DC 37, 5 OCB2d 24 (BCB 2012)

(Arb.) (Docket No. BCB-2988-11) (A-13882)

Summary of Decision: HHC challenged the arbitrability of the Union's grievance, which sought to arbitrate the termination of a provisional employee. HHC argues that the contractual provision relied upon by the Union in its Request for Arbitration was nullified by the State Court of Appeals. The Union contended that the Board should hold this matter in abeyance pending its decision on whether HHC is required to bargain over due process procedures for provisional employees. In light of the Court of Appeals' decision nullifying as contrary to public policy the negotiated provision agreed upon by the parties and the lack of any agreement to a successor provision as permitted by subsequent statutory amendment, the Board found that HHC had no contractual obligation to arbitrate the grievant's termination and granted the Petition Challenging Arbitrability. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE NEW YORK CITY
HEALTH AND HOSPITALS CORPORATION,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent.

DECISION AND ORDER

On October 21, 2011, the New York City Health and Hospitals Corporation ("HHC") filed a Petition Challenging Arbitrability of a grievance filed by District Council 37, AFSCME, AFL-CIO ("Union"), on behalf of HHC provisional employee Natasha Mercer ("Grievant"). In its Request for Arbitration, the Union alleges that HHC

wrongfully disciplined the Grievant in violation of the parties' collective bargaining agreement. HHC argues that the Union seeks to arbitrate pursuant to a section of the parties' collective bargaining agreement that was nullified by the State Court of Appeals. The Union argues that the Board should hold this matter in abeyance pending its decision addressing whether HHC is required to bargain over due process procedures for provisional employees. In light of the Court of Appeals' decision nullifying as contrary to public policy the negotiated provision agreed upon by the parties, and the lack of any agreement to a successor provision as permitted by subsequent statutory amendment to the New York Civil Service Law ("CSL"), the Board finds that HHC has no contractual obligation to arbitrate the Grievant's termination and granted the Petition Challenging Arbitrability.

BACKGROUND

The Union represents public employees at various agencies, authorities, boards, and corporations throughout the City of New York ("City"), including HHC. The Union, HHC, and the City are parties to the 1995-2001 Citywide Collective Bargaining Agreement ("Citywide Agreement"), as well as certain "unit" agreements, including the 2005-2008 Clerical Agreement ("Clerical Agreement"). Both agreements remain in *status quo*, with the exception of the provisions governing disciplinary procedures for provisional employees.

Provisional Employee Due Process Rights: Brief Legislative and Bargaining History[1]

New York law provides that "[n]o provisional appointment shall continue for a period in excess of nine months." CSL § 65(2). Notwithstanding this statutory declaration, the City and other municipalities had in the past routinely employed provisional employees beyond the statute's nine-month proscription. In 1988, the City, HHC, and the Union amended most Citywide contracts to provide a due process disciplinary procedure for provisional employees who had served for two years in the same or similar title or related occupational group in the same agency. These contractual provisions continued in effect for nearly 20 years.

In 2007, the Court of Appeals issued its decision in *Matter of City of Long Beach v. Civil Service Employees Assn., Inc. - Long Beach Unit*, 8 N.Y.3d 465 (2007). The Court held that provisions in a collective bargaining agreement conferring disciplinary rights upon provisional employees who were statutorily barred from serving in their provisional titles beyond the nine-month limit specified in CSL § 65(2) were unenforceable as a matter of law. *See City of Long Beach*, 8 N.Y.3d at 471-72. The Court's holding therefore nullified the due process provisions for provisional employees in City contracts.

In early 2008, in order to address the concerns raised in *City of Long Beach*, the State Legislature amended CSL § 65 to add a new section addressing "excess provisional appointments." CSL § 65(5). Section 65(5)(g), which addresses agreements governing disciplinary procedures, permits public employers who have fulfilled certain

[1] For a more extensive history, *see DC 37*, 5 OCB2d 23 (BCB 2012) (docketed as BCB-2990-11).

requirements to provide due process rights for provisional employees for a finite time period under the circumstances set forth therein. *See* CSL § 65(5)(g).

In accordance with the new statutory provision, on August 30, 2011, the City and the Union signed an agreement establishing a disciplinary procedure for provisional City employees. HHC was not a signatory to the agreement. In an October 6, 2011 letter to the Union, the City's Commissioner of Labor Relations confirmed that the agreement "specifically excludes the New York City Health and Hospitals Corporation ("HHC") even though HHC is a signatory to the Citywide Agreement." (Rep., Ex. A).[2]

On October 25, 2011, the Union filed an Improper Practice Petition alleging that HHC refused to bargain over due process rights for provisional employees, in violation of § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The petition, docketed as BCB-2990-11, is decided today in *DC 37*, 5 OCB2d 23, familiarity with which is assumed.

Procedural History of Grievant's Case

The Grievant, a provisional employee at HHC, worked in a title covered by the Clerical Agreement. She was served with disciplinary charges in August 2009. A "provisional conference" was held on October 15, 2009. Step II and Step III conferences were held on January 11, 2010 and March 24, 2011, respectively. The Grievant was terminated on or about March 3, 2010.

On or about June 10, 2011, the Union filed a Request for Arbitration. In the request, the Union described the issue as: "Whether the employer, the Health & Hospitals

[2] The letter additionally states that the agreement will be appended to the Citywide Agreement and all unit agreements provided such unit agreements previously extended such coverage to provisional employees. (*Id.*)

Corporation, violated the collective bargaining agreement by wrongfully disciplining the grievant, and if so, what shall be the remedy." (Pet., Ex. 2) Specifically, the Union asserted that HHC violated Article VI, § 1(g) of the Clerical Agreement.[3] On October 21, 2011, HHC filed the instant Petition Challenging Arbitrability.

POSITIONS OF THE PARTIES

HHC's Position

HHC argues that the grievance cannot proceed to arbitration because the Grievant, a provisional employee at HHC, has no due process rights under the Clerical Agreement. Citing *City of Long Beach*, HHC asserts that the decision rendered null and void all contractual provisions granting disciplinary due process rights to provisional employees. Consequently, Article VI, §§ 1(g) and 6, of the Clerical Agreement are unenforceable.[4] Therefore, HHC has no contractual obligation to arbitrate the matter. HHC contends that, in light of *City of Long Beach*, permitting the arbitration of a provisional employee's termination would also violate the law and public policy. Moreover, HHC argues that, because the Union has no right to arbitrate such matters, the Union's request to hold this matter in abeyance must be denied.

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[3] Article VI, § 1(g), of the Clerical Agreement defines a grievance as 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." (Pet. ¶ 7)

[4] Article VI, § 6, of the Clerical Agreement provides a disciplinary due process procedure governing any case involving a grievance under § 1(g).

Union's Position

The Union contends that, subsequent to the issuance of *City of Long Beach*, the parties had adhered to an "informal agreement" whereby requests for arbitration pertaining to disciplinary grievances of provisional employees with more than two years of service were held in abeyance. (Ans. ¶ 5) Several prior requests for arbitration over disputes of this nature were not challenged by HHC.

The Union argues that the issue before the Board is whether HHC is required to bargain over disciplinary procedures for provisional employees, and whether the parties will thereafter negotiate an agreement that provides due process rights to these employees. If the Board grants the Union's petition in BCB-2990-11, and the parties negotiate an agreement, the terms of that agreement will dictate the outcome of the instant matter. Accordingly, the Union requests that this matter be held in abeyance until BCB-2990-11 is resolved.

DISCUSSION

As we have recently reaffirmed, "[t]he policy of the NYCCBL is to encourage the use of arbitration to resolve grievances." *CEU, L. 237*, 4 OCB2d 52, at 8 (BCB 2011) (quoting *SSEU, L. 371*, 4 OCB2d 38, at 7 (BCB 2011) (citing cases)). [5] Accordingly, we

[5] Section 12-302 of the NYCCBL provides:

> It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

have long held that "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *Id.* (quoting *DC 37, L. 2627*, 3 OCB2d 45, at 7 (BCB 2010) (internal citations omitted)); *CWA, L. 1180*, 1 OCB 8, at 6 (BCB 1968)). However, "[w]e cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties." *Id.* (quoting *DC 37, L. 768*, 3 OCB2d 7, at 15 (BCB 2010); *COBA*, 53 OCB 14, at 5 (BCB 1994)).

Pursuant to NYCCBL § 12-309(a)(3), this Board has exclusive authority "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure established pursuant to [§] 12-312 of this chapter." *CEU, L. 237*, 4 OCB2d 52, at 9. We employ a two-pronged test to determine whether a matter is arbitrable:

> (1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so (2) whether the obligation is broad enough in its scope to include the particular controversy presented. In other words, whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement.

SBA, 3 OCB 2d 54, at 8-9 (BCB 2010) (citations and internal quotation marks omitted); *see also SSEU*, 3 OCB 2, at 2 (BCB 1969). This inquiry does not require a final determination of the rights of the parties because the Board lacks jurisdiction to enforce contractual rights. *PBA*, 4 OCB2d 67, at 10 (BCB 2011); *see also PBA*, 4 OCB2d 22, at 13 (BCB 2011); *NYSNA*, 69 OCB 21, at 7-9 (BCB 2002)).

Where challenged to do so, "the burden is on the Union to establish an arguable relationship between the employer's acts or omissions and the contract provisions it

claims have been breached. If the Union cannot show such a nexus, the grievance will not proceed to arbitration." *CEU, L. 237*, 4 OCB2d 52, at 9 (quoting *Local 371, SSEU*, 65 OCB 39, at 8 (BCB 2000) (editing marks omitted)); *DC 37*, 61 OCB 50, at 7 (BCB 1998); *DEA*, 57 OCB 4, at 9 (BCB 1996).

It is undisputed here that the parties have agreed to arbitrate certain disputes. However, it is also undisputed that the provision of the Citywide Agreement which allowed for arbitration for certain provisional employees, including the Grievant, fell within the proscription of the Court of Appeals' decision in *City of Long Beach*, and that HHC has declined to negotiate a successor agreement provision pursuant to CSL § 65(5). We address the Union's improper practice claims arising out of that refusal to bargain in *DC 37*, 5 OCB2d 23, decided today, and will not reiterate our analysis of that claim here, other than to note that no agreement to arbitrate the dispute at issue has been reached between the parties. Moreover, HHC cannot be bound to the agreement as to provisional employees reached between the City and the Union, as it was clear throughout that the City was not acting as HHC's representative in negotiating that agreement, and HHC cannot be bound by an agreement to which it has not consented. *See DC 37, L. 768*, 3 OCB2d 7, at 14 (BCB 2010), *affd., Matter of Roberts v. NYC Office of Collective Bargaining*, 2011 N.Y. Slip Op. 52094(U) (Sup. Ct. N.Y. Co., Nov. 14, 2011) (Schlesinger, J.). Therefore, we find that no viable and applicable agreement exists that would provide a basis for the claimed rights the Union seeks to arbitrate.

Finally, in view of our determination in *DC 37*, 5 OCB2d 23, that HHC's refusal to negotiate an agreement similar to that reached between the Union and the City did not

violate the duty to bargain in good faith pursuant to § 12-306(a)(1) and (4), we deny as moot the Union's request to hold the instant matter in further abeyance.

Accordingly, for the reasons stated above, we grant HHC's petition and deny the Union's request for arbitration.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, the Petition Challenging Arbitrability filed by the New York City Health and Hospitals Corporation, docketed as BCB-2988-11, hereby is granted in its entirety; and it is further

ORDERED, that the Request for Arbitration filed by District Council 37, AFSCME, AFL-CIO, docketed as A-13882-11, hereby is denied in its entirety.

Dated: May 29, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

I dissent. PETER PEPPER
MEMBER