SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. ALLAN L. WINICK,**

Justice

TRIAL/IAS, PART 10
NASSAU COUNTY

THE TOWN OF HEMPSTEAD ,

Petitioner,

MOTION DATE: August 15, 2000
MOTION SEQUENCE: 001, 002
INDEX NO. 9918/00

-against-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000 AFSCME, AFL-CIO and C.S.E.A. HEMPSTEAD LOCAL 880, LOCAL 1000, AFSCME, AFL-CIO ,

Respondent(s).

The following papers read on this motion:
- Notice of Motion/ Order to Show Cause
- Answering Affidavits
- Replying Affidavits
- Briefs: Plaintiff's/Petitioner's
  - Defendant's/Respondent's

Application pursuant to CPLR article 75 for judgment staying arbitration between petitioner, Town of Hempstead, and respondent Civil Service Employees Association on behalf of Denise M. Lane and James Tosner is granted and the arbitration concerning Lane and Tosner is permanently stayed. Cross-application to compel arbitration is denied.

Respondent Civil Service Employees Association (CSEA) is a labor organization which represents members Denise M. Lane and James Tosner. Lane and Tosner are employed by the petitioner Town of Hempstead (the Town) in a Civil Service Classification of "Part-Time/Seasonal" employee. CSEA contends that both Lane and Tosner work eight

hours per day, five days per week and fifty-two weeks per year, and thus seek all benefits available to full time workers under a Collective Bargaining Agreement (the Agreement) between the Town and CSEA effective from January 1, 1998 through the end of the year 2000.

Lane and Tosner filed complaints with Town Commissioner Nizza on CSEA "grievance" forms signed January 31, 2000 and February 10, 2000. Both "grievances" state:

> I work 8 hours per day, 5 days a week, 52 weeks per year. According to the Civil Service Commission, I am classified as a "Part-time/Seasonal" employee. Regardless of what the Town's Civil Service Commission Classifies me as, I am a full time worker. Therefore, as I am a full time worker, I am entitled to all the benefits as outlined in the contract.

Both Tosner and Lane seek the same relief, to be "treated as a full time employee with respect to salary and benefits."

The Collective Bargaining Agreement, at paragraph 49, provides that part-time seasonal employees "receive no benefits", except "as expressly provided in this agreement". With regard to wages, paragraph 5(f) of the Agreement provides that part-time seasonal employees "shall not receive less than the lawful minimum hourly salary". In contrast, full time employees receive wage increases of 2%, 3%, and 4% for the years 1998, 1999, and 2000 respectively.

By Inter-Departmental Memo dated March 22, 2000, the Town of Hempstead Grievance Board advised CSEA that the subject grievances "are being returned as the Grievance Board is not the proper venue for these applications". The Board indicated that seasonal/part time workers must pursue their grievances under Part 6.0 of Schedule "D".

By letter dated June 1, 2000 CSEA gave notice of its intent to arbitrate and advised that unless the Town applied for a stay within 20 days it would be precluded from "objecting that a valid agreement was not made or has not been complied with and from asserting in court, the bar of a limitation in time." In response the Town timely commenced this proceeding to permanently stay arbitration.

On this application the Town contends that it is entitled to a permanent stay of arbitration on both procedural and substantive grounds. The Town's first objection to arbitration is procedural, based upon respondents' failure to comply with a condition precedent to the grievance procedure as required in the Collective Bargaining Agreement. Thus, the Town claims, Lane and Tosner may not proceed to the final grievance step which is arbitration. The second objection is based upon the substance of the Lane and Tosner complaints which concern their job classifications. The Town contends that any matter involving an employee's job classification is specifically excluded from the grievance procedure, as job classification is a civil service matter.

Respondents contend that petitioner may not rely upon any procedural omission, as the Town failed to appoint two representatives to the grievance board for seasonal and part-time employees. By letter dated January 11, 2000 to William F. Sammon Jr., the Director of Personnel for the Town, CSEA submitted the names of two CSEA executive officers to serve on a part-time/seasonal grievance committee. The general letter, apparently not submitted with respect to any specific grievance or employee, asks for the timely appointment of Town candidates to a part-time/seasonal grievance committee. The Town failed to respond. Respondents do not address the Town's contention that job classification matters are excluded from the grievance procedure.

A review of the Agreement indicates that there is a several step grievance procedure for employees of the Town. The procedure, outlined in Schedule "D" of the Agreement, does not apply to seasonal and part-time employees in the absence of a finding by the four member seasonal grievance committee that the particular grievance is "warranted". Part 6.0 of Schedule "D" provides as follows:

> A Grievance Committee, comprised of a total of four (4) members (two [2] from CSEA and two [2] from the Town of Hempstead), mutually agreeable to both sides, shall be formed solely for the purpose of investigating grievances on behalf of seasonal and part-time employees having a minimum of thirty (30) days' length of service. Upon finding by a majority of this Committee that the grievance is warranted, said seasonal or part-time employee will be permitted to process his/her grievance in accordance with the grievance procedure herein.

There is merit to respondents ' argument that the Town, having failed to appoint two members to the seasonal grievance committee, prevented respondents' compliance with the condition precedent and therefore may not rely on such failure, for "it is the law in New York that a party, on whom depends a condition precedent, who actively hinders or prevents its occurrence, cannot rely on the failure of the condition" (Schefler v. Livestock & Casualty Ins. Co., 44 AD2d 811). However it is unnecessary to address this procedural issue, as the substantive issue of the arbitrability of civil service classifications is determinative. The critical factor is that a grievance, as defined in the Agreement, specifically excludes "any matter involving an employee's job classification [or] title ..." Thus even if the grievance procedure is not barred by the failure of a condition precedent, the explicit exclusion of job classification issues from the grievance procedure and arbitration are fatal to respondents' claims.

"In *Matter of Acting Supt. of Schools of Liverpool Cent. School Dist.* (*United Liverpool Faculty Assn.*) (42 NY2d 509, 513) the Court of Appeals set forth two criteria

which must be met in order to establish a valid agreement to arbitrate a specific dispute involving a public sector collective bargaining agreement ..." (Matter of Susquehanna Val. Cent. School Dist. at Conklin [Susquehanna Valley Teachers' Assn.], 73 AD2d 703, 704, affd 53 NY2d 917). The two-step inquiry set forth in Liverpool for determining whether and when a particular public sector grievance is subject to arbitration, is "whether the Taylor Law authorizes arbitration of the particular subject matter and, if so, whether the parties agreed by the terms of their particular arbitration clause to refer such matter to arbitration" (Matter of Odessa-Montour Cent. School Dist. [Odessa-Montour Teachers Assn.], 271 AD2d 931).

Here, the parties do not address whether the subject matter at issue is arbitrable under step one of the Liverpool inquiry, however, there is clearly a dispute as to whether they agreed to arbitrate the relevant issue under their Collective Bargaining Agreement. At paragraph 13 of the Petition, the Town avers that "the subject matter of the grievance does not fall within the definition of "Grievance" and as such is not arbitrable pursuant to the terms of the collective bargaining agreement."

The grievance procedure is addressed in Schedule "D" of the Agreement, which defines a "grievance" as "any claimed violation, misinterpretation or inequitable application of the existing collective bargaining agreement, rules, procedures, regulations, administrative orders or workrules of the employer or a department, except any matter which is otherwise reviewable pursuant to the Civil Service Law". Specifically excluded from the grievance procedure is "any matter involving an employee's job classification, title, retirement benefits, disciplinary proceeding or any matter which is otherwise reviewable pursuant to Civil Service Law or any rule, law or regulation having the force and effect of law" (Schedule D, Part 2.0), and, any matter "which is not a grievance as defined

herein" shall not be the subject of the binding arbitration procedure provided for in the Agreement (Schedule D, Part 4.6 ). Thus, the provisions establishing the grievance procedure with binding arbitration as the final step, explicitly state that any matter which is not a "grievance as defined" shall not be the subject of the binding arbitration, and job classifications are not to be part of the grievance procedure. It is clear that the nature of the Lane and Tosner complaints is their seasonal and part-time job classification rather than any violation of rules, regulations or provisions of the Agreement. The Agreement does not create or address job titles or classifications, and thus an objection that a classification is wrong does not constitute a "violation, misinterpretation or inequitable application of the existing collective bargaining agreement, rules, procedures, regulations, administrative orders or workrules of the employer". The true nature of the complaint is that Lane and Tosner work full time and are deprived of the benefits of the Agreement because they are classified as seasonal/part-time. Thus, their actual complaint is their classification, which is not grievable and not arbitrable.

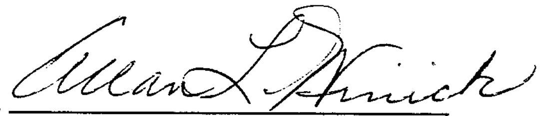
Respondent's reliance upon this court's decision in Matter of Town of Hempstead v Civil Service Employees Association et al. (annexed as Exhibit "H" to the Cross-Motion) is misplaced. There the dispute in issue arguably fell within grievable subject matter, and thus "the scope of substantive contract provisions ... a matter of contract interpretation ... [was] for the arbitrator to resolve" (Board of Ed. of Lakeland Central School Dist. of Shrub Oak v. Barni, 49 NY2d 311). Here, however, "the well-settled proposition" that the threshold question of arbitrability is for the court and not the arbitrator is the operative and relevant provision of law (Matter of General Re Corp. v. Foxe, 177 Misc.2d 867, 873[Supreme Court, New York County]), as the parties' arbitration agreement "unequivocally exclude[s]" the issue of civil service classification (see, Hamershlag,

Kempner & Co., L.P. v. Oestrich, 234 AD2d 172, 173), which is not created or defined by the Agreement.

While Lane and Tosner may legitimately argue that they are not either seasonal or part-time workers based upon their hours, the grievance procedure is the wrong vehicle to address such concerns. Lane and Tosner in essence are seeking a reclassification, or, application of the Agreement to them in express contravention of its terms. The petition to stay arbitration must be granted, as there is no agreement to arbitrate civil service classifications, and thus Lane and Tosner's classifications as seasonal/part-time workers are not grievable or arbitrable.

This constitutes the order and judgment of the court.

Dated: October 2 , 2000



Allan L. Winick J.S.C.