City & HRA v. L. 371, SSEU, 61 OCB 34 (BCB 1998) [Decision No. B-34-98 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	:	
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-between-	:	
	:	
THE CITY OF NEW YORK and the HUMAN RESOURCE ADMINISTRATION,	:	
	:	Decision No. B-34-98
Petitioners,	:	Docket No. BCB-1937-97
	:	(A-6893-97)
-and-	:	
	:	
SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, AFSCME, AFL-CIO,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On October 3, 1997, the Human Resources Administration and the City of New York (hereinafter referred to as "HRA" 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 arbitration filed by the Social Services Employees Union, Local 371, AFSCME, AFL-CIO ("SSEU" or "Union"). The Union filed its answer on December 15, 1997. The City filed its reply on January 22, 1998.

BACKGROUND

The Department of Homeless Services ("DHS") was created by the City to perform certain functions and services previously performed by the HRA, including the operation of the City's shelter care system. Upon the creation of DHS, it was staffed in large part by employees who were

formerly employed by the HRA. The staffing was accomplished by administrative transfers of such employees from the HRA to DHS. From July 13, 1987 until she resigned on May 22, 1994, the grievant was employed by the DHS in the provisional title of Caseworker. The grievant was then employed by the HRA as a per diem provisional Fraud Investigator from September 18, 1995 until April 20, 1997.[1]

On April 11, 1997, a Step II grievance was filed. The grievance was stated as a "[c]laimed 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." The provision of the contract that the Union claimed to have been violated was Article VI, § 1(h).[2] The City responded to the grievance on June 5, 1997. In denying the grievance, it stated that grievant did not have two years of service, and therefore, the contractual language cited is not applicable to the instant matter. It also stated that Article I, §4 of the Citywide agreement defines the term "employee" as a "full-time per annum worker" unless otherwise specified, and that grievant was a provisional with temporary status. The Step III grievance was subsequently denied again on May 27, 1997, on substantially the same basis.

The Union filed a request for arbitration ("RFA") on August 5, 1997. The statement of the

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[1] The grievant was hired under Rule 5.4.1B of the Rules and Regulations of the City Personnel Director as a temporary provisional Fraud Investigator. Under, this rule, grievant should have only served six months but continued to remain in title. She is considered to be in a provisional status for her length of service as a Fraud Investigator. Her per diem status is merely her pay class and is not relevant to her provisional status.

[2] Article VI, §1(h) defines the term "grievance" as "[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."

grievance to be arbitrated was a "wrongful disciplinary action taken against provisional employee who served two or more years in the same or similar title." The contract provision which the Union claims had been violated was Article VI, § 1(h) of the parties' agreement.

POSITIONS OF THE PARTIES

City's Position

The City argues that the RFA fails to establish a nexus between the act complained of and the source of the alleged right, since the parties' agreement, Article VI, § 1(h), specifically excludes provisional employees who have fewer than two years of service in the same agency from challenging a disciplinary action. In addition, the City argues, the provision requires that if there is more than one title the grievant has worked in, that the service be in titles that are the same or similar or in a related occupational group. In applying those requirements to the grievant, the City argues that her employment at the HRA constituted less than two years of service and her previous employment was with the DHS, which is another City agency.

Further, the City argues that when grievant worked at DHS she worked as a Caseworker, which is not a same or similar title or in a related occupational group as her HRA service in the title of Fraud Investigator. Therefore, it contends, the grievant cannot add her DHS employment to her HRA employment in order to meet the threshold requirement of serving two or more years in the same agency or similar title or a related occupational group.

In its reply, the City responds to the Union's assertions that the grievant need not serve two years of continuous service, only two years of cumulative service to satisfy the two year requirement by stating that the Union is claiming that the grievant was reinstated and therefore not a new

employee when she was hired as a provisional Fraud Investigator. It contends that reinstatement determinations require an interpretation of the Rules and Regulations of the New York City Personnel Director ("DOP"),[3] and that according to the DOP, her return cannot be considered a reinstatement because it is in another civil service title.[4] The City argues that the parties' agreement at Article VI § 1(b) specifically excludes the Rules and Regulations of the DOP from the grievance procedure, and as the Union seeks to interpret DOP regulations in order to meet the minimum two year requirement of Article VI § 1(b), the petition challenging arbitrability should be granted.

Union's Position

The Union argues that the grievant performed essentially the same duties and responsibilities as a provisional Caseworker and provisional Fraud Investigator at the HRA and DHS. It states that both her job duties included investigative field work to determine the eligibility of clients for benefits from the City. It argues that the grievant's employment at the HRA and DHS should be deemed employment by the same agency for the purpose of Article VI § 1(h), and as such, the employment

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[3] DOP Rule 6.2.1, titled "General Provisions" states, in pertinent part:

(a) An employee who has completed a probationary term in a permanent position in the competitive or labor class, and who has resigned or retired therefrom may be reinstated with the approval of the city personnel director to:

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(2) to a position in another agency to which the employee would have been eligible for transfer.

(b) Such reinstatement may be made only if the separation from employment was without fault or delinquency on the employee's part and the head of the agency to whom the employee has applied for such reinstatement is willing to reinstate the employee.

[4] DOP Rule 6.2.2, titled "General Provisions" states, in pertinent part:

(a) Such reinstatement shall be subject to the provisions of this section and shall be made without further examination except that the employee reinstated under this section may be subject to such probationary period, investigation, medical or other qualifying tests or requirements as the city personnel director shall determine.

at the HRA should be added to her employment at the DHS to satisfy the two year requirement. The Union contends that Article VI, § 1(h) only requires two years of service, not two years of continuous service. Any possible dispute revolving around the duties performed by the grievant and their similarity, the Union argues, should be resolved by an arbitrator.

DISCUSSION

When a request for arbitration is challenged by the City, initially, this Board must determine whether the parties are in any way obligated to arbitrate controversies and, if they are, whether the act complained of by the Union is arguably related to the cited provision of the parties' agreement.[5] It is well established that it is the policy of the NYCCBL to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[6] 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.[7]

In this case, there is no dispute that the parties have agreed to arbitrate unresolved grievances as defined in their collective bargaining agreement, nor is it denied that alleged violations of departmental rules, regulations or procedures affecting terms and conditions of employment are within the scope to arbitrate. However, we find that the Union has failed to demonstrate the required nexus between the subject of the grievance and the substantive provision of the parties' collective bargaining agreement.

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[5] Decision Nos. B-7-98; B-19-89; B-65-88; B-28-82.

[6] *See, e.g.*, Decision Nos. B-35-89; B-41-82; B-15-82; B-19-81; B-1-75; B-8-68.

[7] Decision Nos. B-41-82; B-15-82.

Article VI, §1(h), in defining the term "grievance" specifically and clearly states that the grievant, in order to grieve an alleged wrongful discipline, must be a provisional employee "who has served for two years in the same or similar title or related occupational group *in the same agency*." (emphasis added). Although the Union argues that the DHS was created by the City to perform certain functions and services previously performed by the HRA, and many employees of the HRA were subsequently hired by the DHS, it is readily apparent that they exist as two separate entities, and cannot be considered the same agency. The Union acknowledges this split of the two agencies in its answer. Moreover, this is not a case of an employee who was transferred, along with her job function, to a newly-created agency. Here, the grievant was employed, initially, by the new agency, DHS. Only later, after a break in service, was she employed by the former "parent" agency, HRA, from which DHS was created. At the point of her employment by HRA, there can be no doubt that the two agencies possessed separate and independent existence. We also find little merit in the Union's argument that the grievant's term as a Fraud Investigator at the HRA was a reinstatement of her former job at the DHS. Thus, as the grievant was a provisional employee who served for less than two years in the same agency, Article VI, §1(h) can not apply to her. Accordingly, we grant the instant petition challenging arbitrability as we find no nexus between the grievant's claim and the relevant provision of the parties' collective bargaining agreement.

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, granted; and it is further

ORDERED, that the request for arbitration filed by the SSEU, Local 371, AFSCME, AFL-CIO be, and the same hereby is denied.

Dated: New York, New York
September 28, 1998

STEVEN C. DeCOSTA
CHAIRMAN

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