City v. L.371, SSEU, 45 OCB 42 (BCB 1990) [Decision No. B-42-90 (Arb)]

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

THE CITY OF NEW YORK, DECISION NO. B-42-90

Petitioner, DOCKET NO. BCB-1241-90
(A-3228-89)

-and-

SOCIAL SERVICES EMPLOYEES UNION,
LOCAL 371, AFSCME, AFL-CIO,

Respondent.

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DECISION AND ORDER

On January 8, 1990, 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 the Social Service Employees Union, Local 371 ("the Union") on behalf of Warren Williams ("the grievant"). The Union filed an answer to the petition on February 9, 1990. The City filed its reply on March 23, 1990.

Background

The grievant was hired as an Assistant Superintendent at the Kenton Hotel Facility of the New York City Human Resources Administration ("HRA" or "the Agency") on November 16, 1987, subject to a one-year probationary period. During his probationary period, the grievant received two interim performance evaluations covering the periods of November 16, 1987 - February 16, 1988 and February 16, 1988 - May 16, 1988. There is no dispute, however, that the grievant did not receive the Tasks and Standards for his position until June 15, 1988.

Although the grievant received a satisfactory rating for each Task and Standard for which he was evaluated, at the end of the second evaluation period he was placed on conditional status, allegedly due to absenteeism and punctuality problems. Appended to the second performance evaluation was a statement, signed by the grievant on August 17, 1988, reflecting his

supervisor's recommendation that the grievant's probationary period be extended by three months. This statement provides that because the grievant had sought remedial intervention of the HRA Employee Assistance Program, demonstrating a strong commitment to his work, his supervisor believed he should be given an opportunity to correct his time and leave problem. On or about September 29, 1988, an agreement to extend grievant's probationary period to February 15, 1989 was fully executed by the City. Notwithstand-ing the extension, the grievant was terminated on November 15, 1988.

On December 15, 1988 the Union filed a Step II grievance, claiming that the City's failure timely to provide the grievant with his Tasks and Standards violated the HRA Non-Managerial Performance Evaluation Procedure Manual ("the Manual"). On February 24, 1989 the Agency upheld the discharge, claiming that because the grievant was terminated due to unsatisfactory attendance, no substantive violation of the Manual was proven.

The Union appealed to Step III on March 8, 1989. The Step III Review Officer, in a decision dated August 7, 1989, found that he had been presented with evidence which indicated that grievant's performance evaluation was not processed in accordance with the Manual. However, the Review Officer held, the grievant was not discharged because of an unsatisfactory evaluation or the inability to perform certain tasks; rather, because the grievant's time and leave record "did not improve but instead grew worse" after August 17, 1988, the Agency acted correctly by terminating his employment during his probationary period.

On October 10, 1989, the Union filed the instant request for arbitration alleging a violation of Article VI, Section 1(b)[1] of the 1984 - 1987

[1] We note that in the request for arbitration, the Union cited Article VI, Section 2 of the Agreement. However, it is clear from the facts alleged and subsequent pleadings of both parties, that the Union relies upon Article VI, Section 1(b) of the Agreement as the source of the alleged right to pursue this matter in the arbitral forum.

Collective Bargaining Agreement between the parties ("the Agreement"). As a remedy, the Union seeks:

> Reinstatement, restoration of all monies lost, restoration of status, and any other just and proper remedy.

Positions of the Parties

City's Position

The City asserts that the Union's request for arbitration should be denied because it fails to state a claim which is arbitrable under the Agreement for the following reasons:

First, the City maintains that there is no contractual basis upon which the Union may challenge the discharge of a probationary employee for unsatisfactory attendance. The City alleges that because the grievant was tardy on eight occasions in September 1988, and on nine more occasions in October 1988, the Agency acted properly in terminating his employment on November 15, 1988. The City points out that these latenesses occurred after August 17, 1988, at which time his supervisor proposed a three-month extension of his probationary period because of prior punctuality problems.

The City claims that its decision to terminate a probationary employee for unsatisfactory attendance is within the City's statutory managerial prerogative under Section 12-307(b) of the New York City Collective Bargaining Law ("NYCCBL").[2] The City maintains that it has not waived any of these

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Article VI, Section 1 of the Agreement, defines a grievance as, inter alia:

> (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 condition 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.

[2] Section 12-307b of the NYCCBL provides, in relevant part:

rights with respect to probationary employees. Even though the parties may agree to "enlarge the traditional and well-defined incidents of probationary status," the City argues, "the Board will require an explicit contractual expression of that intent."[3] Because no such intent is expressed in the contract, the City asserts, the Union may not challenge a disciplinary action taken against a probationary employee. Moreover, the City argues, the gravamen of this dispute concerns the Rules and Regulations of the New York City Personnel Director ("Rules"), entitled "Probationary Terms."[4] Inasmuch as Article VI, Section 1(b) of the Agreement expressly states that disputes involving the Rules are excluded from grievance and arbitration, the City contends that the underlying controversy is not a matter within the scope of the parties' agreement to arbitrate their disputes.

The City also asserts that the grievant's termination had nothing to do with an alleged violation of the Manual, as the Union claims. The City argues that even if there were violations of the Manual, the Union has still failed to establish that "such a violation is in any way connected to the act complained of (i.e., the dismissal of the grievant)." The City maintains that because the Union cannot demonstrate that a substantive violation of the procedures set forth in the Manual resulted in the grievant's termination, the Union may not invoke the Manual as source of the alleged right to arbitrate this dispute. Consequently, the City argues, a grievance based merely on a definitional section of the Agreement, i.e., Article VI, Section 1(b), fails

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> It is the right of the city ... to determine the standards of services to be offered...; determine that standards for the selection for employment; ... maintain the efficiency of governmental operations; ... and exercise complete control and discretion over its organization....

[3] The City cites Decision No. B-6-84.

[4] Section 5.2.1 through 5.2.11 of the Rules sets forth, inter alia, the applicable minimum and maximum periods of probationary service, the conditions under which an agency head may terminate the employment of a probationary employee, and the extension of probationary periods.

to state a cause of action upon which relief may be granted.[5]

Union's Position

The Union contends that it has alleged facts sufficient to demonstrate that the City violated the Manual and, therefore, it has stated an arbitrable claim. Specifically, the Union claims that the Agency violated Section IV, paragraph F of the Manual,[6] by failing to provide grievant with his Tasks and Standards at the beginning of the evaluation period(s). The Union also alleges that the Agency violated Section IV, paragraph G of the Manual,[7] contending that there were no ongoing meetings between grievant and his supervisor during the evaluation period(s). The Union argues that the City may not avoid the obligation to arbitrate this matter by simply claiming that the discharge was based on the grievant's attendance record and, therefore, was unrelated to alleged violations of the Manual. The Union contends that whether the grievant was discharged for poor attendance or as the result of the City's failure to properly evaluate the grievant, clearly is a factual question for an arbitrator to determine. In this connection, however, the Union submits that after the grievant agreed to the extension of his probationary period, his time and leave infractions (which were caused by his being a single parent with a documented problem in finding adequate child care and a recurring back problem), "drastically reduced, and were much less

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[5] The City cites Decision Nos. B-22-85; B-41-82; B-7-81.

[6] Section IV, paragraph F of the Manual provides:

> At the beginning of the evaluation period, the supervisor completes Sections I and II of the form M-303a by entering employee information, and the Master List Task Numbers, Tasks, and Standards...[emphasis in original].

[7] Section IV, paragraph G of the Manual provides:

> During the evaluation period, the supervisor meets with the employee on an ongoing basis to discuss performance and to assist the employee in taking any corrective actions...[emphasis in original].

than that claimed by the Agency."

The Union also rejects the City's claim that this grievance is not arbitrable because the discharge of the Grievant was within the exercise of its management prerogative. The Union submits that in Decision No. B-39-89, the Board held that even provisional employees were allowed to arbitrate similar grievances, finding that the Manual, in effect, circumscribes the exercise of managerial discretion in this area. The rationale utilized by the Board in that decision, the Union argues, "applies with even greater force to a probationary employee."

Discussion

There is no dispute herein that the parties are obligated to arbitrate matters defined as "grievances" pursuant to Article VI, Section 1(b) of the Agreement; nor that an alleged violation of the Manual states an arbitrable claim, even with respect to probationary employees.[8] Instead, the City contends that despite the Union's conclusory allegations which may amount to a violation of the Manual, the gravamen of this dispute concerns an alleged misapplication of the Rules, a matter which is expressly excluded from grievance and arbitration. The Union alleges that notwithstanding the proviso concerning the Rules, it has stated a claim, i.e., an alleged violation of the Manual, which falls within the range of disputes that the parties agreed to arbitrate under Article VI, Section 1(b) of the Agreement.

