

Social Service Employees Union, Local 371, 77 OCB 30 (BCB 2006)

[Decision No. B-30-2006] (Arb) (Docket No. BCB-2563-06) (A-11922-06).

Summary of Decision: The City challenged a grievance alleging that it wrongfully terminated a permanent employee who was entitled to due process rights, in violation of the applicable collective bargaining agreement. The City argued that the Union could not establish a nexus between the subject of the grievance, the termination of an employee considered by the City to be probationary, and the parties' agreement; the dispute involves rules which are exempt from arbitration; and that it was not on notice of the Union's claims. The Board denied the petition, sending to the arbitrator the questions whether the City was properly on notice of the Union's claim, and whether Grievant was an employee with due process rights under the agreement. ***(Official decision follows.)***

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

In the Matter of the Arbitration

-between-

**THE CITY OF NEW YORK and the
ADMINISTRATION OF CHILDREN'S SERVICES,**

Petitioners,

-and-

**SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,
AFSCME,**

Respondent.

DECISION AND ORDER

On August 4, 2006, the City of New York and the Administration of Children's Services ("City" or "ACS") filed a petition challenging the arbitrability of a grievance brought by Social Service Employees Union, Local 371, AFL-CIO ("Union"). The grievance asserts that ACS wrongfully terminated Fritz St. Surin ("Grievant"), a permanent employee with due process rights,

in violation of the Social Services & Related Titles Agreement (“Agreement”). The City argues that the Union cannot establish a nexus between the subject of the grievance, the termination of an employee considered by the City to be probationary, and the Agreement; that the dispute involves the Personnel Rules and Regulations of the City of New York (“Personnel Rules”), which are exempt from arbitration; and that it was not on notice of the Union’s claims. The Board denies the petition, sending to the arbitrator the questions whether the City was properly on notice of the Union’s claims, and whether Grievant was an employee with due process rights under the Agreement.

BACKGROUND

The term of the parties’ Agreement was from April 1, 2000, to June 30, 2002, and it is currently in status quo pursuant to NYCCBL § 12-311(d).

ACS hired the Grievant on July 14, 2002, as a provisional employee in the Child Protective Specialist Level II (“CPS II”) title, which is a competitive civil service title. Effective February 17, 2006, ACS permanently appointed Grievant to the CPS II title.

On March 14, 2006, ACS served Grievant with Charges and Specifications which accused Grievant of approximately 25 separate acts of misconduct or incompetence in violation of the ACS Code of Conduct. On the same date, ACS also issued a Notice of Informal Conference regarding the charges against Grievant, which stated that Grievant’s status was “Provisional Employee with Two or More Years’ Service.” The Informal Conference was held on March 27, 2006, but a determination on those charges never issued.

On April 17, 2006, Grievant received a Non-Managerial Performance Evaluation for the evaluation period of February 17, 2006, to April 17, 2006. Grievant received an overall rating of

“unsatisfactory,” and termination was recommended. ACS notified Grievant by letter dated April 19, 2006, that his employment as a “Probationary” CPS II was terminated.

The Union filed a Step II grievance on behalf of Grievant on April 28, 2006. The Union alleged that a wrongful disciplinary action was taken against a permanent employee in violation of Article VI, § 1(e) of the Agreement. Article VI, § 1(e) defines a grievance as:

A claimed wrongful disciplinary action taken against a permanent Employee covered by Section 75(1) of the Civil Service Law or a permanent Employee covered by the Rules and Regulations of the Health and Hospitals Corporation upon whom the agency head has served written charges of incompetence or misconduct while the Employee is serving in the Employee’s permanent title or which affects the Employee’s permanent status.

On May 15, 2006, the Union filed a Step III grievance, asserting that there had been no response at Step II to the Union’s claim that Article VI, § 1(e) of the Agreement had been violated.

On June 6, 2006, ACS issued a Step II decision (“Step II decision”) which denied the grievance. The decision noted that in addition to the Union’s Article VI, § 1(e) claim under the Agreement, the Union had also alleged that ACS violated the ACS Non-Managerial Performance Evaluation Procedures (“ACS Procedures”) when it terminated Grievant’s employment in less than 90 days.¹

¹ ACS Procedures state, in pertinent part:

PROBATIONARY PERIOD

The purpose of the probationary period is to train the employees in a new position and to ensure that the employee satisfactorily meets performance expectations prior to attaining permanent status. Interim evaluation must be completed **quarterly** (90 days) during the **probationary period**.

Final Evaluation

Final quarter evaluations of probationers are due in the Performance Evaluation Unit prior to the end of the probationary period.

The Step II decision held that the Personnel Rules pertaining to probationary employees applied to the matter, and it cited Personnel Rule § 5.2.7(c)(1). Section 5.2.1(a) of the Personnel Rules provides in pertinent part that, “Every appointment and promotion to a position in the competitive or labor class shall be for a probationary period of one year unless otherwise set forth. . . .” Section 5.2.7(a) provides, in pertinent part, that, “At the end of the probationary term, the agency head may terminate the employment of any unsatisfactory probationer by notice to such probationer and to the commissioner of administrative citywide services.” Section 5.2.7(c) provides, in relevant 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 by notice to the said probationer. . . . The specified minimum period of probationary service . . . shall be: (1) two months for every appointment to a position in the competitive or labor class.

According to the Step II decision, ACS records showed that Grievant was “turned over” from a pure provisional to a probable permanent CPS II on February 17, 2006, received an unsatisfactory performance evaluation that recommended his termination as a probationary employee on April 17, 2006, and was terminated on April 19, 2006. The Step II decision held that under those facts,

Probationary Employees Rated Unacceptable

If the performance of a probationary employee is not acceptable, the options available are:

(a) Termination of employment if the employee does not have permanent civil service status in any title. The services of a probationary employee may be terminated at any time during the probationary period after completion of **two** months for employees who were appointed from an open competitive list. The overall rating must be unsatisfactory.

(Emphasis in original.)

Grievant was a probationary employee whose employment was terminated pursuant to the Personnel Rules. The Step II decision also stated that the termination was in accordance with ACS's Non-Managerial Performance Evaluation Procedure for the same reasons. According to the decision, ACS found that the termination of Grievant's employment was proper under both the Personnel Rules and ACS Procedures, and no contractual, policy, or procedural violation had been shown.

The Union's subsequent Step III grievance filing resulted in a Step III decision, which was issued on June 14, 2006. The New York City Office of Labor Relations Review Officer ("Review Officer") held that, although the grievance alleges a wrongful disciplinary action taken against a permanent employee in violation of Article VI, § 1(e) of the Agreement, Grievant was a probationary employee when he was terminated and was not entitled to disciplinary due process rights.

On June 24, 2006, the Union filed its request for arbitration, in which it states the nature of the grievance as "Grievant was wrongfully terminated." The Union did not cite a provision of the Agreement in the request. As a remedy, the Union seeks reinstatement and restoration of status as if the termination had not occurred.

POSITIONS OF THE PARTIES

City's Position

First, the City argues that it did not have notice of the precise grievance to be arbitrated because the Union failed to cite any provision of the Agreement in the request for arbitration and, in the lower steps of the grievance procedure, the Union cited a provision that is only applicable to permanent employees. The inconsistent and unclear filings severely impaired the City's ability to respond to the request, and the petition should be granted on that basis.

Second, the petition challenging arbitrability should be granted because the Union cannot establish a nexus between the subject of the grievance, the termination of a probationary employee, and Article VI, § 1(e) of the Agreement, as the Article only applies to permanent employees facing disciplinary charges. Since ACS did not terminate the Grievant pursuant to the Agreement, no reasonable relationship exists between the employee's termination for non-disciplinary reasons and Article VI, § 1(e). To the extent that the Step II decision notes that Grievant also alleged that the Agency violated the ACS Procedures, the Union also fails to establish a violation, as ACS Procedures also allow for the dismissal of probationary employees after two months.

Finally, the termination of an employee for failure to successfully complete the required probationary period is not arbitrable because Article VI, § 1(b) of the Agreement excludes disputes which involve the Personnel Rules from arbitration.² Grievant's employment was terminated during his probationary period, the regulations governing probationary terms of City employees are set forth in the Personnel Rules, and disputes regarding the Personnel Rules are expressly excluded from arbitration. Thus, the petition should be granted in its entirety.

Union's Position

The Union argues Grievant was not a probationary employee under § 5.2.2 of the Personnel

² 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; provided disputes involving the Personnel Rules and Regulations of the City of New York . . . shall not be subject to the grievance procedure or arbitration;

Rules.³ By virtue of the credit Grievant was entitled to receive for his 3 ½ years of provisional CPS service prior to his appointment as a permanent CPS, he was not required to serve the one year probationary period otherwise required of an employee. Thus, the Union argues that the Grievant was a permanent employee entitled to due process rights under Article VI, § 1(e) of the Agreement. The Union emphasizes that since 2002, Grievant has been performing the same duties in the same office at ACS.

The Union also argues that Article VI, § 1(h) of the Agreement defines the term “grievance” to include a 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.⁴ The Union contends that once Grievant had two years of service as a provisional CPS II, he acquired due process rights through Article VI § 1(h), and Grievant did not lose those due process rights upon his turn over in position to the permanent CPS position.

³ Section 5.2.2 of the Personnel Rules provides:

Effect of Certain Prior Service and Military Law.

(a) Notwithstanding anything to the contrary contained in paragraph 5.2.1, if a permanent employee has served in a promotional title and particular job assignment on a provisional or temporary basis for a continuous period equal to or greater than the probationary period for that title immediately prior to a permanent promotion to such title or, as determined by the commissioner of citywide administrative services, in a title in a similar grade and in such particular job assignment or similar job assignment in the same agency, the promotee shall not be required to serve a probationary period upon such promotion.

⁴ Article VI, § 1(h) of the Agreement defines the term “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.

DISCUSSION

In this case, the Union seeks arbitration on the question whether ACS violated the parties' Agreement when it terminated Grievant without contractual due process. This Board finds that the Union has established a reasonable relationship between Grievant's termination and Article VI, § 1(e) of the Agreement.

Pursuant to the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-302, this Board's policy is to favor and encourage arbitration to resolve grievances. Doubtful issues of arbitrability are resolved in favor of arbitration. *Organization of Staff Analysts*, Decision No. B-19-2006 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 agreement. *New York State Nurses Ass'n*, Decision No. B-21-2002 at 8.

Here, the first prong of the test has been met. There is no dispute that the parties' Agreement provides for grievance and arbitration procedures concerning discipline, and there is no claim that arbitration of the issue would violate public policy or that it is restricted by statute. Thus, the issue is whether a reasonable relationship exists between Grievant's termination and the Agreement.

First, the City argues that it had no notice of the specific nature of the claim. However, in *New York State Nurses Ass'n*, Decision No. B-21-2002, this Board held that in order to adhere to our

statute's mandate to favor and encourage arbitration, we will refer to an arbitrator any questions as to whether claims and provisions were properly raised during the step grievance process. *Id.* at 12. Thus, the City is free to raise its claim at arbitration.

We now move to the substantive issues raised in the petition. The Union has maintained throughout the grievance procedure that Grievant was a permanent employee who was entitled to due process rights, and who was the subject of wrongful discipline, in violation of Article VI, § 1(e). On the contrary, the City argues that the Grievant was indeed not covered by this Article of the Agreement when his employment was terminated because he was on probation. 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. *District Council 37, Local 154*, Decision No. B-16-2004 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 disciplinary due process rights under the parties' agreement. Since the dispute turned on the meaning of the parties' 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 disciplinary due process rights under the parties' agreement 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 held that the question whether the extension of grievant’s provisional status affected the amount of time necessary to be entitled to disciplinary due process rights under the parties’ agreement was a substantive question of contract interpretation for an arbitrator to decide.

Thus, this Board has regularly refrained from determining the status of a grievant under a collective bargaining agreement when the grievant’s status was genuinely in dispute, leaving the employee’s status as a question for an arbitrator to decide. Here, the Grievant’s status is in dispute. The City argues that the Union cannot establish a nexus between the act complained of and the Agreement because Grievant was a probationary employee when he was terminated pursuant to the Personnel Rules. However, the Union has made probative assertions of fact and law that, pursuant to the Agreement, Grievant was a permanent employee with due process rights at the time he was dismissed.

The Union alleges that because Grievant served as a provisional CPS II in the same office at ACS for a period of over three years, and during that time he performed the same duties he performed as a permanent CPS II, he was not required to serve a one-year probationary period upon his appointment as a permanent employee, and therefore had full due process rights. Therefore, the question is whether Grievant was entitled to due process rights as an employee serving in a “permanent” title under Article VI, § 1(e) Agreement. As in the above-referenced cases, since a determination on that question requires the interpretation of the Agreement, we leave that matter for an arbitrator to decide. *District Council 37, Local 154*, Decision No. B-16-2004 at 6.

The City cites *Social Service Employees Union, Local 371*, Decision No. B-10-2004, and

Social Service Employees Union, Local 371, Decision No. B-36-2002, to support the proposition that this grievance is not arbitrable because in those cases, the grievants were probationary employees terminated pursuant to the Personnel Rules, and, therefore, the Board held that the Union failed to identify a provision of the agreement which would make the grievance arbitrable. Unlike those cases, here, the Union has made specific assertions of fact and law regarding Grievant's tenure and its relation to the Agreement, which raise a legitimate question about his entitlement to due process rights as a "permanent" employee under Article VI, § 1(e). Furthermore, in *Social Service Employees Union, Local 371*, Decision No. B-36-2002, the Union admitted that the grievants were permanent employees serving a probationary period, who were terminated during that period. Here, by contrast, the Union asserts that at the time of his dismissal, Grievant was a permanent employee who was not required to serve a probationary period, and the Union makes specific allegations of fact and law which support that argument.

Thus, this Board finds that the Union is entitled to have an arbitrator make a threshold determination on whether Grievant was "serving in [his] permanent title" under Article VI, § 1(e) of the Agreement and entitled to due process rights. We note, however, that we are not making a determination on whether Grievant was indeed a permanent employee with due process rights, we only state that the Union has shown the existence of a material issue as to the Grievant's status to permit this matter to proceed to arbitration. Therefore, we direct the arbitrator to determine, in the first instance, whether Grievant was entitled to due process rights under the parties' Agreement. If the arbitrator finds that Grievant was entitled to due process rights as a permanent employee, then he or she may then go on to make a decision on the merits of the grievance. If the arbitrator finds otherwise, the inquiry shall end there. As we stated earlier, the City is also free to raise the issue of

notice, so that the arbitrator may decide whether the Union's assertions should be precluded from arbitration. Accordingly, we dismiss the petition in its entirety.

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 Administration of Children's Services, docketed as No. BCB-2563-06, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Social Service Employees Union, Local 371 on behalf of Fritz St. Surin, docketed as A-11922-06, hereby is granted.

Dated: October 25, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
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ERNEST F. HART
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