OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

CITY OF NEW YORK: DECISION NO. B-9-74

Petitioner DOCKET NO. BCB-173-74

-and-

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO "

Respondent

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DECISION AND ORDER

The City's Petition herein contests the arbitrability of a grievance filed by District Council 37. The amended request for arbitration alleges that Willa B. Screen, a probationary Senior Accountant in the Finance Administration, was "terminated from her employment in violation of Article IX of the City-Wide contract." [1] The remedy sought is "compliance with Article IX of the City-Wide contract and immediate restoration to employment with back-pay." The Union frames the questions for the arbitrator as:

> "1. Did the Agency violate grievant's rights under Article IX of the City-Wide contract?
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> 2. if so:
> a) did such violation prejudice grievant in the service of her probationary term?
>
> b) was such violation the cause of her termination?

[1] The City does not oppose the Union's request to amend its request for arbitration and we shall permit the amendment.

The City's Petition contesting arbitrability contends that Article IX of the City-Wide agreement does not Obligate the City "to submit termination of grievant's employment as probationary employee to the arbitration procedure"and that the grievance seeks a "review and reversal" of a determination which is a managerial prerogative. The City further contends that the waiver executed pursuant to §1173-8.0(d) is improper because the underlying dispute has already been submitted to two other forums.

Article IX of the City-Wide contract provides:

> "An employee covered by this Contract shall be entitled to read any evaluatory statement of his work performance or conduct prepared during the term of this Contract if such statement is to be placed in his permanent, personnel folder whether at the central office of the Department or in another work location. He shall acknowledge that he has read such material by affixing his signature on the actual copy to be filed, with the understanding that such signature merely signifies that he read the material to be filed and does not necessarily indicate agreement with its content. The employee shall have the right to answer any material filed and his answer shall be attached to the file copy.

The grievant was appointed to the position of Senior Accountant in the Department of Finance in April, 1973. Before the end of her probationary period, she was notified in writing that she would be terminated on September 18, 1973. The Union contends that grievant was "not permitted to see or read statements evaluatory of her work performance and conduct, which statements were adverse to her and which Were placed in her personnel folder. Therefore, grievant could not exercise her right to answer any such statements.*

The City alleges that before the required waiver was filed in this case, the grievant filed complaints with the New York City Commission on Human Rights and the Equal Employment Opportunity Commission charging that her discharge was caused by racial and sexual discrimination and demanding the same remedy as requested in the instant grievance, reinstatement with back pay.

The City argues that since the grievant is pursuing her Title VII rights she may not also pursue her contractual rights because she has submitted the underlying grievance to a civil rights tribunal.

Section 1173-8.0(d) of the NYCCBL provides:

> "As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall

> be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to-any other administrative or judicial tribunal except for the purposes of enforcing the arbitrator's award."

The questions before the Board require determinations as to the effect of grievant's probationary civil service status on the arbitrability of the grievance and the effect of the waiver requirements where a Title VII discrimination case is pending before another tribunal.

Grievant's probationary status

The grievance cites a violation of grievant's right to read and answer material in her personnel folder. Article XIV of the City-Wide contract provides that "Any grievance concerning matters covered by this agreement shall be processed through the grievance procedure set forth in Executive Order No.52 ... including any amendment thereto Executive Order No.83 amended Executive Order No.52; it defines a grievance as "a dispute concerning tho application or interpretation of the terms of a written, executed collective bargaining agreement and provides that such grievances shall be submitted to arbitration

The City "does not deny that whether Article IX was violated is an arbitrable issue." (Brief, page 9.):

However, it urges that the grievance - "is not arbitrable insofar as a review of the City's termination of Ms. Screen is sought. The City argues that because the Civil Service Law and Rules provide that a probationer may be terminated by the appointing officer without any requirement that a hearing be held, *any hearing which reviewed Ms. Screen's termination as part of a violation of Article IX would do so in contravention of State Civil Service Law, case Law and the Civil Service Commission Rule." The brief cites Application of Ramos, 311 NYS 2d 538 (1970) for the proposition that "A probationary employee need not be furnished with the charges against here is not entitled to a hearing and may be dismissed without reason given for her removal."

While the Civil Service Law may not require that a probationer be served with charges or given a hearing, it is clear that the 'law does not prohibit the City and a public employee representative from contractually expanding the rights of probationary employees. Article IX of the City-Wide contract does note on its face, exclude probationary employees from its application. The effect to be given to the provisions of Article IX and, more specically, the relief, if any, to be granted to a probationary employee alleging a violation of Article IX, are questions which go to the interpretation of the contract and are therefore for an arbitrator. The remedy, if any, Must, be consistent with applicable law. But in no of course,

event may the arbitrator substitute his judgment for that of the employer with respect to the work performance of a probationary employee. The arbitrator's decision in this case must be confined to the question of whether Article IX has been violated - and if so, what is the appropriate remedy for that violation.

