OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Platter of the Arbitration

-between-

THE CITY OF NEW YORK, DECISION NO. B-27-85

Petitioner, DOCKET NO. BCB-734-84 (A-1974-84)

-and-

LOCAL 420 (DISTRICT COUNCIL 37), AFSCME, AFL-CIO

Respondent.
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DECISION AND ORDER

Local 420, District Council 37, AFSCME, AFL-CIO (hereinafter "Local 420" or "the Union") submitted a request for arbitration, received by the Office of Collective Bargaining on September 10, 1984, in which it sought to arbitrate a grievance of its member, Edward Goodman (hereinafter "the grievant"). The City of New York, by its Office of Municipal Labor Relations (hereinafter "OMLR") filed a petition challenging the arbitrability of this grievance on September 20, 1984. The Union filed an answer to the petition on October 15, 1984 to which the City replied on November 2, 1985.

Background

The grievant, Edward Goodman, an employee of the New York City Health and Hospitals (hereinafter "HHC"), also serves as a representative of local 420 in the capacity of

a Chapter Chairperson. Prior to September 27, 1983, the grievant was excused from his duties with HHC with full pay in order to perform labor-management activities for the Union. This paid excusal, known as "release time", is authorized under the terms of the Mayor's Executive order No. 75 (hereinafter "E.O. 75"), entitled "Time Spent on the Conduct of Labor Relations Between the City and its Employees and on Union Activity."

On September 27, 1983, the grievant's paid release time was terminated by the City's Deputy Director of Labor Relations, Harry Karetzky. Karetzky purported to act in reliance on Section 4, subdivision 10 of E.O. 75, which provides:

> "Employees assigned on a full-time or part-time basis or granted leave without pay pursuant to this Order shall at all times conduct themselves in a responsible manner."

Karetzky alleged that he invoked this section as the basis for terminating the grievant's paid release time because the grievant had been indicted for attempted murder, and because the Union had been warned following an earlier incident involving Goodman that his commission of any further acts constituting a "gross impropriety" under E.O. 75 would result in the termination of his release time status.

The Union grieved Karetzky's action as being violative of the rights granted under E.O. 75. The grievance was submitted to arbitration under the parties' collective bargaining agreement (OCB Docket No. A-1783-83). At the arbitration hearing held on November 18, 1983, the issue to be decided was stated as follows:

> "Did the City violate Executive Order No. 75 when it terminated the release time of Edward Goodman? If so, what shall be the remedy?

Following the hearing and after due deliberation, the arbitrator, Walter L. Eisenberg, rendered an award dated December 17, 1983, in which he held that:

> "The City did not violate Mayoral Executive Order No. 75 when it terminated the release time of Edward Goodman."

Meanwhile, during the pendency of the grievance, the grievant requested, and OMLR granted, a leave of absence without pay so that the grievant could continue to serve as the Union's Chapter Chairperson. This leave without pay continued subsequent to the issuance of the December 17, 1983 arbitration award.

At sometime thereafter, the criminal charges were disposed of in a manner favorable to the grievant.[1] Subsequently, the grievant was restored to paid release time, effective May 2, 1984. (On July 16, 1984, his release time was again terminated, for reasons unrelated to this case.) On May 9, 1984, the grievant filed a grievance seeking back pay and benefits for the period between the time his release time was suspended, on September 27, 1983, and the date of his grievance. This grievance was denied at each step of the contractual grievance procedure. Finally, in accordance with Step IV of the grievance procedure, the Union submitted the request for arbitration at issue herein. The grievance to be arbitrated is stated by the Union as follows:

> "Retroactive payment for the unjust revocation of the release time of Edward Goodman."

[1]It is not clear whether the grievant was acquitted of the charges or the indictment against him was dismissed. The record before this Board also fails to indicate the date on which action was taken on the criminal charges.

