Local 371, SSEU, 4 OCB2d 16 (BCB 2011)

(Arb) (Docket No. BCB-2893-10) (A-13511-10).

***Summary of Decision*:** The Union filed a Request for Arbitration alleging that DEP took wrongful disciplinary action against a member by discharging her from employment without providing her any disciplinary process, or, alternatively, wrongfully laying her off out of seniority order on the same date. The City challenged arbitrability on the ground that the Union failed to identify a provision in the parties' Agreement which grants non-competitive employees the right to arbitrate their dismissal prior to the end of their non-competitive probationary periods. The Board found that the Union has shown sufficiently the existence of a material issue as to the reasons for Grievant's termination to permit this matter to proceed to arbitration and directed the arbitrator to determine, in the first instance, whether Grievant was laid off for budgetary reasons during her probationary period, and whether the City adhered to the procedures set forth in the Citywide Contract. If the arbitrator finds that Grievant was laid off and that the City did not adhere to the relevant procedures, then he or she may proceed to make a decision on the merits of the layoff claim. If the arbitrator finds otherwise, the inquiry shall end there. Additionally, the Board granted the petition as it pertains to the Union's claims of wrongful discipline. **(*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 ENVIRONMENTAL PROTECTION,

Petitioners,

-and-

LOCAL 371, SOCIAL SERVICE EMPLOYEES UNION, on behalf of its member HEMILCED COSME,

Respondents.

DECISION AND ORDER

On September 13, 2010, the City of New York ("City") and the New York City Department of Environmental Protection ("DEP") filed a petition challenging the arbitrability of a grievance brought by Local 371, Social Service Employees Union ("Union") on behalf of its member Hemilced Cosme ("Grievant"). On June 24, 2010, the Union filed a Request for Arbitration alleging that DEP took wrongful disciplinary action against Grievant by discharging her from employment effective April 2, 2010, without providing her any disciplinary process, or, alternatively, wrongfully laying off Grievant out of seniority order on that same date. The City argues that the Union has failed to identify a provision in the parties' Agreement which grants non-competitive employees the right to arbitrate their dismissal prior to the end of their non-competitive probationary periods. The Board finds that the Union has shown sufficiently the existence of a material issue as to the reasons for Grievant's termination to permit this matter to proceed to arbitration and directed the arbitrator to determine, in the first instance, whether Grievant was laid off for budgetary reasons during her probationary period, and whether the City adhered to the procedures set forth in the Citywide Contract. If the arbitrator finds that Grievant was laid off and that the City did not adhere to the relevant procedures, then he or she may proceed to make a decision on the merits of the layoff claim. If the arbitrator finds otherwise, the inquiry shall end there. Additionally, the Board grants the petition as it pertains to the Union's claims of wrongful discipline.

BACKGROUND

The Grievant was initially employed by DEP in 2003 as a Clerical Aide. In July 2007, she was appointed to the position of provisional Assistant Community Liaison Worker. On January 3, 2010, her title was reclassified to the non-competitive title of Community Assistant pursuant to

Department of Citywide Administrative Services ("DCAS") Resolution No. 2009-13. (City Ex. 3, Union Ex. B.) According to DCAS, the purpose of the reclassification was to move provisional employees in the Community Liaison Occupational Group into existing noncompetitive-class community titles with corresponding duties. This was done as part of the City's plan to reduce the number of provisional employees working for the City and to reduce the number of competitive examinations required to be given.[1] Pursuant to Personnel Rule 5.2.1(b), new appointments to noncompetitive-class positions ordinarily are subject to a six-month probationary period. However, in recognition of the prior service of the provisional employees being reclassified, the DCAS Resolution waived three months of the probationary period in the new titles.[2] Thus, in accordance with § III(E) of the DCAS Resolution, employees in Grievant's reclassified title were subject to a three-month probationary period, effective January 3, 2010.

On April 1, 2010, Grievant was terminated from employment by DEP pursuant to a letter dated April 2, 2010. The termination letter stated, "Your services with [DEP] as a non-competitive Community Assistant are terminated effective the close of business April 2, 2010." The Union contends that the day prior to her receiving the termination letter, both the DEP Director for Public Affairs and Director for Community Partnership informed Grievant that she would be terminated for budgetary reasons.

On June 2, 2010, the Union filed a Step I grievance on Grievant's behalf. The Union framed the nature of the dispute as, "[A] [w]rongful disciplinary action, i.e., discharge from employment

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[1] Affidavit of Sherry Schultz, DCAS Director of Classification and Compensation, at ¶ 4 (City Ex. 4).

[2] *Id.* at ¶ 6.

effective on or about April 2, 2010, without due process rights; or wrongful layoff out of seniority order effective as of said date." The Union identified Article XVI, § 1 of the Citywide Contract and Article VI, § 1(f) and (6) of the Social Services and Related Titles Agreement ("Unit Agreement") as having been violated. Article VI, § 1(f) of the Unit Agreement defines a grievance as:

> A claimed wrongful disciplinary action taken against a full-time non-competitive class Employee with six (6) months service in title, except for Employees during the period of a mutually agreed upon extension of probation.

Article VI, § 1(b) of the Unit Agreement, relied on by the City herein, provides:

> . . . disputes involving the Personnel Rules and Regulations of the City of New York . . . shall not be subject to the grievance procedure or arbitration.

The Union claims that its citation to Article XVI, § 1 of the Citywide Contract, which does not address layoff procedures, throughout the grievance process, was in error and that it intended to refer to Article XVII, § 1 of the Citywide Contract as having been violated. Article XVII, § 1 states the general procedures an employer is required to follow where layoffs affecting full-time employees in competitive class, non-competitive class, and labor class titles are scheduled, including notice to the Union, meeting to confer about possible alternatives to layoffs, and procedures for transfers in lieu of layoffs.[3]

On June 11, 2010, the DEP Deputy Commissioner for Human Resources and Administration denied the grievance, stating that "At the time that Ms. Cosme was terminated, she was serving her probationary period and there was no disciplinary action taken." DEP denied the grievance on June

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[3] Although not cited by the parties, § 3 of Article XVII specifically addresses layoffs for budgetary or other reasons affecting employees in the non-competitive and labor classes. Pursuant to § 3(g), all employees in probationary status shall be laid off before any employees in the same title who have completed their probationary periods. Among probationers, layoff shall be in inverse order of the date of appointment.

16, 2010, and the Union filed a Step III grievance on June 17, 2010. The grievance was again denied and the Union filed a Request for Arbitration on June 24, 2010.

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union has failed to show a nexus between the act complained of and the source of the grievant's alleged due process rights. Pursuant to Article VI, § 1(b) of the Unit Agreement, disputes regarding the City's Personnel Rules and Regulations are exempt from the grievance procedure. The Personnel Rules and Regulations address, among other topics, the rules and terms of employees during their probationary periods. Personnel Rule 5.2.1(b) specifies that a probationary employee can be terminated prior to completion of probationary service upon the agency head's determination that the employee's conduct and performance are unsatisfactory.[4] Since the grievant was terminated before the completion of the three-month probationary period she was serving pursuant to Personnel Rule 5.2.1(b) and the DCAS Resolution, she was not entitled to due process under the Agreement. Since the Union has not pointed to another provision in the Agreement that grants grievant due process rights, the Request for Arbitration should be dismissed in its entirety.

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[4] Personnel Rule 5.2.1(b) provides:

> 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 commissioner of citywide administrative services. Appointees shall be informed of the applicable probationary period. However, such probationary period may be terminated by the commissioner of citywide administrative services or by the agency head before the end of the probationary period, and the appointment shall thereupon be deemed revoked . . . .

Union's Position

The Union argues that DEP, after having verbally informed grievant that she was being terminated from employment for budgetary reasons, failed to follow the layoff procedures of Article XVII, § 1 of the Agreement. DEP did not specify in its written termination notice to grievant that she was discharged because she did not successfully complete her probationary period. Any such claim at this time must be seen as pretextual, particularly because grievant had been performing the exact same duties, albeit in different titles due to the DCAS reclassification of her title, for almost three years. DEP's failure to follow the layoff procedures of Article XVII, § 1 of the Agreement when it terminated grievant violated that contractual provision and such violation is plainly arbitral. A similar grievance was sustained by an arbitrator in a 2002 award involving an employee serving in the same title.[5]

DISCUSSION

First, we address the issue of the provisions under which the Union has submitted this grievance to arbitration. Throughout the grievance process, the Union has contested Grievant's termination alternatively as a wrongful disciplinary action or a wrongful layoff out of seniority order. As to the portion of the grievance that alleges a wrongful layoff, the Union initially cited to Article XVI, § 1 of the Citywide Contract, which does not address layoffs. In its Answer, the Union pointed to Article XVII, § 1 of the Citywide Contract as having been violated regarding the claimed wrongful layoff. However, Article XVII § 1 consists of general layoff provisions that do not specifically

[5] The Union cites to the award in *SSEU, Local 371 on behalf of Amy Wilson v. City of New York, Bronx County District Attorney's Office*, OCB Case No. A-9320-02.

address the procedures for employees in probationary status. Rather, the layoff procedures for employees in probationary status are found in Article XVII, § 3(g)(i) of the Citywide Contract, which states that employees in affected non-competitive titles in the layoff unit shall be laid off in a certain order. Under Article XVII § 3(g)(i), all employees in probationary status in the same title are to be laid off first, and among the probationers, the layoff shall be in inverse order to the date of original appointment.

Considering the above, we shall construe the Union's grievance as claiming a wrongful layoff in violation of Article XVII, §3(g)(i), since the City was on notice of the nature of the opposing parties' claim throughout the grievance process. We will "not dismiss requests for arbitration because of technical omissions when a petitioner's ability to respond to the request or prepare for arbitration was not impaired." *Local 371, SSEU,* 3 OCB2d 53, at 6-7 (BCB 2010); *NYSNA*, 2 OCB 2d 32, 11 (BCB 2009) (citing *CWA*, 51 OCB 27, at 14 (BCB 1993), *affd*, *City of New York v. MacDonald*, No. 405350/93 (Sup. Ct. N.Y. Co. Sept. 29, 1994), *affd*, 223 A.D.2d 485 (1st Dept. 1996)). Thus, "if the party challenging arbitrability had clear notice of the nature of the opposing parties' claim prior to the submission of its request for arbitration, and therefore had an opportunity to attempt to settle the issue at the lower steps of the grievance procedure, the petition challenging arbitrability will be denied." *CWA*, 51 OCB 27, at 14 (City's challenge to arbitrability denied even though the union failed to cite to the pertinent contract language until it submitted its Answer).[6]

The NYCCBL explicitly promotes and encourages the use of arbitration, and "the

[6] *CWA* involved a grievance challenging out-of-title work, and the union clearly identified at the Step levels that the issue was whether its members were being assigned out-of-title duties. Thus, the City had clear notice of the claim.

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) whether the obligation is broad enough in its scope to include the particular controversy presented. In other words, whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement.

New York City District Council of Carpenters, UBCJA, 3 OCB2d 9, at 11 (BCB 2010) (citations and internal quotation marks omitted). The parties are contractually obligated to arbitrate disputes as defined by the Citywide Contract; thus, the first prong is satisfied.

Moving to the second prong, the Union asserts that the City took a wrongful disciplinary action against the Grievant, in violation of Article VI, §1(f) of the Unit Agreement. However, Article VI, § 1(f) specifically excludes probationary employees in its definition of a wrongful discipline grievance. Thus, the requisite nexus has not been shown between the subject matter of the dispute and the general subject matter of the Unit Agreement.

The Union also asserts that on the day before her employment was terminated, Grievant was told that she was being terminated for budgetary reasons. The City contends that since Grievant was terminated before the completion of her probationary period pursuant to the Personnel Rules, allegedly for reasons of conduct and performance, she is not entitled to due process under the

Agreement. Grievant's letter of termination does not specify for what reason her employment was terminated. If Grievant was laid off and the City failed to adhere to the procedures laid out in Article XVII, § 3(g)(i), the Union would be able to show the requisite nexus between the action of which they complain and Article XVII, § 3(g)(i) of the Citywide Contract. If the Grievant was terminated for reasons of conduct and performance, as the City asserts, the requisite nexus would not be demonstrated.

Accordingly we find that the Union is entitled to have an arbitrator make a threshold determination on whether Grievant was laid off for budgetary reasons, as she alleges, and whether the City adhered to the layoff procedures for probationary employees as set forth in Article XVII, § 3(g)(i) of the Citywide Contract.

We note, however, that we are not making a determination on whether Grievant was indeed laid off or whether the City adhered to the layoff provisions of the Citywide Contract. We only hold that the Union has shown the existence of a material issue as to the reasons for Grievant's termination to permit this matter to proceed to arbitration. Therefore, we direct the arbitrator to determine, in the first instance, whether Grievant was laid off for budgetary reasons during her probationary period, and, if so, whether the City adhered to the layoff procedures as set forth in the Citywide Contract. If the arbitrator finds that Grievant was laid off and that the City did not adhere to the relevant procedures, then he or she may then proceed to make a decision on the merits of the layoff claim. If the arbitrator finds otherwise, the inquiry shall end there. Accordingly, we grant the petition as it pertains to the Union's claim of a wrongful disciplinary action in violation of Article VI, § 1(f) of the Unit Agreement. However, we dismiss the petition to the extent the Request for Arbitration asserts a claim of wrongful layoff and failure to follow layoff procedures, in violation

of Article XVII, § 3(g)(i) of the Citywide Contract.

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 docketed as BCB-2893-10 is hereby denied as to the claim of wrongful layoff and failure to follow layoff procedures, in violation of Article XVII, § 3(g)(i) of the Citywide Contract, and it is further

ORDERED, that the Request for Arbitration filed by Local 371, Social Service Employees Union, docketed as A-13511-10, hereby is granted to the extent the Request for Arbitration asserts a claim of wrongful layoff and failure to follow layoff procedures, in violation of Article XVII, § 3(g)(i) of the Citywide Contract.

ORDERED, that the petition challenging arbitrability docketed as BCB-2893-10 is hereby granted as it pertains to the Union's claim of a wrongful disciplinary action in violation of Article VI, § 1(f) of the Unit Agreement, and it is further

ORDERED, that the Request for Arbitration filed by Local 371, Social Service Employees Union, docketed as A-13511-10, hereby is denied as it pertains to the Union's claim of a wrongful disciplinary action in violation of Article VI, § 1(f) of the Unit Agreement.

Dated: April 28, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER