City v. L.371, SSEU, 37 OCB 1 (BCB 1986) [Decision No. B-1-86 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

DECISION NO. B-1-86
DOCKET NO.BCB-778-85
(A-2108-85)

SOCIAL SERVICE EMPLOYEES UNIONS,
LOCAL 371,

Respondent.

DETERMINATION AND ORDER

On May 2, 1985, the City of New York, appearing by its Office of Municipal Labor Relations ("the City" or "OMLR"), filed a petition challenging the arbitrability of a grievance filed by the Social Service Employees Union, Local 371 ("SSEU" or "the Union") on behalf of Joseph Coplan. On June 6, 1985, the Union submitted a letter, advising the Office of Collective Bargaining that the parties had agreed to consolidate the instant petition with that docketed as BCB-782-85 (A-2110-85). By its letter, the Union also withdrew certain of the allegations stated in its request for arbitration in the instant matter.

Thereafter, by letter dated July 1, 1985, SSEU withdrew its request for arbitration in BCB-782-85 (A-2110-85). The same day, it submitted its answer to the petition challenging

arbitrability in BCB-778-85. The City filed a reply on August 23, 1985.

Background

On September 7, 1984, prior to the expiration of a six month probationary period, the grievant was terminated from his position as a Community Associate with the New York City Department of Parks and Recreation ("the Agency" or "DPR"). A grievance initiated by SSEU at Step III of the grievance procedure, which is set forth at Article VI of its 1980-1982 collective bargaining agreement with the City ("the Agreement"), was denied on March 5, 1985. On April 2, 1985, the Union filed a request for arbitration, alleging as follows:

> Worker was terminated without any controlling agency probationary policies and procedures to ensure rational determination of whether to retain in service or not, and without a letter to the Personnel Director setting forth appropriate and substantial reasons for such action.

The Union claims that termination under the circumstances described above violates the Department of Personnel's Personnel Policy and Procedure No. 615-77 ("PPP 615-77"). [1]

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[1] In the grievance submitted at Step III and in the request for arbitration, violations of PPP 615-77 and of a separate, more detailed document, PPP 615-77a, were alleged. However,

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(Footnote 1/ continued):

by its letter of June 6, 1985, SSEU withdrew its reliance upon

This document bears the subject heading "Use of Probationary Period" and provides, in part, as follows:

> It is essential that effective use be made of the probationary period; it is the single most important opportunity to influence employee selection and development, and it is an opportunity which will not come again. The probationary period is, in effect, an extension of the examining process during which time it can be determined if the probationer can and will do his job satisfactorily.
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> * * *
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> Establishment of a program for effective, positive use of the probationary period is strongly urged. This program should include development of agency probationary policies and procedures aimed at improving employee performance and proper placement for each employee; development of a training program for supervisory staff to carry out agency policy; establishment of controls to ensure that a rational determination to retain or drop the probationer is made before the probationary period expires; establishment of a procedure to ensure action to terminate employment of an unsatisfactory probationer; and establishment of a procedure for

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PPP 615-77a. We note that the requirement referred to in the Union's request for arbitration, i.e., that a written request be made to the Personnel Director where the agency desires to terminate the services of a probationary employee prior to the expiration of his probationary term, derives from PPP 615-77a and does not appear in PPP 615-77.

> informing unsatisfactory probationers that their services are to be terminated.

In its answer to the petition challenging arbitrability, the Union cites the Department of Personnel's 1977 "Agency Guide to Performance Evaluation for Sub-Managerial Positions" ("the Guide") as an additional source of the rights alleged to have been violated in this case. The Introduction to the Guide reads as follows:

> This guide is designed as an aide to agencies in constructing their own sub-managerial performance evaluation systems under the revised City Charter. The Charter provides that agencies are to establish and administer performance evaluation programs to be used during the probationary period and for promotions, assignments, incentives and training. Such programs should also help employees and supervisors improve their job practices and achieve better results. Programs are to be submitted to the City Personnel Director for approval.
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> Performance evaluations used as the basis for personnel decisions - such as promotion, demotion or termination, transfers, monetary rewards, and training - are considered tests and are subject to equal employment opportunity guidelines. Courts expect evaluations to be honestly and fairly conducted and to be based on a job-related system. Features of evaluation systems deemed to be necessary are these:
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> 1. The method used must be valid and job-related.
>
> 2. Ratings must be based on objective and precise rating factors, developed through a thorough job analysis.

3. Raters must consistently observe performance of rates.

4. There must be no ethnic, sex, or other bias in the instrument or in the rater. (It is therefore important to have adequately trained raters.)

The system described in the guide centers around the tasks actually performed in each title in the agency and standards for satisfactory performance in each task, expressed primarily in terms of a product to be produced (quality or quantity), result to be achieved or other consequences to be brought about, or specific behavior (action) to be displayed.

This system is designed to meet the criteria indicated above, as well as to provide information useful for several purposes and to be relatively easy to install. Other systems otherwise acceptable have not been advocated in the guide either because they have limited use or because they are extremely time-consuming to construct. Agencies may follow the system described in this guide or may devise other systems which meet the criteria and purpose indicated above.

As a remedy for the violations alleged in its pleadings, SEU seeks restoration of the grievant to the position of Community Associate with back pay plus interest, and an order directing the Agency to comply with evaluation policies set by the Department of Personnel and DPR in all future

evaluations of the grievant

Positions of the Parties

City's Position

The City asserts that its decision to terminate the grievant was a proper exercise of its management rights under section 1173-4. 3b of the New York City Collective Bargaining Law including, inter alia, the right to:

> determine the standards of services to be offered by its agencies; determine the standards of selection for employment; ... maintain the efficiency of governmental operations; ...and exercise complete control and discretion over its organization....

The City notes that its probationary policy is set forth at section 5.2.1 of the Rules and Regulations of the City Personnel Director ("Personnel Director's Rules")[2],which the

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[2] Section 5.2.1 of the Personnel Director's Rules provides, in relevant part:

> (b) Every original appointment to a position in the non-competitive or exempt class shall be for a probationary period of six months unless otherwise set forth in the terms and conditions for appointment as determined by the city personnel director. Appointees shall be informed of the applicable probationary period. However, such probationary period may be terminated

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(Footnote 2/ continued):

scope of the grievance procedure. - [3]OMLR contends that, since Personnel Policy and Procedure bulletins, such as PPP 615-77, do no more than summarize and prescribe guidelines for agency implementation of the Personnel Director's Rules, disputes involving PPPs are also excluded from the, contractual grievance procedure. In any event, the City asserts, neither the Personnel Director's Rules, nor the cited PPP, affords probationary employees any rights, whether

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by the city personnel director or by the agency head before the end of the probationary period, and the appointment shall thereupon be deemed revoked. Nothing herein shall be deemed to grant permanent tenure to any non-competitive or exempt class employee.

[3] Article VI, Section l(B) of the Agreement defines the term "grievance," in relevant part, as:

> A claimed violation, misinterpretation or misapplication of the rules or regulations, written 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 Personnel Director or the Rules and Regulation of the Health and Hospitals Corporation with respect to those matters I set forth in - the first paragraph of Section 7290.1 of the Unconsolidated Laws shall not be subject to the Grievance Procedure or arbitration; ... (emphasis add).

substantive or procedural, with respect to determination.

OMLR argues further the termination of a probationary employee is not, in any circumstance matter with respect to which it has a duty to arbitrate. The City observes that, in New York, probationary employees may be terminated with out charges or a hearing provided that the decision to terminate is not made in bad faith, and that an arbitrator may not substitute his judgment for that of the employer with respect to the work performance of a probationary employee. The City also notes that this Board has specifically refused to enlarge "the traditional and well-defined incidents" of probationary status in the absence of an explicit contractual expression of intention to do so. [4]According to OMLR, there is no contractual expression of such an intent in the present case.

Insofar as the Union relies upon the Department of Personnel Guide as a basis for its arbitration request, the City objects on the ground that SSEU did not refer to the Guide at the lower steps of the grievance procedure and (2) the Guide does nor constitute a written policy applicable to the agency which employs the grievant within the meaning

[4] The City cites Decision Nos. B-11-76 and B-6-84.

of Article VI, Section 1(B) of the Agreement.

The City notes that the term "grievance" is also defined in the Agreement to include a claim of "wrongful disciplinary action taken against a non-competitive employee with six (6) months of service in title" (Article VI, Section 1(F)). Observing that the grievant had less than six months of service when he was terminated, OMLR concludes that Article VI, Section 1(F) does not provide a basis for arbitration in this case.

Based upon all of the above, the City requests that the Board issue an order finding the grievance asserted by the Union not arbitrable.

Union's Position

The Union claims that the City violated PPP 615-77 and the Department of Personnel Guide by its failure to participate in an organized structured evaluation program with the grievant. It is argued that both PPP 615-77 and the Guide constitute "written policy" within the meaning of Article VI, Section 1(B) of the Agreement, which provides that a claimed violation of written policy is subject to the grievance procedure and arbitration.[5]

[5] Article VI, Section 1(B) is quoted supra at page 7, note 3.

The Union asserts that the City violated its written policy in the following respects, among others: at the beginning of the probationary period, the grievant was not asked to meet with his supervisors for the purpose of being made aware of the tasks upon which he would be evaluated and the procedures he was expected to follow; he was not provided with a written description of the duties he was to perform or with a copy of the agency's rules and regulations; the grievant's supervisors failed to meet with him during the evaluation period for the purpose of discussing his performance and assisting him to take any corrective action that might have been indicated; and the grievant was not shown a copy of any evaluation performed upon him and, as a result, was deprived of an opportunity to rebut the allegations which formed the basis for his termination.

SSEU emphasizes that the instant grievance does not involve the substantive determination made with respect to the grievant's abilities but, rather, the failure of the Department to follow procedures let forth in the Guide and its failure to adhere to goals described in PPP 615-77. Accordingly, the Union maintains that its request for arbitration should be granted.

Discussion

It is not disputed that the City and SSEU are obligated to arbitrate matters defined as "grievances" pursuant to Article VI, Section 1 of the Agreement. The question presented for our adjudication is whether the particular dispute in the matter before us is within the scope of the agreement to arbitrate.

The gravamen of the Union's claim is that DPR failed to implement a clearly articulated policy requiring the establishment of an employee evaluation program (PPP 615-77) and that it failed to adhere to specific provisions of a Department of Personnel Guide in evaluating the grievant. Notwithstanding statements in the Union'' answer to the effect that the grievant's termination was not founded upon objective evidence of his abilities or performance, SSEU makes clear that the matter which it seeks to arbitrate is limited to alleged violations of written policy and procedures dealing with the subject of probationary employment.

In view of the fact that the focus of the grievance is on alleged procedural violations, we find that the City's reliance upon Board Decision Nos. B-11-76 and B-6-84 is misplaced in the present context. in each of those cases, we denied arbitration of a claim that the decision to ter-

minate a probationary employee constituted a wrongful disciplinary action. We cited the principle, Well-settled in 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.

Here, the Union does not seek to arbitrate the grievant's termination, but claims that certain procedural violations deprived the grievant of the opportunity to demonstrate his fitness for the position from which he was discharged. More to the point therefore is Decision No. B-9-74, where we granted arbitration of a claim that the grievant, a probationer, was terminated in violation of the contract in that she was not permitted to read evaluatory statements regarding work performance and conduct which were placed in her personnel folder. In explaining our holding in B 9-74, we noted 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."[6] In the

[6] City of New York v. District Council 37, AFSCKE, AFL-CIO, Decision No. B-9-74 at 5. See, Board of Education v. Bell-more-Merrick United Secondary Teachers, Inc., 39 N.Y. 2d 16-7,347 N.E. 2d 603, 383 N.Y.S. 2d 242 (1976)

present case, the Agreement permits arbitration, inter alia, of claimed violations of "written policy or orders applicable to the agency which employs the grievant." As it does not on its face exclude probationary employees from its application, we conclude that the grievant is. not precluded, on account of his probationary status, from stating an arbitrable claim under Article VI, Section 1(B).[7]

We now turn our attention to the specific issues of arbitrability presented herein. SSEU contends that DPR's failure to adopt or to apply the provisions of the Department of Personnel Guide is inconsistent with the goals announced in, and violates the essence of, PPP 615-77 which, it is alleged, is a written policy of the agency subject to the grievance procedure and arbitration. The City asserts that disputes concerning PPPs, by analogy to disputes involving the Personnel Director's Rules, are expressly excluded from the parties' grievance procedure. Moreover, the City argues PPP 615-77 does not create any rights with respect to the termination of a probationary employee and, therefore, does not provide a basis for arbitration.

As we have often stated, a party seeking arbitration has the burden of establishing to the satisfaction of the

[7] See, Decision No. B-9-74.

Board that there is a prima facie relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration.[8] We find that the Union has not met its burden in this case.

Couched in general and precatory language, PPP 615-77 is a statement of goals and objectives relating to the effective use by, City agencies of the probationary period. From our reading of that document, however, we cannot say that it is arguably the source of a right possessed either by the grievant, or by the Union, to have DPR adopt procedures relating to probationary employment or to have such procedures applied in the present case. The relationship between an alleged agency failure properly to implement the advisory guidelines and general goals stated in PPP 615-77 and the grievant's inability to fulfill his probationary period in a satisfactory manner is simply too attenuated to state an arbitrable claim. Additionally, we find that the purpose of PPP 615-77 - to encourage agencies to establish programs for effective, positive use of the probationary period - deals only indirectly with the rights of bargaining unit personnel. Since the substance of PPP 615-77 runs between the Department of Personnel and other municipal

[8] E.2., Decision Nos. B-8-82; B-7-81; B-4-81; B-21-80; B-15-80; B-15-79; B-7-79; B-3-78; B-3-76; B-1-76.

agencies, we hold that SSEU may not grieve concerning, DPR's alleged non-compliance with the personnel, directive.[9] for purposes of this case, to determine whether PPP 615-77 constitutes a written policy within the contractual definition of a "grievance", as SSEU claims, or whether PPPs are tantamount to Personnel Director's Rules for purposes of the exclusionary language of Article VI, Section l(B), as OMLR contends. In either case, we have found that PPP 615-77 cannot arguably be the source of the rights alleged to have been violated in the instant matter.

We now consider whether the Department of Personnel Guide provides a basis for a direction of arbitration in this case. As noted above, SSEU asserts that the Guide constitutes a written policy of the agency, while OMLR maintains that the-Guide is not a policy but a management tool designed to assist the agencies in establishing their own performance evaluation criteria. According to the City, no agency was mandated to accept the Guide as its written policy and DPR did not do so. Additionally, the City argues that we should deny arbitration of an alleged violation of Guide because the Union failed to raise this claim at the lower steps of the grievance procedure.

[9] See, Decision Nos. B-38-85; B-7-85.

As the City correctly observes we have consistently refused to permit a party to amend its claim at the arbitration step, or thereafter, to include allegations additional to or different from the initial claim.[10] In Decision No. B-20-74, we noted that:

> sound, effective, and speedy grievance procedure entails the clear formulation of the issues at the earliest possible moment, adequate opportunity for both parties to investigate and argue the grievance under discussion, and encouragement by the parties of their representatives to explore and conclude settlements at the lower steps of grievances which do not involve broad questions of policy or of contract interpretation. Obviously, none of these elements is achievable if easy amendment of the grievance at the penultimate moment, i.e., at the arbitration step, were to be permitted.

In Decision No.B-22-74, we explained further:

> The purpose of -the multi-level grievance procedure is to encourage discussion of the dispute at each of the steps. The parties are thus afforded an opportunity and to discuss the claim informally and attempt to settle the matter before it reaches the arbitral stage. Were
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> this Board to permit either party to interpose at this time a novel claim based on a hitherto unpleaded grievance, we would be depriving

[10] E.g., Decision Nos. B-14-84; B-6-80; B-12-77; B-3-76; B-27-75; B-22-74; B-20-74.

> the parties of the beneficial effect of the earlier steps-Of the grievance procedure and foreclosing the possibility of a voluntary settlement.

In keeping with the policy expressed above, we shall deny SSEU's request to arbitrate a claimed violation of the Guide. While our decision is without prejudice to the Union's right to file a timely grievance alleging such violation, we do not decide here the arbitrability of such a grievance, including the question whether the Guide constitutes a "written policy" within the meaning of Article VI, Section 1(B) of the Agreement.

Additionally, we do not decide whether the facts alleged by the Union state an arbitrable claim of wrongful disciplinary action, pursuant to Article VI, Section l(F)of the Agreement, no such claim having been asserted by SSEU.

Thus, while we adhere to our finding in Decision No. B-9-74 that a public employer and a public employee representative may, by their agreement, enlarge upon the rights of probationary-employees which are,,delimited by civil service law and rules, we conclude that, in the present case, the Union has failed to establish that its claim in behalf of a probationary employee is arbitrable under any provision

of the Agreement.

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 petition challenging arbitrability filed by the City of New York be, and the same hereby is, granted; and it is hereby

ORDERED, that the request for arbitration filed by the Social Service Employees Union, Local 371 be, and the same hereby is, denied.

DATED: New York, N.Y.
January 22, 1986

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER

Decision No. B-1-86
Docket No. BCB-778-85
(A-2108-85)

REVISED CONSOLIDATED RULES OF THE OFFICE OF COLLECTIVE BARGAINING

§7.4 Improper Practices. A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of Section 1173-4.2 of the statute may be filed with the Board within four (4) months thereof by one (1) or more public employees or any public employee organization acting in their behalf or by a public employer together with a request to the Board for a final determination of the matter and for an appropriate remedial order. Within ten (10) days after a petition alleging improper practice is filed, the Executive Secretary shall review the allegations thereof to determine whether the facts as alleged may constitute an improper practice as set forth in section 1173-4.2 of the statute. If it is determined that the petition, on its face, does not contain facts sufficient as a matter of law to constitute a violation, or that the alleged violation occurred more than four (4) months prior to the filing of the charge, it shall be dismissed by the Executive Secretary and copies of such determination shall be served upon the parties by certified mail. If, upon such review, the Executive Secretary shall determine that the petition is not, on its face, untimely or insufficient, notice of the determination shall be served on the parties by certified mail, provided, however, that such determination shall not constitute a bar to the assertion by respondent of defenses or challenges to the petition based upon allegations of untimeliness or insufficiency and supported by probative evidence available to the respondent. Within ten (10) days after receipt of a decision of the Executive Secretary dismissing an improper practice petition as provided in this subdivision, the petitioner may file with the Board of Collective Bargaining an original and three (3) copies of a statement in writing setting forth an appeal from the decision together with proof of service t-hereof upon all other parties. The statement shall set forth the reasons for the appeal.

* * * *

§7.8 Answer-Service, and Filing. Within ten (10) days after service of the petition, or, where the petition contains allegations of improper practice, within ten (10) days of the receipt of notice of finding by the Executive Secretary, pursuant to Rule 7.4, that the petition is not, on its face, untimely or insufficient, respondent shall serve and file its answer upon petitioner and any other party respondent, and shall file the original and three (3) copies thereof, with proof of service, with the Board. Where special circumstances exist that warrant an expedited determination, it shall be within the discretionary authority of the Director to order respondent to serve and file its answer within less than ten (10) days.

OTHER SECTIONS OF THE LAW AND RULES MAY BE APPLICABLE.

CONSULT THE COMPLETE TEXT.