City v, L.371, SSEU, 43 OCB 39 (BCB 1989) [Decision No. B-39-89 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of	:	
THE CITY OF NEW YORK,	:	
Petitioner,	:	DECISION NO. B-39-89
-and-	:	DOCKET NO. BCB-1128-89 (A-2913-88)
SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, AFSCME, AFL-CIO,	:	
Respondent.	:	

In the Matter of	:	
THE CITY OF NEW YORK,	:	
Petitioner,	:	
-and-	:	DOCKET NO. BCB-1129-89 (A-2954-88)
SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, AFSCME, AFL-CIO,	:	
Respondent.	:	

In the Matter of	:	
THE CITY OF NEW YORK,	:	
Petitioner,	:	
-and-	:	DOCKET NO. BCB-1132-89 (A-2957-88)
SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, AFSCME, AFL-CIO,	:	
Respondent.	:	

In the Matter of	:	
THE CITY OF NEW YORK,	:	
Petitioner,	:	
-and-	:	DOCKET NO. BCB-1135-89 (A-3003-89)
SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, AFSCME, AFL-CIO,	:	

Respondent.
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DECISION AND ORDER

On January 13, 1989, the City of New York (the "City") filed a petition, Docket No. BCB-1128-89, challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Social Service Employees Union, Local 371, AFSCME, AFL-CIO ("SSEU" or the "Union") on or about October 12, 1988, on behalf of grievant Clifford Blount.

On the same date, the City filed a second petition, Docket No. BCB-1129-89, challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the SSEU on or about November 28, 1988, on behalf of grievant Richard Campbell.

On January 17, 1989, the City filed a third petition, Docket No. BCB-1132-89, challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the SSEU on or about December 2, 1988, on behalf of grievant Angela Chevalier.

On February 6, 1989, the City filed a fourth petition, Docket No. BCB-1135-89, challenging the arbitrability of a grievance that is the subject of request for arbitration filed by the SSEU on or about January 25, 1989, on behalf of grievant Ramon Franco, Jr.

The Union's answers to the first three petitions were filed on March 16, 1989, and its answer to the fourth on

April 6, 1989. The City filed its respective replies on April 13, 1989.

Background

Grievants Blount, Campbell, Chevalier and Franco were formerly employed as provisionally appointed caseworkers with the Human Resources Administration ("HRA" or "Agency"). The SSEU's requests for arbitration allege that as a result of violations of the HRA's non-managerial performance evaluation procedure, these employees were wrongfully terminated and seek, as a remedy, the reinstatement of each grievant with back pay. The City contends that as "pure provisional" employees with less than two years of continuous service with the Agency, all four grievants lack standing to challenge the termination of their employment.[1]

The factual background for each arbitral request is as follows:

Clifford Blount

Mr. Blount was hired on September 21, 1987. On or

[1] On December 22, 1987, the City and District Council 37, AFSCME, AFL-CIO, entered into a Letter Agreement as an amendment to the "July 1, 1987 Citywide Agreement and Other Applicable Agreements." The Letter Agreement, effective July 15, 1988, amends the Citywide Agreement to include, in the definition of a grievance:

> A claimed wrongful disciplinary action taken against a provisional employee who has served for two years in the same or similar title or related occupational group in the same agency.

about April 25, 1988, he received an evaluation for the period of September 21, 1987 through March 31, 1988. On May 10, 1988, the grievant was terminated.

On or about May 20, 1988, Mr. Blount filed a Step II grievance alleging that the agency violated the rules and regulations of the non-managerial employee performance evaluation process in that he did not receive, at the beginning of the evaluatory period, requisite notice of the Tasks and Standards on which he would be evaluated.

On June 24, 1988, the Hearing Officer at Step II acknowledged that not providing the grievant with an opportunity to know the standards by which he would be evaluated is a violation of the agency's evaluation procedure and ordered the evaluation be expunged. However, because Mr. Blount was "a pure provisional employee," the Hearing Officer concluded that no contractual violation occurred and denied the grievance.

The Union's appeal at Step III, alleging that the Department failed to provide the appropriate remedy, was similarly denied on August 17, 1988. The Review Officer stated:

> As a pure provisional employee with less than two years of service,...the grievant lacks the entitlement to appeal the termination of his employ-ment. The appropriate remedy for the violation, which was acknowledged by the Department, has already been afforded the grievant, i.e., expungement of the deficient evaluation.

No satisfactory resolution of the dispute having been reached, the SSEU filed a request for arbitration of the

matter on October 12, 1988.

Richard Campbell

Mr. Campbell was hired on March 23, 1987. On or about July 23, 1987, he received an evaluation for the period of March 23, 1987 through May 15, 1987. On July 31, 1987, Mr. Campbell received the Tasks and Standards applicable to his position. On September 1, 1987, the grievant received another evaluation for the period of May 18, 1987 through August 30, 1987, which he refused to sign. Mr. Campbell was terminated on October 13, 1987.

On or about October 15, 1987, grievant filed a Step I grievance alleging that the agency violated the rules and regulations of the non-managerial employee performance evaluation process in that he did not receive, at the beginning of the May 18 - August 30, 1987 evaluatory period, requisite notice of the Tasks and Standards on which he would be evaluated.

No response having issued at Step I or Step II, the SSEU filed a Step III grievance with the Office of Municipal Labor Relations ("OMLR") on or about April 4, 1988. The determination of the Review Officer, dated October 25, 1988, stated:

> In the interest of sound labor relations, the Agency will immediately expunge the grievant's personnel file of the evaluation at issue, thereby resolving this aspect of the complaint. Resolution of this matter should not, however, be construed as acknowledgment by the Agency of a

> violation as alleged, or as a decision on the merits of the grievance.
>
> With respect to the grievant's requested remedy of restoration to his position as a provisional employee, the termination of Mr. Campbell's employment on 10/13/87 is governed exclusively by the Rules and Regulations of the New York City Personnel Director and, as such, is not subject to adjudication via the contractual grievance procedure.
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> Accordingly, the grievant's requested remedy of restoration to his provisional position is denied.

No satisfactory resolution of the dispute having been reached, the SSEU filed a request for arbitration of the matter on November 29, 1988.

Angela Chevalier

Ms. Chevalier was hired on July 14, 1986. Her employment was terminated on March 18, 1988. Ms. Chevalier had been evaluated only once during her 20-month period of employment, on a date more than six months prior to her termination, and she had received an overall rating of Superior at that time.

On or about March 21, 1988, Ms. Chevalier filed a grievance at Step I alleging that the Agency violated the HRA's non-managerial employee performance evaluation procedure as set forth in an OMLR memorandum dated February 2, 1988,[2] in that she did not receive a timely evaluation prior to her termination.

[2] The relevance of this document is discussed infra at 11.

No response having issued at Step I, the Union filed a Step II grievance on or about May 5, 1988. The Hearing Officer, upon finding the grievant to be a "pure provisional employee whose employment was subject to the discretion of the Agency and whose services were terminated for reasons other than incompetency," denied the grievance on June 20, 1988.

The SSEU filed a Step III grievance with the OMLR on or about July 20, 1988. The determination of the Review Officer, dated September 13, 1988, stated:

> The OMLR memorandum alleged by the Union to have been "violated" refers to appeal rights of certain provisional employees whose employment was terminated between 1/1 and 7/15/88. According to the Department's 6/20/88 Step II Determination in the matter, the grievant, a pure provisional employee, was employed 7/14/86 and dismissed 3/18/88. The OMLR memorandum cited by the Union is applicable only to certain provisionals who have been employed for at least two years; accordingly, it is inapplicable to the grievant, who served for less than two years.
>
> With respect to the Union's complaint that the Department failed to evaluate the grievant prior to dismissing her from employment, the Review Officer is aware of no such requirement that the Department do so nor did the Union cite any.
>
> In sum, as a pure provisional employee with less than two years of service, the grievant lacks standing to appeal the termination of her employment.

No satisfactory resolution of the dispute having been reached, the SSEU filed a request for arbitration of the matter on December 2, 1988.

Ramon Franco, Jr.

Mr. Franco was hired on September 28, 1987. On or about April 25, 1988, the grievant received an evaluation for the period of September 28, 1987 through March 31, 1988.

On May 3, 1988, Mr. Franco filed a grievance at Step II, alleging that the evaluation violated the HRA's non-managerial performance evaluation procedure in that, inter alia, he did not receive, at the beginning of the evaluatory period, requisite notice of the Tasks and Standards on which he would be evaluated. The grievance request, however, did not state the remedy sought.

On May 14, 1988, Mr. Franco's services were terminated.

On June 16, 1988, the Hearing Officer denied the grievance, finding "no deviation from the guidelines contained in the Non-Managerial Employee Performance Evaluation Manual [to] warrant the implied remedy sought."

On or about July 13, 1988, the SSEU filed a Step III grievance with the OMLR, claiming that the grievant's termination was based on a defective evaluation. Thus, the Union sought both rescission of the document and reinstatement of the grievant.

On November 3, 1988, the Review Officer at Step III ordered, in the interest of sound labor relations and without reaching the merits of the grievant's claim, that the evaluation be expunged. However, the requested remedy of reinstatement was denied inasmuch as the Hearing Officer determined that:

> [A]s a provisional employee, the termination of Mr. Franco's employment on 3/31/88 is governed exclusively by the Rules and Regulations of the New York City Personnel Director and, as such, is not subject to adjudication via the contractual grievance procedure.

No satisfactory resolution of the dispute having been reached, the SSEU filed a request for arbitration of the matter on January 25, 1989.

* * *

In the matters of grievants Blount, Campbell and Franco, the SSEU seeks to grieve an alleged violation of the HRA Non-Managerial Employee Performance Evaluation Manual promulgated in May, 1980 ("Manual"). The Union contends that the Agency's failure to abide by the Rules and Regulations governing the non-managerial employee performance evaluation process as set forth in the Manual entitles provisional employees to utilize the grievance procedure of the applicable collective bargaining agreement between these parties, pursuant to Article VI, Section 1 (B) therein.[3]

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[3] Article VI, Section 1 (B), entitled "Grievance Procedure," defines as a grievance, inter alia:

> A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; provided, disputes involving the Rules and Regulations of the New York City Personnel Director ... shall not be subject to the

The Manual is a 34-page document which constitutes the Agency's Rules and Regulations for assessment of the work performance of non-managerial employees, including employees holding titles by provisional appointment.[4] The overall performance evaluation process, as set forth in the section entitled "Steps In Performance Evaluation Process," includes the following major step:

> F. At the beginning of the evaluation period, the supervisor completes Section I and II of Form M-303a [the Non-Managerial Employee Performance Evaluation form] by entering employee information,...Tasks, and Standards comprising the appropriate [set of tasks chosen to evaluate employees in a particular Functional Title]. 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 [Department] Head or designee, who transmits a copy to the Office of Personnel Services, Division of Employee Relations (Manual at 4) (emphasis in original).

The Manual's detailed instructions for completion of Form M-303a, provides that at the beginning of the evaluation period, the employee to be evaluated must be given a copy of Form M-303a with Sections I and II completed.

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grievance procedure or arbitration.

[4] The Manual, at page 14, provides:

> Note: Non-probationary employees, whether permanent, non-competitive, or provisional are evaluated on an annual basis.

Section I of Form M-303a, identifies, inter alia, the employee, the evaluation period, the applicable civil service and functional titles, and the employee's civil service status, i.e., permanent, non-competitive or provisional.

Section II of Form M-303a, identifies, inter alia, the set of tasks, which generally number from four to six, on which an employee will be evaluated. In order to ensure that the evaluatee understands clearly what is expected of him, completion of Section II requires that both the Supervisor and the employee sign and date the form.

The SSEU asserts that the HRA's failure to follow the rules and regulations, inasmuch as these employees were not provided with prior notice of the Tasks and Standards on which they were to be evaluated, constitutes a basis upon which it may arbitrate their claims.

In the matter of grievant Angela Chevalier, SSEU alleges a violation of the non-managerial employee evaluation procedure insofar as it is governed by the written policy of the employer, as set forth in the February 2, 1988 memorandum from Robert W. Linn, Director, OMLR, to agency heads entitled "Contractual Disciplinary Grievance Procedure For Certain Provisional Employees" ("OMLR Memo"). The OMLR Memo was disseminated for the purpose of outlining the substance and procedural compliance aspects of the

Letter Agreement ("Agreement").[5]

The Union's request for arbitration on behalf of Angela Chevalier relies, not on the contents of the Agreement as the source of the right to grieve her claim but rather, on the OMLR Memo. The OMLR Memo, in relevant part, states:

> The Mayor has directed that every provisional employee who has or will have two years of continuous service by July 15, 1988 must be evaluated prior to June 1, 1988* and a decision made as to whether you intend to retain or terminate the employee. The City has agreed that evaluations which were completed more than six months ago may not be used at the sole basis for making a termination decision.
>
> * The [A]greement itself, however, does not require the evaluation of every employee whose services are to be terminated (emphasis added).

Positions of the Parties

City's Position

The City seeks an order by the Board of Collective Bargaining ("Board") denying all four requests for arbitration in their entirety. The City submits that the grievants are "not just challenging the alleged violation of the evaluation procedure but, in essence, [are] also

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[5] See note 1 at 3, supra.

challenging the termination of their employment." Regardless of any right provisional employees may have to challenge alleged violations of Agency policies or procedures, the City argues, because provisional employees with less than two years of service are not entitled to utilize the contractual grievance procedure to grieve their termination, the instant grievances are attempts "to carve out rights that simply do not exist for [these] employees."[6]

The City further submits that the sought after remedies of reinstatement and back pay are unavailable to even a wrongfully terminated provisional employee.[7] Citing NYC Health and Hospitals Corporation v. Local 2507 of District Council 37, 139 Misc.2d 376, 526 N.Y.S.2d 1002 (Sup. 1988), quoting Preddice, the City asserts that the "reinstatement of a provisional employee is but an illusory solution." (Id. at 1003.)

The City also relies heavily on Board Decision No. B-1-77, which involved a factually similar dispute between the instant parties. There, a provisional employee brought an

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[6] The City cites Preddice v. Callanan, 114 A.D.2d 134, 498 N.Y.S.2d 533 (A.D. 3rd Dept. 1986), aff'd, 69 N.Y.2d 288, 513 N.Y.S.2d 958 (Ct.App. 1987), as authority for the following well-established proposition:

> [P]rovisional employees have no expectation of tenure and rights attendant thereto except under the limited circumstances specified in the Civil Service Law §65(4) ... and therefore they may be terminated at any time without charges preferred, a statement of reasons given or a hearing held.

[7] The City cites Id, at 959; Ranus v. Blum, 96 A.D.2d 1144, 467 N.Y.S.2d 741 (A.D. 4th Dept. 1983); Serowick v. Barry, 91 A.D.2d 866, 458 N.Y.S.2d 368 (A.D. 4th Dept. 1982).

action seeking removal of evaluatory statements from his personnel record, reinstatement and back pay for an alleged bad faith termination. In that case, the City asserts, the Board:

> [B]ifurcated the issues and determined (1) the alleged violation of the evaluation procedures was a matter appropriate for arbitration while (2) the alleged improper termination resulting from the viola-tion of the evaluation procedures was not arbitrable.