Positions of the Parties

City's Position

The City submits that the issue presented by the instant request for arbitration is the same as was litigated by these same parties in the earlier arbitration proceeding (A-1783-83). This issue already has been decided by an arbitrator (see Award of Walter L. Eisenberq, dated December 17, 1983). Accordingly, argues the City, the Union is barred from submitting this matter to arbitration by the doctrine of res judicata.The City notes that the Board of Collective Bargaining has recognized and employed the doctrine of res judicata in appropriate cases. For this reason, the City asks that its petition challenging arbitrability be granted.

Union's Position

The Union contends that the issue raised in this proceeding is not the same as the issue decided by the arbitrator in the earlier case. The prior case involved the suspension of the grievant's paid release time based upon a pending criminal indictment. In the present case, the issue to resolved in arbitration involves an employee's right to be compensated for his loss of income resulting from being placed on an unpaid leave of absence pending the outcome of a criminal in-

dictment which is resolved by the grievant's acquittal of the criminal charges. The Union argues that once the criminal charges were disposed of, the prior existence of the indictment may not be used as a basis to penalize the grievant. Thus, according to the Union, upon the grievant's acquittal, he was entitled to be compensated for all wages and benefits he lost as a result of the previous suspension of his paid elease time status.

The Union observes that pursuant to §296.16 of the New York Executive Law, it is an unlawful discriminatory practice for any person, including the City, to act adversely to an individual in connection with his employment on account of a criminal accusation (indictment) which is terminated in favor of such individual. The rights protected under this law are asserted by the Union as a further basis for permitting this dispute to proceed to arbitration.

Finally, the Union argues that as a result of the decision of the United States Supreme Court in the case of McDonald v. City of West Bank, Michigan, U.S., 104 S. Ct. 1799 (1984), the doctrine of res judicata is not applicable to awards of arbitrators.

For these reasons, the Union asks that its grievance be permitted to proceed to arbitration.

Discussion

There is no dispute in this case that the parties have agreed to arbitrate unresolved grievances, as defined in the collective bargaining agreement, and that a claimed violation of the provisions of E.O. 75 - concerning release time for labor-management activity - is within the scope of the parties' agreement to arbitrate. The issue presented here for our determination is whether the Union's request for arbitration should be barred, as the City contends, by the doctrine of res judicata.

Res-judicata will bar the litigation of a claim which has already been decided, where there is an identity as to parties and as to the claim presented.

The New York Court of Appeals has held that in order for a prior judgment to act as a bar to relitigation, it is sufficient:

> "...that the cause of action in the former suit was the same, and that the damages or right claimed in the second suit were items or parts of the same single cause of action upon which the first action was founded." Perry v. Dickerson, 85 N.Y. 375 (1881).

The effect of a prior judgment is conclusive "not only in

respect to every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented." Baltimore Steamship Co. v. Phillips, 274 U.S. 316 (1927). However, if two causes of action involve "different 'rights' and 'wrongs'", the doctrine of res judicata does not apply. Maflo Holding Corp. v. Blume 308 N.Y. 570 (1955).

The doctrine of res-judicata,

> " ... rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. "Commissioner v. Sunner, 33 U.S. 588, 597 (1947).

Thus, in Cromwell v. County of Sac, 94 U.S. 351 (1876), the court stated that:

> "[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." 94 U.S. at.352.

An essential predicate to the application of the doctrine of res judicata, however, is that the dispute arise from the occurrence or transaction upon which the earlier claim was

based. Indeed, the doctrine is effectuated by the application of merger and bar, under which, if the plaintiff wins, the cause of action is merged into the judgment or, if the plaintiff loses, the judgment operates as a bar to the reassertion of the same cause of action.

Applying these considerations to the present case, it is at once apparent that there is identity of parties; both the prior arbitration proceeding and the present request for arbitration involve the City, the Union, and the same grievant, Edward Goodman. The dispositive question is whether the claim (cause of action) in each proceeding is the same. We find that the claim is the same, and that res Judicata is applicable to bar relitigation of this claim.

The issue presented in the earlier arbitration proceeding (A-1783-83) was defined by the arbitrator as:

> "Did the City violate Executive Order No. 75 when it terminated the release time of Edward Goodman? If so, what shall be the remedy?

In the present case (A-1974-84), the request for arbitration defines the grievance as:

> "Retroactive payment for the unjust revocation of the release time of Edward Goodman."

The right to release time for labor-management activity is established solely in E.O. 75. The right claimed to have been violated, as well as the source of that right, is thus the same in both the prior and the present proceedings.

Moreover, the facts concerning the disputed management action, i.e., the termination or revocation of Edward Coodman's paid release time, are substantially the same in both proceedings. The only fact claimed to be different in the present case is the the fact that the criminal charges against the grievant have been dismissed. However, this is a fact which might have been contemplated in the earlier case. With an indictment then pending, the parties knew that the grievant would be either convicted or acquitted. The effect if any, the disposition of the criminal charges would have or should have on the merits of the grievance or the appropriate remedy, are matters which could have been litigated in the first arbitration proceeding. As alleged by the City herein,

> "[ilf the arbitrator had seen fit, he could have fashioned a remedy in which he retained jurisdiction until the final outcome of the indictment, or he could have provided a conditional or interim remedy contingent upon further developments."

No such remedy was awarded by the arbitrator. In upholding

management's suspension of the grievant's release time, the arbitrator indicated that his decision was not based upon the grievant's guilt or innocence of the charges:

> "I have neither reason nor basis for evaluating the conduct which led to Goodman's indictment." Award of Walter L. Eisenberg at p.8.

For these reasons, this Board concludes that the fact of the grievant's acquittal does not create a new or different claim or right sufficient to avoid the preclusive effect of the earlier arbitration award.

The Union's belated assertion of an allegedly "different" claim for "loss of income resulting from being placed on an unpaid leave of absence pending the outcome of a criminal indictment" is not persuasive. First, such a claim was not asserted at the lower steps of the contractual grievance procedure, and, thus, may not be asserted at the point of seeking arbitration.[2] Second, this claim is inconsistent with documentary evidence in the record before US. The record shows that the grievant was not placed in voluntarily on an unpaid leave of absence; to the contrary, he requested, in writing, that he be granted an unpaid leave

[2]Decision No. B-12-77

after his release time was revoked (Exhibit B attached to the City's verified reply). Thus, while the request for a leave of absence may be entirely understandable, [3] it does not form the basis for a separate claim against management, but is merely a consequence of management's action in suspending the grievant's paid release time status.

The Union's further reliance on alleged discriminatory treatment in violation of §296.16 of the New York Executive Law is misplaced. The contractual definition of a grievance does not include claimed violations of State law. Therefore, as we have previously held, the scope of the duty to arbitrate under the contractual language existing herein does not include any duty to arbitrate violations of State law.[4]

Finally, the Union's contention that the Supreme Court's decision in McDonald v. City of West Bank, Michigan[5] holds that res judicata does not apply to awards of arbitrators, is simply incorrect. That decision states that an arbitral award will not preclude a federal court from considering a statutory

[3] The grievant desired the time off from his underlying City employment so that he could continue to serve in his Union position as a Chapter Chairperson.

[4] Decision No. B-4-78.

[5] ____U.S.____, 104 S. Ct. 1799, 115 LRRM 3646 (1984).

claim arising under the Civil Rights Act. It does deal with the situation present herein, where it is asserted that an arbitral award precludes the submission of the same contractial claim before another arbitrator. Mainfestly, the McDonald decision does not impair the application of the doctrine of res judicate under the circumstances of the present

This Board has recognized that in appropriate cases, res judicata should be employed to prevent vexatious and oppressive relitigation of previously arbitrated disputes.[6] We find that all of the prerequisites for the application of res judicata are present in the instant proceeding. Accordingly, we will grant the City's petition challenging arbitrability.

ORDER

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

[6]Decision No. B-16-75; see Decision Nos. B-28-81, B-9-78.

ORDERED, that Local 420's request for arbitration be, and the same hereby is, denied.

Dated: New York, N.Y.
August 15, 1985

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER