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EVERETT E. LEWIS (1924-2007)

June 13, 2022

Via UPS Overnight

Lisa LeCours, Chief Clerk
State of New York Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: Teamsters Local 445 v. Town of Monroe
Mo. No. 2022-407

Dear Ms. LeCours:

We are attorneys for the Respondent Teamsters Local 445 ("Respondent") in the above referenced matter. Pursuant to your June 6, 2022, letter, we submit this jurisdictional response letter to address the issue identified for review by the Court of Appeals. That issue is:

1) Whether a substantial constitutional question is directly involved to support an appeal as of right.

INTRODUCTION

This matter arose when the Employer, 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 Respondent Union. Certain titles, including Ms. Troiano's title, were explicitly written into the recognition clause of the CBA, voluntarily agreed to by the Town. The CBA requires just cause before a covered employee can be terminated.

The Union filed a grievance concerning Ms. Troiano's firing and, when the parties could not resolve the matter, filed a Demand for Arbitration. When the Town refused to arbitrate the case, the Union petitioned to compel arbitration through an Article 75 proceeding. Supreme Court Judge Maria Rosa granted the petition to compel arbitration specifically finding 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. That decision was upheld by the Appellate Division. The 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."

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.

The Petitioner fails to present any authority to challenge what the lower courts considered well established precedent. Nor do they even mention 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 an employee.

POINT I

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

Because there is no basis for the Court to find that arbitration of Troiano's grievance would violate a statute, decisional law, public policy or the Constitution, the Court should not grant leave to appeal this matter.

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 Article 41 of the Civil Service Law where 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.

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 the Civil Service Law. NY CIV SERV § 1, *et seq.* However, merit selection is not required for all positions. Among other exceptions, Article 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. NY CIV SERV § 41. "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. *See* NY CIV SERV § 41.

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." NY CIV SERV § 75. 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.").

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." *New York City Transit Authority v. TWU Local 100, supra,* at 7.)

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).

Article 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." NY CIV SERV § 65(1). 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. NY CIV SERV § 65.

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,* 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. "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."

Article 41 of the Civil Service Law differs markedly from Article 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

For the reasons stated above there are no substantial constitutional questions involved in this case to support an appeal as of right.

Respectfully submitted,

Louie Nikolaidis

cc: Brian Nugent
Rachael M. MacVean

COURT OF APPEALS
OF THE STATE OF NEW YORK
----------X

TEAMSTER LOCAL 445

Petitioner – Respondent

- against-

TOWN OF MONROE

Respondent – Appellant

----------X

AFFIDAVIT OF SERVICE OF LETTER IN OPPOSITION TO APPELLANT'S LEAVE TO APPEAL

MO. NO. 2022-407

State of New York }ss:
County of New York }ss:

LOUIE NIKOLAIDIS, being duly sworn, deposes and says:

1) I am over the age of 18 and not part of this action.

2) On the 13th day of June 2022, I served a copy of the attached Letter In Opposition to Appellant's Leave to Appeal on:

Brian D. Nugent, Esq.

By putting it in a stamped envelope and mailing it to:
Brian D. Nugent, Esq.
Feerick Nugent MacCartney
96 South Broadway
South Nyack, New York, 10960

(Signature of Deponent)

Sworn to before me this 13th Day
Of June, 2022

(Notary Public)

KAY F. MCSWEEN
Notary Public, State of New York
No. 01MC6079104
Qualified in Kings County
Commission Expires August 12, 2022