City & DOJJ v. L. 371, SSEU, 61 OCB 23 (BCB 1998) [Decision No. B-23-98 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	:	
	:	
-between-	:	
	:	
THE CITY OF NEW YORK and the DEPARTMENT OF JUVENILE JUSTICE,	:	
	:	Decision No. B-23-98
Petitioners,	:	Docket No. BCB-1924-97
	:	(A-6785-97)
-and-	:	
	:	
SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, AFSCME, AFL-CIO	:	
	:	
Respondents.	:	

DECISION AND ORDER

On July 14, 1997, the Department of Juvenile Justice and the City of New York (hereinafter referred to as "DJJ" or "City"), appearing by its Office of Labor Relations ("OLR"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitrability filed by the Social Service Employee Union, Local 371, AFSCME, AFL-CIO ("SSEU" or "Union"). The Union filed an answer on October 10, 1997. The City filed its reply on December 2, 1997. The City submitted additional documentation to support claims made in the reply on April 9, 1998. The Board, in the interest of determining if a factual dispute existed, had decided to consider additional documentation from both of the parties and invited the Union to submit a response to the City's submission. The Union's response was submitted on May 4, 1998.

Background

The grievant, Michael Powell, was employed by the Department of Juvenile Justice in the non-competitive title of Houseparent from July 13, 1992 until August 19, 1996, when he was terminated. The DJJ's payroll records indicate that the grievant was classified as a per diem employee in that title. On August 19, 1996, a Step I grievance was filed, challenging the termination of his employment. On August 29, 1996, a Step II grievance was filed. The grievance at these steps alleged a violation of Article VI, Section 1(h), which includes in the definition of a grievance, "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."

On September 13, 1996, a request for a Step III review was filed. At this step the alleged violation was changed to Article VI, Section 1(f), which includes in the definition of a grievance, "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." The Union asserted that the DJJ had taken "[i]mproper disciplinary action in that grievant was wrongfully terminated." The request for a Step III review was denied on January 7, 1997. A revised Step III decision, still denying the grievance, was issued on June 30, 1997. The Step III decision stated that, as grievant was a per-diem employee, the termination of his employment without the service of disciplinary charges was correct. The instant request for arbitration was filed on June 4, 1997. The contractual provision alleged to be violated in the request for arbitration is Article VI, Section 1(f).

Positions of the Parties

City's Position

The City states that Article III, Section 3(b) of the Social Services contract makes a distinction between full-time Houseparents paid an annual salary and per diem employees paid a pro-rated salary. This Article provides that,

> [t]he annual salary rates listed for Houseparent and Senior Houseparent in Section 3(a) above are based upon a normal work week of sixty (60) hours, consisting of forty (40) hours paid at straight time (1x) and twenty hours paid at time and one-half (1-1/2x). Employees hired to work a twelve (12) hour day on a per diem basis shall receive 1/261 of the minimum basic salary listed in Section 2(a).

The City contends that the request for arbitration fails to establish that the grievant has standing to grieve this matter because Article VI, § 1(f) of the Social Services contract specifically excludes employees who are not full-time non-competitive employees from grieving a claimed wrongful discipline. It argues that Article I, § 1 of the contract distinguishes four classes of employees: full-time, part-time per annum, hourly and per diem and pursuant to the recognition clause, a full-time employee is different from a per-diem employee. As Article VI, § 1(f) of the contract includes in the definition of a grievance "a claimed wrongful disciplinary action taken against a full-time non-competitive employee," the word "full-time," added to modify "non-competitive" acts as an explicit limitation upon the rights of noncompetitive employees. Thus, as a per diem employee, the grievant in the instant case cannot, by definition, meet this threshold requirement.

Furthermore, the City argues, Article VI, § 1 of the contract grants grievance rights

concerning claimed wrongful disciplinary actions to only three classes of employees: permanent employees, full-time noncompetitive employees and provisional employees with two years of service. The City asserts that if the drafters of the collective bargaining agreement had wished to include the per diems mentioned in the recognition clause, they would have been included and they were not. Thus, Article VI, § 1(f), cited by the Union as the source of the claimed right to grieve, limits the availability of the disciplinary procedure to full-time employees.

Second, the City asserts that Union has failed to cite a clause in the contract that is arguably related to the grievance sought to be arbitrated. It asserts that the claimed wrongful disciplinary actions that may be grieved under Article VI, § 1(f) are those taken against full-time noncompetitive employees. As a per diem, the grievant is not a full-time employee. Therefore, the request for arbitration must be dismissed.

The City, in its reply, argues that the instant grievance is barred by the doctrine of collateral estoppel. They contend that the same issue has already been arbitrated three times, and fits the three criteria outlined by the Board to apply the doctrine: (1) the issue is identical with an issue in the prior action; (2) the issue was actually litigated and determined in the prior action; and (3) the issue was necessary to the determination of the prior judgment. The City cites BCB cases B-13-92, B-65-88, B-22-86 and B-3-86 in support of this proposition.

The City also argues, in its reply, that the grievant did not regularly work a minimum of 60 hours per week, 52 weeks per year, as indicated by the Union. The City asserts that, even counting annual leave and sick leave as "days worked," grievant did not regularly work 60 hour weeks. They allege that in the first eight months of 1996, the time cards show that the grievant worked only eight

weeks of 60 or more hours, the remainder being 24 and 36 or 48 hour weeks. The City submitted the affidavit of Marlene Probherbs, Deputy Director of Personnel, in support of these contentions.

Union's Position

The Union asserts that a Houseparent's status as a full-time employee covered by Article VI, §1 (f) is properly determined by reference to the number of hours worked by the employee and not by the payroll classification in which the employee is placed by DJJ. The Union alleges that the grievant was continuously employed by the DJJ as a Houseparent for more than four years, for at least 60 hours per week, fifty-two weeks per year.

The Union cites two contract provisions in support of its assertion: the aforementioned Article II, § 3(b), as cited in the City's position, and Article II, § 1(b) of the agreement, which reads:

> Except as otherwise specified, all salary provisions of this Agreement, including minimum and maximum salaries, advancement increases, education differentials and any other salary adjustments, are based upon a normal work week of 35 hours. The normal work week for employees in the titles of Community Assistant and Houseparent Aide shall be 40 hours and effective April 1, 1985 for employees in the titles of Houseparent and Senior Houseparent shall be 60 hours...An employee who works on a part-time per annum basis and who is eligible for any salary adjustments provided in this Agreement shall receive the appropriate pro-rata portion of such salary adjustment computed on the relationship between the number of hours regularly worked each week by such employee and the number of hours in the said normal work week, unless otherwise specified.

Based on those provisions, the Union argues, it is clear that Article VI, § 1(f) does not limit coverage to per-annum full time employees, as nowhere in that provision is the term per-annum used. It asserts that Article III, § 1(b) refers to the normal work week for employees in the title of Houseparent to be 60 hours and that Article III, § 3(b) provides for annual salary rates for a

Houseparent based upon a normal work week of 60 hours. Furthermore, the distinction provided in Article III, § 3(b) is full-time versus per diem and part-time employment, not per-annum versus per diem employment. The term per diem as used in Article VI, § 1(f) and Article III, §§ 1(b) and 3 (b), the Union asserts, clearly refers to those employees who work less than 60 hours per week.

The Union concludes by stating that, as a Houseparent continuously employed by DJJ for more than four years, who worked at least 60 hours per week, fifty-two weeks per year, the grievant was a full-time non-competitive employee with six months service in title even if, as alleged by Petitioners, he was in a per diem pay classification at the DJJ. Accordingly, his discharge from employment is a grievance within the meaning of Article VI, § 1(f) of the collective bargaining agreement.

In response to the supplemental evidence submitted by the City, the Union states that the grievant advised them that he does not have any basis for disputing the City's contentions regarding the number of hours he worked during the eight months preceding his termination, as put forth in Marlene Probherbs' affidavit.

Discussion

When the City challenges the arbitrability of a grievance, this Board must first determine whether the parties are in any way obligated to arbitrate their controversies and, if they are, whether that contractual obligation is broad enough to include the act complained of by the Union.[1] Doubtful issues of arbitrability are resolved in favor of arbitration.[2] In the instant matter, the parties do not

[1] Decision Nos. B-19-89; B-65-88; B-28-82.

[2] Decision Nos. B-65-88; B-16-80.

dispute that the alleged violation of the contract is an arbitrable grievance. The City, however, argues that grievant lacks standing to submit a grievance to arbitration under the terms of the Agreement.

The doctrine of standing to sue holds that a petitioner may only complain of the allegedly wrongful conduct if her legally protected interests have been violated. In the instant matter, the precise issue to be decided is whether grievant has rights deriving from the agreement between the parties. The resolution of the dispute turns on an interpretation of the terms of the parties' agreement. For this reason, the City's claims constitute a challenge to the existence of a nexus between the contract and the benefits sought by the Union, rather than an issue of standing.[3] The burden is on the Union to establish a nexus between the City's acts and the contract provisions it claims have been breached.[4] Once an arguable relationship is shown, this Board will not consider the merits of a case; it is for the arbitrator to decide the applicability of the cited provisions.[5]

We find that the Union has not met its burden. In order for the grievant to state a claim under Article VI, § 1(f), the grievant must be a full-time non-competitive employee with six months of service in title. Under the interpretation of the contract provision offered by the Union, full-time service for a Houseparent requires a work week of at least 60 hours a week, fifty-two weeks per year. The evidence presented in the instant matter, and uncontested by the grievant, reveals that the

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[3] *See* Decision No. B-52-91.

[4] Decision Nos. B-1-89; B-7-81.

[5] Decision Nos. B-24-92; B-46-91; B-29-89.

grievant did not work 60 hours a week, fifty-two weeks per year.[6] Consequently, the grievant was not a full-time employee, and cannot avail himself of the provisions of Article VI, § 1(f). Accordingly, the Union has failed to show an arguable relationship between the City's acts and Article VI, § 1(f) of the parties' contract, and the City's petition challenging arbitrability is granted in its entirety.

ORDER

[6] Contrast the Board's holding in BCB Decision No. B-3-98, wherein we found that it was a question of contract interpretation whether the grievant fell within coverage of provisions cited by the Union.

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 herein, be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration as to the alleged violation, be, and the same hereby is, denied;

DATED: New York, New York
June 30, 1998

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

SAUL KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOGUCKI
MEMBER