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

-between-

THE CITY OF NEW YORK, DECISION NO. B-28-87

Petitioner, DOCKET NO. BCB-932-87 (A-2494-86)

-and-

DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Respondent.
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DECISION AND ORDER

On January 16, 1987, the City of New York, appearing by its Office of Municipal Labor Relations ("the City"), filed a petition challenging the arbitrability of a grievance submitted by District Council 37, Local 375, AFSCME, AFL-CIO ("the Union") on behalf of Sideris Caramintzos ("grievant"). The Union submitted an answer on February 9, 1987, to which the City replied on March 12, 1987. At the April 30th meeting of the Board of Collective Bargaining ("Board"), the City members requested that the draft decision be held in abeyance until the next meeting to give the City an opportunity to resolve the matter and possibly withdraw its petition. At the May 21st meeting, the City members indicated, however, that a newly discovered issue had arisen concerning a case filed on grievant's

behalf in New York State Supreme Court. The Office of Collective Bargaining ("OCB") notified the parties on May 22, 1987 that they would be permitted to submit additional pleadings addressing this issue. Accordingly, the City filed a supplemental reply on June 2, 1987, and the Union filed a supplemental response on June 12, 1987.

Background

The Department of Environmental Protection ("DEP") terminated grievant in January 1986 from his probationary position as an assistant chemical engineer. In May 1986, the Union filed an Article 78 petition in New York State Supreme Court on grievant's behalf. The petition alleges that grievant was wrongfully discharged in violation of Section 75-b of the Civil Service Law ("Whistleblower Law") for his disclosure that a company he bad investigated w as tampering with its industrial pretreatment system and the devices that monitor the discharge of commercial wastes into the City's sewer system. The petition also alleges that DEP violated (1) Personnel Policy and Procedure No. 490-85 by denying grievant the right*to see or sign his performance evaluation, and (2) Section 75 of the Civil Service Law by terminating grievant two days after he had attained permanent civil service status.

In the petition, the Union seeks grievant's reinstatement with full back pay, the expunction of references to his termination from all his work records and personnel file, the restoration of seniority rights and fringe benefits, along with all reasonable costs, disbursements, and attorney fees.

On November 20, 1986, the Union filed a request for arbitration seeking to arbitrate the following issues:

1. Whether DEP violated a rule, regulation, written policy or order contrary to Article VI, Section 1(B) of the collective bargaining agreement, (unit contract), when it terminated Sideris Caramintzos, a probationary Assistant Chemical Engineer, on or about January 8, 1986 without following the interview procedures set forth in Personnel Practices, Section IV, Sections 4.0, 6.0 and 8.0 of DEP Guide to Policies and Procedures for Plant Operation Employees and if so, what shall the remedy be?

2. Whether DEP violated a rule, regulation, written policy or order contrary to Article VI, Section l(B) of the collective bargaining agreement, (unit contract), when it terminated Sideris Caramintzos, a probationary Assistant Chemical Engineer, on or about January 8, 1986 without following the evaluation procedures set forth in New York City Guide to Performance Evaluations for Sub-Managerial Positions and if so, what shall the remedy be?

3. Whether DEP violated a rule, regulation, written policy or order contrary to Article VI, Section l(B) of the collective bargaining agreement, (unit contract), when it terminated Sideris Caramintzos, a probationary Assistant Chemical Engineer, on or about January 8, 1986 without following the evaluation procedures set forth in New York City Department of Personnel Policy and Procedure Bulletin No. 611-85, Section I(i) and if so, what shall the remedy be?

4. Whether DEP violated Article X, Section I and 2 of the Citywide collective bargaining agreement when it summarily terminated Sideris Caramintzos on or about January 8, 1986 in reliance upon a December 17, 1985 memorandum and other probationary evaluations secretly written and placed in his file by DEP supervisors and if so, what shall the remedy be?

In addition, the Union's answer to the petition challenging arbitrability claims that DEP did not approve the request for grievant's termination until January 8, 1986, one day after his probationary status bad expired. As its remedy in arbitration, the Union seeks reinstatement with full back pay, along with restoration of all benefits and seniority.

Positions of the Parties

Union's Position

In its answer to the petition challenging arbitrability, the Union alleges that DEP hired grievant on June 4, 1984 as a chemical engineer intern for the Industrial

Waste Control Section. DEP later appointed grievant to the title of assistant chemical engineer, with a probationary period that allegedly ran from January 7, 1985 through January 7, 1986.

Between November 1984 and August 1985, grievant received four performance evaluations which respectively rated his work as "good", "good", "very good", and "outstanding". Grievant continued in this position until December 20, 1985, when he went on sick leave due to injuries sustained in an automobile accident. DEP allegedly notified grievant by telephone on January 10, 1986 that he was being discharged.

According to the Union, from August 1985 until grievant's termination date, DEP failed to conduct an exit interview or to follow the proper evaluation procedures, such as providing grievant with a copy of his written evaluation or permitting him to offer a response. Rather, the Union alleges that Larry Klein, the chief of grievant's section, wrote and placed into grievant's personnel file, without his knowledge, a memorandum requesting his termination. Mr. Klein then allegedly caused grievant's supervisors

to complete and place into grievant's file two inaccurate evaluations, dated January 2 and 3, 1986, which were designed to justify the position set forth in Mr. Klein's memorandum.

As its first argument in support of its request for arbitration, the Union asserts that DEP did not approve the requested termination until January 8, 1986, one day after grievant's probationary status had expired. Thus, the Union claims that DEP disciplined grievant in violation of the parties' collective bargaining agreement.

The Union further contends that DEP's actions violated various written policies and sections of the collective bargaining agreement, as detailed below.

1. DEP Supervisor's Guide to Policies and Procedures for Plant Operations Employees ("DEP Guide")

a. Section 2.3(b)

The Union claims that DEP violated Section 2.3(b) of the DEP Guide, which provides that "[p]robationary employees shall receive interim evaluations every three months and a final 'pink' evaluation at the end of one year," and that "it is critical that the

final 'pink' evaluation sheet be submitted to Administration at the end of the 10th month." DEP failed to comply with either requirement, according to the Union.

b. Section 2.5(b)(2)

Section 2.5(b) states that "the reviewer should not casually or arbitrarily substitute his judgment for that of the rater. If the reviewer or location chief adds comments he must explain his reasons to the ratee, rater and reviewer, and they must acknowledge the comments by dating and initialing them on the evaluation form." Grievant's termination violated this section, in the Union's view, since the "January 2 and 3, 1986 evaluations secretly placed in his personnel file reflected the judgment of Larry Klein, the Location Chief" and not that of the rater or the reviewer.

c. Section 3.1

Section 3.1 provides in pertinent part that "[s]upervisors have a responsibility to regularly inform an employee on his/her level of performance; this is called feedback or informal evaluation. An employee should not be surprised at the year end review." The Union asserts that, contrary to the requirement of this section,

grievant's supervisors did not inform him of the level of his performance from August 1985 until his termination in January 1986.

d. Section 3.4

Section 3.4, under the heading "Probationary Employees", provides in relevant part as follows :

> a) During the evaluation period, the supervisor meets regularly with the employee to discuss the employee's performance as compared to standards. Any necessary corrective actions are discussed and initiated. The supervisor continues to observe the employee's behavior in carrying out tasks and, when appropriate, reviews work products.
>
> b Toward the end of each three-month period (i.e., first, second and third quarters), the employee and the supervisor meet for an appraisal interview. Shortly thereafter, the evaluation is forwarded to Administration.
>
> c) Probationary employees, after two months of original employment (or four months for a promotion), may be terminated in that title. If you wish to recommend termination before the end of the probation period (i.e., the end of the 10th month) you must prepare a memo of justification to your Division Chief. Attached to the memo should be a copy of all interim evaluations. The interim evaluations should reflect your request to terminate the individual; if they do not, termination is probably premature.

> d) By the end of the 10th month, a final appraisal interview is held and the evaluation is finalized as described above Section 3.3 ...
>
> f) Only D.E.P. Personnel may actually terminate (or demote) an employee. Your evaluation is only a recommendation. D.E.P. Personnel will prepare a formal memo advising the employee that they have failed to satisfactorily complete probation. You should not verbally advise an employee that he/she is to be terminated (or demoted), this can only be handled by the formal D.E.P. letter signed by the Director of Personnel ...

The Union argues that DEP violated the above provisions by neither evaluating grievant in the five-month period between August 1985 and January 1986, nor attaching the interim evaluations to the December 17, 1985 memorandum that requested grievant's termination.

e. Sections 5.0, 5.1, 5.2, 5.3, 6.0, 6.1, 6.2, 6.3, 6.4, 6.5, and 6.6(c).

These sections set forth guidelines for supervisors to follow in preparing performance evaluations. They detail the desirability of discussions with the employee that encompass such elements as (1) feedback, i.e., "telling the employee how be or she is doing"; (2) analysis, i.e., "determining why the employee is attaining or not attaining standards"; and

(3) planning; i.e., "improving the employee's abilities to perform or changing the conditions interfering with performance." Also detailed is the use of performance evaluations for such purposes as the control of operations and employee motivation. According to the Union, grievant's supervisor failed to-comply with these provisions from July through December 1985.

2. Agency Guide to Performance Evaluation for Sub-Managerial Positions ("Agency Guide")

a. Section II, A.2(b)

This section provides that "[w]hen an agency is large, the annual evaluation period may be staggered by organizational unit or by Occupational Group."

b. Section II, A.4(d)

The Union contends that DEP's actions violated the requirement of this provision that "[a]ll employees, including probationary employees, will be shown their evaluation reports."

c. Section II, C.3-C.5

Section II, C provides in part as follows:

> 3. During the evaluation period, the supervisor meets regularly with the employee to discuss the employee's performance

as compared to standards. Any necessary corrective actions are discussed and initiated. The supervisor continues to observe the employee's behavior in carrying out tasks and, when appropriate, reviews work products.

4. Toward the end of the evaluation period, the employee and the supervisor meet at an annual appraisal interview to discuss the reasons why standards were attained or not attained, and-to plan for the improvement of the employee's performance. Plans are developed for improving the employee's abilities to perform or for changing conditions interfering with performance. The supervisor also gives the employee a preliminary overall performance rating and discusses personnel recommendations (with regard to placement, assignments, and long-range development plans), if such actions are contemplated and information is available at the time of the interview.

5. No more than 10 calendar days after the annual appraisal interview, the performance evaluation rating is made final and the form is signed by the employee and the supervisor. It is reviewed by the next level superior. Indicated on the form are actions which need to be taken (in respect to plans and recommendations) by higher levels of management, the Agency Personnel Officer or the Agency Training Officer. The employee may submit an appeal if be or she does not agree with the rating or the recommendations. A copy of the evaluation form is forwarded to the Personnel Office which initiates actions required of other persons in order to implement recommendations ...

DEP allegedly failed to comply with these provisions between August 1985 and January 1986.

d. Section VI, F.2

The Union claims that DEP violated the requirement of Section VI, F.2 that "[p]robationary employees should be evaluated by three months, and supervisors are to make recommendations as to whether to retain or terminate employees."

3. Department of Personnel's Personnel Policy and Procedure No. 616-85 ("PPP 616-85")

The subject beading of PPP 616-85 is "Probationary Period - Its Use and the Major Provisions of Governing Rules." The document defines itself as "an advisory bulletin to management about rights and privileges created by other sources" that does not "give or create any rights or privileges to probationary employees." Although the Union cites no particular section of PPP 616-85, the provisions set forth below are a representative sample of the subjects covered:

Policy

> It is the responsibility of every agency head to insure that adequate and proper practices in relation to the probationary term are carried out, and that unsatisfactory probationers are dismissed in a timely fashion. (N.Y.C. Charter, Section 814a(13)).

I. Some Major Provisions of the Rules Governing the Probationary Period

a) Unless otherwise provided by the City Personnel Director, a one-year probationary period is required upon appointment and promotion for all competitive and labor class employees. (C.P.D. Rule 5.2.1.).

b) Unless otherwise provided by the City Personnel Director, a six-month probationary period is required for every original appointment to a position in the non-competitive and exempt class ...

c) A probationary period other than that described in (a) and (b) above may be set forth by the City Personnel Director in a certification for appointment or promotion or in the "Terms and Conditions" for appointment.

d) All employees shall be informed of the applicable probationary period. (C.P.D. Rule 5.2.1)

b) After the completion of a specified period of minimum probationary service, the agency head may terminate the employment of any probationer whose conduct and performance is not satisfactory by notice to such probationer and to the City Personnel Director. (C.P.D. Rule 5.2.7) ...

II. Procedural Guidelines Governing Probation

1. Notice of Probationary Period Requirement

> Appointing officers should inform each appointee and promotee of the specific probationary period requirement, in writing. This may be done at the appointment or promotion interview. Where probation is being extended pursuant to Rule-5.2.8(b), the employee should be so informed, in writing, and as far as practicable the duration of the probationary term as a result of the extension should be indicated.

4. DEP Employees Guide to Policies and Procedures ("Employee's Guide")

a. Section IV, 4.0

The Union contends that DEP never evaluated grievant in accordance with the requirements of the following section:

> 4.0 Probationary Reports
>
> An interim probationary report is required every two months for newly appointed and promoted employees.
>
> The immediate supervisor, in conference with, and under the guidance of the location supervisor, is responsible for completing the reports, which should be signed by the supervisor and initialled by the location supervisor. The employee being rated will be asked to read the report and initial and date the document. At the time the supervisor shall discuss the contents of the report with the employee and furnish him with a copy.

> Attention will be given to the area for remarks on the back of the report.
>
> Specific instances and dates to support ratings of other than standard may be given. The employee may also request to have a statement attached.
>
> Supervisors shall forward the original report, in a sealed envelope, to "Probationary Reports", Wards Island within five days of the monthly anniversary date. One copy shall be kept in the location file.
>
> No voluntary transfers within Plant Operations will be permitted during the probationary period.

b. Section IV, 6.0

The Union asserts that the failure to provide grievant with an exit interview violated Section IV, 6.0, which provides in pertinent part that "[a]ll employees ... leaving City service, regardless of the reason, must participate in an 'Exit interview'"

c. Section IV, 8.0

In the Union's view, DEP violated Section IV, 8.0, which provides in part as follows:

> 8.0 Sub-Managerial Employee Performance Evaluation
>
> The Charter of the City of New York mandates that all agencies institute a performance evaluation program for all employees.

The Department of Personnel has established development guidelines and is responsible for auditing the program.

Tasks that describe the actual work being done, and standards that reflect acceptable performance have been developed for each civil service title. These tasks and standards may be changed, added to or eliminated as conditions change.

Starting January 1981, each rating period will be for one year (12 months) At the beginning of a rating period, it is the responsibility of the immediate supervisor to designate the tasks and standards for each of his subordinates. This is indicated on an "Agreement Sheet" and is to be signed and dated by the supervisor, the employee and by the reviewer. The reviewer may be the next level of supervision or the location or section chief.

The original Agreement Sheet will be sent to the performance evaluation unit at Wards Island, a copy kept in the location file and one copy given to the employee. The employee shall also be given a copy of the tasks and standards for that title.

During the rating period, the performance of all employees shall be observed. It is also desireable (sic) to comment upon the performance.

At the end of the rating period, a supervisor must conduct a formal "Appraisal Interview" with each of his subordinates before finalizing the "Tasks and Standards Rating Sheet" (PO 554) and "Overall Appraisal Sheet" (PO 555). This inter-

view is conducted to permit the employees and supervisor to discuss the ratings and perhaps formulate methods of performance and job improvements.

5. City-wide collective bargaining agreement, Article X

The Union also asserts a violation of the following section of the collective bargaining agreement:

Article X: Evaluations and Personnel Folders

Section 1

An employee shall be required to accept a copy of any evaluatory statement of the employee's work performance or conduct prepared during the term of this Agreement if such statement is to be placed in the employee's permanent personnel folder whether at the central office of the agency or in another work location. Prior to being given a copy of such evaluatory statement the employee must sign a form which shall indicate only that the employee was given a copy of the evaluatory statement but that the employee does not necessarily agree with its contents. The employee shall have the right to answer any such evaluatory statement filed and the answer shall be attached to the copy. Any evaluatory statement with respect to the employee's work performance or conduct, a copy of which is not given to the employee may not be used in any subsequent disciplinary actions against the employee. At the time disciplinary action is commenced the Employer shall review the employee's personnel folder and remove any of the herein described material which has not been seen by the employee.

> An employee shall be permitted to view the employee's personnel folder once a year and when an adverse personnel action is initiated against the employee by the Employer. The viewing shall be in the presence of a designee of the Employer and held at such time and place as the Employer may prescribe.
>
> Section 2
>
> If any employee finds in the employee's personnel folder any material relating to the employee's work performance or conduct in addition to evaluatory statements prepared after July 1, 1967 (or the date the agency came under the provisions of the Citywide Agreement, whichever is later) the employee shall have the right to answer any material filed and the answer shall be attached to the copy.

In its supplemental response, the Union also denies that it has violated the waiver requirement of Section 1173-8.0(d) of the New York City Collective Bargaining Law.[1] The Union argues that the Board

[1]Section 1173-8.0(d) provides as follows:

> 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.

has only found a violation of the waiver requirement and dismissed a request for arbitration where 1) the parties to the court proceeding and the request for arbitration are identical; 2) the party seeking arbitration has previously sought to litigate the same rule or regulation cited in the request for arbitration; or 3) previous litigation resolved the same legal issue on the merits. In the Union's view, none of these circumstances are present here since the grievant, not the Union, is the named petitioner in the currently pending Article 78 proceeding and since the causes of action set forth in the Article 78 petition are "legally distinct" from the issues raised in the request for arbitration.

City's Position

The City maintains that the Union, in alleging that grievant's termination violated the collective bargaining agreement and various written policies, has failed to state an arbitrable claim. The City asserts that under Section 5.2.7. of the Rules and Regulations of the New York City Personnel Director, DEP had the absolute power to terminate grievant. According to the City, since the agreement explicitly excludes these Rules and Regulations from

the grievance procedure, the manuals which merely implement the Rules are thereby excluded as well.

To allow arbitration in this matter, the City contends, would limit the absolute right of the agency head to terminate probationary employees and would provide such employees with the- very right of review that they have been unable to attain at the bargaining table. Specifically, the City points out that the current agreement does not include the proposal advanced by the Union in 1984 that "[a]n employee shall be entitled to appeal his or her performance evaluation through the grievance procedure including arbitration."

The City further maintains that, since they are not the product of collective bargaining negotiations, the manuals and memoranda cited by the Union do not create substantive rights attaching to the benefit of probationary employees.

In its supplemental reply, the City also argues that the Union is unable to comply with the waiver requirement of Section 1173-8.0(d) of the New York City Collective Bargaining Law. Specifically, the City claims that the Union raised several issues in its Article 78 petition, as detailed below, which

are the same as those identified in the request for arbitration:

AS AND FOR A SECOND CAUSE OF ACTION

36. Petitioner's termination was affected by an error of law in that it was not officially approved until January 8, 1986, two days after he became a permanent civil service employee and "therefore petitioner was deprived of his permanent civil service position in violation of Section 75 of the Civil Service Law.

AS AND FOR A THIRD CAUSE OF ACTION

37. Petitioner's termination based upon the January 2, 1986 evaluation, which was never shown to or signed by petitioner, was in violation of New York City Department of Personnel Policy and Procedure No. 490-85.

AS AND FOR A FOURTH CAUSE OF ACTION

38. Petitioner was terminated effective the close of business on January 6, 1986 the last day of his probationary period, in order wilfully to obstruct his certification as a permanent Assistant Chemical Engineer, in violation of Section 106 of the Civil Service Law.

AS AND FOR A FIFTH CAUSE OF ACTION

39. Petitioner was terminated because of the work performance evaluations dated January 2, 1986 which were written for the purpose of injuring the plaintiff's prospects for civil service certification, in violation of Section 106 of the Civil Service Law.

AS AND FOR A SIXTH CAUSE OF ACTION

> 40. Petitioner's January 2, 1986 substituted probationary evaluation was materially altered, and falsified to misrepresent petitioner's status, in violation of Section 106 of the Civil Service Law, to provide additional reasons to justify petitioner's termination and to conceal the retaliatory motive for the termination.

Accordingly, the City argues that since the waiver accompanying the request for arbitration is invalid, its petition challenging arbitrability should be granted.

Discussion

Where the parties, as here, do not dispute that they have agreed to arbitrate their controversies, the question before this Board on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of the agreement to arbitrate.[2]

Article VI, Section 1(B) of the parties' unit agreement provides that the term "grievance" shall mean, inter alia:

> A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of

[2]E.g., Decision No. B-6-86.

> employment; provided, disputes involving the Rules and Regulations of the New York City Personnel Director or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the grievance procedure or arbitration ...

In addition, Article XV, Section 1 of the City-wide agreement applicable to the parties provides that the term "grievance" shall include, inter alia, a "dispute concerning the application or interpretation of the terms of this Agreement" or a "claimed wrongful disciplinary action taken against ... a permanent competitive employee ... upon whom the agency has served written charges of incompetency."

As we have frequently ruled, a party seeking arbitration has the burden of establishing at least an arguable relationship - a nexus - between the act complained of and the source of the alleged right, redress of which is sought through arbitration.[3] We find that the Union's claim that DEP's actions constituted wrongful disciplinary action since grievant had attained permanent civil service status on the

[3] E.g., Decision Nos. B-6-86; B-8-82; B-7-81; B-4-81; B-21-80; B-15-80; B-15-79; B-7-79; B-3-78; B-3-76; B-1-76.

day before his termination establishes such a nexus. In support of this claim, the Union submitted a "Requested Personnel Action" form showing that the termination decision was approved on January 8, 1986, as well as various probationary reports indicating that grievant's appointment date was January 7, 1985. Other than a general denial, the City has made no allegations which refute the Union's argument. The Union has thus established at least an arguable relationship between Article XV of the City-wide agreement and its claim that grievant had attained permanent civil service status prior to his termination date.

Furthermore, we find that the Union has demonstrated a prima facie relationship between the alleged violations of evaluation procedures and the provisions it cites in the DEP Guide, the Agency Guide, the Employee's Guide, and PPP 616-85. All of these documents impose specific standards and requirements and thus constitute written policies subject to arbitration under Article VI of the Unit agreement.[4]

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[4]See also Decision No. B-31-82 (Human Resources Administration Non-Managerial Employee Performance Evaluation Manual is a "written policy", subject to arbitration under the agreement); B-38-85 (Bureau of Child Support Informationals 18/83 and 12/84 constitute "written policies" falling under the contractual definition of a grievance); B-6-86 (Human Resources Administration

(continued...)

We recognize that PPP 616-85 defines itself as an "advisory bulletin" that "does not give or create any rights or privileges to probationary employees." However, it is the function of the Board, and not that of the City, to determine whether the document provides a source for the right to proceed to arbitration under the agreement. A contrary ruling would enable the City to avoid arbitration simply by adding this type of language to any document it issues, even where it otherwise clearly constitutes a written policy within the meaning of the agreement.

PPP 616-85 speaks in explicit terms about the rules governing the probationary period. While most of its provisions refer to another document from which the rule apparently derives, others do not. Thus, the document on its face appears to be more than simply a compilation of rules from other sources. Accordingly, we hold that PPP 616-85 is arguably a source in support of the claim for arbitration herein; beyond that point, any further determination as to the nature and scope of rights, if any, created by PPP 616-85 and their application in a given case would be matters to be dealt with by an arbitrator and not this Board.

(...continued)
Non-Managerial Employee Performance Manual and New York City Guide to Performance Evaluation for Sub-Managerial Positions are "written policies" ' under which a probationary employee may challenge alleged violations of evaluation.

Having so found, we must nevertheless turn to the City's claim that the Union has violated Section 1173-8.0(d) since a grievance, even where otherwise arbitrable, may not be submitted to arbitration if the waiver provision has been violated.[5]

The purpose of Section 1173-8.0(d) is to prevent multiple litigation of the same dispute and to ensure that a grievant who elects to seek redress through the arbitration process will not attempt to relitigate the matter in another forum. A union is deemed to have submitted the underlying dispute to two forums where the matter in controversy involves either common legal issues[6] or common factual

[5]Decision No. B-7-86.

[6]E.g., Decision No. B-8-71 (at issue in both the Article 78 petition and the request for arbitration was whether the Fire Department had violated Article XXI of the parties' contract when it received certain transcripts into evidence at the departmental disciplinary hearing); Decision No. B-8-79 (at issue in both the Article 78 petition and the request for arbitration was whether the Police Department had violated the contract by rescheduling grievant from his normal tour of duty for the purpose of a court appearance.)

issues.[7]

The Board may find that the same underlying dispute has been submitted to two forums even where the Union has neither cited the same statute, rule, regulation, or contract provision[8] nor requested the same remedy.[9] Furthermore, the Board has denied the request for

[7]E.g., Decision No. B-10-74 (at issue in both the improper practice petition and the request for arbitration was whether the involuntary transfers of certain employees constituted reprisals for an earlier strike); Decision No. B-31-81 (at issue in both the improper practice petition and the request for arbitration was whether the City departed from its prior practice when it applied Executive Order No. 75 to justify grievant's termination).

[8]E.g., Decision No. B-10-74 (the improper practice petition cited a violation of Section 202 of the Civil Service Law, while the request for arbitration alleged a violation of "existing policy"); Decision No. B-10-82 (the Article 78 petition claimed a violation of Section 75 of the Civil Service Law, while the request for arbitration alleged a violation of the parties' contract).

