City v. OSA, 53 OCB 28 (BCB 1994) [Decision No. B-28-94 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

DRAFT
11/21/94

-between-

City of New York,

Petitioner,

Decision No. B-28-94

-and-

Docket No. BCB-1654-94

(A-5469-94)

Organization of Staff Analysts,

Respondent.

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DETERMINATION AND ORDER

On May 23, 1994, the City of New York ("the City"), by its Office of Labor Relations ("OLR"), filed a petition challenging the arbitrability of a grievance filed by the Organization of Staff Analysts ("the Union"). The grievance alleges that the City violated Article VI, § 1(f)[1] of its collective bargaining agreement with the Union and § 10c of the Municipal Coalition

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

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 in the same agency.

Agreement[2] by "taking wrongful disciplinary action against a provisional employee who had served for two years in the same title in the same agency, and by laying off an employee as a result of a restructuring without making any effort to prevent the layoff." The Union filed an answer on July 5, 1994. The City did not submit a reply.

Background

Regina Santucci ("grievant") was hired as a provisional employee in the title Associate Staff Analyst on March 4, 1992. By letter dated March 1, 1994, the City's Office of the Comptroller informed the grievant that, "pursuant to the reorganization of the Audit Bureau," her position would be terminated "effective March 3, 1994 at the close of business." According to the Union, she was retained on the payroll until March 5, 1994 and was first notified of her termination on March 7, 1994, when she returned to work after taking sick leave.

The grievant filed a grievance at Step I on March 7, 1994, alleging a "violation of OSA contract Article VI, § 1(f) whereby a wrongful disciplinary action was taken against [her] without presenting [her] with charges or a hearing." The grievance was

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[2] Section 10c of the Municipal Coalition Agreement provides:

The City agrees to make every practical effort during the term of this Municipal Coalition Agreement not to lay off or terminate employees for economic reasons or as a result of restructuring due to changes in the level, methods, means, personnel, organization and technology of City services or as a result of work being shifted to an outside contractor.

denied by letter dated March 14, 1994, on the grounds that the petitioner's termination "did not violate the section of the Organization of Staff Analysts contract cited" in the grievance. A Step II grievance filed on March 17, 1994, was denied by letter dated March 22, 1994, on the same grounds. A request for a Step III Conference was denied by OLR by letter dated April 11, 1994. The OLR Review Officer found that the grievant, "at the time her employment was terminated, was a provisional employee with less than two years of continuous service. As such, this employee has no standing to appeal the termination of her employment...."

Pursuant to the terms of the collective bargaining agreement, the Union submitted a Request for Arbitration of the instant matter on April 21, 1994. As a remedy, it seeks "reinstatement of grievant to her position with back pay to the day of layoff."

Positions of the Parties

City's Position

The City maintains that the grievant has no standing to bring the grievance under Article VI, § 1(f) because she was a provisional employee who was not entitled to due process rights and could be terminated at any time. Although the collective bargaining agreement provides due process rights for provisional employees with two years of service, the City claims, the grievant had served for less than two years when she was terminated because she was appointed on March 4, 1992 and terminated as of March 3, 1994.

The City argues that the Union has not established a nexus between the grievance presented and § 10c of the Municipal Coalition Agreement. It alleges that, although the Union characterizes the City's action as a layoff, the change was actually a "reconstructing" of the agency. It maintains that a layoff is a "curtailment" due to economic factors and that, therefore, the grievant was not laid off from her position. The City contends that § 10c of the Municipal Coalition Agreement does not refer to the loss of a provisional appointment "due to administrative reasons" and, accordingly, there is no nexus between the issue in dispute and the contract provision cited. In addition, the City states, the Union alternately characterizes the agency's action at a layoff and as wrongful discipline.

The parties have specifically agreed to exclude from arbitration the issue of termination of provisional appointments where a civil service eligible list exists, the City contends. In addition, the City argues, such termination is regulated by the Rules and Regulations of the Department of Personnel and the parties have agreed to exempt from arbitration all disputes concerning the Rules and Regulations of the Personnel Director.

The City maintains that it has the right, pursuant to § 12-307b of the New York City Collective Bargaining Law ("NYCCBL"),[3]

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[3] Section 12-307 of the NYCCBL provides, in relevant part:
b. 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; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of
(continued...)

to determine the work locations to which its employees are assigned and the work to be performed. It is well-established, the City states, that § 12-307b guarantees the City the unilateral right to determine the methods, means and personnel by which governmental operations are to be conducted, unless this right has been limited by the parties in their collective bargaining agreement. According to the City, the parties have only agreed in the Municipal Coalition Agreement that it will make an attempt not to lay off employees. Therefore, the City argues, the decision to lay off employees has been preserved as a management right which cannot form the basis of an arbitrable dispute. The City contends that the remedy sought by the Union, restoring the grievant to her provisional appointment, goes beyond the scope of the agreement.

Union's Position

The Union claims that the grievant had served for two years in her title, since she was appointed as of the start of business on March 4, 1992 and terminated as of the close of business on March 3, 1994. However, the Union contends, the grievant did not actually receive notice of termination until March 7, 1994 and

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[3](...continued)
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....

was on the payroll until March 5, 1994. For this reason, the Union maintains, the instant dispute is arbitrable pursuant to the collective bargaining agreement.

The Union contends that the issue of whether the grievant's termination is an act of discipline or the result of a reorganization is a question of fact which must be determined by an arbitrator. The Union argues that if an arbitrator determines that the grievant was terminated because of a reorganization, then the City has violated § 10c of the Municipal Coalition Agreement because it did not make an effort to retain the grievant.

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.[4] Doubtful issues of arbitrability are resolved in favor of arbitration.[5] In the instant matter, the parties do not dispute that the alleged violation of the contract is an arbitrable grievance.

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

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

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

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."[6] Here, the precise issue to be decided is whether the grievant has rights deriving from the agreement between the parties. The resolution of the dispute turns on an interpretation of the terms of the 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.[7]

The next issue here is the question of whether the grievant served the requisite amount of time necessary to be entitled to rights guaranteed by the due process provisions of the agreement between the Union and the City. The agreement confers due process rights upon provisional employees upon the completion of two years of service. The grievant was hired by the Department on March 4, 1992. She was terminated by a letter dated March 3, 1994, which stated that the termination was effective at "the close of business" on that day. She allegedly received the termination letter at her place of employment on March 7, 1994.

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

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[6] See also Decision No. B-52-91.

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

interpretation of the terms of the agreement.[8] The conflict between the parties' interpretations of when the grievant had completed two years of service, and when she was terminated, presents a question of contract interpretation as well as a question of fact, which are for an arbitrator to decide. Moreover, there exists a clear nexus between the Union's claim and the provision of the contract. Therefore, the first question for the arbitrator is whether the grievant had completed two years of service and was entitled to disciplinary due process rights. If that issue is resolved in the grievant's favor, it remains for the arbitrator to decide whether the termination constituted a wrongful action.

We next consider the arbitrability of the Union's claim that the grievant's termination is arguably a violation of § 10c of the Municipal Coalition Agreement. That provision states, "[t]he City agrees to make every practical effort during the term of this Municipal Coalition Agreement not to lay off or terminate employees for economic reasons or as a result of restructuring due to changes in the level, methods, means, personnel, organization and technology of City services...."

In its letter dated March 3, 1994, the City informed the grievant that she was being terminated "pursuant to the reorganization of the Audit Bureau." In its pleadings, the City claims that the termination was the result of "a reconstructing." Section 10c of the contract concerns the layoff or termination of

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

an employee as a result of a "restructuring." Whether or not a "reorganization" or "reconstructing" of an agency is synonymous with a "restructuring" is also a question of contract interpretation, which is for an arbitrator to decide.

Finally, we turn to the Union's claim that the City violated the contract because it did not attempt to avoid the grievant's termination. We find that a nexus exists between the claimed violation and § 10(c) of the Municipal Coalition Agreement. Therefore, if the issue concerning "restructuring" is first found to be arbitrable, the question of whether or not the agency attempted to avoid the grievant's termination may also be decided by the arbitrator.

Accordingly, for all of the above reasons, we find that the grievance presented by the Union is arbitrable.

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 the Organization of Staff Analysts be, and the same hereby is, granted.

Dated: New York, New York
November 29, 1994

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

JEROME E. JOSEPH
MEMBER

RICHARD W. WILSKER
MEMBER

THOMAS J. GIBLIN
MEMBER