City & FDNY v. L. 2507, DC 37, 69 OCB 41 (BCB 2002) [Decision No. B-41-2002 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

CITY OF NEW YORK AND THE NEW YORK CITY FIRE DEPARTMENT,

Decision No. B-41-2002
Docket No. BCB-2222-01 (A-8858-01)

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 2507, AFSCME,

Respondent.

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DECISION AND ORDER

The City of New York and the New York City Fire Department ("City"or "Department") filed a petition on June 15, 2001, challenging the arbitrability of a grievance brought by District Council 37, Local 2507 ("Union") on behalf of Daniel Graham ("Grievant"). The grievance asserts that the Department's Bureau of Emergency Medical Service wrongfully terminated Graham when the Department treated a positive drug test result as a violation of a Stipulation of Settlement of a prior disciplinary proceeding ("Stipulation"). The City argues that the dispute is not arbitrable because Graham contravened the terms of the Stipulation during a prescribed one-year period and, by terms of the Stipulation, knowingly waived his right to the contractual grievance procedure. The Union contends that the alleged misconduct occurred before, not after, the signing of the Stipulation; therefore, Graham should be afforded arbitration over the factual issues. Since this Board finds that the City's actions were within the scope of the Stipulation and

the signatories' waiver overrides any agreement to arbitrate, we grant the City's petition.

BACKGROUND

Graham held a position as an Emergency Medical Services Specialist – EMT ("E.M.T."), since May 1996. On February 22, 1999, he pleaded guilty to criminal trespass, a violation, in satisfaction of one charge of trespass and one charge of unlawful possession of marijuana. The next year, on February 2 and March 6, 2000, the Department brought three disciplinary charges against Grievant (1) for failure to inform the Department promptly of his arrest, (2) for his conviction of trespass, and (3) for the arrest based on unlawful possession of marijuana.

On March 6, 2000, Graham executed a Stipulation of Settlement with the Department regarding these disciplinary matters. In lieu of a hearing at the Office of Administrative Trials and Hearings and in return for the City's dismissing the disciplinary charges and keeping Grievant in his position as an E.M.T., he agreed, among other terms, to the following:

> 8. That E.M.T. Graham understands that, upon execution of this agreement, he will be tested at the sole discretion of the Department for alcohol, marijuana and any other controlled substance use and/or abuse commencing immediately and continuing for a period of twelve (12) months from the execution of this agreement.
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> 10. That E.M.T. Graham understands that any refusal to submit to any test ordered by the Department, any refusal to take breath, blood or urine test requested by a law enforcement agency in connection with an arrest, or the finding of the presence of alcohol, marijuana or any other controlled substance in his blood or urine will be deemed to be a violation of this agreement.
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> * * *

> 14. That E.M.T. Graham understands that in the event of any violation of this agreement and/or any future misconduct related to alcohol, marijuana, or controlled substance, including conviction, for a period of twelve (12) months following the execution of this stipulation, he will be terminated, and that the Department has the right to terminate his services without a hearing of any kind, and E.M.T. Graham hereby waives any and all rights, including any right to a disciplinary hearing pursuant to Sections 75 and 76 of the Civil Service Law, Article 78 of the Civil Practice Law and Rules, and any applicable collective bargaining agreement.
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> 19. That this Stipulation constitutes a waiver by E.M.T. Graham whereby he is estopped from commencing or continuing any judicial or administrative proceedings or appeal, before any court of competent jurisdiction, administrative tribunal or Civil Service Commission, including but not limited to, actions pursuant to the Civil Rights Act of 1964 or any other Federal Civil Rights Statute . . . , and any applicable contractual grievance procedures, to contest the authority and jurisdiction of the Fire Department to impose the terms and conditions which are embodied in this Stipulation.

Graham also acknowledged in Paragraph 21 that he signed the Stipulation knowingly and intentionally after discussions with and advice from counsel or a union representative.

On March 14, 2000, the Department conducted a urine test pursuant to the terms of the Stipulation entered into the previous week. On May 1, 2000, the Department received the results of the blood test, which showed that Grievant tested positive for marijuana. The Department suspended Grievant that same day.

On May 12, 2000, the Department notified Graham that he had seven days, under Paragraph 15 of the Stipulation, to present any mitigating evidence. On May 19, 2000, Graham requested a retest of the March 14 sample and was reinstated to restrictive duty on May 31. The

retest showed a positive result. Graham was terminated on June 8, 2000.

According to the Union, Grievant was also tested on April 6, 2000, and that result was negative. No exhibit was attached to the answer, and no information presented as to the dates the parties received the results.

On June 13, 2000, the Union, alleging wrongful termination, filed a grievance at Step II. The Department did not schedule a conference for Step II or for the requested Step III appeal. The Union filed a Request for Arbitration on May 5, 2001, seeking back pay and reinstatement under Article VII, § 1(e), of the collective bargaining agreement ("CBA.")

POSITIONS OF THE PARTIES

City's Position

The City acknowledges that the CBA includes a provision, Article VII, § 1(e), for grievance and arbitration of claims concerning wrongful disciplinary action but argues that Graham, by the terms of the Stipulation, specifically waived those rights in exchange for being allowed to continue his employment.[1] Paragraph 14 of the Stipulation, the City contends, specifically gave the Department the authority during a stipulated period to terminate him without a disciplinary hearing for any misconduct related to marijuana and other controlled substances.

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[1] Art. VII, § 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.

The City urges the Board to adhere to cases in which the Board determined that an employee who has temporarily waived the right to contractual grievance procedures under a stipulation may not resort to those procedures if s/he is terminated for conduct proscribed by the stipulation. Since Graham waived all grievance rights and tests showed that he violated the Stipulation, the Department contends, it had authority to terminate Grievant without a hearing.

Union's Position

According to the Union, a careful reading of Paragraph 8 of the Stipulation reveals that Graham waived his right to grieve a wrongful termination only for "alcohol, marijuana and any other controlled substance use and/or abuse commencing immediately" from the March 6 execution of the Stipulation. (Answer ¶ 20; Union's emphasis.) Graham thus waived his right to challenge a wrongful termination for marijuana use or abuse starting March 6, and not before.

The Union asserts that the drug tests administered by the Department can detect only the residue of past drug use, not the actual presence of marijuana, and thus do not reveal when a person used the drug. Since Graham was a longtime, frequent user of marijuana in the past, the drug tests employed by the Department demonstrate only that he smoked in the past, not around the time of the test. To support its position, the Union offers an affidavit by Dr. John P. Morgan.

According to the Union, Graham stopped using marijuana in mid-February 2000, after the Department filed charges against him. (Answer ¶ 33.) As soon as he was notified of the positive drug test, Graham informed the Department that he had not used marijuana since he had signed the Stipulation. The City neglected to acknowledge his statement and unfairly overlooked the fact that the April 6 test was negative, another indication that the March 14 positive result was

due only to past use. Thus, according to the Union, the actual misconduct did not occur during, but before, the stipulated period.

A drug test that is scientifically incapable of detecting the time or date of drug use, the Union declares, is a legally insufficient basis on which to preclude arbitration. Since the City did not hear the claim at the lower steps of the grievance procedure, the Union should now have the right to establish wrongful termination under the CBA for conduct that occurred prior to March 6 and, therefore, is not covered by the language of the Stipulation.

DISCUSSION

The issue in this case is whether the Stipulation of Settlement precludes processing the grievance. When, as here, parties have expressly waived their grievance procedure for specific disputes, this Board cannot override the signatories' agreement and compel either party to arbitrate those disputes. The record persuades us that the City has acted within the scope of the "last chance agreement." Accordingly, the petition is granted.

In determining arbitrability, this Board must decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy presented. *Social Service Employment Union*, Decision No. B-2-69 at 2; *see Social Service Employees Union, Local 371*, Decision No. B-22-2001 at 6. In this case, the parties do not dispute that absent the Stipulation, Graham's claim could be arbitrable. However, the City contends that in the Stipulation, Graham waived arbitration under the CBA, and thus the parties have agreed specifically not to arbitrate this

particular controversy.

This Board has repeatedly denied requests for arbitration when parties have agreed in a stipulation of settlement of disciplinary charges that future misconduct during the stipulated period would constitute a basis for summary dismissal. *Social Service Employees Union, Local 371*, Decision No. B-22-2001; *District Council 37, Local 1549, AFSCME,* Decision No. B-33-98; *District Council 37, Local 376,* Decision No. B-21-90. The Board looks at the scope of the parties' stipulation and then determines whether the issue raised falls within the parameters of the parties' agreement. *City Employees Union, Local 237, International Brotherhood of Teamsters*, Decision No. B-43-98 at 4-5. For example, if the parties have stipulated that discipline for certain misconduct is not arbitrable, and the grievant was terminated for that type of misconduct committed during the specified period, we will not inquire into the particulars of the grievance or attempt to interpret the language of the stipulation. *Id.* at 6.

In *Social Service Employees Union, Local 371*, Decision No. B-22-2001, and *District Council 37, Local 376,* Decision No. B-21-90, the grievants alleged that their claims were arbitrable because they received notice of termination after the specified period expired. The stipulations in both cases made no mention of a cutoff date for notification, and, since the conduct occurred during the stipulated period, we found no basis to override the parties' waiver agreement. *Local 371*, Decision No. B-22-2001 at 8; *Local 376*, Decision No. B-21-90 at 9. In *District Council 37, Local 1549*, Decision No. B-33-98, the grievant claimed that another person was responsible for the actions for which she was terminated. We found that the stipulation specifically gave her employer the right to determine whether the grievant had violated the terms

of the agreement, the employer had so determined, and her termination was pursuant to the stipulation; thus, the grievance was not arbitrable. *Id*. at 8-9. Finally, in *City Employees Union, Local 237*, Decision No. B-43-98, the union contended that the grievant's termination was due not to a violation of the stipulation but rather to "some other reason," which the union did not specify. *Id*. at 4. Again we found that we would not override the clear language of the stipulation, in which the parties waived their rights to contractual grievance procedures and gave exclusive authority to the employer to determine violations. There were no allegations that the party attempting to use the stipulation as a bar to arbitration intentionally breached the agreement or engaged in bad faith in the termination of the grievant. Such allegations could arguably fall outside the scope of those arbitration waivers.

We reiterate that we conduct a specific analysis of the provisions of a last chance stipulation in each case to determine whether either party has reserved any arbitration rights. Here, the language specifies that the grievant waived his right to a hearing on any issue concerning drug and alcohol testing. The Union nevertheless is asking us to find that the conduct in question – the use of marijuana – occurred prior to the signing of the Stipulation and, thus, under Paragraph 8, falls outside the scope of the Stipulation. Nothing on the face of the agreement indicates such an exclusion. Therefore, we find no grounds upon which to submit this question to arbitration.[2]

Nor is it appropriate for this Board to find arbitrable the validity of drug tests when the

[2] In the instant case, the Union argues that *District Council 37, Local 1549*, Decision No. B-33-98, is distinguishable from this one because here the Union presents a factual issue. However, *Local 1549* did not address whether a factual issue was presented. Rather, the question the Board considered was whether the City's action was pursuant to the last chance agreement on its face, without requiring any interpretation of that agreement.

parties have not so specified in the stipulation. If the parties had reached an understanding that particular tests should be employed or that any testing immediately following the execution of the agreement would be invalidated by the possibility of prior drug use, they could have included that language in the Stipulation.

Finally, the Union argues that the Stipulation does not provide the City with the unfettered right to terminate Graham for misconduct related to controlled substances. However, Paragraph 14 explicitly gives the Department the right during a one year period to terminate him without a hearing for any misconduct related to marijuana or other controlled substances. The Union does not allege that the City has intentionally violated the agreement or acted in bad faith in terminating Graham. Therefore, following our precedents, we find that the Department acted within the scope of the Stipulation, and Graham's termination under that Stipulation is not arbitrable.

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 City's petition challenging arbitrability, docketed as BCB-2222-01, be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 2507, be, and the same hereby is, denied.

Dated: November 22, 2002
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER

The Labor members dissent in the attached opinion.

DISSENTING OPINION

We dissent from the Decision and Order.

Preliminarily, it should be emphasized that paragraph 14 of the March 6, 2002 Stipulation of Settlement makes it clear, beyond peradventure, that the violative conduct was intended to be prospective only. Hence, only such conduct as demonstrably occurred subsequent to the March 6, 2002 execution of the Stipulation of Settlement could operate to effectuate the terms of the so-called "last-chance agreement" provided under the Stipulation.

The record demonstrates the following to be relevant facts—indeed, the majority does not disagree. Some eight days after the execution of the Stipulation of Settlement, a urine test was conducted. That test, which serves as the basis for the Grievance discharge, assertedly ultimately showed a positive result for the use of prohibited substances.[1] On behalf of Grievant the Union maintained that an April 6, 2000 test was conducted and that it showed a negative result.[2] The Union also maintained that drug tests of the kind here administered "can detect only the residue of past drug use, not the actual presence of marijuana, and thus do not reveal when a person used the drug." See, majority opinion at p. 5. Indeed, the Union submitted a supporting affidavit of a physician, who also showed that, since Grievant was a long-time, frequent user of marijuana in the past, the drug test employed was merely retrospective.

The majority holding abridges New York public policy. As the Court of Appeals has made clear, arbitration, particularly in this context, is favored. Indeed, even under what might be

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[1]The sample which was produced by the March 14, 2000 test was later retested and again found positive. However, it must be stressed that the sample that was retested at a subsequent date was simply the same product of a March 14, 2000 test.

[2]While no corroborative evidence was submitted with the answer, proof of the April 6, 2000 test and its asserted results would obviously constitute an important, if not critical, item of proof in any arbitration, but is not required at this juncture since we are not here as the fact finders.

viewed by some as troublesome circumstances, the Court of Appeals reiterated that public policy position In Matter of New York City Transit Authority v. Transport Workers Union of America, Local 100, AFL-CIO, et al., ___ NY2d, ___, 2002, NY/OP 07241 (Oct. 10, 2002).

Here several factual issues are critical to any determination as to whether the last-chance Stipulation could be invoked to bar arbitrability. If, as the Union maintains on behalf of the Grievant, the conduct complained of was not clearly and solely referable to events occurring subsequent to the March 6, 2000 execution of the Stipulation of Settlement, the arbitrator could properly conclude that Grievant could not be punished. It is not our province to determine those facts. The Union has made a proffer, including the affidavit of a physician, to support its position. Likewise, the Union has made a proffer of subsequent drug testing that provided a contrary result to that he claimed as providing a basis for discharge. Those facts, in and of themselves, give rise to a fair ground for adversarial testing in the context of arbitration proceedings. C£, United Steel Workers of America, AFL-CIO-CLC, 969 F2d 1468 (3rd Cir 1992).

The determination by the majority to deny Grievant the opportunity to exhaust a contractual right to arbitration abridges public policy and is, we submit, in error.

DATED: December 3, 2002
New York, New York

CHARLES G. MOERDLER
LABOR MEMBER

BRUCE SIMON
LABOR MEMBER