City & DOF v. L. 1549, DC 37, 61 OCB 33 (BCB 1998) [Decision No. B-33-98 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	
--between--	
	DECISION NO. B-33-98
CITY of NEW YORK AND THE NEW YORK CITY DEPARTMENT OF FINANCE,	DOCKET NO. BCB-1905-97 (A-6514-97)
Petitioner,	
--and--	
DISTRICT COUNCIL 37, LOCAL 1549, AFSCME, AFL-CIO,	
Respondents.	

DECISION AND ORDER

The City of New York and the Department of Finance ("City") filed a petition on April 25, 1997, challenging the arbitrability of a request for arbitration submitted by Local 1549, District Council 37, AFSCME, AFL-CIO, ("Union"). The grievance concerned the alleged wrongful termination of Tracey Crosland (“Crosland” or "Grievant"). In its challenge, the City alleges that the dispute is not arbitrable, because, *inter alia*, the Grievant allegedly waived her right to the contractual grievance procedure under the terms of a stipulation of settlement of a prior disciplinary proceeding. The Union filed a verified answer on May 5, 1997, and on May 12, 1997, the City filed a verified reply. The City submitted an affirmation in response to a request from the Trial Examiner for more information. The Union did not object to the submission but did object to the delay occasioned by the City’s response to the Trial Examiner’s request.

Background

The parties herein are signatories to the Clerical Administrative Employees collective bargaining agreement ("unit agreement") for the period from January 1, 1992, to March 31, 1995. It covers the title of Technical Support Aide, in which Crosland served as a provisional for more than two years.[1] Article VI of the unit agreement provides for the resolution of contractual grievances. In Section 1(g), the Article defines a grievance as, *inter alia*, "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." Section 5 outlines a grievance procedure culminating in binding arbitration with respect to disciplinary action against provisional employees.

The City and Union are also parties to a citywide agreement covering the period from July 1, 1990, to June 30, 1992, whose terms continued in effect, for the relevant time period herein, under the status quo provision of Section 12-311(d) of the New York City Collective Bargaining Law ("NYCCBL"). The citywide agreement contains language identical to the unit agreement with respect to disciplinary action against provisionals with more than two years' service.

On February 1, 1995, Crosland was informed by an Assistant Commissioner of the Department of Finance that charges would be filed against her which alleged tampering with public records, falsifying business records, and computer tampering in violation of departmental

[1] The provisional nature of Crosland's employment during the times relevant herein is not in dispute.

regulations and New York State penal laws. These charges were made in connection with the alleged abuse of her position, to wit, illegally entering the Parking Violations Summons Tracking and Accounts Receivable System ("STARS") by computer to prevent her mother's car from being towed.

These disciplinary charges were settled when the Grievant and the Union entered into a Stipulation of Settlement ("Stipulation") with the City. The Stipulation memorialized her admission of wrongdoing and her agreement to a 20-day suspension of employment without pay. In Paragraph 3, the Grievant "waive[d] any and all rights granted to her under the provisions of Sections 75 and 76 of the Civil Service Law or in accordance with the Grievance Procedures set forth in her union's contract with the City of New York with respect to the instant proceedings." The Stipulation continued, "The Employee is fully aware that this waiver of her rights is final and irrevocable...." It further stated, in relevant part:

> The Employee understands and agrees that she must satisfy all provisions of this Stipulation and must abide by all Finance and City-wide rules and regulations, including all policies and procedures, and the Finance Code of Conduct, and that failure to do so, reported to and confirmed by the Department Advocate, shall result in her termination from employment without a hearing.

The Stipulation was signed by the Grievant and a representative of the Union on February 22, 1995. Officials of the Department signed it on March 10, 1995. Crosland served her suspension from March 13, 1995, to April 7, 1995.

The Union does not deny that, on August 2, 1995, April 12, 1996, and April 25, 1996, hearings were held at the Queens Help Center, Crosland's place of business, with respect to the adjudication of parking violations on three vehicles registered in her name. These hearings were

the subject of a memorandum dated May 2, 1996, from Crosland's supervisor, Joyce Dudley, to her. It confirmed a conversation of that date between Dudley and Crosland during which Crosland was "cautioned concerning [her] failure to comply with departmental rules and regulations concerning employee's [sic] hearing procedures." The memo continued, "Department regulations specifically prohibit employees from having hearings on vehicles registered in their name at any Help Center. Therefore you are in violation of this regulation. . . ." [2] The memo also stated that the matter would be referred to the Director of the Help Center for disciplinary action, with a copy to be placed in Crosland's personnel file. At the bottom of the memo, Crosland's signature, dated "5-2-96," indicated her receipt of the memo and her understanding that she had a right to submit a reply in writing if she chose.

By letter dated June 14, 1996, Crosland's employment was terminated without a hearing, effective at the close of business that day. The reason stated in the letter was her failure to contact the agency's Special Employee Summons Panel to contest "certain parking violation summonses issued to vehicles registered by [her]. Instead," the letter continued, she "authorized someone else to adjudicate the summonses at a Help Center."

The Union filed a Step I grievance on Crosland's behalf on July 12, 1996. It cited Article XVI of the citywide agreement, alleging wrongful disciplinary action against the Grievant as a provisional employee in title for two or more years. No Step I decision was issued. On

---

[2] The memo did not specify the regulation by number or title, but there is no dispute that Department of Finance Policy and Procedure OLA-1-94, which requires an employee wishing to contest certain parking violation summonses to contact the agency's Special Employee Summons Panel, is the regulation which the Grievant is alleged to have violated.

September 26, 1996, the Union filed a request for a Step II hearing, alleging violation of the same contractual provision. On October 9, Answorth Robinson, Department of Finance Labor Relations Officer, denied the Step II hearing on the ground that the Grievant's employment was properly terminated under the terms of the Stipulation of Settlement. On October 24, 1996, the Union requested a Step III hearing on the basis of the same contractual provision. The Step III decision dated November 7, 1996, denied the request, again citing the Stipulation as the source of the Grievant's waiver of any right to grieve the termination of her employment. On January 3, 1997, the Union filed a request for arbitration of the Grievant's claim, citing, not the provision of the citywide agreement which it had earlier cited, but rather Article VI, Section 1(g), of the unit agreement, the provision of the unit agreement identical to that in Article XVI of the citywide agreement.

Positions of the Parties

City's Position

The City maintains that it properly exercised its statutory management right to terminate Crosland's employment under the terms of the Stipulation. In support of this position, the City offers the affirmation by Department Advocate Zulma A. Bodon in which Bodon stated that Grievant Crosland acknowledged that her conduct was tantamount to a violation of the Department's rules and regulations for which she would be disciplined.[3] The City further

[3] We take the statement to be based on Crosland's signature attesting to the fact that she received a copy of the May 2, 1996, memorandum from her supervisor and that she acknowledged that she had a right to submit a written response to it. The wording of the affirmation does not articulate an acknowledgement that Crosland's conduct violated departmental rules and regulations or that she would be disciplined for it, but the omission has no

contends that, by signing the Stipulation of Settlement of prior disciplinary charges against her, Crosland waived her right to pursue the contractual grievance procedure in order to contest the lack of a hearing with respect to her discharge from employment.

The City also contends that the Union's answer addresses the merits of the grievance, not its arbitrability. It also maintains that the Union has stated no nexus between the act complained of and the provision of the relevant collective bargaining agreement cited in the request for arbitration.

Union's Position

The Union contends that the Grievant was unaware that her mechanic had incurred parking tickets while in possession of vehicles registered in Crosland's name and similarly was unaware that the mechanic appeared at the hearings for the disposition of the tickets. The Union further contends that, when Crosland signed the Stipulation that disposed of the earlier disciplinary charges, she did not anticipate that she would be held accountable under such circumstances. The Union does not deny that the tickets were incurred or that hearings were held with respect to the tickets at the Help Center at which Crosland was employed.

In support of its claim that Crosland was not responsible for the mechanic's actions which caused her to be in violation of departmental regulations regarding the processing of employee parking tickets, the Union offers a letter assertedly written by the mechanic in which the mechanic stated that he "received a lot of tickets on Miss Crosland's car. Instead of telling her, I proceeded to take care of them myself . . . I found out later that I couldn't handle Miss Crosland's

---

bearing on the question of arbitrability of the instant grievance.

tickets at her office and I caused her to be in violation of the rules and regulations of her office . . . Miss Crosland knew nothing that I was doing and nothing about her tickets. . . ."

In addition to those tickets assertedly incurred by the mechanic, the Union alleges that Crosland's mother paid two tickets "without the knowledge of Tracey Crosland" at Crosland's place of business. There is no indication that a hearing was held with respect to those tickets. There is also no indication that her mother's payment of these uncontested tickets formed any part of the City's grounds for terminating her employment.

The Union asserts that "[t]hese alleged technical, *de minimus* violations of the Agency Procedures were by persons other than [Grievant]." Moreover, it asserts that "[t]here is no allegation that there was any impropriety in the handling of these tickets by the third parties." In sum, the Union argues, "The employee should be permitted a forum to allege meritorious defenses to the allegations of misconduct made by petitioner against her, especially as the allegations involve the acts of others." The Union argues that, "[a]s a Civil Service employee, [Grievant] did not surrender her right to arbitrate her arbitrary and capricious termination."

Discussion

In considering a petition challenging arbitrability, the Board first must determine whether the parties are obligated by an agreement to arbitrate their grievances,[4] and, if so, whether the obligation is broad enough in scope to include the particular controversy at issue.[5] In the instant proceeding, there is no dispute that the parties herein have agreed to arbitrate claims regarding

---

[4] Decision Nos. B-27-89, B-37-88 and B-12-77.

[5] Decision Nos. B-47-92, B-24-92 and B-10-92.

wrongful discipline and termination of provisional employees with more than two years in a title. Here, the City has determined that Grievant Crosland violated departmental regulations regarding the adjudication of parking tickets charged to her vehicles, thereby violating the terms of the Stipulation of Settlement and entitling the Department to discharge her without a hearing. The question presented to us is whether the City's determination is subject to review under the contractual grievance and arbitration procedure.

In sum, the City argues, *inter alia*, that departmental regulations were violated and that Crosland knew she violated those regulations. The City also argues that, as a result of the asserted violation of departmental regulations, the terms of the Stipulation were breached, and the Department was entitled to discharge Crosland without a hearing. The Union does not deny that departmental regulations were breached, but it asserts that, when Crosland signed the Stipulation, she did not anticipate that an individual other than herself would take action which would cause her to be in violation of departmental regulations. It argues that the Grievant is entitled to a hearing to prove that she was not responsible for the actions for which her employment was terminated.

This Board previously considered a case wherein we found that a stipulation of settlement of disciplinary charges precluded resort to contractual grievance procedures for the resolution of subsequent disciplinary charges. [6] There, the grievant was a provisional employee who executed the stipulation of settlement whereby he agreed to waive any rights under the law or applicable contract in the event that his employment were terminated for a breach of the terms of the

[6] Decision No. B-21-90.

stipulation. He was placed on probation pursuant to the terms of the stipulation and was discharged, the day after the probationary period ended, for misconduct which occurred during the probationary period established by the stipulation. The Board held that the grievant's discharge was not subject to the contractual grievance and arbitration procedure, because the parties to the stipulation had agreed that misconduct during the probationary period would constitute a basis for summary dismissal.[7] Although the language of the stipulation there differed from the language of the Stipulation in the instant case, the employer in both cases retained exclusive authority to determine whether or not the terms of the stipulation had been violated.[8]

In arguing that the instant grievance is arbitrable, the Union would have this Board interpret the Stipulation to determine whether the Grievant had abided by the departmental regulations. We decline to do so for the following reasons:

First, the affirmation submitted by the City persuades us that the Department Advocate did, indeed, deliberate and render a determination as required under the terms of the Stipulation in order for the penalty prescribed in the Stipulation to take effect. In light of the clear language of the Stipulation, we do not find any authority for this Board — or an arbitrator — to review the finding by the Department Advocate. The question of whether there was sufficient basis for the Advocate to "confirm" that the Grievant committed the alleged violation is tantamount to the

---

[7] *Id.*

[8] The stipulation in the earlier case required the grievant to submit to physical examination and drug testing "when ordered to do so by the Department in accordance with the provisions of the Uniform Code of Discipline." Refusal to comply was to be deemed a violation of the stipulation, and the presence of any illegal drug, "as determined by the aforemenioned examination or testing" was also grounds for grievant's discharge.

ultimate question which, absent the Stipulation, arguably could be arbitrated. That question is whether the Grievant was wrongfully disciplined under the collective bargaining agreement.

Secondly, the Union does not dispute that the Department Advocate did, indeed, render a determination. The dispute is over the outcome of that determination. Inasmuch as the Stipulation plainly provides that the determination is to be made by the Department Advocate and any resulting termination is to be "without a hearing," and because there is no question on the facts presented here that the Department Advocate did render a determination, there is no basis on which the Board can permit arbitration of this claim. [9]

[9] We recognize that this may be perceived as a harsh result, but it is one compelled by the clear language of the Stipulation that the Grievant and the Union signed. Though the Department Advocate is not barred from a review and reconsideration of the previous determination, Grievant's recourse, as a consequences of the Stipulation, cannot lie in this forum.

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 docketed as BCB-1905-97 be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration of the grievance docketed as A-6514-97 be, the same hereby is, denied.

Dated:
New York, NY
Sept.28, 1998

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS A. GIBLIN
MEMBER