SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of the
CITY OF NEW YORK,

Petitioner,

-against-

ARVID ANDERSON, as Chairman and Impartial Members of the Board of Collective Bargaining; Board of Collective Bargaining; Uniformed Firefighters Association,

Index No. 41407/75

Respondents.

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

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Fein, J. (NYLJ 10/22/75, Vol. 174 No. 79, p. 6)

MATTER OF CITY OF NEW YORK (Anderson) - Application by petitioner, City of New York (City), pursuant to article 78 CPLR, for judgment annulling, the determination of respondent, The Board of Collective Bargaining, dated June 4, 1975 that the grievance of respondent, Uniformed Firefighters Association (UFA) with respect to Fire Department Order No. 3 is arbitrable. Cross-motion by respondent, UFA for dismissal of petition and the grounds that the same is barred by the statute of limitations or, in the alternative, for an order transferring the proceedings to a term of the Appellate Division, First Department, on the grounds that this court lacks subject matter jurisdiction (CPLR 7804[g]; 7803[4]).

On or about April 26, 1974, respondent UFA filed with the Office of Collective Bargaining (OCB) a request for arbitration alleging in substance that Fire Department Order No. 3. 1974, violated the existing policy and practice of the Fire Department of the City of New York (Fire Dept.), and so violated the terms and conditions of the existing collective bargaining agreement between the UFA and the City. Immediately thereafter, petitioner City flied a petition with the Board of Collective Bargaining (BCB) challenging the arbitrability of the UFA's demand for arbitration on the grounds that a prior proceeding allegedly barred arbitration of the claimed violation of the collective bargaining agreement.

On or about May 2, 1974, respondent UFA filed an improper practice charge with the New York State Public Employment Revelations Board (PERB), alleged that the "involuntary" transfers Of firefighters affected by Fire Dept. Order No. 3

constituted discrimination, reprisal and punishment for union activity in violation of Civil Service Law Section 209-a(1)(c).

On July 29, 1974, BCB issued a decision that the filing of the improper practice charge with the PERB constituted a violation of the waiver provision of Section 3-8.0 of the New York City Collective Bargaining Law Administrative Code of the City of New York, Section 1173-8.0) and ordered that the City's petition contesting arbitrability be held in abeyance until PERB should rule on the improper practice charge or until the UFA should withdraw its charge before PERB.

On or about Sept. 30, 1974, the UFA withdrew its improper practice charge before PERB and by letter dated Oct. 25, 1974, OCB directed that upon the receipt of additional papers from the UFA, the arbitrability proceeding would be formally re-instituted.

Subsequent to the filing of such additional papers by the UFA, and the filing of a reply to such papers by the City, BCB, on Dec. 13, 1974, issued a decision stating it was improper to rule on the City's allegations with regard to the applicability of the doctrines of res judicata and collateral estoppel without ascertaining the extent of the UFA's knowledge of the nature and potential effects of the transfers embodied in Fire Dept. Order No. 3.BCB therefore ordered a hearing so that the parties could offer evidence on this question.

On Jan. 3, 1975, such hearing was held before Trial Examiner Joan Weitzman; subsequently, such hearing was reopened and held further by the said Trial Examiner.

On June 4, 1975, BCB issued a decision that the question raised by the Involuntary transfers of the firefighters effectuated by Fire Dept. Order No. 3 was a proper subject of arbitration.

On or about June 26, 1975, the City served and filed the petition instituting this proceeding, alleging that the determination of BCB is "arbitrary, capricious, illegal and an abuse of discretion . . . erroneous as a matter of law since the arbitration requested by that UFA is barred by the doctrines of res judicata and or collateral estoppel. . . . erroneous as a matter of law since when the UFA initiated litigation before PERB on the same underlying dispute, it waived its right to utilize the forum of arbitration."

Respondent, by cross-motion, seeks to dismiss the petition on the ground that the four month statute of limitations has run. (CPLR Sec. 217). There is no merit to such contention. The decision of the BCB which is under review was dated June 4, 1975. The respondent was served with the Article 78 CPLR proceeding on June 26, 1975, well within the four month period.

