STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

MICHAEL BUKOWSKI and
THE NEW YORK STATE CORRECTIONAL
OFFICERS AND POLICE BENEVOLENT
ASSOCIATION, INC.,

Petitioners,

For a Judgment Pursuant to *CPLR* Article 75
Confirming an Arbitration Award

-against-

STATE OF NEW YORK DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SUPERVISION, Anthony J. Annucci, Acting
Commissioner, and STATE OF NEW YORK,

Respondents.

DECISION AND ORDER/JUDGMENT
Index No.: 3305-13
RJI No.: 01-13-110408

(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

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O'CONNOR, J.:

Petitioners Michael Bukowski ("petitioner") and The New York State Correctional Officers and Police Benevolent Association, Inc. ("NYSCOPBA") (collectively "petitioners") commenced this special proceeding seeking a judgment, pursuant to CPLR Article 75, confirming an arbitration award, dated November 13, 2014, made by Arbitrator Larry Dais in connection with a contractual grievance arbitration. Respondents State of New York Department of Corrections and Community Supervision ("DOCCS") and Anthony J. Annucci, Acting Commissioner (collectively "respondents") oppose the application.

Background

Petitioner was employed as a Correction Officer by the New York State Department of Corrections and Community Supervision, and was a member of the Security Services Unit ("SSU") of State Employees, which is represented by NYSCOPBA. NYSCOPBA is the recognized and certified collective bargaining representative of the SSU, which includes all correction officers and correction sergeants employed by the State of New York and DOCCS. The State of New York and NYSCOPBA are parties to a Collective Bargaining Agreement ("CBA"),[1] which, as relevant here, includes an expedited disciplinary arbitration procedure that culminates in final and binding arbitration.

On August 5, 2014, DOCCS issued a Notice of Discpline ("NOD") to the petitioner, charging him with violating certain provisions of the DOCCS' Employee Manual and DOCCS' Directive 4944. Specifically, DOCCS alleged that on July 22, 2014, petitioner: (1) "used excessive force and

[1] The 2009-2016 CBA covers the disciplinary grievance arbitration at issue in this proceeding.

unjust physical force when [he] employed corporal punishment on inmate [RF] . . . by kicking his testicles, causing serious physical injury"; (2) "failed to complete the 'Use of Force Report' Form #2104 Part A – 'Report of Incident,' Attachment A"; (3) "failed to notify [his] supervisor or medical staff that inmate [RF] . . . was observed to be in tears, doubled over, and in medical distress"; and (4) "provided a false and misleading statement regarding the use of physical force," by indicating in a memorandum to a correction sergeant "that at no time did [he] kick inmate [RF] . . . in the groin, which [he] did" (Petition, Ex. C at 1-2). DOCCS further claimed that on July 28, 2014, during ain interrogation conducted by staff members from the DOCCS' Office of the Inspector General, petitioner "made a false and misleading statement," by stating "no," "when asked if [he] had kicked inmate [RF] . . . in the groin" (*id.* at 2).

In the NOD, DOCCS noted that "the Department is charged with the care, custody, and control of inmates within [its] system," and that "[a]s part of this duty, employees must be relied upon to only use the amount of physical force which is necessary and to accurately and completely report the circumstances and facts of that physical force" (*id.*). DOCCS also noted that the petitioner's actions "resulted in serious physical injury to an inmate assigned to [his] care," and that petitioner's "actions have compromised [his] veracity and are in direct conflict with the high standards of integrity expected of [DOCCS] employees" (*id.*). According to the NOD, petitioner was suspended without pay on July 31, 2014 (*id.*). He was advised that if he found the discipline to be without just cause or the penalty excessive, he must file a disciplinary grievance no later than fourteen days after his receipt of the NOD (*id.*).

On or about August 7, 2014, NYSCOPBA filed a disciplinary grievance on petitioner's behalf, contesting the NOD, and by correspondence, dated August 8, 2014, submitted the grievance

to the expedited disciplinary arbitration procedure in accordance with Article 8 of the CBA (*see* Answer, Ex. K; Petition at ¶¶ 14-15). Pursuant to Section 8.8 of the CBA, Larry Dais ("arbitrator") was designated to hear and decide the grievance (*see* Petition at ¶ 18, Ex. A at 1, Ex. B at 29). Hearings were held before the arbitrator over the course of three days: September 22, October 8, and October 31, 2014, respectively (*id.* at ¶ 20, Ex. A at 1). Petitioner was represented by counsel, DOCCS was represented by a Labor Relations Representative, and the parties were afforded the opportunity to present testimony, cross-examine witnesses, submit documentary evidence, and provide closing oral arguments (*id.* at ¶ 19, Ex. A at 2).

On November 13, 2014, the arbitrator issued a written opinion and award, finding, among other things, "that [the petitioner] is guilty of the charges alleged in the Notice of Discipline," and "that the State had probable cause to suspend the [petitioner] without pay in accordance with Article 8.4 of the [CBA]" (Petition, Ex. A at 4). As an award, the arbitrator sustained the charges of misconduct, but amended "the proposed penalty of termination . . . to a one-hundred-twenty (120) day suspension" (*id.* at 5). In rendering the award, the arbitrator "considered and applied appropriate weight to the [petitioner's] work history," which he noted "is absent of any other past misconduct" (*id.* at 4). Despite this award, petitioner has not been reinstated to his employment with DOCCS. This proceeding followed.

Petitioner maintains that the arbitration award meets the criteria for confirmation pursuant to CPLR § 7510, and should be confirmed. Respondents, in opposition, argue that the award should be set aside as violative of, among other things, the State's strong public policy against inmate abuse. In reply, petitioner argues that although this case, like every public sector labor dispute, raises competing public policy issues, respondent has not proven that any strong public policy exists that

would prevent the arbitrator from reinstating the petitioner to his employment with DOCCS after issuing a 120-day suspension without pay.

Discussion

CPLR § 7510 provides that "[t]he court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." A court may vacate an arbitration award, pursuant to CPLR § 7511(b), "if the court finds that the rights of [a] party were prejudiced by an . . . 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" (CPRL § 7511[b][1][iii]). "[A]n arbitrator 'exceed[s] his power'" within 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 Kowaleski [New York State Dep't of Corr. Servs.]*, 16 N.Y.3d 85, 90-91 [2010], quoting *Matter of New York City Transit Auth. v. Transp. Workers' Union of Am., Local 100, AFL-CIO*, 6 N.Y.3d 332, 336 [2005]; *see Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 N.Y.3d 530, 534 [2010]).

Notably, it is "this State's well-established rule that an arbitrator's rulings, unlike a trial court's, are largely unreviewable" (*Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 N.Y.3d at 534). Indeed, "courts are obligated to give deference to the decision of the arbitrator" (*Matter of New York City Transit Auth. v. Transp. Workers' Union of Am., Local 100, AFL-CIO*, 6 N.Y.3d at 336), and "are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies" (*Matter of New York State Corr. Officers & Police Benevolent Ass'n v. State of New York*, 94 N.Y.2d 321, 326 [1999]). Therefore, courts "cannot examine the merits of an arbitration award" or "substitute [their] judgment for that of the arbitrator simply because [they]

believe[ ] [their] interpretation would be the better one" (*id.*). This is true "[e]ven where an arbitrator has made an error of law or fact" (*Matter of Falzone [New York Cent. Mut. Fire Ins. Co.], supra*), and "even where the apparent, or even the plain meaning of the words of the contract has been disregarded" (*Matter of United Fed'n of Teachers, Local 2, AFT, AFL-CIO v. Bd. of Educ. of City Sch. Dist. of City of New York*, 1 N.Y.3d 72, 83 [2003].

Despite this deference, a penalty imposed by an arbitrator that "shocks the conscience" need not be upheld (*see Matter of City of New York v. Org. of Staff Analysts*, 103 A.D.3d 448, 449 [1st Dep't 2013], citing *Matter of Waldren v. Town of Islip*, 6 N.Y.3d 735, 736 [2005]; *see also Matter of Schnaars v. Copiague Union Free Sch. Dist.*, 275 A.D.2d 462, 463 [2d Dep't 2000]; *cf. Matter of Shenendehowa Cent. Sch. Dist. Bd. of Educ. [Civil Serv. Empls. Ass'n, Local 1000, AFSCME, AFL-CIO, Local 864]*, 20 N.Y.3d 1026, 1027 [2013]; *Matter of Capone v. Patchogue-Medford Union Free Sch. Dist.*, 38 A.D.3d 770, 772 [2d Dep't 2007]). Here, upon a review of the record, the Court finds that the award of a120-day suspension "is so disproportionate to [petitioner's] offense as to be shocking to one's sense of fairness'" (*Matter of Waldren v. Town of Islip*, 6 N.Y.3d at 736, quoting *Matter of Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 237 [1974]; *cf. Matter of City of New York v. Organization of Staff Analysts*, 103 A.D.3d at 449; *Matter of Capone v. Patchogue-Medford Union Free Sch. Dist.*, 38 A.D.3d at 772), especially given the arbitrator's finding of guilt as to all charges in the NOD.

It is not without significance that petitioner's physical assault of inmate RF, by kicking him in the groin, resulted in the inmate's emergency hospital admission to treat a ruptured testicle, and surgery to remove approximately one-third of that testicle (*see* Affirmation of Nancy J. Heywood,

Esq. at ¶ 5). Nor is it insignificant that following his physical assault of inmate RF, petitioner failed to report his use of force; made no attempt to get inmate RF medical treatment; affirmatively made a false and misleading statement to a correction sergeant; and, during an investigation by the DOCCS' Office of the Inspector General, again made a false and misleading statement, all in what appears to be an attempt to cover up his misconduct and avoid the consequences of his actions, and in complete disregard for the health, welfare, and safety of an individual whose custody and care he was charged with overseeing. Furthermore, petitioner's assault of inmate RF would, outside of this context and if charged, constitute a felony offense punishable by a term of imprisonment.

Conclusion

Therefore, in light of all circumstances, the Court finds that the penalty awarded by the arbitrator shocks the judicial conscience and cannot be upheld.

Any remaining arguments have been considered and found to be without merit, or need not be reached in light of this determination.

Accordingly, it is hereby

ORDERED AND ADJUDGED, that petitioners' motion, pursuant to CPLR Article 75, to confirm the November 13, 2014 opinion and award of Arbitrator Larry Dais is granted only to the extent of confirming that portion of opinion and award sustaining the charges of misconduct against petitioner; and it is further

ORDERED AND ADJUDGED, that the November 13, 2014 opinion and award of Arbitrator Larry Dais is vacated to the extent that the matter is remitted for the imposition of a new penalty not inconsistent with this Decision and Order/Judgment.

This memorandum constitutes the Decision and Order/Judgment of the Court. The original

Decision and Order/Judgment is being returned to the Attorney General. A copy of this Decision and Order/Judgment together with all papers in this proceeding are being forwarded to the Albany County Clerk for filing. The signing of this Decision and Order/Judgment and delivery of a copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the original Decision and Order/Judgment.

SO ORDERED AND ADJUDGED.

ENTER.

Dated: July 14, 2015
Albany, New York

Kimberly A. O'Connor

HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

Papers Considered:

1. Notice of Verified Petition, dated December 17, 2014; Verified Petition to Confirm Arbitration Award, verified December 17, 2014 and December 18, 2014, with Exhibits A-C annexed; Petitioner's Memorandum of Law, dated December 17, 2014;
2. Answer, dated and verified January 30, 2014, with Exhibits A-S annexed; Affirmation of Nancy J. Heywood, Esq., dated January 29, 2015, with unmarked exhibit annexed; Affidavit of Patrick J. Griffin, sworn to January 29, 2015, with unmarked exhibit annexed; Affirmation of Adrienne J. Kerwin, Esq., dated January 30, 2015 with Exhibit A annexed; Respondent's Memorandum of Law in Opposition to the Petition, dated January 30, 2015; *and*
3. Petitioner's Reply Memorandum of Law, dated February 5, 2015.