City v. Libert, 59 OCB 1 (BCB 1997) [Decision No. B-1-97 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration :

Between

THE CITY OF NEW YORK :
Petitioner,

-and-

LLEWELLYN LIBERT
Respondent. :

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DECISION NO. B-1-97
DOCKET NO. BCB-1835-96
(A-6204-96)

DECISION AND ORDER

On May 23, 1996, the City of New York ("the City") filed a verified petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by Local 371, Social Services Employees Union ("the Union") on behalf of member Llewellyn Libert ("Grievant"). On August 9, 1996, the Union filed an answer to the petition. On September 4, 1996, the City filed reply.

BACKGROUND

On July 11, 1994, Grievant was initially employed in the civil service position of Provision Principal Administrative Associate, Level II (PAA-II) and assigned to Department of Health's (D.O.H.) TB control unit in the in-house title of Special Assistant to the Program Management Officer, Joseph Slade. Effective April 13, 1995, Grievant's title was administratively changed from PAA-II to the non-competitive civil service title of Community Associate. Grievant was terminated in August, 1995, approximately four-and-a-half months after his title change.

The City and the Union are parties to a collective bargaining agreement, hereinafter referred to as the Citywide Agreement, covering the period January 1, 1992 through March 31, 1995. The Union filed a Step I grievance dated October 23, 1995 contesting the Grievant's termination. A letter dated October 30, 1995, from the D.O.H. to the Union denied the Step I grievance. On October 27, 1995, the Union filed a Step II grievance. With no response to

the Step II grievance, the Union filed a Step III grievance on November 24, 1995. No response to the Step III grievance having been received, the Union filed the request for arbitration on February 15, 1996. In its request, the Union claimed a violation of Article VI of the Citywide Agreement. Article VI, entitled "Grievance Procedure", provides, in pertinent part:

> Section 1.
>
> > f. A claimed wrongful disciplinary action taken against a full-time non-competitive employee with six (6) months service in-title, except for employees during the period of a mutually agreed upon extension of probation.

As a remedy, the Union seeks reinstatement of Grievant with full back pay and expungement from agency records of any record of his termination.

POSITIONS OF THE PARTIES

The City's Position

The City contends that the Union's request for arbitration should be denied due to its failure to establish a nexus between the alleged violation and the contract provision at issue. The City cites several prior decisions of this Board as having held that the grievant must demonstrate a substantial nexus between the contract provision cited and the situation out of which the grievance arises.[1] The City also argues that it is the proponent who has the duty to demonstrate that the contractual clause cited applies to the dispute in question and that the right invoked is arguably related to the grievance.

The City maintains that Grievant has no rights under the cited contract provision, Article VI, Section 1.f., since that section is concerned with disciplinary rights for non-competitive employees with more than six months in-title. As a non-competitive employee with less than six months service in-title, Grievant allegedly has no rights under the cited provision.

The City cites Rule 5.2.1(b) of the Rules and Regulations of the City Personnel Director as controlling in this case. This rule states that the non-competitive title of Community Associate carries a mandatory six month probationary period. Grievant, the

[1] Citing Decision Nos. B-25-83; B-20-89; and B-68-89.

City points out, was terminated four-and-a half-months into his probationary period.

The City argues that the contract provision in question must be strictly construed. The City points out that there are other New York City municipal labor contracts that explicitly adopt "same or similar titles" language, while this one does not. It maintains that the absence of such language in Section 1.f. of the instant Agreement must be interpreted as an affirmative decision resulting from the complex process of collective bargaining that produced the finished contract.

The Union's Position

The Union submits that the City wrongfully terminated Grievant. The Union agrees that Grievant was terminated in August, 1995, approximately four-and-a-half months after his title change. It argues, however, that regardless of the change in his title, Grievant allegedly performed the same tasks and duties under both titles. Thus, he assertedly continued to be employed in the D.O.H.'s TB control unit, at the same work location, in the same in-house title of Special Assistant to the Program Management Officer, Joseph Slade.

The Union submits that Grievant's prior time as a PAA-II should be counted towards his probationary period in the new title of Community Associate. The Union reiterates that Grievant performed the exact duties and functions under both titles. Thus, the termination assertedly violated Article VI, Section 1.f. of the Citywide Agreement.

The Union also claims that the grievance is arbitrable due to the D.O.H.'s alleged failure ever to have given the Grievant a copy of the tasks and standards required for his position.

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.[2] We cannot create a duty to arbitrate where none exists, however, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[3]

In the instant matter, it is undisputed that Grievant was a City employee for more than one year. As such, the Union claims that Grievant's termination constitutes a violation of the "Grievance Procedure" provision of the Citywide Agreement. It

[2] 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.

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

reaches this conclusion by contending that Grievants' prior time as a PAA-II should be counted towards his new title of Community Associate.

Article VI, Section 1.f. does not, on its face, grant probationary employees with less than six (6) months in-title service protection. It specifies that disciplinary rights for non-competitive employees exist only where such employees have gained six months service in the same title. The contract makes no allowance or exception based on the substantive work being performed by the employee. "Service in title" is the sole determinative factor in determining eligibility for disciplinary rights.

Where the language of the contract is clear and unambiguous, we deem the contract to mean what it says.[4] Thus, we cannot expand the clear meaning of this collectively bargained contract language to mean "same or similar tasks" -- language and meaning that the Union would have us adopt.

The Union's argument pertaining to tasks and standards has no bearing on the current issue which is the discharge of a Grievant with insufficient time in service. Failure to provide a unit member with a copy of the tasks and standards may state an independent contractual violation claim, but there is no evidence

[4] See Decisions Nos. B-8-92 and B-25-90.

that such a claim was made at the lower steps of the grievance procedure in this case. We can not ignore the essential purpose of a multi-level grievance procedure which is to permit management an opportunity to resolve the matter in dispute voluntarily. Furthermore, we have consistently denied requests for arbitration of claims that have not been raised at the lower steps of the grievance procedure. Since the Union did not raise this issue at the lower levels of the grievance procedure we will not consider it at this time.[5]

Accordingly, we shall grant the City's petition challenging arbitrability.

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-1835-96, be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by Local

[5] See Decision Nos. B-25-87, B-40-88, B-71-89, B-29-91 and B-27-93.

371, Social Services Employees Union on behalf of member Llewellyn Libert, in Docket No. BCB-1835-96 be, and the same hereby is denied.

DATED: NEW YORK, N.Y.
January 30, 1997

STEVEN C. DeCOSTA
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