City v. L. 1182, CWA, 59 OCB 3 (BCB 1997) [Decision No. B-3-97 (Arb)]

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,

Decision No. B-3-97
Docket No. BCB-1770-95
and (A-5927-95)

Communication Workers of America,
Local 1182

Respondent.
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DECISION AND ORDER

On August 1, 1995, the City of New York, appearing by its Office of Labor Relations ("the City") filed a petition challenging the arbitrability of a grievance filed by the Communication Workers of America, Local 1182 ("the Union") on behalf of Jeffrey Hunter ("the grievant") on March 9, 1995. The grievance appealled his termination and other penalties in a disciplinary action.

The Union requested, and was granted, numerous extensions of time in which to file its answer, which was submitted on June 3, 1996. The City requested, and was granted, an extension of time in which to file a reply, which was filed on June 21, 1996.

Background

The grievant was hired by the New York City Department of Sanitation ("the Department") on May 4, 1987, and most recently held the position of Associate Sanitation Enforcement Agent I. The City claims that on December 14, 1994, the grievant was

observed outside his assigned patrol area and out of uniform while on duty, with an unauthorized passenger in the Department car assigned to him. Later that day, the grievant was observed at a location to which he was not assigned, when he should have been on patrol. The Department vehicle assigned to the grievant contained a gun, which the grievant admitted belonged to him.

The grievant was suspended immediately, without pay. On December 15, 1994, the grievant was served with two charges alleging violation of several Department regulations based upon the conduct observed on December 14, 1994, and upon the falsification of the grievant's activity report for that date. On December 22, 1994, after a Step I hearing had been held, the grievant was informed that his employment was terminated and that he was also given a 44-day suspension.

On December 30, 1994, the grievant signed a form letter by which he waived his right to a section 78 hearing and elected to use the contractual grievance procedure. The form contained the following language:

> As a condition for submitting this matter to the Grievance Procedure, I hereby waive the right to utilize the procedure available to me pursuant to Section 75 and 76 of the Civil Service Law or any other administrative or judicial tribunal, except for the purpose of enforcing an arbitrator's award, if any, and consent to proceed in accordance with said Grievance Procedure.

On January 12, 1995, the grievant waived the 30-day statutory limit on suspensions and agreed to continue on suspension until the Step II decision was rendered.

The grievance was denied at Step II and the grievant's

employment was terminated effective January 31, 1995. The grievance was denied at Step III on March 9, 1995.

On March 24, 1995, the Union filed the instant request for arbitration,[1] claiming a violation of Article VI, § lb of the collective bargaining agreement with the City, which defines a grievance as, among other things, "a claimed violation, misapplication or misinterpretation of the rules or regulations, written policy or orders of the Employer..." The grievance alleges that the penalties are too severe and requests as a remedy that the grievant be reinstated and made whole. The city, in its petition challenging arbitrability, presumed that the request was intended to allege a violation of Article VI, § le, "a claimed wrongful disciplinary action" and addressed the request as such.

On or about April 25, 1995, the grievant, who is African-American, filed a complaint with the New York State Division of Human Rights ("DHR") and with the Equal Employment Opportunity Commission ("EEOC") alleging that he had been discriminated against because the penalty imposed on him was more severe than penalties imposed on Hispanic employees. Appended to the complaint is the following statement, subscribed and sworn before a notary, that:

> I have not commenced any other civil or criminal action, nor do I have an action pending before any administrative agency under any other law of the state based upon this same unlawful discriminatory practice.

On June 29, 1995, the OCB received an undated waiver signed by

[1]Case No. A-5927-95.

the grievant, describing the grievance sought to be arbitrated as "The penalties [of] 44 days' fine, final warning and termination, are too severe in view of Grievant's 8-year tenure and good record.[2]

Positions of the Parties

City's Position

The City contends that the Union's request for arbitration should be denied because the grievant has failed to execute a valid waiver. The City cites Decision Nos. B-31-80, B-28-87, and B-19-86 for the proposition that the requirement of a waiver under Section 12-312(d)[3] of the New York City collective Bargaining Law ("NYCCBL") is a condition precedent to the right of arbitration, and that the purpose of the waiver requirement is to prevent multiple litigation of the same dispute. It maintains that an underlying dispute has been submitted to two forums where the matter in controversy involves either common legal issues or common factual issues, and the parties in interest are the same. The City argues that the instant grievance arises from the same

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[2] The waiver contained the following language:
The undersigned ... 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.

[3] Section 12-312(d) of the NYCCBL provides:

As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organizations shall be required to file with the director a written waiver of the right, if any, ... to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

underlying dispute as his EEOC and DHR claims: his actions on December 14, 1994 and the penalty imposed for grievant's misconduct on that day.

The City also relies upon the decision of the Supreme Court in Gilmer v. Interstate/ Johnson Lane Corporation [4] for the proposition that a prospective waiver of a right arising under federal law is permissible; according to the City, access to a forum other than arbitration no longer is necessary to ensure the fair resolution of anti-discrimination claims.

For these and other reasons, the City submits that the request for arbitration should be denied.

Union's Position

The Union maintains that the grievant submitted a valid waiver and the request for arbitration should not be denied. The Union asserts that the issue in the instant case is whether an individual can seek vindication of his or her contractual rights in arbitration under the NYCCBL without forfeiting his or her statutory rights. According to the Union, the Board has held that an employee who has "filed a charge with the EEOC may subsequently execute a valid waiver under our rules."[5]

The Union asserts that the distinction raised by the City between waiver of statutory and contractual rights is meaningless and

[4] 111 S. Ct. 1647 (1991).

[5] B-64-91 at 7.

should not be considered, in light of the Board's prior determination in Decision No. B-64-91.

The Union also submits argument intended to show that the City's reliance on the Gilmer decision is misplaced, and that the validity of the Board's Decision No. B-64-91 is unaffected thereby. For these reasons, the Union submits that the petition challenging arbitrability should be dismissed and the request for arbitration granted.

Discussion

The purpose of the statutory waiver provision is to prevent multiple litigations of the same dispute, by ensuring that a grievant will not pursue the same underlying dispute in a different forum while submitting to arbitration under our statute.[6] A union renders a waiver invalid by submitting, to arbitration and in another forum, claims which arise from the same factual circumstances, involve the same parties, and seek a determination of common issues of law.[7]

In arguing that the waiver submitted by the Union is

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[6]Section 12-312 of the NYCCBL provides, in relevant part:

d. As a condition to the right of a municipal employee organization to invoke impartial arbitration ...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.

[7]See, e.g., Decision Nos. B-38-91; B-20-91; B-17-90.

invalid, the City asserts that no claimant is guaranteed two forums for a Title VII claim. This suggests that both the arbitrator and the EEOC and/or DHR are being asked to adjudicate the Title VII claim. We find, however, that the contractual grievance and the statutory claim are not the same dispute, and, therefore, there is no reason under §12-312 of the NYCCBL why the two claims may not be heard in different forums. In finding the grievance to be arbitrable, we are not allowing the grievant two forums for his Title VII claim; rather, we are holding that a contractual wrongful discipline claim under a collective bargaining agreement can be heard by a labor arbitrator while the grievant pursues a discrimination claim under a statute in another forum.

The Union has executed a valid waiver. The grievance and the discrimination claim arise from the same set of facts and involve the same parties, but they concern wholly different issues of law which derive from different sources. Although both claims concern the penalty that the grievant sustained in the disciplinary hearing, they are different claims. The grievant's statutory claims allege discrimination on account of his ethnicity, as evidenced by what he claims to be a more severe penalty in his disciplinary action than was imposed on employees of other ethnic groups who also were subject to discipline. His claim in arbitration concerns a contractual issue of alleged wrongful discipline on the grounds that the penalty imposed was excessive under the circumstances; it is alleged specifically that "the

penalties ... are too severe in view of Grievant's 8-year tenure and good record." The request for arbitration contains no mention of any claim of discrimination or of disparate treatment on the basis of ethnicity.

We do not deem these distinct claims to be the same underlying dispute within the meaning of §12-312 of the NYCCBL. Since this is the case, we need not address the parties' arguments based upon the Gilmer decision. Therefore, we find that the grievant has not foreclosed his right to arbitration of the contractual grievance under the collective bargaining agreement by bringing statutory claims of discrimination in other jurisdictions.

We caution that this finding of arbitrability is limited to the precise contractual claim stated on the waiver that was signed by the grievant:

> The penalties [of] 44 days' fine, final warning and termination are too severe in view of grievant's 8-year tenure and good record

Anything beyond this stated claim would inject matters not contained in the request for arbitration and would not be in accord with our practice of not permitting the submission to arbitration of claims belatedly advanced.

Accordingly, the instant petition challenging arbitrability is dismissed.

ORDER

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

ORDERED, that the petition challenging arbitrability filed herein by the City of New York be, and the same hereby is, denied, and it is further,

ORDERED, that the request for arbitration filed herein by the Communication Workers of America, Local 1182, be, and the same hereby is, granted.

Dated: New York, New York
January 30, 1997

Steven C. DeCosta
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

Saul G. Kramer
MEMBER

Richard A. Wilsker
MEMBER