Dept' of Employment & City v. L. 371, SSEU, 67 OCB 8 (BCB 2001) [Decision No. B-8-2002 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

DEPARTMENT OF EMPLOYMENT and
the CITY OF NEW YORK,

Petitioners,

Decision No. B-8-2001
Docket No. BCB-2168-00
(A-8099-00)
(A-8172-00)

-and-

SOCIAL SERVICE EMPLOYEES UNION
LOCAL 371, AFSCME, AFL-CIO,

Respondent.

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DECISION AND ORDER

The City of New York ("City") and the Department of Employment ("DOE") filed a petition challenging the arbitrability of grievances filed by the Social Service Employees Union, Local 371, AFSCME, AFL-CIO ("Union") on behalf of a DOE employee, Emerita Rivera. The City alleges that the waiver requirement, under § 12-312d of the New York City Collective Bargaining Law ("NYCCBL"), was violated when Rivera filed a court action against the City based upon the same underlying dispute. Rivera, represented by counsel, alleges that the claims in the court action differ from the claims in the requests for arbitration. The petition is granted for the reasons discussed below.

BACKGROUND

Rivera has been employed by the DOE since 1968. Since 1994, she has served in the Civil

Service title of Contract Specialist II in the DOE's Summer Youth Employment Program ("SYEP"). A function of the job requires that the Contract Specialist make periodic visits to different field offices. In April 1998, the Rivera informed the DOE that she believed that a medical condition prevented her from making the field visits. She requested and was granted a medical leave of absence from June 16, 1998, through November 30, 1998. When Rivera returned from leave on December 1, 1998, she requested a reassignment because she believed that her medical condition still precluded her from performing field work. She was subsequently referred for a medical evaluation pursuant to § 72 of the Civil Service Law, which provides for involuntary leave due to a disability. She was examined by two physicians, and was found mentally and physically fit to perform the full duties of her position. She was notified of the withdrawal of the § 72 proceeding by letter from the DOE, dated February 9, 1999.

On July 12, 1999, Rivera was served with disciplinary charges, and on July 20, 1999, she was served with a revised notice and statement of charges regarding her alleged refusal to perform field work necessary to complete her project monitoring duties. Step I, II, and III hearings were held and the charges were sustained. A penalty of five days' suspension without pay was imposed.

On September 14, 1999, Rivera was served with a second set of disciplinary charges regarding her alleged refusal to perform field work. After Step I and Step II hearings, the charges were upheld and a penalty of ten days' suspension without pay was imposed.

On October 20, 1999, Rivera filed a *pro se* complaint against the DOE with the United States District Court for the Southern District of New York. Rivera alleged that the Department had violated Title VII of the Civil Rights Act of 1964 by allegedly failing to promote her and retaliating

against her based on race and age.

On February 4, 2000, the Union filed a request for arbitration, which was docketed as Case No. A-8099-00. The grievance stated is whether Rivera was wrongfully disciplined in violation of the collective bargaining agreement when she was suspended without pay for five days. The requested remedy is restoration of all monies lost. The request was accompanied by a waiver, executed by Rivera on December 1, 1999.

On February 25, 2000, Rivera was served with a third set of disciplinary charges regarding her refusal to perform field work. After Step I and Step II hearings, the charges were upheld and a penalty of termination recommended. Following the Step II conference, Rivera's employment was terminated effective March 24, 2000.

On March 20, 2000, the Union filed a second request for arbitration docketed as Case No. A-8172-00. The grievance stated is whether the grievant was wrongfully disciplined in violation of the collective bargaining agreement when she was suspended without pay for ten days and when her employment was terminated. The requested remedy is restoration of all monies lost. The request was also accompanied by a copy of a waiver executed by Rivera on December 1, 1999.

On September 29, 2000, Rivera, represented by counsel, filed an amended court complaint against the DOE in the Title VII action. The first claim in the amended complaint alleges that the suspensions and termination of the grievant and failure to promote or transfer her constituted discrimination against her on the basis of her race and national origin and retaliation against her for filing a complaint with the Equal Opportunity Commission. The second claim in the amended complaint alleges that the grievant was suspended and terminated because of her disability or

perceived disability, in violation of the Rehabilitation Act, 29 U.S.C. §794.

The third and fourth claims in the amended complaint allege that Rivera's suspension and termination, and the failure to promote or transfer her constituted discrimination in violation of the New York State Human Rights Law, and the New York City Administrative Code. These claims also allege harassing treatment as a result of her alleged request for accommodation for her medical condition. Much of the history revolving around Rivera's medical problems and subsequent disciplinary actions are reiterated in the third and fourth claims. The remedy requested is that the City reinstate her to a higher title than her former title with back pay and benefits, with interest.

POSITIONS OF THE PARTIES

City's Position

The City argues that the litigation of the same underlying dispute in the court action has rendered the grievant and the Union unable to fulfill the statutory condition precedent to submitting this dispute to arbitration. The requirement of a waiver under § 12-312(d) of the New York City Collective Bargaining Law ("NYCCBL") is a condition precedent to arbitration.

The City urges the Board of Collective Bargaining ("Board") to utilize the standard set forth in *City of New York v. District Council 37, AFSCME, AFL-CIO*, Decision No. B-28-87. In this case, the Board enunciated the following standard on pages 26, 27, and 28:

> A union is deemed to have submitted the underlying dispute to two forums where the matter in controversy involves either common legal issues or common factual issues.
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> The Board may find that the same underlying dispute has been submitted to two forums even where the Union has neither cited the same statute, rule, regulation, or contract provision nor requested the same remedy. Furthermore, the Board has denied arbitration even where the party raised additional matters in the other forum beyond those asserted in the request. Thus, in applying Section [12-

> 312(d)], the Board has generally denied arbitration where the party has commenced another proceeding seeking permanent relief.

Here, even though the issues presented to the court also include alleged failure to promote or transfer the grievant, all of the causes of action allege that the grievant's two suspensions and termination violated her statutory rights by discriminating and retaliating against her based upon her race, national origin, and actual or perceived disability. The underlying dispute in both the instant grievances and in the judicial proceeding involves the legitimacy of the DOE's discipline of the grievant, and the same facts lie at the core of the grievance and the federal case: either the grievant was physically and mentally able to fully perform the duties of her position and engaged in misconduct by refusing to do so, or the grievant was medically unable to perform those duties, and the DOE wrongfully disciplined her for refusing to perform those duties. Like the arbitration, the federal case will almost certainly require the employer to come forward with legitimate nondiscriminatory reasons for the discipline and termination imposed.[1]

The City notes that since the parties are the same, the actions arise from the same factual circumstances and dispute the validity of the same disciplinary events, the same underlying dispute has been submitted to two forums. The Board should also consider that the undesirable potential consequence of allowing both proceedings to go forth simultaneously is the possibility of different disciplinary outcomes involving the same individual.

The fact that the underlying dispute concerning grievant's suspension and termination also involves claims of statutory discrimination does not render the waiver valid. Although the City is aware of the Board's rejection of the City's challenges to the validity of waivers in Decision Nos.

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[1] *McDonnell-Douglas v. Green*, 411 U.S. 792 (1975).

B-9-74 and B-64-91, based upon the Board's interpretation of the United States Supreme Court's decision in *Alexander v. Gardener Denver*,[2] subsequent cases establish that *Alexander* is not controlling in the instant case, for various reasons.

Grievant's Position

The grievant argues that despite her previous filing of a charge of discrimination with the EEOC, the Board has held that a grievant may still execute an effective waiver.[3] The Board has distinguished between claims brought under Title VII and other Civil Rights claims versus those that do not claim discrimination, citing the mandate of *Alexander*.[4] Moreover, the Union sought arbitration, claiming violations of the parties' collective bargaining agreement – nowhere in its Request for Arbitration does the Union make claims regarding discrimination. On the other hand, in her Federal Amended Complaint, the grievant avers discrimination based on Race, National Origin, Disability and Retaliation, pursuant to Federal, State and/or Local Civil Rights Laws. Thus, the claims are not the same dispute, and there is no reason under § 12-312 of the NYCCBL why the claims may not be heard in different forums.

DISCUSSION

The waiver requirement is set forth in § 12-312d of the NYCCBL. It reads:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the

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2 94 S.Ct. 1011(1974).

3 Decision No. B-64-91.

4 Decision Nos. B-64-91 and B-9-74.

> underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

The statutory waiver requirement is a jurisdictional condition precedent to the Board's authority to order a case to arbitration. The purpose of the waiver provision set forth in §12-312(d) is to prevent multiple litigations of the same dispute and to assure that the grievant who elects to seek redress through the arbitration process will not attempt to relitigate the matter in another forum.[5]

Here, we find that the grievant has submitted the same dispute to two different forums, and that in so doing, she has violated the waiver provision and may not avail herself of arbitration while simultaneously prosecuting her civil claim. The grievant's suit in federal court includes alleged violations of Title VII and the Rehabilitation Act, as well as provisions of state and city law. In considering these claims in their totality, we find that for the purposes of § 12-312d, they concern the same underlying dispute because both the statutory claims and the contractual grievance arise, substantially, from the events surrounding the grievant's suspension and termination. The suit in federal court may contain other factual and legal arguments, but, as we have held before, and noted above, the assertion of additional claims beyond those asserted in the request for arbitration is not germane to the outcome. We also note that the grievant could have elected to submit her claims in either of the forums available, yet chose to pursue both. Accordingly, for all the reasons stated above, we shall deny the grievant's requests for arbitration, and grant the City's petition challenging arbitrability.

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[5] *City of New York v. District Council 37, AFSCME, AFL-CIO*, Decision No. B-28-87.

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 be, and the same hereby is, granted; and it is further

ORDERED, that the requests for arbitration filed by the grievant be, and the same hereby is denied.

Dated: March 28, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER