City v. DC37, 47 OCB 64 (BCB 1991) [Decision No. B-64-91 (Arb)]

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

-between-

DECISION NO. B-64-91
DOCKET NO. BCB-1335-90
(A-3605-90)

THE CITY OF NEW YORK,
Petitioner,
-and-

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,
Respondent.
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DECISION AND ORDER

On December 10, 1990, the City of New York ("City"), through its Office of Labor Relations, filed an amended petition challenging the arbitrability of a grievance filed by District Council 37, AFSCME, ("DC 37" or "Union").[1] On January 3, 1991, DC 37 filed an answer to the amended petition challenging arbitrability; the City filed a reply on January 14, 1991.

BACKGROUND

During June and July of 1990, DC 37 filed a grievance at Steps I, II, and III of the grievance procedure, which was denied by the City at each step. The grievance alleged:

> Violation of Citywide Bargaining Agreement, and the Unit Bargaining including Article VI, Section 1(b), 1(e) and 1(f) and applicable federal, state and local statutes and applicable agency rules and regulations, i.e., the NYC Department of Environmental Protection has taken "a wrongful disciplinary action" against Dr. Maripuri and has not presented charges or provided due process for this action, in part, due to Dr. Maripuri's insistence

[1] The amended petition challenging arbitrability substitutes for a previous petition filed on November 8, 1990. It appears that the amended petition was filed in response to an amended request for arbitration and that consent was given by the respective parties for the amendments.

> that promotions be made on the basis of qualifications and that the agency not discriminate against employee on basis of "national origin."

In its amended request for arbitration, the Union seeks to arbitrate the issues of:

> [w]hether the employer engaged in unlawful discrimination against the grievant based upon national origin; whether the employer wrongfully discharged the grievant due to grievant's insistence that proper procedures be followed in the administration of the office and the promotional policies followed therein.

The Union claims a violation of "Executive Order No. 22, dated August 24, 1970 issued by Mayor Lindsay and other orders barring discrimination (incorporated by reference as a written policy of the agency) [and] D.O.P. Personnel Policy and Procedure No. 470-85."[2] As a remedy, the Union seeks the restoration of the grievant

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[2] Executive Order No. 22 (August 24, 1970) states, in relevant portion, as follows:

PROHIBITING DISCRIMINATION IN EMPLOYMENT
BY CITY DEPARTMENTS AND AGENCIES

WHEREAS, it is the policy of the City of New York to assure and protect all employees of the City against discrimination based on race, creed, color, national origin, ancestry or sex, and to protect older workers from discrimination based on age, in the recruitment, assignment, promotion or other aspects of employment by City departments and agencies;

NOW, THEREFORE, by the power vested in me as Mayor of the City of New York, it is hereby ordered as follows:

Section 1. There shall be no discrimination by any City department, agency or official representative thereof against any employee of or applicant for employment by the City of New York because of race, creed, color, national origin, ancestry, sex or age (except, in the case of sex or age, on the basis of a bona fide occupational qualification, and except for limitations imposed by

(continued...)

2 (... continued)
the New York City Employee Retirement System, or when there is a statutory requirement imposing age limitations) or because of any complaint, grievance or appeal brought to enforce the provisions of this order. . . .

to the position of Associate Chemist I, retroactive to May 18, 1990; the payment of back salary and benefits; and any other action necessary in order to make the grievant whole.

Department of Personnel, Personnel Policy and Procedure No. 470-85 (August 15, 1985) states as follows:

SUBJECT: Policy Barring Discrimination in Appointment and Promotion Processes

Supersedes: Personnel Policy and Procedure No. 470-77

Background: It has been a long-standing policy of the City of New York to provide equal opportunity in City employment. The Department of Personnel is committed to policies and procedures that assure equal employment opportunity for all.

Policy: It has been the policy of the Department of Personnel in conducting civil service examinations and investigations and in processing appointments and promotions in the civil service (except where restrictions are established pursuant to law) not to consider such factors as sex, private sexual orientation, age, race, color, religion, national origin, handicap, and political or personal convictions of the individual.

Procedure: Agencies will be guided by the foregoing in their personnel policies and practices. For example: Agency heads should make certain that interviews for appointment or promotion are not scheduled on days of religious observance....

POSITIONS OF THE PARTIES

City's Position

In its amended petition challenging arbitrability, the City argues that as non-competitive employee with fewer than five years of service, the grievant is not covered by §75(l) of the Civil Service Law and, therefore, may not grieve the discharge or the City's failure to serve written charges under Article VI, Sections 1(E) and 1(F) of the collective bargaining agreement.[3]

Furthermore, the City alleges that the grievant in the instant matter filed a charge of discrimination based upon national origin with the Equal Employment Opportunity Commission ("EEOC") before filing the amended request for arbitration and that the EEOC charge is currently open and pending. The City notes that §12-312(d) of the New York City Collective Bargaining Law ("NYCCBL") requires as

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[3] Article VI, Section 1 states as follows:

> The term "grievance" shall mean: (E) A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(l) of the Civil Service Law ... (F) Failure to serve written charges as required by Section 75 of the Civil Service Law ... upon a permanent employee covered by Section 75(l) of the Civil Service Law ...

Section 75(l) of the Civil Service Law provides that an employee in the non-competitive class who has completed at least five years of continuous service may not be removed, except for incompetency or misconduct shown after a hearing upon stated charges.

a condition for invoking impartial arbitration that a grievant file a written waiver of the right to submit the dispute to another forum and that the grievant in the instant case submitted such a document. Accordingly, the City argues that the instant request for arbitration should be denied because the grievant failed to execute a valid waiver.

The City distinguishes Alexander v. Gardner Denver,[4] which the Board relied upon in Decision No. B-9-74. The City argues that "the issue in Alexander was whether a court should refuse to hear an employee's Title VII claims because of [a] prior resort to arbitration on the same issue," whereas in the instant case "the issue is whether the Board can vitiate the requirement for obtaining the right to go to arbitration by compelling arbitration of a matter already submitted to the EEOC." Moreover, the City argues that "the waiver required under the NYCCBL is not a 'prospective waiver' under Alexander." The City distinguishes the collective bargaining agreement in Alexander, in which the right to proceed to arbitration was not conditioned upon the signing of a waiver, from the instant case, in which there is such a condition on the right to proceed to arbitration. Finally, the City argues that the Court in Alexander was "attempting to prevent ... the waiver of purely personal and individual rights by a union which

[4]415 U.S. 36, 94 S.Ct. 1011, 7 FEP 81 (1974).

is only empowered to waive collective rights." Accordingly, the City claims, an individual employee may waive a cause of action under Title VII as part of a voluntary settlement of a grievance or as a condition for arbitration.

In its reply, the City elaborates on these arguments. The City argues that the arbitration clause at issue in the instant case does not provide for arbitration as the sole and exclusive remedy; rather, an employee may choose among the statutory and contractual remedies available. According to the City, the Alexander decision is inapplicable to the instant dispute because arbitration is not the only remedy available to the grievant. Moreover, the City contends that although the Court in Alexander would not infer a waiver from the "mere resort to the arbitral forum," the Court did not foreclose the waiver of a right which had matured. Finally, the City contends that as the arbitration forum is available only upon the filing of a valid waiver, the instant grievance may not be arbitrated because a valid waiver has not been filed.

Union's Position

The Union alleges that the grievant, who is of Indian descent, was discriminated against on the basis of national origin "with regard to evaluations and possible promotion, and [in an] ultimate

discharge."

The Union argues that the City misinterprets the Supreme Court's decision in Alexander and neglects to discuss Decision No. B-9-74. The Union explains that the Supreme Court held in Alexander that the right to a trial in federal court under Title VII was not foreclosed by the prior submission of the same dispute to arbitration under a collective bargaining agreement. Recognizing that the instant case presents the converse issue of whether the grievant's previous filing of an EEOC complaint precludes subsequent arbitration of the claim, the Union insists that the rationale used by the Supreme Court in Alexander is equally applicable. Accordingly, the Union stresses that the Alexander decision recognized that an employee may have both a contractual right to submit a claim to arbitration and a statutory right to adjudicate that claim in a different forum. The Union further argues that the Board previously addressed this issue in Decision No. B-9-74 and found that an employee who filed a charge with the EEOC may subsequently execute a valid waiver under our rules.

As to the City's challenge to arbitration on the basis that the grievant did not state.a grievance under Article VI, Sections l(E) and l(F) of the colle tive bargaining agreement, the Union responds that the grievant stated a grievance under Article VI,

§1(B). As Article VI, §1(B) defines a grievance as "[a] claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment," the Union argues that in alleging a violation of Executive Order No. 22 and D.O.P. Personnel Policy and Procedure No. 470-85, it stated a grievance under this section.

DISCUSSION

The City challenges the arbitrability of the instant grievance on the basis that the grievant, who is a non-competitive employee with fewer than five years of service, may not grieve a discharge or the City's failure to serve written charges under Article VI, Sections 1(E) and 1(F) of the collective bargaining agreement. The Union responds that it has stated a grievance under Article VI, §1(B), which defines a grievance as:

> [a] claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; provided, disputes involving the Rules and Regulations of the New York City Personnel Director ... shall not be subject to the grievance procedure or arbitration.

Unlike Article VI, Sections 1(E) and 1(F), Article VI, §1(B) does not limit the availability of the grievance procedure to certain employees. Accordingly, a non-competitive employee with fewer than

five years of service may pursue a grievance under Article VI, §1(B). When an identical argument challenging arbitrability was raised by the City in Decision No. B-18-90, we similarly held that "[as] the employment status of the grievant is irrelevant under Article VI, §I(B), the city's reliance on Article VI, §1(E) and Section 75(l) of the Civil Service Law is misplaced."

The Union argues that in alleging a violation of Executive Order No. 22 and D.O.P. Personnel Policy and Procedure No. 470-85, it has stated a grievance under Article VI, §1(B). We have previously found alleged violations of Executive Orders to constitute arbitrable grievances under provisions similar to Article VI, §1(B).[5] Similarly, we have previously determined that a D.O.P. Personnel Policy and Procedure (or "PPP") is a "written policy" subject to arbitration under Article VI, §1(B).[6] Accordingly, we find that as Executive Order No. 22 and D.O.P. Personnel Policy and Procedure No. 470-85 constitute written policies or orders of the City applicable to the agency employing the grievant and affecting terms and conditions of employment, DC 37 has stated an arbitrable grievance under Article VI, §I(B).

[5] Decision Nos. B-59-90; B-41-90; B-18-83; B-1-78; B-13-77.

[6] Decision No. B-28-87.

We next address the question raised by the city regarding the validity of the waiver filed by DC 37 in accordance with §12-312(d) of the NYCCBL. We previously addressed this issue in Decision No. B-9-74 wherein we held that a grievant may execute an effective waiver under our rules, despite the grievant's previous filing of a charge of discrimination with the EEOC. We based our decision in B-9-74 on the Supreme Court's ruling in Alexander.

In Alexander, the Supreme Court decided that arbitration under a non-discrimination clause of a collective bargaining agreement does not foreclose a grievant from vindicating Title VII rights. The Court pointed out that Congress enacted Title VII to address important policy concerns against discriminatory employment practices and that an examination of the statute's legislative history reveals a Congressional intent to allow an individual to pursue independently rights under both Title VII and other state and federal statutes. Thus, the Court concluded that Title VII's purpose and procedures strongly suggest that an individual does not forfeit a private cause of action by also pursuing rights in arbitration.[7]

In accordance with Alexander and our previous decision in B-9-74, we find that a grievant does not have to waive statutory rights under Title VII in order to be granted access to a

[7] See also, Decision No. B-28-87 at 31-32.

contractual arbitration procedure. We are mindful of the Supreme Court's recent opinion in Gilmer v. Interstate/Johnson Lane Corporation[8] and conclude that it has no effect on our determination in the present case.

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 herein, be, and the same hereby is, dismissed; and it is further

[8] 111 S.Ct. 1647 (1991). The Supreme Court in Gilmer held that an age discrimination claim was subject to compulsory arbitration pursuant to an arbitration agreement contained in a securities registration application. The majority did not address the question of whether the Federal Arbitration Act extends to arbitration clauses contained in employment contracts or collective bargaining agreements.

ORDERED, that the request f or arbitration be, and the same hereby is, granted.

DATED: New York, NY
December 27, 1991

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
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JEROME E JOSEPH
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MEMBER