City & FDNY v. UFA, 73 OCB 3A (BCB 2004) [Decision No. B-3A-2004]

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 NEW YORK CITY FIRE DEPARTMENT,

Decision No. B-3A-2004
Docket No. BCB-2365-03
(A-10199-03)

Petitioners,

-and-

UNIFORMED FIREFIGHTERS ASSOCIATION
OF GREATER NEW YORK,

Respondent.

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DECISION AND ORDER

On February 20, 2004, the City of New York and the New York City Fire Department ("FDNY"or "City") filed a motion for reconsideration of *Uniformed Firefighters Ass'n of Greater New York*, Decision No. B-3-2004, dated January 29, 2004. The decision denied, in part, the City's petition challenging the arbitrability of a group grievance brought by the Uniformed Firefighters Association of Greater New York ("UFA" or "Union") based on the Board's finding that a reasonable relationship exists between a portion of the grievance and the parties' collective bargaining agreement ("Agreement"). The City argues for reconsideration on the grounds that the waiver filed by the Union, pursuant to §12-312(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), has been rendered invalid by the Union's subsequent filing of a federal lawsuit in

connection with the same underlying dispute. The Union argues that the motion for reconsideration should be denied because the grievance and the federal lawsuit do not involve the same parties or legal claims. In the alternative, the Union argues that, if the waiver is found invalid, the appropriate remedy would be an order precluding arbitration only until such time as the Union withdraws from the federal lawsuit. Since the parties to the grievance alleging a violation of the Agreement have also alleged a violation of the Agreement in a federal suit, we find that the Union has not submitted a valid waiver as required by NYCCBL § 12-312(d). The federal court claims alleging violations of statutory and constitutional rights, on the other hand, did not impact the validity of the waiver. Thus, upon reconsideration, this Board finds that, unless and until the federal plaintiffs withdraw the *contractual* claims from their lawsuit, the City's petition challenging arbitrability is granted and the Union's request for arbitration is denied.

BACKGROUND

On September 4, 2003, the UFA President filed a Step III grievance "on behalf of himself, all consenting grievants, and for all other firefighters similarly situated." The grievance asserts:

> The Department has unilaterally promulgated a list of Firefighters who, in their arbitrary judgment, have used substantial service-connected medical leave. An order was issued that at least 19 Firefighters from the list would be unilaterally reassigned to another company because of their use of service-connected medical leave. However, on August 29, 2003, the UFA was notified by FDNY Labor Relations Director Lillian Rivera-Inzerillo that the Department would re-assign members with a higher rate of usage of service-connected medical leave than their peers to other less active work environments for the "members' best interests." These reassignments are not only disciplinary punishment without providing the

> contractual protections for discipline, but also violate existing policies, procedures and regulations of the Fire Department affecting the terms and conditions of employment and violate the collective bargaining agreement. This Grievance is on behalf of all Firefighters who will be affected by this notification and all others similarly situated.

On September 29, 2003, the Union filed a request for arbitration with the Office of Collective Bargaining ("OCB"). The named grievant was the UFA President "on behalf of himself and all other Firefighters similarly situated who have been involuntarily transferred."

The Union attached a signed waiver by the UFA President "hereby waiv[ing] the UFA's right to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award." The language of the waiver submitted exactly tracked the language used in NYCCBL § 12-312(d), § 1-06(b)(1)(iii) of the Rules of the OCB (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"), and OCB's Request for Arbitration "Waiver" Form.[1]

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[1] NYCCBL § 12-312(d) provides:

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

(Emphasis added.)

OCB Rule § 1-06(b)(1)(iii) provides:

> [W]hen the party requesting arbitration is a public employee organization, file a waiver, signed by the grievant(s) and the public employee organization, waiving any rights *to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.*

(Emphasis added.)

On October 30, 2003, the City filed a petition challenging arbitrability with OCB on the grounds that the grievance was not reasonably related to the Agreement and the department policies allegedly violated. The City noted, in its verified reply dated December 12, 2003, that the Union had hired a law firm to explore the possibility of filing a federal lawsuit to stop the reassignments at issue.

On January 15, 2004, the Union, the UFA President, John Doe, Jane Roe, and 25 named firefighters filed a complaint with the United States District Court for the Eastern District of New York against the City, FDNY, and three FDNY officials. *See Cassidy v. Scoppetta*, No. 04 Civ. 0155 (E.D.N.Y.). The plaintiffs alleged that the defendants' detailing of firefighters with a history of service-connected medical leave violated the state and federal constitutions, 42 U.S.C.§ 1983, Title VII of the Civil Rights Act of 1964, the American with Disabilities Act, the Labor Management Relations Act of 1947, the New York State Executive Law, the New York State Human Rights Law, the New York City Administrative Code, and lastly, the Agreement. Specifically, as and for a fourth cause of action, the plaintiffs alleged:

> All of the actions herein were undertaken in violation of a contractual agreement entered into by the City of New York and the Uniformed Firefighters Association

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OCB's waiver form requires that a representative of the union seeking arbitration as well as the grievant or grievants fill in a description of the grievance sought to be arbitrated and sign the following statement:

> The undersigned employee organization and employee(s) aggrieved in this matter waive the right, if any, *to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.*

(Emphasis added.)

> of Greater New York. The terms of the collective bargaining agreement contain provisions governing all changes in policies, practices and procedures pertaining to the firefighters for the New York City Fire Department.
>
> The detail policy disregards the CBA, enforcing a separate proviso not agreed to or in accord with the contractual agreement. The policies, procedures and practices of the defendants as set forth in this complaint violates the rights of plaintiffs under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185.[2]

Complaint ¶¶ 888-889, at 139-140.

On January 29, 2004, the Board issued *Uniformed Firefighters Ass'n of Greater New York*, Decision No. B-3-2004, denying the petition challenging arbitrability in regard to the claim that the transfers violated the disciplinary provisions of the Agreement, and granting the City's petition in regard to the claim that the transfers violated Department policies and regulations. Accordingly, the Union's request for arbitration was granted solely on the claim that the transfers violated Article XVII of the Agreement. In the decision, the Board noted, "[s]ince, to our knowledge, the Union has not filed a federal lawsuit, we do not address this issue." *Id.* at 9 n.7.

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union's request for arbitration should be dismissed because the Union has not filed a valid waiver, a statutory condition precedent to submitting the dispute to

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[2] Section 301 of the Labor Management Relations Act of 1947 provides:
Suits for *violation of contracts* between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties . . .
29 U.S.C. § 185(a) (emphasis added).

arbitration. According to the City, the Union has submitted the same underlying dispute, concerning the detailing of firefighters with above-average service-connected medical leave, to a federal court. The City asserts that there is a complete overlap in facts and law between the court action and the proposed arbitration. Accordingly, the Union's waiver is invalid and arbitration is precluded.

Union's Position

The Union argues that the waiver was not invalidated by the commencement of the federal lawsuit since the lawsuit involves different parties and seeks the determination of legal issues that are not before the arbitrator. The Union asserts that the UFA is the sole grievant in the arbitration. While the UFA is also a plaintiff in the federal suit, the other plaintiffs include 25 individual FDNY firefighters who are not named as grievants in the arbitration.

Furthermore, the Union claims that the disparity in the style of the two proceedings is consistent with a finding that they seek to resolve separate and distinct legal claims. According to the Union, while the arbitration is premised on the disciplinary provisions of the Agreement, the federal suit seeks vindication under various civil rights statutes. Since the City has failed to demonstrate identity of the legal issues and parties, the Union contends that the City's motion for reconsideration and underlying petition challenging arbitrability should be denied.

Alternatively, the Union argues that, if the waiver is invalid, outright dismissal of the request for arbitration is inappropriate. Since commencing a court proceeding is only a provisional election to present a dispute in a judicial forum, the request for arbitration should be denied and the petition challenging arbitrability granted only until such time as the UFA withdraws from the federal suit. The Union suggests that it be given a period of 30 days from

service of the order precluding arbitration to withdraw from the federal suit.

DISCUSSION

Section 12-312(d) of the NYCCBL provides:

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

See also OCB Rule § 1-06(b)(1)(iii); Request for Arbitration "Waiver" Form.

Here, the Union filed a letter waiving the right "to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award." The City challenges the effectiveness of this waiver.

In determining whether the "underlying dispute" has been raised in multiple forums, we are guided by several Supreme Court decisions and other case law. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), a unionized employee brought a race discrimination claim under Title VII after losing an arbitration on his claim that he suffered racial discrimination in violation of the collective bargaining agreement. Noting that "[t]he distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence," the Supreme Court held that "an individual does not forfeit his private cause of action [under Title VII] if he first pursues his grievance to final arbitration under the nondiscrimination clause of a CBA." *Id.* at 49-50; *see also Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 730 (1981) (a claim under the Fair Labor

Standards Act ("FLSA") was not barred by the prior submission of the grievance concerning the "same underlying facts"); *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 292 (1984) (an arbitration pursuant to a collective bargaining agreement should not be afforded *res judicata* or collateral-estoppel effect in a § 1983 action).

However, in *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 23 (1991), a case in which a non-unionized employee signed an arbitration agreement in a securities registration application as a condition of employment, the Court held that a claim under the Age Discrimination in Employment Act ("ADEA") could be subjected to compulsory arbitration.

The Court addressed the "tension" between *Gardner-Denver* and *Gilmer* in *Wright v. Universal Maritime Service Corp*., 525 U.S. 70, 76-77 (1998). There, a unionized employee filed a federal suit under the Americans with Disabilities Act ("ADA") rather than filing a grievance. The Court did not find it necessary to decide whether a union-negotiated waiver of a judicial forum to resolve statutory rights would be enforceable because what was asserted to be such a waiver was not "clear and unmistakable." *Id.* at 77, 82. The Court noted that "whether or not *Gardner-Denver*'s seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*, *Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA." *Id.* at 80. Since the arbitration clause in *Wright* was "general" and the remainder of the collective bargaining agreement did not contain "explicit incorporation of statutory antidiscrimination requirements," the Court refused to find a "clear and unmistakable" waiver of the employee's ADA claims. *Id.*

Following *Wright*, several courts have interpreted the requirement that waivers of a

judicial forum be "clear and unmistakable." In *Rogers v. New York University*, 220 F.3d 73, 74 (2d Cir. 2000), a case in which the collective bargaining agreement contained an arbitration provision but the employee proceeded with litigation, the Second Circuit affirmed the denial of a motion to stay the discrimination action under the ADA, the Family Medical Leave Act ("FMLA"), and New York State and City human rights laws, for two reasons, "either one of which," in the court's words, "would suffice." Following the lead of seven of eight circuits that had previously considered the question, the court held that *Gardner-Denver* was still good law. Thus, arbitration provisions in union-negotiated collective bargaining agreements that purported to waive the right to raise statutory claims in a federal forum were unenforceable. *Id.* at 75. The Court continued that even if such waivers were enforceable, the purported waiver in the collective bargaining agreement was insufficient because, under the standard enunciated in *Wright*, it was not "clear and unmistakable." *Id.* at 77. Citing a number of cases dealing with that standard, the court stated that a waiver of statutory rights contained in a collective bargaining agreement could be sufficiently clear and unmistakable if either: (1) the arbitration clause contained "a provision whereby employees specifically agree to submit all federal causes of action arising out of their employment to arbitration"; or (2) the collective bargaining agreement contained "an explicit incorporation of the statutory anti-discrimination requirements in addition to a broad and general arbitration clause." *Id.* at 76. By "specific incorporation," the court required that the collective bargaining agreement "should make compliance with the *named or cited* statute a contractual commitment that is subject to the arbitration clause." *Id.* (emphasis added).

Applying the "clear and unmistakable" test, the *Rogers* court found that the collective

bargaining agreement at issue did not contain an explicit waiver of a judicial forum because the arbitration clause, encompassing "any dispute concerning the interpretation, application, or claimed violation of a specific term or provision of this Agreement" was "broad and general." *Id.* Similarly, the anti-discrimination provision, which stated that "there shall be no discrimination as defined by applicable Federal, New York State, and New York City laws," did not incorporate any law explicitly. *Id.* at 74, 76. The clause entitling employees to the provisions of the FMLA "create[d] contractual rights coextensive with the FMLA," but did not "specifically make compliance with the FMLA a contractual commitment that is subject to the arbitration clause." *Id.* at 76; *see also Fayer v. Town of Middlebury*, 258 F.3d 117, 123 (2d Cir. 2001) (a clause providing for arbitration of disputes "as to the interpretation and application of any clause" in the collective bargaining agreement was not enforceable and did not prevent litigation of the plaintiff's constitutional claims brought under § 1983); *Kelly v. Classic Rests. Corp.*, No. 01 CV 09345, 2003 WL 22052845, at *4 (S.D.N.Y. Sept. 2, 2003) (a collective bargaining agreement's clause providing for arbitration of "any and all disputes between the parties to this agreement, in connection with or arising out of the application or interpretation of this agreement" would not preclude plaintiff from raising his ADEA claims in federal court).

New York state law parallels that of the federal courts insofar as it requires that a waiver of a judicial forum to enforce statutory rights be "clear, explicit and unequivocal and . . . not depend upon implication or subtlety." *Waldron v. Goddess*, 61 N.Y.2d 181, 183-184 (1984). In *Crespo v. 160 West End Avenue Owners Corp.*, 253 A.D.2d 28, 32-33 (1st Dep't 1999), the First Department held that plaintiff's age discrimination claim under the Executive Law was not subject to arbitration under either the "clear, explicit and unequivocal" standard or the federal

"clear and unmistakable" standard when the collective bargaining agreement required arbitration of "all differences between the parties . . . as to interpretation, application or performance of any part of this agreement" and prohibited discrimination. *See Grovesteen v. N.Y. State Pub. Employees Fed'n*, 265 A.D.2d 784, 785-786 (3d Dep't 1999) (finding no "clear, explicit and unequivocal" waiver of the right to a judicial forum for statutory discrimination claims when the collective bargaining agreement provided for a grievance procedure to resolve "any and all disputes," contained a clause mandating compliance with the law governing the personal and organizational rights of employees and precluding discrimination, and contained a clause excluding from arbitration all grievances relating to the "mutual respect for the dignity of every employee").

The Southern District of New York has directly addressed the scope of the OCB waiver language in three cases: *Scheiner v. New York City Health and Hospitals*, 152 F. Supp. 2d 487 (S.D.N.Y. 2001); *Khamba v. SSEU Local 371*, No. 97 CIV. 4461 (DLC), 1999 WL 58924 (S.D.N.Y. Feb. 5, 1999), *aff'd*, 225 F.3d 646 (2d Cir. 2000); and *Giles v. City of New York*, 41 F. Supp. 2d 308 (S.D.N.Y. 1999).

In *Scheiner*, an OCB-appointed arbitrator found that the Health and Hospitals Corporation ("HHC") violated the collective bargaining agreement and its own rules and regulations by using irregular procedures when it revoked the plaintiff physician's staff and clinical privileges and terminated his employment. 152 F. Supp. 2d at 493. With regard to the same disciplinary proceedings, plaintiff subsequently filed a § 1983 suit alleging violations of the First and Fourteenth Amendments and asserting state law claims for malicious prosecution and a violation of the New York State whistleblower statute. *Id.* at 494. HHC argued that the plaintiff

waived his right to submit his Fourteenth Amendment due process claim to a judicial forum because: (1) the collective bargaining agreement between the Doctors Council and the City of New York required, as a condition of arbitration, that the plaintiff sign a waiver with language identical to OCB's waiver form; and (2) the plaintiff signed such a written waiver when he submitted his grievance to arbitration. *Id.* at 497-498. OCB's records indicate that it was, in fact, OCB's waiver form.

Rejecting HHC's argument, the *Scheiner* court held that neither the collective bargaining agreement nor the written waiver precluded plaintiff from subsequently filing a due process claim in federal court pursuant to § 1983. *Id.* at 499. The court found that the waiver provision in the collective bargaining agreement was "not a 'clear and unmistakable' waiver by represented employees to pursue their rights to sue for violations of Section 1983 in federal court." *Id.* Distinguishing *Gilmer*, the court reasoned that the written waiver signed by plaintiff was "not broad enough to cover the federal claims" asserted. *Id.* Since the grievance plaintiff submitted to arbitration was "Violation of the applicable . . . collective bargaining agreement by the improper discipline and/or termination of employment of Clifford Scheiner, M.D.," the court found that "the only dispute . . . for which he waived his right to seek judicial review is the dispute over a violation of the collective bargaining agreement, not a dispute over the violations of a federal statute, such as Section 1983." *Id.*; *see also Khamba*, 1999 WL 58924, at *1 (noting, in *dicta*, that signing OCB's waiver form does not preclude a Title VII claim).

The Southern District reached a similar conclusion in *Giles*, a case which addressed a collective bargaining agreement between District Council 37, Local 371, and the City of New York, that incorporated the language of the NYCCBL's waiver requirement in its arbitration

provision. In *Giles*, individual employees filed a FLSA suit after their union had requested arbitration but prior to the hearing. The arbitrator subsequently interpreted the collective bargaining agreement in favor of the City. The court found that the language of the collective bargaining agreement's arbitration provision, construed broadly or narrowly, was "not a 'clear and unmistakable waiver of the covered employees' rights to a judicial forum' for claims of individual rights under statutes such as the FLSA." *Giles*, 41 F. Supp. 2d at 312 (quoting *Wright*).

Consistent with these decisions, the Board finds that the OCB waiver, reflective of the NYCCBL, is general in language and does not explicitly incorporate any statutes**.** As a consequence, it is neither a "clear and unmistakable" nor a "clear, explicit and unequivocal" waiver of a judicial forum for claimed violations of statutory and constitutional rights. We hold that the scope of the OCB waiver is limited to contractual claims under the collective bargaining agreement. In other words, the "underlying dispute" referred to in the OCB waiver does not encompass all statutory, constitutional, or common law claims arising from the same factual circumstances. To the extent that our prior cases, including *District Council 37*, Decision No. B-28-87, are inconsistent, they are hereby overruled.

The Union requested arbitration of a grievance alleging a violation of the Agreement on behalf of firefighters affected by FDNY's decision to detail firefighters with a history of substantial service-connected medical leave to less active units. In regard to the same factual circumstances, the Union and the affected firefighters filed a complaint in federal court that alleged, *inter alia*, a violation of the Agreement. As a result, we find that the parties to the grievance have submitted the underlying dispute to a judicial forum and, therefore, the Union is

unable to satisfy the condition of arbitration set forth in NYCCBL § 12-312(d).

The Union's claim that the individual plaintiffs in the federal suit are not parties to the arbitration is without merit. The request for arbitration was filed "on behalf of [the UFA President] and all other Firefighters similarly situated who have been involuntarily transferred." As firefighters involuntarily transferred based on their use of service-connected medical leave, the individual plaintiffs are grievants in the arbitration, even if not specifically named. *See Correction Officers Benevolent Ass'n*, Decision No. B-24-96 at 12 (grievance on behalf of a grievant and "other similarly situated correction officers" involved the same parties as a federal action on behalf of two named officers and "all other correction officers"); *Committee of Interns and Residents*, Decision No. B-31-81 at 10 ("The fact that, in each case, certain parties are involved without being named as formal parties is not dispositive.").

This Board has held that "the commencement of a court proceeding for adjudication of a dispute constitutes only a provisional election to present that dispute in the judicial forum." *Correction Officers Benevolent Ass'n*, Decision No. B-24-96 at 13. As the waiver of contractual claims did not preclude litigation of statutory and constitutional claims, we find that the Union can restore its capacity to execute a waiver in compliance with NYCCBL § 12-312(d) and proceed to arbitration on behalf of the grievants if, within 30 days of service of this order, all the plaintiffs in the federal suit withdraw the fourth cause of action and any other claims alleging violations of the Agreement from the federal case. To the extent that prior decisions, including *District Council 37*, Decision No. B-28A-87, required the withdrawal of the entire court action, those decisions are hereby overruled.

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 of New York and the New York City Fire Department's motion for reconsideration be, and the same hereby is, granted; and it is further

ORDERED, that the City of New York and the New York City Fire Department's petition challenging arbitrability, docketed as BCB-2365-03, be, and the same hereby is, granted unless and until all contractual claims are withdrawn from *Cassidy v. Scoppetta*, No. 04 Civ. 0155 (E.D.N.Y. filed Jan. 15, 2004) within 30 days of service of this order; and it is further

ORDERED, that the request for arbitration filed by the Uniformed Firefighters Association of Greater New York, and docketed as A-10199-03, be, and the same hereby is, denied unless and until all contractual claims are withdrawn from *Cassidy v. Scoppetta*, No. 04 Civ. 0155 (E.D.N.Y. filed Jan. 15, 2004) within 30 days of service of this order.

Dated: December 13, 2004
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

ERNEST F. HART
MEMBER

BRUCE H. SIMON
MEMBER