District Council 37, Local 983 (Mario Gallo), 75 OCB 24 (BCB 2005)

[Decision No. B-24-2005] (Docket No. BCB-2442-05, A-10777-04).

Summary of Decision: The Union alleges that Grievant was wrongfully disciplined when he was terminated from his position in violation of Article VI of the parties' collective bargaining agreement. The City contends that Grievant waived any rights to appeal his termination pursuant to a written stipulation that Grievant and the Union signed. Moreover, the City argues that the Union cannot establish a nexus between Grievant's termination for failure to meet a job qualification and the wrongful discipline provision of the CBA. This Board finds that the waiver in the parties' stipulation agreement precludes arbitration. Furthermore, even if the stipulation was invalid and its waiver provision ineffective, the Union has not established a reasonable relationship between Grievant's termination due to his failure to maintain a CDL, a qualification of employment, and the CBA's grievance provisions. Accordingly, we grant the City's petition. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, Local 983 (Mario Gallo),

Petitioner,

- and -

CITY OF NEW YORK &
DEPARTMENT OF TRANSPORTATION,

Respondents.

DECISION AND ORDER

On November 12, 2004, the City of New York and the Department of Transportation ("City," "DOT," or "Department") filed a petition challenging the arbitrability of a grievance filed by District Council 37, Local 983 ("Union"), on beha lf of Mario Gallo ("Grievant"). The

Union alleges that Grievant was wrongfully disciplined when he was terminated from his position in violation of Article VI of the parties' collective bargaining agreement ("CBA"). The City contends that Grievant waived any rights to appeal his termination pursuant to a written stipulation that Grievant and the Union signed. Moreover, the City argues that the Union cannot establish a nexus between Grievant's termination for failure to meet a job qualification and the wrongful discipline provision of the CBA. This Board finds that the waiver in the parties' stipulation agreement precludes arbitration. Furthermore, even if the stipulation was invalid and its waiver provision ineffective, the Union has not established a reasonable relationship between Grievant's termination due to his failure to maintain a CDL, a qualification of employment, and the CBA's grievance provisions. Accordingly, we grant the City's petition.

BACKGROUND

Grievant was hired by DOT on or about November 3, 1996, as an Assistant City Highway Repairer ("ACHR"), and assigned to DOT's Roadway Repair and Maintenance Division. The duties of an ACHR include repair of curbs, sidewalks, and manhole edges; cleaning construction and repair sites; snow removal; general vehicle maintenance; and masonry work. In order to perform these duties, ACHR may use picks and other equipment, may operate a motorized vehicle, and may be required to safely direct traffic around large construction projects. The job specification for the title states, in pertinent part:

> License Requirement
> A Driver License valid in the State of New York is required at the time of appointment. A Class B Commercial Driver License is required within ninety days of the date of appointment. There may be certain age requirements to obtain this license.

DOT's "Loss of License Policy" ("Policy"), dated November 2003, outlines DOT's policy regarding the maintenance of specific licenses required for various titles. It states:

> [I]f the job specification for the title in which the employee was hired requires that a specific license be maintained for the duration of employment and that license is subsequently not maintained, the employee is no longer qualified to hold the position.

If an employee has lost a required license, the Policy provides:

a. The Office of the Advocate will confer with the employee and allow the employee to use five (5) days of their annual leave or comp time to rectify the situation and validate his/her license.
b. If the employee is unable to produce a valid license within that five day period and has been employed by DOT for less than two years or is serving probation in his/her title, (s)he will be terminated since (s)he no longer meets the qualifications for the title.
c. If a permanent employee or other employees with two or more years of service is unable to produce a valid license, (s)he will be given the opportunity to accept a voluntary six (6) month suspension in order to have the license reissued. The acceptance of the six (6) month suspension will be in the form of a written document (stipulation) and signed by the employee. It will NOT be a disciplinary suspension, NOR will it imply disciplinary action. If the employee does not agree to the suspension, (s)he will be terminated.
d. If the employee is successful in obtaining the requisite license in less than six (6) months, (s)he will contact the Office of the Advocate and make an appointment to produce the valid license. After presentation of the valid license at the Office of the Advocate, the employee will be returned to duty. If (s)he fails to obtain the license by the end of the six month suspension period, the employee will be terminated.

According to the City, on January 21, 2004, DOT was notified by the Department of Motor Vehicles that Grievant's Class B Commercial Driver's License ("CDL") had been revoked. Marcia Sampson, DOT's Assistant Director of the Office of the Advocate, met with Grievant on January 23, 2004. Sampson advised Grievant that he would be given five days to obtain his CDL. Grievant was also told that if he could not obtain his CDL by January 29, 2004, he would have to contact his Union representative and could sign a "License Stipulation"

("Stipulation"). Sampson provided Grievant with a handwritten outline of these terms.

On February 9, 2004, Grievant was issued a "Restricted Use" New York State Driver's License ("Restricted Use License"). On February 17, 2004, Grievant, accompanied by Union representative David Catala, met with Sampson. The Union asserts that Catala had not been informed that DOT had promulgated the Policy. Because Grievant had failed to obtain his CDL, Grievant was asked if he would enter into a Stipulation. Grievant informed Sampson that he had been issued a Restricted Use License which would allow him to continue to perform his duties as an ACHR, but Sampson refused to allow Grievant to return to work. The Union claims that the Grievant was not given an advance copy of the Stipulation, was not given an opportunity to consult an attorney about its contents, was not allowed to make any changes to the Stipulation, and was informed that he had to sign it in order to avoid being terminated immediately.

Grievant and Catala both signed the Stipulation which provides, in part:

1. Discussions were held between the Department and Assistant City Highway Repairer Mario Gallo;
2. That during those discussions, Mario Gallo acknowledged that he does not possess a valid New York State driver's license;
3. That a valid New York State driver's license is a requirement for the position for which Mario Gallo is employed by the agency;
4. That Mario Gallo accepts a suspension from his position with the agency until such time that his driver's license is restored;
5. That, for the purposes of this Agreement, restoration of a valid New York State driver's license shall be deemed to include both a full restoration of driving privileges or the issuance of a license permitting the operation of motor vehicles for work-related purposes;
6. That within ten (10) business days of the restoration of his driver's license, as specified in Paragraph five (5), Mario Gallo shall submit documentation regarding the restoration to the agency's Office of the Advocate;

* * *

10. That failure to make a timely request for reinstatement as specified in paragraph six (6) shall be deemed an abandonment by Mario Gallo of his position with the Department, and shall result in the automatic termination of Mario Gallo's

position with the Department;

* * *

12. That, in the event that a suspension pursuant to this Agreement exceeds a period of six (6) months, Mario Gallo shall be terminated from his position with the agency;
13. That Mario Gallo waives any rights he may have pursuant to New York Civil Service Law and/or any collective bargaining agreement to challenge the termination of his position with the agency pursuant to either Paragraphs ten (10) and/or twelve (12);
14. That, notwithstanding the provisions of Paragraph thirteen (13), an employee terminated pursuant to Paragraphs ten (10) and /or twelve (12) does not waive his rights pursuant to law or contract to challenge the agency's determination with regards to the calculation of relevant time periods;
15. That this Agreement constitutes a waiver by Mario Gallo whereby he is estopped from commencing any judicial or administrative proceedings or appeal before any court of competent jurisdiction, administrative tribunal, or Civil Service Commission to contest the lawfulness, authority, and jurisdiction of the Commissioner in imposing the terms which are embodied in this Stipulation;
16. That Mario Gallo confirms that this Stipulation and Agreement has been entered into knowingly and intentionally, without coercion or duress practiced upon him or influencing him in any way, and after having discussion with and having been advised by his union representative and/or counsel, does accept all terms and conditions contained herein.

On August 9, 2004, the Union filed a Step I grievance alleging that DOT's termination of Grievant "is in violation of the Blue Collar Contract Article VI, section 1, sub. a, b, c, i and the attached stipulation between Mario Gallo and the NYC Dept of Transportation."

On September 7, 2004, DOT sent Grievant a letter informing him that he would be terminated on September 10, 2004, because he had failed to maintain a CDL and was no longer qualified for his position. By letter dated September 20, 2004, DOT denied the Union's grievance, stating that Grievant was terminated because he failed to maintain a CDL as required by the job specification and was no longer qualified to hold his position, and that the matter was not grievable under the terms of the parties' CBA.

On October 13, 2004, and corrected on November 19, 2004, the Union filed a request for

arbitration alleging that DOT violated Article VI, § 1(h), of the CBA and that the issue to be arbitrated is: "Whether the employer, the New York City Department of Transportation, has wrongfully disciplined the grievant Mario Gallo and, if so, what shall the remedy be?" The remedy sought is reinstatement of Grievant with back pay with interest and expungement of all disciplinary charges.

Article VI of the CBA provides in relevant part that the term "Grievance" shall mean:

a. A dispute concerning the application or interpretation of the terms of this Agreement.
b. 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 terms and conditions of employment. . .
c. A claimed assignment of Employees to duties substantially different from those stated in their job specifications;

* * *

h. A claimed wrongful disciplinary action taken against a provisional employee who has served for two years in the same or similar title or related occupational group in the same agency.
i. A claimed wrongful disciplinary action taken against an employee appointed pursuant to Rule 3.2.11 of the Personnel Rules and Regulations of the City of New York who has served continuously for two years in the same or similar title or related occupational group in the same agency.

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union's request for arbitration must be dismissed because Grievant waived any rights to appeal his termination pursuant to the Stipulation. The City also argues that because the Union cannot establish a nexus between Grievant's dismissal for failure to meet a job qualification and the wrongful discipline provision of the CBA, the Union has failed to state a grievable claim under the CBA.

In response to the Union's allegation that Grievant and the Union had no knowledge of the Policy, the City contends that the Policy was issued in November 2003 and distributed to all DOT employees. Under the Policy, an employee is informed that if he or she does not procure a required license within the requisite period, the employee has the option of entering into a Stipulation or being terminated for failure to meet the license requirement. Grievant and his Union representative knowingly entered into the Stipulation free of coercion or duress.

Union's Position

The Union states that its request for arbitration includes allegations set forth in the original grievance presented to DOT as well as the claim under Article VI, § 1(h), of the parties' CBA. The Union asserts that it has established a nexus between the termination and Article VI of the parties' CBA and that it is entitled to an arbitration addressing whether Grievant's termination was wrongful.

According to the Union, ACHRs are regularly and consistently assigned to operate non-commercial motor vehicles on a full-time basis, for which a CDL is not required, provided the operator possesses a valid New York State driver's license. ACHRs who have lost their licenses have been assigned to in-title duties that do not involve the operation of a commercial motor vehicle. DOT's decision to terminate Grievant rather than demote or reassign him to other in-title duties underscores the fact that his termination was disciplinary in nature.

Alternatively, the Union argues that the Stipulation conflicts with the Policy and constitutes a violation, misapplication, or misinterpretation of the Policy at issue. Moreover, DOT violated the terms of the Stipulation when it refused to allow Grievant to return to work with a Restricted Use License. The Stipulation makes no reference to a CDL, only to a valid

driver's license and states that DOT will reinstate Grievant if he presents "a valid NYS driver's license" to DOT.[1]

DISCUSSION

Pursuant to § 12-302 of the NYCCBL, the public policy of New York City is to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances. *District Council 37, Local 1407, AFSCME,* Decision No. B-7-2005 at 10. However, the Board cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *Social Service Employees Union, Local 371,* Decision No. B-34-2002 at 4.

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 agreed to arbitrate their controversies through a grievance

[1] The Union also argues that the Policy was unilaterally promulgated and enforced against Grievant in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). This issue was raised more fully in a related improper practice petition, Docket No. BCB-2422-04, which the Union has withdrawn. Therefore, we will not address the issue.

procedure in their CBA, and there is no claim that an arbitration is restricted by statute or public policy. Thus, the issue is whether Grievant's termination for failure to maintain a CDL is arbitrable. This Board finds that the signatories' waiver in the Stipulation overrides the CBA's arbitration provisions. Furthermore, the Union has not established a reasonable relationship between Grievant's termination due to his failure to maintain a qualification of employment and the CBA's grievance provisions.

This Board has found that a union or its members may waive the right to arbitration. *District Council 37,* Decision No. B-41-2002 (Board upheld stipulation waiving arbitration for future misconduct); *Social Service Employees Union, Local 371*, Decision No. B-22-2001; (no basis to override parties' waiver in stipulation agreement regarding prior disciplinary proceeding); *District Council 37, Local 1549,* Decision No. B-33-98 (Board found no authority to send case to arbitration to review dismissal of employee under the terms of stipulation agreement). Here, paragraph 13 of the Stipulation specifically provides that Grievant agrees to waive his right to challenge his termination under the CSL or the parties' CBA. When, as here, the parties have expressly waived their grievance rights for specific disputes, this Board cannot override the signatories' agreement and compel either party to arbitrate those disputes. *District Council 37,* Decision No. B-41-2002 at 6.

Even if we were to find the Stipulation invalid and the waiver provision ineffective, the Union has not established a reasonable relationship between Grievant's termination and the grievance procedures set forth in the CBA. The Board has consistently held that failure to maintain a qualification of employment, such as residency or a State license, does not give rise to arbitration rights under the parties' contractual wrongful discipline procedures. *District Council*

37, Local 1407, AFSCME, Decision No. B-7-2005 (residency); *District Council 37, Local 2507,* Decision No. B-18-2001 (license); *District Council 37, Local 375,* Decision No. B-14-2001 (residency); *Organization of Staff Analysts,* Decision No. B-41-96 (residency). The Board's holdings are consistent with rulings from the courts, including *Felix v. City of New York Dep't of Citywide Administrative Services,* 3 N.Y.3d 498 (2004) (failure to establish and maintain residency is a violation of the City's residency requirement that results in forfeiture of employment and is not misconduct that would entitle an employee to a pre-removal hearing); *Naliboff v. Davis,* 133 A.D.2d 632 (2d Dep't 1987), *appeal denied,* 71 N.Y.2d 805 (1988) (no hearing required for termination of emergency service dispatchers for failure to maintain certification); and *Mandelkern v. City of Buffalo,* 64 A.D.2d 279 (4th Dep't 1978) (failure to maintain residency, a qualification of employment, results in forfeiture of employment). Therefore, DOT had the right to suspend and terminate Grievant without a disciplinary hearing, and there is no reasonable relationship between his termination and the disciplinary hearing procedures under Article VI, § 1(h), of the CBA.

Although the Union did not cite to Article VI, § 1(a), (b), (c), and (i), in its request for arbitration, we address whether there is a reasonable relationship between these contract provisions and Grievant's termination because they were referenced in the Step I grievance and the Union discusses them in its answer to the petition. Article VI, § 1(a), is inapplicable because there is no dispute concerning the application or interpretation of the terms of the CBA. As to Article VI, § 1(b), which provides grievance rights for the misapplication of a policy, other than conclusory allegations, the Union has not alleged facts to support its claim that DOT misapplied the Policy. *Cf. District Council 37, Local 1407,* Decision No. B-7-2005. There is no reasonable

relationship between Grievant's termination and Article VI, § 1(c), because Grievant does not claim that he was assigned duties that were not in his job specification. Finally, there is no reasonable relationship between Article VI, § 1(i), and Grievant's termination because there is no evidence that he was appointed under Rule 3.2.11 of the Personnel Rules and Regulations of the City of New York.

As to the Union's contention that DOT failed to comply with the terms of the Stipulation, we find that the Stipulation did not provide for an independent dispute resolution mechanism. Thus, there is no evidence that the parties agreed to employ grievance and arbitration procedures to resolve questions of enforcement of the Stipulation. *Uniformed Firefighters Ass'n,* Decision No. B-18-2005 at 12. We find no grounds to submit the grievance to arbitration and, accordingly, we grant the City's petition.

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 Transportation, docketed as BCB-2442-04, be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 983, docketed as A-10777-04, be, and the same hereby is, denied.

Dated: July 28, 2005
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
MEMBER

M. DAVID ZURNDORFER
MEMBER