District Council 37 Local 1549, 75 OCB 33 (BCB 2005)

[Decision No. B-33-2005(Arb)] (Docket No. BCB-2465-05) (A-10870-04).

Summary of Decision: City challenged the arbitrability of a grievance alleging that the Union cannot establish a nexus to the parties' agreement and that Grievant waived her right to a hearing when she agreed to a six month probation as part of a settlement of a prior disciplinary matter. The Union contended that DOITT wrongfully terminated Grievant in violation of Article VI, § 1(g), which provides hearing rights to provisional employees with more than two years of service in their title, and that the issue whether she waived her right to grieve should be presented to an arbitrator. The Board found that the Union failed to demonstrate a reasonable relationship between Grievant's termination and Article VI, § 1(g), of the parties' agreement because Grievant did not serve two years in her provisional title at DOITT. Accordingly, the Board granted the City's petition. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

CITY OF NEW YORK &
THE NEW YORK CITY DEPARTMENT OF INFORMATION TECHNOLOGY AND COMMUNICATIONS,

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 1549 (QUADISHA AVERA),

Respondent.

DECISION AND ORDER

On March 14, 2005, the City of New York and the City Department of Information Technology and Telecommunications ("City" or "DOITT") filed a petition challenging the arbitrability of a grievance brought by District Council 37, Local 1549 ("Union") on behalf of

Quadisha Avera ("Grievant"). The grievance asserts that DOITT wrongfully terminated Grievant in violation of Article VI, § 1(g), of the Clerical Agreement ("Agreement"). The City argues that the grievance is not arbitrable because Grievant signed a Stipulation and Agreement ("Stipulation") that resolved a prior disciplinary proceeding for excessive lateness and agreed to a six month probation. When Grievant subsequently contravened the terms of DOITT's time and leave policies, she was terminated pursuant to the Stipulation. The Union argues that the issue whether Grievant waived her right to grieve her termination should be presented to an arbitrator. This Board finds that the Union failed to demonstrate a reasonable relationship between Grievant's termination and Article VI, §1(g), of the Agreement because Grievant did not serve two years in her provisional title at DOITT. Thus, the City's petition is granted.

BACKGROUND

On September 18, 2000, Grievant was hired by the City of New York Department of Housing Preservation and Development ("HPD") and received a non-competitive appointment to the title of City Seasonal Aide. It is undisputed that Grievant served a probationary period in this title.

According to the City, on January 5, 2003, Grievant was functionally transferred to DOITT. On March 2, 2003, Grievant received a provisional appointment as a Call Center Representative at DOITT.

Grievant was subsequently served with disciplinary charges for violating Rule 8C of DOITT's Code of Conduct, which states that excessive employee lateness is grounds for a disciplinary action. Specifically, the charges alleged that Grievant was excessively late or absent from work twenty-eight times from February 28, 2003, through January 15, 2004.

An Informal Conference was scheduled for March 24, 2004. On that date, in settlement of the disciplinary charges against her, Grievant signed the Stipulation. Phyllis Streeter, Grievance Representative for the Union, also signed the document as a witness to Grievant's acceptance of the terms of the Stipulation. The Stipulation provides:

> I, Quadisha Avera, acknowledge receipt of a copy of the Charges and Specifications and a copy of the provisions of Section 75 and 76 of the Civil Service Law. I have been advised that the penalty recommended for said Charges and Specifications as a result of the Settlement Stipulation in lieu of the Informal Conference scheduled for 3/25/04 is as follows:
>
> **Penalty:**
> 1. Two days deducted from annual leave bank.
> 2. Six months probation.
>
> I am fully aware that I am entitled to a disciplinary hearing pursuant to Section 75 of the Civil Service Law and that I may elect to appeal from an adverse decision rendered after such hearing either to the Supreme Court of the State of New York or to the New York Civil Service Commission in accordance with the procedures set forth in Section 76 of the Civil Service Law. **But, I waive all rights granted to me under the provisions of Section 75 and 76 of the Civil Service Law and I accept the penalty specified above.**
>
> I am also fully aware that if I am covered by a collective bargaining agreement between a union and the City of New York that affords the grievance procedure as an alternative to the Civil Service Law procedure, referred to above, my union, with my consent, may alternatively choose to proceed in accordance with the Grievance Procedure set forth in the said union agreement. **But, I waive all rights of appeal through the grievance procedure granted to me under any and all collective bargaining agreements between any union which represents my title and the City of New York and I ACCEPT THE PENALTY SPECIFIED ABOVE.**
>
> If this penalty is approved by the appointing officer, I accept such decision. I am fully aware that this is waiver [sic] of my right to a Section 75 hearing or to a hearing under the grievance procedure alternative is **FINAL, IRREVOCABLE AND BINDING.**

(Emphasis in original.)

According to the City, on July 15, 27, and 29, 2004, Grievant arrived late to work. On August 5, 2004, she was given a warning memorandum concerning these latenesses. On August 30 and September 1, 2004, Grievant again arrived late to work. On September 21, 2004, Grievant was sent a letter informing her that she had been terminated in accordance with the terms of the Stipulation.

On October 19, 2004, the Union filed a grievance challenging Grievant's termination. On November 24, 2004, DOITT denied the grievance, citing the waiver provision in the Stipulation as the basis for its decision. On December 13, 2004, the Union filed a request for arbitration alleging that Grievant was wrongfully terminated in violation of Article VI § 1(g), of the Agreement. Article VI, § 1(g), of the 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." The Union seeks Grievant's reinstatement with back pay and expungement of all disciplinary charges.

POSITIONS OF THE PARTIES

City's Position

The City argues that the request for arbitration should be dismissed because the Union cannot establish a nexus between the termination of Grievant pursuant to the Stipulation and Article VI, §1(g), of the Agreement. The City contends that Grievant agreed to extend her probation period for six months. Probationary employees are not contractually entitled to receive written charges and specifications. In signing the Stipulation, which was executed in consideration of DOITT's resolution of the pending disciplinary charges, Grievant waived her right to be served with charges

during that six month period and consequently is not covered by Article VI, §1(g). Since Grievant waived grievance rights and continued to be late to work during her probationary period, DOITT had authority to terminate her without a hearing.

The City also argues that at the time Grievant was served with disciplinary charges, as well as the date of her termination, she was a provisional employee with less than two years of service in the same or similar title.

Union's Position

The Union argues that the waiver of rights pertains only to the disciplinary matter at hand and does not mean that Grievant agreed to waive her right to appeal future matters. The absence of terms making specific reference to future violations means that the Stipulation referred only to the instant disciplinary proceeding. Moreover, while the Stipulation refers to probation, it fails to mention the terms of that probation or that Grievant explicitly waived her right to a hearing regarding her termination. Since the Stipulation is vague and waiver of an employee's rights must be explicit, a waiver of future hearing rights should not be inferred.

Furthermore, the Union argues that the City is wrong in asserting that Grievant agreed to "extend her probation for six months," for Grievant was not on probation when the Stipulation was signed. The Stipulation would have to state explicitly that Grievant was becoming an entry-level probationary employee. Since DOITT was the drafting party, the Stipulation should be construed against it if there is a question concerning its meaning. In any event, the issue how to construe the Stipulation is for the arbitrator.

The Union also argues that Grievant's entitlement to arbitration dates from her original hire on September 18, 2000, and not to her appointment to her title as Call Center Representative on March 2, 2005.

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 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 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, which provides grievance rights to provisional employees who have served for two years in the same or similar title or related occupational group in the same agency, because Grievant did not serve two years in her provisional title at DOITT.

In *Social Services Employees Union, Local 371*, Decision No. B-34-98, the Board denied a grievance brought under an identical contract provision finding that service in a prior agency could

not be counted towards two years of service in the provisional title at the agency where grievant's employment was terminated. Even though the second agency was created to perform certain functions and services previously performed by the prior agency and was staffed by employees transferred from the prior agency, it was apparent that the two agencies were separate entities and could not be considered the same agency. Since grievant was a provisional employee who served in her title for less than two years in the second agency, the cited contract provision providing hearing rights did not apply. *See also Social Services Employees Union, Local 371*, Decision No. B-36-2002 (hearing rights accrued at prior agency in a separate and distinct title not transferable to new title); c*f. Social Services Employees Union, Local 371*, Decision No. B-10-2004 (grievant not entitled to a hearing under prior title's contract provision which provided rights to non-competitive employees who served for six months because she was transferred to a competitive title which required one year of service and was terminated before she had done so.).

Here, Grievant was transferred to DOITT on January 5, 2003, and was appointed to the provisional title of Call Center Representative on March 2, 2003. She was subsequently terminated on September 21, 2004, which is less than two years from either her transfer to DOITT or her appointment to her provisional title at that agency. Since Grievant was not "a provisional employee who has served for two years in the same or similar title or related occupational group in the same agency" she does not fall within the definition of a grievance set forth in Article VI, §1(g), of the Agreement. Contrary to the Union's claim, Grievant's entitlement to arbitration as a provisional Call Center Representative at DOIIT does not date from her appointment to the non-competitive title of City Seasonal Aide at HPD.

Since there is no nexus between Grievant's termination and the parties' disciplinary procedures we need not address the question whether Grievant waived her right to a hearing under the terms of the Stipulation.

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 of Information Technology and Communications and docketed as BCB No. 2465-05 hereby is granted; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 1540 on behalf of Quadisha Avera and docketed as A-10870-05 hereby is denied.

Dated: December 5, 2005
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

GABRIELLE SEMEL
MEMBER

I concur in the result: CHARLES G. MOERDLER
MEMBER