City & Dep't of Sanitation v. Doctors Council, 49 OCB 28 (BCB 1992) [Decision No. B-28-92 (Arb)]

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

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF SANITATION,

Petitioners,

-and-

DOCTORS COUNCIL,

Respondent.

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DECISION NO. B-28-92

DOCKET NO. BCB-1410-91 (A-3817-91)

DECISION AND ORDER

On August 12, 1991, the City of New York ("the City") and the New York City Department of Sanitation ("the Department"), filed a petition challenging the arbitrability of a grievance filed by Doctors Council ("the Union") on behalf of itself and three named grievants.[1] The statement of the grievance to be arbitrated was set forth as follows:

(1) The improper imposition by the City of a six-month probationary period on longstanding incumbents in the Department of Sanitation;

(2) The improper suspension from employment without pay of at least one incumbent during transfer from one title to another.

The Union filed an answer to the petition on September 10, 1991. The City filed a reply on October 2, 1991.

Background

[1] The Union's request for arbitration specified the names of the grievants as:

Doctors Council
Ed Ming Chin, M.D.
Ira Weisberg, M.D.
Elliot Lederman, M.D.

Each of the individuals named as grievants in this matter were employed by the Department in the title Medical Specialist (Sanitation).[2] On March 3, 1989, the City Personnel Director adopted Resolution No. 89-2, which amended the Classified Service of the City's Civil Service by including in the Non-Competitive Class, inter alia, the title City Medical Specialist (Part-Time).[3]

On August 30, 1990, Mr. Leonard Rosenberg, Director of Classification and Compensation of the City's Department of Personnel, notified the Department of Sanitation that the temporary title code number for Medical Specialist (Sanitation) had been cancelled and may no longer be used. Mr. Rosenberg advised the Department to use the recently classified Non-Competitive City Medical Specialist (Part-Time) title in its place.

On September 7, 1990, Ms. Rosa L. Vazquez, the Department's Deputy

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[2] The non-competitive title Medical Specialist (Sanitation) was created on October 23, 1982, and was given Temporary Title Code Number 05367. The qualification requirements set forth in the job specification for this title are:

1. Graduation from an accredited medical school.
2. Possession of a license to practice medicine in the State of New York.
3. (a) Board Certification issued by appropriate Specialty Board (A.M.A.), or
   (b) Specialty Board Eligibility.

[3] The Title Code Number for City Medical Specialist (Part-Time) is 53040. The qualification requirements set forth in the job specification for this title are:

> Possession of a valid license to practice medicine in the State of New York and either (a) valid Board Certification issued by the appropriate American Specialty Board in any specialty area required by the agency, or (b) current approved application on file for admission to the certifying examination given by the appropriate American Specialty Board in any specialty area required by the agency.

Director of Health and Safety sent an intra-departmental memorandum addressed to all Medical Staff regarding: Board Certification. The memorandum provided:

> Attached please find job descriptions for City Medical Specialists. The qualification requirements for this title applies to all City agencies.
>
> Please provide this office with evidence of either:
>
> a. valid board certification issued by the appropriate specialty board; or
>
> b. current approved application on file for admission to the specialty certifying examination.
>
> Please comply with this requirement by September 14, 1990. If you have any questions please call my office.
>
> Thank you for your continued cooperation.

On September 24, 1990, Ms. Brenda P. Smith, the Department's Director of Health and Safety sent an intra-departmental memorandum to Mr. Gordon D. Keit, Director of Personnel, on the subject: Physician Reclassification. The memorandum provided:

> In compliance with Leonard Rosenberg's directive dated August 30, 1990, the following physicians presently working in the Medical Specialist (Sanita-tion) title should be terminated and reappointed as City Medical Specialist - Part Time to satisfy the reclassification requirements.
>
> [The three individuals named as grievants in this matter were among the nine physicians listed.]

* * *

On October 26, 1990, Ms. Ellen C. Doubraski, the Department's Deputy Director of Personnel, sent the following letter to one of the named grievants, Dr. Ed Ming Chin:

> Your present title of Medical Specialist (Sanitation), title code 05367, has been cancelled by the New York City Department of Personnel and may no longer be used by this agency.

Therefore, please report to Sanitation Personnel, 346 Broadway, Room 1007, on Wednesday, October 31, 1990 at 10:30 A.M., where you will be offered the new title of City Medical Specialist, title code 53040.

In order to qualify for this position, please bring the following documents so that you may be processed for the new title:

- a valid license to practice medicine in the State of New York AND
- either a valid Board Certification issued by the appropriate American Specialty Board in any specialty area
- or a current approved application on file for admission to the certifying examination given by the appropriate American Specialty Board in any specialty area.

On November 14, 1990, Mr. Keit sent a letter to Dr. Chin which provided:

As you are aware, pursuant to Resolution No. 89-2 dated March 3, 1989, your present title of Medical Specialist (Sanitation) T.C. #05367 has been eliminated by the New York City Department of Personnel.

Therefore, please be advised that effective close-of-business November 21, 1990, your services are terminated.

On November 26, 1990, Ms. Smith sent a letter to Dr. Chin, which provided:

Pursuant to our conversation today and as indicated in your letter from Personnel Director Keit dated November 14, 1990, your services in the clinic were terminated on November 21, 1990. Your last paid work day was November 21, 1990.

You will be paid for your accrued annual leave that ends on December 4, 1990, which is two weeks beyond your last work date. You will no longer be on payroll after December 4, 1990.

On January 10, 1991, Mr. Jerry A. Nelson, the Department's Supervisor of Performance Evaluation and Probation, sent a letter to each of the individuals

named as grievants in this matter (Drs. Chin, Ira Weisberg and Elliot Lederman). This letter provided:

> This is to inform you that you will be appointed as a non-competitive City Medical Specialist effective January 28, 1991. According to the Department of Personnel Rules and Regula-tions you shall serve a six month probationary period which will begin from your date of appoint-ment on January 28, 1991.
>
> It is the Department's expectation that you will become board certified as a result of the next appropriate examining process currently being conducted by the board for the specialty to which you have applied. Failure to secure such certification may jeopardize your continued employment with the Department.

On January 17, 1991, the Union filed a Step III grievance on behalf of Drs. Chin, Weisberg, Lederman, et al., claiming that the imposition of a purported six (6) month probationary period on long standing incumbents is a violation of the grievants' contractual tenure rights. The Union also sought to grieve "any losses suffered by these employees as a result of their having been terminated from the now abolished title of Medical Specialist, including the loss of pay and benefits to Dr. Ed Ming Chin." Finally, the Union objected to the Department's decision to impose new conditions of employment, "such as the requirement that doctors become board certified or risk removal."

In a decision dated June 25, 1991, a Step III Review Officer of the City's Office of Labor Relations denied the grievance in its entirety. Citing Article VIII, Section 1(B) of the 7/1/84 - 6/30/87 Collective Bargaining Agreement between the parties ("the Agreement") as controlling,[4] the Review

[4] Article VIII, Section 1(B) of the Agreement provides,

DEFINITION: The term "Grievance" shall mean:

* * *

(continued...)

Officer held that the Union's complaints "do not represent grievable issues and may not be addressed in this forum" because the disputes involve the Rules and Regulations of the City Personnel Director ("the Rules").

No satisfactory resolution of the matter having been reached, the Union filed the instant request for arbitration on July 16, 1991, alleging that the Department's actions violate Articles I and VIII, Section 1 of the Agreement.[5]

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[4](...continued)
(B) A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders 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** ... [emphasis added].

[5] Article I of the Agreement is entitled Union Recognition and Unit Designation and provides, in relevant part:

> The Employer recognizes the Union as the sole and exclusive collective bargaining representative for the bargaining unit set forth below, consisting of employees of the Employer, wherever employed, whether full-time, part-time per annum, hourly, per session, or per diem, in the below-listed title(s), and in any successor title(s)....

Article VIII of the Agreement is entitled Grievance Procedure and Section 1 provides, in relevant part:

> DEFINITION: The term "Grievance" shall mean:
>
> (A) A dispute concerning the application or interpretation of the terms of this Agreement;
>
> (B) [See note 4, supra, at 6]
>
> * * *
>
> (E) A claimed wrongful disciplinary action taken against (i) a permanent employee covered by Section 75(1) of the Civil Service Law; (ii) a permanent competitive employee covered by the Rules and Regulations of the Health and Hospitals Corporation; (iii) a non-competitive per annum

(continued...)

As a remedy, the Union seeks:

> A declaration that the City's attempt to impose a new probationary period on longstanding incumbents is improper; an order directing the City to cease and desist from attempting to implement the new probation-ary period for incumbents and to correct the personnel files of the affected employees to reflect that they have tenure rights under the collective bargaining agreement; back pay and benefits, plus interest, for any incumbent who was improperly suspended from work during the transfer from one title to another; and such other relief as may be appropriate.

Positions of the Parties

City's Position

The City argues that the Union's request for arbitration should be denied because Article VIII, Section 1(B) of the Agreement expressly excludes alleged violations of the Rules from the definition of an arbitrable grievance. In support of its argument, the City alleges that Rule X authorizes the creation and abolition of titles in the non-competitive class of positions;[6] the City further maintains that the probationary period at

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[5](...continued)
employee appointed in a title in Section 2(A) of Article III hereof who was employed prior to September 1, 1983 or who has completed one year of service; and **(iv) a per diem or per session employee of a Mayoral Agency who is regularly employed 17-1/2 or more hours per week and has completed one year of such employment;** upon whom the agency head shall have served written charges of incompetency or misconduct while the employee is serving in his or her permanent title or which affects his or her permanent or continued status of employment [emphasis added].

* * *

[6] According to the City, Rule X empowered the City Personnel Director to authorize the title City Medical Specialist to replace the title Medical Specialist (Sanitation) in the non-competitive class of positions. Rule X is entitled

(continued...)

issue was imposed pursuant to Rule V.[7] Accordingly, the City submits, inasmuch as the entire process at issue in this dispute is governed by the Rules, the request for arbitration "must be dismissed as a matter which the parties have not included within their contractual dispute resolution procedures." Additionally, the City contends that the Union has failed to identify a substantive contract provision which can serve as the nexus between the acts complained of and the Agreement. In this connection, the City argues

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[6](...continued)
Classification of Positions Not Included in the Career and Salary Plan or in the New York City Housing Authority Classification Plan and provides, in relevant part:

Section II - Positions in the Non-Competitive Class

10.2.1. Number of Positions
Unless a different or an unlimited number is specifically prescribed hereafter, only one appointment may be made to or under the title of any offices or positions in the non-competitive class listed under this rule.

10.2.2. Classification and Compensation Schedule N
(a) The titles, part numbers, number of positions authorized, and limitations on tenure, if any, for each title in the non-competitive class subject to this rule are set forth in the "classification and compensation schedules of the classified service," schedule N, under their respective departments, under the caption positions subject to rule X....

[7] According to the City, Rule V empowered the City Personnel Director to establish a six month probationary period for any employee appointed to the title City Medical Specialist. Rule V is entitled Appointment and Promotions and provides, in pertinent part:

5.2.1 Probationary Term ...

(b) Every original appointment to a position in the non-competitive or exempt class shall be for a probationary period of six months unless otherwise set forth in the terms and conditions for appointment as determined by the City personnel director....

that the Union has not demonstrated how Article I of the Agreement, the union recognition clause, is arguably related to the instant dispute. Inasmuch as it is clear that Article I protects no rights of employees other than the right to be represented by the Union for purposes of collective bargaining, the City asserts that it requires no interpretation to see that the acts complained of are unrelated to that provision.

Finally, the City argues that the Union may not rely on a contract provision which merely defines the term "grievance" (i.e., Article VIII, Sections 1(A) and 1(E)(iv) of the Agreement), as the sole source of the right to arbitrate this dispute. In specific response to the claimed violation of Article VIII, Section 1(E)(iv), the City asserts that the Union has failed to allege facts sufficient to support a claim of wrongful disciplinary action. The City submits that where, as here, management's prerogative has been challenged on the ground that the action taken was disciplinary in nature, the Union must raise a substantial issue as to the disciplinary nature of the acts complained of. The City argues that the Union's "bare allegation that an action was taken for punitive reasons, without a shred of evidence to show that such action was related to punishment, establishes an insufficient nexus to the contractual disciplinary grievance procedure to gain arbitration."

Union's Position

The Union maintains that the contractual prohibition against submitting disputes involving the Rules to arbitration [Article VIII, Section 1(B)], does not divest the Union of the right to grieve either "[a] dispute concerning the application or interpretation of the terms of this Agreement [Article VIII,

Section 1(A)]" or "[a] claimed wrongful disciplinary action taken against ... a per diem or per session employee of a Mayoral Agency who is regularly employed 17-1/2 or more hours per week and has completed one year of such employment [Article VIII, Section 1(E)(iv)]." The limitation concerning the Rules, the Union argues, cannot divest employees of rights conferred by other provisions of the Agreement.

Despite the City's assertions to the contrary, the Union contends that Article VIII, Section 1(E)(iv) of the Agreement may serve as an independent basis for submitting this dispute to arbitration for two reasons. In the first instance, the Union points out that the Board of Collective Bargaining ("the Board") has consistently found a sufficient nexus between an act which is arguably disciplinary in nature and the right to grieve such an act when the contract defines the term "grievance" to include "a claimed wrongful disciplinary action." In such circumstances, the Union argues, the argument that a definitional section may not furnish a basis for a grievance has been expressly rejected by the Board.

Moreover, the Union contends, it has stated an arbitrable claim because Article VIII, Section 1(E)(iv) of the Agreement creates contractual tenure rights in employees to which it is applicable. The Union submits that because the instant grievants have been employed more than 17-1/2 hours per week in a per session title in a mayoral agency for more than one year -- and in the case of Dr. Chin, for almost 10 years -- they have tenure under the contract and can be removed only for cause. Accordingly, the Union submits, a claim that the City sought to unilaterally divest these employees of their tenure rights under the contract states an arbitrable claim.

Finally, the Union alleges that the City arguably violated Article I of the Agreement (the union recognition clause), when it "attempted to circumvent the Union and the contract by transferring employees from one title to another." Even if it is not clear whether such an allegation falls within the contemplation of Article VIII, Section 1(A) of the Agreement, the Union asserts that to the extent there is any ambiguity as to the meaning and application of Article I or of any other provision of the Agreement, such provision should be interpreted by an arbitrator and not the Board.

DISCUSSION

Section 12-302 of the New York City Collective Bargaining Law ("NYCCBL") states:

> It is hereby declared to be the policy of the city to favor and encourage ... final impartial arbitration of grievances between municipal agencies and certified employee organizations.

In administering this policy, this Board has nevertheless stressed that it can neither create a duty to arbitrate where none exists nor enlarge the obligation to submit disputes to arbitration beyond the scope established by the parties in their contract. It is well settled that a party may be required to submit to arbitration only to the extent that it has previously consented and agreed to do so.[8] Thus, in deciding issues of arbitrability, we must first ascertain whether the parties have agreed to resolve their disputes through arbitration and, if so, whether that obligation encompasses the

[8] Decision Nos. B-35-89; B-26-88; B-14-87; B-39-86; B-24-86; B-41-82; B-15-82; B-12-77.

controversy under Board consideration.[9]

In the instant matter, Article VIII, Section 1 of the Agreement, which specifically defines the scope and sets the limits of the contractual obligation to arbitrate disputes, is the controlling provision. In addition to setting forth several definitions of the term "grievance," this provision also contains exclusionary language to the effect that disputes involving the Rules "shall not be subject to the grievance procedure or arbitration."[10] It is the City's position that regardless of any other provision the Union cites as the basis for its request, unless it can establish that the gravamen of the dispute does not involve the Rules, the preclusive effect of this proviso removes the entire dispute from the scope of matters arbitral under the contract.

The Union maintains that the Agreement provides several definitions of a grievance; in order to grieve a matter, it need satisfy only one. In this connection, the Union submits that to the extent the Agreement defines a grievance as a claimed violation, misapplication or misinterpretation of the terms of the Agreement -- and as a claimed wrongful disciplinary action, the instant request presents two alternative bases for the submission of this dispute to arbitration. The Union contends that the limitation upon which the City relies precludes only disputes involving the Rules; it does not purport to and cannot divest the Union of the right to arbitrate disputes defined as grievances under Article VIII, Section 1(A) of the Agreement (the basis for

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[9] Decision Nos. B-18-91; B-27-89; B-65-88; B-28-82.

[10] See Article VIII, Section 1(B) of the Agreement, note 4, supra, at 6.

redress of a claimed violation of a substantive provision of the contract such as the union recognition clause) and/or Article VIII, Section 1(E)(iv) of the Agreement.

As we have frequently held, a party seeking arbitration has the burden of establishing at least an arguable relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration.[11] In this regard, a union, where challenged to do so, has a duty to show that the contract provision invoked is arguably related to the grievance to be arbitrated.[12]

Applying these considerations to the dispute herein, initially we find that the Union has not met its burden of demonstrating a nexus between the challenged actions and Article I of the Agreement (the union recognition clause). There is no question that the Union is the certified representative of employees in the title City Medical Specialist;[13] nor any dispute that employees in this title are covered by the Agreement. Inasmuch as the Union has failed to allege specific and substantial reasons whereby the Union's representational rights have been adversely affected by the City's actions, the bare allegation that the City "attempted to circumvent the Union and the

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[11] E.g., Decision Nos. B-29-91; B-42-90; B-28-87; B-6-86; B-8-82; B-7-81; B-21-80; B-15-80; B-15-79; B-3-78; B-1-76.

[12] Decision Nos. B-6-88; B-35-86; B-10-86; B-4-83; B-8-82; B-7-81.

[13] See Board of Certification Decision No. 16-89, adding, inter alia, the title City Medical Specialist to the bargaining unit.

contract" will not suffice.[14] Nor do we perceive that an ambiguity exists which would itself create the need for arbitral resolution of such a claim.

We further find that the Union has failed to identify a contract provision which arguably constitutes the basis of the alleged contractual "tenure rights" enjoyed by Drs. Chin, Weisberg and Lederman. Although the Union is correct in claiming that an alleged violation of Article VIII, Section 1(E)(iv) of the Agreement may constitute an independent basis for a grievance,[15] it does not follow that the procedural due process protections which operate in the event of a claimed wrongful disciplinary action apply to every set of circumstances where a grievant's employment status is at issue (e.g., layoffs due to lack of work). Rather, in advancing a claim under this provision of the Agreement, the Union must demonstrate that the challenged management action is arguably disciplinary in nature.

Based on the facts presented, the Union has failed to persuade us that the grievants named herein arguably were disciplined within the meaning of Article VIII, Section 1(E)(iv) of the Agreement. Ordinarily, the question of whether an employee has been disciplined within the meaning of a contractual term is one to be determined by an arbitrator.[16] But, where, as here, the disputed action is within the scope of an express management right,[17] this

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[14] See Decision No. B-47-88.

[15] See Decision No. B-33-90 and the cases cited therein.

[16] Decision Nos. B-5-84; B-8-81; B-8-74; B-25-72.

[17] It is well settled that the creation and abolition of positions or titles is a fundamental right of management. See Section 12-307b of the NYCCBL, which provides, in pertinent part:

(continued...)

Board has fashioned a test of arbitrability which strikes a balance between the competing interests of the parties.[18] A bare allegation that an action was taken for a disciplinary purpose is insufficient to establish a nexus between the disputed act and the contractual right to grieve a wrongful disciplinary action. In any case in which an exercise of management prerogative is challenged on the ground that the act is of a disciplinary nature, we have held that:

> ... the burden will not only be on the union ultimately to prove that allegation, but the union will be required initially to establish to the satisfaction of the Board that a substantial issue is presented in this regard. This will require close scrutiny by this Board on a case by case basis.[19]

In applying this test to the instant matter we find that the Union has failed to present a substantial issue concerning the claimed wrongful disciplinary actions allegedly taken against the grievants. Other than conclusory and speculative statements regarding disciplinary action, the Union does not even attempt to demonstrate that the alleged "transfers" of Drs. Weisberg and Lederman from one title to the other were even remotely related

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[17](...continued)

> It is the right of the city, or any other public employer, acting through its agencies, to ... determine the standards of selection for employment; ... relieve its employees from duty because of lack of work or for other legitimate reasons; ... determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications....

See also, Decision Nos. B-23-75; B-13-74; B-1-70; B-3-69.

[18] Decision Nos. B-54-91; B-52-89; B-47-88; B-4-87; B-40-86; B-27-84; B-5-84; B-9-81; B-8-81.

[19] See Decision No. B-8-81, at 11. See also, Decision Nos. B-52-89; B-81-88; B-33-88; B-4-87.

to punishment. While the Union does claim that Dr. Chin was removed from the Department's payroll and suffered a loss of pay and benefits during the period of time which elapsed between his termination from the title Medical Specialist (Sanitation) and his appointment to the title City Medical Specialist, this alone does not support a conclusion that the disputed action was punitively motivated. The Union has failed to allege any facts or circumstances traditionally characteristic of wrongful disciplinary action.[20] It has also failed to demonstrate that disciplinary action arguably was intended by the City.[21] This contrasts sharply with the circumstances in other cases where we have found that a substantial showing of disciplinary action had been made.[22] Accordingly, the Union may not rely upon Article VIII, Section 1(E)(iv) of the Agreement as the source of the alleged right to arbitrate this dispute.

Finally, we turn to the Union's claim that "the imposition by the City of a six month probationary period on longstanding incumbents" presents an arbitrable matter. Stated another way, the Union argues that because the act of placing the grievants on probation constitutes an "attempt" by the City to divest them of rights accrued under the Agreement, a claim under Article VIII,

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[20] E.g., the service of written charges, verbal accusation of incompetence or misconduct; the imposition of a disciplinary penalty. (We note, however, that the failure to serve formal charges will not bar arbitration of a claim of wrongful discipline when the facts alleged establish a sufficient nexus between the disputed action and a credible showing that the action had punitive motivation. See Decision No. B-57-90.)

[21] See Decision Nos. B-52-89; B-61-88.

[22] See Decision Nos. B-61-88; B-33-88; B-9-81; B-8-81.

Section 1(A) of the Agreement has been stated.[23] The City maintains that because the City Personnel Director has sole jurisdiction over the manner in which titles are created or abolished, and because the parties have agreed that such decisions are not subject to arbitral review, the entire request for arbitration should be denied.

Our authority to find a matter arbitrable rests upon the contractual obligation incurred by the parties. Article VIII, Section 1(B) of the Agreement provides, in relevant part, that "disputes involving the Rules and Regulations of the New York City Personnel Director ... shall not be subject to the grievance procedure or arbitration." Therefore, the City is correct that arbitration would be the wrong forum in which to argue an alleged violation of the Rules. It is also true, however, that the Union disclaims any attempt to raise a claim of Rule violation. Rather, the issue presently under consideration is whether the Union has identified a contractual limitation on the City's managerial right to classify titles and to establish probationary periods. For the following reasons, we conclude that an arbitrable case or controversy under the terms of the Agreement has not been stated:

First, no facts have been alleged to substantiate the Union's claim that the City is attempting to "circumvent [it] and the contract by transferring employees from one title to another" and, thereby, divest the grievants of their contractual due process rights. As previously set forth, the Union has made no showing that any of the grievants have been disciplined within the

[23] Article VIII, Section 1(A) of the Agreement defines the term "grievance" as "[a] dispute concerning the application or interpretation of the terms of this Agreement."

meaning of Article VIII, Section 1(E)(iv) of the Agreement; nor has the Union alleged how these grievants have been denied access to any contractual due process protections to which they arguably are entitled under the Agreement. We are thus brought to the conclusion that this aspect of the Union's request for arbitration is both conclusory and anticipatory and, at least on the basis of the record before us, that the allegation does not present an issue ripe for submission to arbitration.

In this connection, however, we note that the contractual due process rights under Article VIII, Section 1(E)(iv) of the Agreement accrue to "a per diem or per session employee of a Mayoral Agency who is regularly employed 17-1/2 or more hours per week and has completed one year of such employment [emphasis added]." We further note that if, in the future, a substantial issue concerning the disciplinary nature of a management act is raised, the question of whether an individual employed for one year or more is entitled to the contractual due process benefits cited by the Union, notwithstanding his or her probationary status, will call for an interpretation of this provision.[24]

Second, to the extent that the Union is seeking assurances that "[n]either the Personnel Director nor any other management representative can unilaterally divest the [grievants] of their tenure rights under the contract," it seeks a finding that the City is not shielded from an examination of its actions simply "[b]y changing the name of the title in which [the grievants] are employed." In this regard we note that if the record contained facts which supported the Union's assertion that the City was

[24] See Decision Nos. B-4-84; B-28-75; B-8-74.

motivated by a desire to frustrate the grievants' contractual due process rights, such facts might form the basis of a claim of improper public employer practice under Section 12-306a of the NYCCBL,[25] but they do not constitute a contract violation.

Accordingly, we grant the City's petition challenging the arbitrability of the instant request for arbitration in its entirety.

[25] Cf., Decision No. B-37-91 (we found that the facts alleged raised a substantial issue concerning whether the elimination of certain positions "was motivated by ... the intention of management to avoid its obligations under the collective bargaining agreement.")

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 City's petition challenging arbitrability be, and the same hereby is, granted; and it is further

ORDERED, that Doctors Council's request for arbitration be, and the same hereby is, denied.

DATED: New York, New York
June 24, 1992

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
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