City v. UPOA, 29 OCB 27 (BCB 1982) [Decision No. B-27-82 (Arb)]

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

THE CITY OF NEW YORK,

Petitioner,

-and-

UNITED PROBATION OFFICERS ASSOCIATION,

Respondent.
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DECISION No. B-27-82

DOCKET NO. BCB-584-82
(A-1480-82)

DECISION AND ORDER

On April 5, 1982, the City of New York, appearing by its Office of Municipal Labor Relations (hereinafter "the City" or "OMLR"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the United Probation Officers Association (hereinafter "the Union" or "UPOA") on behalf of employee Morris Frey on March 25, 1982. The Union filed an answer on May 6, 1982, to which the City replied on May 11, 1982.

Request for Arbitration

The request for arbitration alleges that the City violated Article VI, Section 1(c) of the 1980-1982 collective bargaining agreement (hereinafter "the Agreement")

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entered into between the parties by "requiring Morris Frey as a Supervising Probation Officer to engage in lateness control procedure

Among the several definitions of the term "grievance" found in Article VI, Section l(c) states a grievance to be:

> A claimed assignment of employees to duties substantially different from those stated in their job specifi-cations.

As a remedy, the Union seeks to have the Department of Probation (hereinafter "the Department") "cease and desist from requiring bargaining unit members from engaging in lateness control..."

The instant grievance was filed pursuant to the Agreement's grievance-arbitration procedures contained in Article VI, Section 2 thereof.

Background

In December, 1977 the Department instituted an Absence Control Plan. under the provisions of General Order No.15-77, Supervising Probation Officers were required to "keep a careful record of all absences and play an active part in directing and counseling employees." After exhausting the initial steps of the grievance pro-

cedure, the Union filed a request for arbitration in Docket No. A-804-79 on January 19, 1979, on behalf of "all Supervising Probation officers." Included as part of this group grievance was the present grievant, Morris Frey.

Hearings on the grievance in Docket No. A-804-79 were held in April and June, 1979 before Arbitrator Joan Weitzman. The parties stipulated to the following issue:

> Whether the duties and responsibilities of a Supervising Probation Officer, pursuant to the Absence Control Plan, are substantially different from those stated in the Job Specifications, in violation of the Collective Bargaining Agreement? If they are, should the Employer be directed not to assign such duties, as they are currently being assigned under the Absence Control Plan?

On August 20, 1979, the Arbitrator rendered her decision in which she found that:

> The duties and responsibilities of a Supervising Probation Officer, pursuant to the Absence Control Plan, are not substantially different from those stated in the Job Specifications, in violation of the Collective Bargaining Agreement. The grievance is denied.

On December 10, 1979, a Lateness Control Program was established for all non-managerial Department employees by Executive Memorandum No.45-79. The implementation of

the Lateness Control Program underlies the present grievance, in that Supervising Probation officers were assigned certain duties and responsibilities which the Union claims they are not required to perform.

Positions of the Parties

The City's Position

OMLR asserts that the subject of the request for arbitration is the same issue submitted to and decided by Arbitrator Weitzman in Docket No. A-804-79. Thus, in that the instant dispute involves the same parties as in Docket it is alleged that the current request for consideration by the No. A-804-79, arbitration is barred from arbitral doctrine of res judicata and should not be Entertained.

The City argues that although deals with lateness control and the the present matter prior proceeding concerned absence control, both cases relate to the duties of a Supervising Probation officer in implementing the two control plans. The duties, it is urged, under General Order No. 15-77 (absence control) and Executive Memorandum No. 45-79 (lateness control) are the same; i.e., keeping track of absences and latenesses of employees, conferring with employees, and recording absences and latenesses on a

form entitled "Absence and Tardiness Record." Thus, the City maintains that the present matter has already been decided by the decision and award in Docket No. A-804-79.

The City disputes the Union's contentions regarding this Board's subject matter jurisdiction. Contrary to the position taken by the UPOA, OMLR maintains that the applicability of the defense of res judicata is a question to be decided by the Board, rather than by an arbitrator.

The Union's Position

The UPOA asserts that where a party seeks arbitration under a valid and subsisting contract and the precise issue has not been adjudicated under that agreement, the defense of res judicata is a question for the arbitrator rather than the Board. It is urged that under Section 7.3 of the Revised Consolidated Rules of the office of Collective Bargaining (hereinafter "the Rules"),[1] once the parties have

[1] Rule 7.3 states:

> Scope of Collective Bargaining and Grievance Arbitration. A public employer or certified or designated public employee organization which is party to a disagreement as to whether a matter is within the scope of collective bargaining under Section 1173-4.3 of the statute, or whether a matter is a proper subject for the grievance and arbitration procedure established pursuant to Section 1173-8.0 of the statute or under an applicable executive order, or pursuant to collective bargaining agreement may petition the Board for a final determination thereof.

agreed by contract to arbitrate a grievance of the kind being, asserted, the function of the Board is limited to determining whether the matter is a proper subject for the grievance-arbitration procedure.

The Union also argues that the City's reliance on doctrine of res judicata is erroneous in the present matter. Res judicata applies only where there is an identity of parties and issue. The Union maintains that is an absence of identity of issue between Docket. No. A-804-79 and the instant case since the former dealt with absence control while the latter pertains to the imposition of requirements in conjunction with lateness control. Furthermore, the contracts under which the two grievances arose are not identical.

The UPOA further contends that the City is "estopped" from asserting a claim of res judicata in view of "previous acquiescence" in two arbitrations involving the same issue with another municipal union wherein the arbitrators handed down inconsistent awards. The Union stated that in Docket No. A-218-72 Arbitrator Daniel House denied the grievance brought by the Marine Engineers Beneficial Association (hereinafter "MEBA") on behalf of an individual grievant. However, in Docket No. 26-72, Arbitrator

Milton Rubin sustained MEBA's position on the same issue, which had been presented as a group grievance.

Discussion

The parties to this proceeding do not question their obligation under the Agreement to submit to arbitration a grievance pertaining to an out-of-title claim. Rather, the City is contesting arbitrability on the grounds that the present grievance is barred by the doctrine of res judicata.

Before examining the City's challenge, however, we must first resolve the Union's allegation that questions the Board's authority to determine the applicability of this defense. It is well established that the Board of Collective Bargaining, rather than the arbitrator, is the forum charged with the duty of determining substantive arbitrability.[2] In so doing, we may be called upon to consider relevant legal defenses such as res judicata and collateral estoppel.[3]

Res judicata will bar the litigation of a claim which has already been decided, where there is an identity as to parties and as to the claim presented. While it is undisputed

[2] Decision Nos. B-8-68, B-8-69, B-19-72, B-11-80, B-20-82.

[3] Decision Nos. B-16-75, B-20-75, B-9-78, B-13-80, B-10-82.

that the present litigants were involved in Docket No. A-804-79, the parties disagree as to whether there is an identity of issue between that case and the present one.

The facts establish that the claim in Docket No. related to a Supervising Probation Officer's duties under a newly promulgated Absence Control Plan. The Arbitrator found that the duties under the Absence Control Plan were consistent with the job specifications for the title and denied the Union's grievance.

In the instant matter, we are dealing with a different program, one that pertains to Lateness Control. OMLR argues that the two plans prescribe the same duties for Supervising Probation Officers, so that there is no issue left to be resolved. The City would have the Board compare the two plans to reach the same conclusion. We decline to do so.

In deciding questions of arbitrability, the Board will not inquire into the merits of a dispute,[4] for issues concerning the merits of a grievance are for the arbitrator to resolve.[5] To compare the two plans and decide whether or not the duties of Supervising Probation Officers are the same under each would usurp the power of

[4] Decision Nos. B-12-69, B-8-74, B-1-75, B-10-77.

[5] Decision Nos. B-2-68, B-9-80.

the arbitrator to independently resolve the merits of the grievance, for a finding would have already been made and arbitration might be precluded altogether. Furthermore, we note that the contract under which the grievance in Docket No. A-804-79 was brought is not the same Agreement under which the present matter was filed.

We therefore find that the legal requirements for application of the res judicata defense have not been met herein. In that there is no clear and obvious identity of issue, the instant matter is readily distinguishable from the situation presented in Decision No. B-28-81, cited by the City, in which a union's request for arbitration was denied. In Decision No. B-28-81, we found that the arbitrator in a prior proceeding had already decided the precise issue over which arbitration was again being sought. Here however, although seemingly close, it is not readily apparent that the issues are identical. At no time did the arbitrator in Docket No. A-804-79 either examine or discuss lateness control.

In reaching our conclusion, we give no credence to the Union's argument that OMLR is estopped from raising the defense of res judicata because the City partook in two arbitration proceedings with MEBA over the same issue, i.e., compensatory time. Not only is an estoppel argument misplaced in this context, but as stated by the Union

itself, the first matter concerned an individual's grievance while the second case was filed as a group grievance. A careful reading of the two awards shows that the arbitrator in the first case expressly insulated his award from extension to other employees, thereby allowing for inconsistent findings.

In addition to our finding that the legal requirements for the application of res judicata are not present in this case, we wish to reiterate that a finding that a matter is arbitrable does not imply a disposition on the, merits or a determination as to the substance of a claim.[6] Furthermore, we observe that it has always been Board policy to favor settlement of disputes by arbitration when the parties have agreed to a mechanism for arbitration.[7] Based upon the above considerations, we find that this grievance should be submitted 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

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[6] Decision Nos. B-2-68, B-14-81.

[7] Decision Nos. B-8-68, B-12-71, B-1-78, B-13-80; also see NYCCBL §1173-2.0.

ORDERED, that the City's petition challenging arbitrability be, and the same 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.
July 13, 1982

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

CAROLYN GENTILE
MEMBER