City v. L.1549, DC37, 43 OCB 50 (BCB 1989) [Decision No. B-50-89 (Arb)]

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

The CITY OF NEW YORK, Petitioner, — DECISION NO. B-50-89
DOCKET NO. BCB-1125-89 (A-2952-88)

-and-

LOCAL 1549, DISTRICT COUNCIL 37, AFSCME, AFL-CIO, Respondent.

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DECISION AND ORDER

On January 6, 1989, 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 that was submitted by Local 1549, District Council 37, AFSCME ("the Union"), on behalf of its member Edythe George ("Grievant"). The Union filed an answer to the petition on February 22, 1989. The City filed a reply on April 3, 1989.

BACKGROUND

At a hearing held pursuant to Section 75 of the Civil Service Law, Grievant, an Office Aide III employed by the New York City Police Department, Internal Affairs Division, was found guilty of insubordination because of her refusal to answer

questions during an "official Police Department investigation." The Hearing Officer assigned to the case recommended that Grievant be dismissed from her position, which determination was affirmed by the Police Commissioner, effective May 21, 1982. Grievant appealed her dismissal pursuant to Section 76 of the Civil Service Law. After reviewing the record, testimony and post-hearing memoranda submitted by both sides, the Civil Service Commission determined that the "P.D. [Police Department] did not adhere to pertinent provisions of P.G. [Patrol Guide] 118-9, as the record below does not reflect appellant's refusal to answer questions `specifically, directly and narrowly related' to her official duties."[1] Accordingly, on May 20, 1983, the Civil

[1] Patrol Guide Section 118-9 governs the interrogation of both uniformed and civilian employees of the Police Department during an official departmental investigation. It requires that members of the Police Department "answer questions specifically, directly and narrowly related to official duties" and, in addition, includes the following provision:

> If a member of the Department is under arrest or is the subject of a criminal investigation or there is a likelihood that criminal charges may result from the investigation, the following warnings shall be given to the member concerned prior to commencement of the interrogation:
>
> I wish to advise you that you are being questioned as part of an official investigation by the Police Department. You will be asked questions specifically directly and narrowly related to the performance of your official duties. You are entitled to all the rights and privileges guaranteed by the laws of the State of New York, the Constitution of this State and the Constitution of the United States, including the right not to be compelled to incriminate yourself and

(continued...)

Service Commission held that "the determination of dismissal is reversed."

Upon receipt of the decision, the Police Department filed a motion in Supreme Court, New York County, for a judgment pursuant to Article 78 of the Civil Practice Law and Rules, seeking to annul the determination of the Civil Service Commission on the ground that "it was arbitrary because it failed to consider the special and sensitive status of Police Department employees." In March 1984, the court denied the Police Department's application and dismissed its Article 78 petition, finding that:

> The Police Department's position that it must be assured of the integrity of all of its employees is laudable, but it must be balanced against the rights of those employees. The Patrol Guide itself has performed this balancing function, and the Police Department should not now be heard to complain that its criteria cannot be informally expanded to meet what are perceived as the exigencies of the moment.

The actual date of her restoration to duty is not clear.

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[1](...continued)
the right to have legal counsel present at each and every stage of this investigation.

I further wish to advise you that if you refuse to testify or to answer questions relating to the performance of your official duties, you will be subject to departmental charges which could result in your dismissal from the Police Department. If you do answer, neither your statements nor any information or evidence which is gained by reason of such statements can be used against you in any subsequent criminal proceeding. However, these statements may be used against you in relation to subsequent departmental charges.

Thereafter, on May 14, 1987, the Union filed a grievance on behalf of Ms. George at Step I of the grievance procedure, claiming that her "annual leave and sick time from 5/21/82 - 10/1/84 was not restored." The Step I grievance was denied on or about May 28, 1987, and the Union filed its claim at Step II. The Step II grievance was denied on March 21, 1988 and, on October 19, 1988, the grievance filed at Step III of the grievance procedure also was denied. No satisfactory resolution of the matter having been reached, on November 25, 1988, the Union filed a request for arbitration alleging violations of Rule 2.4 (Calculation of Annual Leave Credits) and Rule 3.0 (Sick Leave Allowance) of the Time and Leave Regulations of the Citywide contract. As a remedy, it seeks the "[r]estoration of annual leave and sick leave balances for the period May 21, 1982 to October 1, 1984."

POSITIONS OF THE PARTIES

City's Position

The City argues that the request for arbitration must be denied because the Union has violated the waiver provision set forth in Section 12-312d of the New York City Collective Bargaining Law ("NYCCBL").[2] In support of its position, the City

[2] Section 12-312d of the NYCCBL states as follows:
(continued...)

notes that the remedy requested by the Union, restoration of accrued annual and sick leave, covers a period of time that begins with Grievant's dismissal from the Police Department and ends with her eventual reinstatement pursuant to the decision of the Civil Service Commission. "Apparently", the City asserts, "the Commission reinstated the [G]rievant without restoring her annual and sick leave balances. The Supreme Court, New York County also omitted any reference to annual and sick leave balances when it denied the Police Department's appeal." The City contends, however, that having already exercised her rights pursuant to the Civil Service Law, Sections 75 and 76, Grievant may not pursue a remedy in arbitration for the same underlying dispute. The City submits that "[a]ny contrary ruling would clearly upset the policy underlying the waiver, as set forth by the Board, to prevent multiple and repetitive litigation."

The City also disputes the Union's assertion that since the remedies sought in the proceeding brought pursuant to Section 76 of the Civil Service Law and the request for arbitration are

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[2](...continued)

> 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.

different, the two actions do not concern the same underlying dispute. In support of its position, the City notes that in prior decisions this Board has held that arguments addressed to questions of remedy are not relevant to the arbitrability of a grievance.

Finally, the City notes that Article VI, Section 5 of the applicable collective bargaining agreement between the parties requires that a written waiver be executed as a precondition to invoking arbitration.[3] In the instant matter, Grievant, when terminated, elected to exercise her Section 75 rights and, therefore, never executed such a waiver. Accordingly, the City argues that "[G]rievant should not be allowed to grieve the appropriate remedy for this termination for which no contractual waiver was filed."[4]

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[3] Article VI, Section 5 of the July 1, 1980 to June 30, 1982 agreement states, in relevant part, as follows:

> As a condition for submitting the matter to the Grievance Procedure the employee and the Union shall file a written waiver of the right to utilize the procedures available to the employee pursuant to Section 75 and 76 of the Civil Service Law or the Rules and Regulations of the Health and Hospitals Corporation or any other administrative or judicial tribunal, except for the purpose of enforcing an arbitrator's award, if any.

[4] We take administrative notice of the fact that a waiver signed by Grievant and her Union representative was received by the Office of Municipal Labor Relations on December 15, 1988, a few weeks after the request for arbitration was filed. The issue of whether the contract required the execution and submission of

(continued...)

Union's Position

The Union contends that the City "gravely misapprehends the nature of the grievance underlying the instant dispute ...." It submits that the request for arbitration does not challenge the remedy fashioned by the Civil Service Commission or the State Supreme Court. "Indeed", the Union states, it "does not believe that the Civil Service Commission had the authority to grant the remedy sought by the present grievance - restoration of annual leave and sick leave balances."

In support of its position, the Union asserts that the Civil Service Law limits appeals under Section 76 to the issue of a penalty of demotion in grade or dismissal from the civil service, or suspension without pay, or a fine imposed pursuant to the provisions of Section 75 of the Civil Service Law. It is not within the authority or power of the Civil Service Commission to grant remedies provided under a collective bargaining agreement. Thus, according to the Union, when the Police Department appealed the Commission's Section 76 decision, the scope of the court's review was limited to whether the determination was "purely arbitrary". The court had no authority to grant further remedies, such as those provided under the collective bargaining

[4](...continued)
another waiver at some earlier stage of the grievance procedure and, if so, whether the Grievant complied with such requirement, however, are matters of procedural arbitrability which should be determined by an arbitrator and not by this Board. See e.g., Decision Nos. B-61-88; B-32-87; B-28-84; B-25-72; B-6-68.

agreement.

In any event, the Union argues that the issue of restoration of Grievant's annual leave and sick leave balances did not arise until after the Civil Service Commission issued its decision ordering her reinstatement. Therefore, the Union submits that the contractual issue of accrual of annual leave and sick leave balances would have been moot if Grievant had not been reinstated. The Union contends that the Police Department deprived Grievant of her annual leave and sick leave balances "in retaliation for her victories before the Civil Service Commission and in court. This retaliation, in violation of the collective bargaining agreement, obviously occurred after Ms. George was reinstated." Inasmuch as the City's "[u]nstated, but implied ... challenge to arbitrability" is based on the doctrine of collateral estoppel, the Union alleges that for the above-stated reasons, the City's claim is without merit.

Finally, the Union asserts that the petition challenging arbitrability should be dismissed because the City's arguments are addressed to the question of remedy, which the Board of Collective Bargaining has ruled is not relevant to the arbitrability of a grievance. Instead, the Union submits that the "sole dispositive question" before the Board on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of the agreement to arbitrate. Since the City does not dispute that the alleged violation of

Rule 2.4 and Rule 3.0 of the Time and Leave Regulations of the Citywide contract falls within the scope of the parties agreement to arbitrate, the Union argues that the petition challenging arbitrability must be dismissed.

DISCUSSION

It is well-established that in determining disputes concerning arbitrability, this Board must decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy at issue in the matter before the Board.[5] It is clear that the parties in the case herein have agreed to arbitrate grievances, as defined in Article XV, Section 1 of the 1980-1982 Citywide Agreement,[6] and that the alleged violation of Rule 2.4 and Rule 3.0 of the Time and Leave Regulations of the Citywide contract falls within the contractual definition of an arbitrable grievance. The City argues, however, that the request for arbitration must be denied because the Union has violated the waiver provision set forth in Section 12-312d of the NYCCBL. The City maintains that the action complained of by

[5] Decision Nos. B-27-89; B-65-88; B-28-82.

[6] Article XV, Section 1 of the Citywide Agreement defines the term "grievance" as:

> a dispute concerning the application or interpretation of the terms of this Agreement.

the Union, failure to restore Grievant's annual leave and sick leave from May 21, 1982 to October 1, 1984 concerns a matter that has already been addressed by the Civil Service Commission. Having exercised her rights pursuant to Sections 75 and 76 of the Civil Service Law, the City asserts, Grievant may not seek a remedy in arbitration for the same underlying dispute.

The Union, on the other hand, submits that it is not within the authority or power of the Civil Service Commission to grant remedies provided under a collective bargaining agreement. Moreover, it claims that the issue of restoration of Grievant's annual leave and sick leave balances did not arise until after she was reinstated by the Civil Service Commission. Therefore, the contractual issue of accrual of annual and sick leave would have been moot if Grievant was not reinstated.

In prior decisions, this Board has stated 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. A union is deemed to have submitted the underlying dispute to two forums, and thus to have rendered itself incapable of executing an effective waiver under Section 12-312d, where the proceedings in both forums arise out of the same factual circumstances, involve the same parties,

and seek the determination of common issues of law[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 arbitration even where the party raised additional matters in the other forum beyond those asserted in the request for arbitration.

In Decision No. B-8-79, this Board further held that it would be senseless to interpret the statutory waiver requirement as barring the submission of a matter to the courts subsequent to an arbitration, while permitting a matter that has already been adjudicated on the merits by a court to be submitted to arbitration. The Board concluded that such a construction would ascribe to the law, at least by implication, the intent to give superior status to arbitral awards over court judgments, which is clearly not the purpose of the law. Rather, it noted that the law is intended only to force an express and conclusive election as a precondition to obtaining the remedy of arbitration. Thus, the Board stated that:

> Commencement of a court proceeding for adjudication of the underlying dispute in a

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[7] See e.g., Decision Nos. B-28-87; B-8-79; B-8-71.

[8] See e.g., Decision Nos. B-10-82; B-10-74.

[9] See e.g., Decision No. B-8-71.

> matter such as this 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 [§12-312d] of the NYCCBL. Having obtained a judgment of a court on an issue, a party seeking arbitration of the same issue no longer has the capacity to make a waiver satisfactory to the statutory requirement.

Applying these principles to the instant matter, we find that the request for arbitration filed by the Union should be denied because it violated the waiver requirement set forth in the NYCCBL. In so ruling, we note that contrary to the Union's assertion, Grievant did submit the same underlying dispute to the Civil Service Commission as is presented in the instant request for arbitration. The actions complained of in both proceedings arise out of Grievant's dismissal from the Police Department in violation of Section 118-9 of the Patrol Guide. The only difference between the two proceedings is the remedy requested. In the proceeding before the Civil Service Commission, Grievant requested reinstatement, pursuant to Section 76 of the Civil Service Law which, we note, authorizes back pay; whereas in the instant proceeding, Grievant seeks the restoration of annual leave and sick leave balances for the period of time during which she was wrongfully dismissed.

Moreover, we are not persuaded by the Union's claim that it could not have violated the statutory waiver requirement inasmuch as it is not within the authority or power of the Civil Service Commission to grant the contractual remedy requested in the

request for arbitration.[10] To the contrary, we find that Grievant chose to proceed under the Civil Service Law and, therefore, elected to be bound by whatever remedies are provided thereunder. We note that in Decision No. B-8-71, the Uniformed Firefighters Association ("UFA") presented an argument similar to the argument presented by the Union herein. It argued that since the Article 78 remedy and the contractual arbitral remedy would afford different forms of relief, the filing of a claim in one forum does not preclude the filing of a second claim in another forum. In rejecting that argument, this Board noted that the distinction in the remedies provided under Article 78 and under the contractual arbitration procedure demonstrates the fact that the grievants made a deliberate choice between different forums, with knowledge of all of the facts necessary to make an election

[10] We note that Civil Service Law, Section 76.3 provides that an employee reinstated pursuant to a determination by a municipal civil service commission "...shall receive the salary or compensation he would have been entitled by law to have received in his position for the period of removal...." While it has been held that this language does not authorize the payment of the cash equivalent of vacation days or personal leave days in addition to lost salary, Alongi v. City of New York, 92 Misc. 2d 1082, 402 N.Y.S. 2d 99 (1st Dept. 1977), it does not appear that the courts have addressed the question of whether an award of credit for vacation or personal leave days which would have accrued during a period of removal, to be added to an employee's leave balances, is authorized under this section. However, at least one court has ruled that credit (not cash) for accrued sick leave may be awarded to a reinstated employee under the nearly identical provisions of Civil Service Law, Section 77. (See, May v. Shaw, 92 Misc. 2d 140, 399 N.Y.S. 2d 983 (Sup. Ct. Orange Cty. 1977).) See also, City of Lackawanna v. AFSCME, AFL-CIO, Local #1205, 98 Misc. 2d 712, 414 N.Y.S. 2d 638 (Sup. Ct. Erie Cty. 1979).

as between the statutory remedy and the contractual arbitral remedy. We stated that:

> This is a classic illustration involving the doctrine of election of remedies...Having commenced an action involving a statutory remedy for redress of an alleged contractual breach prior to commencing the arbitration proceeding, they may not now be permitted, through their representative, to invoke the arbitral remedy. The commencement of the Article 78 proceeding, with knowledge of the contractual remedy known to the grievants, is an election of remedies concerning the alleged breach of contract.[11]

We also find that contrary to the Union's assertion, the City does not argue that the request for arbitration should be denied because the remedy requested is unavailable in arbitration. In this regard, we note that the parties concur that arguments addressed to the question of remedy are not relevant in determining the arbitrability of a grievance. Rather, the City claims, and we agree, that the fact that the remedy requested in the Civil Service Law, Section 76 proceeding and in the request for arbitration are different does not by itself establish that the two proceedings involve different

[11] See also, Decision Nos. B-21-85; B-7-76; B-15-75. In Kavoukian v. Bethlehem Central School District, 63 A.D. 2d 767, 404 N.Y.S. 2d 738 (3d Dept. 1978), leave denied, 46 N.Y. 2d 709, 414 N.Y.S. 2d 1026, the court held that an employee feeling himself aggrieved by discipline imposed may appeal to the Civil Service Commission or commence an Article 78 proceeding to review the proposed penalty or the parties can agree to proceed with the grievance procedure culminating in arbitration as the third alternative. However, once the controversy is heard and a decision is arrived at either by an arbitrator, commissioner or judge, that is the end of the matter.

underlying disputes.

Finally, we reject the Union's contention that its request for arbitration must be granted because the Police Department deprived Grievant of her annual and sick leave balances in retaliation for her victories before the Civil Service Commission and in court. We note that while the alleged retaliation against Grievant may state a claim of improper practice in violation of Section 12-306a(1) of the NYCCBL,[12] it does not state a claim which is arbitrable within the contractual definition of the term "grievance."

Accordingly, for all of the reasons stated above, we shall deny the Union's request for arbitration, and grant the City's petition challenging arbitrability.

ORDER

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

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[12] Section 12-306a(1) of the NYCCBL states as follows:

> It shall be an improper practice for a public employer or its agents:
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
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> * * *

hereby

ORDERED, that the request for arbitration filed by Local 1549, District Council 37, AFSCME, AFL-CIO be, and the same hereby is, denied; and it is further

ORDERED, that the petition challenging arbitrability filed

by the City of New York, and the same hereby is, granted.

DATED: New York, N.Y.
September 13, 1989

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CHAIRMAN

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MEMBER

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