Cty v. L.371, SSEU, 45 OCB 10 (BCB 1990) [Decision No. B-10-90 (Arb)]

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

-between-

THE CITY OF NEW YORK, Decision No. B-10-90

Petitioner, Docket No. BCB-1184-89
(A-3128-89)

-and-

LOCAL 371, SOCIAL SERVICE
EMPLOYEES UNION,

Respondent.
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DECISION AND ORDER

On July 19, 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. The request was filed by Local 371 of the Social Service Employees Union ("the Union") on or about June 26, 1989. The grievance contests the involuntary termination of a per diem employee by the New York City Human Resources Administration ("HRA"). After receiving several extensions of time in order to obtain payroll records, the Union filed an answer to the petition on January 19, 1990. The City filed a reply on February 1, 1990.

Background

Nathaniel Sims ("the grievant") was hired as an Institutional Aide by the New York City Human Resources Administration on February 14, 1986. The grievant was discharged without advance notice or a "due process" hearing on or about July 18, 1988.

On or about August 12, 1988, the Union, in behalf of the grievant, filed a Step II grievance with the Administrative Officer of the HRA seeking reinstatement. The grievance claimed that, having been appointed on February 14, 1986, the grievant should have been "annualized" under an "Agreement re Institutional Aides" ("the Institutional Aides Agreement"), in which case he

should have been "entitled to contractual due process prior to the imposition of a disciplinary penalty."

The Institutional Aides Agreement was memorialized by a letter dated March 2, 1987 from Office of Municipal Labor Relations Director Robert W. Linn to District Council 37 and Local 371 of the Social Service Employees Union, and reads, in pertinent part, as follows:

> Effective July 1, 1986 per diem Institutional Aides who have completed twelve (12) months of service working at least 35 hours per week during those twelve months shall be annualized at the completion of 12 months of service.

The letter was amended and clarified by a subsequent letter of interpretation from the Director, dated January 14, 1988, that reads, in pertinent part, as follows:

> By letter dated March 2, 1987 it was agreed that certain Institutional Aides in HRA's divisions of Family and Adult Services and Crisis Intervention Services would be annualized. Pursuant to discussions with representatives of HRA and Local 371 it is agreed that the March 2, 1987 letter shall be interpreted as follows:
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> 1. The annualization of "full time" per diem Institutional Aides is not limited to FAS and CIS. If other divisions of HRA hire per diem Institutional Aides who are regularly assigned to work 35 or more hours per week, those IA's will be annualized on the same basis as detailed in the March 2, 1987 letter to the extent that HRA has the appropriate budget authorization and budget lines.
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> 2. In determining the 12 months of service necessary for annualization, breaks in service of less than 31 days or time on an approved leave shall not constitute a break in service, but time not in a pay status shall not count in calculating the 12 months.
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> * * *
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> 4. Upon annualization the IA's shall serve a six (6) month probation period.

On or about October 11, 1988, a Step II decision was issued by the Deputy Administrator of the HRA denying the grievance on the grounds that management's failure to annualize the grievant was consistent with the provision of the Institutional Aides Agreement. According to the decision, the grievant was not considered eligible for annualization because "he has not been a full-time per diem employee for 12 continuous months."

On or about October 20, 1988, the grievance was appealed to Step III. On or about April 5, 1989 a step III decision was issued denying the grievance. The decision found that the grievant did not meet the criteria set forth in the Institutional Aides Agreement because he failed to work the required number of hours to be considered annualized. Without annualization, he was held not to be entitled to contractual due process rights.

With no satisfactory resolution of the grievance having been reached, the Union filed a Request for Arbitration on or about June 26, 1989. The request alleges that the City violated the agreements of March 2, 1987 and

January 14, 1988, by failing to annualize the grievant and terminating him without contractual due process. The remedy requested is an immediate return to work, full back pay plus interest and that in all other ways he be made 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 assertedly there exists no nexus between the termination and an agreement or a contractual provision through which arbitration can be gained. The City cites a number of decisions to show that this Board has held that where arbitrability is challenged, we will inquire whether there is a nexus between the alleged wrong complained of and the cited contractual provision.[1]

According to the City, with respect to the Institutional Aides Agreement, this nexus does not exist because, at the time that he had received the termination notice, the grievant had not yet acquired the status of an "annualized" employee. The City bases its position upon its interpretation of the Agreement, and upon the grievant's time and leave records. It maintains that the grievant's status changed from full-time to part-time in September of 1986, and that he worked part-time for eight of the twelve months in 1987. According to the City, inasmuch as the grievant failed to work the twelve (12) continuous months required by the agreement for annualization, he lost any right he might have had to become annualized, and thus he was not entitled to contractual due process rights.

The City concludes that the HRA, in terminating the grievant's employment, merely exercised its statutory managerial prerogative to relieve

[1] Decision Nos. B-9-83; B-41-82; B-8-82; B-8-81; B-7-81; B-21-80; B-7-79; B-3-78 and B-1-76.

an employee from duty for legitimate

reasons, as provided by Section 12-307b. of the New York City Collective Bargaining Law.[2]

Union's Position

The Union maintains that the grievant worked a sufficient number of hours to have been annualized as provided by the Institutional Aides Agreement. Consequently, the Union contends, on the date he was notified of his termination, the grievant was entitled to service of written charges and due process, as provided in Article VI of the collective bargaining agreement.[3]

The union argues that, at very least, there exists a factual

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[2] Section 12-307b. of the NYCCBL, provides, in pertinent part, as follows:

> It is the right of the city, or any other public employer, acting through its agencies, to . . . relieve its employees from duty because of lack of work or for other legitimate reasons; . . .

[3] Article VI, Section 1. of the parties' collective bargaining agreement defines a grievance, in pertinent part as:

> (E) A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(i) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status.

dispute as to whether the grievant did, in fact, complete twelve months of service working at least 35 hours per week so as to be annualized under the Agreement, and that the Grievant should be afforded an opportunity to establish before an arbitrator that he has satisfied this requirement.

The Union bases its position upon its interpretation of the March 2, 1987 letter memorializing the Agreement, the January 14, 1988 amended interpretation, and upon the grievant's pay stubs, dating from October 23, 1986 to August 5, 1988. The union notes that the Agreement provides that per diem Institutional Aides "shall be annualized at the completion of 12 months of service." In its review of the grievant's pay stubs, the Union maintains that the stubs dated October 23, 1986, November 20, 1986 and December 4, 1986 all show the grievant working at least 35 hours a week. The Union also claims that at least eight pay stubs reporting 1988 wages reflect that the grievant worked for more hours than he was paid during these periods.[4] According to the Union, this unpaid work indicates that the HRA made timekeeping errors, and that the grievant's time and leave records may be inaccurate. Finally, the Union notes that the stub dated August 5, 1988 reports overtime earnings. It claims that this overtime would not have been paid if the grievant had worked less than 35 hours per week, as alleged by the City.

According to the Union, the pay stubs demonstrate that the grievant actually worked a sufficient number of full-time weeks to become annualized, and that he would have been annualized but for errors or omissions by the HRA in maintaining the grievant's time and leave records.

DISCUSSION

It is well established that it is the policy of the New York City

[4] The Union refers to check stubs dated March 17, April 1, April 15, April 29, May 13, May 27, June 10 and August 5, 1988.

Collective Bargaining Law to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[5] However, we cannot create a duty to arbitrate beyond the scope established by the parties.[6]

The issue that we must decide in this case concerns the question of nexus between the grievant's termination of employment, and the Institutional Aides Agreement of March 2, 1987, and its January 14, 1988 amended interpretation, which established annualization procedures for certain per diem employees. Where the City has challenged nexus in an arbitrability proceeding, the Union bears the burden of showing

[5] Decision Nos. B-49-89; B-41-82; B-15-82; B-19-81 and B-1-75.

[6] Decision Nos. B-49-89; B-41-82 and B-15-82.

that a prima facie relationship exists between the act complained of and the source of the alleged right, redress of which is sought through arbitration.[7]

The City's arbitrability challenge is based upon the grievant's employment history. It contends that the grievant did not fulfill the required twelve months of full-time work needed to become an annualized employee under the Institutional Aides Agreement, and, as a result, he is not entitled to contractual due process rights.

The City's challenge expressly or implicitly contains several discrete parts. Each requires a threshold condition to be satisfied or a question to be answered before we can find this case arbitrable. First, since the Institutional Aides Agreement was made effective in July of 1986, and since the grievant was hired in February of 1986, the question of whether the Agreement arguably credits retroactive employment time is implicated. Second, because a substantial portion of the grievant's employment history indicates that he worked part-time between 1986 and 1988, the question of whether the Agreement arguably allows part-time periods of work to be bridged must be examined. Third, if both of these conditions are satisfied, we must

[7] Decision Nos. B-27-89; B-19-89; B-47-88; B-5-88 and B-16-87.

consider whether the grievant arguably accumulated a sufficient number of full-time months of service, not only to become annualized, but to satisfy the subsequent six month probation period as well. Fourth, even if the grievant became annualized, we must decide whether he arguably was entitled to coverage under Article VI of the parties' collective bargaining agreement (disciplinary arbitration) or to some other type of procedural due process protection. We shall discuss each of these issues in the order that they logically follow.

Retroactivity

The intent of the memorializing letter of March 2, 1987 is unclear with respect to retroactivity ("Effective July 1, 1986 per diem Institutional Aides who have completed twelve (12) months of service working at least 35 hours per week during those twelve months shall be annualized at the completion of 12 months of service."). We cannot tell what "during those twelve months" means, or what it was intended to mean. Although occasionally we must examine contract language in order to resolve threshold questions of arbitrability, as we have said in past decisions, the actual interpretation of the contract and the applicability of its terms must be left for an arbitrator.[8]

Bridge Provision

The second issue is whether arguably there was a bridge provision in the Agreement which would span periods of part-time work. On the one hand, the City asserts that the Agreement requires per diem employees to work full-time for twelve continuous months to become annualized. The Union, on the other hand, contends that the grievant worked full-time for a cumulative total of at least twelve months.

We find that the letter of March 2, 1987 does not expressly require per

[8] Decision Nos. B-64-89; B-27-89; B-2-89; B-71-88; B-54-88; B-27-86 and B-4-85.

diem employees to work twelve continuous months of full-time service in order to become annualized ("per diem Institutional Aides who have completed twelve (12) months of service working at least 35 hours per week during those twelve months shall be annualized at the completion of 12 months of service"). The January 14, 1988 letter of interpretation, however, makes provision for breaks in service ("In determining the 12 months of service necessary for annualization, breaks in service of less than 31 days or time on an approved leave shall not constitute a break in service, but time not in a pay status shall not count in calculating the 12 months"). It follows, therefore, that if a period of leave does not constitute a break in service, a period of part-time work may not either. Thus, alternating periods of full-time work and part-time work may not necessarily constitute a break in service, and subsequent periods of full-time employment could be cumulative. This too is a matter of interpretation that we must leave for an arbitrator to determine.

Accumulation of Full-Time Employment

The third issue is whether the grievant arguably accumulated a total of 12 months of full-time service during his approximately thirty-month employment history with the HRA. The City maintains that he did not; the Union makes a number of arguments to show that he did. We need go no further than the City's pleadings, however, to find that the grievant arguably qualifies as having worked the requisite number of full-time months.

In its reply, the City contends that the grievant's status changed from full-time to part-time in September, 1986. Thus, he arguably worked full-time for eight months, from February, 1986 through September, 1986. Additionally, in its petition, the City acknowledges that the grievant worked full-time during the months of January, February, March and May of 1987, for a total of four more months. This comprises a cumulative total of approximately twelve months of full-time service. The grievant's subsequent fourteen months of

employment, from June, 1987 through July, 1988, would have allowed him even more time to make up for any marginal shortfall and to satisfy the probation requirement.

It is not possible for us to make our inquiry any more precise. The only documentation that we were provided with was employee pay check stubs from October 26, 1986, to August 5, 1988. Although the stubs report total earnings, they do not provide an hourly rate. Thus, we could not calculate the number of hours that the grievant worked during a particular pay period. Moreover, because per diem employees are paid bi-weekly, even if we knew the grievant's hourly rate, we still could not be certain how his time had been distributed. Accumulation of full-time employment credit is a factual question, which we leave for the parties to demonstrate through more accurate time and leave records in the arbitral forum.

Due Process

The final issue is whether, even if the grievant became annualized, he was entitled to procedural due process protection. The Union argues that the grievant was wrongfully terminated without being granted contractual due process rights provided by Article VI, Section 10 of the Institutional Services Contract. The City not only asserts that the grievant was not entitled to contractual due process rights because he was not annualized pursuant to the Institutional Aides Agreement, but it also contends that he was not entitled to due process protection under Article VI of the Agreement because he was never a "permanent competitive employee covered by the provisions of Section 75(i) pursuant to the Civil Service Law."

It is unclear whether the contractual due process rights referred to by the City in its discussion of the grievant's annualization status are the same as those provided by Article VI of the collective bargaining agreement. Neither the letter of March 2, 1987 memorializing the Institutional Aides

Agreement, nor the January 14, 1988 interpretation of the agreement, mentions due process rights for annualized employees. Thus, we cannot tell whether these rights are matching, whether they are substantially equivalent, or whether they offer some lesser degree of protection. This question, too, we leave for an arbitrator to determine.

In conclusion, we find that each of the issues expressly or implicitly raised by the City either require a factual determination or a determination of the parties' intent, and we have long held that it is not properly a function of this Board to delve into the merits of a case.[9] In all respects, however, we are satisfied that the Union has established the necessary prima facie relationship, or nexus, between the grievant's termination and the Institutional Aides Agreement to support its request for arbitration. 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.[10] Therefore, we shall grant the Union's request for arbitration in the matter of the termination of the per diem employment of Nathaniel Sims by the New York City Human Resources Administration.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by

[9] Decision Nos. B-49-89; B-63-88; B-36-88; B-30-86; B-27-86; B-31-85; B-1-75 and B-18-72.

[10] Decision Nos. B-49-89; B-18-83; B-5-77 and B-5-76.

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-1184-89, be, and the same hereby is, dismissed; and it is further

ORDERED, that the request for arbitration filed by Social Service Employees Union, Local 371, in Docket No. BCB-1184-89 be, and the same hereby is granted.

DATED: New York, N.Y.
March 28, 1990

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

DEAN L. SILVERBERG
MEMBER