***District Council 37, Local 1549,* 77 OCB 13 (BCB 2006)**
[Decision No. B-13-2006(Arb.)] (Docket No. BCB-2522-05) (A-11474-05).

Summary of Decision: The City filed a petition challenging the arbitrability of a grievance, which asserted that Grievant was wrongfully terminated in violation of the parties' collective bargaining agreement. The City contended that Grievant, by executing a stipulation of settlement, which placed him on a one year probationary period, waived his right to his contractual appeal rights concerning his termination. The Board found that, as a result of Grievant's probationary status, he was precluded from arbitrating his termination, and thus, no reasonable relationship existed between the act complained of and the rights invoked. Accordingly, the City's petition was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK and THE DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS,

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 1549,

Respondent.

DECISION AND ORDER

On November 30, 2005, the City of New York and the Department of Information Technology and Telecommunications ("City" or "DOITT") filed a petition challenging the arbitrability of a grievance brought by District Council 37, Local 1549 ("Union" or "Local 1549") on behalf of Maurice Taylor ("Grievant"). The grievance asserts that DOITT's termination of

Grievant was wrongful because DOITT's allegations concerning Grievant's discourteous conduct, inefficient performance of job duties, and use of obscene and abusive language are false. The City argues that the grievance is not subject to arbitration under the parties' collective bargaining agreement ("Agreement") because, after waiving his right to the contractual grievance procedure, Grievant contravened the terms of DOITT's Code of Conduct ("Code of Conduct"), which was a violation of a stipulation of settlement executed by Grievant and the parties. Relying upon a determination by the Unemployment Insurance Appeal Board ("UIAB") which found that Grievant did not engage in any alleged misconduct, the Union asserts that since Grievant never violated the Code of Conduct, his termination was improper. We find that Grievant's status as a probationary employee affords him no procedural rights to grieve termination imposed because of alleged Code of Conduct violations. We cannot grant rights to Grievant that he has voluntarily surrendered through the last chance agreement, and, accordingly, we grant the City's petition.

BACKGROUND

Grievant was appointed to the non-competitive position of a City Seasonal Aide for the Department of Housing Preservation and Development on October 10, 2000. Grievant's first six months with this department was a probationary period. Grievant worked for this department until January 6, 2003,when he was transferred to DOITT. Grievant served provisionally in the Call Center Representative title and was assigned to the New York 3-1-1 Call Center. Grievant's responsibilities included responding to telephone inquiries, providing customer service, taking complaints and service requests, entering data regarding telephone calls, and, when possible, transferring calls to the appropriate agency.

Two years later, in January 2005, Grievant was served with a Statement of Charges alleging that he had violated the Code of Conduct due to his excessive lateness for the period of February 2004 through December 2004. Instead of challenging these charges and exercising his statutory and/or contractual rights of appeal, Grievant entered into a stipulation of settlement, dated January 20, 2005 ("Last Chance Agreement"), which reads:

> I, Maurice Taylor, acknowledge receipt of a copy of the Charges and Specifications and a copy of the provisions of Section 75 and 76 of the Civil Service Law. I have been advised that the penalty recommended for said Charges and Specifications as a result of the Settlement Stipulation in lieu of the Informal Conference scheduled for 1/21/05 is as follows:
>
> **Penalty**
>
> One week's suspension to begin on 1/24/05. Employee will return to work on 1/31/05.
>
> One year's probation. The Director of Labor Relations will review the employee's record in six months. If there are no violations of the Code of Conduct, the remaining probation period will be lifted and considered time served. The employee understands that violation of the Code of Conduct during the probationary period may lead to termination.
>
> I am fully aware that I am entitled to a disciplinary hearing pursuant to Section 75 of the Civil Service Law and that I may elect to appeal from an adverse decision rendered after such hearing either to the Supreme Court of the State of New York or to the New York Civil Service Commission in accordance with the procedures set forth in Section 76 of the Civil Service Law. But I waive all rights granted to me under the provisions of Sections 75 and 76 of the Civil Service Law and I accept the penalty specified above.
>
> I am also fully aware that if I am covered by a collective bargaining agreement between a union and the City of New York that affords the grievance procedure as an alternative to the Civil Service Law procedure, referred to above, my union, with my consent, may alternatively choose to proceed in accordance with the Grievance Procedure set forth in the said union agreement. But I waive all rights of appeal through the grievance procedure granted to me under any and all collective bargaining agreements between any union which represents my title and the City of New York and I ACCEPT THE PENALTY SPECIFIED ABOVE.

> If this penalty is approved by the appointing officer, I accept such decision. I am fully aware that this waiver of my right to a Section 75 hearing or to a hearing under the grievance procedure alternative is FINAL, IRREVOCABLE AND BINDING."

(emphasis omitted).

Grievant returned to work from his suspension on January 31, 2005, and during his probationary period, he received two customer service compliment letters and a performance evaluation with the score of "100." However, also during this period, Grievant was "written up" on at least five occasions for lateness issues, as well as being "written up" numerous other times concerning topics ranging from his failure "to properly log-off of the phones" to his "excessive percentage of blank activity records." Finally, on May 10, 2005, Grievant received a call from a person who wanted to file a noise complaint against her neighbor. According to the written reprimand submitted by the City, Grievant was "unnecessarily aggressive towards the caller," was "insensitive to the caller's needs," used obscene and inappropriate language, and hung up on the caller. According to the reprimand, Grievant violated §§ 1, 21, and 33 of the Code of Conduct.[1]

In the morning of May 13, 2005, Mary Reyes, Grievant's supervisor, approached Grievant at his workstation to discuss the May 10, 2005 incident and presented him with the written reprimand. According to the Union but denied by the City, Grievant requested that a Union representative be present, but Reyes denied this request and then asked Grievant about this incident.

---

[1] The Code of Conduct, in pertinent part, states:

> Section 1 - Employees shall be courteous and considerate in their contact with the public.
>
> * * *
>
> Section 21 - Employees shall perform their duties and assignments in such a manner as to reflect orderliness and efficiency at all times.
>
> * * *
>
> Section 33 - Employees shall not use obscene, abusive or inappropriate language with a supervisor, a fellow employee or private citizen.

Claiming he did not act inappropriately or use obscene language, Grievant attempted to refute the version contained in the reprimand. Reyes then instructed Grievant to sign a NYC 3-1-1 Call Center Disciplinary Report, and even though the Union asserts that Grievant disagreed with the facts contained therein, he signed the reprimand acknowledging receipt thereof. Later that day, Grievant was served with a letter from Reinalda Medina, who is the Assistant Commissioner for Human Resources, stating that his employment with DOITT was terminated, effective immediately.

Sometime after Grievant's termination, he applied for unemployment insurance benefits from the New York State Department of Labor but was initially disqualified because he was terminated for misconduct. Grievant appealed this determination, and, on appeal, the UIAB administrative law judge credited Grievant's version of the May 10, 2005 incident. The administrative law judge noted that DOITT's failure to preserve the recording of this call was "significant" and found that Grievant did not engage in the alleged misconduct. Thus, he was entitled to receive unemployment insurance benefits.[2]

On May 20, 2005, Grievant filed a grievance alleging that DOITT violated Article VI, § 1(a), (b), and (g) of the Agreement when it wrongfully terminated him on baseless grounds.[3] On August

---

[2] These findings and determinations were upheld by the UIAB in a decision, dated November 7, 2005.

[3] Article VI, § 1, of the Agreement, in pertinent part, states:
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 . . . ;
* * *
(g) 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
(continued...)

19, 2005, a Step III determination was issued dismissing Grievant's claim against DOITT because he had "waived all rights of appeal through the grievance procedure." Consequently, the Union filed a request for arbitration, dated September 29, 2005, asserting that Grievant's termination was a wrongful disciplinary action, which violated Article VI, § 1(b) and (g) of the Agreement, and requesting that Grievant be reinstated with full back pay.

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(b) or (g) of the Agreement. Here, Grievant was disciplined for excessive lateness and entered into the Last Chance Agreement, foregoing his statutory and contractual rights to challenge DOITT's determination regarding that issue. A condition of the Last Chance Agreement was placement on one year's probation, during which time any violation of the Code of Conduct could result in his termination. Thus, when Grievant's supervisor found he acted in a manner that violated three provisions of the Code of Conduct, DOITT was empowered under the Last Chance Agreement to exercise its right to terminate his employment. Since the Board has consistently dismissed cases when an employee is terminated pursuant to stipulations of settlement, the instant matter should be decided similarly.

In response to the Union's assertion that the language of the Last Chance Agreement does not mandate Grievant's termination, the City asserts that the phrase "may lead to termination" grants

---

[3](...continued)
agency.

DOITT the discretionary authority to exercise this clause or not, as demonstrated by DOITT's failure to terminate Grievant after any of the other numerous incidents that occurred during his probationary period. The language in this stipulation does not restrict the agency's ability to terminate Grievant for any violation of the Code of Conduct. In addition, the City argues that the arbitrary and capricious standard established by the parties and applied by the Board in *Department of Probation*, Decision No. B-51-98, is inapplicable in the instant matter because the Last Chance Agreement, here, does not contain limiting language as the stipulation in that case did. Thus, DOITT's authority is not limited by anything contained in the Last Chance Agreement or by any case law that interprets these stipulations.

Union's Position

The Union argues that Grievant, as a provisional employee with two years in the same job title, is entitled to due process set forth in Article VI, § 1(g) of the Agreement. In light of the questions of fact concerning the May 10, 2005 incident and the finding by the UIAB crediting Grievant's version of this incident and discrediting DOITT's version, an arbitrator should decide whether Grievant did, in fact, violate the Code of Conduct on May 10, 2005.

The Union also argues that the Last Chance Agreement does not reserve for DOITT the power to impose unilateral discipline because the Last Chance Agreement merely states that violations of the Code of Conduct "may lead to termination." Rather, this agreement reserved for DOITT the power to extend Grievant's probationary period. Furthermore, the Union contends that Grievant waived his statutory and contractual rights only to review the excessive lateness charge and the penalty imposed upon him pursuant to the Last Chance Agreement. Grievant, however, did not waive his right to grieve future alleged violations of the Last Chance Agreement that may arise

during the course of his probation. The Last Chance Agreement does not mandate termination for a violation of the Code of Conduct, and DOITT's imposition of this penalty upon Grievant was arbitrary and capricious in light of the UIAB determination.

Finally, the Union asserts that the termination resulted from a meeting between Grievant and his supervisor who denied Grievant's request for a Union representative to be present. According to the Union, Grievant had a reasonable belief that discipline could have resulted from this meeting with Reyes, he was entitled to have a Union representative present, and Reyes's denial of his request constituted a violation of his right under *Weingarten. See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). Thus an arbitrator should be presented with the issue whether Grievant's *Weingarten* rights were violated. The Union, citing Civil Service Law § 75(2), also advances that unlawfully obtained statements should be suppressed and any penalty arising out of that meeting should be rescinded.

DISCUSSION

The issue in this case is whether the Last Chance Agreement precludes granting the Union's request for arbitration concerning Grievant's termination. We find that Grievant's acceptance of the terms of the Last Chance Agreement, and specifically the term that places Grievant on a year's probation, supercedes his contractual right to the grievance procedures for the term of the probationary period.

Although this Board's statutory directive is to promote and encourage impartial arbitration as the selected means for the resolution of grievances, NYCCBL § 12-302; *New York State Nurses Ass'n*, Decision No. B-21-2002, *citing Matter of Board of Education [Watertown Education Ass'n]*, 93 N.Y. 2d. 132 (1999), we cannot create a duty to arbitrate if none exists or enlarge a duty to

arbitrate beyond the scope established by the parties. *United Marine Division, Local 333, ILA*, Decision No. B-12-2005 at 8; *Social Serv. 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 Serv. Employment Union*, Decision No. B-2-69 at 2; *see District Council 37, AFSCME*, Decision No. B-47-99 at 8-9, 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 7. In this case, absent the Last Chance Agreement, Grievant's claim could be arbitrable. However, in the Last Chance Agreement, Grievant specifically agreed to be placed on probation for one year, thereby relinquishing all contractual grievance rights he had gained over the course of his employment with DOITT.

This Board has repeatedly denied requests for arbitration when parties have agreed in a stipulation of settlement of disciplinary charges that future misconduct during the stipulated period would constitute a basis for summary dismissal. *District Council 37, Local 2507*, Decision No. B-41-2002; *Social Serv. 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, Int'l Bhd. of Teamsters*, Decision No. B-43-98 at 4-5. We conduct a specific analysis of the provisions of a last chance agreement in each case to determine

whether either party has reserved any arbitration rights. *District Council 37, Local 2507*, Decision No. B-41-2002 at 8.

In *United Marine Division, Local 333, ILA*, Decision No. B-12-2005, the grievant executed a stipulation of settlement to dispose of charges that he had neglected to perform his assigned duties. This stipulation stated that he agreed "to serve a one (1) year probation period" and agreed "that any violation of the agency's Code of Conduct during the probationary period would result in his immediate termination." *Id.* at 2-3. During his probation, the grievant received a letter stating that he violated the agency Code of Conduct by, *inter alia*, talking on his cell phone during work hours and was terminated immediately pursuant to the stipulation of settlement. The union challenged the grievant's termination claiming that these allegations were false and that an arbitrator should determine the veracity of these allegations. The Board found that "since grievant expressly waived his right to arbitration by agreeing to a nearly unrestricted probationary status," this Board had no basis to find this matter arbitrable. *Id.* at 8; *see also District Council 37, Local 983*, Decision No. B-11-2005 at 8, *aff'd, Local 983, District Council 37 v. New York City Bd. of Collective Bargaining*, No. 107616/05 (Sup. Ct. N.Y. Co. January 18, 2006) (the probationary status of a grievant, pursuant to a stipulation of settlement, encompasses subsequent actions as well as the immediate acts that gave rise to the stipulation.).

In *District Council 37, Local 376*, Decision No. B-21-90, the grievant agreed, in lieu of disciplinary charges concerning substance abuse, to a twelve month probationary period, and the stipulation of settlement stated any misconduct or unsatisfactory performance would result in termination. After a supervisor allegedly observed the grievant at a restaurant during working hours, he was terminated. We held that since the grievant was terminated for allegedly engaging in

misconduct during his probationary period, and he relinquished his right to arbitrate disputes regarding his termination due to his probationary status, the grievance was not arbitrable. *Id*. at 11.

Here, in consideration for the resolution of the excessive lateness charges proffered against Grievant, he agreed to serve a one week suspension and a one year probationary period. The Last Chance Agreement states that "the employee understands that violation of the Code of Conduct during the probationary period may lead to termination." While on probation, Grievant allegedly was discourteous, performed an assignment inefficiently and used obscene language with a private citizen, all acts determined by DOITT to violate the Code of Conduct. On this basis, DOITT terminated Grievant's employment without giving him an opportunity to challenge these allegations. Since Grievant agreed to be placed on probation for one year and the alleged violations of the Code of Conduct occurred during that period, this Board cannot grant rights that Grievant has voluntarily surrendered through the Last Chance Agreement. Therefore, there is no basis on which to find arbitrable the factual issue whether Grievant's actions were violative of the Code of Conduct.

The Union contends that DOITT's allegations against Grievant are false and that an arbitrator should determine the veracity of these allegations. However, as in the above-cited decisions, Grievant's assertion that his employer's allegations are fabricated does not render this matter arbitrable because an employee who is on unrestricted probation is not entitled to contractual grievance rights. *See United Marine Division, Local 333, ILA* Decision No. 12-2005 at 7; *see also Social Serv. Employees Union*, Decision No. B-10-2004 at 7-8.

In addition, the Union's reliance on *Department of Probation*, Decision No. B-51-98, is misplaced. There, the stipulation of settlement executed by the grievant provided that he would be placed on a year's probation and 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 grievant's probationary period was not unrestricted, but, rather, was limited by the foregoing quoted language. Thus, the grievant was entitled to have an arbitrator determine whether the City acted arbitrarily and capriciously in dismissing her.

Here, the Last Chance Agreement contains no language requiring that DOITT act in good faith and not be arbitrary. The Union's allegations concerning DOITT's bad faith are based primarily upon the UIAB's crediting Grievant's version of the events of May 10, 2005. UIAB's finding addresses the merits of Grievant's termination, whereas, in the instant matter, this Board may only address the issue of arbitrability. Moreover, since this Board administers the NYCCBL, not the New York State Unemployment Insurance Law, we find that the UIAB's subsequent finding that Grievant did not engage in the alleged misconduct, as defined under the New York State Unemployment Insurance Law, that would forfeit his entitlement to unemployment insurance benefits is not determinative of any issue before this Board. *See generally Int'l Bhd. of Teamsters, Local 858*, Decision No. B-38-92 at 11-12 ("The Board's authority does not extend to the administration of any statute other than the NYCCBL [and] the Board is without jurisdiction to interpret, administer or enforce the provisions of the New York State Labor Law.")

Further, the Union argues that the words "may lead to termination" in the Last Chance Agreement did not reserve for DOITT the power to terminate Grievant. However, we have found that the use of such language in a stipulation of settlement does, in fact, grant the employer the authority to terminate the employee who has executed a stipulation of settlement. *See District Council 37, Local 983*, Decision No. B-11-2005 at 9; *Social Serv. Employees Union, Local 371*,

Decision No. B-22-2001.

Finally, any allegation concerning the alleged violation of Grievant's *Weingarten* rights is not properly raised in a contractual grievance. In an arbitrability proceeding, this Board is presented with the question whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement, not whether the employer has violated an employee's rights granted under NYCCBL § 12-305. Based upon the record before this Board, there is no evidence of anything equivalent to a *Weingarten* rights clause contained in the Agreement, thus, there is no reasonable relationship between the alleged *Weingarten* rights violation and the Agreement. Such a claim could have been raised in an improper practice 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, the petition challenging arbitrability filed by the City of New York and the Department of Information Technology and Telecommunications, docketed as BCB-2522-05, hereby is granted; and it is further,

ORDERED, that the request for arbitration filed by District Council 37, Local 1549, on behalf of Maurice Taylor, docketed as A-11474-05, hereby is denied.

Dated: April 4, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

DISSENTING OPINION

I dissent. To be effective, a waiver must be knowing, explicit and wholly unequivocal. Here, there was no explicit statement in the "last chance agreement" that the employee unequivocally waived or voluntarily surrendered his prospective rights to arbitration under the parties' collective bargaining agreement.

CHARLES G. MOERDLER
MEMBER