City v. Doctors Council, 35 OCB 16 (BCB 1985) [Decision No. B-16-85 (Arb)]

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

-between-

THE CITY OF NEW YORK, DECISION NO. B-16-85

Petitioner, DOCKET NO. BCB-751-84 (A-2006-84)

-and-

DOCTORS COUNCIL,

Respondent.
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DECISION AND ORDER

On November 19, 1984, the City of New York (the "City"), by its office of Municipal Labor Relations ("OMLR"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration which was filed on November 5, 1984. On December 5, 1984, Doctors Council ("respondent") filed an answer to which the City replied on December 17, 1984.

Background

On July 11, 1984, Doctors Council filed a grievAnce on behalf of Dr. olive Barlow ("grievant"), pursuant to "Article VIII, Section 2 of the effective Doctors Council contract," in which it alleged that the termination of Dr. Barlow's employment on July 2, 1984, as a Medical Investigator with the Office of the Chief Medical Examiner

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was "arbitrary, capricious and otherwise without cause. For a remedy, Doctors Council requested that Dr. Barlow be "reinstated to her position, restored to her former work schedule, and receive all backpay and other benefits she is due since her termination." The grievance was denied, and the denial subsequently affirmed at Steps II and III, on July 26, 1984 and September 21, 1984, respectively. The request for arbitration presently under consideration was filed on November 5, 1984.

According to the City, the grievance as originally filed by respondent, was commenced pursuant to Article VIII of the 1980-82 Clinicians' Contract between the City of New York and Doctors Council ("Agreement"), which provided, at Section l(F) that

> [p]er session employees who have been employed at least 5 years on a regular basis of at least 10 hours per week, will not be subject to termination of employment for arbitrary or capricious reasons; and any issues hereunder shall be subject to the contractual grievance procedure up to and including Step III (OMLR) only.

At the Step III Conference held on October 18, 1984, the Union, petitioner alleges, sought to amend its claim by invoking the contractual rights of per session

employees contained in the 1982-1984 Doctors Council Agreement ("Successor Agreement") which (1) includes for the first time the right to certain per session employee to request arbitration for alleged wrongful disciplinary action; and (2) requires that charges be served by the agency head upon any such employee for alleged misconduct or incompetency. [1]

In a Step III decision which was issued on October 24, 1984, the OMLR hearing officer determined that

> [a]s the contractual clause under which the Union now seeks to adjudicate the instant grievance was not

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[1] Article VIII provides, at Section l(e)(iv) that a grievance shall include a claimed wrongful disciplinary action

> taken against ... a per session employee or a Mayoral Agency who is regularly employed 17-~ or more hours per week and has completed one year of such employment; upon whom the agency head shall have served written charges of incompetency or misconduct while the employee is serving in his or her permanent title or which affects his or her permanent or continued status of employment.

in effect at the time the grievance arose, and as said clause has no retroactive applicability, and as the Union declined to proceed on its original grievance except insofar as it represented an alternative to its new theory of the case introduced at Step III, the grievance is hereby dismissed.

Positions of the Parties

City's Position

Petitioner maintains that although the 1980-1982 Agreement had expired at the time the grievant was terminated, the parties were nevertheless "bound by the terms of that agreement pending negotiation and final approval of a successor agreement," by virtue of the status quo provision of the New York City Collective Bargaining Law ("NYCCBL"). Therefore, it is argued,

> [t]he definition of grievance and the grievance procedure of the 1982-84 Agreement have no bearing on the grievant's rights to grieve a termination which preceded the effective date of the contract. [Emphasis added -

It is the City's position that the effective date of the Successor Agreement was August 29, 1984, the date on which it was approved by the Financial Control Board. To support this position, petitioner cites Article XVI of the Successor Agreement which provides that

> [t]he provisions of this Agreement are subject to applicable provisions of law, including the New York State Financial Emergency Act for the City of New York ....

and, Section 5408(l)(e)(iv) of the New York State Financial Emergency Act for the City of New York ("NYSFEA"), which provides that

> [d]uring a control, period, if the (financial control] board approves the terms of a reviewed contract or other obligation, the City ... may enter into such contract or other obligation upon the terms submitted to the board. [2]

The City maintains that while it did enter into specific agreements which provided for the retroactive implementation of certain provisions of the Successor Agreement, no such agreement was made for the retroactive application of the grievance-arbitration provision.

For the foregoing reasons, the City concludes that

> [i]f the Union is invoking rights under the 1980-82 Agreement ... under Article VIII, Section l(F), the Grievant, a per session employee, has no right to

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[2] N.Y. Unconsol. Laws §§5401-5420 (McKinney 1979 & Supp. 1981-82), amending Ch. 868 [19751 N.Y. Laws 1404 (McKinney).

request arbitration .... If the Union is invoking rights under the 1982-1984 Agreement the Request for Arbitration must be denied because the grievance predates the effective date of that contract, and therefore, the grievance rights contained therein do not apply to the instant matter.

Union's Position

In its answer to the petition challenging arbitrability, Doctors Council sets forth the events which led to the formulation of, and agreement upon, the terms of the 1982-84 Doctors' Council Contract. Specifically, it maintains that following several months of negotiations, general agreement on a contract which was to include a provision for the submission to arbitration of wrongful disciplinary action taken against per session employees in grievant's position, was achieved in August 1983, and indeed a completed draft was submitted to OMLR by October 1983. Following additional months in which the parties exchanged correspondence relating to the precise language to be adopted in the agreement, a copy of the Successor Agreement, executed by respondent, was received, and it is maintained, approved by OMLR on or about March 14, 1984, as evidenced by a letter to respondent's counsel from Robert W. Linn, Director of OMLR, of that date. The letter reads as follows:

> I have received the signed copy of the 1982-84 Agreement and have sent it to our word processing section for incorporation of the agreed modifications.

I have also spoken to the Health and Hospitals Corporation and have agreed that implementation of the roll-over may commence pending approval of the Financial Control Board of the Agreement.

We agree also to the following items:

1. The Doctors Council shall withdraw the pending grievance and demand for arbitration concerning the payment of the 50 cent longevity differential to per session employees who have been reclassified. Such employees shall have that differential incorporated into their salary rate, retroactive to their reclassifi cation. That differential shall be paid in lieu of any subsequent longevity differential payable under Note (LD) of Section 3 Article III of te 1982-84 collective bargaining agreement. Those per session employees who were not entitled to payment of the 50-cent differential at the time of their reclassification shall received credit for service rendered after July 1, 1981, but prior to their reclassification for the purpose of any future entitlement to a longevity differential under said Note (LD)

2. The Employer shall make hepatitis B vaccine available at no cost to employees covered by the 1982-84 Agreement. In the event that the cost of such vaccine provided to said employees exceeds $25,000, the Doctors Council Welfare Fund

shall reimburse the Employer for any such excess.

3.The Employer shall provide the Doctors Council with list(s) of employees and their addresses, insofar as such information is available.

4. To the extent that the new PMS and HHC payroll programs permit and when made available to all employees paid via the systems (a) all employees will be paid bi-weekly; (b) time and leave statements will be regularly provided to all employees; and (c) percentage due/fees deduction shall be available.

A separate side letter will be prepared to implement the Welfare Fund agreement (paragraph 3 in your letter of February 7, 1984).

Doctors Council further maintains that even before the final language had been approved by the parties, the contract had already been implemented. Salary increases, it is alleged, were placed into effect and paid retroactively to July 1, 1982, between November 1983 and January 1984, and non-economic provisions were intended to have retroactive effect to a date prior to both FCB approval and final agreement on the specific language of the Successor Agreement.

Based on the foregoing, respondent maintains that it cannot be argued seriously that there was no contract until the FCB approved the Successor Agreement on August 29, 1984, and that upon such approval, retroactive effect was given only to economic provisions. In effect, the City is suggesting that a contract is not effective until after, by its terms, it has expired.

Discussion

In opposing the submission of this matter to arbitration, petitioner argues that the Successor Agreement, pursuant to which the request for arbitration was made, was not in effect at the time the grievance arose. The City maintains, therefore, that the request "must be denied because the grievance predates the effective date of the contract, and, therefore, the grievance rights contained therein do not apply in the instant matter."

In support of its position, the City maintains that the effective date of the Successor Agreement was August 29, 1984, the date on which Financial Control Board approval was granted. Since, it is argued, the Successor Agreement was not in effect on July -1, 1984, the date on which the grievance arose, the Union may not invoke rights

under that agreement. It is further maintained that unless and until a collective bargaining agreement is approved by the FCB, the provisions of the prior contract, i.e., the 1980-82 Clinicians' Contract, remain in effect by virtue of thestatus quo provision of the NYCCBL.

In carefully considering the respective positions of the parties herein, we are persuaded that whether we accept the Union's position - that the "effective date" of the contract was in no event later than March 14, 1984, or the City's view - that the "effective date" was August 29, 1984, the provisions of the 1982-1984 Contract apply in the circumstances of this case.

In New York City Health and Hospitals Corporation and Committee of Interns and Residents, a grievance had been filed on April 6, 1983; the 1982-84 Agreement, pursuant to which it was brought, was not concluded until April 29, 1983. In our decision, B-14-84, we held that

> [t]here can be no doubt that the grievance was filed before the 1982-84 Agreement was in effect, whether its effective date is deemed to be as early as the date the agreement was concluded by the parties, or the date of its execution, or the date of approval by the FCB.

We found there that "[slince the grievance was filed before even the earliest of these dates, well within the status quo period governed by the 1980-82 Agreement," it would not be necessary to resolve the parties dispute as to the effective date of the 1980-82 Agreement.

In the instant proceeding, it appears that the Successor Agreement was concluded no later than March 14, 1984, several months before the filing of the grievance, as evidenced by Robert Linn's letter of that date. This etter, it should be stressed, had been signed by both parties to this dispute and, in fact, incorporated into the Successor Agreement as it was finally executed on August 29, 1984. There can be no question, therefore, that the provisions of the Successor Agreement must be deemed to have, at the least, retroactive effect back to March 14, 1984. Any other conclusion would, as Doctors Council points out, amount to the untenable suggestion that a contract may be rendered ineffective during a considerable portion of its intended term and in fact, as in the instant case - as to some if not all of its provisions - never come into effect simply because of delays in submission of the matter to FCB or because of delays in FCB's consideration of it or both. This would, indeed, violate even the Financial Emergency

Act, upon which the City in its argument relies. Section 5404 of the Act expressly provides that "[n)othing contained in this act shall be construed to impair the right of employees to organize or to bargain collectively. " [Emphasis added]

Since the request for arbitration was filed on November 5, 1984, and since the City was on notice, as early as October 18, 1984,[3] that Doctors' Council was relying on the provisions of the Successor Agreement, we find that the claim underlying the request for arbitration filed on November 5, 1984, in connection with an incident which occurred on July 2, 1984, is arbitrable under the 1982-84 Agreement.

For the foregoing reasons, we will direct that this matter 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

[3] The date of the Step III Conference, at which time the Union allegedly sought to amend its claim by invoking the provisions of the 1982-84 Contract.

ORDERED, that the petition challenging arbitrability filed by the City of New York in Docket No. BCB-751-84 be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by Doctors Council be, and the same hereby is, granted.

DATED: New York, N.Y.
May 21, 1985

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER