City v. DC37, 25 OCB 37 (BCB 1980) [Decision No. B-37-80 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK,

Petitioner,

- and -

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent

DECISION NO. B-37-80

Docket No: BCB-432-80 (A-1052-80)

DECISION AND ORDER

On May 16, 1980, the Respondent, District Council 37, AFSCME, AFL-CIO, (the "Union") , filed a Request for Arbitration. in which it seeks to arbitrate the following dispute:

> "Individuals continue to be assigned duties of 'Acting Principal Administrative Associates' while a Principal Administrative Associate list is in existence; employees on the aforementioned list are denied promotions because of assignment of others to duties substantially different from those in their job specifications."

The City of New York (the "City") filed a Motion for Particularization of the Request for Arbitration on June 6, 1980, requesting the names, titles and agencies of the individuals allegedly assigned the duties of Acting Principal Administrative Associate ("Acting PAA").

Following the Union's filing on July 1, 1980 of its opposition to Motion for Particularization, the City filed a letter with the Office of Collective Bargaining ("OCB") on July 11, 1980 requesting dismissal of the Request for Arbitration in its entirety.

On July 17, 1980, a meeting was held at OCB at which counsel for the Union agreed to Provide by letter a list of employees who were allegedly assigned to the Acting PAA position and, by letter dated July 17, 1980, the Union indicated that the grieving employees are employed at the Human Resources Administration ("HRA") and attached a list of 29 such employees and the location of their employment within HRA.

On July 31, 1980, the City filed its Petition Challenging Arbitrability (the "Petition") and on August 6, 1980, the Union filed its Answer.

POSITION OF THE PARTIES

The Union maintains that it has stated a violation of and hence an arbitrable grievance under Article VII, Section 13 (hereinafter referred to as "Section 13") of its Collective Bargaining Agreement with the City dated January 1, 1978 (the "Agreement") which provides as follows:

> "Section 13: Notwithstanding any other provision in this Agreement, the parties agree that Section 1(c) of this Grievance Procedure shall be available to any person in the units designated in Section I of Article I herein who claims to be aggrieved by an alleged assignment of any City employee, whether within or without such unit, to clerical-administrative duties that are substantially different from the duties stated in the job specification for the title held by such employee. Light Duty assignments of permanent City employees, within or without such designated unit, who have been certified by the appropriate procedures, shall be excluded from this provision.

> Such grievance may be taken directly to the arbitration step of the grievance Procedure upon the election of the Union."

Section 1(c) of Article VII provides as follows:

> "The term 'grievance' shall mean
>
> * * *
>
> (C) A claimed assignment of employees to duties substantially different from those stated in their job specifications;"

The Union asserts that it has stated an arbitrable grievance under Section 13 since it is alleging that the City "has assigned employees holding other than the title [PAA] to that title on an 'acting' basis hence to duties substantially different from those in their job descriptions."(Answer ¶ 8).

In addition, the Union argues that the "acting" assignments have been made in spite of the availability of a current PAA eligible list (Answer ¶ 10) and seeks a remedy discontinuing Acting PAA assignments and assigning permanent PAA's from the current PAA eligible list.

In its Petition, the City maintains that the Request for Arbitration "does not allege a contractual violation." (Petition ¶ 9):

> "Rather, it alleges a violation of the Rules and Regulations of the Civil service Commission which provide for promotion from preferred lists."

For its argument, the City relies on Article VII, Section 1(B) that states in part that "... disputes involving the Rules and Regulations of the New York City, Civil Service Commissions... shall not be subject to the grievance procedure or arbitration." (Petition ¶ 10) .

In addition citing Board decisions B-10-71 and B-11-69, the City argues that the failure to make appointments and the elimination of promotional opportunities are management prerogatives that are not only not arbitrable, (Petition ¶ 11),but also are outside the power of an arbitrator to remedy. (Petition ¶ 12).

DISCUSSION

The City is correct that it has the sole right to promote, that promotion is a management right and a subject on which the Agreement is silent. In Decision B-10-71, the Board ruled that such decisions on promotions, unless specifically limited or modified by contract, are not arbitrable; the Board reaffirms that principle.

The City errs, however, in characterizing the grievance in this case as a promotion grievance. It is not. From the Union's initial Request for Arbitration and its repeated references to Section 13, it is clear to us that the Union is grieving out-of-title assignments of clerical-administrative duties to unit and non-unit employees

on an "acting" basis, which duties are not covered by their respective job specifications. In other words, the Union is arguing that the City cannot appoint people as Acting PAA's where performance of the PAA duties is out-of-title. Therefore, the City's assertion that Section 1(B) of the Agreement excludes this matter from arbitration because the grievance involves a rule of the Civil Service Commission is not persuasive. This is an out-of-title case, not a promotion case.

Section 1(C) of the Agreement, as previously stated, defines a grievance to include out-of-title claims:

> "A claimed assignment of employees to duties substantially different from those stated in their job specifications."

More significantly, Section 13 clarifies who may assert a l(C) violation and over what type of out-of-title assignment. The dispositive language of Section 13 is as follows:

> "Notwithstanding any other provision in this Agreement, ... this Grievance Procedure shall be available to any person ... who claims to be aggrieved by an alleged assignment of any City employee ... to clerical-administrative duties that are substantially different from the duties stated in the job specification for the title held by such employee." (Emphasis added.)

The grievants in this case qualify as "any" persons who claim to be aggrieved since because they are on the eligible list, arguably they would be performing the PAA duties but for the "Acting PAA's"; the duties complained of are "clerical-administrative"

and such duties are alleged to be "substantially different" from the duties of "such" employees, namely the acting PAA's.

The language of Section 13 is clear and unambiguous, and very broad. As stated by the Board in B-10-79:

> "As the Board has stated in Decision No. B-19-75, where contract language is clear and unambiguous on its face, there is no need to look to the intent of the parties or to the other provisions of the contract to aid in the interpretation of the clause at issue."

Since Section 13 is broad enough to include the grievants within its coverage, a valid grievance has been stated. The Board need go no further in analyzing the Agreement. By the terms of Section 13, this matter may go to arbitration.

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 petition of the City challenging-arbitrability should be, and the same hereby is denied; and it is further

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

DATED: October 1, 1980
New York, New York

ARVID ANDERSON
CHAIRMAN

DANIEL G COLLINS
MEMBER

WALTER L. EISENBERG
MEMBER

JOHN D. FEERICK
MEMBER

FRANKLIN J. HAVELICK
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