City & Dep't of Sanitation v. DC37, 47 OCB 54 (BCB 1991) [Decision No. B-54-91 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

- between

Department of Sanitation and City of New York,

Petitioners,

DECISION NO. B-54-91

DOCKET NO. BCB-1395-91 (A-3772-91)

-and-

District Council 37, AFSCME, AFL-CIO,

Respondent.

DECISION AND ORDER

The City of New York, by its Office of Labor Relations ("the City"), filed a petition on July 1, 1991, challenging the arbitrability of a grievance submitted by District Council 37, AFSCME, AFL-CIO ("the Union"). The grievance contests the termination of a provisional Accounting Assistant by the New York City Department of Sanitation ("the Department") on the grounds that the termination was a disciplinary action taken without due process. The Union filed an answer on July 22, 1991. The City filed a reply on August 27, 1991.

Background

Sawalak Feldman ("grievant") was hired by the Department of Sanitation as a provisional employee in the title of Assistant Accountant on July 6, 1987. Until January, 1990, she received overall ratings of "satisfactory" on her performance evaluations,

which were completed, signed and dated by grievant and her supervisor at the customary four-month intervals.

In January, 1990, grievant was assigned a now supervisor. On September 21, 1990, she received a "counseling memo" from the Assistant Supervisor of the Payrolls Unit, advising her that she had wrongly handled audit transactions. The memo concluded, "a recurrence of this nature may lead to disciplinary action against you." From January, 1990, until February, 1991, grievant did not receive performance evaluations from her supervisor. The record shows one performance evaluation sheet, giving grievant an overall "conditional" evaluation for the previous twelve months, signed and dated by grievant's supervisor on February 1, 1991. This performance evaluation was not signed by grievant.

From January 1, 1991 to February 29, 1991, 173 provisional employees in civilian titles at the Department of Sanitation were terminated for economic reasons. On February 1, 1991, grievant received a memorandum from the Department advising her that her position had been targeted for layoff. On February 11, 1991, grievant received an "Amended Termination Letter" advising her that she was being terminated at close of business on February 24, 1991 because of budget cutbacks. Grievant was one of two provisional employees in the title Assistant Accountant who were terminated by the Department on that day, along with 158 employees in other titles.

On March 5, 1991, the Union filed a Step I grievance on

behalf of grievant, alleging that she had been terminated without cause or service of charges, in violation of the collective bargaining agreement between the parties[1] as amended by the Letter Agreement of December 22, 1987.[2] The Department's Director of Labor Relations denied the grievance by letter dated March, 13, 1991, stating that grievant "was not terminated for

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[1] Article VI of the collective bargaining agreement between the parties provides, in relevant part:

> Section 1.
> Definition: The term "Grievance" shall mean:
>
> 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.
>
> 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...

[2] The Letter Agreement is the letter dated December 22, 1987 from Robert Linn, Director of OLR to Stanley Hill, Executive Director of the union. The letter 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....

cause. Rather, the grievant was laid-off as part of the recent layoffs resulting from the economies the City was required to effect... Accordingly, the matter does not come within the purview of the contractual provisions cited and the grievance is denied."

Grievant protested the Step I decision in a Step III grievance filed on April 1, 1991. The grievance was denied by decision dated April 24, 1991. No satisfactory resolution of the grievance having been reached, the Union filed a Request for Arbitration of the instant grievance an May 23, 1991. It seeks, as a remedy, "reinstatement, back pay with interest, benefits and any other action required to make the grievant whole; [and] direction to the agency to comply with contractual provisions and agreements."

Positions of the Parties

City's Position

The City asserts that the Union has failed to establish a nexus between grievant's termination and the contractual right to grieve a wrongful disciplinary action, because grievant's termination was for economic reasons and not a matter the parties have agreed to arbitrate. The City maintains that the right to effect economic layoffs is a management right afforded the Department by § 12-307 of the New York City collective Bargaining

Law ("NYCCBL").[3] For that reason, the City argues, it is not required to bargain with the Union over economic layoffs unless the Union demonstrates that the action will have a practical impact.

The City cites Decision No. B-14-87, which, it maintains, holds that grievant must show an arguable relationship between the act complained of and the source of the alleged right in order to demonstrate such a nexus. The City states further that, according to the Board's holding in B-8-81, the Union must present a "substantial issue", rather than a "bare allegation" that the management decision was made for disciplinary purposes. The City argues that the instant petition offers no facts to support its allegation that grievant's termination was not for

[3] Section 12-307b of the NYCCBL provides:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determined the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions or workload or manning, are within the scope of collective bargaining.

economic reasons.

The City contends that even if qrievant can allege facts showing that the termination arguably was punitive, the Department must still be allowed to terminate grievant for economic reasons. Allowing the Union to arbitrate the instant grievance, the City argues, would grant grievant greater retention rights in her position than those of other provisional and competitive class employees. The City asserts that the facts in the instant case are not sufficient to establish a nexus, as they were in Decision Nos. B-9-81, B-8-81 and B-57-90, but, in any event, the Department still may not be precluded from terminating grievant for economic reasons while disciplinary charges were pending.

Relying on Decision No. B-39-89, the City argues that provisional employees do not have retention rights in their positions other than those established in collective bargaining. The City asserts that affording grievant a remedy in the instant matter would create greater job retention rights for provisional employees who have been charged with misconduct than for those who have not. The City states that, should the Board find the instant matter arbitrable, it must establish a clear standard of review to ensure that no arbitrator oversteps his or her authority in rendering a decision, and must expressly limit the kind of remedy an arbitrator could award.

Union's Position

The Union asserts that, as a provisional employee with more than two years of service, grievant is entitled to due process rights according to the terms of the Letter Agreement between the City and District Council 37. The Union states that after more than two years of employment during which grievant received overall "satisfactory" performance ratings, she was assigned to work with a supervisor with limited accounting background. The Union further states that grievant received a "counseling memo" concerning her job performance in September, 1990, and, on February 1, 1991, an overall "conditional" rating for the period January 1, 1990 to December 31, 1990. The Union maintains that the Department hired at least three additional provisional Assistant Accountants at the end of 1990. Despite having less seniority than grievant, the Union asserts, these employees were not laid off during the January budgetary modifications. The Union argues, therefore, that grievant's termination for budgetary reasons was a ruse by which the Department terminated grievant for cause without providing her due process rights.

The Union points to the unsatisfactory evaluation proffered to grievant on the same day as the layoff notice, the counseling memo of September, 1990, and the fact that the Department retained other provisional Assistant Accountants, some of whom had served less time in the title, to support this argument. The Union maintains that it has thus established a nexus between the instant grievance and a contract provision it claims has been

violated, and has raised a substantial issue that the termination was effected for disciplinary purposes. The board may not look further into this matter, the Union claims, without going into the merits of the grievance.

The Union contests the City's assertion that by finding this grievance arbitrable, the Board would be granting greater retention rights to some provisional employees. The Union claims that the City argues a question of remedy rather than arbitrability. Moreover, the Union argues, it is not within the mandate of the Board to decide the propriety of potential remedies, or to define or limit the scope of an arbitrator's powers. To do so, the Union claims, would deprive the arbitrator of the ability to consider and fashion a remedy. The Union asserts that if an arbitrator oversteps his or her authority, the City may challenge the action in the appropriate judicial forum.

Discussion

In considering challenges to arbitrability we must first ascertain whether there is a demonstrable relationship between the act complained of and the source of the right alleged to have been violated. When challenged, the party requesting arbitration must show that the parties have agreed to arbitrate the type of dispute set forth in the Request for Arbitration ana that the contract provision invoked is arguably related to the grievance

to be arbitrated.[4] The parties have included a grievance procedure in their collective bargaining agreement culminating in binding arbitration, and have agreed that provisional employees with over two years of service are entitled to a contractual due process procedure for 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.

The question of whether an employee has been disciplined within the meaning of a contractual term is ordinarily one to be determined by an arbitrator.[5] When a management right afforded to the City is challenged as a disciplinary measure effected without due process, however, the burden is on the Union to present a substantial issue under the collective bargaining agreement.[6] The City is correct in its assertion that the right to lay off employees for economic reasons is a fundamental right of management.[7] The issue here is whether grievant has presented facts which demonstrate an issue of discipline substantial enough to override the Department's right to effect layoffs due to economic reasons.

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[4] Decision Nos. B-74-89; B-52-88; B-35-88.

[5] Decision Nos. B-52-89; B-40-86; B-5-84; B-25-72.

[6] Decision Nos. B-57-90; B-16-86; B-8-81.

[7] Decision Nos. B-23-75; B-21-75; B-4-71.

In the absence of any contractual or other limitation, the City retains the right, pursuant to Section 12-307b of the NYCCBL, to "relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of government operations; [and] determine the methods, means and personnel by which government operations are to be conducted...."[8] The Department's right to terminate provisional employees is contractually limited only by the Letter Agreement of 1987, which invests provisional employees with due process rights with respect to a disciplinary action.

In the instant matter, we find that the Union has not met its threshold burden of showing that grievant's termination raises a substantial question as to whether the action taken was disciplinary. In contrast to the facts alleged in other cases in which we found that the Union had made a substantial showing of disciplinary action,[9] we find here that the Union has failed to allege facts or circumstances compelling enough to lead us to believe that the termination was predicated on discipline, such as the service of written charges, verbal accusations of incompetence of misconduct, or the imposition of a penalty.

A review of the record reveals no evidence which can be construed as circumscribing the Department's managerial

[8] Decision No. B-54-87.

[9] Decision Nos. B-9-81; B-8-81. Decision No. B-40-86 reviews the facts in these cases at 13-14.

prerogative to terminate provisional employees for economic reasons. Moreover, we reject the Union's contention that the proximity in time of grievant's "conditional" performance evaluation and her layoff, without more, establishes a causal connection sufficient to make a shoving that grievant's termination was for a disciplinary purpose. We do not accept the contention that a "conditional" rating on a performance evaluation, or a memo in which the supervisor states that "a recurrence of this nature may lead to disciplinary action against you", means that disciplinary procedures were instituted or in process at the time that grievant was terminated.[10]

We also reject the Union's argument that retaining three provisional employees hired into grievant's title before the layoff demonstrates that grievant's layoff was a ruse by which the Department terminated her for disciplinary reasons without complying with contractual due process procedures. By so arguing, the Union implies that grievant had accrued a seniority

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[10] We held in Decision No. B-40-86 that:

> ... the function of a performance review... is to put an employee on notice of management's assessment of his or her strengths and weaknesses, and to provide feedback to the employee so that discipline will not have to be taken....
>
> We are cognizant of the fact that grievant's supervisor did not use the performance review process to achieve these goals, and, in fact, did not adequately or officially notify grievant of his dissatisfaction with her performance. This failure by the supervisor, however, does not transform the evaluation process into a disciplinary process.

right in her title. Grievant was a provisional rather than a permanent employee. The rights of these two categories of employees differ under the civil Service Law; provisional employees have no right to seniority in their titles. Further, grievant was one of 173 employees laid off by the Department in February 1991. This fact clearly establishes the City's motive of economic necessity for the layoff. We will not examine the process by which the selection for economic layoffs was made without more evidence from the Union that grievant was targeted for termination based on disciplinary reasons.

The Board cannot enlarge a duty to arbitrate beyond the scope established by the parties.[11] In this case, the Union has failed to establish a nexus between the events leading to grievant's termination for economic reasons and the section of the contract which affords grievant due process rights. For this reason, we grant the instant petition.

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, granted;

[11] Decision Nos. B-24-91; B-52-90; B-11-90; B-41-82; B-15-82.

and it is further,

ORDERED, that the request for arbitration by District Council 37, AFSCME, AFL-CIO be, and the same hereby is, denied.

Dated: November 25, 1991
New York, New York

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
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GEORGE BENJAMIN DANIELS
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