

NYCHA v. PBA (for NYC Housing), 17 OCB 7 (BCB 1976) [Decision No. B-7-76 (Arb)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

-----x

In the Matter of

NEW YORK CITY HOUSING AUTHORITY,

Petitioner

-and-

DECISION NO. B-7-76

NEW YORK CITY HOUSING PATROLMEN'S  
BENEVOLENT ASSOCIATION, INC.,

DOCKET NO. BCB-260-76

Respondent

-----x

---

DECISION AND ORDER

The New York City Housing Authority filed its petition on June 11, 1976 contesting the arbitrability of a grievance dated May 20, 1976 filed by the New York City Housing Patrolmen's Benevolent Association, Inc., on behalf of a housing authority police officer.<sup>1</sup> The grievance arises out of the arrest of the grievant on March 14, 1975 and from the subsequent disciplinary action taken by the employer. The Association's Answer was filed on June 21, 1976.

THE FACTS

The papers submitted by the parties reveal the following facts, in substance. On March 14, 1975, the grievant was arrested by a member of the New York City Police Department for a violation of §1192 of the Vehicle and

---

<sup>1</sup> The request was not accompanied by grievant's waiver and was thus incomplete as a matter of form. The completed waiver was not received by the Housing Authority until May 24, 1976. On June 3, 1976, the Authority sent a letter to the office of Collective Bargaining objecting to the request for arbitration on the ground that the matter had been appealed to the Civil Service Commission, but apparently no copy of the letter was served on the Association. It is not disputed herein that at a meeting called by the OCB Deputy Director for Disputes on June 4, 1976, the parties discussed the issues presented by the instant case.

Traffic Law which prohibits operation of a motor vehicle while under the influence of alcohol. He was released from custody, given a desk appearance ticket and then appeared before his commanding officer, an Inspector in the New York City Housing Authority Police Department who discussed with him the facts of his arrest.

Decision No. B-7-76

Docket No. BCB-260-76

2.

On September 30, 1975 the grievant was served with disciplinary charges relating to the March 14, 1975 incident and to another incident which took place on June 17, 1975. The charges stated:

"You are charged with incompetency and misconduct as follows:

1. On or about March 14, 1975:

(a) In the Criminal Court of the City of New York, County of New York, based on a criminal charge that you had violated Section 1192 of the Vehicle and Traffic Law on or about March 14, 1975, the Disposition of said charge against you was an Adjournment in Contemplation of Dismissal (Section 170.55 of the Criminal Procedure Law);

(b) In violation of Rule #84 of the Housing Police Rules and Regulations, when you reported to Chief of Patrol Richard T. Beckel, you were unfit for duty as a result of having indulged in intoxicants.

2. On or about June 17, 1975, while on duty at Morris Houses:

(a) In violation of Rule #84 of the Housing Police Rules and Regulations, you were unfit for duty as a result of having

indulged in intoxicants;

- (b) In violation of Rule #61 of the Housing Police Rules and Regulations, you failed to report for patrol in uniform; and,
- (c) In violation of Rule #54A of the Housing Police Rules and Regulations, you did not record in your Memo Book a full and accurate record of duty performed; all of which has impaired your usefulness as an employee of the Authority."

A Housing Authority hearing officer found the grievant guilty of the charges enumerated in 1(b) and 2(b) quoted above and recommended that a penalty of suspension without pay for 44 working days be imposed.

This recommendation was upheld by the Members of the Housing Authority on March 23, 1976; they imposed the 44 working day suspension.<sup>2</sup> Thereafter, on May 4, 1976 the grievant appealed to the Civil Service Commission pursuant to Section 76 of the Civil Service Law. The appeal states:

"Please take notice that Alphonzie Cleveland, a housing police officer in the competitive class of the Civil Service, subject to the jurisdiction of the Civil Service Commission of the City of New York, by Lowell & Karassik, his attorneys, hereby appeals the determination of the New York City Housing Authority dated March 23, 1976, directing his suspension for a period of 44 working days, a copy of which resolution and advice with respect thereto is attached hereto and made a part hereof."

At the disciplinary hearing on the charges quoted above, the Inspector testified concerning the events of March 14, 1975, including grievant's appearance and grievant's description of his arrest. The grievant's attorney objected to the testimony on the ground that the Inspector had not given certain "Bill of Rights" warnings to grievant on the day of his arrest prior to conducting his interview with grievant. These warnings

---

<sup>2</sup> The penalty has been stayed pending resolution of the grievant's challenge to the discipline.

are provided in Housing Police General order #17 of 1969 (revised as #5 of 1976) and incorporated into the collective bargaining agreement by reference. The General order provides, inter alia, that a member of the Department shall be advised of his right to remain silent and his right to counsel if he is "under arrest or is a subject of a criminal investigation." While the disciplinary process described above was pending, grievant filed a Step II grievance under the contract protesting the Inspector's failure to give the warnings specified in the General Order, and attacking the admission of the Inspector's testimony at the disciplinary hearing.

The grievance sought to be arbitrated herein alleges not only the failure of the Inspector to give the warnings required and the wrongful introduction of the Inspector's testimony concerning his interview with grievant before the hearing officer, but also the failure of the employer to process the Step II grievance properly. The demand for arbitration challenges the procedure used by the employer in the lower step determinations of the grievance relating to the failure to give the required warnings, and alleges that contractual and ad hoc agreements concerning processing of the instant grievance at the lower steps were breached by the Authority. As a remedy the grievance demands vacation of the Housing Authority Resolution relating to disciplinary charges.

#### POSITIONS OF THE PARTIES

The Housing Authority alleges that the grievance is not arbitrable under the contract and that the grievant has violated

the waiver provision of the NYCCBL. It contends that:

"The provision of §1173-8 0 d of the Collective Bargaining Law and §6.3 of the Consolidated Rules requiring waiving of the right to submit an underlying dispute to any other administrative or judicial tribunal as a condition of invoking impartial arbitration is consonant with the Civil Service Law and case law on the subject and reflects the public policy of the State that a civil service employee aggrieved by a disciplinary determination is restricted to one forum in pursuit of a remedy."

The Association raises several points in opposition to the Housing Authority's contention that the matter is not arbitrable. First, the Association argues that the Authority's objections were not timely raised under the ten day limit of §6.4 of the Board's rules. Second, the Association points out that many of the Authority's objections go to the merits of the grievance and to the interpretation of the contract and are therefore for the arbitrator and not for the forum determining arbitrability. Third, the Association argues that the appeal to the Civil Service Commission does not bar arbitration for the following reasons, in substance:

1. The Civil Service Commission proceeding is a matter to be raised before the arbitrator "and the OCB's threshold jurisdiction is limited by its rules to whether the subject matter falls within the grievance procedures";
2. Charge 2(b) of which the grievant was convicted is not related to the grievance sought to be arbitrated herein and the grievant's right to appeal that charge to the Civil Service Commission should not preclude his right to seek arbitration of the instant unrelated grievance.

3. The Authority's objection that the Civil Service Commission will consider the subject of the instant grievance is premature and the Authority is free to urge the grievant's waiver herein to the Civil Service Commission.
4. The arbitrator and the Civil Service Commission will not necessarily issue overlapping decisions and, in any case, the Civil Service Commission will not consider the alleged violation of procedural steps of the contract.

#### DISCUSSION

We shall proceed first to a consideration of the waiver provisions of the law. Section 1173-8.0d 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 purpose of enforcing the arbitrator's award.

The Board has consistently held that this statutory requirement imposes a condition precedent to arbitration.<sup>3</sup> The Board's consideration of the requirement of §1173-8.0d is not dependent on a timely objection by a party raising the issue, but is a jurisdictional requirement imposed by statute which limits the Board's authority to order a case to arbitration. Therefore, if the waiver requirement of the law has been violated, the grievance may not be submitted to an arbitrator

---

<sup>3</sup> City of N.Y. and UFA, Dec. No. B-10-74; City of NY and UFOA, Dec. No. B-11-75; City of NY and UFOA, Dec. No. B-15-75.

even if the grievance is otherwise arbitrable.

In the instant case, it is clear that the grievant has submitted the same underlying dispute as is presented in the demand for arbitration to the Civil Service Commission through an appeal under §76 of the Civil Service Law. The remedy requested from the arbitrator is "vacation with prejudice of the resolution relating to disciplinary charges." Similarly, the appeal to the Civil Service Commission is directed to the self same resolution of the Housing Authority imposing a disciplinary suspension of 44 days. The aim of both the appeal and the grievance is reversal of the Housing Authority resolution of March 23, 1976. Both the appeal and the grievance are directed to the same underlying dispute, that is, the discipline imposed on grievant as a result of his actions on March 14, 1975.

While it is true that the Civil Service appeal also encompasses an event which occurred on June 17, 1975 and is not related to the instant grievance, the grievant has not attempted to limit his §76 proceeding so as to exclude the substance of the contractual grievance. In order to comply with the waiver provision of §1173-8.0d, the matter sought to be arbitrated may not also be made the subject of a proceeding in another forum. Here, it is clear that the Civil Service appeal covers the discipline imposed as a result of the March 14, 1975 occurrences. We are similarly not persuaded by the grievant's contention that the Authority may avoid overlapping jurisdiction by urging the waiver before the Civil Service Commission. The Board of



Collective Bargaining is the agency solely charged with enforcement of the NYCCBL and its provisions on waivers, and it is the duty of the Board, as prescribed by law, to bar arbitration where the underlying dispute has been placed before another forum.

Finally, we find that it is beside the point to argue, as the Association does, that the Civil Service Commission will not consider whether the Step II grievance was properly handled under the contract. The fact is that the Civil Service Commission will consider whether the hearing officer properly took certain testimony from the Inspector.<sup>4</sup> The aim of the Step II grievance is also to attack testimony from the Inspector. Thus, the "Bill of Rights" issue will be litigated before the Civil Service Commission just as it would have been before an arbitrator. By choosing statutory relief under the Civil Service Law, the grievant has elected to forego certain contractual remedies relating to the processing of his grievance. However, the underlying dispute - the imposition of discipline as a result of the events of March 14, 1975 including the Inspector's interviewing of grievant - will be placed as fully before the Civil Service Commission as it would have been before an arbitrators

---

<sup>4</sup> The Association's Answer herein states that the Civil Service Commission will concern itself with the question "whether the Hearing Officer committed error in basing his decision in whole or in part on testimony received..."

The instant case is remarkably similar to UFA, -Local 94, IAAF, Dec. No. B-8-71, in which the Board was presented with a demand for arbitration where grievants had previously filed an Article 78 proceeding. The Board found that in the Article 78 proceeding the Union argued:

"the alleged violation of the collective bargaining agreement consisted in receiving in evidence over objection, at a departmental disciplinary hearing, the transcripts of the interrogation of the individual grievants obtained during an investigation prior to the disciplinary hearing. The relief requested by the individual grievants in such action (now pending in the Appellate Division, First Judicial Department) is vacatur of the dismissal and fine determinations made by the Fire Commissioner and a judicial decree that two of the petitioners be reinstated with back pay and that the fine imposed upon the third petitioner be reimbursed to him."

In the arbitration proceeding, the Board found that the Union requested arbitration claiming the existence of a dispute concerning "a breach" of "Article XXI" of the collective bargaining agreement "relating to a violation of the right of a fireman to representation by counsel."

The Board held that:

"the grievants made a deliberate choice between different forums with knowledge of all the facts necessary to make an election as between the statutory remedy and the contractual arbitral remedy. Success in the Article 78 proceeding may mean the reinstatement of two of the grievants and reimbursement of the fine to the third grievant, while success in the arbitration proceeding may mean the correction of the record upon which the decision of the departmental trial examiner was based. It follows that, if the record is corrected by an arbitrator's award, and the alleged objectionable parts expunged, it may be that the Fire Commissioner's disciplinary determination will have

lost its underpinnings -- the record."

"This is a classic illustration involving the doctrine of election of remedies (cf. Terry et al v. Manger, 121 NY 161). Having commenced an action invoking a statutory remedy for redress of an alleged contractual breach prior to commencing the arbitration proceeding, they may not now be permitted, through their representative, to invoke the arbitral remedy. The commencement of the Article 78 proceeding, with knowledge of the contractual remedy known to the grievants, is an election of remedies concerning the alleged breach of contract.

"The relief sought in the Article 78 proceeding encompasses all the relief being requested in the arbitration proceeding with respect to the alleged breach of contract and is totally sufficient to grant the grievants everything they are requesting by way of relief."

In this case, the grievant has violated the requirements of §1173-8.0d by submitting the same underlying dispute to the Civil Service Commission as he now seeks to submit to arbitration. It is the purpose of the statute to prevent just such a dual submission. Therefore, we may not order the matter submitted to arbitration.

We do not consider or discuss any of the Housing Authority's other objections to arbitration having found that the waiver requirement is an absolute bar in the instant case.

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

Decision No. B-7-76  
Docket No. BCB-260-76

11.

ORDERED, that the Petition of the New York City Housing Authority herein be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by the New York City Housing Patrolman's Benevolent Association, Inc. be, and the same hereby is, dismissed.

DATED: New York, N.Y.  
July 13, 1976

ARVID ANDERSON  
CHAIRMAN

ERIC J. SCHMERTZ  
MEMBER

THOMAS J. HERLIHY  
MEMBER

EDWARD F. GRAY  
MEMBER