breach of that collective bargaining agreement itself), and whether that determination is to be made by this court or by the arbitrator.

Sullivan, a senior court clerk assigned to the Civil Court who had been employed in the courts since 1982, was formally charged by notice dated October 24, 2004, with

"incompetency, misconduct, and conduct prejudicial to the good order and efficiency" of UCS based on his having taken "an excessive number of sick days" after being warned by his supervisor (see exhibit B to petition). These charges were resolved by a stipulation (at petition, exhibit C) between Sullivan, the union and UCS (through its Office of Court Administration ["OCA"]) wherein OCA dropped the charges against Sullivan, and Sullivan waived his rights to a disciplinary hearing, administrative appeal and judicial recourse, and agreed to participate in petitioner's Work/Life Assistance Program (the "WLA program") and to be placed on probation for two years. As specified in the stipulation, Sullivan could be terminated without a hearing or any of the other procedural safeguards afforded by Article 24 of his collective bargaining agreement [Article 23 in the 2003-2007 contract] if he breached that probation by being: (i) "late for work more than twice in any calendar month" or "late for more than a total of one-half hour in any calendar month" absent proof of "extraordinary circumstances beyond his control"; (ii) absent on sick leave and failing to present a satisfactory doctor's note within a day of his return to work; (iii) "absent on annual leave without without prior written approval by his supervisor"; or, (iv) absent from work without notifying a supervisor by 9 a.m. on that day. Sullivan could also be similarly terminated if he failed to contact the WLA program and to comply with its recommendations.

On July 15, 2005, Sullivan's employment was summarily terminated without notice by letter of even date signed by UCS (Joan B. Carey) which made reference to the stipulation and nothing else (petition, exhibit D).

Thereafter, by letter dated August 16, 2005, the union brought a step 1 contract grievance on the ground that UCS "plainly breached both the spirit and the express terms of the

[s]tipulation in terminating [Sullivan's] employment" so summarily when Sullivan had complied with all the conditions of the stipulation (see exhibit F to petition). That grievance was expeditiously denied without reason or discussion (id., exhibit G). The union proceeded to a step 2 grievance (id., exhibit H), submitting documentation that Sullivan had not violated the terms of the stipulation (id., exhibit I). The step 2 grievance was denied on February 7, 2006, based on the "determin[ation] by the Deputy Chief Administrative Judge (New York City Courts) [i.e., Joan B. Carey] that [Sullivan] had engaged in conduct that violated the stipulation" (id., exhibit J, p 2). Ten days later, the union demanded arbitration (id., exhibit K) and this proceeding ensued.

UCS seeks to stay the arbitration on the grounds that under applicable law and court rules it had every right to fire Sullivan, a probationary employee, as it did, and that the underlying grievance was not a contract dispute but rather a disciplinary matter affecting only one union member, whose only proper avenue of redress was to bring an Article 78 proceeding.

It is well established that generally, "[a]bsent a statute or rule to the contrary, a probationary employee may be discharged without a hearing and without a statement of reasons" (Reynolds v. Crosson, 183 AD2d 482, 483 [1st Dept 1992]) "in the absence of a showing that the termination was for a constitutionally impermissible purpose, in bad faith, or in violation of ... law" (Matter of Phillips [Kiepper], 236 AD2d 542 [2d Dept 1997]). In the court system, whether such a probationary employee is terminated or permanently appointed is in the discretion of the Chief Administrative Judge (22 NYCRR §§ 80.1[3], 25.22; State of New York Unified Court System v. District Council 37, 3 AD3d 435 [1st Dept 2004]).

However, although also dubbed a probationary employee, Sullivan is not in this class or subject to these legal tenets. Mere nomenclature does not suffice to reduce him to that tenuous level. Since Sullivan's "probationary status was pursuant to a disciplinary penalty and not part of the evaluation process governing newly hired, promoted or transferred employees, the provisions of [22 NYCRR § 25.22] do not apply" (Reynolds v. Crosson, supra, 183 AD2d at 483). Sullivan's status as a probationary employee stemmed solely from the stipulation, rather than from the normal course of the hiring process. Under these circumstances, UCS' right to terminate petitioner during his probationary period was curtailed from unfettered latitude (see supra) to one of the specific grounds set forth in the stipulation. The union negotiated the stipulation with OCA on its member's behalf and was a party to that stipulation. "Arbitration provisions pertaining to employee discipline contained in a [collective bargaining agreement] can be supplemented or superceded by specific language in a last chance agreement" (Matter of Von Roll Isola USA, Inc. [International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers], 304 AD2d 934, 935 [3d Dept 2003]). In effecting a waiver of Sullivan's rights to a hearing and other procedural safeguards afforded to him by his collective bargaining agreement, the stipulation modified the terms of that agreement, at least with respect to Sullivan. "Once the parties to a broad arbitration clause have made a valid choice of forum, as here, all questions with respect to the validity and effect of subsequent documents purporting to work a modification or termination of their original agreement are to be resolved by the arbitrator" (Schlaifer v. Sedlow, 51 NY2d 181, 185 [1980]). In essence, it can be said that by limiting OCA's discretion to terminate Sullivan during his probationary period in the stipulation, the union exercised its collective bargaining power to obtain 'just cause' rights for a probationary

employee. "[T]he parties to a public employee collective bargaining agreement may validly agree to confer contractual job security 'just cause' rights upon probationary employees, and ... under a broad contract grievance/arbitration clause, any dispute over whether the contract confers such rights is arbitrable" (County of Schenectady v. Lainhart, 177 AD2d 826, 827 [3d Dept 1991], citing Matter of Franklin Central School [Franklin Teachers Assn.], 51 NY2d 348, 355-356 [1980]).

In fact, Sullivan was fired without a stated reason, and according to the union, the implied reason was factually inaccurate. After 23 years of service with UCS, the least Sullivan deserves is that his employer honor the stipulation, which under the law is enforceable to the same extent as any other contract (Lazich v. Vittoria & Parker, 196 AD2d 526, 527-528 [2d Dept 1993], lv den 82 NY2d 656 [1993]; see also Rowe v. Great A&P Tea Co., 46 NY2d 62 [1978]). However, since that same stipulation explicitly precludes Sullivan from trying to enforce it through any other means, but is silent about the grievance/arbitration process his union negotiated to obtain in the collective bargaining agreement, arbitration cannot be foreclosed.

Since its decision denying the step 2 grievance, UCS has consistently expressed the same contradictory argument on which this petition is based: in the stipulation Sullivan waived "any and all rights he may have to a hearing, an appeal or a **judicial challenge**" concerning the underlying disciplinary charges or the penalty that could be imposed pursuant to the stipulation (petition, exhibit F, p 3, emphasis added), yet, Sullivan "could have sought review of the Deputy Chief Administrative Judge's[sic] (New York City Courts) [unspecified] determination by filing an Article 78 proceeding" (id., p 4). To the extent this means that Sullivan could have mounted such a judicial challenge to the determination to terminate his employment, such means of

redress is clearly barred by the stipulation. To the extent it means that Sullivan could have brought an Article 78 proceeding challenging the factual determination by the Deputy Chief Administrative Judge (New York City Courts) that he had breached the terms of the stipulation, it is an impossibility since such a factual finding was in fact never made. As noted above, at no time was Sullivan formally notified of the reason for his termination. In fact, that vital omission was part of the union's step 1 grievance, in which the union's counsel stated that the termination letter "implied that [Sullivan] had violated the terms of the [s]tipulation but specified no particular violation thereof" and it was only by telephone conversation that one of the union's representatives was told of the alleged breaches, which the union's subsequent investigation revealed were baseless (exhibit C to petition).

Furthermore, UCS' argument is at best disingenuous. Having taken away in the stipulation all of Sullivan's other possible means of redress, including the right to institute an Article 78 proceeding, UCS cannot now credibly argue that such Article 78 proceeding was Sullivan's only remedy. Were Sullivan to bring an Article 78 proceeding, UCS could successfully seek to dismiss it on the ground that he had explicitly waived that remedy (see Montiel v. Kiley, 147 AD2d 402 [1st Dept 1989]). In this context, it is significant that at no point has UCS expressed a willingness to waive the stipulation's exclusion of Article 78 as a remedy. Were this court to sanctify petitioner's position, it would in effect be holding that a negotiated bilateral agreement is binding only on the party with the least bargaining power (Sullivan), and that the party with the most bargaining power (UCS) is free to violate that agreement with impunity. This the court will not do.

At the heart of the grievance at bar is the premise that in terminating Sullivan without regard for whether he actually violated his obligations under the stipulation, UCS acted in bad faith in its dealings and negotiations with the union. In the instant proceeding, the union charges UCS with similar bad faith in not unhesitatingly honoring the arbitrability clause of the collective bargaining agreement. An employer's duty to act in good faith in dealing with a union is at the very core of every collective bargaining agreement. Without good faith on both sides our entire system of collective bargaining would be pointless. "[P]ublic employers and certified employee organizations [have a duty] to bargain in good faith on wages, hours and working conditions.... An employer commits an improper practice if it alters, without prior good-faith negotiation, a term or condition of employment" (*cf.* Matter of Levitt [Board of Collective Bargaining of the City of New York, 79 NY2d 120, 126 [1992]).

Contrary to UCS' argument, the grievance at bar is not unknown to this state. A contract grievance over an employer's failure to follow specific procedures terminating a probationary employee has been held to be arbitrable upon the court's finding that "both issues invoked ... in the[] arbitration demand ... bear a reasonable relationship to the general subject matter of the [collective bargaining a]greement.... The fact that the substantive clauses of the contract might not support the grievance is irrelevant on the threshold question of arbitrability.... It is for the arbitrator to make a more exacting interpretation of the precise scope of these substantive provisions of the collective bargaining agreement, and whether the subject matter of the dispute fits within them" (Matter of Vestal Central School District [Vestal Teachers Association], 2 AD3d 1190, 1193 [3d Dept 2003], lv den 2 NY3d 708 [2004], citations omitted).

In opposition to UCS and support of its cross-motion, the union argues that since the question to be arbitrated is whether Sullivan's termination constituted a breach of the stipulation, it is arbitrable as a contract grievance because the stipulation, which waved specific portions of the collective bargaining agreement between the parties based on negotiations between the parties to that collective bargaining agreement, is an extension or amendment of that agreement. This position is supported by caselaw (see, e.g., L&R Exploration Venture v. Grynberg, 22 AD3d 221, 222 [1st Dept 2005], lv den 6 NY3d 749 [2005] ["the question is not whether the parties' claims are governed by other, subsequently executed agreements, but whether such claims 'touch' or 'implicate' 'any of the terms or conditions' of the ... agreement"]). Furthermore, the union contends that under the terms of its collective bargaining agreement (¶ 15.7) the question of its grievance's arbitrability is to be decided by the arbitrator, not the court.

"[T]he question of arbitrability is an issue generally for judicial determination in the first instance.... An important legal and practical exception has evolved which recognizes, respects and enforces a commitment by the parties, nevertheless, to arbitrate even that issue when they clearly and unmistakably so provide" (Matter of Smith Barney Shearson Inc. v. Sacharow, 91 NY2d 39, 45-46 [1997]; see also First Options of Chicago, Inc. v. Kaplan, 514 US 938, 943-944 [1995]). The applicable collective bargaining agreement defines a contract grievance as "a dispute concerning the interpretation, application or claimed violation of a specific term or provision of th[at a]greement" (¶ 15.1[a]). The contract further provides that "[i]n the event the Union appeals a Step 2 decision to Step 3 and the parties cannot agree as to whether it constitutes an arbitrable grievance, the issue of arbitrability shall be preliminarily submitted to arbitration

prior to the resolution of the dispute on the merits in accordance with the procedures for arbitration set forth in Step 3" (¶ 15.7).

"It is what is negotiated that prevails.... [I]t is well settled that a contract provision in a collective bargaining agreement may modify, supplement, or replace the more traditional forms of protection afforded public employees" (Matter of Civil Service Employees Association Inc. [New York State Unified Court System], n.o.r., NYLJ Jan 22, 1996 at 29, col 4 [Sup Ct, NY Co, Crane, J, 1996], citing Dye v. New York City Transit Authority, 88 AD2d 899 [2d Dept 1982], affd 57 NY2d 917 [1982] and cases cited therein). The collective bargaining agreement here is crystal clear -- the question of the grievance's arbitrability is to be decided by the arbitration, and the arguments made by the parties in these proceedings should be directed at the arbitrator, not the court.

There is no bar to the enforceability of that clause. The grievance at bar does not entail the interpretation of a statute, which the First Department has held should be made by a court rather than an arbitrator (State of New York Unified Court System v. Court Attorneys Association of the City of New York, 267 AD2d 92, 93 [1st Dept 1997]), nor was Sullivan a confidential employee (*cf.* Matter of Conigland [Rosenblatt], 171 AD2d 864 [2d Dept 1991]). It is immaterial that the stipulation does not specifically prove for arbitration under the collective bargaining agreement. UCS' "performance or nonperformance of the [stipulation] is a matter for the arbitrator, the absence of an arbitration provision in the settlement agreement notwithstanding" (City of Buffalo v. American Federation of State, County and Municipal Employees, 80 AD2d 721 [4th Dept 1981]), since the collective bargaining agreement does not explicitly exclude disciplinary matters from what may constitute a contract grievance subject to

arbitration (compare, Matter of New York City Transit Authority [Transport Workers Union of America], 177 AD2d 695 [2d Dept 1991]; see Board of Education of Lakeland Central School District of Shrub Oak v. Barni, 49 NY2d 311 [1980]; Matter of Von Roll Isola USA, Inc., supra, 304 AD2d at 935).

Accordingly, petitioner's application is denied and the petition is dismissed. Respondent's cross-motion is granted only to the extent that the parties are directed to proceed to arbitration as provided for in the collective bargaining agreement. (15.7)

This decision constitutes the judgment of the court.

DATED: Dec. 22, 2006

J.S.C.