District Council 37, Local 371 (Chrisman), 75 OCB 26 (BCB 2005)

[Decision No. B-26-2005] (Docket No. BCB-2438-04) (A-10715-04).

Summary of Decision: City challenged a grievance alleging that grievant was wrongfully discharged, for failure to maintain residency, in violation of the applicable collective bargaining agreements. The Board granted the petition and held that failure to maintain residency, a qualification of employment, does not give rise to arbitration rights under the parties' contractual wrongful discipline procedures. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK &
DEPARTMENT FOR THE AGING,

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 371, AFSCME
AFL-CIO, AND JOHN CHRISMAN,

Respondents.

DECISION AND ORDER

On October 26, 2004, the City of New York and the Department for the Aging ("City" or "Department") filed a petition challenging the arbitrability of a grievance brought by District Council 37, Local 371 ("Union"). The grievance asserts that the Department wrongfully terminated John Chrisman ("Grievant") in violation of Article VI, § 1(g) of the Engineering and Scientific Agreement ("Agreement") and Article XVI of the Citywide Agreement ("Citywide"). The City alleges that the grievance is not arbitrable because the Union cannot establish a nexus

between the termination, which was due to Grievant's failure to maintain city residency, a qualification of employment, and the Agreement or the Citywide. Because the failure to maintain a qualification of employment, such as residency, does not give rise to arbitration rights under the parties' contractual wrongful discipline procedures, this Board finds that the Union has not established a reasonable relationship between Grievant's termination and the cited provisions.

BACKGROUND

Pursuant to New York City Administrative Code ("Admin. Code") §§ 12-119 to 12-121, the Department of Citywide Personnel Services ("DCAS") issued Personnel Services Bulletin 100-8, dated June 30, 1997 ("Bulletin") which sets forth the City's residency requirement. Both the Admin. Code and the Bulletin provide that the failure to establish or maintain residency shall result in forfeiture of employment but that prior to dismissal, an employee shall be given notice and an opportunity to contest the charge.[1]

---

[1] Admin. Code § 12-120 provides:
Except as otherwise provided . . . any person who enters city service . . . (i) shall be a resident of the city on the date that he or she enters city service or shall establish city residence within ninety days after such date and (ii) shall thereafter maintain city residence as a condition of employment. Failure to establish or maintain city residence . . . shall constitute a forfeiture of employment; provided, however, that prior to dismissal for failure to establish or maintain city residence an employee shall be given notice of and the opportunity to contest the charge that his or her residence is outside the city.

Section VI of the Bulletin provides:
Failure to establish or maintain City residence . . . shall result in a forfeiture of employment. However, prior to dismissal for failure to establish or maintain City residence, an employee shall be given notice of and the opportunity to contest the charge that his or her residence is outside the City. The notice should be in writing, but should not resemble a disciplinary charge. An employee may respond to this allegation of non-

Grievant was appointed to the title of Provisional Associate Space Analyst by the Department on July 31, 2000. At that time, Grievant resided in Stamford, Connecticut, and acknowledged that he would establish a city residence, as required, within 90 days. In October 2000, Grievant submitted proof of New York City residency.

In April 2003, the Department received information that Grievant was no longer residing in New York City and had been commuting daily from Connecticut. The City conducted a investigation and found that Grievant had a Connecticut State Driver's license and a car registered with a Stamford address. Moreover, Grievant received mail at that address, a home which he owned. Grievant also served jury duty on August 5, 2003, in Connecticut. Finally, City investigators observed Grievant on six afternoons between May 6 and September 24, 2003, traveling from New York City by train to Stamford and on four mornings between August 21 and September 25, 2003, arriving at the Stamford train station and boarding a train to New York City.

According to the Union, in late 2001 and early 2002, Grievant traveled frequently to Connecticut to visit his ill mother who passed away in June 2002. After her death, Grievant was required to attend to matters relating to his mother's estate in Connecticut. In addition, Grievant developed fibermyalgia which made travel a physical hardship. The Union alleges that Grievant, at an unspecified time, notified the Department about the fact that "he needed to temporarily reside in Connecticut" and that he was given express approval from an Assistant Commissioner to reside there. The Department mailed pay stubs to a Connecticut post office box. At no time was Grievant informed that his temporary residence in Connecticut was not approved or that he

---

> residency by providing a written response and relevant documents in support of a claim of residence. . . . Under no circumstances should an employee be subject to disciplinary charges when the sole allegation is one of non-residence.

would be subject to termination. Grievant alleges that he intended to return to New York City.

By memorandum dated January 6, 2004, the Department advised Grievant that he was to appear at the Employment Law Unit on February 2, 2004, at which time he would have an opportunity to contest the allegations of non-residence, pursuant to Admin. Code § 12-120. Grievant was advised that he could appear with a Union representative and/or an attorney.

On February 2, 2004, Grievant appeared at the meeting and admitted that he was living in Connecticut. According to the Union, Grievant stated that he had approval of the Department to live there. According to the City, Grievant stated that his landlord was renovating his building and that he could not move back to New York City until this was done.

By letter dated February 5, 2005, Grievant was informed that he was in violation of the City's residency requirement and that he had forfeited his employment. Grievant's employment was terminated effective February 6, 2004.

On March 9, 2004, Grievant filed a Step I grievance alleging wrongful termination in violation of Article VI, § 1(g), of the Agreement and Article XVI of the Citywide.[2] On March 17, 2004, the Department found that the grievance was not subject to the grievance procedure because the failure to maintain residency is a non-disciplinary matter. Grievant appealed but failed to appear at Step III hearing. The appeal was dismissed by letter dated August 4, 2004.

On September 14, 2005, the Union filed a request for arbitration. The grievance sought

---

[2]Article VI, § 1 (g), of the Agreement provides that "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."

Article XVI, of the Citywide Agreement sets forth the disciplinary grievance procedure for provisional employees who have served in the same title or related occupational group in the same agency for two or more years.

to be arbitrated is whether the Department wrongfully terminated Grievant in violation of Article VI, § 1(g), of the Agreement and Article XVI of the Citywide. The Union seeks Grievant's reinstatement, back pay, and expungement of all disciplinary charges.

POSITIONS OF THE PARTIES

City's Position

The City argues that Grievant is a provisional employee with no rights under Civil Service Law ("CSL") § 75. Unlike permanent employees covered by CSL § 75, Grievant's disciplinary rights stem only from collective bargaining agreements between the parties. The Board and the courts have recognized that the failure to maintain residency is not misconduct which gives rise to disciplinary hearing rights under the applicable collective bargaining agreements. Therefore, there is no nexus between the termination and the cited provisions.

Union's Position

The Union argues that the City should be estopped from arguing that termination for failure to maintain residency does not constitute "a claimed wrongful disciplinary action" under the agreements. The City, pending its appeal of *Felix v. City of New York Dep't of Citywide Administrative Services,* 309 A.D.2d 626 (1st Dep't 2003), advised City agencies that decisions to remove permanently appointed employees for failure to maintain residency must be pursued through CSL § 75. If Grievant had been a permanent employee, he would have been entitled to a hearing pursuant to CSL § 75 as provided by Article VI, § 1(e), of the Agreement.[3] Therefore,

---

[3] Article VI, § 1(e), of the Agreement defines a grievance as:
A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law . . . upon whom the agency head has served written charges of

Grievant is entitled to the due process protections set forth in the parties' collective bargaining agreements. Moreover, the question whether Grievant violated the residency requirement is a question of fact which should be heard by the arbitrator.

DISCUSSION

It is 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. However, the Board 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.

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 at 8.

Here, the parties have obligated themselves to arbitrate their controversies through a

---

incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status

grievance procedure, and there is no claim that this arbitration would violate public policy or that it is restricted by statute. Thus, the issue is whether there is a reasonable relationship between Grievant's termination and the parties' disciplinary procedures. We find that the Union has failed to establish a reasonable relationship between the termination and Article VI, § 1(g), of the Agreement or Article XVI, of the Citywide because the failure to maintain a qualification of employment, such as residency, does not give rise to arbitration rights under these provisions.

In *Felix v. City of New York Dep't of Citywide Administrative Services*, 3 N.Y.3d 498 (2004), Francisco Felix, a DCAS employee, signed an agreement in 1993 that he would maintain residency in New York City. In 2001, DCAS suspected that Felix was living outside the City in violation of Admin. Code § 12-120. DCAS scheduled a meeting at which Felix was afforded the opportunity to be represented by an attorney and a union representative and to present documents supporting his position that he lived in the City. Felix appeared with a union representative but brought no documentation except for a driver's license. Felix claimed that he was not aware that he was required to be a resident. Felix was then given two extra days to gather more information. When he returned with his union representative, Felix provided eight documents, seven of which were found by DCAS to have been created in the past two days for the purpose of establishing residency. The eighth document was a 2000 W-2 form which showed Felix's address to be outside the City. Accordingly, DCAS determined that Felix was not a City resident and terminated him pursuant to Admin. Code § 12-120. Felix appealed in an Article 78 proceeding, alleging that he had been terminated without a pre-removal hearing under CSL § 75(1). The lower court ordered that Felix be reinstated on the grounds that he was improperly denied a CSL § 75 hearing and the First Department affirmed. *Felix v. New York City Dep't of Citywide*

Administrative Services, No. 40284/02 (Sup. Ct. N.Y. Co. Oct. 16, 2002), *aff'd*, 309 A.D.2d 626 (1st Dep't 2003).

The Court of Appeals reversed and found that the failure to establish and to maintain residency is a violation of the City's residency requirement, which results in forfeiture of employment, and is not misconduct that would entitle a City employee to a pre-removal hearing. The Court stated:

> We note at the outset that the act of failing to maintain one's residence within the municipality is separate and distinct from an act of misconduct by a municipal employee in the performance of his or her work. Failure to maintain residence renders an individual ineligible for continued municipal employment under New York City Administrative Code § 12-120, while an act of misconduct invokes Civil Service Law § 75 disciplinary procedures, including a pre-removal hearing if removal of the municipal employee is contemplated (*see e.g., Mandelkern v. City of Buffalo, et al.,* 64 A.D.2d 279 [4th Dep't 1978]).

Felix, 3 N.Y.3d 498, 505 (2004). The Court further found that the City's residency requirement has a different purpose than that underlying CSL § 75(1) and, accordingly, a pre-removal hearing is not required for dismissals pursuant to Admin. Code § 12-120. *Id.* at 505-506. Furthermore, the procedure afforded Felix by DCAS to contest the charges satisfied state and federal due process requirements and DCAS correctly determined that Felix had forfeited his position. *Id.* at 506; *see also Naliboff v. Davis*, 133 A.D.2d 632 (2d Dep't 1987) (no hearing is required for termination of emergency service dispatchers for failure to maintain State certification license); *Mandelkern v. City of Buffalo,* 64 A.D.2d 279 (4th Dep't 1978) (failure to maintain residency, a qualification of employment, results in forfeiture of employment).

Like the Courts, the Board has consistently held that the failure to maintain a qualification of employment, such as residency or a State license, does not give rise to arbitration rights under

the parties' contractual wrongful discipline procedures. *District Council 37, Local 983,* Decision No. B-24-2005 (license); *District Council 37, Local 1407,* Decision No. B-7-2005 (residency)*; District Council 37, Local 2507,* Decision No. B-18-2001 (license); *District Council 37, Local 375,* Decision No. B-14-2001 (residency); *Organization of Staff Analysts,* Decision No. B-41-96 (residency).

Consistent with this case law, we find that the Department had the right to terminate Grievant because his failure to maintain residency, a qualification of employment, is not misconduct and does not give rise to arbitration rights under the parties' contractual wrongful discipline procedures. Accordingly, there is no reasonable relationship between Grievant's termination and Article VI, of the Agreement or Article XVI of the Citywide.

Contrary to the dissent's opinion, estoppel cannot be invoked to require the City to provide a disciplinary hearing when one is otherwise unavailable. *Cf. Jackson v. Triborough Bridge and Tunnel Auth.*, 155 Misc. 2d 715, 720-21 (Sup. Ct. N.Y. Co. 1992) (estoppel may not be raised against a public agency to require disciplinary hearing because petitioner had agreed to be a probationary employee and was, thus, subject to termination without a hearing). While it is alleged that Grievant relied on the Department's permission to live in Connecticut and that as a result his termination for failure to maintain city residency was improper, such action is not reviewable under the parties' contractual wrongful discipline procedures which is limited to review of employee incompetence or misconduct. Therefore, dismissal of the grievance is without prejudice to any rights that Respondents 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 City of New York and the Department for the Aging, docketed as BCB-2438-04, be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 371, docketed as A-10715-04, be, and the same hereby is, denied.

Dated: September 21, 2005
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

I dissent. CHARLES G. MOERDLER
MEMBER

I dissent. BRUCE H. SIMON
MEMBER

DISSENT BY LABOR MEMBERS

I dissent. A fundamental question of fact is presented and plainly appears from the face of the majority opinion: Did the Petitioners by word and deed create an estoppel?

Respondents maintain that the Petitioner Department was notified as to the factum of temporary residence outside the City of New York, that the employee was given express approval by an Assistant Commissioner and, significantly, the Department "mailed pay stubs to a Connecticut post office box" (thereby indicating knowledge and possible acquiescence by Petitioners).

On the totality of this Record a question of fact is raised. It is not this Board's province to resolve such factual issues; rather, it is for the Arbitrator to determine on a complete record.

Dated: September 21, 2005
New York, New York

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
MEMBER