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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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TRIAL PART: 10

IN THE MATTER OF THE APPLICATION OF

SHERIFF OFFICERS ASSOCIATION, INC.
EX REL. PATRICK MCCAFFREY,

NASSAU COUNTY

Petitioner,
for an Order and Judgment pursuant to NY CPLR Article 75,

INDEX NO:1833-12

-against-

MOTION SEQ NO.:1

COUNTY OF NASSAU,

Respondent.

SUBMIT DATE:03/28/12

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The following papers having been read on this motion:

Notice of Petition.....1
Memorandum of Law.....2
Opposition.....3
Reply.....4

This Petition by the Sheriff Officers Association o/b/o Kathryn Ranieri for a judgment pursuant to CPLR §7511 annulling and vacating Arthur A. Riegel, Esq.'s arbitration award dated November 15, 2011 which denied Ranieri's Amended Grievance dated May 11, 2011 challenging her referral by the respondent Nassau County ("County") to independent medical consultant Dr. Charles H. Rosenberg on May 6, 2011 to determine whether she had sufficiently recovered from January 20, 2006 injuries which she sustained in the course of duty and whether she was physically capable of returning to work on a full-time restricted duty or no-duty capacity is determined as provided herein.

Kathryn Ranieri has been a correction officer employed by the County since March 2001. On January 30, 2006, she suffered injuries to her left wrist and lumbar spine in the course of her employment as a result of a struggle with an inmate who was attempting suicide. Via correspondence dated January 31, 2006, Ranieri was awarded sick time benefits pursuant to General

Municipal Law § 207-c from January 20-22, 2006. That correspondence noted however that "[a]ny future absences alleged to be due to the injury sustained on the above referenced date must be documented with additional medical certification [and that] the applicability of 207-c benefits for future absences and medical treatment will be determined on a case-by-case basis." Ranieri remained on full duty until July 2006, when she was put on restricted duty. From the date of the injury until April 2007, she intermittently took sick leave days pursuant to General Municipal Law § 207-c as a result of her on-the-job injuries. She was thereafter examined by the County Police Surgeon seven times, on April 17, 2007, July 25, 2007, October 17, 2007, February 14, 2008, June 5, 2008, March 4, 2009, and February 3, 2011.

In his report of April 17, 2007, the Police Surgeon found that Ranieri remained on "Full Duty"status until July 2006 when she went on "Restricted Duty" until the final week of January 2007 when she signed out sick. He concluded that she had moderate partial disability to her lumbar spine and that she was only capable of "Restricted Duty." The Police Surgeon found however that she could work any/all tours of duty and/or shifts and that she could be assigned to work hours in excess of one tour of duty.

As the result of his examination of Ranieri, in his report dated July 25, 2007, the Police Surgeon again noted that she had remained on "Full Duty"status until July 2006 and that she went on "Restricted Duty" until the final week of January 2007 when "she signed out sick." He concluded that she could remain on "Restricted Duty"; that she could continue to work any/all tours of duty and/or shifts; and, that she could be assigned to work hours in excess of one tour of duty.

Upon re-evaluating Ranieri again, in his reports dated October 17, 2007 and February 14, 2008, the Police Surgeon concluded that she was "[n]ot capable of Full Duty but [could] continue with Restricted Duties"; that she could continue to work any/all tours of duty and/or shifts; and, that she could continue to be assigned to work hours in excess of one tour of duty.

Upon re-evaluating Ranieri again, in his report dated June 5, 2008, the Police Surgeon noted that she continued to work restricted assignment; that she was still "not capable of Full Duty but [could] continue with restricted duties"; and, that she could work any/all tours of duty and/or shifts and be assigned to work hours in excess of one tour of duty.

Upon re-evaluating Ranieri, in his report of March 4, 2009, , the Police Surgeon specifically

noted that she works "Restricted Assignment **with intermittent periods of Sick Leave**" and that she was "**permanently disabled for Full Day as CO** [correction officer] (emphasis added)." He found that while she could continue to be assigned and/or permitted to work during any/all tours of duty or shifts, that she **could no longer** be assigned or permitted to work hours in excess of one tour of duty.

Finally, upon re-evaluating Ranieri, in his report of February 3, 2011, the Police Surgeon noted that she "had been RA [Restricted Assignment] since 2007"; and that she was "**permanently disabled for full duty as CO** [correction officer]; [and that] she remains on RA [Restricted Assignment] (emphasis added)." He again found that while she could continue to be assigned and/or permitted to work during any/all tours of duty or shifts, that she still **could not** be assigned or permitted to work hours in excess of one tour of duty.

It is not disputed that throughout all this time, Ranieri took medical leave pursuant to General Municipal Law § 207-c without challenge by the County. The number of those leave days substantially decreased after 2007 and remained generally the same in each year thereafter.

Ranieri was absent on February 22-25, 2011 and April 4-8, 2011 for which dates she again sought medical leave benefits pursuant to General Municipal Law § 207-c. The County viewed this behavior as in derogation of the Police Surgeon's February 3, 2011 report and accordingly on May 6, 2011, the County referred Ranieri for an evaluation by an independent medical consultant, Dr. Craig H. Rosenberg of Rehabilitation Medicine Associates, to determine whether, inter alia, she had sufficiently recovered and was physically capable of returning to work in a **full-time** restricted duty or no-duty capacity. Dr. Rosenberg found, *inter alia*, that Ranieri was not capable of working in a full duty capacity but that she could continue working **full time** in a limited duty capacity at the sedentary-light physical demand level.

Via Amended Grievance Report dated May 11, 2011, the Sheriff Officers Association challenged the County's referral of Ranieri to Dr. Rosenberg as well as the issue referred to him as violative of their Collective Bargaining Agreement ("CBA"). A hearing was held on May 6, 2011 before arbitrator Arthur A. Riegel. Arbitrator Riegel noted that a correction officer could in fact dispute the Police Surgeon's findings through his/her conduct. He noted that the Police Surgeon found that Ranieri could work eight hour days on Restricted Duty on February 3, 2011. He therefore

concluded that by thereafter absenting herself two sets of consecutive days and seeking leave pursuant to General Municipal Law § 207-c, via her conduct, Ranieri had in fact disputed the Police Surgeon's report of February 3, 2011. Arbitrator Riegel found that the Police Surgeon's February 3, 2011 report varied significantly from his/her March 4, 2009 report in that the earlier of these reports allowed for intermittent use of sick leave but there was no such provision in the February 3, 2011 report. Thus, Arbitrator Riegel concluded that Ranieri knew or should have known that she was no longer entitled to intermittent leave pursuant to General Municipal Law § 207-c when she was absent in February and April 2011. He found that by attempting to avail herself of leave pursuant to General Municipal Law § 207-c based upon an alleged inability to work due to her January 20, 2006 injury, Ranieri had violated the Police Surgeon's February 3, 2011 conclusion that she could work eight hour days of restricted duty. He additionally found that because Ranieri had challenged the Police Surgeon's February 3, 2011 report via her actions, the County properly required an independent medical examination pursuant to the CBA. He rejected Ranieri's position that the County had deprived her of her choice under the CBA between a hearing or an evaluation by an independent medical examiner to resolve her dispute. He noted that the term *full time* is distinguishable from *full duty*. He opined *"Full time* connotes working eight hour days the length of a tour of duty while *full duty* indicates an ability to perform all of the functions of a correction officer." In conclusion, Arbitrator Riegel found that the County did not violate the CBA by unilaterally sending Ranieri for an independent medical examination and that the question posed was proper in the context of the facts of this case.

The petitioner seeks annulment and vacatur of the arbitrator's award on two grounds: Based upon the County's insistence of an Independent Medical Examination on May 6, 2011, and its referral to the doctor of whether she was capable of working full time.

An arbitrator's award can be vacated when it violates strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's award under CPLR § 7511(b)(i). Matter of New York State Correctional Officers & Police Benev. Ass'n, Inc. v State, 94 NY2d 321, 326 (1999). "Any limitation upon the power of the arbitrator must be set forth as part of the arbitration clause itself, for to infer a limitation from the substantive provisions of an agreement containing an arbitration clause calling for arbitration of all disputes arising out of the

contract, or for arbitration in some other broadly worded formulation, is to involve the courts in the merits of the dispute – interpretation of the contract's provisions – in violation of the legislative mandate." Matter of Silverman (Benmor Coats), 61 NY2d 299, 307 91984) citing Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co., 37 NY2d 91, (1975); Matter of Wilaka Constr. Co. [New York City Housing Auth.], 17 NY2d 195 (1966); Siegel NY Prac, §§ 589, 590.

General Municipal Law § 207-c obligates Nassau County to not only pay for all medical care necessitated by injuries sustained by correction officers in the performance of their duties, but to pay them the full amount of their regular salary until their disability ceases. With respect to an injured employee who has been awarded benefits pursuant to General Municipal Law § 207-c's return to work, the parties' CBA provides at Attachment B, ¶ 5, "in disputed cases where the Department believes that a Correction Officer who has been out of work as a result of a prior line-of-duty injury or illness (mental or physical) is capable both physically and/or mentally of performing either temporary limited duties or full duties, the Correction Officer may elect to have the dispute resolved at a due process hearing conducted pursuant to General Municipal Law Section 207 8 [sic] or by the medical consulting service described herein." With respect to an injured employee who has been awarded General Municipal Law § 207-c benefits and alleges a subsequent incapacity as a result of their injury following their return to work, the CBA provides at Attachment B, ¶ 13:

> "the Officer shall be re-examined by the medical consultant service provided that the Officer presents to the Department at his/her own expense a detailed report from a medical doctor specifying the changes that occurred in the Officer's condition since his/her prior examination by the medical consultant service and how such changes have resulted in deterioration of the condition. The parties agree that the Officer shall remain on Workers' Compensation status while out of work and be charged with a reduction of such leave accruals during the pendency of this re-examination period. Should the officer be found unfit for limited duty upon re-examination due to the line-of-duty injury or illness, then is/her sick leave deductions shall be restored retroactive to the date the Department was notified by the physician of the change in condition."

The County's Department Policy and Procedure No. CD-03-01-10 (II)(H) further provides:

> "Every absence based on GML 207-c and Workers' Compensation law requires documentation by a physician's note. Officers reporting back to work after an absence based on GML 207-c must report to MIU and provide a physician's note. The physician's note will include the date of the injury, a diagnosis and prognosis relative to the injury, and work status (Full Duty-no restrictions or Restricted Duty and restrictions listed). Officers who fail to provide a physician's note will have their accumulated sick time charged for such periods of absence."

The arbitrator here lacks authority under Attachment B, ¶ (5) of the CBA. The County argues that this is a "disputed case" pursuant to Par. 5 of Attachment B of the contract and therefore they had the right to refer her to an independent medical consultation. The court notes initially that Ranieri had not been "out of work" when the referrals to both Dr. Rosenberg as well as Riegel were made. In addition, Ranieri did not dispute her physical or mental ability to perform permanent limited duties. As found by the Police Surgeon, she was permanently on restricted duties. However the county argues that this case presents what is referred to as a "dispute by conduct" situation because in the Police Surgeon February, 2011 report he did not state that she was taking intermittent 207-c time off as a result of the injuries. His report makes no mention, one way or the other, of 207 c time off. From this omission the county argues that she is not entitled to any such time off and by continuing to do so she disputed the police surgeon's findings by her conduct. The court cannot, however, make that connection. Not every one of the prior surgeon reports mentioned 207c benefits and the county took no action after those reports. The court notes that benefits under General Municipal Law § 207-c only cease when a beneficiary's disability has ceased. In view of the Police Surgeon's official finding that Ranieri was "permanently disabled," it appears illogical that those related benefits have ceased. On the other hand it would appear logical that someone who has been found to be disabled would need time off now and then because of that disability. Finally, if for no other reason, Arbitrator Reinhardt lacked jurisdiction because ¶ 5 of Attachment B affords the Correction Officer an option to have the dispute of whether s/he is "capable both physically and/or

mentally of performing either temporary limited duties or full duties" resolved either at a due process hearing conducted pursuant to General Municipal Law § 207-c or by the medical consulting service. That option was never afforded the petitioner, thereby abrogating the arbitrator's authority.

In any event, the issue referred to Dr. Rosenberg for resolution does not fall within the issues that could be referred to an independent medical examiner. Attachment B, ¶ 3 of the CBA provides:

> Issues which shall be affected and/or determined by the use of an independent medical facility as follows:
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> * * *
>
> 3. Whether a Correction Officer who incurred an illness or injury (mental or physical) as a result of the performance of police/peace duties has sufficiently recovered and is physically and mentally able for either temporary limited duty assignments or full duty.

The issue referred here was "[w]hether Officer Kathryn Ranieri, who sustained injuries to her left wrist and low back in the performance of her duties on January 20, 2006, has sufficiently recovered and is physically capable of returning to work **in a full time** restricted duty or no-duty capacity." Under the parties' CBA, "full time" was not an issue for resolution by Dr. Rosenberg. By allowing this determination to be made, Arbitrator Riegel improperly permitted the CBA to be rewritten.

The Arbitrator's reliance on a prior decision by him as constituting past practice on which he was entitled to rely in making his determinations here was misplaced. He may not do so if it results as it has here in bypassing express contractual provisions. Matter of New York City Tr. Auth. v Patrolmen's Benev. Ass'n of New York City Transit Police Dept., 129 AD2d 708 (2nd Dept 1987), app dism., 70 NY2d 719 (1987); see also, Hunsinger v Minns, 197 AD2d 871 (4th Dept 1993).

The petition is granted and the arbitrator's determination dated November 15, 2011 is vacated and annulled.

This constitutes the decision and order of this Court.

ENTER

DATED: May 9, 2012

HON. ARTHUR M. DIAMOND
J. S.C.

To:

Attorney for Plaintiff
KOEHLER & ISAACS, LLP.
61 Broadway, 25th Floor
New York, New York 10006

Attorney for Respondent
BEE READY FISHBEIN HATTER & DONOVAN, LLP.
170 Old Country Road, Suite 200
Mineola, New York 11501