City & HRA v. L. 371, SSEU, 67 OCB 20 (BCB 2001) [Decision No. B-20-2001 (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 AND THE HUMAN RESOURCES ADMINISTRATION,

Petitioners,

Decision No. B-20-2001
Docket No. BCB-2140-00
(A-8207-00)

-and-

SOCIAL SERVICE EMPLOYEES UNION , LOCAL 371, AFSCME, AFL-CIO,

Respondent.

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DECISION AND ORDER

The New York City Human Resources Administration ("HRA" or "Petitioner") filed a petition on June 30, 2000, challenging the arbitrability of a grievance filed by Social Service Employees Union, Local 371 ("Union" or "Respondent") on behalf of Robert Slavin. The grievance asserts that Petitioner acted improperly when it demoted Robert Slavin from his probationary Supervisor I title to his permanent civil service title of Caseworker without serving him with written disciplinary charges. Respondent asserts that HRA's actions were in violation of Article VI, § 1 (g) of the collective bargaining agreement between HRA and the Union ("CBA") as well as HRA Procedure 77-1. Petitioner argues that no nexus exists between the

subject of the grievance and the CBA or HRA Procedure and that because Slavin was a probationary Supervisor I, he was not entitled to written charges. Since we find that the Union has not established the requisite nexus, this Board grants HRA's petition.

BACKGROUND

Robert Slavin was provisionally appointed to the civil service title of Caseworker at HRA on September 11, 1988, and received a permanent appointment to that title on December 19, 1988. On November 2, 1998, he was promoted to the probationary title of Supervisor I (Welfare). On April 12, 1999, Slavin was demoted to his permanent civil service title of Caseworker. HRA's Office of Personnel Services recorded his demotion as a "Probationary Demotion."

The Union filed a Step I grievance alleging a violation of Article VI, § 1 (g) of the CBA[1] and HRA Procedure 77-1.[2] The grievance reads:

> Specifically, the above member was written up and referred for disciplinary action without conference and has been made to suffer the penalty of demotion. Said action constitutes a disciplinary [sic] in the absence of charges. Remedy requested is restoration to Supervisor I position, along with money and perquisites, as well as any other just and appropriate remedy.

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[1] Article VII, §1 (g) of the CBA provides in relevant part:
The term "Grievance" shall mean:
g. Failure to serve written charges as required by Section 75 of the Civil Service Law or the Rules and Regulations of the Health and Hospitals Corporation upon a permanent employee covered by Section 75(1) of the Civil Service Law . . . .

[2] HRA Procedure 77-1, entitled "Disciplinary Action," provides a detailed description of "the procedural requirements of a disciplinary proceeding and the rights of the employee in a disciplinary action based on the employee's work and/or conduct which is job related." It also states that all disciplinary actions are "subject to the State Civil Service Law (Section 75 and 76)."

A Step II grievance, filed on April 22, 1999, states: "No response to Step I. Appealing to Step II." By memorandum dated June 9, 1999, the Deputy Administrator of HRA's Office of Labor Relations, Ralph Zinzi, denied the grievance. A Step III grievance was filed on June 24, 1999, alleging the same two violations first raised at Steps I and II of the grievance process. On April 13, 2000, the Union filed a request for arbitration.

The statement of the grievance in the request for arbitration provides: "Appeal demotion from Sup I (W) to Caseworker based on a flawed evaluation." As the contract provision, rule, or regulation it claims was violated, the Union lists Article VI, § 1 (g) of the CBA, and HRA Procedure 77-1, both of which were raised during the grievance process. The request for arbitration also raised three new claims: alleged violations of Article V of the CBA,[3] Article X of the 1995-2001 Citywide Agreement,[4] and the Non-Managerial Performance Evaluation Manual.[5] The Union cites Article VI, §2, Step IV of the CBA as the section of the contract under which the

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[3] Article V of the CBA, entitled "Productivity and Performance," addresses the Employer's right under the New York City Collective Bargaining Law ("NYCCBL") to "establish and/or revise performance standards, or norms notwithstanding the existence of prior performance levels, norms or standards." Article V also grants the employer the right to "establish and/or revise standards for supervisory responsibility in achieving and maintaining performance levels of supervised employees." Employees who perform unsatisfactorily or who fail to meet the standards set forth in this provision may be subject to disciplinary measures.

[4] Article X of the 1995-2001 Citywide Agreement, entitled "Evaluations and Personnel Folders," sets forth the guidelines under which employees may review and reply to any evaluations placed in their personnel folder by their employers.

[5] The Non-Managerial Employee Performance Evaluation Manual provides a detailed description of the performance evaluation system. The manual covers topics such as which employees will be evaluated, how often they will be evaluated, and how employees may appeal an unsatisfactory rating on an evaluation.

demand for arbitration is made.[6] In its request for arbitration, the Union seeks the following remedies: "Return to Sup I (W) and the salary lost from that demotion and any other proper remedy."

POSITIONS OF THE PARTIES

Petitioner's Position

HRA argues that the Union has failed to establish a nexus between the act complained of and Article VII, § 1(g) of the CBA, which requires HRA to serve written charges upon a permanent employee who is being disciplined. Petitioner argues that because Slavin was not a permanent employee in the Supervisor I title, he was not entitled to written charges prior to his probationary demotion. Therefore, Respondent has not demonstrated the required nexus between the alleged violation and Article VII, § 1(g) of the CBA. (Pet. ¶ 22.)[7]

HRA also claims that Respondent failed to demonstrate a nexus between Slavin's probationary demotion and HRA Procedure 77-1,[8] which sets forth the rights of an employee involved in a disciplinary action. HRA argues that because of Slavin's status as a probationary employee, HRA Procedure 77-1 does not apply. (Pet. ¶¶ 24, 25.)

Petitioner mentions § 5.2.7 (c) of the Personnel Rules and Regulations of the City of New York ("Personnel Rules") which specifically authorize the agency to terminate any probationer in

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[6] Article VII, §2, Step IV provides in relevant part:
An appeal from an unsatisfactory determination at Step III may be brought solely by the Union to the Office of Collective Bargaining for impartial arbitration within fifteen (15) working days of receipt of the Step III determination . . . .

[7] The abbreviation in this decision for "Petition" is "Pet.," "Answer" is "Ans."

[8] *See supra* note 2, at 2.

a competitive title "whose conduct or performance is not satisfactory" after at least four months of the probationary period have been completed. (Pet. ¶ 7, ¶ 23.) HRA also notes that Article VI, § 1 (b) of the CBA expressly removes from the grievance-arbitration procedure "disputes involving the rules and regulations of the City of New York." Thus, HRA argues that because Slavin completed a little over five months of his probationary period prior to his demotion, HRA's actions were authorized by the Personnel Rules regardless of the basis for his demotion. (Pet. ¶ 23.)

According to HRA, Respondent improperly raised three new claims for the first time in its request for arbitration (alleged violations of Article V of the CBA, Article X of the Citywide Agreement, and the Non-Managerial Performance Evaluation Manual) and changed the statement of the grievance from an alleged violation of disciplinary procedures to "appeal demotion . . . based on flawed evaluation." (Pet. ¶ 28.) HRA refers to *New York City Health and Hosp. Corp. v. L. 30, Int'l Union of Operating Eng'r*, [9] in which the Board denied the arbitration of a claim raised for the first time in the Union's request for arbitration. (Pet. ¶ 30.) HRA argues that Respondent did not allege a possible violation concerning a supervisor's evaluation of Slavin throughout the course of the contractual grievance process and never put HRA on notice of such a claim. Therefore, HRA urges the Board to dismiss Respondent's newly raised claims.

Respondent's Position

Respondent asserts that it has established the requisite nexus between the alleged

[9] *See* B-16-98

violation and Article VI, § 1 (b) of the CBA and HRA Procedure 77-1. (Ans. ¶¶ 25, 26.) Furthermore, Respondent denies HRA's allegation that new claims were improperly raised for the first time in the Union's request for arbitration. (Ans. ¶ 27.)

DISCUSSION

The issue before this Board is the arbitrability of the Union's claim that HRA violated Article VI, § 1 (b) of the CBA and HRA Procedure 77-1 when it demoted Slavin to his permanent title of Caseworker. Because the Union has failed to successfully demonstrate the required nexus between the subject of the grievance and the cited contractual provisions, we deny the Union's request for arbitration.

When a union's request for arbitration is challenged, we must determine whether the parties are obligated to arbitrate their controversies and, if they are, whether the act complained of by the union is arguably related to the source of the right alleged to have been violated.[10] When arbitrability is challenged, the burden is on the union to establish a nexus between the City's acts and the contract provisions it claims have been breached.[11] If an arguable relationship is shown to exist, this Board will not consider the merits of the case, but will refer the case to an

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[10] *See Human Resources Admin. and City of New York v. District Council 37, Local 1549 & Haynes,* Decision No. B-18-99 at 7; *see also Human Resources Admin. and City of New York v. Social Serv. Employees Union, Local 371*, Decision No. B-7-98 at 5; *City of New York v. District Council 37, Local 1795*, Decision No. B-19-89 at 5; *City of New York v. Communication Workers of Am., AFL-CIO*, Decision No. B-28-82 at 7.

[11] *See City of New York v. Communications Workers of Am.*, Decision No. B-13-93 at 8; *see also Dep't of Probation and City of New York v. United Probation Officers' Ass'n*, Decision No. B-10-92 at 9.

arbitrator to interpret the cited provision of the parties' agreement.[12] The policy of the New York City Collective Bargaining Law ("NYCCBL") is to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[13] The parties in this case have agreed to arbitrate unresolved grievances as defined in their collective bargaining agreement.

We find there is no arguable nexus between the grievance and Article VI, § 1 (g) of the CBA or HRA Procedure 77-1. Under Article VI, § 1 (g) of the CBA, an employer is required to serve written charges "upon a permanent employee covered by Section 75 (1) of the Civil Service Law" who is being disciplined. Similarly, HRA Procedure 77-1 outlines the procedural requirements in a Section 75 disciplinary proceeding and describes the rights of an employee involved in a disciplinary action. The procedure states that "disciplinary actions are subject to the State Civil Service Law." There is no dispute that the grievant, Robert Slavin, was permanently appointed to the Caseworker title on December 19, 1988, and on November 2, 1998, he was promoted to the probationary title of Supervisor I (Welfare). It is also undisputed that Slavin was demoted to his permanent Caseworker title on April 12, 1999. Because Slavin was a probationary employee at the time he was demoted, we find that he cannot avail himself of the disciplinary procedure applicable to "permanent" employees. Therefore, to the extent that the Union has failed to establish a nexus between the grievant's probationary demotion and Article

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[12] *See City of New York v. Corr. Officers' Benevolent Ass'n*, Decision No. B-12-94 at 9.

[13] *See City of New York and New York City Fire Dep't v. Unif. Firefighters Ass'n,* Decision No. B-25-99 at 9; *see also City of New York and New York City Dep't of Transp. v. United Marine Div., Local 333*, Decision No. B-35-89 at 10; *City of New York v. United Bhd. of Carpenters and Joiners of Am.*, Decision No. B-15-82 at 3.

VI, § 1 (g) of the CBA or HRA Procedure 77-1, we deny the Union's request for arbitration.

We also note that § 5.2.7 (c) of the Personnel Rules authorizes HRA to terminate a probationer who performs unsatisfactorily after s/he has completed at least four months of the probationary period. According to Article VI, § 1 (b) of the CBA, the Personnel Rules are non-grievable. Petitioner correctly argues that regardless of the reason for Slavin's probationary demotion, HRA was authorized under the Personnel Rules to take such action against Slavin, who had completed five months of his probationary period.

Finally, HRA's argument that the Union improperly raised three new claims in its request for arbitration raises an issue that this Board has previously addressed. This Board has consistently held that a party may not amend its request for arbitration to add claims that it failed to raise in the previous steps of the grievance procedure.[14] We have stated that:

> The purpose of the multi-level grievance procedure is to encourage discussion of the dispute at each of the steps. The parties are thus afforded an opportunity to discuss the claims informally and to attempt to settle the matter before it reaches the arbitral stage. Were this Board to permit either party to interpose at this time a novel claim based on a hitherto unpleaded grievance, we would be depriving the parties of the beneficial effect of the earlier steps of the grievance procedure and foreclosing the possibility of a voluntary settlement.[15]

A review of the record below supports HRA's contention that the sole issue presented and considered during Steps I through III of the grievance process was that Slavin "was written up

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[14] *See City of New York and Dep't of Corr. v. Communications Workers of Am., Local 1180*, Decision No. B-35-87 at 7.

[15] *See New York City Health and Hosp. Corp. v. Local 420, District Council 37,* Decision No. B-24-99 at 6; see also *New York City Police Dep't and City of New York v. Patrolmen's Benevolent Ass'n*, Decision No. B-7-99 at 9; *City of New York v. Int'l Union of Operating Eng'r, Local 15,* Decision No. B-12-77 at 5.

and referred for disciplinary action without conference and . . . [s]aid action constitutes a disciplinary [action] in the absence of charges." The Union gave no indication that it was raising or intended to raise any additional claims. Based on these facts, we find it reasonable for HRA to have believed the grievance was limited to a dispute regarding a failure to serve Slavin with written disciplinary charges. After the Union filed its request for arbitration, it raised three additional claims – alleged violations of the Non-Managerial Performance Evaluation Manual, Article V of the CBA, and Article X of the Citywide Agreement. The Union also changed the statement of its grievance to "appeal demotion . . . based on flawed evaluation." We find that the Union's failure to raise these new claims during the lower steps of the grievance process, before its submission of the request for arbitration, denied HRA the opportunity to resolve the grievance.

Accordingly, the Union's request for arbitration must be dismissed in its entirety.

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 and the Human Resources Administration, be and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by the Social Service Employees Union, Local 371, be and the same hereby is, denied.

Dated: May 22, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

BRUCE H. SIMON
MEMBER

RICHARD A. WILSKER
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