City v. L. 2507, DC 37 & Rosa, 59 OCB 47 (BCB 1997) [Decision No. B-47-97 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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| In the Matter of the Arbitration, | : | |
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| -between- | : | |
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| THE CITY OF NEW YORK, | : | |
| Petitioner, | : | Decision No. B-47-97 |
| | : | Docket No. BCB-1895-97 |
| -and- | : | (A-6493-96) |
| | : | |
| DISTRICT COUNCIL 37, LOCAL 2507, AFSCME, AFL-CIO, (Xenia Rosa), | : | |
| Respondent. | : | |

## DECISION AND ORDER

On March 14, 1997, the City of New York ("City"), appearing by the Office of Labor Relations ("OLR"), filed a petition challenging a request for arbitration of a grievance filed by District Council 37 ("the Union"), on behalf of its member, Xenia Rosa ("the grievant"). The Request for Arbitration alleged that the employer failed to provide the grievant with a copy of her tasks and standards; failed to conduct a performance evaluation at the correct time and then terminated her employment improperly. The Union filed an Answer to the Petition Challenging Arbitrability on April 4, 1997. The City's reply was filed on April 18, 1997. On May 7, 1997, the Union submitted a sur-reply which was followed by an objection by the City, received on May 8, 1997. After being asked, by the Trial Examiner, to submit a letter detailing what new circumstances, if any, existed warranting the consideration of the sur-reply, the Union submitted two explanatory letters, on May 12 and 13, 1997. These letters where followed by a final objection by the City which was received by the Office of Collective Bargaining on May 14, 1997.

## BACKGROUND

The grievant was appointed by the Health and Hospital Corporation ("HHC") as a provisional Emergency Medical Services ("EMS") employee on March 15, 1995. On May 15, 1995, she was appointed permanently from the Emergency Medical Technician list. The grievant received a performance evaluation on January 26, 1996, for the period of August 15, 1995, through January 15, 1996. She was terminated on February 16, 1996, on the ground that she was excessively absent. On March 17, 1996, pursuant to Section 70(2) of New York Civil Service Law[1], the EMS personnel were functionally transferred from HHC to the New York City Fire Department ("FDNY"). On April 1, 1996, the grievant filed a Step I grievance alleging that:

> There has been a violation, misapplication and/or misinterpretation including but not limited to Human Resources Order 93-19, Section C and Section E in that I have not received a midway interim evaluation during my probationary period and I have been subsequently terminated effective February 16, 1997.

This grievance was denied on May 1, 1996, on the ground that the grievant was a probationary employee. After a Step II grievance was filed on May 3, 1996, and was also denied, a Step III grievance was filed on June 21, 1996. Upon receiving no response, the Union filed a request for Arbitration on the grievant's behalf on December 16, 1996. As a remedy, the Union requested, among other things, reinstatement with full back pay.

[1]Section 70(2) of the New York Civil Service Law provides for the transfer of personnel during a functional transfer.

## POSITIONS OF THE PARTIES

City's Position

The City claims that there is no factual dispute that the grievant did, in fact, receive a midterm performance evaluation. Therefore, contends the City, there is nothing to arbitrate and the Request for Arbitration should be dismissed. The City also claims that reinstatement with back-pay, an award sought by the Union, is one which is unavailable to provisional employees.[2] The city further asserts that "probationary employees have no disciplinary rights under the collective bargaining agreement" and defends its decision to terminate the grievant alleging that her work history is marred by habitual absences.

The City asserts that the Union "failed to state a claim that is within the scope of the [Agreement's] grievance procedure." According to the City, on March 17, 1996, "when the functional transfer of EMS employees took place, the written policies of the HHC respecting EMS employees became null and void." Since the instant grievance was filed on April 1, 1996, continues the City, " -- approximately two weeks after Human Resource Order 93-19 was superseded by the FDNY policies and procedures -- it was not founded upon an existing written policy." The City contends that since there are "no *existing* rules, regulations, written policies, or orders of the City" that were violated, affecting the grievant's employment, the request for arbitration should be dismissed.

In the City's reply, it contends that the Union's allegation that the grievant did not receive

[2] The City corrected itself in its reply, and noted that the grievant here was in fact a probationary employee and not provisional.

her tasks and standards, that she did not receive counseling concerning attendance problems, and that she did not receive a follow up evaluation are irrelevant and "were not submitted at the lower levels of the grievance procedure, and therefore are not related to the instant grievance."

Union's Position

According to the Union, the Employer failed to follow the then-applicable procedure governing the evaluation of probationary employees in that it failed to provide the grievant with a copy of her tasks and standards; failed to conduct a performance evaluation at the correct time; and then terminated her employment improperly. The provision upon which the Union bases its claim is the Emergency Medical Service Human Resources Order, Number 93-19, Sections C and E, which state:

> C. Probationary employees shall receive at least one written interim evaluation during their probationary period, to be completed no later than midway through the probationary period. A final evaluation shall be completed before the end of the probationary period.
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> * * *
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> E. A follow-up evaluation is required if an employee has received an overall evaluation which is less than Satisfactory. The period of time for the follow-up evaluation shall be established by the supervisor, but it shall not exceed three months.

According to the Union, when the grievant's employment was terminated during her probationary period without her receiving an interim evaluation and the required follow-up evaluation, HHC violated its own EMS Human Resources Order. The Union cites the decisions of this Board[3] in support of its proposition that the Human Resources Order is a written policy and is thus subject to

[3] The Union refers to Decisions No. B-15-90, B-18-90, and B-28-87.

arbitration.

The Union adds that the violation of the Human Resources Order occurred on February 16, 1996, while the grievant was still an employee of HHC. Further, the grievance was filed within 120 days of the grievant's termination, and was thus timely. In light of these facts, asserts the Union, "[i]t is ludicrous [for the City] to argue that the grievant should be estopped from filing a valid grievance ... simply because her title had been transferred to another agency after the violation occurred."

The Union further notes that the grievant was a permanent probationary employee when her employment was terminated and that "Article VII, Section 1.b. of the parties' collective bargaining agreement does not limit the filing of grievances over an employer's violation of Section 1.b. to any particular category of employees. Rather, any member, regardless of their status as a permanent or provisional employee, may file a grievance over a violation of an agency rule or regulation, written policy or order." The Union contends, citing several Board decisions[4], that a grievant cannot be denied her right to the arbitration of an evaluation procedure merely because of her probationary status.

In the Union's sur-reply, it contends that the City's reply failed to address the employer's failure to provide the grievant with her tasks and standards and to conduct the required follow-up interview. The Union alleges that these substantive violations of Human Resources Order 93-19, "are clearly grievable under Article VII, Section 1.b. of the parties' collective bargaining agreement. In the letter submitted by the Union which detailed the special circumstances warranting the sur-reply's inclusion in the record, the Union adds that the City:

[4] Decisions No. B-28-94, B-62-91, and B-6-86.

> ... wrongly states as fact that the grievant and or the union neglected to previously raise in the grievance the agency's 1) failure to provide the grievant with a copy of her tasks and standards ... and thus Respondent is barred from raising such violations in the instant grievance. Petitioner boldly states that '[N]one of these allegations are contained in the instant grievance and were not submitted at the lower levels of the grievance procedures.' ... However, in both the grievance and the Request for Arbitration, the grievant and the union alleged a violation of EMS Human Resources Order 93-19. Thus, contrary to the Petitioner's assertion, this Order specifically requires that the EMS provide the grievant with a copy of her tasks and standards....

## DISCUSSION

Regarding the Union's submission of a sur-reply, we find that the City's argument that the Union failed to raise the issue of the City's failure to provide the grievant with her tasks and standards, was raised for the first time in the City's reply. In light of this fact, and the fact that the Union's sur-reply, and subsequent letters, addressed and clarified this issue, we find that the inclusion of the Union's sur-reply is warranted. Accordingly, the sur-reply will be considered in our analysis of the matter before us.[5]

This Board's function in determining whether a grievance is arbitrable is to ascertain whether there exists an agreement between the parties that, in any way, obligates them to arbitrate their controversies and, if so, whether the obligation is broad enough to include the particular matter in dispute.[6]

In the instant matter, the City does not dispute that the alleged violation is one which was

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[5] See Decision No. B-14-83 at 37, where this Board noted the criteria for accepting sur-replies.

[6] Decisions No. B-43-87; B-40-86; B-1-84.

arbitrable under the collective bargaining agreement at the time of its alleged occurrence, or that the collective bargaining agreement covered the grievant prior to her termination. Instead the City's primary challenge to the arbitrability of the grievance is that since a "functional transfer of EMS employees took place, the written policies of the HHC respecting EMS employees became null and void." The City adds that the instant grievance is not "founded upon an existing written policy." We do not agree.

When DC37 sought to accrete the EMT title to its existing bargaining unit, pursuant to the impending transfer, the Board of Certification issued Decision No. 4-96, an Order Amending Certification, on February 27, 1996. It stated, in pertinent part:

> **ORDERED that Certification No. 62D-75** (as previously amended) **be, and the same hereby is, further amended to include the titles** of Assistant Bio-Medical Equipment Technician, Bio-Medical Equipment Technician, Emergency Medical Specialist-Paramedic**, Emergency Medical Specialist - EMT**, Senior Bio-Medical Equipment Technician, supervising Emergency Medical Specialist, and Ambulance technician, **subject to existing contracts, if any**. (emphasis added).

Contrary to the City's contention, for which it fails to offer any legal support, the Hospital Technicians Contract and the EMS Human Resource Order 93-19, did not become null and void after the transfer. Upon transfer, the titles were accreted to DC37 ***subject to*** the existing contract.

According to the grievance procedure of the Hospital Technicians Contract, a grievance, which is "a claimed violation ... of the rules or regulations, written policies or orders of the

Employer ...",[7] is arbitrable.[8] The procedures of the Human Resources Order were alleged to have been violated by the City when the City failed to provide the grievant with a timely evaluation and a follow-up evaluation prior to the termination employment. The Human Resources Order is just that, an order, and falls under the language of Article VII, Section 1.b. of the Agreement. In light of these facts, and because we are not persuaded by the City's argument that the Union's allegations "are not related to the instant grievance", we find that the parties are obligated by the Hospital Technician's Contract, to arbitrate their controversies and specifically, to arbitrate the matter in dispute before us. The fact that, subsequent to the alleged violation and the grievant's termination by HHC, the position in question was functionally transferred to the FDNY, cannot serve to preclude the arbitration of a claim that accrued prior thereto.

Regarding the City's argument that the remedy of reinstatement with back pay is one which "does not exist for provisional employees", we have long held that provisional employees are not precluded, on account of their status, from asserting an arbitrable claim.[9] Furthermore, whether the remedy of reinstatement and back pay might permissibly be awarded is not properly before this Board. In Decision No. B-32-96, the city, in its petition challenging arbitrability, maintained that an arbitrator was not empowered to award one of the remedies requested by the Union. We noted there

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[7] See The Hospital Technician's Contract, Article VII, Section 1.b.

[8] Article VII, Section 2, Step IV, states, in pertinent part:

> An appeal from an unsatisfactory determination at STEP III may be brought solely by the Union to the Office of Collective Bargaining for impartial arbitration within fifteen (15) work days of receipt of the STEP III determination.

[9] Decision No. B-62-91 at 6; B-39-89.

that we had established in past decisions that questions of remedy are separate and distinct from questions or arbitrability and that arguments addressed to questions of remedy are not relevant to the arbitrability of the grievance.[10] Accordingly, we will not deny the instant grievant her right to arbitration on those grounds.

**ORDER**

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City

[10] See also, Decisions No. B-47-92; B-15-90; B-50-89.

Collective Bargaining Law, it is hereby

ORDERED, that the challenge to arbitrability raised herein by The City of New York be, and the same is hereby, denied in all respects, and it is further

ORDERED, that the Request for Arbitration filed herein by District Council 37, Local 2507, in all respects be, and same is hereby, granted.

Dated: October 28, 1997
New York, N.Y.

STEVE DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOGUCKI
MEMBER