In determining the arbitrability of disputes, we will inquire as to the prima facie relationship between the act complained of and the source of the alleged right.[9] It is well-settled that where challenged, a union has the burden of establishing that the contract provision invoked arguably deals with the subject matter at issue.[10]

In the instant matter, the Union alleges, and the City does not deny, that procedural violations of the Manual have occurred. Furthermore, there is no dispute that probationary employees are subject to the procedures set forth in the Manual. We have long held that once the Union cites a rule, regulation, written policy or order which it claims has been violated, and demonstrates a colorable basis for its claim, it thereby satisfies the elements of arbitrability to the extent they are considered by the Board.[11] Therefore, we conclude that the Union has alleged facts sufficient to

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[8] See e.g., Decision No. B-31-82.

[9] Decision Nos. B-28-87; B-6-86; B-8-82; B-7-81; B-4-81; B-28-80; B-15-80; B-15-79; B-7-9; B-3-78; B-3-76; B-1-76.

[10] Decision Nos. B-40-88; B-16-87; B-36-86; B-1-84.

[11] Decision Nos. B-30-89; B-5-89; B-24-88; B-9-83; B-21-80.

demonstrate a claim which is arguably within the ambit of Article VI, Section 1(b) of the Agreement.[12]

We will not, as the City urges, inquire into the merits of this dispute to determine whether the grievant's discharge came as a consequence of procedural violations of the Manual or as a result of his attendance problems. Whether these procedural defects contributed to the City's decision to terminate the grievant on November 15, 1988, is beyond the scope of the Board's inquiry into matters of substantive arbitrability.[13]

In support of this conclusion, we note that in Decision No. B-31-82, the City also admitted that some procedural violations occurred but disputed the union's contention that the defects were so substantial as to deprive the grievant in that matter of a fair and proper evaluation. Therein, we held:

[12] Decision Nos. B-39-89; B-12-86; B-6-86; B-38-85; B-31-82.

[13] Decision B-1-84.

> For the Board to determine which procedural steps the City overlooked and the effect of those procedural violations on the Grievant's evaluation would be to usurp the power of the arbitrator to independently resolve the merits of the grievance.[14]

Furthermore, inasmuch as the City agreed to extend the grievant's probationary period by three months and terminated him short of the commencement of this extended period, at least an arguable issue is raised as to whether the decision to terminate the grievant was related to his attendance.[15] As the Union persuasively argues, "the actual reason for the discharge is an ultimate question of fact which must be resolved in the arbitration process."[16]

However, as the City correctly points out, pursuant to Section 12-307b of the NYCCBL, the Agency has a right to terminate a probationary employee during his probationary period unless this right is limited by an express waiver or otherwise prohibited by law. Our decision herein does not conflict with this right. We decide only that the effect to be given the cited provisions of the Manual and the relief, if any, go to the interpretation and application of those provisions and that these are issues that an arbitrator must resolve. We direct, however, that the remedy, if any, shall be limited to accomplishing adherence to the procedures of the Manual that the Agency adopted as part of its decision-making process.[17]

Accordingly, inasmuch as it is uncontroverted that the Agency failed to evaluate the Grievant in accordance with the Manual, the City's petition challenging the arbitrability of this matter is dismissed and the grievance shall be submitted to arbitration with the limitations indicated above.

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[14] Decision No. B-31-82, at 13.

[15] We further note in this connection that the Agency initiated the request that the Grievant be terminated on October 6, 1988.

[16] See Decision Nos. B-31-82; B-27-82; B-1-75; B-2-68.

[17] To the extent Grievant's request for arbitration seeks reinstatement with back pay, 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 the Grievant that are greater than those enjoyed by similarly situated employees under the Civil Service Law. See Decision No. B-18-90, note 11, at 9.

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 petition of the City of New York challenging arbitrability be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration of Social Services Employees Union, Local 371, AFSCME, AFL-CIO be, and the same hereby is, granted.

DATED: New York, New York
July 26, 1990

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