

**STATE OF NEW YORK
SUPREME COURT**

SULLIVAN COUNTY

In the Matter of the Application of
COUNTY OF SULLIVAN,

Petitioner,

To vacate An Arbitrator's Award Pursuant to
Article 75 of the Civil Practice Law and Rules

**Decision & Order
Index No.: 1501-12**

-against-

**LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL NO. 17,**

Respondent.

Supreme Court, Sullivan County
Motion Return Date: June 27, 2012
RJI No. 52-32961-2012

Present: Christopher E. Cahill, JSC

Appearances:

Roemer Wallens Gold & Mineaux LLP
Attorneys for petitioner
13 Columbia Circle
Albany, New York 12203
By: James W. Roemer, Jr., Esq.
Jonathan H. Kerr, Esq.

Meyer, Suozzi, English & Klein, PC
Attorneys for respondent
1350 Broadway, Suite 501
New York, New York 10018
By: Richard S. Corenthal, Esq.
Joni H. Kletter, Esq.

Cahill, J.:

This is a proceeding brought pursuant to CPLR 7511 (b) (1) (iii) to vacate the Award and Opinion dated March 1, 2012 of Josef P. Sirefman, Arbitrator (the Award),

which found in favor of respondent Laborers International Union of North America, Local No. 17 (the Union) on its grievance alleging a violation by petitioner County of Sullivan (the County) of Article II, Section 201 and Article VIII, Sections 814.3 and 815 of the Collective Bargaining Agreement covering the period January 1, 2008 through June 30, 2012 (the Agreement). Petitioner seeks to vacate the Award on the grounds that 1) Arbitrator Sirefman acted in excess of his power; 2) the Award violates important public policy considerations; and 3) the Award was so imperfectly executed that it was not final and definite.

The Arbitrator found the following undisputed facts. The County and the Union entered into a contract covering positions in the Department of Public Works, which included the Monticello Landfill and several transfer stations, covering January 1, 2008 through June 30, 2012. In 2009, due to economic difficulties, the County decided to eliminate approximately 100 positions, which led to the lay-off of many employees. The Monticello Landfill was closed. Following discussions with the Union, the County restructured the solid waste operations, and 15 jobs of Department of Public Works employees, who remained covered by the Union, were preserved.

In its grievance and demand for arbitration dated March 1, 2010, the Union alleged that when the Monticello Landfill position of Senior Account Clerk/Typist, a Competitive Class position in the Union's bargaining work unit held by Kim Szabo-Lutz for the previous ten years, was abolished, the County improperly transferred the bargaining unit work out of the bargaining unit to the County's Treasurer's Office at the Government Center, which is represented by the International Brotherhood of Teamsters Local 445. As a result, Ms. Szabo-Lutz bumped Rosetta Austin who had been working in the Department of Public Works in the position of Senior Account Clerk; and Ms. Austin was laid off. The Union asserted that the position of Senior Account Clerk/Typist should be restored to its bargaining unit and that the affected employees should be restored to their former positions in the bargaining unit.

A hearing was held on September 28, 2010, May 3, 2011 and June 20, 2011, at which testimony was heard from Ms. Szabo-Lutz and Ms. Austin, as well as other County

employees and a Union representative. According to the testimony, the job duties previously performed by Ms. Szabo-Lutz in the Senior Account Clerk/Typist position (classified as Grade 4) were assigned to a newly created position in the County Treasurer's Office entitled User Fee Collection Specialist and allocated to the Competitive Class in the bargaining work unit of the International Brotherhood of Teamsters Local 445. Ms. Szabo-Lutz testified that she trained the employee hired to the position of User Fee Collection Specialist.

Testimony was also received on the bumping process which lead to Ms. Szabo-Lutz, who had seniority, retreating to the position of Senior Account Clerk (classified as Grade 3) in the Public Works Department, formerly held by Ms. Austin, who was laid off. The employee provisionally hired for the position of User Fee Collections Specialist was unable to perform the necessary job duties and was terminated. The position of User Fee Collections Specialist was reclassified as Senior Account Clerk. Ms. Austin, who was on the preferred list for hiring in that position, was hired back to the position of Senior Account Clerk in the Treasurer's Office, performing the job duties formerly assigned to the User Fee Collections Specialist and Senior Account Clerk/Typist. Ms. Austin testified that she spent about five hours out of the seven-hour work day devoted to job duties formerly carried out by the Senior Account Clerk/Typist. The record further discloses that Ms. Austin has since been promoted to the position of Principal Account Clerk in the Treasurer's Office.

