City, Office of Court Admin. v. DC37, 19 OCB 5 (BCB 1977) [Decision No. B-5-77 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

OFFICE OF COURT
ADMINISTRATION and
THE CITY OF NEW YORK,

DECISION NO. B-5-77

DOCKET NO. BCB-268-77
(A-637-77)

Petitioner

-and-

DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Respondent
- - - - - - - - - - - - - - - - - -X

DETERMINATION AND ORDER

On February 3, 1977, District Council 37, AFSCME, AFL-CIO, filed a Request for Arbitration of the grievances of thirty-two Confidential Attendants formerly employed by the Office of Court Administration. The grievants allege violations of Article III, Sections 1 and 2; Article V, Section 1, Subsections (A) & (B); and Article II (which incorporates Article V, Section 16 of the City-Wide Agreement) of the Court-Wide unit contract dated August 4, 1976. As relief for these alleged contractual violations, all thirty-two grievants seek the cash equivalent of the claimed annual leave due them, with interest theron. Further, two grievants, Stein and Tedesco seek the cash equivalent of the claimed terminal leave due them, with interest thereon.

Petitioner, appearing by the Office of Municipal Labor Relations (OMLR), contends that the Request for Arbitration must be dismissed as it would be illegal and contrary to public policy for an arbitrator to award the relief requested.

BACKGROUND

On May 21, 1976, thirty-two Confidential Attendants were laid off for fiscal reasons by the office of Court Administration. These employees "thereafter demanded that they be paid, pursuant to Executive Order No. 76, dated March 23, 1973, a sum of money equivalent to the unused creditable vacation and/or compensatory time allowances standing to their credit." The grievants all claim the cash equivalent of twenty days annual leave, plus one day for each individual year of service. Additionally, two of the thirty-two grievants (Stein and Tedesco) claim terminal leave pursuant to the terms of Article V, Section 16 of the City-Wide Contract which is incorporated by reference into the Court-wide Agreement at Article II. These two grievants claim that they are entitled to such cash payment in lieu of terminal leave as they had more than ten years of service.

At Step III of the grievance procedure, the position of the Office of Court Administration, the employer of the thirty-two grievants, was that written time and leave records were not continuously maintained and therefore are unavailable

to substantiate the grievants' claims. The Step III Hearing Officer framed the issue as whether grievants had a balance of unused annual leave to their credits as of May 21, 1976 and if so, what was the balance for payment under Executive Order No. 76. The decision of the Hearing Officer was that OLR lacked the authority to order payment in the absence of time and leave records or other relevant proof. The decision further noted that the grievants might possibly avail themselves of another avenue of remedy by filing a claim with the Office of the Comptroller. As to the demands of two of the grievants for terminal leave, the Hearing Officer once again cited the absence of time and leave records in upholding the refusal to pay the cash equivalent for terminal leave.

Thereafter, the Union filed the instant Request for Arbitration.

APPLICABLE CONTRACT TERMS AND OTHER REGULATIONS

The Court-Wide Contract provides:

ARTICLE II - CITY-WIDE AGREEMENT

Except as otherwise provided herein, the parties agree to be bound by the provisions of the City-Wide Agreement between District Council 37, AFSCME, AFL-CIO and the City of New York. Where approval or assent of the City Civil Service Commission is required or the rules and regulations of the City Civil Service Commission are cited, the Administrative Board of the Judicial

Conference and the Rules of the Administrative Board of the Judicial Conference of the State of New York (22 NYCRR) shall be deemed substituted for application to court employees covered by this agreement.

§1 ARTICLE III - TIME AND LEAVE

All provisions of the Time and Leave Rules of the Administrative Board (22 NYCRR 24) approved effective October 1, 1964 and amendments and official interpretations relating thereto in effect on the effective date of this contract shall apply to all employees covered by this contract . . .

§2 Annual leave may be accrued up to (2) years, with a maximum of 54 days.

Time and Leave Rules of the Administrative Board

(22 NYCRR 24) provides:

§24.1(b)(1)

All employees paid by a fiscal authority whose budget permits payment in cash for accrued vacation credits upon separation from its service, shall, at the time of separation from such service and from the service of the unified court system, be entitled to the payment of compensation in cash to themselves, their estates or beneficiaries, as the case may be, for vacation credits not in excess of 30 days accrued and unused as of the effective date of separation....

Certification for payment under this subdivision shall be made by the administrative board or an Appellate Division only where accurate records of vacation and sick leave credits and charges have been kept.

§24.6 provides:

> Computing terminal leave. Terminal leave with pay upon retirement may be allowed in the discretion of the administrative judge not to exceed one month for every 10 years of service, prorated for a fractional part thereof. The administrative judge shall be guided in this matter by the character of service rendered and by the manner and ectent of use of sick leave credits by the employee.

ARTICLE V - GRIEVANCE PROCEDURE

1. Definition: the term "grievance" shall mean:
(A) A dispute concerning the application or interpretation of the terms of this collective bargaining agreement;

(B)a claimed violation, misinterpretation, or misapplication of the rules or regu-ations, existing policy or orders applicable to the agency which employs the grievant affecting the terms and conditions of employment; ....

The City-Wide contract provides:

ARTICLE V - TIME AND LEAVE

Section 1

All provisions of the Resolution approved by the Board of Estimate on June 5, 1956 on "Leave Regulations for Employees Who Are Under the Career and Salary Plan" and amendments, and official interpretations relating thereto, in effect on the effective date of this Contract and amendments which may be required to reflect the provisions of this Contract shall apply to all employees covered by the Contract....

* * *

Section 16

a. Effective January 1, 1975, the terminal leave provision for all employees, except as provided in paragraphs b. and c. below, shall be as follows:

Terminal leave with pay shall be granted prior to final separation to employees who have completed at least 10 years of service on the basis of one day terminal leave for each two days of accumulated sick leave up to a maximum of 120 days of terminal leave. Such leave shall be computed on the basis of work days rather than calendar days.

The Career and Salary Plan, Leave Regulations provide:

Section 6.1

Daily time records shall be maintained showing the actual hours worked by each employee.

POSITIONS OF THE PARTIES

Petitioner states that grievants' demands were denied because written time and leave records were not continuously maintained. The requirement for maintaining daily records is found in the leave regulations of the Career and Salary Plan. Petitioner contends that these regulations are applicable to employees in the title of Confidential Attendants.

Petitioner concedes that Executive order No. 76 authorizes a lump sum payment in lieu of accumulated leave under certain circumstances, and that this payment could be available to employees terminated by fiscal considetations.

However, the City argues that daily time records must be kept so that calculation of the Jump sum is possible.

To support its argument concerning the necessity of maintaining time records, Petitioner relies on In re Goldberg [N.Y.L.J., August 9, 1976, p.8 (Sup. Ct., Bx. Cty.)], and Verdicchio v. Ross, [Mem. op. by J. Nadel, October 8, 1976, (Sup. Ct., N.Y. Cty.)]. In Goldberg, the court declined to order the payment of a lump sum in lieu of terminal leave to a law secretary who was a member of the Executive Pay Plan. The basis for the decision was the failure to maintain required time records. The court stated:

> "There are, of course, sound and practical reasons why the agencies in charge of administration require the keeping of accurate sick leave records. Before granting lump sum payments in lieu of terminal leave both the City and the Administrative Board have established a policy of requiring proof of attendance."

The court in Verdicchio, a case similar on the facts to Goldberg, restated the necessity of maintaining records and concluded that it is the employee's duty to keep such records:

> "Petitioner cannot on one hand disavow his obligation to maintain time records as required by the specific leave regulations, and on the other claim that he is entitled to be compensated under these regulations, which required the maintenance of such time records."

This "imperative construction of the law," the City contends, "is binding upon the parties and it may not be evaded by collective bargaining or arbitration." Therefore, since grievants are not entitled to lump sum payments in lieu of annual leave absent the proper time records, an arbitrator could not grant the relief requested.

The City cites Burnell v. Anderson, [N.Y.L.J., November 26, 1975, p.8 (Sup. Ct., N.Y. Cty.)]. In Burnell, the unions sought arbitration relating to out-of-title-work and demanded as a remedy a cease and desist order prohibiting out-of-title assignments and an award of back pay for such work already performed. The Board of Collective Bargaining found the entire matter arbitrable. The Supreme Court reversed as to that part of the Board's order which ordered arbitration of claimed retroactive higher pay for out-of-title work performed by grievants. Citing §100 of the Civil Service Law, which the Court found "prohibits payment of salary to a person holding a position in the classified service without the certification of the municipal commission that they are employed in their respective positions in accordance with law," the court held that the remedy requested in arbitration was clearly in violation of §100. Although recognizing the public policy favoring arbitration, the court found the remedy requested placed the controversy within the exception to this general rule because "the

performance which is the subject of the demands for arbitration is prohibited by statute." The City contends herein that state policy requires the maintenance of records by the employees and, therefore, the request for arbitration must be denied in accordance with guidelines established by Burnell.

The only other possibility, Petitioner argues, would be for grievants to reconstruct their time records by "guesswork". Yet, Petitioner contends that even if this guesswork succeeded, "an award in favor of the grievants would clearly violate the Civil Service [Law] and be subject to vacatur." Therefore, Petitioner urges that the request for arbitration be denied.

In support of its demand for arbitration, the Union relies on Article III, Section I of the Court-Wide Contract which provides that "all provisions of the Time and Leave Rules of the Administrative Board (22 NYCRR 24) ... shall apply to all employees covered by this contract." Section 24.1(b)(1) of the Time and Leave Rules requires that "accurate records" must be kept, while §24.6 makes no mention at all of record keeping. The Union's position is that §24.1(b)(1) of the Time and Leave Rules of the Administrative Board authorizes payment to the grievants, and that "it is the duty of management to keep accurate records of vacation and sick leave credits and charges." The Union asserts that the grievants will provide "documentary proof" of their claims, such as

letters from the judges whom they served attesting to the regular attendance.

The Union attempts to distinguish Goldberg and Verdicchio, cited by the City. In those cases, the employees based their respective claims on the Executive Pay Plan which incorporates the Leave Regulations for Employees Who Are Under the Career and Salary Plan. Section 6.1 of these Leave Regulations requires that "daily time records" shall be maintained. In contrast, grievants' claims herein are made pursuant to Section 24.1(b)(1) of the Time and Leave Rules of the Administrative Board, which requires only "accurate records."

As to the claim of terminal leave by grievants Stein and Tedesco, the Union maintains that a cash payment is authorized pursuant to Section 24.6 of the Time and Leave Rules of the Administrative Board. This section, unlike Section 24.1(b)(1) which provides for cash payments in lieu of unused annual leave, and requires "accurate records," has no requirement at all for the maintenance of records. The Union relies on Application of Spindel, 78 Misc. 2d 440, 357 NYS 2d 613. In that case, the employee sought to recover a lump sum payment in lieu of terminal leave while the employer, citing Section 24.1(b)(1) of the Administrative Board Rules, claimed that no payment could be made absent

the maintenance of records. The Court held:

> "In short, then, there is presently no regulation which requires the keeping of sick leave records for the purpose of computing the lump sum payment due employees in petitioner's position. Also, there is presently no regulation as to how to determine the proper credit in the absence of such records. Yet, petitioner is entitled to a lump sum payment based upon accrued sickleave."

The Court ordered the following relief:

> "To promote justice, and to effectuate the payment of a lump sum in lieu of terminal leave as mandated by Personnel Order No. 76/70, the court must fashion its own remedy. In doing so, the court should be guided by the policy set by the Administrative Board of the Judicial Conference in similar circumstances. And, as appears from Section 24.2, the Board, in such instance, gave credit for six days per year. Such formula appears to be eminently fair under the circumstances of this case, and is adopted by the court."

The Union argues that the Spindel decision is "practically on all fours with the claims here for terminal leave."

In its Reply, Petitioner contends that the letters from the judges under whom grievants worked would not satisfy the requirement of "daily time records" under the Leave Regulations of the Career and Salary Plan nor the requirement of "accurate records" under the Administrative Board Rules.

DISCUSSION

The resolution of grievants' claims centers on which leave regulations apply to employees in the titles held by grievants. The City relies on §6.1 of the Leave Regulations of the Career and Salary Plan, while the Union points to the Leave Regulations of the Administrative Board Rules (22 NYCRR 24).

To state the issue in its simplest form, the Board is presented with two opposing arguments based on two interpretations of the Court-Wide Contract. The interpretation urged by the City would apply Career and Salary Plan Leave Regulations, while the Union's interpretation applies the Administrative Board Time and Leave Rules. In Matter of City of New York and Social Services Employees Union, Local 371, D.C. 37, AFSCME, AFL-CIO, B-4-72, we stated:

> "The interpretation of contract terms and the determination of their applicability in a given case is a function for the arbitrator and not for the forum dealing with the question of the arbitrability of the underlying dispute."

Therefore, this Board should not determine the interpretation to be given to the contract terms at issue herein nor should it determine their application to the grievants' claims.

The decision to be reached by the Board concerns solely the arbitrability of the grievances. In Matter of

Office of Labor Relations and Social Services Employees Union, B-2-69, we established the basis for determining questions of arbitrability. We held:

> "In determining arbitrability, the Board must decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy presented."

The instant dispute concerns the application of the Court-Wide Contract and interpretation of the appropriate leave regulations. The dispute falls squarely within the definition of a grievance agreed to by the parties in Article V, §1 of their contract; it is a dispute concerning "application or interpretation" of the contract and concerning a "claimed ... misinterpretation of rules or regulations ... applicable to the agency which employees the grievant affecting the terms and conditions of employment." Thus, the dispute is clearly within the standards of B-2-69, and the request for arbitration should be granted. We find that Goldberg and Verdicchio, cited by the City, are not applicable because those cases dealt with rights under the Executive Pay Plan whereas none of the thirty-two grievants herein are covered by that plan. Consequently, the Burnell case cannot be a bar to arbitration herein. Contrary to the City's assertions, it seems that no court has decided the issues of entitlement to annual leave for employees in

the titles held by grievants, nor is there any law or regulation which, on its face, bars the relief requested. Moreover, the decision in Spindel, supra, indicates that some employees subject to the Administrative Board Rules of the Judicial Conference have been granted terminal leave even though certain records had not been kept.

Therefore, we find the instant grievances arbitrable. We leave for determination by the arbitrator the question concerning which time and leave regulations apply to grievants pursuant to the collective bargaining agreement between the parties, as well as the interpretation of the requirements thereunder. The parties have contractually committed themselves to seek resolution of such questions in an arbitral forum. It follows that the arbitrator, based on his or her reading of the contract and the applicable regulations, will determine where the duty to maintain time records lies and the standard of proof to be applied to those records. We make no determination concerning the adequacy of the letters which the Union seeks to introduce to prove the grievants' claims. If the arbitrator determines that the contract might provide for cash payments to employees such as the grievants herein, it will then be necessary for the arbitrator to decide if the claims as to time worked by the individual grievants have been properly substantiated.

O R D E R

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 City's petition challenging arbirability be, and the sume hereby is, denied; and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is, granted.

DATED: New York, N.Y.
June 1 , 1977

ARVID ANDERSON
C h a i r m a n

ERIC J. SCHMERTZ
M e m b e r

WALTER L. EISENBERG
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