SSEU, L. 371, 11 OCB2d 21 (BCB 2018)

(Arb.) (Docket No. BCB-4265-18) (A-15423-18)

Summary of Decision*:** HHC challenged the arbitrability of grievances alleging that it wrongfully terminated two employees. HHC argued that the dispute pertains to the Personnel Rules and Regulations of the HHC, and is excluded from the collective bargaining agreement's grievance and arbitration process. HHC also argued that the employees were probationary and that there is no nexus between the termination of probationary employees and the collective bargaining agreement. The Board found that a nexus exists between the subject matter of the grievance and the collective bargaining agreement. Accordingly, the petition was denied, and the request for arbitration was granted. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

NEW YORK CITY HEALTH + HOSPITALS,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
SOCIAL SERVICES EMPLOYEE UNION, LOCAL 371,
on behalf of its members Rosemarie Cruz and Debora Ferguson,

Respondent.

DECISION AND ORDER

On March 5, 2018, NYC Health + Hospitals filed a petition challenging the arbitrability of two grievances brought by District Council 37, AFSCME, AFL-CIO, Social Services Employees Union, Local 371 ("Union") on behalf of its members, Rosemarie Cruz and Debora Ferguson

("Grievants").[1] In the grievances, the Union alleges that HHC wrongfully terminated Grievants without providing them with the disciplinary due process rights to which they are contractually entitled, in violation of Article VI, §§ 1(f) and 2, of the Social Services and Related Titles Collective Bargaining Agreement ("Agreement"). HHC argues that the dispute pertains to the Personnel Rules and Regulations of the HHC, and is excluded from the Agreement's grievance and arbitration process. HHC also argues that the employees were probationary and that there is no nexus between the termination of probationary employees and the Agreement. The Board finds that a nexus exists between the subject matter of the grievance and the Agreement. Accordingly, the petition is denied, and the request for arbitration is granted.

BACKGROUND

Debora Ferguson and Rosemarie Cruz were appointed to the non-competitive civil service title of Case Management Associate/Assistant Systems Analyst, effective April 18, 2016, and May 2, 2016, respectively. Effective November 1, 2016, HHC changed Grievants' titles to Community Liaison Worker Level II (Corporate)/Community Care Management Associate I (Functional) ("CLW"), a non-competitive title at MetroPlus Health Plan ("MetroPlus"), a health insurance plan operated by HHC.

The Union and HHC are parties to the Agreement, which covers the period March 3, 2010 to July 2, 2017 and remains in *status quo* pursuant to NYCCBL § 12-311(d). Article VI, § 1, of the Agreement defines the term "grievance" as:

> b. A claimed violation, misinterpretation or misapplication of the rules and regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting

[1] We refer to New York City Health and Hospitals Corporation as "New York City Health + Hospitals" or "HHC" throughout this Decision and Order.

> terms and conditions of employment; provided disputes involving the Personnel Rules and Regulations of . . . [HHC] with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be the subject to the grievance procedure or arbitration;
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> * * *
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> f. A claimed wrongful disciplinary action taken against a full-time non-competitive class Employee with six (6) months service in title, except for Employees during the period of a mutually agreed upon extension of probation. This provision shall not apply to non-competitive Employees with rights pursuant to Section 75(1) of the Civil Service Law.[2]

(Pet., Ex. B)

According to HHC, Grievants were subject to a one-year probationary period, pursuant to § 5.2.1 of HHC's Personnel Rules and Regulations ("Personnel Rules"). This section provides, in pertinent part:

> a) General
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> Every appointment and promotion in the competitive, non-competitive or labor class shall be made subject to the successful completion of a probationary period, unless otherwise set forth in the terms and conditions for certification for appointment as determined by the Senior Vice President.
>
> b) Duration of Probationary Term
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> i. The probationary period shall be twelve (12) months unless otherwise set forth in the terms and conditions of certification for appointment or promotion as determined by the Senior Vice President.
>
> ii. Such probationary period may be extended for a period not to exceed an additional six (6) months.
>
> iii. Notwithstanding the provisions of subdivisions b) i, b) ii, and c) of this section, the probationary period shall be

[2] Article VI, § 6, of the Agreement sets forth the disciplinary procedure for grievances under Section 1(f).

> increased by the number of days the probationer does not perform the duties of the position. The Appointing Officer may terminate the employment of the probationer at any time during the extended period.
>
> c) Extension of Probationary Term
>
> The Appointing Officer and the probationary employee may, by mutual consent, extend the probationary period for one or more additional periods not exceeding in the aggregate six months; the Appointing Officer may terminate the employment of the probationer at any time during the extended period.

(Pet., Ex. E)

On April 12, 2017, Simran Kaur, MetroPlus' Director of Employee Relations, Human Resources & Organizational Development, emailed Union grievance representative Alex Elias, that HHC intended to extend Grievants' probationary periods. In her email, Kaur asked to meet with Elias regarding the extension of Grievants' probationary periods.

Before receiving a response from Elias, on or about April 18, 2017, Kuar provided Ferguson with a Probationary Period Extension Agreement ("Ferguson Extension Agreement"), which Ferguson signed extending her probationary period as a CLW from April 18, 2017, to July 18, 2017. The Ferguson Extension Agreement contains signature lines for Ferguson, Kaur, and Elias. It provides, in part, that "MetroPlus and [the Union] and Debora Ferguson have agreed to extend the probationary period . . . from April 18, 2017 to July 18, 2017. All parties have had the complete terms and conditions of this agreement clearly explained . . . ." (Pet., Ex. Q) The reason provided for the extension of Ferguson's probationary period is "Job Performance Issues." (*Id.*)

Kaur signed the Ferguson Extension Agreement on behalf of MetroPlus. However, Elias' name was crossed out, and his signature line was blank. Instead, the Ferguson Extension Agreement was signed on a separate line by Jason Dunn-Ford, a Union delegate who worked at

Grievants' work location.[3] The Union avers and the City denies that Dunn-Ford "is not an employee or representative of the Union and is not authorized to bind the Union by his actions." (Ans. ¶ 64)

On April 19, 2017, Elias responded to Kaur and inquired as to whether Kaur was available the following afternoon to discuss the extension of Grievants' probationary periods and stating that, if not, he would select a date the following week.[4] Two weeks later, on or about May 1, 2017, Cruz signed a Probationary Period Extension Agreement ("Cruz Extension Agreement") with nearly identical wording to the Ferguson Extension Agreement. Similar to the Ferguson Extension Agreement, the agreement also contains signature lines for Cruz, Kaur, and Elias and is signed by Kaur and Dunn-Ford. It also cites "Job Performance Issues" as the reason for the extension of the probationary period, and extends Cruz's probationary period from May 2, 2017, to August 2, 2017.[5] (Pet., Ex. H)

Over six weeks after Elias' April response, Kaur responded to Elias on June 5, 2017, advising him that: "I'm not available this Thursday. How's your availability next week?" (Ans., Ex. 3) Less than an hour later, Elias responded by email advising Kaur: "You emailed me about 2 employees on April 12 who needed their probationary periods extended. I replied asking for a

[3] As the Union delegate, Dunn-Ford was elected by unit members at Grievants' work location and is responsible for representing them at meetings that may lead to disciplinary action and assisting them with filing grievances.

[4] Neither party alleges that at the time of the April 19 email, Elias was aware of the Ferguson Extension Agreement or any communication between HHC and Union Delegate Dunn-Ford regarding that Agreement.

[5] According to HHC, Grievants' probationary periods were tolled, pursuant to Personnel Rule 5.2.1(b)(iii), by 18 days each beyond their one-year anniversaries because of absences. We note the Grievants' original probationary periods were not expiring until sometime in early and mid-May 2017.

meeting on April 19, of which you just replied . . . Please check this." (Ans., Ex. 3) Elias also advised Kaur in the email that he was available to meet the following Wednesday, and requested information regarding Cruz and Ferguson, including performance evaluations, job functions, supervisory sessions, and work performance counseling sessions with any corrective actions. Less than an hour later, Kaur advised Elias that "[t]he probationary period[s] w[ere] extended in [Jason Dunn-Ford's] presence as we (Jason and I) could not get in touch with you prior to the expiration of the employees' probationary period." (Id.)

