Social Services Employees Union, Local 371 (Baksh), **77 OCB 5 (BCB 2006)**
[Decision No. B-5-2006(Arb)] (Docket No. BCB-2500-05) (A-11318-05).

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 Union argued that Grievant was not afforded a full and complete opportunity under an HRA procedure to submit proof that he was in compliance with the residency law. 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 &
HUMAN RESOURCES ADMINISTRATION,

Petitioners,

-and-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,
AFSCME and MOHAMED BAKSH,

Respondents.

DECISION AND ORDER

On August 12, 2005, the City of New York and the Human Resources Administration ("City" or "HRA") filed a petition challenging the arbitrability of a grievance brought by Social Service Employees Union, Local 371, AFL-CIO ("Union"). The grievance asserts that HRA wrongfully terminated Mohamed Baksh ("Grievant") in violation of the Social Services & Related Titles Agreement ("Agreement"). 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 condition of employment, and the Agreement. The Union argues that Grievant was not afforded a full and complete opportunity under the HRA procedure to submit proof that he was in compliance with the residency law. 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, and because the Union has failed to identify an HRA policy which has been allegedly violated, this Board finds that the Union has not established a reasonable relationship between Grievant's termination and the parties' Agreement.

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]

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[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.

Grievant was employed by HRA as an Associate Fraud Investigator Specialist Level II. He started employment with the City on September 10, 1990.

HRA Internal Operations Division ("IOD") began an investigation of Grievant after receiving an allegation that Grievant was not a City resident. According to the City, on August 5, 2002, Grievant was interviewed by IOD in the presence of his attorney, at which time Grievant stated that he had been living in Bellerose, Queens, New York, for approximately ten years. Over the next two years, IOD investigated the allegations: the investigation included several field visits, interviews with Grievant's parents and the mail carrier at the Bellerose address, and the evaluation of documents obtained by IOD. According to the City, Grievant was informed of the allegations and given an opportunity to submit evidence and appear in person to respond to the allegations. Also according to the City, Grievant submitted documentation in support of his position in the form of a deed, utility bills, tax returns, and other material.

IOD eventually concluded that Grievant lived outside of the City in Baldwin, New York. On May 25, 2005, HRA's Employment Law Division, after reviewing the results of the investigation, recommended that Grievant's employment be terminated for failure to comply with the residency requirement. HRA terminated Grievant's employment on May 26, 2005, for failure to comply with the City's residency requirements.

On June 16, 2005, Grievant filed a Step I grievance, alleging that he was wrongfully

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> 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-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.

terminated in violation of Article VI, § 1(g), of the Agreement.[2] On June 17, 2005, the Union filed a request for arbitration. The grievance to be arbitrated is stated as wrongful termination. The Union seeks reinstatement with reimbursement for all money and benefits lost as a remedy.

POSITIONS OF THE PARTIES

City's Position

The City argues that the definition of the term "grievance," as defined in Article VI, § 1(b), of the Agreement specifically excludes disputes involving Personnel Rules and Regulations of the City of New York.[3] The dispute in the instant matter involves the residency requirement, which is addressed in the DCAS Bulletin. Since the DCAS Bulletin constitutes a Personnel Rule or Regulation, the dispute is not subject to arbitration pursuant to Article VI, § 1(b), of the Agreement. Thus, there can be no relationship between the act complained of and the Agreement, and the grievance cannot proceed to arbitration.

According to the City, the New York Court of Appeals has held that failure to establish residency is a violation of the City's residency requirement which results in forfeiture of employment and is not misconduct that would entitle an employee to a pre-removal hearing. *Felix v. City of New*

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[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."

[3] Article VI, § 1(b), of the Agreement defines a 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 . . . .

York Dep't of Citywide Administrative Services, 3 N.Y.3d 498 (2004).

Union's Position

The Union argues that at all relevant times there existed within HRA a written policy, rule, regulation, or order pursuant to which employees such as Grievant who was believed by HRA to be in violation of the residency law, to submit proof to the agency to establish that he was in compliance with the law. The Union argues that Grievant was not afforded a full and complete opportunity under the HRA procedure to submit proof that he was in compliance with the residency law. Thus, the grievance is arbitrable under Article VI, § 1(b), of the Agreement.

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 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 of the Agreement because the failure to maintain a qualification of employment, such as residency, does not give rise to arbitration rights under the Agreement, and because the Union has failed to identify an HRA policy which was allegedly violated.

In *Felix v. City of New York Dep't of Citywide Administrative Services*, 3 N.Y.3d 498, the Court of Appeals 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 that failure to maintain residence renders an individual ineligible for continued municipal employment under Admin. 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. The Court further found that the City's residency requirement has a different purpose from that underlying CSL § 75(1), and, accordingly, a pre-removal hearing is not required for dismissals pursuant to Admin. Code § 12-120. Furthermore, DCAS's procedure afforded to Felix to contest the charges satisfied state and federal due process requirements, and DCAS correctly determined that Felix had forfeited his position. *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, this 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 HRA 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.

Next we turn to the Union's claim, asserted for the first time in its answer to the petition challenging arbitrability, that the grievance is arbitrable under Article VI, § 1(b), of the Agreement because HRA violated its own written procedures. In *District Council 37, Local 1407, AFSCME,* Decision No. B-7-2005, we stated that while Article VI, § 1(b), expressly precludes arbitration of claims concerning the misapplication of DCAS rules, when an agency chooses to adopt its own rules that reflect rules and statutes that are exempt from arbitration, these agency rules may be subject to arbitration under the parties' contractual grievance procedures. The Board found the grievance arbitrable because the union was able to establish a reasonable relationship between grievant's termination for failing to maintain City residency and the agency's rules concerning residency.

In the instant matter, Article VI, § 1(b), expressly precludes arbitration of claims concerning the misapplication of DCAS rules. Although the Union claims that there is a separate HRA

procedure, under which this grievance could be arbitrable, for the submission of proof that Grievant was in compliance with the residency law, it does not identify the source of this provision nor provide any documentation regarding the content of any such procedure. Without this information, the Board cannot make a determination whether a reasonable relationship exists between Grievant's termination and an HRA procedure. Thus, the City's petition challenging arbitrability is granted.

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 Human Resources Administration, docketed as BCB-2500-05, be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by Social Service Employees Union, Local 371, docketed as A-11318-05, be, and the same hereby is, denied.

Dated: January 23, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

BRUCE H. SIMON
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER