To Be Argued By:
BRIAN D. NUGENT
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Appellate Division, Second Department Docket No. 2017-11372
Dutchess County Clerk's Index No. 52247/17
Orange County Clerk's Index No. EF006793-2017

Court of Appeals

STATE OF NEW YORK

In the Matter of
TEAMSTERS LOCAL 445,

Petitioner-Respondent,

—against—

TOWN OF MONROE,

Respondent-Appellant.

REPLY BRIEF FOR RESPONDENT-APPELLANT

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I
Preliminary Statement

Teamsters Local 445 ("Respondent") dedicates much of its brief to whether the parties agreed to arbitrate when the substantive issue before the Court is whether public policy, the constitution, and statutory and decisional law preclude arbitration.[1] *See* Respondent's Br. at pp. 3-4, 6-9.[2] Respondent's brief does not counter or address the merits of the Town's public policy arguments which weigh against improperly granting permanency to exempt class positions via collective bargaining agreement provisions. Respondent's brief also does not respond to the effect of the CBA's removal of the appointing power from the appointing authority.

Generally, Respondent's opposition merely restates the determinations of the lower courts without addressing the substantive issues presented on appeal concerning the perils of allowing the civil service system to be circumvented by allowing job protections to be afforded to exempt employees via a collective bargaining agreement. Respondent's opposition ignores the fact that exempt class civil service employees need not demonstrate merit and fitness for service, nor take examinations, nor appear on eligible lists, nor serve probationary periods. The

[1] *See Acting Superintendent of Schools of Liverpool Cent. Sch. Dist. v. United Liverpool Faculty Ass'n*, 42 N.Y.2d 509, 510 (1977) ("*Liverpool*"); *In re Bd. of Educ. of Watertown City Sch. Dist. (Watertown Educ. Ass'n)*, 93 N.Y.2d 132, 137 (1999) ("*Watertown*").

[2] Unless otherwise indicated, case quotations/citations omit all internal alterations, quotation marks, footnotes, and citations.

provisions of the Civil Service Law do not apply the protections of CSL § 75 to the exempt class. While CSL § 75 rights may be extended to certain classes of employees by contract, they cannot properly be applied to exempt class positions without contravening public policy, the constitution, and statutory and decisional law.

There is significant authority supporting a holding that the Secretary of the Planning Board, may not grieve her termination through a collective bargaining arbitration provision. First, *Martin v. Hennessy*, stands for the rule that attempts to reclassify exempt class positions by providing CSL § 75 tenure protections are void as circumventing CSL § 75 and for failing to follow the "requisite procedures of Civil Service Law § 20." 147 A.D.2d 800, 801 (3d Dept. 1989) (hereinafter *Hennessy*). Respondent's brief fails to address *Hennessy* at all. Second, *City of Long Beach v. Civ. Serv. Employees Ass'n, Inc.--Long Beach Unit*, provides precedent for invalidating CBA provisions based upon merit and fitness public policy considerations. 8 N.Y.3d 465 (2007) (hereinafter "*Long Beach*"). While Respondent focuses on the statutory language discussed by this Court in *Long Beach*, it was the public policy considerations of the *Long Beach* Court which the Town raised in its opening brief. *See Long Beach*, 8 N.Y.3d at 470 ("[G]ranting the relief sought on behalf of the provisional employees under the so called "tenure" provisions of the CBA would violate the Civil Service Law *and public policy*") (emphasis supplied).

Exempt employees, like provisional employees, cannot be the subject of a *de facto* reclassification without violating public policy. Meanwhile, *People ex rel. Garvey v. Prendergast*, expresses the public policy specifically applicable to this action. 148 A.D. 129, 130–35 (1st Dept. 1911); s*ee also Sullivan v. Town of Babylon*, 222 A.D.2d 593, 594, 634 N.Y.S.2d 772, 772 (2d Dept. 1995) ("[s]ince the petitioner's position was exempt, her employment could be terminated at will without a hearing"). Finally, *Waters v. City of Glen Cove*, expresses the "elementary principle" that the appointing authority has the power to remove an employee, at-will, with no obligation to explain. 181 A.D.2d 783, 783 (2d Dept. 1992) (hereinafter "*Waters*").[3]

Here, New York's public policy preference for arbitration of public employee and employer disputes as expressed in the Taylor Law is not in dispute. But, in applying that public policy, the Appellate Division, Second Department ("Second Department") misread or overlooked the facts in *Ruiz v. County of Rockland* (R. 163), and applied to this case, a new rule that contravenes public policy and statutory prohibitions, and contradicts several lines of decisional law.[4] 138 A.D.3d 999, 1000, 31 N.Y.S.3d 95, 96 (2d Dept. 2016) (hereinafter "*Ruiz*").

The Second Department misapprehended that the Secretary of the Planning Board's civil service class is exempt, and therefore differs greatly from Ruiz's civil

[3] Respondent fails to address the Planning Board's power to remove its appointee.
[4] In the interest of full disclosure, this firm (Brian D. Nugent, Esq.) represented Carlos Ruiz in that *Ruiz v. County of Rockland* action.

service class which was non-competitive. And, as such, it mistakenly applied the rule set forth in *Ruiz* to this case where it has no applicability. The *Ruiz* Court did not, and could not, have reached the issue of arbitrating grievances of exempt class employees in a case that only concerned a non-competitive class employee. In fact, the Ruiz court, in rendering its determination specifically used the language " . . . irrespective of *his* class designation under the Civil Service Law." *See Ruiz*, 138 A.D.3d at 1000 (emphasis supplied). *His* class designation was non-competitive.[5] Ruiz cannot be properly interpreted as an expansive determination that any and all civil service classes, including the exempt class, can attain entitlement to job protections via collective bargaining agreement. Yet, *Ruiz* was the sole case relied upon by the Appellate Division for this spurious rule regarding job protection for exempt class employees. *See* (R. 163). Heretofore, even labor unions have taken a contrary position regarding exempt employees, for example:

> Tenure for non-competitive and labor class employees who have not served in their position for 5 continuous years can be negotiated. Exempt class employees are at will employees and, as such, have no tenure in their current position.

[5] There was no dispute in the *Ruiz* matter that his title (Undercover Investigator) was non-competitive and the County of Rockland admitted such status in its papers below available online from the Rockland County Clerk's office. See Rockland County Supreme Court, Index No. 035813/2013, Doc. No. 30. Respondent's do not dispute that Ruiz was in a non-competitive position.

A Civil Service Primer at p. 30.[6] Other than the decision below, Respondent does not identify any other authority in support of this newly created law. Respondent also fails to address the distinction between protection of a non-competitive class employee and an employee in the exempt class.

Under the Second Department's Opinion and Order ("Opinion"), the framework is set for every political appointment to an exempt class civil service position to be converted into a permanent one via a CBA provision, without qualification or examination. It is difficult to discern how there could be any distinction left between a competitive, non-competitive or exempt class employees if CBA provisions can, by stroke of the pen, confer equal job security protections on all employee classes, effectively casting aside the legislature's decision making in regard to the civil service system in New York State and the requirements of merit and fitness embodied in our constitution.

[6] *A Civil Service Primer*, CSEA Legal Department & Research Department, March 2019, reprinted November 2019, available at https://cseany.org/wp-content/uploads/2020/10/Civil-Service-Primer-1_UP-2019.pdf (last accessed December 1, 2022).

II
Argument

A. There is Overwhelming Support for a Holding That the CBA is Void to the Extent Respondent Seeks to Apply it to the Secretary of the Planning Board.

Respondent does not contest that the cases relied upon by the Appellate Division deal exclusively with non-competitive class civil service employees. Instead, Respondent's argument, merely repeats and doubles down on the Second Department's holding below, which is based upon a misreading of *Ruiz*, a case involving an employee in the non-competitive class. 138 A.D.3d at 1000. While this Court is not bound by *Ruiz*, the misapplication of that case sheds light on the reason why the parties have reached this Court. A review of recent case law indicates that *Ruiz* has only been cited once since it was decided in 2016, and that cite was in the Opinion. The Second Department's decision relied on *Ruiz* for an unprecedented one-sentence holding that would essentially upend New York Civil Service Law on an issue that was not even before the Court in *Ruiz*.[7] The Opinion relies on a

[7] The Opinion in this case is now cited as creating new law despite being entirely based upon a misreading of *Ruiz*. *See In re Mun. Housing Authority of the City of Yonkers v. Local 456*, 2022 N.Y. Slip Op. 31247(U), 6, 2022 WL 1489583, at *4 (N.Y. Sup. Westchester Cnty. 2022) ("The Court stated: "Contrary to the Town's contention, there is no statutory, constitutional, or public policy prohibition against arbitrating this dispute regarding the termination of an employee in an 'exempt class' under the Civil Service Law"); (McKinney's Cons Laws of NY, Book 9, Civ Serv. § 41, Notes of Decisions 44), ("Dispute between town and labor union, arising from town's termination of former secretary of town planning board, was arbitrable; although employee was exempt under New York Civil Service Law, there was no statutory, constitutional, or public policy prohibition against arbitrating dispute"); (11 Am. Jur. Trials 327) (Originally published in 1966)

misreading of *Ruiz*, which led to a holding that *all* classes of Civil Service Employees can be afforded job security protections by a CBA without violating public policy. *Ruiz* does not stand for that holding and, to the extent it can be argued that such issue had been reached in *Ruiz*, it would have been *dicta*. This Court should entirely disregard both Respondent's and the Second Department's reliance on *Ruiz* and instead rely on the logic of far more appropriate analogs to this case, such as *Hennessy* and *Long Beach, Waters*, and the like.

The *Ruiz* Court held that "the disciplinary procedure outlined in the CBA entitles Ruiz to grieve his termination through arbitration irrespective of *his* class designation under the Civil Service Law." *Id.* 138 A.D.3d at 1000 (emphasis supplied). The reading ascribed to *Ruiz* in the Opinion and relied on by Respondent renders the inclusion of the word "his" superfluous. Notwithstanding, the *Ruiz* Court, in rendering its decision, did not need to reach or consider the issue of whether an exempt employee may grieve his termination through arbitration. To the extent the *Ruiz* opinion can be read as addressing the exempt class, such a reading would constitute *dicta* and be of no persuasive value as *Ruiz* does not provide any analysis

("although employee was exempt under New York Civil Service Law, there was no statutory, constitutional, or public policy prohibition against arbitrating dispute"); (Ability of unions to compel employees to arbitrate statutory rights, 13A N.Y. Prac, Employment Law in New York § 8:61 (2d ed.)) ("There is no statutory, constitutional or policy prohibition against arbitrating a dispute involving an employee in an exempt class and thus, arbitration may be compelled").

addressing the statutory prohibitions nor public policy considerations in allowing the reclassification of an exempt class civil service employee by CBA.

Under *Ruiz*, if read to apply to exempt class employees, a CBA could afford more protection to an exempt class employee than any other public service employee, providing instant job protection upon appointment. CSL § 63 provides for probationary periods for the competitive class which do not apply to the exempt class. Thus, if the Second Department's misapplication of *Ruiz* is permitted to stand, every appointee to the exempt class can be afforded CSL § 75 protections *from the moment of his/her appointment* by virtue of a collective bargaining agreement provision.

The Second Department's application of *Ruiz* to this case constitutes an unprecedented case of judicial overreach, allowing all exempt class employees to be deemed the equivalent to, or greater than, other civil service class designations without legislative consideration, without public hearing, and without consideration for the public fisc. The Taylor Law does not permit the Courts to go that far.

In contrast to *Ruiz*, *Hennessy* is a well-reasoned decision in regard to reclassification of exempt employees and should be followed here. Under *Hennessy*, an agency cannot reclassify an exempt position lacking CSL § 75 protections by resolution or regulatory fiat. The procedure for reclassification is expressly set forth in CSL § 20 and the role belongs to the civil service commissions after public hearing

and with approval of elected officials. CSL § 20. Logically, a Town may not circumvent both CSL §§ 75 and 20 by CBA, like the New York State Thruway Authority was prohibited from doing in *Hennessy*.

Respondent unsuccessfully attempts to distinguish *City of Long Beach v. Civ. Serv. Employees Ass'n, Inc.—Long Beach Unit*, 8 N.Y.3d 465 (2007) (hereinafter "*Long Beach*") by claiming some significance to the fact that the Secretary of the Planning Board was not a provisional appointment. *See* Respondent's Brief p. 14. But that was only one reason why this Court held that provisional employees may not have tenure conferred on them. Just as provisional employees cannot ripen into permanent employees by CBA provision, exempt employees may not do so either without violating public policy. Such CBA provisions not only circumvent statutory prohibitions as in *Long Beach*, but also violate public policy as they allow exempt employees to ripen into permanent civil service employment without adhering to the constitutional preference for merit selection. *See id.* at 472; *see also City of Long Beach v Civ. Serv. Employees Ass'n, Inc.,--Long Beach Unit*, 29 AD3d 789, 789–90 (2d Dept. 2006) ("Because the provisions of the parties' collective bargaining agreement upon which the appellant relies have the effect of limiting the petitioner's ability to discharge provisional employees, those provisions are against public policy and unenforceable as a matter of law").

Respondent misconstrues the Town's argument in relation to CSL §§ 75 and 76. *See* Respondent's Br. at p. 12. Whether the parties agreed to CSL §§ 75 and 76 protections for the Secretary of the Planning Board is an issue of contract interpretation. The issue before this Court is the distinction between non-competitive and exempt class civil service employees and whether a CBA provision can confer permanency on exempt employees as a matter of public policy. The Opinion only relies on non-competitive class cases, a different civil service class of positions. This is significant because the non-competitive class is expressly included, as a class, within the provisions of CSL §§ 75 and 76. (R. 163). *Long Beach* forecloses Respondent's argument that CSL § 76 provides *carte blanche* to modify the Civil Service Law via CBA provision where doing so would violate statutory prohibitions and public policy.

In addition, such CBA provisions would bind future Planning Boards, stripping them of their authority to appoint and remove the secretary of their board. Accordingly, both *Hennessy* and *Long Beach* and the corresponding public policy provide persuasive authority for reversing the Opinion, especially in light of the fact that the Opinion is based upon a misreading of *Ruiz.*

B. Respondent Fails to Refute the Public Policy, Constitutional, Statutory and Decisional Law Bases for a Holding That the CBA Is Void to the Extent Respondent Seeks to Apply It to the Secretary of the Planning Board.

It is well-settled that the Courts should not disturb the legislative intent to confer "unrestricted authority and to fix unlimited responsibility for appointments to positions in [the exempt] class upon the officer exercising the power of appointment." *People ex rel. Garvey v. Prendergast*, 148 A.D. 129, 130–35 (1st Dept. 1911). By misapplying *Ruiz v. County of Rockland*, the Opinion has done just that. 138 A.D.3d at 999, 1000, 31 N.Y.S.3d 95, 96 (2d Dept. 2016). Respondent repeatedly puts forth arguments regarding the text of the agreement, which is entirely irrelevant to the "may-they-arbitrate" inquiry before the Court. *See* Respondent's Br. at pp. 7-9. Logically, the Court cannot sanction the void provisions of the CBA, if it could, there would be no need for the "may-they-arbitrate" inquiry at all.

When negotiating the agreement with municipal officials, Respondent was charged with understanding the law and disregards it at their own peril "since the extent of that authority is a matter of public record, there is a conclusive presumption that he is aware of it." *See Walentas v. New York City Dept. of Ports*, 167 A.D.2d 211, 211–12, 561 N.Y.S.2d 718, 719 (1st Dept. 1990). Respondent's suggestion that the Town should have submitted a unit clarification petition to PERB to redefine the bargaining unit misses the point entirely. *See Respondent's Br*. at p. 10. The Town

has not asserted that an exempt employee cannot be a member of a bargaining unit, but only that a CBA cannot, as a matter of public policy, confer job protections and permanency on an exempt class employee.

Respondent relies extensively on the fact that the bookkeeper was excluded from the protections afforded to the Secretary of the Planning Board. *See* Respondent's Br. at pp. 8-9. Nowhere in its brief does Respondent address *why* the bookkeeper was excluded. The answer is apparent from the language of the CBA, which provides that the bookkeeper: "as an exempt position[,] … serves at the sole discretion of the Town Supervisor…" R. 45. For the same reasons that the bookkeeper was excluded, public policy, constitutional and statutory prohibitions, and decisional law all forbid arbitration here. Thus, the document Respondent negotiated contradicts its position taken in this action. Like the bookkeeper, the Secretary of the Planning Board is an exempt appointee who serves solely at the discretion of the appointing authority, the Planning Board, who in this case, asked the Town to remove its appointee. R. 132. Accordingly, the Opinion should be reversed and the Planning Board's decision to exercise its authority to remove its Secretary should be upheld.

III

Conclusion

There is overwhelming authority supporting reversal of the Opinion because any relief granted in favor of the Secretary of the Planning Board would contravene the Constitution, public policy, the CSL, and Decisional Law. Accordingly, the Opinion and Order of the Second Department must be reversed.

DATED: February 10, 2023
South Nyack, New York

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Certification

I certify pursuant to 500.13(c)(1) that the total word count for all printed text in the body of the brief, exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by subsection 500.1(h) of this Part is 2,960 words.

DATED: February 10, 2023
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