

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

The City of New York,

Petitioner,

-and-

Communications Workers of America,  
Local 1180,

Respondent.

Decision No. B-62-91

Docket No. BCB-1219-89  
(A-3211-89)

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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 October 23, 1989 challenging the arbitrability of a grievance submitted by Local 1180 of the Communications Workers of America ("the Union"). The grievance alleges that the Human Resources Administration ("the Agency") violated Article VI of the PAA Unit Contract ("the contract") when it demoted two provisional Computer Associates without due process. Both parties requested and received several extensions of time in which to file their subsequent pleadings. Subsequently, the Union filed an answer and the City filed a reply.<sup>1</sup>

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<sup>1</sup> Further delay in determining this matter was occasioned by the need to reassign this case to a new Trial Examiner after the Trial Examiner who had been handling the matter left the employment of the agency.

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Background

The grievants, Sadie Thomas and Judith Clarke, were employed by the City as Principal Administrative Associates ("PAA"s). In March, 1987, each assumed the title of Provisional Computer Associate (Technical Support, Level II) ("CATS III"). Grievants were officially reclassified by the City as having started in their provisional titles as of November 2, 1987 for Thomas and November 9, 1987 for Clarke.

A grievance was filed by the Union alleging that grievants were not being paid salaries commensurate with their new title. In October, 1988, the parties entered into a settlement by which the City agreed to pay grievants the amount of the difference between their salaries as PAA's and CATS II, retroactive to March 9, 1987. On June 1, 1989, grievants received letters from the Agency's Department of Personnel informing them that they were being returned to their former Civil Service titles.

The Union filed a Step II grievance on June 1, 1989, alleging that grievants had been demoted without cause or service of charges, in violation of the collective bargaining agreement between the parties<sup>2</sup> as amended by the Letter Agreement of

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<sup>2</sup> Article VI of the collective bargaining agreement between the parties provides, in relevant part:

Section 1.

Definition: The term "Grievance" shall mean:

- F. 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  
(continued... )

2 ( ... continued)  
in the same agency.

December 22, 1987.<sup>3</sup> A Step II determination was issued on July 6, 1989, denying the grievance on the grounds that grievants had served less than two years in the provisional CATS II title and had no standing to appeal the termination of her provisional employment." The grievance was subsequently denied at Step III on August 16, 1989.

No satisfactory resolution of the dispute having been reached, the Union filed a Request for Arbitration on September 15, 1989, alleging a violation of the Letter Agreement between the parties which grants due process rights to provisionals with two or more years of service in the same or similar title in a department. It seeks, as a remedy, that the City recognize a "retroactive seniority date in (the] CATS title to March 9, 1987"

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<sup>3</sup> 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....

and that grievants be restored to their provisional titles with retroactive pay and benefits.

Positions of the Parties

City's Position

The City argues that grievants' provisional status bars review of the termination of their provisional employment. It maintains that the purpose of probationary periods in Civil Service titles is to furnish the appointee with an opportunity to demonstrate fitness for the job. Although a probationary employee has a certain expectation that satisfactory performance will ripen into permanent appointment, the City asserts, there can be no similar expectation on the part of a provisional employee, since provisional employment does not include testing or qualifying procedures to determine fitness for permanent status. Affording grievants the remedy requested, the City maintains, would give provisional employees greater rights than employees in permanent or probationary Civil Service titles. Furthermore, the City argues, grievants in the instant dispute are not entitled to the limited due process rights negotiated for provisional employees because they did not serve the requisite amount of time necessary to qualify under the provisions of the Letter Agreement.

In its reply, the City challenges the Union's submission of the Stipulation of Settlement entered into between the City and the Union. It maintains that any reference by the Board to this document in the instant proceeding would violate part 4 of the stipulation, which states:

... this Stipulation shall not be offered into evidence for any purpose or for any administrative, judicial or other proceeding except for the purposes of enforcing the obligations contained herein.

The City maintains that November, 1987, is the appropriate start date for calculating service time because it is the date of official reclassification of title.

#### Union's Position

The Union maintains that grievants assumed the duties and responsibilities of their provisional titles in March, 1987, received the salary appropriate to their provisional titles from March 9, 1987, and were removed from their titles without written charges or disciplinary proceedings on June 2, 1989. For this reason, the Union asserts, they meet the requirement of two years of service stipulated in the Letter Agreement.

The Union alleges that the City's assertion that grievants began employment in their provisional titles on November 2, 1987 is based on the date of formal reclassification, which is a bureaucratic determination that does not reflect the actual date of commencement of service.

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.<sup>4</sup> Doubtful issues of arbitrability are resolved in favor of arbitration.<sup>5</sup> 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 grievants' status as provisional employees bars submission of the grievance to arbitration under the terms of the Agreement.

The Board found in Decision No. B-39-89 that "provisional employees are not 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.<sup>6</sup> The burden is on

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<sup>4</sup> Decision Nos. B-19-89; B-65-88; B-28-82.

<sup>5</sup> Decision Nos. B-65-88; B-16-80.

<sup>6</sup> Decision No. B-52-91.

the Union to establish a nexus between the City's acts and the contract provisions it claims have been breached.<sup>7</sup>

The City argues that the parties' Stipulation of Settlement concerning grievant's pay retroactive to March, 1987, may not be considered here, because by its own terms it precludes submission of the Stipulation as evidence before another forum. The Union argues, however, that the document allows such submission for the purposes of enforcing the obligations contained therein, including the determination of the date upon which compensation for the duties in question commenced.

The Union submitted, with its pleadings, affidavits executed by the grievants in which they affirmed that they had commenced their duties in the provisional titles and had been paid the salaries appropriate to those titles from March, 1987. The City, in its reply, did not challenge grievants' affirmations. Thus, we need not decide whether the use of the Stipulation as urged by the Union is permissible under its own terms because it is undisputed, in the record before us, that grievants received the salaries appropriate to their provisional CATS II titles retroactive to March, 1987.

The issue here is the question of whether grievants 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

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<sup>7</sup> Decision Nos. B-1-89; B-7-81.

employees at the completion of two years of service. To determine arbitrability, we must consider whether the grievance involves a dispute concerning the application or interpretation of the terms of the agreement.<sup>8</sup> The City argues that grievants had not completed two years of service in the title when they were terminated because the requisite amount of time had not elapsed from the date grievants were officially reclassified in their positions until the date of their demotion. The Union argues that grievants had completed more than two years of service because they had performed the duties of the title and received the correct pay for their service as of March, 1987, and were thus eligible for due process rights. The language of the parties' Letter Agreement, incorporated into their collective bargaining agreement, merely states that the contractual due process procedure applies to "provisional employees who have served for two years in the same or similar title...." The conflict between the parties' interpretations of when grievants had commenced their term of service presents a substantive question of contract interpretation for an arbitrator to decide.

Because there is clearly a nexus between the Union's claim and the provisions of the Letter Agreement, we find the grievance presented to be arbitrable.

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<sup>8</sup> 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 Local 1180, Communications Workers of America be, and the same hereby is, granted.

Dated: New York, New York  
December 27, 1991

MALCOLM D. MACDONALD  
CHAIRMAN

GEORGE NICOLAU  
MEMBER

DANIEL G. COLLINS  
MEMBER

CAROLYN GENTILE  
MEMBER

JEROME E. JOSEPH  
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GEORGE B. DANIELS  
MEMBER