

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-28A-87

Petitioner,

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

-and-

DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Respondent.

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Supplemental Decision and Clarifying Order

On July 22, 1987, the Board issued an order granting the Union's request for arbitration provided that the Union withdraw its Article 78 proceeding in the same underlying matter within thirty days of receipt of our decision. The Union thereafter filed a notice with the New York State Supreme Court withdrawing its action "with prejudice as to those [issues] which will be arbitrated under said decision and without prejudice as to all other issues raised in this action which will not be subject to said arbitration."

On October 15, 1987, the City filed a letter objecting to the Union's withdrawal on the grounds that it failed to comply with Section 3217 of the New York Civil Practice Law and Rules ["CPLR"] and that it violated the spirit of our

decision by limiting the withdrawal to only "those [issues] which will be arbitrated."

The Union argues, in response, that our order did not indicate whether the withdrawal must be in compliance with the CPLR or whether it must be with prejudice. Furthermore, the Union claims that the limiting language of the withdrawal was necessary to prevent grievant from being left without a forum in case "an arbitrator subsequently found that [grievant's] civil service status, a central claim raised in D.C. 37's Request for Arbitration, was not arbitrable notwithstanding the Board's Decision in B-28-87."

We agree with the City that the Union's withdrawal fails to comply with the intent of our order. As we ruled in Decision No. B-28-87, the purpose of the waiver provision found in Section 1173-8.0d of the New York City Collective Bargaining Law 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." We went on to find that the Union had attempted to litigate the same dispute in two forums, and we ordered the Union to withdraw its Article 78 proceeding if it desired to pursue

arbitration of its claim. We in no way limited our order to require the withdrawal of only "those issues to be arbitrated." As we believe our decision in B-28-87 made clear, the waiver provision precludes arbitration where the same underlying dispute, rather than the same issue, has been submitted to another forum. Thus, we observed that the Board has denied a request for arbitration "even where the party raised additional matters in the other forum beyond those asserted in the request."

The Union is correct that the grievant herein may be left without a forum if it must withdraw the Article 78 proceeding and an arbitrator subsequently finds that the civil service status issue is not arbitrable "notwithstanding our decision." However, such a result is no different from that in any other case decided under the waiver provision where a party is required to elect one forum to pursue his claim. The possibility that a party may ultimately not prevail on one of the issues he seeks to challenge is surely insufficient reason to preclude the application of our waiver provision. In any case, we must question the basis for the Union's concern, since Decision No. B-28-87 specifically found that grievant's civil

service status at the time of his termination was an arbitrable issue.

In the event that there was a genuine misunderstanding over the scope of our prior order, we will provide the Union with a final opportunity to withdraw its Article 78 proceeding. Thus, we will grant the Union's request for arbitration if, within ten days of receipt of this order, it voluntarily discontinues the Article 78 proceeding by filing the stipulation required under Section 3217(a)2 of the CPLR. The withdrawal effectuated by this stipulation must be with prejudice and must apply to the Article 78 proceeding in its entirety, not simply to those issues which will be arbitrated under Decision No. B-28-87.

Clarifying Order

Pursuant to the powers vested in 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 ten days of receipt of this supplemental decision and clarifying order, the Union voluntarily discontinues

the Article 78 proceeding at index number 10132/86 by filing a stipulation pursuant to Section 3217(a)2 of the CPLR which withdraws, with prejudice, such proceeding in its entirety and without limitation, 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 ten days of receipt of this supplemental decision and clarifying order, the Union voluntarily discontinues the Article 78 proceeding at index number 10132/86 by filing a stipulation pursuant to Section 3217(a)2 of the CPLR which withdraws, with prejudice, such proceeding in its entirety and without limitation, then the Union's request for arbitration shall be granted.

DATED: New York, N.Y.
October 26, 1987

ARVID ANDERSON
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

DEAN L. SILVERBERG
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER