

NEW YORK COURT OF APPEALS

Matter of Kowaleski v. New York State Department of Correctional Services

16 N.Y.3d 85 (2010) · Decided December 21, 2010

SUMMARY

The New York Court of Appeals held that an arbitrator exceeded a specifically enumerated limitation on his power by refusing to consider and determine an employee's retaliation defense under Civil Service Law § 75-b. Because the arbitrator failed to separately determine whether the disciplinary action was retaliatory, the court vacated the arbitration award and remitted the matter for further proceedings. The court explained that a disciplinary action may be retaliatory even if the employee committed the alleged misconduct.

CASE DETAILS

COURT	New York Court of Appeals
WRITING FOR THE COURT	Ciparick, J.; Chief Judge Lippman; Judge Graffeo; Judge Read; Judge Smith; Judge Pigott; Judge Jones
JURISDICTION	New York
DECIDED	December 21, 2010
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal as of right from an Appellate Division order affirming Supreme Court's refusal to vacate an arbitration award under CPLR 7511.
STANDARD OF REVIEW	An arbitration award may be vacated under CPLR 7511(b)(1)(iii) when the arbitrator exceeded the specifically enumerated limitations on his or her power. Outside narrowly circumscribed exceptions, courts may not review an arbitrator's legal or factual errors.
PRECEDENTIAL VALUE	Published precedential opinion of the New York Court of Appeals.
PARTIES	Barbara Kowaleski v. New York State Department of Correctional Services

TOPICS

whistleblower

employment arbitration

statutory interpretation

appellate procedure

standard of review

PRACTICE AREAS

employment law

administrative law

arbitration

QUESTIONS PRESENTED

1. Whether an arbitrator was required under Civil Service Law § 75-b to consider and determine on the merits an employee's affirmative defense that disciplinary action was retaliatory for whistleblowing.
2. Whether the arbitrator's failure to separately consider the retaliation defense constituted an excess of power requiring vacatur of the arbitration award under CPLR 7511(b)(1)(iii).
3. Whether consideration of retaliation evidence in assessing witness credibility and guilt was sufficient to satisfy Civil Service Law § 75-b.

HOLDINGS

1. When an employee raises a Civil Service Law § 75-b retaliation defense in arbitration, the arbitrator must consider and determine the merits of that defense as part of the arbitration award, regardless of contrary limitations in the collective bargaining agreement.
2. The arbitrator exceeded a specifically enumerated limitation on his power by refusing to consider and determine Kowaleski's retaliation defense, requiring vacatur of the award under CPLR 7511(b)(1)(iii).
3. It was insufficient for the arbitrator merely to consider retaliation evidence in evaluating witness credibility and determining guilt; section 75-b required a separate determination of whether the disciplinary action was based solely on retaliatory motive.

KEY QUOTATIONS

“In short, the statute requires the arbitrator to consider and determine the merits of an employee’s retaliation defense where such a defense is raised” (91)

“A disciplinary action may be retaliatory even where an employee is guilty of the alleged infraction.” (92)

“This separate retaliation inquiry is critical.” (92)

FACTUAL BACKGROUND

Barbara Kowaleski, a correction officer employed by the New York State Department of Correctional Services, was charged with three disciplinary violations arising from events in September and October 2004. She asserted that the disciplinary action was retaliation for reporting a fellow officer's misconduct in 2002. The arbitrator found her guilty of two charges and upheld termination, but refused to separately consider the retaliation defense on the merits, reasoning that the collective bargaining agreement limited his authority to determining guilt, innocence, and the appropriateness of the penalty.

PROCEDURAL HISTORY

DOCS charged Kowaleski with three disciplinary violations and sought her termination. After an arbitration hearing, the arbitrator found her guilty of two charges and upheld discharge, declining to consider her Civil Service Law § 75-b retaliation defense as an affirmative defense. Supreme Court found that the arbitrator

exceeded his power but declined to vacate the award, and the Appellate Division affirmed. The New York Court of Appeals reversed, vacated the award, and remitted the matter to Supreme Court.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Vacate the arbitration award and remit the matter to Supreme Court for further proceedings consistent with the opinion, including discretionary consideration of whether any rehearing should be conducted before a different arbitrator.

CASES CITED

- Matter of Kowaleski [New York State Department of Correctional Services], 61 A.D.3d 1081 (3d Dep't 2009)
- Matter of New York City Transit Authority v. Transport Workers' Union of America, Local 100, AFL-CIO, 6 N.Y.3d 332, 336 (2005)
- Matter of Falzone v. New York Central Mutual Fire Insurance Co., 15 N.Y.3d 530, 534 (2010)
- Matter of Obot [New York State Department of Correctional Services], 89 N.Y.2d 883, 885-886 (1996)

OPINION

In re the Arbitration between Kowaleski & New York State Department of Correctional Services
16 N.Y.3d 85

CIPARICK, J.

OPINION OF THE COURT

Ciparick, J. Petitioner Barbara Kowaleski began her employment with the State Department of Correctional Services (DOCS) as a correction officer in 1981, and was assigned to the Hale Creek Correctional Facility (Hale Creek) in 1995. In October 2004, she was served with a notice of discipline (Notice) charging her with violating provisions of the employees' manual on three separate occasions in September and October 2004:1 (1) in September *892004, she allegedly "made inappropriate comments of a personal nature about another staff member in the presence of staff and inmates"; (2) in October 2004, she allegedly argued with a fellow employee; and (3) also in October 2004, she allegedly was "disrespectful and insubordinate" when she ignored a superior's order to stop interrupting another employee. The Notice called for her termination and the loss of any accrued leave. Kowaleski filed a grievance and, pursuant to a collective bargaining agreement (CBA), a hearing was held before an arbitrator. At the start of the hearing, Kowaleski argued that the disciplinary action was only being brought to retaliate against her for reporting a fellow officer's misconduct in 2002, and that she was entitled to raise this as an affirmative defense pursuant to Civil Service Law § 75-b, which prohibits public employers from retaliating against employees for reporting their coworkers' improper conduct.2 The arbitrator determined

that because the CBA limited his authority “to determinations of guilt or innocence and the appropriateness of proposed penalties,” he lacked authority to consider Kowaleski’s retaliation defense. He noted, however, that he would consider evidence of retaliation when determining witness credibility and “in the larger context of guilt or innocence.” In January 2007, the arbitrator found Kowaleski guilty of two of the three charges and determined that termination was appropriate. He found that Kowaleski had, in the presence of inmates, asked if a fellow officer’s son had been shot, potentially endangering the officer and his family, and that she had insubordinately ignored a superior’s instructions. The arbitrator noted that, under the CBA, an employee can only be disciplined for “just cause,” which requires, among other things, that the employer made a “fair and objective investigation,” that “the employer’s action was non-discriminatory,” and that “the penalty is reasonably related to the seriousness of the *90offense.” After finding Kowaleski guilty, the arbitrator concluded that there was “just cause” for the penalty of discharge, which was not “arbitrary, capricious, unreasonable, or excessive.” Kowaleski filed this CPLR 7511 petition seeking a declaration (1) vacating the arbitrator’s opinion and award, and (2) directing that the charges in the Notice be dismissed or remanded for a new hearing before a different arbitrator. DOCS moved to dismiss the petition. Supreme Court found that the arbitrator exceeded his power by ignoring Civil Service Law § 75-b, but concluded that because this was an error of law, the award should not be vacated. The court further reasoned that section 75-b only precludes disciplinary action “taken solely in retaliation,” and here witness testimony provided a “separate and independent” basis for the action. Supreme Court found that the arbitrator’s findings and award were rational. The Appellate Division affirmed, with two Justices dissenting. The majority found that although the arbitrator “incorrectly stated that it was beyond his jurisdiction to consider petitioner’s claim of retaliation, this error of law does not warrant vacating the award under the circumstances,” given the arbitrator’s rational and supported finding that Kowaleski was guilty of two of the charges (Matter of Kowaleski [New York State Dept. of Correctional Servs.], 61 AD3d 1081, 1083 [3d Dept 2009]). Moreover, the majority reasoned, the arbitrator did consider “evidence of retaliation in weighing witness credibility and assessing petitioner’s guilt” (id.). Two Justices dissented on the grounds that Kowaleski was “deprived of her right to have the arbitrator determine . . . the specific factual issue of whether the disciplinary charges were, in the first instance, initiated and pursued to retaliate for the prior matters” (id. at 1085 [brackets and internal quotation marks omitted]). Kowaleski appealed as a matter of right pursuant to CPLR 5601 (a). We agree with the dissenting Justices and now reverse. Under CPLR 7511 (b) an arbitration award must be vacated if, as relevant here, a party’s rights were impaired by an arbitrator who “exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made” (CPLR 7511 [b] [1] [iii]). It is well-settled that an arbitrator “exceed[s] his power” under the meaning of the statute where his “award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator’s power” (Matter of New York City Tr. Auth. v Transport Workers’ Union of Am., Local 100, AFL-CIO, 6 NY3d

*91332, 336 [2005]; see also *Matter of Falzone* [New York Cent. Mut. Fire Ins. Co.], 15 NY3d 530 [2010]). Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where “an arbitrator has made an error of law or fact” (*Falzone*, 15 NY3d at 534). Here, the arbitrator clearly exceeded a “specifically enumerated limitation” on his power. As the courts below found, and DOCS concedes, the arbitrator not only had authority to consider Kowaleski’s retaliation defense, but was required to do so. Civil Service Law § 75-b prohibits a public employer from taking disciplinary action to retaliate against an employee for reporting “improper governmental action” (Civil Service Law § 75-b [2] [a]). If “the employee reasonably believes dismissal or other disciplinary action would not have been taken but for” the whistleblowing, the employee “may assert such as a defense before the designated arbitrator or hearing officer” (Civil Service Law § 75-b [3] [a]). Whatever the terms of the CBA, “[t]he merits of such defense shall be considered and determined as part of the arbitration award or hearing officer decision” (*id.* [emphasis added]). In short, the statute requires the arbitrator to consider and determine the merits of an employee’s retaliation defense where such a defense is raised (*cf.* *Matter of Obot* [New York State Dept. of Correctional Servs.], 89 NY2d 883, 885-886 [1996] [award not vacated where an employee failed to raise the retaliation defense in the arbitration and the arbitrator did not consider it]). If the arbitrator or hearing officer finds that “the dismissal or other disciplinary action is based solely” on the employer’s desire to retaliate, the disciplinary proceeding must be dismissed (Civil Service Law § 75-b [3] [a]). Therefore, the arbitrator’s finding here that he did not have authority under the CBA to consider Kowaleski’s retaliation defense was not only incorrect as a matter of law, but also in excess of an explicit limitation on his power. Because he failed to consider and determine the defense, the award must be vacated. Contrary to DOCS’ position, it was not enough for the arbitrator to hear evidence of retaliation in the context of making determinations as to witness credibility and deciding Kowaleski’s guilt. A disciplinary action may be retaliatory even where an employee is guilty of the alleged infraction. Under Civil Service Law § 75-b (3), an arbitrator is required to dismiss a disciplinary action based solely on retaliatory motive, regardless of the employee’s guilt or innocence (see Civil Service Law § 75-b [2] [a]; [3] [a]). This separate retaliation inquiry is critical. In order to be effective, whistleblower protections like those embodied in Civil Service Law § 75-b must shield employees from being retaliated against by an employer’s selective application of theoretically neutral rules. Thus, a separate determination regarding the employer’s motivation in bringing the action is necessary if section 75-b is to truly “establish[] a major right for employees—the right to speak out against dangerous or harmful employer practices” (Governor’s Approval Mem, Bill Jacket, L 1984, ch 660, at 5). Because we find that the arbitrator’s failure to separately consider and determine Kowaleski’s affirmative defense of retaliation on the merits requires the award to be vacated, we decline to reach Kowaleski’s other arguments. We note, however, that she has requested that any rehearing be before a different arbitrator. That request should be ruled on by Supreme Court in the exercise of its discretion. Therefore, the order of the Appellate Division,

insofar as appealed from, should be reversed, with costs, petitioner's application to vacate the arbitration award granted, and the matter remitted to Supreme Court for further proceedings in accordance with this opinion. Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott and Jones concur. Order, insofar as appealed from, reversed, etc. . In 2003, Kowaleski had received two notices of discipline, both with dismissal from service as the proposed penalty. In the resulting arbitration, she testified that she had reported a fellow correction officer's misconduct in 2002, and was frequently harassed at work. While noting that it was "not within [his] authority to make a determination of whether harassment occurred," the arbitrator observed that Kowaleski was "the object of animosity and/or harassment" by some of her fellow officers, and that the harassment "may have originated when CO Kowaleski informed her supervisor of the *89[2002] incident." He found her guilty of some of the disciplinary charges and imposed a 60-day suspension. . Kowaleski testified that, in 2002, she observed a fellow officer use excessive force on an inmate, and she refused to sign a report that she had witnessed the inmate assault the officer. The sergeant who was supposed to be supervising when the incident occurred told Kowaleski to "[k]eep [her] mouth shut or else [she] would be escorted off the premises." A group of her coworkers began harassing her, and the harassment escalated after she reported the incident to the administration. A retired correction sergeant who had last worked at Hale Creek in 2005 testified that Kowaleski "couldn't make a move without getting blamed for something."