City v. L.237, IBT, Civil Service Bar Ass., 25 OCB 42 (BCB 1980) [Decision No. B-42-80 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK,

Petitioner,

Decision No. B-42-80

-and

Docket No. BCB-440-80
(A-1070-80)

THE CIVIL SERVICE BAR ASSOCIATION
AND LOCAL 237, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

Respondents.

DECISION AND ORDER

On June 24, 1980, the Civil Service Bar Association, by its affiliated union, Local 237 of the International Brotherhood of Teamsters (hereinafter "CSBA" or "the Union"), filed a request for arbitration alleging that the grievant, Steven H. Berke, an attorney, was wrongfully terminated in violation of written policies of his employer, the Human Resources Administration (hereinafter "HRA") .

The City, through its office of Municipal Labor Relations (hereinafter "the City" or "OMLR"), filed a petition challenging arbitrability on July 24, 1980.[1] The City contends that since

[1] The Union initially objected to the City's petition on the ground that it was untimely filed, more than ten days after service of the request for arbitration and filing with the Board. The City countered this objection by reference to an "understanding" that had been reached between the parties and the office of Collective Bargaining (hereinafter "OCB") to the effect that the ten-day period would not begin to run until copies of the HRA procedures alleged to have been violated had been received by both OMLR and OCB. By letter to the Board dated September 23, 1980, the Union withdrew so much of its objection to the City's petition as was based upon the issue of timeliness.

grievant was terminated for unsatisfactory work performance during the probationary period, he has no right to bring a grievance under the collective bargaining agreement between CSBA and the City-

BACKGROUND

The grievant was appointed to the position of Attorney in the Human Resources Administration of the Department of Social Services on April 30, 1979. On November 30, 1979, he was advised by letter from Gary Calnek, Assistant Commissioner for Personnel Administration of HRA, that his "employment as a probationary Attorney [was] being discontinued effective at the close of business [that day]"

CSBA brought a grievance at Step I on Mr. Berke's behalf asserting that, as grievant's probationary period came to an end on October 30, 1979, he could not thereafter be dismissed without a hearing pursuant to section 75 of the Civil Service Law or without having an opportunity to bring a grievance under the collective bargaining agreement.

The Union stated further at Step I that the letter purporting to terminate grievant's employment was "illegal" as it was not signed by the Commissioner of Social Services or by any of his deputies. CSBA seeks to have the letter rescinded on this ground and on the further ground that grievant's probationary performance as reflected in the only evaluation seen by him was "outstanding" or unsatisfactory" in all categories and "unsatisfactory" in none.

In its Step II decision, dated February 22, 1980, the HRA office of Labor Relations denied the grievance, stating that "the probationary period is one year from date of appointment" and that grievant could therefore be dismissed at any time during the year if his work performance was unsatisfactory, which it was.

On June 24 1980, CSBA filed a request for arbitration of this grievance.[2]

POSITIONS OF THE PARTIES

Union Position

CSBA contends that a grievance has been stated under Article VI, Sections 1 (B) and (D) of the 1978-79 unit contract between the Union and the City. Those sections define the term "grievance" as follows:

> (B) A claimed violation, misinterpretation or misapplication of the written rules or written regulations, existing written policy or written orders of the agency which employs the grievant affecting the terms and conditions of employment;
>
> (D) A claimed wrongful disciplinary action against an employee.

The Union claims that HRA Procedures Nos. 74-24 (Performance Reports) and 74 -28 (Assignment, Promotion, Reinstatement, Transfer and Separation of Staff Members), written policies of the agency

[2] In its request for arbitration the Union indicated that the grievance had not been fully processed-through all steps of the applicable grievance procedure because "no response from Step III" was received.

which employs the grievant, have been violated in that grievant was terminated after the expiration of the six-month probationary period without the protections that should have been afforded him as a permanent employee pursuant to section 75 of the Civil Service Law.[3] Although it does not cite specific language it deems to have been violated, the Union apparently contends that KHA Procedures provide for a six-month probationary period, which provision was violated when grievant was terminated after seven months of employment as if he were still a probationer. The Union argues that it is the role of an arbitrator and not of the Board to determine whether KHA's policies were violated, and cites Board
Decision No. B-10-77 in support of its position. In B-10-77, the Board held that a grievant need do no more than "allege a contractual violation within the definition of a grievance agreed to by the parties and incorporated by them into their contract."

CSBA also alleges that grievant's termination constitutes a "wrongful disciplinary action against an employee." The Union

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[3] The New York State Civil Service Law §75 provides in pertinent part:

> 1. Removal and other disciplinary action. A person described in paragraph (a), or paragraph (b), or paragraph (c), or paragraph (d) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.
>
> (a) A person holding a position by permanent appointment in the competitive class of the classified civil service, ...

reiterates this allegation in its answer to the City's petition challenging arbitrability, and states in the immediately succeeding sentence, "clearly there is a question as to whether the grievant was terminated in violation of the written Rules and Regulations of HRA," thus suggesting that discharge of an employee in violation of agency regulations constitutes, per se, a wrongful disciplinary action.

The Union seeks full back pay for the grievant as a remedy.

City Position

The City contends that the probationary period for competitive appointees such as grievant is one year as per Rule 5.2.1 of the Rules and Regulations of the City Personnel Director. Rule 5.2.1 provides in pertinent part:

> **Probationary Term**
>
> (a) Every appointment and promotion to a position in the competitive or labor class shall be for a probationary period of one year unless otherwise set forth in the terms and conditions of the certification for appointment or promotion as determined by the city personnel director. Appointees shall be informed of the applicable probationary period.

Since grievant was terminated within the one-year probationary period, says the City, he has neither the tenure rights provided by the Civil Service Law nor a right to bring a grievance under the contract between the parties. OMLR's explanation for the latter contention is that "the clear and unambiguous language of the

Personnel Director's Rules" precludes a probationary employee from using a grievance procedure to contest his discharge.

OMLR cites two prior Board decisions in support of its position: Decision No. B-11-76, where the Board denied a request by Local 237, IBT for arbitration of a probationary employee's grievance on the ground that the contract between the parties did not indicate any intent to grant probationary employees the right to arbitrate their dismissal at the end of the probationary period,[4] and Decision No. B-1-77, where the Board found a claim of improper termination of a provisional employee not arbitrable since provisional employees have no job tenure rights nor are they entitled to procedural safeguards upon termination. However, a question as to whether the employee was denied contractual rights in the latter case was deemed arbitrable.[5]

The City asserts further that since the grievant failed to complete the required probationary period, an arbitrator would lack jurisdiction to consider the claims raised in the Union's request.

For all of these reasons, OMLR seeks an order by the Board, denying the Union's request for arbitration.

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[4] New York City Health and Hospitals Corporation v. Local 237, International Brotherhood of Teamsters, Decision No. B-11-76.

[5] City of New York v. District Council 37, AFME, AFL-CIO (Social Service Employees Union, Local 371), Decision No. B-1-77.

DISCUSSION

CSBA claims that the grievant is entitled to arbitration of his grievance on two theories. One theory is that an "existing written policy of the agency which employs the grievant" has been violated (Article VI, Section l(B)),namely, HRA Procedures 74-24 and 74-28. The Union's second theory is that grievant's discharge constitutes a "wrongful disciplinary action" (Article VI, Section 1 (D)).

With respect to the Union's first theory, the City does not contest that the HRA Procedures alleged to have been violated are existing written policies of the employer. Rather, OMLR asserts that the probationary period for all competitive appointees is one year and, therefore, grievant's discharge seven months after his appointment without a hearing, which the Civil Service Law guarantees only to permanent employees, was proper.

An examination of relevant Rules and Regulations of the City Personnel Director, which "have the force and effect of law,"[6] and of relevant sections of the New York State Civil Service Law (hereinafter "CSL") and of the New York City Charter (hereinafter "Charter") demonstrates the validity of the City's position.

In addition to Rule 5.2.1, which provides that appointments in the competitive class are subject to a probationary period of

[6] Section II of the City Personnel Director's Rules explicitly provides:

2.2. These rules shall have the force and effect of law.

one year, Rule 5.2.7, concerning termination of probationary employees, is applicable to the instant grievance. Rule 5.2.7 provides in pertinent part:

> (a) At the end of the probationary term, the agency head may terminate the employment of any unsatisfactory probationer by notice to such probationer and to the city personnel director.
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> (c) Notwithstanding the provisions of paragraph 5.2.1 and 5.2.7(a) the agency head may terminate the employment of any probationer whose conduct and performance .is not satisfactory after the completion of a minimum period of probationary service and before the completion of the maximum period of probationary service by notice to the said probationer and to the city personnel director. The specified minimum period of probationary service, unless other wise set forth in the terms and conditions of the certification for appointment or promotion as determined by the city personnel director, shall be
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> (1) two months for every appointment to a position in the competitive or labor class and
>
> (2) four months for every promotion to a position in the competitive or labor class.

The instant controversy between CSBA and the City arises because HRA Procedures 74-24 and 74-28F issued in 1974, conflict with the Personnel Director's Rules in that the agency procedures contemplate a six-month probationary period. Procedure 74-24 states in a section captioned "General Information":

> Every employee whose status, whether provisional or permanent, or promoted after certification from a list to a position in the competitive or labor class is

> required to serve a probationary period, generally six months, which is subject to an evaluation and rating report.

Procedure 74-28 provides that a "probationary employee may be dismissed upon notice at the end of six months." It further provides that:

> Any probationary employee may be separated from his probationary title prior to six months, upon showing to the satisfaction of the City Director of Personnel that the conduct or performance of the probationer has been unsatisfactory. At the discretion of the Appointing Officer, the services of the probationer may be terminated at any time after two months of service following his original appointment date or after four months of service following the date of his promotion. If the separation is to be effected prior to two months or four months as noted above, approval is required from the City Director of Personnel.

The following facts are undisputed: (1) that grievant was appointed as an attorney in the competitive class from an Eligible List established January 1, 1979 and certified by the Department of Personnel; (2) that grievant was evaluated after five months of employment and was given "outstanding" or "satisfactory" ratings in all categories; (3) that appointments to the position of attorney from the Eligible List on which grievant's name appeared were specifically subject to a one-year probationary period; (4) that grievant was notified by letter dated November 30, 1979, seven months after his appointment, from the Assistant Commissioner for Personnel

Administration of HRA on behalf of the Administrator/Commissioner that his "employment as a probationary Attorney" would be discontinued at the close of business that day.

Section 1173-5.0(a)(3) of the New York City Collective Bargaining Law (hereinafter "NYCCBL" provides that the Board "shall have the power and duty ... to make-a final determination as to .whether a dispute is a proper subject for grievance and arbitration procedure...." In determining whether a dispute is a "proper subject" for arbitration, the Board must consider whether the parties are obligated, contractually or otherwise, to arbitrate their controversies and whether a particular dispute is within the scope of such obligation.[7] With these principles in mind and since resolution of the conflict between Rules and Regulations of the City Personnel Director and internal procedures of the HRA, which is at the heart of the dispute between CSBA and the City-in the instant case, is essentially a matter of statutory and rule construction, and not a matter of contract interpretation, we shall resolve the controversy administratively as we are permitted by NYCCBL Section 1173-5.0(a)(3) to do.

We note that the Union has alleged a "violation ... of the written rules or written regulations, existing written policy or written orders of the agency which employs the grievant..." and that such an allegation appears to state a grievance within

[7] Office of Labor Relations v. Social Service Employees Union, Decision No. B-2-69.

the definition of that term as set forth at Article VI, Section l(B) of the contract between the parties. We also note that we held in Decision No. B-10-77 and subsequent cases that a grievant need do no more than "allege a contractual violation within the definition of grievance...." Nevertheless, we shall deny the request for arbitration under Article VI, Section l(B) because we find that the agency procedures alleged to have been violated have been pre-empted in all respects relevant herein by the Rules and Regulations of the City Personnel Director.

The New York State Civil Service Law provides that "[t]he state civil service commission and municipal civil service commissions shall ... provide by rule for the conditions and extent of probationary service."[8] The revised New York City Charter gives to the city personnel director "all the powers and duties of a municipal civil service commission provided in the civil service law or in any other statute or local law other than such powers and duties as are by this chapter assigned to the Mayor, city civil service commission or the heads of city agencies."[9] The Charter also provides that "[t]he personnel director shall promulgate rules and regulations relating to personnel policies, programs and activities of city government...."[10]

[8] Civil Service Law §63(2).

[9] N.Y.C. ADMIN. CODE ANN., Chap. 35, §811 (amended, Nov.4,1975).

[10] Id., §813c.

The delegation of authority in the Charter to the City Personnel Director represents a change from the former system under which functions now performed by the Personnel Director were performed by the New York City Civil Service Commission. By resolution dated July 19, 1978, the City Personnel Director adopted.(effective 1977) and amended the rules and regulations of the New York City Civil Service Commission which were in force and effect on December 311 1976.[11] Rule V (Appointments and Promotions)Section II (Probationary Terms) establishes the probationary term of one year for all appointments in the competitive class (Rule 5.2.1) and provides for termination at the end of the probationary term (Rule 5.2.7(a)) or after a minimum period of service but before the completion of the term (Rule 5.2.7(c)).[12] As stated above, these rules have the force and effect of law.[13]

Thus, the State Civil Service Law and New York City Charter, read together, show that the power to establish probationary periods is a power given by law to the City Personnel Director. When an agency promulgates internal procedures which make reference to or provide for a period of probationary service, as HRA has done in the instant case, these procedures must be consistent with rules promulgated by the City Personnel Director.

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[11] Resolution 78-41 of the City Personnel Director.

[12] These rules are quoted at pp. 5 and 8 supra.

[13] Rules and Regulations of the City-Personnel Director, Section 2.2.

In fact, the agency procedures at issue were once consistent with the (then) City Civil Service Commission rules. HRA issued its Procedures Nos. 74-24 and 74-28 in 1974 and, except for a revision of No. 74-24 in January 1975, neither Procedure has been revised or re-issued. As late as February 1977, Personnel Policy and Procedure No. 615-77a, providing for a six-month probationary period was issued by the Department of Personnel. In 1978, however, the current Rules and Regulations of the City Personnel Director were promulgated providing a one-year probationary period for competitive class appointees. Clearly, the HRA Procedures at issue, although once consistent with civil service rules, have not been updated to conform with the new rule concerning probationary periods.

We conclude that the period for probationary service has been determined by the Personnel Director in the exercise of powers previously vested in the New York City Civil Service Commission, and in accordance with the mandate of section 63(2) of the State Civil Service Law. The Rules and Regulations of-the Personnel Director have the force and effect of law and preempt inconsistent agency rules.[14]

With respect to the Union's claim in a letter dated November 13, 1980 that HRA procedures require "that a probationary employee

[14] While Rule 5.2.1 does leave room for the establishment of a probationary period other than one year if "set forth in the terms and conditions of the certification for appointment or promotion," the Union has offered no evidence that such a provision was made in the certification for appointment of the grievant.

must have received an unsatisfactory performance evaluation in order to be terminated," we note that Procedure No. 74-28 does not speak of an unsatisfactory evaluation but requires only a "showing to the satisfaction of the City Director of Personnel that the conduct or performance of the probationer-has been unsatisfactory." Thus, the fact that the only evaluation report received by the grievant gave him satisfactory or outstanding ratings in all categories does not preclude the employer from subsequently judging grievant's conduct or performance to be unsatisfactory and dismissing him on notice. Further, the Personnel Director's Rule 5.2.7(c) which closely parallels the HRA Procedure concerning dismissal of probationary employees (quoted at p. 9 supra) requires only a determination by the agency head that the probationer's performance is unsatisfactory. It does not require a "showing to the satisfaction of the City Director of Personnel." We have concluded and reiterate our conclusion that the Personnel Director's Rules and Regulations are preemptive of inconsistent agency procedures.

While the above analysis disposes of CSBA's request for arbitration under Article VI, Section l(B) of the collective bargaining agreement between the parties, the Union also seeks arbitration under Article VI, Section 1(D) ("a claimed wrongful disciplinary action against an employee"). The City does not address this allegation specifically, but contends that "the clear and unambiguous language of the Personnel Director's Rules" precludes a probationary employee from using the grievance procedure

to contest his discharge. However, OMLR fails to cite, and our search fails to reveal any section or rule where such a preclusion is made. Nonetheless, for the following reasons, the Union's request for arbitration under Article VI, Section 1(D) also shall be denied.

The term "grievance" is defined in Section 1(D) as "a claimed wrongful, disciplinary action against an employee" and thus, on its face, would seem to be available to probationary as well as permanent employees. However, the procedure for processing grievances that is delineated in Article VI, Section 2 and which applies to all employees, specifically excepts Section 1(C) and (D) type grievances.[15] Article VI, Section 4 sets forth an entirely different procedure which is to be followed for Section 1(D) type grievances. That procedure is available only to permanent competitive employees. Section 4 provides as follows:

> (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: ...[16]

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[15] Article VI, Section 2 provides:

> The Grievance Procedure, except for paragraphs (C) and (D) of Section 1, shall be as follows:
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> Employees may at any time informally discuss with their supervisors a matter which may become a grievance. If the results of such a discussion are unsatisfactory, the employees may present the grievance at Step 1....

[16] The structure of the grievance procedure in Article VI, is regrettably, ambiguous. However, there can be little doubt that section 1(D) type grievances are to be disposed of in accordance with the procedure set forth at Section 4.

Since the grievant was a probationary employee at the time of his termination, the agency could properly terminate him on notice for unsatisfactory conduct or performance. Further, since grievant was a probationary employee at the time of his termination, the contractual procedure for grieving disciplinary actions is not available to him. Therefore, we shall deny the Union's request for arbitration and grant the City's petition.

0 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 challenging arbitrability be, and the same hereby is granted.

DATED: New York, N.Y.
December 2, 1980

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

WALTER L. EISENBERG
MEMBER

EDWARD SILVER
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