City v. L.371, SSEU, 37 OCB 6 (BCB 1986) [Decision No. B-6-86 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

CITY OF NEW YORK,

Petitioner

DECISION NO. B-6-86
DOCKET NO. BCB-772-85
(A-2084-85)

-and-

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371,

Respondent.

DECISION AND ORDER

On March 28, 1985, the City of New York, appearing by its Office of Municipal Labor Relations ("the City"), filed a petition challenging arbitrabiliity of a grievance submitted by the Social Service Employees Union, Local 371 ("the Union") on behalf of Robert Lindsay (grievant). The Union filed an answer to the petition on June 10, 1985.

Background

Following a series of performance evaluations during his one-year probationary period, the grievant was discharged from his position as a caseworker with the New York City Department of Social Services ("Agency"). In its request for arbitration, the Union alleged that the evaluations which led to griev-

ant's termination violated (1) Article VI, Section 1B of the Union's collective bargaining agreement with the City ("agreement"), (2) the Human Resources Administration Non-Managerial Employee Performance Evaluation Manual ("Manual"), (3) the New York City Guide to Performance Evaluation for Sub-Managerial Positions ("Guide"), (4) Personnel Policy and Procedure No. 615-77. ("PPP 615-77"), and (5) Personnel Policy and Procedure 615-77a ("PPP 615-77a").

As a remedy, the Union seeks grievant's reinstatement, along with back pay and emoluments, expunction of the performance evaluations and related documents from grievant's records, and an order that the Agency comply with the Manual in conducting further evaluations.

Positions of the Parties

City's Position

The City asserts that the Union's grievance is not arbitrable because it does not fall within the purview of Article VI, Section 1 of the agreement, which defines "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.

Thus, in the City's view, the request for arbitration must be dismissed since no dispute exists concerning the application or interpretation of the terms of the agreement, and no rules, regulations, written policies, or orders of the City were violated which affected grievant's employment.

In addition, the City argues that since the rules of the Department of Personnel specifically grant an agency the right to terminate probationary employees at any time prior to the completion of their probationary period,[1] such employees are not entitled under any circumstances to grieve allegedly

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[1] 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.

improper terminations.[2] This is true, the City maintains, even where procedural violations may have occurred during the evaluation process.

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 City violated various of its written policies in its evaluations of grievant's performance. These alleged breaches of written policy, in the Union's view, are grievable matters under Article VI, Section l(b) of the parties' agreement. The allegations fall into several categories which are here summarized seriatim.

a. Alleged violations at the beginning of the evaluation period.

With respect to alleged violations of written poli at the beginning of grievant's evaluation period, the Union Cites Article IV, Section F of the Manual, which provides as follows:

> At the beginning of the evaluation period, the supervisor completes Sections I and II of Form M-303A by

[2] In support of its position, the City cites Decision Nos.B-1-77, B-11-76, and B-9-74.

> entering employee information, and the Master List Task Numbers, Tasks, and Standards comprising the appropriate FACT.[3] At this time, the employee, the supervisor, and the reviewer (a superior at least one level above the supervisor) all sign in the appropriate area of Section II. The supervisor retains the original of Form M-303A and distributes one copy each to the employee, the reviewer, and the RA/C Head or designee, who transmits a copy to the Office of Personnel Services, Division of Employee Relations. [emphasis in original]

Conrad Pierce, grievant's supervisor from until June 1984, allegedly failed, however, to complete Sections I and II of Form M-303A and distribute them to grievant at the beginning of each evaluation period, thereby allegedly depriving grievant of the opportunity to know the tasks upon which he would later be evaluated; instead, for each of his three evaluations of grievant's performance, Mr. Pierce allegedly completed Form M-303A only after the evaluation period had expired. Similarly, Laura Jeidel, who became grievant's supervisor in June 1984, allegedly did not complete Sections I and II of Form M-303A at the beginning of grievant's evaluation period.

