City & Dep’t of Health v. L. 154, DC 37 & Loder, 73 OCB 16 (BCB 2004) [Decision No. B-16-2004 (IP)]

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

-between-

THE CITY OF NEW YORK AND THE NEW YORK DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 154, AND YOLANDA LODER,

Respondents.
---x

Decision No. B-16-2004
Docket No. BCB- 2417-04
(A-10618-04)

DECISION AND ORDER

On July 19, 2004, the City of New York and the Department of Health and Mental Hygiene (“City” or “DOH”) filed a petition challenging the arbitrability of a grievance brought by District Council 37, Local 154 (“Union”) on behalf of Yolanda Loder (“Grievant”). The grievance alleges that Grievant was terminated in violation of the parties’ collective bargaining agreement (“Clerical Agreement”), which provides grievance rights to provisional employees who have served two years in their title. The City argues that the grievance is not arbitrable because Grievant did not serve two years in her provisional title; the time she was absent without pay does not qualify as time served under the Labor Relations Order No. 84/1 (“LRO 84/1”). The Union responds that whether Grievant completed the requisite two-year provisional service to qualify for grievance rights is a matter of contract interpretation. We find that whether

Grievant served two years as a provisional employee is a question for an arbitrator to decide because it requires a determination that LRO 84/1 applies and affects the Clerical Agreement, as alleged by the City. Accordingly, we deny the petition challenging arbitrability and remand the grievance to arbitration.

BACKGROUND

On October 15, 2001, Grievant was appointed as a provisional Public Records Aide at DOH. From March 2 to April 11, 2003, Grievant was absent from work and received Workers' Compensation. Grievant returned to work for the period April 12 to July 30, 2003.

On July 31, 2003, Grievant went on sick leave without pay until September 29, 2003. Extensions for her leave of absence were granted on: September 26, until November 14, 2003; November 14, until December 12, 2003; and December 12, 2003, until January 12, 2004. On January 12, 2004, Grievant did not return to work and did not provide any additional medical documentation for another extension of her leave of absence. By letter dated February 9, 2003, Grievant was terminated, effective immediately.

On March 23, 2004, the Union filed a grievance at Step II alleging that Grievant was improperly terminated while on medical leave and that this constituted wrongful discipline against a provisional employee who had served more than two years in title, in violation of Article IV, § 1(g), of the Clerical Agreement.[1] On April 2, 2004, DOH reviewed Grievant's time and leave record and denied the grievance. DOH stated that the Clerical Agreement did not

---

[1] Article VI, § 1(g), of the Clerical Agreement defines a "grievance" as: "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."

provide Grievant with disciplinary rights because she was not on a leave of absence at the time of her termination and she had worked only 20 months, instead of the required two years, in her provisional title. On April 16, 2004, Grievant filed a Step III grievance. She did not receive a response.

On June 21, 2004, Grievant filed a request for arbitration. The request alleges that Grievant was wrongfully disciplined in violation of Article IV, § 1(g), of the Clerical Agreement. Grievant seeks reinstatement, back pay, and expungement of all disciplinary charges.

POSITIONS OF THE PARTIES

City's Position

______The City argues that the Union has failed to show a nexus between the act complained of and Article IV, § 1(g), of the Clerical Agreement. Grievant did not serve as a provisional Public Records Aide, or in any other title at DOH, for two years and, therefore, has no due process rights. During the course of her employment, Grievant took two extended leaves of absence. One was leave under Workers' Compensation from March 2, to April 11, 2003. The second, according to the City, was leave without pay for the period July 31, 2003, until her termination on February 9, 2004. Under LRO 84/1, which is entitled "Alternative Career and Salary Pay Plan Regulations Applicable to Career and Salary Plan Employees in Certain Classes of Positions Covered by Collective Bargaining Agreements," Grievant's time on leave without pay does not count towards time served in her provisional title. LRO 84/1, § II(6), defines "service" as "active service, not below standard service, while employed in a class of positions subject to these regulations, except as otherwise provided in an Implementing Personnel Order." LRO 84/1

§ II(7), defines "absence" and identifies the discrete types of leave which are considered part of an employee's active uninterrupted service. Leave without pay, unlike Workers' Compensation, is not identified as a qualifying absence and cannot be included in the calculation of active service. Since Grievant did not serve two years in her provisional title as set forth in LRO 84/1, she is not entitled to disciplinary rights under the Clerical Agreement. Therefore, the request for arbitration must be denied.

Union's Position

The Union argues that whether Grievant completed the requisite two year provisional service to qualify for grievance rights is a matter of contract interpretation for the arbitrator to decide. Since Grievant received her termination notice three months after her two year anniversary at DOH, she was a provisional employee and entitled to arbitrate her termination.

DISCUSSION

It is the public policy of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances. NYCCBL § 12-302; *District Council 37, Local 2507*, Decision No. B-18-2002 at 10. 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 Clerical Agreement. *New York State Nurses Ass'n,* Decision No. B-21-2002 at 8.

Here, the parties have obligated themselves to arbitrate their controversies through a grievance procedure, and there is no claim that this arbitration would violate public policy or that it is restricted by statute. We find that the Union has set forth a nexus between the grievance and the provision of the Clerical Agreement providing grievance rights to a provisional employee with more than two years in title who claims to be wrongfully disciplined.

The issue raised by the City, in reliance on LRO 84/1, is whether Grievant served the requisite two years under the terms of the Clerical Agreement. The Board has repeatedly stated that the interpretation of contract terms and the determination of their applicability in a given case is a function for the arbitrator. *Social Services Employees Union,* Decision No. B-3-98 at 6; *Social Service Employees' Union, Local 371,* Decision No. B-4-72 at 2. In *Social Service Employees' Union, Local 371*, Decision No. B-3-2003, the dispute centered on whether a grievant's prior provisional service was in the same or similar title as the title from which he was terminated so as to constitute two years of service that would qualify him for arbitration rights. Since the dispute turned on the meaning of the term, "same or similar title," the Board referred the matter to the arbitrator. *See also Organization of Staff Analysts,* Decision No. B-28-94 (conflict concerning parties' differing interpretations of provision concerning whether grievant had completed the requisite two years of service in order to qualify for arbitration presented a question of contract interpretation for an arbitrator to decide).

Similarly, in *District Council 37*, Decision No. B-52-91, the Board was asked to determine the arbitrability of a grievance filed by a provisional employee whose provisional

status had been "extended" six months by her supervisor. The employee was terminated more than two years after her start date but before her extension was completed. The Board found that whether the extension of grievant's provisional status affected the amount of time necessary to be entitled to rights guaranteed by the parties' agreement presented a substantive question of contract interpretation for an arbitrator to decide.

In this case, the City is asking the Board to determine the meaning of "served for two years" and find that the grievance is not arbitrable because Grievant has not fulfilled this requirement. The Clerical Agreement does not define the term, "served for two years." Instead, the City invites the Board to consider LRO 84/1, §§ II(6) and (7), and conclude that, under these sections, Grievant's time on an unpaid leave of absence does not count towards her two years of service. We decline to do so. First, such an inquiry would require that we make a determination concerning the LRO's applicability to this case despite the lack of evidence that it has been incorporated into the Clerical Agreement. Second, we would be required to interpret the meaning of the terms "service" and "absence" as set forth in LRO 84/1 and determine their effect on Article IV, § 1(g), of the Clerical Agreement. Since such determinations are the function of an arbitrator, we deny the petition challenging arbitrability and refer this matter 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, the petition challenging arbitrability filed by the City of New York and the Department of Health and Mental Hygiene, docketed as BCB No. 2714-04, hereby is denied; and it is further,

ORDERED, that the request for arbitration filed by District Council 37, Local 154 on behalf of Yolanda Loder, docketed as A-10618-04, hereby is granted.

Dated: September 27, 2004
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

VINCENT BOLLON
MEMBER