State of New York
Court of Appeals

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

-against-

TOWN OF MONROE,
Respondent-Appellant.

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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Date Completed: May 18, 2022

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

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COURT OF APPEALS
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In the Matter of Teamsters Local 445,

Petitioner-Respondent,

v.

TOWN OF MONROE,

Respondent-Appellant.

----------X

NOTICE OF MOTION FOR PERMISSION TO APPEAL TO THE NEW YORK COURT OF APPEALS PURSUANT TO CPLR 5602(b)(2)(ii)

PLEASE TAKE NOTICE that Respondent-Appellant Town of Monroe ("Town") will move this Court, pursuant to CPLR 5602(b)(2)(ii) and Rule 500.22 of the Rules of Practice of the Court of Appeals, upon the record of the prior appeal to the Appellate Division, Second Department, and upon the papers submitted herewith, at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on May 30, 2022, at 9:30 a.m., for an order granting permission to appeal to this Court from a Decision, Order, and Judgment of the Supreme Court, Dutchess County, entered on April 19, 2022 ("Decision, Order, and Judgment"), necessarily affected by a Decision and Order of the Appellate Division, Second Department, entered on November 12, 2020 ("Decision and Order").

PLEASE TAKE FURTHER NOTICE that the Town is also filing Notice of Appeal from the Decision and Order, because the Town is entitled to an appeal as

of right under CPLR 5601(d). However, in an abundance of caution, the Town alternatively seeks leave to appeal should this Court determine that there is no appeal as of right. *See, e.g., Gorman v. Rice*, 24 N.Y.3d 1032, 1036 (2014) (a party may "appeal [] as of right" and "alternatively [] s[eek] leave to appeal").

Dated: May 18, 2022
South Nyack, New York

Yours, etc.,

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RULE 500.1(f) CORPORATE DISCLOSURE STATEMENT

Respondent-Appellant Town of Monroe is not a publicly held corporation. It has no subsidiaries or affiliates that are publicly traded.

INTRODUCTION

Respondent-Appellant Town of Monroe ("Town") appeals from a Decision, Order and Judgment of the Supreme Court, Dutchess County. The Town is entitled to appeal as of right under CPLR 5601(d) because "the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment" and "which finally determines an action where there is directly involved the construction of the constitution of the state ..." Specifically, the Appellate Division held on the first-prong of the two-prong test for whether a public sector employer and an employee is arbitrable that "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." This holding with respect the constitution necessarily affects the judgment as the Supreme Court could not have granted judgment in favor of Teamsters Local 445 ("Teamsters") without a holding on the constitutional issue within the Order of the Appellate Division.

In an abundance of caution, the Town also moves for leave to appeal. This case presents a substantial state constitutional question about whether a job protection provision of a Collective Bargaining Agreement ("CBA") which seeks to protect an appointed exempt class employee who may otherwise be terminated

at-will violates New York State Constitution Article V, Section 6 and the Civil Service Law, which was enacted to carry Article V of the New York State Constitution into effect, by granting job protections without requiring that the appointment be made based upon "merit and fitness" and examination of the appointee.

PRELIMINARY STATEMENT

The lower court decisions of the Appellate Division, Second Department and the Orange County Supreme Court, if allowed to stand, would effect a substantial change in the at-will nature of exempt class civil service employees in the State of New York. Exempt class positions in New York State are positions which do not require a candidate to pass any examination (competitive or non-competitive) and do not have any minimum training or experience requirements. Exempt class positions are typically civil service titles that work in confidential relationships or policy level positions. As such, persons in the exempt class serve at the pleasure of the employer.

The instant appeal concerns an unprecedented decision of the Appellate Division, Second Department in which the court, erroneously relying on case law regarding non-competitive class employees, determined that exempt class employees could obtain job protection, ripening their positions into permanent

employment, by the mere inclusion of a job-security provision in a contract or collective bargaining agreement. Contrary to the Appellate Division's determination, allowing a contract to provide job security to an exempt employee contravenes the very substance of the New York State Constitution's merit and fitness clause. The long standing, at-will nature of exempt class positions in this state balances their inconsistency with the merit and fitness clause of the New York State Constitution since they attain no job security in such positions.

However, the Appellate Division decision below would now allow governmental executives or boards to appoint an exempt class employee, without any qualifications or examination, and then merely execute a contract to ensure that such exempt class employee would not have permanent job protection on the same level as competitive and non-competitive employees. Such result contravenes the very heart of this state's Constitutional merit and fitness clause and is contrary to the law in the State of New York. As such, a contract clause that purports to confer permanency to an exempt class position is unconstitutional and arbitration of matters under such clause is constitutionally barred.

BACKGROUND

A. Timeliness of the Motion

Teamsters served Notice of Entry of the Decision, Order and Judgment of the Supreme Court, Dutchess County via the New York State Courts E-Filing system on April 19, 2022. *See* **Exhibit E**. This motion was served on May 19, 2022, and is thus timely. *See* CPLR §§ 2103(b)(1), 5513(b).

B. Relevant Factual Background

The appeal relates to the constitutionality of a provision of a collective bargaining agreement between the Town and Teamsters which provides job protections to an appointed exempt employee who would otherwise be subject to termination at-will by the Town Board.

1. The Exempt Appointed Position of Secretary of the Planning Board

During a prior administration, Katheryn Troiano ("Troiano") was appointed as Secretary of the Planning Board of the Town. The position of the Secretary of the Planning Board of the Town of Monroe is an exempt position under New York State Civil Service Law § 41(1) and as such is subject to termination at-will.

The Orange County Department of Human Resources Position Control Report provides that Secretary of the Planning Board is an exempt class position under the New York State Civil Service Law. (R. 103, 139).

In that regard, on February 6, 2012, the Town adopted a resolution "to revise the position of the Planning Board Secretary from part-time to full time exempt with expanded duties…" (R. 102, 131).

2. The CBA Purporting to Address Termination of the Secretary of the Planning Board

On or about December 28, 2015, the prior Town administration entered into a CBA (R. 107-25) which included the position of Secretary of the Planning Board within the Bargaining Unit (R. 111).

The CBA unconstitutionally requires that the Town to establish just cause for termination of the Secretary of the Planning Board. (R. 110). The CBA acknowledges that Bookkeeper to the Town Supervisor is an exempt position and "serves at the sole discretion of Town Supervisor, and, as such, the Union may not challenge such appointment or termination of such appointment through any administrative or legal proceeding." (R. 124).

The CBA unconstitutionally neglects to make the same carveout for the appointed exempt position of Secretary of the Planning Board. *See* (R. 107-25).

3. The Town Terminates Troiano's At-Will Employment as Secretary of the Planning Board

On February 27, 2017, the Town adopted a resolution terminating Troiano's at-will employment. (R. 102, 132).

4. Teamster's Grievance

On March 1, 2017, Mary Ellen Beams, as Town Clerk of the Town received a grievance from Teamsters on behalf of Troiano. (R. 102, 126). The grievance alleged that the Town violated Sections 2.1.1 and 11.2.2 of the CBA. (R. 126).

C. Relevant Procedural History

1. Teamster's Petition to Compel Arbitration

On August 24, 2017, Teamster's filed a Verified Petition to Compel Arbitration. (R. 16-78).

2. The Town's Motion to Dismiss the Verified Petition

By Notice of motion dated September 8, 2017, the Town moved to dismiss the Verified Petition. (R. 81-150). Teamsters filed opposition to the Town's motion to dismiss. (R. 151-56).

3. The Supreme Court's Decision

By Decision and Order dated September 29, 2017, the Supreme Court held, in relevant part:

> [T]he mere fact that her position was classified as exempt under the Civil Service Law is not dispositive of whether she is entitled to grieve and arbitrate her termination under the CBA entered between the parties. If 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).

And further held, "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 of merit selection." (R. 10-11).

4. The Appellate Division Decision Necessarily Affecting the Final Judgment

On November 12, 2020 on a prior appeal, the Appellate Division, Second Department held, "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." *See* Exhibit B, pg. 2. [1]

5. This Court Sua Sponte *Dismisses the Prior Appeal*

By Order dated September 9, 2021, this Court, *sua sponte,* dismissed the Town's prior appeal holding, "the order appealed from does not finally determine the proceeding within the meaning of the constitution."

6. *The Supreme Court's Decision, Order and Judgment*

By Decision, Order and Judgment, the Supreme Court has now granted final judgment in favor of Petitioner expressly holding that the Judgment is necessarily affected by the Appellate Division's Decision and Order on the prior appeal, holding: "the Appellate Division, Second Department affirmed this Court's denial

[1] Internal quotation marks and citations omitted unless otherwise stated.

of the motion to dismiss. The Appellate Division noted that there is no statutory, constitutional or public policy prohibition against arbitration … the only issues that remain which were not dispensed with by the Appellate Division's decision …"

JURISDICTIONAL STATEMENT

This action originated in the Supreme Court, Orange County. The Second Department's Decision and Order on the prior appeal necessarily affects the Decision, Order and Judgment of the Supreme Court which completely disposed of the matter below. Accordingly, this Court has jurisdiction over the Town's motion for leave to appeal and its proposed appeal. *See* 5602(b)(2)(ii).

STATEMENT OF QUESTION PRESENTED FOR REVIEW

1. Is a job protection provision in a CBA for an exempt class employee who cannot be terminated at will unconstitutional and violate Article V, Section 6 of the New York State Constitution?

Answer: Yes.

The question raised here was preserved below. (Brief for the Town dated April 17, 2018 at pgs. I, 7-11; Reply Brief for the Town dated June 6, 2018 at pgs. 9, 16).

REASONS FOR GRANTING LEAVE

This Court's intervention is needed to ensure that the constitution is faithfully followed by municipal boards as they exit their administration by clarifying the meaning of Article V, Section 6 of the New York State Constitution, specifically, whether it forbids a municipality from creating a new class of employment by bargaining away constitutional edicts and causing appointed exempt employees, who would otherwise be terminable at will under the New York Civil Service Law, to receive job protections which have the additional unconstitutional effect of nullifying the incoming municipal board's appointing power. By allowing such provisions in a CBA protecting exempt class employees, those positions improperly ripen into permanent appointments without any required exam or qualifications.

The Appellate Division, Second Department erred in failing to consider that by providing job protections to an appointed exempt employee, the CBA violated the New York State Constitution and New York Civil Service Laws by creating a permanent position without legislative inquiry into impracticability of merit and fitness and competitive examination. And that the appointment of the Secretary of the Planning Board involved the appointing power belonging to the Town of Monroe which could not be bargained away.

Left unchecked, the Decision and Order of the Appellate Division, Second Department opens the door for outgoing municipal elected officials to protect their political allies or friends with collective bargaining agreements or other contracts which would unconstitutionally provide job protections to appointed exempt employees, thereby permanently removing and bypassing the constitutional requirements of merit and fitness and examination, and stripping the public of its appointing power. A decision here reversing the Appellate Division would reaffirm the principle that public officials may not enter into contracts which run afoul of the constitution or bargain away rights belonging to the public, especially those derived from the New York State Constitution.

A. The Appellate Division, Second Department's Erred in Failing to Consider that, Under the Constitution, Civil Service Employees are Subject to Merit and Fitness Unless That is Determined to be Impractical by The Legislature, and Thus, the CBA Cannot Create a New De Facto Class of Permanent Employee under the Constitution

Article V, Section 6 of the New York State Constitution provides in relevant part: "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive…" Article V, Section 6 does several things, including: (1) announcing New York's public policy favoring merit and fitness and

competitive examination when it comes to appointment of civil service employees; (2) creating a requirement that appointment of its civil service employees must be according merit and fitness and competitive examination as far as practicable; and (3) permitting the legislature to create classes of appointments which would not be subject to such a requirement. *See Wood v. Irving*, 85 N.Y.2d 238, 242–43, 647 N.E.2d 1332, 1335(1995) (Article 6 "articulates long-standing, well-settled State policy that appointments and promotions within the civil service system must be merit-based and, when "practicable," determined by competitive examination").

> The constitutional dictate does not create an absolute bar to civil service appointments and promotions without competitive examinations (*Matter of Sloat v. Board of Examiners,* 274 N.Y. 367, 373, 9 N.E.2d 12; *Matter of Sanger v. Greene,* 269 N.Y. 33, 40, 198 N.E. 622). An untested appointment or promotion, however, must rest on (1) a legislative determination that ascertaining fitness by competitive examination is "impracticable" (*Matter of Andresen v. Rice,* 277 N.Y. 271, 279, 14 N.E.2d 65); and (2) a sound, discernible basis supporting the Legislature's determination of impracticability (*id.; see also, Matter of Sanger v. Greene, supra,* at 40, 198 N.E. 622). *Wood v. Irving*, 85 N.Y.2d 238, 243 (1995).

Despite the clear constitutional edict, the CBA between the parties purports to include the Secretary of the Planning Board within the agreement's job security provisions. The management rights provision of the CBA provides that the rights and responsibilities of management include the ability to "terminate employees for

just cause." The CBA thus unconstitutionally provides job protections to the bargaining unit essentially converting the Secretary of the Planning Board to a permanent position within the Civil Service. The CBA unconstitutionally creates a new class of employee outside the bounds of Article V, Section 6.

1. Troiano was an Appointed Exempt Civil Service Employee

New York State Civil Service Law § 41(1) provides in relevant part: "The following offices and positions shall be in the exempt class: (c) one secretary of each municipal board or commission authorized by law to appoint a secretary." Teamsters has never argued that Troiano was or should have been classified as anything but an exempt employee. Exempt employees are "terminable at will under New York law without a hearing and without cause." *Carfora v. City of New York*, 705 F. Supp. 1007, 1009 (S.D.N.Y. 1989).

Beyond the statutory dictates, the Orange County Department of Human Resources Position Control Report provides that Secretary of the Planning Board is an exempt class position under the New York State Civil Service Law. (R. 103, 139). Moreover, before her termination, the Town adopted a resolution "to revise the position of the Planning Board Secretary from part-time to full time exempt with expanded duties…," well before entering into the collective bargaining agreement. (R. 102, 131).

Indeed, all of the Supreme Court Orders and the Decision and Order of the Appellate Division, Second Department hold that Troiano is an exempt civil service employee. Accordingly, Troiano was an exempt employee subject to termination at-will under the New York State Constitution and the New York Civil Service Laws.

2. *The Appellate Division, Second Department Erred in Relying on Law Related to Non-Competitive Positions Rather than Exempt Positions.*

It bears repeating, as an exempt employee, Troiano was subject to termination at will. *See Bergamini v. Manhattan & Bronx Surface Transit Operating Auth.*, 62 N.Y.2d 897, 899 (1984). The Appellate Division, Second Department overlooked this distinction and cited only to cases involving non-competive class employees, a different class of positions that are included within the provisions of Civil Service Law § 75.

Exempt class employees differ from non-competitive class employees in how and why they need not comply with the merit and fitness requirements of the New York Constitution:

> The criteria necessary ... to permit exempt classifications[ ] are the confidential nature of the position, the performance of duties which require the exercise of authority or discretion at a high level[ ] or the need for the appointee to have some expertise or personal qualities which cannot be measured by a competitive examination.

> *Spence v. New York State Dept. of Civ. Serv.*, 189 A.D.3d 1785, 1786, 138 N.Y.S.3d 222, 224 (3d Dept. 2020).
>
> The Commission may ... place a title in the noncompetitive class where 'it is impracticable to determine merit and fitness for the berth by competitive examination (*Matter of Spence v. New York State Dept. of Civ. Serv.,* 156 A.D.3d at 988, 67 N.Y.S.3d 309, quoting *Matter of Goodfellow v. Bahou,* 92 A.D.2d 1085, 1085, 461 N.Y.S.2d 570 [1983], *lv denied* 59 N.Y.2d 606, 466 N.Y.S.2d 1026, 453 N.E.2d 551 [1983]; *see* Civil Service Law § 42[1]; *Matter of Wood v. Irving,* 85 N.Y.2d at 243, 623 N.Y.S.2d 824, 647 N.E.2d 1332). Such impracticability may arise " 'due to either the confidential nature of the position or because the character of the position renders an examination inadequate to measure the qualifications of the prospective employee.' *Spence v. New York State Dept. of Civ. Serv.*, 197 A.D.3d 1396, 1397, 154 N.Y.S.3d 143, 146 (3d Dept. 2021)

Thus, this case differs from the line of Appellate Division cases upholding collective bargaining agreements affording additional protections to non-competitive class employees. *Cf. Ruiz v. County of Rockland*, 138 A.D.3d 999, 31 N.Y.S.3d 95 (2d Dept. 2016) (non-competitive class); *In re State Unified Ct. System v. Assn. of Surrogate's and S. Ct. Reporters Within City of New York*, 104 A.D.3d 621, 621, 961 N.Y.S.2d 773 (1st Dept. 2013) (non-competitive class); *Inc. Vill. of Lake Grove v. Civ. Serv. Employees Ass'n, Inc., Long Island Region No. 1,* 118 A.D.2d 781, 782, 500 N.Y.S.2d 290 (2d Dept. 1986) ("noncompetitive class").

The Appellate Division erroneously relied on the above line of cases in treating the law of non-competitive positions as being the same as exempt class position and failed to recognize the distinguishing characteristics between a non-competitive employees and exempt employees. A distinction which the CBA itself recognizes makes the termination not subject to arbitration:

> **Bookkeeper to Town Supervisor**: Notwithstanding the above, it is understood that the position of Bookkeeper to Supervisor is classified as an exempt position by the Orange County civil service agency and serves at the sole discretion of the Town Supervisor and, as such, the Union may not challenge such appointment or termination of such appointment through any administrative or legal proceeding.

(Emphasis added).

The Supreme Court inexplicably interpreted this provision to somehow suggest that the parties intentionally protected Troiano, but the language suggests the opposite, that the parties believed and understood that the CBA could not govern the termination of the exempt employees. Even so, as explained below, neither the legislature, nor an administrator, nor the executive branch can validate an unconstitutional contract provision and ripen an exempt appointment into a permanent one with job protection.

3. This Court's Precedent Requires Reversal

This Court's precedent holding that appointments for permanent positions without a legislative determination regarding merit and fitness, and competitive examination violate the New York State Constitution and the Civil Service Laws which were enacted to carry Article V, Section 6 of the New York State Constitution into effect. The same analysis applies here and requires reversal.

In In *People ex rel. Campbell v. Partridge*, 89 A.D. 497, 498–99 (2d Dept. 1903), *aff'd,* 179 N.Y. 530 (1904), the designation or appointment of a relator as a telegraph operator was held to be the equivalent of a promotion which the Second Department held requires under the Constitution that the employee to undergo an examination. This Court affirmed the Appellate Division, Second Department's holding:

> Under the provisions of the Constitution and the civil service law, therefore, the relator's promotion could not be effected without an examination; and as there is no claim that his name was ever upon an eligible list, or any of the civil service rules complied with in his designation, we think that the order was properly denied, and should be affirmed, with costs."

As the documentary evidence from the Orange County Department of Human Resources established, the position of Planning Board Secretary was and is an exempt position. (R. 131). The CBA's provision provided job protections to

an employee not otherwise entitled to protections under Civ. Serv. Law § 75 et. Seq. of the Civil Service Laws. Compare Civil Service Law § 76(4), which allows modification of job protections for other classes of employees included within Civil Service § 75. However, this provision has never been applied to allow job protections for exempt class employees since exempt class employees are not entitled to any protections under Civil Service Law § 75. *See Penny v. Kirk*, 260 A.D. 886, 22 N.Y.S.2d 996 (2d Dep't 1940). However, below, the Supreme Court and Appellate Division have improperly expanded Civil Service Law § 76(4) to include exempt class employees under Civil Service § 75. By doing so, the Supreme Court and Appellate Division have authorized a CBA which usurps the constitution and the Civil Service Laws and effectively makes the exempt position of Planning Board Secretary a permanent position without any examination, qualifications or review by the appropriate civil service commission.

Similarly, in *Wood v. Irving*, 85 N.Y.2d 238, this Court struck down Civil Service Law § 58(4)(c), which bestowed on a police officer temporarily assigned detective work, a permanent detective position solely through the passage and time, without meeting a merit and fitness requirement. This Court held because there is no evidence of a legislative consideration or determination of impracticability of testing for the detective rank, the enactment fails its

constitutional threshold. *Id.* at 243. For the same reasons, the CBA providing job protections to an appointed exempt class employee is unconstitutional. Simply put, there was zero legislative effort used to determine whether, if the Secretary of the Planning Board were a permanent position, it would it be impracticable to base the appointment on merit and fitness and competitive examination.

State-wide labor unions in New York also recognize that exempt class employees are at-will employees. The New York State Civil Service Employees Association (CSEA), in its publication entitled "A Civil Service Primer" states:

> 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.

A Civil Service Primer at p. 30[2]

Here, the CBA creates a new class of employee by providing permanent job protection to an appointed exempt class civil service position without any merit and fitness standard. Like *Wood,* there has been no "legislative determination that ascertaining fitness by competitive examination is "impracticable" *Wood v. Irving*, 85 N.Y.2d at 243. Nor was there any "sound, discernible basis supporting the Legislature's determination of impracticability." *Id.* Accordingly, the Judgment must be reversed.

[2] *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

4. An Unconstitutional CBA Cannot be Sanctioned by the Court

The Court, even in equity, cannot sanction an employment or contract which violates the New York State Constitution. And such a defense can never be waived.

> "By placing this provision in the Constitution the People of the State have declared in unmistakable terms that merit, ascertained as therein provided, shall govern appointments and promotions in the public service, and have thus formulated and announced the public policy of the State. No administrative officer may violate the provisions of the Constitution, and no court may sanction a violation. Administrative officers may at times through inadvertence disregard a mandate of a statute or even of the Constitution. When redress is sought in the courts for an alleged wrongful discharge or removal of an employee of the State or one of its civil divisions, the court, too, may fail to note that the employment was illegal from its inception, unless the legality of the employment is challenged by the defendant. An employment which in its inception violates the provisions of the Constitution is illegal and against public policy, regardless of the good faith of the parties. It is the duty of the appropriate administrative officers of the State or its civil divisions to discontinue an illegal employment when they note its illegality, and if rights based upon such employment are asserted in the courts, the legality of the appointment should not go unchallenged by public officers; but regardless of whether the legality is challenged or not, a court must refuse to sanction such an employment which violates the mandate of the Constitution whenever the illegality becomes apparent to it. In such case the defense cannot be waived by the defendant. The defense is allowed, not for the sake of the defendant, but of the law itself. It will not enforce what it has forbidden and

> denounced." *Palmer v. Board of Educ. of Union Free Sch. Dist.,* 276 N.Y. 222, 226 (1937). *See also, Civil Service Employees,* at 74 ("the public policy manifested in the Civil Service Law is very strong").

Thus, the Appellate Division, Second Department erred in holding that there was no constitutional bar to arbitrating the termination of an exempt civil service employee. Such arbitration violates the merit and fitness clause of the New York State Constitution by enforcing a contract provision that improperly confers job protection on an exempt employee who did not pass any examination and was not required to meet any qualifications for the position.

B. The Appellate Division, Second Department's Erred in Failing to Consider Whether the CBA Unconstitutionally Stripped the People of the Town of Monroe of their Appointing Power

The Constitution leaves to the public a right to appoint and terminate certain exempt employees at-will. Employee classes subject to the civil service exam do not serve subject to this public right of appointment and termination. To provide an appointed exempt employee with the job protections of the Civil Service Law violates the New York State Constitution by stripping the public of its appointing power.[3]

[3] "Mandamus will not lie to compel restoration to office or employment where the office or employment is held at the pleasure or will of the appointing power." 55 C.J.S. Mandamus § 288 (citing *Penny v. Kirk*, 260 A.D. 886).

The Court of Appeals has long held that the appointing authority has a right to "dispense with the services of one who has no right to the position." *People ex rel. Hannan v. Bd. of Health of City of Troy*, 153 N.Y. 513, 519, 47 N.E. 785, 7 E.H. Smith 513 (1897). Article V, Section 6 of the New York State Constitution recognizes that the power to appoint and in turn, to terminate, belongs to the legislature and leaves to the legislature, thus it belongs to the electorate. The Public's Appointing Power is recognized by many Courts throughout the country as a right belonging to the public which cannot be contracted away.

Recently, the Supreme Court of Alabama held, "The Commission is authorized by the local law to hire a county engineer only on an at-will basis, and the Commission exceeded that authority when it attempted to contract away the power to terminate Robbins's employment at its pleasure." *Robbins v. Cleburne Cnty. Commn.*, 300 So. 3d 573, 578, 2020 IER Cases 34709, 2020 WL 502541 (Ala. 2020).

The Supreme Court of West Virginia reached the same conclusion in *Williams v. Brown*, 190 W.Va. 202, 205, 437 S.E.2d 775, 778 (1993) (quoting *Barbor v. County Court*, 85 W.Va. 359, 363, 101 S.E. 721, 722-23 (1920)):

> Where a statute conferring the power to appoint fixes no definite term of office, but provides that the tenure shall

> be at the pleasure of the appointing body, the implied power to remove such appointee may be exercised at its discretion, and cannot be contracted away so as to bind the appointing body to retain him in such position for a definite, fixed period.

Also, the Supreme Court of Minnesota in *Jensen v. Indep. Consol. Sch. Dist. No. 85, Hennepin County*, 160 Minn. 233, 236–37, 199 N.W. 911, 913 (1924):

> This right which the board has to release the superintendent at its pleasure is a public right, and exists for a public purpose. The school board cannot by contract deprive itself of such right. Under our statute the district has in its discretion the inalienable power to remove the superintendent at any time. It cannot contract to keep him in office for any time certain. It cannot renounce or agree not to exercise its power of removal at pleasure.

Equally, the Supreme Court of Georgia held, 'the appointee holds at the pleasure of the appointing power, although it was attempted by the appointing power to fix a definite term." *Wright v. Gamble*, 136 Ga. 376, 381, 71 S.E. 795, 797 (1911) (quoting Parsons v. Breed, 126 Ky. 759, 768, 104 S.W. 766, 768 (1907)).

One Federal Court, even if only in an unreported decision, has held that this appointing and dismissal power cannot be contracted away under the New York Constitution, holding, "Consequently, a person holding an administrative position by appointment or contract of employment without compliance with the provisions of the [New York State] Constitution, has no legal right which is violated by a discharge." *Clark v. Mercado*, 96-CV-0052E(F), 2002 WL 433043, at *10

(W.D.N.Y. Feb. 14, 2002) (*citing " Palmer v. Board of Educ. of Union Free Sch. Dist*., 276 N.Y. 222, 229 (1937) ("There can be no right to make an appointment or contract which would create a legal right of tenure where the Constitution forbids such right.")). Its conclusion is well supported.

Indeed, it is well settled that "[t]he equitable powers of the courts may not be invoked to sanction disregard of statutory safeguards and restrictions." *See Seif v. City of Long Beach*, 286 N.Y. 382, 388 (1941):

> Mere acceptance of benefits by the city under a contract made without authority does not estop a municipal corporation from challenging the validity of the contract and from denying liability for materials furnished or services rendered under a contract not made or ratified by a board or officer acting under authority conferred by law and in the manner prescribed by law. 286 N.Y. 382, 387.

Likewise, "mutual understandings and customs could not create a property interest for purposes of due process when they are contrary to the express provisions of regulations and statutes." *Baden v. Koch*, 638 F.2d 486, 492 (2d Cir. 1980). "The creation of an obligation against a municipality by way of contract can only result from an affirmative determination to create the obligation in the form and manner provided by statute." *City of Zanesville, Ohio v. Mohawk Data Scis. Corp.*, 97 A.D.2d 64, 66, 468 N.Y.S.2d 271, 273 (4th Dept. 1983).

> Those dealing with officers or agents of municipal corporations must at their peril see to it that such officers

> or agents are acting within their authority (*Schumacher Stone Co. v. Village of Columbus Grove,* 73 Ohio App. 557, 563, 57 N.E.2d 251) and they have no right to presume that the persons with whom they are dealing are acting within the line of their authority (*McDonald v. Mayor etc. of N.Y.,* 68 N.Y. 23, 27). Since the authority of such officers and agents is a matter of public record, there is a conclusive presumption that persons dealing with them know the extent of their authority (*Lindlots Realty *67 Corp. v. County of Suffolk,* 278 N.Y. 45, 53, 15 N.E.2d 393; see, generally, 10 McQuillin, Municipal Corporations [3d ed.], § 29.04). Although application of this rule results in occasional hardship, it has been held that the loss should be ascribed to the negligence of the person who failed to ascertain the authority vested in the public agency with whom he dealt and "statutes designed to protect the public should not be annulled for his benefit." (*McCloud & Geigle v. City of Columbus,* 54 Ohio St. 439, 453, 44 N.E. 95). Common sense dictates this course of action since statutory requirements could otherwise be nullified at the will of public officials to the detriment of the taxpaying public, and funds derived from public taxation could be subjected to waste and dissipation. *City of Zanesville, Ohio v. Mohawk Data Scis. Corp.*, 97 A.D.2d 64, 66–67, 468 N.Y.S.2d 271, 273 (4th Dept. 1983).

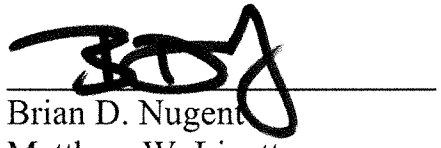
The CBA's creation of an appointed exempt employee who cannot be terminated at-will was unconstitutional and violated Article V, Section 6. No call for equity can be invoked to sanction the constitutional violation. Case law is clear that the individual who contracted with the municipality, not the taxpayers, is entitled to no benefit from the contract entered into by the municipality without authority. Accordingly, the Judgment of the Supreme Court should be reversed,

and a judgment entered in favor of the Town on its motion to dismiss the petition to compel arbitration.

CONCLUSION

For these reasons, if the Court holds that there is no appeal as of right, it should grant leave to appeal the Decision and Order of the Appellate Division on the prior appeal.

Dated: May 18, 2022
South Nyack, New York



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Attorneys for Respondent-Appellant Town of Monroe

Exhibit A

SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

TEAMSTERS LOCAL 445,

Petitioner,

-against-

TOWN OF MONROE,

Respondent.

DECISION AND ORDER

Index No: 52247/2017

The following papers were read and considered on respondent's motion to dismiss:

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
AFFIDAVIT IN SUPPORT
AFFIDAVIT IN SUPPORT
EXHIBITS 1-11

AFFIRMATION IN OPPOSITION

Respondent Town of Monroe moves to dismiss this special proceeding petitioner commenced pursuant to CPLR 7503 to compel arbitration. On or about February 27, 2017, the Town terminated Catherine Troiano who was employed as secretary to the Town Planning Board. Petitioner asserts that Troiano was a union member covered by a collective bargaining agreement ("CBA") in which the Town agreed to arbitrate any unresolved grievances of covered members. Respondent moves to dismiss the petition asserting that Troiano was an at-will employee in the exempt class of Civil Service not entitled to Civil Service protection. Respondent also claims that petitioners failed to make a timely demand for arbitration.

Generally, "public policy in this State favors arbitral resolution of public sector labor disputes." City of Long Beach v CSEA, Inc.-Long Beach Unit, 8 NY3d 465 (2007). However, arbitration is essentially a creature of contract and thus parties may not be compelled to participate in an arbitration unless they have clearly agreed to do so. See Intl. Aviation Services of New York, Inc. v Flagsim Co, Inc., 43 AD2d 971 (2nd Dep't 1974). A public employer is free to negotiate any controversy only in the absence of plain and clear prohibitions in statute, controlling decisional law

or restricted public policy. City of Oneida v Oneida City Unit, 78 AD2d 727 (3rd Dep't 1980). "The question of arbitrability in the public sector is subject to a two-tiered analysis. It must first be determined whether there is any statute, decisional law or public policy precluding a public employer from agreeing to refer the dispute to arbitration." Id. The parties must also have agreed in their collective bargaining agreement to refer the particular matter to arbitration. Id; Matter of City of Johnstown, 99 NY2d 273 (2002).

Respondent maintains that Troiano did not hold a non-competitive Civil Service position in the Town that would afford her the benefit of arbitration and grievance procedures in the CBA and under Civil Service Law§75. It emphasizes that the secretary to a planning board is statutorily classified as an exempt position under Civil Service Law §41. However, the mere fact that her position was classified as exempt under the Civil Service Law is not dispositive of whether she is entitled to grieve and arbitrate her termination under the CBA entered into between the parties. If 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.

CBA §3.2 expressly provides that the secretary to the planning board is included in the bargaining unit governed by the CBA. Article 11 of the agreement further provides that the union may file a formal complaint on behalf of aggrieved members of the bargaining unit and submit a matter to arbitration if not satisfied with the Town's written response to a grievance. §11.2 of the CBA entitled "Disciplinary Procedure" provides that discipline shall be in accordance with the statutory provisions set forth in Civil Service Law §§75 and 76 and that the Town will provide written notices of discipline containing all charges and specifications and the penalty sought. Notably, that section expressly exempts the bookkeeper to the Town Supervisor from such procedures, stating that the union may not challenge the termination of the bookkeeper under any circumstances. There is no similar provision pertaining to the planning board secretary.

The foregoing terms of the CBA clearly gave Troiano, in her capacity as planning board secretary, the right to pursue the grievance procedures and ultimately arbitration. The mere fact that she was exempt as a Civil Service employee did not bar the Town from providing her such protections as a matter of contract. Nor has the Town demonstrated that affording Troiano such protections violates any statute, decisional law or public policy. None of the cases respondent cites involve a collective bargaining agreement that expressly grants an exempt employee the right to challenge disciplinary actions or termination. Contract provisions in collective bargaining agreements may modify, supplement or replace the more traditional forms of protection afforded public employees under the Civil Service Law. See generally Dye v New York City Transit Authority, 88 AD2d 899 (2nd Dep't 1982). Respondent's reliance on City of Long Beach v CSEA, Inc., 8 NY3d 465 (2007) is misplaced. In that case, the court held that it was against public policy for a contract to require an arbitration pertaining to the termination of provisional appointments. In contrast, Troiano was not a provisional appointment. She was a non-provisional employee hired to work as secretary to the Town Planning Board and was expressly afforded rights to challenge her termination under the CBA. 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 of merit selection.

The court further rejects respondent's claim that petitioners failed to properly file a demand for arbitration. The CBA provides that the union is required to file a demand for arbitration with the Town Supervisor within 14 days of receiving the Town Board's response to a grievance or when such response should have been received. On April 3, 2017, the union's attorney sent an e-mail to various individuals, including the Town Supervisor at his e-mail address, stating that the union had not received a second step decision concerning Troiano's termination, and that pursuant to CBA §11.1.4 "the Union is submitting to the Town Supervisor a demand for arbitration." The e-mail further requests that the Town have someone contact counsel for the purpose of facilitating the selection of a panel of arbitrators. There is nothing in the CBA barring a demand for arbitration to be filed by e-mail and it is undisputed that the April 3, 2017 e-mail was timely sent to the Town Supervisor. The mere fact that it was sent to other individuals as well as the Town Supervisor does not make it invalid. It was sent to the supervisor and it stated that the union is submitting a demand for arbitration. Its content was sufficient to constitute a demand as required under the CBA.

Based on the foregoing, it is hereby

ORDERED that respondent's motion to dismiss the verified petition is denied. Respondent is hereby directed to either file an answer to the petition or notify the court that they do not intend to oppose the petition within 30 days of the entry of this decision and order.

This constitutes the decision and order of the court.

Dated: September 29, 2017
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

Brian D. Nugent, Esq.
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96 South Broadway
South Nyack, NY 10960

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350 W. 31st Street, Suite 401
New York, NY 10001

Scanned to the E-File System only

Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of

its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

Exhibit B

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D64602
G/afa

_____AD3d_____ Argued - March 24, 2020

MARK C. DILLON, J.P.
JOSEPH J. MALTESE
BETSY BARROS
FRANCESCA E. CONNOLLY, JJ.

2017-11372 DECISION & ORDER

In the Matter of Teamsters Local 445, respondent,
v Town of Monroe, appellant.

(Index No. 52247/17)

Feerick Lynch MacCartney & Nugent, PLLC, South Nyack, NY (Brian D. Nugent of counsel), for appellant.

Lewis Clifton & Nikolaidis, P.C., New York, NY (Julian J. Gonzalez of counsel), for respondent.

In a proceeding pursuant to CPLR article 75 to compel arbitration, the Town of Monroe appeals from an order of the Supreme Court, Dutchess County (Maria G. Rosa, J.), dated September 29, 2017. The order denied the motion of the Town of Monroe to dismiss the petition.

ORDERED that the order is affirmed, with costs.

The petitioner, Teamsters Local 445, commenced this proceeding pursuant to CPLR article 75 to compel arbitration of a dispute regarding the termination of Kathryn Troiano from her position as secretary to the Town of Monroe Planning Board. The Town of Monroe moved to dismiss the petition, asserting that the dispute was nonarbitrable and that the petitioner failed to make a timely demand for arbitration. In an order dated September 29, 2017, the Supreme Court denied the Town's motion. The Town appeals.

A dispute between a public sector employer and an employee is arbitrable if it satisfies a two-prong test: "First, the court must determine whether there is any statutory, constitutional, or public policy prohibition against arbitrating the grievance. If there is no prohibition against the arbitration, the court must determine whether the parties agreed to arbitrate the particular

dispute by examining their collective bargaining agreement" (*Matter of Board of Educ. of the Yonkers City Sch. Dist. v Yonkers Fedn. of Teachers*, 180 AD3d 1041, 1042 [citations and internal quotation marks omitted]; *see Matter of County of Chautauqua v Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO, County of Chautauqua Unit 6300, Chautauqua County Local 807*, 8 NY3d 513, 519; *Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, 153 AD3d 617, 617-618).

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 (Civil Service Law § 41; *see Matter of State of N.Y. Unified Ct. Sys. v Association of Surrogate's & Supreme Ct. Reporters Within the City of N.Y.*, 104 AD3d 621, 621; *Matter of Incorporated Vil. of Lake Grove v Civil Serv. Empls. Assn.*, 118 AD2d 781, 782; *cf. Matter of City of Long Beach v Civil Serv. Empls. Assn., Inc.–Long Beach Unit*, 8 NY3d 465).

We further agree with the Supreme Court's determination that the parties agreed, in their collective bargaining agreement (hereinafter CBA), to arbitrate the dispute. The CBA authorized the petitioner to file grievances, and ultimately demand arbitration, on behalf of bargaining unit employees, including the secretary to the Planning Board, irrespective of her class designation under the Civil Service Law (*see Matter of Ruiz v County of Rockland*, 138 AD3d 999, 1000). Where, as here, the relevant arbitration provision of the CBA is broad, providing for arbitration of any grievance involving "a claimed violation, misinterpretation or inequitable application" of the CBA, a court "should merely determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA" (*Matter of Board of Educ. of Watertown City School Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 143; *see Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, 176 AD3d 1197, 1199). "If there is, the court should rule the matter arbitrable, and the arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them" (*Matter of Board of Educ. of Watertown City School Dist. [Watertown Educ. Assn.]*, 93 NY2d at 143; *see Matter of Rockland v Superior Officers Council of the Sheriff's Corr. Officers Assn. of Rockland County*, 178 AD3d 821, 823).

Here, a reasonable relationship exists between the subject matter of the dispute and the general subject matter of the CBA (*see Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, 176 AD3d at 1199). The issue of whether Troiano was afforded tenure protections within "the scope of the substantive provisions of the CBA is a matter of contract interpretation and application reserved for the arbitrator" (*Matter of Village of Garden City v Professional Firefighters Assn. of Nassau County, Local 1588*, 161 AD3d 1086, 1089; *see Board of Educ. of Lakeland Cent. School Dist. of Shrub Oak v Barni*, 49 NY2d 311, 314-315; *Matter of Ruiz v County of Rockland*, 138 AD3d at 1000).

The Town's contention that the petitioner did not properly file its demand for arbitration pursuant to the CBA is a matter of procedural arbitrability to be resolved by the arbitrator (*see Matter of Enlarged City School Dist. of Troy [Troy Teachers Assn.]*, 69 NY2d 905, 907; *Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 8-9; *Matter of City of Watertown*

[Watertown Professional Firefighters' Assn. Local 191], 152 AD3d 1231, 1234; *Matter of Incorporated Vil. of Floral Park v Floral Park Police Benevolent Assn.*, 131 AD3d 1240, 1242).

Accordingly, we agree with the Supreme Court's determination denying the Town's motion to dismiss the petition.

DILLON, J.P., MALTESE, BARROS and CONNOLLY, JJ., concur.

ENTER:

Aprilanne Agostino

Aprilanne Agostino
Clerk of the Court

SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION SECOND DEPT.
I, APRILANNE AGOSTINO, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this copy with the original filed in my office on NOV 12 2020 and that this copy is a correct transcription of said originial.
IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on NOV 12 2020
Aprilanne Agostino

Exhibit C

State of New York
Court of Appeals

Decided and Entered on the ninth day of September, 2021

Present, Hon. Janet DiFiore, *Chief Judge,* ***presiding.***

SSD 49
In the Matter of Teamsters Local 445,
Respondent,
v.
Town of Monroe,
Appellant.

Appellant having appealed to the Court of Appeals in the above title;

Upon the papers filed and due deliberation, it is

ORDERED, that the appeal is dismissed without costs, by the Court *sua sponte*, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution.

John P. Asiello
Clerk of the Court

Exhibit D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

TEAMSTERS LOCAL 445,

Petitioner,

DECISION, ORDER AND JUDGMENT

-against-

Index No. 52247/17

TOWN OF MONROE,

Respondent.

The following papers were read and considered on this petition to compel arbitration:

NOTICE OF PETITION
VERIFIED PETITION
AFFIRMATION IN SUPPORT (erroneously entitled "Affidavit")
EXHIBITS A - G

VERIFIED ANSWER

On August 24, 2017, the Teamsters Local 445, Petitioner, commenced this proceeding pursuant to CPLR Article 75 to compel arbitration of a dispute regarding the termination of an employee of Respondent Town of Monroe, Kathryn Troiano. By notice of motion filed September 8, 2017, Respondent moved to dismiss. On September 29, 2017, this court denied the motion to dismiss and directed Respondent to file an answer within thirty days. Instead of answering, Respondent appealed. The notice of appeal was filed October 17, 2017.

On November 12, 2020, the Appellate Division, Second Department affirmed this court's denial of the motion to dismiss. The Appellate Division noted that there is no statutory, constitutional or public policy prohibition against arbitration; that the parties agreed to arbitrate; that there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the collective bargaining agreement; that the issue of whether Kathryn Troiano was afforded tenure protections within the scope of the substantive provisions of the collective bargaining agreement is a question for the arbitrator; and that the Town's assertion that the demand for arbitration was not properly filed is also for the arbitrator to determine.

On September 9, 2021, the Court of Appeals dismissed Respondent's appeal to it on the ground that the order denying dismissal of the petition to arbitrate did not finally determine the proceeding.

It was not until November 3, 2021, that Respondent filed an answer. This court directed the answer to be filed within thirty days of the denial of the motion to dismiss. Through correspondence, counsel argued as to whether the matter was stayed pending appeal. This court determined that it was. As the Court of Appeals dismissed the appeal on September 9, 2021, the answer should have been filed, at the very latest, by October 9, 2021. Respondent's counsel advised the court by letter dated and filed September 28, 2021, that it would file its answer on or before October 27, 2021. It did not. The court attorney responded that the matter was calendared for control purposes only for November 3, 2021. That was not a decision or order modifying the deadline. Therefore, the answer was filed late.

As to the substance of the petition and answer, the only issues that remain which were not dispensed with by the Appellate Division's decision are Respondent's contentions that arbitration cannot be compelled because the collective bargaining agreement has expired, Petitioner no longer represents the Respondent's employees, and that Troiano cannot be reinstated because the bargaining unit no longer exists. The Court finds that Respondent's contentions are without merit. "[T]he duty to arbitrate a dispute arising during the term of the agreement survives the expiration thereof" (*D'Addario v Weinstein*, 211 AD2d 633, 634 [2d Dept 1995] [internal quotations and citations omitted]). Here, the right to arbitrate accrued under the collective bargaining agreement while it was in effect. As such, the right to arbitration survived the expiration of the agreement (*see Fairfield Towers Condo. Ass'n v Fishman*, 1 AD3d 252, 254 [1st Dept 2003], citing *Litton Fin. Print. Div. v National Labor Relations Bd.*, 501 US 190, 208 [1991]). The appropriate remedy available to Troiano should the arbitrator find in her favor is for the arbitrator to determine (*see e.g., Fairfield Towers Cond. Ass'n v Fishman*, 1 AD3d at 254).

Based upon the foregoing, the petition to compel arbitration is granted.

The foregoing constitutes the decision, order and judgment of the Court.

Dated: January 21 ,2022
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

2

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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Exhibit E

SUPREME COURT OF NEW YORK
COUNTY OF DUTCHESS

----------X

TEAMSTER LOCAL 445

Petitioner – Respondent

-against-

TOWN OF MONROE

Respondent – Appellant

----------X

Index No. 2017-52247

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of a DECISION, ORDER and JUDGMENT duly Entered in the office of the Supreme Court, State of New York County of Dutchess on the 21st day of January 2022.

Dated: April 19, 2022

Signature: _____

Print Name: Louie Nikolaidis

Address: Lewis, Clifton & Nikolaidis
227 West 29th Street, Suite 9R
New York, NY 10001