District Council 37, *Local 376*, 75 OCB 20 (BCB 2005)

[Decision No. B-20-2005] (Docket No. BCB-2461-05) (A-10930–05).

Summary of Decision: DEP challenged the arbitrability of a grievance alleging wrongful disciplinary action and argued that the grievant had no right to arbitration because he had signed a letter authorizing DEP to place him on suspension pending the outcome of a criminal matter and waiving his right to back pay, which was the only remedy sought by DC 37. The Board found that fashioning a remedy is for an arbitrator to determine and that by no provision in the letter did grievant waive his right to arbitration. Since the union established a nexus between the alleged action and the parties' agreement, the Board denied the petition and granted arbitration. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

CITY OF NEW YORK &
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Petitioner,

- and -

DISTRICT COUNCIL 37, LOCAL 376, AFSCME, AFL-CIO,

Respondents.

DECISION AND ORDER

On February 23, 2005, the City of New York and the Department of Environmental Protection ("City" or "DEP") filed a petition challenging the arbitrability of a grievance brought by District Council 37, Local 376 ("DC 37" or "Union"). The Union's grievance is that in violation of the parties' Laborer Non-Economic Agreement ("Agreement"), DEP wrongfully took disciplinary action against David Teran ("Grievant") and suspended him without pay for

over 30 days without a hearing. The City argues that because Grievant signed a letter authorizing DEP to keep him on suspension and waiving any right to pay during the suspension ("Letter"), the Union cannot establish a reasonable relationship between the disciplinary action and the Agreement. This Board finds that since the Letter has no language regarding waiver of the right to arbitrate a grievance on the disciplinary action and since the Union has shown a nexus between the discipline and the Agreement, this case may proceed to arbitration.

BACKGROUND

Grievant has worked for DEP since 1996 as a permanently appointed Construction Laborer. On September 17, 2002, Grievant was arrested and detained until October 21, 2002. He returned to work on October 22 and acknowledged in a written document that he would be suspended without pay "for a period not to exceed thirty days." On October 24, 2002, the Department served Grievant with written disciplinary charges for violating DEP's Uniform Code of Discipline: (1) for engaging in conduct prejudicial to good order by committing an act of moral turpitude, (2) for absenting himself without authorization between September 18 and October 21, 2002, and (3) for failing to notify the Department immediately of his arrest.

Between October 23 and October 28, 2002, Marsha Rotheim, Director of DEP's Office of Disciplinary Counsel, spoke to Chandler Henderson, a Union representative, to see whether Grievant would agree to remain on unpaid suspension until the criminal matter was resolved. According to the City, such a delay would allow DEP to suspend Grievant without pay for over the statutory and contractual 30-day limit. If he refused to agree to a delay, the City could go forward with the disciplinary charges, and Grievant would risk termination. In an affirmation

attached to the pleadings, Rotheim states that Henderson repeatedly failed to respond to her and never rejected the proposal. Henderson states in an affidavit that he steadfastly refused to advise Grievant to waive the statutory and contractual right not to be suspended for over 30 days and advised Grievant not to sign any waivers.

On November 1, 2002, DEP wrote the Letter that DEP wished Grievant to sign. It reads as follows:

> To whom it may concern:
>
> I, David Teran, request an adjournment of any proceeding in the disciplinary action currently pending against me until such time that the criminal matter against me is resolved and I notify the agency of such resolution.
>
> I understand that in requesting this adjournment, I am authorizing the agency to keep me "on suspension," and I am waiving any right to pay for the period of suspension. I have sought the advice of counsel and/or my union representative regarding this decision.
>
> Further, I understand that even in the event my request for an adjournment is granted, the agency may, with proper notice, reactivate these charges and seek a resolution in accordance with state law or contract.
>
> My current address is . . . .
>
> Very truly yours,
>
> _____
> David Teran Date
>
> _____
> Witness Date

Grievant did not immediately sign the Letter.

In an affidavit, Grievant states that 30 days after he signed the initial suspension document dated October 22, 2002, he appeared for work on about November 22, 2002. DEP

informed him that his suspension without pay would continue, and he was sent home. On December 21, 2002, Henderson left town for the holidays. Grievant states that on December 22, 2002, Rotheim called him at home and said that he must sign the Letter or DEP would immediately dismiss him and that signing this could not wait until Henderson returned. Rotheim asserts that she did not speak to Grievant in December 2002 about signing the Letter. It is undisputed that Grievant did sign the Letter on December 22, 2002, and mailed it to Rotheim. No witness signed.

On June 1, 2003, after he was acquitted at trial, Grievant returned to work. The Union filed a Step II grievance on July 7, 2003, pursuant to Article V, § 2, of the Agreement, which enunciates the grievance procedure. The nature of the grievance was: "A claimed wrongful disciplinary action taken against a permanent employee covered by section 75 of the Civil Service Law" and "Grievant was wrongfully suspended after an arrest."[1] DEP's Director of Labor Relations offered four dates for a Step II hearing between August 5 and 21, 2003, and the City states that the Union never responded. The Union asserts that DEP refused to schedule a hearing on a date that its representative could meet. While the City states that neither DEP nor the Office of Labor Relations ("OLR") has a record of a Step III Grievance request, the Union has provided a copy of the request addressed to OLR and dated November 19, 2003.

About ten months later, on September 13, 2004, the Department held an informal Step A

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[1] The Union cited to Article V, § 1(e), of the Agreement, which defines "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.

conference regarding the disciplinary charges served on October 24, 2002.[2] DEP found on September 20, 2004, that the charges were substantiated and recommended a five-week suspension. In late November or early December 2004, DEP referred the case to the Office of Administrative Trials and Hearings ("OATH") to seek a determination concerning the disciplinary charges.

On January 28, 2005, the Union filed the request for arbitration and stated the grievance as: "Whether the employer wrongfully disciplined grievant, and, if so, what shall be the remedy?" On February 1, 2005, the Union wrote to the Administrative Law Judge ("ALJ") at OATH to seek to remove the case from OATH since Grievant had already proceeded in July 2003 with the contractual grievance procedure to determine wrongful disciplinary action and had not chosen OATH for a forum. Objecting to removal of the case from OATH, DEP argued that the contractual grievance proceeding pertained to Grievant's suspension without pay for longer than 30 days, whereas the matter which was referred to OATH after the Step A informal conference dealt with the disciplinary charges served on October 24, 2002. DEP wrote to the OATH ALJ: "Obviously, while Mr. Teran may grieve the suspension he experienced based on the agreement [Letter] he submitted to the agency, this is a separate issue from the disposition of

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[2]Article V, § 4, of the Agreement deals with procedures regarding Article V, § 1(e), wrongful disciplinary actions. Step A is the initial informal conference. Step B(i) enunciates procedures to follow if the employee is not satisfied and reads, in pertinent part:

> If the employee is not satisfied with the determination at Step A above then the Employer shall proceed in accordance with the disciplinary procedures set forth in Section 75 of the Civil Service Law. . . . As an alternative, the Union with the consent of the employee may choose to proceed in accordance with the Grievance Procedure set forth in this Agreement, including the right to proceed to binding arbitration pursuant to Step IV of such Grievance Procedure. . . . [T]he period of an employee's suspension without pay pending hearing and determination of charges shall not exceed thirty (30) days.

the disciplinary charges themselves." (Letter of Assistant Deputy Counsel, p. 2, attached to answer as Exhibit C in Affirmation of Stuart Lichten.) On February 18, 2005, at a pretrial conference at OATH, the parties agreed that the ALJ would remove the case from the OATH calendar pending the outcome of the arbitration proceeding. On February 23, 2005, the City filed its petition challenging arbitrability.

As a remedy in the request for arbitration, the Union asks that the case proceed to arbitration for a determination on the question whether Grievant should receive back pay.

POSITIONS OF THE PARTIES

City's Position

The City claims that the waiver in the Letter renders the case moot. Because the remedy sought is back pay and Grievant waived back pay, there is no remedy for an arbitrator to fashion.

The City also argues that by the Letter, Grievant authorized DEP to suspend him without pay for over 30 days and waived the right to pay while he was not at work. The Letter also "clearly and unequivocally waives the Grievant's rights to appeal his suspension." The City compares the Letter to a stipulation, such as a "last chance agreement," in which the employee usually agrees to waive grievance rights under the parties' collective bargaining agreement or the New York Civil Service Law ("CSL").

According to the City, Grievant freely signed the Letter without duress. Rotheim was not coercive but advised Grievant that he may be subject to termination. The Letter is a bargained-for agreement for which there was mutual consideration. DEP was allowed to place Grievant on unpaid suspension longer than would ordinarily be allowed under CSL § 75, and Grievant was

able to delay the processing of the disciplinary charges so that if he were exonerated or the charges were reduced, he would have that benefit at the DEP's disciplinary hearing. Since the waiver is valid, the Letter precludes Grievant from seeking arbitral review of the suspension.

Finally, the City argues that in the Letter Grievant did not waive his right to appeal disciplinary action taken when the charges themselves were reactivated. DEP did reactivate the charges by the informal conference in September 2004. The City claims that Grievant pursued his appeal on the charges at OATH. This Board should reject the Union's attempt to join two separate issues, the seven-month suspension, which is not arbitrable because of the waiver, and the merits of the charges, which should be heard at OATH.

Union's Position

The Union argues that the grievance it filed in July 2003 pursuant to Article V, § 1(e), for wrongful disciplinary action is arbitrable. The City's claim that there are two separate issues is incorrect. The issue being litigated is the wrongfulness of disciplinary action, that is, the seven-month suspension, for the charges filed on October 24, 2002. Under Article V, § 4, of the Agreement, the Union, with Grievant's consent, elected to proceed in accordance with the grievance procedure. Furthermore, after the September 2004 informal conference, which the Union calls invalid, Grievant did not elect to go to OATH because he had already started the grievance process over one year earlier. Thus, the wrongfulness of any discipline imposed as a result of the written charges filed in October 2002 must be decided at arbitration, and OATH has no jurisdiction in this case.

When Grievant initially returned to work on October 22, 2002, he acknowledged that he would be suspended without pay for the contractual 30 days. However, the Union asserts, when

Grievant returned to work on November 22, 2002, and was told that he was still suspended without pay, DEP wrongfully imposed discipline without holding an informal hearing, in violation of the Agreement.

According to the Union, the Letter with the waiver language is void for several reasons. First, Grievant had no choice but to sign because he was informed that he would be discharged if he refused. DEP used the unlawful discipline of suspension without a hearing as a leverage to coerce Grievant to sign. Second, once Grievant asked for Union representation, it was unlawful for Rotheim to continue the discussion without a Union representative. Instead, since the discussions with Henderson did not inure to DEP's satisfaction, DEP waited for Henderson to leave and then approach Grievant again. Third, the Letter is not signed by an agent of Local 376 or DC 37; not signed by a witness even though on its face the document requires such signature; and not signed by an agent of DEP and, therefore, there is no consideration because no mutual consent exists. Fourth, the Letter is framed as a "request," and there is no indication that the request was granted. Thus, the status of the request is in doubt. Fifth, by the time Grievant signed the Letter on December 22, 2002, the suspension was well over 30 days. For all these reasons, the waiver language in the Letter has no legal effect.

Finally, the Union points out that in her letter to the OATH ALJ, DEP's Assistant Disciplinary Counsel conceded that Grievant "may grieve the suspension he experienced based on the agreement [Letter] he submitted to the agency. . . ." Therefore, the grievance should proceed to arbitration.

DISCUSSION

Initially, this Board finds that the issue in this case is not moot even if, as the City argues, Grievant waived his right to back pay during his suspension from work and no remedy exists. As noted in *Uniformed Fire Officers Ass'n*, Decision No. B-18-2005, in arbitrability cases, when the City argues that the only apparent remedy is unavailable and therefore the issue is moot, we have nonetheless stated that questions of remedy are for an arbitrator to decide. *See District Council 37, Local 2507*, Decision No. B- 47-97; *Social Service Employees Union, Local 371*, Decision No. B-39-89. Questions of remedy are distinct from those of arbitrability, and "arguments addressed to questions of remedy are not relevant to the arbitrability of the grievance." *District Council 37, Local 2507*, Decision No. B-47-97 at 9; *District Council 37, Local 1549*, Decision No. B-32-96 at 6. It is for an arbitrator to determine the propriety of a remedy sought by a union and to fashion one appropriate to the circumstances. *Social Service Employees Union, Local 371*, Decision No. B-39-89 at 18-19. In this case, the question whether the Letter constitutes a waiver of Grievant's right to back pay is an issue for an arbitrator and is not relevant to this Board's determination of arbitrability. Thus we do not find the case moot.

As to the substantive issue in this case, this Board must decide whether the grievance claiming wrongful disciplinary action is arbitrable. The policy under the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-302 is to favor and encourage arbitration to resolve grievances. Doubtful issues of arbitrability are resolved in favor of arbitration. *Correction Officers Benevolent Ass'n*, Decision No. B-12-94 at 10. 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," *Social Service Employment Union,* Decision No. B-2-69; *see also District Council 37, AFSCME*, Decision No. B-47-99, or, in other words, "whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter" of the agreement. *New York State Nurses Ass'n,* Decision No. B-21-2002 at 8.

Here, the parties have included in their Agreement a grievance procedure culminating in binding arbitration. Thus, the first part of the test is established. The second prong is also met because the issue concerns a claimed wrongful disciplinary action exactly as stated under Article V, § 1(e), of the Agreement. The Union, in its July 2003 Step II grievance stated the grievance as: "A claimed wrongful disciplinary action taken against a permanent employee covered by section 75 of the Civil Service Law" and "Grievant was wrongfully suspended after an arrest." Again, in its January 2005 request for arbitration, the Union stated the grievance to be arbitrated as: "Whether the employer wrongfully disciplined grievant. . . ."

The City does not dispute that disciplinary charges are grievable under the Agreement. Rather, the City argues that the Board must construe the Union's Step II grievance and request for arbitration as covering only the "suspension," and contends that Grievant waived his right to arbitrate the suspension when he signed the Letter. The City also argues that the disciplinary charges were never grieved because Grievant elected to proceed to OATH and not to an arbitrator. We reject both of these arguments. We find that the October 24, 2002, written charges and Grievant's suspension after his arrest are claimed disciplinary actions covered by Article V, § 1(e), of the Agreement.

The only disciplinary action pending against Grievant at the time the Union filed the Step II grievance was the issuance of the October 2002 charges relating to his arrest. The Step II grievance refers to "wrongful disciplinary action." Even though the wording does not clearly state that such action includes the disciplinary charges as well as the suspension, Grievant filed the Step II grievance soon after his acquittal of the criminal charges, the bases on which DEP filed its disciplinary charges. One could thus reasonably read the Step II grievance as contesting the disciplinary charges as well as the suspension. We refer to an arbitrator any questions as to whether claims and provisions were properly raised during the step grievance process. *See New York State Nurses Ass'n*, Decision No. B-21-2002 at 12.

Furthermore, we reject the City's contention that the waiver language in the Letter bars the arbitration of Grievant's suspension. The Board will find a waiver of statutory or contractual rights only when the intention to waive such rights is clear, unmistakable, and unambiguous. In *Local 1182, Communications Workers of America*, Decision No. B-26-96, the Board held that an employee's acceptance of a disciplinary penalty and agreement to waive "any and all rights . . . pursuant to the Civil Service Law and any other applicable statute, regulation, or agreement which pertains to disciplinary action" did not bar an improper practice petition alleging that the discipline was retaliation. *See District Council 37, Local 983*, Decision No. B-11-2005 (Board held that a stipulation waiving any and all rights pursuant to "New York Civil Service Law, any other applicable laws, statutes, rules, regulations and contractual agreements which pertain to disciplinary action" was a clear and unmistakable waiver of the employee's grievance rights); *see also Civil Service Employees Ass'n v. Newman*, 88 A.D.2d 685, 686 (3d Dep't 1982), *aff'd*, 61 N.Y.2d 1001 (1984) (a waiver of rights under the CSL is "the intentional relinquishment of a

known right" and "must be clear, unmistakable and without ambiguity").

Here, nothing in the Letter indicates that Grievant clearly and unmistakably waived his right to appeal his suspension. Indeed, the Letter authorized DEP to keep Grievant "on suspension" and waived his "right to pay for the period of suspension." However, the terms of the Letter stating that DEP "may, with proper notice, reactivate these charges and seek a resolution in accordance with state law or contract" cannot be construed as a waiver of Grievant's right to grieve the suspension. None of the provisions in the Letter expresses any intention to relinquish the Grievant's right to arbitrate. *See Newman, supra*. Thus, we find that the Letter does not preclude arbitration of the suspension.

Finally, we reject the City's argument that the wrongful discipline grievance is not arbitrable because Grievant elected to pursue his appeal of the charges to OATH. The City has presented no evidence that Grievant elected to appeal his disciplinary charges to OATH. Rather, the record shows that Grievant filed his grievance challenging the wrongful disciplinary action in July 2003. By this action, Grievant chose to proceed with the grievance procedure under the Agreement, s*ee International Brotherhood of Teamsters, Local 237*, Decision No. B-21-2005, and the grievance must now proceed to arbitration.

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 of New York and the Department of Environmental Protection and docketed as BCB-2461-05, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 376, and docketed as A-10930-05, hereby is granted.

Dated: June 20, 2005
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

GABRIELLE SEMEL
MEMBER

M. DAVID ZURNDORFER
MEMBER