DOITT v. L. 371, SSEU, 73 OCB 10 (BCB 2004) [Decision No. B-10-2004 (Arb)]

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

-between-

NEW YORK CITY DEPARTMENT OF
INFORMATION TECHNOLOGY AND
TELECOMMUNICATIONS,

Petitioner,

Decision No. B-10-2004
Docket No. BCB-2381-04
(A-10340-03)

-and-

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371,

Respondent.
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DECISION AND ORDER

The New York City Department of Information Technology and Telecommunications ("City" or "DOITT") challenges the arbitrability of a grievance brought by the Social Service Employees Union, Local 371 ("Union") on behalf of Yvonne Cornick. The grievance alleges that Cornick was wrongfully terminated from her position at DOITT for disciplinary reasons in violation of due process rights provided by the Social Services and Related Titles collective bargaining agreement ("CBA") and the Citywide Agreement. The City contends that Cornick was a probationary employee at the time of her termination and that no reasonable relationship exists between the subject matter of the grievance and either Article VI of the CBA or Articles IX and XV of the Citywide Agreement. Because this Board finds that the termination of Cornick's employment as a probationary employee is not reasonably related to the cited provisions of

either of the parties' collective bargaining agreements, the instant petition is granted.

BACKGROUND

On December 11, 2002, Cornick was employed by DOITT to work full-time in the non-competitive title of Community Associate. Under of the Personnel Rules and Regulations of the City of New York ("Personnel Rules"), employees serving in a non-competitive title must serve a probationary term of six months.[1]

Pursuant to Resolution No. 2003-2, the New York City Department of Citywide Administrative Services ("DCAS") functionally transferred employees in several titles, including Community Associate, to fill the new position of 311 Call Center Representative ("CCR"). The functional transfer became effective January 6, 2003. The personnel action also involved reclassification of the titles of the affected employees, effective March 2, 2003.

Under Personnel Rule § 5.2.1, employees serving in the CCR title, which is classified as competitive, must serve a probationary term of one year. By memorandum dated March 6, 2003, from DCAS's Director of Classification and Compensation ("DCAS Memo"), employees who had completed their probationary period in the non-competitive title of Community Associate by the time they were functionally transferred to the competitive title of CCR would become permanent. By contrast, employees who had not completed their probationary period would be

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[1] Personnel Rule § 5.2.1 provides, in pertinent part:
(a) Every appointment . . . to a position in the competitive . . . class shall be for a probationary period of one year . . .

(b) Every original appointment to a position in the non-competitive . . . class shall be for a probationary period of six months. . . .

required to serve the remainder of a one-year probationary period as prescribed by § 5.2.1 of the Personnel Rules, with time already served credited toward the probationary period. In addition, under Personnel Rule § 5.2.7, a probationary employee can be terminated prior to completion of probationary service upon the agency head's determination that the employee's conduct and performance are unsatisfactory.[2]

Prior to transfer, Cornick served nearly three months in the non-competitive title of Community Associate. Consistent with the DCAS Memo, that period of service was credited to her for purposes of completing the one-year probationary period in the competitive CCR title into which she was reclassified.

On June 19, 2003, Cornick began an approved two-month disability leave of absence. At the end of two months, she did not return to work. By letter dated August 28, 2003, DOITT informed Cornick that she could face disciplinary charges for being absent without leave ("AWOL") if she did not submit documentation to extend her leave beyond August 19, 2003. Cornick returned to work on September 19, 2003. By letter dated October 9, 2003, a supervisor informed Cornick that she was considered AWOL from August 19 to September 19, 2003, because of her failure to present the requested documentation.

The City notes that between December 11, 2002, her starting date with DOITT, and October 14, 2003, Cornick had used in excess of 100 hours of sick leave and 560 hours of leave

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[2] Personnel Rule § 5.2.7 provides:
(c) [T]he agency head may terminate the employment of any probationer whose conduct and performance is not satisfactory after the completion of a minimum period of probationary service and before the completion of the maximum period of probationary service by notice to the said probationer and to the commissioner of citywide administrative services. . . .

without pay. By letter dated October 14, 2003, Cornick was informed that her employment was terminated.

On October 20, 2003, the Union filed a grievance at Step One under the CBA as well as under the Citywide Agreement, contending that the termination constituted wrongful discipline. On October 27, DOITT's Director of Labor Relations denied the grievance "because Ms. Cornick's employment status of Probable Permanent does not entitle her to disciplinary rights unless she successfully completes her probationary period." No Step Two and Three determinations were issued.

The Union filed a Request for Arbitration dated December 18, 2003. The grievance alleged that "Cornick was wrongfully terminated from her position as Community Associate," her prior title, in violation of unspecified sections of Article VI (Grievance Procedure) of the CBA and unspecified sections of Articles IX (Personnel and Pay Practices) and XV (Adjustment of Disputes) of the Citywide Agreement.

POSITIONS OF THE PARTIES

City's Position

First, the City argues that Cornick, who served less than three months in the non-competitive Community Associate title, was required to complete a one-year probationary period in the competitive CCR title. Though given credit for the time she served in the prior title, Cornick was terminated during the probationary period because of her attendance deficiency. Cornick's termination is not arbitrable because DOITT's action was taken pursuant to the Personnel Rules, which are expressly excluded from the grievance process, under Article VI,

§ 1(b),[3] of the CBA.

Second, the City argues that the Union has failed to articulate a nexus between the grievance and Article VI of the CBA. Nothing in Article VI gives probationary employees the right to arbitrate their termination. Finally, since the Union has failed to identify any specific sections in the Citywide Agreement which were allegedly violated, the Union has failed to articulate any nexus to this Agreement.

Union's Position

The Union argues that effective March 2, 2003, Cornick was involuntarily transferred to the position of CCR without her request or approval and that there were no changes to her duties or responsibilities. At the time of her discharge, Cornick had served more than six months and the City should not be able to deprive her of due process rights which accrued under Article VI of the CBA. In its Answer, the Union specifically identifies Article VI, §§ 1(f) and 6,[4] of the CBA, both of which pertain to non-competitive employees, and Article XVI[5] of the Citywide

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[3] Article VI, § 1(b), of the CBA provides, in relevant part:
[D]isputes involving the Personnel Rules and Regulations of the City of New York . . . shall not be subject to the grievance procedure or arbitration. . . .

[4] Article VI, § 1(f), provides a grievance procedure, in relevant part, for:
A claimed wrongful disciplinary action taken against a full-time non-competitive class Employee with six (6) months service in title. . . .

Article VI, § 6, provides:
In any case involving a grievance under Section 1(f) of this Article, [prescribed grievance] procedures shall govern upon service of written charges of incompetence or misconduct. . . .

[5] Article XVI of the Citywide Agreement provides, in relevant part:
When a claimed wrongful disciplinary action has been 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, [a prescribed grievance] procedure shall govern. . . .

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 Employees Union,* Decision No. B-03-2003; *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 a collective bargaining agreement. *New York State Nurses Association,* Decision No. B–21–2002 at 7. The interpretation of contract terms and the determination of their applicability in a given case is a function for the arbitrator. *Doctors Council*, Decision No. B-18-2001 at 11; *Social Service Employees' Union, Local 371, D.C. 37, AFSCME*, Decision No. B-4-72 at 2.

Here, the first prong of the test has been met. The parties have obligated themselves to arbitrate their controversies through the four-step grievance procedure and there is no claim that arbitration would violate public policy. Thus, the issue is whether there is a reasonable relationship between the termination of Cornick's employment and the following contractual provisions: (i) Article VI, § 1(f), of the CBA, which provides grievance rights to non-competitive employees with six months in title, (ii) Article VI, § 6, of the CBA, which provides for a disciplinary procedure for non-competitive employees, (iii) Article IX of the Citywide Agreement, concerning personnel and pay practices, and (iv) Article XVI of the Citywide

Agreement, concerning disciplinary procedures for provisional employees with two years of service in title.

In *Social Service Employee Union, Local 371, AFSCME*, Decision No. B-36-2002, an employee who had served more than two years in a provisional title was transferred to a permanent position. Prior to completing a one-year probationary period, as required by § 5.2.1 of the Personnel Rules, his employment was terminated. The union sought to grieve the termination arguing that grievant acquired due process rights after completing two years of service in the provisional title and that when he was appointed to a permanent position, he did not lose these previously acquired rights. The Board granted the City's petition challenging arbitrability on the grounds that the parties had negotiated separate disciplinary provisions for permanent and provisional employees, and the union had failed to identify a provision in the agreement which granted permanent employees who had previously completed two years of provisional service the right to arbitrate their dismissal prior to the end of their probationary period.

In the instant case, Cornick served nearly three months in the non-competitive title of Community Associate prior to her transfer to the competitive CCR title. When terminated, Cornick had worked approximately ten months of her one-year probationary period which included three months as a Community Associate. The Union's claim that Cornick should be granted the same due process rights accorded to non-competitive employees who have completed a six-month probationary period is without merit. The City and the Union have negotiated separate disciplinary provisions for competitive and non-competitive employees. These terms provide for a probationary period of six months for non-competitive employees and one year for competitive employees. The Union has failed to identify a provision in either the CBA or the

Citywide Agreement which grants competitive employees the right to arbitrate their dismissal based on due process rights which would have accrued had they remained in the prior title. In fact, the DCAS Memo expressly provides that non-competitive employees who had not completed their six-month probationary period at the time of transfer to the CCR title were required to complete the one-year probationary period as a competitive employee, with work as a non-competitive employee credited to the one-year period.

Further, this Board has held that competitive employees do not have due process rights with respect to termination during their probationary term and may be dismissed pursuant to the City's Personnel Rules. *Amaker*, Decision No. B-32-98 at 7. Here, it is undisputed that Cornick was serving in a competitive title when she was terminated during her one-year probationary period. Article VI, §§ 1(f) and 6, of the CBA, relied on by the Union, pertain specifically to non-competitive employees and not competitive ones like Cornick. In addition, under Article VI, § 1(b), of the CBA, disputes regarding the City's Personnel Rules, such as the instant claim, are exempt from the grievance procedure. On these grounds, the Union has failed to establish a reasonable relationship between Cornick's termination and the cited provisions of the CBA.

With respect to the Citywide Agreement, Article XVI, which the Union also cites as having been violated, pertains specifically to disciplinary procedures for two-year provisional employees. It is undisputed that Cornick did not have two years of service to her credit; nor did she serve as a provisional employee. Therefore, there is no reasonable relationship between this Article and Cornick's termination. Finally, while the Union claims that the City violated Article IX of the Citywide Agreement, it has failed to specify any section of Article IX. On these grounds, the Union has failed to establish a reasonable relationship between Cornick's

termination and the cited provisions of the Citywide Agreement as well, and, thus, these reasons, 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 docketed as BCB-2381-04, filed by the City of New York be, and the same hereby is, granted; and if it further

ORDERED, that the request for arbitration, filed by the Social Service Employees Union, Local 371, docketed as A-10340-03, be, and the same hereby is, denied.

Dated: May 17, 2004
New York, New York

MARLENE A. GOLD
CHAIR

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