***International Brotherhood of Teamsters, Local 237*, 77 OCB 36 (BCB 2007)**
[Decision No. B-36-2007] (Arb.) (Docket No. BCB-2611-07) (A-12237-07).

Summary of Decision**:* The City challenged the arbitrability of a grievance alleging that the City, in violation of the parties' collective bargaining agreement, wrongfully disciplined an employee by terminating her after she failed to return to work after a year on disability leave due to an occupational related injury. The City argued that the employee had not completed her probationary period prior to taking disability leave and was, therefore, ineligible for reinstatement. The Board found that the request for arbitration should be denied because there was no nexus between the Union's claim and the parties' collective bargaining 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 NEW YORK CITY TAXI AND LIMOUSINE COMMISSION

Petitioners,

-and-

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 237,

Respondent.

DECISION AND ORDER

On March 29, 2007, the City of New York ("City") and the New York City Taxi and Limousine Commission ("TLC" or "Agency") filed a petition challenging the arbitrability of a grievance brought by the International Brotherhood of Teamsters, Local 237 ("Union"), on behalf of Dayra Garay ("Grievant"). On March 9, 2007, the Union filed a Request for Arbitration ("RFA")

alleging that the City wrongfully disciplined Grievant in violation of the parties' collective bargaining agreement ("Agreement") by terminating her after she failed to return to work after a year's absence on disability leave due to an occupation injury. The City argues that the employee had not completed her probationary period prior to taking the leave of absence and was, therefore, ineligible for reinstatement. The City argues that the RFA should be dismissed because the Union has failed to establish a nexus between the subject of the grievance and the Agreement. The Board finds the grievance not to be arbitrable. Accordingly, the petition is granted, and the RFA is denied.

BACKGROUND

The Agreement covers the period from April 1, 2002, through August 6, 2005, and remains in force pursuant to the *status quo* provisions of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").[1]

Grievant commenced employment on April 13, 2003, at the TLC as a permanent Taxi and Limousine Inspector subject to a one year probationary term prior to attaining permanent status.[2] Grievant was injured on the job on November 7, 2003, went out on workers compensation on that date, and remained absent from work until her termination on December 7, 2004.

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[1] Section 12-311(d) NYCCBL provides, in pertinent part:

> Preservation of status quo. During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement . . . the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdown, work stoppages or mass absenteeism nor shall such public employee organization induce any mass resignation, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. . . .

[2] Grievant took civil service exam #0056 and was selected from list #9796.

On November 8, 2004, Carmen Rojas, the TLC Director of Personnel/Labor Relations, sent Grievant a letter that reads, in pertinent part:

> Please be advised that the Taxi and Limousine Commission's records indicate that you have been continuously absent from work since **November 7, 2003**[,] a period of one year, because of a work related disability, which prevents you from performing the duties of your position as a Taxi and Limousine Inspector.
>
> This is a request that you resolve your employment status with this agency. If you are physically and mentally fit to perform the duties of your position and wish to return to work, you must contact me by **December 7, 2004.** The TLC may then schedule a medical examination to determine whether you are currently capable of performing the duties of your position.
>
> If you are still physically and mentally unable to perform the duties of your position, or if you fail to contact me by **December 7, 2004,** your employment will be terminated pursuant to Section 71 of the Civil Service Law. If you are terminated, you may request to be reinstated to your position within one year after your disability ceases.
>
> You may also resolve your employment by resigning or, if you are eligible, retiring. If you have questions please contact me immediately at (212) 676-1095.

(Pet. Ex. B.) (emphasis in original).[3] Grievant failed to contact the TLC, and on December 28, 2004,

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[3] Section 71 of the Civil Service Law ("CSL") entitled "Reinstatement after separation for disability" provides:

> Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law, he or she shall be entitled to a leave of absence for at least one year, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position. Notwithstanding the foregoing, where an employee has been separated from the service by reason of a disability resulting from an assault sustained in the course of his or her employment, he or she shall be entitled to a leave of absence for at least two years, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of duties of his or her position. Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission having jurisdiction over the position last held by such employee for a medical examination to be conducted by a medical officer selected for that purpose by such department or commission. If, upon such medical

Rojas sent Grievant a letter informing her of her termination. The December 28, 2004, letter reads, in pertinent part:

> Pursuant to Section 71 when an employee has been separated from employment by reason of disability resulting from occupational injury, they shall be entitled to a leave of absence for at least one year. On November 8, 2004, you were advised that you had been continuously absent from work since November 7, 2003, a period of one year. We requested that you resolve your employment status with this agency by December 7, 2004. As of today, December 28, 2004[,] you have not returned to work nor have you responded to our request. Therefore, pursuant to Section 71 of the Civil Service Law, your employment as a Taxi and Limousine Inspector has been terminated effective December 7, 2004.
>
> Section 71 of the Civil Service Law, also states that within one year after termination of [sic] your disability, you may apply for a medical examination for the purpose of determining whether you are physically and mentally fit to perform the duties of your position. If you are found fit, you will be reinstated to your former position, if vacant, or to a vacancy in a similar position in a lower grade in the same occupational field or a vacancy for which you are eligible for transfer. If no appropriate vacancies exist, or if the workload does not warrant filling the vacancy, your name will be placed on a preferred list for a period of four years. If you are reinstated to a position in a lower grade, your name will be placed on the preferred eligible list for your former or any similar position.

(Pet. Ex. C.) Grievant eventually contacted the Department of Citywide Administrative Services ("DCAS") seeking reinstatement pursuant to CSL § 71 and underwent the required medical

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> examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his or her former position, he or she shall be reinstated to his or her former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he or she was eligible for transfer. If no appropriate vacancy shall exist to which reinstatement may be made, or if the work load does not warrant the filing of such vacancy, the name of such person shall be placed upon a preferred list for his or her former position, and he or she shall be eligible for reinstatement from such preferred list for a period of four years. In the event that such person is reinstated to a position in a grade lower than that of his or her former position, his or her name shall be placed on the preferred eligible list for his or her former position or any similar position. This section shall not be deemed to modify or supersede any other provisions of law applicable to the re-employment of persons retired from the public service on account of disability.

examination.[4] On August 4, 2006, the DCAS informed Grievant that the medical examination indicated she was "fit to perform the duties of her former position . . ."[5] (Pet. ¶ 10.) The TLC arranged to reinstate Grievant effective August 28, 2006. Subsequent to the August 4, 2004, letter, the DCAS notified the TLC that Grievant was not eligible to be reinstated pursuant to CSL § 71 because she had not completed the prescribed one year probationary period.[6] On August 25, 2006, the TLC informed Grievant not to report to duty and on August 29, 2006, Grievant returned the equipment that had been issued to her.

On August 31, 2006, Joseph A. De Marco, DCAS Deputy Commissioner, sent Grievant a letter correcting the August 4, 2006, letter, which reads, in pertinent part:

> This is a correction to our letter dated August 4, 2006, in which my office informed you that you were entitled to be reinstated to your former title of Taxi and Limousine Inspector, under provisions of Section 71 of the New York State Civil Service Law. Unfortunately, in terminating you pursuant to the provisions of the Civil Service Law, the Taxi and Limousine Commission ("TLC") made an error with respect to your entitlement to the benefits and protections of that section. Regrettably, this error was not detected by my office until now. Consequently, we regret to inform you that you are not eligible for reinstatement pursuant to Section 71.
>
> Section 71 of the Civil Service Law provides for the reinstatement of individuals who were serving ***permanently*** in competitive class positions, but who were subsequently separated from the service by reasons of a disability resulting from occupational injury or disease as defined by the workers' compensation law. An employee, however, does not attain "permanent status" until he or she has successfully completed the prescribed probationary period.

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[4] The record does not indicate exactly when Grievant contacted the DCAS or took the medical examination.

[5] The letter is quoted in the petition but is not part of the record.

[6] The record does not indicate how or when exactly the DCAS informed the TLC that Grievant was not eligible for reinstatement under CSL § 71.

> A review of our records indicates that on April 13, 2003, you were appointed from the civil service list for Taxi and Limousine Inspector, Exam No. 0056, but, on or about November 8, 2003 (a little less than seven months later), you began a workers' compensation leave of absence, an absence from which you did not return. Consequently, you did not successfully complete your one-year probationary period, and, therefore, you never attained "permanent" status as a Taxi and Limousine Inspector. TLC, therefore, was mistaken when it characterized your termination as a termination pursuant to Section 71. Because you were not entitled to be terminated under the provisions of Section 71, we are unable to reinstate you under those provisions.

(Pet. Ex. E.) (emphasis in original).

On October 27, 2006, Grievant grieved "the Commission's refusal to allow her to return to duty after being medically cleared by the City to return to her previous position and [sic] an inspector." (Pet. Ex. F.) The TLC denied the grievance on October 30, 2006, because Grievant "had not successfully completed the prescribed probationary period[,] she had not attained permanent status, and was therefore, not eligible for Section 71." (Pet. Ex. G.)

On November 30, 2006, the Union requested a Step III hearing claiming "that TLC has violated Article VI § (1)(e) of the Special Officer's Agreement by wrongfully disciplining Darya Garay for [sic] failing to allow her to return to work after injury."[7] (Pet. Ex. H.) Article VI § (1)(e) of the Agreement 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.

(Pet. Ex. A.) On February 9, 2007, the Office of Labor Relations denied the grievance because "the

[7] There was no Step II proceeding; the October 27, 2006, grievance appears to be Step I but the Union viewed the decision issued as a Step II determination and therefore proceeded to Step III, without any objection from the TLC.

Union alleges that the Grievant's termination [] was a wrongful disciplinary action. In its Step III filing, the Union does not cite an applicable contractual provision alleged to have been violated." (Pet. Ex. I.)

On March 9, 2007, the Union filed the RFA, asserting as the issue to be arbitrated that the "Employer has wrongfully disciplined the grievant." (Pet. Ex. J.) The specific contract provision alleged to have been violated was Article VI § (1)(f) of the Agreement, which 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." (Pet. Ex. A.)

POSITIONS OF THE PARTIES

City's Position

The City argues that the RFA must be denied because the Union has not established a nexus between the subject of the grievance and any written rule, regulation, or policy of Grievant's employer. Specifically, the City argues that there is no nexus between the subject of the grievance and either Article VI § (1)(e) or (f) of the Agreement. The City states that Grievant was terminated because she was absent from the TLC for over a year while not completing the prescribed one year probationary period for competitive employees. Both Article VI § (1)(e) & (f), however, refer to "wrongful disciplinary action," and Grievant was not terminated as a result of any disciplinary action. No charges of incompetence or misconduct were brought against Grievant. Also, Article VI § (1)(f) is inapplicable as it refers to provisional employees, while Grievant was a competitive employee on probation.

Further, the City argues that since Grievant was terminated while serving the one year probationary period required by the Personnel Rules and Regulations of the City of New York ("Personnel Rules"), the termination is not grievable. Article VI § (1)(b) of the Agreement explicitly states "disputes involving the Personnel Rules . . ., shall not be subject to the grievance procedure or arbitration." (Pet. Ex. A.) Since Grievant had only completed seven months of the required one year probationary period required under Personnel Rules § 5.2.1(a), Grievant was not a permanent employee when she was terminated.[8]

Finally, the City argues that disputes, applicability, and interpretation of CSL § 71– the statute under which Grievant was terminated and erroneously offered reinstatement – are beyond the scope of the Agreement. Therefore, the proper forum for Grievant's dispute is an Article 78 proceeding pursuant to the New York Civil Practice Law and Rules, not arbitration.

Union's Position

First, the Union explains that its reference to Article VI § (1)(f) of the Agreement in the RFA was a typographical error and that the intended reference was to Article VI § (1)(e), the same section cited in the request for a Step III hearing. This typographical error should not effect the RFA as both sub-sections address wrongful discipline taken against an employee, and the City was on notice of the correct provision as of the Step III proceeding. Therefore, the City's argument that Grievant was

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[8] Personnel Rules § 5.2.1(a) provides:

> 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 in the terms and conditions of the certification for appointment or promotion as determined by the commissioner of citywide administrative services. Appointees shall be informed of the applicable probationary period.

not a provisional employee is irrelevant.

Next, the Union asserts that Grievant was not terminated for failure to complete her probationary term, as alleged by the City. Rather, as reflected by the December 28, 2004, termination letter, Grievant was terminated for alleged unauthorized absence and/or failure to timely contact the TLC. Under these circumstances, the lack of written charges of incompetence or misconduct is no bar to arbitrability, as whether an employee has been disciplined within the meaning of a contract term is to be determined by an arbitrator. Therefore, the Union argues it has alleged an arguable nexus between the grievance, wrongful termination, and Article VI § (1)(e) of the Agreement.

Further, the Union asserts that Grievant's alleged status as a probationary employee is not a bar to arbitration. The parties disagree as to the interpretation of Article VI § (1)(e) as it applies to the termination of Grievant. A dispute regarding whether an employee is permanent or probationary and had rights under Article VI § (1)(e) requires the interpretation of contract terms and is, therefore, a function of the arbitrator.

The RFA is not based upon an interpretation or misapplication of CSL § 71. Therefore, the City's arguments that disputes under CSL § 71 are not arbitrable should be disregarded. Grievant was not terminated under CSL § 71; rather the TLC cited CSL § 71 as grounds for rescinding her reinstatement. Grievant was terminated for failing to timely contact the TLC regarding her employment, not for violating CSL § 71. Grievant only applied for reinstatement pursuant to CSL § 71 because she was instructed to do so by the employer. CSL § 71 does not set a limit on the maximum period of separation allowed due to occupational injury. To the contrary, it sets a minimum of "at least one year." CSL § 71. Finally, the City asserted in their August 31, 2006,

letter that CSL § 71 did not apply to Grievant. Accordingly, the City cannot now argue that a law they previously insisted does not apply to Grievant bars Grievant's arbitration.

The Union concludes that it is not obligated to conclusively establish a nexus in the RFA but rather is only required to demonstrate that the contract provision invoked in the RFA is arguably related to the grievance to be arbitrated. Here, the Union contends that the TLC violated Article VI § (1) (e) of the Agreement by wrongfully disciplining Grievant when they terminated her, affecting her permanent status as an employee. Such wrongful discipline is grievable under the Agreement and the grievance is, therefore, arguably related to the provisions of the Agreement.

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. *See New York State Nurses Ass'n*, Decision No. B-21-2002 (in depth discussion of public sector arbitration and the Board's role therein). However, "we cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties." *District Council 37*, Decision No. B-13-06 at 8-9 (citations omitted). When the arbitrability of a grievance is challenged, this Board applies a two prong test to determine arbitrability: "(1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so (2) whether 'the obligation is broad enough in its scope to include the particular controversy presented.'" *New York State Nurses Ass'n*, Decision No. B-21-2002 at 7 (*quoting Soc. Serv. Employment Union*, Decision No. B-2-69 at 2) (additional citations omitted). In other words, we consider "whether there is a nexus, that is, a reasonable relationship between the subject matter of

the dispute and the general subject matter of the CBA." *Id.* at 8; *see also Org. of Staff Analysts*, Decision No. B-22-2007 at 10; *Sergeants Benevolent Ass'n*, Decision No. B-15-2007 at 5; *Corrections Captains Ass'n*, Decision No. B-10-2007 at 18; *Soc. Serv. Employment Union*, Decision No. B-30-2006 at 2.

Here, the first prong of the test has been met. There is no dispute that the Union and the City are obligated to arbitrate their controversies through the grievance procedure set forth in the Agreement, and we find no statutory, contractual, or court-enunciated public policy restrictions are applicable. Therefore, the issue is whether a reasonable relationship exists between Grievant's termination and the provisions of the Agreement relied upon by the Union. The resolution turns on whether Grievant was a permanent employee at the time of her termination, for if Grievant had not completed her probationary period, her grievance has no nexus to Article IV § (1)(e) of the Agreement, which applies to permanent employees. *District Council 37*, Decision No. B-13-2006 at 11; *District Council 37*, Decision No. B-12-90 at 5; *Gaud*, Decision No. B-58-88 at 14.[9]

It is undisputed that Grievant was employed by the TLC for over a year and that her probationary period was for a year. That, however, does not resolve the issue, for, as this Board stated in *Gaud*, Decision No. B-58-88:

> the fact that petitioner was terminated more than one year after his probationary period commenced does not in itself establish that he had attained the status of a permanent employee prior to his termination. As noted by respondent, Rule 5.2.8 of the Rules and Regulations of the City Personnel Director requires that the probationary period be extended by the number of days the probationer does not

[9] Petitioner has not argued that any provision of the Agreement provides grievance rights to probationary employees. *See, e.g., District Council 37*, Decision No. B-29-2007 at 12 (A probationary employee's request for arbitration granted as petitioner identified contract provision arguably allowing grievance rights after three months even though probationary term was for six months); *City Employees Union, Local 237, IBT*, Decision No. B-27-2006.

perform the duties of the position.

Id. at 14; *see also District Council 37*, Decision No. B-12-90 at 7 ("In this connection we note that the [Personnel] Rules [§ 5.2.8(b)] provide for the extension of the probationary period by the number of days a probationer does not fully perform the duties of his position."). Personnel Rules § 5.2.8(b) provides:

> Notwithstanding the provisions of paragraphs 5.2.1, 5.2.2, and 5.2.8(a), 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 in a different job title; provided, however, that the agency head may terminate the employment of the probationer at any time during any such additional period.

The Board decision in *Gaud* holding reflects well-settled case law. In *Tomlinson v. Ward*, 110 A.D. 2d 537, 538, (1st Dept.), *aff'd*, 66 N.Y.2d 771 (1985), the Court, analyzing the State equivalent of the Personnel Rules, the Rules for the Classified Service of the Department of Civil Service, held that: "The [probationary] period should be measured by the number of days a probationer is actually working on the job." *Id.* at 538 (*citing Woltjen v. Burke*, 52 A.D. 2d 678 (3rd Dept. 1976)); *see also Garcia v. Bratton*, 90 N.Y.2d 991 (1997) (the period of the time spent on modified duty could not be counted toward a police officer's probationary term under Personnel Rules § 5.2.8(b)); *Agate v. New York City Health and Hospitals Corp.*, 2006 N.Y. Misc. LEXIS 4020 (Sup. Ct. N.Y. Co. March 17, 2006) (same holding as *Tomlinson* for the equivalent New York City Health and Hospitals Corporation Rule).

Applying *Tomlinson* and *Gaud* to the facts of the instant case, the Board concludes that Grievant was not a permanent employee at the time of her termination. The undisputed facts are that Grievant commenced employment on April 13, 2003, was injured on the job and went out on

workers compensation on November 7, 2003, and remained absent from work until her termination on December 7, 2004. Grievant did not spend a year actually working on the job and her employer did not have a full year to evaluate her. Therefore, Grievant was terminated during her probationary period. Since the Grievant was not a permanent employee, there is no nexus between the Union's claim and Article IV § (1)(e) of the Agreement. *New York State Nurses Ass'n*, Decision No. B-42-2001. Therefore, this Board grants the City's petition challenging arbitrability.

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 Taxi and Limousine Commission , docketed as No. BCB-2611-07, hereby is granted; and it is further

ORDERED, that the request for arbitration filed by the International Brotherhood of Teamsters, Local 237 the Sergeants Benevolent Association, docketed as A-12237-07, hereby is denied.

Dated: October 25, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER