SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 26

----------x

NEW YORK CITY DEPARTMENT OF SANITATION and THE CITY OF NEW YORK

Petitioners,

For an Order Pursuant to Article 75 and Article 78 of the Civil Practice Law and Rules

Index No. 402944/93

- against -

MALCOLM D. MacDONALD, as Chairman of the New York City Board of Collective Bargaining, the New York CITY BOARD OF COLLECTIVE BARGAINING, and DISTRICT, COUNCIL 37, LOCAL 375, AFSCME,

Respondents.

----------x

CARMEN BEAUCHAMP CIPARICK, J.:

In this special proceeding, petitioners Now York City Department of Sanitation and the City of New York (collectively DOS), move for judgment: (1) pursuant to CPLR 7803 [c], annulling Decision No. B-12-93 (the Decision), by respondent, the Now York City Board of Collective Bargaining (BCB), on the ground it is arbitrary and capricious and/or affected by an error. of law and; (1) pursuant to CPLR 7503 [b], granting a permanent stay of arbitration on the ground the dispute between the parties is not arbitrable under the Collective Bargaining Agreement entered between DOS and respondent District council 37, Local 375, AFSCME (the Union).

The dispute herein &risen out of the transfer of Richard Diamond (Diamond), an employee of DOS. Diamond holds the position of Civil

Engineer, Level II. He has been employed by DOS for approximately nine years. Diamond is a member of the Union, who in turn with DOS, are parties to the subject Collective Bargain Agreement (the Agreement). Respondent BCB, pursuant to Chapter 54 of the New York City Charter, overseas the conduct of labor relations among, inter alia, DOS and the Union, a public employee organization DOS and Union are subject to the New York City Collective Bargaining Law, et seq. (NYCCBL).

Article VI, Section I of the Agreement contains a grievance and arbitration procedure. In pertinent parte Article VI, Section 1, (b], [e], and [f] outlines definitions of grievances subject to arbitration. The provision sets out the following disputes subject to arbitration:

> [b] A claimed violation, misinterpretation or misapplication of the rules or regulations, ...of the Employer involving Rules and Regulations of the New York City Personnel Director or the Rules and Regulations of the Health and Hospitals Corporation.... .
>
> [e] A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75 [1] of the Civil Service Law or a permanent employee covered by, the Rules and Regulations of the Health and Hospitals Corporation upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status.
>
> [f] Failure to serve written charges as required by Section 75 of the Civil Service Law or the Rules and Regulations of the Health and Hospitals. Corporation upon a permanent employee covered by Section 75 [1] of the Civil Service Law or a permanent, employee covered by the Rules and Regulations of the Health and Hospitals Corporation where any of the penalties not forth in Section 75 (3) of the Civil Service, Law have been, imposed.

In June 1991 Diamond was Project Manager of the DOS facility located in Maspeth, Queens. In his capacity as Project Manager, Diamond oversaw and coordinated DOS's construction projects. On or about November 8, 1991, Diamond wrote a memorandum to the Director of Construction, Joseph Gragnano (Gragnano) criticizing certain personnel changes and work procedures that were implemented without his knowledge. Diamond also wrote that future directives be put in writing by Gragnano. Allegedly, Gragnano never formally responded to Diamond's letter because the letter was not written on DOS official stationary. Allegedly, during that time Gragnano called Diamond an incompetent and told him that because of his incompetency he would be transferred to Fresh Kills facility located in Staten Island, New York, approximately 20 miles from the Maspeth facility. On or about November 19, 1991, Diamond was transferred to Fresh Kills. On or about November 21, 1991, Diamond, Gragnano and DOS Chief Engineer, Richard Pfeiffer (Pfeiffer) met to discuss the transfer. At the meeting, Gragnano allegedly reiterated that Diamond's transfer was based upon the latter's incompetency.[1]

On behalf of Diamond, the Union filed a grievance with the New York City Office of Labor Relations (OLR), pursuant to Article VI,

---

[1] DOS argues that Diamond was one of four engineers assigned to Fresh Kills to participate in a large clean-up, construction, and monitoring operation mandated by a court ordered consent decree issued by the United States District Court for the District of New Jersey, Township of Woodbridge v City of New York, 79 Civ. 1060 [Barry, J.]. (Petition, ¶10).

Section 1 of the Agreement, challenging Diamond's transfer was a violation of Section 1 [b], [e], and [f] of the Agreement (discussed supra). On or About February 7, 1992, the grievance was denied on the ground that the transfer was a business necessity. Union appealed to the Deputy Chief Review Officer of OLR. In her decision dated March 16, 1992, the grievance was denied on the ground Diamond's transfer was not punitive but a function of managerial prerogative to staff and manage operations.

Pursuant to the Administrative Code of the City of New York (Admin. Code), §12-309a [3], challenges to the arbitrability of a grievance are heard by respondent BCB. On or about May 28, 1992, on behalf of Diamond, Union filed a Request for Arbitration with BCB, alleging DOS wrongfully transferred Diamond in violation of Article VI, Section I, of the Agreement and that the transfer was punitive in nature and subject to binding arbitration. OLR petitioned the BCB, challenging Union's request that the dispute be arbitrated. Union filed an answer and OLR submitted its reply.

In the Decision Dated March 24, 1993, BCB dismissed in part DOS's petition and granted in part Union's request for arbitration.
BCB rejected two of the three claimed bases for arbitrating the dispute. Firstly, Union contended that Article VI, Section 1 [f] of the Agreement was violated in the ground the transfer constituted a grievance in the form of a penalty enumerated in Section 75 [3] of the Civil Rights Law. BCB rejected this claim. It ruled the transfer was one of the penalties enumerated in

the subject section of the Civil Service Law.

Secondly, BCB rejected as a basis of arbitrability the Union's claim that the transfer constituted a claimed "violation, misinterpretation or misapplication of the rules and regulations" of DOS, as outlined in Article VI, Section 1 [b].

However, BCB ruled that the Union raised a substantial question of whether the transfer was a "disciplinary action" under Article VI, Section I [e] of the Agreement and that this was sufficient ground to proceed to arbitration. BCB found that the Union established a sufficient nexus between Diamond's transfer and a punitive motivation by Gragnano, although no written charges of incompetency or misconduct were filed against Diamond. BCB ruled that the question of whether the transfer was a "disciplinary action" regardless of the absence of a written charge of incompetence or misconduct was to be decided by an arbitrator. BCB based its decision on several factual allegations made by the Union that taken together raised the inference that Diamond's transfer was punitive: (1) Diamond sent the critical letter to Gragnano did approximately one week before the transfer, to which Gragnano did not respond, (2) Gragnano stated that Diamond was incompetent and would be transferred, (3) that Diamond was given a critical performance evaluation around the time of his transfer, and 94) that Diamond was transferred to an inconvenient and distant location. BCB ruled that DOS's denial of the allegations served only to raise an issue of credibility which must be determined by

the arbitrator. (see Petition, Ex E, pp 13-14). As a consequence of the BCB determination the instant action was commenced by DOS.

The issue presented herein is whether BCB's determination is arbitrary and capricious and/or based on an error of law because Diamond was never served with “written charges of incompetency or misconduct" as allegedly required by Article VI, Section I, [e], of the Agreement to constitute a disciplinary action. It is well settled that. judicial inquiry into the propriety of an administrative agency’s actions is limited to analyzing whether the agency’s actions are arbitrary and capricious. The court can not substitute its judgment for that of the agency if the decision is rational and proper. (Levitt v Board of Collective Bargaining of the City of New York, Office of Collective Bargaining, 79 NY2d, 120 [1992]).

DOS's contention that BCB erred as a matter of law by failing to recognize as binding precedent, the case of Matter of New York City v Board of Collective Bargainina, (Index No. 41479/81 (Supreme Court, New York County, Pecora, J.]), is unpersuasive.[2]

DOS concedes that a proposed order regarding the 1981 action was

[2] Justice Pecora granted the City of Now York's motion to reverse BCB's determination which had found a transfer similar to the one at bar arbitrable. Justice Pecora, disagreed, and stated that based on the Admin. Code and the Now York City Charter, each department has “unfettered discretion" to deploy personnel, to assign employees to various" tasks, and to manage the internal if fairs of the department. (see Petition. Ex F). Justice Pecora also held that the clear, language of the Agreement, Article VI, Section 1, [a], determined that grievance procedures did not take effect until written charges had been served. (Ibid).

never signed by Justice Pecora. For all the reasons explained by DOS -- which fall short of good cause -- the fact remains that a proposed order was not submitted for signature within a reasonable time after Justice Pecora issued his decision.[3] Uniform Rules for the New York State Trial Courts, § 202.48, requires the victorious party bears the responsibility of drafting and submitting a proposed settlement to the court within 60 days after the signing and filing of the decision, or in the absence of a showing of good cause, the matter shall be deemed abandoned. (see Feldman v. New York City Transit Authority, 171 AD2D 473 [1st Dept. 1991]). In effect, the abandonment constituted a nullity of the 1981 decision and any legal effect that case may have had upon BCB disappeared.

Morever, the contention that state law requires that Justice Pecora's decision be treated as a final order on the merits, has no application here. The doctrine of collateral estoppel bars relitigation of issues of fact previously determined by a prior valid judgment. (McGrath v. Gold, 36 NY2d 406 [1975]). The doctrine of collateral estoppel does not apply to questions of law. (see, Hop Wah v Coughlin, 160 AD2d 1054 [3rd. 1990]. appeal denied

[3] As the successful party in the 1981 actions the City of New York did not submit a settled judgment to the court. However in 1985, it was successful in blocking BCB's attempt to enter judgment on the 1981 action. It objected to the proposed judgment on the ground that Court Rule 660.8 (a) [6] (superseded by Uniform Rules For The New York State Trial Court, § 202.48), prevented the litigation of stale claims. The City argued if BCB were to appeal the judgment successfully, it would be particularly burdensome on the City to be forced to arbitrate an old claim. Nevertheless, at this time DOS argues that the Union is bound by the 1981 decision although there has been no entry of judgement.

76 NY2d 708 [1990]). With respect Justice Pecora's decision, the question determined involved contract interpretation, which has been held to be a question of law. (see 805 Third Ave., v M. W. Realty, 58 NY2d 447 [1983]). Lastly, assuming, arguendo, a mixed question of law and fact was addressed in the earlier decision, collateral estoppel would not apply because BCB has presented different facts involving different party defendants and issues altogether different from that of the 1981 case.

According BCB is not bound by the decision in Matter of City of New York v Board of Collective Bargaining, supra. It was not an error of law not to follow the 1981 decision by Justice Pecora.

Disposing of the above issue, the Court turns to the question of whether the parties herein agreed to arbitrate the dispute for which arbitration has been demanded. The legislature of this State has declared that it is the policy of the state to promote harmonious and cooperative relationships between government and its employees. This policy is best effectuated by, **inter alia**, encouraging such public employers and public employee organizations to agree upon procedures for resolving disputes. (see New York Civil Service Law, §200 (commonly known as the Taylor Law]).

Pursuant to the NYCCBL (discussed supra), the City has adopted the same public policy. (see Admin. Code, § 12-302). BCB is conferred by law "to make a final determination as to whether dispute is a proper subject for grievance and arbitration procedures established pursuant to [Admin. Code, §12-312]." (see

Admin. code, § 12-309 [b]). Pursuant to Admin. Code §12-312 [b], collective bargaining agreements may contain provisions for grievance procedures, in step terminating with impartial arbitration, as the case here.

The parties agree that certain disputes regarding employee grievance are subject to arbitration. However, BCB argues, and DOS disputes, that the transfer of an employee not accompanied by written charges of incompetence or misconduct can be in certain instances arbitrable where the totality of the underlying circumstances raises the inference that the transfer may have been
a wrongful disciplinary action taken against a permanent employee.

Resolution of the question in the context of arbitration authorized under the Taylor Law (Civil Service Law) is a threshold
judicial function. (South Colonie Cent. School Dist., v. South Colonie Teachers Association, 46 NY2d 521, 525 [1979]. DOS argues
absent a finding that there exists an "express, direct and unequivocal" agreement to arbitrate a dispute, courts exercising this function must stay arbitration. (see also Acting Supt. of Schools of Liverpool Cent. School Dist. v united Liverpool Faculty
Ass'n., 42 NY2d 509, 510-511 [1977] [courts are to be guided by the principle that the agreement to arbitrate must be express, direct, and unequivocal as to the issues or dispute to be submitted
to arbitration, anything less will lead to a denial of arbitration.][hereinafter Liverpool]).

DOS argues that absent express contract language permitting arbitrations of disputes of a transfer of an employee and absent written charges preceding the event, the same does not constitute a claim of wrongful disciplinary action and is not arbitrable. DOS relies upon the standard of determining arbitrability enunciated by the Court of Appeals in Liverpool, supra. In Liverpool, the court of Appeals stated that in the field of public sector employment, as distinguished from labor relations in the private sector, there must be express language in the contract in order for the parties to arbitrate a dispute. (Ibid, at 513-514).

However, the Court of Appeals has applied a less stringent test in subsequent cases involving grievances between a public employee and public employer based upon a claimed violation of a disciplinary provision of a contract that may be arbitrable within the meaning of the parties' unambiguous agreement to arbitrate. (see Board of Educ., of Lakeland Cent. School dist., of Shrub Oak v Barni, 49 NY2d 311, 314 [1980]. In Liverpool supra, the Court of Appeals held that arbitration should be stayed in cases where the parties' arbitration agreement does not unambiguously extend to the particular dispute. (Ibid). Liverpool supra, does not permit a court to stay arbitration where the parties' agreement to arbitrate the dispute is clear and unequivocal but there is some ambiguity as to the coverage of the applicable substantive provision of the contract. (see Wyandanch Union Free School Dist., v Wyandanch Teachers Ass'n., 48 NY2d 669, [1979]). In such an instance,

“[t]the question of the scope of the substantive provisions of the contract is itself a matter of contract interpretation and application, and hence it must be deemed a matter for resolution by the arbitrator (citations omitted (Board of Educ., of Lakeland Cent., Dist., of Shrub Oak v Barni, supra, at 314).

If there exists some dispute as to the coverage of the substantive provision of the contract, the dispute is to be determined by the arbitrator. (see Board of Educ., Ass’n. 74 NY2d 912 [1989]; see also Franklin Cent., School v Franklin Teachers Ass’n, 51 NY2d 348 (1980], [if it is determined that the arbitration clause is broad enough to encompass the subject matter of the dispute, a question of whether the substantive portion of the agreement entitles grievant to the relief requested is for the arbitrator].) Although the choice of the arbitration forum should be "express",and “unequivocal" (Liverpool supra), this does "not mean to suggest that hairsplitting analysis should be used to. discourage or delay demands for arbitration in public sector contracts." (Board of Educ., of the City of New York v Glaubman, 53 NY2d 781 783 (1981]).

The arbitration provision in issue explicitly provides for arbitration where “a claimed wrongful disciplinary action taken against a permanent employee covered by the Civil Service Law or a permanent employee covered by the Rules and Regulations of the [New York City] Health and Hospital Corporation upon whom the agency

head had served written charges of incompetency or misconduct... "Emphasis added, underscoring supplied).

Examination of the arbitration clause in issue reveals that its scope is not as narrow as DOS claims. The Court finds Article VI, Section I [e] is ambiguous regarding whether delivery of written charges is a condition precedent before the dispute in issue can constitute a wrongful disciplinary action subject to arbitration. It is not unequivocally clear that service of written charges must precede a disputed transfer in order that the same constitute a wrongful disciplinary action.

Article VI, Section I [e] has been consistently interpreted by BCB as one requiring a balance of the competing interests of both the public employer and the permanent public employee. In order to balance the competing interests that arise when a disputed action falls within the scope of an express management right, e.g., Transfer of employees to meet operational and managerial demands, BCB has fashioned the test of arbitrability (discussed supra), i.e., the Union must allege sufficient facts to establish an arguable relationship between the act complained of and the sources of the right asserted. In short, the mere allegation of a disciplinary transfer, without more, is insufficient to warrant a finding of arbitrability.[4]

[4] BCB applies a two-prong threshold test: (1) whether there is a contractual provision providing for arbitration and, (2) if so, whether the particular dispute in within the of the arbitration provision.

BCB's arbitrability test is consistent with the legal precedent set forth under Liverpool supra, and its progeny. (see Board of Educ., of Lakeland Cent., School Dist., of Shrub Oak v Barni, supra; Wyandanch Union Free School Dist., v Wyandanch Teachers Ass'n, supra; Board of Educ., of the Watertown City School Dist., v Watertown Educ., Ass'n, supra; Franklin Cent., School v Franklin Teachers Ass'n, supra; Board of Educ., of the City of New York v Glaubman, supra).

The subject provision is not narrow, encompassing disputes arising out of wrongful disciplinary action. It is also simultaneously broad and ambiguous regarding whether the service of written charges applies only in instances involving permanent employees covered under the rules of the New York City Health and Hospitals Corporation. (E.g., see McKinney's Uncons Laws of NY, § 7390 [1] [Public Health]; L 1969, ch 5), [Article VI, Section I [e], may had been an aftermath of §7390 [1]. Section 7390 deals with personnel administration of hospital employees; it provides in pertinent part: "Until [HHC] adopts by-laws, rules and regulations relating to personnel administration the corporation shall administer its personnel pursuant to the civil service law, the rules and regulations, ... and orders of the New York city department of personnel and civil service commission... ."]).

In view of the fact that the Court finds the parties' agreement to arbitrate is not narrow, and that it is impossible to conclude, as argued by DOS, that the parties' agreement to arbitrate does not

include the dispute in issue, the question of the scope of the substantive provisions is itself a matter of contract interpretation and application, and must be deemed a matter for resolution by the arbitrator. (Board of Educ., of the Roosevelt Union Free School Dist., v Roosevelt Teachers Ass'n., 47 NY2d 748 [1979]). There is ambiguity as to the coverage of the subject arbitration provision.

Respondent's determination was not arbitrary and capricious, it was not rendered under error of law. Accordingly, the petition is denied in all respects and it is dismissed. This shall constitute the decision and judgement of the court.

DATED: Dec. 20, 1993

J. S. C.

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on February 2, 1995

Present -- Hon. Francis T. Murphy, Presiding Justice
Ernst H. Rosenberger
Milton L. Williams
Peter Tom, Justices

----------x

New York City Department of Sanitation and The City of New York,

Petitioners-Appellants,

For an Order Pursuant to Articles 75 and 78 of the Civil Practice Law and Rules, M-6339

-against-

Malcolm D. MacDonald, etc., et al.,

Respondents-Respondents.

----------x

Petitioners-appellants having moved for an enlargement of time in which to perfect the appeal from the order and judgment (one paper) of the Supreme Court, New York County, entered on February 2, 1994,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that said motion be and the same is granted insofar as to enlarge petitioners-appellants, time in which to perfect the appeal to the **May 1995** Term of this Court.

ENTER:

D. S.
Clerk