

City & HPD v. L. 371, SSEU, 67 OCB 22 (BCB 2001) [Decision No. B-22-2001 (Arb)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

-----X

In the Matter of the Arbitration

-between-

CITY OF NEW YORK & NEW YORK CITY  
DEPARTMENT OF HOUSING PRESERVATION  
AND DEVELOPMENT,

Decision No. B-22-2001  
Docket No. BCB-2182-01  
(A-8442-00)

Petitioner,

-and-

SOCIAL SERVICES EMPLOYEES UNION,  
LOCAL 371,

Respondent.

-----X

**DECISION AND ORDER**

The New York City Department of Housing Preservation and Development (“HPD” or “City”) filed a petition on January 26, 2001, challenging the arbitrability of a grievance brought by Local 371, Social Services Employees Union (“Union”) on behalf of Felix Almanzar (“Grievant”). The grievance asserts that HPD terminated Almanzar in violation of a Stipulation of Settlement of a prior disciplinary proceeding. The City argues that the dispute is not arbitrable because Almanzar contravened the terms of the stipulation during a prescribed one-year probationary period and, by terms of the stipulation, knowingly waived his right to the contractual grievance procedure. The Union’s argument is that HPD informed Almanzar only after the probationary period that he had failed to complete probation successfully; therefore, Almanzar should have received a hearing. Since this Board finds that the signatories’ waiver

overrides any agreement to arbitrate, this Board grants the City's petition.

### **BACKGROUND**

Felix Almanzar held a position as Repair Crew Worker with the Department of Housing Preservation and Development. On April 24, 1998, Almanzar and the Union executed a Stipulation of Settlement with HPD regarding Disciplinary Case No. D82/96 and Office of Collective Bargaining Case No. A-6544-97. In return for the City's dismissing the disciplinary charges and reinstating Almanzar to his position as Repair Crew Worker, Almanzar agreed, among other terms, to remain on unpaid leave until the New York City Employee Assistance Program ("EAP") attested to his fitness, to be placed on probation for one year from the time he started work, to submit to a breathalyzer evaluation should the HPD have reasonable suspicion to believe that grievant was under the influence of alcohol during working hours, and – most relevant to this case – to supply medical documentation for each use of sick leave and to waive rights granted in accordance with contractual grievance procedures. Specific pertinent terms of the Stipulation read as follows:

FIFTH: The grievant will be on an unpaid leave of absence until he submits to the Department a letter from EAP attesting to his fitness to return to duty. Upon receipt of such letter, the Department agrees to promptly reinstate grievant to the position of Repair Crew Worker.

SIXTH: The grievant will be placed on disciplinary probation for one year commencing with the date he is reinstated to the position of Repair Crew Worker.

\* \* \*

ELEVENTH: During the disciplinary probationary period the grievant shall:  
a) Submit upon his return to work original medical documentation acceptable to the Department for each

use of sick leave or absences due to medical reasons; and

- b) Submit a written Request/Application for Leave Form for his supervisor's approval at least twenty-four (24) hours in advance of his use of any type or length of leave, including sick leave when circumstances permit (i.e. scheduled medical appointment, surgical procedure, etc.).

\* \* \*

SEVENTEENTH: The Department agrees to provide the grievant with any applicable documentation should the Department deem that he has violated the terms and conditions of this Stipulation of Settlement.

EIGHTEENTH: Should it be deemed by the Department that the grievant has violated any of the terms and conditions of this Stipulation of Settlement and that the termination of his employment is warranted, the Department agrees to allow the grievant five (5) business days after receipt of Notice of Termination for failure of probation to submit his letter of resignation.

NINETEENTH: The grievant agrees that should he violate any term or condition of this Stipulation of Settlement, absent a letter of resignation, his employment with the Department shall be terminated ten (10) business days after written notice is sent to his below noted address. . . . The grievant hereby waives any and all rights granted to him under the provisions of Sections 75 and 76 of the Civil Service Law as well as all rights granted to him in accordance with the Grievance Procedure set forth in the applicable collective bargaining agreement to appeal his termination from employment.

Almanzar returned to his position on May 18 or May 19, 1998, and thus his probationary period was complete on or around May 18, 1999. By letter of June 23, 1999, Bernard Schwarz, Assistant Commissioner, Resources Management and Labor Relations, informed Almanzar that he had violated Term Eleven of the Stipulation by failing to provide original medical documentation for sick leave on January 8, 1999, February 19, 1999, May 3, 1999, and May 4,

1999. (Petitioner's Exhibit No. 3.)<sup>1</sup> Attached to the letter was the City's computerized record of Grievant's attendance, in accordance with Term Seventeen. (Pet. Ex. 4.) The letter informed Almanzar that because he had not successfully completed his disciplinary probation, he would be terminated from his position on July 9, 1999, unless he submitted a letter of resignation by July 1. Almanzar submitted a letter of resignation on July 9 (Pet. Ex. 5), but HPD accepted the resignation, which then became effective on July 13. (Pet. Ex. 3.) The Union filed a request for arbitration on September 18, 2000. There is no information in the pleadings of any Step grievance proceedings. Grievant seeks restoration to his job and all lost pay.

## **POSITIONS OF THE PARTIES**

### **City's Position**

HPD argues that Almanzar and the Union, by the terms of the Stipulation of Settlement, specifically waived any contractual grievance rights in exchange for Grievant's being allowed to continue his employment. The City acknowledges that its collective bargaining agreement ("CBA") with the Union includes a provision, Article VI, § 1(e), for grievance and arbitration of claims concerning wrongful disciplinary action.<sup>2</sup> However, the City contends, the parties' stipulation indicates that HPD's termination of Almanzar does not fall within the meaning of

---

<sup>1</sup> In this decision, Petition is denoted by "Pet."; Answer by "Ans"; Exhibit by "Ex."

<sup>2</sup> Art. VI, § 1(e), defines the term "grievance" 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.

disciplinary action as defined by the CBA. Rather, as a “last chance” probationary agreement, the stipulation gives HPD the authority to end Almanzar’s employment without a hearing if he failed to satisfy probation. (Pet. ¶¶ 16-21.)

The City compares the instant case to *City of New York and District Council 37, Local 376, AFSCME*,<sup>3</sup> in which the Board found that the grievant and his Union had, by stipulation, waived the right to arbitrate disputes arising from a disciplinary problem and had agreed that management had authority to terminate the grievant for misconduct during the probationary period. Since, according to the City, the dates for which Almanzar failed to provide HPD with medical documentation fall within the probationary period, HPD had discretion to terminate Grievant, and such discharge is not arbitrable. (Pet. ¶¶ 25-27.) Finally, the City argues that Almanzar’s voluntary resignation, though late, shows that HPD took no actual disciplinary action which could be construed as a grievance under the CBA. (Pet. ¶¶ 30-31.)

### **Union’s Position**

The Union’s argument is that on or around May 18, 1999, Almanzar had successfully completed probation. At no time during the year did HPD inform him that he ever violated any condition of his probation. On June 23, the date of the Notice of Termination, Almanzar was no longer a probationary employee under the terms of the Stipulation of Settlement. Instead, he was a permanent employee of HPD covered by Section 75(1) of the Civil Service Law. Therefore, under Article VI, § 1(e) of the CBA, Almanzar could no longer be discharged as probationary employee under the terms of the Stipulation of Settlement. HPD’s failure to discharge Grievant

---

<sup>3</sup> Decision No. B-21-90.

prior to May 18 demonstrates that HPD irrevocably waived its right to terminate him as a probationary employee. (Ans. ¶¶ 33, 36-40.)

The Union generally denies the City's allegations (1) that Almanzar violated Term Eleven of the stipulation by failing to document sick leave on the four days in question; (2) that the dispute is not arbitrable because Almanzar and the Union waived contractual grievance rights for stipulated violations during the probationary period; and (3) that HPD had sole discretion to determine whether Almanzar violated the terms of the stipulation. (Ans. ¶¶ 8, 21; 16, 25; 27.) The Union asserts that Grievant's July 9, 1999, letter of resignation has no legal consequence since it was coerced by HPD's Notice of Termination; thus the termination was an actual or constructive discharge, and the grievance is arbitrable. (Ans. ¶ 42.)

### **DISCUSSION**

The question in this case is: When a grievant and a union sign a waiver of contractual grievance procedure in a "last chance" agreement, is a dispute over a termination arbitrable if the grievant allegedly violated the stipulation during the probationary period but the employer informed the grievant after the probationary period was over? This Board finds that since the parties did not specify a time limit for notification in the stipulation and since the Board cannot create a duty to arbitrate that would, essentially, override the signatories' waiver agreement, this grievance is not arbitrable.

To determine arbitrability, this Board considers, first, whether the parties have agreed, in a collective bargaining agreement, to arbitrate the type of controversy in question, and, second,

whether the grievance is arguably related to the cited provision in the CBA.<sup>4</sup> In *District Council 37, Local 376*, the grievant signed a stipulation to dispose of disciplinary charges.<sup>5</sup> The stipulation provided that any violation of the conditions of the probation or any other misconduct would result in immediate termination.<sup>6</sup> During the one-year probation, in November 1988, a supervisor observed the grievant and several other employees eating at a restaurant far from their construction worksite during working hours. The other employees involved were docked one day's pay for the misconduct. The City notified the grievant in June 1989 that he had violated his probation and would be terminated. He received the official notification on or after July 5, about one week after his probationary period expired.<sup>7</sup>

In *Local 376*, this Board found that the City discharged the grievant for engaging in misconduct committed during the probationary period and that the stipulation did not limit the time during which the City could terminate the grievant for violation of the specific paragraph of the stipulation. Furthermore, the grievant and his union had unequivocally waived the right to arbitrate disputes arising from the application of the specific term. Therefore, the City had no obligation to serve the grievant with disciplinary charges or afford him a hearing before

---

<sup>4</sup> *City of New York & Dep't of Health and City Employees Union, Local 237, I.B.T.*, Decision No. B-43-98 at 4; *City of New York & New York City Dep't of Finance and District Council 37, Local 1549, AFSCME*, Decision No. B-33-98 at 7; *District Council 37, Local 376*, Decision No. B-21-90 at 8.

<sup>5</sup> B-21-90 at 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 3.

terminating his employment.<sup>8</sup>

In *City Employees Union, Local 237*, and in *District Council 37, Local 1549*, this Board followed the *Local 376* case.<sup>9</sup> In both decisions, the parties to the stipulation had agreed that misconduct during the probationary period would constitute a basis for summary dismissal, and the employer had retained the control to determine whether the grievant had violated the terms of the stipulation.<sup>10</sup> This Board found no authority to send the cases to an arbitrator to review the findings of the employer.<sup>11</sup>

In the instant case, the parties do not dispute that absent the Stipulation of Settlement, Almanzar's grievance arguably would be arbitrable. However, by Term Nineteen, the Grievant and the Union agreed to waive all rights granted in accordance with the grievance procedure in the CBA. We find no basis to override the parties' waiver agreement. In addition, the parties expressly agreed in Paragraph 11 that the City could terminate Almanzar's employment if he failed during the probationary period to provide original medical documentation for days he took sick leave. Under Paragraph 18, if HPD deemed that Almanzar violated any term of the stipulation, HPD could terminate his employment. The record indicates that Almanzar did not provide acceptable documentation upon his return from four days of sick leave.<sup>12</sup> Thus, as in the

---

<sup>8</sup> *Id.* at 10-11.

<sup>9</sup> Decision Nos. B-43-98, B-33-98.

<sup>10</sup> *City Employees Union, Local 237*, B-43-98 at 5; *District Council 37, Local 1549*, B-33-98 at 9-10.

<sup>11</sup> B-43-98 at 6; B-33-98 at 9-10.

<sup>12</sup> The City has attached records to show that Almanzar took undocumented leave on four occasions within the probationary period, including two days in May, close to the end of



*Local 376* case, with facts similar to those here, this Board finds that the terms of the Stipulation of Settlement permit the City to terminate the Grievant summarily for a violation of the stipulation. Also, just as in *Local 376*, the stipulation here provides no time requirement for notification of termination. We do not find that the City was precluded from notifying Almanzar approximately five weeks after the probationary period was over since the violations occurred during probation. In this case, the time frame for the notification was not unreasonable. Accordingly, we grant the City's petition and dismiss the request for arbitration.<sup>13</sup>

---

probation.

<sup>13</sup> Having decided this case for the reasons noted above, this Board will not reach the question whether Grievant's resignation demonstrates that the City took no disciplinary action. We note that absent the stipulation, the City would have been under no obligation to accept Almanzar's resignation. The City complied with the term in the stipulation to allow Almanzar to resign, and he availed himself of that opportunity.

**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 HPD's petition challenging arbitrability be, and the same hereby is granted; and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is denied.

Dated: June 14, 2001  
New York, New York

---

MARLENE A. GOLD  
CHAIRMAN

---

DANIEL G. COLLINS  
MEMBER

---

GABRIELLE SEMEL  
MEMBER

---

CHARLES G. MOERDLER  
MEMBER

---

RICHARD A. WILSKER  
MEMBER

---

EUGENE MITTELMAN  
MEMBER