

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration :  
: between :  
THE CITY OF NEW YORK and the DEPARTMENT :  
OF PARKS AND RECREATION :  
: Petitioners, : Decision No. B-8-98  
: Docket No. BCB-1914-97  
and : (A-6749-97)  
: DISTRICT COUNCIL 37, AFSCME, AFL-CIO :  
: Respondent. :  
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**DECISION AND ORDER**

On June 10, 1997, the New York City Department of Parks and Recreation (“DPR”) and the City of New York (hereinafter collectively referred to as "City"), appearing by its Office of Labor Relations, filed a petition challenging the arbitrability of a group grievance filed by the District Council 37, AFSCME, AFL-CIO (“DC 37” or "Union"). The Union filed an answer on July 10, 1997, and on August 5, 1997, the City filed its reply.

**Background**

On July 8, 1996, Dawud Stewart (“Stewart” or “Grievant”), employed in the Civil Service title of Lifeguard, was observed sleeping on duty by investigators from the DPR Advocate’s Office. Stewart was questioned by the investigators at that time with respect to his awareness of the people who were in the pool. On July 10, 1996, the DPR Advocates conducted an interview with the Grievant at his work site. It is alleged that, at these interviews, the Grievant was not informed of his right to have an attorney or a union representative present, and that pressure was

brought to bear upon him to resign, *i.e.*, resign or be terminated and face charges; Stewart resigned. That same day, after being informed of the Stewart's interview and subsequent resignation, Local 508 President, Peter Stein,<sup>1</sup> and Local 461 President, Franklin Paige,<sup>2</sup> demanded that the Grievant be allowed to rescind his resignation. The Grievant was suspended and an informal conference was scheduled for July 22, 1996.<sup>3</sup>

On July 15, 1996, the Union initiated a group grievance at Step III of the grievance procedure, alleging that the DPR Advocate's Office conducted interviews of Lifeguard title series personnel without the presence of an attorney or a union representative, in violation of Article XXIII of the Seasonal Unit Agreement ("Agreement"),<sup>4</sup> and that the Grievant's rights in particular were violated in this manner on July 8 & 10, 1996.

On August 7, 1996, after receiving an unfavorable decision at the informal conference, held concerning his suspension, the Union sought a Step II hearing on behalf of the Grievant, individually, regarding the disciplinary charges preferred against him. On August 26, 1996, the Union and the Grievant and the City entered into a Stipulation of Settlement ("Settlement"), whereby the grievance docketed as Agency Grievance Number 08-JB14-0896 was withdrawn with prejudice, and the City was released from any and all claims relating to the dispute underlying Stewart's grievance.

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<sup>1</sup> Local 508 is the designated representative of New York City Lifeguards Supervisors.

<sup>2</sup> Local 461 is the designated representative of New York City Lifeguards.

<sup>3</sup> The pleadings do not indicate whether the resignation was rescinded; it is assumed so since the Grievant was suspended.

<sup>4</sup> Article XXIII addresses Lifeguard Personnel Practices.

On December 10, 1996, a Step III conference was held regarding the Union's group grievance. The matter was held in abeyance, pending the outcome of a Labor Management Meeting, and on March 12, 1997, based on testimony gathered therein, the grievance was denied. The Review Officer concluded that the issues involving the Grievant's complaint were resolved by the Settlement, and since Dawud Stewart was the only named grievant in the group grievance, the entire matter was thereby reconciled.

The Union filed a request for arbitration on May 16, 1997, asserting a violation of Article XXIII, §11 of the Agreement,<sup>5</sup> seeking to "Cease and desist interviews. Comply with the

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<sup>5</sup> Article XXIII, §11 states:

When an employee employed at least one year as a Lifeguard or Chief Lifeguard is summoned to an interview which may lead to disciplinary action and which is conducted by someone outside the normal supervisory chain of command, the following procedure shall apply:

- a. Lifeguard personnel who are summoned to the appropriate office at their agency shall be notified, whenever feasible, in writing at least two (2) work days in advance of the day on which the interview or hearing is to be held, and a statement of the reason for the summons shall be attached, except where an emergency is present or where considerations of confidentiality are involved.
- b. Whenever such Lifeguard personnel is summoned for an interview or hearing for the record which may lead to disciplinary action, the Lifeguard personnel shall be entitled to be accompanied by a Union representative or a lawyer, and he or she shall be informed of this right. Upon the request of the Lifeguard personnel, the Inspector General, in his or her discretion, may agree to the Lifeguard personnel being accompanied by a Lawyer and a Union representative. Such permission shall not be unreasonably denied. If a statement is taken, the Lifeguard personnel shall be entitled to a copy.

(continued...)

collective bargaining agreement. Punitive damages as the arbitrator deems appropriate. Such other and further relief as deemed appropriate.”

### **Positions of the Parties**

#### **City's Position**

In its petition challenging arbitrability, the City claims that the Union has not established a nexus between the alleged wrongful act and the cited provision of the Agreement. The City states that the Union has failed to allege any facts in the request for arbitration relating to the group grievance; the only facts alleged pertain to the grievance of Stewart, which was settled on August 26, 1996. The City argues that the insufficiency of the Union’s claim is made more evident by the fact that, during the time in which the decision was held in abeyance after the Step III hearing, no further evidence was brought forward by the Union in support of its claim. The City also points out, however, that the fact that this matter was held in abeyance has no bearing on the credibility of the Union’s claims.

In its reply, the City states that the August 8, 1996 Step II hearing on behalf of the Grievant in an individual capacity, did not attempt to bifurcate that issue from the previous Step III group grievance. Rather, the City asserts that a majority of the matters discussed entailed the practice of sending investigators to inspect pools and beaches and conduct interviews; this hearing was not limited to the Grievant. The City claims that this hearing resulted in the DPR

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<sup>5</sup>(...continued)

- c. Whenever possible, such hearings and interviews shall be held in physical surroundings which are conducive to privacy and confidentiality.

entering into the Settlement of Grievance No. 08-JB14-0896, intended to reconcile all matters relating to the group grievance of the Lifeguards and the individual grievances of Stewart.

Since the Grievant has entered into the Settlement, the City contends that the Union has failed to come forward with an individual who is aggrieved under the terms of the Agreement and that it is seeking to circumvent the Settlement by filing the request for arbitration herein. The City claims that the prior disciplinary discussions dealt with both the Grievant and the Lifeguards as a group, asserting that the Grievant's discipline was "inextricably linked to the means by which he was disciplined. Any claim concerning the July 10, 1996 interview of Stewart is therefore a claim "in connection with" Agency Grievance No. 08-JB14-0896." The City states that the Settlement releases the City regarding all claims that the rights of the Grievant were violated, thereby precluding the Union and the Grievant from going forward with this claim. Absent the allegations regarding the Grievant, the City argues that all that is left in the request for arbitration is an "elusive claim" that the DPR "conducted interviews of personnel in the Lifeguard Series in a manner which violated the collective bargaining agreement." Without any further facts or circumstances, the City states that the Union has failed to demonstrate a nexus between the alleged act and the contractual provision cited. The City continues, stating that the Union did not allege any new facts at the Step III hearing on December 10, 1996 which would distinguish the group grievance from the individual grievance of Dawud Stewart.

The City claims that the Union's attempted bifurcation of the claims relating to the discipline of the Grievant and the interview that was conducted in connection thereto, and the Group grievance, is contrary to the elucidated facts: the Union's request for a Step II hearing did

not bifurcate the issues, and a majority of the matters discussed at that hearing involved the Group grievance. Therefore, the City concludes that, since the Settlement releases it from all claims arising from the underlying, un-bifurcated dispute, namely, the interview of the Grievant and the resulting disciplinary charges, and since no new facts have been pled regarding the Lifeguards as a group, there is no nexus between the alleged acts and the applicable provision of the contract. Hence, it is asserted that the matter must be dismissed.

#### Union's Position

The Union denies that the grievance giving rise to the instant request for arbitration is the same as referenced by the City as 08-JB14-0896, as the latter dealt solely with the disciplinary charges against the Grievant. The Union maintains that the underlying grievance in the matter now before the Board was not meant to address specific disciplinary charges against the Grievant, but was directed toward the broader issue of the DPR Advocates' "abusive behavior and violation of the workers' collectively bargained due process rights." It is asserted that the Settlement was not entered into to resolve the asserted contractual violations concerning the group grievance and the Grievant *qua* group member, but was to settle the specific disciplinary charges against the Grievant.

The Union states that there is a nexus between the alleged violation and the cited contract provision, *i.e.*, the interviewing of the Lifeguards in a manner violative of Article XXIII, §11 of the Seasonal Agreement, and that this allegation was pled in the grievance, along with the specific incident involving the Grievant. Moreover, the Union states that the grievance need not include a complete recitation of the facts pertaining thereto, but need only establish a link

between the alleged act and cited contractual provision; whether there are facts to be brought out with respect to the violation of the contract is for a question for the arbitrator

The Union states that the City's pleadings allege that the Settlement has made the instant matter moot. The Union disagrees with that assessment, claiming that the hearings and subsequent Settlement regarding the Grievant addressed separate issues, seeking to redress the Grievant's individual problems. The Union asserts that the instant matter seeks to resolve the contractual violations with regard to the failure to respect the rights of the Lifeguards when interviewed; whether the Settlement renders this matter moot is for an arbitrator to decide.

### **Discussion**

When a request for arbitration is challenged by the City, initially, this Board must determine whether the parties are in any way obligated to arbitrate controversies and, if they are, whether the act complained of by the Union is arguably related to the cited provision of the parties' agreement.<sup>6</sup> Doubtful issues of arbitrability are resolved in favor of arbitration.<sup>7</sup> In the instant matter, the parties do not dispute that the alleged violation of the contract is an arbitrable grievance.<sup>8</sup> However, the City argues that the Settlement has nullified any nexus between the alleged group grievance and the cited contractual provision. Conversely, the Union argues that the group grievance survives any Settlement between Stewart and the DPR because Stewart settled individually with regard to a separate grievance.

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<sup>6</sup> Decision Nos. B-19-89; B-65-88; B-28-82.

<sup>7</sup> Decision Nos. B-65-88; B-16-80.

<sup>8</sup> Agreement, Article VI - GRIEVANCE PROCEDURE.

We first address the issue of whether Dawud Stewart filed a second individual grievance which was the subject of the Settlement. The record shows that, after receiving an unfavorable decision at the July 22, 1996 informal conference, the Union sought a Step II hearing for Stewart, individually, with regard to the disciplinary charges against him. However, the record contains no evidence that a separate, individual grievance had ever been filed on behalf of Stewart. The only document in the record that is described as a grievance is the group grievance filed by the Union on July 15, 1996; Dawud Stewart was the only affected employee identified by name in the group grievance. This group grievance was filed prior to the informal conference on July 22, 1996, and apparently was discussed at that conference in addition to the disciplinary charges brought against Stewart. The Union asserts that when it, thereafter, sought a Step II hearing for Stewart, individually, on the disciplinary charges, the individual and group claims were thereby bifurcated, creating two separate grievances, enabling Stewart to settle the grievance with respect to the disciplinary charges against him, separate and apart from his alleged improper interview and the related group grievance. A bifurcated claim, however, does not give rise to two independent actions, but separates one claim into two interdependent aspects of a single claim, *i.e.*, liability and damages.<sup>9</sup> In the instant matter, there is no evidence that the Union sought any such formal separation of issues pertaining to the original group grievance. In any event, assuming, *arguendo*, that the grievance was bifurcated, we find that this does not give rise to a separate grievance, independent from the group grievance. Moreover, there is no indication that

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<sup>9</sup> DAVID D. SIEGEL, *NEW YORK PRACTICE* 197 (1991). “In New York practice, bifurcation has come to mean the trial of the liability issue in a personal injury or wrongful death case separate from and prior to trial of the damages question.” *Id.*



a separate grievance was filed by Stewart, or on his behalf, giving rise to two independent grievances. We therefore find that only one grievance was filed in this matter: the group grievance in which Stewart was the only named member of the group.

We next address the issue of whether the Settlement releases the City from the claimed group grievance. The Settlement withdraws Grievance Number 08-JB14-0896, with prejudice and releases the City from “any and all claims .... in connection with the underlying dispute ....” Having concluded that there is only one grievance with respect to Dawud Stewart, it is axiomatic that the Settlement encompass both the disciplinary charges against Stewart and his alleged improper interview. The precipitating and underlying dispute giving rise to the grievance is the absence of representation for the Grievant at his interview. Stewart is thus the linchpin which ties the group to the alleged violation of the contract; when he signed the Settlement withdrawing the grievance and releasing the City from all claims, it was, perforce, the group grievance. Absent the evidence of Stewart’s interview, there is no other substantive evidence, in the grievance procedure or request for arbitration, that any other Lifeguards have been interviewed without being afforded representation.<sup>10</sup> We therefore find that Stewart’s Settlement withdrawing the grievance negates any nexus that may have existed between the group grievance and the contract. Accordingly, we dismiss the Union’s request for arbitration. We note, however, that this Settlement does not preclude the Union and Grievant from raising this issue

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<sup>10</sup> We note that in the Union’s answer, a second grievance, dated July 2, 1997, was submitted as evidence of the ongoing nature of the alleged violation. However, as that grievance was filed subsequent to the date of the instant request for arbitration (May 16, 1997), raised for the first time in the Union’s answer, it shall not be considered as evidence of the group grievance alleged herein.

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again, in the event of a perceived violation of the parties' collective bargaining agreement involving other incidents or other employees.

**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 challenge to arbitrability raised herein by the petitioners be, and the same is granted; and

ORDERED, that the request for arbitration raised herein by the respondent be, and the same is denied.

Dated: March 24, 1998  
New York, N.Y.

Steven C. DeCosta  
CHAIRMAN

Daniel G. Collins  
MEMBER

George Nicolau  
MEMBER

Carolyn Gentile  
MEMBER

Jerome E. Joseph  
MEMBER

Richard A. Wilsker  
MEMBER

Saul G. Kramer  
MEMBER