City v. Social Service Union, Local 371, 69 OCB 27 (BCB 2002) [Decision No. B-27-2002]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK,

Petitioner,

Decision No. B-27-2002
Docket No. BCB-2233-01
(A-8953-01)

-and-

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371,

Respondent.
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DECISION AND ORDER

The City of New York ("City") challenges the arbitrability of a grievance brought by the Social Service Employees Union, Local 371 ("Union") alleging wrongful termination of Jenell Thornton ("Grievant") from her provisional appointment as a Caseworker at the Administration for Children's Services ("ACS"). Petitioner asserts that Grievant's provisional employment was terminated under the Rules and Regulations of the Department of Citywide Administrative Services ("DCAS") because of the establishment of a civil service list for her title, and that the parties' collective bargaining agreement ("CBA") excludes from the contractual grievance procedure claims which involve these Personnel Rules and Regulations. Respondent argues that a reasonable relationship exists between the contractual provision claimed to have been violated and the action taken to terminate Grievant's employment and asks that the Board of Collective Bargaining refer the matter to arbitration. This Board finds a reasonable relationship between

the CBA and the City's termination of Grievant. Accordingly, we deny the petition and direct that the grievance proceed to arbitration.

BACKGROUND

ACS hired Grievant as a Caseworker on July 14, 1997. On November 22, 1998, her title changed from Caseworker to Child Welfare Specialist, but at all times her civil service status was provisional. The parties' CBA provides for a multi-step procedure to resolve claims of wrongful discipline.[1]

On November 30, 2000, Grievant was served with disciplinary charges related in part to her job performance. An informal disciplinary conference was held on December 11, 2000. By letter dated January 31, 2001, the Step I conference holder recommended the penalty of employment termination. On February 12, 2001, Grievant elected to appeal.

On March 2, 2001, six days before a Step II hearing, Glenn Greenfield, ACS Deputy Director for Certification, informed Grievant by letter that ACS had filled her position from the open competitive civil service list for Child Welfare Specialist and that her employment was terminated as of the close of business that day.

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[1] Article VI, § 1 defines "grievance," in relevant part, as follows:

> 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 the Personnel Rules and Regulations of the City of New York . . . shall not be subject to the grievance procedure or arbitration . . . .
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> h. 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 March 8, 2001, the Step II hearing was convened. Although Grievant was not present, Union Representative Rose Lovaglio attended on her behalf. Lovaglio informed the hearing officer that Grievant's employment had been terminated six days earlier purportedly due to Grievant's status as a provisional employee. The hearing officer confirmed that information and dismissed the case for "administrative reasons."

The City has informed the Board, at our request, that six other provisional employees were scheduled to be terminated within the same week but 141 provisional employees who were in the same title were not scheduled for termination.

On May 16, 2001, the Union filed another grievance, this one alleging that Grievant was wrongfully discharged in violation of Article VI, § 1(h), of the CBA. No Step I decision appears to have been issued.

On June 19, 2001, Carol Jordan, Director of the ACS Office of Labor Relations, denied this second grievance at Step II. On July 13, 2001, the Union filed a request for arbitration appealing the termination and seeking reinstatement with back pay, restoration of time to leave banks, and expungement of the disciplinary charges from Grievant's personnel record.[2]

POSITIONS OF THE PARTIES

City's Position

The City argues first that the parties' CBA excludes from the contractual grievance procedure disputes which involve Personnel Rules and Regulations of the City of New York.

[2] The request for arbitration cites Article VI, § 1(f), of the CBA, pertaining to full-time, non-competitive employees with six months of service in a title, but the City does not dispute that the Union intended to cite § 1(h) instead, pertaining to provisional employees.

Because Grievant's provisional employment was terminated on account of the establishment of a civil service list, pursuant to Rule V of the Rules and Regulations of DCAS,[3] Grievant's discharge is not appealable through the grievance procedure.

Second, the City argues that the Union has not proven a relationship between Grievant's termination and Article VI, § 1(h), pertaining to the right to grieve wrongful discipline for provisional employees with two or more years in the same or similar title. Because Grievant failed to appear at the hearing, Grievant "was not and could not be terminated pursuant to those disciplinary charges." Moreover, even if Grievant had been disciplined, she abandoned her right to appeal by failing to appear at the hearing on March 8, 2001.

Finally, the City asserts that Greenfield also notified six other provisional employees that their positions were filled from the competitive list and that the Union has failed to establish that

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[3] Rule V states, in relevant part:

> Section 5.5.1 Whenever there is no appropriate eligible list available for filing a vacancy in the competitive class, the agency head may nominate a person to the city personnel director for non-competitive examination, and: (a) if such nominee shall be certified by the city personnel director as qualified after such non-competitive examination, the nominee may be appointed provisionally to fill such a vacancy until a selection and appointment can be made after competitive examination . . . .
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> Section 5.5.3 A provisional appointment to any position shall be terminated within two months following the establishment of an appropriate eligible list for filling vacancies in such positions . . . .
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> * * *
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> (c) in no case however shall the employment of such provisional appointee be continued longer than four months following the establishment of such eligible list . . . .

Grievant's termination was for disciplinary reasons rather than in compliance with civil service requirements. Thus, the Union has further failed to prove a nexus between the termination of Grievant's provisional employment upon the establishment of a civil service list for her title, as required by Civil Service Law (CSL) § 65,[4] and the cited section of the CBA pertaining to wrongful discipline.

Union's Position

Grievant's employment was terminated for disciplinary reasons, and any assertion that it was because of Grievant's civil service status is pretextual. The Union points to the fact that a hearing was convened on March 8, 2001, on the disciplinary matter. It was not the Grievant who abandoned the appeal of that disciplinary matter but ACS, which closed the case without rendering a decision.

The Union frames the central issue here as a question of fact for an arbitrator: whether Grievant was discharged by reason of alleged misconduct or because of civil service status. If the former, then Grievant was denied the due process to which she was entitled under Article VI, § (h), and the relationship between the termination and the cited sections of the CBA would be evident. Thus, the Union urges that this question of fact be determined in arbitration.

DISCUSSION

NYCCBL § 12-302 states: "It is hereby declared to be the policy of the city to favor and

[4] CSL § 65 provides, in relevant part, that a "provisional appointment to any position shall be terminated within two months following the establishment of an appropriate eligible list for filing vacancies in such positions . . . ."

encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations." This Board has thus promoted arbitration as the selected means for resolution of disputes. *See District Council 37, Local 375*, Decision No. B-12-93 at 12, *aff'd sub nom. New York City Dep't of Sanitation v. MacDonald*, No. 402944 (N.Y. Sup. Ct. December 20, 1993), *aff'd*, 215 A.D.2d 324, 627 N.Y.S.2d 619 (1st Dep't 1995), *aff'd*, 87 N.Y.2d 650, 642 N.Y.S.2d 156 (1996); *District Council 37, AFSCME*, Decision No. B-14-74.

In determining arbitrability, this Board decides first whether the parties are contractually obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions; and, if so, whether "the obligation is broad enough in its scope to include the particular controversy presented," *Social Service Employment Union,* Decision No. B-2-69; *see District Council 37, AFSCME*, Decision No. B-47-99, or, in other words, "whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA." *New York State Nurses Ass'n*, Decision No. B-21-2002.

In some instances – particularly in cases concerning transfer, reassignment, or the termination of provisional employees – a union may claim that an action taken by management was pretextual and, as a result, constitutes wrongful discipline and is grievable. At the same time, the City may assert that the action was required by law or was a management right and is not subject to the parties' contractual grievance procedure. *See, e.g., Correction Officers' Benevolent Ass'n*, Decision No. B-13-99; *Fire Alarm Dispatchers Benevolent Ass'n*, Decision No. B-33-88. In these circumstances, this Board examines the factual allegations to ascertain whether a reasonable relationship, though not apparent, indeed exists between the action complained of and the relevant contract provision. *Social Service Employees Union, Local 371*,

Decision No. B-17-98. This analysis is consistent with the standard enunciated in *Matter of Board of Education [Watertown Education Ass'n]*, 93 N.Y.2d 132, 137-138, 143, 688 N.Y.S.2d 463, 467, 471 (1999), and our recent decision, *New York State Nurses Ass'n*, Decision No. B-21-2002 at 7. Therefore, we no longer need to characterize the inquiry in such cases as the "substantial issue test." *Local 621, Service Employees International Union*, Decision No. B-2-2001 at 16; *District Council 37, AFSCME,* Decision No. B-8-81 at 11. This Board will continue carefully to examine the pleadings, which must contain sufficient specific allegations of fact for us to determine whether the disputed action is grievable. *District Council 37, AFSCME*, Decision No. B-33-90 at 9-11; *Fire Alarm Dispatchers Benevolent Ass'n*, Decision No. B-33-88 at 15.

In *Social Service Employees Union, Local 371*, Decision No. B-17-98, the union argued that the termination of a former provisional employee was pretextual because the discharge was for disciplinary reasons, not the establishment of a civil service list, as asserted by the employer. The union alleged that the employer had recently objected to misconduct by the grievant and that all other provisional agency workers in the grievant's title were redeployed, not dismissed. This Board concluded that the record contained sufficient facts to raise issues that should be heard by an arbitrator. *See also Correction Officers' Benevolent Ass'n*, Decision No. B-13-99 at 9 (claim arbitrable because sufficient issues raised as to whether reassignment was made in response to grievant's use of sick leave); *District Council 37, Local 375*, Decision No. B-12-93 at 12 (grievant's criticism of supervisor and subsequent poor evaluation followed immediately by transfer to inconvenient location raised question whether actions were disciplinary in nature).

Here, Article VI of the parties' CBA provides for the arbitration of claims of wrongful

discipline. The Union contends that the City's reliance on Grievant's provisional civil service status to terminate her was pretextual and that her discharge was actually for disciplinary reasons. The record reveals that disciplinary charges were filed against Grievant three months before her termination. ACS conducted a full Step I conference, and the hearing officer recommended a penalty of termination for disciplinary reasons. When Grievant was discharged, allegedly pursuant to CSL § 65, ACS retained 141 provisional employees in the same title as Grievant and terminated only six others. The City has not explained why these few provisional employees were dismissed and the overwhelming majority retained. These particular facts demonstrate that a reasonable relationship exists between Grievant's termination and the wrongful discipline provision of the CBA. We therefore direct arbitration.

If the arbitrator finds that Grievant's employment was terminated because of wrongful discipline, we note that the remedy available may be limited by a showing that Grievant's position would have been filled by an eligible on the civil service list.

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 docketed as BCB-2233-01, be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by the Social Service Employees Union, Local 371, and docketed as A-8953-01, be, and the same hereby is, granted.

Dated: September 23, 2002
New York, New York

MARLENE A. GOLD
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