DC 37, L. 2627, 3 OCB2d 45 (BCB 2010)

(Arb.) (Docket No. BCB-2848-10) (A-13385-10).

Summary of Decision*:* The City challenged the arbitrability of a grievance alleging that it violated the parties' collective bargaining agreement and a Personnel Services Bulletin when it extended Grievant's probationary period and subsequently terminated Grievant without written charges during the extended probationary period. The City argues that Grievant had not completed her probationary period prior to her termination; thus, no nexus exists between the subject of the grievance and the Agreement. Further, the City argues that an arbitration would need to address whether the City properly calculated the length of the probationary period. Such is determined by the Personnel Rules and is not arbitrable. The Board found that the automatic extension of probationary periods due to absences is not arbitrable. Accordingly, the request for arbitration was denied. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 2627, AFSCME, AFL-CIO,

Respondent.

DECISION AND ORDER

On March 25, 2010, the City of New York ("City") and the New York City Department of Health and Mental Hygiene ("DOHMH" or "Department") filed a petition challenging the arbitrability of a grievance brought by District Council 37, Local 2627, AFSCME, AFL-CIO, ("Union"), on behalf of Janice Folkes ("Grievant"). On February 25, 2010, the Union filed a

Request for Arbitration ("RFA"). The RFA alleged that the City violated the parties' collective bargaining agreement ("Agreement") and a Department of Citywide Administration Services ("DCAS") Personnel Services Bulletin ("PSB") when it extended Grievant's probationary period and subsequently terminated Grievant without written charges during Grievant's extended probationary period. The City argues that no nexus exists between the subject of the grievance and the Agreement as Grievant had not completed her probationary period prior to her termination. The City also contends that an arbitration would need to address whether the City properly calculated the length of Grievant's probationary period. Such would be determined by the Personnel Rules and Regulations of the City of New York ("Personnel Rules"), which are excluded from arbitration. The Board finds that the automatic extension of probationary periods due to absences is not arbitrable. Accordingly, the petition is granted, and the RFA is denied.

BACKGROUND

Grievant was appointed a Computer Aide, Level 1, a competitive civil service title, on August 18, 2008. Rule 5 (Appointments and Promotions), part 2 (Probationary Terms), of the Personnel Rules governs the probationary period of permanent appointees. PSB 200-6R (Probationary Periods) also applies to probationary service. PSB 200-6R states that it is derived from multiple sources, including Personnel Rule 5.2.[1]

Grievant's appointment letter stated that she would become "permanent at the end of one year, provided your performance is of a satisfactory level." (Pet., Ex. D). The Union calculates that

[1] PSB 200-6R states its sources as "[Personnel Rules] 5.2, 6.1.6, 6.2.2 and 6.6.3; General Examination Regulation E.20; New York Civil Service Law Sections 63 and 81.4; New York Military Law Section 243.9; and Citywide Agreement." (Pet., Ex. O).

Grievant's probationary year would have ended on August 17, 2009; the City calculates that it would have ended on August 18, 2009. The appointment letter did not inform Grievant that her probationary period would be extended based upon absences. It is undisputed that Grievant was absent from work for several days during the initial year probationary period.

On August 18, 2009, Grievant received an email from her supervisor stating that "the probationary term is counted by time actually worked. Due to the fact that you have taken 33 days leave while on probation, the Department is extending your probation by the same number of days (33)." (Pet., Ex. G). Grievant acknowledges that she took sick leave, bereavement leave, and annual leave but does not state how much, except that she believes it was less than 34 days.

The City avers that Grievant's probationary period was extended pursuant to Personnel Rule 5.2.8(b),which states that "the probationary term is extended by the number of days when the probationer does not perform the duties of the position, for example: . . . annual leave, sick leave." (Pet, Ex. C). The City calculates that Grievant's extended probationary period would have ended on October 25, 2009. On September 25, 2009, Grievant received a letter stating that she would be terminated, effective September 25. No reason for the termination was given.

On October 21, 2009, the Union filed a Step I grievance stating:

> There has been a violation, misapplication and/or misinterpretation of the [Agreement] Article VI–[§] 1B and 1F. DCAS–[PSB] 200-6R. The agency extended the grievant[']s probationary period after the end of 1 year and terminated grievant without written charges and without 30 days notice.

(Pet., Ex. J). Article VI, § 1(b), of the Agreement defines a grievance as "a claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency." (Pet., Ex. A). However, Article VI, § 1(b), explicitly excludes

from the definition of grievance "disputes involving the [Personnel Rules]." (*Id.*). Article VI, § 1(f), includes within the definition of a grievance the "[f]ailure to serve written charges . . . upon a permanent employee." (*Id.*).

PSB 200-6R, § I.B.2, provides that the "probationary period shall be extended by the number of days the probationer is absent or does not perform the duties of the position during both the original probationary period and the extended probationary period, if any." (Pet., Ex. O). It further provides that "the employee must be so notified prior to the expiration of the original probationary period or the extension." (*Id.*). A second notice provision is contained in PSB 200-6R, § II.C.1: "At least one month prior to the completion of the regular probationary period, the agency must notify the employee in writing that the employee's probationary period will be extended." (*Id.*).

The Union requested that the grievance proceed to Step II prior to DOHMH responding. DOHMH denied the Step II grievance. On November 5, 2009, the Union filed a Step III grievance repeating verbatim the statement in the Step I grievance. On February 25, 2009, prior to DOHMH responding to the Step III grievance, the Union filed the RFA, stating the issue to be arbitrated as:

> Whether the employer, [DOHMH], violated article VI–[§] 1(b) & 1(f) of the [Agreement] and DCAS PSB 200-6R when it extended the grievant's probationary period and terminated grievant without written charges after the expiration of grievant[']s probationary period, and if so, what shall be the remedy?

(Pet., Ex. B). The RFA seeks reinstatement and to make Grievant whole.

POSITIONS OF THE PARTIES

City's Position

The City argues that Grievant was terminated within her probationary period pursuant to

Personnel Rule 5.2.8(b), not PSB 200-6R. Personnel Rule 5.2.8(b) automatically extends the probationary period by the number of days the probationer does not perform the duties of the position. Article VI, § 1(b), of the Agreement explicitly excludes from arbitration disputes related to the Personnel Rules. Therefore, no nexus exists between it and Grievant's termination. As Grievant had not completed her probationary period by September 25, she was not a permanent employee when she was terminated, and no nexus exists to Article VI, § 1(f), of the Agreement.

The City cites *Garcia v. Bratton*, 90 N.Y.2d 991 (1997), which held that Personnel Rule 5.2.8(b) automatically extends the probationary period and does not require that notice be provided to the employee. New York courts have repeatedly stressed the importance of City agencies having the full probationary period to evaluate employees. Sending the instant matter to arbitration deprives DOHMH of that full period. Further, the Board has repeatedly held that the calculation of the probation period and the propriety of extending the probationary period are non-arbitrable as such would necessitate an interpretation of the Personnel Rules.

The City also argues that any claims based upon the notice provisions of PSB 200-6R, §§ I.B.1, I.B.2, or II.C.1, are not arbitrable as these sections were not cited in any of the Union's prior filings and were raised for the first time in the Answer. The RFA states the issues as the improper extension of Grievant's probationary period, followed by her termination without written charges. As such, any claim based upon lack of notice are new and not arbitrable. Further, the notice provisions of PSB 200-6R only apply to voluntarily extensions of the probationary period and do not apply when the probationary period is automatically extended by Personal Rule 5.2.8(b). Even if the arbitrator found that DOHMH did not provide proper notice, the arbitrator would still need to interpret Personnel Rule 5.2.8(b) to ascertain if Grievant's probationary period was properly

calculated.

Finally, the City argues that the Union's reliance upon a Board decision finding provisions of PSB 200-6R to be arbitrable is misplaced. That decision concerned whether an employee was properly notified of her termination pursuant to PSB 200-6R, § II.D, an issue not raised in the instant case. The Union's reliance upon an arbitration award is also misplaced. In that arbitration, the agency told the employee that it was extending her probationary period after it had expired. In the instant case, Grievant was notified of the extension prior to the expiration her probationary period.

Union's Position

The Union argues that the RFA is not based upon the Personnel Rules and would not require the calculation of Grievant's probationary period. Grievant's claim is premised upon the failure of DOHMH to provide the notice required by PSB 200-6R of the extension of her probationary period. The Personnel Rules are silent as to the procedures for extending a probationary period. Such procedures are found in PBS 200-6R and § II.C.1 explicitly requires at least one month notice. No such timely notice was provided to Grievant. Therefore, there is a nexus between the subject of the grievance and Article VI, § 1(b), of the Agreement.

The Union also argues that DOHMH ordinarily does not extended the probationary period due to absences. An arbitrator has previously found that the failure to comply with the notice provisions of PBS 200-6R renders an extension ineffective. Therefore, Grievant became a permanent employee prior to her termination on September 25, 2009. As no written charges were served, there is a nexus between the subject of the grievance and Article VI, § 1(f).

The Union cites *OSA*, 1 OCB2d 42 (BCB 2008), in which the Board held that the notice provisions of PSB 200-6R were specific statements of rights which might support a claim for

arbitration. Therefore, the Union is not seeking to create a duty to arbitrate where none exists.

DISCUSSION

As a preliminary matter, we reject the City's argument that the Union's claims based upon PSB 200-6R, §§ I.B.1, I.B.2, or II.C.1, are not arbitrable because these sections were not explicitly cited prior to the Answer. The RFA cited PSB 200-6R and the Step grievances stated that DOHMH failed to provide notice. Therefore, the City was provided sufficient notice to make it cognizant of the basis of the claims. *See PBA*, 73 OCB 47, at 7 (BCB 2004) (failure to cite explicit provision in a RFA not fatal where sufficient notice was provided).

NYCCBL § 12-309(a)(3) grants this Board the power "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure established pursuant to [§] 12-312 of this chapter."[2] The NYCCBL explicitly promotes and encourages the use of arbitration, and "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *CEA*, 3 OCB2d 3, at 12 (BCB 2010) (citations omitted); *see also* NYCCBL § 12-302 ("policy of the city to favor and encourage . . . final, impartial arbitration of grievances"). The Board, however, "cannot create a duty to arbitrate where none exists." *Id.* (quoting *UFA, L. 94*, 23 OCB 10, 6 (BCB 1979)).

When the arbitrability of a grievance is challenged, we employ a two pronged test:

> (1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so

[2] NYCCBL § 12-312 sets forth the parties' rights and responsibilities in arbitrations and the Board's role in administering an arbitration panel.

> (2) whether the obligation is broad enough in its scope to include the particular controversy presented.

PBA, 3 OCB2d 10, at 10 (BCB 2010) (citations omitted); *see also NYSNA*, 69 OCB 21, at 7 (BCB 2002).

In the instant case, the Union cannot satisfy the first prong. As a threshold matter, Article VI, § 1(b), of the Agreement excludes from arbitration "disputes involving the [Personnel Rules]." (Pet., Ex. J). We have repeatedly held that "[e]mployees do not have grievance rights with respect to terminations during their probationary term and may be dismissed at any time pursuant to the [Personnel Rules]." *Local 420, DC 37*, 69 OCB 38, at 6-7 (BCB 2002); *see also SSEU, L. 371*, 69 OCB 36, at 6 (BCB-2002); *Amaker*, 61 OCB 32, at 6-7 (BCB 1998). The Union does not explicitly seek to arbitrate the Personnel Rules, and states that the arbitration need not address the calculation of the probationary period. However, the Union alleges that Grievant became a permanent employee prior to her termination and that DOHMH ordinarily does not extend the probationary period due to absences. Further, the Union calculates that Grievant's probationary year, if not extended, would have ended on August 17, 2009, while the City calculates that it would have ended on August 18, 2009. Therefore, the Union raises whether DOHMH miscalculated the probationary period. A claim such as that alleged herein brought on behalf of Grievant that the probationary period was miscalculated falls within contractual exclusion agreed upon by the parties. Any recourse for such a miscalculation would have to be in a judicial, not an arbitral, forum.

Nor does reliance on the notice provisions of PSR 200-6R provide the requisite nexus. In *Garcia v. Bratton*, 90 N.Y.2d at 994, the New York State Court of Appeals held that "as a matter of public policy" Personnel Rule 5.2.8(b) automatically extends the probationary period due to

absences.[3] The *Garcia* court noted that when the employee is "not performing the duties of the position, [the employer] is denied the very purpose of the probationary period, which is 'to ascertain the fitness of the probationer and to give the probationer a reasonable opportunity to demonstrate the ability to perform the duties of the office.'" *Id.* at 993 (quoting *Matter of Tomlinson v. Ward*, 110 A.D.2d 537, at 538 (1st Dept.1985), *affd*, 66 N.Y.2d 771 (1985)).[4] Further, the Court held that "[Personnel Rule] 5.2.8(b) explicitly overrides other provisions of the rules . . . in automatically extending the probationary term so as to assure that the public interest is protected." *Id.* at 994 (citing N.Y. Const., Art. V, § 6). The majority also held that an employee is not entitled to notice of the extension. *Id.* at 993.[5]

We are constrained by the Court of Appeals' holding in *Garcia* to find that the public policy considerations implicit in Personnel Rule 5.2.8(b) override the notice provisions of PSB 200-6R. *See Smith v. New York City Dept. of Correction*, 292 A.D.2d 198 (1st Dept. 2002) ("Contrary to petitioner's contention, he was not entitled to personal notice that his probationary period had been extended by his absences."); *Garnes v. Kelly*, 51 A.D.3d 538, 539 (1st Dept. 2008) ("petitioner's probationary period was extended by the use of, *inter alia*, vacation days and his placement on

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[3] *Garcia* concerned a police officer placed on modified duty during her probationary period. The police officer was terminated over two years later while still on modified duty. The police officer argued, and the trial court found, that modified duty did not extend the probationary period. The Appellate Court reversed, and the Court of Appeals affirmed.

[4] The *Tomlinson* Court analyzed the State equivalent of the Personnel Rules and held that the probationary period is "measured by the number of days a probationer is actually working on the job." *Id.*, 110 A.D.2d at 538 (citing *Woltjen v. Burke*, 52 A.D. 2d 678 (3rd Dept. 1976)).

[5] The dissent in *Garcia* agreed that the probationary period was automatically extended due to absences and "agree[d] with the majority that this rule protects the public interest." *Id.* at 997. However, the dissent argued that the police officer was entitled to notice that modified duty would extend her probationary period.

modified duty, and there is no requirement that petitioner be notified of the extension of the probationary period."); *Matter of Agate v. NYC Health and Hosp. Corp.*, Index No. 111222/05, at 3 (Sup. Ct. N.Y. Co. Feb. 23, 2006) (Cahn, J.) ("The Court of Appeals has specifically ruled that when agency rules provide for an automatic extension of the probationary period to include those days that the probationer did not perform his or her duties, no notice for such an extension of probation is required.").

Our previous decision in *OSA*, 1 OCB2d 42, does not provide a basis for arbitration here. In that case, neither party raised *Garcia*. Rather, the issue in *OSA* was whether PSB 200-6R merely restated the cognate provisions of the Personnel Rules and, therefore, fell within the exclusion from arbitration. *Id.*, at 18. We found that PSB 200-6R contained additional procedures not found in the Personnel Rules and held that such claims of procedural rights could fall outside of the exclusion from arbitration of claims arising under the Personnel Rules. *Id.,* at 20. That holding is consistent with established New York case law that the City is free to create procedural rights which may be arbitrable as long as such rights do not contradict external laws. *See County of Chautauqua v. Civ. Serv. Empl. Assn.*, 8 N.Y.3d 513, 519 (2007) ("Thus, although the Taylor Law reflects this State's 'strong' policy favoring arbitration, this principle is not without limits.") (citing *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.*, 6 NY3d 563, 575 (2006); *Matter of New York City Dept. of Sanitation v MacDonald,* 87 NY2d 650, 656 (1996); *Matter of Union Free School Dist. No. 2 of Town of Cheektowaga v Nyquist*, 38 NY2d 137, 143 (1975)); *see also CSBA, L. 237*, 75 OCB 5, at 13 (BCB 2005) (employer "may grant rights greater than those the CSL provides" as long as such rights do "not conflict with the external laws."); *CEU, L. 237*, 77 OCB 27, at 16 (BCB 2006). While we adhere to that general statement, we note

that in the present case, the notice provisions of PSB 200-6R conflict with external law, as found by the Court of Appeals in *Garcia*. To the extent our holding in the instant case conflicts with our holding in *OSA*, *OSA* is overruled.[6]

In the instant case, the RFA would require an arbitrator to determine if Grievant's probationary period was improperly extended such that she became a permanent employee with a right to written charges. This issue is foreclosed from arbitration by Personnel Rule 5.2.8(b), which automatically extends a probationary period due to absences and does not require notice of such.[7] Accordingly, the petition is granted and the RFA is denied.

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[6] We need not resolve the factual dispute as to when the probationary period, extended or otherwise, would have ended or when PSB 200-6R would require notice as we find the Personnel Rules to be dispositive.

[7] The Union's reliance on *Organization of Staff Analysts v. City of New York, Dept. of Transportation*, A-10771-04 (Drucker, Arb., Oct. 24, 2006), is misplaced. That matter was arbitrable because the City had not filed a challenge to arbitrablility with the Board as required by § 1-06(c)(1) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1). The arbitrator found "that the requirements of [§] 1-06(c)(1) are crystalline and preclude any consideration of the City's arguments challenging arbitrability." *Id.*, at 4. Further, the City did not argue in that case that the Personnel Rules automatically extend a probationary period and that no notice of such is required.

ORDER

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 petition challenging arbitrability filed by the City of New York and the New York City Department of Health and Mental Hygiene, docketed as No. BCB-2848-10, hereby is granted; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 2627, docketed as A-13385-10, hereby is denied.

Dated: September 22, 2010
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

PAMELA S. SILVERBLATT
MEMBER

M. DAVID ZURNDORFER
MEMBER

I dissent GABRIELLE SEMEL
MEMBER