City v. L. 420, DC 37, 59 OCB 21 (BCB 1997) [Decision No. B-21-97 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration :

--between-- :

THE CITY OF NEW YORK, :
Petitioner, :

--and-- :

LOCAL 420, D.C. 37, AFSCME,
AFL-CIO, :
Respondent.

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DECISION NO. B-21-97

DOCKET NO. BCB-1776-95
(A-5494-94)

DECISION AND ORDER

On August 15, 1995, the City of New York, appearing by its Office of Labor Relations ("the City") filed a petition challenging a request for arbitration of a group grievance submitted by the Local 420, D.C. 37, AFSCME, AFL-CIO, ("Union"). On September 12, 1995, the Union, by its attorney advised the Office of Collective Bargaining that he would be filing an answer "by September 15, 1995." No answer was filed. On March 3, 1997, by facsimile ("fax") transmission, the Union requested a copy of the petition and stated that an answer would be filed "immediately." However, the letter did not state a reason for its delays to date.

By letter dated March 11, 1997, sent by fax and by regular mail, the Trial Examiner informed the Union that an answer submitted at that time would be untimely by more than seventeen (17) months. The letter also advised that, absent either a

showing of good cause for the delay or evidence of agreement by the parties in lieu of a showing of good cause, no extension of the time limit prescribed in the OCB Rules[1] would be permitted and the Union's right to file an answer would be waived, unless these defects were cured by March 21, 1997. The Union failed to respond to the Trial Examiner's letter of March 11, 1997. To date, the Union has failed to submit an Answer.

Background

The City asserts that the Grievant, Zelda Johnson, was appointed to the title of Institutional Aide by the Department of Correction on January 21, 1993. It further asserts that the original appointment letter incorrectly stated that her title was "non-competitive." The City offers a memorandum transmitted from Lorraine Williams, P.A.A. II (Recruitment & Certification), within the Department of Correction to Katreen D. Sublett, Supervising Housekeeper, West Facility, requesting that the Grievant, inter alia, sign a form in duplicate attesting to her employment status as a provisional employee. The City maintains that the Grievant's status was "properly adjusted from non-competitive to provisional to reflect its true classification."

According to the City, the Grievant's employment was

[1] Section 1-07 of the Rules of the City of New York.

terminated on February 7, 1994, and the Union asked to appeal the termination, at Step II of the contractual grievance procedure.[2] A Step II decision was issued on March 18, 1994, denying the grievance on the ground that the Grievant was a provisional employee with no contractual, due process right to contest the discharge. On March 24, 1994, the Union appealed the Step II decision, citing a violation of Article VI, specifically, Section 1(G) which defines a claim of wrongful discipline of a non-competitive employee as a contractual grievance, as well as Section 11, which provides a special procedure for grieving claims under Section 1(G). A request for a Step III hearing was denied on April 6, 1994, on the grounds that the Grievant was employed in a temporary title and that, according to the Step III hearing officer, "while the classification of this temporary title is pending, the title is considered to be in the competitive class and all appointments to this title are provisional." Consequently, the City asserts, the grievant was provisionally appointed and, at the time of her employment termination, "did not have the requisite two (2) years of employment that would have qualified her for the service of

[2] The parties herein were parties to the Institutional Services Unit Agreement, for the term from October 1, 1990 -- December 31, 1991, whose non-economic terms were extended by operation of Section 12-311(d) of the NYCCBL. Article VI of the applicable collective bargaining agreement contained the grievance procedure.

disciplinary charges."

A Request for Arbitration was filed on May 16, 1994, alleging wrongful termination in violation of the section relating to claimed wrongful disciplinary action against non-competitive employees. As a remedy, the Union demands "[r]einstatement, back pay and benefits. To be made whole."

City's Challenge to Arbitrability

The City contends that, as the Grievant was a provisional employee with less than two years' service in the title of Institutional Aide, she did not have a contract right to file a grievance to dispute the termination of her employment. The City contends that the applicable Agreement excludes the Grievant's employment classification from the contractual grievance procedure and, thus, her employment termination is not grievable or arbitrable.

Discussion

While the Union has defaulted in answering the Petition in this case, it is still the responsibility of this Board to ascertain the prima facie sufficiency of the City's Petition before granting the relief requested by the City. We have reviewed the Petition as well as the Request for Arbitration and are satisfied that the Petition, on its face, is meritorious and

should be granted. No evidence has been presented which disputes the City's contention that the Grievant's status was, in fact, provisional due to the temporary nature of the title code into which she was hired and from which she was subsequently discharged. Further, no evidence has been presented which disputes the City's contention that the Grievant was not entitled to any contract right to grieve the employment termination.

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 of the City of New York contesting arbitrability be, and the same hereby is, granted; and it is further

ORDERED, that the Request for Arbitration of Local 420, D.C. 37, AFSCME, AFL-CIO, on behalf of Zelda Johnson, be and the same hereby is, denied.

DATED: New York, N.Y.
April 24, 1997

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

SAUL G. KRAMER
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER