City v. DC37, 45 OCB 23 (BCB 1990) [Decision No. B-23-90 (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,
Petitioners,

Decision No. B-23-90
Docket No. BCB 1218-89
(A-3176-89)

-and-

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,
Respondents.
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DECISION AND ORDER

On October 20, 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 which is the subject of a request for arbitration that was filed on or about August 15, 1989. District Council 37, AFSCME ("the Union") filed its answer on November 24, 1989, and the City filed a reply on December 8, 1989.

A hearing was held before a Trial Examiner designated by the Board of Collective Bargaining on February 27, 1990. The Union and the City filed post-hearing memoranda on March 16, 1990.

BACKGROUND

The grievant, Nathan McClain, was initially hired by the City of New York in 1973. He began working for the Department of Housing Preservation and Development (“HPD”) in 1978.

Thereafter, in 1987 the grievant resigned from his position as a Quality Assurance Specialist, and was appointed to the position of probationary Supervisor of Building Maintenance.

On April 28, 1988, the grievant was arrested and charged with "Bribe Receiving in the Third Degree". On or about the same date, he was served with charges and a notice of suspension pursuant to which he was removed from the HPD payroll. The criminal charges against the grievant were dismissed on October 20, 1988, and the grievant was reinstated to the HPD payroll on or about November 1, 1988, with a retroactive reinstatement date of May 29, 1988.

On January 27, 1989, Bernard Schwartz, Assistant Commissioner for Resources Management Labor Relations at the HPD, met with the grievant and informed him that his performance had been deemed unsatisfactory by his supervisors. Mr. Schwartz requested that the grievant sign a six month extension of his probationary period ("the Extension") so that his performance could be further evaluated prior to his appointment to the position of permanent Supervisor of Building Maintenance. Although the grievant requested that a Union representative be present while he signed the Extension, Mr. Schwartz informed the grievant that if he did not sign the Extension immediately, he would be terminated.

Consequently, the grievant executed the Extension.[1] Thereafter, in a letter dated May 31, 1989, Karen Brewster, Human Resources Director at the HPD, advised the grievant that his "probationary employment" with the HPD would be terminated as of the close of business on June 9, 1989.

On July 24, 1989, the Union filed a grievance at Step III in which it challenged the grievant's allegedly wrongful termination. The City never responded to the grievance, and the Union subsequently filed a request for arbitration alleging that the City had violated Article VI, §§l(B), 1(E) and 1(F) of the Engineering Scientific Contract ("the Agrement)[2] when it

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[1] The Extension provides in relevant part as follows:

> I hereby consent to a six month extension of my probationary period.

[2] Article VI of the Agreement provides in relevant part as follows:

> Section 1
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> D E F I N I T 1 0 N: 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;
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> (E) A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(l) 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

(continued...)

terminated the grievant. As a remedy, the Union requests that the grievant be reinstated with full back pay, including interest and benefits.

City Position

The City contends that this grievance, on its face, challenges the application of the Rules and Regulations of the New York City Personnel Director.[3] It asserts that pursuant to Article VI, Section 1(B) of the Agreement, alleged violations of the Rules and Regulations of the New York City Personnel Director are not arbitrable, and that the instant dispute is therefore beyond the scope of the arbitration clause negotiated by the parties.

Nevertheless, the City asserts that prior to the execution of the Extension, the grievant's probationary period was set to expire on March 22, 1989. It contends, however, that pursuant to the terms of the Extension, the grievant had consented to the

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[2] (....continued)
> title or which affects the employee's permanent status.
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> (F) Failure to serve written charges as required by Section 75 of the Civil Service Law . . . upon a permanent employee covered by Section 75(1) of the Civil Service Law . . . where any of the penalties . . . set forth in Section 75(3) of the Civil Service Law has been imposed.

[3] The Rules and Regulations of the New York City Personnel Director, in relevant part, set forth the method by which the probationary period is calculated.

extension of the duration of his probationary period, and that he was therefore a probationary employee at the time of his discharge on June 9, 1989.

Consequently, the City argues that the determination to terminate the grievant was within its managerial prerogative. It notes that pursuant to the terms of the Agreement, probationary employees are not entitled to be served with disciplinary charges, nor do they have the right to arbitrate alleged wrongful disciplinary actions. Thus, the City maintains that management has the "unfettered right" to determine whether it will retain an employee during his probationary period.

Union Position

The Union argues that contrary to the City's contention, the instant dispute does not involve the application of the Rules and Regulations of the New York City Personnel Director. It asserts that the sole issue being presented for resolution by the Board is whether the grievant was wrongfully disciplined when he was terminated without having been served with disciplinary charges.

Although the Union disputes the City's claim that the grievant's probationary period would have expired on March 22, 1989 if he had not signed the Extension, it concedes that the grievant was a probationary employee on January 27, 1989 when he signed the Extension. The Union asserts, however, that the Extension is invalid because the grievant did not have the

capacity to agree to extend his probationary period. Moreover, the Union argues that the Extension must be deemed null and void because it was executed under conditions of coercion and duress. Consequently, the Union concludes that the grievant had attained permanent employee status prior to his termination, and that he is entitled to the protections afforded to permanent employees in Article VI, Section 1 of the Agreement.

Discussion

In considering a challenge to the arbitrability of a grievance, this Board must determine whether a prima facie relationship exists between the act complained of, and the source of the right being invoked, and whether the parties agreed to arbitrate disputes of that nature. Therefore, where challenged to do so, a party must demonstrate that the right being invoked is arguably related to the grievance in question, and that the contractual arbitration clause negotiated by the parties is applicable to the dispute presented.[4]

In the instant case, the Union alleges that the City wrongfully disciplined the grievant when it terminated him without having served him with disciplinary charges or affording him a due process hearing. The City argues that at the time of his discharge, the grievant was on probation, and was not

[4] Decision Nos. B-5-88; B-16-87; B-35-86; B-22-86.

entitled to the cited contractual protections which are applicable only to permanent employees. Thus, in effect, the City asserts that there is no nexus between the contractual provisions which the Union cites as the basis for its grievance and the dispute presented herein.

Although it is our policy to refrain from adjudicating the merits of a claim, it is necessary, in certain cases, to scrutinize the particular facts involved more closely than we might otherwise deem appropriate in order to determine, as a threshold matter, whether a union has presented a colorable basis for its grievance.[5] In ascertaining whether there is a prima facie relationship between the contractual provisions cited by the Union and the subject matter of the instant grievance, we note that the parties do not dispute that the protections against wrongful disciplinary actions set forth in the cited contractual provisions extend only to permanent employees. Therefore, it is clear that we can resolve this dispute only by determining whether the grievant was a "permanent" or a "probationary" employee at the time of his discharge.

Arguing that the grievant attained permanent employee status prior to the date upon which he was discharged, the Union asserts that the Extension is invalid because the grievant did not have the capacity to agree to prolong his probationary period. We

[5] Decision Nos. B-13-90; B-54-87; B-9-83; B-21-90.

note, in this connection, that the courts have upheld the right of a public employee to waive his status as a permanent employee provided such waiver is effected openly, voluntarily and knowingly.[6] It follows that a public employee may also agree to extend his probationary period prior to having attained permanent status, and that the grievant had the capacity to execute an extension of his probationary period.

The Union argues, further, that even if the grievant could have assented to the extension of his probationary period, the Extension must be deemed null and void because it was signed under circumstances of coercion and duress. We have carefully considered all the evidence presented by the parties on this question, and find that the Assistant Commissioner did not coerce the grievant into signing the Extension.

We note that the grievant credibly testified before a Trial Examiner designated by the Board, that he signed the Extension after being told by the Assistant Commissioner that he would be terminated immediately if he refused to do so. It is well established that the use of a threat to obtain assent to an

[6] See, Whitehead v. State Department of Mental Hygiene, 71 A.D.2d 653, 418 N.Y.S.2d 806 (Ct. App. 1979), aff'd 51 N.Y.2d 781,433 N.Y.S.2d 98, 412 N.E.2d 1323 (Ct. App. 1980) ; Clayton v. Dominquez, 134 A.D.2d 345, 520 N.Y.S.2d 822 (2d Dept. 1987); Sepulveda v. Long Island State Park, 123 A.D.2d 703, 507 N.Y.S.2d 69 (2d Dept. 1986).

agreement is improper only if the threat was wrongful.[7] A threat "to do that which one has the right to do does not constitute duress."[8]

It is undisputed that the grievant was a probationary employee on January 27, 1989 when he executed the Extension. It is therefore clear that the Assistant Commissioner, in his discretion, could have terminated the grievant on that date without affording him the contractual privileges to which permanent municipal employees are entitled. This would also have deprived the grievant of the additional opportunity to perform his duties during the period of extension in such fashion as would enhance his chances of achieving permanent status.

We find that in informing the grievant that he would be terminated if he did not sign the Extension, the Assistant Commissioner merely stated his intention to preclude the grievant from becoming a permanent Supervisor of Building Maintenance if his performance did not improve during an extended probationary period. We hold that the threat made by the Assistant Commissioner to the grievant was not wrongful, that the grievant did not sign the Extension under conditions of coercion and

[7] See, 805 Third Avenue Company v. M.W Realty Associates, 461 N.Y.S.2d 778, 58 N.Y.2d 447, 448 N.E.2d 445 (Ct. App. 1983); Midwood Development Corporation v. K 12th Associates, 537 N.Y.S.2d 237 (2nd Dept 1989), Polito v. Polito, 503 N.Y.S.2d 867, 121 A.D.2d 614 (2nd Dept 1986).

[8] Gerstein v. 532 Broad Hollow Road Co., 429 N.Y.S.2d 195 at 199, 75 A.D.2d 292 (1st Dept. 1980).

duress, and that the Extension was thus valid and effective.

Accordingly, we find that the grievant could not have been a permanent employee on June 9, 1989, the date of his discharge. Since pursuant to the terms of the Extension, which is dated January 27, 1989, the grievant agreed to extend his probationary period by six months, he could not have attained permanent employee status until July 27, 1989, at the earliest.

Finally, we note that the circumstances of this case do not warrant the application or interpretation of the Rules and Regulations of the New York City Personnel Director. Our determination that the grievant was a probationary employee on the date of his termination is based solely on our interpretation and application of the Extension. We reject the City's contention that the Rules and Regulations of the Personnel Director have any bearing on the arbitrability of this matter.

Accordingly, we rule that the grievant was not entitled to the protections afforded by Article VI, §§1(E) and 1(F) of the Agreement when he was discharged, and that there is consequently no nexus between Article VI, §§1(B), 1(E) and 1(F) of the Agreement and the instant dispute.

0 R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

0 R D E R E D, that the petition challenging arbitrability filed herein by the City of New York be, and the same is hereby granted, and it is further

0 R D E R E D, that the request for arbitration filed herein by the Union be, and the same is hereby denied.

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

MALCOLM D. MACDONALD
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