City v. L.371, SSEU, 57 OCB 14 (BCB 1996) [Decision No. B-14-96 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

CITY OF NEW YORK,

Petitioners,

DECISION NO. B-14-96

-and-

DOCKET NO. BCB-1676-94
(A-5640-94)

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371,

Respondent.

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DECISION AND ORDER

On August 30, 1994, the New York City Office of Labor Relations ("City") filed a petition challenging the arbitrability of a grievance submitted by the Social Service Employees Union, Local 371 ("Union") concerning a claimed wrongful termination of a probationary employee in the classified civil service title of Caseworker in the Department of Social Services of the Human Resources Administration ("HRA"). After several requests for an extension of time to respond were granted, the Union filed an Answer on November 18, 1994. The City filed a Reply on November 29, 1994.

Background

The City and the Union are parties to a collective bargaining agreement ("Agreement") covering the time period relevant herein.[1] Article VI of the applicable Agreement sets forth the grievance and arbitration procedure to be used for resolution of disputes arising thereunder. Section 1 of Article VI of the Agreement provides, in pertinent part, as follows:

DEFINITION: The term "Grievance" shall mean:

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[1] The applicable contract is the Social Services Agreement dated March 16, 1992.

* * *

> (b) A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer 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 . . .

* * *

> (e) A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law or a permanent employee covered by the Rules and Regulations of the Health and Hospitals Corporation upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status.

Section 2 of Article VI sets forth various four-step procedures for resolving grievances.

Sarah Pearson ("Grievant") was employed by the HRA as a Caseworker. An exhibit attached to the Petition indicates that she was hired January 11, 1993. By letter dated December 29, 1993, from Jean Matthews, HRA's Deputy Administrator for Personnel Administration, the Grievant was advised that her employment was being discontinued, effective at the close of business that day. There is no dispute that her employment status was as a probationary employee.

On or about March 17, 1994, a grievance was filed at Step II.[2] The grievance claimed, in pertinent part:

> There has been a violation, misapplication and/or misinterpretation of the SSEU Local 371 contract, including but not limited to Article VI, and/or rules and regulations, policy, or orders applicable to HRA/DSS, including but not limited to HRA Executive Order 618, HRA Procedure No. 93-18 in that Ms. Sarah Pearson was terminated from her employment as a Caseworker on December 29, 1993 (she first learned of her termination on March 16, 1994) in spite of illness about which her superiors were aware, and for which she sought help from them. Ms. Pearson has suffered discrimination to the extent of loss of employment because of her disability. She is now medically ready to return to work.

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[2] The grievance states, without elaboration, that Ms. Pearson "first learned of her termination on March 16, 1994."

The grievance does not specify the nature of the claimed illness or disability.

On or about May 20, 1994, the grievance was denied at Step II on the ground that the Grievant's employment status was probationary, and thus the matter was related exclusively to the Rules and Regulations of the Personnel Director, therefore, not subject to the contractual grievance procedure. On or about June 20, 1994, Grievant appealed for a Step III hearing. On July 18, 1994, the Step III hearing was denied again on the ground that, under Personnel Rules, the Grievant, as a probationary employee, had no right to grieve her employment termination.

On July 27, 1994, a Request for Arbitration was filed by the Union. The Union states the grievance as "wrongful disciplinary action resulting in wrongful termination." Article VI of the collective bargaining agreement is cited as the contract provision claimed to have been violated. It is also the section under which the demand for arbitration was made. As a remedy, the Union seeks "[i]mmediate reinstatement to employment status as if the instant charges had never been filed with all attendant adjustments, and any other remedy appropriate to the circumstances."

Positions of the Parties

City's Position

The City challenges the arbitrability of the grievance on the ground that the Grievant was a probationary employee with less than one year of service at the time that she was discharged, thus, "not entitled pursuant to the collective bargaining agreement between the parties to grieve her termination." The City cites § 5.2.7 (Termination) of the Time and Leave Regulations of the Department of Personnel which provides, in pertinent part, as follows:

> (a) At the end of the probationary term, the agency head may terminate the employment of any unsatisfactory probationer by notice to such probationer and to the city personnel director.

* * *

> (c) Notwithstanding the provisions of paragraphs 5.2.1 and 5.2.7(a), the agency head may terminate the employment of any probationer whose conduct and performance is not satisfactory after the completion of a minimum period of probationary service and before the completion of the maximum period of probationary service by notice to the said probationer and to the city personnel director. . . .

The City observes that the procedure and determination as to when and how a probationary employee is separated from service are expressly excluded from the contractual grievance procedure. It cites that portion of Article VI, § 1(b), which provides that "disputes involving the Rules and Regulations of the New York City Personnel Director or . . . [or the Health and Hospitals Corporation] shall not be subject to the grievance procedure or arbitration." Thus, it continues, a probationary employee can be dismissed for any reason except where there is a statutory prohibition or except where the employer has acted in bad faith. In the City's view, the Union is attempting to circumvent the Rules and Regulations of the Personnel Director by "erroneously characteriz[ing] this grievance as a violation of the written policy of HRA."

