City & DOT v. United Marine Division, L. 333, 75 OCB 12 (BCB 2005) [Decision No. B-12-05, (Arb)]

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 DEPARTMENT OF TRANSPORTATION,

Petitioners,

-and-

UNITED MARINE DIVISION, LOCAL 333, INTERNATIONAL LONGSHOREMAN'S ASSOCIATION, AFL-CIO (RICHARD WEINBERG),

Respondents.
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Decision No. B-12-2005
Docket No. BCB-2433-04
(A-10686-04)

DECISION AND ORDER

On September 30, 2004, the City of New York and the Department of Transportation ("City" or "DOT") filed a petition challenging the arbitrability of a grievance brought by the United Marine Division, Local 333, International Longshoreman's Association ("Union") on behalf of Richard Weinberg ("Grievant"). The grievance asserts that DOT wrongfully terminated Grievant because DOT incorrectly construed his actions as violative of a Stipulation and Agreement ("Stipulation") resolving a prior disciplinary proceeding, and because the allegations against him are false. The City argues that the grievance is not subject to arbitration under the collective bargaining agreement ("Agreement") because Grievant knowingly waived his right to the contractual grievance procedure and contravened the terms of the Code of Conduct, a violation of the Stipulation. The Union argues that a factual issue whether DOT acted in good

faith should be presented to an arbitrator. Since this Board finds that Grievant's waiver of his right to arbitration was clear, unmistakable, and without ambiguity, we grant the City's petition.

BACKGROUND

The grievant was hired by DOT on September 2, 1997, as a Deck Hand (Ferry). In June 2004, Grievant was served with disciplinary charges for violating the Department's Code of Conduct. The charges alleged that Grievant neglected to perform his duties, failed to obey a supervisor's order, engaged in conduct prejudicial to good order and discipline, including reading a newspaper while on duty, and engaged in conduct tending to bring the City and the Department into disrepute. On June 29, 2004, following an Informal Conference at the Department, the Conference Leader found that the charges had been substantiated and recommended a penalty of termination of Grievant's employment.

On July 7, 2004, Grievant and a Union representative signed a Stipulation in settlement of the disciplinary charges against him. The Stipulation reads, in pertinent part:

> IT IS STIPULATED AND AGREED THAT:
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> 1. The Respondent Richard M. Weinberg admits that on May 25, 2004 and May 27, 2004 he neglected to perform his assigned duties aboard the Ferryboat Samuel Newhouse. On May 27, 2004 the Respondent admits that he failed to obey a lawful order of a supervisor over the ferry P.A. system.
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> 2. The Respondent . . . agrees to serve a thirty (30) day suspension for the period of June 11, 2004 through July 10, 2004.
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> 3. The Respondent . . . agrees to a reassignment of shift, duties and/or location at the discretion of the Agency.
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> 4. The Respondent . . . agrees to serve a one (1) year probation period, commencing upon the execution of this agreement.

> 5. The Respondent . . . agrees that any violation of the agency's Code of Conduct during the probation period will result in his immediate termination.
>
> Richard M. Weinberg 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 and/or attorney in this matter, and that he accepts all terms and conditions contained herein.
>
> Moreover, it is agreed, understood and acknowledged that in executing this Stipulation and Agreement, Richard M. Weinberg 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.

Grievant returned to work from his suspension on July 13, 2004. On July 20, 2004, Marlene Hochstadt, Assistant Commissioner, Human Resources, for DOT, sent Grievant a letter terminating his employment. The letter stated that on July 13, 14, 15, and 18, Grievant violated the Stipulation by talking on his cell phone while on duty, leaving his assigned post without authorization, behaving in an insubordinate and inappropriate manner to supervisory personnel, and reading a newspaper while on duty. The letter stated that such conduct violated sections 1, 2, 3, 30, 31, 32, and 38 of the DOT's Code of Conduct.[1] It also stated that since such conduct

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[1] The Code of Conduct states, in pertinent part:
Employees of the Department of Transportation 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.
3. Speak or act discourteously, or use boisterous, abusive, or vulgar language, in any relationship with the public or with other DOT personnel, while on duty.

* * *

30. Fail, refuse, or neglect to obey any lawful order of a supervisor or superior, or interfere with any person carrying out such lawful order.

(continued...)

occurred during the probationary period established in the Stipulation and Grievant had agreed that any violation of the DOT's Code of Conduct during the probation period would result in his immediate termination. His employment was terminated as of July 20, 2004.

On July 28, 2004, the Union filed a Step II grievance appealing Grievant's termination. That same day, DOT denied the grievance, stating that the discharge was a result of his violation of the Stipulation and is, therefore, not grievable.

The Union filed its request for arbitration on August 11, 2004, alleging that Grievant was wrongfully terminated in violation of Section 75(1) of the Civil Service Law ("CSL") and Article VI, § 1(e), of the Agreement. Article VI, § 1(e), defines the term "grievance" as a claimed wrongful disciplinary action taken against a permanent employee covered by § 75 of the CSL upon whom the agency head has served written charges of incompetence or misconduct. As a remedy, Grievant seeks reinstatement with full back pay and benefits.

POSITIONS OF THE PARTIES

City's Position

The City argues that the request for arbitration must be dismissed because the Union cannot establish a nexus between the termination of Grievant and Article VI, §1(e), of the Agreement. Here, Grievant was not served with written charges of incompetence or misconduct because he entered into the Stipulation in which he agreed that he would be immediately

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[1](...continued)

31. Perform assigned duties improperly or inefficiently or neglect or refuse to perform duties.
32. Leave an assigned post until properly relieved or otherwise authorized by Supervisor.

* * *

38. Depart from assigned work area without authorization of supervisor.

terminated if he violated the Code of Conduct. That Stipulation grants DOT the authority to determine whether Grievant has violated the terms of the Code of Conduct during his probationary period and to dismiss him immediately for any violation without filing written charges. In waiving any rights he may have had under all applicable laws and contractual agreements, Grievant consented to that authority and may not challenge it.

In response to the Union's assertion that the Code of Conduct does not prohibit Grievant's actions in using a cell phone or reading the newspaper while on duty, the City observes that the termination letter identifies the specific provisions of the Code of Conduct which were violated.

Union's Position

The Union argues that as a condition precedent to terminating Grievant, DOT must show that he violated the Code of Conduct and that it did not act arbitrarily or capriciously. Grievant denies that he left his post unauthorized or that he was insubordinate or acted inappropriately to any supervisor. Moreover, there is no prohibition in the Code of Conduct against using a cell phone or reading a paper. Therefore, the factual issue whether Grievant violated the Stipulation must be sent to an arbitrator to decide.

The City also acted in bad faith by not transferring Grievant so that he would not be retaliated against by his supervisor once he returned from suspension, as agreed to in the Stipulation. Here, Grievant was terminated less than one week after he returned to work following his suspension. The failure to transfer him and the speed with which he was terminated raise a factual issue whether DOT acted in good faith, a question which should be presented to an arbitrator.

Finally, pursuant to Article VI, § 1(b), "the Union is bound to arbitrate any dispute arising out of the employee's employment with the City."[2] Therefore, "the union in order to enforce this agreement, must be permitted to arbitrate this dispute."

DISCUSSION

The issue in this case is whether the Stipulation of Settlement precludes processing the grievance. We find that it does because Grievant expressly waived his right to any statutory or contractual grievance procedures during a one-year probation.

To determine arbitrability, this Board decides first whether the parties are contractually obligated to arbitrate a controversy, 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. *New York State Nurses Ass'n,* Decision No. B-21-2002 at 7. In this case, absent the Stipulation, Grievant's claim could be arbitrable. However, in the Stipulation, Grievant waived arbitration under the Agreement, 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, or a "last chance agreement," that future misconduct during the stipulated period would constitute a basis for summary dismissal. *District*

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[2] Article VI, § 1(b), of the Agreement defines the term grievance as:
A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting the terms and conditions of employment; provided, disputes involving the Personnel Rules and Regulations of the City of New York shall not be subject to the Grievance Procedure or arbitration.

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 agreement in each case to determine whether either party has reserved any arbitration rights. *District Council 37, L. 2507*, Decision No. B-41-2002 at 8.

In *District Council 37, Local 376*, Decision No. B-21-90, grievant had signed a stipulation to dispose of disciplinary charges of substance abuse. The stipulation provided that any violation of the conditions of the one-year probation or any other misconduct during that time would result in termination. After a supervisor allegedly observed grievant and other employees at a restaurant during working hours, the grievant's employment was terminated. We held that since grievant had "clearly and unequivocally" waived the right to arbitrate disputes regarding his termination, the grievance was not arbitrable. *Id*. at 10.

Here, the language specifies that Grievant agreed to serve a one-year probationary period and waived any and all rights he may have had under the CSL, applicable rules, and contractual agreements that pertain to discipline against employees. In other circumstances, an employee who is on unrestricted probation is excluded from the grievance process and may be terminated without charges or a hearing. *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. Grievant stipulated that his agreement to these terms was in consideration of the resolution of the disciplinary charges

proffered against him. He also agreed that any violation of DOT's Code of Conduct, which covers a wide array of misconduct, would result in his immediate termination. Grievant's employment was terminated for misconduct which occurred during the agreed-upon probationary period after DOT determined that he did not adhere to the Code. The Union nevertheless is asking us to find that the matter should be sent to an arbitrator because the allegations against Grievant are false or that some of the violations of which he is accused are not included in the Code of Conduct. Since Grievant expressly waived his right to arbitration by agreeing to a nearly unrestricted probationary status, this Board has no basis to find arbitrable the factual issue whether Grievant violated the Stipulation. The Board cannot create a duty to arbitrate if none exists or enlarge a duty beyond the scope established by the parties. *Social Service Employees Union, Local 371*, Decision No. B-34-2002 at 4.

The Union's reliance on *Dep't of Probation*, Decision No. B-51-98, is misplaced. There, a grievant agreed to be placed on a one year probation and agreed that if she accumulated more than one hour of unexcused lateness during that period, her employment would be terminated immediately. While the stipulation contained a waiver provision, it also provided that any action taken by the City during the probationary period "will be in good faith and will not be arbitrary or capricious in any way." *Id.* at 2. When the grievant was subsequently terminated for lateness, the union filed a grievance alleging wrongful discipline. The Board found that the accumulation of 60 minutes of unexcused absences was a condition precedent to the City taking action in accordance with the stipulation. Because the union argued that grievant submitted documents to the City that excused her lateness and that her total unexcused lateness was 21 minutes, and because neither party submitted evidence supporting or refuting this contention, the Board held

that the grievant was entitled to have a neutral factfinder make a determination whether the City acted arbitrarily and capriciously in dismissing her.

Here, the Stipulation contains no language which limits DOT's actions. Nor has the Union identified a condition precedent which must be satisfied before DOT takes action in accordance with the Stipulation. The Union's allegations concerning DOT's bad faith are conclusory and are based primarily upon DOT's "failure" to transfer Grievant and the rapidity with which Grievant was terminated. We note that the Stipulation explicitly states that transferring Grievant was in "the discretion of the Agency." The fact that Grievant's employment was terminated for conduct similar to that which led to the Stipulation, within a week of his return from suspension, does not provide a basis to arbitrate a claim that the termination was in bad faith.

Finally, even if this dispute falls within the definition of a grievance under Article VI, § 1(b), we cannot mandate that a dispute proceed to arbitration when a grievant has waived his right to do so. Therefore, we find no grounds upon which to submit this grievance to arbitration, and, accordingly, grant the petition challenging arbitrability.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, the petition challenging arbitrability filed by the City of New York and the Department of Transportation, docketed as BCB No. 2433-04, hereby is granted; and it is further,

ORDERED, that the request for arbitration filed by United Marine Division, Local 333, International Longshoreman's Association, AFL-CIO, on behalf of Richard Weinberg, docketed as A-10686-04, hereby is denied.

Dated: May 10, 2005
New York, New York

MARLENE A. GOLD
CHAIR

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MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
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