COURT OF APPEALS NO. APL-2022-00077

State of New York
Court of Appeals

In the Matter of
TEAMSTERS LOCAL 445,
Petitioner-Respondent,

-against-

TOWN OF MONROE,
Respondent-Appellant.

BRIEF FOR PETITIONER-RESPONDENT

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Appellate Division, Second Department Docket No. 2017-11372
Supreme Court, Dutchess County, Index No. 52247/17

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did the trial court properly grant Petitioner-Respondent's motion to compel arbitration on the grounds that the Collective Bargaining Agreement expressly provides that the underlying termination grievance is arbitrable, and that arbitration of the grievance would not violate any constitutional, statute, decisional law, or public policy?

Answer: Yes.

PRELIMINARY STATEMENT

This matter arose when the Employer, the Town of Monroe, terminated Kate Troiano, the Secretary to the Town's Planning Board, without providing any explanation or reason. During the relevant time period the Town was a party to a Collective Bargaining Agreement (CBA) with the Union. Certain titles, including Ms. Troiano's title, were explicitly included in the recognition clause of the CBA. The CBA requires just cause before a covered employee can be terminated.

The Union filed a grievance concerning Ms. Troiano's termination and, when the parties could not resolve the matter, filed a Demand for Arbitration. The Town refused to arbitrate Troiano's termination. The Town based its refusal to arbitrate on Troiano's status as an exempt employee under Civil Service Law Art. 41. However, the position of Secretary to the Town Planning Board is explicitly included in the bargaining unit covered by the CBA. Furthermore, the CBA

specifically names another exempt position under Section 41 of the Civil Service Law—the Bookkeeper to the Town Supervisor—as the only employee prohibited from arbitrating disciplinary claims under the CBA.

The Town also claims that arbitration of a termination grievance filed by a Section 41 employee, such as Troiano, would violate the Constitution, statues, decisional law, and public policy. This Town claim was explicitly rejected by both the trial court and the Appellate Division. The Appellate Court stated: "[T]here 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." (R. 162). Furthermore, the Town has not cited any decisional law concerning the arbitration of a grievance filed on behalf of an exempt employee who is explicitly covered by a Collective Bargaining Agreement.

COUNTER STATEMENT OF THE CASE

After the Town refused to arbitrate the case, the Union petitioned the Supreme Court to compel arbitration through a Section 75 proceeding. On September 29, 2017 Judge Maria Rosa granted the petition to compel arbitration and specifically found that there was no public policy, statutory or constitutional prohibition to arbitrating the termination of an exempt employee where, as here, the Employer voluntarily included the employee in the bargaining unit. (R. 9). On

November 12, 2020 that decision was upheld by the Appellate Division Second Department.

On December 9, 2021, this Court dismissed the Town's prior appeal and remanded the matter back to the trial court. On January 21, 2022, the trial court entered a Decision, Order and Judgment reaffirming its decision compelling arbitration. (R. 165). In this appeal the Town again fails to present any authority to challenge what the lower courts considered well established precedent. Nor do they take into account that the Town voluntarily recognized the position of Secretary of the Planning Board as part of the bargaining unit and entered into a collective bargaining agreement explicitly including that title and a discipline and grievance procedure requiring just cause before terminating such an employee.

COUNTER-STATEMENT OF FACTS

The Union and Town are parties to a CBA that states that management requires "just cause" to discipline and terminate employees. (R. 110 at 2.1.1). The CBA further states that discipline shall be in accordance with Sections 75 and 76 of the New York Civil Service Law and that the Town must provide an employee with "a written Notice of Discipline, which shall contain all charges and specifications and the penalty." (R. 124 at 11.2.1 and 11.2.2.). The CBA only prohibits one bargaining unit member from challenging the termination of their appointment through any administrative or legal proceeding: the Bookkeeper to the

Town Supervisor. (R. 124 at 11.2.3). The CBA does not prohibit any other bargaining unit members from pursuing grievances or arbitration over discipline. *Id*.

The CBA has a grievance procedure that culminates in binding arbitration. Article 11.1.4 of the CBA states as follows:

> Step Three – Binding Arbitration: In the event the Union is not satisfied with the response to the grievance at Step Two, the Union may submit the matter to arbitration. The demand for arbitration must be filed with the Town Supervisor within fourteen calendar days from receiving the Step Three response, or when the Step Three response should have been received.

(R.123)

Kathryn Troiano was employed by the Town as Secretary to the Town Planning Board. This position, "Secretary to Planning Board," is explicitly included in the bargaining unit defined in the CBA. (R. 111 at 3.2.1).

Secretary to the Town Planning Board is classified as an "exempt" position under Section 41 of the Civil Service Law. (R. at 139). Bookkeeper to the Town Supervisor is also classified as an "exempt" position under Section 41 of the Civil Service Law. (R. 136). While the Article 11.2.3 of the CBA explicitly excludes the Bookkeeper to the Town Supervisor from the CBA's disciplinary protections, it does not exclude the Secretary to the Town Planning Board. (R. 124 at 11.2.3).

Troiano was terminated by the Town on February 27, 2017. She was given no reason for her termination. (R. 25 at ¶6; R. 47). The Town did not provide

Troiano with a written Notice of Discipline containing all charges against her as required by the Collective Bargaining Agreement. (R. 124 at 11.2.1 and 11.2.2).

On March 1, 2017, the Union filed a grievance concerning Troiano's termination. (R. 25 at ¶7; R. 48). The Town did not respond to the grievance. On March 17, 2017, the Union appealed the grievance to the Town Board by written appeal to the Town Clerk. (R. 25 at ¶8; R. 49). Again, the Town did not respond.

On April 3, 2017, the Union appealed the denial of the grievance to arbitration by timely filing a demand for arbitration with Town Supervisor Harley Doles. (R. 25 at ¶9; R. 50). The Demand for Arbitration stated as follows:

> The Union has not received a second step decision concerning the termination of Kathryn Troiano. Therefore, pursuant to Section 11.1.4 of the Agreement, the Union is submitting to the Town Supervisor a demand for arbitration. Since the CBA requires that the arbitrator be selected from a panel of five and such panel has not yet been established, please have your counsel contact my office to select a panel and/or the parties can mutually select an arbitrator to hear this case. Thanks.

(R. 50)

The Town refused to arbitrate the grievance concerning Troiano's termination. On August 24, 2017, the Union filed a Verified Petition to compel arbitration of its grievance concerning Troiano's termination in the Supreme Court, Orange County. (R. 14-23.). The case was subsequently reassigned to Judge Maria G. Rosa of the Supreme Court, Dutchess County. (R.9-13,157-160). On September

8, 2017, the Town filed a motion to dismiss the Union's petition to compel arbitration. (R. 81-150).

On September 29, 2017, Judge Rosa issued a Decision and Order denying the Town's motion to dismiss the Verified Complaint. (R. 9-13). The court rejected the Town's argument that the dispute was not arbitrable because the position of Secretary to the Town Planning Board is classified as an exempt position under Civil Service Law §41, holding that "[i]f the CBA affords her such protections and requiring the Town to arbitrate would not violate a statute, decisional law or public policy, there is no bar to arbitration." (R. 10).

The court found that Articles 3.2 and 11.2 of the CBA "clearly gave Troiano, in her capacity as planning board secretary, the right to pursue the grievance procedures and ultimately arbitration" and that arbitration of her grievance would not violate any statute, decisional law or public policy. *Id*. The court noted that none of the cases cited by the Town involved a CBA such as this one that expressly granted the exempt employee the right to challenge disciplinary actions or termination. *Id*. The Court distinguished the present case from *City of Long Beach v. Civil Service Employees Association, Inc.* 8 N.Y.3d 465, 470 (2007) which held that it was against public policy to allow an arbitration regarding the termination of a provisional employee, because it would undermine the constitutional preference for merit selection. (R. 10-11). Because Troiano's

position was not a provisional appointment, the court held, this policy consideration is absent. *Id*.

The Town subsequently filed a Notice of Appeal with Request for Appellate Division Intervention on October 17, 2017. (R. 1-8). That appeal was denied by the Appellate Division on November 12, 2020. (R. 162).

ARGUMENT

POINT I

THE COLLECTIVE BARGAINING AGREEMENT PROVIDES THAT THE UNDERLYING GRIEVANCE IS ARBITRABLE

On appeal, the Town claims that Troiano is excluded from the disciplinary procedure of the CBA. An examination of the CBA shows that, in fact, the CBA gives Troiano the right to pursue a grievance to arbitration in regard to any discipline issued to her.

The position of "Secretary to Planning Board" is explicitly included in the bargaining unit defined in the CBA. (R. 111 at 3.2.1). The Town admits that Troiano was part of the bargaining unit. (Respondent-Appellants Brief at 12). The Town has been unable to point to any language in the CBA that excludes the Secretary to the Town Planning Board from the coverage of Article 11 due process procedures, which includes the grievance procedure and disciplinary procedures. (R. 44-45). Instead, the Town interprets Article 11.2.1 of the CBA, which states that discipline shall be in accordance with Sections 75 and 76 of the Civil Service

Law, as thereby implicitly excluding all employee who are classified as exempt under Civil Service Law § 41. (R. 45).

This interpretation of Article 11.2.1 is contradicted by the two paragraphs immediately following it. Article 11.2.2 requires that *all* bargaining unit members be provided with a written notice of discipline including the "charges" against them. (R. 45). This Article requiring that exempt employees be provided with a notice of the "charges" against them would be meaningless if the Employer had unlimited discretion to terminate exempt bargaining unit members at will.

Article 11.2.3 goes even further in undermining the Town's position. It states that "[n]otwithstanding the above"—i.e. the disciplinary protections granted all bargaining unit members—the Bookkeeper to the Town Supervisor cannot challenge the termination of his or her appointment "through any administrative or legal proceeding." As noted earlier, the Bookkeeper to the Town Supervisor is classified as an exempt employee under Section 41 of the Civil Service Law. This begs the question: if Article 11.2.1 excludes all exempt employees from the CBA's disciplinary protections, then why did the Employer negotiate to include Article 11.2.3.

The Employer contends that the exclusion of the Bookkeeper to the Town Supervisor in Article 11.2.3 is only given by way of example and that all exempt employees are excluded. But the language of Article 11.2.3 does not support this

interpretation. The explicit exclusion of one exempt employee, the Bookkeeper, from the CBA's disciplinary protections confirms that other exempt employees who are not mentioned in Article 11.2.3 are protected by the due process procedures in Article 11 of the CBA.

POINT II

ARBITRATION OF THE GRIEVANCE WOULD NOT VIOLATE ANY STATUTE, DECISIONAL LAW, PUBLIC POLICY, OR THE CONSTITUTION

New York public policy "favors arbitral resolution of public sector labor disputes." *City of Long Beach v. Civil Service Employees Association*, 8 N.Y.3d 465, 470 (2007), quoting *Matter of Professional, Clerical, Technical Employees Association v. Buffalo Board of Education*, 90 N.Y.2d 364, 372 (1997). The public policy exception to an arbitrator's power to resolve disputes is "extremely narrow." *United Federation of Teachers, Local 2 v. Board of Education of the City School District of the City of New York*, 1 N.Y.3d 72, 80 (2003), citing *Matter of New York City Transit Authority. v. Transport Workers Union of America, Local 100*, AFL–CIO, 99 N.Y.2d 1, 6–7 (2002) ("Judicial restraint under the public policy exception is particularly appropriate in arbitrations pursuant to public employment collective bargaining agreements."); *Matter of City of New Rochelle v Uniformed Fire Fighters Assn., Inc., Local 273, I.A.F.F*, 206 AD3d 727, 728 (3d Dept. 2022), quoting *Matter of County of Nassau v Detective Assn., Inc. of the Police Dept. of*

Nassau, 188 AD 1049 at 1050). ("However, a dispute between a public sector employer and an employee is only arbitrable if it satisfies a two-prong test. In determining whether a grievance is arbitrable, a court must first ask whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance, and if there is no prohibition against arbitration, the court must then examine the CBA to determine if the parties have agreed to arbitrate the dispute at issue").

As discussed below, there is no statute, case law, public policy or constitutional authority prohibiting the arbitration of a grievance filed on behalf of an employee classified as "exempt" under Section 41 of the Civil Service Law where, as in this case, the parties have voluntarily agreed to arbitration pursuant to a CBA. Specifically, arbitration of this grievance would in no way conflict with the public policy of promoting merit-based selection in public employment. Furthermore, there is a statutory remedy available if the Employer wants to remove an exempt employee from the bargaining unit. That remedy would be to file a unit clarification petition with the Public Employment Relations Board (PERB). Unexplainably, the Town never has filed such a petition with PERB concerning the Secretary of the Planning Board position.

The New York Constitution requires that civil service positions be filled "according to merit and fitness to be ascertained, as far as practicable, by

examination." New York Constitution Art. 5, Sec. 6. The purpose of this section was "to replace the spoils system with a system of merit selection and to protect the public as well as the individual employee.'" *City of Long Beach v. Civil Service Employees Association*, 8 N.Y.3d 465, 470 (2007), quoting *Matter of Montero v. Lum*, 68 N.Y.2d 253, 258 (1986).

This constitutional preference for merit selection is incorporated in Section 1, New York Civil Service Law, et seq. However, merit selection is not required for all positions. Among other exceptions, Section 41 of the Civil Service Law establishes a category of "exempt" employees who do not have to take a competitive civil service exam prior to hiring because it is not considered practicable:

"The purpose of the exempt class is to permit an appointment without civil service examination." *Matter of Byrnes v Windels*, 265 N.Y. 403, 405 (1934). Article 41 does not contain any provisions barring exempt employees covered by a CBA from grieving or arbitrating disciplinary matters.

Article 75 of the Civil Service Law provides those public employees in five categories cannot be subjected to discipline "except for incompetency or misconduct shown after a hearing upon stated charges." Article 75 does not contain any provision stating that a public employer cannot agree via a CBA to

provide similar disciplinary protections to public employees that do not fall within the five categories listed in Article 75 unless otherwise prohibited. *Id.*

Public employers in New York State can and regularly do negotiate provisions that modify the protections contained in the Civil Service Law. "It is well settled that a contract provision in a collective bargaining agreement may modify, supplement, or replace the more traditional forms of protection afforded public employees, for example, those in sections 75 and 76 of the Civil Service Law which delineate procedures and remedies available to employees to challenge disciplinary action taken or proposed to be taken against them by their employers." *Dye v. New York City Transit Authority*, 88 A.D.2d 899, (2nd Dept. 1982), aff'd 57 N.Y.2d 917 (1982).

This includes the negotiation of CBA provisions that grant the ability to grieve and arbitrate claims to employees who would not otherwise have those rights under the Civil Service Law. See *Ruiz v. County of Rockland*, 138 A.D.3d 999, 1000 (2nd Dept. 2016) ("[T]he disciplinary procedure outlined in the CBA entitles Ruiz to grieve his termination through arbitration irrespective of his class designation under the Civil Service Law.") *Incorporated Village of Lake Grove v. Civil Service Employees Association, Inc.*, 118 A.D.2d 781, 782 (2nd Dept. 1986) ("[T]he employee whose dismissal is the subject of the proposed arbitration was in a noncompetitive class and was not entitled to the tenure protections afforded by

Civil Service Law § 75. Nevertheless, collective bargaining agreements may modify or even supplant the statutory provisions of Civil Service Law § 75").

The court should not interfere with the arbitration of the dispute in this case since it does not "contravene a strong public policy, almost invariably involving an important constitutional or statutory duty or responsibility." *Matter of Professional, Clerical, Technical Employees Association v. Buffalo Board of Education*, 90 N.Y.2d 364, 372 (1997), quoting *Matter of Port Jefferson State Teachers Association. v. Brookhaven–Comsewogue Union Free School District*, 45 N.Y.2d 898, 899 (1978).

As discussed above, the public policy that undergirds the Civil Service Law is a preference for merit selection via civil service exam where practicable. On this basis, the court has stayed the arbitration of grievances regarding the termination of "provisional" employees temporarily hired without competitive examination. *City of Long Beach v. Civil Service Employees Association*, 8 N.Y.3d 465 (2007).

Section 65 of the Civil Service Law provides those provisional appointments can be made only when "there is no appropriate eligible list available for filling a vacancy in the competitive class" and that the provisional appointment shall only continue "until a selection and appointment can be made after competitive examination." Section 65(1) of the Civil Service Law. Furthermore, the statute

requires that the employer hold a civil service exam within one month of the provisional appointment, that the appointment must normally end within two months of the establishment of an eligibility list, and that no provisional appointment may last more than nine months. Section 65 of the Civil Service Law.

Citing these factors, the court held in *City of Long Beach* that it was against public policy to grant tenure rights to provisional employees under the terms of a CBA. *City of Long Beach v. Civil Service Employees Association*, 8 N.Y.3d 465, 472 (2007).

The trial court easily distinguished *City of Long Beach* from the present case. Significantly, Troiano was not in a provisional appointment. The trial court stated: "Because she worked in a position classified as exempt, this is not a situation where allowing her to pursue arbitration would undermine the public policy in the Civil Service Law designed to insure adherence to the constitutional preference for merit selection." (R.10).

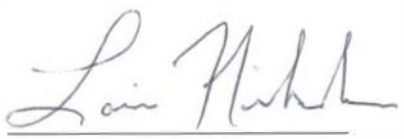
Section 41 of the Civil Service Law differs markedly from Section 65 of the Civil Service Law. Article 65, as explained by the court in *City of Long Beach*, explicitly states that employees in provisional appointments can maintain their employment only until a merit selection can be made. Article 41 contains no similar provisions. None of the public policy arguments for prohibiting provisional

employees from arbitrating termination grievances apply to exempt employees such as Troiano.

CONCLUSION

There is no statute, case law, public policy or constitutional authority prohibiting the arbitration of a grievance filed on behalf of an employee classified as "exempt" Section 41 of the Civil Service Law where the parties have voluntarily agreed to include such employee in the bargaining unit and to provide such employee the due process protections of the CBA, including access to the grievance and arbitration provisions of the CBA.

Respectfully Submitted,

By: 

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In the Matter of TEAMSTERS LOCAL 445 v. TOWN OF MONROE

22-00077

State of New York }
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