HHC v. L. 420, DC 37, 69 OCB 38 (BCB 2002) [Decision No. B-38-2002 (Arb)]

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

Decision No. B-38-02
Docket No. BCB-2294-02
(A-9405-02)

-between-

NEW YORK CITY HEALTH AND
HOSPITALS CORPORATION,

Petitioner,

-and-

LOCAL 420, DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Respondent.
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DECISION AND ORDER

On July 26, 2002, the New York City Health and Hospitals Corporation ("HHC") filed a petition challenging the arbitrability of a grievance brought by District Council 37, AFSCME, Local 420 ("Union") on behalf of Aurea Castro. The grievance claims that Castro was improperly discharged for falsifying her job application, and when it was demonstrated by court records that she had not been convicted of any crime, HHC recanted its position and alleged that Castro could not be re-hired because she had failed her probation. The Union claims that HHC acted unfairly and violated the terms of the parties' collective bargaining agreement ("Agreement"). HHC argues that under the Agreement, Castro was not entitled to grieve her termination because she was both a probationary employee and a non-competitive employee with less than three months of service. We find that the Union has failed to demonstrate a reasonable

relationship between Castro's termination and the cited provision of the Agreement. Accordingly, the petition challenging arbitrability is granted.

BACKGROUND

On February 14, 2000, Castro was appointed to the non-competitive title of Dietary Aide at North Central Bronx Hospital. In her employment application, Castro certified that she had never been convicted of a crime. By letter dated May 8, 2000, Castro was advised that she was terminated effective immediately due to a falsification of her employment application.

The Union provided HHC with a letter dated June 5, 2000, from Castro's criminal attorney stating that in 1992 Castro had been charged with a misdemeanor offense which had not yet been decided and that they were hopeful that it would soon be dismissed. The Union also provided a case disposition from the criminal court showing that the case against Castro had been dismissed on July 6, 2000.

According to the Union's Exhibit I, Castro's supervisors prepared an evaluation dated September 9, 2000, giving Castro an overall unsatisfactory rating. The evaluation stated that Castro needed improvement in many areas and that she had failed to pass her probation. In the comment section it was noted that Castro was also suspected of smoking on the premises, owing money to co-workers and acting inappropriately towards patients. In the box provided for the employee's signiture was the notation that Castro was "unavailable."[1]

By letter dated October 4, 2000, the Union requested a meeting to resolve the issue of

[1] In its Reply, HHC does not provide any information about this evaluation or explain why it was prepared after Castro's termination.

Castro's termination. On October 24, 2000, HHC advised the Union that it had received the information substantiating that Castro did not falsify her application. However, due to Castro's performance during her probationary period, HHC was unwilling to rehire her.

On April 24, 2001, the Union filed a grievance at Step I claiming that Castro had originally been terminated for falsifying her job application and that upon production of evidence exonerating her, management refused to reinstate Castro claiming that she had failed to meet her probationary requirements. The Union alleged that Castro was denied due process in violation of Article VI, § 1(a) and (g), of the Agreement. The grievance was denied at Step II, without a hearing, on the grounds that Castro had less than three months of service and, as a result, did not have the right to appeal her termination through the contractual grievance process. The Step II decision also noted that the grievance was untimely in that it was filed six months after the Union was notified that Castro's employment would not be reinstated. The Union appealed, and on May 17, 2002, a Step III decision affirmed the Step II decision.

On June 21, 2002, the Union filed a request for arbitration alleging wrongful termination in violation of only Article VI, § 1(g), of the Agreement.[2] The Union seeks Castro's

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[2] Article VI, § 1(g), provides that the term "grievance" shall mean:
A claimed wrongful disciplinary action taken against a non-competitive employee as defined in Section 11 of this Article.

Section 11 provides:
Grievances relating to a claimed wrongful disciplinary action taken against a non-competitive employee shall be subject to and governed by the following special procedure:
The provisions contained in this section shall not apply to any of the following categories of employees covered by this contract:
a. Per diem employees.
b. Temporary employees.
c. Probationary employees.

reinstatement, back pay, and expungement of all disciplinary charges.

POSITIONS OF THE PARTIES

HHC's Position

HHC argues that the grievance is not arbitrable because the Union has failed to show a nexus between the termination of Castro as a probationary employee and Article VI, § 1(g), of the Agreement. Specifically excluded from the coverage of Article VI, § 1(g), are probationary employees and non-competitive employees with less than three months of service. Furthermore, § 5:2:1 of the Rules and Regulations of the City of New York require that every appointment in a non-competitive class shall be made subject to the successful completion of a probationary period of one year.[3] Since at the time of her termination, Castro had not yet completed her probation and was a non-competitive employee with less than three months of service, she was not entitled to grieve her termination.

In its reply, HHC objects to the Union's new claim, raised for the first time in its answer, that Castro's termination was violative of New York State Executive Law § 296(15) and (16)

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d. Trainees, provisionals.
e. Non-competitive employees with less than three (3) months service in the title.
f. Competitive class employees.

[3] Personnel Rules and Regulations § 5.2.1 provide in pertinent part:
(a) Every appointment and promotion in the competitive class, non-competitive or labor class shall be made subject to the successful completion of a probationary period . . . .
(b)(i) The probationary period shall be twelve (12) months unless otherwise set forth in the terms and conditions of certification for appointment or promotion as determined by the Vice President.

("Human Rights Law"). The Union's attempt to amend the grievance at this stage should be denied. Moreover, the Union has failed to demonstrate that an alleged violation of the Human Rights Law is grievable under the Agreement; such violations are for the courts to determine.

Union's Position

The Union argues that HHC discharged Castro under the erroneous belief that she lied on her employment application about not being convicted of a crime. Her discharge, therefore, violated the Human Rights Law, which prohibits public employers from discriminating against employees because of an arrest record. Moreover, because HHC subsequently changed the reason for Castro's termination to a facially lawful reason – her alleged poor work performance – the termination date should be deemed to be October 24, 2000, when HHC first asserted this reason. Accordingly, Castor's termination was more than three months after she commenced service in her title as Dietary Aide. HHC should not be permitted to take advantage of its illegal act and avoid its obligation to deal with the Union fairly and in good faith. This is especially true because HHC refused to hold a grievance hearing in this matter. Finally, with regard to HHC's argument that Castro did not have the right to grieve her termination because she was a probationary and a non-competitive employee, there is an ambiguity in § 11 of the Agreement which should be resolved by an arbitrator. According to the Union, § 11, "on its face, both grants and denies employees in their probationary period, but with more than three months service in the title, the right to grieve and then arbitrate a dispute concerning the employee's wrongful termination." (Answer ¶ 22.)

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 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 Castro's termination and Article VI, § 1(g), of the Agreement.

It is undisputed that Castro was a probationary employee who was terminated prior to completing her one year probationary period. Employees do not have grievance rights with respect to terminations during their probationary term and may be dismissed at any time pursuant to the City's Personnel Rules and Regulations. *Social Service Employee Union, Local 371,*

AFSCME, Decision No. B-36-2002 at 6; *Amaker*, Decision No. B-32-98 at 7.

Contrary to the Union's claim, § 11 expressly excludes both probationary employees and non-competitive employees with less than three months service from the grievance process. We find that Castro falls into both of these categories and that as a result she was not entitled to grieve her termination. The possibility of an employee's exclusion from the grievance process because she is both a probationary and a non-competitive employee with more than three months is irrelevant here. We reject the Union's contention that Castro's termination date should be changed to October 24, 2000, which is more than three months after her date of hire, because HHC first asserted that it was unwilling to rehire her due to her poor performance on that date. It is undisputed that on May 8, 2000, the effective date of her termination, Castro had less than three months of service in her title. Because Castro had not served three months in her title, she could not avail herself of the disciplinary procedure applicable to non-competitive employees with more than three months in service. *New York State Nurses Ass'n*, Decision No. B-6-84 at 11-12.

Furthermore, under civil service law, a probationary employee may be terminated without charges or a hearing provided that the decision to terminate is not made in bad faith or is otherwise prohibited by law. *Social Services Employees Union, Local 371, AFSCME*, Decision No. B-42-90 at 10; *Social Services Employees Union, Local 371,* Decision No. B-1-86 at 12. Here, the Union admits that HHC initially discharged Castro under the "erroneous belief" that she lied on her employment application about not being convicted of a crime and does not claim that this decision was made in bad faith. Moreover, we have upheld terminations of probationary employees for unsatisfactory conduct or performance. *Civil Service Bar Ass'n and Local 237*,

Decision No. B-42-80.

To the extent Castro may have a claim that her discharge for falsifying her employment application violated the Human Rights Law, these claims have traditionally been entertained in the courts and not by arbitrators who are appointed by the Board of Collective Bargaining under § 1-06 of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1). The Union has failed to demonstrate that an alleged violation of the Human Rights Law is a permissible grievance under the Agreement. Therefore, dismissal of the Union's request for arbitration is without prejudice to any rights that Castro may have in another forum.

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 New York City Health and Hospitals Corporation, Docket No. A-9405-02, hereby is granted; and it is further

ORDERED, that the request for arbitration filed by District Council 37, AFSCME, Local 420 on behalf of Aurea Castro, hereby is denied.

DATED: November 22, 2002
New York, New York

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