The City challenges arbitrability also on the ground that the grievance is vague. It argues that, while the initial grievance statement complained of a "violation, misapplication, and/or misinterpretation of the SSEU Local 371 contract," i.e., an apparent allegation that Subsection (b) of Article VI, § 1, of the Agreement was violated, the Request for Arbitration actually states that the complaint is about "[w]rongful disciplinary action resulting in wrongful termination," which applies to different subsections of Article VI, § 1. Thus, the City argues that the Union fails to specify which section of Article VI has allegedly been violated, and that the City cannot fully and completely respond to the request for arbitration because it cannot evaluate and challenge the claim.

Third, the City challenges arbitrability on the ground that the Union has failed to establish the required nexus between the actions which it avers are the subject of the complaint, i.e., wrongful disciplinary action resulting

in wrongful termination, and the HRA policies and procedures cited at Step II as the basis of its claim. The City states that alleged violations of HRA Executive Order 618 and HRA Procedure No. 93-18 are not subject to resolution through the contractual grievance procedure. It argues that Executive Order 618 is a code of conduct for HRA employees, providing them with "guidelines for the behavior expected from them while representing the agency" and "warn[ing] of the potential for discipline should they fail to comply with the code." As such, the City maintains, it places no affirmative duty on the employer. As to Procedure No. 93-18, the City states it provides a method by which complaints of discrimination should be made, and it argues that the Grievant failed to avail herself of the procedures prescribed therein. Since the Grievant chose not to pursue a course of action under Executive Order 618 or Procedure No. 93-18, the City continues, HRA cannot be accused of violating either document. It points out that these avenues are still open to her.

Union's Position

As to the City's argument regarding the Grievant's probationary employment status, the Union relies on its argument that Executive Order 618 constitutes a written policy or order of the agency which employed the Grievant affecting her terms and condition of employment within the meaning of Article VI, § 1(b), of the Agreement. It does not address Personnel Rules regarding termination of probationary employees. The Union further argues that nothing in Executive Order 618 excludes the applicability of its terms to probationary employees such as the Grievant. In addition, the Union states that the Executive Order is of the same character as HRA Procedure No. 92-10 which has been held applicable to a provisional employee with less than two years of service "who can have no legally cognizable expectation of continued employment,"[3] and which, it suggests, should be applicable "with even greater

[3] In the Matter of the Arbitration between SSEU, L. 371, and the City of New York, Case Nos. A-4507-92 and A-4611-93,

force to a probationary employee, who has a legitimate expectation of continued employment with civil service protection upon the successful completion of her probationary period."

As to the City's argument alleging vagueness of the Union's claim, the Union counters that the language of the grievance clearly specifies a violation, misapplication, and/or misinterpretation of rules and regulations, policy, or orders applicable to HRA, including but not limited to HRA Executive Order 618 and HRA Procedure No. 93-18 in that the Grievant claims she was terminated from her probationary position because of her illness. The Union continues, "The only section of Article VI to which the preceding allegation could possibly apply is Section 1(b)." The Union further contends that this was clear to the City because the City cited that section of the Agreement as not applicable here and posited arguments regarding the Grievant's probationary status.

As to nexus, the Union alleges that the termination was because of a disabling illness, allegedly in violation of Executive Order 618 and Procedure No. 93-18 as written policy or orders of the agency.

Discussion

Where, as here, the parties do not dispute that they have agreed to arbitrate their controversies, the question before the Board on a petition challenging arbitrability is whether the particular controversy at issue is

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Opinion and Award, Robert Douglas, Arbitrator, April 12, 1994; upon the Arbitrator's finding that HRA Procedure No. 92-10 (re: the processing of complaints of discrimination) constitutes written policy of the agency encompassed within the parties' contractual definition of an arbitrable grievance, the Arbitrator held that the grievant (a provisional, probationary Caseworker in the Division of AIDS Services, HRA) was not precluded from pursuing her grievance concerning alleged violation of Procedure No. 92-10 on the basis of her status as a probationary employee.

within the scope of the parties' agreement to arbitrate.[4] When challenged to do so, a union requesting arbitration has the burden of showing that the contractual provision which it claims has been violated is arguably related to the grievance sought to be arbitrated.[5]

The City argues that the Union's claim is vague because it cannot determine if the Union intends to articulate only a claimed violation of Subsection (b) of Article VI, § 1, of the Agreement concerning agency written policy or orders, or if it also intends to articulate a claim of wrongful discipline presumably arising under Subsection (e). This latter section relates to permanent employees, whose employment status the Grievant was apparently attempting to achieve. The City claims essentially that, before the Request for Arbitration was filed, it was not on notice of any claim arising under Article VI, § 1(e). We need not reach the issue of whether the City was on notice of any such claim. Subsection (e) applies only to permanent employees. It is undisputed that the Grievant herein does not fall within the category of employees covered by this section. We, therefore, find no nexus between the action which is the subject of the complaint and Article VI, § 1(e).

To the extent that the grievance below alleged a violation of Executive Order 618 and HRA Procedure No. 93-18, we find that the City was on notice that the Union claimed a violation of written agency policy and procedures. Under most contracts between the City and municipal unions which contain language similar to that found in Article VI, § 1(b), of the instant Agreement, a public employer's non-compliance with its own rule, regulation,

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[4] City of New York v. D.C. 37, L. 375, Decision No. B-12-93, aff'd sub nom. N.Y.C. Dep't of Sanitation & City v. Malcolm D. MacDonald, et al., __ A.D.2d __, 627 N.Y.S.2d 619 (1st Dep't 1995), mot. for lv. to appeal granted, __ N.Y.2d __ (Sept. 7, 1995) (No. 910); see, also, B-5-96, B-2-95, B-47-92 and B-15-90.

[5] Decision Nos. B-23-95, B-2-95, B-50-92 and B-47-92.

written policy or order is grievable and arbitrable.[6] We have also found that alleged violations of executive orders may constitute arbitrable grievances under provisions similar to this section of the Agreement at issue here.[7]

We find that the Grievant herein arguably falls within the category of employees whom Executive Order 618 and Procedure No. 93-18 are intended to address. We make this finding because, first, the Union alleges that she had an illness and that the loss of her employment was a result thereof. Furthermore, the City does not deny that she may be eligible to pursue a claim of discrimination based on a claimed disability. Whether the Grievant herein had a disability and whether she experienced discrimination based on that alleged disability are not matters into which we need to inquire in order to determine whether the Union has stated an arbitrable claim under Article VI, § 1[b], of the Agreement. Secondly, nothing in the Agreement requires resort to HRA Procedure No. 93-18, before a grievant pursues a contractual remedy.[8] Inasmuch as Executive Order 618 constitutes written policy or orders of HRA affecting terms and conditions of the Grievant's employment as contemplated in Article VI, § 1(b), of the Agreement, and based on the claim that the Grievant's employment was terminated because of a disability, we find that the Union has stated an arguable nexus and that the question of an alleged violation of Article VI, § 1(b), of the Agreement is arbitrable.

As to the claim that HRA Procedure No. 93-18 also falls within this category of written policy or orders of the agency affecting terms and conditions of the Grievant's employment as contemplated in Article VI, § 1(b), of the Agreement, we find no nexus. Although the City does not deny that the

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[6] Decision Nos. B-2-92 and B-3-83.

[7] Decision Nos. B-5-96, B-64-91, B-59-90, B-41-90, B-18-83, B-1-78 and B-13-77.

[8] See Decision No. B-5-96, in which the Board held that a claimed violation of HRA Executive Order 618 was arbitrable under Article VI, § 1(b), of the Agreement cited herein.

Grievant herein may be entitled to pursue a disability claim under HRA Procedure No. 93-18, we find that the Procedure itself does not provide substantive rights which a grievant can pursue under the contractual grievance procedure.[9]

For these reasons, we find arbitrable the sole question of whether the Grievant was denied any contractual rights under Article VI, § 1(b), of the applicable Agreement with respect to a claimed violation of Executive Order 618. The effect to be given the Executive Order and the relief, if any, go to the interpretation and application of the Executive Order; these issues are for an arbitrator to resolve. Furthermore, the parties should not anticipate that an arbitrator will fashion improper, illegal or inappropriate relief. Our ruling upholding the arbitrability of this single question only affords an arbitrator the opportunity to consider the merits of the claim[10] and to fashion a remedy, if needed, which would be appropriate to the circumstances and within the limits of applicable law.[11]

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[9] See Decision No. B-5-96, concerning HRA Procedure No. 92-18.

[10] The question of whether or not the Grievant complied with any available procedure(s) for redress of rights under the applicable executive order is for an arbitrator, not this Board.

[11] See Decision No. B-39-89 and cases cited therein.

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 Union's Request for Arbitration be, and the same hereby is, granted with respect to the question of whether Article VI, § 1(b), of the Agreement has been violated with respect to HRA Executive Order 618; and it is further

ORDERED, that the City's Petition Challenging Arbitrability, in all other respects be, and the same hereby is, granted.

DATED: New York, N.Y.
May 21, 1996

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

JEROME E. JOSEPH
MEMBER

THOMAS J. GIBLIN
MEMBER

Dissent. SAUL G. KRAMER
MEMBER