The Union asserts that these actions, along with the alleged failure of the supervisors to meet with grievant to discuss the tasks upon which he

[3] "FACT" is the Manual's acronym for "Functionally Assigned Cluster of Tasks".

would be evaluated, also violated Article II, Section C of the Guide:

> 1. At the beginning of each evaluation period, the supervisor reviews each employee's Tasks and Standards Sheet to ensure that it is up to date and actually reflects the work that the employee does.* Normally, when feasible the supervisor should consult with the employee as to work actually being performed. If the tasks of the employee have changed, the Tasks and Standards Sheet is revised to reflect the changes. if there are changes, the supervisor draws up a new sheet which is signed by the employee, the supervisor and the superior. The supervisor keeps one copy and forwards one to the Personnel Office.
>
> *If all or a large proportion of employees in a title (such as Sanitation Man) are expected to perform exactly the same tasks and up to the same standards, individual Tasks and Standards Sheets need not be drawn up. A common list of tasks and standards may be used to evaluate all employees who perform the same tasks.

According to the Union, the City also violated Article VIII, Section II of the Manual:

> <u>At the beginning of the evaluation period</u>, after Section I and II of form M-3103a have been completed and signed by the supervisor, reviewer, and employee, the supervisor retains the original (for completion of the remaining sections at the end of the evaluation period) and distributes one copy each to the reviewer, the employee, and the

> RA/C Head or designee. The RA/C Head or designee will forward a copy of this Form M-303a to the office of Personnel Services, Division, of Employee Relations.
>
> > Note: Sections I and II-of Form M-303a are to be completed at the beginning of the regular annual evaluation period for the employee's Civil Service Title and Level. However, at any time during the evaluation period, whenever a supervisor is assigned a new employee -- whether by transfer, new hire, or other other means -- the supervisor must immediately complete Sections I and II of Form M-303a for that employee and distribute the form as described above.
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> In a personal conference with the employee, the supervisor should review the specific tasks and standards on which the employee will be evaluated. The supervisor should elicit and answer any questions the employee may have in order to ensure that the employee understands clearly what is expected of him/her. Whenever the employer's assigned duties are such that the FACT for his/her Functional Title does not accurately apply, the supervisor must either bring the employee's assigned duties in line with the FACT or request that the RA/C Head or designee change the employee's Functional Title. [Emphasis in original]

In addition, the Union maintains that the supervisor's alleged failure to meet with grievant at the beginning of each evaluation period was inconsistent with the policy expressed by PPP No-615-77, which provides, in pertinent 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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> * * *
>
> 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 informing unsatisfactory probationers that their services are to be terminated.

b. <u>Alleged violations during the evaluation period</u>.

The Union alleges that grievant's supervisors failed to "meet with him on an ongoing basis to discuss grievant's performance and to assist him in taking corrective actions which might be indicated." In addition to claiming that this failure violates the

"essence" of PPP No. 615-77, the Union also cite the following provisions of the Manual and Guide:

> 2. During the evaluation period, the supervisor meets regularly with the employee to discuss the employee's performance as compared to standards. Any necessary corrective actions are discussed and initiated. The supervisor continues to observe the employee's behavior in carrying out tasks and, when appropriate, reviews, work products.[4]
>
> G. During the evaluation period, the supervisor meets with the employee on an ongoing basis to discuss performance and to assist the employee in taking-any corrective actions. The supervisor will continue to review the work and to observe time performance of tasks. [emphasis in original][5]

C. Alleged violations in the final stages of the evaluation period

The Union cites two provisions of the Manual with respect to alleged violations of written policy in the final stages of the evaluation period.

> Approximately ten days before the end of the evaluation period, the supervisor completes, in rough draft, Sections III through VI of Form M-303A.

[4] Manual, Article II, Section C, at 7.

[5] Guide, Article IV, Section G, at 5.

> After discussion with the employee of the contents of these sections, Sections III through VI are completed in final form. Sections V11 and VIII are then completed in full. One copy each of the fully completed Form M-303a is retained by the supervisor, the reviewer, and the employee, and the original is forwarded to the RA/C Head or designee, who then transmits it to the Office of Personnel Services, Division of Employee Relataions.[6]
>
> Approximately ten days before the end of the evaluation period, the supervisor conducts an evaluation interview with the employee to discuss whether and to what degree standards have been met. The supervisor comes prepared to this meeting with Form M-303a, Sections III through VI, filled out in rough draft, and informs the employee of the his/her individual task ratings and the overall rating. Where called for; plans shall be made for improvement for the next evaluation period. [7][Emphasis in original]

Grievant's supervisors, however, allegedly failed to meet with grievant prior to the end of the evaluation period to discuss his performance; instead, the supervisors allegedly held the evaluation interviews on the same day that grievant was requested to sign the evaluations allegedly did not provide grievant with any opportunity to respond.

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[6] Manual, Article IV, Section I, at 5.

[7] Manual, Article IV, Section I, at 5.

The Union also argues that the City failed to observe Article II, Section A of the Guide regarding a change in supervisors during the evaluation period:

> Ordinarily, the unit chief or direct supervisor rates the employee's work and the supervisor's superior reviews. If there has been more than one supervisor in an evaluation period, either the last supervisor rates and the first supervisor makes an informational statement about the incumbent or each supervisor may submit a separate evaluation.

In this respect, the Manual provides in Article VIII, Section II as follows:

> Note: In the event of the death, departure, or other incapacity of the supervisor to complete the remaining sections of Form M-303a, these sections are to be completed by the reviewer. The reason why the supervisor is unable to complete the evaluation should be entered clearly in Section VIII, Supervisor's Signature Date. [Emphasis in original]

The Union, however, alleges that Mr. Pierce, in violation of Section A of the Guide, did not prepare an evaluation of grievant's performance after the new supervisor, Ms. Jeidel, took his place. In addition, the Union asserts that Article VIII, Section II of the Manual was violated when Ms. Jeidel allegedly performed and Seymour Rothman allegedly reviewed grievant's July 1984 evaluation.

Finally, without citation to any particular provision, the Union argues that the alleged failure to provide grievant with a copy of his fourth evaluation effectively deprived him of "the opportunity to rebut the evaluation and have his rebuttal considered by the Department of Personnel prior to approving his termination."

The Union emphasizes that the grievance involved herein does not turn upon the subjective determinations made by the Agency regarding grievant's performance, but upon the failure of the Agency to adhere to the procedures set forth in the Manual and the Guide, as well as the goals expressed in PPP No. 615-77.

Accordingly, the Union asserts that its request for arbitration should be granted.

Discussion

Where the parties, as here, do not dispute that they have agreed to arbitrate their controversies, the only question before this Board on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of their agreement to arbitrate.[8]

[8] See, e.g., Decision No. B-1-86.

The essence of the Union's claim is that the Agency violated various written policies regarding evaluation procedures which affected grievant's probationary employment and that such violations of written policy fall within the definition of an arbitrable grievance contained in the parties' agreement. The City, on the other hand, argues that (1) a probationary employee may not under any circumstances, even those involving violations of procedures in the evaluation process, grieve an allegedly improper termination, and (2) the Agency has not violated any written policy which affected grievant's employment.

With respect to its first argument, we believe that the City has misinterpreted the applicable law. In Board Decision No. B-9-74, a case cited by the City, we ruled that an employee who had been terminated during her probationary was entitled to proceed to arbitration on her claim that she had been denied her right under Article IX of the parties' contract to read evaluatory statements of her work performance.[9]

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[9] The other cases cited by the City are inapposite to the issues presented here. In Decision B-1-77, we granted the Union's request for arbitration, applying the reasoning of B-7-74 to a provisional employee who argued that he had been denied his contractual

(more)

We reasoned as follows:

> 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. Article IX of the City-Wide contract does not, on its face, exclude probationary employees from its application. The effect to be given to the provisions of Article IX, and, more specifically the relief, if any, to be granted to a probationary employee alleging a violation of Article IX, are questions which go to the interpretation of the contract and are therefore for an arbitrator.

Similarly, the grievant here cannot be denied arbitration of claimed violations in evaluation procedure solely because, as a probationary employee, the City has the right to terminate him during his probationary period; as stated in B-9-74, the parties may agree to confer arbitrable rights upon probationary employees.

(Footnote 9/ continued)

right to review evaluatory statements of his work performance; we denied arbitration, however, on his claim of improper termination. In Decision No. B-11-76, we denied the Union's request for arbitration regarding the allegedly improper termination of a probationary employee. As previously noted, the Union is here not grieving the subjective determinations made by the Agency with respect to grievant's work, but rather the alleged failure to the Agency to comply with various written policies.

The Union contends that the City has conferred such rights upon the grievant herein by instituting "written policies", i.e., the Manual, the Guide, PPP 615-77, and PPP 615-77a, which do not exclude probationary employees from their application,[10] and by agreeing to arbitrate claimed violations of such written policies. Since we agree that the City is obligated to arbitrate claimed violations of "written policy" and since we find that the documents upon which the Union relies do not, on their face, exclude probationary employees, the only remaining question is whether these documents are, in fact, "written policies."

a. <u>The Manual</u>

In a case similar to the matter presently before us, this Board resolved the issue of whether the Manual constitutes a written policy of the Agency. In Decision No. B-31-82, a non-probationary employee filed a grievance claiming that the Human Resources Administration, in conducting evaluations of his performance, had disregarded the procedures set forth in the Manual. We ruled that the Manual was a written policy of the Agency and, as such, presented a grievable matter

[10] In fact, some of the written policies cited herein apply specifically to probationary employees.

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

b. The Guide

The Introduction to the Guide states 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.
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> 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. [emphasis added]

As we have frequently stated, a party seeking arbitration has the burden of establishing to the satisfaction of the 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.[11]

[11] Eg., Decisions 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.

Since the Agency here, in accordance with the provision of the Guide cited above, has devised an alternative performance evaluation system, viz., the Manual, we deem it unnecessary for purposes of this case to determine whether the Guide would constitute written policy within the contractual definition of a "grievance" if it had not been replaced by the alternative provisions of the Manual. Accordingly, we will deny the Union's request for arbitration insofar as it based upon the provisions of the Guide.

c. PPP 615-77

We find that the union has not met its burden of establishing a prima facie relationship between the alleged violations of evaluation procedure and PPP 615-77. As we noted in Decision No. B-1-86, PPP 615-77, couched in general and precatory language, is a statement of goals and objectives relating to the effective use by city agencies of the probationary period; it is not arguably the source of a right, possessed either by the grievant or the Union, to require a City agency to adopt

particular procedures with respect to performance evaluations.

Therefore, we deny the Union's request for arbitration regarding the alleged violations of PPP 615-77.

d. PPP 615-77a

With respect to PPP 615-77a, the Union has likewise failed to meet its burden of establishing a prima facie relationship between the act complained of and the source of the alleged right, since it has pleaded no facts and pointed to no section of PPP 615-77a which would demonstrate a "violation" of that document[12] even if we were to find it a "written policy."

Thus, we will deny the Union's request for arbitration with respect to its claims based upon PPP 615-7177a.

Conclusion

For the above reasons, we will grant the Union's request for arbitration and deny the City's petition insofar as it relates to the City's alleged failure to comply with the procedures set forth in the Manual

[12] Indeed, the Union never raised the issue of PPP 615-77a at any time after its request for arbitration.

in conducting grievant's performance evaluations. With respect to the alleged violations of PPP 615-77, PPP 615-77a, and the Guide we will deny the request for arbitration and grant the petition.

O R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargining Law, it is hereby

ORDERED, that the petition challenging arbitrability filed by the City of New York be, and the same hereby is, granted, only to the extent that the request for arbitration is based upon claimed violations of Personnel Policy and Procedure Nos. 615-77, 615-77a, and the Guide and, in all other respects, it is denied; and it is further

ORDERED, that the request for arbitration filed by the Social Services Employees Union, Local 371 be, and the same hereby is, granted, only to the extent that it is based upon claimed violations of the sections of the Manual which are enumerated in the above decision and which relate to performance evaluation procedures;

and, in all other respects, it is denied.

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

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