State of New York
Court of Appeals

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To be argued Wednesday, September 7, 2022

No. 70 Matter of City of Long Beach v New York State Public Employment Relations Board

Jay Gusler, a professional firefighter in the City of Long Beach and a member of the Long Beach Professional Firefighters Association (the Union), was injured in the line of duty in November 2014. When he remained out of work for nearly a year, the City sent him a letter in November 2015 informing him that it was "evaluating whether to exercise its right to separate [him] from employment" under Civil Service Law (CSL) § 71. The letter told Gusler that he would be given a hearing if he wanted to contest his termination, directed him to confirm in writing whether he would attend the hearing, and said his failure to respond would result in an automatic recommendation for termination.

CSL § 71 provides, "Where an employee has been separated from service by reason of a disability resulting from occupational injury or disease..., he or she shall be entitled to a leave of absence for at least one year, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position."

The Union sent the City a demand to negotiate the procedures for terminating its members under CSL § 71 and, when the City refused, the Union filed an improper practice charge contending that its refusal to negotiate violated CSL § 209-a(1)(d) of the Taylor Law.

An administrative law judge (ALJ) agreed with the Union that the City's refusal violated the Taylor Law. The ALJ said the City established termination procedures – requiring "notice to the affected employee, an opportunity to be heard and, if the employee does not pursue the opportunity to be heard, automatic termination" – that "impact" the terms and conditions of employment and are therefore a mandatory subject of negotiation.

The Public Employment Relations Board (PERB) affirmed the decision, citing its own precedents to conclude "the City has an obligation to bargain prior to imposing procedures for terminating an employee pursuant to CSL § 71." It said "there is nothing inescapably implicit in CSL § 71 which establishes the Legislature's plain and clear intent to exempt employers from the State's strong and sweeping policy to support employer-employee negotiations."

Supreme Court denied the City's petition to annul PERB's decision, deferring to PERB's interpretation of CSL § 71. "As the agency charged with implementing the fundamental policies of the Taylor Law, the board is presumed to have developed an expertise and judgment that requires us to accept its construction if not unreasonable...," the court said.

The Appellate Division, Second Department reversed, saying no deference was owed to PERB because the "'question is one of pure statutory construction.'" It said, "The Department of Civil Service has promulgated implementing regulations for [CSL] § 71, including detailed procedures for notifying an employee of the right to a one-year leave of absence during continued disability, and notifying an employee of an impending termination following the expiration of that one-year period and the right to a hearing and to apply for a return to duty.... Here, the specific directives of [CSL] § 71 and 4 NYCRR 5.9 leave no room for negotiation of the procedures to be followed prior to the termination.... Therefore the presumption in favor of collective bargaining is overcome."

PERB and the Union argue, "This Court's precedent firmly establishes that procedures associated with the discretionary exercise of statutory rights are mandatorily negotiable absent plain and clear or inescapably implicit legislative intent to the contrary." They say the City did not preserve its claim that state regulations left no room for bargaining by raising it in any of the prior proceedings and, in any case, "A regulation cannot supersede Taylor Law bargaining obligations."

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State of New York
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To be argued Wednesday, September 7, 2022

No. 81 34-06 73, LLC v Seneca Insurance Company

Seneca Insurance Company issued a commercial policy, effective from April 2009 to April 2010, covering nine vacant buildings and lots owned by limited liability companies controlled by Mohannad Malik (the Malik plaintiffs). The policy included a Protective Safeguards Endorsement (PSE) that required the insureds to maintain automatic sprinkler systems in the buildings, among other things, and provided that Seneca would not pay for any fire loss or damage if they failed to do so. The covered properties included a vacant warehouse in Long Island City, which caught fire in September 2009. Seneca disclaimed coverage based on the fire department's report that the building did not have a working sprinkler system. The Malik plaintiffs then brought this breach of contract action against Seneca.

When discovery revealed that Seneca had inspected the warehouse in April 2009 and informed Malik that the sprinkler system was out of service and should be repaired, but it did not cancel the policy and apparently did not follow up to determine whether the system was repaired, the plaintiffs contended that Seneca had waived its right to disclaim coverage based on failure to comply with the PSE. Supreme Court found there were issues of fact regarding the waiver claim. At trial, after Malik testified that he never intended to insure the warehouse as a sprinklered building and Seneca's vice president for underwriting conceded that the PSE might have been included in the policy by mistake, the plaintiffs moved to amend their complaint to conform to the proof and add a claim for reformation of the policy to exclude the PSE based on mutual mistake. The court rejected Seneca's argument that the reformation claim was barred by the six-year statute of limitations, concluding that the reformation claim related back to the timely breach of contract claim under CPLR 203(f). The jury found that the parties' "true agreement" was for a policy without a PSE and that the sprinkler requirement had been included by mistake. The court entered a $4.5 million judgment against Seneca.

The Appellate Division, First Department affirmed, saying the reformation claim was not time-barred because it "relates back to the complaint here where the applicability of the Protective Safeguards Endorsement ... has been at the heart of the litigation from the outset and the same evidence that [Seneca] waived enforcement of the endorsement because it inspected the subject premises and knew they were non-sprinklered but did not cancel the policy supports plaintiffs' claim that the endorsement was unenforceable, regardless of whether the claim is based on waiver or reformation....

Seneca argues that the relation back doctrine and CPLR 203(f) cannot save the time-barred reformation claim because the plaintiffs' initial timely complaint did not give it notice of what facts would need to be proved to litigate the new claim of mutual mistake. The original complaint did not contain "any allegations related to what took place prior to the issuance of the policy, i.e., there are no allegations of any mistakes made during the negotiation or issuance of the policy." It says the lower courts failed to apply "binding Court of Appeals precedent" that CPLR 203(f) "cannot be used to save a reformation claim when the only claim previously asserted is a breach of contract claim."

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State of New York
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To be argued Wednesday, September 7, 2022

No. 72 People v Hasahn D. Murray

Hasahn Murray and two co-defendants were charged with beating and robbing a man in East Harlem in July 2016. At the conclusion of their joint jury trial, Supreme Court excused both alternate jurors and sent them home, then broke for lunch before delivering the final jury charge. When the proceedings resumed about an hour later, a defense counsel informed the judge that a sworn juror had discussed the case at a social gathering the prior weekend and said that "all of the defendants had been busted on video" and the jury need only determine "the degree of the charge." Attorneys for all three defendants moved for a mistrial, arguing that the juror had prematurely decided the defendants' guilt and there were no available alternates. Instead, the court contacted the alternate jurors, who said over speaker phone that they remained available for jury service, had not discussed the case with anyone, and had not decided the question of guilt. The judge told them to return to court the next morning, when she dismissed the sworn juror for misconduct, replaced her with the first alternate juror, and then delivered the jury charge. Murray was convicted of robbery and assault in the second degree and sentenced to 12 years in prison.

On appeal, Murray argued that the trial court did not comply with CPL 270.35(1), which governs the substitution of an alternate when a judge must discharge a sworn juror mid-trial. The statute provides, "If an alternate juror or jurors are available for service, the court must order that the discharged juror be replaced by the alternate juror ... provided, however, that if the trial jury has begun its deliberations, the defendant must consent to such replacement.... If no alternate juror is available, the court must declare a mistrial...."

The Appellate Division, First Department affirmed on a 4-1 vote, ruling the trial court properly substituted the alternate where the interval between his discharge and reinstatement as a juror "was de minimis." The majority said, "[A]ccording to the plain language of CPL 270.35(1), the trial court was required to decide if the alternate was 'available for service,' and did not require the consent of defendant given that the jury had not begun its deliberations.... [T]his court has instructed trial judges to bear in mind the ultimate objective of ensuring the impartiality of the fact finder, while balancing whether the 'removal of the [alternate] juror would ... necessitate[] the drastic remedy of a mistrial'.... That is precisely what occurred here. The trial court twice questioned the alternates and ascertained that they could fairly deliberate before substitution. We review such a determination for abuse of discretion and find none here."

The dissenter said the trial court "had neither the statutory authority nor the inherent power to recall alternate jurors who had been discharged and returned to their private life," and should instead have granted a mistrial. "[T]he alternates were specifically given permission to return to private lives, which included if they wanted, speaking with anyone, including lawyers, about the case.... Once the alternates were 'excused,' they were no longer 'available alternates.'" She said, "The majorities' position, carried to its logical conclusion, would make the discharge of a juror meaningless, because the trial court would have the authority and discretion to reinstate an alternate juror at any time after discharge, even a juror who had returned to their personal life, as long as they are available to serve."

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