[9]E.g., Decision No. B-8-71 (Article 78 proceeding sought reversal of the disciplinary determination, while the request for arbitration sought to expunge certain matters from the record of the disciplinary hearing).

arbitration even where the party raised additional matters in the other forum beyond those asserted in the request.[10] Thus, in applying Section 1173-8.0(d), the Board has generally denied arbitration where the party has commenced another proceeding seeking permanent relief.[11]

Applying these principles to the instant matter, we find that the grievance here concerns the same underlying dispute that has been filed in another forum. That being the case, grievant is unable to comply with the waiver requirement of Section 1173-8.0(d) and may not seek arbitration of his claim.

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[10]E.g., Decision NO- B-7-76 (although the Civil Service appeal encompassed an event that was unrelated to the grievance, the grievant made no attempt to limit the appeal to exclude the substance of the contractual grievance); Decision No. B-21-85 (since the Union elected in the judicial proceeding to plead, in part, a violation of a department rule as the basis for injunctive relief and then asserted a violation of the same rule in its request for arbitration, the waiver provision cannot be satisfied); Decision No. B-11-75 (the request for arbitration asserted a violation of Article VI of the parties' contract, while the Article 78 petition asserted violations of the Civil Service Law, the New York State Constitution, and Article VI).

[11]But see Decision No. B-13-76 (the Union did not violate the waiver provision since the PERB and court proceedings, which involved whether the suspension of benefits violated the Civil Service Law, were

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In so ruling, we reject the Union's argument that the waiver requirement bars arbitration only where the parties in both forums are identical. The grievant and the City are clearly the parties in interest in both the arbitration case and the Article 78 proceeding; the Union's absence as a formal., named party to the Article 78 proceeding does not lead to the conclusion that the underlying disputes are different.

In Decision No. B-31-81, the Board specifically addressed this issue. The Union argued that since the parties named in the arbitration case and the improper practice petition were not identical, the waiver provision of Section 1173-8.0(d) had not been violated. In rejecting this argument, the Board ruled that since the parties in interest in both cases were clearly the same, the lack of status as a formal party was "not dispositive" of the issue.

(...continued)
distinguishable from the request for arbitration, which involved whether the suspension of benefits violated the parties' contract); Decision No. B-39-80

(the Union did not violate the waiver provision since the improper practice petition, which involved whether the Police Department implemented a rotating work schedule in retaliation for the exercise of protected union rights, was not identical to the request for arbitration, which involved whether the Department violated the parties' contract by the implementation of the rotating work schedule). To the extent. that they are inconsistent with the holding herein, Decision Nos. B-13-76 and B-39-80 are hereby overruled.

Furthermore, we find no merit in the Union's contention that the waiver provision only applies where the "party seeking arbitration has previously sought to litigate the exact same rule or regulation as that which is cited in the request for arbitration. As previously noted, the relevant issue is whether the grievant has submitted the same underlying dispute to another forum, not whether he is attempting to litigate the same rule or regulation.

We also reject the Union's claim that the waiver provision only applies where previous litigation has led to a resolution of the same legal issue. The Board has never held that a final determination is a prerequisite to the applicability of Section 1173-8.0(d). As we ruled in Decision No. B-11-75:[12]

> ... [T]he Union may not litigate a dispute in court and simultaneously seek arbitration of the same underlying dispute. The requirement of filing a

[12]See also Decision No. B-10-74 (the Union may not avail itself of arbitration while simultaneously pressing an improper practice charge); Decision No. B-8-79 (commencement of a court proceeding for

(continued...)

waiver, pursuant to Section 1173-8.0(d) of the New York City Collective Bargaining Law, is a condition precedent to the right to arbitration. The pendency of a proceeding in court is an absolute bar to any proceeding before this Board with respect to the Union's request for arbitration.

Finally, although not raised by the Union, we note that the matter presented herein is distinguishable from Decision No. B-9-74. In that case, the Board declined to apply the waiver provision to a grievant who had also asserted Title VII claims before the Equal Employment Opportunity Commission. This determination, in the Board's view, was mandated by the decision of the United States Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

In Alexander, the Supreme Court decided that arbitration under a non-discrimination clause of a collective bargaining agreement does not foreclose a grievant from vindicating his Title VII rights. The Court pointed out that Congress enacted Title VII to address important policy concerns against discriminatory employment practices and that the legislative history manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other state and federal statutes. Thus, the Court concluded that Title VII's purpose and procedures

(...continued)
adjudication of the same underlying dispute constitutes at least a provisional election: permitting the matter to proceed to the point of judgment renders the election conclusive and irreversible for purposes of Section 1173-8.0(d)); Decision No. B-31-81 (the Union may not avail itself of arbitration while simultaneously prosecuting its improper practice petition).

strongly suggest that an individual does not forfeit his private cause of action by also pursuing his rights in arbitration.

A similar conclusion is not warranted here. Although we are aware of the strong policy considerations underlying the Whistleblower Law, we see no evidence of any legislative intent to allow an individual to pursue his rights under this law in addition to those he asserts in the arbitration forum. To the contrary, Section 75-b(3) of the Whistleblower Law specifically provides that an employee subject to a collective bargaining agreement containing a final and binding arbitration procedure or to Section 75 of the Civil Service Law is entitled to assert a whistle-blower defense before the arbitrator or hearing officer, who shall then consider the merits of the defense as part of his decision; only in the absence of such procedures does Section 75-b(3) permit an employee to commence a court action.[13] Thus, under the circum-

[13]Section 75-b(3) provides as follows:

> 3. (a) where an employee is subject to dismissal or other disciplinary action under a final and binding arbitration provision, or other disciplinary procedure contained in a collectively negotiated agreement, or under section

(continued...)

(...continued)

seventy-five of this title or any other provision of state or local law and the employee reasonably believes dismissal or other disciplinary action would not have been taken but for the conduct protected under subdivision two of this section, he or she may assert such as a defense before the designated arbitrator or hearing officer. The merits of such defense shall be considered and determined as part of the arbitration award or hearing officer decision of the matter. If there is a finding that the dismissal or other disciplinary action is based solely on a violation by the employer of such subdivision, the arbitrator or bearing officer shall dismiss or recommend dismissal of the disciplinary proceeding, as appropriate, and, if appropriate, reinstate the employee with back pay, and, in the case of an arbitration procedure, may take other appropriate action as is permitted in the collectively negotiated agreement.

(b) Where an employee is subject to a collectively negotiated agreement

which contains provisions preventing an employer from taking adverse personnel actions and which contains a final and binding arbitration provision to resolve alleged violations of such provisions of the agreement and the employee reasonably believes that such personnel action would not have been taken but for the conduct protected under subdivision two of this section, he or she may assert such as a claim before the arbitrator. The arbitrator shall consider such claim and determine its merits and shall, if a determination is made that such adverse personnel action is based on a violation by the employer of such subdivision, take such action to remedy the violation as is permitted by the collectively negotiated agreement.

(continued...)

stances present here, we find no reason to disregard the statutory policy expressed in Section 1173-8.0(d).

In summary, we bold that the Union is attempting to litigate the same underlying dispute in two forums. In both proceedings, the Union claims that DEP improperly terminated grievant after he had attained permanent civil service status and that grievant's supervisors acted improperly with respect to his performance evaluations. Furthermore, the relief, that the Union seeks in the arbitration case encompasses all of the relief obtainable in the Article 78 proceeding; i.e., grievant's reinstatement with full back pay and the restoration of all benefits and seniority.

For the preceding reasons, we will dismiss the request for arbitration herein unless, within thirty days of receipt of this decision and order, a written request is made to withdraw the Article 78 proceeding pending at index number 10132/86. Upon the expiration of this time period, if no such withdrawal has been requested, grievant will no longer be subject to the arbitration procedure contained in the parties' agreement.

(...continued)

> (c) Where an employee is not subject to any of the provisions of paragraph (a) or (b) of this subdivision, the employee may commence action in a court of competent jurisdiction under the same terms and conditions as set forth in article twenty-C of the labor law.

0 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 City's petition challenging arbitrability be, and the same hereby is, granted, provided that, if, within thirty days of receipt of this decision and order, a written request is made to withdraw the Article 78 proceeding at index number 10132/86, then the City's petition herein shall be denied; and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is, denied, provided that, if, within thirty days after receipt of this decision and order, a written request is made to withdraw the Article 78 proceeding at index number 10131/86,

0 R D E R

then the Union's request for arbitration shall be granted.

DATED: New York, N.Y.
July 22, 1987

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

DEAN L. SILVERBERG
MEMBER

PATRICK F.X. MULHEARN
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER