[1] In the Matter of the Application of the Jordan- Elbridge Central School District and the Board of Education thereof, Petitioners, For an Order Pursuant to Article 75 of the CPLR Vacating the Hearing Officer's Decision, against Anonymous, a Tenured Administrator, Respondent.**

2012-3582

SUPREME COURT OF NEW YORK, ONONDAGA COUNTY

2012 N.Y. Misc. LEXIS 5137; 2012 NY Slip Op 52068U

October 16, 2012, Decided

CORE TERMS: arbitrator's, final awards, arbitration, discovery, hearing officer, final determination, vacate, hearing officer's, interlocutory, interim, subject matter, arbitration proceedings, compulsory, entertain, exceeded, vacating, coverage, insurer, emails

COUNSEL: [*1] For Petitioners: CHARLES C. SPAGNOLI, ESQ., OF THE LAW FIRM OF FRANK W. MILLER.

For Respondent: STEPHEN CIOTOLI, ESQ., OF O'HARA, O'CONNELL & CIOTOLI, P.C.

JUDGES: Donald A. Greenwood, J.

OPINION BY: Donald A. Greenwood

OPINION

The petitioners, Jordan-Elbridge Central School District and the Board of Education, bring this petition pursuant to CPLR §7511 seeking to vacate the Decision of Hearing Officer Frederick P. Day which ordered them to produce certain emails during discovery. *See, CPLR §7511*. Day had been previously appointed by the New York State Education Department to hear and decide charges filed by the petitioners against the respondent pursuant to Education Law §3020-a. On May 4, 2012 the hearing officer ordered the petitioner district to produce emails for ten individuals covering a period of three years each, and by letter dated June 13, 2012 the **[**2]** district requested that the hearing officer reconsider the decision. At the parties' appearance on June 25, 2012 the hearing officer denied the district's request for consideration. The petitioner brings this action to vacate an award on the ground that the hearing officer's decision "exceeded his power or so imperfectly executed it that a final and definite **[*2]** award upon the subject matter submitted was not made." *CPLR §7511(b)(1)(iii)*. The petition was filed on July 5, 2012 and no transcript of the June 25, 2012 hearing or the hearing officer's decision was provided in support of the petition. As of the date of this decision, the petitioners have not provided the Court with the transcript.

The respondent has answered the petition and at the same time seeks to dismiss the petition on the ground that this Court lacks jurisdiction to vacate the decision at this stage of the proceeding inasmuch as the discovery order is not a final determination subject to review under CPLR §7511. The law is well settled that in order for this Court to intervene or even entertain a suit seeking court intervention there must be an "award" within the meaning of the statute. *See,*

Mobil Oil Indonesia, Inc. v. Asamera Oil, 43 NY2d 276, 372 N.E.2d 21, 401 N.Y.S.2d 186 (1977). The Court of Appeals, in addressing a decision made in the context of a request for discovery, has held that before the" awards' of arbitrators which are subject to judicial examination under the statute - only to a very limited extent - are the final determinations made at the conclusion of the arbitration proceedings. Generally **[*3]** the award is the arbitrator's decision and final determination upon the matters submitted." *Id*. The Fourth Department recently addressed this issue in the context of respondent's motion for summary judgment dismissal of eleven of sixteen pending charges in an Education Law §3020-a hearing. *See, Geneva City School District v. Anonymous*, 77 AD3d 1365, 908 N.Y.S.2d 506 (4th Dept. 2010). The Court held that the hearing officer's granting of the motion constituted an "interim award." *See, id*.

The respondent correctly argues here that a decision on a discovery issue during the ongoing proceeding is an interlocutory order which involves only a limited procedural question and in no way constitutes a final determination made at the conclusion of the arbitration proceedings. *See, Mobil Oil, supra*; *see also, Geneva City School District, supra*. There is therefore no authority for judicial intervention at this juncture. *See, Geneva City School District, supra, citing, Town of Southampton v. Patrolman's Benevolent Association of Southampton Town, Inc*., 8 AD3d 580, 778 N.Y.S.2d 698 (2d Dept. 2004).

The petitioners' reliance upon *Board of Education of Westmoreland Central School District v. Westmoreland Teacher's Association*, is misplaced. **[*4]** *See, Board of Education of Westmoreland Central School District v. Westmoreland Teacher's Association* 58 AD2d 228, 397 N.Y.S.2d 474 (4th Dept. 1977). In that case the arbitrator had rendered a final and conclusive decision on the ultimate subject matter of the arbitration, but had maintained continuing jurisdiction over a future school year. *See, id*. The Fourth Department ruled that the entire matter submitted to the arbitrator was final and it was appropriate for the hearing officer to continue jurisdiction.[1]

1 This Court specifically rejects the analysis in the unreported case of *Jordan-Elbridge Central School District v. Anonymous, A Tenured Teacher* (RJI 33-11-0136) dated 2/16/11, as advocated by petitioners where the court ruled that a discovery determination of a hearing officer was final for purposes of an Article 75 review. *See, Mobil Oil, supra*.

The petitioners, in ignoring the requirement that an arbitrator's award be a final **[**3]** determination upon the matter submitted, urges this Court to review the arbitrator's interim discovery decision here.[2] However, in the case relied upon by the petitioners, the Court of Appeals has not held that review of an interim decision is proper. *See, Mount St. Mary's Hospital of Niagara Falls v. Catherwood*, 26 NY2d 493, 260 N.E.2d 508, 311 N.Y.S.2d 863 (1970). **[*5]** Nor does its progeny; instead, all of the subsequent Court of Appeals cases concern final awards by arbitrators.[3] Similarly, the Fourth Department in applying *Mount St. Mary's, supra*. has also done so only in the context of final awards.[4] The petitioners are correct that they may ultimately be entitled to a review of the arbitrator's final award that is "to be measured according to whether [it is] rational or arbitrary **[**4]** and capricious in accordance with the principals articulated in *Mount St. Mary's Hospital, supra*. *See, City of Buffalo v. Rinaldo*, 41 NY2d 764, 364 N.E.2d 817, 396 N.Y.S.2d 152 (1997). However, the petitioners are not entitled to such relief prior to a final determination and award." The state favors and encourages arbitration as a means of conserving the time and resources of the court and the contracting parties' (citations omitted) and for the court to entertain review of intermediary arbitration decisions involving procedure or any other interlocutory matter would disjoint and unduly delay the proceedings thereby thwarting the very purpose of conservation. Not only the limitations of the statute but policy considerations as well dictate that the courts refrain from entertaining such interlocutory **[*6]** determinations made by arbitrators." *Mobil Oil, supra*.

2 In this case, the hearing officer has determined that respondent is entitled to discovery of documents to assist him in preparing his defense to the charges made against him. Courts have upheld this and emphasized the rights of the accused employee over the students' privacy with

appropriate redaction. *See, Matter of Bd. of Educ. of Is. Trees Union Free School Dist. v. Butcher*, 61 AD2d 1011, 402 N.Y.S.2d 626 (2d Dept. 1978). To the extent that petitioners are unwilling to produce those documents or they view the production as unlawful, they may have no other choice but to withdraw those charges. This is commonly done in other areas of law when the records protected are intertwined with the charges brought. For example, criminal charges may be withdrawn to protect the identity of a confidential informant or a plaintiff may discontinue certain claims to avoid the disclosure of certain medical records.

3 *See, City of Buffalo v. Rinaldo*, 41 NY2d 764, 364 N.E.2d 817, 396 N.Y.S.2d 152 (1997), (where the petitioner sought to vacate and annul an arbitration award granting police department employees a retroactive pay increase); *see also, Levine v. Zurich American Insurance Co.*, 49 NY2d 907, 405 N.E.2d 675, 428 N.Y.S.2d 193 (1980), **[*7]** (proceeding brought to vacate arbitrator's final award based on finding that a jury verdict in a prior negligence action had not included recovery for an injured party's "basic economic loss" as defined in the No Fault Law); *see also, Furstenberg and Aetna Casualty and Surety Co. v. Allstate Insurance Co.*, 49 NY2d 757, 403 N.E.2d 170, 426 N.Y.S.2d 465 (1980), (auto liability insurer's motion to vacate a final award concerning defective notice of termination); *see also, Petrofsky v. Allstate Insurance Co.*, 54 NY2d 207, 429 N.E.2d 755, 445 N.Y.S.2d 77 (1981), (finding that a master arbitrator exceeded his powers in vacating a final award of an arbitrator); *see also, Smith v. Firemen's Insurance Co., et al*, 55 NY2d 224, 433 N.E.2d 509, 448 N.Y.S.2d 444 (1982), (finding that a master arbitrator did not exceed his powers in vacating an arbitrators final award in favor of a first party insured in a compulsory arbitration); *see also, Motor Vehicle Manufacturer's Association of US, Inc. v. State of New York*, 75 NY2d 175, 550 N.E.2d 919, 551 N.Y.S.2d 470 (1990), (plaintiff trade associations representing automobile manufacturers, importers and distributors sought declaration that General Business Law §198-a ("Lemon Law") violated the New York State Constitution, holing that if a consumer chose arbitration that claim became **[*8]** reviewable when either party sought subsequent review of the award).

4 *See, New York Central Mutual Fire Insurance Co. v. Nichols*, 192 AD2d 1131, 596 N.Y.S.2d 621 (4th Dept. 1993), (insurer brought Article 78 proceeding seeking review of final award and dispute concerning uninsured motorist coverage and the court rejected petitioner's argument that the arbitration was compulsory, and therefore subject to the broad judicial review available in CPLR Article 78 proceedings); *see also, Berent v. County of Erie*, 86 AD2d 764, 448 N.Y.S.2d 282 (4th Dept. 1982), (proceeding seeking confirmation of an arbitrator's determination concerning coverage for a county employee's injury); *see also, Brunner v. Allstate Insurance Co.*, 79 AD2d 491, 437 N.Y.S.2d 199 (4th Dept., 1981), (review of final award concerning a review of interest on a medical benefit claim and attorney's fees); *see also, City of Auburn v. Nash*, 34 AD2d 345, 312 N.Y.S.2d 700 (4th Dept. 1970), (dispute concerning city employee's compliance with provision of collective bargaining agreement between city employees relating to time for requesting arbitration of grievance was determinable by arbitrators and not by the court).

NOW, therefore, for the foregoing reasons, it is

ORDERED, that the respondent's motion **[*9]** for dismissal of the petition for lack of jurisdiction is granted.

ENTER

Dated: October 16, 2012

Syracuse, New York DONALD A. GREENWOOD

Supreme Court Justice