

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM, PART I

- - - - - x
JOHN T. BURNELL, City Director
of Labor Relations

v

ARVID ANDERSON as Chairman and
Impartial Member of the Board
of Collective Bargaining;
CWA Local 1180; Allied Bldg.
Inspectors

- - - - - x

ASCH, J. (174 No. 102 NYLJ 11/26/75, p. 8, cols. 1 and 2)

"Matter of Burnell (Anderson) - This is an article 78 proceeding for judgment annulling the determination of respondent Board of Collective Bargaining (BCB) which found that the three grievances filed by the respondent labor unions were subject to arbitration and directed resolution by arbitration. Petitioner bases its claim before BCB and in this proceeding upon the contention that the relief sought violates state law and public policy and is not a proper subject for arbitration.

"Respondent Communications Workers of America, Local 1180 (CWA) filed a request for arbitration in behalf of Stewart Labelling the remedy sought as "Proper Salary Payment." Allied Building Inspectors (ABI) filed a request for arbitration on behalf of Bochicchio describing the remedy sought as follows: "Payment of cash promotional guarantee is demanded retroactively from 11/27/73 to 4/29/74." Both of these individual grievants claim that they were performing duties out of their civil service titles. Each of them performed such out of title work for a period of time until they received a promotion to a higher title.

"In addition, ABI has requested arbitration on behalf of all construction inspectors who are alleged to be assigned to duties substantially different from those stated in their job specifications. The remedy sought is a substantial salary increase for additional out of title duties or to permanently cease and desist such assignments.

"Pursuant to section 7. 3 of the Revised Consolidated Rules of the Office of Collective Bargaining, petitioner sought a ruling that these matters were not within the scope of collective bargaining agreements involved as the relief requested is in violation of law. This proceeding is brought to review the determination which rejected those applications and directed arbitration. It is not contested that the grievances made fall within the ambit of proper grievances to be submitted to arbitration if they do not violate state law or public policy.

"Where parties enter into agreements to settle disputes by arbitration, any controversy encompassed by the arbitration provision must go to arbitration. An exception to this general policy is where the performance which is the subject of the demands for arbitration is prohibited by statute (Matter of Exercycle Corp. [Maratta], 9 N.Y. 2d 329 and Matter of Glekel [Gluck], 30 N.Y. 2d 93). These agreements to arbitrate cannot oust the court from its role in the enforcement of major state policies embodied in statutory form (Matter of Aimcee Wholesale Corp. [Tomar Products, Inc.] 21 N.Y. 2d N.Y. 621

"The grievances on behalf of the two individuals are presented so as to seek the salary prescribed in the collective bargaining agreements for the higher title. Regardless of the semantics used, the basis of these two grievances. is still a claim for higher salary for out of title work. With the exception of a temporary emergency situation, no one may be assigned to perform the duties of any position unless duly promoted to that position in accordance with the Civil Service Law and applicable rules (Civil Service Law, sec. 61[2]). Section 100(1)(a) of the Civil Service Law prohibits payment of salary to a person holding a position in the classified service without the certification of the municipal commission that they are employed in their respective positions in accordance with law. Neither of these individuals has a certification to the higher title for the period for which they seek additional salary. They received the salary for the positions to which they were properly appointed at that time. No claim is made that they are entitled to be certified to the higher titles for the periods in issue. Promotion to a higher position in the Civil Service comes through examination and neither performance of the higher duties nor assignment can obviate this (Matter of Meyer v. Hoberman, 30 A.D. 2d 938, aff'd 24 N.Y. 2d 830). The Civil Service Law may not be evaded by a change of employment to give these two individuals the salary for the higher grade when they were not entitled to the promotion retroactively (Wood v. City of N.Y., 274 N.Y. 155). Section 100, formerly section 20, of the Civil Service Law is an expression of policy whereby the Legislature makes it clear that any person who rendered services in violation of the statute will be denied the right to recover compensation on any basis (Cassella v. City of Schenectady, 281 App. Div. 428). The arbitrators may not circumvent and violate the provisions of the Civil Service Law by directing payments for a salary grade for a period of time for which these two individuals were not certified as eligible, the only relief requested.

"A different situation exists as to the demand for arbitration made by ABI on behalf of the class of construction inspectors assigned duties substantially different from those stated in their job specifications. As an alternative to payment of salary

increases, the demand for arbitration requests an injunction to enjoin out of title work. Such injunctive relief does not violate the statute and is obtainable to enforce it (Matter of Ainsberg v. McCoy, 26 N.Y. 2d 56).

"The respondents contend that there is an adequate remedy at law prohibiting the review of the determination. Petitioners have the right to arbitrate and thereafter apply to the court, to vacate any adverse award which they claim violates the law. Such a remedy is not adequate because it compels petitioner unnecessarily to expend time and effort to defend individual claims on the facts when the law precludes granting the relief. Because of the particular manner in which this controversy arises, it is brought before the court for the first time in the form of an article 78 proceeding. However, the substance of this legal controversy is an application to stay arbitration which must be granted to prevent ousting the court from enforcing major state policies (Matter of Aimcee Wholesale Corp. [Tomar Products, Inc. 2, supra]). A waste of effort would be involved in arbitrating claims which violate the law.

"The court does not condone violations of law by petitioners by assigning personnel to out of title work. While additional salary may not be paid, injunctive relief is available to halt violations of the Civil Service Law. Such relief must be sought by arbitration as the forum chosen by the parties.

"The petition is granted to annul that portion of the determination as directed arbitration of the claims made by the two individual grievants. It is dismissed in so far as it seeks to annul the determination as to the class of construction inspectors who seek injunctive relief as an alternative remedy. Settle judgment."