City v. L.237, IBT, 41 OCB 54 (BCB 1988) [Decision No. B-54-88 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK

Petitioner,

-and-

LOCAL 237, I.B.T.,

Respondent.

DECISION NO. B-54-88

DOCKET NO. BCB-1038-88 (A-2780-88)

In the Matter of

THE CITY OF NEW YORK

Petitioner,

-and-

LOCAL 237, I.B.T.,

Respondent.

DECISION NO. B-54-88

DOCKET NO. BCB-1066-88 (A-2832-88)

DECISION AND ORDER

On March 14, 1988, the City of New York, appearing by its Office of Municipal Labor Relations ("the City") filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration, which was submitted by Local 237, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO ("the

Union") on February 24, 1988. This grievance contests the findings and a recommendation of termination rendered by a hearing officer in the course of a disciplinary proceeding. The Union filed its answer on March 25, 1988. The City filed a reply on April 7, 1988.

On June 30, 1988, the City filed another petition challenging arbitrability which opposed a second request for arbitration stemming from the same disciplinary proceeding. The second grievance and request for arbitration challenges the actual application of the penalty of termination of employment, and is the subject of a second request for arbitration filed by the Union on June 20, 1988. The Union filed its answer on July 15, 1988. The City filed a reply on July 29, 1988.

The above-described challenges to arbitrability are consolidated for decision herein, as they concern the same parties, and they involve overlapping events and factual circumstances.

Background

On January 25, 1988, the grievant, an Associate Attorney in the Human Resources Administration Office of Legal Affairs ("HRA"), filed a discrimination complaint with the United States Department of Health and Human Services Office for Civil Rights ("Office for Civil Rights" or "OCR"). In her OCR

complaint, the grievant charged that she had been harassed by supervisory personnel in the HRA Office of Legal Affairs because of her handicap, spinal stenosis, in violation of Section 504 of the Rehabilitation Act of 1973.[1] Approximately one week later, she was notified by the HRA that formal disciplinary action was being taken against her.

On February 9, 1988, an informal conference was held before the General Counsel of the HRA as a preliminary to his preparation of findings and recommendations regarding numerous charges of misconduct and incompetency that had been lodged against the grievant. By memorandum dated February 17, 1988, the General Counsel reported to the Administrator of the HRA that he had found the grievant guilty of most of the charges, and he recommended the termination of her employment. The Union then filed a request for arbitration pursuant to the parties' contractual disciplinary procedure,[2] in which it

[1]Chapter 16 - Vocational Rehabilitation and Other Rehabilitation Services, Title 29, U.S.C.A., Section 794.

[2]Article VI contains the parties' entire grievance procedure. Section 4 of Article VI contains the parties' disciplinary procedure, and details a two-phase process. The first phase provides for the issuance of written charges, the production of evidence and witnesses, and a "conference" with Union representation before the designee of the agency head. Within ten days, the designee must issue a written determination "implementing" disciplinary action. In the second phase, the person being disciplined must then either accept the decision (penalty) as issued, or appeal. Appeal may either be made pursuant to Section 75 of the Civil Service Law or by request for arbitral review.

indicated that it would challenge the findings of the General Counsel and it also would appeal the severity of his recommended penalty.

While the request for arbitration and the Office for Civil Rights complaint were pending, the Deputy Administrator of the HRA, on behalf of the Administrator, informed the grievant, by letter dated March 1, 1988, that the Administrator had adopted the General Counsel's findings and recommendation, and that, effective March 4, 1988, at the close of business, her employment would be discontinued.

On or about March 15, 1988, the Union filed a new grievance on behalf of the grievant, alleging that the Administrator had exceeded his authority by terminating her employment before an arbitrator had made a final determination of her guilt and of the appropriateness of the penalty. It is this second grievance which is the subject of the second request for arbitration.

The record reflects that, although the HRA did eventually issue responses to the second grievance at various stages of the grievance procedure, in each instance the response was issued belatedly after the Union had moved the grievance to the next step of the grievance procedure. The HRA issued a Step I response dated April 8, 1988, but on or about March 31, 1988, the Union had already filed at Step II; the HRA issued a Step II response dated May 6, 1988, but on or about April 14,

1988, the Union had already filed at Step III. There is no indication that a Step III decision was ever issued.[3]

Finally, by letter dated May 11, 1988, the Office for Civil Rights advised the HRA that the grievant had amended her complaint, and that she was now alleging that the HRA had "terminated her from her position as an Attorney on the basis of her handicap." The grievant disputes the accuracy of the letter, contending that she did not amend her complaint but merely notified the OCR orally that her employment had been terminated.

POSITIONS OF THE PARTIES

City's Position

The question of waiver is the sole issue raised by the City in its challenges to the arbitrability of both of the instant grievances. The City asserts that the policy underlying the statutory waiver provision contained in Section

[3]The Union had the right to move forward to the next step of the grievance procedure without awaiting a response from management under certain circumstances. Article VI, Section 7. of the Agreement provides that, "If the Employer exceeds any time limit prescribed at any Step in the Grievance Procedure, the grievant and/or the Union may invoke the next step of the procedure." The time limits placed upon the employer to reply are as follows:

Step I - Three work days following date of submission.

Step II - End of the tenth work day following the date on which the appeal was filed.

Step III - Fifteen working days following the date on which the appeal was filed.

12-312 d. of the New York City Collective Bargaining Law ("NYCCBL")[4] is to prevent repeated litigation of the same underlying dispute, and to prevent unnecessary or repetitive litigation, and it cites several decisions of this Board in support of its assertion.[5]

In challenging the Union's initial request for arbitration, the City argues that, by having previously filed a complaint with the Office for Civil Rights, the grievant's written waivers, one required by Section 12-312(d) of the

[4]NYCCBL Section 12-312 d. reads 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, or 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.

[5]Decision Nos. B-13-76; B-6-78; and B-8-79.

NYCCBL, supra, and a second required by the HRA,[6] are both invalid. In challenging the Union's second request for arbitration, the City argues that the grievant's written waivers are doubly invalid; not only does the pendency of the Office for Civil Rights complaint invalidate them, but the filing of the previous request for arbitration of the same grievance invalidates them as well.

In support of its position, the City notes that this Board, in Decision No. B-28-87, has stated that the purpose behind the waiver provision is "to prevent multiple litigation of the same dispute and to insure that the grievant who elects

[6]As a precondition for obtaining arbitral review of the disciplinary action taken by the HRA against her, the grievant was required to sign a "Section 75 Hearing and Election of Grievance Procedure" form, which provides, in pertinent part, as follows:

> I am also fully aware that as an alternative, the Union with my consent may elect to proceed in accordance with the Grievance Procedure set forth in its contract with the City of New York including the right to proceed to binding arbitration, and I so consent. As a condition for submitting this matter to the Grievance Procedure, I hereby file with the Location Head this written waiver of the right to utilize the procedures available to me pursuant to Sections 75 and 76 of the Civil Service Law or any other administrative or judicial tribunal, except for the purpose of enforcing an arbitrator's award, if any. I am fully aware that this waiver of my right to a Section 75 hearing is final and irrevocable. [Emphasis in original.]

to seek redress through the arbitration process will not attempt to relitigate the matter in another forum." The City further quotes from Decision No. B-28A-87, wherein this Board elaborated upon its waiver policy by declaring that the definition of "cause of action" should be broadly construed, and it held that "the waiver provision precludes arbitration where the same underlying dispute, rather than the same issue, has been submitted to another forum [emphasis in original]." The City concludes that, because the grievant filed a complaint with the Office for Civil Rights, and because Section 504 of the Rehabilitation Act provides for various remedies including reinstatement, the grievant "violated both the letter and the spirit of Section 12-312(d) of the [NYCCBL]," when she executed a waiver "after seeking reinstatement at the OCR."

With regard to the second request for arbitration, the City argues that it is merely a duplication of the earlier request filed by the Union on February 24, 1988, and, therefore, it also renders the written waiver submitted by the Union null and void. The City contends that both requests concern the same grievance, wrongful termination, and both requests seek the same remedy, immediate reinstatement with full back pay and interest. The fact that the remedy sought in the instant request technically did not exist when the first request was filed is inapposite, according to the City,

because the Union had, and continues to have, the right to amend the remedy that it initially requested.

The City distinguishes the ruling of the United States Supreme Court in Alexander v. Gardner-Denver Co. and a subsequent related Board decision,[7] both of which were cited by the Union, by asserting that the policy concern in Gardner-Denver was the protection of rights guaranteed under Title VII of the Civil Rights Act of 1964.[8] Here, the City argues, the facts are the reverse. The grievant's federal rights already have been preserved. The only issue is whether her contractual rights remain. The City maintains that the dismissal of the Union's request for arbitration would contravene neither Gardner-Denver nor this Board's prior precedent. The City further distinguishes Gardner-Denver by noting that the Supreme Court's analysis was "rooted in Title VII and the paramount congressional purpose behind Title VII." The present case, the City points out, involves a claim filed pursuant to Title V.

[7]In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) [hereinafter cited as Gardner-Denver], the Supreme Court held that prior resort to arbitration did not constitute an election of remedies or a waiver of judicial relief in Title VII actions. In Decision No. B-9-74, the Board held that in light of the holding in Gardner-Denver, the waiver required by the NYCCBL is not affected by the commencement of a Title VII proceeding.

[8]Equal Employment Opportunities, Title 42, U.S.C.A., Sections 2000e to 2000e-17.

Union's Position

The Union argues that three separate and distinct disputes exist between the grievant and the Union, on the one hand, and the HRA, on the other. In essence, according to the Union, the matter pending before the Office for Civil Rights is limited to an allegation of harassment in the workplace due to a physical disability, whereas the requests for arbitration are concerned, first, with the justification for the disciplinary action proposed to be taken against the grievant, and second, with the procedural legitimacy of the termination of her employment while the request to arbitrate the disciplinary findings and proposed penalty was pending. Therefore, the Union contends, the three disputes are separate and distinct, and the question of waiver has no application.

According to the Union, the grievant's complaint with the Office for Civil Rights was limited to an allegation of harassment due to a physical handicap, and it did not refer to the impending recommended termination of her employment. It asserts that, although the OCR was "orally advised" of the grievant's dismissal, the grievant has never explicitly sought reinstatement and/or back pay through the Federal Office for Civil Rights nor submitted any amendment of the subject matter or change in the scope of her original complaint to the OCR. Therefore, the Union concludes, since the grievant has

never specifically requested reinstatement from the Office for Civil Rights, and since, according to the Union, the OCR lacks the authority to order the grievant's reinstatement on its own volition, there is no multiple litigation of the dispute which is the subject of the first request for arbitration.

The Union distinguishes the first request for arbitration by contending that it was filed pursuant to the parties' contractual disciplinary procedure. It is limited in scope, however, to a challenge of the findings and recommendation to terminate the grievant's employment made by a designated hearing officer.

The second request for arbitration, according to the Union, arises out of a grievance challenging the right of the Administrator to terminate the grievant's employment prior to the completion of the disciplinary process, and it is based upon a procedural provision of the contract. Thus, it does not directly challenge the issues of individual guilt or appropriateness of penalty, but rather, it raises a new question of contract interpretation.

The Union maintains that Article VI, Section 4 of the collective bargaining agreement limits the maximum disciplinary penalty that may be imposed prior to the final decision of an arbitrator, to a thirty-day suspension without

pay.[9] Therefore, according to the Union, regardless of the merits of the charges levied against her, the grievant is entitled to be placed in full pay status for the period between the end of the thirtieth day of her suspension and the day upon which the final arbitration award is issued. The Union argues that the grievant could not make this claim as part of her initial request for arbitration because the decision to terminate her employment had not yet been made at the time the arbitration request was filed.

[9]The specific contractual language upon which the Union bases its assertion that, prior to the final decision of the arbitrator, a penalty of no more than suspension without pay for thirty days may be imposed, appears in Article VI, Section 4, Step A., and reads as follows:

> If the grievant notifies the agency head that (s)he is not satisfied with the decision under Step A above, the Employer shall then proceed in accordance with the disciplinary procedures set forth in Section 75 of the Civil Service Law unless the grievant, in the notice of refusal to accept the decision under Step A., properly states that the Union with the grievant's consent is electing to proceed under Step B [arbitration] and at the same time the Union and the grievant submit a waiver of the grievant's right to the procedure available to him under Section 75 and 76 of the Civil Service Law or any other administrative or judicial tribunal, except for the purposes of enforcing an arbitrator's award, if any. **Notwithstanding such waiver, the period of an employee's suspension without pay pending hearing and determination of charges shall not exceed thirty (30) days.** [Emphasis added.]

The Union then urges that even if this Board should find that a waiver violation technically occurred, it should expand upon its existing Gardner-Denver policy (note 7, supra) and accord the same protection to Section 504 complaints as Title VII actions presently enjoy. The Union argues that, although Section 504 of the Rehabilitation Act of 1973 is discrete from Title VII of the Civil Rights Act of 1964, the policy considerations behind both pieces of legislation are virtually identical. Therefore, in the Union's view, denying the grievant the right to proceed to arbitration solely because she has a contemporaneous discrimination complaint pending before the Office for Civil Rights, would be contrary to public policy.

DISCUSSION

It is clear that the parties have agreed to arbitrate grievances, and that the Union's claim of wrongful disciplinary action, on its face, appears to lie within the contractual definition of an arbitrable grievance. We therefore turn to the City's claim that the Union has violated Section 12-312 d. of the NYCCBL, since a grievance, even where otherwise arbitrable, may not be submitted to arbitration if the waiver provision has been violated.[10]

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

In prior decisions, we have said that the purpose of the waiver provision 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.[11] A Union is deemed to have submitted the underlying dispute to two forums where the matter in controversy involves either common legal issues or common factual issues.[12]

Thus, in applying Section 12-312 d., we have generally denied arbitration where the party has commenced another proceeding seeking similar permanent relief. We have made exceptions to this general principle, however. In Decision Nos. B-13-76 and B-39-80,[13] we held that the filing of an improper practice petition alleging the violation of statutory rights does not constitute a waiver of the right to seek arbitration of a dispute arising out of the same circumstances when the underlying issues are distinct. In reaching this conclusion, we reasoned that the remedies available in each forum are different; an improper practice charge raises statutory issues that are within the exclusive jurisdiction of the Board to resolve, and, therefore, are outside the scope of

[11]Decision Nos. B-28-87 and B-28A-87.

[12]Decision Nos. B-8-71; B-10-74; B-8-81; and B-31-81.

[13]Subsequently overruled in part by Decision No. B-28-87.

an arbitrator's authority. Thus, the pivotal fact in Decision Nos. B-13-76 and B-39-80, was whether the issue presented could have been submitted, fully litigated, and effectively disposed of in one proceeding - either an improper practice proceeding or an arbitration proceeding.[14]

Court decisions relating to the improper practice jurisdiction of the New York State Public Employment Relations Board ("PERB") support the principle that the assertion of a statutory right does not automatically preclude the assertion of a contractual right, even though both claims arise out of the same circumstances and involve the same parties. The courts focus on the nature of the claim and whether the PERB possesses the statutory authority to grant all of the relief sought by the petitioner. (See Jefferson County Board of Supervisors v. PERB, 36 N.Y.2d 533, 369 N.Y.S.2d 662 [1975].)

As to the grievant's complaint to the Office for Civil Rights under Section 504 and the first request for arbitration, it is clear that the disputes presented - with regard both to the rights asserted and the remedies sought - are entirely different. The proceeding before the OCR involves the grievant's rights under Section 504 not to be harassed or discriminated against by reason of her physical handicap. The relief sought is cessation of any such

[14]See Decision No. B-35-88.

harassment. In contrast, the request for arbitration is addressed to circumstances which arose subsequent to the filing of the OCR complaint and to the fact that the grievant had been subjected to disciplinary action and, pursuant to her contractual rights, sought review of the employer's disciplinary action in arbitration. In such an arbitration, the grievant could litigate the alleged impropriety of disciplinary action on a host of grounds separate and apart from alleged harassment because of physical disability. The two proceedings thus differ in regard to the circumstances out of which they arose, the rights upon which they are based, and the nature of the relief sought. We do not find these two matters to involve the same "underlying dispute" within the meaning of NYCCBL Section 12-312 d. and, therefore, we conclude that the statutory waiver requirement has not been violated.

We are also satisfied that the dispute which is the subject of the second request for arbitration is distinct from both the Office for Civil Rights complaint and the first request for arbitration. Although both requests for arbitration can be traced back to a common factual background, the sole issue to be considered in the second submission is the meaning and import of the final sentence of Section 4 of Article VI: "Notwithstanding such waiver, the period of an

employee's suspension without pay pending hearing and determination of charges shall not exceed thirty (30) days."

One indication of this distinction lies in the different procedural paths that the requests for arbitration followed. The first request was made pursuant to the parties' contractual disciplinary procedure, and the request for arbitral review occurred immediately after the designated hearing officer made his findings and recommendation. The second request for arbitration, on the other hand, was filed as a grievance and followed the procedural steps required by the parties' grievance procedure.

The most significant difference between the subject matter of the dispute presented in the second request for arbitration and any of the other disputes involved here is that it is strictly the assertion of a claimed contractual right not to be suspended without pay, pending completion of a review of disciplinary action, for more than thirty days. The Union asserts that this right entitles an employee - even where the ultimate disciplinary penalty of discharge is eventually found justified - to be paid for however long the process may last beyond thirty days. This dispute does not challenge the disciplinary action either on its merits or on procedural grounds as the first arbitration request does. Rather, it addresses the failure of the employer to maintain the grievant in full pay status until completion of

appropriate review procedures where the process exceeds thirty days in length.

A determination of whether the disputed language places a thirty-day limit upon disciplinary suspensions without pay, in the event that the person subject to disciplinary action has elected either arbitral review or a Civil Service Law Section 75 proceeding, requires interpretation of the intent and application of the Agreement. Such an issue involves the merits of the grievance which, as we have often said, is a matter for resolution by an arbitrator.[15] We find that this contractual interpretation issue is distinct from the issues raised in either the Office for Civil Rights complaint or the first request for arbitration.

Accordingly, we will grant both of the Union's requests for arbitration and deny both of the City's petitions challenging arbitrability. However, because of the commonality of the factual background in both the request for arbitration in Docket No. BCB-1038-88, and the request for arbitration in Docket No. BCB-1066-88, for the sake of economy and expediency, we will allow both disputes to be submitted

[15]Decision Nos. B-12-69; B-8-74; B-1-75; B-5-76; B-10-77; B-17-80; B-4-81; B-7-81; and B-10-86.

for simultaneous adjudication before the same arbitrator, if both of the parties so request.

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 petition challenging arbitrability filed by the City of New York in Docket No. B-1038-88 be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by Local 237, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO in Docket No. B-1038-88 be, and the same hereby is, granted; and it is further

ORDERED, that the petition challenging arbitrability filed by the City of New York in Docket No. B-1066-88 be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by Local 237, International Brotherhood of Teamsters, Chauffeurs,

Warehousemen and Helpers of America, AFL-CIO in Docket No. B-1066-88 be, and the same hereby is, granted.

DATED: New York, N.Y.
October 25, 1988

MALCOLM D. MacDONALD

DANIEL G. COLLINS

GEORGE NICOLAU

CAROLYN GENTILE

EDWARD F. GRAY

DEAN L. SILVERBERG