DC 37, L. 420, 5 OCB2d 4 (BCB 2012)

(Arb) (Docket No. BCB-2972-11) (A-13870-11).

Summary of Decision: The New York City Health and Hospitals Corporation challenged the arbitrability of a grievance alleging that the Grievant was wrongfully terminated in violation of the collective bargaining agreement and a stipulation of settlement of prior disciplinary charges. HHC argued that the matter was not arbitrable because, in the stipulation, the Grievant expressly agreed to serve a one-year probation during which he waived his right to grieve a termination based on charges of misconduct similar to those resolved by the stipulation. The Union argued that the grievance was arbitrable because the alleged misconduct that led to the Grievant's termination was not similar to the misconduct resolved by the stipulation. The Board found that, while claims of wrongful discipline generally are arbitrable under the parties' agreement, the Grievant's right to arbitration was expressly waived pursuant to the terms of the stipulation. Accordingly, the City's Petition Challenging Arbitrability was granted, and the Union's Request for Arbitration was denied. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 420,

Respondent.

DECISION AND ORDER

On August 5, 2011, the City of New York ("City") filed a petition challenging the arbitrability of a grievance filed by District Council 37, AFSCME, AFL-CIO, Local 420 ("Union"). The Union's Request for Arbitration claims that the New York City Health and

Hospitals Corporation ("HHC") violated the parties' collective bargaining agreement and a stipulation of settlement of prior disciplinary charges ("Stipulation") by wrongfully terminating employee Louis White ("Grievant"). HHC argues that the matter is not arbitrable because, in the Stipulation, the Grievant expressly agreed to serve a one-year probation during which he waived his right to grieve a termination based on charges of misconduct similar to those resolved by the Stipulation. The Union argues that the grievance is arbitrable because the alleged misconduct that led to the Grievant's termination is not similar to the misconduct resolved by the Stipulation. The Union further argues that HHC acted in bad faith by terminating the Grievant because it was aware of the reasons for the Grievant's absence from work. This Board finds that, while claims of wrongful discipline generally are arbitrable under the Agreement, the Grievant's right to arbitration was expressly waived pursuant to the terms of the Stipulation. Accordingly, the City's Petition Challenging Arbitrability is granted, and the Union's Request for Arbitration is denied.

BACKGROUND

The Grievant is a Nurse's Aide who works at HHC's Bellevue Hospital Center ("Facility"). The Union is the certified collective bargaining representative of HHC employees in the Nurse's Aide civil service title, including the Grievant. The City and the Union are parties to the 2005-2008 Institutional Services Unit Agreement ("Agreement"), which expired in 2008 and currently remains in effect pursuant to the *status quo* provision of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

Article VI of the Agreement sets forth the parties' grievance procedure. Section 1 thereof defines the types of grievances that are subject to arbitration, including:

> b. 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 Personnel Rules and Regulations of the City of New York or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the grievance procedure or arbitration; [and]
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> * * *
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> e. A claimed wrongful disciplinary action taken against a permanent Employee covered by Section 75(1) of the Civil Service Law or a permanent Employee covered by the Rules and Regulations of the Health and Hospitals Corporation upon whom the agency head has served written charges of incompetence or misconduct while the Employee is serving in the Employee's permanent title or which affects the Employee's permanent status.

(Pet., Ex. A) (emphasis in original).

The Union alleges a violation of these contractual provisions as well as the terms of the Stipulation, which was entered into by HHC, the Facility, the Union, and the Grievant on September 16, 2010. The Stipulation resolved the following disciplinary charges that the Facility preferred against the Grievant:

> CHARGE 1: MISCONDUCT
>
> Specification 1: On or about February 13, 2010 you were absent without leave when you did not return from your lunch break at approximately 1 PM to complete the remainder of your shift.

Specification 2: On or about February 13, 2010 you were derelict in your duties when you failed to notify your supervisor that you would not be returning to work the remainder of the shift or the overtime for which you had been scheduled to work.

Specification 3: On or about February 13, 2010 you falsified your timesheet to represent that you had returned to work after your lunch break and worked until the end of the scheduled shift and an overtime shift.

Specification 4: That on or about February 13, 2010 your failure to return from your lunch break resulted in your patient rounds having to be completed by other staff. This is job abandonment.

CHARGE 2: MISCONDUCT

Specification 1: That on or about August 25, 2010 you were absent without leave.

Specification 2: That you falsified your timesheet when you represented that you had worked your scheduled shift on August 25, 2010.

(Pet., Ex. C). With regard to these charges, the parties stipulated and agreed, among other things, that:

FIRST: For the disciplinary charges specified in the Notice and Statement of Charges dated March 3, 2010, as amended September 16, 2010, and set forth above, the Respondent pleads no contest and agrees to accept the penalty of a 30 day suspension for the record, 5 days without pay to be served.

SECOND: The Respondent is placed on a disciplinary probation for a period of one year. If the Respondent is charged with misconduct similar to the charges herein during this period and the charges are sustained by the Facility following a Step 1A conference, the Respondent will be terminated. The Respondent hereby waives any and all rights granted to him under the provisions of Section 7:5 of the HHC Personnel Rules and Regulations as well as rights granted to him in accordance with the

> Grievance Procedure set forth in the applicable collective bargaining agreement to appeal his termination. The decision of the Facility to terminate the Respondent's employment shall be final.

(Pet., Ex. C).

Following the execution of the Stipulation, the Grievant was bitten by an agitated patient during his shift on November 26, 2010. HHC alleges—and the Union denies—that the Grievant was subsequently escorted to Occupational Health Service ("OHS"), provided with a form by his supervisor, and asked to have the document completed at OHS before returning it to the nursing office. According to HHC, the Grievant did not return the form to the nursing office, and there is no record of his injury with the Human Resources Department. It is undisputed, however, that the Grievant was evaluated by a Facility physician who completed a Physician's Report, which provided that the Grievant was advised to obtain treatment and then return to duty. The Physician's Report also provided that the Grievant was required to obtain clearance from his private physician before returning to duty. According to the Union, the form indicated that a copy would be sent to Employee Health Service and the Grievant's Department Supervisor. The Union alleges that the Grievant was provided with only one copy of the form.

HHC asserts—and the Union denies—that the Grievant did not return to work and did not communicate with his supervisor or the Human Resources Department subsequent to November 26, 2010. On December 9, 2010, the Facility sent the Grievant a letter requesting that the Grievant explain the reasons for his absence and provide such explanation within five days. If the absence was due to illness, the Grievant was directed to submit a doctor's note to his supervisor containing the diagnosis, dates of treatment and/or confinement, prognosis, and expected date of return to duty. If the Grievant did not intend to return to duty, he was directed to complete an attached resignation form and return it to the Facility's Office of Labor Relations.

The letter further stated that if the Grievant failed to reply to the letter in the manner prescribed, the Facility would initiate disciplinary action if he was a permanent employee or terminate him without a hearing if he was a provisional employee. According to HHC, the Grievant did not respond to the letter.

On December 21, 2010, the Grievant applied for workers' compensation benefits. On his application, the Grievant noted that, as a consequence of being bitten by a patient, he sustained an injury to the inner portion of his right arm. The Grievant did not specify the nature and extent of his injury. The Grievant elected to receive the difference between the amount of his weekly salary and the compensation rate, subject to, among other conditions, the requirement that "medical examinations will be undergone by [him] as are requested by the Workers' Compensation Division of the Law Department and [his] agency, and when found fit for duty by said physicians, [he] shall return to [his] employment." (Ans., Ex. B).

On January 20, 2011, the Facility's Human Resources Department mailed a letter to the Grievant, informing him that the Human Resources Department had no current information regarding the status of his medical leave and that he was required to submit medical documentation from a workers' compensation certified physician. On January 24, 2011, the Facility's Human Resources Department again mailed a letter to the Grievant. The second letter is identical to the first letter in all material respects except for the fact that it was mailed to a different address.[1] According to HHC, the Grievant did not provide the requested medical documentation.

[1] The contents of the letters are as follows:

> Our records indicate that you have been absent from your position as a Nurse Aide, due to a work related injury you sustained on November 26, 2010.

On January 24, 2011, the Facility's Labor Relations Department also sent the Grievant a letter, notifying him that he had been absent from his position since November 26, 2010, and similarly requesting the Grievant to inform the Facility of his whereabouts within five days. According to HHC, the Grievant also did not respond to this letter.

On February 7, 2011, the Facility issued a Notice and Statement of Charges against the Grievant for being "absent without official leave (AWOL) since November 26, 2010 until present." (Pet., Ex. F). A Step 1(A) informal disciplinary conference was held on March 8, 2011; the Grievant failed to appear. At the Step 1(A) conference, the charges against the Grievant were amended to include charges for failing to appear at the Step 1(A) conference and for violating the terms of the Stipulation. On March 30, 2011, the Facility issued a Step 1(A) decision terminating the Grievant's services as a Nurse's Aide. The Step 1(A) decision states that the Grievant "waived all rights of appeal in a prior settlement; therefore the above decision is final and binding." (Pet., Ex. G).

Following the Grievant's termination, a Benefits Examiner at the City of New York Law Department Workers' Compensation Division prepared a "Notice to Chair of Carrier's Action on Claim for Benefits" form, which was dated April 6, 2011. The form indicates that the Grievant's workers' compensation claim was not disputed, but that payment had not begun because it was

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> One of the requirements for persons on workers' compensation leave of absence is that you must submit medical documentation to Human Resources Workers' Compensation Unit, every 3 to 4 weeks from a workers' compensation certified physician.
>
> As of today's date, we have no current information regarding the status of your medical leave. Please contact us no later than the close of business Friday, February 4, 2011 with your medical documentation.

(Rep., Ex. A).

pending the submission of medical evidence. The notice also indicated that HHC requested reimbursement for wages paid to the Grievant beginning on November 27, 2010. As of the date of this Decision and Order, there is no evidence that the Grievant ever received any workers' compensation benefits for the work-related injury that he sustained.

On May 24, 2011, the Union filed a Request for Arbitration with the New York City Office of Collective Bargaining. The Request for Arbitration describes the grievance to be arbitrated as:

> Whether the employer, the Health & Hospitals Corporation, violated the collective bargaining agreement and terms of the stipulation of settlement by wrongfully terminating the grievant, and if so, what shall be the remedy?

(Pet., Ex. B). As relief, the Union requests that an arbitrator order "[r]einstatement, back pay with interest and any other remedy necessary to make the grievant whole." (*Id*.).

POSITIONS OF THE PARTIES

HHC's Position

HHC argues that the grievance is not arbitrable because the Grievant expressly waived his right to invoke the contractual grievance procedure if he was terminated for misconduct similar to the misconduct documented in the Stipulation during his one-year disciplinary probation period. According to HHC, it is well-established that the Board has denied requests for arbitration when parties agreed in a stipulation of settlement that future misconduct would result in summary dismissal. In a dispute such as this one, the Board considers the scope of the parties' stipulation and then determines whether the issue raised falls within the parameters of the parties' agreement.

Here, HHC argues that the clear language of the Stipulation precludes any review of the Grievant's termination because he was charged with misconduct that is similar to the charges set forth in the Stipulation. HHC contends that the plain language of the Stipulation demonstrates that the Grievant waived his right to arbitrate issues related to his termination under these circumstances. Accordingly, the question of whether the Grievant's termination was wrongful is not reviewable by an arbitrator under the Agreement.

HHC further maintains that the Stipulation does not limit HHC's ability to terminate the Grievant to only those instances in which he engages in the same conduct that is addressed in the Stipulation. Rather, the Stipulation provides that the Grievant will be terminated if he is charged with misconduct similar to that for which he was previously charged, including AWOL. HHC argues that the instant charge that the Grievant was AWOL since November 26, 2010, falls within the scope of the stipulation because it concerns misconduct that is similar to that which is delineated in the Stipulation.

Although the Grievant filed for workers' compensation benefits, HHC argues that he is not released from his responsibility to contact his department or respond to repeated requests by the Human Resources Department for medical documentation to support his absence from work. Because the Grievant did not submit such documentation and did not contact his employer, the Facility did not approve his absence, and he was deemed AWOL. Moreover, at the time of the Grievant's termination, the Grievant still had not submitted to the Facility any information or medical documentation regarding his absence from work. The fact that the Grievant completed an Employee's Notice of Injury form does not relieve him of his responsibility to submit medical documentation or provide notice regarding the length of his absence from work.

According to HHC, when a last chance agreement does not contain any language requiring an employer to act in good faith and not be arbitrary or capricious, the Board has declined to examine whether a termination was made in good faith. Accordingly, HHC argues that, because the Stipulation does not contain language requiring the employer to act in good faith and not be arbitrary or capricious, notwithstanding the Union's allegations that the Facility's decision to terminate the Grievant was made in bad faith, the Board should not examine that question. HHC submits that the Board has further indicated that an employee on unrestricted probation is not entitled to contractual grievance rights, even if the employee asserts that his employer's allegations are false.

Union's Position

According to the Union, HHC's claim that the grievance is not arbitrable is premised on a purported waiver of the Grievant's due process rights via the Stipulation. The Union contends that, absent the Stipulation, there would be no dispute that an arbitrable controversy exists. Where the parties have agreed in a stipulation of settlement of disciplinary charges that future misconduct during a specified period would constitute a basis for summary dismissal, the Board considers the scope of the stipulation and then determines whether the issue raised falls within the parameters of the parties' agreement.

Here, the Union seeks to arbitrate the Grievant's termination. The Union argues that the allegation of a prolonged, unauthorized absence differs from the alleged misconduct that led to the execution of the Stipulation. The Stipulation concerned alleged misconduct that occurred on February 13, 2010, when the Grievant allegedly did not return promptly from his lunch break, and on August 25, 2010, when the Grievant allegedly was absent without official leave and falsified his timesheet. Although the term "AWOL" appears in the Stipulation, the Union

maintains that the events of February 13, 2010, and August 25, 2010, are not similar to the conduct alleged in the instant matter. The difference is that the alleged misconduct detailed in the Stipulation concerned the Grievant's failure to perform his job and the falsification of his timesheet, whereas, here, the conduct concerns time and attendance issues related to the Grievant's alleged absence from work for a prolonged period of time without explanation. Because the conduct in the instant matter is not similar to the conduct that gave rise to the Stipulation, the terms of the Stipulation should not apply to the instant charges.

The Union further contends that HHC acted in bad faith by terminating the Grievant because it was aware that the Grievant was assaulted by a patient and a Facility physician informed the Grievant that he needed to be evaluated by his private physician and cleared for duty prior to returning to work. The Grievant subsequently filed for workers' compensation benefits. The Union submits that HHC cannot claim that it was unaware of the Grievant's absence because the Notice to Chair of Carrier's Action on Claim for Benefits form indicates that HHC was aware that the Grievant filed for workers' compensation benefits. According to the Union, HHC supplied the necessary forms to the City of New York Law Department Workers' Compensation Division, and, in fact, paid the Grievant from the time of his injury through the date of his termination. The Union argues that the Board has recognized that allegations that an employer intentionally breached an agreement or engaged in bad faith in the termination of an employee could arguably fall outside the scope of a waiver of arbitration rights.

DISCUSSION

The NYCCBL provides that it is the statutory policy of the City to favor the use of impartial arbitration to resolve disputes. *See* NYCCBL § 12-302; *ADW/DWA*, 4 OCB2d 21, at

10 (BCB 2011); *NYSNA*, 69 OCB 21, at 6 (BCB 2002). To carry out this policy, the "Board is charged with the task of making threshold determinations of substantive arbitrability." *ADW/DWA*, 4 OCB2d 21, at 10 (quoting *DEA*, 57 OCB 4, at 9-10 (BCB 1996)); NYCCBL § 12-309(a)(3). The Board's function "is confined to determining whether the grievance is one which, on its face, is governed by the contract." *UFOA*, 15 OCB 2, at 7 (BCB 1975); *see also ADW/DWA*, 4 OCB2d 21, at 10; *Local 300, SEIU*, 55 OCB 6, at 9 (BCB 1995). The "presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *CEA*, 3 OCB2d 3, at 12 (BCB 2010) (citations omitted). The Board, however, cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *See CCA*, 3 OCB2d 43, at 8 (BCB 2010); *SSEU, L. 371*, 69 OCB 34, at 4 (BCB 2002).

To determine whether a grievance is arbitrable, the Board employs a two-prong test, which considers:

> (1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so (2) whether the obligation is broad enough in its scope to include the particular controversy presented. In other words, whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement.

UFOA, 4 OCB2d 5, at 8-9 (BCB 2011) (citations and internal quotation marks omitted); *see also SSEU*, 3 OCB 2, at 2 (BCB 1969). This inquiry does not require a final determination of the rights of the parties because the Board lacks jurisdiction to enforce contractual rights. *See NYSNA*, 3 OCB2d 55, at 7-8 (BCB 2010) (citations omitted); *NYSNA*, 69 OCB 21, at 7-9. Accordingly, the Board generally will not inquire into the merits of the dispute. *See DC 37*, 27 OCB 9, at 5 (BCB 1981).

While the parties may be contractually obligated to arbitrate certain controversies, a union or its members may waive the right to arbitration by specific language in a stipulation of settlement of disciplinary charges, which is otherwise known as a "last chance" agreement. *See UFA*, 75 OCB 18, at 13 (BCB 2005) (citing *DC 37, L. 2507*, 69 OCB 41 (BCB 2002)). Accordingly, the Board has repeatedly denied requests for arbitration where the parties stipulated that future charges of misconduct during an agreed-upon period would constitute a basis for summary dismissal. *See DC 37, L. 1549*, 77 OCB 13, at 9 (BCB 2006); *United Marine Division, L. 333*, 75 OCB 12, at 6 (BCB 2005); *DC 37, L. 983*, 75 OCB 11 (BCB 2005); *DC 37, L. 2507*, 69 OCB 41 (BCB 2002); *SSEU, L. 371*, 67 OCB 22 (BCB 2001); *CEU, L. 237*, 61 OCB 43 (BCB 1998); *DC 37, L. 1549*, 61 OCB 33 (BCB 1998); *DC 37, L. 376*, 45 OCB 21 (BCB 1990). Employees serving an agreed-upon period of probation, however, may be entitled to some rights pursuant to a last chance agreement. *See DC 37*, 79 OCB 29, at 10 (BCB 2007). In such situations, the Board evaluates the scope of the parties' stipulation by conducting a specific analysis of the waiver provisions of the last chance agreement to determine whether either party has reserved any arbitration rights. *See DC 37, L. 1549*, 77 OCB 13, at 9-10; *United Marine Division, L. 333*, 75 OCB 12, at 7; *DC 37, L. 2507*, 69 OCB 41, at 8. The Board then determines whether the issue raised is within the parameters of the stipulation. *See United Marine Division, L. 333*, 75 OCB 12, at 7.

Here, it is undisputed that the parties have agreed to submit certain disputes to arbitration. The Agreement contains a grievance procedure, which provides for final and binding arbitration of specified matters, including claims of wrongful disciplinary action. The parties, however, entered into the Stipulation, which, the parties agree, includes a waiver of the Grievant's rights to appeal his termination for "misconduct similar to the charges" resolved by the Stipulation. (Pet.,

Ex. C). In the Stipulation, the Grievant agreed that if he was charged with similar misconduct, he would be terminated without any right of appeal under the Agreement. Thus, the Stipulation, on its face, reflects that the extent of the Grievant's probationary status was restricted because the Stipulation contains language limiting the Grievant's waiver of contractual grievance rights to circumstances involving "misconduct similar to the charges" referenced in the Stipulation. (*Id*.). The Grievant's agreement to these terms of restricted probationary status was in consideration for the resolution of the prior disciplinary charges proffered against him.

A determination of whether, in the circumstances of this case, the Stipulation precludes the processing of the Request for Arbitration requires an examination of the scope of the waiver language. In prior decisions, we stated that, "if the parties have stipulated that discipline for certain misconduct is not arbitrable, and the grievant was terminated for that type of misconduct committed during the specified period, we will not inquire into the particulars of the grievance or attempt to interpret the language of the stipulation." *DC 37, L. 2507*, 69 OCB 41, at 7. Here, the plain language of the Stipulation states that the waiver applies to "misconduct similar to the charges herein . . . ." (Pet., Ex. C). The Stipulation documents two charges of misconduct, one of which contains four specifications and the other of which contains two specifications. Four of the six specifications implicitly concern the time and leave violation of being AWOL; indeed, one of them specifically states that the Grievant was charged with misconduct for being "absent without leave" on a particular work day. (*Id*.).

We find that HHC's charge of misconduct against the Grievant for having been AWOL since November 26, 2010, is similar to the charges of misconduct referenced in the Stipulation. Like the charges of misconduct resolved by the Stipulation, the present grievance concerns a charge that the Grievant was AWOL—indeed, the Grievant allegedly absented himself from the

workplace for an extended period of time without communication or explanation. HHC bases its charge of misconduct on its accusations that the Grievant never returned to work following his work-related injury on November 26, 2010, and that the Grievant never communicated with the Facility regarding his absence from work or provided any information or medical documentation regarding the extent of his injury. The record establishes that the Facility sent the Grievant multiple letters over the course of the two months that followed the Grievant's injury, inquiring about his absence from work and informing him that he was required to submit medical documentation. There is no allegation that the Grievant responded to any of the Facility's letters, and the Union did not deny that the Grievant ever received the correspondence. As a consequence, the Facility deemed the Grievant AWOL, and he was terminated.

Because we find that the alleged misconduct is similar to the charges resolved by the Stipulation, the Grievant waived his right to arbitrate his termination.[2] Consequently, the City's Petition Challenging Arbitrability is granted, and the Union's Request for Arbitration is denied.

[2] We find the instant matter distinguishable from *DC 37, L. 1070*, 61 OCB 51, where we deferred to arbitration a factual issue regarding whether the grievant accumulated the requisite amount of unexcused lateness required under a stipulation to permit the employer to discharge her without any grievance rights, and, if not, directed the arbitrator to consider the legal issue regarding whether the employer acted in an arbitrary or capricious manner in terminating the grievant. Here, the only condition precedent to HHC's terminating the Grievant without grievance rights is that the alleged misconduct be similar to the misconduct for which the Grievant was previously charged. Because we do not find that a factual issue exists regarding the similarity of the alleged misconduct to the misconduct detailed in the Stipulation, a factual inquiry is not needed.

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 New York City Health and Hospitals Corporation, docketed as BCB-2972-11, hereby is granted; and it is further

ORDERED, that the Request for Arbitration filed by District Council 37, AFSCME, AFL-CIO, Local 420, docketed as A-13870-11, hereby is denied.

Dated: January 25, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES MOERDLER
MEMBER

PETER B. PEPPER
MEMBER