State of Connecticut
State Board of Mediation and Arbitration

In the Matter of	Case No. 2022-A-0052
City of Danbury	Date of Award July 7, 2022
-and	Date of Hearings: November 30, 2021
	January 26, 2022
Danbury Professional Firefighters Local 801, IAFF, AFL-CIO	March 2, 2022

AWARD

PANEL MEMBERS:

Dennis C. Murphy, Esq., Public Member
Santo Franzo, Labor Member
Richard A. Podurgiel, Management Member

Eric W. Chester, Representing the Union
Michael C. Harrington, Esq., Representing the City

Procedural History and Issue

This is a dispute between the City of Danbury (city), and the Danbury Professional Firefighters Local 801, IAFF, AFL-CIO (union), concerning the arbitrability of a timely filed grievance on behalf Firefighter Kelly Grover (grievant), concerning her termination from employment. After due notice the parties appeared at the Board's offices on March 2, 2022, and had opportunity to offer evidence and witnesses and cross-examine same. The parties filed post hearing briefs.

The parties stipulated to the issue as follows:

Whether the Union's appeal in Case No. 2022-A-0052 is arbitrable under the parties' Collective Bargaining Agreement? (Joint Exhibit A).

Relevant Collective Bargaining Provisions

ARTICLE 5 – DISCIPLINARY ACTION:

No permanent employee shall be disciplined, except for just cause. If any employee is disciplined, and in the judgment of such employee, this action is taken by the City without just cause, he may, no later than seven (7) days after the date of such action, appeal in writing to the Mayor to have the action rescinded or to have the severity of the punishment reduced. Within fourteen (14) days after receiving such appeal, the Mayor or his designee shall arrange to and meet with the Union's Grievance Committee for the purpose of attempting to resolve this dispute. If such employee is dissatisfied with the results of such meeting, the Union may, no later than ten (10) days thereafter, submit such dispute to arbitration by the Connecticut State Board of Mediation and Arbitration. Said Arbitration Board shall have the power to uphold the action of the City or to rescind or modify such action, and such power shall include but shall not be limited to the right to reinstate a suspended or discharged employee with full back pay. Nothing contained herein shall prevent any employee from representing himself in the first and second steps of the grievance process. The Union shall be the exclusive representative for filing for arbitration. The procedure set forth in this Article shall supersede the Civil Service Rules/Regulations of the City.

"Discipline" includes written reprimand, suspension, demotion/reduction in rank

(temporary or permanent), temporary reduction in rate of pay (but not rank.)

ARTICLE 15 – INJURY LEAVE

Section 1. Each employee who is injured or disabled in the line of duty and within the scope of his employment shall be entitled to injury leave with full pay from the date of injury, until such time as the first of the following occurs:
(1) he is able to return to duty;

(2) he is placed on disability pension;

(3) he has reached maximum medical improvement as determined by his treating physician and is no longer able to perform firefighting duties;

(4) eighteen (18) calendar months have passed, provided that the eighteen (18) months shall be extended by up to six (6) months if the treating physician certifies that it is likely the employee will be able to return to work during that period.
(Joint Exhibit 1).

Findings of Fact

1. The grievant worked as a firefighter for the City of Danbury. On or about November 8, 2017, she reported an injury to her head that she reportedly received during a training exercise. (Joint Exhibits 2, 5, and 7). As a result of her reported injury, Ms. Grover never returned to work full-duty as a firefighter, but was placed on Injury Leave as provided under Art. 15. (Test. of Chief Richard Thode, (Chief); Joint Exhibit 1).

2. The grievant's physician opined in an April 21, 2021 letter that the grievant is "unable to perform duties as a firefighter due to this work-related injury. ...(her) work status has not changed, as she has reached MMI, and remains able to work a modified duty of 8-hours, taking breaks as needed. She cannot perform the fit for duty test...."

3. The grievant did not engage in any misconduct.

4. The city terminated the grievant's employment in a Notice of Termination dated July 21, 2021 stating that she was "unable to perform the essential functions of your job as a Firefighter." (Joint Exhibit 8).

Arguments of the Employer

The city argues that the union's appeal under Article 5 of the collective bargaining agreement fails because that Article permits an appeal from "discipline". The grievant, it argues,

was not disciplined; she did nothing improper requiring punishment, but rather, was terminated from employment due to the fact that she could no longer perform the functions of a firefighter due to her injuries.

The city argues that the specific language of Article 5 must be taken as expressly excluding and prohibiting, any right of appeal any action the city takes that is not "discipline". Thus, the grievance here is not arbitrable.

The city distinguishes the outcome in Bristol Firefighter IAFF Local 773 & City of Bristol, AAA Case No. 01-20-0017-4760, which found a matter arbitrable when a firefighter was terminated for being unable to respond to certain fire calls geographically, by pointing out that in that case the contract provision stated: "No regular employee shall be dismissed, discharged, suspended, fined, reduced in rank or disciplined in any other manner except for just cause.". The city argues that "discharged" in this provision uniquely and broadly covers an employee's termination when it is not deemed "punishment".

Arguments of the Union

The union relies upon the U.S. Supreme Court *Steelworkers Trilogy* to argue that the matter is arbitrable. There is a presumption in favor of arbitrability, and that "...unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, doubts should be resolved in favor of coverage." **Steelworkers V. Warrior & Gulf Navigation Co.**, 363 U.S. at 582, 46 LRRM 2416 (1960).

Further, the union argues that the matter under dispute has not been specifically excluded from arbitration under the agreement. This, with the clear public policy in favor of arbitrability of disputes, should compel the Panel to find in favor of arbitrability.

Discussion

The city has the burden to demonstrate by a clear preponderance of the evidence that the matter at hand is not arbitrable. It has failed in that burden.

The city's analysis and distinction of the Bristol Firefighter AAA arbitration case although interesting misses the mark. The arbitration clause in that matter is more properly read as defining "dismissal, discharge, suspended, fined, reduced in rank..." all as discipline, as they are followed by "or disciplined in *any other manner* except for just cause." (italics added). The "any other manner" phrase can only be read to reflect back and classify the items previously listed.

Concluding that both cases concern similarly constructed arbitration clauses certainly does not end our analysis here, however. Importantly, by asserting that the city terminated the grievant for a good reason which should not be considered discipline, the city is requiring us to turn our minds to discern whether or not the reason is in fact a good one. And by doing so we leave the realm of the issue before us, which is, does this Panel have the authority to determine whether or not the termination was for a good and just cause.

Additionally, as was the viewpoint in the Bristol Firefighter matter, an employer's unilateral declaration that an employee was terminated for somehow failing to be able to perform all the tasks of the job clearly falls within the presumption of arbitrability. Terminating an employee for these reasons cannot be found to clearly fall outside the generally understood definition of discipline.

Further, should an employer's determination be made on false information, or in bad faith, a review of whether the cause was just pursuant to the agreed upon language of the agreement is required. The matter is arbitrable.

AWARD

The Union's appeal in Case No. 2022-A-0052 is arbitrable under the parties' Collective Bargaining Agreement.

Dennis C. Murphy, Esq.
Public Member

Santo Franzo
Labor Member

Richard A. Podurgiel
Management Member DISSENTING