City v. DC37, 31 OCB 9 (BCB 1983) [Decision No. B-9-83 (Arb)]

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

THE CITY OF NEW YORK,

DECISION NO. B-9-83

Petitioner,

DOCKET NO. BCB-599-82
- and - (A-1526-82)

DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Respondent.
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DECISION AND ORDER

On June 28, 1982, the City of New York, appearing by its Office of Municipal Labor Relations (hereinafter "the City" or "OMLR") a petition challenging the arbitrability of a grievance that is the ,subject of a request for arbitration filed by District Council 37 (hereinafter "D.C. 37" or "the Union") on June 15, 1982. D.C. 37 filed an answer on July 22, 1982, to which the City replied on July 27, 1982.

BACKGROUND

The grievant, Frank Grimes, a Senior Sewage Treatment the Department of Environmental Protection (hereinafter "DEP") requested an opportunity to work overtime; the request was denied. The Step III decision of

DEP indicates that the reason for the denial was to avoid the grievant's working twenty-four straight hours which the Department did not wish to permit. The Department's Step III decision further indicates that the grievant's duties were assigned to an Electrician's Helper who, it was asserted, performed those duties under the supervision of the North Pumping Station Superintendent. Nevertheless, the grievant alleges that the denial of his request for the overtime assignment violated Rule 46 of the DEP Rules and Regulations which provides as follows:

> Supervisory personnel shall be responsible for the proper instruction, discipline, health, safety, efficiency, and the method of performance of official duties of all subordinates under their jurisdiction.

The grievance was brought pursuant to Executive Order 83 (hereinafter "E.O. 83"), which provides a grievance procedure for employees of mayoral agencies of the City of New York who are eligible for collective bargaining under the New York City Collective Bargaining Law (hereinafter "NYCCBL") but who are not covered by a collective bargaining agreement.[1] Section 5b of E.O. 83 defines the term a "grievance" to include:

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[1] See E.O. 83 §5a(l)(B). We note that a contract covering non-economic conditions of employment for Sewage Treatment Workers (whose wages and other economic terms of employment are determined by the City Comptroller pursuant to Section 220 of the New York State Labor Law) was executed on April 19, 1982 for the period July 1, 1980 through June 30, 1982. However, at the time the instant grievance was initiated and prior to the execution of a 1980-82 agreement, there had been no working conditions contract covering these employees since

> (A) a dispute concerning the application Or interpretation of the terms of (i) a written, executed collective agreement, or (ii) a determination under Section two hundred twenty of the Labor Law affecting terms and conditions of employment;
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> (B) a claimed violation, misinterpretation, or misapplication of the written rules or regulations of the mayoral agency by whom the grievant is employed affecting the terms and conditions of his or her employment; and
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> (C) a claimed assignment of a grievant to duties substantially different from those stated in his or her job classification....

D.C. 37 contends that the alleged violation of D.E.P. Rule 46 constitutes a grievance within the meaning of section 5b (B) .

POSITIONS OF THE PARTIES

City's Position

The City's challenge to arbitration of the stated grievance is twofold:

1) the Union failed to demonstrate a prima facie relationship between the denial of a request to work overtime and D.E.P. Rule 46 defining supervisory responsibility; and

2) the decision to assign overtime work and to determine which employees shall be so assigned is within management's sole discretion where, as here, there is no contract provision, agency rule or regulation, or provision in the Executive Order on the subject of overtime.

The City disputes the Union's interpretation of Rule 46 as requiring that 'proper supervision be maintained at all times." Rather, the City states, Rule 46 simply describes the duties of supervisory personnel vis-a-vis subordinates. Thus, even assuming that the denial of the grievant's request to work overtime resulted in a lack of supervisory personnel at the worksite, no violation of Rule 46 would be stated, according to OMLR. Further, the City notes, this Board has recognized that it is management's prerogative to determine the quality and level of supervision to be provided.[2]

For the aforementioned reasons, the City maintains that the Union's request for arbitration should be denied.

Union's Position

District Council 37 argues that Rule 46 "provides that proper supervision be maintained at all times." Therefore, the Union asserts, there is a direct relationship between the grievance stated and Rule 46, in that the denial of overtime to the grievant resulted in the assignment of supervisory duties to a non-supervisory employee who was, by virtue of being a non-supervisor, unqualified to perform those duties.

[2] The City cites Decisions Nos. B-7-69, B-1-70, B-2-73, B-16-74, B-18-74, B-3-75 and B-5-75.

The Union disputes the City's contention that decisions concerning the assignment of overtime are not subject to the grievance procedure. According to D.C. 37, the fact that management's failure to assign the grievant to work overtime resulted ultimately in a violation of Rule 46 establishes a "causal relationship" between the denial of overtime and the cited rule sufficient to state a grievance within the meaning of E.O. 83 section 5b(B).

As a remedy, the Union seeks to have the Board enjoin the Department of Environmental Protection from violating Rule 46 in the future, "thus depriving grievant of his request to work overtime."

DISCUSSION

As we have long held, the Board's function in determining arbitrability is to 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.[3] Where, as here, the parties to a dispute are not signatories to a written collective bargaining agreement and the dispute involves mayoral agency employees eligible for collective bargaining under the NYCCBL, the grievance procedures set forth in E.O. 83 are applicable.[4] In the instant case, D.C. 37

[3] Decision Nos. B-2-69; B-4-72; B-8-74; B-28-75; B-1-76; 19-10-77.

[4] E.O. 83 §5. Decision No. B-13-77.

maintains that the grievance presented constitutes:

> "a claimed violation, misinterpretation, or misapplication of the written rules or regulations of the mayoral agency by whom the grievant is employed affecting the terms and conditions of his or her employment" (E.O. 83 section Sb(B)).

Thus, the dispute between the Union and the City concerns tile scope of the obligation under section 5b(B) to submit grievances to arbitration.

Two issues are presented for resolution by the Board:

First, the City asserts that there is no relationship between the act complained of in the grievance and the source of the alleged right redress of which is sought in arbitration. In the City's view, D.E.P. Rule 46 merely describes the duties of supervisory personnel; it does not give a Senior Sewage Treatment Worker, such as the grievant, an absolute right to work overtime.

Second, the City denies that it is obligated to submit to arbitration a dispute involving the denial of an overtime assignment, as decisions to grant or to deny requests for overtime work are within its management rights under NYCCBL section 1173-4.3b to "direct its employees," "maintain the efficiency of governmental operations" and "determine the

methods, means and personnel by which government operations are to be conducted." Similarly, OMLR notes, decisions as to the quality and level of supervision to be provided are within its statutorily protected rights. Absent a contract provision or agency rule or regulation on the subject of overtime or on the subject of supervision, OMLR claims that it cannot be required to submit disputes concerning such matters to the arbitral forum.

The gravamen of D.C. 37's claim is that D.E.P. Rule 46 which, according to the Union, "provides that proper supervision be maintained at all times," was violated by the assignment of a non-supervisory employee to perform supervisory duties in the place of the grievant. The violation, it is alleged, was a direct result of the City's denial of the grievant's request to perform such duties as an overtime assignment. Thus, the Union maintains, there is a "causal relationship" between the grievance and the source of the alleged right.

The problem with the Union's reasoning is that it misconstrues the oft-stated principle that "the grievant, where challenged to do so, has a duty to show that the statute, departmental rule or contract provision he

invoked is arguably related to the grievance to be arbitrated."[5] The nexus which the proponent of arbitration must establish is not a causal relationship" as the Union has attempted to demonstrate in the instant case, but a substantive relationship between the right claimed to have been violated and a contract provision or agency rule which is deemed to afford such a right.[6] In our view, even if Rule 46 could be read to require the maintenance of proper supervision at all times, and even if the denial of the grievant's request to work overtime resulted in a lack of supervisory personnel at the worksite, a prima facie relationship between the denial of the overtime assignment and Rule 46 would not be established. This result is required because the grievant has not demonstrated that the rule he claims was violated is arguably the source of a right to work overtime.

It has been and is the policy of this Board, in determining arbitrability, not to inquire into the merits of a claim.[7] However where, as here, we are required to determine

[5] Decision No. B-1-76. See also Decisions Nos. B-3-78, B-7-79, B-15-79, B-21-80, -7-81,,B-8-82 B-41-82.

[6] Cf. Decision No. B-8-81.

[7] Decisions Nos. B-8-74; B-1-75; B-5-76; B-10-77; B-12-79; B-21-80 ; B-7-81; B-4-83.

whether a rule of the Department is arguably related to the grievance to be arbitrated, we must examine the content of that rule more closely than we might otherwise. This is not to say that we interpret the rule, for that is a function reserved to an arbitrator. We do scrutinize the rule, however, to determine whether it may provide a colorable basis for the grievant's claim. In this case, we do not find such a basis.[8] D.E.P. Rule 46 defines the responsibilities of supervisory personnel vis-a-vis their subordinates in the Department, while the grievant complains that he was denied an opportunity to work overtime. Rule 46, on its face, does not address the subject of overtime. Therefore, we hold that Rule 46 cannot form the basis of D.C. 37's request for arbitration herein.

Nor has the Union presented evidence of any other provision or rule which would arguably have entitled the grievant to the overtime assignment that was denied. Furthermore, the City claims, and we agree, that in the absence of a contractual or other limitation, the assignment of overtime is within the City's statutory management right to:

> "...determine the methods, means and personnel by which government operations are to be conducted" (NYCCBL section 1173-4.3b).[9]

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[8] See, e.g., Decisions Nos. B-15-79; B-21-80.

[9] Decision No. B-7-81.

Similarly, we agree with the City, and have held previously, that the City has the right, as a matter of management prerogative, to determine assignments unilaterally,[10] including the right to determine the quality and level of supervision to be provided.[11] We do not find that Rule 46 creates any limitation on the City's exercise of its rights in this regard; nor has any other arguable limitation on the City's unilateral rights been alleged to us by the Union.

Accordingly, and for all of the aforementioned reasons, we find the grievance presented not arbitrable.

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 City's petition challenging arbitrability be, and the same hereby is, granted; and it is further

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[10] Decisions Nos. B-18-74, B-19-79.

[11] See, e.g., Decision No. B-6-79.

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

DATED: New York, N. Y.
March 22, 1983

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

CAROLYN GENTILE
MEMBER