City v. DC37, 45 OCB 12 (BCB 1990) [Decision No. B-12-90 (Arb)]

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

THE CITY OF NEW YORK,

Petitioner, DECISION NO. B-12-90

-and- DOCKET NO. BCB-1183-89
(A-3076-89)

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent.

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DECISION AND ORDER

On July 28, 1989, the City of New York ("City"), by its Office of Municipal Labor Relations ("OMLR"), filed a petition challenging the arbitrability of a grievance filed by District Council 37, AFSCME, AFL-CIO ("DC 37" or "Union"), on behalf of David Gibson ("Grievant"). The request for arbitration alleges that the City failed to follow the proper procedure when it terminated Mr. Gibson. The City maintains that the matter is not arbitrable because it involves the dismissal of a probationary employee.

After receiving several extensions of time with the consent of the City, DC 37 filed an answer on November 29, 1989. The City filed a reply on December 11, 1989.

Background

Grievant was hired on October 1, 1984 as an Office Aide with the Department of Social Services, Human Resources Administration ("Agency"). On or about March 1, 1985, Grievant was terminated. His termination was reversed

on appeal to the Civil Service Commission, by a decision dated August 15, 1987. It is unclear whether Grievant was reinstated on October 13, 1987 or on an unspecified date in November 1987.[1] The record below indicates that in May 1988, Grievant "developed a medical problem which caused him to take extensive time off and on June 2, 1987 [sic] the Department ... put him on restricted duty."[2] On July 19, 1988, the City informed Grievant by letter and without the service of written charges that his employment was terminated.

DC 37 filed a Step II Grievance, dated July 16, 1988, claiming that Grievant was unfairly disciplined and improperly terminated. The Union alleged that the Agency had miscalculated Grievant's probationary period and that he had achieved permanent status by the date he was discharged. Therefore, the Union asserts, the Agency failed to follow the proper disciplinary procedures set forth in the 1982-84 Collective Bargaining Agreement ("Agreement") between the parties.

The Step II determination dated August 24, 1988, found no merit in the Union's contention that the Grievant's probationary period had been miscalculated. The Agency sustained its decision to terminate Grievant based on "his poor attendance record."

On or about August 25, 1988, DC 37 filed a Step III Grievance with OMLR. The grievance was denied almost ten months later in a decision dated June 9, 1989. In the interim, on April 21, 1989, DC 37 filed the instant request for

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[1] In the Background and Discussion section of its Step III Decision, the City initially states that Grievant was reinstated in November 1987. However, the Hearing Officer later refers to October 13, 1987, as the date of reinstatement.

[2] Id.

arbitration alleging a violation of Article VI, Section 1(E) and 1(F)[3] of Agreement. The Union seeks, as a remedy:

> Reinstatement of the grievant to employment, together with back pay, benefits, seniority, and any other action required to make the grievant whole.

Positions of the Parties

The City's Position

The City submits that because the Grievant was still a probationary employee on July 19, 1988, he never acquired the contractual due process rights which entitle him to the "service of disciplinary charges." Therefore, the City asserts, the Grievant possesses no right under the Agreement to challenge his termination.

Moreover, the City argues, resolution of this dispute requires an examination of the Rules and Regulations of the City's Personnel Director ("Rules") governing probationary periods,[4] a matter which is not subject to

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[3] Article VI, Section 1(E) and 1(F) provide:

DEFINITION: The term "Grievance" shall mean:

(E) A claimed wrongful disciplinary action taken against a <u>permanent</u> employee covered by Section 75(1) of the Civil Service Law ... upon whom the agency head has served written charges of incompetency or misconduct ... [emphasis added].

(F) Failure to serve written charges as required by Section 75 of the Civil Service Law ... upon a <u>permanent</u> employee covered by Section 75(1) of the Civil Service Law ... [emphasis added].

[4] Rule 5.2.1 through Rule 5.2.11 are entitled "Probationary Terms" and set forth, <u>inter</u> <u>alia</u>, the applicable minimum and (continued...)

the grievance and arbitration procedure under Article VI, Section 1(B) of the Agreement.[5] Furthermore, the City contends, the Union cannot first rely on the Rules to advance the argument that Grievant's probationary period was satisfied (by crediting Grievant with five months of prior service) and then argue that this grievance has nothing to do with the Rules.

The Union's Position

DC 37 rejects the City's contention that the proviso within Article VI, Section 1(B), concerning the Rules, governs this dispute. The Union states:

> This proceeding does not involve ... a challenge to policies of the New York City Personnel Director concerning probationary employees. It has nothing to do with Rule 5.2.1 through 5.2.11 [emphasis in original].

In any event, the Union submits, even allowing for application of the Rules Grievant still attained permanent status, and all the rights attendant thereto, as of July 19, 1988.

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[4](...continued)
maximum periods of probationary service, the effect of certain prior service on probationary periods, criteria for the extension of probationary periods, etc.

[5] Article VI, Section 1(B) of the Agreement provides:

> DEFINITION: The term "Grievance" shall mean:
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> (B) 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 grievance procedure or arbitration; [emphasis added].

The Union argues, therefore, that the issue is not whether Grievant was a probationary employee, as the City contends. Rather, the issue is whether the employer failed to follow the proper procedure when it disciplined and terminated a permanent employee.

Discussion

In deciding issues of arbitrability, we have repeatedly held that the scope of our inquiry includes ascertaining whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough to cover the particular controversy presented. This is a threshold determina-tion which the Board must make.[6]

In the instant matter, it is clear that the parties have agreed to arbitrate grievances, as defined in Article VI of the Agreement. There is no dispute that a claimed "wrongful disciplinary action taken against a permanent employee" [Article VI, Section 1(E)] or a claimed "failure to serve written charges ... upon a permanent employee" [Article VI, Section 1(F)] is expressly within the contractual definition of an arbitrable grievance. It is self-evident, however, that the right to assert alleged violations of these provisions are subject to the precondition of permanent employee status. Despite DC 37's claim that arbitrability of this matter does not turn on Grievant's status, clearly, the threshold determination here is whether the Grievant attained permanent civil service status on or before the day he was terminated.

[6] Decision Nos. B-51-89; B-61-88; B-30-86; B-21-84; B-15-79; B-11-76; B-28-75; B-8-74.

It is well settled that where challenged to do so, a union must demonstrate that the contract provision relied upon is arguably related to the claim underlying the request for arbitration.[7] The City claims that the Grievant cannot satisfy a precondition of entitlement to the contractual benefits cited by the Union inasmuch as he was a probationary employee when his employment was terminated. As the proponent of arbitration in this matter, DC 37 has the burden of establishing a reasonable basis for us to conclude that Grievant does possess a contractual right to challenge his discharge.

Based on the limited amount of information supplied by the parties, it is not possible to calculate the number of months Grievant may have been employed with the Agency. Moreover, the City alleges that Grievant's absences were so excessive after his reinstatement that, according to the Rules, his probationary period was automatically extended.[8] Furthermore, the City argues, the Union's position assumes that "prior service credit" be given for the time Grievant worked in 1984-85. We find that these allegations raise a substantial issue as to whether this dispute falls within the ambit of Article VI, Section 1(B) of the Agreement.

Other than to state that Article VI, Section 1(B) is "irrelevant" to this matter, the Union made no attempt to rebut the City's arguments. Moreover, DC 37 did not allege any facts to support its contention that even allowing for the deduction of annual and sick leave pursuant to the Rules,

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[7] E.g., Decision No. B-51-89 and the cases cited therein.

[8] We also note that Grievant was placed on "restricted duty" in June, 1988.

Grievant had performed the duties of his position for the requisite 12 months.

In this connection we note that the Rules provide for the extension of the probationary period by the number of days a probationer does not fully perform the duties of his position;[9] and for full restoration after separation from service under certain circumstances.[10] However, determining whether the Agency failed to accurately calculate the Grievant's probationary term, as the Union alleged in the first instance (Step II), or failed to correctly apply

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[9] Rule 5.2.8 provides, in relevant part:

Extension of Probationary Period

(b) Notwithstanding the provisions of paragraphs 5.2.1, 5.2.2 and 5.2.8(a), the probationary term is extended by the number of days when the probationer does not perform the duties of the position, for example: limited duty status, annual leave, sick leave, leave without pay, or use of compensatory time earned in a different job title; provided, however, that the agency head may terminate the employment of the probationer at any time during any such additional period.

[10] Rule 5.2.6 provides:

Restoration After Separation From Service; Conditions

A probationer separated from the service for any reason other than fault or delinquency may be restored by, and at the discretion of the city personnel director to the eligible list from which selected, if it be in existence, with the same relative standing thereon for general certification therefrom or for certification to agencies other than the one from which the probationer was separated provided that:

(a) the time during which such person has actually served shall be deducted from the probationary term if such person be again selected by the same agency head;

(b) if selected by another agency head, such person shall be required to serve a full probationary term unless such agency head elects to credit such person with the time theretofore served.

Rule 5.2.6 by not crediting Grievant with five months of service in 1984-85, requires interpretation and application of the Rules. As the City points out, the resolution of disputes involving the Rules are expressly excluded from the grievance and arbitration procedure, pursuant to Article VI, Section 1(B) of the Agreement.

By the terms of the parties' Agreement, the threshold determination that must be made here may not be submitted to the arbitral forum. While it is the policy of the NYCCBL and this Board to favor impartial arbitration of grievances,[11] we cannot create a duty to arbitrate where none exists. Because the Union did not present any evidence to support its contention that Grievant had achieved permanent status before his discharge or demonstrate that the underlying dispute is within the scope of the parties' agreement to arbitrate, DC 37 cannot establish the requisite nexus between the act complained of and the source of an alleged right, redress of which is sought through arbitration.

Accordingly, the instant request for arbitration must be denied. Nothing in this decision, however, shall constitute prejudice to the Grievant's right to seek redress of the underlying dispute in an appropriate forum. Furthermore, if it is determined that Grievant was a permanent employee when he was terminated, the Union may then seek arbitral review of the issues herein that remain in dispute.

ORDER

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[11] See Section 12-302 of the NYCCBL; Decision No. B-19-81.

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 City's petition challenging arbitrability be, and the same hereby is, granted; and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is, denied.

DATED: New York, New York
March 28, 1990

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

DEAN L. SILVERBERG
MEMBER