City & DDC v. L. 375, DC 37, 67 OCB 14 (BCB 2001) [Decision No. B-14-2001 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	:	
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-between-	:	
	:	
NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION AND THE CITY OF NEW YORK,	:	
	:	Decision No. B-14-2001
Petitioners,	:	Docket No. BCB-2176-01
	:	(A-8481-00)
-and-	:	
	:	
DISTRICT COUNCIL 37, LOCAL 375 (Syed Nayyer)	:	
	:	
Respondent.	:	

DECISION AND ORDER

On January 5, 2001, the City of New York ("City") filed a petition challenging the arbitrability of a grievance filed by District Council 37, AFSCME, AFL-CIO, on behalf of the Civil Service Technical Guild, Local 375 ("Union"), and Syed Nayyer ("Grievant"). The Union claims Grievant's employment was wrongfully terminated in violation of the unit collective bargaining agreement ("unit agreement") because he had earlier filed a contractual grievance alleging out-of-title work. The City argues that Grievant was discharged because he failed to qualify for work, that is, he failed to satisfy the City residency requirement.

Because we find that there is no nexus between the termination of Grievant for failure to maintain a City residence and the wrongful discipline provision of the agreement, we grant the City's petition.

BACKGROUND

Grievant was appointed as a provisional Associate Engineering Technician, Level II, in the Department of Transportation on March 8, 1993. At that time, he did not live in the City of New York but acknowledged that City residency was a requirement of the job and signed a sworn statement that he would comply within 90 days.

In July 1993, he was promoted to Assistant Laboratory Manager. In October 1995, his employer became aware that he lived outside the City and directed him to satisfy the residency requirement and provide proof that he had.[1] In June 1996, many functions of the Department of Transportation ("DOT") were transferred to the newly formed Department of Design and Construction ("DDC") and several employees including Grievant were functionally transferred to the new agency.

In June 1997, Grievant was promoted to Laboratory Manager. Three months later, DCC became aware that Grievant had stated on various agency documents that his residence was on Long Island rather than in the City of New York. He was again directed to satisfy the residency requirement. After requesting additional time, he complied.

From March 1999, Grievant performed additional supervisory duties, namely, those of General Manager, and in April 1999, he officially assumed those duties but his civil service job title did not change. In May 1999, Grievant filed a grievance at Step I of the contractual grievance procedure alleging out-of-title work. The grievance was heard at Step II and Grievant was awarded back pay from April 8 to August 22, 1999. He disagreed with the amount of back

[1] Nothing in the papers filed indicates whether the agency followed up.

pay awarded and continued his grievance to Step III.

From August 31, 1999, to January 26, 2000, Grievant was on authorized leave from his job. During that time – on January 6, 2000, to be exact – a copy of the Step II out-of-title decision was mailed to his Brooklyn address but was returned as undeliverable. The agency investigated and determined that Grievant was again residing on Long Island. Two months after Grievant returned to work in January 2000, his supervisors told him they knew that he was no longer living in Brooklyn. They directed him to present any evidence he might have to refute the agency's determination by March 24, 2000, or to forfeit his employment at that time.

In a meeting with his supervisors on that day, Grievant admitted that he did not at that time live in the City and asked for more time to comply with the residency requirement. They denied his request and told him that although it was not their choice to terminate his employment, they were forced to do so under the law.

On June 22, 2000, the Union filed the instant grievance at Step I of the contractually provided grievance procedure alleging a violation of Article VI, § 1 of the unit agreement.[2] No

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[2] Article VI (Grievance Procedure), § 1 (Definition), of the unit agreement defines a "grievance" in relevant 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 Personnel Rules and Regulations of the City of New York . . . shall not be subject to the grievance procedure or arbitration;
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> e. A claimed wrongful disciplinary action taken against a permanent Employee covered by § 75(1) of the Civil Service Law . . . upon whom the agency has

decision was issued. On July 19, 2000, the Union filed at Step II. On August 8, 2000, the grievance was denied on the grounds that the claim failed to meet the criteria set forth in the cited section of the unit agreement. On September 1, 2000, the Union filed at Step III, and before a Step III conference could be held, the Union filed a request for arbitration which this petition challenges.

POSITIONS OF THE PARTIES

City's Position

The City asserts that this case arises because Grievant's own conduct has caused him to forfeit his employment. His failure to comply with the residency requirement left his supervisors no choice but to take the action that they did. The residency requirement is a statutory, not a contractual, condition of employment over which no arbitrator has jurisdiction in the instant matter. Moreover, no position Grievant held or sought was exempt from the residency requirement. Even if Grievant's claim were true that, earlier in his employment, supervisors had given him more time to comply, the Union can point to no nexus between the contract provision alleged to have been violated and the grievance to be arbitrated because the applicable unit agreement contains no provision permitting waiver of the residency requirement.

In addition, the Union has alleged no facts or circumstances usually associated with disciplinary action and, thus, has failed to meet its burden of raising a substantial issue – that management's action constitutes wrongful discipline – under the collective bargaining agreement.

> served written charges of incompetency or misconduct while the Employee is serving in the Employee's permanent title or which affects the Employee's permanent status . . . .

Neither the quality of Grievant's work nor discipline of any other nature is at issue here.

Union's Position

From July 1993 when he was Assistant Laboratory Manager to July 1996 when he promoted to Laboratory Manager, Grievant performed duties which he contends "fell under those of a Construction Project Manager," a title he said was exempt from the residency requirement. He contended that he had been promised a promotion to that title. He pursued the promotion by filing a contractual grievance which hewon. He disagreed with the employer's finding about the length of time he had performed out-of-title work and he claimed the back-pay award was not adequate compensation. He felt pressure from supervisors to accept the back-pay award and to withdraw his grievance. Grievant argues that but for his rejection of the Step II award, his employment would not have been terminated.

Grievant's termination was retaliatory for filing the out-of-title grievance and punitive insofar as supervisors permitted him earlier in his employment to take additional time in order to comply with the residency requirement. The residency issue was a pretext for disciplining Grievant in violation of Article VI, §1(e) of the unit agreement for his disagreement with his supervisors regarding his out-of-title claim.

DISCUSSION

It is public policy, expressed in the New York City Collective Bargaining Law, ("NYCCBL"), to promote and encourage arbitration as the selected means for adjudicating and resolving contractual grievances.[3] When the employer 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.[4] We cannot create a duty to arbitrate where none exists nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[5]

Here, the unit agreement provides a grievance and arbitration procedure,[6] but the parties disagree as to whether the instant matter is arbitrable under its terms. We find that it is not arbitrable because the Union has failed to establish a relationship between the termination of Grievant's employment and Article VI, § 1(e), which it claims had been breached.[7] That section relates to claimed wrongful disciplinary action taken against a permanent employee covered by § 75(1) of the Civil Service Law ("CSL") upon whom the agency has served written charges of incompetency or misconduct. There is no dispute that Grievant was a permanent employee covered by CSL § 75 at the time period relevant here but there is no evidence that he was ever served with written charges of incompetency or misconduct. In fact, the City presents evidence,

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[3] *See, e.g., City of New York v. Org. of Staff Analysts*, Decision No. 41-96 at 8–9.

[4] *See, e.g., New York City Police Dep't and City of New York v. Detectives' Endowment Ass'n*, Decision No. B-4-96 at 8 and cases cited therein at n. 7.

[5] *See, e.g., Org. of Staff Analysts*, Decision No. 41-96 at 9.

[6] *See* text at 4, above.

[7] *See, e.g., Org. of Staff Analysts*, Decision No. 41-96 at 10.

not contradicted by the Union, that Grievant's supervisors approved of his job performance.

This Board decided the same issue in *Organization of Staff Analysts*, in which a union, citing an identical contractual definition of a grievance, sought to arbitrate a grievant's employment termination for violating a residency requirement.[8] We held there that, *inter alia*, the union had shown no nexus between employment termination for failure to comply with a City residency requirement and the definition of a contractual grievance as wrongful discipline. We relied on two Appellate Division decisions that held that termination for want of a job qualification did not constitute discipline[9] and that specifically addressed a residency requirement as constituting a job qualification.[10] In the latter case, employees who failed to satisfy that requirement were discharged but not deemed to have been disciplined.[11] Our finding here that the Union has failed to establish a nexus between termination of Grievant's employment and the contractual definition of a grievance is entirely consistent with our own precedent as well as judicial case law.

For want of a nexus, we need not address the City's argument that the Union has failed to raise a substantial issue under the collective bargaining agreement in challenging the

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[8] *Id.* at 4.

[9] *Naliboff v. Davis*, 133 A.D.2d 632, 519 N.Y.S.2d 740, 741 (2d Dep't 1987).

[10] *Mandelkern v. City of Buffalo*, 64 A.D.2d 279, 409 N.Y.S.2d 881, 882 (4th Dep't 1978)

[11] *Id.*

Department's statutory right to relieve Grievant from duty for a legitimate reason.[12] For the same reason, we also need not address the Union's defenses, first that the Department punished Grievant by denying him more time – as it did in the past – to re-establish residency or, second that he was disciplined or retaliated against for rejecting the Step II, out-of-title award. Moreover, the Union's contention that Grievant's discharge on residency grounds was pretextual is misplaced in the instant proceeding challenging arbitrability.

Because the Union has failed to establish the requisite nexus, we deny its request to arbitrate the claim of wrongful termination and grant the City's petition challenging arbitrability.

[12] *City of New York v. Communications Workers of America*, Decision No. B-13-93 at 10.

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 instant petition challenging arbitrability docketed as BCB-2176-01 be, and the same hereby is, granted; and it is further

ORDERED, that the instant request for arbitration docketed as A-8481-00 be, and the same hereby is denied.

Dated: April 30, 2001
New York, NY

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

BRUCE H. SIMON
MEMBER

EUGENE MITTELMAN
MEMBER