On or about, June 14, 2017 and prior to the expiration of their extended probationary periods, the Union was informed that Grievants were being terminated. In response, on June 14, 2017, the Union filed Step I grievances ("Grievances") on their behalf, alleging that HHC violated Article VI, § 1(f) of the Agreement by wrongfully disciplining Grievants, to which HHC did not respond. On or about June 28, 2017, the Union appealed the Grievances to Step II. HHC terminated Grievants, effective June 30, 2017. On or about July 3, 2017, the Union supplemented the Step II grievances with Grievants' termination letters. The Step II appeals were denied on July 6, 2017, on the ground that Grievants lacked standing as probationary employees to challenge their termination because they had "mutually agreed upon [an] extension of [their] probation[ary periods]." (Ans., Ex. K; T) The Union appealed to Step III, and the Grievances were again denied for the same reason. On February 6, 2018, the Union filed a consolidated request for arbitration on the Grievances, which HHC challenges in the instant petition.

POSITIONS OF THE PARTIES

HHC's Position

HHC challenges the arbitrability of the Grievances on two grounds. First, it argues that § 7390.8 of the New York City Health and Hospitals Corporation Act, N.Y. Unconsolidated Law ("HHC Act") and the Agreement excludes the Grievances from arbitration.[6] It asserts that the dispute over the validity of the Extension Agreements and its authority to terminate Grievants is governed by § 5.2.1(b)-(c) of its Personnel Rules and that HHC Act § 7390.8 grants HHC's Personnel Review Board exclusive jurisdiction over such disputes. Further, HHC argues that, in recognition of the HHC Personnel Review Board's exclusive authority to resolve disputes relating to § 5.2.1 of its Personnel Rules, Article VI § 1(b), of the Agreement "explicitly excludes" from arbitration any misinterpretation or misapplication of these rules. Consequently, HHC maintains that the Grievances are not arbitrable. (Rep. ¶ 46)

Second, HHC argues that the request for arbitration must be dismissed because the Union failed to establish a nexus between Grievants' terminations and any applicable provision of the

[6] HHC Act § 7390.8(b), in pertinent part, provides:

> Except for matters which are subject to [the] collective bargaining agreement, the personnel review board shall have the right, at the instance of any aggrieved employee of [HHC] or any certified employee organization representing such employee, any by law, rule or regulation promulgated pursuant to this section or any action of [HHC] related thereto and upon such review to direct [HHC] to take or refrain from such action as the personnel review board shall deem proper except, however, nothing contained in this section shall abridge the right of [HHC] to exercise any managerial prerogatives . . . .

Agreement. While acknowledging that this Board has previously found arbitrable disputes over a grievant's status under Article VI of the Agreement, HHC maintains that there is no genuine dispute as to Grievants' probationary status and that it had authority under § 5.2.1(b) of its Personnel Rules to terminate Grievants. It argues that Personnel Rule § 5.2.1(c) only requires consent of the probationary employee and that the Union's consent is not necessary for a valid Extension Agreement. To the extent the Union's consent is deemed necessary, HHC asserts that Dunn-Ford had the apparent authority to act on behalf of the Union and that HHC reasonably relied upon his signature on the Extension Agreements as the Union's consent. Absent a genuine dispute over Grievants' status, HHC maintains that the Extension Agreements are valid and that Grievants' terminations occurred during their probationary periods. It argues that since probationary employees are expressly excluded from the disciplinary due process rights afforded under Article VI § 1(f), of the Agreement, the Grievances are not arbitrable. Consequently, HHC requests that the Board grant its petition and deny the Union's request for arbitration.

Union's Position

The Union contends that upon Grievants' appointment to the CLW title on or about November 1, 2016, they became subject to a six-month probationary period as non-competitive employees pursuant to Article VI, § 1(f), of the Agreement.[7] The Union argues that the two employees were not probationary at the time of their discharge because the Extension Agreements are invalid. It asserts that it did not "mutually agree" to them, as required by Article VI, § 1(f), of the Agreement. (Ans., Ex. 2) It argues that only authorized Union representatives can agree to

[7] The Union also alleges that Grievants were denied their due process rights under the Agreement, and incorrectly cites Article VI, § 2. The cited section sets forth the grievance procedure for certain grievances defined in Article VI, § 1. The section that governs grievances filed pursuant to Article VI, § 1(f) is Article VI, § 6.

extend an employee's probationary period and that the Extension Agreements were not executed by Elias, the authorized Union representative. The Union asserts that Dunn-Ford was not authorized to sign the Extension Agreements, thus his signature was not sufficient to bind the Union or to constitute a waiver of Grievants' due process rights. The Union points to HHC's inclusion of a signature line for Elias on the Extension Agreements as an acknowledgement by HHC that Elias was designated as the authorized Union representative. According to the Union, since Elias did not sign the Extension Agreements, they are invalid. Since Grievants were discharged on or about June 30, 2017, which is more than six months after November 1, 2016, the Union argues that Grievants were denied contractual disciplinary due process rights, in violation of Article VI, §§ 1(f) and 6.

The Union further argues that the Board has previously held that where a grievant's status as a probationary or permanent employee is in dispute, a union is entitled to have an arbitrator make a threshold determination as to the status. Therefore, it asserts that the Board should permit an arbitrator to determine whether the extensions of Grievants' probationary periods were mutually agreed upon under Article VI, § 1(f), and, if not, whether they were wrongfully terminated. Accordingly, the Union requests that the Board deny HHC's petition and grant its request for arbitration.

DISCUSSION

HHC challenges the arbitrability of two grievances alleging violations of Article VI, § 1(f), of the Agreement for terminating Grievants' employment. The Board finds the Grievances arbitrable.

It is the "policy of the [C]ity to favor and encourage . . . final, impartial arbitration of grievances." Section 12-302 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"); *see also* NYCCBL § 12-312 (setting forth grievance and arbitration procedures). As such, "the NYCCBL explicitly promotes and encourages the use of arbitration, and 'the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration.'" *PBA*, 4 OCB2d 22, at 12 (BCB 2011) (quoting *CEA*, 3 OCB2d 3, at 12 (BCB 2010)); *see also DC 37*, 13 OCB 14, at 11 (BCB 1974).

Under NYCCBL § 12-309(a)(3), the Board is empowered "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration." However, the Board "cannot create a duty to arbitrate if none exists, [nor can we] enlarge a duty to arbitrate beyond the scope established by the parties" in their collective bargaining agreements. *DC 37, L. 768*, 4 OCB2d 45, at 12 (BCB 2011) (quoting *PBA*, 4 OCB2d 22, at 12); *see also CCA*, 3 OCB2d 43, at 8 (BCB 2010); *SSEU, L.371*, 69 OCB 34, at 4 (BCB 2002). The Board applies a two-pronged test to determine whether a grievance is arbitrable. This test considers:

> (1) whether the parties are 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. In other words, whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement.

DC 37, L. 420, 5 OCB2d 4, at 12 (BCB 2012) (quoting *UFOA*, 4 OCB2d 5, at 9 (BCB 2011)) (citations and internal quotation marks omitted).

We find that the parties agreed to resolve the instant disputes through the Agreement's grievance procedure. It is undisputed that the parties agreed to resolve certain contractual and disciplinary disputes through a grievance procedure. However, HHC asserts that the Union is precluded from grieving or arbitrating the disputes at issue based on the exclusion contained in Article VI § 1(b) of the Agreement and HHC Act § 7390.8. We find that HHC's reliance on Article VI § 1(b) and HHC Act § 7390.8 is misplaced. The Union does not claim that the HHC misapplied its Personnel Rules. It asserts that the basis for the Grievances is Article VI, § 1(f). The Union claims that the Grievants were entitled to disciplinary due process rights as required by Article VI, § 1(f) because the Extension Agreements were not mutually agreed upon and therefore, not valid. HHC Act § 7390.8 expressly excludes from the Personnel Review Board "matters which are subject to the collective bargaining agreement." HHC Act § 7390.8(b). The instant dispute concerns the negotiated language in Article VI, § 1(f). Consequently, the first prong of the test is satisfied.[8] *See SSEU, L. 371,* 71 OCB 22, at 9 (BCB 2003) (finding Article VI, § 1(b) of the Agreement does not exclude from arbitration a grievance where HHC's Personnel Rules are not the subject of the grievance).

With respect to the second prong, the burden is on the Union to "demonstrate a *prima facie* relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration.'" *PBA,* 4 OCB2d 22, at 13 (quoting *PBA,* 3 OCB2d 1, at 11 (2010)); *see also Local 371,* 17 OCB 1, at 11 (BCB 1976). Such a showing "does not require a final determination of the rights of the parties in this matter; such a final determination would in fact

[8] HHC does not deny that the Agreement permits grievances for wrongful disciplinary actions against non-competitive employees. Nor does it assert that a collective bargaining agreement cannot provide broader rights than those contained in the Personnel Rules, or that such contractual provisions are unenforceable as a matter of statute or public policy.

constitute 'an interpretation of the agreement that this Board is not empowered to undertake.'" *OSA*, 1 OCB2d 42, at 16 (BCB 2008) (quoting *Local 1157, DC 37*, 1 OCB2d 24, at 9 (BCB 2008)). "Once an arguable relationship is shown, the Board will not consider the merits of the grievance . . . [as] where each interpretation is plausible; the conflict between the parties' interpretation presents a substantive question of interpretation for an arbitrator to decide." *PBA*, 4 OCB2d 22, at 13 (citations and internal editing marks omitted); *see also COBA*, 63 OCB 13, at 10 (BCB 1999); *Local 3, IBEW*, 45 OCB 59, at 11 (BCB 1990).

We find that a nexus exists between HHC's termination of Grievants' employment and Article VI, § 1(f). Article VI, § 1(f) provides disciplinary due process rights to full-time employees with six months of service in a non-competitive title, except when the disciplinary action occurs "during the period of a mutually agreed upon extension of a probationary period." (Pet., Ex. B) "[T]his 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" and has repeatedly held that the interpretation of contract terms and their applicability to disputes concerning an "employee's status [is] a question for an arbitrator to decide."[9] *SEIU, L. 371,* 77 OCB 30, at 10 (BCB 2006) (finding arbitrable a dispute concerning whether a grievant was serving in a "permanent title" under the parties agreement to qualify for disciplinary due process rights) Here, the parties' dispute over Grievants' eligibility for disciplinary due process rights is premised on

[9] The cases cited by HHC in which a grievant's status was governed by HHC's Personnel Rules are distinguishable because there were no genuine disputes as to employee status, as there are here. *See DC 37, L. 2627*, 3 OCB2d 45, at 8 (BCB 2010) (finding the calculation of a probationary period is governed by HHC's Personnel Rules and not arbitrable when there is no genuine dispute over grievant's status); *NYSNA*, 33 OCB 6, at 13 (BCB 1984) (granting petition challenging arbitrability where it was undisputed that Grievant was probationary and contract excluded probationary employees from challenging disciplinary actions.)

the validity of the Extension Agreements, specifically, whether they were "mutually agreed upon" under Article VI, § 1(f) of the Agreement. We find this to be a genuine dispute over Grievants' probationary status under the collective bargaining agreement, which requires interpretation of the Agreement, and we leave the matter for an arbitrator to decide. *See OSA*, 53 OCB 28, at 7-8 (BCB 1994) (finding arbitrable a dispute concerning whether a grievant had completed the requisite two years of service in order to qualify for disciplinary due process rights); *DC 37*, 47 OCB 52, at 11-12 (BCB 1991) (finding arbitrable a dispute over whether an extension of a grievant's provisional status affected the amount of time necessary to be entitled to disciplinary due process rights under the parties' agreement). Accordingly, we find the Union's claim under Article VI, §§ 1(f) and 6 arbitrable and deny the HHC'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, that the petition challenging arbitrability filed by the New York City Health + Hospitals, docketed as BCB-4265-18, hereby is denied, and it is further

ORDERED, that the request for arbitration filed by District Council 37, AFSCME, AFL-CIO, Social Services Employees Union, Local 371, docketed as A-15423-18, hereby is granted.

Dated June 14, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER