City & Law Dep't v. L. 1549, DC 37 & Henry, 69 OCB 3 (BCB 2002) [Decision No. B-3-2002 (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 LAW DEPARTMENT,

Petitioner,

Decision No. B-3-2002
Docket No. BCB-2187-01
(A-8505-00)

-and-

DISTRICT COUNCIL 37, LOCAL 1549, AFSCME, AFL-CIO, AND PHYLLIS HENRY

Respondents.

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DECISION AND ORDER

The City of New York and the Law Department ("Department" or "Petitioner") filed a petition on February 9, 2001, challenging the arbitrability of a grievance filed by District Council 37, Local 1549 ("Union" or "Respondent") on behalf of Phyllis Henry. The grievance asserts that Petitioner violated Article VI, § 1 (b), of the collective bargaining agreement between the Department and the Union ("CBA"), as well as § 21(a)(2) of the Personnel Rules and Regulations of the City of New York ("Personnel Rules"), when it terminated Henry from her

probationary legal secretary assistant position without having first evaluated her.[1] In its request for arbitration, the Union restated its claim under the afore cited provisions. Petitioner argues that because Henry had not completed her one-year probationary period, the Department's termination of her employment was authorized by the Personnel Rules. Petitioner further asserts that, in any case, a violation of the Personnel Rules is not subject to the grievance procedure or to arbitration. Since we find, from the record, that the Department had clear notice that the Union's grievance concerned a claimed violation or misapplication of the Department's own written policy and procedures relating to performance evaluations of non-legal, sub-managerial employees, we find that the dispute is arbitrable under the parties' Agreement, and we deny the petition.

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[1] Both the Union and the City refer to § 21(a)(2) of the Personnel Rules, which states in relevant part:

> 2. Period of Service Covered For Permanent and Probationary Employees
> a. The rating period should be no greater than 12 months. For probationary employees, interim evaluations should be submitted every three months and a final report must be prepared before the end of the probationary period. In each interim period, the supervisor must recommend that the probationary employee either be retained for an additional three month period or terminated from the position. All competitive class employees must receive a final probationary rating of good or better to become permanent employees.

Although not noted by either party, this provision appears to have been superceded on an undetermined date by Rule 7.5.6, which states:

> Sub-Managerial Performance Evaluations for Probationary Employees.
> (a) Interim evaluations shall be made for sub-managerial probationary employees at least every three months and a final report shall be made at the end of the probationary period. Each interim evaluation shall contain a recommendation that the probationary employee either be retained for an additional three-month period or terminated from the position.

BACKGROUND

Phyllis Henry, who was appointed to the competitive title of Legal Secretarial Assistant for the Law Department on July 6, 1998, was required to complete a one year probation period. During the course of her probationary period, Henry did not receive any evaluations regarding her job performance. On June 21, 1999, Henry was terminated from her position.

The Union filed a Step I grievance on October 4, 1999, alleging a violation of Article VI, § 1 (b), of the CBA[2] and of the Personnel Rule § 21(a)(2). The grievance reads:

> A violation of the L. 1549 DC 37 Clerical Administrative Employees Unit Contract Article VI, Section 1b and the NYC Department of Personnel's Rules and Regulations Appendix VI Section 21 a(2) - Period of service covered for permanent probationary employees. The NYC Law Dept. misapplied the Dept. of Personnel's Rules and Regulations by not evaluating Ms. Phyllis Henry during her probationary period with interim evaluations periodically.

The City never responded to the Union's Step II grievance that was filed on November 15, 1999. On December 3, 1999, the Union requested a Step III conference. On September 14, 2000, Office of Labor Relations ("OLR") Review Officer, Philip Alonso, dismissed the grievance after the grievant failed to appear at the Step III conference held on September 7, 2000.

On November 6, 2000, the Union filed a request for arbitration. The statement of the

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[2] Article VII, §1 (b), of the CBA provides in relevant part:
The term "Grievance" shall mean:
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 or the Rules . . . shall not be subject to the grievance procedure or arbitration.

grievance in the request for arbitration reads:

> Whether the employer, the New York City Law Department, has wrongfully terminated the grievant Phyllis Henry, and whether the employer has violated its own written rules and regulations by failing to conduct performance evaluations in violation of NYC Department of Personnel's Rules and Regulations, Appendix VI, Section 21(a)(2) and, if so, what shall the remedy be?

As the contract provision, rule, or regulation it claims was violated, the Union lists Article VI, § 1 (b) of the CBA, and Appendix VI, § 21(a)(2) of the Personnel Rules. In its answer, the Union observes that the Department has incorporated the substance of Rule 21(a)(2) into its own written policies and procedures under Section 4.1.1 of the New York City Law Department's Agency Guide, which states in relevant part, that:

> [a]ll employees are to be evaluated by their supervisors and their evaluations are to be reviewed by their Division Chiefs. Each evaluation is done with a reference to meeting objectives through comparison with a list of Tasks and Standards. . . . [E]mployees may be given interim evaluations during the course of the evaluation period.

In its request for arbitration, the Union seeks the following remedies: "order the employer to conduct performance evaluations, reinstatement, back pay with interest, expungement of all disciplinary charges and any other remedy necessary to make the grievant whole."

POSITIONS OF THE PARTIES

Petitioner's Position

The Department argues that the Union has failed to establish a nexus between the act complained of and Article VI, § 1(b) of the CBA or Personnel Rule § 21(a)(2). Article VI, § 1

(b), of the CBA simply defines the term "grievance." The Department argues that the Union must cite a specific provision of the CBA that has allegedly been violated. Furthermore, Article VI, § 1 (b), expressly removes from the grievance-arbitration procedure "disputes involving the rules and regulations of the City of New York." Thus, the Union is prohibited from claiming a violation of Personnel Rule § 21(a)(2) and has not demonstrated the required nexus between Henry's probationary termination and Article VI, § 1(b), of the CBA or Personnel Rule § 21(a)(2).

The Department argues that even if the cited Personnel Rules were applicable, § 5.2.7 (c) of the Rules specifically authorize the agency to terminate any probationer in a competitive title "whose conduct or performance is not satisfactory" before the probationary period has been completed. Thus, the Department argues that because Henry had not yet completed her one year probationary period prior to her termination, Petitioner's actions were authorized by the Personnel Rules regardless of the basis for the termination.

According to Petitioner, Respondent improperly raised the issue of wrongful discipline (wrongful termination) for the first time in its request for arbitration. Petitioner argues that throughout the course of the contractual grievance process, the grievant neither alleged a wrongful disciplinary action nor cited any contractual provisions pertaining to discipline. Since the Department was never put on notice of such a claim, Petitioner urges the Board to dismiss Respondent's newly raised wrongful discipline claim.

Respondent's Position

In its answer, Respondent asserts that it mistakenly cited the wrong written policy during the lower steps of the grievance process and in its request for arbitration. The Union's position is

that although it failed to assert a violation of the New York City Law Department's Agency Guide which outlines the Department's evaluation procedure, the Department was on notice that the grievance stemmed from the Department's failure to evaluate Henry during her probationary period. The Department was not prejudiced, the Union argues, because the cited provision, Section 21(a)(2) of the Personnel Rules, is incorporated into the Department's Agency Guide as a written policy. Thus, the Union argues that the Department's obligation to conduct its evaluation of Henry arises under Section 4.1.1 of its Agency Guide, and the dispute is therefore arbitrable under Article VI of the Agreement as a claimed violation of a written agency policy.

The Union avers that the disputed issue for arbitration is not wrongful discipline. It acknowledges that the decision to terminate a probationary employee is a right reserved to the Department under the statutory scheme governing the terms and conditions of probationary employment. It argues, however, that "a grievant cannot be denied arbitration of an alleged violation of written policy concerning evaluation procedures simply because the City has a right to terminate a probationary employee during the probationary period." The Union maintains, therefore, that the "wrongful termination" phrase used in the request for arbitration merely reflects the remedy of reinstatement, initially requested in its Step I grievance, and now sought in arbitration.

DISCUSSION

The Board has carefully reviewed the positions of the parties as set forth in their respective pleadings. Based on the record before us, we are persuaded that the Department had clear notice that the Union was challenging the Department's failure to evaluate Henry prior to terminating her employment. We hold that since the Department, from the outset, knew the

nature of the Union's grievance, the Union's belated identification of Section 4.1.1 of the Department's Agency Guide as the provision that was violated does not preclude arbitration of its claim.

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 an arguable nexus exists between the grievance and the contract provision alleged to have been violated. *Dist. Council 37, Local 1549 ,* Decision No. B-18-99 at 7; *Communication Workers of Am.,* Decision No. B-28-82 at 7. The burden is on the union to establish such a nexus. *Communications Workers of Am.*, Decision No. B-1-2001 at 8; *Dist. Council 37, Local 1549,*Decision B-50-98 at 7. Failure to demonstrate the required nexus prevents this Board from submitting a grievance to arbitration. *Social Serv. Employees Union, Local 371,* Decision No. B-39-2000 at 8. The parties in this case agree that they are obligated to arbitrate unresolved grievances pursuant to their collective bargaining agreement.

We find that a nexus between the grievance and Article VI, § 1 (b), of the CBA exists in this case. In order to promote the resolution of real issues, we have "consistently declined to adopt an overly technical application of procedural rules." *Communications Workers of Am.*, Decision No. B-29-89 at 10. Absent a showing of prejudice, "we will not allow a technical oversight to preclude adjudication of the merits of any arguments or claims raised in the pleadings of a case." *Id.* We long ago held that we simply "will not dismiss an otherwise valid request for arbitration where insignificant omissions or oversights do not obscure the real issues as to which arbitration is sought." *Patrolmen's Benevolent Association,* Decision No. B-9-79.

The record in this case establishes beyond cavil that the Union was not challenging the

substantive determination underlying the Department's decision to terminate Henry. Rather, it was "clear from the outset" that the Union was seeking arbitral review of a claimed failure by the Department to follow written performance evaluation procedures preceding Henry's termination. *Communications Workers of Am., Local 1180,* Decision No. B-35-87. It is apparent from the grievance itself that the Union has asserted that it was improper for the Department to reach a decision on whether to retain or terminate Henry without first evaluating her job performance. On this record, we find that the City cannot avoid arbitration by claiming it did not understand the nature of the Union's claim.

We observe, moreover, that the City has not alleged that it could not reasonably have understood the Union's claim as one alleging a violation of Agency Guide 4.1.1. In any case, it is unlikely we would credit such a claim. What put the City on notice about the substance of the Union's claim was the clear statement in the grievance protesting the Department's failure to evaluate Henry during her probationary period. Given this clear expression of the nature of the dispute, we think that the Department was not relieved of any obligation to arbitrate the dispute simply because the Union mistakenly cited a Department of Personnel Rule instead of the Department's own written, consistent policy on the same subject.

Under the parties' Agreement, this alleged violation of a written agency policy is an arbitrable grievance. Whether the Section 4.1.1 was, indeed, violated, and whether the appropriate remedy is reinstatement is for an arbitrator to decide.

Accordingly, the City's petition challenging arbitrability is denied.

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 Law Department, be and the same hereby is, denied, and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 1549, be and the same hereby is, granted.

Dated: January 30, 2002
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

GABRIELLE SEMEL
MEMBER

VINCENT BOLLON
MEMBER

EUGENE MITTELMAN
MEMBER

RICHARD A. WILSKER
MEMBER