District Council 37, 79 OCB 29 (BCB 2007)
[Decision No B-29-2007] (Arb) (Docket No. BCB-2620-07) (A-12244-07).

Summary of Decision: The City filed a petition challenging the arbitrability of a grievance alleging that the parties' collective bargaining agreement was violated when Grievant was terminated. The City contended that this grievance is not subject to arbitration because the Union failed to establish the necessary nexus between the subject matter of the grievance, the termination of Grievant, and the source of the alleged rights. The Board found that, even though two provisions in the parties' collective bargaining agreement appeared to be in conflict, the Union's grievance is arbitrable because a nexus existed between Grievant's termination and one of the cited provisions, while leaving the resolution of the conflicting contractual provisions to an arbitrator. Accordingly, the petition challenging arbitrability is dismissed. ***(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 NEW YORK CITY DEPARTMENT OF CULTURAL AFFAIRS,

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 299,

Respondent.

DECISION AND ORDER

On May 8, 2007, the City of New York and the New York City Department of Cultural Affairs ("City" or "DCA") filed a petition challenging the arbitrability of a grievance brought by District Council 37, Local 299 ("Union" or "Local 299") on behalf of Andrew Jacobi ("Grievant").

The grievance, filed on March 16, 2007, at Step II, alleges that DCA violated Article VI §§ 1(h) and 10 of the parties' collective bargaining agreement when DCA wrongfully disciplined Grievant and terminated him without issuing disciplinary charges or conducting a conference. The City contends that Grievant was a probationary employee at the time of his termination and that probationary employees are specifically excluded from receiving the grievance rights under the contractual provisions cited. Therefore, the City argues that this grievance is not subject to arbitration because Local 299 failed to establish the necessary nexus between the subject matter of the grievance, the termination of Grievant, and the source of the alleged rights, Article VI of the parties' collective bargaining agreement. We find that the Union's grievance is arbitrable because, even though two provisions in the parties' collective bargaining agreement appear to conflict with each other, a nexus exists between Grievant's termination and one of the cited provisions. We further find that the resolution of the apparent conflict between these contractual provisions requires the interpretation of the parties' collective bargaining agreement, and thus requires an arbitrator. Accordingly, the petition challenging arbitrability is dismissed and the request for arbitration is granted.

BACKGROUND

DCA is the agency responsible for supporting cultural activities within the City of New York by funding public services art and advocating for nonprofit cultural organizations throughout the five boroughs. DCA works to create and expand public programming, provide technical assistance to those programs, and ensure audiences for those programs. Aiding in this mission is the non-competitive title of Associate Arts Program Specialist, which is represented by Local 299. This title is covered by the parties' collective bargaining agreement for the term from July 1, 2002 to June 30,

2005 ("Agreement"), and is currently in status quo, pursuant to the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-311(d).

On February 21, 2006, Grievant received a letter from DCA appointing him to the non-competitive title of Associate Arts Program Specialist, effective February 27, 2006. He received the in-house title of Capital Projects Manager and was placed in the Capital Projects Unit, under the supervision of Susan Chin, Assistant Commissioner of the Capital Projects Unit. This letter stated: "As a non-competitive employee, you will be required to serve a six month probationary period [in order to] provide [Grievant and DCA] with an opportunity to evaluate the employment relationship. During this period, [DCA] reserves the right to terminate your employment at any time." (Petition, Exhibit B.) This letter further stated that, upon completion of four continuous months of employment, Grievant was "permitted to take approved annual leave as it accrues;" and was "permitted to use annual leave at any time for religious holidays and sick leave . . . as it accrues for personal illness." *Id*.

Pursuant to the Personnel Rules and Regulations of the City of New York ("Personnel Rules") § 5.2.1(b), "[e]very original appointment to a position in the non-competitive or exempt class shall be for a probationary period of six months unless otherwise set forth in the terms and conditions for appointment as determined by the commissioner of citywide administrative services." (Petition, Exhibit D.) Additionally, Personnel Rule § 5.2.8(b) provides that "the probationary term is extended by the number of days when the probationer does not perform the duties of the position, for example limited duty status, annual leave, sick leave, leave without pay, or use of compensatory time earned . . . ." *Id.*

Grievant was responsible for working with cultural organizations that receive municipal capital funds from DCA and acted as a liaison between DCA and such organizations in the design and implementation of cultural programming and projects. Grievant was required to work 35 hours per week, excluding five hours per week for lunch. Over the course of his employment at DCA, Grievant accrued fifty-two and a half hours of annual leave, thirty five hours of sick leave, and forty-four and a half hours in compensatory time. However, during this time, Grievant used twenty-six and a half hours of annual leave, fourteen hours of sick leave, and forty-one and half hours of compensatory time.

The City alleges but the Union denies that on August 15, 2006, Chin met with Grievant, informed him that his job performance was unsatisfactory, and that he was terminated effective Friday September 1, 2006, approximately two weeks from the time of the meeting. The record demonstrates that on August 31, 2006, Grievant met with Chin and Victor Metoyer, Deputy Director of Capital Projects Unit, for an exit interview, during which Grievant was told that he was required to submit his DCA identification card and final timesheet on September 1, 2006 to Metoyer.

On September 1, 2006, DCA sent Grievant a letter memorializing his termination, but this letter was not served upon Grievant personally because he was not in the office that day. According to the Union, Grievant was out of the office from Friday, September 1 to Wednesday, September 6, 2006, and never received the September 1, 2006 letter. Thus, on September 7, 2006, Grievant returned to DCA and was informed again that he had been terminated, effective September 1, 2006. That same day, Grievant filed a grievance at Step II alleging that DCA had violated Article VI § 1(h) of the Agreement by taking a wrongful disciplinary action against a non-competitive employee

without following the procedures set forth in the Agreement.[1]

Article VI § 10 of the Agreement, which was invoked by direct reference in Article VI § 1(h) of the Agreement, sets forth:

> Grievances relating to a claimed wrongful disciplinary action taken against a non-competitive employee shall be subject to and governed by the following special procedure:
>
> The provisions contained in this section shall not apply to any of the following categories of employees covered by this contract:
>
> a. Per diem employees
> b. Temporary employees
> c. Probationary employees
> d. Trainees and provisional employees
> e. Non-competitive employees with less that three (3) months of service in the title
> f. Competitive class employees
> g. Employees covered by Section 75(1) of the Civil Service Law or Section 7:5:1 of the Rules and Regulations of the Health and Hospital Corporation.
>
> **Step I(n)** Following the service of written charges upon an employee, a conference shall be held with respect to such changes by a person who is designated by the agency head to review such charges. The employee may be represented at such a conference by a representative of the Union. The person designated by the agency head to review the charges shall take any steps necessary to a proper disposition of the charges and shall issue a decision in writing by the end of the fifth day following the date of the conference.

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[1] Article VI, in pertinent part, states:

Section 1. - Definition

The term "Grievance" shall mean:

> a. A dispute concerning the application or interpretation of the terms of this Agreement;
>
> b. A claimed violation, misinterpretation or misapplication of the rules, regulations *written* policy or orders of the Employer applicable to the agency which employs the grievance 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 . . . ;
>
> * * *
>
> h. A claimed wrongful disciplinary action taken against a non-competitive employee as defined in Section 10 of this Article VI. (Emphasis in original.)

> **Step II(n)** If the employee is dissatisfied with the decision in the **Step I** above, he/she may appeal such decision. The appeal must be within five (5) working days of the receipt of such decision. Such appeal shall be treated as a grievance appeal beginning with **Step II** of the Grievance Procedure set forth herein. (Emphasis in original.)

DCA did not respond to the September 7, 2006 grievance, and, on October 2, 2006, Grievant requested a Step III hearing be held. On February 14, 2007, a Step III conference was held, and, two days later, on February 16, 2007, a Step III determination was issued denying Grievant's claim because "no nexus exist[ed] between the Grievant's dismissal from employment and the provision claimed to have been violated." (Petition, Exhibit G.) This decision further stated, in pertinent part:

> Article VI Section 10 sets forth a special disciplinary grievance procedure which provides for appeal following the service of written charges, a conference regarding the charges, and issuance of a decision by the agency. Here, the Grievant was not served with written charges, a conference was not held, and a decision was not issued by the agency regarding the charges.
>
> Further, aside from setting forth a special disciplinary procedure for non-competitive employees, Article VI Section 10 specifically lists categories of employees excluded from coverage under the provision; probationary employees are not covered. The record establishes that the Grievant was a probationary employee at the time of his dismissal. Pursuant to the City's personnel rules and regulations, generally, a non-competitive employee must serve a probationary period of six (6) months, to be extended by the number of days the employee does not perform the duties of the position, i.e. annual leave, sick leave, use of compensatory time, etc.
>
> Here, the Grievant was appointed on or about February 26, 2006 and terminated on or about September 2, 2006; while technically, the Grievant was terminated more than six months after his appointment, his probationary term was extended by his use of annual leave and sick leave.

