City v. DC37, 37 OCB 31 (BCB 1986) [Decision No. B-31-86 (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-31-86

DOCKET NO. BCB-844-86
Petitioner, (A-2225-85)

-and-

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,

Respondent.
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DECISION AND ORDER

On January 16, 1986, 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 District Council 37, AFSCME, AFL-CIO ("the Union") on behalf of Robert Polite ("the grievant"). The Union filed an answer on March 24, 1986, to which the City replied on April 11, 1986.

Background

The grievant has worked for New York City Health and Hospitals Corporation ("HHC") as a bio-medical equipment technician since 1958. Grievant's place of work was Cumberland Hospital until its closing in September 1983, at which time he transferred to Woodhull Hospital.

Prior to and immediately after his transfer, grievant worked the 11:00 p.m. to 7:00 a.m. tour of duty. In July 1984, however, grievant's supervisor, Alexander Brown, prepared a written evaluation which said that grievant needed additional in-service training and, accordingly, should be placed on the day tour.

Grievant apparently objected to the transfer since documentation accompanying the Union's answer indicates that Mr. Brown requested that disciplinary action be taken against grievant for failure to complete an assignment and to report to the day tour for additional training. Mr. Brown, however, rescinded the request on November 20, 1984, saying that grievant had "made some adjustments with respect to the aforementioned problems." Mr. Brown also noted that grievant's assignment to the day tour would be rescinded only if grievant became fully oriented with his work.

When grievant resumed work on the night shift is not apparent from the pleadings and accompanying exhibits. The record does disclose, however, that Mr. Brown issued a memorandum to grievant on January 7, 1985 directing him to report to the day tour as of February 1, 1985 "due to the reorganization of the department."

On February 13, 1985, grievant filed a Step I grievance claiming that his transfer to the day tour violated a verbal agreement between HHC and the Union, which allegedly provided that all employees transferred from Cumberland Hospital would retain their same tour of duty at Woodhull Hospital. The Step IA decision denied the grievance on the bases that (1) the verbal agreement applied only to initial assignments after the transfers, not to those that might become necessary in the future, and (2) the change in grievant's tour was a proper exercise of managerial prerogative in view of grievant's need for closer supervision. The Step II and Step III decisions also denied the grievance, essentially reiterating the reasons expressed by the Step IA hearing officer.

The Union thereupon filed a request for arbitration on September 30, 1985, defining the issue to be arbitrated as follows:

> Did the Health and Hospitals Corporation violate a verbal agreement with District Council 37 when it reassigned grievant to 8:00 a.m. to 4:00 p.m. shift?

The Union identified "Article II of the 1982-84 Institutional Services Contract" as the basis for its request for arbitration.

On February 19, 1986, the Union filed an amended request for arbitration in which it made the following modification of its statement of the issue:

> Did the Health and Hospitals Corporation improperly reassign the grievant to work the 8:00 a.m. to 4:00 p.m. shift?

As the basis for its demand for arbitration in the amended request, the Union cited "Article VI of the 1982-84 Hospital Technicians and Supplemental Agreement."

On March 11, 1986, the City filed an "Affirmation in Opposition to the Proposed Amended Request for Arbitration," asserting that the amended request "constitutes a significant departure from the issue to be arbitrated set forth in the initial Request for Arbitration." In reply, the Union submitted on March 24, 1986 an "Affirmation in Support of Amended Request for Arbitration."

Positions of the Parties

City's Position

With respect to the issue raised by the initial request for arbitration, the City maintains that it is in no way obligated to arbitrate a dispute arising from a verbal agreement. The City further asserts that

the reassignment of employees upon the closing of Cumberland Hospital constituted an exercise of managerial right which cannot be challenged in an arbitral forum.

As for the amended request for arbitration, the City argues that the Union has improperly raised an issue which it failed to assert in the prior steps of the grievance procedure. Thus, the City claims that it cannot now be required to submit the matter to arbitration.

Union's Position

The Union first argues that by assigning grievant to the day shift, HHC violated its verbal agreement not to alter the tours of duty of employees who were transferred from Cumberland to Woodhull Hospital. According to the Union, the parties "clearly understood" that violations of this agreement would be subject to the grievance arbitration procedure. Thus, the Union maintains that the City, by challenging the arbitrability of the verbal agreement, is impermissably requesting this Board to delve into the merits of the dispute.

Furthermore, the Union disputes the City's assertion that the alleged violation of the verbal agreement was

the only issue raised in the prior grievance proceedings; instead, the Union claims that it argued throughout the grievance procedure that grievant's constituted wrongful disciplinary action and violated the practice of assigning employees their tours of duty based on seniority." [1] In the Union's view, this alleged wrongful disciplinary action is cognizable under the parties' collective bargaining agreement, which defines a grievance as, inter alia, a "claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(l) of the Civil Service Law ... upon whom the agency head has served written charges of incompetency...

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[1] The Union cites no provision of the collective Bargaining contract under which a claimed violation of a practice relating to seniority rights would be arbitrable; the Union merely contends that "[o]ther issues raised in the grievance procedure such as HHC's violation of the past practice of assigning tours by seniority and the arbitrary and capricious nature of the reassignment ... can also be raised under the agreement."

As we have frequently stated, a party seeking arbitration has the burden of establishing to the satisfaction of the Board that there is a prima facie relationship between the act complained of and the source of the alleged right, redress of which is sought through arbitration. E.g., Decision Nos. B-8-82; B-7-81; B-4-81; B-21-80; B-15-80; B-15-79; B-7-79; B-3-78; B-3-76; B-1-76. By failing even to cite the contract provision or written policy upon which it relies, the Union clearly has not met its burden here, and its argument with respect to a claimed violation of seniority rights will not be addressed further herein.

Discussion

a. The Amended Request for Arbitration

This Board has long ruled that a party may not amend its request for arbitration to add claims it failed to raise in the previous steps of the grievance procedure.[2] The basis for this holding has been expressed as follows:

> The purpose of the multi-level grievance procedure is to encourage discussion of the dispute at each of the steps. The parties are thus afforded an opportunity to discuss the claim informally and to attempt to settle the matter before it reaches the arbitral stage. Were this Board to permit either party to interpose at this time a novel claim based on a hitherto unpleaded grievance, we would be depriving the parties of the beneficial effect of the earlier steps of the grievance procedure and foreclosing the possibility of a voluntary settlement.[3] [footnote omitted]

[2] Decision Nos. B-20-74; B-22-74; B-27-75; B-12-77; B-6-80.

[3] Decision No. B-22-74.

The record in this case demonstrates that at each stage of the prior proceedings herein, the parties confined themselves to the issue of whether grievant's transfer from the night to the day tour violated their alleged oral agreement. While it is true that the City below offered grievant's need for closer supervision as justification for the transfer, nothing in the record suggests

that the parties even considered the issue of the transfer as a wrongful disciplinary action. Thus, our of the record discloses no attempt on the part Union in the proceedings below to demonstrate transfer was unjustified discipline, nor any attempt on the City's part to substantiate the basis for the corrective measures it imposed.

We note that the initial grievance defined the issue as follows: "We had an agreement that any transfer would remain on their tour of duty, the hospital is in violation of that agreement." The Step IA decision which followed clearly focused on the claim that the parties' verbal agreement had been violated, and the union's letter appealing the decision did not challenge the transfer as a wrongful disciplinary action. Rather, the appeal letter simply said, "We will prove, that the Labor Relations Officer was bias [sic] in her decision and not dealing with the merit of the case."

Similarly, the Step II decision states as follows:

> After reviewing the record and considering the arguments presented by the union at this conference, I have determined that the agreement referred to by the union was a commitment to maintain employees in their same tours, to the extent possible, at the time employees were being reassigned to Woodhull Hospital.

Surely upon receipt of this decision, if not at an earlier stage, the Union should have been put on notice that the City considered the grievance to be limited, as defined by the hearing officer, to the alleged violation of the parties' verbal agreement. If the Union believed that the scope of the grievance was broader than this, it had an obligation to make its belief known to the City.[4] Instead, the Union urged as the basis for its appeal of the Step II decision only that "the decision and the arbitrary move was [sic] not done in good judgement an the part of the department." Neither this letter nor any other evidence of record can fairly be read to constitute an objection to the City's expressed understanding of the scope of the grievance.

Therefore, from our review of the record, we can only conclude that the Union has attempted in its amended request for arbitration to raise a new claim not within the scope of the prior grievance proceedings. Accordingly, we will dismiss the Union's amended request for arbitration.

[4] Decision No. B-6-80.

b. The Initial Request for Arbitration

Since, upon reviewing the answer, it appears that the Union still seeks to rely upon the issue raised in its original request for arbitration, we will direct our attention thereto. Specifically, the Union claims that the verbal agreement it entered into with the City is the source of its right to proceed to arbitration herein.

The parties stipulated at Article VI, Section I of their agreement that the term grievance shall mean:

> (A) A dispute concerning the application or interpretation of the terms of this Agreement;
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> (B) A claimed violation, misinterpretation, or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; provided, disputes involving the Rules and Regulations of the New York City Personnel Director or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the Grievance Procedure or arbitration;

Thus, in order to fall within the contractual definition of a grievance, of an alleged violation a party must cite as the source of an alleged violation either another provision of

the Agreement or a rule, regulation, written policy, or order. The Union here has done neither; instead, it claims that the City has violated a "verbal agreement" between the parties. There has been no allegation, however, that this verbal agreement rises to the level of an authorized modification of the collective bargaining agreement. The violation of an unwritten policy is thus plainly outside the purview of the contractual definition of a grievance. See Decision No. B-30-84 (where a claimed violation of an unwritten policy is not included within the contractual definition of a grievance, a dispute based on such policy is not arbitrable). Accordingly, we must deny the Union's request to arbitrate this matter.

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 and the amended request for arbitration filed by District Council 37, AFSCME, AFL-CIO be, and the same hereby is, denied; and it is further

ORDERED, that the petition of the City of New York challenging arbitrability be, and the same hereby is, granted.

DATED: New York, N.Y.
May 29, 1986

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

JOHN D. FEERICK
MEMBER

DEAN L.SILVERBERG
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER