Matter of Morrison v New York City Transit Auth.
2013 NY Slip Op 33068(U)
December 9, 2013
Sup Ct, New York County
Docket Number: 652816/13
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

In the Matter of the Application of
RICHARD MORRISON and TRANSPORT WORKERS
UNION OF GREATER NEW YORK, LOCAL 100
Petitioner,

For an Order Compelling Arbitration under Article
75 of the Civil Practice Laws and Rules,

- v -

NEW YORK CITY TRANSIT AUTHORITY

Defendant.

INDEX NO. 652816/13

MOTION DATE 11-13-2013

MOTION SEQ. NO. 001

MOTION CAL. NO. ______

The following papers, numbered 1 to 6 were read on this petition Pursuant to CPLR 75 to compel arbitration and cross petition to stay arbitration.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4,5
Replying Affidavits	6

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

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that this Petition Pursuant to CPLR § 75 to compel arbitration is denied, the cross Petition to permanently stay arbitration is granted.

Mr. Morrison, a Transit Authority bus operator since September 24, 2001, was assaulted while on duty sustaining an injury to his right thumb on September 14, 2009. After 30 days of absence Mr. Morrison applied for and was granted Workers Compensation. On October 19, 2009 the Transit Authority Worker's Compensation unit referred Mr. Morrison for an independent Medical Examination (IME)- throughout this time Mr. Morrison was subject to IME's by an orthopedic surgeon as a result of his work status- and he was found to be disabled and unable to work. As his absence from work approached two (2) years he was given notice, by letter dated September 1, 2011, that consistent with the period specified in Civil Service Law § 71, he would be terminated effective October 4, 2011, unless he returned to work by that date. He was also given the option to request a leave of absence of up to six (6) months. [see Cross Petition Exhibit D]

On September 12, 2011 Mr. Morrison produced a note dated September 7, 2011 which stated that " Patient was seen by Dr. Larkin on Wednesday September 7, 2011 and will be returning on Monday September 12, 2011." The note did not state that Mr. Morrison was clear to return to work. By letter dated October 4, 2011 Mr. Morrison was notified that his employment had been terminated in accordance with section 71 of the Civil Service Law. On November 15, 2011 after he had been terminated, Mr. Morrison

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submitted a handwritten note from Dr. Thomas Larkin, which stated that Mr. Morrison was able to return to work to full duty as a bus operator without restrictions. [see Cross Petition Exhibits E, G and H].

Notwithstanding the September 7, 2011 and November 15, 2011 letters, Dr. Larkin continued to examine Mr. Morrison and submitted C4's through June of 2012 finding that Mr. Morrison was 100% disabled and unable to work due to the injury sustained in September 2009. The Workers Compensation Board continued to issue checks for Mr. Morrison's disability which Mr. Morrison cashed. [see Cross Petition Exhibit F].

Civil Service Law § 71 provides in part:
"....Where an employee has been separated from the service by reason of a disability resulting from an assault in the course of his or her employment, he or she shall be entitled to a leave of absence for at least two years, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position. Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission having jurisdiction over the position last held by such employee for a medical examination to be conducted by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his or her former position, he or she shall be reinstated to his or her former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he or she was eligible for transfer. If no appropriate vacancy shall exist to which reinstatement may be made, or if the work load does not warrant the filling of such vacancy, the name of such person shall be placed upon a preferred list for his or her former position, and he or she shall be eligible for reinstatement from such preferred list for a period of four years..."

In accordance with section 71 Mr. Morrison applied for reinstatement on January 11, 2012 [see Cross motion Exhibit J]. In accordance with the procedures of Section 71 Respondent obtained a current IME report and Medical documentation from Mr. Morrison's treating physician, scheduled a reinstatement examination to assess his condition- which was performed on June 18, 2012 - and reinstated him to his former position as a Transit Authority bus Operator on July 16, 2012. Mr. Morrison continued to receive Workers Compensation payments up to July 2012.

Following reinstatement Mr. Morrison filed a grievance under the Collective Bargaining Agreement (CBA) seeking back pay from September 7, 2011 through July 16, 2012 [see Cross Motion Exhibit B]. This grievance was denied by Baimusa Kamara, Senior Director Labor Contract Disputes, on June 9, 2013 finding, in relevant part, that "the CBA does not permit an arbitrator to make determinations as to whether the Civil Service Law has been violated, and that nothing under CLS section 71 permits for payment of back pay[see Cross Petition Exhibit I].

Petitioner now seeks to compel Arbitration of his grievance pursuant to the parties Collective Bargaining Agreement. Respondent opposes and Cross petitions to Permanently Stay Arbitration of this grievance, in essence, on the grounds that it is not contemplated in the parties Collective Bargaining Agreement.

Petitioner claims that in failing to reinstate him on September 12, 2011 Respondent violated sections 2.16(B) and [C] of the Collective Bargaining Agreement, that these sections confer greater rights than those contained in the Civil Service Law and that in accordance with the Collective Bargaining Agreement a violation of these sections is a violation of the Collective Bargaining Agreement subject to Arbitration.

Respondent claims that Petitioner was terminated pursuant to Civil Service Law § 71, that termination and reinstatement under this section is not contemplated in the Collective Bargaining Agreement, therefore, not subject to Arbitration.

Section 2.16 titled Physical Disability in (B) refers to the procedure to be followed where an employee is found by the Transit Authority's Medical Department to be physically disqualified from the performance of his or her full duties. [C] refers to the position the employee must occupy after the Transit Authority's Medical Department certifies that employee is no longer physically disqualified from the performance of his or her full duties.

Respondent followed the procedure in 2.16(B) and reinstated him to his former position in accordance with 2.16[C].

In determining whether a dispute is arbitrable, the court first asks whether the parties may arbitrate the dispute by inquiring if there is any statutory, constitutional, or public policy prohibition against arbitration of the grievance. If no prohibition exists, the court then asks whether the parties in fact agreed to arbitrate the particular dispute by examining the parties' Collective Bargaining Agreement, but if there is a prohibition the inquiry ends and an arbitrator cannot act (Matter of Kenmore-Town of Tonwanda Union Free School District v. Ken-Ton School Employees Association, 110 A.D. 3d 1494, 974 N.Y.S2d 679 [4th Dept. 2013];County of Catechu v. Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO, 8 N.Y.3d 513, 869 N.E.2d 1, 838 N.Y.S.2d 1[2007]; Board of Education of Yorktown Central School District v. Yorktown Congress of Teachers, 98 A.D.3d 665, 949 N.Y.S.2d 777 [2nd. Dept. 2012];Mariano v. Town of Orchard Park, 92 A.D.3d 1232, 938 N.Y.S. 2d 399 [4th Dept. 2012]).

A Grievance may be submitted to arbitration only where the parties agree to arbitrate that kind of dispute, and where it is lawful for them to do so (in re City of Johnstown Police Benevolent Association, 99 N.Y.2d 273, 784 N.E.2d 1158, 755 N.Y.S.2d 49 [2002]). A court should stay arbitration where the parties' arbitration agreement does not unambiguously extend to the particular dispute or where the agreement expressly excludes the subject matter contested(Board of Education of Lakeland Central School District of Shrub Oak v. Barni, 49 N.Y.2d 311, 401 N.E.2d 912, 425 N.Y.S.2d 554 [1980]; Babylon Union Free School District v. Babylon Teachers Association, 79 N.Y.2d 773, 587 N.E.2d 267, 579 N.Y.S.2d 629 [1991]). The court must determine whether the parties in fact agreed to arbitrate the particular dispute by examining their Collective Bargaining Agreement (New York City Transit Authority v. Transport Workers Union of America, Local 100, 88 A.D.3d 887, 931 N.Y.S.2d 331[2nd. Dept. 2011]).

The parties' Collective Bargaining Agreement Section 2.1 GRIEVANCE AND ARBITRATION PROCEDURES (B) (3)[c] states: "....The Authority may also submit to the Impartial Arbitrator for his/her opinion and determination any complaint arising solely out of the interpretation, application, breach, or claim of breach of the provisions of this agreement..." At 2.1(B)(3)(e)(1) it states: "An impartial Arbitrator in rendering any opinion or determination, shall be strictly limited to the interpretation and application of the provisions of this agreement.....and he/she shall be without any power or authority to add to, delete from, or modify any of the provisions of this agreement.... The impartial Arbitrator shall not have the authority to render any opinion or make any recommendations: (1) inconsistent with or contrary to the provisions of the applicable Civil Service Laws and Regulations..." At Section 2.16A.2 it states: " The determination that any employee is disabled from performing the full duties of his/her position shall be within the exclusive determination of the Transit Authority, on the advice of its Medical Department, whose findings shall be final and binding and not subject to review or arbitration (except as provided for in section 2.1 of this agreement)." [See Cross petition Exhibit C Collective Bargaining Agreement at Pgs. 35, 37 and 72].

Petitioner was terminated pursuant to Civil Service Law § 71 as being disqualified from the performance of his duties, The parties' arbitration agreement does not unambiguously extend to this particular dispute or to the determination by the Transit Authority's Medical Department, whose findings are final and binding. In fact, it specifically excludes arbitration of this determination. The Transit Authority's Medical Department determined that Petitioner was capable of performing his full duties as a Transit Bus Operator as of July 16, 2012. This determination in accordance with the parties' Collective Bargaining Agreement is final and binding and not subject to review or arbitration.

If Petitioner wanted to challenge Respondent's determination terminating his employment under Civil Service Law § 71 and his subsequent reinstatement in July 2012, he needed to do so by commencing an Article 78 Proceeding (See Matter of Lazzari v. Town of Eastchester, 20 N.Y.3d 214,981 N.E.2d 777, 958 N.Y.S.2d 76 [2012]). This claim is subject to the four months limitations period of an Article 78 Proceeding (See CPLR § 217[1]; McGovern v. Levittown Fire District, 27 A.D.3d 533, 813 N.Y.S.2d 131 [2nd. Dept. 2006]). An administrative determination becomes "final and binding" triggering the four month statute of limitations for commencing an Article 78 proceeding, when the petitioner seeking review has been aggrieved by it. [Rocco v. Kelly, 20 A.D. 3d 364, 799 N.Y.S. 2d 469 [App. Div. 1st. 2005]; Yarbough v. Franco, 95 N.Y. 2d 342, 740 N.E. 2d 224, 717 N.Y.S. 2d 79 [2000]. The four month limitations period for Article 78 review runs from petitioner's receipt of the adverse determination [Yarbough v. Franco, 95 N.Y. 2d 342, 740 N.E. 2d 224, 717 N.Y.S. 2d 79 [supra]), and any challenge to the determination are by now time barred.

Accordingly, it is ORDERED that defendant's petition pursuant to CPLR 75 to compel arbitration is denied, and it is further

ORDERED, that Respondent's Cross Petition to permanently stay arbitration is granted, and it is further

ORDERED, that arbitration of this matter between the parties is permanently stayed.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: December 9, 2013

Manuel J. Mendez
J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE