D'Onofrio, 79 OCB 28 (BCB 2007)

[Decision No B-28-2007] (Arb) (Docket No. BCB-2621-07) (A-11294-05).

Summary of Decision**:* Petitioner challenged the arbitrability of a grievance he filed alleging wrongful discipline. Petitioner argued that there was no nexus between the subject of his grievance and a specific provision of an applicable collective bargaining agreement granting him the right to grieve a thirty day annual leave penalty. The Board found that Petitioner's challenge is untimely, judicially estopped, contrary to the purpose of the Rules, and, therefore, barred from consideration. The Board also explained that such a challenge, if granted, affords no greater remedy than that which Petitioner may avail himself by withdrawing his request for arbitration. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

ROBERT J. D'ONOFRIO,

Petitioner,

-and-

THE CITY OF NEW YORK,
the NEW YORK CITY POLICE DEPARTMENT,
and STEAMFITTERS' LOCAL UNION 638,

Respondents.

DECISION AND ORDER

On May 9, 2007, Petitioner filed a petition challenging the arbitrability of his grievance, which was the subject of a request for arbitration he filed on July 7, 2005, against the New York City Police Department ("NYPD") alleging wrongful discipline. Petitioner argues that there is no nexus between the subject of his grievance and a specific provision of a collective bargaining agreement

that grants him the right to challenge discipline imposed upon him by the NYPD. Based on arguments asserted by the City in *D'Onofrio,* Decision No. B-4-2007, Petitioner argues that his grievance rights arise solely from Mayoral Executive Order 83 (EO 83) which does not grant him the right to challenge disciplinary action. Section 1-06(c)(1) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") permits challenges to arbitrability only within ten business days after service of the request for arbitration. Since Petitioner did not file within this time period, we find that his challenge is untimely and must be dismissed.

BACKGROUND

Petitioner was hired in 1997 by the NYPD and held the civil service title of Steamfitter. At the time this grievance arose, he was assigned to the Building Maintenance Section. The title of Steamfitter is a prevailing wage title covered by § 220 of the New York Sate Labor Law, and, therefore, the wages are established by a Consent Determination issued by the Comptroller of the City of New York. Steamfitters are represented by the Steamfitters' Union Local 638 ("Union"). There is no non-economic collective bargaining agreement between the City and the Union. Grievance and arbitration rights accorded to employees in the title Steamfitter originate in EO 83.

Between 2002 and 2005, several sets of disciplinary charges and specifications were served upon Petitioner by the NYPD.[1] As a result of these disciplinary charges and specifications, the NYPD imposed a thirty day suspension in 2004; a thirty day annual leave penalty in 2005; and, terminated Petitioner in November 2005. For these sets of charges and specifications, Informal

[1] The disciplinary history is detailed in *D'Onofrio*, Decision No. B-3-2007 (Petitioner alleged that the Union breached its duty of fair representation) and *D'Onofrio*, Decision No. B-4-2007 (City challenged arbitrability of D'Onofrio's grievance) and need not be repeated here.

Conferences were conducted, grievances were filed, and in some instances Step II and Step III grievance meetings were held. In effect, these disciplinary matters were treated by the City, the NYPD, the Union, and Petitioner, as though Petitioner had grievance rights. Though the Union did not attempt to proceed to arbitration, Petitioner, on his own initiative but with the Union's consent, filed three separate requests for arbitration challenging these allegedly wrongful disciplinary actions.

The City did not challenge the arbitrability of Petitioner's first two requests for arbitration, A-11162-05 and A-11294-05, where Petitioner sought to arbitrate the thirty day suspension and the thirty day annual leave penalty, respectively. In both those cases, arbitrators were selected in accordance with OCB Rules.

On August 29, 2006, NYPD filed a petition pursuant to OCB Rule § 1-06(c)(1) challenging the arbitrability of Petitioner's third request for arbitration, A-11999-06, in which Petitioner sought to challenge his allegedly wrongful termination. The City alleged that D'Onofrio failed to establish the requisite nexus between the subject of the grievance and a specific provision of a collective bargaining agreement.[2] Specifically, the City argued that since D'Onofrio worked in a title that is covered by § 220 of the New York State Labor Law and has no collective bargaining agreement, D'Onofrio's only right to request arbitration arises from EO 83, which expressly excludes the right to challenge disciplinary action. In *D'Onofrio*, Decision No. B-4-2007, the Board denied the City's challenge. As the Board explained:

> This belated assertion by the City, after it actively participated in and processed this

[2] During the pendency of the City's challenge, Petitioner requested that A-11999-06 be consolidated with A-11162-05. The City did not object to the request but pointed out that it had filed a challenge to the arbitrability of the request in A-11999-06. The Deputy Chair granted the consolidation on September 12, 2006, "in the event Case Number A-11999-06 proceeds to arbitration."

> particular grievance and two others through each step of the procedure over three years, could leave Respondent without any remedy, as the time to contest his termination pursuant to Civil Service Law § 75 has passed. We also note that under Article 78 of the Civil Practice Law and Rules, Respondent [D'Onofrio] only has four months to challenge the actions of NYPD in court, and that time has passed as well. Because of the City's failure to assert its claim that no grievance remedy was available to Respondent [and] led him to forego other available remedies, we find that he has been injured and prejudiced by the City's actions . . . ."

Id. at 10.

In the instant matter, Petitioner asks that we dismiss his own request for arbitration in A-11294-05, challenging the thirty day annual leave penalty.[3] Petitioner bases his argument on the same grounds advanced by the City in *D'Onofrio*, Decision No. B-4-2007 and states that he is now interested in challenging this disciplinary action through the New York City Office of Administrative Trials and Hearings ("OATH"). He requests that this Board reinstate him to his former position so that he may pursue that claim. Alternatively, Petitioner requests that we simply dismiss his request for arbitration.

POSITIONS OF THE PARTIES

Petitioner's Position

In the instant matter, Petitioner admittedly uses verbatim the City's arguments in its petition challenging arbitrability in *D'Onofrio*, Decision No. B-4-2007. Petition, at p. 6. Petitioner alleges that he himself has failed to establish a nexus between the disciplinary penalty imposed upon him and a specific provision of a collective bargaining agreement. Petitioner explains that there is no non-economic agreement covering his former civil service title and that his only grievance and

[3] Petitioner erroneously identifies the penalty imposed as a thirty day suspension. The disciplinary action that is the subject of the request for arbitration docketed as A-11294-05, is a thirty day annual leave penalty.

arbitration rights derive from EO 83. Further, Petitioner argues that EO 83 does not grant him the right to challenge disciplinary action to arbitration. Petitioner requests that we dismiss his request for arbitration docketed as A-11294-05 and reinstate him to his former position so that he may challenge the disciplinary action at OATH, or, alternatively, simply dismiss his request for arbitration.

Petitioner's Reply requests that documents submitted in three docketed BCB petitions, BCB-2537-06, BCB-2570-06 and BCB-2579-06, be incorporated herein. Further, Petitioner requests that the Board gather some "3000 pages and 74 audio tapes" from the City "so that the Board can make an informed decision." Reply, ¶ 8. The Reply does not offer any explanation of the relevance of these petitions, documents and tapes. It does not, in any manner, reference or respond to factual allegations or arguments contained in either the City's or the Union's Answers.[4]

Union's Position

After detailing Petitioner's disciplinary history with the NYPD and the efforts of the Union to assist Petitioner and averring that Petitioner agreed to file a request for arbitration concerning the underlying dispute at issue here with the Union bearing no cost or responsibility thereof, the Union raises several affirmative defenses in support of its position that the instant petition be denied. The Union argues that Petitioner is time barred from bringing the instant challenge under OCB Rule § 1-06(c); that Petitioner is estopped or has waived his ability to challenge the arbitrability of his own

[4] OCB Rule § 1-07 (i) states, in pertinent part, that "petitioner may serve and file a verified reply which shall contain admissions and denials of any additional facts or new matter alleged in the answer." Since the Reply raises matters that are not germane to the instant petition challenging arbitrability and are not responsive to the City's and Union's answers, the Board need not address these matters as set forth in the Reply. *See United Probation Officers Ass'n,* Decision No. B-21-98 at 5.

grievance; and, that laches must apply because Petitioner has, without justification, delayed his challenge causing "prejudice to the Respondents as well as to the [arbitration] process itself" (Union Answer, ¶ 51). Finally, should the Board grant the instant petition, inconsistent results may occur as a result of one disciplinary action proceeding to OATH while another is adjudicated in the arbitral forum.[5]

City's Position

The City argues that Petitioner has failed to comply with OCB Rule § 1-06 (c), which requires that a petition challenging arbitrability be filed within ten business days after service of a request for arbitration. Petitioner filed his request for arbitration in July 2005 and cannot wait "nearly two years" to file this challenge. (City Answer, ¶ 55.) The City also argues that Petitioner is barred by the doctrine of laches from challenging the arbitrability of his own request. In applying the three pronged test articulated by this Board, the City alleges that: (1) Petitioner has had knowledge that the City and the Union are not parties to a collective bargaining agreement granting a right to arbitration of disciplinary matters and that Petitioner knew that EO 83 does not grant such rights; (2) Petitioner has offered no excuse for his delay in filing the instant petition; and, (3) that the City would be prejudiced were this Board to grant the petition and delay or deny final adjudication of the underlying disciplinary dispute.

DISCUSSION

NYCCBL § 12-309(a)(3) requires the Board to resolve disputes as to arbitration by vesting

[5] The Union also raises defenses and legal argument as to allegations of a breach of the duty of fair representation. We need not consider those defenses and arguments as they are not germane to the instant challenge, but rather to other actions filed by Petitioner and addressed in our previous decisions. *See D'Onofrio*, Decision No. B-26-2007; *D'Onofrio*, Decision No. B-3-2007.

in it the authority "to make final determination as to whether a dispute is a proper subject for grievance and arbitration . . . ."[6] *See New York State Nurses Ass'n,* Decision No. B-21-2002 (in depth discussion of the Board's role in public sector arbitration). The explicit policy of the NYCCBL "is to favor and encourage arbitration to resolve grievances." *See Communications Workers of America, Local 1182,* Decision No. B-31-2006 at 7; *Doctors Council,* Decision No. B-18-2001 at 9-10.[7] Thus, this Board has long held that "the presumption is that disputes are arbitrable, and that 'doubtful issues of arbitrability are resolved in favor of arbitration.'" *Id.* (quoting *Organization of Staff Analysts*, Decision No. B-19-2006 at 10); *District Council 37*, Decision No. B-14-74 at 12.

In the instant matter, for the same reasons asserted by the City in *D'Onofrio*, Decision No. B-4-2007, Petitioner asks that we dismiss his own request for arbitration. OCB Rule § 1-06 (c) provides, in pertinent part, that:

> [a] petition for a final determination by the Board as to whether the grievance is a proper subject for arbitration shall be served and filed within 10 business days after service of the request for arbitration . . . upon the other party to the grievance, or the party so served shall be precluded thereafter from contesting in any forum the arbitrability of the grievance.

Petitioner's request for arbitration, A-11294-05, was filed on July 11, 2005. Petitioner filed this

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[6] NYCCBL §12-312 delineates the parties' rights and responsibilities in arbitrations and the Board's role in administering an arbitration panel.

[7] Section 12-302 of the NYCCBL provides:
Statement of policy. It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

challenge twenty-one months later on May 9, 2006. We therefore find that Petitioner's challenge to arbitrability is untimely and must be dismissed. *See District Council 37*, Decision No. B-13-75.

However, were we to reach the merits, the Board would nevertheless find it appropriate to dismiss the instant challenge. Petitioner, with the Union's consent, submitted a request for arbitration to the Office of Collective Bargaining. Pursuant to that request, Petitioner and the City selected an arbitrator in accordance with OCB Rules. An arbitrator was appointed to adjudicate Petitioner's grievance. Inasmuch as a grievant who has submitted a request for arbitration remains free to withdraw the demand, as does Petitioner, the grievant is estopped from challenging his own request. It is well established that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." *State of New Hampshire v. State of Maine*, 532 US 742, 749 (2001); *see also Environmental Concern, Inc. v. Larchwood Construction Corp.*, 101 A.D.2d 591, 593 (2d Dep't. 1984) (noting that "[t]he policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings"). Petitioner is therefore estopped from challenging his own request for arbitration.

This Board has not previously been confronted with the task of considering a challenge to a party's own request for arbitration. Such a challenge may not have been contemplated in the OCB Rules since, if granted, the challenge would, in fact, be futile. A successful challenge by a party to that party's own request for arbitration would afford no greater relief than the withdrawal of the request for arbitration, an option retained by the party who has filed a request for arbitration. In any event, for the reasons stated above, Petitioner's challenge to arbitrability in this case is dismissed.

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 docketed as BCB-2621-07 be, and the same hereby is, dismissed; and it is further

ORDERED, that the request for arbitration filed by Robert J. D'Onofrio, docketed as A-11294-05, shall proceed to arbitration unless withdrawn by the Grievant.

Dated: August 2, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

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