City, DEP v. L.376, DC37, 45 OCB 18 (BCB 1990) [Decision No. B-18-90 (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 and the NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

DECISION NO. B-18-90
DOCKET NO. BCB-1202-89 (A-3113-89)

Petitioners,

-and-

LOCAL 376, DISTRICT COUNCIL 37 AFSCME, AFL-CIO,

Respondent.

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Decision and Order

On August 28, 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 376, AFSCME, AFL-CIO ("the Union") on behalf of Mary Hull, John Littlejohn, Stacy Blunt, Donald Taylor, Virgil Ellison, Mark Phillips and all other similarly situated employees ("grievants"). The Union submitted an answer on September 11, 1989. The City filed a reply on November 2, 1989. Thereafter, on November 20, 1989, the Union submitted a sur-reply, to which the City responded on November 29, 1989.[1]

[1] The OCB Rules and Regulations do not provide for the filing of a sur-reply; permission to file is discretionary with this Board. Although no application was made by the Union to the Board in this case, we note that the City did not file an objection. To the contrary, upon receipt of the Union's sur-reply, the City filed a response thereto. Thus, to the extent

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Background

The grievants were employed by the Department of Environmental Protection ("DEP") in the title Apprentice (Construction Laborers) when they were dismissed from their positions.

On April 19, 1989, the grievants filed a Step I grievance alleging that the DEP violated the guidelines set forth in the New York City Department of Personnel Agency Guide to Performance Evaluation for Sub-managerial Positions ("Guide").[2] No satisfactory resolution of the matter having been achieved, the Union requested review of its grievance at Step III of the grievance procedure.

On May 23, 1989, a Step III decision was issued denying the

[1](... continued)
the Union's sur-reply and the City's response clarify the parties' positions with respect to the relevance of Decision No. B-39-89 to the instant matter, we shall consider them.

[2] The Guide, a 24 page document, states in Section I, entitled "Introduction", that it is intended to provide agencies with the technical assistance and guidance necessary to administer their sub-managerial performance evaluation program as mandated by the City Charter. The Introduction further states that in order to insure uniformity of performance evaluation of city workers employed in different city agencies, the system described in the Guide is the only one which has been approved for agency use. "Agencies feeling that another system or modification to this system may better serve their needs may submit their complete plan to the City Personnel Director for approval. Any deviation from this guide must be approved before implementation by the agency."
The other sections of the Guide are as follows: Administration; Formulating Tasks And Standards; Rating Considerations; The Appraisal Interview; Uses of Performance Evaluation.

grievance on the ground that the employees were "pure provisionals" with less than two years of service and, as such, had no standing to appeal the termination of their employment. On August 1, 1989, an amended Step III decision was issued correcting the May 23, 1989 decision. The amended decision deleted the reference to the grievants as "pure provisional" employees and correctly noted that they were non-competitive employees with less than five years of service. The denial of the grievance remained unchanged.

Thereafter, the Union filed a request for arbitration pursuant to Article VI, §2 of the parties' collective bargaining agreement ("Agreement") alleging that the DEP violated the rules and regulations contained in the Guide through the use of improper procedures and motives in the conduct of performance evaluations. As a remedy, the Union requested "reinstatement with back pay and benefits and the performance of proper and fair evaluations."

Positions of the Parties

City's Position

The City alleges that the grievants have no standing to appeal their termination because they were non-competitive employees. In support of its position, the City relies on Article VI, §1(E) of the Agreement, which defines a grievance as

follows:

> A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law or a permanent competitive employee covered by the Rules and Regulations of the Health and Hospitals Corporations 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

The City maintains that the grievants are not covered by Article VI, §(1) of the Agreement because it pertains only to permanent employees covered under Section 75(1) of the Civil Service Law.

The City further claims that under Section 75(l) of the Civil Service Law, non-competitive class employees may be terminated for any reason unless they have completed at least five years of continuous service in the non-competitive class. Inasmuch as the grievants have not finished five years of continuous service, the City maintains that they have no standing to grieve under Article VI, §1 of the Agreement.

In any event, the City asserts that even if there were an obligation to arbitrate the alleged violation of the evaluation procedure, since the Guide is a Rule and Regulation of the New York City Personnel Director it is expressly excluded from the definition of the term "grievance" under Article VI, §l(B) of the Agreement.[3] Therefore, the City submits, the Union has not met

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[3] Under Article VI, §l(B)of the Agreement the term "grievance" is defined as follows:

(continued...)

its burden of establishing a prima facie relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration.

Finally, the City argues that the Union's reliance on Decision Nos. B-31-82 and B-6-86 to support its claim is misplaced. The City contends that those decisions involved alleged procedural violations of employee manuals; the Board did not permit arbitration of the Guide which is at issue in the instant case. Thus, for the foregoing reasons, the City submits that the request for arbitration should be denied in its entirety.

Union's Position

The Union claims that the City's reliance on Section 75(l) of the Civil Service Law is misplaced. The Union notes that Section 75(l) pertains to wrongful disciplinary actions. Since the instant grievance involves the alleged wrongful terminations of grievants, rather than disciplinary actions, it claims that Section 75 is irrelevant to the matter at issue herein.

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[3] (... continued)

> 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."

Furthermore, the Union relies on Decision No. B-39-89, wherein "pure provisionals" were held to have standing to challenge violations of the Agency evaluation guidelines in the arbitral forum. In the instant matter, the Union argues, the grievants were in an apprenticeship program with a two year probationary period and, therefore, had a reasonable expectation of achieving permanent status and the rights attendant thereto. Accordingly, they must be afforded the right to have their grievances heard before an arbitrator.

The Union further alleges that based on Board of Education of Chataugua Central School District v. Chataugua Central School Teachers Association,[4] once a valid agreement providing for arbitration has been entered into, any controversy arising between the parties to the contract which is encompassed within those provisions must proceed to arbitration. Because the presumption of arbitrability applies with the same force to questions of procedural arbitrability as it does to substantive arbitrability, the Union contends that the grievants are not precluded from challenging a violation of procedure in the arbitral forum.

The Union also relies on the Board's determination in Decision No. B-31-82, wherein it held that a job evaluation procedure has the force and effect of a written policy of the

[4] 6 PERB ¶7506 (1973).

agency and, therefore, presents a grievable matter.

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]

The City contends that the request for arbitration must be dismissed because grievants' claims are not within the scope of the parties' agreement to arbitrate. In addition, it argues that the grievants have no standing to appeal their termination because they are not members of the class covered by Article VI, §1(E) of the Agreement.

In relying on Article VI, §1(E) of the Agreement, we note that the City has ignored the other provisions of Article VI, §1. For example, Article VI, §I(B) of the Agreement defines a grievance as follows:

> A claimed violation, misinterpretation or misapplication of the rules and regulations, written policies, or orders of the Employer

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

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

> applicable to the agency which employs the grievant affecting terms and conditions of employment; provided disputes involving the Rules and Regulations of the City Personnel Director... shall not be subject the grievance procedure or arbitration...

The Agency Guide, which grievants allege the City has violated, constitutes a written policy under Article VI, §1(B) and, therefore, falls within the contractual definition of the term "grievance".[7] Thus, we find that the Union has demonstrated a prima facie relationship between the act complained of (the alleged violations of the Guide) and the provisions it cites in support of its claim (Article VI, §1(B).)[8] Since the employment status of the grievant is irrelevant under Article VI, §1(B), the city's reliance on Article VI, §1(E) and Section 75(1) of the Civil Service Law is misplaced. Accordingly, we find that the grievants have standing to appeal the alleged violation of the guidelines set forth in the Guide in the arbitral forum.

In Decision No. B-6-86, this Board did not resolve the issue of the arbitrability of a claimed violation of the Guide. Rather, we concluded that the employee Manual which was cited in that matter superseded the Guide and that it was therefore "unnecessary ... to determine whether the Guide would constitute written policy within the contractual definition of a 'grievance' if it had not been replaced by the alternative provisions of the

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

[8] See e.g. Decision Nos. B-6-86; B-2-82; B-7-81; B-4-81.

manual".[9] In Decision No. B-28-87, however, the Board specifically held that the Guide is a written policy of the DEP.[10] Thus, we find that the grievants' allegations of violations of the Guide fall within the definition of the term "grievance" set forth in Article VI, §1(B) and, therefore, are arbitrable.

Accordingly, for all of the reasons stated above, we shall deny the City's petition challenging arbitrability and shall grant the Union's request for arbitration.[11]

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 City's petition challenging arbitrability, to the extent it challenges the alleged violation of the City's Agency Guide to Performance Evaluation for Sub-Managerial Positions be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by Local 376, District Council 37, AFSCME, AFL-CIO to the extent it

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

[10] Decision No. B-28-87 at 24.

[11] To the extent grievants' request for arbitration seeks reinstatement with back pay and benefits as a remedy, we note that in no event shall the remedy awarded by the arbitrator have the effect of creating job retention or due process rights in these individuals that are greater than those enjoyed by similarly situated employees under the Civil Service Law.

challenges the alleged violation of the City's Agency Guide to Performance Evaluation for Sub-Managerial Positions be, and the same hereby is, granted.

Dated: New York, N.Y.
April 25, 1990

MALCOLM D. MacDONALD
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