SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 47

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THE CITY OF NEW YORK,

Petitioner, Index No. 409776/94

-against-

MALCOLM D. MACDONALD, as Chair of the New York City Board of Collective Bargaining, THE BOARD OF COLLECTIVE BARGAINING, SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,

Respondents.

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PAULA J. OMANSKY, J.:

Petitioner The City of New York ("City") seeks a judgment: (1) annulling and setting aside the determination of respondent Board of Collective Bargaining ("Board"), which mandated arbitration between the City and respondent Social Services Employees Union, Local 371 ("Union"), and (2) permanently staying such arbitration.

The Parties and their Relationships

The Board of Collective Bargaining is the City administrative agency responsible for the administration and enforcement of public sector collective bargaining. Specifically, the Board is vested, among other things, with the power to decide whether a dispute is a proper subject for grievance and arbitration.

The Union is the certified bargaining representative of certain public employees, among them those holding the non-competitive title of Institutional Aide.

Simeon Hawkins ("Hawkins"), a union member, was employed as an Institutional Aide for the Human Resources Administration (“HRA”)

from March 20, 1984 to August s, 1991. Hawkins was terminated from his position as a result of disciplinary action commenced against him.

Civil Service Law §75 Disciplinary Procedure

There are two routes by which public employees are subject to discipline. One is the statutory disciplinary process set forth under New York Civil Service Law (“CSL”) §75. Under CSL §75, employees holding non competitive titles who have completed five years of continuous service must receive written charges and a hearing prior to their dismissal from employment or other disciplinary action. The New York City Charter authorizes the office of Administrative Trials and Hearings ("OATH") to conduct Section 75 disciplinary proceedings (New York City Charter, Chapter 45-A, §1048; see CSL §75(2)). The Administrative Law Judge (“ALJ”) conducting the OATH hearing issues a report and recommendation to the head of the employing agency. The agency head reviews the AW's report and makes a final administrative determination as to penalty, if any. CSL §76 provides only two methods of appealing from this final determination: (1) by means of a proceeding pursuant to Article 78 of the CPLR or (2) an appeal to the Civil Service Commission (CSL §76[1]).

Civil Service Law §76(4) authorizes a collective bargaining agreement to be substituted for the disciplinary procedures found in CSL §§75 and 76, and provides an alternate route for disciplining a public employee. There was such a collective bargaining agreement ("Agreement") here between the Union and HRA,

and its provisions covered Hawkins. The Agreement (Article VI) sets out a four step grievance procedure for an employee being subject to discipline. Steps I and II provide that:

> Step I(n) - Following the service of written charges upon an employee a conference shall be held with respect to such charges by a person who is designated by the agency head to review such charges. The employee may be represented at such conference by a representative of the Union. The person designated by the agency head to review the charges shall take any steps necessary to a proper disposition of the charges and shall issue a decision in writing by the end of the fifth day following the date of the conference.
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> Step II - If the employee is dissatisfied with the decision in Step I above, he may appeal such decision. The appeal must be within five (5) working days of the receipt of such decision. Such appeal shall be treated as a grievance appeal beginning with Step II of the Grievance Procedure set forth herein.

(Article VI, Section 11 [emphasis added].

If an employee who timely elects to pursue the contractual grievance process is dissatisfied with the determination rendered at Steps II and III, then the contract provides, in step IV, an impartial arbitration of the grievance. As a condition of invoking impartial arbitration, the Union and employee must submit a waiver pursuant to Section 12-312(d) of the New York City Administrative Code waiving all rights to submit the subject grievance to any other administrative or judicial forum except for the purpose of

enforcing the arbitrator's award (see also, Agreement, Article VI, Section 3).

Under both Section 75 and the Agreement, the covered employee receives written charges and a hearing, and a date is set for an informal conference. Upon receipt of the conference holder's determination, the covered employee must then elect the four step grievance process under the collective bargaining agreement culminating in arbitration, or forego the grievance procedure and proceed under CSL §75; namely, an OATH hearing with the right of appeal of the agency head's final determination by way of an Article 78 proceeding or appeal to the civil service commission. If the employee fails to opt timely for the grievance process, a Section 75 OATH hearing proceeds automatically.

Underlying Facts and Administrative Determinations

On October 9, 1989, Hawkins was personally served by HRA with: (1) Notice of Charges and Specifications alleging that Hawkins had been absent without leave from his job for 89 days (i.e., from December 15, 1988 through April 10, 1989), and (2) Notice of Informal Conference, scheduled for October 26, 1989.

On October 26, 1989 an informal conference was held. There was no appearance by Hawkins or respondent Union. A May 22, 1990 letter addressed to Hawkins stated that: (1) the Charges and Specifications were established, (2) a penalty of dismissal was recommended, (3) Hawkins had five days to either (a) accept the recommendation, reject it or ask that it be reviewed pursuant to CSL §75, or (b) reject it, waive CSL §75 review procedures and

proceed according to the parties' contractual provisions. The letter stated that Hawkins' failure to select one of the above options would result in HRA holding a hearing in accordance with CSL §75. The City alleged that the May 22nd letter was mailed to Hawkins at his last known address -- 563 East 91st Street in Brooklyn, New York (i.e., the “91st Street address").

On October 17, 1990, OATH allegedly notified Hawkins by mail at the 91st Street address that a disciplinary hearing was scheduled for December 13, 1990. On that date, a hearing was held. Neither Hawkins nor the Union was present. OATH's ALJ determined that: (1) Hawkins was properly served with the charges and notice of hearing, (2) Hawkins was absent from work without authorization from December 15, 1988 to April 10, 1989, (3) Hawkins was guilty as charged, and (4) termination was the recommended penalty.

On July 31, 1991, HRA's Commissioner adopted the ALJ’s report and recommendations and affirmed the penalty of dismissal.

On August 8, 1991, Hawkins was personally served with a letter notifying him of the Commissioner's decision to terminate him from his employment. The circumstances surrounding the personal service are in dispute. Also, the termination letter was allegedly mailed to Hawkins at 243 Howard Avenue, Brooklyn, New York (i.e., the "Howard Avenue address").

On October 30, 1991, respondent Union, on behalf of Hawkins, filed a Step II grievance alleging that he was wrongfully terminated in violation of the parties' collective bargaining agreement. Specifically, the Union argued Hawkins was wrongfully

terminated without: (1) the service of charges, (2) forty-eight (48) hours notice to the Union of any hearing or OATH trial, and (3) any notice of determination sent to either the Union or Hawkins. On December 20, 1991, the HRA denied the Step II grievance on the ground that Hawkins had been found guilty as charged in the earlier CSL §75 hearing, and Hawkins' avenues of appeal were thus limited either to: (1) the Civil Service Commission, or (2) the State Supreme Court.

On January 14, 1992, respondent Union appealed the Step II decision to Step III. By letter dated January 27, 1992, the Union was notified that its Step III grievance was denied because "the contractual grievance procedure is not the appropriate forum in which to appeal a decision rendered pursuant to CSL §75."

On July 31, 1992, the Union, on behalf of Hawkins, filed a request for arbitration accompanied by two- waivers. The waivers, from the Union and Hawkins, stated that they were waiving their rights, if any, to submit the underlying dispute to any other administrative or judicial tribunal except for enforcement of the arbitrator's award. The City objected to going forth with arbitration on the grounds that: (1) the waivers were invalid, and (2) res judicata and collateral estoppel barred the arbitration. Respondent City filed a petition with the Board of Collective Bargaining for a determination on the issue of arbitrability.

The Board determined that a factual issue existed as to whether Hawkins timely received notice of the written Step I(n) conference decision and of the scheduled OATH hearing. For support

that such a factual dispute existed, the Board relied on the following -- (1) the City mailed the notice of the conference decision and the OATH hearing to the 91st Street address, (2) the City claimed, without the personnel records being submitted, that 91st Street was the most current address listed in Hawkins' personnel records, (3) the Union-claimed that: (a) the 91st Street address was not Hawkins most current address, (b) Hawkins timely submitted the required written notice of his change of address, (4) the City mailed the notice of employment termination not to the 91st Street address, but to the Howard Avenue address, (5) an affidavit by HRA's Personnel Consultant was submitted showing that the City may have known that the 91st Street was not the correct address, and (6) no affirmation or other proof of service exists in support of the mailings notifying Hawkins of the conference determination or date for the OATH hearing.

Addressing res judicata and collateral estoppel, the Board refused to defer to the findings of OATH's ALJ that notice to Hawkins was satisfactory on the grounds that OATH operated as a management hearing officer, rather than as a independent administrative agency. Accordingly, the Board directed the issues to an arbitrator.

The Board described the issues to be decided by the arbitrator as follows: if the arbitrator found that Hawkins received notice of the informal conference determination and date of the OATH hearing, then Hawkins' failure to appeal the conference decision would have constituted an election to follow CSL § 75 rather than

the grievance procedure, in which case the OATH hearing and subsequent Section 75 proceedings would be valid. Further, if the arbitrator found that OATH hearing was valid, then Hawkins would be precluded from satisfying the waiver requirements. However, the Board said, if Hawkins did not receive notice of the conference decision which triggers the right to elect the grievance procedure under the collective bargaining agreement, then the OATH hearing and subsequent Section 75 proceedings were in, effect a nullity.

In this proceeding the City challenges the Board's determination as arbitrary and capricious, contrary to law, and in excess of the Board's jurisdiction, and requests that the Court permanently stay the arbitration.

DISCUSSION

In reviewing an agency's determination, the court must decide whether the agency had a rational basis for the conclusion reached, or instead acted arbitrarily and capriciously or in abuse of its discretion (CPLR 7803[3]; Matter of Clancy-Cullen Storage Co. v. Board of Elections in the City of New York, 98 AD2d 635, 636). An action is arbitrary if "it is without sound basis in reason and is generally taken without regard to the facts" (Matter of Pell v. Board of Educ., 34 NY2d 222, 231). Moreover, the construction given by the administrative agency to statutes and regulations should be accepted by the court if it is not irrational or unreasonable (Matter of Lumpkin v. Department of Social Services, 45 NY2d 351, appeal dismissed 439 US 1040).

The premise underlying the Board's position is that the OATH proceeding was a nullity if Hawkins did not receive the conference holder's determination and that an arbitrator should decide whether Hawkins was deprived of his right under the collective bargaining agreement to elect the grievance procedure. As the Board phrased it, "genuine issues of fact and contract interpretation involving the term 'receipt' [go] to the competency of OATH to hear the dispute in the first instance (a condition precedent for OATH's jurisdiction)" (Resp's brief, p. 32).

An arbitrator does not have the authority to determine that OATH acted in the absence of jurisdiction. Neither the Board's authority "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure" (NYC Admin. Code §12-309a(3]), nor the arbitrator's authority to resolve disputes as to the coverage of the substantive provisions of the contract (see, Board of Education of Lakeland Central school District of Shrub Oak v. Barni, 311, 314 [19801; Board of Education of the Watertown City School District v. Watertown Education Association, 74 N-Y.2d 912(1989)), as well as questions concerning compliance with the contractual grievance process (see, Enlarged City School District of Troy v. Troy Teacher's Assn., 69 NY2d 905 (1987]; County of Rockland v. Primlano Construction Co. Inc., 51 NY2d 1 [1980]) is authority for the arbitrator to review a disciplinary process conducted and completed pursuant to Civil Service Law §75. Once a Section 75 hearing is completed, an OATH hearing held, and a final determination made by the agency head, it

is too late for arbitration. Civil Service Law §76(1) provides that at this stage any challenge to a Section 75 proceeding must be made in an Article 78 proceeding or by appeal to the Civil Service Commission. There is no authority in the Civil Service Law, the New York City Administrative Code, or the collective bargaining agreement between the parties for an arbitrator to sit as a third reviewing body alongside the court or the civil service commission to review the propriety of an OATH hearing, even if credible evidence suggests that OATH proceeded in the absence of jurisdiction.

Notably the City did not agree to arbitrate the jurisdictional basis of an OATH proceeding, and in the public sector, in the absence of express, direct and unequivocal language providing for arbitration, an obligation to arbitrate will not be inferred (see, Board of Education of the City of New York v. Glaubman, 53 N.Y.2d 781, 783 [1981]); In the Matter of the Arbitration between the Acting Superintendent of Liverpool Central School District and United Liverpool Facility Assoc., 42 N.Y.2d 509, 513-514 [1977]); In the Matter of the Arbitration between City of Plattsburgh and Local 788 and New York Counsel, 108 AD2d 1045-1046 [3d Dept. 1985].

The Board too easily dismissed the claims in the nature of res judicata and collateral estoppel on the grounds that the OATH hearing results in a non-final determination to which no particular deference is due. This overlooks the fact that a final determination was in fact made in this case by the HRA Commissioner so that the matter was ripe for review pursuant to CSL §76. The

Board failed to accord any significance to the fact that the administrative proceeding was complete under the terms of Civil Service Law S75. While the OATH hearing officer did not address the issue of Hawkins' right under the collective bargaining agreement, Hawkins may challenge both OATH's jurisdictional basis and the prescribed penalty in an Article 78 proceeding (see, Matter of Gibbs v. New York City Health and Hospitals Corporation and Bellevue Hospital Center, Index No. 41411/79, Sup. Ct. N.Y. Co., Dontzin, J.).

Although the Board focused on what it considered the questionable assumption of OATH jurisdiction, the predicate for the Board's jurisdiction is, if anything, more suspect. New York City Administrative Code §12-312(d) requires that as a condition of invoking arbitration the grievant[1] and the union file written waivers of their rights to resort "to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award." The purpose of the waiver requirement is to prevent multiple litigations of the same dispute and to force an election of procedures. The Board has held that a grievant who lacks the capacity to make a waiver satisfactory to meet the statutory requirement has not satisfied the condition precedent to arbitration, and cannot invoke the Board's jurisdiction (Matter of New York City Health and Hospitals Corporation and District Counsel

[1]Hawkins is not a party to this proceeding because only the Union has the right to handle the arbitration procedures in a collective bargaining agreement (see, Vaca v. Sipes, 386 U.S. 171, 191 (1966).

37, AFSCME. AFL-CIO, dated March 23, 1982, Decision No. B-10-82).

Here Hawkins and the Union signed waivers as if the administrative process had never taken place. The Board improperly accepted these waivers at face value when it should have rejected them on the ground that they were contrary to fact. The Board should have found that Hawkins and the Union were incapable of signing the waivers which are the predicate for satisfying the jurisdictional requirement for arbitration.

Finally, the City's concern about inconsistent adjudications is well-founded. If an arbitrator decides that the OATH hearing was a nullity, he or she will conduct a de novo review, may reach a different conclusion, and impose a different penalty from that imposed by the HRA Commissioner in this case. It is no answer that the city need only forego moving to vacate any inconsistent award by the arbitrator. The HRA Commissioner need not defer to an arbitrator's award made after the matter was litigated in a Section 75 proceeding as if the arbitrator's award were the equivalent of a court adjudication or determination of the Civil Service commission.

In sum, the Board's order that the City was required to arbitrate the issue of OATH's jurisdiction, namely whether Hawkins received notice of the conference holder's determination, or in the absence of such receipt of notice was deprived of his right under the collective bargaining agreement to elect the grievance procedure, was arbitrary and an abuse of the Board's discretion (CPLR 7803[3]). Accordingly, petitioner's application for (1) a

judgment annulling and setting aside the order issued by the Board of Collective Bargaining and (2) permanently staying the arbitration is granted.

The foregoing constitutes the decision and order of the court.

J.S.C.