HHC v. SSEU, L. 371, 71 OCB 22 (BCB 2003) [Decision No. B-22-2003 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,
Petitioner,

Decision No. B-22-2003
Docket No. BCB-2329-03
(A-9770-02)

-and-

SSEU, Local 371,

Respondent.

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DECISION AND ORDER

On March 10, 2003, the New York City Health and Hospitals Corporation ("HHC") filed a petition challenging the arbitrability of a grievance brought by the Social Service Employees Union, Local 371 ("Union") on behalf of Lludelkis Raposo ("Grievant"), a provisional Caseworker with more than two years' experience at HHC. The grievance asserts that HHC violated the parties' collective bargaining agreement ("Agreement") by terminating Grievant's employment without providing her due process rights. HHC argues that the grievance is not subject to arbitration under the Agreement because (1) HHC's Rules and Regulations required that Grievant be replaced by a candidate from the established civil service eligible list, and (2) the Union failed to establish a nexus between the grievance and the provisions of the Agreement allegedly violated. The Union contends that HHC terminated Grievant because of her perceived incompetence or misconduct. Since the pleadings include sufficient allegations of fact to suggest

that the termination may have been disciplinary, this Board finds that a reasonable relationship exists between the grievance and the Agreement and denies the petition challenging arbitrability.

BACKGROUND

On April 3, 1995, Grievant was hired as a provisional Caseworker at the Woodhull Medical & Mental Health Center, a facility of HHC within its North Brooklyn Health Network. A general civil service eligible list for the title Caseworker at HHC was established on August 10, 1999. A Selective Certification-Spanish list, comprised of names selected from the general civil service list, was established for the title Caseworker at HHC on October 19, 1999. Grievant's name did not appear on either list.

Grievant received an overall rating of "Unsatisfactory" in an undated written performance evaluation covering the period from April 3, 2001 to April 3, 2002. The Union claims that the performance evaluation was given to Grievant on July 8, 2002.[1] Four days later, on July 12, 2002, the North Brooklyn Health Network sent Grievant a letter informing her that her provisional position "had been selected for permanent appointment" and would be filled by a candidate from the established civil service list. Accordingly, she would be terminated, effective Friday, August 23, 2002. The pleadings do not indicate how many provisional employees were terminated pursuant to the civil service list at this time. Grievant's position was filled on Monday, August 26, 2002, by a candidate ranked 988 on the 1999 Selective Certification-Spanish list. The list was certified on August 1, 2002, almost three weeks after Grievant was

[1] The record does not indicate when Grievant received her performance evaluations in prior years.

notified of her termination. Both the general civil service list and the Selective Certification-Spanish list were exhausted prior to their expiration, on October 28, 2002. A new general civil service list was established on November 15, 2002.

On November 11, 2002, the Union filed a Step I grievance with the North Brooklyn Health Network, alleging "wrongful disciplinary action, i.e., discharge from employment without due process rights" in violation of Article VI, §§ 1(h) and 7, of the Agreement.[2] In response, the North Brooklyn Health Network stated, on November 25, 2002, that it was unable to grant a grievance conference because it had not disciplined Grievant.

The Union repeated its claim in a Step II grievance, filed with HHC on December 2, 2002. HHC responded to the Step II grievance on January 2, 2003. It dismissed the Union's claim without a hearing because Grievant was terminated pursuant to HHC's Personnel Rules & Regulations and not as a result of disciplinary action.

On December 9, 2002, prior to receiving HHC's response to the Step II grievance, the Union filed a Step III grievance with the Office of Labor Relations. The pleadings do not indicate whether a response was given. The Union filed a request for arbitration with the Office of Collective Bargaining on December 23, 2002. As a remedy, the Union seeks reinstatement with full back pay and emoluments.

HHC filed its petition challenging arbitrability on March 10, 2003. Prior to filing its

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[2] Article VI, § 1(h), defines the term grievance as:
A claimed wrongful disciplinary action taken against a provisional employee who has served for two years in the same of similar title or related occupational group in the same agency.

Article VI, § 7, establishes the disciplinary procedure for provisional employees "upon service of written charges of incompetency or misconduct."

answer, the Union made a request under the Freedom of Information Law ("FOIL") for the names and dates of hire for each provisional Caseworker employed at HHC on August 23, 2002. HHC responded to the FOIL request on April 16, 2003, by providing a list of provisional employees currently in the Caseworker title. The list indicates each employee's hiring date and facility. The Union attached the FOIL list as an exhibit to its answer, filed on May 8, 2003.

According to the list, on April 16, 2003, 164 provisional Caseworkers worked at HHC corporation-wide. Nine provisional Caseworkers were hired after August 23, 2002. Thus, at least 155 provisional Caseworkers were employed at HHC corporation-wide at the time of Grievant's termination.[3] Of these, 16 provisional Caseworkers had been hired before Grievant was hired; 139 were hired after. Four provisional Caseworkers were hired on August 19, 2002, just four days before Grievant was terminated. One was hired on August 26, 2002, three days after Grievant was terminated.

None of the provisional Caseworkers hired after Grievant's termination worked at the Woodhull facility, where Grievant had been employed. At the time of Grievant's termination, five provisional Caseworkers remained at the Woodhull facility. Four of them had been hired more recently than had Grievant. One was hired on March 4, 2002, and two on June 18, 2002, roughly two months prior to Grievant's termination.

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[3] The record does not indicate how many provisional Caseworkers left HHC in this time period. It is possible that some provisional Caseworkers employed at the time of Grievant's termination were no longer employed when the list was generated on April 16, 2003. Consequently, the number of provisional Caseworkers employed at HHC corporation-wide at the time of Grievant's termination might be higher than 155.

POSITIONS OF THE PARTIES

HHC's Position

HHC first argues that the Union's request for arbitration should be dismissed because Article VI, § 1(b), of the Agreement[4] precludes arbitrating disputes involving HHC's Rules and Regulations. According to HHC, the dispute is excluded from arbitration pursuant to § 1(b) since § 4:7:2 and § 5:5:4 of HHC's Rules and Regulations[5] require that Grievant be removed from her provisional title. In addition, Grievant's termination was pursuant to Civil Service Law § 65,[6] a violation of which is not subject to arbitration under the Agreement. The duty to

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[4] Article VI, § 1(b), defines the term grievance as:
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 the terms and conditions of employment; provided, disputes involving the Personnel Rules and Regulations of the City of New York or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the grievance procedure or arbitration.

[5] Section 4:7:2 describes the selection procedure as follows:
a) Appointments or promotions from an eligible list to a position in the competitive class shall be made by selection of one of the three persons certified by the Vice President as standing highest on such list who are available and willing to accept appointment or promotion.
b) Candidates passed over for appointment or promotion will be give or sent written notice of their non-selection.

Section 5:5:4 provides:
A provisional appointment shall be terminated within two months following the establishment of an appropriate list except if the number of provisional to be replaced at one time is so great as to interfere with the ordinary order of business, the Vice President may extend the period of their employment for up to four months after the list is established.

[6] Section 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

arbitrate should not be extended beyond what the parties have previously agreed in the Agreement.

Second, HHC argues that the request for arbitration should be dismissed because the Union has failed to establish a nexus between the grievance and the contract provisions allegedly violated. HHC asserts that Article VI, §§ 1(h) and 7, relied upon by the Union, do not apply to Grievant because she was not served with disciplinary charges. Rather, she was a provisional employee terminated due to the certification of a civil service list, in compliance with HHC's Rules and Regulations. Accordingly, there is no grievable claim.

In its reply papers, HHC argues that the Union's attempt to establish a nexus fails because it incorrectly assumes that (1) HHC, rather than its facilities, makes appointments from the civil service list, and (2) provisional employees have seniority rights. HHC asserts that since it is a decentralized organization and appointments from the civil service list are made on a facility basis, the number of provisional Caseworkers continuing to work at HHC corporation-wide is irrelevant. Furthermore, since provisional employees lack seniority rights under the law or any collective bargaining agreement, Grievant was not entitled to greater protection than the four provisional Woodhull Caseworkers who were hired more recently than Grievant but who were not terminated as a result of the civil service list. In addition, HHC notes that reviewing Grievant for her performance in the period between April 3, 2001, and April 3, 2002, was appropriate since Grievant's hiring date was April 3, 1995. Therefore, the request for arbitration should be denied.

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Union's Position

The Union argues that the petition challenging arbitrability should be denied and the request for arbitration granted since Grievant was discharged because of her perceived incompetence or misconduct and not because of the movement of the civil service list. In support of this assertion, the Union relies on two facts: (1) 148 provisional Caseworkers with less seniority than Grievant continued to work at HHC corporation-wide following Grievant's termination,[7] and (2) Grievant was notified of her discharge only four days after receiving an unsatisfactory performance evaluation. If, as the facts strongly suggest, Grievant was terminated for alleged incompetence or misconduct, she was entitled to receive notice of the charges and a due process hearing under Article VI, §§ 1(h) and 7, of the Agreement. Therefore, an arbitrator should determine the reason for Grievant's termination.

DISCUSSION

The policy of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") is to favor and encourage impartial arbitration as the selected means for the resolution of grievances between municipal agencies and certified employee organizations. NYCCBL §12-302. To determine arbitrability, the 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*

[7] The Union's calculation includes provisional Caseworkers hired after Grievant's termination.

Service Employment Union, Decision No. B-2-69 at 2; *see District Council 37, AFSCME*, Decision No. B-47-99 at 8-9, 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 at 7. The Board, however, cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *Social Service Employees Union, Local 371*, Decision No. B-34-2002 at 4.

Here, the first prong of the test has been met. The parties are contractually obligated to arbitrate their controversies through the grievance procedure set forth in the Agreement and do not allege that arbitration of this grievance would violate public policy. HHC's reliance on Article VI, § 1(b), which excludes disputes over HHC's Rules and Regulations from the grievance process, is misplaced. Section 1(b) is inapplicable since HHC's Rules and Regulations are not the subject matter of the grievance. Therefore, we turn to the second prong of the test: whether Grievant's termination is reasonably related to the contractual wrongful discipline provisions invoked. This Board finds that the record indicates sufficient facts to conclude that the grievance is reasonably related to the Agreement. Accordingly, we deny the petition challenging arbitrability.

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*, Decision No. B-34-2002 at 5; *Social Service*

Employees Union, Local 371, Decision No. B-27-2002 at 6; *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.

For example, in *Social Service Employees Union, Local 371*, Decision No. B-8-2003, the Board considered the following facts: (1) the provisional employee's supervisor had made numerous complaints about her work performance, (2) the provisional employee received an overall rating of "Unsatisfactory" on her performance evaluation,[8] and (3) on the date of the provisional employee's discharge, 839 provisional employees with the same title remained at the agency. Based upon these facts, the Board determined that a reasonable relationship existed between the provisional employee's termination, allegedly a result of the establishment of a civil service list, and the wrongful discipline provision of the parties' collective bargaining agreement. The Board was not influenced by the union's assertion that many of the remaining provisional employees had less seniority than the grievant had. *See Social Service Employees Union*, Decision No. B-34-2002 at 6 (finding that the allegation that other provisional employees with less seniority were not discharged is insufficient to support a claim that a provisional employee's termination was disciplinary).

Similarly, in *Social Service Employees Union*, Decision No. B-27-2002, another case in

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[8] In prior cases in which a performance evaluation was the sole evidence proffered, the Board has found that an unsatisfactory rating on an annual review was insufficient evidence of discipline. *Doctor's Council*, Decision No. B-18-94 at 16-17; *District Council 37, Local 1549*, Decision No. 40-86 at 12-13. However, the Board has considered performance evaluations in conjunction with other evidence of disciplinary action. *See District Council 37, Local 375*, Decision No. B-12-93 at 14 (relying, in part, upon a critical performance evaluation received at the time the grievant was transferred to a distant and inconvenient location), *aff'd sub nom. New York City Dep't of Sanitation v. MacDonald*, No. 402944/93 (Sup. Ct. N.Y. Co. Dec. 20, 1993), *aff'd*, 215 A.D.2d 324 (1st Dep't 1995), *aff'd*, 87 N.Y.2d 650 (1996).

which civil service requirements were allegedly used as a pretext for disciplinary action, the Board found sufficient facts to find that a reasonable relationship existed between termination of a provisional employee and the parties' collective bargaining agreement. The record revealed the following: (1) the agency had filed disciplinary charges against the provisional employee three months prior to her termination,[9] (2) a hearing officer had recommended termination, and (3) only six of 147 provisional employees had been discharged. The Board noted that the City had "not explained why these few provisional employees were dismissed and the overwhelming majority retained." *Id.* at 8.

As in the cases discussed above, the record here contains sufficient facts to demonstrate a reasonable relationship between Grievant's termination and the wrongful disciplinary provisions of the Agreement. First, the civil service list from which Grievant's replacement was selected had been in existence for three years and was close to expiration at the time of Grievant's termination. *Compare Social Service Employees Union*, Decision No. B-34-2002 (arbitration denied in case in which provisional employee notified of termination three weeks after establishment of a civil service list), *with Social Service Employees Union*, Decision No. B-8-2003 (arbitration ordered in case in which provisional employee notified of termination almost a year after establishment of one civil service list and almost four months after establishment of a second list). HHC offers no explanation why, after three years, it "selected" Grievant's

[9] Although proximity in time "without more" is an insufficient indicia of disciplinary action, *Doctor's Council*, Decision No. B-18-94 at 18; *District Council 37*, Decision No. B-54-91 at 11; *District Council 37*, Decision No. B-52-89 at 9, timing coupled with other persuasive evidence is a factor this Board considers. *See District Council 37*, Decision No. B-12-93 at 13-14 (noting that the transfer was one week after the grievant criticized his superior and at the same time as his critical performance review).

provisional position to be filled by a permanent employee from the civil service eligible list. Second, Grievant was notified of her termination only four days after receiving an "Unsatisfactory" rating on her annual performance review. Finally, 155 provisional Caseworkers continued to work at HHC corporation-wide and five provisional Caseworkers continued to work at the Woodhull facility following Grievant's termination. HHC does not assert that any other provisional Caseworkers were terminated at the same time as Grievant was. Viewed as a whole, these facts support a finding that Grievant's termination may have been discipline for unsatisfactory performance. Whether Grievant was terminated for performance-related reasons, as alleged by the Union, or because of the civil service list, as alleged by HHC, is a factual question which should be resolved by an arbitrator, not by this Board. *Social Service Employees Union*, Decision No. B-8-2003 at 8-9.

Based on the totality of the circumstances, we need not determine whether, as HHC asserts, the medical facility rather than the entire corporation is the relevant employer unit. Even if we were to consider just the provisional employees remaining at the Woodhull facility, there is sufficient evidence to find a reasonable relationship between the grievance and the Agreement.

Therefore, Grievant has an arbitrable claim under Article VI, §§ 1(h) and 7, the wrongful termination provisions of the Agreement. Accordingly, the parties are directed 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 New York City Health and Hospitals Corporation's petition challenging arbitrability docketed as BCB-2329-03 be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by Social Service Employees Union, Local 371, and docketed as A-9770-02, be, and the same hereby is, granted.

Dated: July 29, 2003
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

ERNEST F. HART
MEMBER

CHARLES G. MOERDLER
MEMBER