City v. L.237, CEU, 25 OCB 1 (BCB 1980) [Decision No. B-1-80 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

CITY OF NEW YORK, DECISION NO. B-1-80

Petitioner

DOCKET NO. BCB-348-79

-and

CITY EMPLOYEES UNION, LOCAL 237, I.B.T.,

Respondent

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In the Matter of

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-and

CITY EMPLOYEES UNION, LOCAL 237, I.B.T.,

Respondent

DECISION AND ORDER

The Union filed its requests for arbitration in both of the above captioned cases seeking reversal of claimed wrongful disciplinary actions. Each of the grievants is a CETA employee. Because identical issues are raised by the requests for arbitration and by the City's petitions contesting arbitrability, we shall consolidate the cases for purposes of Board decision.

Both of the grievants herein are represented by Local 237.

In BCB-348-79 (A-893-79), Grievant Felitia Wilson was a Special Officer (CETA) who was discharged by the Human Resources Administration "for falsifying welfare records and defrauding the City of New York by collecting full checks during the time you were fully employed in the CETA Program and being paid on a full time basis."

In BCB-349-79 (A-894-79), Grievant Anthony Vasquez was a Butcher (CETA) who was discharged by the Corrections Department "for reasons of unsatisfactory performance."

Local 237 is a party to a contract covering Special Officers and a contract covering Institutional Titles, including Butchers. These contracts define arbitrable grievances so far as is pertinent, in identical language:

> "A claimed wrongful disciplinary action taken against a permanent employee covered by Section, in 75(1) of the Civil Service Law or a permanent competitive employee covered by the Rules and Regulations of the Health and Hospitals Corporation upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in his permanent title or which affects his permanent status."

The City contends that CETA employees are not entitled to the disciplinary grievance procedures of the contract because they are "provisional" and not "permanent" employees.

Both the City and the Union filed briefs in support of their respective positions. In addition, and at the request of Local 237, oral arguments were presented by the

parties at a meeting of the Board on December 11, 1979; at that time, the Board permitted a representative of District Council 37, AFSCME, AFL-CIO, to join Local 237 in oral argument in support of the union petition.

Background

The CETA program provides federal funding to local governments, including New York City, to provide job opportunities to unemployed, economically disadvantaged persons.[1] The purpose of the program is to provide "transitional public service programs until unsubsidized employment can be obtained."[2] The Department of Labor is charged with the duty of promulgating and administering regulations and guidelines for the conduct of CETA programs, including procedures for the resolution of disputes between grantees such as the City of New York and CETA employees. The regulations applicable to the Grievants in the instant case mandate the establishment of complaint procedures which include a hearing and rights of appeal at the local and federal level.[3] The federal regulations provide that a local government must establish such complaint procedures and that CETA employees shall also have access to any existing civil service or collective bargaining grievance procedures applicable to other employees similarly employed.

[1] 29 USC §801 et seq.

[2] Tautam v Marshall, Report and Recommendation of Magistrate Sinclair, 77 Civ. 1860, September 21, 1978.

[3] See Federal Register, Vol.44, No.65, April 3, 1979, §676.83 et seq.

The Union's attempted utilization of the contractual grievance procedures in the instant case arises from the requirement that CETA employees have the same access to grievance procedures under a labor contract as is granted to other public employees subject to the collective bargaining agreement.

Exhibits supplied by the City as attachments to its brief indicate that both of the named Grievants herein completed New York City Department of Personnel forms entitled "Request for Approval of Provisional, Exceptional, Seasonal, Temporary, or Military Replacement Appointment." Both Grievants completed and signed "Section B" entitled "Personal History Section" and both Grievants answered "No" to the question "Are you a permanent City employee?"

The Personnel Department forms also include "Section A" which is "To be Filled in by Appointing Officer." Section A contains spaces for the inclusion of the name of the appointing agency, the title and title code number of the position to be filled, salary, pay grade, work location and the like. Immediately under these spaces is a large box entitled "appointment to be made under Commission Rule and for Reason checked below." The list of reasons available for checking reads as follows:

[Rule] 5.5.1 - Provisional, In a Permanent vacancy
5.6.1 - Seasonal
5.7.2 - Exceptional - For Service outside New York City

5.4.1 - Temporary - Not to Exceed
One Month

5.4.2 - Temporary - Leave of Absence
for Months, Granted to
5.4.3 - Temporary - Where Position
Will Exist for Months

Section 243 - Military leave of

Then follows the signature of the "Appointing Officer" and the certification of such officer that "this appointment is properly made under the rule checked above."

The Personnel Department forms for both Grievants herein show that the appointing agency certified that the Grievants were appointed pursuant to Rule 5.4.3 - Temporary.

The New York City Civil Service Rules and Regulations provide for temporary appointments for varying lengths of time pursuant to Rules 5.4.1 through 5.4.5 in order to fill positions which are vacant by reason of leave of absence or, pursuant to 5.4.3, when the position will not continue in existence beyond a stated period of time. Provisional appointments are made pursuant to Rules 5.5.1 through 5.5.5 and are designed for the instance where "there is no appropriate eligible list available for filling a vacancy in the competitive class."

Positions of the Parties

The City contends that the language of the contract permits disciplinary grievances to he arbitrated only in cases where the grievant is a "permanent" employee. The City asserts that CETA workers are "provisional" employees and may

therefore not avail themselves of disciplinary grievance arbitration. The City states that "the status of CETA employees as provisionals under the State Civil Service Law has been recognized by the Courts. Carritue v. Beame, N.Y.L.J. November 26, 1976, s.12, cols. 1-3 (Sup. Ct. N.Y. Co., Greenfield, J.)" The City also cites the Report and Recommendation of Magistrate Sinclair in Gautam v. Marshall, supra, to the effect that "the express language of the grant agreement between the City of New York and the United States Department of Labor provides, in pertinent part, that 'The current status of all CETA participants in City employment is provisional.'"

The City points out that while CETA employees may not avail themselves of either collective bargaining or civil service review procedures in disciplinary cases, CETA employees do have a forum available in the mandated CETA complaint procedures. The City alleges that "the grievants were informed that the CETA procedure was the appropriate forum for their appeals but failed to avail themselves thereof."

The Union argues that, contrary to the City's assertion, CETA employees are not provisional. The Union contends that provisionals are hired only to fill vacancies in positions included in the City budget and that there are no budget lines for CETA employees. The Union asserts that the City's own actions belie its claim that CETA workers are

provisional. The Union contends that in light of the fact that the City insists on a Board of Certification order accreting CETA titles to an existing unit before it will bargain for CETA employees, the City itself demonstrates that CETA workers are not serving in existing titles provisionally. The Union points out that "any provisional employee hired in a covered title is automatically covered by the contract."

The Union argues that "at the inception of the CETA Program these employees were granted a special status not defined in the applicable laws for Civil Service of either New York City or New York State." The Union further urges that CETA employees "are entitled to every part of the contract under which they are covered. If they are covered by the contract for wages ... how can they not also be covered by clauses containing the appeals from disciplinary actions taken against them." Finally, the Union asserts that the language in the grant agreement stating that CETA employees are provisional is "self-serving" and "drafted by the City unilaterally without the benefit of Union in put."

Discussion

The decision in the instant case must turn on whether the CETA employees seeking to arbitrate their grievances herein are "permanent" employees within the contemplation of the contracts between the parties.

The contracts do not provide a definition of "permanent" employee. However, in the context of the contractual

grievance provision quoted above, it seems clear that the term "permanent" is intended to be given its usual meaning under Civil Service Law. A permanent employee has tenure under Civil Service Law. He or she may not be removed from employment except for misconduct or incompetency[4] and if positions are abolished due to reasons of economy or lack of work, a permanent employee retains rights of reinstatement based on seniority.[5] CETA employment is specifically designed to be the antithesis of permanent public employment; it is conceived of as a transitional form of employment which prepares the worker for entry into and competition in the marketplace of unsubsidized labor. We take administrative notice of the fact that CETA programs are generally limited by federal law to a maximum period of employment of eighteen months; these maximum periods have been extended in the past.

Further, the papers used in the employment process for CETA workers make clear by their very headings that permanent employment is not contemplated.

The City maintains variously that CETA workers are provisional or temporary. Thus, while it was shown on oral argument that CETA workers were described in certain Personnel Department forms as temporary employees, the City's earlier pleadings maintain that they are provisional. The latter con-

[4] Civil Service Law §75.

[5] Civil Service Law §80.

tention may have found its origin in the 1975 CETA agreement between the City and the U. S. Department of Labor which states that "the current status of . . . CETA participants . . is provisional. The City is considering a temporary classification which does not effect the rights or benefits." (sic) The agreement goes on to state:

> "Under State Civil Service Law, provisional or temporary employees whether unsubsidized or not are not entitled to a hearing prior to dismissal or to placement upon a preferred eligible list ... in the case of lay-off.... Such rights can be provided only to permanently appointed employees, generally those in competitive class who have been appointed after competitive examination."

The case of Carritue v. Beame, supra, does not hold, as the City contends, that CETA employment is "provisional." Justice Greenfield's opinion is instructive and thorough and it does not find that CETA employees are provisionals. The opinion deals with a challenge to the City's hiring of laid-off permanent civil service firefighters in titles denoted "Fireman (CETA)" based on an allegation that the residency requirements of the CETA program violate Civil Service Law. Justice Greenfield found that Civil Service Law was not violated because:

> "the laid-off firemen ... were not reinstated to their former positions as permanent civil service employees. They were appointed to newly created CETA titles which do not confer civil service status. The CETA program contemplates a temporary period of 'transitional employment' until the job holder can move into regular unsubsidized employment."

Although Justice Greenfield was not asked to decide whether CETA employment is provisional or temporary, we note that refers to the program as "temporary."

The other case cited by the City, Gautam v. Marshall, supra, does not hold that CETA employees are provisionals within the

meaning of the New York State Civil Service Law. The Magistrate's Report refers to the 1975 CETA agreement and adopts its use of the term provisional while noting that neither provisional nor temporary employees are entitled to a hearing prior to dismissal.

Treatment of CETA participants, including the two grievants herein, as temporary employees is evidenced by City Personnel Department documents submitted to us on oral argument by Counsel for the City which explicitly state that the grievants were appointed to temporary positions and which bear formal certification of that fact by the respective Appointing Officers.

In short, the evidence before us is confused as to the precise status of CETA participants. Nothing in the record in this matter shows conclusively and unequivocally what the status of these employees is in contemplation of Civil Service Law, Rules and Regulations. On the other hand, it is not the function of this Board nor the purpose of this decision to make any such determination. It is sufficient for our purposes that they are clearly not "permanent" employees in contemplation of Civil Service Law and of the contract between the parties.

In oral argument, the unions made two basic contentions:

(1) that CETA employees are entitled under the Comprehensive Employment Training Act, to all benefits received by other employees under the same collective bargaining agreement; and

(2) that CETA employees cannot be provisionals, as the City maintains they are, because a provisional employee cannot be continued in that status for more than nine months under Civil Service Law and are employed in that transitional status only in competitive positions for which competitive examinations must be offered.

It was argued by the unions, in this connection, that since CETA employees cannot legally be provisional employees, they must be, at least de facto, either permanent competitive or non-competitive employees. The City countered by showing not only that CETA employees were not and could not be hired as permanent competitive employees, never having taken competitive examinations, but that they could not have been hired as non-competitive employees because non-competitive designation requires specific approval - neither sought nor granted in this case - by the State Civil Service Commission.

It is our conclusion that neither the written pleadings and briefs nor the various oral arguments provide clear proof as to the status of CETA employees in contemplation of Civil

Service Law, nor are we certain after viewing the entire record of this case that CETA employees fit into any of the clearly defined categories of Civil Service employment created by state law. However, the single fact of which we are most certain and the only fact necessary to the resolution of the question before us -- is that CETA employees are not permanent employees as defined by Civil Service Law and as contemplated in the contracts before us. These contracts, it must be stressed, do not single out CETA employees, as such, to deprive them of rights generally available to all other employees covered by the contracts. Instead, the contracts single out permanent employees to make them the only ones covered by the provision for arbitration of disciplinary grievances. If such distinctions are violative of the federal law, that law -and the forums it provides must be the source of redress. There is no way that this Board could properly set about monitoring compliance with the Comprehensive Employment Training Act through the revision of clear terms of collective bargaining agreements; we have neither jurisdiction to administer CETA nor power to revise contracts.

Thus, whatever their status may be, since they are not "Permanent" employees the Grievants herein are not covered by the contractual grievance provision relating to "permanent employees." We must therefore deny arbitration of their claims of wrongful termination. In this respect,

Grievants are being treated equally under the contract with any other non-permanent employees.[6]

We recognize that the Union seeks herein to gain for CETA employees the same rights as are enjoyed by permanent non-CETA employees represented by Local 237. However, it is clear that these rights are not available under the contract as presently worded and cannot be created by decision of this Board. We have no more power to extend such rights to CETA employees than we would have to grant them to any other group of non-permanent employees. There is no bar to the arbitration of disciplinary grievances under the NYCCBL or under State Law as to any category of public employees, and nothing in the existing law nor in this decision would prevent the extension through collective bargaining of the right of arbitration of disciplinary matters to these and other categories of employees represented by respondent Union. See Antinore v. State, 40 NY 2d 921 (1976). We note that at least two contracts currently provide for such arbitrations. The collective bargaining agreement between the City and Head Start Division, DC 1707, AFL-CIO provides that the term grievance shall mean "a claimed wrongful disciplinary action taken against an employee." (Article XIV, 51(b).) Further, the contract between the City and DC 37 on behalf of Unit B

[6] See Decision No. B-2-78 where the Board discussed the status of CETA employees.

of the Institutional Services provides in Article VI, §1(F) that "a claimed wrongful disciplinary action taken against a non-competitive employee as defined in Section 10 of this Article" shall constitute a "grievance." Under §10, the grievance procedure is denied to temporary employees and is granted to provisionals with at least three months service in title.

We have considered the argument of the Union that the Grievants were not properly notified of their appeal rights pursuant to federally mandated CETA procedures and that therefore the grievants have lost those rights by failing to exercise them. It is doubtful that such contentions would, in any circumstance, have a bearing on the Union's assertion of the right to submit the controversy to arbitration. Moreover, we believe that the Union's fears in this regard may not be well founded. If the grievants were not properly notified of their federal rights or if they were not properly assisted in their attempts to pursue these rights, it would seem improbable that there has been a waiver and the grievants may pursue their federal rights.

Therefore, based on the clear terms of the contracts before us restricting arbitration to "permanent" employees, we must deny the requests for arbitration.

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 Petitions herein be, and the same hereby are, granted; and it is further

ORDERED, that the requests for arbitration be, and the same hereby are, denied.

DATED: New York, N.Y.
February 4, 1980

ARVID ANDERSON
CHAIRMAN

ERIC J. SCHMERTZ
MEMBER

WALTER L. EISENBERG
MEMBER

EDWARD SILVER
MEMBER

FRANKLIN J. HAVELICK
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