Respondent's further contention that the matter should be referred to the Appellate Division is likewise without merit. CPLR Section 7804(g) provides that where an issue is raised under Subdivision 4 of Section 7803, "the court shall make an order directing that the proceeding be transferred for

disposition to a term of the appellate division." CPLR 7803(4), in designating the questions that may be raised in an Article 78 proceeding, provides:

"4. whether a determination made as a result of a hearing held, and at which evidence is taken, pursuant to direction of law is, on the entire record, supported by substantial evidence."

The instant proceeding does not appear to raise an issue of whether the determination is supported by substantial evidence so as to require transfer to the Appellant Division. Nor does it appear that a hearing was held "pursuant to direction by law" with the meaning of the statute. Moreover, such a contention is more appropriately raised by answer and not by cross-motion to dismiss on objections in point of law.

Accordingly, the cross-motion is denied. Respondents shall serve their answers within ten days after a copy of the order to be entered herein, with notice of entry. The matter is to be restored to the calendar of Special Term, Part 1,for Nov. 12,1975, for submission to the Justice there presiding. The parties are directed to file on or before the return date of the application copies of the relevant contracts, the demands for arbitration and the transcripts of the hearings heretofore held.

Settle order.

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NYLJ - Thursday - January 29, 1976 - Vol. 175 No. 20 - pp. 8-9

Justice Gellinoff

IN RE CITY OF N.Y. (Anderson)-In this article, 78 proceeding, petitioner, the City of New York, seeks review of a determination of respondent, the Board of Collective Bargaining, which granted an application of the Uniform Firefighters Association for arbitration of a collective bargaining dispute. Petitioner alleges that the union's application is barred by res judicata, and waiver.

On Jan. 4. 1974, petitioner's Fire Department Issued an order resulting in the reassignment of various members of the department. Immediately upon promulgation of the order, even before its terms became known, the union filed grievance, complaining that the order, violated a provision of the collective bargaining agreement between the union and petitioner, which required that two weeks' notice be given the union in the, event of certain transfers. The matter, proceeded to arbitration, where it was !determined that the nature of the transfers involved in the order did not come within the notice provision of the agreement, and that the transfers were therefore valid without notice.

Subsequently, the union filed a new grievance, asserting that various specific transfers constituted an unfair labor practice. as being in effect punishment for labor activities. After conducting a hearing, and concluding that the union could not have raised this issue in the initial arbitration, since the union then lacked knowledge of the details of the transfers.

respondent granted the union's request for arbitration of this new grievance. Petitioner challenges that ruling as arbitrary, capricious and contrary to law.

Petitioner errs. however, in contending that the new arbitration is barred as simply a relitigation of the issue whether the transfers violate the collective bargaining. agreement. The issues raised now are wholly different from those in the first arbitration. The first simply involved the question of petitioner's power to direct any transfers without notice. The new grievance challenges specific transfers as unlawful labor practices, a claim unknown to the union when it first sought to enjoin all transfers.

Accordingly, the court concludes that the new arbitration is not barred by res judicata.

Petitioner's claim of waiver has no greater merit. It is based upon the union*s filing a complaint with the Public Employment Relations Board with respect to the claims now sought to be arbitrated. However. respondent correctly concluded that such complaint did not constitute a waiver. First, the complaint was filed subsequent to the filing of the instant grievance. Second, the complaint was withdrawn after respondent determined to hold this proceeding in abeyance pending the results of that complaint. Finally, the PERB in any event lacked authority to render an enforceable determined to hold this proceeding in abeyance pending the results of that complaint. Finally, the PERB in any event lacked authority to render an enforceable determination (see, Jefferson County v. PERB. 36 N. Y. 2d 534 [19751; Professional Staff Congress, CUNY v. Board of Higher Education, - Misc. 2d -, 373 N.Y. S. 2d 453 [Sup. Ct., N. Y. Co., 1975])

Respondent's determination. was thus neither contrary to law, nor arbitrary or capricious. The application is denied. Settle judgment.