City & DOT v. DC37, L. 983, 75 OCB 11 (BCB 2005) [Decision No. B-11-05, (Arb)], Appeal Pending

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 DEPARTMENT OF TRANSPORTATION,

Decision No. B-11-2005
Docket No. BCB-2444-04
(A-10794-04)

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 983, AFL-CIO,

Respondent.
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DECISION AND ORDER

The City of New York and the New York City Department of Transportation ("City" or "Department" or "DOT") filed a petition on November 23, 2004, challenging the arbitrability of a grievance brought by District Council 37, Local 983 ("Union") on behalf of Alexander Modawar ("Grievant"). The grievance asserts that DOT wrongfully terminated Modawar without written charges or a hearing, in violation of a Stipulation of Settlement of a prior disciplinary action ("Stipulation") and of the Seasonal Assistant City Highway Repairer Memorandum of Agreement ("MOA"). The City argues that the dispute is not arbitrable because Grievant 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 language of the Stipulation indicates that if Grievant violated the

Stipulation, DOT could seek his discharge through the contractual disciplinary process and that Grievant did not waive his right to the grievance process for future incidents. This Board finds that the City's actions were within the scope of the language of the Stipulation and that the waiver in the Stipulation overrides any contractual agreement to arbitrate. Accordingly, we grant the City's petition.

BACKGROUND

Modawar was hired by DOT on July 9, 2000, as a Seasonal Assistant City Highway Repairer ("ACHR"). He was arrested four times between October 22, 2001, and August 2, 2002, on several charges, including harassment, criminal mischief, and violation of an Order of Protection. DOT was prepared to file disciplinary charges against Grievant for his violation of Paragraphs 1 and 2 of DOT's Code of Conduct.[1]

In lieu of formal disciplinary action, the parties sought to settle the case. Grievant and Walter Drummond, Local 983 First Vice President, state in affidavits that Erica Caraway, Disciplinary Counsel of DOT's Office of the Advocate, advised them in a conversation that during a one year probation, DOT would be able to seek Grievant's discharge through the disciplinary process. Furthermore, while Grievant would waive rights to appeal the discipline imposed for the 2001 and 2002 arrests, he would not be required to waive grievance rights for future incidents. The City denies these claims. Grievant and Drummond also state that later

[1] Under the Code of Conduct, employees in DOT shall not:
1. Engage in conduct tending to bring the City of New York, DOT or any other City agency into disrepute.
2. Engage in conduct prejudicial to the good order and discipline of DOT.

Caraway drafted the Stipulation and presented it to Grievant on a "take-it-or-leave-it" basis. Grievant and Drummond believed that the Stipulation incorporated the terms as Caraway allegedly advised.

On July 14, 2003, Grievant, Drummond, and Caraway signed the Stipulation. Grievant agreed to pay a $200 fine and agreed, among other terms, to the following:

> 3. Alexander Modawar agrees to serve a one (1) year probation period, effective upon execution of the Stipulation Agreement. During the probationary period, the Respondent agrees to adhere to the agency's Code of Conduct. Specifically, Alexander Modawar agrees not to violate paragraphs 1 and 2 of the Code and agrees not to get arrested during the probationary period.
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> 4. Alexander Modawar confirms that this Agreement has been entered into knowingly and intentionally, without coercion, duress or influence, that he was fully represented and fully advised by his union representatives in this matter, and that he accepts all terms and conditions contained herein.
>
> IT SHOULD BE CLEARLY ACKNOWLEDGED that should Alexander Modawar violate any of the conditions set forth in paragraph three (3) during the probationary period, the Department may seek to terminate his employment. The determination of whether the Respondent has violated the Stipulation Agreement shall be made by the Office of the Advocate.
>
> MOREOVER, it is agreed, understood and acknowledged that in executing this Stipulation and Agreement, Alexander Modawar is irrevocably waiving any and all rights he may have pursuant to New York Civil Service Law, any other applicable laws, statutes, rules, regulations and contractual agreements which pertain to disciplinary action against New York City employees. This document is executed in consideration of the Department's resolution of the aforementioned charges without the furtherance of disciplinary action in this matter.

(Emphasis added.)

The City states that Modawar was arrested on December 3, 2003, March 23, 2004, and March 25, 2004. Although the Union generally denies this assertion, the City provides an Arrest Notification to the Department of Administrative Services of the December 3 arrest. (City's Exhibit 5.) On April 2, 2004, Caraway sent Grievant a letter terminating his employment as a result of his noncompliance with the Stipulation. The Union's Step II grievance appealing the discharge was dismissed on September 28, 2004, as not grievable. The Union requested a Step III hearing but before a determination was made, the Union filed the Request for Arbitration on November 8, 2004, seeking Modawar's reinstatement and back pay.

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union has shown no nexus between the termination of Grievant's employment and Section 4(c) of the MOA.[2] The City acknowledges that this section provides for grievance and arbitration of claims concerning wrongful disciplinary action but argues that Grievant, by the terms of the Stipulation, specifically waived those rights in exchange for being allowed to avoid formal disciplinary proceedings on the 2001 and 2002 Code of Conduct violations. Therefore, Grievant relinquished his rights under § 4(c) of the MOA.

Furthermore, the City states, Modawar gave DOT's Office of the Advocate exclusive authority to determine whether he violated the terms of the Stipulation, and, if so, whether to

[2] Section 4(c) of the MOA provides a four Step procedure for "an employee who has been employed for at least three (3) *consecutive* seasons as a seasonal ACHR and who has had written charges of incompetency or misconduct served upon him or her . . . ." (Emphasis in original.)

discharge him for that violation. According to the City, the language in the Stipulation is clear on its face, and nothing grants authority to another person or entity to review DOT's determination. The City disputes the Union's argument that the language, "may seek to terminate his employment," merely grants DOT the right to file written charges on future misconduct. DOT already has that right; therefore, the language in question at most gives the Office of the Advocate discretion rather than a directive to discharge Grievant without a hearing. Since Modawar waived grievance rights and contravened the specific provision in the Stipulation not to get arrested during the probationary period, DOT had authority to terminate Grievant summarily.

Union's Position

According to the Union, Modawar's dismissal without written charges and a hearing violated the due process provisions of the MOA. Caraway drafted the Stipulation, which Grievant signed, believing that he would be able to have grievance rights for possible future charges. The Union states that Drummond's signature was as a witness to Grievant's signing. Local 983 was not a party to the agreement and waived no rights.

The Union contends that no provision in the Stipulation mandates Grievant's automatic dismissal without due process rights. The words, "the Department may seek to terminate his employment," denote a pursuit of charges through the disciplinary procedure. If the agency had sole discretion, it would not have to "seek," or "request," termination. Furthermore, the use of the word "may" indicates that DOT could ask for a penalty different from termination. In other cases decided by the Board, language in Stipulations include: "shall result in her termination,"

District Council 37, Local 1549, Decision No. B-33-98 at 3, or "his employment . . . shall be terminated," *Social Services Employees Union, Local 371*, Decision No. B-22-2001 at 3. Here, the provision's language does not suggest a non-reviewable, peremptory dismissal but a hearing by a third party.

In addition, the waiver paragraph is in standard, boilerplate language, indicating that the Stipulation was "executed in consideration of the Department's resolution of the aforementioned charges without the furtherance of disciplinary action in this matter." (Emphasis added.) This routine waiver concerns the right to appeal the underlying charges of the Stipulation, as understood by the words, "in this matter," and cannot be transformed to an extraordinary waiver of all future claims. Citing to New York State case law, the Union argues that to the extent that the Stipulation is ambiguous, it must be construed, like a contract, against the party who prepared it, especially if that party is an attorney and the other is not. Furthermore, waivers of fundamental rights are not presumed. Waivers of rights under the N.Y. Civil Service Law ("CSL,"), for example, "must be clear, unmistakable and without ambiguity." *Civil Service Employees Ass'n v. Newman*, 88 A.D.2d 685 (3d Dep't 1982), *aff'd*, 61 N.Y.2d 1001 (1984). The Union asserts that since the Stipulation here does not unequivocally waive Modawar's job protection rights, Local 983 should be permitted to arbitrate the instant dispute.

DISCUSSION

In this case the Board must decide whether the grievance claiming wrongful termination is arbitrable in light of the Stipulation of Settlement. We find that by signing the Stipulation, the

parties expressly waived their grievance procedure for specific disputes, and this Board cannot override the signatories' agreement in order to compel either party to arbitrate those disputes. Since DOT acted within the scope of the "last chance agreement," the grievance is not arbitrable and the petition is granted.

To determine arbitrability, this Board decides first whether the parties are in any way obligated to arbitrate their controversies, absent court-enunciated public policy, statutory, or constitutional restrictions; and, if so, whether the obligation is broad enough in its scope to include the particular controversy presented. *See New York State Nurses Ass'n*, Decision No. B-21-2002 at 7. In this case, the parties do not dispute that absent the Stipulation, Modawar's claim would be arbitrable. However, the City contends that in the Stipulation, Modawar waived arbitration under the MOA, and thus the parties have agreed specifically not to arbitrate this particular controversy.

This Board has denied requests for arbitration when parties have agreed in a stipulation of settlement of disciplinary charges that future misconduct during the specified period would constitute a basis for summary dismissal. *District Council 37, Local 2507*, Decision No. B-41-2002; *Social Service Employees Union, Local 371*, Decision No. B-22-2001; *District Council 37, Local 1549, AFSCME,* Decision No. B-33-98. 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. We conduct a specific analysis of the waiver provisions of a last chance stipulation in each case to determine whether either party has reserved any arbitration rights. *See*

District Council 37, Local 2507, Decision No. B-41-2002 at 8.

In *Social Services Employees Union, Local 371*, Decision No. B-22-2001 at 3, 8, the Board found that the grievant waived his right to the grievance process under a waiver provision similar to the one used in the instant case. The grievant had waived all rights under §§ 75 and 76 of the CSL and under the parties' collective bargaining agreement. In *District Council 37, Local 1070*, Decision No. B-51-98 at 4, 5, the union asserted that when the grievant signed the stipulation waiving her right to arbitration "in this matter," the provision applied only to the underlying disciplinary charges. However, the Board determined that the words, "in this matter," referred to subsequent disciplinary actions resulting from similar misconduct to that stated in the stipulation.[3] *See also District Council 37, Local 1549*, Decision No. B-33-98 at 3 (grievant's waiver of all grievance rights granted under the CSL or the collective bargaining agreement "with respect to the instant proceedings" included future conduct). We have also said in other circumstances that an employee who is on unrestricted probation is excluded from the grievance process and thus may be terminated without charges or a hearing. *See Social Service Employees Union*, Decision No. B-10-2004 at 7-8; *Local 420, District Council 37*, Decision No. B-38-2002 at 6-7.

Here, Grievant signed the Stipulation in which he agreed to be on probation and to waive irrevocably all rights under the CSL, other applicable law, and contractual agreements which pertain to disciplinary action against New York City employees. The next sentence, that this

[3] The Board rejected the union's waiver arguments but sent the matter to arbitration solely to determine whether the Department of Probation had complied with the provision in the Stipulation that the Department would act in good faith and not in an arbitrary manner. *Id*. at 5.

"document is executed in consideration of the Department's resolution of the aforementioned charges without the furtherance of disciplinary action in this matter," indicates that DOT would not file formal charges in the underlying matter but in no way restricts DOT from summarily dismissing Grievant on future misconduct. We thus reject the Union's argument, as we have in past cases, that the routine, boilerplate language or the words, "in this matter," invalidate the waiver provision concerning prospective conduct.

We also find unconvincing the Union's assertion that the words, "the Department may seek to terminate his employment," demonstrate that DOT was required to follow the MOA grievance procedure before dismissing Modawar for future misconduct. We have found that similar language in other stipulations did not require arbitration. In *Social Services Employees Union, Local 371*, Decision No. B-22-2001 at 3, the language concerning the agency's right to terminate was: "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 agency would take summary action. In *District Council 37, Local 1549*, Decision No. B-33-98 at 3, the grievant's failure to follow certain rules would be "reported to and confirmed by the Department Advocate," who would have the right to dismiss without a hearing. Here, even if the provision gave discretion to DOT, nothing in the language requires written charges and a hearing. Furthermore, the clause, "the Department may seek to terminate his employment," may not be read in isolation.

> IT SHOULD BE CLEARLY ACKNOWLEDGED that should Alexander Modawar violate any of the conditions set forth in paragraph three (3) during the probationary period, the Department may seek to terminate his employment. The determination of

> whether the Respondent has violated the Stipulation Agreement shall be made by the Office of the Advocate.

The stipulation gives DOT the exclusive right to dismiss Grievant summarily by stating that the determination of a violation shall be made by the Office of the Advocate. Moreover, as the City points out, since DOT has the contractual right to file written charges for any future misconduct, construing the Stipulation to require formal procedures would be illogical.

Finally, both the Grievant and his Union representative state that they "believed" that despite the agreement to serve a term of probation, Grievant would retain pre-existing procedural rights. Even in the event that Caraway had conveyed such an opinion, the Board must look to the written, signed Stipulation to make our determination. *See City Employees Union, Local 237*, Decision No. B-43-98 at 6. Pursuant to Paragraph 4 of the Stipulation, Modawar confirmed that he executed the agreement without coercion, duress, or influence and that he was fully represented and advised by his Union.

Thus, we find that Modawar's waiver of his grievance rights was clear, unmistakable, and without ambiguity and that DOT had authority to terminate his employment summarily for contravening the specific provision in the Stipulation not to get arrested during the probationary period. Therefore, the petition is granted and the arbitration denied.

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-2444-04, be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration, docketed as A-10794-04 and filed by District Council 37, Local 983, be, and the same hereby is, denied.

Dated: May 10, 2005
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

M. DAVID ZURNDORFER
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