City & ACS v. L. 371, SSEU, 69 OCB 34 (BCB 2002) [Decision No. B-34-2002 (Arb)]

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

Decision No. B-34-2002
Docket No. BCB-2261-01
(A-9068-01)

-between-

THE CITY OF NEW YORK and THE
ADMINISTRATION FOR CHILDREN'S SERVICES,

Petitioners,

-and-

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371, EMILY SCOTT and IRIS NIEVES,

Respondents.
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DECISION AND ORDER

On December 14, 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 brought by the Social Service Employees Union, Local 371 ("Union") on behalf of Emily Scott.[1] The grievance alleges that Scott, a provisional employee, was discharged for disciplinary reasons without written charges and a hearing as required by the parties' collective bargaining agreement ("Agreement"). The City alleges that Scott was terminated in compliance with the Personnel Rules and Regulations of the City of New York and § 65 of the New York Civil Service Law ("CSL"), which required that she be terminated because her provisional position had been filled

[1] When filed, the petition also concerned a second grievance, subsequently withdrawn, on behalf of Iris Nieves (A-9067-01). The pleadings in this matter were complete on April 15, 2002.

from an open competitive civil service list. We find that the Union has failed to allege sufficient facts to demonstrate a reasonable relationship between Scott's termination and the cited provisions of the Agreement. Accordingly, the petition challenging arbitrability is granted.

BACKGROUND

On June 30, 1997, Scott was appointed as a provisional caseworker for ACS. On June 12, 1999, the civil service examination for Child Protective Specialist ("CPS") Exam No. 8061 was given. Scott did not take the exam.

On June 10, 2000, Scott took and passed CPS Exam No. 9026. On January 24, 2001, a list of eligibles for Exam No. 8061 was established. Scott did not appear on the list. By letter dated February 16, 2001, Scott was advised that she was terminated because her provisional position had been filled from the open competitive civil service list for CPS.

On May 9, 2001, a list of eligibles for Exam No. 9026 was established for appointment to the title of CPS and Scott's name appeared on the list. On June 12, 2001, Scott filed the instant grievance at Step I seeking reinstatement full back pay and benefits. The grievance was denied at Step II and a Step III decision was never issued. On August 27, 2001, Scott was appointed as a permanent CPS from the list for Exam No. 9026.

On October 15, 2001, the Union filed a request for arbitration alleging wrongful discipline in violation of Article VI, §1 (h), of the Agreement.[2] The Union seeks back pay and benefits for Scott during the period of February 16 through August, 27, 2001.

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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."

POSITIONS OF THE PARTIES

City's Position

The City argues that the grievance is not arbitrable. Scott, along with other provisional employees, was terminated because she was a provisional employee whose position was filled from the open competitive civil service list for CPS. Termination pursuant to the Rules and Regulations of the City of New York[3] and CSL § 65,[4] is not subject to the grievance procedure. Moreover, the Union failed to establish a nexus between the Agreement and the grievance because it failed to allege facts which show that the termination was predicted on discipline.

Union's Position

According to the Union, the City's contention that Scott's discharge was due solely to the movement of the CPS eligible list is a pretext for discipline and is designed to deprive Scott of her rights under the Agreement. Scott believes her position was filled by another provisional employee with less seniority and other provisional employees with less seniority were not discharged. The City has failed to submit any evidence to show that other provisional CPS employees were terminated because of the eligibles list. Because Scott was a provisional

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[3] Article VI, § 1(b), of the parties' collective bargaining agreement provides:

> A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy of 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**. . . (emphasis added).

[4] CSL § 65 provides, in relevant part: 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. . . ."

employee with more than two years of service, she was covered by Article VI, §1 (h), of the Agreement. Thus, if her discharge was for disciplinary reasons, she was entitled to the due process procedures set forth in the Agreement.

DISCUSSION

To determine 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 also 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 Agreement. *New York State Nurses Ass'n,* Decision No. B–21–2002. The Board cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties. *Organization of Staff Analysts*, Decision No. B-41-96 at 8.

Here, there is no dispute that the first prong of the test has been met. The parties have obligated themselves to arbitrate their controversies through the four step grievance procedure set forth in their Agreement, and there is no claim that this arbitration would violate public policy. Instead, the issue is whether the contractual wrongful discipline provision invoked is reasonably related to the grievance to be arbitrated. We find that the Union has failed to allege sufficient facts to demonstrate the required relationship between Scott's termination and Article VI, § 1(h), of the Agreement.

When the City challenges arbitrability by asserting that it had a legal duty or a statutory right to take an action – such as transfer, reassignment, or termination of provisional employees – but the union contends that management's action was punitive and thus subject to the contractual grievance procedures, the Board examines the pleadings to ascertain whether a reasonable relationship, though not apparent, indeed exists between the subject matter of the dispute and the contract. *Social Service Employees Union, Local 371*, Decision No. B-27-2002 at 6-7; *see also New York State Nurses Ass'n*, Decision No. B-21-2002 at 7. Under these circumstances, when a union alleges that the City's action was pretextual, we scrutinize the sufficiency of the specific allegations.

If a union's claim that an employer's actions were motivated by discipline are unsupported by sufficient facts to make out such a claim, the City's challenge to arbitration will be granted. In *Organization of Staff Analysts*, Decision No. B-12-96, we granted the City's petition because the Union failed to demonstrate the required relationship between the demotion of employees from their provisional titles to their permanent appointments in compliance CSL § 65 and the cited contract provisions concerning economic layoffs, restructuring, and contracting out of services. We stated: "The Union fails to allege any specific facts that would indicate that the personnel action was caused by anything but a need to comply with Section 65 of the Civil Service Law. It only speculates that the demotions may have been caused by anything but the need to comply with the Civil Service Law." *Id*. at 8; *see also City Employees Union Local 237, International Brotherhood of Teamsters*, Decision No. B-44-98 (Union's conclusory claim that employer's suspension of grievant motivated by discipline unsupported by any allegations of fact); *Doctors Council*, Decision No. B-18-94 (Union's presentation of a

"negative performance evaluation" as sole evidence of grievant's claim that reassignment was intended as a disciplinary measure found insufficient).

In contrast to the facts alleged in other cases where we found that a union had made a sufficient showing of disciplinary action,[5] here the Union only speculates that Scott's termination was a pretext for discipline and offers no allegations of fact relating to alleged discipline to substantiate this claim. Even if Scott's position was filled by another provisional employee with less seniority and other provisional employees with less seniority were not discharged, these allegation standing alone are insufficient to support a claim for discipline. We find "the record is devoid of any allegations of facts or circumstances which are traditionally characteristic of disciplinary action." *New York State Nurses Ass'n*, Decision No. B-2-95 at 13.

Indeed, the record indicates that Scott was terminated in compliance with the Personnel Rules and CSL § 65. First, Scott was terminated 23 days after the creation of the eligibles list for Exam No. 8061, which Scott did not take. Then, Scott was appointed as a permanent CPS approximately six months after she was terminated and approximately three months after her name appeared on the eligibles list for Exam No. 9026. These facts tend to support the City's position that ACS was filling the CPS title with eligible candidates from the appropriate civil service lists. In the absence of evidence supporting the Union's conclusory assertion of disciplinary motive, we find that there is no reasonable relationship between this termination in

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[5] *Social Service Employees Union, Local 371*, Decision No. B-27-2002 (provisional employee's termination under CSL arbitrable because union alleged that prior to termination, agency filed disciplinary charges against grievant and hearing officer recommended termination); *Social Service Employees Union, Local 371*, Decision No. B-17-98 at 7 (provisional employee's termination under CSL arbitrable because union presented recent memorandum by agency objecting to grievant's misconduct and all other provisional agency workers in grievant's title were redeployed, not dismissed).

compliance with CSL § 65 and the provision of the Agreement concerning discipline.

Accordingly, the petition challenging arbitrability is granted.

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 Administration for Children's Services, Docket No. A-9068-01, hereby is granted; and it is further,

ORDERED, that the request for arbitration filed by the Social Service Employee Union, Local 371 on behalf of Emily Scott, hereby is denied.

DATED: October 30, 2002
New York, New York

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