City v. L. 371, SSEU & Gooden, 61 OCB 17 (BCB 1998) [Decision No. B-17-98 (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- :

SOCIAL SERVICES EMPLOYEES UNION, LOCAL371 and RORY GOODEN, :
Respondents. :
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Decision No. B-17-98
Docket No. BCB-1921-97
(A-6710-97)

DECISION AND ORDER

On June 25, 1997, the City of New York ("the City"), appearing by its Office of Labor Relations, filed a petition challenging the arbitrability of a grievance filed by the Social Services Employees Union, Local 371 ("SSEU" or "the Union"), on behalf of Rory Gooden ("the grievant"). The Union filed its answer to the City's petition challenging arbitrability on August 12, 1997. The City's reply followed on February 9, 1998.

BACKGROUND

The grievant was appointed as a provisional caseworker by the City's Human Resources Administration Child Welfare Administration ("HRA") in May 1989. On or about August 28, 1995, the grievant received a letter from HRA's Director of Recruitment, Selection and Placement, notifying him that "because of the certification ... of the civil service list for Caseworker, it is was necessary to terminate [his] services as a provisional Caseworker." The letter further informed the grievant that his last day of work was to be on September 8, 1995. On

or about January 3, 1996, the grievant filed an Article 78 proceeding against the City in the Supreme Court of the State of New York, alleging that his discharge was based on a pretext in order to avoid affording him the due process rights to which he was entitled under the parties' collective bargaining agreement ("Agreement"). On June 11, 1996, the Court ordered the City to hold proceedings under the Grievance Procedure of the Agreement. A Step II grievance was held on July 24, 1996 and the decision, upholding the grievant's discharge, was issued on July 31,1996. The Step III grievance was filed on August 16, 1996; the decision, issued on April 24, 1997, denied the Step III grievance. The Union's request for arbitration followed on May 1, 1997. Therein, it alleged that the grievant was wrongfully terminated in violation of Article VI §1(h) of the Agreement.[1]

POSITION OF THE PARTIES

City's Position

The City contends that the decision to terminate the grievant's employment, which was

[1] Article VI, sets forth the parties' Grievance Procedure. The definition section, Section 1, defines a grievance, in pertinent part, as:

* * *

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;

* * *

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.

made on August 14, 1995,[2] was pursuant to Title 59 of the Rules of the City of New York, Rule V, § V, 5.5.3, which provides that a "provisional appointment to any position shall be terminated within two months following the establishment of an appropriate eligible list for filling vacancies in such positions [and that in no case] shall the employment of such provisional appointee be continued longer than four months following the establishment of such eligible list." The City notes that these Rules and Regulations of the New York City Personnel Director are specifically excluded from the grievance procedure under Article VI, §1(b).[3] According to the City, the "exclusion contained in Article VI, Section 1(b) is unambiguous and must be given effect." Furthermore, notes the City, the Board of Collective Bargaining ("the Board") has held that a party may only be required to submit to arbitration to the extent that it agreed to that arbitration.[4]

Finally, the City asserts that the Union failed to show the required nexus between the grievance and the contractual provision, cited as the basis for its claim. According to the City, Article VI, §1(h), merely defines a grievance and contains no substantive rights and the Union did not show that the contractual provision applies to the dispute in question.

Union's Position

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[2] In its reply the City includes copies of two intra-departmental memoranda as proof of the department's decision to discharge the grievant. One memorandum has a facsimile imprinted date of August 14, 1995, and the other is dated August 15, 1995. The City notes that both of these dates are earlier than the August 22, 1995, date of the court appearance incident referred to by the Union. The City further asserts that the memoranda indicate that another provisional employee also was discharged.

[3] *See supra* note 1, at 2.

[4] Decision Nos. B-28-92; B-26-88, B-35-89; B-39-86.

The Union contends that the Rules and Regulations was used a pretext for terminating the grievant's employment. In support of this contention the Union notes that the grievant was the only provisional employee that had his employment terminated; the other provisional employees were redeployed. According to the Union, the real reason for the grievant's discharge was the City's "mistaken perception that the Grievant was guilty of misconduct in connection with an incident which occurred on August 22, 1995." The Union claims that on August 22, 1995, the grievant appeared in the Family Court of the State of New York in King's County in a case involving a petition for termination of parental rights. The grievant's immediate supervisor approved his appearance but the HRA's "Office of Legal Affairs ... upon learning of the Grievant's appearance and conduct, objected to the same." According to the Union, a memorandum was submitted by an Office of Legal Affairs attorney to the Child Welfare Administration objecting to the grievant's appearance and conduct.[5] The Union suggests that the grievant's discharge was a result of this "incident" and the City's attempt to deny the grievant his due process rights.

The Union claims that the facts herein set forth a *prima facie* case that the reason advanced by the City for the grievant's discharge was pre-textual. According to the Union, the question of whether the grievant's discharge was wrongful discipline or proper within the applicable regulations is a question of fact well within the purview of an arbitrator and therefore arbitrable.

The Article 78 Proceeding

[5] Neither the relevance of the grievant's appearance nor the basis for the City's objection to the grievant's appearance and conduct was made clear in the pleadings.

On or about January 4, 1996, the grievant filed an Article 78 proceeding against the City in the Supreme Court of the State of New York. There, he alleged that the City's termination of his employment was arbitrary, capricious and unlawful because he was "discharged for the pretextual reason of the certification of the Caseworker eligible list whereas the true reason for his discharge was the alleged misconduct [and the City's desire to] avoid affording him the due process rights to which he was entitled under the Agreement."

On April 26, 1997, the City filed a motion to dismiss the grievant's Article 78 proceeding and a supporting memorandum of law. Therein, the City argued that the "grievance and arbitration procedure contained in the contract is the exclusive remedy for disputes concerning the application of the collective bargaining agreement. Accordingly, the petition must be dismissed based upon petitioner's failure to follow the procedure."

In response to the City's motion, the grievant noted that when the City terminated his "employment upon the falsely stated reason that [he] was being replaced due to the movement of the caseworker civil service list" it:

> was well aware when it took such action that my discharge for that stated reason was one which I could not contest under the grievance provision of the collective bargaining agreement, because a discharge for that reason is not included within the definition of the term 'grievance' under the agreement. Now, incredibly, and, I submit, disingenuosly, respondent claims my petition should be dismissed because I failed to utilized the grievance procedure of the agreement.

The Court, in a decision dated June 11, 1996, granted the City's motion and dismissed the Article 78 proceeding, stating that it was "unconvinced that submission of the dispute to arbitration would have been futile".

DISCUSSION

______Article VI, §1(h) of the Agreement permits arbitration of "a claimed wrongful disciplinary action taken against a provisional employee who has served for two years in the same title ..." In this case, the grievant, a provisional employee with more than two years of service, maintains that the termination of his employment constituted "a claimed wrongful disciplinary action." The City, on the other hand, denies that the termination was disciplinary in nature; according to the City, the decision to terminate the grievant's employment was made pursuant to Title 59 of the Rules of the City of New York, Rule V, §V, 5.5.3, which requires that provisional appointments be terminated following the establishment of an eligible list. The City argues that it exercised its statutory management right, pursuant to §12-307(b) of the NYCCBL, to "relieve its employees from duty because of lack of work or for other legitimate reasons." i.e., in order to comply with the Rules of the City of New York.

Ordinarily, the question of whether an employee has been disciplined within the meaning of a contractual term is one to be determined by an arbitrator.[6] However, where the City alleges that the disputed action is within the rights accorded to management by §12-307(b) of the NYCCBL, we have been careful to fashion a test of arbitrability which strikes a balance between often conflicting considerations and which accommodates both the employer's management prerogatives and the contractual rights asserted by the Union.[7] Under this test we require the

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[6] *See*, Decision Nos. B-18-94; B-12-93; B-33-90.

[7] In this regard, we emphasize that this arbitrability test is the exception rather than the rule. It is not applied in every case in which the City merely asserts that its action falls within the purview of the statutory management rights provision. Rather, the Board has reserved this test for cases where the contract provision invoked by the union, on its face, does not appear to relate to

party seeking arbitration to do more than demonstrate an arguable relationship between the act complained of and the source of the alleged right. The party must show, to the Board's satisfaction, that the disputed action raises a substantial question as to whether it was disciplinary in nature.[8] Such a showing requires our close scrutiny on a case by case basis.[9]

We find that the Union has met its burden of showing that the grievant's discharge raises a substantial question as to whether the City's action was disciplinary in nature. In its answer, the Union cites the incident which transpired on August 22, 1995, as the basis for the grievant's discharge. As support for its claim, the Union notes that the HRA's Office of Legal Affairs objected to the grievant's appearance in Family Court and sent a memorandum indicating that objection to the Child Welfare Administration. This, coupled with the Union's allegation that "each and every other of the numerous provisional Caseworkers who were then employed by the Petitioner were redeployed to other positions within the [City] and no such Caseworkers other than grievant was discharged", creates a substantial issue as to whether the grievant's discharge

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the subject matter of the management right asserted. The Board has applied this test most often in cases where an employee was transferred and the union claimed that the transfer was disciplinary and therefore arbitrable pursuant to a contractual provision that defines a grievance as a claimed wrongful disciplinary action. In those cases, the contract provision granting the right to grieve wrongful discipline, on its face, did not appear to be related to management's right to transfer employees. Accordingly, in those cases, the union had the burden of showing, by factual allegations, that the transfer in question was intended as a disciplinary action. S*ee* Decision Nos. B-18-94; B-12-93; B-52-89; B-33-88; B-5-87. In the instant matter, this test is being applied because the contract provision granting the right to grieve wrongful discipline, on its face, does not appear to be related to management's right to terminate employment pursuant to the Rules of the City of New York.

[8] *See* Decision Nos. B-18-94 at 12,13; B-19-92 at 6; B-52-89 at 10.

[9] *Id.*

was the result of punitive motivation by the City.

The allegations and documentary evidence submitted by the City in its reply ,which under generally accepted principles of pleading are deemed denied by the Union, further create questions of fact as to the City's defenses that (a) the decision was made to terminate the grievant's employment before the occurrence of the court appearance incident, and (b) the grievant was not the only provisional caseworker who was not redeployed. These issues go to the merits of the grievance. If the City's evidence is found to be authentic, it would seem to rebut the basis for the Union's claim of wrongful discipline. However, having found that the Union has raised a substantial issue of wrongful discipline, it is not for this Board to resolve factual disputes. These are questions properly to be determined by an arbitrator. Accordingly, we find the instant matter arbitrable.

Finally, we note that in moving to dismiss the Article 78 proceeding, the City argued that the appropriate forum for the grievant's claim to be heard was through the grievance and arbitration procedure provided in the parties' agreement and not in the proceeding before the court. However, in the instant matter, the City contradicts this argument by alleging that the grievant's claim is, in fact, excluded from the contractual definition of a grievance and, therefore, cannot appropriately be decided by an arbitrator. Here, the City alleges that because the grievant's claim regards the Rules and Regulations of the New York City Personnel Director, it is not arbitrable under the exclusion provision of Article VI §1(b) of the Agreement. The Union argues that the City's conduct, in adopting a contradictory position in the present matter, is "audacious in the extreme, to say the least." We do not condone the City's actions in this regard

and deem them inconsistent with good practice.

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 be, and the same hereby is, denied, and it is further,

ORDERED, that the request for arbitration in Docket No. BCB-1921-9 7 (A-6710-97) be, and the same hereby is, granted.

Dated: New York, New York
June 18, 1998

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

I dissent. ANTHONY P. COLES
MEMBER

I dissent. RICHARD A. WILSKER
MEMBER