City v. L. 237, CEU, 59 OCB 44 (BCB 1997) [Decision No. B-44-97 (Arb)]

In the Matter of the Arbitration	:	
	:	
-between-	:	
	:	
City of New York,	:	
	:	
Petitioner,	:	Decision No. B-44-97
	:	Docket No. BCB-1704-94
- and -	:	(A-5352-94)
	:	
City Employees Union, L. 237 of International Brotherhood of Teamsters,	:	
	:	
Respondent.	:	

DECISION AND ORDER

On December 16, 1994, the City of New York ("City"), by its Office of Labor Relations, filed a petition challenging the arbitrability of a grievance submitted by City Employees Union, Local 237 of the International Brotherhood of Teamsters ("Union") claiming wrongful discharge of an employee of the New York City Department of Finance ("DOF"). The Union filed an answer on February 26, 1996. The City filed a reply on March 8, 1996.

Background

The Union and the City were parties to a collective bargaining agreement that ran from October 1, 1991 to December 31, 1994 and provided for arbitration of grievances concerning wrongful termination.[1] Neil McNaughton ("Grievant") was employed by DOF as a provisional

[1] Article VI ("Grievance Procedure") of the collective bargaining agreement provides, in relevant part:

(continued...)

Associate Attorney and had served for more than two years in the title. Disciplinary charges were served on him in June, 1993. According to court papers made part of the record in this case, the Grievant was accused of insubordination and pursued a grievance of wrongful discipline through the initial steps of the contractual grievance and arbitration procedure.

On August 16, 1993, the Grievant filed an action in New York State Supreme Court, New York County ("McNaughton I")[2] pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR").[3] He asked for injunctive relief and damages for intentional infliction of emotional harm and negligent infliction of emotional harm, which he claimed he suffered because DOF employees had subjected him to "the silent treatment."

The Grievant's employment was terminated on February 8, 1994, as a result of the disciplinary action. The Union filed a request for arbitration on his behalf on February 23, 1994, alleging improper termination. The Union and the Grievant signed the required waiver,[4] which provides, in relevant part:

(...continued)
Section 1. Definition. The term "Grievance" shall mean:

* * *

f. A claimed wrongful disciplinary action taken against a provisional employee who has served for two years in the same or similar title or related occupational group in the same agency.

[2] McNaughton v. O'Cleireacain, Index No. 122799/93.

[3] Article 78 of the CPLR provides for review of determinations made by administrative agencies.

[4] Section 12-312(d) of the New York City Collective Bargaining Law provides:

As a condition to the right of a municipal employee organization to invoke impartial arbitration ... the grievant or grievants and such organization shall be requied 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 award.

> 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.

On April 7, 1994, the Grievant filed a second civil action ("McNaughton II"),[5] which was consolidated with the first. As consolidated, the Grievant's complaint now charged DOF and some of its employees with intentional infliction of emotional harm and negligence in not investigating his complaint or counteracting the harmful effects of the alleged shunning.

On June 16, 1994, the Grievant began a third civil action ("McNaughton III")[6] in New York State Supreme Court. In it, he claimed damages for benefits lost by the alleged tortious interference of DOF employees with the collective bargaining agreement under which he was covered. The complaint also alleged libel and publication of false charges against him by DOF employees and a psychological consulting firm hired by DOF to examine him. In addition, the Grievant charged that DOF employees engaged in retaliatory acts after he filed McNaughton I, and alleged intentional infliction of emotional harm.

The Office of Collective Bargaining ("OCB") processed the Union's request for arbitration, the parties chose an arbitrator, and an arbitration hearing was scheduled to begin in January 1995. By letter dated December 9, 1994, however, the City informed the OCB that it intended to file a petition challenging arbitrability, on the grounds that the Grievant's court actions violated the statutory waiver provision of the New York City Collective Bargaining Law ("NYCCBL").[7] It filed

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[5]McNaughton v. O'Cleireacain, Index No. 110171/94.

[6]McNaughton v. O'Cleireacain, Index No. 117531/94.

[7]See, fn. 4, supra.

its petition on December 16, 1994, with service on the Union. By memo dated December 22, 1994, to the attorneys for the Union and the City, the OCB's Deputy Director of Dispute Resolution confirmed that each had consented to an adjournment of the arbitration hearing, pending the outcome of the City's petition.

On May 3, 1995, the Grievant filed a claim in the U.S. District Court for the Southern District of New York ("McNaughton IV").[8] He alleged violation of constitutional and civil rights and asserted claims under New York State law. Among these claims were his assertions that DOF violated contractual disciplinary procedures, that the attorney for the City intentionally delayed the arbitration, and that the City unilaterally applied for and received a stay of the arbitration.

On June 1, 1995, the New York State Supreme Court dismissed on the merits all of the claims in McNaughton I, II and III. The court held that the defendants' conduct did not meet standards necessary for findings of intentional or negligent infliction of emotional harm, or defamation. Addressing the Grievant's claim that the defendants tortiously interfered with the collective bargaining agreement, it noted that the City had argued that the plaintiff's claims should be pursued through the grievance procedure provided by the collective bargaining agreement. Citing the waiver, the court stated:

> Plaintiff asserts that in signing this waiver, he intended to waive only his right to petition for reinstatement and back pay. The courts interprets the waiver more broadly than does the plaintiff. However, it is unnecessary to determine which claims plaintiff has waived since, as set forth below, none of them states a cause of action.

It then dismissed the Grievant's tort claim on the grounds that he was not in privity of contract with

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[8]McNaughton v. Giuliani, 95 Civ. 3066.

the City and some of the defendants had qualified immunity from defamation. As to the Grievant's federal claims, the court held that the Grievant had not shown a violation of any right under federal law or proved tortious interference with his contractual rights. The Grievant appealed the decision.

In a letter dated June 19, 1995, the Union's attorney wrote what he characterized as a "response to the ... Petition Challenging Arbitrability" and requested that an arbitration hearing be scheduled, but did not serve a copy of the letter on the City. By letter dated February 7, 1996, the Union's attorney again requested an immediate arbitration hearing. By letter dated February 13, 1996, the Trial Examiner assigned to the case reminded the Union's attorney that the Union had never filed a verified answer. The OCB allowed the Union to file an answer on February 23, 1996 and DOF to file a reply on March 8, 1996.

A draft decision was presented to the Board of Collective Bargaining at its meeting in July, 1996. The Board members suggested that the draft be held while the Board ascertained the status of the Grievant's case in federal court.

In September, 1996, the City sent the OCB a copy of a summary order of the Second Circuit, affirming the dismissal by the U.S. District Court of the Grievant's federal claims because of issue preclusion. The City noted that the Grievant's appeal of the decision in his state court case was pending.[9]

On April 9, 1997, in response to the Trial Examiner's request, the City forwarded a copy of the decision of the New York State Supreme Court in McNaughton I, II and III. In an attached letter, the City claimed that the Union's answer was untimely and should not be considered.

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[9]McNaughton, et.al., fn. 8, supra.

Positions of the Parties

City's Position

The City maintains that a valid waiver under Section 12-312(d) of the NYCCBL is a condition precedent to the right of arbitration. It asserts that the statutory waiver provision was enacted to prevent multiple litigations of the same dispute and to ensure that a grievant who chooses to seek redress through arbitration will not litigate the same matter in another forum. The City argues that the waiver includes litigation arising out of disciplinary proceedings.

The City notes that the Board has held that a grievant has submitted the same underlying claim in different forums when the proceedings arise out of the same factual circumstances, involve the same parties and concern the same underlying dispute. According to the City, these elements are satisfied in the instant case. It argues that the grievant's allegations of false disciplinary charges are the basis of the claims in McNaughton II and III, and that this violates the statutory waiver provision.

Union's Position

The Union contends that the City distorts the meaning of the phrase "wrongful termination" by construing it to mean that any action that refers to the Grievant's discharge automatically makes the waiver void. It maintains that the Grievant's actions in state and federal court concern issues that will not be addressed in arbitration. By mentioning events leading to his discharge, the Union argues, the Grievant intended only to illustrate what had occurred; his court actions, however, pursue claims of intentional infliction of emotional harm, tortious interference with contractual rights and libel.

The Union notes that its request for arbitration arises from Article VI of the contract. Thus, it contends, its grievance deals directly with the improper termination of the grievant's employment, apart from the separate claims in state and federal court.

According to the Union, the instant petition was filed late in order to prejudice and harm the Grievant. It contends that the City accepted the Grievant's request for arbitration in February 1994, but delayed scheduling the hearing until January 1995. By the time the City challenged arbitrability, the Union claims, the Grievant had already conformed his first action to name the parties.

Discussion

The statutory waiver requirement is a jurisdictional condition precedent to the Board's authority to order a case to arbitration. It ensures that a grievant who requests arbitration will not also litigate the same underlying dispute in another forum.[10] A union has submitted an underlying dispute in two forums, and thus rendered itself incapable of executing an effective waiver, if 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.[11] Election of the judicial forum becomes irreversible for purposes of NYCCBL Section 12-312(d) when a judgment on the merits of a dispute has been rendered.[12]

Here, all of the proceedings involve the same parties and arise from the fact that the Grievant

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[10]Decision Nos. B-35-88; B-10-85.

[11]Decision Nos. B-24-96; B-50-89.

[12]Decision No. B-34-90.

was disciplined and discharged. We find, further, that the grievance and the tort actions here are so inextricably intertwined that they seek the determination of the same underlying dispute, unlike other cases in which the contractual and statutory claims were distinct and severable.[13] That this dispute has now been adjudicated in state and federal courts is evidenced by the pleadings in the tort actions, which set before the courts the same underlying dispute as formed the basis of the grievance. Having obtained a judgment of the court on these issues, the Grievant no longer has the capacity to make a waiver satisfactory to the statutory requirement.[14] Accordingly, we grant the City's petition challenging arbitrability.

[13]*See, e.g.,* Decision No. B-3-97.

[14]Decision No. B-8-79

DETERMINATION AND 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 be, and the same hereby is, granted, and it is further,

ORDERED, that the request for arbitration in Docket No. A-5352-94 be, and the same hereby is, denied.

Dated: New York, New York
October 28, 1997

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT BOGUCKI
MEMBER

SAUL KRAMER
MEMBER

RICHARD WILSKER
MEMBER