City v. DC37, 47 OCB 52 (BCB 1991) [Decision No. B-52-91 (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-52-91

-and-

DOCKET NO. BCB-1322-90

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

The City of New York ("the City"), by its office of Labor Relations ("OLR"), filed a petition on September 13, 1990, challenging the arbitrability of a grievance submitted by District Council 37, AFSCME, AFL-CIO ("the Union"). The grievance alleges that the Department of Finance ("the Department") wrongfully failed to serve written disciplinary charges, failed to provide due process rights, wrongfully took disciplinary action and wrongfully terminated grievant's employment in violation of the contract between the Union and the City ("the Agreement").[1] The Union filed an answer on September 26, 1990. The City filed a reply on October 9, 1990.

[1] The City and the Union are parties to a collective bargaining agreement dated July 1, 1987 to June 30, 1990.

Background

The grievant, Sheila Ford, was hired by the Department as a provisional employee in the title Tax Auditor on December 7, 1987. On October 31, 1989, grievant received a memo titled "Two Years Provisional Performance Evaluation - Six Months Extension" ("the extension memo") from her supervisor, which stated:

> You were transferred to my Group during July of 89 and because of this, I cannot fairly assess your performance. In order for me to recommend that you be retained, [an] extension of six (6) months, will be required.
>
> During this period you must demonstrate that you have the ability to close cases in a comprehensive sense. At this writing I have not been able to sign off on any of your cases due to various audit questions. After each succeeding two month period, we will have an informal conference on your progress. (Emphasis in the original.)

The memo was signed and dated by grievant and her supervisor.

By letter dated December 6, 1989, the Department's Director of Human Resources informed grievant that her services as a provisional Tax Auditor were "terminated effective December 6, 1989 at the close of business." She received the letter at approximately 11:00 A.M. on December 7, 1989 at her work location.

The Union filed a grievance contesting the termination.[2] In a letter to the Union dated July 12, 1990, OLR stated:

> This Office is in receipt of your request for an appeal of the termination of [grievant]. Pursuant to the 12/27/87 letter of agreement between District Council

[2] The parties do not state when the grievance was filed.

37, AFSCME and the City of New York,[3] a provisional employee who has served for two continuous years in the same or similar title, shall be granted contractual disciplinary grievance rights.
The Review Officer has been advised by the Department of Finance that the grievant is a provisional employee with less than two continuous years of service. As such, the grievant has no standing to appeal the termination of her provisional employment.
Please be advised that the instant grievance is hereby dismissed without a Step III Conference.

Pursuant to the terms of the Agreement,[4] the Union submitted

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[3] On December 22, 1987, the City and District Council 37, AFSCME, AFL-CIO, entered into an agreement as an amendment to the "July 1, 1987 Citywide Agreement and Other Applicable Agreements." The Letter Agreement states, in relevant part:

> This is to confirm our mutual understanding and agreement regarding the resolution of your bargaining demand in the negotiations for the agreement successor to the 1984-87 Citywide Agreement and other applicable agreements which seeks due process rights for provisionals.
>
> The Citywide Agreement and other applicable agreements shall be amended to include: a contractual due process procedure effective July 15, 1988 for provisional employees who have served for two years in the same or similar title or related occupational group in the same agency....

[4] Article VI of the contract provides, in relevant part:

Section 1.

Definition: The term "Grievance" shall mean:

A. A dispute concerning the application or interpretation of the terms of this Agreement;

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...

(Continued. . .)

(...continued)

G. A claimed wrongful disciplinary action taken against a provisional employee who has served for two years in the same or similar title or related occupational group in the same agency.

a Request for Arbitration of the instant matter dated July 31, 1990. It alleges a violation of "the due process agreement between the Union and the City of December 22, 1987;[5] City-wide Contract, Article XV[6]; and Accounting and EDP contract Article VI."[7]

Positions of the Parties

City's Position

The City argues that although the Letter Agreement confers the right to notice and a hearing at termination upon provisional employees with two or more years of service, grievant has no standing to bring her grievance to arbitration because her provisional status was extended for six months. It asserts that, at the time of grievant's termination, over four months remained

before her due process rights would have accrued.

According to the City, although grievant could have been terminated when she received the extension memo, she was given another opportunity to demonstrate her ability to perform her job. The City asserts that the contents of the extension memo clearly show that the purpose of the extension was to give the Department more time to evaluate grievant's performance, and that

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Section 2.
STEP IV. An appeal from an unsatisfactory determination at STEP III may be brought solely by the Union to the Office of Collective Bargaining for impartial arbitration...

[5] See footnote 3, supra.

[6] Article XV of the City-wide Contract provides a process for the resolution of disputes between the parties.

[7] Article VI, "Grievance Procedure", of the contract between the City and the Union for Accounting and Electronic Data Processing Titles, sets forth the procedures for resolution of grievances. The relevant portions of Article VI appear in footnote 3, supra.

grievant was aware that signing the memo "affected the accrual of her due process rights."

In its reply, the City elaborates on this argument. It states that the purpose of the extension was to postpone the accrual of due process rights. Otherwise, the City maintains, such an extension would be meaningless. The City asserts that grievant does not allege that she was unaware of the nature of what she signed, or why she signed it, and that she cannot now claim that the extension was ineffective.

The City argues that allowing the instant matter to proceed to arbitration would "defeat the purpose of the extension, penalize the Department for giving the grievant another opportunity to demonstrate her ability to perform her job duties, and discourage the Department from giving employees a second chance in the future... Given the choice of terminating the employee or extending the appointment and risking having the employee accrue due process rights, the Department would most likely terminate the employee."

The City further asserts in its reply that even if

grievant's provisional status had not been extended, she was terminated before the end of the two-year qualifying period and thus has no standing to go to arbitration.

The Union's Position

The Union maintains that grievant served the amount of time necessary to make her eligible for due process rights under the terms of the Letter Agreement. It asserts that the City has conceded, in its petition, that had it not been for the extension, grievant's due process rights would have accrued.

The Union argues that the extension of October 31, 1989 did not postpone the accrual of grievant's due process rights. It maintains that the extension letter neither explicitly nor implicitly indicated agreement by grievant that the additional time would postpone the accrual of her rights, and that such consent was neither asked for nor given. The Union asserts that if the Department wanted the extension of time to act as a waiver to accruing grievant's rights, it had a legal obligation to secure express waivers from her and from the Union. The Union states that such a waiver of rights may not be implied from grievant's acceptance of the extension.

The Union argues that a provisional employee does not have to be retained for any specific period of time before being terminated. It maintains that the Department had no need to extend grievant's provisional employment unless it wanted to claim that the extension prevented grievant from accruing the

necessary time to meet the two-year requirement for due process rights.

The Union maintains that since neither the grievant nor the Union agreed that the extension would act as a waiver of rights, and since grievant was terminated after having completed two years of service, she is entitled to arbitration of her grievance under the terms of the Agreement.

Discussion

When the City challenges the arbitrability of a grievance, this Board must first determine whether the parties are in any way obligated to arbitrate controversies and, if they are, whether that contractual obligation is broad enough to include the act complained of by the Union.[8] Doubtful issues of arbitrability are resolved in favor of arbitration.[9] In the instant matter, the parties do not dispute that the alleged violation of the contract is an arbitrable grievance. The City, however, argues that grievant lacks standing to submit a grievance to arbitration under the terms of the Agreement.

The doctrine of standing to sue holds that a petitioner may only complain of the allegedly wrongful conduct if her legally protected interests have been violated. The Board found in Decision No. B-39-89 that "provisional employees are not

[8] Decision Nos. B-19-89; B-65-88; B-28-82.

[9] Decision Nos. B-65-88; B-16-80.

precluded, on account of their provisional status, from asserting an arbitrable claim on the basis of rights derived from the contract between the parties." In the instant matter, the precise issue to be decided is whether grievant has rights deriving from the agreement between the parties. The resolution of the dispute turns on an interpretation of the terms of the Letter Agreement. For this reason, the City's claims constitute a challenge to the existence of a nexus between the contract and the benefits sought by the Union, rather than an issue of standing. The burden is on the Union to establish a nexus between the City's acts and the contract provisions it claims have been breached.[10]

The City first argues that grievant did not accrue due process rights as a provisional employee because of a "probationary" period imposed upon her by her supervisor. Going further, the City maintains that even if the first question is resolved in favor of grievant, we must also consider the issues of when grievant was terminated and whether grievant had served the requisite two years specified by the Letter Agreement. By so arguing, the City asks us to decide matters of contract interpretation which should properly be left to an arbitrator.

It is sometimes difficult to determine valid issues of substantive arbitrability without crossing the line separating them from issues which involve the merits of the particular case.

[10] Decision Nos. B-1-89; B-7-81.

It has been our practice in such cases to allow only those incursions upon the realm of the arbitrator which are essential and unavoidable in determining threshold questions of substantive arbitrability.[11] This is not such a case. Here, the City itself has invited inquiry into the merits, and we decline to consider its argument.

We will, however, take this opportunity to remind the parties of what may and may not be pleaded in a case before this Board. The intent of assigning to the Board the duty of resolving questions of substantive arbitrability was to spare the parties the cost of submitting such issues to arbitration or the delay of litigating them in the courts. It is well-settled that our national labor policy protects the arbitration process and preserves the right of the proponent of arbitration to have the merits of the case heard by an arbitrator, once its right to arbitration has been established.[12] The City now asks us to allow the opponent of arbitration to raise a question of substantive arbitrability before this forum and, in so doing, also raise an issue going to the merits of the grievance, giving it two opportunities to have the issue resolved in its favor. We

[11] Decision Nos. B-23-90; B-54-87; B-9-83.

[12] Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960) ; United Steelworkers of America v. warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); see also, John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); AT&T Technologies, Inc. v. communication Workers of America, 475 U.S. 643 (1986).

view this as an abuse of a process that was instituted to accommodate the parties. If this practice continues to occur in future cases, we will find an appropriate remedy.

The City argues that the extension memo created a "probationary period" during which grievant's rights did not accrue. Grievant, however, was a provisional, not a probationary, employee. The rights of and procedures applicable to these two categories of employees differ under the Civil Service Law. No matter what procedure the Department chooses to use to evaluate its personnel, there exists no authority under the Civil Service Law to apply probationary periods or extensions to provisional employees. Notwithstanding the absence of any similar statutory protection, a provisional employee is entitled to due process rights under the terms of the Letter Agreement after serving two years in the same or similar title.

The City claims that the Department created a "probationary period" for grievant by the terms of its extension memo, yet it has not cited the source of any authority to create probationary periods or extensions for provisional employees subject to the contractual two-year period for the accrual of due process rights. Since the Department has not identified the source of its claimed right to create such extensions, we will not consider the City's argument that grievant was aware that signing the extension memo postponed the accrual of her rights, nor reach the question raised by the Union of whether the Department was required to obtain an express waiver of due process rights. We

find that the purported extension of the "probationary period" cannot serve to bar arbitration of the grievant's claim herein.

The City argues that the Department will be less likely to retain marginal provisional personnel if it is not allowed to create such probationary periods. The Department may terminate a provisional employee at will, and it may use whatever evaluation methods it chooses. It may not, by instituting a new evaluation or "extension" policy, alter the nature of provisional employment or create new terms of employment for a particular employee, in derogation of the contractual due process provisions. The parties have agreed that a provisional employee who serves for two years shall accrue certain due process rights; they have not agreed that the two-year period may be extended at management's request.

The issue here is the question of whether grievant served the requisite amount of time necessary to be entitled to rights guaranteed by the due process agreement between the Union and the City. The agreement confers due process rights upon provisional employees at the completion of two years of service. Grievant was hired by the Department on December 7, 1987. She was terminated by letter dated December 6, 1989, which stated that the termination was effective at "the close of business" on that day. She received the termination letter at her place of employment at 11:00 A.M. on December 7, 1989.

To determine arbitrability, we must consider whether the grievance involves a dispute concerning the application or

interpretation of the terms of the agreement.[13] The City argues that grievant had not completed two years of service in the title when she was terminated. The Union argues that grievant had completed two years of service, and was thus eligible for due process rights. The language of the parties' Letter Agreement, incorporated into their collective bargaining agreement, merely states that their contractual due process procedure will apply to "provisional employees who have served for two years in the same or similar title....” The conflict between the parties' interpretations of when grievant had completed two years of service, and when she was terminated, presents a substantive question of contract interpretation for an arbitrator to decide. Moreover, there exists a clear nexus between the Union's claim and the provisions of the Letter Agreement.

Accordingly, we find the grievance presented to be arbitrable.

[13] Decision Nos. B-59-90; B-49-89; B-27-89.

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 District Council 37, AFSCME, AFL-CIO be, and the same hereby is, granted.

Dated: New York, New York
October 23, 1991

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