

On Submission

**State of New York Supreme Court
Appellate Division — Fourth Department**

GENEVA CITY SCHOOL DISTRICT,

Appellant-Appellants,

-vs-

ANONYMOUS, A TENURED TEACHER,

Respondent-Respondent.

Appeal From Ontario County
Index No. : 101900
Docket No. : CA 10-00465

**AMICUS BRIEF IN SUPPORT OF APPELLANT'S REQUEST TO
TO VACATE AN ARBITRATION AWARD PURSUANT TO CPLR 7511**

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QUESTION PRESENTED

Did the arbitrator improperly usurp Appellant’s statutory authority and violate established public policy by dismissing eleven (11) charges in a 3020-a proceeding against Respondent-Respondent (the “Respondent”) upon the ground that previously issued *Holt/Doyle* memorandums issued to Respondent her supervisors barred the board of education of Appellant-Appellant (the “Appellant”) from pursuing disciplinary charges under Education Law § 3020-a *unless* the Respondent repeated her egregious conduct.

The Court below answered no.

PRELIMINARY STATEMENT

Appellant's board of education preferred sixteen (16) separate disciplinary charges against Respondent, a tenured teacher, pursuant to Education Law §§ 3020 and 3020-a. The arbitrator dismissed eleven (11) of the charges and barred the introduction of any counseling memoranda or so-called Letters of Administrative Criticism ("LAC") in the §3020-a hearing. [*See*, R. 30-31].

Respondent's first argument to the arbitrator was that the LACs issued by Respondent's supervisors affirmatively disposed of all misconduct that was the subject of those LACs. Respondent argued that, therefore, any subsequent § 3020-a charge based upon conduct that was the subject of a previous LAC, effectively constituted "double jeopardy." Well aware of the fairly universal rejection of the double jeopardy argument in the § 3020-a context, the arbitration award (hereinafter, the "Award") facially rejected this argument by correctly noting that Respondent's LACs were not punishment within the meaning of the Court of Appeals' decision in *Holt/Doyle*, 52 N.Y.2d 625 (1981).

However, the Award adopted an alternative statement of essentially the same argument in dismissing the charges. Specifically, the arbitrator held that, where Respondent had not repeated any of the conduct which was the subject of the LACs, neither the LACs nor the incidents that were discussed therein could form the basis for § 3020-a charges on the ground that there was insufficient "notice and/or warning unless and until the subject transgression has been repeated." In other words, the arbitrator effectively endorsed Respondent's double jeopardy argument by cloaking the Award in the rhetoric of notice and/or warning.

Before this Court, Respondent offers a third iteration of its argument in support of dismissal. That is, that the charges and the proof submitted in support of the charges fail to set forth just cause for disciplining the Respondent.” It should be noted that the Award never once raises or touches upon the issue of “just cause.” Regardless, it is respectfully submitted that Respondent’s position on appeal, like her arguments to the Court below, are at best an attempt to obfuscate the legally flawed and logically irrational Award.

At its core, this case is about the statutory duty and authority of a board of education to discipline a tenured employee and the reality that a board of education retains that authority regardless of what administrative criticisms may have been issued by the school district’s administrative staff. Respondent’s argument, that the dismissed charges were invalid because Respondent had not repeated the conduct addressed in the LACs, is ultimately misplaced since the Appellant did not charge Respondent with a failure to follow directives of her supervisor as set forth in a LAC.

Ultimately, there is simply no rational basis for dismissing the charges where, to do so, improperly usurps a board of education’s statutory authority and is an affront to New York public policy concerning the management and discipline of public employees. Accordingly, this Court should overturn the Award.

STATEMENT OF FACTS

On June 11, 2007, the Appellant board of education voted to find probable cause pursuant to N.Y. Education Law § 3020-a on sixteen charges of alleged misconduct against Respondent (hereinafter, the “3020-a charges”). [R. 19, 36-46]. Respondent is a tenured librarian employed

by Appellant. [R. 14]. Respondent requested a hearing before an arbitrator who had been appointed by the New York State Department of Education. [R. 14-15, 47-48]. A pre-hearing conference between the parties was held on October 31, 2007, followed by a one-day hearing at which Respondent raised the double jeopardy argument regarding the majority of the § 3020-a charges. [R. 19].

Respondent filed a motion for summary judgment dated May 16, 2008 in which she sought dismissal of eleven of the charges. [R. 19-20, 62-72]. In support of that motion, Respondent argued “the School District has brought charges for the same acts addressed in its letters of Administrative Criticism” and “by doing so, *it is attempting to punish the respondent twice for the same alleged conduct.*” [R. 63] [emphasis added]. Respondent’s underlying motion papers rely exclusively on the notion that “once a penalty has been assessed and accepted it cannot be increased.” [See R. 64-72]. Accordingly, Respondent moved to dismiss Charges 1, 2, 3, 5, 6, 8, 11, 12, 13, 14 and 15 because the conduct specified in those charges had been previously discussed in the LACs. [R. 67-71].

In response to the motion for summary judgment, Appellant argued that the LACs were not discipline within the meaning of Education Law § 3020-a. Rather, they were permissible critical and constructive administrative memorandums as endorsed by the Court of Appeals in *Holt v. Webutuck Cent. Sch. Dist.*, 52 N.Y.2d 625 (1981). [R. 24-25]. Since the LACs are not and cannot be considered punishment, Respondent had not been previously punished for her conduct and, consequently, there could be no double jeopardy attached to the § 3020-a charges. [Id.]. The arbitrator found that the LACs did *not* constitute discipline (R. 28). However, he also granted Respondent’s motion to dismiss eleven of the charges on the ground that they did not allege that Respondent had “repeated any of the transgressions” [R. 30] and it was, therefore,

inappropriate to the consider the LACs as a matter of “notice and/or warning” regarding that conduct and, therefore, the conduct addressed by the LACs was an improper basis for disciplinary charges. [R. 31]

Appellant commenced a special proceeding pursuant to CPLR Article 75 seeking to vacate the Award as irrational and in violation of established and important public policy. [R. 13-18]. The Supreme Court denied Appellant’s petition and also denied Respondent’s argument that the Award was an unappealable interim order. [R. 5-11]. Appellant filed a timely notice of appeal asking this Court to reverse the ruling of the Supreme Court and to vacate the Award. [R. 2-4]. Respondent has not cross appealed or otherwise challenged on this appeal the underlying determination that the LACs were not discipline or the Supreme Court’s holding that the Award was appealable as a final determination.

The New York State Association of Management Advocates For School Labor Affairs (hereinafter, “MASLA”) and the New York State School Boards Association (hereinafter, “NYSSBA”) moved this Court for permission to submit a brief as *amicus curie* in support of Appellant’s argument that the Award should be voided as a matter of law. The Court granted MASLA and NYSSBA permission to file briefs in support of Appellant. This brief is filed on behalf of MASLA.

ARGUMENT

In New York, an arbitration award may be vacated if the award violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator’s powers. *United Federation of Teachers v. Bd. of Ed. of City of New York*, 1 N.Y.3d 72, 79 (2003); *Matter of New York City Tr. Auth. v. Transport Workers Union*, 99 N.Y.2d 1, 6-7 (2002);

Matter of Bd. of Educ. of Arlington Sch. Dist. v. Arlington Teacher Assn., 78 N.Y.2d 33, 37 (1991). A petition to vacate an arbitration award on the ground that it violates public policy must show that the award “violates a well-defined constitution, statutory or common law of this State.” *United Federation of Teachers*, 1 N.Y.3d at 80, citing *Transport Workers*, 99 N.Y.2d at 11. Violation of *either* a statutory provision or well-defined common law which represents an important public policy is sufficient grounds to vacate an award. *Id.*; see *Honeoye Falls-Lima Cent. Sch. Dist. v. Honeoye Falls-Lima Educ. Assn.*, 49 N.Y.2d 732, 733 (1980); *Candor Cent. Sch. Dist. v. Candor Teachers Assn.*, 42 N.Y.2d 266, 271 (1977); *Cohoes City Sch. Dist. v. Cohoes Teachers Assn.*, 40 N.Y.2d 774, 775-78 (1976).

In this proceeding, the Award should be voided as a matter of public policy on two grounds. First, it improperly usurps Appellant’s statutory authority and duty to initiate the discipline of tenured employees. See Education Law § 3020-a; *Holt*, 52 N.Y.2d at 633. Second and more important, the Award violates strong public policy endorsed by the Court of Appeals that favors the use of letters of constructive administrative criticism as essential tools for the effective management of public employees. See *Holt*, 52 N.Y.2d 625. On either basis, this Court should vacate the Award and remand with instructions to consider the dismissed charges.

POINT I

THE ARBITRATION AWARD VIOLATES IMPORTANT PUBLIC POLICIES BY IMPROPERLY USURPING APPELLANT’S STATUTORY DUTIES

In New York, tenured employees are guaranteed several due process protections in connection with discipline proceedings commenced by an employer. N.Y. Educ. Law § 3020-a; see, e.g., *Gutman v. Bd. of Educ. City of New York*, 18 Misc.3d 609 (Sup.Ct. New York County 2007). It is also true that public employers cannot bargain away certain statutory powers and responsibilities. See *Honeoye*, 49 N.Y.2d 732 [seniority determinations under Educ. Law §

2510(2)]; *Candor Cent. Sch. Dist.*, 42 N.Y.2d 266 [termination of non-tenured probationary employees for any reason under Educ. Law § 2509, 2573, 3012 & 3013]; *Cohoes City Sch. Dist.*, 40 N.Y.2d 774 [tenure determinations for probationary employees under Educ. Law §§ 2509, 2573, 3012, 3013 & 6206]; *Three Vill. Teacher's Assn. v. Three Vill. Cent. Sch. Dist.*, 128 A.D.2d 626 (2d Dept. 1987), *lv denied* 70 N.Y.2d 608 (1987) [qualification requirements from a board of education for particular teaching positions under Educ. Law § 2573(9)].

Section 3020-a is part of a legislative balancing act under the Education Law concerning both employee rights *and* employer responsibilities. Section 3020-a states in part:

2.(a) Upon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, ***the employing board, in executive session***, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists to bring a disciplinary proceeding against an employee pursuant to this section.

Thus, it is clear that a board of education has the sole duty and responsibility to decide whether to prefer disciplinary charges against a tenured employee. Moreover, it is beyond cavil that the duty to discipline a tenured employee is at least as important as the duty to make seniority determinations, or to terminate non-tenured employees, or to grant tenure, or to decide qualification requirements for teaching positions.

In *Three Village*, the Appellate Division was faced with a very similar question concerning a school district's statutory authority that was central to the district's maintenance of adequate standards in the classroom. 128 A.D.2d 626. There, the district determined that a senior teacher was not qualified for a permanent substitute position. *Id.*, at 627. In an arbitration that challenged this determination, the arbitrator held that the issue of teacher placement was governed by the collective bargaining agreement and that the district's decision contrary to that

agreement was arbitrary and capricious. *Id.* The Appellate Division vacated the arbitration award. It held that, while the issue of teacher transfers may be a subject of collective bargaining, certain powers such as the responsibility to determine qualifications must remain “*nondelegable and nonnegotiable.*” *Id.*, citing *Cohoes*, 40 N.Y.2d at 777-778 (emphasis added); N.Y. Educ. Law § 2573(9). Determining whether a prospective applicant possesses the requisite qualifications “is a responsibility of the type that may not be bargained away, as it is central to the maintenance of adequate standards in the classroom.” *Three Village*, 128 A.D.2d at 627, citing *Honeoye*, 49 N.Y.2d at 734.

As in *Three Village*, Appellant here may bargain over the scope and manner in which a disciplinary action proceeds, either under Education Law § 3020-a or by an alternative procedure. However, it may *not* bargain away its duty to commence disciplinary proceedings against a tenured employees in the first instance. *See* N.Y. Educ. Law §§ 3020 and 3020-a. The Award reaches the directly contrary conclusion in holding that the LACs issued by Respondent’s supervisors precluded Appellant from preferring § 3020-a charges against Respondent *unless* the charges also allege that Respondent had repeated the specific and egregious conduct of which she was warned in the LACs. [R. 16, 28-31]. However, the decision whether there is sufficient probable cause that a teacher committed misconduct to justify § 3020-a charges is Appellant’s statutory duty and one which is clearly central to the maintenance of adequate standards in the classroom. *See Three Village*, 128 A.D.2d at 627, *lv denied*, 70 N.Y.2d 608, citing *Honeoye*, 49 N.Y.2d at 734; *Candor Cent. Sch. Dist.*, 42 N.Y.2d 266; *Cohoes*, 40 N.Y.2d at 777-778. The Award impermissibly held that Appellant had delegated its right to prefer charges to its supervisory staff by virtue of those administrators issuing LACs to Respondent. This conclusion

is directly contrary to established public policy codified in express provisions of the Education Law. *Id.*

Appellant's nondelegable duty to commence disciplinary proceedings for teacher misconduct was clearly violated by the Award which is, therefore, against public policy. *Three Village*, 128 A.D.2d at 627; *Cohoes*, 40 N.Y.2d at 777-778; N.Y. Educ. Law § 3020-a(2). The Award effectively holds that a school district delegates its obligation to bring disciplinary charges simply through the issuance of LACs. Accordingly, the Award is void as against public policy for violating Appellant's statutory obligation and statutory duty to initiate disciplinary charges against its tenured employees under Education Law § 3020-a. *Honeoye*, 49 N.Y.2d 732; *Candor Cent. Sch. Dist.*, 42 N.Y.2d 266; *Cohoes City Sch. Dist.*, 40 N.Y.2d 774.

POINT II

THE AWARD VIOLATES PUBLIC POLICY ESTABLISHED BY THE COURT OF APPEALS IN *HOLT/DOYLE*

For almost thirty years, the Court of Appeals' decision in *Holt/Doyle*, 52 N.Y.2d 625 (1981), has been the controlling law regarding critical but constructive administrative criticisms of tenured teachers. In that seminal opinion, the Court recognized that "section 3020-a of the Education Law ... protects tenured teachers from arbitrary suspension or removal ... a critical part of the system of contemporary protections that safeguard tenured teachers from official or bureaucratic caprice." *Holt*, 52 N.Y.2d at 632. At the same time, the Court held that the statute "was not intended to interfere with the day-to-day operation of the educational system in which administrative evaluation of a teacher's performance plans an important part." *Id.* Key to its holding, the Court also stated that, if it were to find that LACs constituted discipline within the meaning of section 3020-a, "the interpretation ... would result in leaving the school

administration with only a choice between an oral admonition of a teacher and the initiation of formal disciplinary proceedings,” clearly an untenable interpretation. *Id.*, at 632-33.

The Commissioner of Education has also held, on multiple occasions, that the use of LACs is proper in a subsequent 3020-a proceeding based upon the same conduct and that an arbitrator’s refusal to consider such charges is *reversible error*. See *Bd. of Ed. of Locust Valley Cent. Sch. Dist.*, 33 Ed.Dept.Rep. 184, Comm. Dec. No. 13057 *2 (Nov. 30, 1993); *Matter of Bd. of Educ. of City Sch. Dist. of New York*, 24 Ed. Dept. Rep. 163, 166, Comm. Dec. No 11,353 *3 (Nov. 1, 1984). Therefore, the central public policy of *Holt/Doyle* is that LACs are vital administrative tools for public employer’s effective management of their employees and any interpretation which endangers their use is improper, against the letter and spirit of Education Law § 3020-a, and contrary to important public policy. *Holt*, 52 N.Y.2d 625.

The Award completely circumvents both the holding in *Holt/Doyle* and the important public policy reaffirmed by the Court in that case. If the Award is allowed to stand, public school districts will now be faced with the Hobson’s choice of either making no criticism (or only oral admonitions) or bringing formal disciplinary charges under Education Law § 3020-a in those situations where LACs had been issued. *Holt*, 42 N.Y.2d at 633. Faced with such a choice, school districts would likely discontinue the use of LACs to preserve the ability to formally discipline a wayward employee. Stated differently, there is no reason any school district would allow its administrators to issue LACs for fear of foreclosing the board of education’s right to institute future discipline based upon conduct which was the subject of a LAC. In the words of the Court of Appeals in *Holt/Doyle*,

Such an informal warning serves, we believe, as a useful tool to help the administrator correct minor problems before they grow into major ones. Should the school administrator be deprived of this informal means of policy enforcement, one of two situations will ultimately prevail. The school

administration must either overlook all minor infractions and allow them to go unremedied if an oral admonition had yielded no results or must initiate formal disciplinary action to remedy each such infraction. In the first case, a tenured teacher would be allowed free reign to disregard supervisory directives so long as his infraction does not rise to the level of conduct which could result in a formal disciplinary proceeding. In the latter, the teacher would be faced with the spectre of formal proceedings upon any breach of school policy, however small. Surely the Legislature has not expressly limited a school district to a policy choice between these extremes of permissiveness and strictness. Common sense dictates that another, more moderate, option should be available. *Holt*, 52 N.Y.2d at 633.

Similar limiting and illogical consequences would necessarily flow if the Award is allowed to stand. For example, a tenured teacher could, with impunity, ignore warnings contained in 50 informal *Holt/Doyle* memorandums that addressed 50 separate and different acts of fairly severe misconduct, and subsequent 3020-a charges against that teacher could not mention those prior memorandums or allege those prior acts of misconduct. On the other hand, a tenured teacher who received three *Holt/Doyle* memos for three separate acts of the same relatively minor misconduct (e.g., failure to turn in lesson plans to the administration) and who was charged under 3020-a, would find that those memorandums were admissible and probative. It is apparent which of these two scenarios is more destructive of “the efficient management of the modern school system” [*Id.*, 503] and totally anathema to the moderate “common sense” option that the Court of Appeals endorsed in *Holt/Doyle*. [*Id.*, 503].

Additionally, the implications of the Award have potentially devastating financial consequences for school districts, which would be forced to spend exorbitant amounts of money on formal disciplinary proceedings under § 3020-a and to refrain from issuing LACs to correct the performance of a teacher perceived as inadequate. *Cf. Holt*, 42 N.Y.2d at 633. According to survey information released by NYSSBA in 2009, districts in New York spent an average of \$216,588 to pursue disciplinary charges against tenured employees, up from approximately \$128,941 just five years prior. *See Appendix, Quality Educators in Every School*, NYSSBA

2008; *On Board Online*, NYSSBA News, May 11, 2009; and *On Board Online*, Albany Update, June 9, 2008. Moreover, the public policy supporting the Court of Appeal's decision in *Holt* is directly on point as to the likely consequences of the Award. According to the Court in *Holt/Doyle*, "a broader range of administrative review of a teacher's performance is both necessary to the *efficient management of a modern school system* and consistent with the *letter and spirit of section 3020-a of the Education Law*." *Id.*

Finally, although not expressed, the Award is obviously predicated upon the basic assumptions that (1) the LACs were a form of discipline selected by Appellant from a range of possible disciplines and, once chosen, Appellant was "stuck with it," and (2) a school district must file 3020-a disciplinary charges regarding every discrete act of misconduct or, alternatively, if it issues *Holt/Doyle* memos and 3020-a charges are subsequently filed, those charges must allege a repeat of the conduct cited in the memos in order to survive a motion to dismiss. Both assumptions are facially incorrect.

The arbitrator's misinterpretation *Holt's* central holding incorrectly limits the permitted use of LACs contrary to the principals and policy approved by the Court of Appeals in *Holt/Doyle*. 52 N.Y.2d at 632-33. The Award violates the important public policy articulated by the Court by eliminating or significantly limiting the use of LACs as a permitted tool for managing public employees. Thus, it is void as a matter of law.

CONCLUSION

Accordingly, this Court should overturn the Award as being in violation of important public policy. It improperly usurps a board of education's statutory authority under Education Law § 3020-a. Moreover, the Award clearly violates the important public policy

enunciated in *Holt/Doyle*. Consequently, it is respectfully submitted this court should vacate the Award as against public policy and remand with instructions that the arbitrator consider the preferred charges.

Dated: August 13, 2010

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