City v. L.2627, DC37, 43 OCB 49 (BCB 1989) [Decision No. B-49-89 (Arb)]

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

-between-

DECISION NO. B-49-89

THE CITY OF NEW YORK,

DOCKET NO. BCB-1175-89 (A-3089-89)

Petitioner,

-and-

DISTRICT COUNCIL 37, LOCAL 2627
AFSCME, AFL-CIO,

Respondent.
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DECISION AND ORDER

On June 9, 1989, the City of New York, appearing by its Office of Municipal Labor Relations ("the City") filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration, which was submitted by District Council 37, Local 2627, AFSCME, AFL-CIO ("the Union") on or about January 3, 1989. The grievance contests the involuntary termination of a provisional employee on the second anniversary of his employment with the Department of Correction ("the Department"). The Union filed its answer on June 30, 1989. The City filed a reply on August 18, 1989. The Union filed a rebutting affidavit on August 31, 1989.

BACKGROUND

John Moses ("the grievant") was hired as a provisional Computer Associate by the Department of Correction on February 2, 1987. Throughout his time of employment with the Department, the "preponderance" of his tours, according to the City, were from 9:00 a.m. to 5:00 p.m., although he also may have worked from 8:30 a.m. to 4:30 p.m., and from 9:30 a.m. to 5:30 p.m. on various occasions. On February 1, 1989, sometime after 5:00 p.m., but before he had left his work site, the grievant accepted a hand-delivered letter advising him that "[e]ffective Wednesday, February 1, 1989 close of business, your services as a Provisional Computer Associate (Software) with the New York City Department of Correction will be terminated." The parties dispute the exact hours that he was scheduled to work on that day.[1]

On or about February 9, 1989, the Union, in behalf of the grievant, filed a Step II grievance, claiming that his termination was in violation of the "Due process - Provisional"

[1] In the rebutting affidavit, the grievant attests that his shifts never varied from 9:00 a.m. to 5:00 p.m., and that, on February 1, 1989, he finished work at 5:00 p.m., but that he stayed on the premises until approximately 5:20 or 5:30 because "my supervisor had asked me to 'stick around.'"

agreement between the City and the Union,[2] as well as in violation of various other provisions of the parties' unit contract, the City-wide Contract, and "any other applicable rules/regulations/policies law, etc." concerning termination of employment without due process. The Grievance was denied at Step II on the ground that the matter was outside the contractual definition of a grievance.

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[2] The terms of the agreement, referred to herein as the "Due Process agreement," were set forth in a letter from the Director of the Office of Municipal Labor Relations to the Executive Director of District Council 37 ("Linn letter"), dated December 22, 1987, which reads, in pertinent part, as follows:

> This is to confirm our mutual understanding and agreement regarding the resolution of your bargaining demand in the negotiations for the agreement successor to the 1984-87 Citywide Agreement and other applicable agreements which seeks due process rights for provisionals.
>
> The Citywide Agreement and other applicable agreements shall be amended to include: a contractual due process procedure effective July 15, 1988 for provisional employees who have served for two years in the same or similar title or related occupational group in the same agency. Standard amending language to be added to the applicable agreements is attached hereto.

Both parties submitted identical copies of a "Standard Unit Contract Article VI - Grievance Procedure," which sets out a disciplinary procedure for provisional employees, and both identified it as the attachment referred to in the Linn letter.

On or about March 8, 1989, the Union appealed the grievance to Step III. On or about May 10, 1989, the grievance was denied at Step III by the Office of Municipal Labor Relations, after it found that:

> The Review Officer has been advised by the agency that the complainant is a pure provisional employee with less than two years of service. As such, the complainant has no standing to appeal the termination of his employment.

With no satisfactory resolution of the grievance having been reached, the Union immediately filed a request for arbitration. The request continued to claim that the grievant's termination was in violation of the Due Process agreement, as well as Article VI, Section 1 of the "Accounting and EDP Contract" ("Unit Agreement"), which is identical to the attachment referred to in the Linn letter, and Article XV of the City-Wide Contract, which is a standard grievance resolution procedure. As a remedy, the Union requested "[i]mmediate reinstatement and return to work, full back pay with interest and benefits, and any other action required to make the grievant whole."

POSITIONS OF THE PARTIES

City's Position

The City maintains that it is under no obligation to arbitrate the grievant's termination in this case because, at the time that he received the termination notice, the grievant had not yet acquired the status of an employee covered by the Due Process agreement. Therefore, according to the City, there exists no nexus between the termination and a contractual provision through which arbitration can be gained.

The City bases its position upon its interpretation of the December 22, 1987 Linn letter agreement, which grants due process rights to provisional employees who have served for two years, and upon its understanding of how time accrues under the agreement. The City does not dispute that the grievant was hired on February 2, 1987, nor does it deny that the provisions of agreement would have become effective for him on February 1, 1989. It argues, however, that, inasmuch as the Department of Correction is a twenty-four hour per day operation, the accrual period did not expire until midnight of February 1, which is when the Department's close of business actually occurred. According to the City, the meaning of the agreement is plain, and, it

asserts, this Board has long held that when contractual language is clear and unambiguous on its face there is no need to look to the intent of the parties or to other provisions of the contract to aid in the interpretation of the clause at issue.

The City further contends that, even assuming that the grievant's Due Process agreement rights "ripened" at the end of his tour rather than at midnight on February 1, 1989, the termination notice was given to him before he signed out at 5:30 p.m.. Therefore, it argues, the grievant actually was notified before his tour ended that day, which was "prior to the ripening of any provisional rights status."

The City supports its accrual calculation by citing a New York Court of Appeals memorandum decision, upholding a First Department ruling, in a case involving a probationary New York City police officer.[3] The decision found that the services of the officer, whose probation period expired on midnight July 31, were properly terminated, even though he did not actually receive a termination notification until the afternoon of August 1. According to the City, this result should similarly apply to provisional employees, who, it argues, may be properly terminated even if the time limits of the Due Process agreement appear not to have been followed exactly.

Finally, the City argues that the Union has failed to

[3] Going v. Kennedy, 5 N.Y.2d 900, 183 N.Y.S.2d 81 (1959).

demonstrate a nexus between the termination of the grievant's services and Article VI, Section 1 of the Unit Agreement. According to the City, the standard amending language attached to the Linn letter has not yet been incorporated in the collective bargaining agreement between the Department of Correction and Local 2627. Therefore, the City contends, inasmuch as no provisional rights language exists in the Unit Agreement, the Due Process agreement cannot serve as the basis for the Union's claim.

Union's Position

The Union maintains that on February 1, 1989, the grievant's tour of duty ended at 5:00 p.m., and that he was not served with the termination letter until sometime thereafter. In its view, the arbitral issue focuses simply on the question of whether the grievant was entitled to protection under the Due Process agreement, and more specifically, whether he already had completed the requisite two years of service before he was terminated.

The Union rejects the City's claim that the termination letter was timely because it was served before the Department's close of business occurred at midnight, maintaining that the

grievant completed his work at 5:00 p.m., and arguing that, for purposes of determining his time in service, the Department's close of business time and its hours of operation are irrelevant. The Union notes that the Due Process agreement contains no reference to an agency's close of business time, and that it refers only to the time served in title and in the same agency by a provisional employee.

The Union also rejects the City's argument based on the case of Going v. Kennedy, maintaining that a termination under a provision of the Civil Service Law is inapposite to this case, which depends upon the interpretation of a contractual agreement between the two parties. Moreover, according to the Union, the rule which evolved from Going and from later cases, is that strict compliance with time in cases concerning termination of probationary employees may not always be necessary, provided that a termination notice is mailed or that service is attempted before the probationary period expires. In the instant case, the Union contends, the Department allowed the grievant's two-year due process rights to ripen without ever attempting to make service, reiterating that the termination notification was given to the grievant only after his work day had ended on February 1, 1989.

Finally, the Union denies the City's claim that the Due Process agreement has not yet been incorporated into the Unit

Agreement. It argues that the standard unit contractual language was attached to the Linn letter agreement dated December 22, 1987, and that it became effective immediately upon signing. According to the Union, no further action was required to incorporate the language into the Unit Agreement.

DISCUSSION

It is well established that it is the policy of the New York City Collective Bargaining Law to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[4] However, we cannot create a duty to arbitrate where none exists nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[5]

The issue that we must decide in this case concerns the question of nexus between the grievant's termination of employment and the Linn letter of December 22, 1987, which established due process rights for certain provisional employees. Where the City has challenged nexus in an arbitrability proceeding, the Union bears the burden of showing that a prima

[4] E.g. Decision Nos. B-41-82; B-15-82; B-19-81; B-1-75; B-8-68.

[5] Decision No. B-41-82 and B-15-82.

facie relationship exists between the act complained of and the source of the alleged right, redress of which is sought through arbitration.[6]

The City challenges the Union's request for arbitration on three grounds: First, it contends that the accrual time did not "ripen" until the end of the grievant's tour of duty on February 1, 1989, and that he received notice before the end of his tour. Second, that in any event, the Department had until midnight of February 1 to terminate the grievant's employment because the Department of Correction operates twenty-four hours per day and, therefore, the close of business does not occur until midnight regardless of when a particular employee's tour ends. Third, that the immediate parties, the Department of Correction and Local 2627, are not bound by the terms of the Due Process agreement because it allegedly has not been formally incorporated into their Unit Agreement.

We are satisfied that the Union has established the necessary prima facie relationship, or nexus, between the grievant's termination and the Due Process agreement to support its request for arbitration. We believe that the issues raised by the City require a factual determination or a determination of the parties' intent, and we have long held that it is not

[6] See, Decision Nos. B-47-88; B-5-88; B-16-87; B-35-86; B-8-82; B-15-79; and B-1-76.

properly a function of this Board to delve into the merits of a case.[7] Once a prima facie relationship has been shown, the final resolution of whether the grievant is entitled to the contractual benefit cited by the Union is a matter that is beyond our jurisdiction, and is exclusively for an arbitrator to decide.[8]

With regard to the incorporation issue, the parties do not dispute that the City and District Council 37, in behalf of all employees who are subject to the city-wide Career and Salary Plan, including members of Local 2627, reached an agreement on the terms of a due process procedure for provisional employees, reflected by the Linn letter of December 22, 1987. The parties also agree that the model contract language attached to the Linn letter, entitled "Standard Unit Contract Article VI - Grievance Procedure" would be the language that all units subject to city-wide bargaining would have to incorporate into their unit agreements. Inasmuch as Local 2627 does not bargain in its own behalf on city-wide issues, and because there is no allegation of a special and unique circumstance that would entitle the local to bargain for a modification of the Due Process agreement at the unit level, it seems unlikely that the agreement did not automatically become effective for eligible members of Local

[7] Decision Nos. B-63-88; B-36-88; B-30-86; B-27-86; B-31-85; B-1-75; B-18-72 and B-12-69.

[8] Decision Nos. B-35-89; B-18-83; B-5-77 and B-5-76.

2627. Nevertheless, we leave it for the arbitrator to decide whether, in fact, the parties are bound by the agreement, and whether it has been incorporated into their unit contract.

Moreover, we note that the request for arbitration claims a violation of the Due Process agreement itself, as well as the unit contract. It is arguable that the Union's claim arises under the City-wide Agreement, as amended by the Due Process agreement, regardless of whether that agreement has been further incorporated into the unit contract. This issue, as well, is one for an arbitrator to determine.

The question of whether the grievant's tour of duty ended at 5:00 p.m. or 5:30 p.m. is a factual one concerning the merits of the grievance which is not for this Board to resolve. Similarly, the question of whether "served for two years" means service until the end of an employee's normal work day, or service up to the agency's close of business for the day, concerns the intent of the parties, which must also be decided by an arbitrator.

After carefully reviewing the Linn letter and its attached model contract language, it is apparent to us that the Due Process agreement for provisional employees has created a new and unique employment relationship for those employees who are covered by the agreement -- a relationship that is markedly different from any other class of civil service employment. Because this new employment relationship is unique, and because

it is a product of a negotiated agreement rather than a statute, we think that it is inapposite for the parties to rely upon case law that developed out of probationary employment disputes based upon §63 of the Civil Service Law.

The case of Going v. Kennedy, cited by the City in this case, illustrates the shortcoming of equating probationary employment with provisional employment subject to the Due Process agreement. Peter Going was appointed to the New York City Police Department on February 1, 1955, and he was required to serve a six month probationary period. His employment was terminated effective July 31, 1955 on medical grounds, but he did not receive a letter of dismissal until August 1. Although the Appellate Division found that the notice was timely served, the decision was based upon a finding that Going did not work on July 31 because he was given the day off, and that the Police Commissioner, upon realizing that Going was not working, immediately attempted to deliver the letter to Going at his home. Thus, the Court found, the Department had made a good faith attempt to comply with the notification requirement.[9]

A central issue in the Going decision, however, is the Court's analysis of the employment relationship that exists for probationary employees. Relying upon an early Court of Appeals

[9] Application of Going, 5 A.D.2d 173, 170 N.Y.S.2d 234 (1958).

ruling,[10] the Going court re-affirmed the principle that "the appointing power is authorized to terminate the employment of any unsatisfactory [probationary] employee only at the end of the probation period," because "the probationary term may be said to be a further and additional test to which an applicant is subjected before he may obtain permanent status and to meet this test the probationer is entitled to serve the entire term." [Emphasis added.] Recognizing that the "window period" for termination would thus open only on the final day of the probationary period, the Court reasoned that strict compliance would be impossible in every case where a probationary employee was not at his or her place of work on the last day of the probationary term.

Although the Rules and Regulations of the City Personnel Director, which became effective in 1977, may have modified the job preservation right for some classes of probationary employees in New York City, the Going decision has not been overturned. It still serves to point out the significant distinction between probationary employees, who enjoy a limited right to keep their employment during their probationary period, and provisional employees, who may be terminated at any time without cause prior to the completion of their second year of employment. In this

[10] People ex rel. Kastor v. Kearney, 164 N.Y 64, 74 N.Y.S. 391 (1900).

case, a further distinction also exists, inasmuch as the instant grievant evidently was at his place of work during the entire day of his second anniversary, and he apparently could been given the termination notice well before the end of his tour.

For all of the above reasons, we shall grant the Union's request for arbitration in the matter of the termination of the provisional employment of John Moses by the Department of Correction.

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 filed by the City of New York, and docketed at BCB-1175-89, be, and the same hereby is, dismissed; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 2627, AFSCME, AFL-CIO, in Docket No. BCB-1175-89 be, and the same hereby is granted.

DATED: New York, N.Y.
September 13, 1989

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