City v. L.621, SEIU, 37 OCB 3 (BCB 1986) [Decision No. B-3-86 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

LOCAL 621, S.E.I.U

Respondent.

DECISION NO. B-3-86
DOCKET NO. BCB-793-85
(A-2151-85)

DECISION AND ORDER

Local 621, S.E.I.U., (hereinafter "Local 621" or "the Union") submitted a request for arbitration, received by the Office of Collective Bargaining on June 4, 1985, in which the Union sought to arbitrate a grievance concerning the alleged violation of the contract between the parties by the Department of Sanitation's publication of transfer vacancies. The City of New York, by its Office of Municipal Labor Relations (herein "City" or "OMLR") filed a petition challenging the arbitrability of this grievance on June 14, 1985. The Union filed an answer to the petition on July 12, 1985, to which the City replied on July 23, 1985.

The issue herein is whether a prior arbitration proceeding bars respondent Union from seeking arbitration of this grievance.

Background

The City and Local 621 are parties to a collective bargaining agreement effective July 1, 1982 to June 30, 1986. Article VII of this agreement sets forth the conditions governing transfer of employees.

On February 22, 1984, the Department of Sanitation published a listing of locations, both in the field and in the central repair shop, for which voluntary transfer requests were being accepted.[1]

On February 27, 1984, the Union filed a grievance alleging that the posting was in violation of Article VII of the contract between the parties in that it failed to specify certain information required by Article VII.

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[1] The posting reads as follows:

Requests for voluntary transfers are being accepted for the following locations:

Richmond Boro Command	- Five (5) vacancies
Manhattan Boro Command	- Three (3) vacancies
Hamilton Boro Command	- Three (3) vacancies
Cozine Boro Command	- One (1) vacancy
Central Repair Shop	- Five (5) vacancies

All interested Supervisors of Mechanics (M.V.) with permanent status may apply in writing to either P.T. Ames or T.J. Clavin, Central Repair Shop, Room 608 no later than Friday, March 9. 1984.

On July 3, 1984, the Department of Sanitation issued three more notifications of vacancies in the field and in the central repair shop.[2]

On July 11, 1984, the Union filed three separate grievances alleging that the July 3 postings were in violation of Article VII of the agreement. On July 18, 1984, these grievances were denied.

On July 19, 1984, the Union filed a request for arbitration of the following grievances:

> Whether the February 22, 1984 Inter Departmental Correspondence from the Department of Sanitation concerning "transfer requests" complied with the posting requirements contained in Article VII of the contract between Local 621 and the City of New York. [Emphasis supplied]

On July 24, 1984, the Union filed Step II grievances concerning the July 1984 postings; these were denied on August 17, 1984. On August 27, 1984, the Union appealed to Step III and requested that a Step III hearing be scheduled. On January 15, 1985, an arbitration hearing was held at which the only issue before the arbitrator was whether the February 1984[3] postings were in violation of the contract.

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[2] These read, in pertinent part:

> Request for voluntary transfer to the Central Repair Shop [Zerega Ave. Borough Command/Richmond Borough Command) is now being accepted.

[3] Emphasis supplied.

On February 12, 1985, the arbitration award issued, finding the posting of February 22, 1984 invalid in that it did not comport with the contractual requirements of Article VII. As a remedy, the arbitrator directed the City "in the future, to abide by the posting requirements set forth above [in his decision] when posting vacancies in the field and in the central repair shop." The award goes on to direct that the City rescind and repost transfers made to the central repair shop only; it does not direct recission or reposting of field vacancies. In discussing the appropriate remedy, the arbitrator's decision states:[4]

> The problem of remedy, other than the prospective order above concerning wording of future notices, is more complex. Regardless of practice, either party may demand a return to the requirements of the contract. Where the practice has not been consistent with the contract, and where no written demand has been served to return to the requirements, the first grievance becomes such a demand. When such a situation has arisen arbitrators have issued prospective orders but have not remedied the violation grieved ....
>
> Since the city never departed from the contract requirements until February 22, 1984 with regard to CRS [Central Repair Shop] vacancies, and since the union grieved this first violation, a retrospective remedy is appropriate. The arbitrator shall direct the city to rescind the five transfers to

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[4] pp. 10-11.

> the central repair facility approved pursuant to the February 22, 1984 notice and to repost those five vacancies for bidding and transfer. The posting shall specify the specialized shops where the vacancies exist.
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> Since the prior practice concerning field vacancies has been mixed, the arbitrator shall not direct the rescinding of the twelve field operations transfers approved pursuant to the February 22, 1984 posting.

On March 11, 1985, the City, treating the award as it applied to the July as well as the February grievances, reposted the positions at the central repair shop which had originally been posted in both February and July 1984. It did not repost any field positions.

On March 29, 1985, the Union renewed its request for Step III grievance hearing with respect to the July postings. On May 20, 1985, the Step III grievance was denied.

On June 3, 1985, the Union filed a request for arbitration of the following issue:

> Whether the [July 3, 19841 Inter-Departmental Correspondence from the Department of Sanitation concerning "transfer requests" complied with the posting requirements contained in Article VII of the contract between Local 621 and the City of New York.

The City's Position

The City takes the position that the doctrines of res judicata and collateral estoppel prevent consideration of the Union's claim with respect to the July 1984 grievances

in an arbitration proceeding. The City asserts that the issues presented in the instant case are "factually and contractually identical" to those previously arbitrated, except with respect to the dates of the documents alleged as violative of the contract. Further, the City argues, the Union had the opportunity to combine the two grievances and litigate all the issues, including the appropriate remedy, as well as to petition the arbitrator for a clarification of any ambiguities in his decision under CPLR Sec. 7509, yet the Union did not take advantage of either of these opportunities. Finally, the City asserts that the award determined what the remedy should be in the event of any violation of Article VII, that the City complied by reposting July 1984 central repair shop vacancies, and that the remedy with respect to field positions was to operate only prospectively -- from the time of the award -- and does not require that any transfers,.other than those in the central repair shop, be rescinded or reposted retroactively.

The Union's Position

The Union takes the position that the arbitrator's award, although it did not address the issue of the July 1984 postings directly, confirms that the July 1984 postings violated contractual prescriptions, as the same specifications were missing from the July postings as the arbitrator had

found wanting in the February postings. The Union agrees that, given the violation, the July 1984 central repair vacancies were properly reposted.

By the instant request, however, the Union seeks a determination whether, under all the circumstances, the Union is entitled to reposting and rebidding with respect to the field vacancies improperly posted in July 1984.

Although the wording of the instant request for arbitration is identical to that of the February 1984 request, the Union, in its answer to the City's petition challenging arbitrability, takes the position that, because the arbitrator found the Union's February 1964 grievance to constitute a demand to return to the contract terms, the Union is entitled to relief for all infractions after that demand, including the City's alleged failure to return to contract terms when it published transfer vacancies in July 1984.

The union argues, in essence, as follows; The arbitrator's award finds that the filing of the February grievance constitutes a demand to return to contract terms. Before the union made this demand, the parties had tolerated deviations from contractual terms with respect to posting of field positions and thus, as the arbitrator states, only a prospective order is appropriate -- one which provides for a remedy for violations which occur after one party puts

the other on notice that it wishes to return to contract terms. On the other hand, the February posting was the first deviation from contract terms with respect to the CRS. In such a situation, where no established pattern of deviation from contractual terms has been allowed to develop, it is appropriate for an award to include retrospective remediation of all violations grieved. Because the July postings occurred after the Union indicated, by its February demand, that it would no longer countenance deviations from the contract with respect to posting of field vacancies, it is entitled to a retroactive remedy tor any violations taking place after February 1984, including the July 1984 publication of field vacancies.

Discussion

There is no dispute in this case that the parties have agreed to arbitrate unresolved grievances, as defined in their collective bargaining agreement, and that a claimed violation of the provisions of Article VII concerning transfers is within the scope of the parties' agreement to arbitrate. In fact, the parties have recently arbitrated just such a grievance. Nevertheless, the City argues that since an arbitrator has already sustained a grievance which, it maintains, is identical to that herein and awarded a remedy which the City has already complied with as to the instant

grievance, there remain no arbitrable issues upon which to grant Local 612's request for arbitration. Thus, the City contends, the request for arbitration is barred by operation of the doctrines of res judicata and/or collateral estoppel.

Before considering the facts herein, it is well to consider the impact of the various legal doctrines governing the effect of prior awards. As the Supreme Court has explained:

> Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.[5]

Another doctrine, stare decisis, is that rule by which a prior decision reached on the basis of similar facts may be adopted as a standard of judgment with respect to subsequent cases involving the same issues, even where the parties involved are entirely different. Thus, the outcome of a party's claim may be governed by a prior award which precludes a claim under res judicata, precludes an issue by collateral estoppel, or controls the decision by stare decisis.

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[5] Parklane Hosiery Co. v. Shore, 339 U.S. 322, 326, fn. 5 (1978). See also Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597-98 (1948).

Under the doctrine of res judicata, the parties are bound "not only in respect to every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented."[6] It is essential to the application of this doctrine, however, that the dispute arise from the same occurrence or transaction upon which the earlier claim was based. Thus, if two causes of action involve "different 'rights' and wrongs,'" the doctrine of res judicata does not apply.[7] For example, as the Supreme Court explained in Commissioner v. Sunnen, supra, a tax case,

> if a claim ... relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year. But if the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit.[8]

Applying the principles of res, judicata to the instant case, we observe that the basis for the two sets of grievances is the same: the alleged violation of the same contract

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[6] Cromwell v. County of Sac, 94 U.S. 351, 352 (1876).

[7] Maflo Holding Corp. v. Blume, 308 N.Y. 570 (1955).

[8] See also General Motors Corporation, 158 N.L.R.B. No.149, 62 L.R.R.M. 1210 (1968)

article by a similar act. However, the grievances arise from separate occurrences or transactions: the publication of vacancies on February 22, 1984 and on July 3, 1984, over four months later. Moreover, the Union, by the instant petition, alleges an additional wrong beyond that alleged in the February grievance. The February grievance alleged that the City was departing from contractual posting requirements. In the instant case concerning the July grievances, the Union alleges in essence that the City failed to revert to contractually mandated posting requirements after the Union's February demand that it do so. As the Arbitrator's award (supra at 4-5) makes clear, the Union's February grievance, in effect, cut off any mutually countenanced past practice and, consituting a demand for return to contract requirements, created a situation in which the rights and duties of the parties changed significantly. Clearly, the two proceedings are related to separate and distinct incidents allegedly giving rise to two different legal wrongs, and the disposition of one cannot reasonably be deemed to bar the other on the grounds of res judicata.[9]

With respect to the City's second argument, the party seeking to assert collaterally the estoppel of a prior judgment must establish that the issue: (1) is identical with an issue in the prior action; (2) was actually litigated and determined in the prior action; (3) was necessary to the

[9] See B-9-78

determination of the prior judgment.[10] The City has not, in the Board's opinion, sustained the burden of establishing a basis for the application of collateral estoppel in the instant proceeding. The July grievance was not before the arbitrator. Thus, he did not consider the issue whether the remedy he prescribed for the February grievance was also appropriate with respect to the July grievance. As this issue was neither actually litigated nor necessary to the outcome of the prior arbitration, its consideration in arbitration is not barred by the doctrine of collateral estoppel.[11]

Moreover, we note, as did the arbitrator, that the very assertion of the February grievance creates differences in the nature and quality of that grievance and the July grievance which preclude any question as to the applicability of the doctrines of res judicata and/or collateral estoppel. The February grievance involved alleged violations against a background of established practice of deviation from contract terms. It also signaled the Union's protest against continuation of the practice and a demand for return to contract terms. Thus, while the February grievance as to field vacancies was not subject to retroactive remediation, the July grievance - if sustained - may be.

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[10] "Collateral Estoppel in New York," 36 N.Y.U.L. Rev. 1158, f-171 (1961).

[11] See B-13-80.

For the same reasons, the City's assertion that Proceedings on the instant petition are further barred by the Union's failure timely to request clarification of the arbitration award pursuant to C.P.L.R. Sec. 7509 is inapposite, as that section is concerned with modification rather than clarification.

Based upon all the foregoing considerations, we have concluded that there exists an ample basis to support the submission of the July 1984 grievances to arbitration. It may be that the arbitrator will find a sufficient similarity of fact between the two alleged violations so as to require that one or more issues may be governed by the arbitrator's decision in the February grievance. However, given the limited scope of our inquiry in proceedings challenging arbitrability, any remaining question concerning the precedential value of the prior award is for the arbitrator to decide.

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 request for arbitration of Local 612, S.E.I.U. be, and the same hereby is, granted; and is further

ORDERED, that the petition challenging arbitrability be, and the same hereby is, denied.

DATED: New York, N.Y.
January 22, 1986

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

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