City v. OSA, 57 OCB 41 (BCB 1996) [Decision No. B-41-96 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
----------x
In the Matter of the Arbitration
-between-

THE CITY OF NEW YORK, DECISION NO. B-41-96

Petitioner, DOCKET NO. BCB-1839-96
-and- (A-6297-96)

THE ORGANIZATION OF STAFF ANALYSTS,

Respondent.
----------x

DECISION AND ORDER

On June 20, 1996, the City of New York, appearing by its Office of Labor Relations, filed a petition challenging a request for arbitration of a grievance that was submitted by the Organization of Staff Analysts ("OSA" or the "Union"). The request for arbitration was filed on May 9, 1996. The grievance involves the termination of employment of a Staff Analyst employed by the City's Human Resources Administration ("HRA"). The Union filed its answer on July 18, 1996. The City filed a reply on August 7, 1996.

BACKGROUND

On May 30, 1995, the Commissioner of the HRA, on behalf of Larry Rothstein, the grievant herein, requested permission from the Department of Personnel for Mr. Rothstein to relocate outside New York City due to a personal hardship. By letter to the Commissioner dated June 9, 1995, the City's Director of Personnel denied the request. In a letter dated June 28, 1995, the HRA's Deputy Administrator for Personnel Administration informed the grievant that his request had been denied by the Department of Personnel. The Deputy Administrator's letter went on to warn that

> . . . you are subject to immediate termination from the permanent title of civil service Staff Analyst should you relocate.

In early September 1995, the grievant's employment was terminated due to his failure to maintain his residence in New York City. On September 11, 1995, the grievant submitted a

Step 2 grievance to the HRA's Office of Labor Relations asserting that he was "improperly terminated without a hearing as required." The HRA denied the grievance on the ground that the grievant's termination "was due to non-compliance with NYC Department of Personnel Rules and Regulations on residency requirements," which assertedly were outside the coverage of the parties' contractual grievance procedure.

Subsequently, a Step 3 grievance was filed with the City's Office of Labor Relations. By letter dated April 22, 1996, the Deputy Chief Review Officer denied the grievance on the ground that the grievant was "disqualified from [his] position by the City Personnel Director when he failed to maintain residence in New York City pursuant to the Residency Law." The Deputy Chief Review Officer's letter went on to instruct that "disqualifi-cation by the City Personnel Director is not subject to appeal under the contractual grievance procedure."

In its May 9, 1996 request for arbitration, the Union described the grievance to be arbitrated as follows:

> Whether the City violated the "Residency Law" (Administrative Code #12-119 RT Seq.), New York Civil Service Law #77, and the New York City Department of Personnel Policy & Procedure No. 540-86 by not giving notice of and an opportun-ity to contest the charge that his or her residence is outside the City.

Personnel Policy & Procedure ("PPP") No. 540-86 was issued by then City Personnel Director Judith Levitt on December 17, 1986. It is a ten page document designed to implement a change in the Administrative Code that requires newly hired City employees to be or become City residents. The PPP states that "failure to establish or maintain City residence as required by . . . the Administrative Code shall result in a forfeiture of employment. However, prior to dismissal . . . the employee shall be given notice of and the opportunity to contest the charge that his or her residence is outside the City." (PPP, Policy, Section VI.) The policy and procedure also provides that agencies may request consideration by the City Personnel Director for personal

hardship exemptions for non-City residents subject to residence requirements. (PPP, Procedures, Section III.A.) If an exemption request is made prior to an anticipated move outside the City, "the employee is subject to immediate termination from his/her position if residence is changed." (PPP, Procedures, Section III.C.)

Article VI (Grievance Procedure) of the parties' collective bargaining agreement includes within the definition of the term "Grievance"

> a claimed violation . . . 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. (Article VI, § 1.b.)

The Article also includes within the definition

> A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law upon whom the agency has served written charges of incompetency or misconduct . . . . (Article VI, § 1.e.)

Not included within the definition of a grievance are alleged violations of the Administrative Code or the Civil Service Law.

POSITIONS OF THE PARTIES

City's Position[1]

The first of the City's remaining two arbitrability challenges concerns managerial authority. According to the City, the Union's grievance is based solely on residency, a matter of managerial prerogative, and not on any facts or circumstances associated with discipline. When management acts pursuant to its statutory authority, the burden assertedly is on the Union to present a substantial issue under the collective bargaining agreement.[2] The City contends that here, OSA failed to allege sufficient facts to support its claim that the action taken against the grievant constituted wrongful discipline. The City further points out that courts have held that residency is a mere qualification of employment, unrelated to job performance, misconduct or competency.[3] The Civil Service Law, on the other hand, prescribes the procedures for removal of protected employees charged with delinquencies in the performance of their job. It has nothing to do with eligibility for employment.[4]

In its final challenge to arbitrability, the City argues that this Board

---

[1] The City's petition raises four separate challenges to arbitrability. In its answer, the Union recognizes that

> violations [of the Residency Law and the Civil Service Law] would not be found to be arbitrable by the Board . . . except insofar as they constitute violations of the collective bargaining agreement. Therefore, there is no need to address petitioner's first and second challenges to arbitrability.

[2] Citing Decision Nos. B-13-93 and B-5-84.

[3] Citing Mandelkern v. City of Buffalo, 64 A.D.2d 279, 409 N.Y.S.2d 881, 882 (4th Dep't 1978).

[4] Id.

cannot enlarge the obligation to submit disputes to arbitration beyond the scope that the parties establish in their contract. It maintains that where the contractual definition of a grievance specifically excludes disputes involving the City Personnel Director, and where the Union is relying on such a dispute as a basis for arbitration, its reliance is misplaced.[5]

Union's Position

In the Union's view, the underlying grievance involves both the imposition of discipline, which is contractually protected, and the violation of a written City policy that occurred when the grievant was refused a hardship waiver from the residency requirement. With respect to discipline, the Union argues that when an employee is discharged for moving out of the City after being denied permission to do so, it is no different from any other action stemming from an interpretation of law that results in termination of employment. It likens a residency violation to other infractions of law, such as sexual harassment or sale of drugs, and contends that even though an employee may have broken a law, he or she is still entitled to a civil service hearing. The Union supports its position with an appellate court decision holding that a permanent employee who has violated a residency law is entitled to a disciplinary hearing under Section 75 of the Civil Service Law.[6]

In this case, the Union maintains that because the grievant was terminated for relocating outside New York City, the question of whether the termination was wrongful is for an arbitrator to decide. Referring to an arbitration award rendered in a previous similar dispute, the Union claims that when other city agencies terminate employees because of alleged violations of the residency laws and of the Department of Personnel policy and

---

[5] Citing Decision No. B-18-91.

[6] Citing Tanner v. County of Nassau, 88 A.D.2d 661, 450 N.Y.S.2d 733 (2nd Dep't 1982).

procedures implementing the law, the City files charges and arbitrates the disciplinary issue.[7] According to the Union, the City recognizes that it is required to afford a Section 75 hearing or an alternate contractual disciplinary procedure in these situations.

With respect to written policy, the Union contends that the Department of Personnel policy and procedure that covers residency, PPP No. 540-86, is, by its terms, applicable to the HRA. Since the parties' contractual definition of a "grievance" includes a claimed violation, misinterpretation, or misapplication of the rules or regulations, written policy, or orders of the employer, this dispute assertedly must be arbitrated. The Union distinguishes the contractual proviso making disputes involving "rules and regulations of the Personnel Director" ineligible for arbitration, arguing that a "personnel policy and procedure" is different. According to the Union, the City Personnel Director's "rules" are codified in Title 59 of the Rules of the City of New York, and concededly are exempt from arbitration. A Department of Personnel "policy and procedure", on the other hand, assertedly is not a "written rule or regulation." Rather, it is a "written policy" which, in the Union's view, is subject to arbitration.[8]

DISCUSSION

It is public policy, expressed in the New York City Collective Bargaining Law, to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[9] We cannot create a duty to arbitrate where none exists, however, nor can we enlarge a duty to arbitrate

[7] Citing Fire Alarm Dispatchers Benevolent Ass'n. and City, Docket No. A-3765-91.

[8] Citing Decision No. B-64-91.

[9] Decision Nos. B-14-94; B-5-94; B-33-93; B-8-92; B-60-91; B-24-91; B-76-90; B-73-90; B-52-90; B-41-82; B-15-82; B-19-81; B-1-75; and B-8-68.

beyond the scope established by the parties.[10] The Union raises two alternate theories in support of arbitration in this case: that a unit member who is terminated for violating a residency requirement is entitled to contractual disciplinary review; and that an alleged violation of a personnel policy and procedure issued by the Personnel Director states an arbitrable grievance because it asserts a violation of a written policy. We shall address these theories separately.

Alleged Violations of Personnel Policy and Procedures as Arbitrable Matters

In Decision No. B-64-91, we held that "a D.O.P. Personnel Policy and Procedure (or 'PPP') is a 'written policy' subject to arbitration under [the contractual definition of a grievance[11]]."[12] Here, the City cites Decision No. B-18-91 as standing for the proposition that a claimed violation of a PPP is not subject to arbitration. Decision No. B-18-91 is not directly on point, however, because it concerned a City Personnel Director's Resolution, as opposed to the cases involving PPPs.

The defect in the Union's position, however, is that there is an insufficient nexus between the act complained of, the grievant's termination of employment, and PPP No. 540-86. This is so because the PPP simply grants employees the right to request an exemption from the residency requirement. However, by its terms, the Director of Personnel is vested with absolute, unreviewable authority to decide whether an employee should receive a waiver from the City's statutory residency requirement. The Union does not contest

[10] Decision Nos. B-14-94; B-5-94; B-33-93; B-8-92; B-60-91; B-24-91; B-76-90; B-73-90; B-52-90; B-31-90; B-11-90; B-41-82 and B-15-82.

[11] A contractual definition identical with the definition of a grievance in OSA's Agreement.

[12] Citing and relying upon Decision No. B-28-87.

the charge that the grievant's residence is outside the City, and, since there appears to be no question that the grievant's request for a waiver was denied by the Personnel Director, and that the grievant left his City residence despite being admonished against doing so, there is no issue for an arbitrator to resolve under PPP No. 540-86.

Residency Violations as Matters of Discipline

With respect to residency requirement violations as matters of discipline, there are two leading appellate division decisions that are directly in conflict with one another.

In a 1978 decision, stemming from a case where two attorneys in the City of Buffalo corporation counsel's office challenged a city ordinance providing for forfeiture of employment if they fail to reside in the city, the Fourth Department stated:

> Preliminarily, it should be observed that local governments may lawfully require as a condition of employment that employees reside within their territorial limits.[13]

The court then went on to explain the distinction between a residency requirement violation, and other types of misconduct whereby an employee can invoke Civil Service Law protection:

> The local legislation [residency] and the Civil Service Law have different purposes. The ordinance is designed with the legitimate purpose of encouraging city employees to maintain a commitment and involvement with the government which employs them by living within the city. When so viewed, it is clear that residence is a consideration unrelated to job performance, misconduct or competency. It is a qualification of employment. . . .
>
> * * *
>
> The Civil Service Law, on the other hand, prescribes the procedures for removal or a protected employee charged with delinquencies in the performance of his job. It has nothing to do with eligibility for

[13] Mandelkern v. City of Buffalo, 64 A.D.2d 279, 409 N.Y.S.2d 881, 882.

> employment.[14] [Emphasis added.]

In holding that residency is a qualification for employment, and not a matter for discipline, the court presumably would have denied a Section 75 hearing to any corporation counsel attorney who moved out of the city and was discharged as a result.

A Second Department decision, handed down four years after Mandelkern, is contradictory. In this latter case, a Nassau County employee was terminated for violating a county ordinance prohibiting employees from dwelling outside the county. The Court held:

> Although a municipality may enact a local ordinance requiring its employees to reside within its boundaries [citing Mandelkern], it may not, without a hearing pursuant to section 75, terminate tenured employees who establish outside residence.[15]

Complicating matters still further, that same appellate court, three years later, issued a decision that seems inconsistent. In this case, several Suffolk County emergency service dispatchers were terminated for allowing their EMT certifications to lapse. The court ruled:

> Pursuant to Civil Service Law §75 [employees] are protected from being removed or otherwise subjected to any disciplinary penalty except for misconduct or incompetency shown after a hearing upon stated charges. We conclude under the circumstances of this case that a hearing was not necessary since the petitioners do not deny that their EMT certifica-tions have lapsed, as a consequence of which they were no longer qualified for their positions, and there exists no factual issues to be explored at a hearing.[16]

In other words, the Court concluded that EMT certifications were strictly qualifications for employment. When dispatchers' certifications lapsed and

---

[14] Id.

[15] Tanner v. County of Nassau, 88 A.D.2d 661, 450 N.Y.S.2d 733, 734 (1982).

[16] Naliboff v. Davis, 133 A.D.2d 632, 519 N.Y.S.2d 740, 741 (1987).

the County discontinued their employment, the Court ruled that the terminations did not involve employee discipline and thus did not warrant Section 75 disciplinary hearings.

To this equation we add one additional appellate decision that arose from one of our own cases. In Decision No. B-7-87, we said that by forcing applicants for hire or promotion to disclose existing debts to the City in a "debt questionnaire", and compelling them to repay those debts, the City had unilaterally changed a term and condition of employment. A New York Supreme Court Justice annulled our decision, accepting the Personnel Director's contention that her directives are exempt from collective bargaining because they constitute the fixing of qualifications or standards of selection for employment.[17] The First Department affirmed, holding that the law is clear that a public employer does not have to bargain over employee qualifications or the right to review pertinent information related thereto.[18] The Court of Appeals reversed both lower courts on the issue of forced repayment of debt, holding that they failed to accord proper deference to the Board's decision that the required payroll deductions involved a condition of employment, not a qualification, and that because they affected wages, they were therefore within the scope of collective bargaining. On the matter of the debt questionnaire itself, however, the Court of Appeals affirmed the lower courts, holding that no rational balancing of the competing interests -- the City's substantial interest in collecting outstanding debt against an employee's right to privacy -- could result in a conclusion that the questionnaire alters a term or condition of employment.[19]

In view of Levitt, and of the conflicting Appellate Division residency

---

[17] Judith A. Levitt v. Bd. of Collective Bargaining, 531 N.Y.S.2d 703 (1988).

[18] 567 N.Y.S.2d 435 (1991).

[19] 79 N.Y.2d 120, 580 N.Y.S.2d 917, 140 LRRM 2238 (1992).

decisions in the Second and Fourth Departments, we conclude that the approach taken in Mandelkern and Naliboff is more consistent with our precedent than Tanner. We therefore hold that there is no nexus between a contractual provision granting employees the right to grieve wrongful discipline, and management's enforcement of residency as one of its qualifications of employment. In other words, disqualification from continued employment for violating the City's residency law cannot arguably amount to a matter of discipline as contemplated by the contractual disciplinary procedure.

Accordingly, we find that the Union has not established a nexus between termination of employment due to lack of New York City residence and the contractual disciplinary procedure. We also find that, in these circumstances, there is no nexus between the grievant's termination and PPP No. 540-86, the personnel policy and procedure that implements the City's residency law.

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 challenging arbitrability filed by the City of New York, and docketed as BCB-1839-96, be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by the Organization of Staff Analysts in Docket No. BCB-1839-96 be, and the same hereby is, denied.

DATED: New York, N.Y.
October 31, 1996

STEVEN C. DECOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOGUCKI

MEMBER

RICHARD A. WILSKER
MEMBER

SAUL G. KRAMER
MEMBER