

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

NEW YORK CITY HEALTH AND
HOSPITALS CORPORATION

DECISION NO. B-11-76

-and-

DOCKET NO. BCB-255-76
A-561-76)

LOCAL 237, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

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DECISION AND ORDER

The New York City Health and Hospitals Corporation (HHC) contests the arbitrability of a grievance filed by Local 237, International Brotherhood of Teamsters. The request for arbitration states that the grievance to be arbitrated is "disciplinary action" taken against John Maldonado, a probationary Special Officer in the New York City Health and Hospitals Corporation. The grievant was terminated from employment by letter of June 10, 1975, stating, "since the beginning of your employment on December 23, 1974, your work performance has not been satisfactory." The Union alleges that the dismissal was in violation of the contract grievance procedure, Article VI, Section 4. The remedy sought by the Union is dismissal of the charges.

The Employer's petition objects to arbitrability on two grounds. First, the HHC claims that the grievance is not arbitrable because it involves the dismissal of an employee during his probationary period. Therefore, the Employer argues, "the dispute involves the rules and regulations of the

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New York City Civil Service Commission concerning probationary service in competitive titles." The Employer contends that Article VI, Section 1(B) of the contract expressly excludes this matter from the definition of a grievance by stating "disputes involving the rules and regulations of the New York City Civil Service Commission shall not be subject to the grievance procedure or arbitration." Moreover, the grievance is not arbitrable as a matter of law, "because dismissal during the probationary period under the Civil Service Law has never been subject to the grievance procedure and arbitration. . ." The Corporation also contests arbitrability on the basis of the Union's alleged failure to file the necessary waiver pursuant to Section 6.3 of the Revised Consolidated Rules of the Office of Collective Bargaining.

The Union responded to the Employer's petition in a letter dated May 13, 1976. With respect to the HHC's objection to arbitration on the basis of the Union's failure to file a waiver, the Union states that it did file a waiver, which it assumes was proper inasmuch as it has not been notified to the contrary by the Office of Collective Bargaining.

The Union argues that it is not challenging the rules of the Civil Service Commission concerning probationary employees. The Union states:

"We believe that those rules gave
certain powers to administrators,
but with those powers went a trust.

This union's grievance says that the trust was violated and the powers abused in the case of Mr. Maldonado. The question this grievance raises is: Is the power and trust given administration over probationary employees so sacred that the true motives of these administrators cannot be questioned?"

APPLICABLE CONTRACT PROVISIONS

Article VI, Section 1 of the contract between the parties defines a grievance as:

- "(A) A dispute concerning the application or interpretation of the terms of this collective bargaining agreement;
- (B) A claimed violation, misinterpretation or misapplication of the rules or regulations, existing policy or orders applicable to the agency which employs the grievant affecting the terms and conditions of employment; provided, disputes involving the rules and regulations of the New York City Civil Service Commission shall not be subject to the grievance procedure or arbitration;
- (C) A claimed assignment of employees to duties substantially different from those stated in their job specifications;

- (D) A claimed improper holding of an open-competitive rather than a promotional examination; and
- (E) A claimed wrongful disciplinary action against an employee."

Section 4, cited by the Union, provides:

- (a) "In any case involving a permanent competitive employee employed in an agency the head of which is appointed by the Mayor, upon whom the agency head has served written charges of incompetency or misconduct, the following procedure shall govern:...."

DISCUSSION

The Corporation's challenge to the Union's request for arbitration contains several distinct components. The allegation that the proper waiver was not filed will be decided first. The facts reveal that at the time the Request for Arbitration was filed, it was not accompanied by the necessary individual waiver pursuant to §6.3 of the Revised Consolidated Rules of the Office of Collective Bargaining. However, this omission is not fatal to the processing of the case. Upon notification, on May 15, 1976, the Union submitted a waiver

on behalf of the Union and the individual grievant. The statutory mandate of the OCB, which is ". . . to favor and encourage final, impartial arbitration of grievances . . ." ¹ would not be served by allowing this corrected procedural oversight to bar the grievant from pursuing his claim.

In deciding issues of arbitrability, the Board has repeatedly held that the scope of its inquiry includes "ascertaining whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough to cover the particular controversy presented."² This is a threshold decision which the Board must make.

An examination of the contract between the parties, Article VI, Section 1(B), indicates the intention to remove "disputes involving the rules and regulations of the New York City Civil Service Commission" from the arbitration process. It is well settled under civil service law that a probationary employee may be terminated at the end of the probationary period without charges or a hearing provided that the decision to terminate is not made in bad faith.³

¹ NYCCBL, §1173-2.0.

² See, N.Y.C. Health and Hospitals Corp. -and- Committee of Interns and-Residents, Decision No. B-28-75; City of New York -and- Communications Workers of America, Decision No. B-8-74.

³ Voll v. Helbing, 9 NYS 2d 376 [App Div 3rd Dept (1939)], appeal dismissed 294 NY 653 (1945); Ramos v. Dept. of Mental Hygiene, 311 NYS 2d 538 [App Div 1st Dept (1970)]1; Howard v. Kross, 202 NYS 2d 445 (1960).

Pursuant to the New York City Health and Hospitals Corporation Act, Unconsol. Laws §7390, the Corporation promulgated its own Personnel Rules and Regulations effective March 1, 1973, thereby removing certain employees, including grievant, from the jurisdiction of the New York City Civil Service Commission. The Rules and Regulations are similar to, and in many cases a verbatim copy of, the New York City Civil Service Commission rules and regulations. Therefore, we shall treat all references in the contract and in the parties papers to the New York City Civil Service Commission rules and regulations as referring to the HHC Personnel Rules and Regulations. With respect to probationary employees, the HHC Rules provide, in pertinent part:

- 5:2:1 "Every appointment and promotion in the competitive or non-competitive class shall be made subject to the successful completion of a probationary period."
- 5:2:2 "The Appointing officer may terminate a probationer for gross misconduct or because his performance is not satisfactory at any time during the course of his probation by written notice to the probationer."

In the case of probationers in competitive titles where performance is not satisfactory, he may do so only after a minimum period of probationary service of two months for original appointment, and four months for promotion appointments.

Following completion of the required minimum probationary period, the Appointing Officer may terminate a probationer at any time during or at the end of the maximum probationary period."

The grievant herein does not claim that his civil service rights have been violated, nor did he seek redress pursuant to the HHC Rules. Instead, arbitration is sought under the contractual definition of a grievance cited above.

Taken together, the various provisions of the contract between the parties do not indicate any intent to grant probationary employees the right to arbitrate their dismissal at the end of the probation period. The definition of a grievance specifically omits from the scope of arbitrable matters the application of civil service rules. Furthermore, although the contract defines a grievance as "a claimed wrongful disciplinary action," Section 4 of the contract specifies a disciplinary procedure applicable to "permanent" employees only. Where it is sought to enlarge the traditional and well-defined incidents of probationary status, the Board will require an explicit contractual expression of that intent. We find no such expression of intent in the contract before us now. Therefore, we shall deny the request for arbitration.

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O R D E R

Pursuant to the power vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED that the petition of the Health and Hospitals Corporation herein be, and the same hereby is, granted; and it is further

ORDERED that the Union's request for arbitration be, and the same hereby is, denied.

DATED: New York, N.Y.

September 8, 1976.

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

ERIC J. SCHMERTZ
MEMBER

EDWARD SILVER
MEMBER

DANIEL L. PERSONS
MEMBER