On March 14, 2007, Local 299 filed the instant request for arbitration on Grievant's behalf claiming that DCA violated Article VI §§ 1(h) and 10 of the Agreement when DCA "wrongfully terminated" Grievant without service of charges. (Petition, Exhibit H.) The Union seeks, *inter alia*, reinstatement, backpay, and expungement of Grievant's personnel folder.

On May 8, 2007, the City filed the instant petition challenging the arbitrability of the Union's grievance.

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union failed to establish a nexus between the act complained of in the grievance, the dismissal of Grievant, and the provision invoked in the grievance, Article VI §§ 1(h) and 10. Even though these sections provide special procedures for non-competitive employees facing disciplinary action, the instant matter does not fall within the scope of these contractual provisions. First, Grievant was an originally appointed, non-competitive employee, and, based upon §5.2.1(b) of the Personnel Rules, was required to serve a probationary period of six months, which is extended by the number of days the probationary employee does not perform the duties of the position. After his appointment on February 27, 2006, Grievant, whose six month probationary period should have ended on August 25, 2006, used twenty six and a half hours of annual leave, fourteen hours of sick leave and forty-one and a half hours of compensatory time. Accordingly, Grievant's usage of his leave time extended his probationary period by approximately twelve working days. Therefore, as of September 1, 2006, which was the effective date of Grievant's dismissal, Grievant was still a probationary employee. The specific language of Article VI § 10 and the special procedures contained therein exclude probationary employees. Thus, Grievant is not eligible to claim rights and/or protection under that contractual provision.

The City also argues that Article VI §§ 1(h) and 10 are inapplicable to the instant matter because these contractual provisions address disciplinary actions taken against non-competitive

employees, but Grievant was a probationary employee dismissed for performing his duties in an unsatisfactory manner. Further belying the Union's position that these contractual provisions are applicable to the instant matter, DCA never treated Grievant's dismissal as a disciplinary action since DCA never brought or served charges against Grievant, nor did it hold a hearing, as provided by Article VI § 10. Therefore, the Union cannot establish a reasonable relationship between Grievant's dismissal, the act complained of in the instant grievance, and Article VI §§ 1(h) and 10, the provisions invoked therein.

Finally, the City argues that to the extent that the Union is attempting to grieve a claimed violation, misinterpretation, or misapplication of §§ 5.2.1 and 5.2.8 of the Personnel Rules or the calculation and/or extension of Grievant's probationary period, Article VI § 1(b) precludes the grieving of the Personnel Rules. Accordingly, no nexus can be established between Grievant's dismissal and §§ 5.2.1 and 5.2.8 of the Personnel Rules.

Union's Position

The Union contends that a nexus does exist between Grievant's termination on September 1, 2007 and Article VI §§ 1(h) and 10. Grievant is entitled to the special procedures set forth in Article VI §§ 1(h) and 10 of the Agreement because his termination was a disciplinary action based on poor work performance and he worked as an Associate Arts Program Specialist, which is a non-competitive title, for over three months. Therefore, based upon the language of the invoked provisions of the Agreement, Grievant possessed grievance rights and is entitled to arbitrate this dispute.

The Union further contends that the City's position stating that Grievant is deemed a probationary employee for the purpose of Article VI § 10 of the Agreement and not a non-

competitive employee with over three months of service in the title creates a factual dispute requiring contractual interpretation, which is more properly suited for an arbitrator than the Board. Moreover, to the extent that additional information and fact finding is required to resolve the instant dispute, arbitration is the appropriate forum.

Finally, the Union contends that, even though §§ 5.2.1 and 5.2.8 of the Personnel Rules deem Grievant to be a probationer, and probationary employees typically do not have grievance rights, the City, in negotiating the Agreement, decided to award such rights to non-competitive employees with over three months of service in the title who also happen to be probationary employees under the Personnel Rules. The issue of whether Grievant is a probationer or a non-competitive employee with over three months of service under the meaning of these contractual provisions should be resolved by an arbitrator.

DISCUSSION

This Board's statutory directive is to promote and encourage impartial arbitration as the selected means for the resolution of grievances. NYCCBL § 12-302; *New York State Nurses Ass'n*, Decision No. B-21-2002. However, we cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *Soc. Serv. Employees Union, Local 371*, Decision No. B-34-2002 at 4.

In determining 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 Services Employment Union*, Decision No. B-2-69 at 2; *see District*

Council 37, AFSCME, Decision No. B-47-99 at 8-9, 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 7.

We find that the Union's grievance satisfies the first prong of arbitrability test because the parties are obligated to arbitrate their controversies through the grievance procedure set forth in the Agreement, and no statutory, contractual or court-enunciated public policy restrictions are applicable. Thus, the remaining inquiry is whether the termination of Grievant, who was a non-competitive employee with over three months of service in title serving his six month probationary period, without issuing disciplinary charges or conducting a conference, is reasonably related to Article VI §§ 1(h) and 10 of the Agreement.

We have held that an employee who is on unrestricted probation, either due to recent appointment or execution of a last chance agreement containing such an unrestricted probationary provision, is not entitled to contractual grievance rights. *See District Council 37, Local 1549*, Decision No. B-13-2006 at 11; *see also United Marine Division, Local 333, ILA*, Decision No. 12-2005 at 8 (by agreeing to unrestricted probation as a stipulation contained in a last chance agreement, the employee expressly waived his right to arbitration); *District Council 37, Local 376*, Decision No. B-21-90 at 11 (holding that the employee "relinquished his right to arbitrate disputes regarding his termination due to his probationary status.")

However, probationary employees may be awarded some rights pursuant to a last chance agreement. *See District Council 37, Local 1070*, Decision No. B-51-98. In that case, the grievant executed a last chance agreement placing her on a one year probationary period, waiving her rights under applicable statutes or contract provisions to challenge any disciplinary action taken against her,

as long as that action was done so in good faith, and not arbitrarily or capriciously. *See id.* at 2. When grievant was terminated and a dispute arose regarding whether she had, in fact, violated the terms of the agreement, the union grieved her termination. This Board found that, since the agency was obligated to act in good faith, and not in an arbitrary or capricious manner, and a dispute existed regarding grievant's violation of the agreement, the union presented a valid issue for an arbitrator to decide, which was whether the agency, by terminating the grievant even though she did not violate the terms of the agreement, acted arbitrarily, capriciously, or in bad faith,. *See id.* at 5-6.

Additionally, probationary employees may also be awarded certain rights as set forth by the regulations which define the parameters of being a probationary employee. *See City Employees Union, Local 237, IBT*, Decision No. B-27-2006. In that case, the agency promulgated a manual that contained rules and regulations governing, *inter alia*, grievance procedures and probationary employees. The grievance procedure regulation allowed "the processing of grievance of *all* employees . . . and it declar[ed] *any* employee may present his/her grievance." *Id.* at 15. (Emphasis in original) (internal quotations removed). The Board held that, since the grievance procedure regulations do not specifically exclude probationary employees from the grievance process or limit grievance rights to those employees who possess such rights under the N.Y. Civil Service Law, the grievance must proceed to arbitration. *See id.* at 16.

Here, Personnel Rule §§ 5.2.1(b) and 5.2.8(b) provides that a newly appointed, non-competitive employee must serve a probationary period of six months which will be extended by any days that the employee does not actually perform the duties of the position. Pursuant to these rules, Grievant is a probationary employee, who has served approximately five months and two weeks of

his probationary period.[2] As stated above, Grievant's probationary status does not, *per se*, strip him of all employment rights, including the ability to participate in the grievance procedure. In fact, Article VI § 1(h) provides that non-competitive employees who have been allegedly subjected to wrongful disciplinary action may be entitled to the grievance procedures set forth in Article VI § 10 of the Agreement. However, a possible conflict exists between two provisions in Article VI § 10 regarding which types of employees are specifically excluded from these grievance rights.

Article VI § 10 states that the "provisions contained in this section [Article VI § 10 of the Agreement] shall not apply to any of the following categories of employees . . . : "© probationary employees" [and] "(e) non-competitive employees with less than three (3) months of service in the title." (Article VI § 10 of the Agreement.) Thus, Article VI § 10(e) of the Agreement may allow Grievant and other non-competitive employees with three or more months of service in title to grieve a wrongful disciplinary action, even though they have not completed the requisite six month probationary period. On the other hand, Article VI § 10© may prevent Grievant and other non-competitive employees with more than three and less than six months of service in title from grieving wrongful disciplinary actions. This apparent conflict in contractual terms requires interpretation of the Agreement.

Possible conflicting terms in the parties' collective bargaining agreements raise questions of contract interpretation, which are more properly suited for an arbitrator to decided rather than the Board. *See District Council 37, Local 2507*, Decision No. B-18-2001 at 11 (noting that, to the extent that two regulations may conflict, "this [potential conflict] raises a question of contract interpretation, which an arbitrator must decide"); *Unif. Firefighters Ass'n*, Decision No. B-40-93 at

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[2] Grievant's probationary status is conceded. (See Union's Answer, ¶ 6.)

9; *see also District Council 37, Local 1549*, Decision No. B-18-1999 at 9 (holding that, when the meaning of a contractual term potentially conflicts with the meaning given to that term by an applicable statute, such dispute is arbitrable); *see generally, Captains Endowment Ass'n*, Decision No. B-17-2007 at 12.

Here, we find that the grievance in the instant matter is arbitrable. First, Local 299 has established a nexus between the act complained of in the instant grievance and the provisions invoked therein. Pursuant to Article VI § 1(h), Grievant, a non-competitive employee with over five months of service in the Associate Arts Program Specialist title, alleges that he was wrongfully disciplined, entitling him to the rights set forth in Article VI § 10, and is not specifically excluded by Article VI § 10(e). Second, an examination of the clear and unambiguous language of this contractual provision raises a question requiring interpretation of the Agreement. Simply, non-competitive employees with three or more months of service in title arguably could be entitled to the grievance procedures set forth in Article VI § 10, even though they have not completed their six month probationary period. Such conflicts require interpretation of the Agreement, which must be done by an arbitrator.[3]

We further find that the City's argument that Article VI § 1(h) of the Agreement is inapplicable because Grievant was not subjected to a wrongful disciplinary action is unpersuasive. The City argues that Grievant's probationary status and DCA's failure to levy charges or to conduct a conference are indicia that Grievant was not subjected to a disciplinary action, and, therefore, the

[3] We recognize that an arbitrator might ultimately determine Grievant is not entitled to the grievance rights set forth in Article VI §§ 1(h) and 10 because he failed to complete his six month probationary period. This possibility does not negate the fact that the Union established a reasonable relationship between the instant grievance and §§ 1(h) and 10 of the Agreement.

grievance rights awarded in Article VI §§ 1(h) and 10 do not apply to Grievant. However, we have long held that "the question of whether an employee has been disciplined within the meaning of a contractual term is one to be determined by an arbitrator." *District Council 37, Local 1549*, Decision No. B-40-86 at 10. In *Social Service Employees Union, Local 371*, Decision No. B-22-2003, a union grieved the termination of a provisional employee alleging that this employee was wrongfully disciplined, awarding him the right to grieve his termination. The agency argued that the employee was terminated because he was replaced by a permanent candidate from an existing civil service list. The Board found the grievance arbitrable because the union had established the possibility that the employee was terminated for disciplinary reasons since the civil service list referred to by the agency was three years old and the employee had recently received an "unsatisfactory" performance evaluation, and the employee was one of very few provisional employees terminated. *Id*. at 10-11; *see also Soc. Serv. Employees Union, Local 371*, Decision No. B-8-2003 at 8 (performance evaluations indicating overall ratings of "unsatisfactory" indicate that the agency was "dissatisfied with [the employee's] performance," thereby creating a "reasonable relationship between the grievant's termination and the wrongful discipline provision of the CBA.")

In the instant matter, Grievant claims that his termination was wrongful disciplinary action. The City admits that at the August 15, 2006 meeting between Chin and Grievant, he was informed that his job performance was unsatisfactory. Furthermore, DCA affirmatively stated that Grievant's termination was a result of his unsatisfactory job performance. Accordingly, we find that sufficient facts have been alleged to create a plausible possibility that Grievant's termination was for disciplinary reasons. As such, we reject the City's argument that Grievant was not subjected to a wrongful disciplinary action, and we present this issue to an arbitrator for determination.

As such, the City's petition challenging the arbitrability of the instant grievance is denied, and the request for arbitration 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, the petition challenging arbitrability filed by the City of New York and the New York City Department of Cultural Affairs, docketed as No. BCB-2620-07 and the same hereby is, dismissed; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 299, docketed as A-12244-07, and the same hereby is granted.

Dated: August 2, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER