City v. L. 371, SSEU, 59 OCB 30 (BCB 1997) [Decision No. B-30-97 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	
--between--	
	DECISION NO. B-30-97
THE CITY OF NEW YORK, Petitioner,	DOCKET NO. BCB-1578-93 (A-4316-92)
--and--	
SOCIAL SERVICES EMPLOYEES UNION, LOCAL 371, Respondent.	

DECISION AND ORDER

On May 7, 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"). After three requests for an extension of time, to which the City consented, the Union filed its answer on August 19, 1993. The City filed its reply on September 16, 1993. With the consent of both parties, the Office of Collective Bargaining held the instant proceeding in abeyance pending the final determination of a court proceeding involving a similar issue.

Background

Jessica Colley ("Grievant") held the permanent, competitive class title of "Supervisor I (Welfare)" in the Department of Social Services of the Human Resources administration ("HRA" or "agency"). She was assigned to the agency's Protective Services

for Adults Office ("PSA") in Queens from October 12, 1988, until October 18, 1991. By memorandum dated May 10, 1990, Rosalind Clarke, Manager of the HRA Employee Relations Unit, notified Frances Gittens, Manager of the Employee Discipline Unit, Team # 6, that the Grievant had been absent without authorization since March 1, 1990, that no response was received to a letter dated April 27, 1990, and that the matter was being referred to it for "appropriate" disciplinary action. An affidavit sworn to on June 22, 1990, attested that an attempt was made, pursuant to Section 75 of the Civil Service Law ("Section 75" or "CSL § 75"),[1] to serve charges and specifications on the Grievant on June 20, 1990, and that the server was unable to do so. The server attested that he spoke to the door man of the building at 195 Adams Street who stated that Jessica Colley had moved one year earlier. The server further attested that, on June 22, 1990, he mailed a true copy of the charges and specifications by regular mail and certified mail to the Grievant at the Adams Street address.

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[1] Section 75 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 permanent appointment in the competitive class of the classified civil 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 herein, who can elect Section 75 as a substitute for their contractual disciplinary procedures.

On July 10, 1990, an informal conference was held as scheduled. The Grievant did not attend. In a letter to her dated July 13, 1990, the Informal Conference Holder stated that the charges had been established and that she was recommending dismissal as the appropriate penalty. The letter also stated that the Grievant had five days either to accept the recommendation, reject it and ask that it be reviewed pursuant to Section 75 provisions, or proceed according to the contractual grievance procedure. The letter also stated that if the Grievant did not choose one of these options, the HRA would hold a hearing in accordance with § 75 of the Civil Service Law on the charges. The City alleges that the Informal Conference Holder's letter was mailed to the Grievant at her last known address: 195 Adams Street, Brooklyn, N.Y. 11201.

By letter dated October 22, 1990, assertedly mailed to the Grievant at the Adams Street address and mailed to the Respondent Union, the Office Manager of the City's Office of Administrative Trials and Hearings ("OATH") allegedly informed the Grievant and Union that a formal hearing on the charges would be held on December 12, 1990, at the OATH's Manhattan office. On the scheduled date, OATH's Chief Administrative Law Judge convened a hearing on the charges notwithstanding the absence of the Grievant. The judge reported to the HRA Administrator ("Administrator") his findings that the Grievant had been served

properly with the charges and notice of hearing and that the Grievant had been absent from work without authorization since March 1, 1990. The judge found the Grievant guilty as charged and recommended a penalty of employment termination.

On or about May 1, 1991, the Grievant returned to work. Two months later, on July 8, 1991, the HRA Administrator adopted the findings of OATH as well as the recommended penalty of dismissal. Three months after the Administrator adopted the OATH findings and recommendation and five months after the Grievant returned to work, the Grievant was dismissed by a letter dated October 18, 1991, addressed to 195 Adams Street, Brooklyn, effective at the close of business that day.

On November 8, 1991, pursuant to CSL § 76, the Union filed with the New York City Civil Service Commission an appeal of the Administrator's decision to terminate the Grievant. It is unclear from the record how the Union came to know of the Administrator's decision, whether by information from the Grievant, correspondence directed to the Union, or another manner. By letter dated December 17, 1991, also addressed to 195 Adams Street in Brooklyn, the Executive Secretary of the New York City Civil Service Commission advised the Grievant that oral argument on the appeal was scheduled for February 20, 1992.

On February 11, 1992, the Union filed a Step II grievance, alleging that the Grievant's employment was terminated without

due process. The grievance stated, in pertinent part:

> There has been a violation, misapplication, and/or misinterpretation of the SSEU Local 371 Contract, including but not limited to Article VI, and/or of rule and regulations, policy, or orders applicable to HRA/DSS in that Jessica Colley has been terminated from her Supervisor I position without appropriate due process. A problem, among others, is that charges were not served to her correct address, though the Agency was aware of it.

A Step II determination was not issued.

On February 20, 1992, the Union requested adjournment of the hearing in the CSL § 76 appeal. On March 17, 1992, the Union filed a grievance with the Office of Labor Relations at Step III alleging, inter alia, dismissal of the Grievant without due process in violation of Article VI of the contract. A hearing was held on April 24, 1992, and the Step III decision, dated April 30, 1992, denied the grievance. The hearing officer found that the Grievant's address of record prior to September, 1991, was 195 Adams Street, Brooklyn, New York, and that the Department had afforded the Grievant due process.

On July 11, 1992, the Respondent Union requested a third adjournment of the hearing in the § 76 appeal. On July 31, 1992, the Union filed a Request for Arbitration. Pursuant to 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,[2] the Request for Arbitration was

[2] Section 12-312(d) of the NYCCBL provides, in pertinent (continued...)

accompanied by two waivers, one signed by the Grievant and a second signed by the Union, waiving their right, if any, to submit the underlying dispute to any other administrative or judicial tribunal except for enforcement of the arbitrator's award. On August 11, 1992, the Grievant requested withdrawal of the § 76 appeal. On August 20, 1992, the Civil Service Commission granted the Grievant's request to withdraw the appeal.

On April 1, 1993, the parties met before Robert Douglas, their mutually selected arbitrator. After hearing arguments by the petitioner and the respondent therein, the arbitrator adjourned the proceeding indefinitely to permit the Petitioner herein to file the instant Petition Challenging Arbitrability on or before May 3, 1993. The Petitioner was granted an extension to May 7, 1993. On May 7, 1993, the instant Petition was filed with this Board for a determination on the issue of arbitrability.

Under Article VI, Section 1(e), of the applicable collective bargaining agreement ("contract"), covering the term from October

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[2](...continued)
part:

> 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 [the Union] to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

1, 1990, through December 31, 1991, and entered on March 16, 1992, a "grievance" is defined as:

> A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status.

The contract provides for a procedure to be followed which "shall govern upon service of written charges of . . . misconduct."

Positions of the Parties

City's Position

The City argues for dismissal of the Union's Request for Arbitration on the grounds that the Union cannot comply with the statutory waiver requirement of NYCCBL § 12-312(d) due to the fact that the Union and the Grievant submitted the dispute to remedies available under CSL § 75 before they waived their rights under any other grievance procedure. The City notes that the waiver requirement is a condition precedent to this Board's assertion of jurisdiction over a request for arbitration and that this condition cannot be waived. Moreover, the City observes that the statutory waiver requirement applies to both retrospective and prospective arbitration submissions. It further states that to waive purely prospective rights would implicitly give superior status to the arbitration process. This, the City argues, is not the purpose of the law. The City

concludes that, because the grievance was filed after OATH issued its finding and while a § 76 appeal was pending, the Union and the Grievant lost the capacity to file valid waivers. Because the waivers are invalid, the City argues, the statutory condition precedent has not been met and the arbitrability of the Union's case is irrelevant.

In addition, the City argues for dismissal of the Union's Request for Arbitration on the ground that the Request would seek to relitigate questions at issue in the § 75 proceeding, i.e., whether the Grievant was afforded due process in the initial stages of the disciplinary proceeding and whether the employer took wrongful disciplinary action against the Grievant. The City also contends that the same parties are involved and the same facts would be posited to an arbitrator. In its Reply, the City argues that the OATH recommendation, followed by the Administrator's determination, was final and conclusive when the Grievant's appeal to the Civil Service Commission was withdrawn with prejudice.

Moreover, the City insists that the Union's withdrawal of the § 76 appeal, even with prejudice, does not cure the defects in the waivers as presented. The City observes that this Board has accepted prejudicial withdrawal of actions from other forums only when there has been no determination on the merits or when purely procedural, rather than substantive, issues have been

adjudicated.[3] By contrast, the City concludes that the Grievant received a determination on the merits, i.e., an OATH hearing was conducted pursuant to § 75, and a recommendation was subsequently rendered and accepted by the Administrator, resulting in the Grievant's dismissal.

The City further maintains that, if an employee subject to discipline does not waive his § 75 rights and does not affirmatively elect to submit the case to an arbitrator pursuant to the contractual grievance procedure, then an election of remedies is made for the grievant. Petitioner argues that, since the Grievant herein did not file a § 75 waiver, the City was "contractually obligated" under Article VI, § 5, Step B(i), to pursue the matter under § 75. Furthermore, if the Grievant failed to get notice of the disciplinary proceedings against her, it was "undoubtedly," the City states, because she failed to notify the employer of her change of address as required by Agency Policy No. 87-6.

Aside from the waiver issue, 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)

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[3] Citing Board Decision Nos. B-7-90, B-28-87 and B-28A-87.

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, according to the City, arbitration is an invalid mechanism for challenging a decision that resulted from a CSL § 75 proceeding. Similarly, the City argues that the doctrine of collateral estoppel also pertains to this case because the § 75 proceeding already has dealt with each issue that the Union seeks to present in arbitration.

Union's Position

The Union claims that the Grievant received neither actual nor constructive notice of the informal conference. It contends that receipt of notice was necessary to have triggered the Grievant's obligation to make a timely election opting for the contractually provided grievance procedure. The Union maintains further that since she 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, "in or about October, 1989 . . . [the Grievant] submitted a notification of change of address to the agency on the specified form." It asserts additionally that, in February, 1990, when the Grievant submitted a written request to a Mr. Hancock, the director of her unit, for a leave of absence from March 1 to August 31 of that year to care for her father during an illness,[4] the request listed a post office box number where she could be reached by mail. The Union also asserts that, during her absence, the Grievant contacted the HRA Office of Personnel Services on several occasions and in these conversations was told by agency personnel, not named, that the agency's records reflected that she was on approved leave.

The Union contends that it was not until February, 1991, when the Grievant called the agency to inquire about a W-2 tax statement that she was first told by Frances Gittens, Manager of the Employee Discipline Unit, that she was listed as absent without leave. The Union also alleges that Ms. Gittens told the

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[4] The Union's Answer states that agency procedures require leave requests to be acted upon within 30 days from submission, although it cites no provision to that effect. The Answer asserts that HRA neither approved nor denied the Grievant's leave request.

Grievant that, since there were no disciplinary charges outstanding against her she could return to work. She did return to work in May, 1991, and assertedly worked "without incident" until October 8, 1991, when she was informed that a § 75 hearing had been held ten months before, in December, 1990, as a result of which she was discharged. According to the Union, the Grievant was unaware that disciplinary proceedings had taken place.

Discussion

It is clear that the subject of the Union's grievance falls within the scope of the parties' agreement to arbitrate disputes. Article VI, §1(e), of that agreement defines the term "grievance" to include a claimed wrongful disciplinary action. That the Grievant's employment termination was a disciplinary penalty is not disputed. Therefore, in the absence of any other considerations, the grievance would be arbitrable. However, the City has urged three grounds for barring arbitration of this matter:

1. the Grievant and the Respondent are incapable of complying with the waiver requirement of NYCCBL §12-312(d);

2. the request for arbitration is barred by the doctrine of res judicata; and

3. the request for arbitration is barred by the doctrine of collateral estoppel.

Since the issue of compliance with the statutory waiver

requirement goes to the Board's jurisdiction to entertain the Petition, we address this issue first. Failure to meet this jurisdictional requirement obviates discussion of the other two arguments.

The statutory waiver requirement imposed under NYCCBL § 12-312(d) is a jurisdictional condition precedent to this Board's authority to order a case to arbitration.[5] Thus, if the waiver requirement of the NYCCBL has not been met, the grievance may not be submitted to an arbitrator even though it is otherwise arbitrable.[6] It is well established that the purpose of the waiver requirement is to prevent multiple litigation of the same dispute and to insure that a grievant who elects to seek redress through the arbitration process will not attempt to relitigate the same matter in another forum.[7] A union is deemed to have submitted an underlying dispute in two forums, and thus to have rendered itself incapable of executing an effective waiver under § 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]

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[5] Decision Nos. B-7-90, B-72-89, B-10-82, and B-8-79.

[6] Decision Nos. B-7-90 and B-10-82.

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

[8] Decision Nos. B-38-91, B-20-91, B-70-90, B-17-90, B-7-90 and B-50-89.

The instant proceeding arises out of the same factual circumstances as that addressed by OATH in the proceeding under Section 75 of the Civil Service Law. It also involves the same parties and seeks determination of common issues of law. In light of a recent ruling by the Appellate Division, First Department, on this same issue, we are constrained to hold that, once OATH found that it had jurisdiction and rendered a recommendation to the HRA Administrator, the only appeal available was to the Civil Service Commission or the courts. This Board is without jurisdiction to submit that issue to arbitration.[9]

For this reason, we hold that the statutory waiver requirement under § 12-312(d) of the NYCCBL has not been met and grant the instant petition challenging arbitrability.

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[9] City of New York v. Malcolm D. MacDonald, etc., and Social Service Employees Union, Local 371, Decision No. B-13-94, rev., __ N.Y.S.2d __ (Sup. Ct., N.Y. Co. 1996), aff'd __ A.D.2d __, __ N.Y.S.2d __ (1st Dept. 1997).

O R D E R

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 instant petition challenging arbitrability by the City of New York be, and the same is hereby granted, and it is further

ORDERED, that the request for arbitration filed herein by the Union be, and the same is hereby denied.

Dated: June 26, 1997
New York, N.Y.

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

SAUL G. KRAMER
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOGUCKI
MEMBER