After the conclusion of the hearing, Arbitrator Sirefman found, as is relevant herein:

4. The County violated Article II, Section 201 and Article VIII 814.3 and 815 [sic] of the Agreement by transferring bargaining unit member Kim Szabo-Lutz's Senior Account Clerk/Typist job duties out of the Department of Public Works unit to the Treasurer's Office, causing the layoff of Bargaining unit member Rosetta Austin, a Senior Account Clerk.

The Arbitrator remanded the matter to the parties for "mutual resolution in accordance with the opinion herein," retaining jurisdiction to re-open to hear and determine the

remaining issues in the event that the parties had not resolved the matter by May 1, 2012. To the Court's knowledge, no further hearing or determination has occurred to date.

Courts are not only obligated to give deference to the decision of the arbitrator (N.Y. City Transit Authority v Transportation Workers' Union, Local 100, 6 NY3d 332, 336 [2005]), they "are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies" (New York State Correctional Officers & Police Benevolent Ass'n v State, 94 NY2d 321, 326 [1999]). "An arbitration award may be vacated on three narrow grounds: 'it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power' " (Matter of Board of Educ. of Arlington Cent. School Dist. v Arlington Teachers Assn., 78 NY2d 33, 37, . . . [1991] [citations omitted]) (United Federation of Teachers, Local 2 v Board of Education, 1 NY3d 72, 79 [2003]).

Article II, Section 201 states, "The Employer recognizes the Union as the sole and exclusive bargaining agent for the purposes of establishing salaries and working conditions and the administration of grievances arising thereunder, . . ." Article VIII, Section 814.3 states, as is relevant herein:

In the event of a reduction in the work force in the Competitive Class[,] employees who hold a permanent position in a title, may displace another employee serving in the same title, or in a title in direct line of promotion, provided, however, that no employee shall displace any other employee having greater seniority.

Section 815 reads, in relevant part, "When the work force is increased after a lay-off, employees will be recalled according to seniority. Notice of recall shall be sent to the employee The Union shall be notified at the same time."

The County contends that the Agreement did not contain any provisions concerning the transfer of bargaining unit work. Therefore, the Arbitrator exceeded his powers by irrationally construing Article II, Section 201 and Article VIII, Sections 814.3 and 815 of the Agreement so as to include a prohibition against transferring bargaining unit work. The County further argues that in irrationally construing these provisions so as to include a prohibition against transferring bargaining unit work, the Arbitrator rewrote

the Agreement, exceeding his powers as set forth in Article XVIII, Section 1803 (d) of the Agreement, which states that the Arbitrator shall not amend, modify or delete any provisions of the Agreement.

“An arbitrator is charged with the interpretation and application of the agreement” (N.Y. City Transit Authority v Transportation Workers' Union, Local 100, supra). The Court is precluded from substituting its judgment for that of the arbitrator simply because it believes its interpretation of the Agreement would be better than that of the Arbitrator (see New York State Correctional Officers & Police Benevolent Ass'n v State, supra). “Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice” (id.).

Ms. Szabo-Lutz testified that she trained the new User Fee Collections Specialist in her former job duties, using the computer programs and computer formerly in her office at the Landfill. Ms. Austin testified that when she was rehired to the Treasurer's Office position of Senior Account Clerk, she performed the job duties formerly performed by Ms. Szabo-Lutz in the Landfill position of Senior Account Clerk/Typist.

The Court has reviewed the Agreement, particularly the “recognition clause” set forth in Article II, Section 201, in the context of the hearing testimony and finds that it was not irrational for the Arbitrator to determine that the transfer of Ms. Szabo-Lutz's job duties outside of the Union's bargaining work unit was prohibited by Article II, Section 201. Nor was it irrational for the Arbitrator to find that Article VIII, Sections 814.3 and 815 were thereafter implicated when Ms. Szabo-Lutz retreated to the position of Senior Account Clerk, formerly held by Ms. Austin, and Ms. Austin was bumped and laid off. Further, it was not irrational to construe the “recognition clause” so as to prohibit the abolishment of a bargaining work unit position while transferring and continuing the job duties outside of the bargaining work unit covered by the contract. Accordingly, the Arbitrator did not amend, modify or delete any contract provision (see Rockville Centre Teachers Association v Board of Education, 48 AD2d 698 [2d Dept 1975]; Hammondsport Central School District v Hammondsport Non-Teaching Personnel Organization, 261 AD2d 874 [4th Dept 1999]).

Alternatively, the County argues that PERB has exclusive jurisdiction over this dispute. The County, however, failed to provide any legal authority to demonstrate that this matter would not be subject to the established law that PERB has no jurisdiction over disputes concerning Collective Bargaining Agreements (see Roma v Ruffo, 92 NY2d 489 [1998]; Civil Service Law 205 [5] [d]). The Arbitrator found that the dispute concerned the interpretation or application of the Collective Bargaining Agreement. The Court finds that this determination was a reasonable assessment of the underlying facts and applicable law. Article XVIII, Sections 1801(a), 1802 and 1803 of the Agreement permits the Union to submit any “claimed dispute as to the application or interpretation of this Agreement” to the grievance procedure, which includes arbitration.

“Judicial restraint under the public policy exception is particularly appropriate in arbitrations pursuant to public employment collective bargaining agreements” (N.Y. City Transit Authority v Transportation Workers Union of America, 99 NY2d 1, 7 [2002]). Furthermore, “in labor disputes, arbitrators are mutually chosen by labor and management because of their particular expertise and insight” (Ibid. at p. 8) into the labor/management relationship; and the Courts may not “intervene in this stage of the collective bargaining process in pursuit of their own policy views, or because they simply disagree with the arbitrator's weighing of the policy considerations” (id; N.Y. City Transit Authority v Transportation Workers' Union, Local 100, supra).

Furthermore, the County has failed to articulate any strong public policy which has been implicated by the Arbitrator's determination. While the County claims that its rights under Civil Service Law 80 and 81 give it the authority to consolidate, abolish or transfer positions, the Arbitrator clearly and rationally found that the County's authority under Civil Service Law 80 and 81 was not an issue in the proceeding. The Arbitrator determined that the dispute was not about statutes, but about the interpretation and application of the terms of the Agreement. The Arbitrator's determination did not state that the County could not abolish positions or exercise its authority pursuant to the Civil Service Law; it stated that when the job duties of a position are transferred out of the bargaining unit, into another bargaining unit represented by another union, without

notification and discussion, the position is not abolished since it has been improperly transferred in violation of the Agreement. This determination is not irrational and does not violate public policy considerations. Finally, the Court notes that the Arbitrator's decision does not create a "job security" clause. Unlike the Village in Matter of Johnson City Professional Firefighters Local 921 v Village of Johnson City (18 NY3d 32 [2011]), the County continues to have the right to abolish the position and/or to exercise any other of its rights pursuant to Article XVII.

An arbitrator's remand for the parties to fashion a resolution based on the decision is not deficient and subject to vacatur simply because the parties may be unable to resolve the issue without further intervention (see Meisels v Uhr, 79 NY2d 526, 536 [1992]). In this case, the County contends that the Award did not determine the parties' rights and obligations, did not resolve the controversy and created new controversies. The County claims that in response to the remand, the Union sought reinstatement of Ms. Szabo-Lutz to the position of Senior Account Clerk/Typist in the bargaining unit--which the County continues to claim was abolished--with restoration of lost wages, restoration to Ms. Austin of lost wages and benefits, restoration of Union dues to Local 17, as well as restoration of lost benefits to another unnamed employee claimed by the Union to have been affected by Ms. Austin's promotion in the Treasurer's Office. In the petition, the Union asserts that the only remaining issue is the ministerial calculation of lost wages by those affected by the improper transfer of job duties.

The Court finds that the Arbitrator answered the question posed by the parties and determined the dispute between the parties by finding that the Senior Account Clerk/Typist position was, in fact, not abolished and that the consequent retreat of Ms. Szabo-Lutz and "bumping" of Ms. Austin was not proper and violated the Agreement. Therefore, the affected employees are entitled to be made whole. If the parties cannot agree on how to achieve this, the arbitration hearing must be re-opened in conformance with the Award.

The Court has reviewed petitioner's remaining contentions and find them to be without merit.

Accordingly, as petitioner has failed to demonstrate that the Arbitrator's decision was irrational, in violation of a strong public policy or in excess of a specific limitation, the petition must be denied.

Therefore, it is

ORDERED that the verified petition is denied.

This shall constitute the decision and order of the Court. The original decision and order and all other papers are being delivered to the Supreme Court Clerk for transmission to the Sullivan County Clerk for filing. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: Kingston, New York
September 24, 2012

ENTER,



CHRISTOPHER E. CAHILL, JSC

Papers considered: Notice of Petition and Verified Petition dated May 31, 2012 with exhibits, Affidavit of Carolyn Hill dated June 1, 2012 with exhibits, Memorandum of Law dated May 31, 2012; Verified Answer dated June 19, 2012 with exhibits, Memorandum of Law dated June 20, 2012; Reply Affirmation of James W. Roemer, Jr., Esq., dated June 26, 2012 with exhibit.