UFA, 4 OCB2d 65 (BCB 2011)

(Arb.) (Docket No. BCB-2957-11) (A-13817-11).

Summary of Decision*:** The City challenged the arbitrability of a grievance that seeks contractual benefits for a grievant whose termination was remitted by a court decision to the Fire Commissioner for reconsideration. The City asserted that arbitration of disciplinary penalties violates public policy and that no nexus exists between the challenged action and the parties' agreement. Finally, the City claimed that the Union's waiver is invalid because the Grievant submitted the dispute to other forums. The Union argued that arbitration of contractual benefits will not violate public policy and that a nexus exists with the parties' agreement. Further, the Union asserts that the waiver is valid because the instant dispute differs from the matters before other forums. The Board found that the instant dispute arose directly from the claims submitted to another forum, rendering the waiver invalid. Accordingly, the Petition Challenging Arbitrability was granted. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK and
THE FIRE DEPARTMENT OF THE CITY OF NEW YORK,

Petitioners,

-and-

UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, IAFF, AFL-CIO, on behalf of JOHN SCHROEDER,

Respondent.

DECISION AND ORDER

On May 11, 2011, the City of New York ("City") and the Fire Department of the City of New York ("FDNY") filed a Petition Challenging Arbitrability of a grievance filed by the Uniformed Firefighters Association, Local 94 ("Union") on behalf of its member John Schroeder ("Grievant"). In its Request for Arbitration, the Union alleges that the Grievant is entitled to

reinstatement on the payroll, back pay, and other benefits since the date of his termination because the Appellate Division determined that the FDNY improperly terminated the Grievant, annulled the termination and remitted the case to the Commissioner for a new decision. The City asserts that the Union's Request for Arbitration should be denied because public policy prohibits arbitration of disciplinary matters. The City also argues that no nexus exists between the challenged action and the parties' Collective Bargaining Agreement ("Agreement"), and asserts that the Union's waiver is invalid because it previously submitted the dispute to other forums. The Union argues that the underlying dispute involves the payment of contractual benefits, not employee discipline, and thus, arbitration will not violate public policy. The Union asserts that a nexus exists between the failure to compensate the grievant and the Agreement, and that the waiver is valid because the instant dispute differs from the matters heard in other forums. This Board finds that the instant dispute arose directly from the Appellate Division's decision, rendering the waiver invalid. Accordingly, the Petition Challenging Arbitrability is granted.

BACKGROUND

The Union is duly certified as the collective bargaining representative for employees in the civil service title Firefighter. The Union and the City are parties to an Agreement effective from August 8, 2008, through July 31, 2010, which is in *status quo*. The Grievant is a member of the Union and began working for the FDNY in 1990.

On October 24, 2004, the Grievant was given a drug test pursuant to the FDNY's random drug testing policy. The Grievant tested positive for cocaine metabolite. As a result, on October 28, 2004, the FDNY served disciplinary charges on the Grievant, charging him with use of an illegal drug, conduct unbecoming and prejudicial to good order and discipline, and a violation of

his oath of office. The Grievant was disciplined pursuant to § 15-113 of the Administrative Code of the City of New York ("Administrative Code"), which outlines the disciplinary procedure governing Firefighters.[1]

An Administrative Law Judge ("ALJ") of the New York City Office of Administrative Trials and Hearings ("OATH") held a three-day hearing on the disciplinary charges and issued a Report and Recommendation to the Fire Commissioner on September 28, 2007. The ALJ sustained all three charges against the Grievant and "recommend[ed] a penalty other than termination." (Pet., Ex. E). Specifically, the ALJ, noting that the parties agreed that the Grievant was unfit to be a Firefighter, recommended that the disciplinary penalty be held in abeyance so that the Grievant could retire due to a job-related disability in lieu of termination, or alternatively, that the Fire Commissioner impose a disciplinary penalty of ten days' suspension.[2]

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[1] Although City employees are generally disciplined pursuant to § 75 of the New York State Civil Service Law ("CSL") or, alternatively, pursuant to procedures in the collective bargaining agreement, Firefighters are disciplined pursuant to the Administrative Code. Further, the Agreement does not contain a contractual disciplinary procedure.

[2] Pursuant to § 15-113 of the Administrative Code:

> [The] commissioner shall have power, in his or her discretion on conviction of a member of the force of any legal offense or neglect of duty, or violation of rules, or neglect or disobedience of orders or incapacity, . . . or conduct unbecoming of an officer or member, or other breach of discipline, to punish the offending party by reprimand, forfeiture and withholding of pay for a specified time, or dismissal from the force; but not more than ten days' pay shall be forfeited and withheld for any offense. Officers and members of the uniformed force shall be removable only after written charges shall have been preferred against them, and after the charges shall have been publicly examined into, . . . and in such manner of examination as the rules and regulations of the commissioner may prescribe. (Pet., Ex. D).

Likewise, the New York City Charter ("City Charter") provides, in relevant part: "The commissioner shall have sole and exclusive power and perform all duties for the government, discipline, management, maintenance and direction of the fire department. . . ." (Pet., Ex. H).

The ALJ's Report and Recommendation states that "[a]llowing [the Grievant] to receive his work-related disability pension would not minimize the serious misconduct that he committed . . . but it would give appropriate weight to the mental and physical injuries that he sustained on September 11, 2001, and will remain with him for the rest of his life." [3] (Pet., Ex. E). The ALJ considered termination "unduly harsh" in light of the Grievant's unblemished service record and his traumatic experiences in the 1993 World Trade Center bombing and the September 11, 2001 attacks, which resulted in post-traumatic stress disorder ("PTSD") and a chronic lung disability. (*Id.*) The ALJ noted that the Grievant received extensive counseling from a social worker employed by the FDNY in October 2001, but the social worker was not called as a witness. Starting in March 2002, the Grievant attended group sessions with a private clinical psychologist for more than a year. [4] After receiving the results of his October 2004 drug test, the Grievant contacted the private clinical psychologist and received individual psychotherapy sessions. The Grievant applied for a disability pension and, according to the OATH Report and Recommendation, is currently awaiting the final step—for the Board of Trustees to vote on the application.[5]

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[3] According to the Report and Recommendation, evidence presented regarding the Grievant's mental and physical health was unrefuted at the OATH hearing.

[4] The ALJ noted that the Grievant admitted to drinking heavily. The Grievant's private clinical psychologist testified at the OATH hearing that it "was not uncommon for those who suffer from PTSD to self-medicate with alcohol and illegal drugs." (Pet., Ex. E).

[5] The Fire Commissioner noted in his decision that the Grievant did not submit his application for a disability pension until after the positive test result. In May 2005, a panel approved the Grievant's application. In September 2005, the 1B Medical Board agreed that the Grievant has a work-related disability. At the time the ALJ issued his Report and Recommendation, this application was pending.

On November 21, 2008, the Fire Commissioner upheld the ALJ's findings, but concluded that termination was the appropriate penalty. In justifying a penalty of termination rather than a lesser penalty, the Fire Commissioner relied, in part, upon the Grievant's Counseling Services Unit records and statements that the Grievant made to his counselor. The Grievant was terminated on November 21, 2008.

On March 11, 2009, the Grievant filed a Petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to annul the termination.[6] On October 19, 2010, in *Matter of Schroeder v. Scoppetta*, 77 A.D.3d 840 (2d Dept. 2010), the Appellate Division held that the Fire Commissioner improperly relied on records that were not admitted into evidence at the OATH hearing, and thus deprived the Grievant of an opportunity to cross-examine the witness regarding the information. Specifically, the Appellate Division stated:

> Based upon his review of [the Counseling Services Unit records] the Fire Commissioner found that [the Grievant] had admitted to using cocaine more than once to his counselor and that "this behavior suggests a pattern of drug use." . . . [I]t is clear from the record, as confirmed by the ALJ in his report, that [the Grievant's] counselor did not testify at the hearing and her records were not admitted as evidence. [The Grievant] had no opportunity to cross-examine the counselor or to explain any of the statements he allegedly made to her, or to rebut the information contained in her records.

(Pet., Ex. G). Accordingly, the Appellate Division held that the Fire Commissioner's "determination is annulled . . . and the matter is remitted to the respondent Fire Commissioner of the City of New York for a new determination based solely upon matters in the hearing record." (*Id.*). The Court of Appeals denied the City's request for leave. (*Id.*)

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[6] The Grievant filed the Article 78 Petition in the New York State Supreme Court, Kings County on the basis that the termination was not supported by substantial evidence. The parties agreed to remove the case to the Appellate Division, Second Department.

On March 16, 2009, the Grievant filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging that his termination violated Title VII of the Civil Rights Act and the Americans with Disabilities Act ("ADA"). On May 26, 2010, the Grievant filed a federal lawsuit in the Eastern District of New York, docketed as 10-CV-2593, alleging that his termination violated the ADA, New York State Executive Law, and the Administrative Code. Both of these matters are pending.[7]

On February 11, 2011, the Union filed a grievance at Step III, on behalf of the Grievant, alleging that the FDNY violated Article VI, §§ 1 and 2 of the Agreement. Article VI, entitled "Salaries," provides in relevant part the prevailing salary and longevity rates. The grievance states, in relevant part:

> The Appellate Division, Second Department, by Decision and Judgment dated October 19, 2010, annulled the "Commissioner's Decision" dated November 19, 2008, wherein [the Fire Commissioner] terminated [the Grievant] as an employee of the [FDNY], effective November 21, 2008.
>
> The Court determined the [Fire Commissioner] improperly terminated [the Grievant]. Consequently, [the Grievant] remains a New York City Firefighter and is entitled to all the rights and privileges accorded such employment, including immediate reinstatement on the payroll, with health and other benefits.

(Pet., Ex. B). Specifically, the Union seeks reinstatement on the payroll with rights and benefits under the Agreement, back pay, medical benefits, seniority, longevity, and attorneys' fees, dating from the date of the Grievant's improper termination, November 21, 2008.

On March 25, 2011, pursuant to Step IV of the Agreement, the Union filed a Request for Arbitration. The Union attached the Step III grievance, as well as the Agreement's grievance

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[7] The Grievant never received a formal response from the EEOC regarding his complaint. The City has moved to dismiss the federal lawsuit.

procedure, which defines a grievance "as a complaint arising out of a claimed violation, misinterpretation or inequitable application of the provisions of this contract or of existing policy or regulations of the Fire Department affecting the terms and conditions of employment." (Pet., Ex. B). On March 30, 2011, the Union submitted a waiver in which the Grievant acknowledges that he "waive[s] the right, if any, to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award."[8] (Pet., Ex. I).

POSITIONS OF THE PARTIES

City's Position

The City asserts three grounds upon which the Union's Request for Arbitration should be denied. First, the City claims that arbitration of the instant matter would violate public policy because the grievance challenges the FDNY's decision to terminate the Grievant and the FDNY's refusal to reinstate the Grievant. The City Charter grants the Fire Commissioner the sole authority to discipline Firefighters. This legislation evinces a public policy that discipline of Firefighters must be reserved to the agency head, and arbitration of this matter would contradict that policy. Although the Union characterizes the instant dispute as non-disciplinary in nature, the City asserts that the grievance and the request for back-pay essentially challenge, and are inextricably intertwined with, the Fire Commissioner's decision to terminate the Grievant.

Second, the City alleges that no nexus exists between the FDNY's decision to terminate the Grievant and the Agreement. No contractual provision entitles the Union to file a grievance challenging a disciplinary penalty. The City argues that the provision cited by the Union bears no nexus to the Agreement because the instant matter is not a dispute concerning a

[8] The City was served with the Union's waiver on April 26, 2011.

miscalculation or a mispayment of salary or longevity rate. Permitting the Union to proceed to arbitration on the basis of this provision would mean that any claim in which a union seeks a monetary payment would have a nexus with the salary schedule; this contradicts Board precedent. The City also contends that the grievance procedure provisions cited by the Union do not establish a nexus. The City argues that the Appellate Division did not hold that the Grievant should not have been terminated or that he should be reinstated; it merely remitted the disciplinary case to the Fire Commissioner for a new determination. This determination has not yet been rendered. Thus, to the extent the Union is attempting to clarify, enforce, or appeal the court's decision, such an action does not fall within the contractual definition of a grievance.

Last, the City argues that where, as here, the Union has submitted the underlying dispute to another forum, the statutory waiver is invalid. The City argues that the Grievant litigated this claim and pursued the same remedy at OATH, and is currently pursuing the same claim in federal and state court. Once the Grievant submitted this matter–whether the Grievant was improperly terminated–to OATH, he could not execute a valid waiver and an Article 78 proceeding was the only vehicle available to appeal the Fire Commissioner's determination. Further, because the OATH proceeding and the Article 78 proceeding were decided on the merits, the Union may no longer validate the waiver by withdrawing claims. Therefore, the Petition Challenging Arbitrability should be granted.

Union's Position

The Union asserts that the Petition Challenging Arbitrability should be denied because the Union has established the requisite nexus between the Agreement and the FDNY's failure to provide contractual benefits owed to him. According to the Union, pursuant to the Appellate Division's determination, the Grievant remains a Firefighter and is entitled to reinstatement on

payroll and back pay since November 21, 2008. The withholding of any contractual entitlement is arbitrable under the Agreement and the Agreement's definition of grievance provides a sufficient nexus to grant the Request for Arbitration.

Further, the Union argues that the City improperly characterizes the grievance as a challenge to discipline. The Union asserts that the grievance does not challenge discipline because it is not grieving the Fire Commissioner's decision to terminate the Grievant. The grievance asserts only that the FDNY failed to compensate the Grievant for all contractual benefits applicable to the Grievant under the Agreement, including salary. Thus, the issue is whether the City refused to follow the Agreement by failing to compensate the Grievant since the date of his termination. Accordingly, the Union argues that the grievance does not interfere with the Commissioner's authority to discipline and does not violate public policy. In contrast, public policy encourages arbitration and the instant matter should proceed to arbitration.

Last, the Union claims that the waiver is valid because the dispute underlying the instant matter differs from the dispute addressed by the Appellate Division and the claims asserted by the Grievant in state and federal court. The Union argues that it is not challenging the Grievant's termination and it is not seeking the same relief that it sought in other forums. Contrary to the matters in those forums, the instant grievance is contractual and is not an employee discipline case. Therefore, the Board should deny the City's Petition Challenging Arbitrability.

DISCUSSION

We have consistently held that the waiver requirement pursuant to § 12-312(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") constitutes a condition precedent to arbitration that must be satisfied

before the Request for Arbitration may be considered, regardless of the merits of the underlying grievance. *See United Marine Div., L. 333, ILA*, 4 OCB2d 37, at 16 (BCB 2011); *SSEU, L. 371*, 67 OCB 8, at 7 (BCB 2001); *see also PBA*, 23 OCB 8, at 4 (BCB 1979). Accordingly, we first address the City's argument that the Grievant has not submitted a valid waiver because the Grievant has submitted the underlying dispute to OATH, appealed that decision to the Appellate Division, and is currently pursuing the same claim in federal and state court.

NYCCBL § 12-312(d) requires a grievant to file "a written waiver of the right, if any, of said grievant or grievants to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award." NYCCBL § 12-312(d) prevents duplicative litigation of the same dispute and ensures that a grievant who chooses redress through one forum will not attempt to relitigate the same dispute in another forum. *See UFA*, 73 OCB 3A, at 7 (BCB 2004). The waiver avoids subsequent arbitration of a matter that has already been submitted to and adjudicated on its merits by a court. *See PBA*, 23 OCB 8, at 4.

The Appellate Division, First Department, recently held in *Matter of Roberts v. Bloomberg*, 83 A.D.3d 457 (1st Dept. 2011), *lv. denied*, 17 N.Y.3d 706 (2011), that a waiver submitted in accordance with NYCCBL § 12-312(d) constitutes agreement "to arbitrate the entire dispute, not just contractual claims." *Id.* at 458. Here, the issue raised by the Union is whether the Grievant is entitled to reinstatement on payroll and/or contractual benefits as a result of the Appellate Division's ruling. This is a question of remedy arising directly from the Grievant's underlying disciplinary action, which was submitted to the Appellate Division for review pursuant to Article 78 of the CPLR. Although the Union argues it is not seeking review of the Grievant's termination, it is seeking a remedy arising from the Appellate Division's decision. *See PBA*, 3 OCB2d 41, at 13 (BCB 2010) (denying arbitration where a Request for

Arbitration sought damages "'resulting from' and 'consistent with'" the court order). Having obtained a judgment of the Appellate Division on the underlying dispute, the issue of whether the Grievant is now entitled to contractual wages and benefits is for the court. Accordingly, the instant waiver is invalid. *See DC 37, L. 376*, 1 OCB2d 36, at 12 (BCB 2008) ("What dooms the [Request for Arbitration] . . . is that the judicial proceedings have concluded with a judgment on the merits on the precise claims on which arbitration is sought."). The ensuing question is appropriately placed before the Appellate Division, and it cannot be submitted to this forum. Therefore, the Petition Challenging Arbitrability is granted, and the Request for Arbitration is denied.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, the Petition Challenging Arbitrability filed by the City of New York and the Fire Department of the City of New York, docketed as BCB-2957-10, hereby is granted; and it is further

ORDERED, that the Request for Arbitration filed by Uniformed Firefighters' Association, Local 94, IADD, AFL-CIO, on behalf of its member John Schroeder, docketed as A-13817-11, hereby is denied.

Dated: December 20, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

I concur – see opinion.

CHARLES G. MOERDLER
MEMBER

I concur – see opinion.

PETER PEPPER
MEMBER

LABOR MEMBERS' CONCURRING OPINION

We concur in the judgment. Following an evidentiary hearing, the Administrative Law Judge found that Firefighter Schroeder ("Grievant") had used an illegal drug but that he should receive a lesser penalty than dismissal in that he had a prior unblemished record and had suffered from post-traumatic stress disorder as a result of his traumatic experiences in the 1993 World Trade Center bombing and the September 11, 2001 outrage. The ALJ recommended that the penalty be held in abeyance so Grievant could retire due to a job-related disability. Grievant commenced the retirement process and would have completed it but for the shameful action of the Fire Commissioner. The Fire Commissioner ordered termination, relying on matter not in the hearing record. The Appellate Division, Second Department, annulled that determination and remitted for a determination based solely on the record. The Court of Appeals denied leave.[9] The Fire Commissioner has not complied.

Rather than commence judicial proceedings to enforce the determination of the Appellate Division, Grievant inexplicably commenced proceedings before the Equal Employment Opportunity Commission and then a Federal lawsuit charging violation, among other things, of the Americans with Disabilities Act.[10] Grievant's Union later commenced these proceedings.

The Fire Commissioner's inappropriate refusal to proceed as directed by the Appellate Division cannot be redressed here but should be squarely addressed in the State judicial system where appropriate relief can be directed and enforced.

December 20, 2011

CHARLES G. MOERDLER

PETER PEPPER

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[9] *Matter of Schroeder v. Scoppetta*, 77 A.D. 2d 840 (2d Dept. 2010). *lv. denied*, 16 NY 3d 704 (2011).

[10] Whether those proceedings have merit and what the appropriate remedy should be is for those tribunals to determine. This concurrence does not address those issues.