Julien v New York City Transit Authority
2021 NY Slip Op 32379(U)
November 17, 2021
Supreme Court, New York County
Docket Number: Index No. 652993-2021
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

Darnell Julien

INDEX NO. 652993-2021

MOT. DATE

- v -

MOT. SEQ. NO. 001

New York City Transit Authority

The following papers were read on this motion to/for vacatur

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____
Replying Affidavits NYSCEF DOC No(s)._____

In this proceeding, petitioner Darnell Julien ("Julien") seeks an order pursuant to CPLR Article 75 vacating an arbitration award dated May 5, 2021 by Philip L. Maier ("Maier" or "arbitrator"). Respondent New York City Transit Authority ("NYC Transit"), petitioner's former employer, opposes the petition. In short, the award resolved a workplace disciplinary charge brought against Julien for refusing to submit to a drug and alcohol test and Julien's employment was terminated. For the reasons that follow, the petition is denied.

By way of background, Julien worked as a Transit Electrical Helper for the respondent since April 20, 2015. On February 3, 2019, Julien was chosen for a routine random drug and alcohol screening and tested positive for marijuana. Thereafter, respondent required petitioner to take a series mandatory drug tests between August 11, 2019 and March 16, 2020.

The disciplinary charge arose from an event that occurred on March 16, 2020. On that date, Julien reported to the Medical Assessment Center ("MAC") for a routine drug test. When he entered the laboratory, the lab technician, Delvinson Lopez-Jimenez ("Lopez" or "lab tech") directed Julien to stop drinking water and to place his jacket and other belongings in the designated locker. An argument ensued, ending with Lopez canceling the drug test. Thereafter, Julien was served with a Disciplinary Action Notification ("DAN") informing him that his actions on March 16, 2020 were deemed non-compliance with testing procedures and specifically, a refusal to test. The disciplinary charges were referred to arbitration in accordance with the operative Collective Bargaining Agreement ("CBA") between NYC Transit and the Transport Workers Union, Local 100 union, of which Julien was a member. The parties proceeded to arbitration before Maier, who determined that NYC Transit had just cause to discipline Julien and that termination without right to restoration was the appropriate penalty.

Dated: 11/17/2021

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☒ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

Now, Julien seeks to vacate the arbitration award. In his notice of petition, he requests relief pursuant to CPLR Article 75. However, in his petition, Julien seeks relief pursuant to CPLR § 7511(b)(1)(iii). Further, petitioner requests an order vacating or modifying the award and/or set aside or reduce the penalty of termination pursuant to CPLR § 7803(3) as well as costs and disbursements and reasonable attorney's fees.

NYC Transit contends that the arbitration award is proper because purported arbitral errors of fact or law are not reviewable by a court and because the petitioner's challenge to the arbitration award is without merit.

Discussion

The standards of review of an arbitration award pursuant to CPLR § 7511(b) differ, depending on whether the arbitration was voluntary, i.e., resulting from an agreement between two parties, or involuntary, i.e. mandated by statute (*see St. Mary's Hospital v. Catherwood*, 26 NY2d 493 [1970]). Petitioner bears the burden of proof to show that an arbitration award should be vacated (*Matter of New Penn Motor Express, Inc. v. GEICO Gen. Ins. Co.*, 2011 NY Slip Op 32138(U) [Sup Ct Nassau County 2011]).

For voluntary arbitrations, judicial review of the award is extremely limited (*Wien & Malkin LLP v. Helmsley-Spear*, Inc. 6 NY3d 471 [2006]). Such an award will only be set aside if it is completely irrational, violative of a strong public policy, or exceeds a limitation on the arbitrator's power (*Obot v. New York State Dep't of Correctional Servs.*, 637 NYS2d 544 [4th Dept 1996] *aff'd* 653 NYS2d 883 [1996]). In comparison, when an arbitration is involuntary or compulsory, courts will review the award with closer scrutiny (*State Farm Mut. Auto Ins. Co. v. Arabov*, 767 NYS2d 905 [2d Dept 1980]; *see Furstenberg v. Aetna Casualty & Surety Co.*, 49 NY2d 757 [1980]). For a compulsory arbitration, the court must review the award and ensure that it has evidentiary support and is not arbitrary and capricious (*Motor Vehicle Accident Indemnification Corp. v. Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996]).

Petitioner argues that the court should review the underlying award using an involuntary arbitration standard because he did not choose to proceed to arbitration. Specifically, he asserts that as a member of the Transport Workers Union, Local 100, he was subject to the CBA and thus required to submit the subject dispute to arbitration. He further argues that the involuntary arbitration standard can be applied even if the Court finds that the arbitration was not compulsory. He maintains that courts have applied a "compulsory arbitration" standard even where the arbitration was voluntary. In support of this assertion, petitioner cites *Motor Vehicle Mfrs. Ass'n v. State*, (75 NY2d 175 [1990]), claiming that a compulsory arbitration standard was applied by the Court of Appeals even though one of the parties voluntarily elected to go to arbitration. However, *Motor Vehicle Mfrs. Ass'n* is distinguishable from the facts here. In *Motor Vehicle Mfrs. Ass'n*, the arbitration was had pursuant to GBL § 198-a(k), which grants the purchaser of a motor vehicle the unilateral right to submit a claim that the vehicle is defective to arbitration (*Motor Vehicle Mfrs. Ass'n v. State*, 75 NY2d 175 [1990]; Gen Bus § 198-a[k]). That arbitration was subject to a "compulsory arbitration" review standard because the arbitration was not voluntary for all parties. Further, the arbitration was pursuant to statute. In comparison, the instant case is neither mandated by statute and as a member of his union, plaintiff agreed to be bound by the CBA and submit the underlying dispute to arbitration.

Therefore, the arbitration here will be reviewed as a voluntary arbitration, and the arbitration award will only be set aside pursuant to CPLR § 7511(b) if it is completely irrational, violative of a strong public policy, or exceeds a limitation on the arbitrator's power. Pursuant to CPLR § 7511(b)(1)(iii), an arbitration award shall be vacated on the application of a party who participated in the arbitration if the court finds that the rights of that party were prejudiced by an arbitrator making the award who exceeded his power or who so imperfectly executed it that a final and definite award upon the subject matter submitted was not made.

Courts give the widest berth possible to arbitral awards, and will sustain any construction of the facts and the agreement which is not irrational, provided that public policy is not offended (*Albany*

that Julien did not appreciate the potential consequences of his failure to follow Lopez' directions and his combative and uncooperative behavior. Accordingly, the court finds that Maier was not irrational in deciding that termination was an appropriate penalty despite the fact that Julien never received an explicit warning about the potential consequences of his actions.

Petitioner also argues that the arbitration award is irrational because Julien's behavior at the MAC did not prevent the completion of the test. Julien points to the New York City Transit Authority's Drug and Alcohol Policy Statement which states that "employees who fail to cooperate with the testing process in a way that prevents the completion of the test" are deemed to have refused that test. He argues that his failure to cooperate was not in a way that prevented completion of the test. Similarly, he argues that the arbitration award was irrational because Maier failed to consider 49 CFR § 401.191[a][8], which states that an employee refuses to take a drug test if they fail to cooperate with any part of the testing process including, but not limited to, if they behave in a confrontational way that disrupts the collection process. Julien contends that even if he did behave in an uncooperative manner, his behavior did not prevent the completion of the test.

However, Maier found Lopez' testimony, as well as the testimony of another laboratory technician on duty on March 6, 2020, credible. Maier further stated that he found Julien had initially ignored directives from Lopez to stop drinking water and to place his belongings into a locker and that Julien called Lopez "boy" and "homeboy" despite Lopez asking Julien multiple times to not call him names. Maier further determined that Julien said, "I'll call you whatever the fuck I want" and became aggressive and confrontational and wanted to fight. Based upon these findings of fact, Maier was not irrational by finding that Julien's behavior interrupted the testing process, and therefore, constituted a refusal to take the test pursuant to 49 C.F.R. § 401.191[a][8] and the New York City Transit Authority's Drug and Alcohol Policy Statement.

The court finds that Julien failed to prove that the arbitration award was irrational or that it exceeded a limitation on the arbitrator's power. Accordingly, Julien's argument that the award should be vacated or modified pursuant to CPLR § 7511(b)(iii) is rejected.

Finally, petitioner argues that the court should not be strictly limited to the grounds for vacating an arbitration award pursuant to CPLR § 7511(b)(iii). He asserts that the court should also review the award and determine whether it was affected by an error of law, was arbitrary and capricious, or was an abuse of discretion as to the measure or mode of penalty or discipline imposed pursuant to CPLR § 7803(3). At the outset, this request for relief was not properly noticed and is therefore improperly before the court.

