Matter of City of Long Beach v Long Beach Professional Firefighters Associ., Local 287
2014 NY Slip Op 33823(U)
June 5, 2014
Supreme Court, Nassau County
Docket Number: 848/14
Judge: Jeffrey S. Brown

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X TRIAL/IAS PART 16

In the Matter of the Application of
CITY OF LONG BEACH,

Petitioner(s),

for an order pursuant to Article 75 of the CPLR
Vacating Arbitration Award

INDEX # 848/14

Mot. Seq. 1, 2
Mot. Date 3.27.14
Submit Date 4.29.14

-against-

XXX

LONG BEACH PROFESSIONAL FIREFIGHTERS ASSOCIATION; LOCAL 287 (F/K/A UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 287),

Respondent(s).

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The following papers were read on this motion:	Papers Numbered MS 1	MS 2
Petition, Cross Motion, Affidavits (Affirmations), Exhibits Annexed.....	1	2
Answering Affidavit		3
Reply Affidavit.....		4

Application by petitioner City of Long Beach to vacate the arbitration award dated October 31, 2013, delivered to the parties on November 5, 2013, which found Jay Gusler, a paid firefighter with the City of Long Beach Fire Department, not guilty of all disciplinary charges and specifications issued against him on December 6, 2011 is **denied**.

Motion by respondent Long Beach Firefighters Association, Local 287 f/k/a Uniformed Firefighters Association Local 287 (Union) to dismiss the petition pursuant to CPLR 3211(a)(1), (3), (5) and (7) is **denied** as moot.

The instant proceeding arises from 29 charges[1] of misconduct filed against firefighter Jay Gusler on December 6, 2011 by petitioner City of Long Beach in connection with comments he posted on a website devoted to local community affairs between December 3rd and December 4th of 2011.

According to the petition, in December 2011, firefighter Jay Gusler

> "took to the internet to bash his supervisor, Fire Commissioner Scott Kemins, in a highly personal and overtly insubordinate verbal onslaught. Gusler's invective also extended to the volunteer component of the Long Beach Fire Department, which he needlessly smeared in his rant. In so doing, Gusler brought shame and discredit upon the entire department, the City and undermined the image of both."

Noting, *inter alia*, that:

> none of the charges involve firefighter Jay Gusler's work performance as a firefighter;
>
> the charges are highly subjective and speculative;
>
> Fire Commissioner Scott Kremins, as a public official, is not immune from criticism;
>
> there is no evidence of probative value demonstrating that Jay Gusler's remarks effectively disrupted discipline in the City of Long Beach Fire Department and/or undermined authority therein;
>
> while the City of Long Beach may disagree with statements made on the Patch website by Jay Gusler, it is an exaggeration to label said statements as false.

The arbitrator found no basis to sustain the charges brought by the City of Long Beach against Jay Gusler. He found that the 29 charges were "largely subjective and not provable . . . packaged in a way designed to give weight when little if any was warranted." He further found that the charges did not justify Jay Gusler's discharge and that Jay Gusler was not speaking pursuant to his official duties when he posted comments about the Department's extrication abilities but, rather, was addressing a matter of legitimate public interest.

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[1]The City of Long Beach charges that Jay Gusler posted various insulting comments and false statements about Fire Commissioner Scott Krimins and the City of Long Beach Fire Department as a whole on the internet which, *inter alia*, negatively affected discipline within the City of Long Beach Fire Department and undermined the authority of the Fire Commissioner.

As an initial matter, the court notes that respondent Union claims petitioner has improperly attempted to invoke the court's jurisdiction over a matter from which petitioner has no right of appeal since the decision at issue is, from a contractual standpoint, a decision of the City Manager. Respondent contends that the challenged decision is an administrative determination, that resulted from a hearing in which Stanley L. Aiges functioned as a hearing officer, presiding over a disciplinary proceeding in place of the City Manager, and not as an arbitrator. As such, the contested decision is not, according to the respondent Union, an arbitral decision within the ambit of Article 75.

The argument is unavailing. Stanley L. Aiges was appointed by the American Arbitration Association (AAA) to serve as arbitrator in this matter upon petitioner's filing of a demand for arbitration. Respondent Union participated in the arbitration. As stated by the arbitrator, in response to respondent's argument that the petitioner violated the collective bargaining agreement by unilaterally referring the matter to the American Arbitration Association, Article XXIV § 2 of the collective bargaining agreement with respect to disciplinary action is sufficiently broad to permit either party to invoke the services of the AAA. The provision provides, in relevant part, that:

> "The service of charges and specifications shall be brought by a superior officer . . . and shall be considered the initiation of disciplinary proceedings.
>
> "The City Manger shall conduct a hearing and consider the charges *de novo* and make a determination of guilt/innocense and penalty. If the City Manager does not conduct said hearing, the City and Association shall mutually agree upon a designee or shall refer the matter to AAA arbitration."

According to the arbitrator, the plain language of the contract permits the City Manager to refer disciplinary charges to arbitration. Nothing in CPLR § 7502 serves to limit petitioner's ability to file an application to vacate an arbitration award pursuant to CPLR § 7511.

In support of vacatur of the arbitrator's decision, petitioner argues that, in a paramilitary organization such as the City of Long Beach Fire Department, the command structure is irretrievably undermined when an employee berates a supervisor on a personal basis and/or publically casts aspersions on fellow workers. The petitioner maintains that Jay Gusler's internet

diatribe against his supervisor, Fire Commissioner Scott Krimins[2], and his negative remarks about the volunteer members of the fire department, are facially insubordinate, demonstrate conduct unbecoming a fire officer and undermine the chain of command and the public perception of the City of Long Beach Fire Department.

In short, petitioner maintains that the arbitrator's decision fatally undermines the strong public policy in favor of discipline in a paramilitary workforce; disregards the fact that, at the time the challenged statements were made, Jay Gusler functioned in a supervisory capacity and had a responsibility to set an example for his staff and fails to recognize that the manner in which the comments were made was grossly inappropriate.

It is well established that an arbitrator has broad discretion to determine a dispute and fix a remedy (*Matter of Silverman* [*Benmor Coats*], 61 NY2d 299, 307-308 [1984]). Any purported contractual limitation on that discretion must be contained, either explicitly or incorporated by reference, in the arbitration clause of the parties' agreement (*Matter of Board of Educ. of Dover Union Free School Dist. v Dover-Wingdale Teachers' Ass'n*, 61 NY2d 913, 915 [1984]). The role of the court in addressing the disposition of disputes which have been submitted to binding arbitration pursuant to a collective bargaining agreement is limited (*Matter of Sprinzen* [*Nomberg*], 46 NY2d 623, 629 [1979]). In reviewing an award, the court is bound by the arbitrator's factual findings and interpretation of the contract (*Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368, 372 [1st Dept 2004]).

Because arbitrability is a threshold question going to the arbitrator's power to resolve the dispute, a party can seek judicial intervention to determine whether a dispute is arbitrable before consenting to arbitration. The CPLR requires that, in order to raise the arbitrability issue on a motion to vacate, a party must move to stay before participating in arbitration (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of N.Y.*, 1 NY3d 72, 79 [2003]).

The role of public policy in restricting an arbitrator's power to resolve disputes rises at two points in the arbitration process: (1) as a ground for obtaining a stay of arbitration when a party challenges the arbitrability of a stay and (2) as a ground for vacating an award as being made in excess of the arbitrator's powers (*Id.* at 78).

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[2]Petitioner contends that Jay Gusler's comments relating to the Fire Commissioner's lack of qualifications, and the alleged inadequacies of the volunteer training regimen, held the City of Long Beach up to public ridicule and brought discredit of the City of Long Beach Fire Department.

An arbitrator's award will not be vacated because of errors of law and/or fact committed by the arbitrator (*Rochester City School Dist. v Rochester Teachers Ass'n*, 41 NY2d 578, 581 [1977]). Courts should not assume the role of overseers to mold the award to conform to their sense of justice (*Wien v Malkin, LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006]). An arbitration award may, however, be vacated on three narrow grounds: the award is violative of a strong public policy; is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO*, 1 NY3d at 79, [quotation marks and citation omitted]).

With respect to vacatur on public policy grounds, the public policy at issue must be strong, well defined and embodied in constitutional statute or common law and must prohibit a specific matter from being decided, or certain relief from being granted, by the arbitrator (*Matter of Local 333, United Mar. Div., Intl. Longshoreman's Ass'n AFL-CIO v New York City Dept of Transp.*, 35 AD3d 211, 213 [1st Dept 2006], *lv denied* 9 NY3d 805 [2007]). An award may be found to violate public policy only if (1) the arbitration agreement itself violates public policy, (2) the award interferes in areas reserved for others to resolve; or (3) the award violates an explicit law because of its reach (*Matter of New York State Correctional Officers and Police Benev. Ass'n, Inc. v State*, 94 NY2d 321, 327 [1999]). The public policy exception is a narrow one (*Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 419 [1st Dept 2013]). The court cannot vacate an award on public policy grounds when vague or attenuated considerations of a general public interest are at stake (*Matter of New York State Correctional Officers and Police Benev. Ass'n, Inc. v State*, *supra* at p. 327).

Notwithstanding petitioner's objections to the arbitrator's decision, the decision does not violate any statutory requirement or standard for disciplining an employee like Jay Gusler who has, as described by the arbitrator, a "propensity to publish his views on a public website while off duty." Moreover, the arbitrator found "not a scintilla of evidence of any probative value on the record" which establishes that discipline within the City of Long Beach Fire Department was disrupted, or authority undermined, as a result of Jay Gusler's comments. Having concluded that the underlying charges lacked merit, the arbitrator found it unnecessary to reach the free speech issue.

The record supports the conclusion that the arbitrator's award herein is not beyond the bounds of rationality, did not exceed any specific limitation on the arbitrator's power; and was not violative of a strong public policy. There is nothing in the award that reflects, on its face, that its enforcement constitutes a violation of public policy.

Accordingly, the petition by petitioner City of Long Beach to vacate the award herein is **denied** (Mot. Seq. 1). Where, as here, a petition to vacate an arbitration award is denied, the award must be confirmed pursuant to CPLR 7511(e).

Motion by respondent Union to dismiss the petition is **denied** as moot (Mot. Seq. 2).

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
June 5, 2014

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

ENTERED

JUN 06 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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