City & ACS v. L. 371, SSEU, 69 OCB 33 (BCB 2002) [Decision No. B-33-2002 (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
ADMINISTRATION FOR CHILDREN'S
SERVICES,

Petitioners,

Decision No. B-33-2002
Docket No. BCB-2262-01
(A-9088-01)

-and-

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371,

Respondent.
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DECISION AND ORDER

On December 28, 2001, the City of New York and the Administration for Children's Services ("City" or "ACS") filed a petition challenging the arbitrability of a grievance filed by Social Service Employees Union, Local 371 ("Union"), asserting that the grievant, a provisional employee, was wrongfully disciplined when she was terminated from her position in violation of Article VI of the collective bargaining agreement ("CBA"). The City contends that because grievant was a provisional for less than two years, there is no reasonable relationship between the subject matter of the grievance and Article VI of the CBA. The Union argues that the grievant served as a provisional for longer than two years. This Board finds that an arbitrator should determine the questions of fact raised by the parties.

BACKGROUND

The grievant, Ivette Gonzalez, was provisionally appointed as an Investigator (Discipline) Level I for ACS in April 1999. The City claims that the grievant received a notice that this appointment was effective as of April 19, 1999. Disputing this claim, the Union provides a document from the Union's Welfare Fund Office which states that the grievant's hire date was April 4, 1999. On April 17, 2001, the grievant, who remained a provisional in the same title, was advised by letter that her employment was terminated effective immediately.

On May 4, 2001, the Union filed a grievance at Step I and on May 14, 2001, filed at Step II. The Step II decision denied the grievance on the ground that Gonzalez was a provisional employee with less than two years of service in the title and was therefore not covered by the Disciplinary Review Procedure pursuant to Article VI of the CBA. The Union thereafter filed a Step III grievance, and on October 31, 2001, filed a request for arbitration claiming that the grievant was wrongfully terminated in violation of Article VI.[1] The remedy sought is exoneration, expungement of charges, reinstatement, and restoration of lost pay and benefits.

POSITIONS OF THE PARTIES

City's Position

The City argues that there is no reasonable relationship between Gonzalez's termination and Article VI of the CBA. The Union does not cite to a definition of "grievance"

[1] The pleadings in this case were not complete until May 8, 2002.

which would allow grievant to challenge her termination as a wrongful disciplinary action. The Union has not specified any claim or dispute arbitrable under Article VI, § 1(a) - (g), which set forth the definition of a grievance and are not applicable here. Furthermore, the grievant has no right to grieve under § 1(h), which involves provisional employees who have served at least two years, for the grievant has not served the requisite term of employment.[2] The grievant received a formal letter of appointment, which also specified her salary, effective April 19, 1999, and on April 17, 2001, the grievant received her termination letter. Therefore, there is no nexus between the act complained of and the only possible contract provision the grievant could rely on, Article VI, § 1(h).

Further, the facts in the record are insufficient to support the Union's assertion that termination of Gonzalez's employment was a disciplinary action in violation of Article VI of the CBA. ACS took no disciplinary action in this case; even if it had, management has the right to terminate the grievant, prior to completion of two years provisional service, for any reason, including discipline. In addition, the City contends that the document the Union relies on as proof of the grievant's hire date is not official and can serve as evidence only of the month in which the grievant was hired.

When hiring an employee initially, ACS distributes the Citywide Employee Orientation Manual ("Manual"). The manual addresses the rights available to provisional employees and states: "If the provisional employee has less than two years of service, the employee may be terminated at any time without reason."

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[2] Article VI, § 1(h), provides that the term "Grievance" shall mean: 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.

Union's Position

The Union agrees that Gonzalez was terminated on April 17, 2001, but disputes the City's claim that she received a letter appointing her to the provisional title on April 19, 1999. Rather, the Union relies on a document from the Union's Welfare Fund Office, which states that the grievant's hire date was April 4, 1999. This document is a printout of information based in part upon monthly data sent by the New York City Office of Payroll Administration to the Union's parent labor organization, District Council 37. Thus, if Ms. Gonzalez was hired on April 4, 1999, and terminated on April 17, 2001, she has served the requisite two years service and has the right to grieve her discharge as a wrongful disciplinary action under Article VI, § 1(h), of the CBA. Furthermore, the Union denies knowledge that the ACS Manual is distributed to all employees and argues that the content of the Manual is not relevant because the right to arbitration is governed by the CBA. Because there is an issue of fact in this case, the Union argues, the City's petition should be denied and the Request for Arbitration should be granted.

DISCUSSION

In determining questions of arbitrability, this Board will not inquire into the merits of a dispute, a subject for an arbitrator to resolve. Initially, the Board decides 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 Employees 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.

When a case involves a factual dispute or a question of contract interpretation, the Board will submit the case for resolution by an arbitrator. *Social Services Employees Union,* Decision No. B-3-98; *District Council 37,* Decision No. B-52-91. In *Organization of Staff Analysts,* Decision No. B-28-94, one issue was whether the grievant, a provisional employee hired on March 4, 1992, was employed for the required two years to be entitled to rights guaranteed by the due process provisions of the CBA. The matter in dispute was whether the grievant was discharged on March 3, 1994, the date of a letter which stated that termination was effective at close of business on that day, or on March 7, 1994, the date she allegedly received the letter at her place of employment. The Board held that this matter involved both a question of fact and of contract interpretation, questions to be resolved by an arbitrator.

In this case, the parties do not dispute that alleged wrongful discipline by termination of an employee is arbitrable under the CBA. Rather, the only issue is whether the grievant was employed in the provisional position for the requisite two years' service to grant her the right to arbitrate a wrongful termination under Article VI, § 1(h). Both parties agree that the grievant was terminated on April 17, 2001. The resolution of this dispute depends upon a determination whether the grievant's appointment date was April 19, 1999, as stated on the City's letter of notification, or April 4, 1999, as it appears on a printout from the Union's Welfare Fund Office. Since there is no dispute that a provisional who has worked for two years in the same or similar title has grievance rights under the CBA, this Board finds a reasonable relationship between the subject matter of the grievance – whether the grievant was wrongfully terminated – and Article VI, § 1(h), which addresses wrongful termination of an employee. The only issue under dispute

– whether the grievant served the requisite two years to grant her the right to grieve under this provision – is a proper subject for an arbitrator to decide. Therefore, we deny the City's petition challenging arbitrability and direct the parties to proceed to arbitration.

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 in Docket No. BCB-2262-01 filed by the City of New York be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by the Social Service Employees Union, docketed as A-9088-01, be, and the same hereby is, granted.

Dated: October 30, 2002
New York, New York

MARLENE A. GOLD
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