

District Council 37, Local 768, 77 OCB 14 (BCB 2006)

[Decision No. B-14-2006(Arb)] (Docket No. BCB-2530-06) (A-11494-05).

Summary of Decision: The City challenged a grievance alleging that DHMH, in violation of the contract and a written policy concerning evaluations, reassigned grievant to her underlying civil service title. The City argued that the sources invoked did not grant grievance rights to probationary employees. The Board granted arbitration because the demotion was reasonably related to the cited policy covering probationers. ***(Official decision follows.)***

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Arbitration

-between-

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

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 768, AFSCME,

Respondent.

DECISION AND ORDER

On January 13, 2006, the City of New York and the Department of Health and Mental Hygiene (“City” or “DHMH”) filed a petition challenging the arbitrability of a grievance brought by District Council 37, Local 768, AFSCME (“DC 37” or “Union”), on behalf of Jacqueline Montgomery. The request for arbitration alleges that, in violation of the parties’ Health Services Agreement (“Agreement”) and the Agency Guide to Performance Evaluation for Sub-ManAGERIAL Positions (“Agency Guide”), DHMH wrongfully reassigned Montgomery to her permanent civil

service title several months after her promotion. The City argues that since Montgomery was on probation when she was demoted, the Agreement and the Agency Guide are not sources of right to arbitrate the issue presented. This Board finds that because the Agency Guide is a written policy or procedure that covers probationary employees, the Union has shown a reasonable relationship between Grievant's reassignment and the provisions invoked. Accordingly, we deny the petition challenging arbitrability and grant arbitration.

BACKGROUND

Jacqueline Montgomery ("Grievant") was hired by the City as a provisional employee in the competitive civil service title of Public Health Sanitarian on September 20, 1993, and was permanently appointed to that title on October 26, 2001. She was assigned to a Group Day Care Unit. On July 6, 2004, Grievant was promoted to the competitive title of Associate Public Health Sanitarian. According to the City, she was transferred to a newly formed Day Care Lead Unit in September 2004 and given specific written instructions in October. The Union, on the other hand, states that Grievant was transferred on November 19, 2004, and denies that she was given written instructions. Both parties agree that when she started in her new position, DHMH did not provide Grievant with tasks and standards on which she would be evaluated. The City states that formal tasks and standards were not ready to be issued. In a memorandum dated March 4, 2005, DHMH informed Grievant that as of March 7, 2004, she would be reassigned to her permanent civil service title of Public Health Sanitarian and sent back to a Group Day Care Unit because she received an unsatisfactory performance evaluation for the period of July 16, 2004, to February 15, 2005, in her position of Associate Public Health Sanitarian.

On June 23, 2005, Grievant filed a Step I grievance claiming that there was a violation, misapplication, or misinterpretation of § 5.2.1(a) of the New York Department of Personnel Rules and Regulations (“Personnel Rules”), because Grievant was not given the opportunity to complete her one-year probation.¹ The next day, the DHMH Director of Labor Relations, reviewing the grievance at Step II instead of Step I, denied the grievance on the ground that under Personnel Rule § 5.2.7(c), a probationary employee in a competitive title may be terminated after a minimum period of four months and before the completion of probation if an agency head determines that the employee’s conduct and performance are unsatisfactory.²

On June 27, 2005, Grievant filed an amended Step II grievance appealing the Step I response and claiming that DHMH violated its own rules when it failed to give Grievant tasks and standards at the beginning of her evaluation period. The Union cited to Section II (C)(2) and (3), “Overview of Evaluation Process,” in the Agency Guide issued by the New York City Department of Personnel to all City agencies. The Introduction to the Agency Guide, Section I, states that it is “intended to provide agencies with the technical assistance and guidance necessary to administer their sub-managerial performance evaluation programs, as mandated by the City Charter.” The Introduction

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

² Personnel Rule § 5.2.7(c) provides, in pertinent part:
Notwithstanding the provisions of paragraphs 5.2.1 and 5.2.7(a) the 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. The specified minimum period of probationary service . . . shall be:

* * *

(2) four months for every promotion to a position in the competitive or labor class.

continues:

Performance evaluation is a valuable management tool to be used as the basis for personnel decisions – such as promotion, demotion or termination, transfers, monetary rewards, and training.

* * *

In order to insure uniformity of performance evaluation of city workers employed in different city agencies, the system described in this guide is the only one which has been approved for agency use. Agencies feeling that another system or modifications to this system may better serve their needs may submit their complete plan to the City Personnel Director for approval. Any deviations from this guide must be approved before implementation by the agency.

Section II (A)(2)(a), “Period of Service Covered for Permanent and Probationary Employees,”

reads as follows:

The rating period should be no greater than 12 months. For probationary employees, interim evaluations should be submitted every three months and a final report must be prepared before the end of the probationary period. In each interim period, the supervisor must recommend that the probationary employee either be retained for an additional three month period or terminated from the position. All competitive class employees must receive a final probationary rating of good or better to become permanent employees.

Section II (C), Overview of Evaluation Process, provides, in pertinent part:

Normally, the first step in implementing a performance evaluation system is for agencies to develop a master list of tasks and standards for each title in the agency. Each list will contain all of the major tasks (with standards) performed by employees in the title. After the initial formulation of master lists of tasks and standards, the sequence of steps in the evaluation process is as follows:

1. From the master lists, each supervisor will extract appropriate tasks for each employee under his or her supervision and enter them on the employee’s Tasks and Standards Sheet. . . .
2. At the beginning of each evaluation period, the supervisor reviews each employee’s Tasks and Standards Sheet to ensure that it is up to

date and actually reflects the work that the employee does. Normally, when feasible, the supervisor should consult with the employee as to work actually being performed. If the tasks of the employee have changed, the Tasks and Standards Sheet is revised to reflect the changes. If there are changes, the supervisor draws up a new sheet which is signed by the employee, the supervisor and the superior.
. . . (Footnote omitted.)

3. During the evaluation period, the supervisor meets regularly with the employee to discuss the employee's performance as compared to standards. Any necessary corrective actions are discussed and initiated. The supervisor continues to observe the employee's behavior in carrying out tasks and, when appropriate, reviews work products.

On July 20, 2005, in response to the Step II request, DHMH Director of Labor Relations stated that Grievant "now claims that she didn't receive her Tasks and Standards until January 14, 2005." He explained that these were not ready to be issued when the Day Care Lead Unit was established in September 2004 but that DHMH provided employees with detailed written instructions. Since the Director found that Grievant failed to perform satisfactorily while she was in her promotional title for eight months, July 6, 2004, to February 15, 2005, he denied the grievance. On August 25, 2005, Grievant's Step III was denied on the ground that under the Personnel Rules employees may be terminated during their probationary period for unsatisfactory performance.

DC 37 filed a request for arbitration on October 18, 2005, claiming that DHMH violated Article VI, § 1(b), of the Agreement and the Agency Guide when Grievant reverted from her promotional title to her underlying civil service title.³ The remedy sought is that the employer

³ Article VI, § 1(b), of the Agreement defines "grievance" as:

A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; provided, disputes involving the Personnel Rules and Regulations of the City of New York . . . shall not be subject to the grievance procedure or arbitration. (Emphasis removed.)

appoint Grievant back to her rightful position.

POSITIONS OF THE PARTIES

City's Position

The City argues that Grievant's reassignment for failure to complete probation successfully is not arbitrable under the Agreement. Article VI, § 1(b), expressly excludes disputes involving Personnel Rules from the grievance process. Permanent employees have no due process rights during a probationary term and can be dismissed at any time under the Personnel Rules.

Here, the action was taken pursuant to Personnel Rules § 5.2.1(a), which provides that every promotion to a position in the competitive class shall be for a probationary period of one year, and § 5.2.7(c), which provides that an agency may terminate a probationary employee in a competitive title four months after the employee was promoted but before the maximum period. Grievant reverted to her underlying civil service title after eight months; therefore, the reassignment conformed to the Rule. Because any dispute concerning Grievant's reversion to her underlying title is not arbitrable under the Agreement, the Union cannot show a reasonable relationship between the reassignment and the contractual provision invoked.

The City also contends that the Union has not shown a nexus between the action complained of and the Agency Guide. In the request for arbitration the Union did not cite to a specific provision that would grant probationary employees the right to arbitrate a reassignment. Moreover, insofar as the Agency Guide is a Personnel Rule, Article VI, § 1(b), of the Agreement excludes arbitration over a dispute concerning its provisions. Finally, the City asserts that failure to provide an employee with tasks and standards when these do not yet exist for a new unit is not a violation of the Agency Guide.

Union's Position

The Union asserts that it has established a nexus between the reassignment and the sources of right to arbitration. The Agency Guide is a “written policy” under Article VI, § 1(b), of the Agreement; therefore, the Agency Guide is within the contractual definition of the term “grievance.” The City does not dispute that Grievant did not receive the required Tasks and Standards Sheet when she was promoted, and the Agency Guide provides that a newly assigned employee must receive tasks and standards at the outset.

Furthermore, the Union states that this Board favors resolution through impartial arbitration. The Union has raised questions whether DHMH gave Grievant written directions in a memorandum that would be the equivalent of tasks and standards and whether Grievant was actually promoted to her new job on November 19, 2004. If the date was November 19, then, given the March 7, 2005, reassignment date, she reverted to her underlying title earlier than the minimum of four months required by the Personnel Rules. These factual questions should be for an arbitrator to decide.

Finally, the Union says, the City's argument that the request for arbitration lacked specificity has no merit because the City had notice of the grievance as early as June 2004 when the Amended Step II grievance cited to specific provisions in the Agency Guide.

DISCUSSION

In this case, the Union seeks arbitration on the question whether the DHMH's reassignment of Grievant violated or misinterpreted a departmental written policy. This Board finds that since the action complained of bears a reasonable relationship to the Agency Guide, an arbitrator should hear this grievance.

The policy of the New York Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3 (“NYCCBL”) is to favor and encourage arbitration to resolve grievances. NYCCBL § 12-302; *Uniformed Firefighters Ass’n*, B-19-2005 at 13. 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 are contractually obligated to arbitrate their controversies through a grievance procedure. Article VI, § 1(b), of the Agreement defines the term “grievance” as a “claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment. . . .” (Emphasis omitted.) Thus, the question is whether a reasonable relationship exists between Grievant’s reassignment to her underlying civil service title and the policies cited.

This Board has held specifically that the Agency Guide at issue in this case constitutes a written policy subject to arbitration. *See Local 376, District Council 37*, Decision No. B-18-90 at 8; *District Council 37, Local 1549*, Decision No. B-15-90 at 7; *District Council 37*, Decision No. B-28-87 at 24. In *District Council 37, Local 1549*, Decision No. B-15-90, the City challenged the arbitrability of a grievance concerning the demotion of a probationary employee due to an

unsatisfactory evaluation. At the early steps of the grievance procedure, the employer had found that it had violated the Agency Guide and, therefore, expunged the grievant's evaluation from her personnel file. Nevertheless, the employer upheld the grievant's demotion because of her probationary status. The request for arbitration alleged that in the evaluation process, the employer violated the Agency Guide. The City argued, among other things, that the parties' collective bargaining agreement expressly excluded grievances over the misapplication of the Personnel Rules and that allowing arbitration would enlarge the "traditional and well defined incidents of probationary status" beyond an explicit contractual expression of intent to grant probationers grievance rights. *Id.* at 3. This Board held that the Agency Guide constituted a written policy under Article VI, § 1(b), of the parties' contract. Since the City did not refute that the grievant's supervisor failed to follow the evaluation procedure set forth in the Agency Guide, the union established a *prima facie* relationship between the alleged violations of the evaluation procedure and the provisions in the Guide. *Id.* at 6.

The City also argued in that case that the employer had the unfettered right to determine whether to demote a probationary employee. This Board found, however, that Section II (A)(2) of the Agency Guide specifically states that the procedures set forth in the Guide apply to both permanent and probationary employees. The grievance, raising procedural violations of the Agency Guide, was thus arbitrable. *Id.* at 6-7; *see also Soc. Serv. Employees Union, Local 371*, Decision No. B-31-82 at 12 (grievant seeking arbitration not to appeal the content of his performance evaluation but to receive a proper assessment under the employer's written evaluation procedures).

In *Social Service Employees Union, Local 371*, Decision No. B-39-89, and *Social Service Employees Union, Local 371*, Decision No. B-6-86, we also found arbitrable claims that a grievant

did not receive tasks and standards at the outset of the probationary period, in violation of the sub-managerial evaluation procedures.⁴ Furthermore, in *Local 376, District Council 37*, Decision No. B-18-90 at 4, 8, the Board rejected the City's claim that the Agency Guide is a Personnel Rule, disputes over which Article VI, § 1(b), excludes from the grievance process. *See also District Council 37*, Decision No. B-28-87 at 19-20, 24.

In the instant case, we follow our previous determination that the Agency Guide is a written policy of the employer, here DHMH. Grievant was reassigned to her underlying civil service title because of an unsatisfactory evaluation. She alleges that she did not receive a Tasks and Standards Sheet when she was promoted to the title Associate Public Health Sanitarian in July 2004 or when she was transferred to the Day Care Lead Unit in the fall of 2004. The City concedes that DHMH did not issue tasks and standards for Grievant's position because the Day Care Lead Unit was newly formed in September 2004 but asserts that DHMH instead furnished written instructions. That the City did not provide tasks and standards because the unit was new is not dispositive to the issue of arbitrability. Since the Agency Guide addresses evaluation procedures for probationary employees, we find that the Union has shown a reasonable relationship between DHMH's failure to provide tasks and standards and the provisions invoked in the Agency Guide. Any issues, such as when Grievant did receive a Tasks and Standards Sheet, whether she received other written instructions, and whether those would be equivalent to the evaluation procedures enunciated in the Agency Guide, are for an arbitrator to determine.

Finally, we find that the City had ample notice of the claim here since Grievant cited to

⁴ In these cases, the policy was contained in a manual written pursuant to Section I of the Agency Guide allowing employers to create evaluation procedures substantially equivalent to those in the Guide and approved by the Personnel Director.

specific provisions of the Agency Guide at Step II of the grievance process and cited to the Guide as a whole in the request for arbitration. *See Local 420, District Council 37, Decision No. B-9-2002.*

We therefore deny the City's petition and grant the request for 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 New York City Department of Health and Mental Hygiene and docketed as BCB No. 2530-06, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 768, AFSCME, and docketed as A-11494-05, hereby is granted.

Dated: April 4, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

M. DAVID ZURNDORFER
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