City v. L.371, SSEU, 53 OCB 13 (BCB 1994) [Decision No. B-13-94 (Arb)],City of New York v. MacDonald, 409786 N.Y. Co. S.Ct., 2/15/96, *aff'd*, 239 A.D.2d 274, 657 N.Y.S.2d 681 (1st Dept. 1997).

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

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,

Respondent.
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DECISION NO. B-13-94

DOCKET NO. BCB-1582-93 (A-4317-92)

DECISION AND ORDER

On May 24, 1993, the City of New York, appearing by its Office of Labor Relations ("the City") filed a petition challenging a request for arbitration of a grievance that was submitted by Social Service Employees Union, Local 371 ("the Union"). The request for arbitration was filed on July 31, 1992. The grievance contests the termination of employment of an Institutional Aide working at the Greenpoint Men's Shelter/ Outreach Services. The Union filed its answer on August 6, 1993. The City filed a reply on September 24, 1993. At the request of the Trial Examiner, the parties filed supplementary letters clarifying their positions on the interrelationship between their

contractual grievance procedure and the statutory provisions contained in Section 75 of the Civil Service Law.[1]

BACKGROUND

Simeon Hawkins ("the grievant") held the non-competitive class title of Institutional Aide in the Human Resources Administration (the "HRA"), from March 20, 1984 to August 8, 1991. By memorandum dated September 22, 1989, the HRA Office of Legal Affairs notified one of its Informal Conference Holders that disciplinary charges had been lodged against the grievant. The charges accused him of having "been absent continuously without authorization since on or about 12/15/88 through and including 4/10/89 for a total number of 89 workdays." Attached to the memorandum was a copy of a form letter bearing the grievant's address, notifying him that an informal conference would be held on October 26, 1989 at 250 Church Street to discuss the charges. An accompanying affidavit affirmed that the charges and specifications had been served personally on the grievant on October 9, 1989, while he was working at the shelter.

On October 26, 1989, the informal conference took place as scheduled. The grievant did not attend. In her letter to the grievant dated May 22, 1990, the Informal Conference Holder informed him that the charges had been "established," and that she was recommending dismissal as the appropriate penalty. Her letter further advised the grievant that he had five days either

[1] Section 75 of the Civil Service Law provides a means by which certain covered employees subject to disciplinary action may challenge a finding of guilt and the penalty imposed as a result. Covered employees include those holding non-competitive class positions who have completed five or more years of continuous service. Section 75 procedures are available as a matter of right to covered employees for whom there is no contractual substitute, as well as to employees such as the grievant who can elect Section 75 as a substitute for their contractual disciplinary procedures.

to accept the recommendation, reject it and ask that it be reviewed pursuant to Section 75 of the Civil Service Law, or reject it, waive the Section 75 provisions, and proceed according to the contractual grievance procedure. It also advised him that if he did not select one of these options, the HRA would hold a hearing, "in accordance with Section 75 of the Civil Service Law at the time and place set forth on the charges already served upon you." According to the City, the Informal Conference Holder's letter was mailed to the grievant at his last known address: 563 East 91st Street in Brooklyn.

By letter dated October 17, 1990, also assertedly mailed to the East 91st Street address, the Office Manager of the City's Office of Administrative Trials and Hearings ("OATH") notified the grievant that a formal hearing on the charges would be held on December 13, 1990, at the OATH's Manhattan office. On the scheduled date, in the grievant's absence, the OATH's Chief Administrative Law Judge convened a hearing on the charges. Based on the record before him, the judge reported to the HRA Administrator/Commissioner his findings that the grievant had been served properly with the charges and notice of hearing, and that he had been absent from work without authorization from December 15, 1988 to April 10, 1989. He, too, recommended termination of employment as the appropriate penalty.

On July 31, 1991, the HRA Administrator/Commissioner issued a decision adopting the OATH's recommended penalty. By letter dated August 8, 1991, the grievant was told that he was being dismissed from his position, effective at the close of business that day. Unlike the previous two letters, however, this one was addressed to the grievant at 243 Howard Avenue in Brooklyn. Also that same day, the grievant was served personally with a copy of the dismissal letter. The circumstances surrounding the personal service, however, are in dispute.

On October 30, 1991, the grievant's Union filed a Step II grievance in his behalf. The grievance alleged that he "was wrongfully terminated . . . without the service of charges, 48 hours notice to the Union of any hearing or

OATH trial, nor was any determination sent to the Union or the grievant," in violation of Article IV of the parties' collective bargaining agreement (Grievance Procedure). In a Step II decision dated December 20, 1991, the HRA Deputy Administrator denied the grievance on the ground that he had been found guilty as charged in the earlier Section 75 hearing, and, as a result, his avenues of appeal were limited either to the Civil Service Commission or the state Supreme Court.

Dissatisfied with the Step II determination, the Union appealed the grievance to Step III on January 14, 1992. By letter dated January 27, 1992, the Grievance Review Officer at the City's Office of Labor Relations informed the Union that its grievance was denied because "the contractual grievance procedure is not the appropriate forum in which to appeal a decision rendered pursuant to Section 75 of the . . . Civil Service Law."

On July 31, 1992, the Union filed a request for arbitration on the grievant's behalf. It was accompanied by two waivers, one signed by the grievant and the second by the Union, waiving their right, if any, to submit the underlying dispute to any other administrative or judicial tribunal except for enforcment of the arbitrator's award.[2]

On April 15, 1993, the parties met before Paul Yager, their mutually selected arbitrator. The City objected to going forward with the arbitration on the grounds that the NYCCBL waivers were invalid, and that the doctrines of res judicata and collateral estoppel prevent a previously adjudicated case from being relitigated in the arbitral forum. After listening to each sides'

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[2] Distinct from the Section 75 waiver, these waivers were filed pursuant to Section 12-312d. of the New York City Collective Bargaining Law ("NYCCBL"), which requires both the Union and the employee to sign waivers as a condition precedent to arbitration. This section of the law reads as follows:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration, . . . the grievant or grievants and [the Union] 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.

arguments, Arbitrator Yager adjourned the hearing to allow the parties time to file briefs with him. The parties later agreed instead that the City should file the instant petition with this Board for a determination on the issue of arbitrability.

POSITIONS OF THE PARTIES

City's Position

According to the City, when employees in the non-competitive class with more than five years service are subject to discipline, they have Civil Service Law Section 75 rights similar to the statutory rights of competitive class employees. In addition, some non-competitive class employees in the grievant's bargaining unit also enjoy contractual grievance rights similar to those of competitive class unit employees. However, the City maintains that if an employee subject to discipline does not waive his Section 75 rights and affirmatively elect to submit the case to an arbitrator pursuant to the contractual grievance procedure, the employer is "legally obligated to proceed with a Section 75 proceeding." Since the grievant in this case did not file a Section 75 waiver, the HRA assertedly had no option other than to proceed before OATH according to the statutory provisions.

Concerning notification, the City points out that Procedure No. 87-6, made effective April 10, 1987, recites the HRA's employment policy for updating employee records. The Procedure reads, in pertinent part, as follows:

> Each employee is responsible for prompt re-porting to the Office of Personnel Services (OPS), via the location timekeeper, all changes affecting his/her personnel records. Such changes may include, but are not limited to, employee's name; home address . . . .

The Procedure also includes detailed instructions for compliance. The City argues that by mailing the Informal Conference Holder's letter to the grievant's last known address, the HRA satisfied the notification requirement of Section 75 of the Civil Service Law.

Once the OATH hearing was held, according to the City, neither the Union nor the grievant could submit valid arbitration waivers, because the disciplinary action already had been adjudicated under the Civil Service Law. In the City's view, a party seeking arbitration of an issue that was previously litigated on its merits lacks the capacity to comply with the waiver requirement contained in the NYCCBL.[3] To allow this matter to go to arbitration, the City contends, would undermine the purpose of the statutory waiver requirement, which is designed to prevent multiple litigations of the same dispute.

Besides the NYCCBL waiver requirement, the City maintains that the doctrines of res judicata and collateral estoppel also preclude the Union from presenting the grievant's claim to an arbitrator. With respect to res judicata, the City submits that three essential elements must be present for the doctrine to apply: (1) there must have been a final judgment on the merits in an earlier suit; (2) the causes of action in both suits must be the same; and (3) the identity of the parties or their privies must be the same. In the City's view, all three elements are satisfied here: An OATH hearing was held during which the merits of the case were presented to an administrative law judge, including the issues of service of process and the claim of wrongful termination; the parties in both actions have not changed; and the case reached final resolution through an administrative process. Thus, arbitration, according to the City, is an invalid mechanism for challenging a decision that resulted from a Civil Service Law Section 75 proceeding.

Similarly, the City argues that the doctrine of collateral estoppel also pertains to this case because the Section 75 proceeding already has dealt with each issue that the Union is seeking to present in arbitration. It contends

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[3] Citing Decision Nos. B-72-89; B-60-89; B-54-88; B-35-88; B-39-80; and B-13-76, which purportedly stand for the proposition that a grievant does not have the capacity to file a valid waiver when the issues in the grievance have been adjudicated in another forum.

that the Union should not be permitted to arbitrate issues previously adjudicated, because doing so would undermine the purpose of the waiver requirement and give superior status to the arbitration process.

Union's Position

The Union claims that the grievant received neither actual nor constructive notice of the informal conference determination. It contends that receipt of notice was necessary to have triggered the grievant's obligation to make a timely election opting for the grievance procedure. The Union maintains further that since he did not have notice of nor participate in the hearing before the OATH administrative law judge, that proceeding should be deemed a nullity and have no preclusive effect, either by way of election of remedy, waiver, res judicata, or collateral estoppel.

In support of its position, the Union asserts that during the years of his employment with the HRA, the grievant lived at various addresses in Brooklyn: from 1982 to 1984 he lived at 563 East 91st Street; from 1984 to 1987 he lived at 243 Howard Avenue; from 1987 to 1990 he lived at 716 Sacket Street; and from 1990 until his dismissal he lived at 401 Morgan Avenue. According to the Union, each time he moved, he duly provided notice of his change of address to the agency in writing on the specified forms. Yet when the Informal Conference Holder wrote to the grievant on May 22, 1990 to inform him that the charges against him had been established, she mailed the letter to an address that was six years out of date. The Union insists that he never received the letter or became aware of its existence until after the Commissioner made his dismissal final. Similarly, according to the Union, the OATH letter of October 17, 1990, notifying the grievant of the upcoming Section 75 hearing also was sent to the old address. He assertedly never received this letter either. Therefore, according to the Union, the grievant was completely unaware that disciplinary proceedings were going on.

The Union questions why these letters even were sent by mail. It claims

that during the times that the letters allegedly were being mailed, the grievant was working every day at the Atlantic Men's Shelter, where he easily could have been served in person.

Finally, the Union notes that the August 8, 1991 dismissal letter was sent to the grievant at 243 Howard Avenue, an address different from 563 East 91st Street. It points out that although the Howard Avenue address still was not current, it at least was more recent than the East 91st Street location. The Union concludes that even though the Howard Avenue address was incorrect, its use lends credibility to the grievant's contention that he complied with agency policy by giving notice of his changes of address.

DISCUSSION

There is no dispute that the parties have created a procedure for adjudicating grievances relating to claimed wrongful disciplinary action taken against employees in the non-competitive class. Section 11. of their contractual grievance procedure specifically concerns non-competitive class employees. It provides, in pertinent part, as follows:

> Step I(n) - Following the service of written charges upon an employee a conference shall be held with respect to such charges by a person who is designated by the agency head to review such charges. The employee may be represented [at] such conference by a rep-resentative of the Union. The person designated by the agency head to review the charges shall take any steps necessary to a proper disposition of the charges and shall issue a decision in writing by the end of the fifth day following the date of the conference.
>
> Step II(n) - If the employee is dissat-isfied with the decision in Step I above, he

> may appeal such decision. The appeal must be within five (5) working days of the **receipt** of such decision. . . . [Emphasis added.]

However, here the City contends that arbitration should be barred because the waiver, as required by Section 12-312(d) of the NYCCBL, assertedly cannot be valid, and because the doctrines of res judicata and collateral estoppel preclude the matter from being relitigated.

Implicit in this dispute are two key components: one concerns the question of notice, and the second concerns the nature of an OATH proceeding in the context of a Civil Service Law Section 75 disciplinary action.

Notice

If the grievant did, in fact, receive the written Step I(n) conference decision, then the formalities required by Section 11. of the collective bargaining agreement would appear to have been satisfied. In such circumstance, the grievant's failure to appeal the Informal Conference Holder's decision would have constituted an election to be bound by the disciplinary procedures of Section 75 of the Civil Service Law rather than the alternate procedures set forth in the collective bargaining agreement. This, in turn, at least as far as we are concerned, would have validated the outcome of OATH hearing, triggering the ultimate application of the res judicata doctrine. We note that in a factually similar case, the state Supreme Court, in an Article 78 proceeding, validated an OATH hearing held in the petitioner's absence after first determining that proper notice had been given to him. When the Union subsequently sought arbitration on the ground that the substantive issue assertedly was different, we held that the doctrine of res judicata barred the relitigation of the grievance in the arbitral forum.[4]

Additionally, if the OATH hearing in this case was valid, it would preclude the grievant from being able to satisfy the NYCCBL waiver provisions,

[4] Decision No. B-10-82.

since the waiver requirement operates both prospectively and retroactively. As we have said clearly, "A party seeking arbitration of an issue that was previously litigated on its merits lacks the capacity to comply with the statutory waiver requirement."[5]

However, here we are confronted with a factual dispute over whether the grievant ever received the Informal Conference Holder's decision. The City insists that it satisfied the notice requirement by mailing the operative documents [the Step I(n) conference decision and the notice of the OATH hearing] to the grievant at the most current address listed in his personnel records. The Union claims that the City sent these documents to a previous address, even though the grievant allegedly had submitted written notice of a change of address by mail as required by Procedure No. 87-6. The Union argues further that the City, itself, demonstrated the incorrectness of the address used when it mailed the notice of termination to a different, though still out of date, address. We note that in an affidavit prepared on December 11, 1990, by Paul Orloff, an HRA Personnel Consultant, the affiant discloses that by the time the grievant's unauthorized absence began in late 1989, the agency knew that his address had changed to 243 Howard Avenue. Yet despite this knowledge, the HRA and the OATH Office Manager persisted in sending the Informal Conference Holder's letter and the OATH hearing notice to the grievant's previous 563 East 91st Street address:

> 13. My review revealed that the letter referred to in paragraph #12 [request for medical documentation] was mailed to the respondent, by certified mail, at the respondent's last address of record, which address was 563 East 91 Street, Brooklyn, New York 11212 **but when Mr. Hawkins was AWOL his address at that time was 243 Howard Avenue, Brooklyn, New York 12333**. (Orloff affidavit, ¶ 13., emphasis added.)

The various dates, actions, and addresses involved in this proceeding have been placed in a table which, for purposes of clarity, we append to this

[5] Decision No. B-7-90 at 9.

decision. From the allegations set forth in the record herein and reflected in the table, it is clear that the factual dispute raised by the Union as to whether the grievant was properly served with the Informal Conference Holder's decision, as required by the contract, is not based upon mere conclusory allegations but is supported by at least some probative evidence, i.e., the undisputed fact that HRA mailed the notice of termination to an address different than the one to which it mailed the Informal Conference Holder's decision. We are loath to preclude arbitral review of a grievance, otherwise clearly within the scope of the parties' contractual arbitration clause, on the basis of a substantially disputed claim that the contractual notice requirement was satisfied.

The absence of evidence in the record by HRA that it complied with the proof of service requirement of the OATH procedures adds still more uncertainty to the issue of notice. We note that the OATH practice and procedures requires that:

> When a case is placed on either the trial calendar or the conference calendar, the petitioner [party asserting the claim] shall serve the respondent with notice of . . . the date, time and place of the hearing or con-ference. . . . Notice may be served person-ally or by mail, **and appropriate proof of service shall be maintained.** RCNY Title 48 §1-27(b) [formerly §1-07(h)]. Emphasis added.

From the record in this case, it appears that the HRA did nothing more than simply mail the Informal Conference Holder's letter of May 22, 1990 to an address on East 91st Street in Brooklyn. The OATH Office Manager then used the same address for attempting to notify the Petitioner of the date upon which the formal OATH hearing would be held. The record contains no affirmation or other proof of service in support of either mailing, let alone any indication that the agency took any other step that would appear reasonably calculated to ensure that the Petitioner received actual notice of his OATH hearing date.

Nature of an OATH Proceeding in the Context of CSL § 75

Irrespective of the evidence to the contrary, the City maintains that since OATH found that the notice requirements were satisfied, this Board must defer to that finding under the doctrines of res judicata and collateral estoppel. In view of this argument, we must evaluate the issue of whether a proceeding before OATH, brought in the context of a Civil Service Law Section 75 disciplinary action, can be said to be equivalent to a proceeding before another administrative tribunal so as to preclude a matter, once brought to OATH, from being relitigated elsewhere in another administrative proceeding.

Section 75 requires that:

> A person . . . shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges . . .

The hearing must be held by the authority having the power to remove the person against whom such charges are preferred, or by the authority's designee:

> The hearing upon [disciplinary] charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision. . .

In the City of New York, in disciplinary proceedings covered by Section 75 of the Civil Service Law, OATH operates as the employing City agency's designee pursuant to Chapter 45-A, Section 1048 of the City Charter. Thus, in this context, OATH performs the statutory functions of a management hearing officer; it does not have the authority to act as an independent administrative agency that can issue final and binding decisions, and it certainly does not act as a court of law.

It appears that one of the reasons for the creation of OATH was to shift the responsibility of holding Section 75 disciplinary hearings from agency heads or their designees to a central administration. Nevertheless, it is our understanding that, consistent with the provisions of Section 75, the OATH administrative law judge, when the record is closed, makes a recommendation to the agency head of the employing agency; but that agency heads are free to modify the OATH's recommended disposition, or even reject it outright, as they see fit. Thus, OATH's disciplinary recommendations are advisory, and the agency head retains the final authority to determine and impose employee discipline.[6]

In the present case, there exist two parallel procedures for the hearing and determination of disciplinary charges: one pursuant to the provisions of Section 75 of the Civil Service Law, and one pursuant to the provisions of Article VI of the collective bargaining agreement. The existence of these alternate procedures is commonplace in City employment, and authorized by

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[6] See: OATH Annual Report 1993, p.7 "Proceedings At OATH," which reads, in pertinent part, as follows:

> Many cases are referred to OATH for recommended decisions, and therefore the findings, conclusions and relief are proposed to the deciding authority, usually the head of the agency that referred the case to OATH. The most prominent of this type of case are employee disciplinary cases under section 75 of the Civil Service Law.

This is consistent with the provisions of Executive Order No. 32, dated July 25, 1979, which established the OATH. Section 2(a) of E.O. No. 32 provided that "all agency heads shall delegate . . . the authority to conduct disciplinary [hearings] . . . and to make written reports and recommendations with respect to such trials and hearings." Although the Charter revisions of 1988 separated OATH from the Department of Personnel, its limited mandate with respect to Section 75 disciplinary proceedings remains in effect.

Section 76, subdivision 4, of the Civil Service Law.[7] Both procedures herein provide for a hearing before a centralized hearing office: the OATH in one case, the Office of Labor Relations Step 3 hearing office in the other. Both procedures provide for ultimate determination by a higher authority: the agency head in one case, an arbitrator in the other.

Given this Board's express and exclusive authority to determine questions concerning the arbitrability of grievances,[8] and considering the nature of the role played by OATH in one of the parallel disciplinary procedures and the lack of evidence in the record that OATH's own proof of service requirements were satisfied with respect to the notice of hearing allegedly sent to the grievant, we do not believe that a finding by OATH on the notice issue forecloses any inquiry by this Board, any more than would a similar finding by a Step 3 hearing officer. Pursuant to the collective bargaining agreement, the grievant had the right to elect to proceed under the contractual disciplinary grievance procedure, or instead under the Section 75 procedure. The Union alleges that the grievant was deprived of the opportunity to make that election because he was not given notice of either the Informal Conference Holder's letter or the scheduling of the OATH hearing. Based upon the record before us, we find that there is a substantial factual question whether the grievant was properly served with those documents.

We have long held that it is not our function to resolve factual disputes in arbitrability cases. That task is more properly left to the arbitrator.[9] We will not delve into the merits of a grievance beyond the

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[7] See, Auburn Police Local 195 v. Helsby, 62 A.D.2d 12, 404 N.Y.S.2d 396 (3d Dep't 1978); aff'd 46 N.Y.2d 1034, 416 N.Y.S.2d 586 (1979).

[8] NYCCBL § 12-309.a(3).

[9] Decision Nos. B-23-92; B-70-90; B-63-88; and B-27-84.

minimum point necessary to make the arbitrability determination.[10]

Therefore, consistent with this policy, we will return this case to Arbitrator Yager and direct that he make the determination on whether the grievant was given proper notice of the Step I(n) conference decision as prescribed in Section 11. of the Agreement. If he determines that notice was properly given, he is at liberty to rule that the contractual provisions of Steps I(n) and II(n) were satisfied. In such case, the employer would have been justified in proceeding to the OATH hearing unilaterally, even in the grievant's absence.[11] The doctrine of res judicata would then bar further disputation of this matter. An employee is entitled to participate in the OATH hearing, but if he chooses not to participate, the Union cannot use his non-participation as an independent means of securing arbitral review of a previously litigated dispute.

On the other hand, if the grievant was not given proper notice of the Step I(n) conference decision as prescribed by the terms of the collective bargaining agreement, then the City's unilateral decision to proceed to the OATH hearing would have been fundamentally flawed. There appears to be no contractual basis for submitting an employment dispute to a forum where the employee did not participate in its selection, where he lacked notice of the proceeding, and where the outcome would bar further vindication of his rights. In other words, if the arbitrator finds that the notice the employer provided was contractually defective, the OATH hearing and its aftermath, in effect, becomes a nullity, and the arbitration may proceed de novo on the merits of the Union's claim that the employer took wrongful disciplinary action against the grievant.

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[10] Decision No. B-76-90.

[11] Decision No. B-10-82.

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 City of New York, and docketed at BCB-1582-93, be, and the same hereby is, dismissed; and it is further

ORDERED, that the request for arbitration filed by Local 371 of the Social Service Employees Union in Docket No. BCB-1582-93 be, and the same hereby is granted, to the extent set forth herein.

DATED: New York, N.Y.
June 28, 1994

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

JEROME E. JOSEPH
MEMBER

I dissent. DENNISON YOUNG, JR.
MEMBER

I dissent. ANTHONY COLES
MEMBER