

Grievant and the Union entered into a Stipulation of Settlement ("Stipulation") with the Department, resolving the disciplinary action against grievant. In the Stipulation, grievant acknowledged the truth of the various charges of misconduct including Charges III (excessive lateness), and IV (missing work without approval). Grievant agreed to be placed on probation for a one year period.¹ If grievant were to accumulate more than one total hour of unexcused lateness during her probationary period, her employment would be immediately terminated. The Stipulation included a provision which stated that grievant "acknowledges that she may have rights under Section 75 and/or 76 of the New York State Civil Service Law and/or the applicable Collective Bargaining Agreement, and hereby waives all such rights in this matter." It also states that the Department "agrees that any action it takes during the probationary period will be in good faith and will not be arbitrary or capricious in any way."

On August 20, 1996, grievant was mailed a letter from Deputy Commissioner Alfred Siegel notifying the grievant that pursuant to the terms of the Stipulation, her employment with the Department was terminated effective on the close of business on August 20, 1996. On September 30, 1996, a Step I grievance was filed, alleging that the grievant was wrongfully terminated in violation of Article V, §§ 5(a), 5(i) and 16d of the Citywide contract and Article VI, §§ 1(a), (b), (e) and (f) of the collective bargaining agreement that exists between the City and Local 1070 ("Local contract"). The Department did not respond to the grievance, so on September 30, 1996, the Union filed a Step II grievance. The Department did not respond to the Step II grievance, either, so on

¹ This section provides, in pertinent part, "O.A. Ward further understands that she will be subject to all rules and regulations governing employees with probationary status."

November 11, 1996, a Step II hearing was requested by the Union. On May 29, 1997, a Step III decision was issued by OLR Review Officer Theodore M. Davis, denying the grievance. The Review Officer held that grievant had waived her right to a hearing pursuant to the terms of the Stipulation.

On July 14, 1997, the Union filed a request for arbitration. The Union stated the grievance to be arbitrated as, "Whether the employer wrongfully disciplined the grievant in violation of collective bargaining agreement, and if so, what shall the remedy be?" The contract provision claimed by the Union to have been violated was Article VI, Section 1(e) of the Local contract.²

Positions of the Parties

City's Position

The City argues that, insofar as the grievance alleges a violation of Article VI, § 1(e) of the local contract, it fails to state an arbitrable claim. The City asserts that the grievant's termination stems from a Stipulation of Settlement whereby the grievant and the Union waived their right to arbitration when the parties agreed that in the event that grievant accumulated more than one hour of unexcused lateness during any one of the four three-month probational periods, her employment with the Department would result in immediate termination. Furthermore, the City contends that

² Article VI, § 1(e) defines the term "grievance" as:

[a] claimed wrongful disciplinary action taken against a permanent employee covered by § 75(1) of the Civil Service Law or a permanent employee covered by the Rules and Regulations of the Health and Hospitals Corporation 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 grievant agreed to a one year probationary period commencing May 13, 1996, and therefore, the contractual procedure for grieving disciplinary actions is not available to her.

Union's Position

The Union asserts that, when grievant signed the Stipulation waiving her right to arbitration "in this matter," the Stipulation only applied to the underlying disciplinary charges. They argue that there is no specific provision that states that grievant waived her rights to contest future disciplinary actions through the N.Y.S. Civil Service Law or the collective bargaining agreement. Moreover, they assert that there was no provision expressly waiving grievant's right to contest the enforcement of the Stipulation. Accordingly, the Union contends that Article VI, § 1(e) of the Local contract remains available to the grievant, as she is challenging the enforcement of the agreement as a wrongful disciplinary action.

Furthermore, the Union argues that the probationary period agreed to by the grievant was not the same probationary period as outlined in the N.Y.S. Civil Service Law and the Department of Personnel Rules. They assert that these rules apply only to employees who are newly hired and lasts for no longer than one year unless otherwise noted. The Union states that the grievant is a long-time civil service employee who, approximately 13 years ago passed the initial probationary term served by civil service appointees. They also state that the probationary period grievant agreed to was specifically defined and limited by paragraphs one through five of the Stipulation. Finally, they note that grievant submitted documents from the Transit Authority and doctor's notes that excused her lateness and according to grievant's documentation her total unexcused lateness for the three month period in question was 21 minutes, well below the 60 minute minimum provided for in the

Stipulation. Therefore, they argue that on the date of grievant's termination, she was not in violation of the terms of her probationary period, and thus, the contractual grievance procedure was available to her.

Discussion

The Stipulation referred to by both parties in this case lays out the conditions for the continuation of grievant's employment. We find that the "matter" at hand involves her future conduct, and that the Union's arguments regarding the phrase "in this matter" are unconvincing because the phrase clearly refers to possible subsequent disciplinary actions taken against the grievant, as long as the subsequent disciplinary actions are a result of the grievant's unexcused lateness during the agreed to period in the Stipulation. We also find that the grievant had probationary status at the time of her termination, notwithstanding the fact that she was a long-time civil-service employee who approximately 13 years ago passed the initial probationary term served by civil service employees. In the instant matter, grievant and the Union settled a disciplinary action against the grievant by agreeing to a one year probationary period commencing on May 13, 1996, "subject to all rules and regulations governing employees with probationary status." Consequently, the Board finds that on the date of her termination, August 20, 1996, the grievant was a probationary employee.

However, the Union contends that the grievant was not in violation of the terms of her probationary period, as it is alleged that grievant had less than 60 minutes of unexcused lateness during her probationary period. We find that the accumulation of 60 minutes of unexcused absences is a condition precedent to the City taking action in accordance with the Stipulation. The City, in this

Stipulation, agreed not to act arbitrarily or capriciously in administering its terms. Therefore, the allegation that the grievant did not accumulate the 60 minutes of unexcused absences necessary for her discharge clearly raises a factual issue concerning whether the City acted in the required good faith. As neither party submitted documents or other evidence supporting or refuting the Union's contentions, the Board finds that the grievant is entitled to have a neutral factfinder make a determination on whether the City acted arbitrarily and capriciously in dismissing grievant. However, we direct the arbitrator to consider only the narrow question of whether the grievant did, indeed, accumulate the 60 minutes of unexcused lateness required under the terms and conditions of the Stipulation for the City to discharge the grievant. If the arbitrator finds that grievant accumulated the required amount of unexcused lateness, he or she must find that the grievant was terminated from her employment properly, as she was a probationary employee at the time of discharge and the terms of the Stipulation were met in full. If the arbitrator finds that the grievant accumulated less than the required amount of unexcused lateness, then the arbitrator is to determine if the City acted in an arbitrary and capricious manner, and the arbitrator may then determine the appropriate remedy for grievant, if any.

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, denied; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 1070, AFSCME, AFL-CIO be, and the same hereby is granted.

Dated: New York, New York
September 28, 1998

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

ROBERT H. BOGUCKI
MEMBER

THOMAS J. GIBLIN
MEMBER

We must respectfully dissent.

The City of New York employs a work force of more than 200,000 employees spread across a host of departments and agencies and represented by many different labor organizations. As a result, there are many arbitration cases dealing with disciplinary actions taken against non-probationary employees up to and including discharge. Although there are many arbitrations, a significant number of these matters are disposed of short of arbitration by virtue of so-called last chance settlement agreements under which the grievant (represented by his or her union) agrees that some or all of what he or she has been accused of did occur, that a probationary period will be reestablished, that among other things such behavior will not occur again during that period and that in one way or another the question whether there has been compliance with the settlement agreement would be decided without resorting to arbitration. Agreements of this kind usually reflect the harsh factual reality that in the circumstance the employee would have had a minimal chance to save his or her job in arbitration.

The absence of arbitration as the stated means for determining a dispute that arises under such a last chance agreement is an important consideration from the City's perspective since arbitral decisions unlike court decisions cannot be upset in most circumstances because of mistakes of fact or law or because the arbitrator concluded that from his or her perspective the consequences imposed by the employer were too harsh in the circumstances. Arbitrators have very wide discretion under collective agreements. However, last chance agreements, which have a very different basis, are designed to preclude arbitral review as to whether their conditions have or have not been met by the parties. This does not mean that review is precluded for like any other agreement there remains resort to the courts for breach of contract - perhaps a somewhat more demanding route than arbitration, but hardly a remedy that can be considered unfair or unconscionable.

Indeed, judicial review, unlike arbitral review, is constrained by appellant supervision. Arbitrators' decisions are not subject to the same kind of review and are usually not set aside even when they are wrong as a matter of law or fact.

With this preface, we turn to the settlement agreement in issue which is appended.

Glenda Ward was employed in the Department of Probation as an Office Aid III and was a non-probationary employee when the events that gave rise to the settlement agreement took place. In April, 1996, she was served with a number of formal disciplinary charges. She subsequently admitted misconduct with respect to three of them and entered into a Stipulation of Settlement which was agreed to by her union.

Among other things, it was agreed that Ward would "strictly comply with all time and leave rules and regulations of the Department" during the one year probationary period established for her under the Settlement Agreement. Further, it was agreed "that for each of the four, three-month periods comprising the one-year probationary period" Ward would "be permitted no more than one total hour of accumulated unexcused lateness in reporting for her tour of duty. In the event that ... Ward accumulat[ed] more than one hour of unexcused lateness during any one of the four, three-month periods, her employment with the Department [would] ... be immediately terminated". Ward also agreed to pay a \$1,000 fine to the Department, to relinquish 12 days of annual leave as a further penalty for her misconduct and to be evaluated by District Council 37's Personal Services Unit.

For its part, the Department of Probation agreed among other things that any action it took during the probationary period "will be in good faith and would not be arbitrary or capricious in any way."

Significantly, the termination of a probationary employees is not arbitrable under the collective agreement that covered the grievant. The very essence of probationary status is that the termination thereof shall not be subject to arbitral review.

The Department agreed to accept covenants provided by Ward "in lieu of completing further proceedings regarding the charge ... in accordance with Section 75 of the New York State Civil Service Law or the applicable Collective Agreement Grievance Procedure. In return, Ward waived any "rights" that she may have "under Section 75 and/or 76 of the New York State Civil Service Law and/or the applicable Collective Agreement and hereby waives all such rights in this matter." (Emphasis added)

The underlying issue presented here is whether the termination of Ward during the probationary period established by the settlement agreement was arbitrary or capricious in any way (and more important for the purpose of this case), whether that issue is for an arbitrator to determine under the Collective Bargaining Agreement (the only conceivable source of an arbitrator's authority in these circumstances) or for the courts to decide in a suit brought to enforce Ward's rights under the settlement agreement.

It is plain from that agreement that Ward became a probationary employee pursuant to it and that probationary employees are not entitled to arbitration pursuant to the collective agreement. Further, the settlement agreement by its plain terms states that the grievant waives all such rights under the collective agreement in this matter. In these circumstances, it is for the courts to determine whether the Department violated that agreement by not acting in good faith and/or acting arbitrarily or capriciously when it calculated Ward's latenesses pursuant to the settlement agreement. Courts regularly deal with notions of what is "in good faith" and what is or is not "arbitrary or capricious." Indeed those terms are more relevant to Article 78

proceedings and commercial litigation than they are to labor arbitration.

The majority's decision to the contrary (no matter how well intended) is at odds with the settlement agreement in issue here because it relegates questions that arise under the settlement agreement to arbitration under the collective bargaining agreement. This result is the anthesis of what was agreed to by the parties under the settlement agreement.

October 26, 1998

RICHARD A. WILSKER
MEMBER

SAUL G. KRAMER
MEMBER

[Stipulation attached]

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STIPULATION OF SETTLEMENT

Case No. 96/20

It is hereby stipulated and agreed by and between the New York City Department of Probation (hereinafter, the "Department"), and Office Aide III Glenda Ward, as follows:

WHEREAS, Glenda Ward is employed by the Department, holding the title of Office Aide III, and

WHEREAS, O.A. Ward acknowledges that on or about April 17, 1996, she was served with formal disciplinary charges (copy attached hereto as Exhibit 1) dated April 17, 1996, and she admits only to the misconduct charged in Charges III, IV and V, and

WHEREAS, the Department and O.A. Ward have agreed to enter into the following Stipulation of Settlement in lieu of proceeding with the Step I Informal Conference pursuant to the provisions of the Collective Bargaining Agreement which governs this disciplinary matter.

THEREFORE, it is agreed by and between the Department and O.A. Ward and her Union Representative, Isabel Santos, to enter into the following Stipulation of Settlement:

- (1) O.A. Ward agrees that this Stipulation of Settlement will be placed in and become a permanent part of her Department personnel file.
- (2) O.A. Ward agrees to be placed on a probationary period of one year. The probationary period shall commence on May 13, 1996. O.A. Ward understands and acknowledges that during her probationary period, she must maintain in the performance of her duties as on Office Aide III an overall rating of at

*Received
5/14/96*

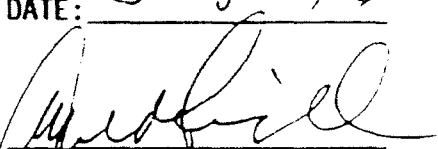
least "good" on her performance evaluations according to the Tasks and Standards for her title. The Department reserves the right to revise and modify such Tasks and Standards as they apply to all Office Aides. Performance evaluations of O.A. Ward shall be prepared at that conclusion of each of the four three-month periods of her one-year probationary period. O.A. Ward agrees to strictly comply with all time and leave rules and regulations of the Department. In addition, O.A. Ward agrees that for each of the four three-month periods comprising her one-year probationary period, she will be permitted no more than one total hour of accumulated unexcused lateness in reporting for her tour of duty. In the event that O.A. Ward accumulates more than one hour of unexcused lateness during any one of the four three-month periods, her employment with the Department will be immediately terminated. O.A. Ward understands that during her one-year probationary period she must submit medical documentation for every usage of sick leave and that no annual leave or compensatory time usage will be approved unless she has available balances and has the leave approved in advance. O.A. Ward further understands that she will be subject to all rules and regulations governing employees with probationary status. The Department agrees that any action it takes during the probationary period will be in good faith and will not be arbitrary or capricious in any way.


- (3) O.A. Ward agrees to undergo an evaluation by District Council 37's Personal Services Unit ("P.S.U.") by a date no later than May 17, 1996, and agrees to provide documentation to the Department Advocate by said date which indicates (a) that an evaluation has taken place, and (b) whether counselling, a treatment program or the equivalent is recommended for her. In the event O.A. Ward fails to provide documentation substantiating her evaluation at P.S.U. by said date, she shall pay a one-hundred (\$100.00) dollar

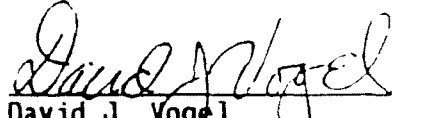
fine to the Department. For each month thereafter that she has not undergone said evaluation, she shall be fined an additional one-hundred (\$100.00) dollars. In the event P.S.U. determines that counselling is recommended for O.A. Ward, she agrees to attend and strictly follow the counselling plan established by the program or therapist to which P.S.U. has referred her. O.A. Ward further agrees to forward to the Department Advocate no later than the tenth day of every month a writing from the program or therapist which indicates that she has attended all appointments, meetings, consultations, counselling sessions and similar events for the preceding month. O.A. Ward agrees that for each month following the execution of this Stipulation of Settlement that she fails to timely provide to the Department Advocate the above-mentioned documentation by the tenth day of the month, she shall pay a fine to the Department in the amount of one-hundred dollars (\$100.00). Said fine shall be deducted from O.A. Ward's bi-weekly paycheck. In the event that O.A. Ward fails to timely provide documentation to the Department Advocate by the tenth of the month for four separate but not necessarily consecutive months, her employment with the Department will be immediately terminated. O.A. Ward understands that her participation in a treatment or counselling program or the equivalent is, for the purposes of the Department, mandatory and her participation will cease only when an authorized therapist counselor, medical practitioner or equivalent has determined that her treatment or counselling is no longer necessary. Once the treatment or counselling had been completed, O.A. Ward shall promptly forward to the Department Advocate a writing from an authorized representative of the treatment or counselling program which states that no further treatment is indicated for her.

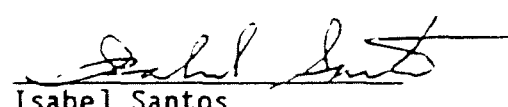
- (4) O.A. Ward also agrees to pay a fine to the Department in the amount of one-thousand dollars (\$1,000.00) as a penalty for her misconduct. Said fine shall be deducted from her bi-weekly paycheck at the rate of twenty-five dollars (\$25.00) per paycheck until the fine has been fully paid to the Department. Said deductions shall commence as soon as practicable. In the event O.A. Ward resigns from the Department, or is separated from employment for any reason whatsoever, prior to the full payment of the fine, the balance due the Department shall be deducted from O.A. Ward's paycheck and any balance still remaining shall be paid by O.A. Ward to the Department.
- (5) O.A. Ward also agrees to relinquish twelve (12) days of Annual Leave as an additional penalty for her misconduct. Said twelve (12) days of Annual Leave shall be deducted at the rate of one (1) day per month until said twelve (12) days are fully deducted. Said deductions shall commence as soon as practicable. In the event O.A. Ward resigns from the Department or is separated from employment for any reason whatsoever, prior to the full deduction of the twelve (12) days of Annual Leave, the balance due to Department shall be deducted from O.A. Ward's paycheck and any balance still remaining shall be paid by O.A. Ward to the Department.
- (6) The Department agrees to accept the foregoing acknowledgments and penalties in lieu of completing further proceedings regarding the disciplinary charges attached hereto, in accordance with Section 75 of the New York State Civil Service Law or the applicable Collective Bargaining Agreement grievance procedure.
- (7) O.A. Ward acknowledges that she may have rights under Section 75 and/or 76 of the New York State Civil Service Law and/or the applicable Collective Bargaining Agreement, and hereby waives all such rights in this matter.

(8) O.A. Ward acknowledges that she has entered into this agreement knowingly, without coercion or duress, and after consultation with her Union Representative, Isabel Santos, and does accept all terms and conditions contained herein.

DATE: 5-8-96

Alfred Siegel
Acting Commissioner

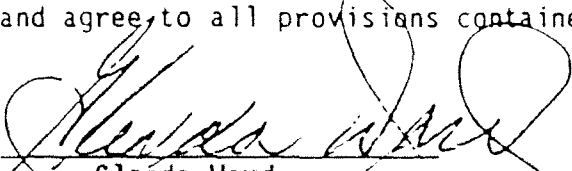

Glenda Ward
Office Aide

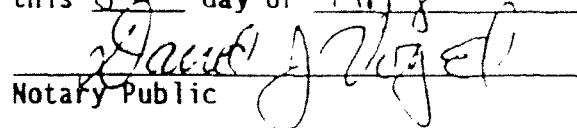

David J. Vogel
Director, Advocate's Office


Isabel Santos
Union Representative

State of New York :
 SS:
County of New York:

I, Glenda Ward, being duly sworn, state that I have read the foregoing Stipulation of Settlement, and that I have discussed it with my Union Representative. I understand and agree to all provisions contained herein.


Glenda Ward

Sworn to before me
this 8th day of MAY, 1996

Notary Public

DAVID J. VOGEL
Notary Public, State of New York
No. 4, 200,566
Qualified in Queens County
Commission Expires March 31, 19...
7/31/96