

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

PRESENT: MICHAEL D. STALLMAN
Justice

PART 5

Local 983

INDEX NO. 107616/05

MOTION DATE 10/21/05

MOTION SEQ. NO. 01

MOTION CAL. NO. 64

- v -

Board of Collectors

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Petition
Notice of ~~Motion~~ Order to Show Cause — Affidavits — Exhibits ...
X Answering Affidavits — Exhibits _____
Replying Affidavits & *Sur-Reply Affirmation* _____

1
2, 3, 6
4, 5, 7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that ~~this motion~~ *and adjudged*

determined according to the and judgment.
Article 78 proceeding in
and notice of entry cannot be served based hereon to
appear in Eastern District of New York Court's Desk Room
and notice of entry cannot be served based hereon to
appear in Eastern District of New York Court's Desk Room

MICHAEL D. STALLMAN
J.S.C.

Dated: 1/18/06

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5**

-----X
LOCAL 983, DISTRICT COUNCIL 37,
AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, AFL-CIO,

Index No. 107616/05

**Decision, Order and
Judgment**

Petitioners,

For a Judgment Pursuant to Article 78 of the C.P.L.R.

- against -

NEW YORK CITY BOARD OF COLLECTIVE
BARGAINING and CITY OF NEW YORK,

Respondents.

-----X
HON. MICHAEL D. STALLMAN, J:

This is a proceeding commenced by the petitioner Local 983, District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO (Local 983), pursuant to Article 78 of the Civil Practice Law and Rules, seeking a judgment annulling a decision of the respondent New York City Board of Collective Bargaining (BCB) in Decision No. B-11-2005. The decision granted the City of New York's (the City) Petition Challenging Arbitrability, and denied arbitration to a member of Local 983.

The City cross-moves for an order, pursuant to CPLR 321 (a)(7) and 7804(f), dismissing the petition for failure to state a cause of action.

Local 983 is a labor organization which represents certain employees of the City. In this action, it is representing Alexander Modawar, a member of Local 983, and a former Assistant City Highway Repairer (ACHR) in the Department of Transportation of the City of New York (DOT). BCB is a city agency charged with, inter alia, administering the New York City Collective Bargaining

Law.¹ It has the power and duty to determine whether a matter is within the scope of collective bargaining (New York City Administrative Code § 12-309[a][2]). The City and Local 983 are parties to a “Memorandum of Agreement” (MOA) which, inter alia, provides for grievance and arbitration of claims concerning wrongful disciplinary action.

Modawar commenced his employment with DOT on or about July 9, 2000. The petition states that, in 2003, Modawar was advised by the Disciplinary Counsel of DOT’s Office of the Advocate that DOT was going to serve formal disciplinary charges against him based upon four arrests, which occurred in 2001 and 2002. Modawar was further advised that disciplinary charges would not be brought against him if he paid a \$200 fine and served one year of probation.

By Stipulation and Agreement, dated July 14, 2003 (the Stipulation), signed by the City, Modawar and Local 983², Modawar admitted that he was arrested in Richmond County, New York on the following dates and charges: (1) October 22, 2001 on a charge of harassment; (2) April 8, 2002 on a charge of criminal mischief; (3) June 11, 2002 on a charge of violation of order of protection; and (4) August 7, 2002 on charges of reckless endangerment, criminal contempt and criminal mischief.

Pursuant to the Stipulation, Modawar agreed to pay a \$200 fine, and to serve a one-year probation period, effective on the date of the signing of the Stipulation. The Stipulation specifically stated that “Modawar agrees not to violate paragraphs 1 and 2 of the [Department’s Code of

¹ “The Board is a neutral adjudicative agency with powers at the local level akin to those of the Public Employment Relations Board at the State level” (Matter of Levitt v Board of Collective Bargaining of the City of New York, 79 NY2d 120, 127 [1992]).

² Local 983 claims it signed the Stipulation merely as a witness; that it was not a party to the stipulation and did not waive any rights.

Conduct]³ and agrees not to get arrested during the probationary period.” It further stated that, if Modawar violated the aforesaid conditions during the probationary period, DOT may terminate Modawar’s employment, and that “[t]he determination of whether [Modawar] has violated the Stipulation Agreement shall be made by the Office of the Advocate.”

Finally, the Stipulation stated that, by executing the Stipulation, Modawar

irrevocably [waives] any and all rights he may have pursuant to New York Civil Service Law, any other applicable laws, statutes, rules regulations and contractual agreements which pertain to disciplinary action against New York City employees.

Approximately five months after executing the Stipulation, Modawar was arrested for assault, to which he subsequently pled guilty. On or about April 2, 2004, Modawar received a letter from DOT informing him that his employment was terminated, effective immediately, as a result of his non-compliance with the Stipulation.

Thereafter, Local 983 filed a grievance with the City appealing the discharge. The complaint was dismissed on September 28, 2004, as not grievable. On or about October 26, 2004, Local 983 filed a Request For Arbitration with BCB, pursuant to section 4[c] of the MOA⁴, on the issue of whether Modawar was wrongfully discharged by DOT. On November 23, 2004, the City filed a Petition Challenging Arbitrability of the grievance brought by Local 983 with BCB. The grievance claimed that Modawar was wrongfully terminated by DOT without written charges or a hearing, in

³ Under DOT’s Code of Conduct, employees shall not:

1. Engage in conduct tending to bring the City of New York, DOT or any other City agency into disrepute.
2. Engage in conduct prejudicial to the good order and discipline of DOT.

⁴ Section 4[c] of the MOA sets forth a four step procedure for “an employee who has been employed for at least three (3) consecutive seasons as a seasonal ACHR and who has had written charges of incompetency or misconduct served upon him or her * * *.”

violation of the Stipulation and of the MOA. The City argued that the dispute was not arbitrable because Modawar violated the terms of the Stipulation during the prescribed one-year probation period. The City further argued that, pursuant to the terms of the Stipulation, Modawar knowingly waived his right to the contractual grievance process.

By Decision and Order dated May 10, 2005, BCB rejected Local 983's allegations that Modwar's dismissal without written charges and a hearing violated his due process rights under MOA, granted the City's petition, and denied arbitration. It determined, among other things, that

the City's actions were within the scope of the language of the Stipulation and that the waiver in the Stipulation overrides any contractual agreement to arbitrate . . . Modwar's waiver of his grievance rights was clear, unmistakable, and without ambiguity and that DOT had authority to terminate his employment summarily for contravening the specific provision in the Stipulation not to get arrested during the probationary period.

Petitioner commenced this proceeding seeking to annul BCB's Decision and Order on the basis that the determination is incorrect as a matter of law, and that BCB's interpretation of the Stipulation is irrational. Local 983 contends, inter alia, that Modawar did not waive his contractual right to grieve his dismissal, but intended that any future infractions would result in disciplinary charges seeking his dismissal through the contractual disciplinary process. It further urges that, to the extent that the Stipulation is ambiguous, it should be construed as not waiving Modawar's rights. In contrast, the City argues that the decision was neither arbitrary nor capricious; thus the decision must be upheld.

As the agency charged with determining whether a matter is within the scope of collective bargaining, BCB "is presumed to have developed an expertise and judgment that requires us to accept its construction if not unreasonable" (Matter of Incorporated Village of Lynbrook v New York State

Pub. Empl. Relations Bd., 48 NY2d 398, 404 [1979]). Thus, BCB's determinations must be given broad deference since it is the agency charged with determining the scope of matters subject to arbitration (see Matter of City of New York v Plumbers Local Union No. 1 of Brooklyn and Queens, 204 AD2d 183 [1st Dept 1994]).

The Court of Appeals has defined the standard of review as being whether a board's decision was "affected by an error of law' or was 'arbitrary and capricious or an abuse of discretion'" (Incorporated Village of Lynbrook v New York State Pub. Empl. Relations Bd., 48 NY2d at 404, quoting CPLR 7803 [3]); Matter of New York City Dept. of Sanitation v MacDonald, 87 NY2d 650 [1996]; Matter of Levitt v Board of Collective Bargaining of the City of New York, 79 NY2d 120, 128 [1992]).

This court finds that Local 983 has failed to demonstrate any legal or factual basis that BCB's Decision and Order granting the City's petition challenging arbitrability of the grievance was arbitrary or capricious, or an error of law. Further, BCB's finding that, under the terms of the Stipulation, Modawar waived his contractual rights has a rational basis.

An employee who has permanent status may waive statutory and contractual rights to a hearing before dismissal, if he or she voluntarily and knowingly waives those rights, in "consideration for the curtailment of pending disciplinary proceedings" (Whitehead v State of New York, 71 AD2d 653, 654 [2d Dept 1979], affd 51 NY2d 344 [1980]; Matter of Abramovich v Board of Educ., 46 NY2d 450 [1979]); Matter of Nedd v Koehler, 159 AD2d 344 [1st Dept 1990]). Here, there is no evidence indicating that Modawar's waiver was not voluntary or knowingly entered into.

Modwar's present contention, that the Stipulation was presented to him on a "take-it-or-leave-it basis, and that it was his "understanding" that he was not waiving his future rights concerning

discipline, is not a persuasive argument that he did not voluntarily and knowingly waive his rights (Modawar affidavit ¶¶ 3 and 4). In paragraph 4 of the Stipulation, Modawar confirms that he enters into the agreement

knowingly and intentionally, without coercion, duress or influence, that he was fully represented and fully advised by his union representatives in this matter, and that he accepts all terms and conditions contained herein.

Since there is no evidence indicating that the waiver was involuntary or not knowingly entered into, “it may not be assumed that an employee would refuse to waive rights if he or she were aware of the rights being waived” (Whitehead v State of New York, 71 AD2d at 654).

In the decision, BCB discusses various prior decisions in which it denied requests for arbitration in cases where there was a stipulation of settlement of disciplinary charges that future misconduct during a specified period would provide a basis for summary dismissal. BCB notes that in each case it analyzes the specific waiver provisions of a stipulation in order to determine whether there was any reservation of arbitration rights.

A negotiated plea agreement is considered a contract, thus it is governed by the same rules as contract interpretation (Matter of Tankard v Abate, 159 Misc 2d 339, 341 [Sup Ct, NY County 1993], affd as modified 213 AD2d 320 [1st Dept 1995], lv denied 86 NY2d 702 [1995]). Where the language of an agreement is clear and unambiguous, the intent must be found therein (R/S Assoc. v New York Job Devel. Auth., 98 NY2d 29, 32 [2002]). A court will not consider extrinsic and parol evidence when an agreement is complete, clear and unambiguous (id. at 33).

In the instant case, BCB looked at the specific language contained in the Stipulation, and found no language which would limit the waiver of rights to past incidents, or would restrict DOT

from summarily terminating Modowar's employment based upon future violations during the probationary period. In fact, BCB reasonably found that the language of the Stipulation specifically gave DOT the right to summarily terminate Modowar's employment on the basis of the Advocate's determination that Modowar violated the conditions set forth in Paragraph 3 during the probationary period. It is undisputed that Modowar was arrested during the one-year probation period.

This court has considered petitioner's remaining arguments and found them to be without merit. Petitioner has failed to demonstrate that BCB's decision was arbitrary or capricious, or affected by an error of law. In fact, BCB reasonably construed the language of the Stipulation. Consequently, the petition is dismissed.

Accordingly, it is

ORDERED AND ADJUDGED that the cross-motion to dismiss the petition is granted, and the petition is denied and the proceeding is dismissed.

This decision constitutes the order and judgment of the Court.

Dated: January 10, 2006
New York, New York

ENTER:

[Handwritten signature]
The judgment has not been entered by the County Clerk. To effect entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

UNFILED JUDGMENT
To be entered by the County Clerk. To effect entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).