City v. L. 371, SSEU, 71 OCB 8 (BCB 2003) [Decision No. B-8-2003 (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,

Petitioner,

-and-

Decision No. B-8-2003
Docket No. BCB-2301-02
(A-9556-02)

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371,

Respondent.

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DECISION AND ORDER

On September 20, 2002, the City of New York 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 Lika Brown, a provisional Child Protective Specialist, Level II. The grievance asserts that Brown was discharged from her employment for performance-related reasons, and that her termination constitutes a wrongful disciplinary action. ACS claims that Brown's provisional position was filled from the open competitive civil service list for Child Protective Specialist, and, therefore, her discharge on that basis is not subject to the contractual grievance procedure. Because this Board finds that the Union has alleged specific facts sufficient to establish that the grievance is reasonably related to the collective bargaining agreement ("CBA"), we deny ACS's petition.

BACKGROUND

Lika Brown was employed by ACS on June 28, 1999, as a provisional Child Protective Specialist, Level I. On December 28, 1999, she became a provisional Child Protective Specialist, Level II. From May 2000 through April 2001, Brown was assigned to Unit 444 at the ACS Central Office. During that period, Brown's supervisor made numerous complaints about her work performance. In March, 2001, Brown received a performance evaluation which gave her an overall rating of "Unsatisfactory."

On or about May 9, 2001, and December 4, 2001, DCAS promulgated eligible lists from exam numbers 9026 and 8061, respectively, for permanent competitive appointment to the title of Child Protective Specialist. Brown did not sit for either exam. By letter dated April 26, 2002, ACS informed Brown that her provisional position had been filled from the open competitive civil service list for her title and that she would be terminated effective immediately.

Documentary evidence provided by ACS in response to the Union counsel's Freedom of Information Law ("FOIL") request shows that as of the date of Brown's discharge, approximately 839 persons holding the title provisional Child Protective Specialist continued to be employed in ACS. Most of these individuals were hired *after* the date Brown started her provisional employment and, thus, had less seniority than she. The 839 provisionals were still employed in ACS as of July 29, 2002, the date of ACS's FOIL response.

Brown filed a Step I grievance on April 29, 2002, alleging that her termination was the result of wrongful disciplinary action. A Step II determination was issued on July 31, 2002, denying the grievance and stating that Brown's termination was due to the certification of a Civil

Service list for the title in which she served provisionally. On August 13, 2002, Brown filed a request for arbitration alleging a violation of Article VI, Section 1(h) of the parties' collective bargaining agreement ("CBA").[1]

POSITIONS OF THE PARTIES

City's Position

The grievant's replacement as a provisional Child Protective Specialist was due to the requirements of the New York State Constitution, Civil Service Law ("CSL") §65,[2] and §5.5.3 of the Personnel Rules and Regulations of the Department of Citywide Administrative Services ("Personnel Rules).[3] These provisions require the replacement of provisional employees when a civil service list for their position is established.

According to the City, the Board has recognized that actions the City is required to take under the CSL are not grievable under the parties' CBA. CSL §65 is not included in the definition of a grievance under the CBA. In addition, Article VI, §1(b), of the CBA specifically

[1] 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."

[2] 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. . . ."

[3] Section 5.5.3 of the Personnel Rules provides, in relevant part: "A provisional appointment shall be terminated within two months following the establishment of an appropriate eligible list for filling vacancies in such positions. . . ."

excludes disputes involving the City's Personnel Rules[4] from the grievance and arbitration procedures of the CBA. Since ACS filled the grievant's position pursuant to the CSL and the Personnel Rules, the grievant's termination is not a grievable issue.

The request for arbitration also fails to establish a nexus between the contract provision alleged to have been violated and the grievance to be arbitrated. While the request for arbitration alleges a violation of Article VI, §1(h), dealing with claimed wrongful disciplinary action, here, there was no disciplinary action. The grievant was removed due to her civil service status as a provisional employee. Therefore, the Union has failed to state a grievable claim, and its request for arbitration should be dismissed.

Union's Position

The grievant was discharged because ACS was dissatisfied with her job performance. This is evidenced by the "Unsatisfactory" performance evaluation the grievant received and the numerous complaints made by her supervisor. Because her discharge was a disciplinary action, the grievant, a provisional employee with more than two years of service in the same title, was entitled to seek arbitration under Article VI, §1(h) of the CBA.

The City's claim that the grievant was removed due to the movement of the Child Protective Specialist civil service list is a pretext for the true reason for her dismissal – its perception of her misconduct or incompetence. At the time of the grievant's discharge, 839 other provisional employees were still employed in the Child Protective Specialist title. Most of these

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[4] Article VI, § 1(b), states, in relevant part:
". . . provided, disputes involving the personnel Rules and Regulations of the City of New York . . . shall not be subject to the grievance procedure or arbitration."

had less seniority than the grievant. Three months after the grievant's removal, these 839 individuals remained in their provisional positions in ACS.

The Union asserts that the question whether the grievant was discharged because of the movement of the civil service list, as alleged by the City, or for performance-related reasons, as alleged by the Union, inherently is a factual question which should be resolved by an arbitrator, upon a full evidentiary record, and not by the Board. Accordingly, the City's petition should be denied.

DISCUSSION

New York City Collective Bargaining Law § 12-302 states: "It is hereby declared to be the policy of the city to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations." This Board has thus promoted arbitration as the selected means for resolution of disputes. *See District Council 37, Local 375*, Decision No. B-12-93 at 12, *aff'd sub nom. New York City Dep't of Sanitation v. MacDonald*, No. 402944 (N.Y. Sup. Ct. December 20, 1993), *aff'd*, 215 A.D.2d 324, 627 N.Y.S.2d 619 (1st Dep't 1995), *aff'd*, 87 N.Y.2d 650, 642 N.Y.S.2d 156 (1996); *District Council 37, AFSCME*, Decision No. B-14-74.

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.

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 CBA, and there is no claim that arbitration of this claim would violate public policy. Instead, the issue is whether the contractual wrongful discipline provision invoked is reasonably related to the circumstances of the grievant's discharge, or whether the reason given by the City – the need to remove a provisional employee upon the establishment of a civil service eligible list – places this dispute outside the scope of the parties' agreement to arbitrate. We find that the Union has alleged sufficient facts to establish that its claim is reasonably related to the CBA; therefore, 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, Local 371*, Decision No. B-34-2002 at 5; *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.

In *Social Service Employees Union, Local 371*, Decision No. B-27-2002, the union argued that the termination of a provisional employee was for disciplinary reasons, not the establishment of a civil service list, as asserted by the employer. The record showed that disciplinary charges had been brought against the grievant, and that more than 100 other provisional employees serving in the same title had not been discharged. This Board found that those particular facts demonstrated a reasonable relationship between the grievant's termination and the wrongful discipline provision of the CBA; and, therefore, we ordered that the grievance be arbitrated. Similarly, in *Social Service Employees Union, Local 371*, Decision No. B-17-98, the union argued that the termination of a provisional employee was for disciplinary reasons and that the reason asserted by the employer – the establishment of a civil service list – was pretextual. The union asserted that the employer had recently objected to alleged misconduct by the grievant and that all other provisional agency workers in the grievant's title were redeployed, not dismissed. This Board concluded that the record contained sufficient facts to raise issues that should be heard by an arbitrator. *See also District Council 37, Local 375*, Decision No. B-12-93 at 12, *aff'd sub nom. New York City Dep't of Sanitation v. MacDonald*, No. 402944 (N.Y. Sup. Ct. December 20, 1993), *aff'd*, 215 A.D.2d 324 (1st Dep't 1995), *aff'd*, 87 N.Y.2d 650 (1996) (grievant's being criticized as "incompetent" and given a poor evaluation, followed immediately by transfer to inconvenient location, held to raise arbitrable question whether employer's actions were disciplinary in nature).

In contrast, in *Social Service Employees Union, Local 371*, Decision No. B-34-2002, the Union alleged that other provisional employees with less seniority were not discharged when the grievant's provisional employment was terminated, but the Union offered no allegations relating

to any discipline to substantiate the claimed relationship to the wrongful discipline provision of the contract. This Board found that the record was devoid of any allegation of facts or circumstances which are traditionally characteristic of disciplinary action, that the Union's assertion of disciplinary motive was conclusory, and we denied arbitration.

In the present case, Article VI, § 1(h), of the parties' CBA provides for the arbitration of claims of wrongful discipline. The Union contends that the City's reliance on Grievant's provisional civil service status to terminate her was pretextual and that her discharge was actually for disciplinary reasons. The undisputed facts show that the grievant's supervisor made numerous complaints about her work performance and that in March 2001, the grievant received a performance evaluation with an overall rating of "Unsatisfactory." These facts support the Union's contention that ACS was dissatisfied with her performance.

When the grievant was discharged, allegedly pursuant to CSL § 65 and § 5.5.3 of the Personnel Rules, ACS retained 839 other provisional employees in the same title. Months after the grievant's dismissal, the other provisional employees remained in their positions. The City has not offered an explanation for why the CSL and the Personnel Rules required the grievant's termination but not the replacement of the other provisional employees. Moreover, many of the remaining provisional employees had less seniority than the grievant.

We find that the evidence concerning ACS's expressed dissatisfaction with the grievant's performance, together with the documentary evidence concerning the continued employment of other provisional employees in the same title, demonstrates that a reasonable relationship exists between the grievant's termination and the wrongful discipline provision of the CBA. Whether the grievant was discharged because of performance-related reasons, as alleged by the Union, or

because of the movement of the civil service list, as alleged by the City, is a factual question which should be resolved by an arbitrator, not by this Board. We therefore deny the petition challenging arbitrability and direct that the grievance be submitted 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 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, Local 371, be and the same hereby is, granted.

Dated: February 26, 2003
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
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RICHARD A. WILSKER
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M. DAVID ZURNDORFER
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