City v. L.1549, DC37, 45 OCB 15 (BCB 1990) [Decision No. B-15-90 (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-15-90
DOCKET NO. BCB-1223-89
(A-3199-89)

-and-

DISTRICT COUNCIL 37, LOCAL 1549,
AFSCME AFL-CIO,
Respondent.
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DECISION AND ORDER

On November 8, 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 submitted by District Council 37, Local 1549, AFSCME, AFL-CIO ("the Union") on behalf Bernard Jones ("grievant"). The Union submitted an answer on December 6, 1989. The City filed a reply on December 18, 1989.

BACKGROUND

The grievant was appointed as an Office Aide III by the Human Resources Administration ("HRA") on October 26, 1986. On March 7, 1988, he was appointed to the title Eligibility Specialist III.[1] Thereafter, on December 8, 1988, the grievant was demoted from the title Eligibility Specialist III to that of

[1] Pursuant to a memorandum from the City Personnel Director to Agency Heads, dated March 14,1988, grievant's probationary period was to commence on January 27, 1988, the date the list was published, and end on January 26, 1989.

Office Aide III.

On January 31, 1989, grievant filed a grievance at Step II of the grievance procedure alleging that the HRA violated the guidelines set forth in the New York City Department of Personnel Agency Guide to Performance Evaluations for Sub-Managerial Positions ("Guide"). Grievant claimed that the employer failed to adhere to the guidelines set forth in the Non-Managerial Employee Evaluation Manual ("Manual") when it demoted him, on December 8, 1988. The demotion, according to the grievant, was the direct result of an evaluation submitted in September 1988.

The Step II decision, issued on April 7, 1989, denied the grievance. In its decision, however, HRA found that it had violated the written procedure set forth in the Manual. Therefore, it directed expungement of the evaluation, but declined to reinstate the grievant since "he was demoted for reasons other than job performance."

Thereafter, on April 17, 1989, grievant filed a Step III grievance. The Step III grievance was denied on July 26, 1989, notwithstanding a finding by the Hearing Officer that there were errors involved in the procedure followed in evaluating grievant. No satisfactory resolution of the dispute having been reached, on September 1, 1989, the Union filed a Request for Arbitration in which it alleged that HRA's violation of the Department of Personnel Guide to Evaluations for Sub-Managerial Employees resulted in grievant's demotion from Eligibility Specialist III

to Office Aide III. As a remedy, the Union requested reinstatement to Eligibility Specialist III, back pay and benefits retroactive to the date of grievant's demotion, and reassignment of grievant to another work location.

POSITIONS OF THE PARTIES

City's Position

The City alleges that the Union's request for arbitration must be dismissed because the Collective Bargaining Agreement between the parties ("Agreement") expressly excludes the alleged misapplication of the Rules and Regulations of the City Personnel Director[2] from the definition of the term "grievance".[3]

The City further alleges that where the grievant seeks to enlarge the traditional and well defined incidents of probationary status, the Board will require an explicit contractual expression of that intent.[4] In the instant matter,

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[2] §§5.2.1 through 5.2.11 set forth the terms and conditions of employment for probationary employees.

[3] Article VI §1(b) of the 1984-1987 Agreement defines a "grievance" as follows:

> 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.

[4] Decision No. B-6-84.

according to the City, not only is such intent not expressed, but the explicit language of the Agreement, Article VI, §1(b), precludes arbitration of such a grievance.

The City asserts that the Union's request for arbitration is based on the premise that probationary employees are entitled to certain rights prior to demotion. The City claims that the Rules and Regulations of the City Personnel Director do not establish such rights. Furthermore, the City submits that Section 12-307b of the New York City Collective Bargaining Law ("NYCCBL") grants the City the "unabridged" management right to "determine the standards of services to be offered... ; determine the standards for the selection of employment; maintain the efficiency of governmental operations; and exercise complete control and discretion over its organization....” It argues that since the City has not waived any of these rights, the grievant can not seek to change the established policies through the grievance procedure. The City asserts that the purpose of the probationary period is to allow management the "unfettered" right to determine whether or not to denote a probationary employee prior to granting the employee permanent status. As a result, such disputes are explicitly excluded from the grievance and arbitration provisions of the contract.

In addition, the City claims that the requested remedy of reinstatement with back pay and benefits is inappropriate in the instant matter. Relying on the Board's prior determination in

Decision No. B-39-89, the City claims that the Board has confined such relief to adherence to the non-managerial employee evaluation procedures adopted by the City.

Union's Position

The Union maintains that, contrary to the City's assertion, it is not relying on the Rules and Regulations of the City Personnel Director; but rather, on the Department of Personnel Agency Guide to Performance Evaluations for Sub-Managerial Positions. Since the Board in its prior decisions has held the Guide to be a written policy, and the City admitted to violating the Guide in the lower steps of the grievance procedure, the Union asserts that there is no factual dispute as to the arbitrability of the instant grievance.

In addition, the Union claims that the City's reliance on Decision No. B-39-89 is misplaced since that case involved a provisional, rather than a probationary employee. The Union notes that the courts and this Board have in the past prohibited back pay awards to provisional employees. However, such prohibition is not applicable to probationary employees.

DISCUSSION

Where, as here, the parties do not dispute that they have agreed to arbitrate their controversies, the question before the Board on a petition challenging arbitrability is whether the

particular controversy at issue is within the scope of the parties' agreement to arbitrate.[5] Where challenged to do so, a party seeking arbitration has the burden of establishing a nexus between the act complained of and the source of the alleged right, redress of which is sought through arbitration.[6]

In the instant case, the City does not refute the Union's claim that grievant's supervisor did not follow the evaluation procedure set forth in the Guide. Since the Guide constitutes a written policy for the purposes of Article VI, §1(b) of the Agreement, we find that the Union has demonstrated a prima facie relationship between the alleged violations of the evaluation procedures and the provisions it cites in the Guide.[7]

Although the City claims that the request for arbitration reaches beyond the scope of the parties' agreement to arbitrate because it challenges the alleged misapplication of the Rules and Regulations of the City Personnel Director, the provisions on which the City relies do not address the alleged violation, namely implementation of the evaluation procedure. The procedure for the evaluation of sub-managerial employees is located in the Agency Guide, which specifically states that it applies to both

[5] Decision No. B-6-86.

[6] Decision Nos. B-6-86; B-2-82; B-7-81; B-4-81.

[7] See Decision No. B-28-87.

permanent and probationary employees.[8] The Union is not challenging the City's right to establish and revise evaluation procedures. Rather, it argues that in implementing the standards, the City has failed to follow the evaluation procedures set forth in the Guide. Since the Union alleges a violation of the Guide, which we have held constitutes a written policy of the Agency,[9] we find that the grievance falls within the scope of the parties' agreement to arbitrate.

The City claims that the remedies sought by the Union in its request for arbitration are inappropriate, and therefore precludes arbitration of the instant grievance. In support of its position, the City relies on Decision No. B-39-89. We disagree. First, Decision No. B-39-89 is distinguishable from the instant case in that it involves a provisional employee, rather than a probationary employee. Inasmuch as the prohibition on awards of back pay has been limited to provisional

[8] Section II. A. 2, entitled Period of Service Covered for Permanent and Probationary Employees, states in relevant part as follows:

> a. ...For probationary employees, interim evaluations should be submitted every three months and a final report must be prepared before the end of the probationary period....

[9] Decision No. B-28-87 (Agency Guide imposes specific standards and requirements and, thus, constitutes a written policy subject to arbitration).

employees,[10] that decision is not applicable here. Secondly, the Board has long held that arguments addressed to the question of remedy are not relevant to the arbitrability of a grievance;[11] neither is the propriety of the remedy sought by the Union.[12]

Finally, we note that this Board has long held that the mere possibility that an arbitrator might render an award that would violate a provision of law is not a sufficient basis upon which to deny an otherwise valid request for arbitration.[13] Neither the Board nor the parties should anticipate that an arbitrator will fashion improper, illegal, or inappropriate relief. our ruling that this grievance may be submitted to arbitration will only afford the arbitrator an opportunity to consider a remedy and fashion one, if warranted, appropriate to the circumstances of this particular case and within the limits of applicable law.[14]

Therefore, for all of the reasons stated above, the Board shall deny the City's petition challenging arbitrability, and grant the Union's request for arbitration.

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[10] E.g., Preddice v. Callanan, 114 A.D.2d 134, 498 N.Y.S.2d 533 (3d Dep't. 1986) aff'd 69 N.Y.2d 288, 513 N.Y.S.2d 958 (1987); Decision No. B-39-89.

[11] E.g., Decision Nos. B-35-89; B-7-88; B-4-2.5; B-32-82.

[12] Decision Nos. B-39-89; B-2-71.

[13] Decision Nos. B-35-88; B-11-88; B-14-81; B-2-78;

[14] Decision Nos. B-14-81; B-2-78; B-1-75

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 request for arbitration filed by District Council 37, Local 1549, AFSCME, AFL-CIO with the limitations described above be, and the same hereby is, granted, and it is further

ORDERED, that the petition challenging arbitrability filed by the City of New York be, and the same hereby is, denied.

DATED: NEW YORK, NEW YORK
March 28, 1990

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

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MEMBER