OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,

Respondent.
- - - - - - - - - - - - - - - - - x

DECISION NO. B-54-87

DOCKET NO. BCB-976-87 (A-2575-87)

DETERMINATION AND ORDER

On July 7, 1987, the City of New York ("City"), by its Office of Municipal Labor Relations, filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Social Service Employees Union, Local 371 ("SSEU" or the "Union"). SSEU filed an answer to the petition on August 7, 1987. On August 20, 1987, the City filed a reply.

Background

The request for arbitration in this matter complains of the termination, on February 5, 1987, of Jose Perez ("the grievant") without the benefit of disciplinary proceedings, allegedly in violation of Article VI, Section 1(F) of the collective bargaining agreement between the parties ("the

Agreement").[1]

The grievant was appointed as a Community Assistant in the Department of General Services in 1985. As the title Community Assistant is classified in the non-competitive class of the civil service, the grievant was subject to a six-month contractual probationary period which he completed successfully. After approximately ten months of service, the grievant's title was changed to Community Liaison Trainee, which is a position in the competitive class. While serving provisionally in this title, the grievant was summarily discharged.[2]

[1]Article VI, Section 1(F) provides, in relevant part:

> [t]he term "Grievance" shall mean... [a] claimed wrongful disciplinary action taken against a non-competitive employee with six (6) months service in title....

[2]The job specification for the title Community Liaison Trainee provides that this title is in a "trainee" class of positions and is subject to a fixed one-year term, upon satisfactory completion of which a trainee is appointed as an Assistant Community Liaison Worker. Despite a discrepancy in the pleadings as to whether the grievant's status in the trainee title was "provisional" or "probationary", the two being mutually inconsistent, it is not disputed that while the grievant was serving as Community Liaison Trainee, he was subject to termination at the will of the employer.

Nature of the Controversy

In the proceeding before the Board, SSEU argues that the grievant's title change was a "nullity" because it was implemented without notice to the Union. The obligation to notify the Union allegedly derives from Article XII, Section 5 of the Agreement, which provides that:

> [t]he Employer agrees to make every reasonable effort to supply the Union with information regarding changes in working conditions, changes in job content, changes in programs, or functions prior to proposed implementation of such changes.

Respondent reasons that, on account of the violation of this provision, and the consequent invalidity of the title change, the grievant should be found to have been a Community Assistant at the time of his termination and, therefore, to have been entitled to the substantive and procedural protections afforded by Article VI, Section l(F).

SSEU asserts further that, although the grievant was informed that the change in his title was "required", his duties remained the same. The Union concludes, therefore, that the title change was unnecessary.

Respondent also argues that if an arbitrator agrees that there has been a violation of Article XII, Section 5 of the Agreement, he or she must conclude that the grievant

was entitled to the benefit of disciplinary procedures pursuant to Article VI, Section l(F). The Union concedes that the termination issue is not arbitrable unless the grievant is restored to the non-competitive title of Community Assistant.

As a remedy for the alleged contract violations, SSEU seeks an order directing the City to comply with the contract and restore the grievant to his Community Assistant position with "full back pay, status, and benefits ...."

Positions of the Parties

Petitioner's Position

In support of its petition challenging arbitrability, the City asserts that respondent has failed to demonstrate a nexus between the termination of the grievant and the provisions of the contract alleged to be violated. Petitioner argues that since Article VI, Section l(F) only permits the grievance of a "claimed wrongful disciplinary action taken against a non-competitive employee with six (6) months service in title," and the grievant in this matter was not a non-competitive employee at the time of his termination, there is no basis for arbitration under this section.

With respect to the Union's contention that the employer's failure to comply with a notice requirement found

in Article XII, Section 5 preserves the right to grieve under Article VI, Section l(F) because it renders the grievant's title change a nullity, petitioner argues that arbitration must be denied because the Union has failed to demonstrate a nexus between Article XII, Section 5 and the change in title. Assuming, arguendo, a nexus were established, the City asserts, respondent has failed to demonstrate that the remedy for a violation of that provision necessarily would involve restoring the grievant to his former title so as to enable him to grieve his termination under Article VI, Section 1 (F) .

Respondent's Position

SSEU refutes the City's contention that the Union has failed to demonstrate a nexus between the grievant's claims and the contract provisions alleged to have been violated, stating that "the required nexus ... is manifestly present."

Discussion

It is well-settled that the function of the Board on a petition challenging arbitrability is to determine whether the parties to the dispute are obligated to arbitrate their controversies and, if so, whether the particular controversy presented is within the scope of that obligation.[3]

[3]E.g., Decision Nos. B-33-87; B-6-86; B-9-83; B-2-69.

Where, as here, the petition is based upon an allegation that a contract provision relied upon by the party seeking arbitration is not the source of any rights claimed to have been denied, we have held that the burden is on the proponent of arbitration to demonstrate, prima facie, a nexus between the acts complained of and the contract provision invoked by such party.

In the present case, it is conceded that the arbitrability of the ultimate issue - the grievant's termination from the position of Community Liaison Trainee - requires, at a minimum, a finding in arbitration that the City's failure to notify the Union prior to changing the grievant's title constitutes a violation of the Agreement and that the appropriate remedy for such violation is to restore the grievant to his former position of Community Assistant. We must agree with petitioner, however, that respondent has failed to specify facts and circumstances which establish a connection between the alleged failure to notify the Union of a proposed change in the grievant's title and an obligation, pursuant to Article XII, Section 5, to "make every reasonable effort to supply the Union with information regarding changes in working conditions, changes in job content, changes in programs, or functions." Respondent has failed to allege any basis for a finding

that a mere title change could qualify as one of the changes as to which an obligation to notify the Union attaches. There is no allegation that the grievant's working conditions or job content have been changed. To the contrary, respondent states that the grievant continues to perform the same duties that he performed as a Community Assistant. Nor does the Union allege that there has been a change in "programs" or "functions" which required or otherwise was related to the grievant's title change. Without more, we cannot find that any relationship arguably exists between the grievance presented and any of the matters enumerated in Article XII, Section 5.

The request for arbitration therefore also must be denied insofar as it alleges a violation of Article VI, Section l(F) for, having failed to establish a right to arbitrate the first part of its grievance, respondent cannot establish a right to-arbitrate the second part. That is, it cannot demonstrate that the grievant was within the class of employees who may grieve a claim of wrongful disciplinary action under Section l(F). It may further be noted that, even if the grievant was a non-competitive employee at the time of his termination, the record before the Board does not indicate that the discharge was based upon reasons of misconduct or incompetence which would entitle such an employee to charges and a hearing under the

Agreement.[4]

We emphasize that, in the absence of any contractual or other limitation, the City retains the right, pursuant to Section 1173-4.3b of the New York City Collective Bargaining Law,

> to relieve its employees from duty because of lack of work or for other legitimate reasons; ... determine the methods, means and personnel by which government operations are to be conducted; ... and exercise complete control and discretion over its organization and the technology of performing its work.

Since the respondent in this matter has not persuaded us, and since we do not find, any provision in the Agreement which arguably limits management's right to change the grievant's title, we must deny the request for arbitration. our determination is, of course, without prejudice to any rights that the grievant may have in another forum.

[4]As noted above, respondent concedes that, in the civil service title of Community Liaison Trainee, the grievant was not entitled to any substantive or procedural rights upon termination. If is well-settled that neither a provisional nor a probationary employee has a right to a hearing prior to termination and that either may be terminated without stated reasons. See, Miller v. Ravitch, 60 N.Y. 2d 527, 470 N.Y.S. 2d.558, 458 N.E. 2d 1235 (1983) (probationary appointee); Ranus v. Blum, 96 A.D. 2d 1144, 467 N.Y.S. 2d 740 (4th Dep't. 1983) (provisional appointee); Civil Service Law §75.

Finally, it should be noted that, while we have consistently held that questions of contract interpretation are for an arbitrator to consider, we are required to examine the provisions of a contract to the limited extent necessary for our threshold determination of a question of arbitrability.[5] Based upon our examination of the clear language of Article XII, Section 5 of the Agreement in this case, we were unable to find a colorable basis for the grievant's claim thereunder or any ambiguity which itself would create the need for arbitral resolution.

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 petition challenging arbitrability filed by the City of New York and docketed as BCB-976-87 be, and the same hereby is, granted; and it is further

[5] See, e.g., Decision Nos. B-39-86; B-9-83.

ORDERED, that the request for arbitration filed by the Social Service Employees Union, Local 371 on behalf of the grievant, Jose Perez be, and the same hereby is, denied.

DATED: New York, N.Y.
October 26, 1987

ARVID ANDERSON
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

DEAN L. SILVERBERG
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER