OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

NEW YORK CITY HUMAN RESOURCES ADMINISTRATION and The CITY of NEW YORK,

Petitioners,

DECISION NO. B-5-96

-and-

DOCKET NO. BCB-1655-94 (A-5442-94)

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,

Respondent.

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DECISION AND ORDER

Pursuant to the New York City Collective Bargaining Law ("NYCCBL"), § 12-312 (Grievance procedure and impartial arbitration), and to the Rules of the City of New York ("Rules"), § 1-07(c) and (e), on May 24, 1994, the City of New York and the New York City Human Resources Administration ("City," "HRA," or "Petitioners") filed a petition challenging the arbitrability of a grievance submitted by the Social Service Employees Union, Local 371 ("Union," "L. 371" or "Respondent") concerning a claimed wrongful termination of a provisional employee in the classified civil service title of Caseworker in HRA's Division of AIDS Services. After numerous requests for an extension of time to file were granted, the Union filed an Answer on November 14, 1994. After further numerous requests for an extension of time to file were granted, Petitioners filed a Reply on May 26, 1995.

Background

It is undisputed that Petitioner and Respondent are parties to a collective bargaining agreement ("Agreement") covering the time period relevant herein.[1] It is also uncontroverted that Article VI of the applicable

[1] The applicable contract is the Social Services Agree (continued...)

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:
>
> (a) A dispute concerning the application or interpretation of this Agreement.
>
> (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 . . .
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> * * *
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> (h) 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.

Section 2 of Article VI sets forth a four-step procedure for resolving grievances, culminating in arbitration.

It is undisputed that Sam Kurshan ("Grievant") was employed by the HRA as a Caseworker in the Division of AIDS Services. It is also undisputed that Grievant's employment was provisional and was terminated on January 5, 1994.[2]

On or about January 6, 1994, a grievance was filed at Step I of the contractually provided grievance procedure, alleging termination of employment because of a disability which Grievant claimed was known to the agency. The grievance claimed violations of HRA Executive Order 618, Article V, and HRA

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[1](...continued)

ment dated March 16, 1992.

[2] A letter dated January 5, 1994, from Jean Matthews, HRA's Executive Deputy Administrator for Personnel Administration, to Grievant, advised him that his "employment as a Provisional Caseworker is being terminated, effective at the close of business today."

Procedure No. 93-18.[3] On or about February 18, 1994, the grievance was denied at Step II on the ground that the contractual grievance procedure was not the appropriate mechanism for resolving disputes over claims arising under the ADA. On or about March 16, 1994, Grievant appealed for a Step III hearing, again alleging a violation of HRA Executive Order 618, but omitting the allegation concerning any aforesaid HRA Procedure. The Step III hearing was denied on grounds that Executive Order 618, Article 5, did not apply to the grievance at issue and that the Grievant's civil service status as a provisional employee prevented his contesting the termination. The Step III hearing officer's report made no reference to any HRA Procedure.

On April 19, 1994, Respondent Union filed a Request for Arbitration with the Office of Collective Bargaining. Respondent alleged wrongful termination

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[3] While the Union neither admits nor denies that the citation of Procedure No. 93-18 represents a typographical error or that the Grievant intended to cite HRA Procedure No. 92-18, the Union's Answer analogizes Procedure No. 92-18 to Executive Order 618, § 5, which is at issue herein. The parties do not dispute that Procedure No. 92-18, not 93-18, is intended.

HRA Procedure No. 92-18, dated November 4, 1992, informs the public and HRA staff who provide direct services that the Agency has implemented the Americans with Disabilities Act Grievance Procedure to handle complaints of discrimination from persons with disabilities. The Americans with Disabilities Act became effective January 26, 1992, and prohibits discrimination on the basis of disability in the areas of employment, public accommodations, state and local government services and telecommunications. A provision of the Act mandates employers to maintain a procedure to address such complaints.

HRA Executive Order No. 618, dated February 7, 1992, generally concerns staff conduct. Article V specifically prohibits discriminatory practices against staff members, applicants for employment, and clients. It states that such practices are subject to sanctions and penalties imposed by the courts and regulatory agencies such as the New York City Commission on Human Rights and the New York State Division of Human Rights.

in violation of the Americans with Disabilities Act ("ADA") and cited violations of HRA Executive Order 618 and violation of HRA Procedure No. 92-18.[4] The Union proceeds under Article VI, § 2, of the SSEU Local Agreement. As a remedy, Respondent seeks restoration of "all monies lost and return to Caseworker position and any other just and proper remedy."

Positions of the Parties

City's Position

The City raises several challenges to the arbitrability of the grievance. It contends that the parties have not agreed that an arbitrable grievance includes disputes arising under local, state, or federal law generally or the Americans with Disabilities Act specifically. The City argues that an alleged violation of Executive Order 618 is properly addressed, not through the contractual grievance procedure, but through a procedure established in HRA Procedure No. 92-18, which implements a mandate under the ADA for employers to maintain a procedure to address complaints arising under that Act with regard to, inter alia, local government services. The City maintains that HRA has no record of any such complaint filed by the Grievant pursuant to Executive Order 618 under Procedure No. 92-18, and that the agency has never been made aware of the specific disability which Grievant claims to have, and that the Grievant has never asked the agency's ADA coordinator for an accommodation.

In addition, the City argues that the Grievant was a provisional employee with less than two years of continuous service and not entitled to pursue his termination claim through the contractual grievance procedure. The City further asserts that an arbitration award cited by the Union in support of its position is not controlling here. The City argues that the arbitration

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[4] The Request for Arbitration cites both Executive Order 618 and HRA Procedure No. 92-18 as the written policy alleged to have been violated. The Union's Answer addresses only the alleged violation of the Executive Order.

case is distinguishable because, inter alia, it involved a probationary, not a provisional, employee.[5]

Further, the City contends that the Union has failed to establish the requisite nexus between the act complained of, which the City identifies as wrongful termination in violation of the ADA, and the contractual provision cited as the basis of the Union's claim. For all these reasons, the City seeks dismissal of the Union's Request for Arbitration.

Union's Position

The Respondent Union asserts that the claim at issue herein is encompassed within the parties' contractual definition of an arbitrable grievance. Specifically, the Union argues that HRA Executive Order 618 constitutes a written policy or order of HRA affecting the terms and conditions of the Grievant's employment within the meaning of Article VI, § 1(b), of the Agreement.

The Union refers to the Step III appeal in which the Grievant stated that he had a medical disability, that "DAS knew of [his] medical history . . .[and that] instead of helping, they moved [him] to different locations and accused [him] of abusing agency staff, premises, client and security." The Grievant further stated that "[a]t no time did DAS assist me in controlling my medical problem. All DAS did was call me to a meeting to advise me of my

[5] 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, 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.

impending dismissal." The Union asserts that the Grievant's termination of employment constituted a violation of HRA Executive Order 618, Article V, which prohibits discrimination by reason of, inter alia, physical and/or mental handicap in the recruitment, assignment and promotion of staff and in other aspects of employment. This alleged violation is the basis for the request for arbitration.[6]

Moreover, although the Union denies knowledge sufficient to form a belief as to the City's allegation that the Grievant had less than two years of continuous service as a provisional, the Union contends that nothing in HRA Executive Order 618 provides that its terms do not apply to provisional employees including the Grievant. The Union argues that Executive Order 618 is "of the same character" as HRA Procedure No. 92-10, under which a grievance by a provisional, probationary HRA Caseworker was held to be arbitrable. The rationale of the arbitrator therein in finding said procedure grievable applies with equal force in the instant case, in the Union's view.[7] To the extent that the grievance and the Request for Arbitration allege a violation of Executive Order 618, Article V, the Union asserts that the grievance is arbitrable.

Discussion

[6] Neither the Request for Arbitration nor the Union's Answer states a claim for wrongful discipline. A review of the Step III grievance claim indicates that the only agency actions complained of were (i) accusation(s) that Grievant "abused" agency staff, premises, clients and security, (ii) Grievant's transfer, and (iii) Grievant's termination of employment. No further facts are alleged to indicate who made the accusations about the Grievant's alleged abuse of personnel and property or the circumstances of the accusations, transfer or termination.

[7] See n. 4, supra.

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 within the scope of the parties' agreement to arbitrate.[8] 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.[9]

Moreover, 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, written policy or order is grievable and arbitrable.[10] In addition, we have found that alleged violations of executive orders constitute arbitrable grievances under provisions similar to this section of the contract.[11]

Applying these criteria to the instant matter, we find that the contractual definition of the term "grievance," as defined by Article VI, § 1(b), of the parties' Agreement contemplates an alleged violation, misinterpretation or misapplication of Executive Order 618, Article V, cited by the Union herein. We find, thus, that the Union has stated an arguable nexus between the act complained of and the section of the Agreement allegedly

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[8] 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-2-95, B-47-92 and B-15-90.

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

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

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

violated.[12]

As to the City's contention that the Grievant's status as a provisional employee precludes him from pursuing a claim regarding the termination of his employment, we find as follows. First, the Union has not proceeded under § 1(h) of Article VI of the Agreement which accords certain rights to two-year provisionals with respect to disciplinary matters. We find this is not a question of rights with respect to disciplinary matters. Rather, we find it concerns a question of whether the termination of Grievant's employment, which has not been alleged by either the Union or the City to have been disciplinary, was violative of the Grievant's rights under Executive Order 618. We have previously held that provisional employees are not precluded, on account of their provisional status, from asserting an arbitrable claim on the basis of rights derived from a contract between the parties.[13] In this case, no basis has been presented that would preclude a provisional employee, such as the Grievant, from asserting a claim under Article VI, § 1(b), of the Agreement, and under the agency rules, regulations and written policies made arbitrable thereby.

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[12] With regard to the claimed violation of HRA Procedure No. 92-18 as set forth in the Request for Arbitration, we note that we have held in an earlier case that a personnel procedure couched in general and precatory language was a statement of goals and objectives rather than an arguable source of a right to arbitrate. Decision No. B-6-86. Similarly, in the instant matter, HRA Procedure No. 92-18 sets forth a general description of the A-D-A and of a procedure to handle complaints under the A-D-A. (The Procedure describes when and how to file a complaint, the filing time limitation, and the steps through which such a complaint filed under the A-D-A may be processed. The Procedure also states that the use of the grievance procedure provided thereunder is not a prerequisite to redressing A-D-A claims under other procedures.) However, the Procedure itself does not provide substantive rights which a grievant can pursue under the contractual grievance procedure.

[13] Decision No. B-62-91, B-39-89, B-1-77 and B-8-74.

For these reasons, we find arbitrable the question of whether the Grievant, a provisional employee, was denied any contractual rights under Article VI, § 1(b), of the applicable Agreement. The parties should not anticipate that an arbitrator will fashion improper, illegal or inappropriate relief. Our ruling upholding the arbitrability of this dispute only affords an arbitrator the opportunity to consider the merits of the claim[14] and to fashion a remedy, if needed, appropriate to the circumstances and within the limits of applicable law.[15]

[14] 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.

[15] 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 City's Petition challenging arbitrability be, and the same hereby is, denied; and it is further

ORDERED, that the Union's Request for Arbitration be, and the same hereby is, granted.

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

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

JEROME E. JOSEPH
MEMBER

ROBERT H. BOGUCKI
MEMBER

I Dissent. SAUL G. KRAMER
MEMBER