HHC v. DC37, 29 OCB 10 (BCB 1982) [Decision No. B-10-82 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

NEW YORK CITY HEALTH AND
HOSPITALS CORPORATION,

Petitioner, Decision No. B-10-82

-and- Docket No. BCB-522-81
(A-1299-81)

DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Respondent.
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DECISION AND ORDER

On August 11, 1981, District Council 37, AFSCME, AFL-CIO (hereinafter "D.C. 37" or "the Union") filed a request for arbitration alleging that the grievant, James Gibbs, was terminated from employment in violation of the collective bargaining agreement between the Union and the Health and Hospitals Corporation (hereinafter "HHC" or "the Corporation").

On August 28, 1981, HHC filed a petition challenging arbitrability on the grounds that the grievant could not satisfy the waiver requirement of the New York City Collective Bargaining Law (hereinafter "NYCCBL"), and that the claim was barred by the principle of collateral estoppel. After obtaining an extension of time, the Union filed an answer on October 16, 1981. The Corporation obtained an extension of time and filed a reply on November 6, 1981.

BACKGROUND

On or about July 20, 1978, the grievant, James Gibbs, was suspended from his employment as a housekeeping aide at the Bellevue Hospital Center because of his arrest on charges of making usurious loans on hospital premises. On or about November 15, 1978, a hearing was held by the employer but Gibbs, having received no notice of the disciplinary charges filed against him and the date and time of the scheduled hearing, failed to attend. By letter dated December 27, 1978, Gibbs was notified of the decision to terminate his employment.

On April 25, 1979, Gibbs commenced an Article 78 proceeding against the Corporation claiming that he was denied notice and a hearing to which he was entitled before termination of employment under section 75 of the Civil Service Law by virtue of being an honorably discharged veteran of the U.S. Army.[1] The remedy sought in the court proceeding included reinstatement and

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[1] Civil Service Law (hereinafter "CSL") section 75 provides, in pertinent part:

> 1. Removal and other disciplinary action. A person described in paragraph (a), or paragraph (b), or paragraph (c), or paragraph (d) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.
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> (a) A person holding a position by permanent appointment in the competitive class of the classified civil service, or

[continued]

back pay from the date of suspension.

Defining the issue to be decided as "whether ... the failure of the petitioner [the grievant herein] to receive actual notice of the hearing deprived the petitioner of his statutory right to a hearing,"[2] New York Supreme Court Justice Michael Dontzin determined that the Corporation's attempts to notify Gibbs of the charges and hearing date were sufficient. The judge noted that Gibbs' failure to advise his employer of a new change of address, which the regulations of his employment required him to do, was in good part responsible for his failure to receive notice. For this reason, the petition was dismissed.[3]

Footnote 1/ continued ...

> (b) a person holding a position by permanent appointment or employment in the classified service of the state or in the several cities, counties, towns, or villages thereof, or in any other political or civil division of the state or of a municipality, or in the public school service, or in any public or special district, or in the service of any authority, commission or board, or in any other branch of public service, who is an honorable [sic] discharged member of the armed forces of the United States having served therein as such member in time of war as defined in section eighty-five of this chapter, or who is an exempt volunteer fireman as defined in the general municipal law, except when a person described in this paragraph holds the position of private secretary, cashier or deputy of any official or department....

[2] Gibbs v. Health and Hospitals Corporation, No. 41411/79 (Sup. Ct., N.Y. County, Spec. Term, Pt. 1, 1979) at 3.

[3] Justice Dontzin did award Gibbs back pay from August 20, 1978 To the date of his termination, however, finding that the Corporation violated CSL §75(3) by its failure to hold the hearing within thirty days of the suspension. CSL §75(3) permits suspension without pay pending a hearing and determination of

charges, but only for a thirty-day period.

On October 10, 1980, Gibbs' union representative filed a grievance on his behalf pursuant to Article VI of the 1978-1980 contract between D.C. 37 and the City. By way of remedy, a hearing was requested to expedite "immediate reinstatement," "immediate reimbursement for time lost" and "payment of all monies other than regular salary."

The request for arbitration, filed on August 11, 1981, describes the grievance to be arbitrated as "whether the grievant... was terminated from employment in violation of the contract between the Union and the Corporation." Specifically, D.C. 37 alleges a violation of Article VI, Section 1(E) which defines the term "grievance'' to include:

> A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(l) of the Civil Service Law or a permanent competitive employee covered by the Rules and Regulations of the Health and Hospitals Corporation upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status; ....

POSITION OF THE PARTIES

Corporation's Position

HHC asserts that the subject of the request for arbitration is identical to the issue submitted to and decided by the supreme court in Gibbs v. Health and Hospitals Corporation. Therefore, the Corporation argues, the instant proceeding should be barred because the grievant no longer has the capacity to

make a waiver satisfactory to the statutory requirement of NYCCBL section 1173-8.0d, and also because the principle of collateral estoppel precludes relitigation of the issue already litigated and determined in the court proceeding.

In its petition, HHC characterizes the issue raised in the court proceeding and in the instant case as the alleged improper termination of employment and characterizes the court's opinion as a decision "on the merits." In the reply to the Union's answer, however, HHC characterizes the issue addressed in the two proceedings as the alleged failure to afford the grievant the contractual procedures required before termination of employment.[4] In either case, HHC asserts that the doctrine of collateral estoppel and the waiver provision of the NYCCBL should be applied to bar the grievant's claim.

The Corporation further maintains in its reply that the substantive claim -- the merits of the termination -- was raised for the first time in the Union's answer to the petition challenging arbitrability. Since the Board of Collective Bargaining

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[4] In support of this characterization, HHC cites a letter dated March 10, 1981 from D.C. 37 attorney Richard Ferreri to Office of Municipal Labor Relations Review Officer Patrick O'Shea in which the Union states:

> It is claimed that the 'wrongful disciplinary action consists of terminating Mr. Gibbs from employment without written charges and a disciplinary hearing.. The Corporation unilaterally declared Mr. Gibbs to be terminated from employment ... without so much as an 'inquest' to present its case in full before a hearing officer.

(hereinafter "the Board") has previously held that new issues may not be raised for the first time at the arbitration stage, HHC argues, the claim asserted by D.C. 37 in its answer cannot be entertained.

District Council 37's Position.

D.C. 37 asserts that the issue determined by the supreme court in Gibbs v. Health and Hospitals Corporation is not identical to the subject of the instant case. The union argues that the court dealt only with the procedural issue of whether Gibbs' right to a hearing under section 75 of the Civil Service Law had been violated. The instant proceeding is brought to contest the merits of the decision to terminate Gibbs' employment and, in contrast to the court case, addresses the substantive issue of whether the termination constituted wrongful disciplinary action within the meaning of Article VI, Section 1(E) of the collective bargaining agreement. D.C. 37 asserts that, for the above reasons, neither the collateral estoppel nor the waiver argument advanced by the Corporation has merit.

DISCUSSION

It is clear that the subject of D.C. 37's grievance falls within the scope of the parties' agreement to arbitrate disputes. Article VI, Section 1(E) of that agreement defines the term "grievance" to include a claimed wrongful disciplinary action. That Gibbs' termination, in the wake of his indictment

on charges of usury, was a disciplinary penalty is not and cannot be disputed. Therefore, in the absence of any other considerations, the grievance would be arbitrable.

However, HHC has urged two grounds for barring arbitration of this matter:

1. the grievant is incapable of complying with the waiver requirement of NYCCBL section 1173-8.0d; and

2. the request for arbitration is barred by the doctrine of collateral estoppel.

Since the issue of compliance with the statutory waiver requirement goes to the Board's jurisdiction to entertain the petition, we shall first address this issue.

NYCCBL section 1173-8.Od provides that:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration .... 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 provision imposes a condition precedent to arbitration.[5] Thus, if the waiver requirement of the NYCCBL has not been met, the grievance may not be submitted to an arbitrator even though it is otherwise arbitrable.

[5] See, e.g. Decision Nos. B-10-74; B-11-75; B-15-75; B-6-76; B-7-76; B-8-79

Article VI, Section 4(a) of the contract between the parties contemplates the following procedure in cases involving a grievance under Section 1(E) of that article:

> Step A. - Following the service of written charges, a conference with such employee shall be held with respect to such charges by the person designated by the agency head to review a grievance at Step I of the Grievance Procedure set forth in this Agreement. The employee may be represented at such conference by a representative of the Union. The person designated by the agency head to review the charges shall take any steps necessary to a proper disposition of the charges and shall issue a determination in writing by the end of the fifth day following the date of the conference.
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> Step B(i). - If the Employee is not satisfied with the determination at Step A. above, then the Employer shall proceed in accordance with the disciplinary procedures set forth in Section 75 of the Civil Service Law or the Rules and Regulations of the Health and Hospitals Corporation. As an alternative, the Union with the consent of the employee may choose to proceed in accord with the Grievance Procedure set forth in this Agreement, including the right to proceed to binding arbitration pursuant to Step IV of such Grievance Procedure.

In the instant case, a hearing as provided for at Step B(i) above was held without the grievant present. The procedural sufficiency of this hearing was challenged and affirmed by a justice of the New York Supreme Court who found that the Corporation had notified the petitioner by certified mail at the addresses it had in its files and at the petitioner's new address. In the

court's opinion, that notice was reasonably calculated to give the grievant actual notice of the proceedings, as required by the due process clause of the Fourteenth Amendment of the Constitution.[6] The court acknowledged that the petitioner was entitled to a hearing pursuant to Civil Service Law Section 75(b) and pursuant to his collective bargaining agreement; thus, in dismissing the petition, the court in effect ruled that the grievant was afforded all the protection the law and applicable contract provide.

The purpose of the waiver requirement of the NYCCBL is to prevent multiple litigations of the same dispute and, to this end, force an election of procedures as a pre-condition to obtaining arbitration.[7] In light of the above-described proceedings, we find that Gibbs' failure to respond to the service of written charges, which failure the court conclusively determined was due to the grievant's inaction, resulted in an election being made for him when the employer proceeded to hold a hearing as it was required by law (CSL §75) and by the Corporation's Rules and Regulations (Section 7.5 - Discipline) to do. Having obtained a determination of the disciplinary charge after a hearing at which he could have contested the charges, and having further obtained a judgment of a court on the validity of the hearing, the grievant, who now seeks arbitration of the

[6] Slip opinion at 3 - 4 (citations omitted).

[7] See Decision No. B-8-79.

issue already determined in those proceedings, lacks the capacity to make a waiver satisfactory to the statutory requirement. Since this condition precedent to arbitration has not been met, our jurisdiction cannot be invoked. Therefore, we do not reach the Corporation's second argument based upon coliateral estoppel, and must deny the request for arbitration.

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 Health and Hospitals Corporation's petition challenging arbitrability be, and the same hereby is, granted; and it is further

ORDERED, that District Council 37's request for arbitration be, and the same hereby is, denied.

DATED: New York, New York
March 23 , 1982.

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDIIAN
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD J. CLEARY
MEMBER

JOHN D. FEERICK
MEMBER

FRANKLIN J. HAVELICK
MEMBER