***International Brotherhood of Teamsters, Local 237 (Moore)*, 75 BCB 21 (BCB 2005)** [Decision No. B-21-2005] (Docket No. BCB-2448-04) (A-10855-04).

Summary of Decision: The City challenged a grievance alleging that a grievant was wrongfully discharged without notice of disciplinary charges in violation of the applicable collective bargaining agreement. The Board granted the petition and held that the waiver requirement of NYCCBL §§ 12-312(d) could not be satisfied because grievant's termination and the attendant questions of notice have been determined by OATH and are currently on appeal to the Civil Service Commission. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK &
HUMAN RESOURCES ADMINISTRATION,

Petitioners,

- and -

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
AFL-CIO, LOCAL 237 (DIANE MOORE),

Respondents.

DECISION AND ORDER

On December 30, 2004, the City of New York and the Human Resources Administration ("City" and "HRA") filed a petition challenging the arbitrability of a grievance brought by the International Brotherhood of Teamsters, AFL-CIO, Local 237 ("Union"). The Union alleges that Diane Moore ("Grievant") was wrongfully discharged without notice of disciplinary charges in violation of the applicable collective bargaining agreement ("Agreement"). The City claims that

the grievance is not arbitrable because the waiver requirement of § 12-312(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") cannot be satisfied – the dispute has been heard by the Office of Administrative Trials and Hearings ("OATH") and appealed to the New York City Civil Service Commission ("CSC"). The Union argues that the waivers should be deemed valid because the City has failed to provide CSC with the OATH record and has frustrated the very process which it says is Grievant's only recourse, and that the parties and issues at OATH were different from those which would be presented to an arbitrator. We find that the waiver requirement of NYCCBL § 12-312(d) cannot be satisfied because Grievant's termination and the attendant questions of notice have been determined by OATH and are currently on appeal to CSC. Accordingly, we grant the instant petition.

BACKGROUND

A. Alternate Disciplinary Procedures

Under N.Y. Civil Service Law ("CSL") § 75, certain classes of employees, including permanent employees, "shall not be removed or otherwise subject to disciplinary penalty . . . except for incompetence or misconduct shown after a hearing upon stated charges." CSL § 75(1). The New York City Charter ("Charter"), Chapter 45-A, § 1048 authorizes OATH to conduct disciplinary hearings of employees which arise under CSL § 75. The Administrative Law Judge ("ALJ") conducting the hearing issues a report and recommendation to the employing agency. Charter, Chapter 45-A, § 1049. The agency may adopt or reject the report and makes a final administrative determination as to penalty, if any. *See* Executive Order No. 32 (1979).

CSL § 76(1) provides that the agency's final determination may be appealed pursuant to CPLR Article 78, or to the CSC.

CSL § 76(4) provides that a contractual disciplinary procedure may be substituted for the procedures found in CSL § 75.[1] The procedure provided by the Agreement in this case sets out a five step grievance process for an employee subject to discipline.[2] If a grievant wishes to appeal an unsatisfactory determination from the step grievance process, the Union may file for

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[1] CSL § 76(4) provides, in relevant part:

> section seventy-five or seventy-six of this chapter . . . may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of this chapter.

[2] Article VI, § 5, of the Agreement provides in relevant part:

> STEP A: Following the service of written charges, a conference with such Employee shall be held . . . by the person designated by the agency head to review a grievance at STEP I . . . . The Employee may be represented . . . by a representative of the Union. The person designated by the agency head . . . shall issue a determination in writing . . . .
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> [T]he Employee may choose to accept such determination as an alternative to and in lieu of a determination made pursuant to the procedures provided for in Section 75 of the Civil Service Law . . . .
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> STEP B(i): If the Employee is not satisfied with the determination . . . 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 to binding arbitration pursuant to STEP IV . . . . As a condition for submitting the matter to the Grievance Procedure the employee and the Union shall file a written waiver of the right to utilize the procedures available to the employee pursuant to Sections 75 and 76 of the Civil Service Law . . . or any other administrative or judicial tribunal, except for the purpose of enforcing an arbitrator's award, if any . . . .
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> STEP B(ii): If the election is made to proceed pursuant to the Grievance Procedure, an appeal from the determination of STEP A above, shall be made to the agency head . . . .
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> STEP C: If the grievant is not satisfied with the determination . . . the grievant or the Union may appeal to the Commissioner of Labor Relations . . . . If the grievant is not satisfied with the determination of the Commissioner of Labor Relations, the Union with the consent of the grievant may proceed to arbitration . . . .

arbitration at the Office of Collective Bargaining. *See* Agreement, Article IV, § 2, Step IV. As a condition of invoking arbitration, the union and the greivant must waive the right "to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award." NYCCBL § 12-312(d).

Under either disciplinary procedure, the covered employee receives written charges and an informal conference is held before a person designated by the agency head. *See* CSL § 75; Agreement, Article VI, § 5, Step A. Afterwards, an employee wishing to challenge a disciplinary determination may invoke the contractual grievance process or appeal to OATH for a CSL § 75 hearing. *See* Agreement, Article VI, § 5, Step B. If the employee fails to elect one of these forums, the employer proceeds pursuant to CSL § 75. *Id*.

B. Underlying Facts and Administrative Determinations

On March 11, 1985, HRA hired Grievant as a permanent Custodial Assistant. On May 5, 1997, she began serving provisionally as a Custodian while retaining her permanent civil service status. Starting on December 31, 2001, Grievant was absent without leave from her job.

The City alleges that by letter dated April 4, 2002, HRA instructed Grievant to provide documentation – medical or otherwise – regarding her absence and directed her to return to work by April 16, 2002. The letter was sent by certified and regular mail to her last address of record. On June 6, 2002, HRA began termination proceedings due to Grievant's failure to respond. The City alleges that on July 3 and 4, 2002, a process server attempted to serve written charges on Grievant by personal delivery at her address of record. On July 5, 2002, the charges were mailed to the same address by first-class and certified mail.

The written charges alleged a violation of HRA Procedure #99-07, § II-K, pertaining to

unauthorized absence, and stated that an informal conference would be held on July 24, 2002. The notice stated that if Grievant were found guilty, she would have five days to accept or refuse the penalty and to elect the statutory or contractual procedure by which the matter could be pursued. Failure to respond would result in implementation of the recommended penalty.

By letter dated July 19, 2002, sent to the address of record, Grievant was adviserd that the conference was being rescheduled to August 7, 2002. The City alleges that on that date, HRA also sent a notice to the Union about the conference.

The City alleges that the conference was held on August 7, 2002. Neither Grievant nor the Union appeared. On August 9, 2002, the Conference Holder issued her report, finding that HRA established that Grievant had been absent from her job without leave, as charged, and recommended termination of employment. In an affidavit dated August 9, 2002, the Conference Holder stated that she mailed her decision on that date to Grievant at her address of record. The decision instructed Grievant that:

> If you do not accept my decision, or do not respond within the **FIVE (5) DAY** period, then the Human Resources Administration shall proceed to hold a hearing, in accordance with Section 75 of the Civil Service Law at the time and place set forth on the charges already served upon you.
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> If you are in a title covered by a Union contract which affords the grievance alternative pursuant to the Civil Service Law, then as an alternative, your union with your consent may choose to proceed in accordance with the Grievance Procedure set forth in its contract with the City of New York. However, as a condition for submitting this matter to the Grievance Procedure, you and your union must file a written waiver of the right to utilize the procedure available to you pursuance to Section 75 and 76 of the Civil Service Law (Waiver, Form M-300j, is annexed hereto) or any other administrative judicial tribunal, except for the purpose of enforcing an arbitrator's award. . . .

The Conference Holder also sent a copy of CSL §§ 75 and 76 and other documents for Grievant to inform HRA whether she would accept the recommended penalty or appeal the determination

under the CSL or the Agreement's grievance process.

Grievant did not elect to appeal the disciplinary action through the contractual grievance procedure. Nor did the Grievant respond within the five day period. Therefore, the City proceeded pursuant to CSL § 75.

On December 10, 2002, a hearing was held at OATH. Neither Grievant nor the Union appeared. At the hearing, HRA presented proof of service both of the charges and notice of hearing. HRA also presented proof regarding Grievant's absences and leave status. OATH found that Grievant had been properly served with the charges and notice of hearing. OATH also determined that Grievant had been absent from December 31, 2001, through November 29, 2002, as charged, and recommended termination. *Human Resources Admin. v. Moore*, OATH Index No. 692/03 (Dec. 11, 2002).

By letter dated March 18, 2003, HRA informed Grievant that it had adopted OATH's findings and recommendation. The letter stated that she would be dismissed effective immediately. The letter advised that Grievant could appeal the termination to the CSC or in Article 78 proceeding.

Also on that same date, Grievant filed a grievance with the Union stating:

> Due to circumstances beyond my control I have become seriously ill, hospitalized and still under doctor supervision since 12/31/01. I have been in constant contact with David Edwards of the Human Resources Office (250 Church Street, N.Y.). To my knowledge all proper papers were filed. Copy of doctor's papers and doctor notes were given to Mr. David Edwards. I have received no written notice or phone call stating that I was on an unauthorized leave. To receive a letter months later to inform me that I'm terminated due to disciplinary action is quite unfair an [sic] unjust. I'm not aware that because I'm sick that I will be dismissed from my job after years of dedicated service. I'm requesting that due to my circumstance my case should be immediately re-open [sic].

On this form, Grievant listed a different home address from the address of record at HRA.

By letter dated April 3, 2003, the Union appealed Grievant's termination to the CSC. On April 22, 2003, CSC mailed an Acknowledgment of Receipt of Notice of Appeal to HRA, with copies to Grievant and the Union's Counsel. The Acknowledgment states in pertinent part:

> Please confirm that:
> - The appeal is timely;
> - It is **not** based on a default judgment/inquest.
>
> If the appeal is timely and not based on a default, please provide the Commission with the following information . . ., within 90 days of the date of this letter.
> - Disciplinary action taken against the employee;
> - Date the employee received written notice of the determination;
> - A copy of the transcript of the proceedings below, including all exhibits and the report and recommendation of the hearing officer;
> - A statement of all prior disciplinary actions in which the employee was found guilty, including the date, nature of the offense, determination and penalty; and
> - A copy of the employee's personnel record with your agency.
>
> * * *
>
> The matter will be set down for oral argument upon receipt of the record below.

The Union alleges that the City has failed to provide CSC with the above-requested documents.

By letter dated February 10, 2004, the Union sought a Step II hearing alleging that Grievant's employment was terminated without due process, citing failure to notify her of the disciplinary hearing and conducting the hearing without her knowledge. No decision was issued and the Union sought a Step III hearing alleging violation of Article VI, § (1)(f), of the Agreement. No decision was issued.

On December 6, 2004, the Union filed for arbitration alleging that Grievant was wrongfully terminated in violation of Article VI, § (1)(e), of the Agreement.[3] Attached were

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[3] Article VI, § (1), of the Agreement defines a grievance in relevant part as:
(e) A claimed wrongful disciplinary action taken against a permanent Employee covered
(continued...)

waivers, filed pursuant to NYCCBL § 12-312(d), signed by the Union and Grievant. As relief, the Union seeks reversal of the disciplinary action, expungement of charges from Grievant's personnel record, back-pay, and any other accrued benefits.

POSITIONS OF THE PARTIES

City's Position

The City contends that it satisfied due process requirements with respect to the disciplinary charges and proceedings against Grievant. By letters dated July 19, 2002, HRA notified Grievant and the Union that an informal conference would be held on August 7, 2002. OATH found that Grievant had been properly served with the charges and notice of hearing, thus establishing the jurisdictional prerequisites for finding her in default. Inasmuch as OATH heard the matter pursuant to CSL § 75, the grievance is not arbitrable because neither the Union nor Grievant can comply with the statutory waiver requirement of NYCCBL § 12-312(d). *City of New York v. MacDonald*, No. 409786/94 (Sup. Ct. N.Y. Co. Feb. 15, 1996), *aff'd*, 239 A.D.2d 274 (1st Dep't 1997). In essence, Grievant is attempting to appeal the OATH decision to an arbitrator rather than in an Article 78 proceeding or to the CSC.

In addition, the grievance should be precluded from arbitration under the doctrines of *res judicata* and collateral estoppel. Here, the parties are identical, the facts to be posed to an arbitrator were already considered by OATH, and the issue whether Grievant was afforded due

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[3](...continued)
by Section 75(1) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetence or misconduct. . . .
(f) A claimed wrongful disciplinary action taken against a provisional Employee who has served for two years in the same or similar title. . . .

process has already been adjudicated.

Union's Position

First, the Union argues that neither the Union nor the Grievant were properly served with notice of the written charges or the OATH hearing. *MacDonald* does not apply in that the grievant in *MacDonald* was personally served with charges.

Second, the waivers should be deemed valid because of the City's failure to forward the OATH record to the CSC as directed. By failing to provide the record, the City has frustrated Grievant in the very option that it urges is her only available recourse.

Third, the Union argues that if Grievant's waiver is invalid, then the Union's waiver should suffice because it was not a party to the proceeding before OATH. Here, the Union has a viable arbitration claim that the manner in which Grievant was disciplined violated the notice requirements of the Agreement. OATH's findings did not include a determination whether the City complied with the Agreement. Moreover, OATH addressed a question of misconduct, not whether Grievant was discharged wrongfully under the Agreement. Contrary to the City's assertion that the dispute has already been litigated at OATH, there was no adjudication on the merits because the proceeding resulted in a default judgment.

DISCUSSION

The issue is whether the waiver requirement set forth in NYCCBL § 12-312(d) can be satisfied. We find that it cannot because Grievant's termination and the attendant questions of notice have been determined at OATH and are currently on appeal to CSC.

Section 12-312(d), of the NYCCBL provides, in relevant part:

> 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 § 1-06(b) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1).

This statutory waiver requirement is a condition precedent to the arbitration of a grievance. *Social Services Employees Union*, Decision No. B-30-97 at 5. The purpose of the waiver is to insure that a grievant who seeks redress through the arbitration process cannot litigate the same underlying contract dispute in another forum. *Uniformed Firefighters Ass'n of Greater New York*, Decision No. B-3A-2004 at 13-14 (waiver may be deemed valid and arbitration may proceed if union withdraws the identical contract dispute from federal forum). When a union seeks to invoke the contractual arbitration forum to review an employer's disciplinary action and that action has already been reviewed in the alternate statutory forum, the waiver provision cannot be satisfied. *See Social Services Employees Union*, Decision No. B-30-97 (review by OATH barred arbitration of same contract claim); *Correction Officers Benevolent Ass'n*, Decision No. B-24-96 *Local 1549* (review by OATH barred arbitration of same contract claim); *District Council 37,* Decision No. B-50-89 (review by CSC barred arbitration of same contract claim); *New York City Housing Patrolmen's Benevolent Ass'n*, Decision No. B-7-76 (review by CSC barred arbitration of same contract claim).

In *City of New York v. MacDonald*, No. 409786/94 (Sup. Ct. N.Y. Co. Feb. 15, 1996), *aff'd*, 239 A.D.2d 274 (1st Dep't 1997), the courts reversed the Board's finding in *Social Services Employees Union, Local 371*, Decision No. B-13-94, that waivers were valid. There,

the grievant had been absent from HRA without leave. Written charges and notice of a conference were personally served but neither grievant nor the union appeared. A letter was mailed to grievant's last known address advising that: the written charges had been established; dismissal was recommended; grievant had five days to accept the recommendation or seek review pursuant to CSL § 75 or the contractual arbitration procedures; and that failure to select one of these options would result in a hearing in accordance with CSL § 75. Notice of the hearing was mailed to grievant's last known address. A hearing was held and neither grievant nor the union appeared. OATH found that grievant had been properly served with the charges and notice of hearing, grievant was absent from work as charged, and that termination was the appropirate penalty. HRA adopted the recommendation and notice of termination was personally served on grievant and mailed to him at a different address. Subsequently, the union sought arbitration, accompanied by waivers from the union and grievant, alleging that grievant had been wrongfully terminated. The City challenged on the grounds that the waivers were invalid.

This Board denied the petition, finding that a factual issue existed whether grievant received timely notice of the informal conference and the OATH hearing. *Social Services Employees Union, Local 371*, Decision No. B-13-94 at 10. The Board directed that if the arbitrator determined that notice was proper, he could rule that the contractual notice provisions were satisfied and that the City was justified in proceeding to OATH even in grievant's absence. If grievant was not given proper notice, then there was no contractual basis for submitting the dispute to OATH and the arbitration could proceed *de novo* on the merits of the union's claim. *Id*. at 14-15. The Court reversed and found that an arbitrator does not have authority to determine whether OATH acted in the absence of jurisdiction. Once the OATH process had

taken place, the waiver requirement could not be satisfied and the grievance could not be subject to arbitration. The only remedy was to appeal the agency's final determination including the claim of lack of notice in a CPLR Article 78 proceeding or to the CSC. Therefore, the Board erred in accepting the waivers as satisfaction of the condition precedent to arbitration. *MacDonald*, 239 A.D.2d at 274-275.

We find that *MacDonald* controls this case. Here, the OATH proceeding has already occurred. Therefore, review of Grievant's termination including whether she was properly served with notice of the written charges and the hearing is through a CPLR Article 78 proceeding or an appeal to the CSC, which has already been filed. Grievant can no longer elect arbitration. The Union's argument that this case is distinguishable from *MacDonald* in that there the grievant was personally served with charges, and here, Grievant was not, is not dispositive. The issue whether the grievant received personal notice had no bearing on the finding that the waiver was invalid. The Court made clear that: "The employee's proper remedy for his claimed lack of receipt of notice was through the statutory appellate process." *MacDonald*, 239 A.D.2d at 274-275. Since the OATH process has taken place, regardless whether it occurred by election or default, we find that the waiver requirement of NYCCBL § 12-312(d) cannot be satisfied.

The Union's reliance on *Correction Officers Benevolent Ass'n*, Decision No. B-24-96, is misplaced. There, the Board found that neither grievant nor the union could arbitrate an employer's disciplinary action for violating the agency's sick leave policy because the dispute had already been heard at OATH. But the union could arbitrate a different contract dispute brought on behalf of the grievant and similarly situated employees alleging that the promulgation and enforcement of the sick leave policy violated the sick leave provision of the contract.

However, since the union had brought this same underlying contract dispute in federal court, it could not satisfy the waiver requirement of NYCCBL § 12-312(d) unless that claim was withdrawn from the federal action. *Id.* at 11-13. Here, the Union has not identified a different contract dispute which it seeks to arbitrate. Rather, it is seeking to arbitrate the same underlying contract dispute heard at OATH.

Finally, we reject the Union's claim that the City should be precluded from challenging the waivers since it has not provided CSC with the OATH record. The Union has provided no support for the Board to ignore the clear mandate of NYCCBL § 12-312(d). We find that this alleged failure has no bearing on whether the Board can accept the waivers as satisfaction of the condition precedent to arbitration. Moreover, we note that the CSC notice directing the City to produce the OATH record applies only in cases where the appeal "is **not** based on a default judgment/inquest." The Union states that the "disciplinary proceeding against the Grievant was pursuant to a default." Union Answer ¶ 63. The remedy to compel production of the OATH record, if appropriate, lies with the CSC or the courts, not with the Board. The Board has no jurisdiction over the administration or enforcement of statutes other than the NYCCBL. *Del Rio*, Decision No. B-06-2005 at 14.

Accordingly, we grant the City's petition challenging arbitrability and deny the Union's grievance on the grounds that the waiver requirement set forth in NYCCBL § 12-312(d) cannot be satisfied. This decision is without prejudice to any rights conferred upon Grievant by the CSC.

O R D E R

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 by the Human Resources Administration and the City of New York, docketed as BCB-2448-04 be, and the same is hereby granted, and it is further

ORDERED, that the request for arbitration filed by the International Brotherhood of Teamsters, Local 237, docketed as A-10855-04, be, and the same is hereby denied.

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