DOC & City v. COBA, 57 OCB 24 (BCB 1996) [Decision No. B-24-96 (Arb)]

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

DEPARTMENT OF CORRECTIONS and
THE CITY OF NEW YORK — Decision No. B-24-96

Petitioner, — Docket No. BCB-1742-95 (A-5839-95)

-and-

THE CORRECTION OFFICERS
BENEVOLENT ASSOCIATION

Respondent.
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DECISION AND ORDER

On April 13, 1995, the Department of Corrections ("DOC" or "Department") and the City of New York ("City"), appearing by its Office of Labor Relations ("OLR"), filed a petition challenging the arbitrability of a grievance submitted by the Correction Officers Benevolent Association ("Union") on behalf of Carlos Valentin ("grievant") and other similarly situated officers. On May 19, 1995, the Union filed an answer to the petition challenging arbitrability and on June 16, 1995, the City filed a reply.

Background

Article X, Section 2 ("sick leave provision") of the parties' collective bargaining agreement ("contract") provides as follows:

> Each Correction Officer shall be entitled to leave with pay for the full period of any incapacity due to illness, injury or mental or physical defect, whether or

not service-connected in accordance with existing procedures.

On April 12, 1993, DOC promulgated Directive #2258R entitled "Absence Control/Uniformed Sick Leave Program." The Directive provides, inter alia:

D. DISCIPLINARY SANCTIONS

A member who reports sick on thirteen (13) to forty-four (44) work days during a twelve (12) month period may be subject to disciplinary sanctions.

E. TERMINATION

1. A member who reports sick on four (4) or more occasions for a total of forty (40) or more work days within a twelve (12) month period may be subject to termination.

2. A member who reports sick on forty-five (45) or more work days within a twelve (12) month period may be [subject] to termination.

3. A member who reports sick on fifteen (15) or more occasions within a twelve (12) month period may be subject to termination.

Shortly thereafter, on May 28, 1993, pursuant to 42 U.S.C. §1983, the Union commenced a federal civil rights action in the United States District Court for the Southern District of New York, Israel v. Abate, 93 Civ 3622 (JSM) ("the federal action"), on behalf of the Union and two named correction officers.[1] In that

[1] Paragraph 4 of the Third Amended Complaint in Israel v. Abate, under the heading "Parties", states:

Plaintiff Stanley Israel, the aggrieved herein, brings this action in his capacity as a New York City Correction Officer and as the President of plaintiff Correction Officers Benevolent Association, Inc., on behalf of all other

(continued...)

action, the Union claimed that by promulgating and enforcing Directive 2258R, the Department was depriving correction officers of their property and contract rights in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. More specifically, the Union claimed, the Department was proscribing the contractual right to sick leave under Article X, Section 2 by subjecting correction officers to sanction, loss of benefits, and termination for exercising the right to sick leave under the agreement. This action is still pending.

In April of 1994, the grievant was served with charges and specifications pursuant to Section 75 of the Civil Service Law ("CSL"). The charges alleged, in part, violations of Directive 2258R; between May 1, 1993 and February 14, 1994, the grievant allegedly reported sick on 39 occasions, all non-service related, and missed a total of 134 work days. On February 22, 1995, also pursuant to Section 75 of the CSL, the Office of Administrative Trials and Hearings ("OATH") held a hearing on the charges. The grievant's defense in that proceeding was, in part, that Directive 2258R violated the parties' collective bargaining agreement. OATH, in its "Report and Recommendation", recommended that the grievant's employment be terminated and found that "the provision of the Collective Bargaining Agreement between the [Union] and the

[1](...continued)
correction officers.

The Third Amended Complaint was filed on August 1, 1994.

Department providing for 'unlimited' sick leave does not bar the petitioner, under Section 75 of the CSL, from terminating the employment of the grievant whose excessive absence due to sick leave renders him incompetent to perform the full duties of a correction officer." The Department accepted these findings and discharged the grievant effective March 30, 1995. In a letter dated March 30, 1995, the Department notified the grievant of its decision and informed him of his right, under Section 76 of the CSL to appeal the Department's determination to either the Civil Service Commission or a Court in accordance with Article 78 of the Civil Practice Law and Rules.

Meanwhile, on January 13, 1995, having received no response to a Step III grievance[2] filed in April of 1994, the Union invoked Article XXI of the contract[3] and filed the instant request for

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[2] In the Step III grievance, the Union stated that "the Department is using this Directive 2258R to discipline or discharge Officer Valentin for proper use of his contractually granted sick leave benefit" and requested that the Department "cease and desist from disciplining officers for the proper use of their contractually provided sick leave benefit" and withdraw the disciplinary charges brought against the grievant.

[3] Article XXI, Section 1 provides that term "grievance" shall mean:

a. a claimed violation, misinterpretation or inequitable application of the provisions of this agreement;

b. a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment, provided that, except as otherwise provided in this Section 1a, the term "grievance" shall not

(continued...)

arbitration on behalf of grievant and others similarly situated. The Union stated the grievance to be arbitrated as follows: "improper issuance of a Directive 2258R that violates the sick leave provision of the Contract and improperly impacts on Correction Officers." As a remedy, the Union seeks an order "declar[ing] invalid so much of Directive 2258R as conflicts with the contract" and directing the Department to "cease and desist from sanctioning Correction Officers for properly using sick leave which they are entitled to by contract", to "make Correction Officers whole for any losses sustained for such improper sanctions", and to "remove references to such sanctions from ... personnel files."

On March 21, 1995, as required by Section 12-312(d) of the New York City Collective Bargaining Law ("NYCCBL"), the Union filed a waiver signed by the grievant and by the Union's president.[4] The

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[3](...continued)
include disciplinary matters;

c. a claimed violation, misinterpretation or misapplication of the Guidelines for Interrogation of Members of the Department referred to in Article XIX of this Agreement;

d. a claimed improper holding of an open-competitive rather than a promotional examination;

e. a claimed assignment of the grievant to duties substantially different from those stated in the employee's job title specification.

[4] Article XXI, Section 3 of the contract provides:

(continued...)

waiver states that "the undersigned employee organization and employee(s) aggrieved in this matter, waive their rights to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award."

Positions of the Parties

City's Position

The City argues that the instant request for arbitration should be denied because the Union and the grievant are incapable of executing an effective waiver under Section 12-312(d) of the NYCCBL. This is so, the City argues, because the Union and the grievant have submitted the underlying dispute in federal court and before OATH.

The City contends that the instant dispute, the federal action, and the OATH proceeding all arise out of the same factual circumstances, involve the same parties, and seek the determination of common issues of law. The factual circumstances, the City argues, involve the placement of correction officers in

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[4](...continued)
As a condition to the right of a Union to invoke impartial arbitration set forth in this Article, ... the employee or employees and the Union shall be required to file with the Director of the Office of Collective Bargaining a written waiver of the right, if any, of the employee or employees and the Union to submit the underlying dispute to any other administration or judicial tribunal except for the purpose of enforcing the arbitrator's award.

disciplinary categories pursuant to Directive 2258R. As for the parties, the City argues that the request for arbitration was filed on behalf of the grievant and "other similarly situated correction officers", the federal action was brought on behalf of named plaintiffs and "all other correction officers", and the grievant was the respondent in the OATH proceeding. The legal issue presented in all three forums, the City argues, is identical, i.e., whether the sick leave provision of the parties' collective bargaining agreement prevents DOC from implementing Directive 2258R. Finally, the City asserts, the remedy sought in each forum is identical: that DOC be required to cease and desist from taking disciplinary action pursuant to Directive 2258R and that any disciplinary action taken be nullified.

As for the Union's arguments concerning Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), McDonald v. City of West Branch, 104 S. Ct. 1799 (1984), and Barrentine v. Arkansas-Best Freight System, 101 S. Ct. 1437 (1981), the City contends that in Gilmer v. Interstate Johnson/Lane Corporation, 111 S. Ct. 1648 (1991) the United States Supreme Court upheld a prospective waiver.[5]

The City next argues that the doctrine of res judicata bars arbitration in this case because the matter has already been

[5] 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 filed by the plaintiff several years prior to the time that his cause of action arose.

resolved on the merits through an OATH proceeding.

Finally, the City argues that the Union has failed to demonstrate the requisite nexus between the grievance to be arbitrated and the contract provision cited as the basis for arbitration. The City maintains that "the gravamen of the grievance is that the grievant was wrongfully terminated pursuant to Section 75 of the Civil Service Law" and that the definition of a grievance set forth in Article XXI, Section 1 of the contract "does not include an alleged violation of the Civil Service Law". In fact, the City argues, Article XXI, Section 1b specifically excludes disciplinary matters. According to the City, the Board has previously held that unless the parties have included Federal and State statutes within the scope of matters to be arbitrated, no arbitrable issue is presented.

Union's Position

Addressing the City's argument that the Union and the grievant are incapable of executing an effective waiver under Section 12-312(d) of the NYCCBL, the Union argues that, as to the federal action, the grievant is not a party. Further, the Union contends, the federal action is "a civil rights action under 42 USC §1983 alleging violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution and violations of the Fair Labor Standards Act". The Union argues that the United States Supreme Court has determined that, as to civil rights

actions and claimed violations of the Fair Labor Standards Act, a waiver does not preclude a litigant from litigating the same issues through both the courts and arbitration. In support of this argument, the Union cites Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), McDonald v. City of West Branch, 104 S. Ct. 1799 (1984), and Barrentine v. Arkansas-Best Freight System, 101 S. Ct. 1437 (1981).

As for the OATH proceeding, the Union argues that the factual and legal issues presented in that proceeding are not the same as the issues which will be presented in arbitration. The Union contends that the issue in arbitration would be one of contract interpretation, i.e., "whether the Directive conflicts with the contract", and "the facts elicited at any hearing would revolve around the negotiating history, the practice of the parties and the intent of the parties." By contrast, the Union argues, the issue before OATH concerned the disciplinary charges, i.e., "whether misconduct occurred and the appropriate penalty." In fact, the Union argues, OATH's jurisdiction is limited to hearing disciplinary charges; the OATH judge does not have jurisdiction over questions of contract interpretation. Finally, the Union argues, "the parties essential to an arbitration proceeding are the Union and the Office of Labor Relations who negotiated and are signatories to the contract" and neither of these parties participated in the OATH proceeding.

Similarly, the Union argues, the doctrine of res judicata does

not bar arbitrability in this case because, as stated supra, the OATH proceeding and the arbitration do not share common parties or issues. Moreover, the Union points out, the decision of an OATH judge is not final as it must be approved by the Correction Commissioner. Therefore, the Union maintains, the final decision on the merits in this case was made not by an impartial decision maker, but by the individual who promulgated Directive 2258R.

Concerning the City's argument that the Union is attempting to grieve a disciplinary matter rather than an alleged contract violation, the Union points out that the grievant was not discharged until March 30, 1995, almost a year after the Union brought its Step III grievance. The Union argues that it could not have been grieving a disciplinary matter a full year before the disciplinary action was taken. Rather, the Union contends, the grievance challenged Directive 2258R insofar as it violates the sick leave provision.

Discussion

The statutory waiver requirement, set forth in NYCCBL Section 12-312(d), is a jurisdictional condition precedent to the Board's authority to order a case to arbitration.[6] It is well established that the waiver provision was enacted to prevent multiple litigation of the same dispute and to insure that a grievant who

[6] Decision Nos. B-7-90 and B-7-76.

chooses to seek redress through the arbitration process will not attempt to relitigate the same matter in another forum.[7] A union (or an employee acting on his own behalf) is deemed to have submitted an underlying dispute in two forums, and thus to have rendered itself incapable of executing an effective waiver under Section 12-312(d), where the proceedings in both forums arise out of the same factual circumstances, involve the same parties, and seek the determination of common issues of law.[8] In applying Section 12-312(d), we have held that "a party seeking arbitration of an issue that was previously litigated on its merits lacks the capacity to comply with the statutory waiver requirement.[9]

We will first address the City's argument that the existence of the OATH determination in this case bars arbitration on waiver grounds. We find that while the statutory waiver requirement prevents the grievant from proceeding to arbitration, it does not prevent the Union from proceeding to arbitration.

The grievant was a party to the OATH proceeding and is a party to the grievance. Additionally, both of these proceedings arise out of the same factual circumstances, i.e., the promulgation and enforcement of Directive 2258R. Finally, although the issue before OATH concerned whether the grievant should be disciplined under

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[7] Decision Nos. B-16-93; B-7-90; B-35-88; and B-10-85.

[8] Decision Nos. B-16-93; B-7-90; B-50-90; B-54-88; and B-35-88.

[9] Decision No. B-13-94.

Section 75 of the Civil Service Law because of his excessive absences, the grievant, in his defense, submitted to OATH the further issue of whether the promulgation and enforcement of Directive 2258R violates the sick leave provision of the contract; this second issue is the subject of the request for arbitration herein. Accordingly, the grievant must be deemed to have submitted the underlying dispute in two forums, rendering himself incapable of executing an effective waiver under §12-312(d) of the NYCCBL. The Union, on the other hand, was not a party to the OATH proceeding as the grievant was the sole respondent before OATH. For this reason, while the Union is not capable of satisfying the waiver requirement as to the named grievant's claim, it is capable of satisfying the waiver requirement on its own claim and those of other unit members similarly situated.[10]

Having found that the grievant cannot satisfy the waiver requirement, we will next address the pending federal action and its effect on the capacity of the Union to file an effective waiver. The federal action and the dispute that the Union seeks to arbitrate in this case involve the same parties. The federal action was brought on behalf of two named officers and "all other correction officers" and the grievance was brought on behalf of the

[10] Similarly, because the Union was not a party to the OATH proceeding, the existence of the OATH determination does not bar arbitration in this case on res judicata grounds. Identity of parties between two proceedings is an element that must be met in order for the doctrine of res judicata to apply. See, Decision No. B-20-91.

grievant and "other similarly situated correction officers." Clearly, the parties to the grievance are included within the category of "all other correction officers" covered by the federal action. The federal action and the grievance also arise out of the same factual circumstances and seek a determination on common issues of law. Both proceedings arise out of the City's promulgation and enforcement of Directive 2258R. In both proceedings, the issue presented is whether, by implementing Directive 2258R, the City violated the contract or, stated differently, deprived correction officers rights granted under the contract. The Union's claim that correction officers are being deprived of their contractual rights is entirely dependant on the existence of the contract; it is derived from the contract. If there were no collective bargaining agreement in place in this case, the Union would not have a federal cause of action for deprivation of contract rights. Thus, it is impossible to draw a distinction between the statutory right and contractual right at issue in this case as they are inseparable.

Having commenced a §1983 action invoking a statutory remedy for redress of an alleged contractual breach prior to commencing the arbitration proceeding, the Union may not now be permitted to invoke the arbitral remedy. In Decision No. B-11-75, this Board held that a union may not litigate a dispute in court and simultaneously seek arbitration of the same underlying dispute because, under these circumstances, it cannot execute a valid

waiver. However, we have also ruled that the commencement of a court proceeding for adjudication of a dispute underlying a grievance constitutes only a provisional election to present that dispute in the judicial forum.[11] The withdrawal of a court action will restore the capacity of a party to execute a waiver which is in compliance with the specifications of Section 12-312(d).[12] Accordingly, the Union's grievance may not proceed to arbitration unless and until it withdraws its pending federal action.

Finally, we turn to the City's argument that, assuming, arguendo, arbitration of this matter is not barred because of an invalid waiver, the claim is not arbitrable because the Union has failed to demonstrate the requisite nexus between the grievance and the contract provision cited. The gravamen of the Union's grievance is that the promulgation and enforcement of Directive 2258R violated the sick leave provision of the contract. This dispute falls squarely within Article XXI, Section 1a. of the contract which defines a "grievance" as "a claimed violation, misinterpretation or inequitable application of the provisions of this agreement. We find that as the arguable nexus between the promulgation of Directive 2258R and the sick leave provision of the agreement is apparent, this dispute is arbitrable.

In sum, we hold that the Union's grievance may not proceed to

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[11] Decision Nos. B-7-90 and B-8-79.

[12] Decision Nos. B-7-90 and B-28-87.

arbitration until and unless the federal action is withdrawn. If the federal action is withdrawn, then the grievance shall proceed to arbitration, and the sole question before the arbitrator will be whether the City violated the sick leave provision of the contract when it promulgated and enforced Directive 2258R and, if so, what the remedy should be. As the grievant cannot satisfy the statutory waiver requirement, he will not be a party to the arbitration and the Union may not relitigate the facts and circumstances surrounding the disciplinary charges brought against the grievant.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining it is hereby,

ORDERED, that the petition challenging arbitrability filed by the Department of Corrections and City of New York be, and the same hereby is, granted unless and until the Correction Officers Benevolent Association withdraws its federal civil rights action, Israel v. Abate, 93 Civ 3622 (JSM); and it is further,

ORDERED, that the Request for Arbitration filed by the Correction Officers Benevolent Association be, and the same hereby is, denied unless and until it withdraws its federal civil rights action, Israel v. Abate, 93 Civ 3622 (JSM); and it is further,

ORDERED, that if the Correction Officers Benevolent Association withdraws its federal civil rights action, Israel v. Abate, 93 Civ 3622 (JSM), within 30 days of service of this order, the Request for Arbitration will be granted to the extent set forth herein.

Dated: New York, New York
June 27, 1996

STEVEN C. DECOSTA
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

JEROME E. JOSEPH
MEMBER

ROBERT H. BOGUCKI
MEMBER

RICHARD A. WILSKER
MEMBER

SAUL G. KRAMER

MEMBER