City & DHS v. L. 371, SSEU, 69 OCB 36 (BCB 2002) [Decision No. B-36-2002 (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
DEPARTMENT OF HOMELESS SERVICES

Petitioners,

-and-

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

Respondent.

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Decision No. B-36-2002
Docket No. 2267-02 (A-9130-02)
Docket No. 2276-02 (A-9146-02)

DECISION AND ORDER

On February 22, 2002, the City of New York and the Department of Homeless Services ("City" or "DHS") filed a petition, Docket No. 2267-02, challenging the arbitrability of a grievance brought by the Social Service Employee Union, Local 371 ("Union") on behalf of Joseph Falero. On March 22, 2002, the City and DHS filed a petition, Docket No. 2276-02, challenging the arbitrability of a grievance brought by the Union on behalf of Rolland Warden. The grievances allege that Falero and Warden (collectively "Grievants") were wrongfully terminated without written charges and a hearing as required by the parties' collective bargaining agreement ("Agreement"). The City argues that the grievances are not arbitrable because Grievants were terminated during their probationary period in accordance with the Personnel Rules and Regulations of the City of New York. The Union responds that Grievants acquired due process rights after completing two years of service as provisional Fraud Investigators and

that when they were appointed to the title of Fraud Investigators, they did not forfeit these previously acquired rights.

The two petitions challenging arbitrability are consolidated because they involve the same parties and common issues. The petitions are granted. We find that there is no reasonable relationship between the termination of Grievants' employment and the parties' contractual disciplinary procedure because the subject matter of the disputes is outside the scope of the Agreement to arbitrate.

BACKGROUND

Docket No. 2267-02

On December 18, 1995, Joseph Falero was provisionally appointed to the title of Fraud Investigator in the Human Resources Administration ("HRA") and remained in that position until August 6, 2000. On August 7, 2000, Falero was appointed from a civil service list to the title of Fraud Investigator at DHS. On July 20, 2001, DHS terminated Falero. There is no indication in the record as to the reason for his termination.

On August 20, 2000, the Union filed a grievance alleging that Falero's termination without charges amounted to a wrongful disciplinary action against a permanent civil servant in violation of Article IV, § 1(g), of the Agreement.[1] On September 20, 2001, DHS denied the grievance stating that Falero was appointed as a probationary Fraud Investigator on August 7,

[1] Article VI, §1 (g) defines "grievance" as "the failure to serve written charges as required by section 75 of the Civil Service Law . . . upon a permanent employee covered by section 75 of the Civil Service Law . . . where any of the penalties . . . set forth in section 75(3) of the Civil Service Law have been imposed."

2000, and was terminated prior to the completion of the one-year probationary period. Consequently, he did not have disciplinary hearing rights.

Docket No. 2276-02

On August 11, 1999, Rolland Warden was provisionally appointed to the title Fraud Investigator in DHS. On December 7, 2001, Warden was appointed from a civil service list to the title of Fraud Investigator at DHS. By letter dated December 21, 2001, DHS terminated Warden's appointment stating that his one year probationary employment with DHS was terminated effective immediately. DHS claims, and the Union denies, that Warden was terminated because he romantically pursued an applicant for emergency housing and promised her eligibility in return for being his girlfriend.

On December 26, 2001, the Union filed a grievance alleging that Warden was terminated without charges in violation of Article IV, § 1(e), of the Agreement.[2] A Step II hearing was conducted on January 15, 2002. On January 17, 2002, DHS denied the grievance finding that Warden had been terminated during his probationary period. Consequently, he did not have disciplinary hearing rights.

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union has failed to show a nexus between the act complained of

[2] Article VI, § 1(e), defines "grievance" as a "claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status."

and the source of the alleged due process rights. After Grievants were appointed from the civil service list, their status changed from provisional to probationary employees pursuant to § 5.2.1(a) of the City's Personnel Rules and Regulations[3] and the Department of Citywide Administrative Services General Examination Regulation § E.20.1 and E.20.2.[4] According to the City, the Union has not alleged a violation of these rules, presumably in recognition of Article VI, § 1 (b), of the Agreement which provides that the Personnel Rules are not subject to the grievance procedure.[5] Because Grievants were probationary employees, they no longer had any due process rights under the Agreement. Accordingly, there is no nexus between their termination and disciplinary action.

Union's Position

The Union argues that under Article IV, § 1(h), of the Agreement, Grievants acquired due process rights for claimed wrongful disciplinary actions after they completed two years of service as provisional Fraud Investigators.[6] When Grievants were appointed to permanent positions in

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[3] Personnel Rules and Regulations § 5.2.1(a) provides that: Every appointment and promotion in the competitive class shall be for a probationary period of one year unless otherwise set forth . . . .

[4] General Examination Regulation § E.20.1 provides: Except as otherwise provided, all appointments and promotions shall be for a probationary term of one year.

General Examination Regulation § E.20.2 provides: Upon showing to the satisfaction of the Director that the services of a probationer have been unsatisfactory, an appointing officer may terminate the employment of such probationer at any time during the probationary term.

[5] Article VI, § 1(b), of the Agreement provides that "disputes involving the Personnel Rules and Regulations of the City of New York. . . shall not be subject to the grievance procedure or arbitration."

[6] Article VI, § 1(h), of the Agreement provides that the term "grievance" shall mean: "A claimed wrongful disciplinary action taken against a provisional employee who has served for

the same title, they did not lose these previously acquired rights. The Union notes that the Agreement is between the City and the Union, not HRA or DHS and the Union. Thus, in Falero's case, the due process rights he acquired while working at HRA for more than two years as a provisional Fraud Investigator were not forfeited when he transferred to the permanent position at DHS, another City agency. Moreover, the case concerning Warden is even more egregious because unlike Falero, who transferred agencies, Warden acquired his two years of provisional service at DHS and was appointed to the permanent position in that agency.

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

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two years in the same or similar title or related occupational group in the same agency."

and there is no claim that arbitration would violate public policy. Instead, the issue is whether there is a reasonable relationship between Article VI, § 1(e), and (g), of the Agreement, which provide grievance rights to permanent employees and the termination of Grievants.

It is undisputed that Grievants were permanent employees who were terminated during their one year probationary period. Moreover, it is undisputed that permanent employees do not have due process rights with respect to terminations during their probationary term and may be dismissed at anytime pursuant to the City's Personnel Rules and Regulations. *Amaker*, Decision No. B-32-98 at 7. Pursuant to Article VI, §1 (b), of the Agreement, disputes regarding the City's Personnel Rules and Regulations are exempt from the grievance procedure.

Here, the parties have negotiated separate disciplinary provisions for permanent and provisional employees. The grievances are sought under the contractual definitions of "grievance" which cover permanent employees. The Union has not identified a provision in the Agreement which grants permanent employees who previously completed two years of provisional service the right to arbitrate their dismissal prior to the end of their probationary period. See *Local 237, Internat'l Brotherhood of Teamsters*, Decision No. B-11-76 at 7. ("Where it is sought to enlarge the traditional and well-defined incidents of probationary status, the Board will require an explicit contractual expression of that intent.") Because the Union has failed to establish a reasonable relationship between Grievants' termination and the Agreement, the petitions challenging arbitrability are 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, the petition challenging arbitrability filed by the City of New York and the Department of Homeless Services, Docket No. 2267-02, 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 Joseph Falero, Docket No. A-9130-02, hereby is denied; and it is further,

ORDERED, the petition challenging arbitrability filed by the City of New York and the Department of Homeless Services, Docket No. 2276-02, 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 Rolland Warden, Docket No. A-9146-02, hereby is denied.

Dated: October 30, 2002
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER

I Dissent. CHARLES G. MOERDLER
MEMBER

I Dissent. BRUCE H. SIMON
MEMBER