City v. DC37, 21 OCB 6 (BCB 1978) [Decision No. B-6-78 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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City of New York,

Petitioner

Decision No. B-6 -78

Docket No. BCB-291-78
(A-719-78)

-and-

District Council 37, AFSCME,
AFL-CIO,

Respondent

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DETERMINATION AND ORDER

District Council 37, AFSCME (the Union), filed a request for arbitration on February 10, 1978, concerning the "out of title" grievance of a Park Foreman. Specifically, the issue to be arbitrated, as stated by the Union, is:

> "Whether the employer violated the collective bargaining agreement between the parties by not reimbursing the grievant for the voluntary assignment to duties at a higher title."

The claimed violated provision, Article XIII, Section I of the parties' collective bargaining agreement, reads as follows:

> "The involuntary assignment of employees to duties different from those included in their job specifications is forbidden."

In addition, the Union relies on Article III, Section I of the ccntract which defines a grievance, inter alia, as:

> "... Non compliance with or misinterpretation or misapplication of

any of the provisions of this agreement."

Factual Background

Grievant, a Park Foreman employed at Leif Ericson Park in Brooklyn, alleged that he had been repeatedly ordered to perform duties substantially different from those in the job specification for his title. Specifically, he stated that since November 1973 (when he first became a Park Foreman) he had been assigned the duties of General Park Foreman for 2 or 3 days at a time on a regular basis, with such assignment re-occurring every 3 or 4 weeks.

A grievance was filed on March 7, 1977, seeking the immediate cessation of the contested assignment or payment at the rate for the higher title when the grievant was so assigned. The Step IV decision, rendered on September 6, 1977, stated that an August 31, 1977 Memorandum from the Department's Director of Maintenance and Operation to the Park Manager, Borough of Brooklyn, rendered the grievance moot. The memorandum read as follows:

> "This memo is to inform you that Park Foreman, Thomas L. Albino is not to be directed to work in his district as Acting General Park Foreman."

Instead of appealing the Step IV decision to impartial arbitration within 15 days as required by the contract, the Union filed a new grievance on October 26, 1977, again claiming a

violation of Article XIII, Section 1 of the PRCA Working Conditions Contract. The grievance stated that on 87 separate occasions beginning in November 1973, the grievant had performed the duties of a General Park Foreman. The remedy requested is of monetary compensation at the rate paid a General Park Foreman for the time worked by Grievant in this capacity."

Position of the Parties

(I) The City Position

The City argues that the grievance is not arbitrable because the Agreement pursuant to which the dispute was brought expired on June 30, 1974, and the arbitration procedure contained therein is no longer valid and enforceable. The City asserts that the New York City Collective Bargaining Law (NYCCBL) Section 1173-7.0(d), which requires public employers and public employee organizations to preserve the status quo during the period of negotiations, is inapplicable. The City argues that the "period of negotiations," which is defined as "the period commencing on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed," never commenced. The City contends that the Union never filed a timely notice pursuant to NYCCBL Section 1173-7.0(a)(1) of its desire to negotiate a new agreement. Therefore, the City asserts, it was not required to preserve the status quo. The City argues that the

Agreement had terminated on its face, and even if it had not expired, it would have terminated by operation of law since an agreement for an indefinite duration is unenforceable as being violative of public policy.

The City contends that the grievance should be barred on the grounds that the matter was the subject of an earlier grievance and is therefore moot. The City, in support of this claim, cites the aforementioned memorandum by the Department's Director of Maintenance and Operation. The City alleges that the earlier grievance and the instant grievance involve the same allegations of out-of-title duties, and that the Union is barred from pursuing a new grievance involving the same subject matter.

The City also argues that the filing of the grievance was untimely in that Article III, Section 2, Step I, of the Agreement requires that a grievance be initiated, inter alia:

> "not later than 120 days after the date on which the grievance arose."

The grievance, the City contends, was filed more than 120 days from the date on which it arose.

The City asserts that the grievant's requested relief, payment for the performance of alleged out-of-title work, is prohibited by law and that an arbitrator cannot be directed to

consider an award which would order a party to perform an act proscribed by law. Matter of Burnell v. Anderson, NYLJ, Nov.26, 1975, p.8 Cols. 1-2, Sup. Ct., N.Y. Cty., Sp. Term, Part I, Asch, J.[1]

(II) The Union Position

The Union alleges that it sent to the appropriate parties a notice informing them of its desire to negotiate a new collective bargaining agreement, in accordance with NYCCBL Section 11737.0(a)(1). The Union also asserts that the present grievance is not moot. In support of its position, the Union argues that even though the present grievance has the same background as the former, a totally different remedy is sought. The Union contends that the remedy sought in the prior grievance ("... to be paid at the rate of a general park foreman or be relieved of this responsibility') was for prospective relief. The Union also submits that the present action is being sought to remedy the past injustices suffered by the grievant, i.e., "monetary compensation for the period the grievant worked out of title."

The Union contends that the instant grievance was not untimely filed. Further, and with regard to the City's claim of procedural untimeliness, the Union asserts that the issue of

[1] The Board notes that the Burnell decision was legislatively overruled with the signing by Governor Carey of an amendment to §100 of the Civil Service Law (Chapter 255, Laws 1978) providing that an arbitrator may grant a monetary remedy for the violation of a contract agreement barring assignment of employees to duties substantially different from those appropriate to the title to which the employees are certified.

procedural untimeliness is a question for an arbitrator to decide. In regard to procedural arbitrability, the Union claims that the City has failed to show injury, change of position, loss of evidence or any other disadvantage even if there was untimeliness in the filing of the grievance.

Finally, the Union states that it is well settled that an Arbitrator is not limited nor confined to granting the requested relief, but has the authority to fashion an appropriate remedy to fit the facts of the case. Matter of Board of Education of Yonkers City School District v. Yonkers Federation of Teachers, 40 NY 2d 268, 386 NYS 2d 657 (1976).

Discussion

The submissions of the parties put into issue the question whether or not a Bargaining Notice pursuant to NYCCBL Section 1173-7.0 (a)(1) was timely filed. Since we are deciding in favor of the City's petition on a different ground, we need not reach a final resolution of the issue at this time.

The issue raised by the City concerning the timeliness of the Union's invocation of the grievance procedure presents a question of procedural arbitrability. As we have often stated, questions of procedural arbitrability are issues to be decided by an arbitrator and not by this Board. Office of Labor Relations v. Social Service Employees Union, Decision No. B-6-68; City of

New York and Social Service Employees Union, Decision No. B-6-75.

On the other hand, the City presents a persuasive argument that the instant grievance should be barred on the grounds that the matter was the subject of an earlier grievance, thereby mooting the present grievance. The papers submitted by the City show that on or about March 14, 1977, the Union initiated a grievance at Step II alleging "involuntary out of title work without monetary compensation" and "performing the duties of a General Park Foreman." The remedy sought was ". . . to be paid the rate of a General Park Foreman or be relieved of this responsibility." (emphasis added) The grievance went through the various steps and resulted in a Step IV decision, rendered on September 6, 1977, which declared the grievance "moot" on the basis of the memorandum issued by the Department's Director of Management and Operation. The Step IV decision stated in part:

> "Since in OMLR File No. 2614, grievant asked to be 'paid or relieved' (not paid and relieved), his complaint was already resolved, and the instant complaint is, therefore, moot."

Grievant, in the above action, had asked to be paid or relieved from further out-of-title assignments. The Step IV remedy granted relief from further out-of-title assignments and no appeal was taken. In the present Request for Arbitration, the grievant now asks for the remedy of reimbursement for performing the same out-of-title work, which he complained about

in the first proceeding. The grievant having had the opportunity to litigate the same matter in a former action should not be permitted again to raise the identical issue in a second action, where the first ended with the employer acceding to grievant's demand as it was then framed. Substitution of a different demand for relief is no basis for allowing a renewal, with arbitration, of the same underlying dispute.

Section 1173-8.0(d) of the NYCCBL requires a written waiver from the party requesting arbitration waiving "its right, if any, to submit the underlying dispute to any other administrative or judicial tribunal except for the purposes of enforcing the arbitrators award." The key term in this waiver provision is "underlying dispute." It is clear that the use of the phrase "underlying dispute " is designed to prevent repeated litigation of once arbitrated disputes. As we stated in City of New York and Uniformed Firefighters Association, Decision No. B-16-75, at page 21:

> " vexatious and oppressive relitigation of previously arbitrated disputes is not to be tolerated. Repeated attempts to arbitrate one underlying dispute constitute an abuse of this Board's processes, discourage harmonious labor-management relations ....”

Our conclusion herein is supported by the arbitration decision rendered in Babcock and Wilcox Company and United 'Steelworkers of America, Local 1082 (CIO), 24 LA 541 at 547 (1955), in which a grievance was found not arbitrable because the Union

had not appealed an identical case to arbitration. The arbitrator stated:

> "The election on the part of the union not to proceed to arbitration with reference to the prior grievance is conclusive of the rights, questions and facts in issue in all other grievances concerning the same and identical subject matter. The final disposition of the previous grievance con stitutes a bar to arbitration of the later grievance, and is conclusive between the company and the union where it involves the same matter which was dealt with in the former dispute."

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 request for arbitration of District Council 37, AFSCME, AFL-CIO be, and the same hereby is, denied; and it is further

ORDERED, that the petition of the City of New York contesting arbitrability be, and the same hereby is granted.

DATED: New York, N.Y.

July 5 , 1978

ARVID ANDERSON
CHAIRMAN

ERIC J. SCHMERTZ
MEMBER

WALTER L. EISENBERG
MEMBER

THOMAS J. HERLIHY
MEMBER

EDWARD J. CLEARY
MEMBER