Accordingly, the City contends that, "even assuming, arguendo, that there is an obligation to arbitrate the alleged violation of the instant grievants' contractual rights, i.e., the evaluation procedure," in the matters of Blount, Campbell and Franco, this obligation is rendered moot. The City submits that inasmuch as any reference to an evaluation or to any aspect of the evaluatory process has been expunged from the personnel records of grievants Blount, Campbell and Franco, there are no live controversies appropriate for submission to an arbitrator on behalf of these grievants.

Finally, with respect to grievant Chevalier, the City argues that the OMLR Memo, and the Agreement referred to therein, are wholly inapplicable. The City submits that the Agreement and the OMLR Memo, which do address the extension of a qualified contractual due process right to certain provisional employees, do not contemplate the expansion of such rights to provisionals with less than two years of continuous service. Therefore, with respect to the Union's assertion that the HRA failed to reevaluate Ms. Chevalier

prior to the termination of her services in accordance with the OMLR Memo, the City denies that any such requirement exists.

Union's Position

SSEU submits that all four grievants, as employees subject to the non-managerial employee performance evaluation procedures set forth in the Manual and the OMLR Memo, may maintain grievances alleging procedural violations thereof.

Contrary to the City's argument, the Union contends that, notwithstanding the sought after remedies of reinstatement with back pay, resolution of the instant disputes should not turn on whether the grievants, as provisional employees, may grieve their alleged wrongful terminations. Rather, the Union asserts, the question for the arbitrator in each case is whether the HRA violated the Agency's evaluation procedure and, if so, what is the appropriate remedy for that violation.

SSEU also maintains that the requested remedy of reinstatement is one that is within the power of the arbitrator to award in each of the instant matters. Unlike the court cases cited by the City, which denied the reinstatement of provisional employees despite violations of their rights, the Union argues that the source of the grievants' rights herein is the collective bargaining agreement rather than Section 65 of the Civil Service Law.

SSEU submits that the City, by agreeing to expunge the defective evaluations from the personnel records of grievants Blount, Campbell and Franco, in effect, conceded that the "HRA had violated the provisions of the Manual." Therefore, the Union argues, an arbitrator could well conclude that while the grievants, as provisionals, were at-will employees subject to discharge for legitimate non-discriminatory reasons, they could not be discharged on the basis of conduct which constitutes a violation of the collective bargaining agreement, i.e., an improper evaluation.

In an attempt to distinguish the Board's finding in Decision No. B-1-77[8] from the issues now before the Board, the Union suggests that:

> [H]ere there is a basis upon which an arbitrator could conclude that there exists in the collective bargaining agreement procedural safeguards with respect to termination guaranteed to provisional employees... (emphasis added).

SSEU bases its theory on the argument that "absent HRA's violations of the Manual the grievant[s'] performance evaluations would have been more favorable, resulting in [their] retention." Finally, with respect to grievant Chevalier, the SSEU contends that while the Agreement, effective July 15, l988, provides provisional employees with two years of continuous service a right to grieve an alleged

[8] Although the Union cites Decision No. B-3-76, it is clear from the text that its argument is in response to the City's reliance on Decision No. B-1-77.

wrongful disciplinary action, the OMLR Memo grants to provisional employees protections that the Agreement itself does not. In other words, SSEU argues, the OMLR Memo speaks to provisional employees who were terminated between February 2, 1988 - July 14, 1988, who would have completed two years of service by July 15, 1988. The Union argues that the OMLR Memo vests in them a right to be evaluated or reevaluated, as the case may be.

Accordingly, the Union asserts, because Ms. Chevalier would have completed two years of continuous service prior to July 15, 1988, failure of the Agency to reevaluate her work performance prior to her termination on March 18, 1988, in accordance with the OMLR Memo, constitutes an arbitrable grievance under the collective bargaining agreement.

Discussion

There is no dispute that the City and the SSEU are obligated to arbitrate matters defined as "grievances" pursuant to Article VI, Section 1 (B) of the collective bargaining agreement.

However, without conceding liability, the City argues that even assuming, arguendo, there is an obligation to arbitrate the alleged violation of other contractual rights, because the Union cannot point to any provision of the contract, the Agreement, or the OMLR Memo which provides an arguable basis upon which provisional employees may challenge the termination of their employment, the absence or mootness of

a remedy must dictate the Board's resolution of these disputes.

In contrast, SSEU asserts that should we find that the instant requests state arguable violations of the collective bargaining agreement, our inquiry as to the question of arbitrability should end there, leaving the issue of remedy for the arbitrator.

As a preliminary matter, we note that provisional employees are not precluded, on account of their provisional status, from asserting an arbitrable claim on the basis of rights derived from the contract between the parties.[9] Furthermore, we have often stated that once the Union cites a rule, regulation, written policy or order which it claims has been violated, and demonstrates an arguable relationship between the acts complained of and the source of the alleged right, it thereby satisfies the elements of arbitrability to the extent they are considered by the Board.[10]

In several prior disputes between the instant parties, we concluded that the Manual constitutes a written policy of the Agency.[11] SSEU alleges, and the City does not deny,

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[9] It is well-settled that under the Civil Service Law, the rights of provisionally appointed employees are limited. However, it is equally clear that the law does not prohibit the City and a public employee representative from contractually expanding the rights of provisional employees. See Decision Nos. B-1-77; B-8-74; B-4-72.

[10] See e.g., Decision No. B-3-83.

[11] Decision Nos. B-12-86; B-6-86; B-38-85; B-31-82.

that the HRA failed to follow the procedures set forth in the Manual for proper completion of the evaluations of grievants Blount, Campbell and Franco. Therefore, we find that inasmuch as provisional employees are expressly subject to the procedures therein, the Union has stated a claim which is arguably within the ambit of the grievance and arbitration clause of the contract with respect to these grievants.

We also note that no dispute exists as to whether the OMLR Memo constitutes a written policy of the employer. In any event, we have always made such determinations on a case-by-case basis and find, here, that the memorandum substantially meets the criteria we applied in past decisions when documents of this nature were put into issue.[12] In Decision No. B-3-83, we considered whether an internal memorandum from the Assistant Director of Personnel Employee Relations and Training of the Bureau of Child Support to all Borough Directors on the subject of "salary adjustments for non-managerial employees" constituted a written policy. This memorandum set forth the guidelines to be utilized in the selection of candidates for merit increases. There, we stated:

> [W]hen a public employer adopts a rule, regula-tion, written policy or order as to a subject, that subject, to the extent so covered, becomes arbitrable under most contracts of the City and municipal union pursuant to standard

[12] See e.g., Decision Nos. B-28-83; B-3-83; B-34-80.

> language such as is set forth in Article VI, Section (1) B of the instant contract rendering non-compliance with written policies and regulations grievable and arbitrable.

Accordingly, we found that the City's alleged failure to adhere to the guidelines set forth in the memorandum formed the basis of an arbitrable claim.

In the instant matter, the OMLR memorandum, in relevant part, directed Agency Heads to undertake a specific course of action during the period of February 2, 1988 through June 1, 1988. Even though not required for compliance with the Agreement, the OMLR Memo adopted the Mayor's order "that every provisional employee who has or will have two years of continuous service by July 15, 1988 ... be evaluated and a decision made as to whether [the Agency intends] to retain or terminate the employee." A plain reading of the memorandum permits the inference that all provisional employees who would have had two years of continuous service by July 15, 1988, were entitled to an evaluation prior to their termination. Inasmuch as the Union has demonstrated that Ms. Chevalier falls within the class of employees to whom the memorandum is arguably addressed, it has stated an arbitrable claim.

Our conclusions herein are consistent with the New York City Collective Bargaining Law and our long-standing policy in favor of arbitral determination of disputes.[13] However, we are mindful of our determination in Decision No. B-1-77,

[13] See NYCCBL §12-302 and Decision Nos. B-25-83; B-41-82; B-15-82; B-19-81; B-1-75; B-8-68.

where we were asked to resolve a similar dispute.[14] There, as the City points out, we found that the grievant's Civil Service status as a provisional employee was relevant to the issue of arbitrability of a claim of improper termination. We held that even though the grievant was entitled to grieve the alleged denial of his contractual rights under Article X[15] and ordered arbitral review of that aspect of the grievance, since we could find no contractual provision concerning the retention or termination of a provisional employee, we held that the claim of improper termination was not arbitrable.

In an attempt to distinguish Decision No. B-1-77 from the instant matters, the Union argues that an arbitrator could well conclude that the procedures of the Manual and the OMLR Memo afford provisional employees procedural safeguards with respect to termination. In any event, SSEU urges, because the Agency used improper evaluations as a basis for discharging grievants Blount, Campbell and Franco, an arbitrable issue remains as to whether the remedy afforded to them was appropriate.

We are in partial agreement with both of the Union's

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[14] The statement of the grievance to be arbitrated in Decision No. B-1-77 read as follows:

> Grievant was improperly terminated. Evaluatory statements of which he was not made aware prior to termination, were placed in his personnel file.

[15] Article X required the employer to give an employee the opportunity to respond to any evaluatory statements of his work performance if such statements were to be placed in his permanent personnel folder.

arguments. With respect to Ms. Chevalier, whether the OMLR Memo was intended to provide her with a right to be reevaluated prior to her termination, goes to the merits of the claim and, thus, is a matter for an arbitrator.[16] Inasmuch as there is at least an arguable relationship between the subject of Ms. Chevalier's grievance and the policy upon which the Union relies, our threshhold arbitrability test has been met. The effect to be given the OMLR Memo, whether it does, in fact, confer the right alleged, goes to the interpretation of the intent and application of the memorandum and is a matter appropriate for resolution in arbitration.

As to the latter argument, whether the City's removal of the allegedly deficient evaluations from the personnel files of these grievants afforded the only remedy available to grievants Blount, Campbell and Franco and by reason thereof moots the issue, is also a question for the arbitrator.[17] We have long held that arguments addressed to questions of remedy are not relevant to the arbitrability of grievances.[18] Neither is the propriety of the remedy sought by the Union.[19]

Moreover, the parties should not anticipate that an

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[16] See Decision Nos. B-10-86; B-1-76; B-25-72.

[17] Decision Nos. B-7-88; B-9-71.

[18] Decision Nos. B-7-88; B-4-85; B-32-82; B-22-81; B-14-74; B-5-74; B-2-71.

[19] Decision No. B-2-71.

arbitra-tor will fashion improper, illegal or inappropriate relief. Our ruling upholding the arbitrability of these disputes only affords an arbitrator the opportunity to consider a remedy and fashion one, if needed, appropriate to the circumstances and within the limits of applicable law.[20]

In this respect, the relief, if any, that may be granted these provisional employees would be confined to accomplishing the limited purpose of adherence to the non-managerial employee performance evaluation procedures the City adopted as part of its decision-making process and under which is it arguably contractually bound. Moreover, we recognize that the courts have held and that the law applicable to these disputes is that provisional employees are not entitled to back pay.[21] Thus, in no event shall such a remedy have the effect of creating job retention or due process rights, in these individuals, that are greater than those enjoyed by similarly situated provisional employees under the Civil Service Law.

Accordingly, we shall grant the SSEU's requests for arbitra-tion of the matters docketed as BCB-1128-89 (Blount), BCB-1129-89 (Campbell), BCB-1132-89 (Chevalier) and BCB-1135-89 (Franco), with the limitations described above.

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[20] Decision Nos. B-7-88; B-14-81; B-2-78.

[21] Preddice v. Callanan, supra, note 6, at 12; Ranus v. Blum, supra, note 7, at 13.

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 Union's requests for arbitration, with the limitations described above, be and the same hereby are, granted and it is further

ORDERED, that the City's petitions challenging arbitrability be, and hereby are, dismissed.

DATED: July 19, 1989
New York, New York

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD SILVER
MEMBER