

City v. L.371, SSEU, 37 OCB 12 (BCB 1986) [Decision No. B-12-86
(Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

DECISION NO. B-12-86

DOCKET NO. BCB-739-84

THE CITY OF NEW YORK,

(A-1986-84)

Petitioner,

-and-

SOCIAL SERVICES EMPLOYEES UNION,
LOCAL 371,

Respondent.

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DECISION AND ORDER

On October 15, 1984, the City of New York, appearing by its Office of Municipal Labor Relations ("OMLR" or "the City"), filed a petition challenging the arbitrability of a grievance submitted by the Social Service Employees Union, Local 371 ("the Union") on behalf of Jeff Wolfer ("the grievant"). The Union filed an answer to the petition on December 10, 1984,¹ to which the City replied on December 26, 1984.

Background

On July 2, 1984, the grievant, a caseworker with the New York City Human Resources Administration ("HRA" or "the

¹ The time in which to file an answer was extended at the request of the Union.

Agency"), filed a grievance at Step I of the grievance procedure² alleging violations of the HRA Non-Managerial Employee Performance Evaluation Manual ("Manual") with regard to his termination from a probationary position. The Step I grievance was denied and, on July 5, 1984, the Union submitted the grievance at Step II. On August 14, 1984, having received no response to the Step II grievance, the Union submitted the grievance at Step III. The Step III grievance was denied on September 14, 1984, on the ground that the Agency had an absolute right under the New York City Department of Personnel's Rules and Regulations to dismiss grievant at the end of his probationary term.³

Thereafter, on October 4, 1984, the Union filed a request for arbitration in which it alleges that the evaluations which led to the grievant's termination violated (1) Article

² The grievance procedure is set forth at Article VI of the 1980-82 collective bargaining agreement between the Union and the City.

³ Rule 5.2.7 of the New York City Department of Personnel Rules and Regulations of the City Personnel Director provides in pertinent part:

(a) At the end of the probationary terms, the agency head may terminate the employment of an unsatisfactory probationer by notice to such probationer and to the City personnel director.

VI, Section 1B of the Collective Bargaining Agreement between the City and the Union ("Agreement"); (2) the Manual and (3) the New York City Department of Personnel Agency Guide to Performance Evaluation for Sub-Managerial Positions ("Guide").

As a remedy, the Union seeks grievant's reinstatement with back pay, expunction of his performance evaluation and related documents from all Agency records and any other just and proper remedy.

Positions of the Parties

City's Position

The City asserts that the Union's request for arbitration fails to state a claim which is arbitrable under the Agreement and, therefore, should be denied. Article VI, Section 1B of the Agreement defines a grievance as:

[a] claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders applicable to the agency which employs the grievant of the Employer affecting terms and conditions of employment; provided, disputes involving the Rules and Regulations of the New York City Personnel Director or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the Grievance Procedure or arbitration.

The City claims that Rule 5.2.7 of the New York City De-

partment of Personnel's Rules and Regulations grants Agency heads the absolute power to terminate unsatisfactory probationary employees prior to the completion of their probationary period. Since the Rules and Regulations of the Personnel Department are explicitly excluded from the definition of a grievance, the City maintains, grievant's termination is not a matter with respect to which it has a duty to arbitrate.

The City further argues that arbitration of the alleged procedural violations of the Manual would, in effect, give the grievant a "substantive right of review" which was neither bargained for nor intended by the parties to the Agreement. The City claims that "where it is sought to enlarge the traditional and well-defined incidents of probationary status, the Board will require an explicit contractual expression of that intent."⁴ The City maintains that in the instant case there is no "explicit contractual expression" of intent to enlarge the rights of probationary employees. Rather, the City contends that the exclusion of the Rules and Regulations of the Personnel Department from the definition of a grievance was intended to bar probationary employees from grie-

⁴ In support of its position, the City cites Decision No.B-11-76.

ving the Agency head's decision to dismiss unsatisfactory employees at the end of their probationary period.

Based upon this reasoning, the City requests that the Board issue an order dismissing the request for arbitration, along with such other relief as may be just and proper.

Union's Position

The Union contends that the Agency's failure to follow delineated procedures in conducting the grievant's performance evaluations during his one year probationary period violated the manual in several important respects. The Union claims that Article IV, Article VIII, Section 2 and Article IX of the Manual were violated in that:

(a.) Grievant was not asked to meet with his supervisors and the reviewer at the beginning of the evaluation period for the purpose of being made aware of the tasks upon which he would be evaluated. No discussion regarding the tasks which would be the basis for his evaluation was held by any of his supervisors, in violation of Article VIII, Section 2;

(b.) Article VIII, Section 2 of the Manual also requires that there be a personal conference between the supervisor and the employee at which the supervisor reviews the specific tasks and standards on which the employee will be evaluated. In addition, this Section requires the supervisor to elicit and answer any questions the employee may have in order to ensure that the employee understands clearly, what is expected of him/her.

Grievant's supervisor failed to comply with this important requirement;

(c.) During the evaluation period, none of the supervisors to whom grievant was alternately assigned met with him on an ongoing basis to discuss his performance and to assist him in taking corrective action which might be indicated, as required in Article IV;

(d.) Grievant's performance was not reviewed on a quarterly or semi-annual basis, in violation of Article IX-of the Manual;

(e.) Grievant's supervisor failed to meet with the Grievant approximately 10 days before the end of the evaluation period to discuss the contents of the evaluation portion of the Evaluation Form M-303A, as required under Article VIII, Section 2, of the Manual. No discussion was had with the Grievant, no opportunity was provided to him to offer comments or clarifications and no opportunity was granted the Grievant to report his comments about the evaluation;

(f.) The evaluation was not processed on a timely basis, as required by Article IV. In fact, Grievant received no evaluation at all for the period October 5, 1983 through January 5, 1984;

(g.) The ratings received by the Grievant for the tasks covered by the performance evaluation were not justified by the objective evidence of his performance, i.e., records, charts, etc.;

(h.) Although Grievant had several supervisors during the period relevant hereto, no performance reviews were prepared by any of the outgoing supervisors to reflect the successive changes in supervision, as required by Article VIII, Section 2.

The Union argues that the Agency was "absolutely required" by the Manual to tell the grievant what was expected of him and how he was doing during the evaluation period. The Union maintains that the procedural defects, described above, were so substantial that it was impossible for the grievant to receive a fair and proper evaluation.

The Union further contends that the Manual, which was adopted by the Agency and distributed to all supervisors pursuant to a memorandum from the HRA Assistant Commissioner of Personnel Administration, clearly constitutes Agency policy. The Union asserts that since a claimed violation of Agency policy comes within the definition of a grievance in Article VI, Section 1B of the Agreement, the grievance herein is arbitrable.

Finally, the Union disputes the City's contention that it is seeking to derive substantive rights for probationary employees from the evaluation procedures contained in the Manual. According to the Union, the subjective determinations made by the Agency about the grievant's work performance is the subject of an appeal to the Evaluation Review Board. The Union maintains that the focus of the instant grievance the failure of the Agency to follow the procedures set forth in the Manual, is different from that in the appeal.

Discussion

The parties herein do not dispute that they have, by their Agreement, obligated themselves to arbitrate matters defined as "grievances" in Article VI, Section 1B. Therefore, the question before the Board is whether the particular controversy at issue is within the scope of their agreement to arbitrate.

The gravamen of the City's claim is that the grievant may not under any circumstances, even those involving violations of procedures in the evaluation process, grieve his allegedly improper termination because (1) the Agency acted pursuant to its authority under Rule 5.2.7 of the Rules and Regulations of the Personnel Department, which is explicitly excluded from the definition of a grievance, and (2) the Agreement contains no "explicit contractual expression" of the parties' intent to enlarge the rights of probationary employees. The Union, on the other hand, argues that the Agency failed to follow the procedures set forth in the Manual in its evaluation of the grievant during his probationary period. Since the Manual, according to the Union, "clearly constitutes" a written policy of the Agency, violations of the evaluation procedures set forth therein fall within the definition of an arbitrable grievance contained in the Agreement.

In prior decisions this Board has held that an employee cannot be denied arbitration of claimed violations in evaluation procedures solely because, as a probationary employee, the City has the right to terminate him during his probationary period. The parties may agree to confer arbitrable rights upon probationary employees.⁵

The Union contends that the City has conferred such rights upon the grievant herein by instituting the Manual, which it claims is a "written policy", and by agreeing to arbitrate claimed violations of such written policies. We agree that the City is obligated to arbitrate claimed violations of "written policy." In addition, we find that the Manual specifically applies to probationary employees. Thus, the only remaining question is whether the Manual is a "written policy."

In a case similar to the matter presently before us, the Board resolved the issue of whether the Manual constitutes a written policy of the Agency. In Decision No. B-6-86, a probationary employee filed a grievance claiming that the HRA, in conducting evaluations of his performance during his probationary term, had disregarded the procedures set forth in the Manual. We ruled that the Manual was a written policy

⁵ Decision Nos. B-9-74; B-6-86.

of the Agency and, as such, presented a grievable matter under the parties' agreement.⁶ Accordingly, our finding that the Manual constitutes a written policy is controlling here, and will grant the Union's request for arbitration with respect to the alleged violations of the Manual by the Agency.

As we ruled further in Decision No. B-6-86 with regard to a union demand similar to that in the instant case for arbitration not only as to the HRA Manual but also the Department of Personnel Guide, the Guide provides an option for line agency adoption of procedures consistent with the criteria set forth in the Guide. HRA's promulgation of the Manual is an exercise of that option and, as we noted in Decision B-6-86, supersedes the Guide. Accordingly, as in Decision B-6-86 "we will deny the Union's request for arbitration insofar as it is based upon the provisions of the Guide".

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 request for arbitration filed by the Social Services Employees Union, Local 371 be, and the same hereby is, granted, to the extent that it is based upon claimed violations of the Manual which relate to performance

⁶ See, also, Decision No. B-31-82.

evaluation procedures; and it is further

ORDERED, that the petition challenging arbitrability filed by the City of New York be, and the same hereby is, granted, to the extent that the request for arbitration is based upon claimed violations of the Guide.

DATED: New York, N.Y.
February 25, 1986

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

CAROLYN GENTILE
MEMBER

DANIEL G. COLLINS
MEMBER