OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	
-between-	
NEW YORK CITY HUMAN RESOURCES ADMINISTRATION and the CITY OF NEW YORK,	
Petitioners,	Decision No. B-39-2000 Docket No. BCB-2114-00 (A-8020-99)
-and-	
SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, AFSCME, AFL-CIO,	
Respondent.	

DECISION AND ORDER

On January 20, 2000, the New York City Human Resources Administration ("HRA") and the City of New York ("City"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by Local 371, Social Service Employees Union, AFSCME, AFL-CIO ("Union"). The Union filed an answer on March 23, 2000. The City submitted a reply on April 28, 2000.

BACKGROUND

On December 5, 1994 Denise Bostick ("grievant") was provisionally appointed to the title of Fraud Investigator. On October 27, 1997, the grievant was permanently appointed to the title of Caseworker from a Civil Service list and, on the same day, took a leave of absence from her permanent Caseworker title to work provisionally as a Fraud Investigator. In March of 1998, HRA was informed by the Department of Citywide Services that an eligible list for filling vacancies was

established for the Civil Service title of Fraud Investigator. The City states that under the New York State Civil Service Law, provisional appointments to any positions are terminated within two months following the establishment of an appropriate eligible list for filling vacancies in such positions.

During the week of March 16, 1998, the grievant was handed a letter dated March 13, 1998 and written by the Acting Director of Recruitment, Selection and Placement for HRA that stated, in relevant part:

> This is to confirm that because of the existence of an open competitive list for Fraud Investigator, it is necessary to terminate your services as a provisional Fraud Investigator effective March 27, 1998, close of business.
>
> You are being returned to your Civil Service title of Caseworker, effective March 30, 1998. Should it be necessary to reassign you as a Caseworker, your Personnel Officer will contact you.

At the point that grievant was handed the letter, the Union contends that her second level supervisor told her that her last day of work as a provisional Fraud Investigator would be Friday, March 27, 1998, and that after that date she should stay home and await instructions as to where she would be assigned as a Caseworker. The Union further states that pursuant to those instructions, grievant did not report to work on March 30, and remained home waiting to receive instructions from HRA as to where and when she should report to work as a Caseworker. The Union claims that she was finally contacted by HRA and told to report to work to a certain location on April 14, 1998. The City agrees that the grievant did not report to work from March 30 until April 14, but denies the Union's other allegations regarding this issue.

When the grievant returned to work, she was told that she would have to fill out a form to cover her 15 days of absence, from March 30, 1998 through April 14, 1998. The grievant protested having to do so, and at some point, grievant's leave balance was charged for 15 days to cover the

absence.[1]

On April 16, 1998, the Union filed a Step I grievance on behalf of Bostick claiming that there had been a violation of Article VI, §§ 1 and 2 of the parties' contract.[2] The Step I grievance alleged that:

> On 3/13/98 I was informed that effective 3/30/98, my services would no longer be needed because of a civil service list. I [left] EVR, close of business 3/20/98 and received a notice dated 3/13/98. I was not returned to work until 4/14/98 after finally being contacted by HRA. My grievance is that HRA terminated me in error and upon recall wanted a 344 for 15 days absence. I want my 15 days returned and my termination notice removed from my personnel folder.

No response was received to the Step I grievance. The Union filed a Step II grievance on April 29, 1998. A Step II hearing was held on July 21, 1998 and a Step II decision was rendered on August 4, 1998. The decision denied the grievance, stating that grievant did not attempt to resolve any confusion she may have had on when and where to report to work and since she did not report to work for ten days, the charge to her leave balances was appropriate. On June 24, 1998, the Union filed a Step III grievance, which was also denied. The decision stated that the grievant's failure to contact HRA's Office of Personnel Services for clarification as to where to report until 2 weeks after her scheduled reassignment date makes her ineligible for leave with pay without a charge to her leave balance.

On November 26, 1999, the Union filed a Request for Arbitration. The grievance to be arbitrated was described as: "I was terminated in error and when restored to pay status I was required

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[1] The number of days charged to her balance was eventually reduced to 10.

[2] Article VI, § 1 defines the term "grievance" and Article VI, § 2 describes the grievance procedure.

to use my accumulated annual leave in order to be paid. I think that the agency which terminated me in error should be required to restore me without my losing time." The sections of the agreement allegedly violated were the Social Services Employees Union, Local 371 agreement, Article VI, §§ 1 and 2. The remedy requested was removal of the notice of termination from the agency's personnel folder, return of the 15 days leave required to be used and any other just and proper remedy.

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union has not shown a nexus between the contractual provision or departmental rule or procedure invoked and the grievance to be arbitrated. The City states that the Union has only alleged that the City has violated Article VI, §§ 1 and 2 of the parties' agreement and that those provisions consist only of the definition of a grievance and the grievance procedure. The City contends that there is nothing in either of those provisions that is even remotely related to removing a grievant from a provisional title and placing her back in her permanent civil service title because of the existence of a civil service list for her provisional title. Furthermore, the City asserts that neither section is related in any way to the deduction of leave for an employee who does not report to work. The City cites several decisions where the Board held that it is not enough to rely solely upon the contractual definition of a grievance.[3] The City also asserts that the Board held that the grievance procedure of a contract does not furnish the independent basis for a grievance.[4]

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[3] The City cites Decision Nos. B-4-94, B-41-82, B-7-81 and B-22-80.

[4] The City cites Decision Nos. B-28-82 and B-30-84.

The City contends that assuming *arguendo* that the gravamen of the grievance is that HRA violated the Civil Service Law as it relates to provisional appointments, the instant grievance must be dismissed because the grievance alleges a violation of a statute. The City asserts that unless they are specifically included in the definition of a grievance, disputes based on statutes are not arbitrable.[5]

The City argues that the Union attempted to amend its Request for Arbitration in its answer by alleging for the first time that the City violated Article VI, § 1(e) of the parties' contract. It argues that the Board has determined that a Union may not amend its Request for Arbitration after the Petition Challenging Arbitrability has been filed because it would defeat the primary intention of the multi-level grievance process, give an unfair advantage to the Union and unfairly prejudice the City in future matters.[6]

The City argues that even if the Board were to determine that the Union can amend its claim, the grievance must be dismissed because the Union has failed to establish the necessary nexus between the actions complained of, the reassignment of the grievant from her provisional title to her permanent title and charging her leave bank, and the wrongful discipline provisions of Article VI, § 1(e). The City contends that Article VI § 1(e) applies to grievants that are serving in their permanent title and have been served with written charges of incompetence or misconduct. In this case, the City contends, the grievant was serving in her provisional title, was never served with disciplinary charges, and was returned to her permanent title by operation of the Civil Service law.

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[5] The City cites Decision No. B-4-96.

[6] The City cites Decision No. B-48-98.

The City states that her employment was not terminated. The City also argues that Article VI § 1(e) is not related in any way to deduction of leave for an employee who does not report to work. The City states that the City did not have to allow the grievant to use leave time to cover her absence but did so anyway.

Union's Position

The Union states that the grievant has alleged that she was wrongfully discharged on March 30, 1998 and that her annual leave balance was wrongfully charged with 15 days upon her return to work. The Union states that Article VI, § 1(e) of the parties' contract, by which the grievant is covered, defines the term "grievance" to include an alleged wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law. The Union contends that as a permanent Caseworker, the grievant was at all relevant times a permanent employee covered by Section 75(1) of the Civil Service Law. The Union argues that the claim that grievant was wrongfully discharged is clearly an alleged wrongful disciplinary action within Article VI, § 1(e) of the contract. The Union asserts that Article VI, § 2 of the contract sets forth the procedural steps required to be followed by the City when discharging an employee covered by Article VI, § 1, which steps were not followed regarding the grievant.

The Union claims that an arbitrator could rationally determine that HRA's instruction to the grievant not to report to work on and after March 30, 1998, in conjunction with its March 13, 1998 letter to her, was a wrongful termination of her in violation of Article VI, §§ 1(e) and (2) of the contract. The Union also claims that a remedy, including restoration of the annual leave charged to her leave balance, is appropriate.

DISCUSSION

As a preliminary matter, we will discuss the City's claim that the Union improperly amended the grievance. The City argues that the Union attempted to amend the grievance in its Answer by adding claims relating to Article VI, Section 1(e) of the parties' agreement. Given the grievant's statement of the nature of the grievance at Step 1, where she claimed she was "terminated in error," and the citation of Article VI, § 1in general, arguably the City was on notice of a claimed violation of Article VI, Section 1(e), which covers wrongful discipline.[7] Therefore, we will consider the Union's claims in relation to Article VI, § 1(e).

We will not, however, consider the Union's claims, proffered for the first time in its Answer, that the City did not adhere to the steps of the grievance procedure. Although the Union, throughout the grievance process, included Article VI, § 2 in its claim, there is insufficient basis to assume that the City could glean from that citation, alone, that the Union was claiming that the procedure was not followed.

When the City challenges the arbitrability of a grievance, we must first determine whether the parties are contractually obligated to arbitrate disputes and, if they are, whether the acts alleged in the grievance are covered by that contractual obligation.[8] Here, the contract provides a grievance and arbitration procedure, but the parties disagree as to whether the instant matter is arbitrable within

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[7] The Board first discussed this issue in *City of New York v. District Council 37, AFSCME, AFL-CIO*, Decision No. B-20-74.

[8] *See, e.g., New York City Police Department and the City of New York v. Detectives' Endowment Association*, Decision No. B-4-96; *The City of New York v. District Council 37, AFSCME, AFL-CIO*, Decision No. B-52-91; *The City of New York v. District Council, Local 1795*, Decision No. B-19-89.

the meaning of the contract. Where challenged to do so, the burden is on the Union to establish an arguable relationship between the City's acts and the contract provisions it claims have been breached.[9] If the Union cannot show such a nexus, the grievance will not proceed to arbitration.[10]

We hold that the Union has not demonstrated a nexus between the City's acts and the contract provision the Union claims has been breached. The City's act in this case is the release of the grievant from her provisional title and her return to her permanent title due to the operation of the Civil Service Law, which the grievant characterizes as a "termination in error".[11] The contract provision cited by the Union is Article VI, § 1(e), relating to "wrongful disciplinary action." We are unable to find an arguable relationship between them. On its face, it appears that petitioner was not disciplined but returned to her permanent title by operation of law. We also note that the contract provision requires that the action be taken against a permanent employee, and grievant was serving as a provisional employee at the time of the City's action. Similarly, we cannot find a nexus between Article VI, § 1(e) and grievant's claims regarding the charge to her leave balance. Nothing in the Article refers to charges to an employee's leave balance generally or specifically. Nor is there any evidence that the charge to the leave balance was intended as a punishment, rather than as a deduction for time that the grievant did not work. Therefore, we grant the City's petition challenging arbitrability.

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[9] Decision No. B-4-96; *The City of New York and the New York City Department of Transportation v. Doctors Council*, Decision No. B-28-92; *The City of New York v. Local 2021, District Council 37, AFSCME, AFL-CIO*, Decision No. B-58-90.

[10] *Department of Probation and the City of New York v. United Probation Officers Association*, Decision No. B-10-92.

[11] This was indicated in the letter to grievant dated March 13, 1998.

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

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

Dated: November 28, 2000
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

BRUCE H. SIMON
MEMBER

CHARLES G. MOERDLER
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER