City v. DC37, (SSEU, L.371), 19 OCB 1 (BCB 1977) [Decision No. B-1-77 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

Petitioner DECISION NO,. B-1-77

-and- DOCKET NO. BCB-262-76

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO, (Social Service Employees
Union, Local 371),

Respondent.

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DECISION AND ORDER

On August 10, 1976, the Social Services Employees Union, Local 371 (the Union) filed a Request for Arbitration of the grievance of Stanley Windley, a former provisional employee of the Department of Social Services. The grievance alleges a violation of Article X of the 1973-1976 City-wide Contract (the Contract). The City-wide representative, District Council 37, designated the Social Service Employees Union, Local 371 to invoke the arbitration procedures as contemplated by Article XIV, 52 of the Contract.

Petitioner, appearing by the Office of Labor Relations (OLR), contends that the Request for Arbitration fails to raise an arbitrable issue and must be dismissed.

BACKGROUND

Grievant was employed as a Provisional House Parent at the Special Services for Children Diagnostic Center from March 12, 1974 to March 3, 1975. In a letter dated March 3, 1975, grievant was notified, by Commissioner James R. Dumpson, that his employment was being discontinued at the close of business on that day.

The statement of the grievance to be arbitrated reads:

> "Grievant was improperly terminated. Evaluatory statements of which he was not made aware prior to termination, were placed in his personnel file."

Because he was not given an opportunity to examine or answer evaluatory statements placed in his-personnel file which concern his work performance and/or conduct, grievant claims that his employer violated Article X of the Contract 1

and Administrative Order No. 7 [1] and, thus, he, the grievant, was improperly terminated.

As relief for the alleged contractual violation, grievant requests that: his termination be rescinded immediately; he be paid from the point of his termination; all evaluatory statements be removed from his personnel record; he be restored to his position as if never dismissed; and any other just and proper remedy.

The Step III Hearing officer held that there was no violation of the Contract or of the procedures specified in Administrative Order No. 7. The Step III decision states:

> "There has been no evidence whatsover of any evaluatory statement placed in this employee's permanent personnel folder of which he has not been given a copy, and, hence, a requirement that he accept a copy of such a statement is not pertinent."

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[1] Administrative Order No. 7, issued by First Deputy Mayor James A. Cavanagh on April 18, 1974, states: "Pursuant to a City-wide agreement recently reached between the City of New York and District Council 37, AFSCME, AFL-CIO, a City em ployee covered by the terms of the contract shall be required to accept a copy of any evaluatory statement of his or her performance or conduct if such statement is to be placed in said employee's permanent personnel folder whether at the central office of the agency or in another work location. Prior to being given a copy of such evaluatory statement, the employee must sign a form which shall indicate only that a copy of the evaluatory statement was received, not necessarily that the employee agrees with its contents. Said employee shall have the right to answer any such evaluatory statement filed and the answer shall be attached to the file copy. Such evaluatory statement with respect to the employee's work performance or conduct, a copy of which is not given to the employee, may not be used in any subsequent disciplinary actions against the employee."

On the basis of lack of evidence of the existence of evaluatory statements concerning grievant, the Hearing Officer concluded that a copy of evaluatory statements could not be given to the grievant nor could there be an answer by grievant to such statements. In addition, the Hearing Officer found that the grievant was not terminated as a result of disciplinary action instituted against him, but that his provisional employment was properly terminated at the discretion of the Commissioner of the agency.

Thereafter, the Union filed the instant Request for Arbitration.

POSITIONS OF THE PARTIES

Petitioner argues that this dispute is not within the definition of a grievance as set forth in Article XIV, §1 of the Contract. [2] OLR asserts that:

> "A person appointed provisionally in the Civil Service acquires no vested right to retention by reason of provisional service. Accordingly, such appointee is not deprived of any rights by reason of a dismissal without hearing or without a statement of the reason for such dismissal."

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[2]Article XIV, §1 of the Contract states:

"Definition: The term 'grievance' shall mean a dispute concerning the application or interpretation of the terms of this collective bargaining agreement."

As no provision of the Contract gives any provisional employee any right to retention, Petitioner argues that the dispute is not within the definition of a grievance as stated in the Contract and that any arbitrator appointed pursuant to the Contract would be without jurisdiction to adjudicate the dispute.

Petitioner also alleges that as neither Article X of the Contract nor Administrative Order No. 7 relate to the retention of a person appointed provisionally in the Civil Service., grievant's claimed violation of the Contract and the Administrative Order is moot by reason of the discontinuance of grievant's provisional appointment.

Respondent contends that there is no language in the Contract excluding provisional employees from the ambit of either Article XIV, "Adjustment of Disputes", or Article X, "Evaluation and Personnel Folders". Respondent cites to Board Decision No. B-9-74, D.C. 37 and City of New York, arguing that the Board held therein that Article IX of the 1970-1973 City-wide Contract, [3] "Examination of Personnel File,"

[3] Article IX of the 1970-1973 City-wide Contract provided that: "An employee covered by this Contract shall be entitled to read any evaluatory statement of his work performance or conduct prepared during the term of this Contract if such statement is to be placed in his permanent personnel folder whether at the central office of the Department or in another work location. He shall acknowledge that he has read such material by affixing his signature on the actual copy to be filed, with the under standing that such signature merely signifies that he read the material to be filed and does not necessarily indicate agreement with its content. The employee shall have the right to answer any material filed and his answer shall be attached to the file copy."

did not, on its face, exclude probationary employees from its application. According to Respondent, the Board found in that case that a grievance of a probationary employee alleging a violation of Article IX is a matter requiring interpretation of the contract, and, therefore, is a proper subject for arbitration. Similarly, argues Respondent, Article X of the present Contract does not, on its face, exclude provisional employees from its application. Therefore, a claimed violation of grievant's right under Article X is a proper subject for arbitration.

Respondent further points out that the Board has consistently held that:

> "In determining arbitrability, the Board must decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy presented." (OLR v. SSEU, Dec. No. B-2-69.)

Respondent urges that the Board apply this standard in the instant matter.

Petitioner, in its Reply, states the question before the Board to be, "Is Petitioner obligated to arbitrate a grievance challenging the discontinuance of a provisional appointee?"

Petitioner argues that the holding of the Board in Decision No. B-9-74 is not controlling here. Citing numerous decisions of New York State courts, Petitioner contends that

the rights, if any, of a provisional appointee are not equivalent to the rights of a permanent employee in probationary status. Therefore, Petitioner concludes:

> "It is, of course, logical that this Board concluded, as it implicitly did in B-9-74, that probationary employees are like all other members of the civil service and, save for the discretion reposed in the appointing authority to terminate for unsatisfactory performance, entitled to all the privileges and emoluments of civil service. The extension of such benefits to provisional appointees is another question entirely. For this Board to so find would fly in the face of the constitutional mandate of Article V, Section 6 of the New York State Constitution which imposes the test of merit and fitness determined by examination which, insofar as is practical is competitive. To endow the provisional appointee with the rights of the probationer is to disregard entirely the existence of Civil Service Law, Section 65. Had the Legislature intended that the two classes be identical, it could have so provided simply by not enacting Section 65. It did, however, choose to establish such a class of persons. Its intent should be respected."

For these reasons, Petitioner urges that the Request for Arbitration be, in all respects, dismissed.

In a letter dated November 2, 1976, after receipt of Petitioner's Reply, counsel for the Union states,"[W]e find it necessary ... to reply to what appears to be certain inaccuracies in petitioner's brief." In this letter, Respondent points out that two of the cases relied on by Petitioner do not”... involve a situation where it is contended, as here, that a provisional employee is entitled to utilize the grievance

procedures in his collective bargaining representative's contract." Respondent contends that the cases cited by Petitioner stand for the proposition that a provisional employee is not entitled to review of his discharge under §75 of the Civil Service Law. But, Respondent argues, provisional employees are not excluded by contractual language, Civil Service Law or case law from the right, expressed in Article XIV of the Contract, to have their employee representative arbitrate an alleged denial of contractual rights.

DISCUSSION

Apparently, this dispute centers on the premise that there is a conflict between the discretionary rights of the employer under the Civil Service Law and the contractual rights of an employee under a collective bargaining agreement

Petitioner argues that a provisional appointment under the Civil Service Law is an employment at will, which may be terminated at the discretion of the employer without violating any rights of a provisional employee. Petitioner contends that the alleged grievance is not arbitrable because the dispute is not within the definition of a grievance as set forth in the Contract, as no provision of the Contract gives any person appointed provisionally in the Civil Service any rights of retention of employment.

Respondent argues that grievant as an employee has certain contractual rights. Because there is a dispute as to whether a contractual right of an employee has been violated, Respondent contends that the resolution of the controversy is a matter for an arbitrator to decide pursuant to Article XIV of the Contract.

The Board believes that both parties have not clearly defined the issues. Petitioner frames the question to be whether the discontinuance of a provisional employee is arbitrable. Respondent argues that the alleged denial of Article X rights resulted in improper termination of grievant's employent and thus assumes in its pleadings that there is a connection between Article X rights and the job tenure rights of provisional employees.

We view the instant controversy to involve two issues. Whether the alleged denial of a provisional employee's rights, if any, under Article X of the Contract to "... accept a copy of any evaluatory statement of his work performance and conduct prepared during the term of this Contract if such statement is to be placed in his permanent personnel folder...." and to " ...answer any such evaluatory statement filed...." is within the ambit of the grievance arbitration clause of the Contract. Secondly, whether the grievant's claim of improper termination is also within the ambit of the grievance arbitration clause.

In D.C. 37 and the City of New York, Decision No. B-9-74, we were confronted with a similar challenge to arbitrability concerning the applicability of Article IX of the 1970-1973 City-wide Contract [4] to a probationary employee. We held that:

> "While the Civil Service Law may not require that a probationer be served with charges or given a hearing, it is clear that the law does not prohibit the City and a public employee representative from contractually expanding the rights of probationary employees. Article IX of the City-wide Contract does not, on its face, exclude probationary employees from its application. The effect to be given to the provisions of Article IX, and, more specifically, the relief, if any, to be granted to a probationary employee alleging a violation of Article IX, are questions which go to the interpretation of the contract and are therefore for an arbitrator. The remedy, if any, must, of course, be consistent with applicable law. But in no event may the arbitrator substitute his judgment for that of the employer with respect to the work performance of a probationary employee. The arbitrator's decision in this case must be confined to the question of whether Article IX has been violated-- and if so, what is the appropriate remedy for that violation."

It must be noted that neither Article IX of the 1970-1973 City-wide Contract nor Article X of the instant Contract define or limit "employees" who are extended rights under the respective provisions. Therefore, as in Decision B-9-74,

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[4] See Footnote 4, supra.

we find that resolution of the narrow question of whether grievant, a provisional employee, was denied his contractual rights, if any, under Article X of the Contract requires interpretation of contract language. We have consistently held that such determinations are to be made by an arbitrator if the parties are in any way obligated to arbitrate their controversies and if the obligation is broad enough in its scope to include the particular controversy.[5] In this case, the parties have agreed in Article XIV, §2 of the Contract to arbitrate disputes concerning any matter defined by the Contract as a "grievance". For the above stated reasons, we hold that this obligation is broad enough in its scope to include grievant's claimed denial of Article X rights.

However, we recognize that in the present case the grievant had the Civil Service status of a provisional appointee, which, by State Law, differs from the probationary status of the grievant in Decision No. B-9-74. This distinction bears on the issue of arbitrability of the claim of improper termination, and not on the question of arbitrability of the alleged violation of the Contract.

The purpose of the probationary term of Civil Service employment differs from the purpose of the provisional term of Civil Service employment. In Albano v. Kirby, 36 N.Y. 2d 526

[5] See, Board Decisions No. B-2-69; B-8-69; B-8-74; B-14-74; B-1-75; B-28-75.

(1975), the Court of Appeals interpreted Section 63 of the Civil Service Law, requiring a probationary period of employment, as follows:

> "While the primary purpose of laws and rules calling for probationary terms is to secure efficient service, they also serve to furnish the appointee with an opportunity to show his or her fitness and to provide a more acceptable and less embarassing means of terminating the employment of an unsatisfactory appointee...." [6] (citations omitted)

The probationary term is a period in which an employee is given an opportunity to prove his or her ability to perform the job effectively and, thereby, qualify to attain permanent status. On the other hand, a provisional appointment does not involve testing or qualifying procedures to determine the appointee's fitness for permanent status. Courts have held that a provisional employee's appointment cannot ripen into permanent appointment without the provisional employee having sought to further qualify for appointment as a permanent appointee.[7] The provisional appointment is an interim measure for use as part of a total statutory scheme, the major purpose of which is to provide prompt examination and to establish appropriate eligibility lists so that permanent appointments based upon merit and fitness may form the essential basis for employment in the government service.[8]

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[6] Albano v. Kirby, 36 N.Y. 2d 526, 531, 369 N.Y. 2d 655, 660

[7] Koso v. Greene, 260 N.Y. 491, 184 N.E. 65 (1933); Poss v. Kern, 263 App. Div. 320, 32 N.Y S. 2d 979 (1st Dept. 1942).

[8] People v. Male, 28 Misc. 2d 185, 214 N.Y.S. 2d 539 (Cty. Ct. Schenectady Cty., 1961).

Furthermore, the job tenure rights of probationary and provisional employees differ. A probationary appointment becomes permanent upon completion of the probationary term absent affirmative action by the employer. Dismissal of a probationary employee at the end of the probationary term may be effectuated without a hearing and without a statement of reasons. The only limitation is that the reasons for termination not be arbitrary and/or capricious.[9] Termination of a probationary employee must occur at the end of the probationary period, by law, so as to insure that the appointee be given an opportunity to show his or her fitness.

If a probationary employee is denied the opportunity to prove fitness and is terminated, reinstatement may be warranted.[10] Moreover, in Board of Education, Bellmore-Merrick Central High School District v. Bellmore-Merrick United Secondary Teachers Inc., 39 N.Y. 2d 167 (1976), the Court of Appeals upheld the reinstatement of a nontenured probationary employee on the grounds that the employee was not given an opportunity to be evaluated in accordance with the procedures set forth in the collective bargaining agreement. The Court held that a finding of a denial of the opportunity to show fitness as guaranteed by the collective bargaining agreement was a proper basis for an order of reinstatement.

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[9] Howard v. Kross, 24 Misc. 2d 973, 202 N.Y.S. 2d 445 (Sup. Ct. N.Y. Cty., 1960).

[10] In re De Cecca, 25 Misc. 2d 425, 205 N.Y.S. 2d 457 (Sup. Ct. Albany Cty., 1960).

In Bellmore-Merrick, the collective bargaining agreement contained a provision similar to Article X of the instant Contract. The provision at issue in that case required "conferences and confrontations" with regard to evaluatory statements. The probationary teacher in that case alleged she was denied tenure on the basis of parental complaints of which she had never been apprised. The employer asserted that it possessed the absolute power to terminate the employment of a probationary teacher. An arbitrator ordered the reinstatement of the grievant-teacher, finding the employer violated the collective bargaining agreement. On appeal of the arbitrator's award to the Court of Appeals, the Board of Education contended that the award violated public policy in that it rendered nugatory the Board of Education's power to discharge nontenured teachers. The Court of Appeals found no merit in this argument. The Court stated:

> "The award merely requires that respondent follow procedures it has agreed to adopt in its decision-making process in the area of tenure. Finally, it should be noted that there is no claim that public policy barred petitioner from agreeing to provide certain procedural guarantees for nontenured teachers." 12

Application of this holding to the case of the discharge of a provisional employee would require a finding that certain procedural safeguards with respect to termination have been

guaranteed to provisional employees. We can find no cases which extend such procedural safeguards to provisional employees, except where reasons have been stated for the termination of a provisional employee and the stated reasons were found to constitute a stigmatizing charge against the employee. [11] In the matter now before the Board, no reasons for grievant's termination have been stated or disclosed.

In Russell v. Hodges, 470 F.2d 212 (C.A.N.Y., 1972), several provisional employees challenged the constitutionality of their termination without a hearing, alleging a violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. The Second Circuit Court of Appeals found no merit in these arguments and responded to the due process claim by stating:

> "It is plain that none of the plaintiffs (provisional employees) had any 'property' interest in continued employment. They clearly had no contractual or statutory claim and none made any allegations to demonstrate a possible claim to de facto tenure." [12]

Similarly, grievant provisional employee in the matter now before us alleges a denial of job tenure rights. From the above analysis, it can be stated that no such tenure rights exist by law. Moreover, unlike the Bellmore-Merrick case, we

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[11] Stearns v. Gilchrist, 84 Misc. 2d 519 378 NYS 2d 312 (Sup. Ct. Orange Cty., 1976).

[12] Russell v. Hodges, 470 F2d 212, 216.

can find no contractual provision concerning the retention or termination of a provisional employee. Therefore, we find that the claim of improper termination is not arbitrable. However, we do find arbitrable the question of whether grievant, a provisional employee, was denied his contractual rights, if any, under Article X of the Contract.

These determinations are necessarily limited to the facts and arguments presented by the parties. Should an arbitrator order the examination of evaluatory statements, if any, contained in grievant's "permanent personnel folder," it is conceivable that the contents of any such evaluatory statements might impinge on statutory or other rights of the grievant. Because of this possibility, we do not intend to preclude by this determination the rights of all concerned to initiate and maintain such further proceedings and to seek such further remedies as may be appropriate in any forum which would have jurisdiction over any such matter.

O R D E R

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

ORDERED, that the City's petition to the extent that it challenges the grievant's claim of right to inspect evaluatory statements concerning his work performance or conduct contained in his permanent personnel folder be, and the same hereby is, denied; and it is further

ORDERED, that the City's petition challenging arbitrability in all other respects be, and the same hereby is, granted; and it is further

ORDERED, that the Union's request for arbitration to the extent that it claims wrongful denial of grievant's right to inspect evaluatory statements concerning his work performance or conduct contained in his permanent personnel folder be, and the same hereby is, granted; and it is further

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

DATED: New York, N.Y.
January 19, 1977

ARVID ANDERSON
CHAIRMAN
WALTER L. EISENBERG
MEMBER

ERIC J. SCHMERTZ
MEMBER

VIRGIL B. DAY
MEMBER

DANIEL L. PERSONS
MEMBER

NOTE: Member Eisenberg, who is a member of the panel of arbitrators designated in the contract between the parties, participated in the decision of this matter but stated that he would pass his turn as arbitrator should the matter be assigned to him under the contract procedure for rotation of arbitration assignments.