COURT OF APPEALS

STATE OF NEW YORK

MATTER OF CITY OF NEW YORK,

Appellant,

-against-

No. 53

NEW YORK STATE NURSES ASSOCIATION,

Respondent.

Westchester County Courthouse
111 Dr. Martin Luther King Jr. Boulevard
White Plains, New York
April 25, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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CHIEF JUDGE DIFIORE: The first matter on this afternoon's calendar is the Matter of the City of New York v. the New York State Nurses Association.

Counsel.

MR. SLACK: May it please the court, Devin Slack on behalf of the City appellants. I'd like to reserve three minutes for rebuttal.

CHIEF JUDGE DIFIORE: Three minutes, sir?

MR. SLACK: Yes.

CHIEF JUDGE DIFIORE: You may.

MR. SLACK: So the basic question in this case is does Section 12-306 of the City's Administrative Code entitle unions to demand documents to probe the evidentiary basis of potential dispute.

CHIEF JUDGE DIFIORE: Counsel, what's the standard of review that applies here?

MR. SLACK: De novo, the same standard that the court applied in New York City Transit Authority when it was addressing a broadly worded provision under the Taylor Law.

JUDGE STEIN: But wasn't that case addressing a - - - just a strict statutory interpretation question?

MR. SLACK: It was, and this case does as well. But - - -

JUDGE STEIN: Well, but here we also have a

contract that - - - that kind of weaves in with that statutory language.

MR. SLACK: That's true, but the Board has never claimed that the statute can be interpreted to give this kind of Step I discovery right. They've claimed that there's a contract. 12-306(c)(4) includes contract interpretation. Therefore, there's this right.

JUDGE STEIN: But - - - but here we have a contract that has specific language about what is included in a grievance - - -

MR. SLACK: That's correct.

JUDGE STEIN: - - - that may not be in other contracts. So that's - - - that's a key to this, isn't it?

MR. SLACK: That's right. And I think the court's review of that is also de novo because the language is clear. It's a grievance, and the parties agreed to a detailed grievance procedure that - - - that goes in four steps. None of them include discovery rights. That's important for a couple reasons. One is the parties did define what kind of information should be exchanged during that process. It's Step I in disciplinary proceedings. It's to be the written charges. For certain kinds of disciplines, like reprimands or lesser forms or discipline or other matters that the parties agree upon, there's an expedited procedure where at Step VI the parties exchange

evidence prior to the hearing. That the parties specified that kind of information exchange in those discrete contexts but not here makes it clear that that's not the right that was intended.

JUDGE FAHEY: As I - - - if I understand it, the petitioners argue that the City never took this position before.

MR. SLACK: The City's position consistently - - - I'm a little puzzled by the - - - by the preservation argument. From the beginning at the outset to our answer to the improper practice petition, through the Supreme Court, below, we've always maintained that neither 12-306 nor the contract - - -

JUDGE FAHEY: As a matter of practice, did you provide the information in this kind of a dispute?

MR. SLACK: The - - - everything suggests no.

JUDGE FAHEY: Okay.

MR. SLACK: There's - - - the - - - according to the union itself, there are seldom any requests on behalf of HRA. It's a small number of employees that are covered by this, so that's not surprising. There are some indications that Health & Hospital Corporation, which has a slightly different status, in general, provided this kind of information. But there's no indication to suggest that it was anything other than voluntary and not some sort of

sense that it was a statutory obligation.

JUDGE FAHEY: The information seems - - - that's being requested doesn't seem onerous, and it seems to be a reasonable request. What's the downside in providing it?

MR. SLACK: Well, I mean I disagree with both premises. The idea that we're going to inject any kind of document discovery into what is meant to be the first stage of a four-step process that begins informally and can resolve disputes early on, to 350,000 employees for a range or disciplinary actions, to - - - to suggest that's not going to have a material effect on the ability on the City to exercise what everyone agrees is their managerial prerogative, I think is incorrect. And this case shows why it is a burden. The - - - the Board - - -

JUDGE RIVERA: But if it avoids going to any other stage, why isn't it a - - -

MR. SLACK: I'm sorry, Your Honor?

JUDGE RIVERA: But if it avoids going to the second stage or third stage, isn't that of value? Isn't that - - -

MR. SLACK: I'd say a - - -

JUDGE RIVERA: - - - perhaps more efficient?

MR. SLACK: I'd say a couple things to that. One is employees don't have to use the grievance procedure. They can always just elect to go under Civil Service Law

75. That's a choice.

JUDGE FAHEY: Well, then they'd get no discovery at all, would they?

MR. SLACK: No.

JUDGE FAHEY: Or - - -

MR. SLACK: Actually, it would go - - - right after the initial determination, it goes to hearing before OATH where the OATH hearing office, who's familiar with the matter, can actually superintend discovery and decide what makes sense.

JUDGE FAHEY: I see.

MR. SLACK: The mechanism here that they propose, the Board proposes, can only be achieved through an improper practice petition that's entirely divorced from any - - - any familiarity with the matter. I think the unions propose that could take four or five months. I doubt whether that will prove true if the Board does take on this entirely new task upon it, which would greatly expand what it's done in the past. But even if it is, four or five months is radically more than what the grievance procedure contemplates.

JUDGE WILSON: What do you make of - - -

JUDGE GARCIA: Counsel.

JUDGE WILSON: Oh, I'm sorry.

JUDGE GARCIA: I'm sorry. There's cases in the

Third Department that both sides cite here, Pfau and then Hampton and some other cases. How do you square, I don't know if I'm saying it right, the Pfau decision, P-F-A-U, with those earlier decisions in - - - in terms of the nature of the proceedings involved?

MR. SLACK: I also don't know how to pronounce it, but I'll - - -

JUDGE FAHEY: It's [Fow']. It's [Fow'] so everybody knows.

JUDGE STEIN: Pfau.

JUDGE GARCIA: Voice of authority.

JUDGE FAHEY: Judge Pfau is a very good judge in - - - in New York State.

JUDGE STEIN: Ann Pfau.

JUDGE FAHEY: Yeah.

MR. SLACK: I mean, partly, the difference in them, I don't know how much we should really worry, like, think about it because it doesn't have to do with the City's Collective Bargaining Law in specific. I think mostly what we can draw from it is that there's a difference between individual disciplinary grievances and these kind of broad-based contractual grievances. But what matters there isn't that they're grievances. It's that under the City's Collective Bargaining Law, only matters that are within the scope of collective

bargaining are subject to this informational right. And contractual grievances are much more likely to raise these kind of broad-based terms in conditions of employment.

City's Collective Bargaining Law is quite clear when it defines the scope of collective - - - of the subjects within the scope of collective bargaining. Section 12-307(a) defines wages, hours, those kind of broad-based terms and conditions of employment. 307(b) makes it clear that taking disciplinary actions and decisions related to that are not within the scope of collective bargaining. If they're not within the scope of collective bargaining, they can't be within the informational right. And we know that the City never intended for this right to exist because it's the public policy of the City as stated in Section 12-312(f) that the parties sit down and bargain over grievance procedures and discovery and - - - and dispute resolution procedures just like this. That's what the parties did.

JUDGE STEIN: But - - - but how - - - how do we get around the fact that the contract defines grievances as including claimed wrongful disciplinary actions, sort of getting back to my original question?

MR. SLACK: Yeah.

JUDGE STEIN: To me, that makes this different

from - - - from just looking at the statute itself or looking at other kinds of - - - of contracts. And how - - - I just - - - how do we get around that?

MR. SLACK: I think - - - I think the simple answer is that it's a grievance. You apply the grievance procedure that the parties negotiated. It's a detailed grievance procedure.

JUDGE STEIN: But - - -

MR. SLACK: The parties did not negotiate for this right.

JUDGE STEIN: But the Board and the courts have held that grievances have this data exchange requirement. And - - -

MR. SLACK: If it's - - - if it's read broadly, I just - - - I don't think that can be reconciled with the plain text of 12-306(c)(4) which talks about data necessary for the discussion, understanding, and negotiation of subjects in the scope of collective bargaining agreement.

JUDGE WILSON: But what - - - what - - -

JUDGE STEIN: But - - -

MR. SLACK: Just by action, not within the scope of collective bargaining.

JUDGE WILSON: What is the purpose of putting the words "disciplinary proceedings" within the definition of grievance in the collective bargaining agreement?

MR. SLACK: So that the parties can exercise the bargained-for grievance procedure, which includes four steps. The earliest that discovery is meant to, use discovery broadly, kicks in is at Step IV when an arbitrator can actually - - - has a matter before him or before her and can superintend to that within the context. Not so the parties could file an improper practice petition that could be filed long after the fact.

JUDGE FAHEY: I see your time - - -

CHIEF JUDGE DIFIORE: Thank you, counsel.

JUDGE FAHEY: Can I - - - Judge - - -

CHIEF JUDGE DIFIORE: Yes. Yes.

JUDGE FAHEY: - - - would it be all right if I just asked - - - thank you. I wanted to ask this to both sides. In - - - in terms of the standard of review, we've got deferential or de novo reviews. I - - - I want to know how you see it, what the meaning of de novo is in your mind. I - - - just so you get a - - - I - - - I read the cases, deferential I see as either implementing or administering as opposed to de novo, which when I read the cases there, we're really talking there either about the extent of the right or obligation or the enactment of a regulation. That's the way I see - - - seem to read the cases as they come out. When you come back - - - I don't expect this off the top of your head, but when you come

back, I'd like you to address it.

MR. SLACK: I'll make a note of that. Thank you.

JUDGE FAHEY: Okay. Thank you.

CHIEF JUDGE DIFIORE: Thank you, counsel.

Counsel.

MS. LEVY: May it please the court, my name is Abigail Levy. I represent the New York City Board of Collective Bargaining. The issue here is whether the Board rationally determined that information disclosure relevant to contractual disciplinary grievances falls within the scope of the parties' statutory obligation to furnish data.

And with all due respect to counsel, he's drawing a false dichotomy here between contractual grievances and disciplinary grievances which, as you've stated, fall - - - are essentially one and the same in the contract. That's what the parties agreed to. So as the First Department affirmed, the Board's decision was rationally based because its interpretation of its own statute, which it's interpreted for coming on fifty years, was reasonable. The decision was consistent with its own precedent and PERBs, the Public Employment Relations Board, and the remedy, critically, was narrowly tailored. This isn't, you know, a fishing expedition where anything that a party asks for - - -

JUDGE GARCIA: It was narrowly tailored for this

case, right? I mean in the next case, they're going to have narrowly tailor it again. Isn't that the fear? Because now you have, if this stands, the ability to ask for what was asked for here and then there will be subsequent challenges to what you're going to get. And isn't that the point that that is going to take time to narrowly tailor? It wasn't a narrowly tailored request.

MS. LEVY: Right. Well, it's - - - the Board uses its, you know, many years of experience and it - - - and - - - and the Board stated in its decision that anything that was, you know, overbroad, not easy, you know, they're not required - - -

JUDGE GARCIA: But that's the discovery process, right? And I think the argument on the other side is that's what you're trying to avoid at this stage. So if you're going to allow this mechanism to be in place, these challenges are going to start off very broad and then it will take time to get to what you describe as the narrowly tailored result.

MS. LEVY: Well, first of all, if the parties produced the documents requested in the first place, then, obviously, it wouldn't get to this point. You know, in the past, the parties - - - and I think my colleague will speak to this, in the past, the parties have generally been able to agree among themselves, produce documents, in the

context of a disciplinary grievance.

JUDGE RIVERA: But isn't that his point that that's been voluntary? It's never been intended that - - - that it's mandatory and that they have no choice about?

MS. LEVY: Right. That's correct. But again, it's - - - it's - - - it would take time, but there's also the flipside to it where if documents are produced early in the grievance process, then there are various scenarios where - - - where, in fact, the union might decide you know what, we're actually not going to pursue this.

JUDGE STEIN: Is - - - is the disciplinary - - -

MS. LEVY: So it really goes both ways.

JUDGE STEIN: - - - action a grievance even before Step I? When does - - - when does a disciplinary action become a grievance? Is - - - does that make sense?

MS. LEVY: Well, the employer would bring a disciplinary action and then - - -

JUDGE STEIN: So as soon as - - - as soon as the employee is - - - is accused of something that's - - - formally, that starts - - - it - - - that's when it becomes a grievance or - - -

MS. LEVY: No, no. The - - - the - - - because the employer's entitled to bring charges against - - - against an employee and then sort of another process would start where the union would decide whether to grieve the

matter.

JUDGE STEIN: So - - - so that's my question is here before Step I, before there was any determination by anybody that - - - that the charges had some - - - you know, had foundation, that's when the request for information was made. And so my question is is was it - - - if we're interpreting the contract in the statute as to require this exchange of information for grievances, was it a grievance yet?

MS. LEVY: It was at - - - so the charges had been brought, and they was - - - there was a Step IA meeting where they - - - the Step IA meeting. Then the information was requested, I believe. And then subsequently, the information was not produced. Subsequently, the employees were terminated.

JUDGE GARCIA: But to go - - - to follow on that a little bit, and maybe this goes back to a Third Department issue, it seems as you have a disciplinary proceeding going forward. The grievance is the union or the employee complaining about that process or the fairness of that process. So why - - - it seems, and correct me if I'm wrong, but why wouldn't the disciplinary process go forward, as it always has, while this other grievance process is taking place? Since if you're tying it to that language, it's - - - it's beyond a disciplinary proceeding

for an employee, it seems to me.

MS. LEVY: I - - -

JUDGE GARCIA: So - - -

MS. LEVY: I'm not sure I understand but the - - -

JUDGE GARCIA: And it may be because I don't understand the process. But it seems as if in some of the cases in the Third Department, the employee disciplinary proceeding went forward while this other issue was being litigated.

MS. LEVY: Right.

JUDGE GARCIA: Why didn't that happen here?

MS. LEVY: Well, the disciplinary - - - I mean the - - - the employees were terminated, so the process did go forward in the sense that they were terminated. But - - - but in the meantime, roughly at the same time, the union brought the improper practice petition seeking - - - seeking these documents that they were unable to get at the beginning of the grievance process. But the - - - but the - - - it didn't stop the - - - the employer's process of disciplining these employees.

JUDGE GARCIA: So that process has been completed in this case?

MS. LEVY: Yes.

JUDGE FAHEY: So by bringing the improper

practice charge, the employees are still on the payroll?

MS. LEVY: I'm going to defer to my colleague who represents NYSNA. I - - - I don't know.

JUDGE FAHEY: Okay. All right. You're not sure of the time frame there. What about the standard of review? You hear my question to counsel. I'm assuming you're going under a deferential standard of review?

MS. LEVY: Right. We - - - we would find that there's a deferential standard of review. I believe that the - - - the Court of Appeals has - - - has long held that there's a deferential standard that's applicable to administrative agencies in general and our agency in particular. And de novo would not be applicable.

JUDGE FAHEY: And - - - and that's - - - isn't that, really, your strongest - - - one of your strongest arguments - - -

MS. LEVY: Yeah.

JUDGE FAHEY: - - - is the standard of review here?

MS. LEVY: Absolutely. I mean we - - - you know, this Agency, this is all we do is labor relations, and this is our statute. We're charged with interpreting this statute. We've interpreted this statute for fifty years. There's a large body of precedent and legislative history addressing the meaning of this particular provision having

to do with furnishing data and requiring that it's necessary for contract administration. So really, you know, the fact that this is a disciplinary - - - a disciplinary grievance is really a distinction without a difference, particularly here.

JUDGE RIVERA: So when the parties enter the collective barg - - - bargaining agreement, you had already had a long history of taking this same position?

MS. LEVY: Well - - -

JUDGE RIVERA: So the HRA was well aware that this was the position you had taken?

MS. LEVY: Well, in fairness, we had addressed this provision. And it does - - - and it doesn't come up that often. But we had addressed this provision, but we had not or rarely had to address it in the context of disciplinary grievances.

CHIEF JUDGE DIFIORE: Thank you, counsel.

Counsel.

MR. VITALE: Good afternoon. May it please the court, Joseph Vitale from the Law Firm of Cohen, Weiss and Simon for the respondent NYSNA, the New York State Nurses Association. I want to - - - because you - - - you've asked a lot of questions that I want to address, first with respect to the question about the charges. The filing of charges is actually an action taken by the employer that

generates response. So that - - - we don't have to wait until someone's terminated at a later stage to file a grievance. And in fact, the case law talks about being able to get information in connection with potential grievances.

So what the City is asking is that not only does the union have to file a grievance, but it has to take it all the way to arbitration in order to get the information that it wants to understand whether or not the grievance has any merit. And as I cited in my brief, there's a Supreme Court case that says that completely would overburden the system. The mechanism is supposed to lead to the efficient review. Of course getting information sooner helps resolve matters. The whole issue about the practice - - - and there was a question about the practice.

JUDGE FAHEY: Right.

MR. VITALE: The collective bargaining agreement at issue that finds a grievance to include improper discipline covers 8,100 nurses, not only the 29 at HRA, but 8,000 at HHC. The undisputed practice, the undisputed record evidence, is that the union has repeatedly asked for information exactly like in this case to HHC, which is covered by the same contract, and has repeatedly gotten information in connection with discipline affecting only one or two employees. So the sign - - -

JUDGE WILSON: And is it - - - in practice - - - in practice, does that burden the process? Has it expedited it? Neither?

MR. VITALE: So my point is two-fold. There's - - - there's no evidence that this was done on a voluntary basis as opposed to in recognition of the statutory obligation to do so. And it undermines - - - because what I really want to address is the arguments about what the practice and how this is a - - - a folly that we're undertaking and it's impractical and it's going to burden down the system. The answer is no. We've been operating for years asking HHC and getting information, and it hasn't burdened down the process. There hasn't been a spate of improper practice proceedings that have been filed because of this newly given right. And with respect to the - - - the argument preservation, what I was arguing in my brief is not that the City has waived the right to complain they don't have the information. What I'm talking about is it is a thirty-year holding by the Board of Collective Bargaining that the right to information includes the right to contract administration. The City's argument proves too much. The City's argument, by focusing on the language of the statute, they say, well, it only says data and so maybe this isn't really data or it only says collective bargaining negotiations, it doesn't say contract

administration. It has been - - - it has been applied to contract administration for over thirty years at the Board.

What we're having here today is the City arguing, yes, for thirty years there's been this obligation to give information in connection with grievances, but now this is special somehow because it's a disciplinary grievance that only affects one or two people. First, it's a distinction without - - - it's a difference without distinction - - - a distinction without a difference. And as I pointed out, this contract governs 8,000 people. Everyone - - - I mean I may fire one employee on day one, but everyone has an interest in what's going on, what - - - what did that employee do wrong, does that constitute just cause for termination under the contract. So the notion that if it only affects one or two people it's not important, besides the fact PERB has already - - - and the courts have already enforced PERB decisions talking about the right to information in connection with discipline involving only one or two people.

JUDGE GARCIA: Counsel - - -

MR. VITALE: You raised the - - -

JUDGE GARCIA: Yeah. My question - - -

MR. VITALE: You asked a question about the Pfau decision, right?

JUDGE GARCIA: No, no. But before we - - -

MR. VITALE: Oh.

JUDGE GARCIA: - - - get to Pfau, could you answer the question, I think that was deferred to you, on what's the effect of this proceeding on the ultimate result of the disciplinary action?

MR. VITALE: It - - - it has no effect. It - - - it had no effect. It will have no effect.

JUDGE GARCIA: So they are not on the payroll?

MR. VITALE: They are not on the payroll. The process continued. The - - - the issue, though, is that the process continued, and from my perspective, from my client's perspective, with one arm behind our back because we did not have the statutorily entitled information that we needed, but it went on. We're not going to suspend the discipline process until we come here on a rainy April day to figure out whether or not there's a statutory obligation to provide the information. I mean things went on. Our point is in terms of the future, it would help resolve situations easier if we had this information while we're administrating - - -

JUDGE STEIN: And is that just a matter of practice or do you think that that's called for by the contract and the statute that - - - that the disciplinary proceedings go - - - goes forward?

MR. VITALE: Well, yeah. I - - - I think it's

called by the contract. There's nothing in the contract that says if the parties have a dispute with respect an improper practice - - - I assume the parties could. You know, at any time when you're administrating the contract, if there was a specifically important issue that needed to be resolved by the Board of Collective Bargaining, the parties could always at that point say, you know what, let's - - - you know, let's take a pause, let's see what happens, let's get the advice of the Board of Collective Bargaining. That's not what happened here. We don't think that there's any statutory requirement that we have to suspend the disciplinary proceedings.

And one quick other thing I wanted to say is that in this parade of horribles, and there was a reference to 350,000 employees. There's no record evidence about what the collective bargaining agreements that covered those 350,000 other employees. We're here about a collective bargaining agreement that covered 8,100 employees, a collective bargaining agreement that specified that grievances included improper termination.

And we're also talking about the issue of the collective bargaining agreement. This - - - the court - - - the case law is if you're going to waive a statutory right in a collective bargaining agreement, you have to do it clearly and unmistakably. The suggestion that all our

rights flowed just from the contract, not from the statute, has been rejected by the courts. I - - - I apologize. I don't remember the case I cited in my brief. But the court says it's a separate independent statutory right that can only be waived clearly and unmistakably. NYSNA did not do that in its contract here with respect to the 8,100 employees.

CHIEF JUDGE DIFIORE: Thank you, Mr. Vitale.

MR. VITALE: Thank you.

CHIEF JUDGE DIFIORE: Mr. Slack.

MR. SLACK: Judge Fahey, I'd like to try and - - - and field the question. I'm - - - I - - -

JUDGE FAHEY: Well, I think the standard of review - - - review is important to your argument.

MR. SLACK: A little bit.

JUDGE FAHEY: Um-hum.

MR. SLACK: Though I don't think any amount of deference is going to change what 12-306(c)(4) says, and it doesn't say anything about this. There's this thing about administrative agencies.

JUDGE FAHEY: So you would say it would apply - - - you - - - you would win even under a deferential standard?

MR. SLACK: Absolutely.

JUDGE FAHEY: Okay. So then we don't need to

spend any time on it. Go ahead.

MR. SLACK: Okay. The one thing I - - - I would say just beyond the - - - the statute itself is that counsel for the Board mentioned fifty years of practice. Never, never extended it this far. Counsel for the Board also mentioned the legislative history. I've seen no reference to legislative history that supports this. In fact, everything goes against it. In the legislative history for the bill, there's the report from Mayor Lindsay, who was the impetus for the entire legislation, which says this duty to bargain in good faith is about achieving, quote, "Equality of posture at the bargaining table." OCB, which is the - - - the parent of the Board, submitted its annual report in that year, in 1970, '71, and it says, quote - - -

JUDGE RIVERA: But when you bargain you - - - you included disciplinary proceedings, right?

MR. SLACK: I'm sorry?

JUDGE RIVERA: Disciplinary - - - but when you bargained, you included disciplinary actions in grievances.

MR. SLACK: Absolutely.

JUDGE RIVERA: So - - - so you went - - - you made that decision upfront.

MR. SLACK: Absolutely.

JUDGE RIVERA: Isn't that - - - isn't that what

he's talking about?

MR. SLACK: We made - - - we made the decision to define disciplinary grievances and to specify the process just like the City's law requires. The Board's - - - the Board's own report from 1970 in the legislative history says, "The City and unions may voluntarily provide for their own dispute settlement procedures." What is this but not a dispute settlement procedure? It wasn't agreed to. Same thing under the Taylor Law, the court doesn't need to reach what the Taylor Law requires, but I think that there's a good reason to believe that PERB is also wrong because the Taylor Law, Section 200 of the Civil Service Law, says that it's the public policy of the State for parties to agree on these procedures, not that the statute dictates them.

And when this court in NYCTA said that there was no right to a Weingarten Right in those, like, potential disciplinary actions, the legislature went back, it added it, just the representational right, no discovery right, and the legislative history in support of that says if parties want more, they can bargain for it. All of this suggests that under State law, City law, it's not required, never has been.

I want to get to one - - - one question that you had raised, Your Honor, when does a grievance actually

begin. I don't - - - I don't think it matters because whatever the grievance is the procedure goes there. But it doesn't start until disciplinary action is taken, and that doesn't happen until after the conference. And I'll go - - -

JUDGE STEIN: So disciplinary action doesn't include bringing charges?

MR. SLACK: No. It's the actual disciplinary action. Just the - - -

JUDGE STEIN: Where - - - where is that? Is that - - -

MR. SLACK: It's - - -

JUDGE STEIN: - - - statutory or is that in the CBA?

MR. SLACK: It's the definition of the grievance. I believe it's the last subparagraph of that. And I want to just correct something. The - - - this information conference was before the conference. It was not after.

JUDGE STEIN: Let me just stop you for a second. The definition of the grievance is when disciplinary action is taken. But is disciplinary action - - -

MR. SLACK: Oh, no. It's not.

JUDGE STEIN: - - - itself defined?

MR. SLACK: It's not.

JUDGE STEIN: Okay.

MR. SLACK: But in the ordinary usage of that, a disciplinary action, like, what would be a disciplinary action subject to an employment case is - - - is the actual action. And as soon as that happens, they have the ability to go to - - -

CHIEF JUDGE DIFIORE: Thank you, counsel.

JUDGE RIVERA: You - - - I'm sorry.

CHIEF JUDGE DIFIORE: Go ahead.

JUDGE RIVERA: I'm sorry. Just to clarify. So you're saying the mere bringing of a charge is not discipline against the employee?

MR. SLACK: Correct. The disciplinary action actually cannot be taken until after that first - - - that - - - that conference. And then the - - - the disciplinary action, which is the subject of Article - - - Civil Service Law 75, you - - - the - - - the employee can just not waive their rights under 75 and go straight to OATH. Get discovery right then. What they can't do is rewrite the bargain - - - the bargain for negotiated procedure that they voluntarily elect to go into.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. SLACK: Thank you.

(Court is adjourned)

C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of City of New York v. New York State Nurses Association, No. 53 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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