Waiver and election of remedies

The purpose of the waiver requirement is to prevent a grievant from having recourse to two tribunals for relief of a single claim. If the grievant might have a remedy pursuant to both a contract and a statute, she is generally required to elect only a single remedy and the other remedy Is waived. Section 1173-8.0(d) requires a grievant to waive submission of "the underlying dispute" as a condition of invoking the arbitral remedy pursuant to the NYCCBL.

In the circumstances of this case, however, it seems that any attempt by grievant to waive submission of her Title VII claims to another tribunal would be of no effect and contrary to public policy.

It is well established that there are certain classes of cases in which the issues raised so closely intertwine questions. of public policy with the vindication of private rights that the courts will not permit those issues to be finally determined by arbitration. These classes of cases

are discussed in Associated Teachers of Huntington v. Board of Education, 33 NYS 2d 229 (1973)t which cites as examples antitrust law controversies, the liquidation of insolvent insurance companies and the determination whether an agreement constitutes a usurious loan. The U.S. Supreme Court has recently indicated that cases alleging violations of civil rights will be treated similarly. In Alexander v. Gardner-Denver Co., U.S. ,94 S.Ct. 1011, 7 FEP Cases 81 (1974), the Court decided that arbitration under a non-discrimination clause of a collective bargaining agreement did not foreclose a grievant from vindicating his Title VII rights under the Civil Rights Act of 1964. The decision of the District Court that "petitioner, having voluntarily elected to pursue his grievance to final arbitration under the 'non-discrimination clause of the collective bargaining agreement, was bound by the arbitral decision and thereby precluded from suing his employer under Title VII" was reversed. The District Court and the Tenth Circuit, which affirmed the lower court decision, had both relied on "notions of elections of remedies and waver and ... the federal policy favoring arbitration of labor disputes.....

The Court said:

> "There is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction. In addition legislative enactments in this area have long evinced a general intent to award parallel or overlapping remedies against discrimination."
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> * * *
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> 'In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums."
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> "[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII .... Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible to

prospective waiver. See Wilko v. Swan, 346 U.S. 427 (1953).

> "The actual submission of petitioner's grievance to arbitration in the present case does not alter the situation. Although presumably an employee may waive his cause of action under Tit ' le VII as part of a voluntary settlement, mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver. Since an employee rights under Title VII may not be waived prospectively, existing contractual rights and remedies against discrimination must result from other concessions already made by the union as part of the economic bargain struck with the employer. It is settled law that no additional concession may be exacted from any employee as the price for enforcing those rights. J.1. Case Co.-v. Labor Board, 321 U.S. 332, 338-339, 14 LRRM 501 (1944)."

The Supreme Court having held that Congress intended anti-discrimination actions under Title VII to overlap and parallel the arbitration process, and having further stated that an employee cannot prospectively waive Title V11 rights, we find that we cannot deny arbitration to the grievant herein.

The grievant could not effectively waive her Title VII rights by proceeding to arbitration under the City-Wide. contract prior to filing a claim under Title VII, and the fact that she filed her waiver herein subsequent to asserting her Title VII rights is not controlling. A holding by us that the waiver must be filed before the

Title VII suit is commenced would be an empty procedural requirement since the waiver has no application to the Title VII proceeding. The waiver is effective, of course, to preclude any further action by grievant to vindicate in any other forum contractual rights not covered by Title VII.

We find that the grievant has filed the waiver required by §1173-8.0(d) of the NYCCBL, and we further find that such waiver is not affected by the commencement of a Title VII proceeding in light of the holding in Alexander v. Gardner-Denver Co.; therefore, we shall refer the grievance to arbitration and dismiss the petition.

O R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the petition herein be, and the same hereby is denied; and it is further

ORDERED,, that the request for arbitration with respect to an alleged violation of Article IXr under the conditions described in this decision be, and the same hereby is, granted.

DATED: New York,, N.Y.
July 2, 1974

ARVID ANDERSON
CHAIRMAN

ERIC J. SCHMERTZ
MEMBER

WALTER L. EISENBERG
MEMBER

VINCENT D. McDONNELL
MEMBER

EDWARD F. GRAY
MEMBER