Moreover, this proceeding arises from an arbitration award, not an administrative decision, and so the application of CPLR Article 78 is inappropriate (*see Long v. Mellen*, 145 AD2d 633 [2d Dept 1988] [stating that when challenging a final determination terminating a petitioner's employment as a result of an arbitration award, it is improper for a court to consider CPLR article 78 as a mode of relief]). The cases cited by petitioner are not applicable to this case. In any event, the court does not find that the award was irrational, arbitrary or affected by an error of law for the reasons already stated. Nor does the court find that the penalty of termination shocks the conscience. Julien, who was on probation for a positive drug test result, should have appreciated the consequences of his inappropriate workplace conduct. Termination of employment is an appropriate penalty for his failure to do so. Indeed, to hold otherwise would send a message that respondent's employees can act with impunity at the workplace and without consequence. Such a result would be improper judicial overreach and otherwise irrational itself.

Finally, petitioner's request for costs, disbursements and attorneys fees is denied. Julien has failed to set forth a legal basis for attorneys fees, and since he has not prevailed in this proceeding, he is not entitled to costs and disbursements. Additionally, since petitioner has failed in his requests for vacatur and modification of the arbitration award, there is no basis for attorney's fees. Therefore, the petitioner's request for attorney's fees is rejected.

County Sheriff's Local 775 of Council 82, etc. on bahlf of Hughes v. County of Albany, 479NYS2n 513 [1984]; *Five Boro Roofing & Sheet Metal Works, Inc. v. Van-Tulco, Inc.*, 580 NYS2d 263 [1st Dept 1992]). The deference given to arbitral awards is such that even a misapplication of the law will not be a sufficient basis for vacatur under CPLR § 7511 (*Matter of Douglas v. New York City Dept. of Educ.*, 34 NYS3d 340 [Sup Ct New York County 2016]; *Matter of Associated Teachers of Huntington v. Board of Educ., Union Free School Dist. No. 3, Town of Huntington*, 33 NY2d 119 [1973]).

Here, petitioner argues that the arbitrator exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made because he relied on Appendix E-1 of the collective bargaining agreement while ignoring applicable federal regulations and the New York City Transit Authority's Drug and Alcohol Policy Statement. Petitioner contends that these unconsidered regulations do not permit the arbitrator to arrive at a conclusion that termination without right to restoration was an appropriate penalty. In support of this argument, Julien submitted the arbitration award and the collective bargaining agreement.

In the arbitration award, Maier states that sections 5.3, 5.3.5, and 6.2 of Appendix E-1 of the CBA were controlling in his decision-making process. Those sections provide as follows:

> 5.3: Employees of the Authority shall submit to Drug screening testing when ordered to do so in the following circumstances:...
>
> 5.3.5: When a drug or controlled substance has been identified in a prior test, and less than one year has elapsed since the employee's successful completion of the EAP, and where applicable, the employee has been restored to duty...
>
> 6.2: Refusal to take such test(s) as provided for under the paragraph 5.3 herein will be deemed an admission of use of Controlled Substances or Drugs and will result in dismissal from service. The provisions of Section 9.0 [Restorations] shall not apply to employees dismissed under this paragraph...

In accordance with these provisions of the CBA, the arbitration award of termination without right to restoration is an appropriate penalty if Julien refused to take a drug test. Julien's argument that these sections of Appendix E-1 of the CBA do not define what constitutes a refusal to take a drug test necessarily fails in the face of the plain language of the CBA.

Julien next argues that the arbitrator's qualification of the March 16, 2020 incident as a "refusal to test" was irrational and exceeded a limitation on the arbitrator's power because: 1) he was given no warning of the possible repercussions of his behavior; and 2) even if he was disrespectful and/or uncooperative, that behavior alone should not constitute a refusal to take a drug test because it did not prevent the completion of the drug test. He asserts, instead, that the only thing that prevented the completion of the drug test was Lopez's cancellation of the test.

Petitioner further cites 49 C.F.R. § 401.191, which states that "as an employee, you have refused to take a drug test if you... [f]ail to cooperate with any part of the testing process (e.g., refuse to empty pockets when directed by the collector, behave in a confrontational way that disrupts the collection process, fail to wash hands after being directed to do so by the collector)" (49 C.F.R. § 401.191[a][8]). Julien also points to the U.S. Department of Transportation's questions and answers on 49 CFR § 40.191 which state that "when the issue is a problem with refusing to follow directions... the collector should warn the employee of potential consequences of a failure to cooperate; and if practical, seek assistance from the DER of supervisor to ensure that the employee understands the ramifications" (Verified Pet. Ex. 2 at 3).

49 CFR § 40.191 is not controlling, and indeed the plain language of this regulation advises that a collector should warn the employee of the potential consequences, but does not require such warning. Additionally, as someone who was on suspension for a positive drug test, the court is not convinced

Conclusion

In accordance herewith, it is hereby

ORDERED that the petition is denied in its entirety; and it is further

ORDERED that the award is confirmed.

Settle judgment on notice.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 11/17/2021
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.