City v. L.621, SEIU, 37 OCB 10 (BCB 1986) [Decision No. B-10-86-(Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between- DECISION NO. B-10-86
DOCKET NO. BCB-785-85
THE CITY OF NEW YORK, (A-2142-85)

Petitioner,

-and-

LOCAL 621, S.E.I.U

Respondent.

DECISION AND ORDER

On May 28, 1985, the City of New York, appearing by its Office of Municipal Labor Relations ("the City"), filed a petition challenging arbitrability of a grievance submitted by Local 621 of the Service Employees International Union ("the Union"). The Union filed its answer to the petition on June 13, 1985, and the City filed a reply on June 24, 1985.

Background

In January 1985, the Department of Sanitation ("DOS") reassigned Jack Zimmardo from a position as basic Supervisor of Mechanics to his current position as Assistant

Supervising Supervisor.[1] Prior to doing so, the City did not post any notice of the opening.

The Union filed a request for arbitration on May 15, 1985, claiming that DOS had violated Article VII, Section 9 of the parties' collective bargaining agreement ("agreement"), which provides as follows:

> When Possible all vacancies that the Employer has decided to fill by permanent transfer shall be posted on a department bulletin board as far in advance of the date the transfer is to be effective as is practiable, however, the Employer need not post a job opening more than a month in advance. This section applies to job openings to be filled either on a voluntary or involuntary basis.

As a remedy, the union seeks recision of the transfer and compliance with the posting requirements set forth in Article VII, Section 9.

Positions of the Parties

City's Position

Based upon the following language contained in Arti

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[1] It is unclear from the pleadings whether Mr. Zimmardo became an Assistant Supervising Supervisor Class I or an Assistant Supervising Supervisor Class II, since the City in its reply admitted the Union's allegation that the transfer involved a Class I position, yet later referred to the transfer as a Class II position. This discrepancy, however, has no bearing upon the resolution of the issues before us.

cle I, Section 2 of the parties' agreement, the City claims that the Union's grievance is not arbitrable:

> The terms "employee" and "employees" as used in this Agreement shall mean only those persons in the unit described in Section 1 of this Article except that Articles VII and VIII shall not apply to employees assigned as Assistant Supervising Supervisor or Supervising Supervisor and paid in accordance with Comptroller's Determinations for such titles.

According to the City, since the above section excludes employees "assigned as Assistant Supervising Supervisor" from Article VII's application, the Union is not entitled to grieve any failure to comply with Article VII with respect to Mr. Zimmardo's assignment as an Assistant Supervising Supervisor. Pointing out that the Board requires the party seeking arbitration to demonstrate a prima facie relationship between the act complained of and the source of the alleged right, the City argues that the Union has failed to meet this requirement here since "the contract states, by its very terms, that Article VII does not apply to Assistant Supervising Supervisors."

Based upon this reasoning, the City requests that the Board issue an order dismissing the request for arbitration or for such other relief as may be just and proper.

Union's Position

The Union arques that contrary to the City's contention, Article 1, Section 2 "does not exclude from coverage under Article VII the transfer of an employee, such as Mr. Zimmardo, who is not assigned as a Supervising Supervisor or an Assistant Supervising Supervisor but who achieves such status following or as a result of the transfer." Thus, the Union maintains that the City violated the agreement by failing to post the vacancy filled by Mr. Zimmardo. Although noting its belief that the City's construction of the agreement is "untenable" the Union argues that "at a minimum, a bona fide issue exists concerning the construction, application and interpretation of the contract which should be resolved at arbitration."

Discussion

Where the parties, as here, do not dispute that they have agreed to arbitrate their controversies, the question before this Board on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of their agreement to arbitrate.[2] The agree-

[2] See, e.g., Decision No. B-4-81.

ment in the instant case defines grievance as, inter alia, a "dispute concerning the application or interpretation of the terms of this Agreement." We find that the grievance herein, which turns on the interpretation and application of Article VII, Section 9 and Article I, Section 2, is a matter upon which the parties have agreed to arbitrate.

As the City has correctly observed, this Board further requires the party seeking arbitration to demonstrate a prima facie relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration.[3] The Union here claims that DOS violated Article VII, Section 9 of the parties' agreement by failing to post the transfer of a Supervisor to the position of Assistant Supervising Supervisor. The City, however, argues that since Article VII, Section 9 does not apply to Assistant Supervising Supervisors, this provision cannot be the source of any right attaching to the Union here.

We reject the City's position and find that there is at least an arguable relationship between the subject of the Union's grievance and the sections of the Agreement

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[3] E.g., Decision Nos. B-8-82; B-7-81; B-4-81; B-21-80; B-15-80; B-7-79; B-3-78; B-3-76; B-1-76.

upon which the Union relies. A determination of whether Article I, Section 2 excludes the application of Article VII to employees transferring into positions as Assistant Supervising Supervisors, as well as to those employees who already hold positions as Assistant Supervising Supervisors, would involve an interpretation of the intent and application of the relevant contract provisions. Such issues involve the merits of the grievance which, as we have often said, are matters for resolution by an arbitrator.[4]

Accordingly, we will grant the Union's request for arbitration and deny the City's petition challenging arbitrability.

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 challenging arbitrability filed by the New York City Office of Municipal Labor Relations be, and the same hereby is, denied; and it is, further

[4] E.g., Decision Nos. B-12-69; B-8-74; B-1-75; B-5-76; B-10-77; B-17-80; B-4-81; B-7-81.

ORDERED, that the request for arbitration filed by Local 621 of the Service Employees International Union be, and the same hereby is, granted.

DATED: New York, N.Y.
February 25, 1986

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

CAROLYN GENTILE
MEMBER

DANIEL G. COLLINS
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