City v. L.376, DC37, 45 OCB 21 (BCB 1990) [Decision No. B-21-90 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

IN THE MATTER OF THE ARBITRATION

-between-

THE CITY OF NEW YORK,
Petitioner,

Decision No. B-21-90
Docket No. BCB-1237-89
(A-3265-89)

-and-

DISTRICT COUNCIL 37, LOCAL 376,
AFSCME, AFL-CIO,
Respondent.

DECISION AND ORDER

On December 22, 1989, the City of New York, appearing by its office of Municipal Labor Relations ("the City"), filed a petition challenging the arbitrability of a request for arbitration that had been filed by D.C. 37 ("the Union") on November 14, 1989. The Union filed an answer on January 19, 1990, and the City filed a reply on February 13, 1990. The Union subsequently filed a sur-reply on March 2, 1990.[1]

BACKGROUND

The grievant, Raymond Bermudez, was hired by the Department of Environmental Protection ("the Department") as a provisional

[1] The Revised Consolidated Rules of the Office of Collective Bargaining do not provide for the filing of sur-replies. It is the policy of this Board not to encourage the filing of pleadings subsequent to those specified in our Rules. Since the City consented to the Union's request to file its sur-reply in this case, however, we have accepted the Union's submission.

Construction Laborer on or about September 1981. On June 30, 1988, he executed a Stipulation and Agreement ("the Stipulation") which disposed of disciplinary charges arising from his alleged substance abuse.[2] Pursuant to the relevant terms of the Stipulation, the grievant was placed on a one year period of probation, and agreed that he would be terminated for any "misconduct or unsatisfactory performance of duties engaged in during th[at] . . . period. . .”

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[2] The Stipulation, which was also signed by the grievant's Union representative and executed by Harvey W. Schultz, the Commissioner of the Department, on July 1, 1988, provides in pertinent part as follows:

> (6) That Raymond Bermudez accepts as a penalty for the above misconduct the imposition of a twelve (12) month probationary period . . .
>
> (7) That said probationary period shall become effective upon the execution of this Stipulation by the Commissioner; . . .
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> (14) That any violation of the conditions of the probationary period . . . . or any other misconduct or unsatisfactory performance of duties engaged in during the probationary period, shall result in the termination of Raymond Burmudez's position with the Department; . . .
>
> (15) That the Department shall extend to Raymond Bermudez an opportunity to submit his resignation prior to effectuating his termination pursuant to Paragraph (14) of this Stipulation;
>
> (16) That Raymond Bermudez agrees to waive any and all rights he may have under the law, and/or any applicable collective bargaining agreement, with respect to the termination of his position pursuant to Paragraph (14); . . .

In November 1988, a supervisor observed the grievant and several other employee s eating at a restaurant located "some distance away" from their designated worksites during work hours ("the restaurant incident"). On June 6, 1989, the grievant was informed that his employment with the Department would be terminated pursuant to paragraph 14 of the Stipulation, due to his involvement in this incident. The grievant was offered the opportunity to resign voluntarily at that time. All the other employees involved in the restaurant incident were docked one day's pay as a penalty for their misconduct.

Thereafter, at an unspecified date, Vincent Parisi, President of the Union, met with Richard Gainer, Chief of Operations at the Department, and allegedly persuaded him to recommend to the Commissioner that the grievant be docked five days' pay instead of being discharged. Mr. Parisi met with Mr. Gainer again on June 21, 1989, and asked him if the grievant's penalty had been processed. Mr. Gainer informed him that it had not, but that he would "go right to the Commissioner" to see that the processing be completed.

Notwithstanding this assurance, on July 5, 1989, the grievant was notified over the telephone, that his employment was terminated. He was subsequently handed a letter of termination from the Commissioner, dated June 30, 1989 ("the Termination

Letter").[3]

The grievant filed identical, undated, Step I and II grievances alleging that the Department had terminated his "without just and sufficient cause" in violation of Section 5 of Executive Order No. 83 which is dated July 26, 1973 ("E.O. No. 83").[4] On July 28, 1989, the grievant's termination was upheld at Step II on the ground that he had been properly discharged pursuant to paragraph 14 of the Stipulation. On October 13, 1989 a Step III decision denying the grievance was issued.

No satisfactory resolution of this dispute having been reached, the Union filed a request for arbitration alleging that the grievant was wrongfully disciplined in violation of E.O. No. 83, §5, and Article XV of the Citywide Agreement ("the

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[3] The Termination Letter provides in relevant part as follows:

> Dear Mr. Bermudez:
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> You are hereby terminated from your civil service position of Construction Laborer, effective as of close of business of this date.

[4] E.O. No. 83, §5 establishes a grievance procedure for all employees of mayoral agencies who are eligible for collective bargaining under the New York City Collective Bargaining Law with several specified exceptions. It is generally used by parties who have not negotiated a collective bargaining agreement at the unit level as a means of obtaining arbitration for their unresolved grievances.

Agreement").[5] As a remedy, it seeks immediate reinstatement of the he grievant to his position with full back pay, interest and benefits, and "the withdrawal of any record in the grievant's personnel file".

POSITIONS OF THE PARTIES

City's Position

The City asserts that the grievant was discharged pursuant to the express terms of paragraph 14 of the Stipulation for misconduct which he committed during his probationary period. It further maintains that pursuant to paragraph 16 of the Stipulation, the grievant cannot maintain the instant action because he waived the right to arbitrate a dismissal carried out pursuant to paragraph 14.

The City disputes the Union's contention that the grievant was not discharged according to the terms of the Stipulation. It notes that on June 6, 1989, the grievant was informed that he would be discharged pursuant to paragraph 14 of the Stipulation for engaging in misconduct during his probationary period, and that he was offered an opportunity to resign voluntarily, as provided for in paragraph 15 of the Stipulation. With respect to the Union's assertion that the Termination Letter did not specify the cause of the grievant's discharge, the City notes that there

[5] Article XV of the Citywide Agreement establishes a grievance procedure for resolving alleged violations of that agreement.

is no provision in the Stipulation which obligated the Department to inform the grievant, in writing, that he was being discharged pursuant to paragraph 14.

Moreover, the City also disputes the Union's argument that since the grievant was not on probation on the date of his termination, he was entitled to be served with disciplinary charges prior to being discharged. The City maintains that the terms of the Stipulation do not mandate that a discharge effected pursuant to paragraph 14 be carried out within the probationary period, and notes that such an interpretation would "allow Grievant to repeatedly violate the terms of the Stipulation during the probationary period so long as he did not get caught within the probationary period". [emphasis in original]. The City argues in the alternative that even if arguendo, the time period during which the grievant could be summarily discharged pursuant to paragraph 14 was limited to his probationary period, the Union's request for arbitration must nevertheless be dismissed because the grievant was informed of his impending termination on June 6, 1989, prior to the expiration of his probationary period.[6]

Union's Position

The Union argues that the grievant was wrongfully

[6] The city concedes that it is unclear whether the grievant received the Termination Letter on June 30, 1989 or on July 5, 1989.

disciplined. It maintains that he was not discharged for engaging in misconduct during his probationary period, and that paragraph 14 of the Stipulation does not constitute a "blank check" for terminating his employment.

In support of its position, the Union notes that the Termination Letter did not specify the cause of the grievant's discharge, and that the matter of the grievant's involvement in the restaurant incident was settled prior to the termination of his employment. The Union asserts that at the time of his discharge, the grievant properly expected that he would not be terminated for his involvement in the restaurant incident, and that the Department had no other reason for which to discharge him under paragraph 14 of the Stipulation.

The Union also maintains that in any event, the grievant was wrongfully disciplined because he was not on probation at the time of his discharge on July 5, 1989, and was therefore entitled to be served with disciplinary charges prior to being discharged. Although the Union admits that the grievant received verbal notification that he would be discharged three weeks prior to the expiration of his probationary period, the Union argues that the existence of such notification is irrelevant because the grievant was not actually terminated until July 5, 1989, his first scheduled work day after the expiration of his probationary period.

DISCUSSION

In considering a petition challenging arbitrability, we have a responsibility to determine whether there is a prima facie relationship between the act complained of, and the source of the right being invoked, and whether the parties have agreed to arbitrate disputes of that nature.[7] We have long held that once a union has established the existence of these preliminary requirements in its grievance, we will direct that the merits of the dispute in question be resolved in arbitration.[8]

In the instant case, the parties do not dispute the fact that an allegation of wrongful disciplinary action taken against the grievant after the expiration of his probationary period would be arbitrable.[9] The essence of their dispute focuses on the issue of whether the grievant's summary termination was effected pursuant to the terms of the Stipulation, or, rather was implemented outside the time frame and scope of the Stipulation. The City maintains that the grievant was properly terminated pursuant to the express provision of paragraph 14 of the Stipulation, whereas the Union alleges that he was entitled to be served with disciplinary charges and to be afforded a due process

[7] Decision Nos. B-29-89; B-19-89; B-61-88; B-37-88.

[8] Decision Nos. B-49-89; B-29-89; B-54-88; B-37-88; B-13-87.

[9] We emphasize that the grievant, who had served in his position since 1981, was on probation pursuant to the terms of a stipulation he executed on June 30, 1988, and not pursuant to any provision of law or rules.

hearing prior to being discharged.

Initially, we find that contrary to the Union's contention, the record clearly indicates that the grievant was discharged for engaging in misconduct during the probationary period established by the terms of the Stipulation. It is undisputed that on June 6, 1989, the grievant was informed of his impending discharge for having been involved in the restaurant incident.

With respect to the Union's contention in its sur-reply, that the grievant was led to believe that he would be penalized only five days' pay for his role in the restaurant incident, we note that the discipline of employees is expressly within the City's statutory management prerogative unless otherwise limited by statute or agreement.[10] In the instant case, pursuant to paragraph 14 of the Stipulation, the parties agreed that any misconduct in which the grievant engaged during his probationary period would constitute a basis for his being summarily discharged. Therefore, we hold that the managerial determination to terminate the grievant for having engaged in misconduct during the term of his stipulated probationary period was completely within the discretion of the Department. The grievant's assumption that the penalty of discharge had been expunged

[10] Section 12-307b. of the New York City Collective Bargaining Law provides in relevant part as follows:

> It is the right of the city . . . . acting through its agencies . . . . [to] take disciplinary action; . . .

pursuant to the alleged verbal agreement between Parisi and Gainer is irrelevant to the efficacy of the Department's final decision to terminate his employment. We note, in this regard, that the Department never processed the five day wage penalty which allegedly was to be substituted for the penalty of discharge.

Moreover, we disagree with the Union's contention that the Department's failure to specify the cause of the grievant's discharge in the Termination Letter indicates that he was not terminated pursuant to paragraph 14 of the Stipulation. As noted by the City, there is no provision in the Stipulation which mandates that a termination letter issued pursuant to paragraph 14 specify that the termination is being carried out according to the terms of the Stipulation.

Since we find that the grievant was discharged for having engaged in misconduct during his probationary period, as provided for in paragraph 14 of the Stipulation, we accept the City's argument that the Union does not have the right to arbitrate the instant dispute. In paragraph 16 of the Stipulation, the grievant and his Union representative clearly and unequivocally waived the right to arbitrate disputes arising from the application of paragraph 14.

Furthermore, even if the waiver in paragraph 16 had not been included in the Stipulation, we would reject the Union's contention that in the instant case, the grievant was entitled to

be served with disciplinary charges prior to being discharged on July 5, 1989, after his probationary period had expired. We note, as does the City, that the Stipulation does not limit the time period during which a termination effected pursuant to paragraph 14 may be carried out, and that the signatories of the Stipulation expressly agreed that:

> any . . . misconduct . . . engaged in during the probationary period, shall result in the termination of Raymond Burmudez's position with the Department; . . . .

Since the grievant was discharged for engaging in misconduct during the probationary period established by the Stipulation, and was advised of his impending termination prior to the expiration of this period, we hold that the City had no obligation to serve him with disciplinary charges or to afford him a due process hearing prior to terminating his employment on July 5, 1989.

Therefore, in addition to finding that the Union waived its right to arbitrate the dispute herein, we determine that in any event, the Union has not demonstrated that the grievant's discharge arguably could be deemed to constitute a wrongful disciplinary action. Accordingly, we dismiss the Union's request for arbitration.

O 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

O R D E R E D, that the challenge to arbitrability raised herein by the City of New York be, and the same is hereby granted and it is further

O R D E R E D, that the request for arbitration filed herein by the Union be, and the same is hereby denied.

Dated: April 25, 1990
New York, N.Y.

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