16-93	affirmed	McManus v. N.Y.C. Dep't of Parks, 111730 N.Y. Co. S.Ct., 6/16/93, *aff'd*, 210 A.D.2d 72, 619 N.Y.S.2d 45 (1st Dep't 1994).	59

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

JOSEPH M. McMANUS,
Petitioner,

-and-

PETER STEIN, AS PRESIDENT OF LOCAL 508, DC37 AFSCME,
Respondent.

DECISION NO. B-16-93

DOCKET NOS. BCB-1412-91 (A-4604-93)

In the Matter of the Improper Practice Proceeding

-between-

JOSEPH M. McMANUS,
Petitioner,

-and-

THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, and PETER STEIN, TONY PUCCIARELLI, and CHRIS FRENCH, AS AGENTS OF NYCDPR,
Respondents.

DOCKET NOS. BCB-1413-91 (A-4604-93)

DECISION AND ORDER

On April 8, 1993, Joseph M. McManus, Petitioner, pro se, filed a motion and supporting affidavit seeking to stay an arbitration proceeding involving his termination of employment pending the outcome of two improper practice petitions that the Petitioner had filed previously. District Council 37, AFSCME, AFL-CIO ("the Union") filed a letter reply on April 19, 1993. The New York City Office of Labor Relations ("the City") filed a letter reply on April 20, 1993.

Background

The Petitioner is a long-time seasonal employee of the New York City Department of Parks and Recreation. He holds the civil service title of Lieutenant Lifeguard, and is a member of Local 508 of District Council 37, the lifeguard supervisors' unit.

On August 10, 1991, the Petitioner was reassigned from Rockaway Beach to the Roy Wilkins pool in St. Albans, Queens. His reassignment was preceded by his involvement in at least three disciplinary conferences the previous month. On July 1, 1991, the Petitioner was accused of being non-attentive to his duties, specifically in that:

> While sitting in the L.G. tower (38th St.), a Lifeguard was observed looking through several magazines. He also had a large piece of plywood propped in front of his tower hindering his view of the water. This endangers the safety of the public. It is your responsibility to supervise your Lifeguards. Finding a Lifeguard engaging in such activity can be viewed as failure to supervise.

On July 6, 1991, the Petitioner was accused of calling his supervisor a "dirt bag," and on July 20, 1991, he was accused of failing to complete his full tour of duty on six occasions. Upon being reassigned, the Petitioner filed a Step I grievance, dated August 13, 1991, claiming that his "involuntary transfer [was] done in an arbitrary and capricious manner."

On August 22, 1991, the Petitioner filed two improper practice petitions, one against the Union and the President of Local 508, Peter Stein, docketed as BCB-1412-91, and the second against the Department of Parks and Recreation and several of its employees, docketed as BCB-1413-91. In his petition against the Union, the Petitioner alleged that the Department and its employees "perpetrate[d] unfair, subjective, and non-contractual labor practices against me, [including] inconsistent scheduling, subjective written reprimands, and an arbitrary and capricious transfer; all of which were ordered by Stein to restrain me from exercising my rights and to force my

resignation and/or termination." In his petition against the Department, the Petitioner contended that management "interfered with me in the exercise of my rights to assist locals 461 and 508; and discriminated against me for the purpose of discouraging my participation in the activities of [the] locals; and as against Peter Stein, it is my claim that he has dominated, and continues to dominate, the administration of both locals." According to papers submitted by the parties, these allegations stemmed from the Department's accusation that the Petitioner did not supervise a subordinate properly, and his subsequent shift reassignment.

On October 3, 1991, the Trial Examiner designated by the Office of Collective Bargaining ("OCB") notified the parties that the two improper practice proceedings were being consolidated, because they involve overlapping events and factual circumstances. On November 28, 1991, the pleadings in both cases were complete, and a pre-hearing conference was scheduled for January 16, 1992. The conference was adjourned at the Petitioner's attorney's request, and re-scheduled for February 10, 1992. At the conclusion of the conference, the parties agreed to set aside six hearing days during May, 1992.

Meanwhile, by notice dated December 9, 1991, the Department had filed eleven disciplinary charges, including twenty-two specifications, against the Petitioner alleging his commission of numerous incidents of misconduct between July 1 and September 1, 1991. Although the charges covered an extended period of time, they included failing to supervise a subordinate properly because, on July 1, 1991, "a lifeguard under [Petitioner's] supervision was observed reading magazines" and having his view obstructed with "a large piece of plywood [that] was propped in front of his tower"; using abusive language to his supervisor on July 6, 1991, by calling him a "dirt bag."; and leaving his assigned work location without authorization.

On January 10, 1992, an informal disciplinary conference was held at the Parks Advocate Office to discuss these charges. By letter dated January 17, 1992, the Conference Leader reported to the Petitioner that he had been found

guilty of five of the eleven charges, and that he was recommending termination of employment as the penalty.

By letter dated March 20, 1992, the Union informed the OCB that it had learned of the disciplinary action that had been taken against the Petitioner. According to the Union, this "casts this situation in an entirely new light," and it requested that the improper practice proceeding be dismissed. In response, the Trial Examiner wrote to the parties asking their views on what effect the pending disciplinary charges against the Petitioner would have on the adjudication of his improper practice claims. The Union's reply advocated the suspension of the improper practice proceeding until the outcome of the disciplinary charges was finally determined. The City and the Petitioner took the position that the improper practice adjudication should go forward, and that the previously scheduled hearing dates for May should be followed.

On April 30, 1992, the parties were advised that, upon consideration of their responses, the adjudication of the improper practice would be held in abeyance until they exhausted their disciplinary review procedures. This direction was based upon the apparent connection between the allegations of misconduct against the Petitioner, and elements of the responding parties' defenses to his improper practice claims. The parties were informed that this Board would retain jurisdiction over the improper practice proceeding until an impartial arbitrator had the opportunity to review the parties' contractual claims. Upon completion of the disciplinary review process, the Board would evaluate any issues that remained outstanding and that might constitute a violation of the New York City Collective Bargaining Law ("NYCCBL").

Between January 1992 and February 1993, the parties advanced through the steps in their contractual disciplinary procedure. On October 9, 1992, a Step C (step 3) hearing took place, and, sometime after that, the Commissioner of Labor Relations issued a decision sustaining the Petitioner's termination. Following the Step C decision, the Union, on February 2, 1993, filed a request for arbitration seeking the Petitioner's reinstatement with restoration of

full back pay and all fringe benefits. However, the request did not contain the Petitioner's requisite written waiver, waiving his right, if any, to submit the arbitration dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.[1] In acknowledging receipt of the Union's request for arbitration, then-Deputy Chairman Alan R. Viani noted that the waiver was not attached to it.

By letter dated February 11, 1993, the Petitioner wrote the following letter to the Union, with a copy delivered to the Trial Examiner:

> According to Article XX, Section 3, of the collective bargaining agreement, the union may only proceed to arbitration upon my consent.
>
> I will consent to arbitration on the condition that the union hires the attorney of my choice for the hearing. I do not wish to use the services of the lawyers that the union has selected without my input.
>
> Consequently, I am prepared to submit, for your consideration, the name of an experienced labor attorney who will conform to your fee schedule.
>
> Please advise me of your decision regarding this matter so that we may proceed to the next step of the proceedings.

Whether the Union replied to the Petitioner's letter is not known. However, as of March 2, 1993, the Union still had not filed the Petitioner's waiver with the OCB. Accordingly, by letter dated March 2, 1993, Deputy Chairman Viani advised the Union's attorney that its arbitration case would be closed administratively unless the waiver was submitted by April 2, 1993.

By letter dated March 25, 1993, the Petitioner informed the OCB that he had dismissed his attorney: "For personal reasons I cannot continue to use his services." He also asked for "a short extension of time" in which to submit his waiver. Pursuant to the Petitioner's request, the deadline was extended to April 9, 1993 by newly-appointed Deputy Chairman Stuart Leibowitz.

On April 8, 1993, the Petitioner filed the instant motion and his supporting affidavit. As of date of this decision and order, the required

---

[1] See NYCCBL Section 12-312d., quoted infra at note 9.

waiver for the arbitration proceeding still has not been filed.

POSITIONS OF THE PARTIES

Petitioner's Position

The Petitioner supports his motion with several arguments. Initially, he contends that the disciplinary charges brought against him are an extension of the actions that comprise his improper practice claims, and that there is a conflict between his interest and that of the City and the Union because both would benefit from his termination. According to the Petitioner, if an arbitrator sustains his termination, the City will be in a position to move for the dismissal of his improper practice claim as moot. On the other hand, even if he succeeds in having his termination reversed, the City allegedly will have benefited improperly "from the discovery" that the arbitration hearing would bring. Insofar as the Union is concerned, the Petitioner asserts that its March 20, 1992 letter to the OCB "clearly demonstrates its inability to fairly represent [him] at the hearings." Additionally, he charges that his appointed Union representative has "made certain derogatory statements" about him to other employees, assertedly showing the contempt that the Union has for him.

The Petitioner next argues that the disciplinary process was flawed at the lower steps. He complains that the contractual time limits were not followed; that he was not notified of the decisions at the various levels as they were issued; and that charges dismissed at the first step were reinstated at the second step without reason. The Petitioner also complains that the Step C decision, issued by the Commissioner of Labor Relations, is ambiguous because it does not clarify which charges were upheld and which were dismissed. This situation assertedly limits his ability to prepare a defense for arbitration.

The Petitioner then argues that it was improper to allow the improper practice proceeding to be held in abeyance because it "effectively turns the

respondent into the petitioner and vise versa." He denies that allegations of misconduct can be a part of the City's improper practice defense by noting that it did not raise any such defense in its answer. According to the Petitioner, both the Union and the City "intended" to place him in a position by which it would be "impossible" for him not to violate certain standards of conduct. Therefore, in his view, this Board has a responsibility to determine whether the charges were brought legitimately, or whether they were prompted by the City's alleged earlier violations of the NYCCBL.

Finally, the Petitioner maintains that he is not obligated to file a waiver, because NYCCBL Section 12-312d. assertedly "pertains only to grievance procedures." According to the Petitioner, he "is essentially a respondent in a disciplinary review procedure," which is controlled by a different section of the collective bargaining agreement. Therefore, in his view, he is not bound by the statutory waiver requirement. In addition, the Petitioner argues that if his termination is upheld after arbitration, the waiver would preclude him from bringing an action in State Supreme Court. He maintains that any employee "having suffered" the way he has "cannot be expected to waive his rights to judicial and appeals review." Moreover, since Sections 722 and 738 of the New York State Labor Law assertedly guarantee his right to file a damages action in Supreme Court, the waiver cannot be applied to an employee faced with termination, since it would prejudice his right to seek damages for wrongful dismissal and "failure of representation."

In conclusion, the Petitioner maintains that the improper practice proceeding "would prove elements of complicity between the City and the Union." In addition, it assertedly would show that the charges of misconduct are without merit and were "concocted" for the sole purpose of avoiding the improper practice claims brought by the Petitioner. For these reasons, he urges this Board to stay the arbitration proceeding, and allow his improper practice claims to go forward.

Union's Position

The Union continues to take the position that the Petitioner's improper practice proceeding should be held in abeyance until his disciplinary arbitration hearing is concluded. The Union emphasizes that it remains willing to go forward in the arbitral forum, and claims that it has already selected an independent attorney to represent the Petitioner at such a proceeding. The Union notes that the arbitration can be commenced as soon as Mr. McManus files a waiver with the OCB.

City's Position

The City opposes the Petitioner's motion on the ground that there is no basis for this Board, under the NYCCBL, to stay arbitration pending the outcome of an improper practice claim. It urges that the prior decision to hold the improper practice proceeding in abeyance until the arbitration is concluded be continued.

Discussion

The Petitioner's motion is but the latest development in an already complicated case. Recognizing that Mr. McManus is now appearing as a pro se petitioner, we will try to explain the status of his various petitions and claims pending before this Board and the Office of Collective Bargaining in as straightforward a manner as possible.

With respect to the instant motion to stay arbitration, the most immediate obstacle that presents itself is one of standing. It is public policy, expressed in Section 12-312f. of the NYCCBL, to empower the public employer and the certified or designated employee organization to invoke impartial binding arbitration as the selected means for the adjudication and

resolution of grievances.[2] This statutory authorization does not extend, however, to the individual employee or to groups of non-certified employees. In this case, the parties' collective bargaining agreement conforms with NYCCBL §12-312f. by limiting the right of an individual employee to invoke arbitration: "If the employee is not satisfied with the decision of the Commissioner of Labor Relations, the Union with the consent of the employee may proceed to arbitration pursuant to the rules and procedures of the Office of Collective Bargaining."[3]

An individual employee lacks standing to invoke arbitration under both the collective bargaining agreement between District Council 37 and the City of New York, and under the provisions of the NYCCBL. This is consistent with well-established principles of law relating to collective bargaining generally and to arbitration specifically. In the absence of specific provisions to the contrary in particular contracts, it is generally recognized that the contracting parties to a collective bargaining agreement are the employer and the union. The union has the authority and the responsibility to administer the contract on behalf of all covered employees and to assure that its provisions are fully upheld and performed. It is for this reason that the submission of a contract claim to arbitration is a matter exclusively within the authority of the union and not of individual employees. It follows that

---

[2] See NYCCBL §12-312f., which reads as follows:

> It is hereby declared to be the public policy of the city that written collective bargaining agreements with certified or designated employee organizations should contain provisions for grievance procedures and impartial binding arbitration, which may be invoked by a public employer or by a certified or designated employee organization.

[3] Article XX, Section 2a., of the 1990-91 Seasonal Agreement between District Council 37 and the City of New York.

individual employees also lack standing to make motions or otherwise to interject themselves into the orderly administration of the arbitration process without the concurrence of the certified or designated employee organization.

Even assuming, arguendo, that the Petitioner could overcome the standing problem, there are other significant impediments to his motion. Foremost, it is extremely doubtful that this Board has the authority to interfere with the grievance process once it has been commenced under the terms of a collective bargaining agreement. Although clearly we have the responsibility for making threshold determinations on a question of arbitrability where a petition raising that issue is presented to us,[4] in the absence of such a challenge to arbitrability, there is nothing else in the NYCCBL that would allow us to intrude into the arbitral process. None of the arguments that the Petitioner makes concerning alleged flaws at the lower steps of the disciplinary procedure, or a perceived conflict of interest between himself and the City and his Union, can expand the scope of our statutory authority. We may only do what the law authorizes.

On the matter of holding his improper practice proceeding in abeyance until the parties exhaust their contractual disciplinary review process, we affirm the earlier decision. The principle of deferral to arbitration in appropriate cases which involve contractual claims relating to the same issue (in this case, the issue of wrongfully imposed discipline) is well-

[4] See NYCCBL §12-309a.(3) (Powers and duties of board of collective bargaining), which reads as follows:

> (3) on the request of a public employer or a certified or designated employee organization which is a party to a grievance, to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure established pursuant to section [12-312] of this chapter.

established.[5] Accordingly, we find that these matters should be evaluated initially in the arbitral forum.

In so ruling, we reiterate that deferral to arbitration does not end the matter as far as the Petitioner's improper practice charges are concerned. The assertion of a contractual right does not automatically preclude the assertion of an improper practice, even when both claims arise out of the same circumstances and involve the same parties.[6] Therefore, we shall retain jurisdiction over the pending consolidated improper practice charges docketed as BCB-1412-91 and BCB-1413-91, but we shall continue to hold the proceedings in that matter in abeyance until the arbitration process has been completed, or until the submission of the dispute to arbitration has been foreclosed.

This brings us to the issue of the waiver, which is required as a condition precedent to submission of a dispute to arbitration. The Petitioner takes the position that he is not required to file a waiver for various reasons. None of them, however, are sound.

The statutory waiver provision established in NYCCBL Section 12-312d. was enacted to prevent multiple litigation of the same dispute, and to insure that a grievant who chooses to seek redress through the arbitration process will not attempt to relitigate the same matter in another forum.[7] A grievant would be deemed to have submitted the same underlying dispute in two forums, and thus have rendered himself or herself 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

---

[5] See: Decision No. B-10-80, adopting the doctrine of Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1971); see also, United Technologies Corp., 268 NLRB 557, 115 LRRM 1049 (1984), and Decision Nos. B-38-91; B-68-90; and B-10-85.

[6] Decision Nos. B-70-90; B-54-88; and B-3-85.

[7] Decision Nos. B-70-90; B-35-88; B-10-85; and B-13-76.

determination of common issues of law.[8]

The Petitioner is entitled to seek judicial review of an arbitrator's award under Article 75 of the New York Civil Practice Law and Rules. The waiver does not affect this right. The statutory waiver requirement does, however, preclude a grievant from seeking independent disciplinary review in two forums. Thus, if his intention is to present the merits of his termination of employment case to a court of law for de novo consideration, then the Union, on his behalf, may not exercise its right to have that same issue determined in the arbitral forum.

Finally, we point out that the statutory waiver provision contains no exclusion for matters arising out of a disciplinary proceeding.[9] It makes no difference whether arbitration is available by means of one contractual article or through several. Once arbitration is requested, the provisions of the NYCCBL require that the grievant file a waiver as a condition precedent to going to arbitration. The Petitioner's continued declination to do so will result in our ordering the dismissal of his Union's request for arbitration that it filed in his behalf.

The Petitioner has delayed the progress of the grievance procedure and

---

[8] Decision Nos. B-70-90; B-50-89; B-54-88; B-35-88; and B-28-87.

[9] NYCCBL §12-312d., the statutory waiver provision, 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, 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.

the submission of this matter to arbitration, first, by refusing to sign the required waiver; second, by seeking an extension of the time within which to submit the waiver; and third, by making the instant motion and allowing the time to submit a waiver to expire. We are aware that any delay may serve to increase the potential liability of the City in the event that the Union prevails in arbitration. We do not condone any further delay. However, in consideration of the fact that the Petitioner currently is appearing pro se, we will give him a final opportunity to submit the required waiver. In the event that he fails to submit the waiver by the time specified in our order herein, the request for arbitration shall be dismissed, and the improper practice proceeding shall go forward forthwith.

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 improper practice petitions of Joseph P. McManus in Docket Nos. BCB-1412-91 and BCB-1412-91 be, and the same hereby are, deferred until such time as an arbitrator reviews the disposition of the disciplinary charges filed against him and issues an opinion and award which this Board may consider in further determining whether an improper practice was committed by the City New York City or by District Council 37, AFSCME, AFL-CIO;

PROVIDED, that Joseph P. McManus shall have signed a waiver pursuant to NYCCBL Section 12-312d. and shall have presented it to District Council 37 on or before May 10, 1993; and it is further

ORDERED, that in the event that Joseph P. McManus should fail or refuse to have signed and presented the waiver to District Council 37 on or before May 10, 1993, the Union's request for arbitration shall be dismissed and the improper practice proceeding filed by Mr. McManus in Docket Nos. BCB-1412-91 and BCB-1412-91 shall go forward forthwith.

Dated: April 28, 1993
New York, N.Y.

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER

DEAN L. SILVERBERG
MEMBER

STEVEN H. WRIGHT
MEMBER