City v. L.1549, DC37, 39 OCB 13 (BCB 1987) [Decision No. B-13-87 (Arb)]

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

-between-

DECISION NO. B-13-87

THE CITY OF NEW YORK,

DOCKET NO. BCB-918-86 (A-2238-85)

Petitioner,

-and-

LOCAL 1549, DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Respondent.
- - - - - - - - - - - - - - - - - - x

DETERMINATION AND ORDER

On October 11, 1985, Local 1549 of District Council 37 (hereinafter "D.C. 37" or "respondent") filed a request for arbitration on behalf of eight Supervising Police Communications Technicians ("SPCTs").[1] After the request was filed,, the time limit for the City to file its petition challenging arbitrability was suspended while the parties pursued settlement discussions. In a letter dated October 24, 1986, counsel for D.C. 37 advised the Office of Collective Bargaining (hereinafter "OCB") that settlement discussions had been unsuccessful

[1]The request for arbitration form does not name the grievants but refers to an attached waiver. The waiver, submitted in compliance with Section 1173-8.0d of the New York City Collective Bargaining Law and Section 6.3 of the Revised Consolidated Rules of the Office of Collective Bargaining, is signed by eight SPCTs.

and requested that the case be restored to the calendar. Thereafter, on November 5, 1986, the City of New York (hereinafter "the City" or "petitioner"), by its Office of Municipal Labor Relations (hereinafter "OMLR"), filed a petition challenging arbitrability. D.C. 37 filed its answer to the petition on January 13, 1987 and, on February 6, 1987, the City filed a reply. Additionally, on March 25, 1987, respondent filed an affidavit in support of its answer to the petition.

Background

The grievance underlying the request for arbitration in this matter arises out of the assignment of Principal Administrative Associates ("PAAs") to serve as borough coordinators in the Communications Division of the New York City Police Department. It is alleged that:

> [s]ince on or about August 25, 1985 Principal Administrative Associates who are not employees within the bargaining unit represented by Local 1549, have been performing out-of-title work, which properly falls within the bargaining unit title of Supervising Police Communications Technician (SPCT), in violation of Article VI, Section 13 of the 1980-982 clerical agreement; as a result of this violation SPCTs have not been paid their assignment differential of $8.09 per shift. The continuing failure to pay this differ-

> ential also constitutes a miscalculation of wages in violation of Article III, Section 8(h) of the 1982-1984 clerical agreement.

Article VI, Section 13 of the 1980-1982 agreement between the parties, cited as the basis for the out of-title claim, provides in its entirety:

> Section 13
>
> Notwithstanding any other provision in this Agreement, the parties agree that Section l(c) of this Grievance Procedure [2] shall be available to any person in the unit designated in Section 1 of Article I herein who claims to be aggrieved by an alleged assignment of any City employee, whether within or without such unit, to clerical-administrative duties that are substantially different from the duties stated in the job specification for the title held by such employee. Light duty assignments of permanent City employees, within or without such designated unit, who have been certified by the appropriate procedures, shall be excluded from this provision. Such grievance may be taken directly to the arbitration step of the Grievance Procedure upon the election of the Union.

[2]Article VI, Section l(C) of the 1980-1982 agreement defines the term "grievance" to include "a claimed assignment of employees to duties substantially different from those stated in their job specifications."

The claim that SPCTs are improperly being denied a prescribed assignment differential is founded upon Article III, Section 8(h) of the 1982-1984 agreement between the parties, which provides as follows:

> Section B. Assignment Differentials
>
> (h) For each tour worked, an assignment differential in the amount indicated below shall be paid to employees in the titles Police Communication Technician and Supervising Police Communication Technician in the Police Department Communications section who perform the following assignments: 911 Operator, Ambulance Liaison, Monitor Box Operator, CCD Operator and ERS Operator:
>
> | Effective Date | Amount |
> |---|---|
> | 7/1/82 | $2.00 P.T. |
> | 9/1/82 | $2.16 P.T. |
> | 7/1/83 | $2.31 P.T. |
>
> For employees in these titles and this section who perform the Radio Dispatcher assignment there shall be an assignment differential in the amounts indicated below for each tour worked:

	Differential		
Service in Assignment	7/1/82	9/1/82	7/1/83
1 Day through 1 year	$5.00 P.T.	$5.40 P.T.	$5.78 P.T.
Over 1 year	$7.00 P.T.	$7.56 P.T.	$8.09 P.T.

> The Department is authorized to make only one differential payment for each assignment tour per position utilized. Such differential shall not become part of the base rate and shall cease when such assignment is terminated.

As a further basis for its grievance, D.C. 37 asserts that an agreement was achieved, at a labor-management meeting on September 8, 1982 to the effect that the assignment of supervisory level PAAs to the Communications Division shall not have an adverse effect on SPCTs in their performance of borough coordinator duties. As evidence of this alleged agreement, respondent submits a letter dated September 13, 1982 from Police Department Inspector Peter J. Prezioso, Commanding officer of the Office of Labor Policy to Ms. Annie Smith, Division Director of Local 1549 of D.C. 37, which states in relevant part:

> Mr. Burns asked if the recent assignment to Communications Division of Principal Administrative Associates would threaten the borough coordinators' positions. Inspector Hoehl advised Mr. Burns that these assignments would not jeopardize the borough coordinators.

It is alleged that the assignment of PAAs to perform borough coordinator duties violates this agreement and

constitutes a grievance within the meaning of Article VI, Sections I(A) and (B) of the 1980-1982 contract.[3]

For a remedy, D.C. 37 seeks an order (1) prohibiting PAAs from performing the duties of SPCTs, (2) restoring the duties of borough coordinator to SPCTs, and (3) directing reimbursement to SPCTs of monies lost as a result of the alleged violations of contract.

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[3]Article VI, Section l(A) and (B) of the 1980-1982 agreement provides:

> Section 1.
>
> DEFINITION: The term "Grievance" shall mean:
>
> (A) A dispute concerning the application or interpretation of the terms of this Agreement;
>
> (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; ....

Positions of the Parties

Petitioner's Position

The City asserts five separate bases for its petition challenging arbitrability.

First, it alleges that the request for arbitration fails to state a sufficiently specific factual basis for a grievance to enable petitioner to respond thereto. If an adequate factual basis is not supplied, OMLR submits that arbitration should be denied.

Second, petitioner contends that the 1982-1984 agreement between the parties cannot serve as a basis for arbitration of any issue in this dispute because it has not been signed.

As a third basis for challenging arbitrability, the City argues that the job specifications for, and the duties performed by, the SPCT title are subsumed within the specifications for and the duties of the PAA title, as the latter is both the supervisory title for SPCTs and the title into which SPCTs may be promoted. OMLR contends that

> any job duties which are within the job specification of the SPCT are also, by definition, within the PAA job specification. Consequently, persons in the PAA title who are performing SPCT job duties are, by definition, performing work within the PAA job specification.

Petitioner concludes that D.C. 37 has "failed to allege facts sufficient to show even an arguable violation of the contractual section which is cited as the basis of its Request."

For a fourth challenge to arbitrability, petitioner argues that respondent has failed to fulfill a "pre- for bringing a group grievance to arbitration," as it has not processed this matter through any step of the grievance procedure contained in Article VI of the agreement.[4]

Fifth, petitioner asserts that the letter from Inspector Prezioso to Ms. Smith relating to the labor-management meeting of September 8, 1982 does not constitute either an agreement between the parties or a written policy within the meaning of the contract and therefore

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[4]Specifically, OMLR cites Article VI, Section 6 of the 1980-1982 agreement, which provides:

> A grievance concerning a large number of employees and which concerns a claimed misinterpretation, inequitable application, violation or failure to comply with the provisions of this Agreement may be filed directly at Step III of the grievance procedure. All other individual grievances in process concerning the same issue shall be consolidated with the "group" grievance.

cannot serve as a basis for this grievance. According to the City the letter merely records the verbal pronouncements of the participants at the labor-management meeting. It is not an agreement, OMLR argues, as it is not signed by the union and does not commit the Police Department to do anything. Furthermore, since Executive Order No. 38 grants to the Director of OMLR the sole power to enter into collective bargaining agreements with representatives of City employees, representatives of the Police Department cannot be found to have entered into an enforceable agreement with the respondent in this case.

Assuming, arguendo, the September 1982 letter is an agreement or a written rule, regulation, policy or order of the Department, however, petitioner contests the arbitrability of a claim founded on the terms thereof because this matter was not raised at any step of the contractual grievance procedure, but only in the respondent's answer to the petition. The City asserts that, under prior decisions of this Board, a party must be estopped from arbitrating a claim advanced for the first time in an answer to a petition challenging arbitrability.

Respondent's Position

D.C. 37 asserts that its request for arbitration states a sufficient factual basis for its grievances to enable the City to respond. Moreover, additional underlying facts are supplied by the allegation that the assignment of PAAs to perform the job of borough coordinator violates the terms of a September 1982 agreement between the parties relating to this matter.

D.C. 37 concedes that the 1982-1984 clerical agreement has not been signed. It argues, however, that agreement on the terms of this contract was reached and that Article III, Section 8(h) thereof was implemented before the present request for arbitration was filed. Under these circumstances, respondent contends, the fact that the agreement has not been signed is not a bar to arbitration of a dispute concerning one of its terms.

D.C. 37 denies that the duties of the SPCT title are subsumed within those of the PAA title or that the duties prescribed in the job specification for SPCT are, by definition, within the PAA job specification. To the contrary, respondent asserts, the City agreed that the jobs of borough coordinators in the Communications Division were to be performed by SPCTS and not by PAAs.

D.C. 37 admits that it did not process the instant matter through any of the steps of the grievance procedure contained in Article VI of the agreement. However, respondent maintains that it was justified in bypassing the pre-arbitral steps as Article VI, Section 13 authorizes commencement of proceedings for this type of claim at the arbitration step.

Finally, respondent asserts that the allegation that PAAs have been assigned to function as borough coordinators in the place of SPCTs states a grievance within the meaning of Article VI, Section 1(A) and (B) because "the breach of the September 8, 1982 agreement ... constitutes a dispute concerning the application or interpretation of the 1980-1982 contract and a violation of a written rule, regulation, policy or order" of the employer.

Discussion

At the outset, we shall address the City's contention that the request for arbitration should be denied because of a failure to plead a sufficient factual basis for the grievance. In evaluating the sufficiency of a request for arbitration, we are guided by Section 6.3 of the Revised Consolidated Rules of the Office of Collective Bargaining ("Rules") which provides as follows:

> A request for arbitration shall contain a plain and concise statement of the grievance to be arbitrated; the request shall be on a form prepared for that purpose by the Board.

The purpose of this rule is to require that a party plead information sufficient to put the other party on notice of the nature of the claim and to enable it to formulate a response thereto. Detailed pleading of all relevant facts is not required, but the material elements of the claim must be clearly set forth.[5] The request for arbitration form itself demands the following specific information:

1. a concise statement of the grievance to be arbitrated;
2. the contract provision, rule or regulation which is claimed to be violated;
3. the section of the agreement, rule or submission under which the demand for arbitration is made;
4. the remedy sought;
5. the names of the grievants; and
6. the size and name(s) of the arbitration panel if one has been selected by the parties.

[5]See, Decision Nos. B-8-85; B-1-83; B-23-82 (improper practice petitions are subject to the same requirement pursuant to section 7.5 of the Rules).

In the instant matter, it is clear that the grievance to be arbitrated involves (a) a claim that eight SPCTs are improperly being denied contractually prescribed assignment differentials because PAAs are being assigned to perform duties which allegedly fall within the job specification of SPCTs, and (b) a claim that the failure to pay the grievants assignment differentials constitutes a miscalculation of wages in violation of contract. These claims are clearly and concisely set forth on a request for arbitration form prepared by the OCB; the provisions of two collective bargaining agreements which allegedly relate to the grievance are cited; the elements of the relief sought by respondent are enumerated; and eight grievants are named. In our opinion, the request for arbitration contains sufficient information to give petitioner notice of the nature of the claim and to enable it to respond. Therefore, we find that the request fully complies with Rule 6.3.

We turn now to the substantive basis for the City's petition challenging arbitrability in this case, namely, its assertion that D.C. 37 has failed to state any facts which arguably establish a violation of Article VI, Section 13 of the 1980-1982 agreement between the parties.

We have long held that the function of this Board in deciding questions of arbitrability is to determine whether the parties are obligated to resolve their controversies through arbitration and, if so, whether the particular dispute before the Board is within the scope of that obligation.[6] We have characterized this task as a threshold inquiry which requires us to ascertain whether there is a prima facie relationship between the acts complained of and the source of the right which is sought to be redressed in arbitration. We have stressed that in determining a question of arbitrability the Board will not inquire into the merits of the dispute.[7]

In the instant matter, petitioner argues that the job duties performed by SPCTS are subsumed within the duties prescribed for the supervisory PAA title and, therefore, PAAs who perform job duties set forth in the job specification for SPCTs cannot be performing out-of-title work. This argument simply asserts that the city has the right to do that which D.C. 37 complains it is doing in violation of the contract. It does not in any way support the petitioner's cause before

[6]Decision No. B-2-69.

[7]Decision Nos. B-1-86; B-4-83; B-4-81; B-12-69.

the Board. Instead, it sidesteps the question of arbitrability, which is the only question before the Board, and focuses on the merits of the underlying dispute. Based upon our examination of the 1980-1982 agreement between the parties, we find that respondent's claim that SPCTs are aggrieved by the assignment of PAAs to duties substantially different from those stated in the PAA job specification passes the threshold test of arbitrability and states a prima facie grievance within the meaning of Article VI, Section 13.

Petitioner also raises certain procedural objections to arbitration in this case, contending that D.C. 37 has failed to process its grievance through any step of the grievance procedure. According to the City, this breach of a precondition for bringing a grievance to arbitration leaves an arbitrator without jurisdiction over the matter. Respondent concedes that it did not grieve its claim through any step of the grievance procedure. However, it argues that Article VI, Section 13 expressly permits a union to initiate a grievance arising under that provision at the arbitration step.

Issues of compliance with the steps of a grievance procedure generally are viewed as issues of procedural

arbitrability to be determined in arbitration rather than in proceedings testing substantive arbitrability.[8] However, because of the unique umpireship status of this Board and the essentially single-employer collective bargaining relationship with which we deal, we have not consistently followed that practice. Instead, and in order to promote the development of a single consistent body of precedent on the subject, to prevent abuse of the process and to save the parties the expense of needless arbitration proceedings, we have undertaken the resolution of such issues in a number of cases.[9] When we have upheld objections to arbitrability based upon a failure to adhere to prescribed grievance procedures, we have stated that the purpose of a multi-step procedure is to promote the resolution of grievances as early as possible within the labor-management structure and that non-adherence to prescribed procedures deprives

[8]John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964); City School Dist. v. Poughkeepsie Public School Teachers Ass'n, 35 N.Y. 2d 599, 364 N.Y.S. 2d 492 (1974); In re Long Island Lumber Co., 15 N.Y. 2d 380; 259 N.Y.S. 2d 142, 207 N.E. 2d 190 (1965).

[9]Decision Nos. B-40-86; B-31-86; B-1-86; B-14-84; B-11-81; B-6-80; B-12-77; B-6-76; B-3-76; B-27-75; B-22-74; B-20-74.

the parties of the opportunity to achieve that end. Accordingly, we have refused to permit a grievance that is significantly defective procedurally to continue to arbitration.

In the present case, Article VI of the parties' 1980-1982 agreement sets forth a multi-step grievance and arbitration procedure. Article VI, Section 6 of that agreement provides that a group grievance, which the City deems this to be, may be filed at Step III of the grievance procedure. In addition, Section 13 of Article VI provides that a claim that other employees are performing out-of-title work to the detriment of the grievants may be taken directly to the arbitration step. We note that well-established rules of contract construction require that meaning be given to every provision of a contract, and that no provision be left without force and effect. However, it also is well-settled that where there is an inconsistency between a specific provision and a general provision of a contract, the specific provision controls.[10] Clearly, Section 13 specifically permitting the initiation of the type of claim prescribed therein at the arbitration step is controlling here. Since the language of the

[10]Muzak Corporation v. Hotel Taft Corporation, 1 N.Y. 2d 42, 150 N.Y.S. 2d 171 (1956). See, 1 Restatement, Contracts §§235(c), 236(a); Decision No. B-39-86.

contract reveals that the intention of the parties was to permit the filing of the instant claim at the request for arbitration stage, we find that D.C. 37 did not breach any condition precedent to arbitration and we shall direct accordingly that this claim be referred to an arbitrator.

With respect to the alleged denial of assignment differentials, in violation of Article III, Section 8(h) of the 1982-1984 agreement, a claim also asserted at the arbitration step, a different result is warranted. Petitioner has argued that the 1982-1984 agreement cannot serve as the basis for arbitration of any claim, since that agreement has not been fully executed. However, we need not resolve the parties' dispute on this point as we have examined the 1982-1984 agreement[11] and find that the procedural basis on which we deny arbitration of this claim would pertain under either of the contracts referenced here.

Article III, Section 8(h) provides that assignment differentials of stated amount shall be paid to employees in specified titles who perform particular assignments of

[11]A copy of the 1982-1984 clerical agreement, prepared by OMLR for the signature of D.C. 37's Executive Director, was supplied to us by the respondent.

a more difficult or responsible nature. A claim that a prescribed differential has been denied clearly states "a dispute concerning the application or interpretation of the terms of this Agreement,"[12] and would be submissible to arbitration. However, the express statement of an exception, such as the filing provision of Article VI, Section 13, discussed above, requires the conclusion that there are no other exceptions.[13] As there is no express provision for the initiation of a claim under Article III, Section 8(h) at the arbitration step, we find that the generally applicable provision governing the initiation of a claim must apply. Respondent's failure to comply with the grievance procedure deprived petitioner of notice and an opportunity to resolve the claim short of arbitration. Since we deem this procedural defect to be significant, we conclude that it would not serve the interests of sound labor-management relations to permit this claim to continue to arbitration. Our denial of the request to arbitrate in this regard is without prejudice, however, to the timely submission of a new grievance

[12]Article VI, Section 1(A).

[13]F. Elkouri and E. Elkouri, How Arbitration Works (4th ed. 1985), at 355.

in compliance with appropriate contractual procedures and, further, in no way precludes the arbitrator designated to hear the out-of-title claim in the instant matter from considering an argument that Article III, Section 8(h) of the 1982-1984 agreement provides the proper measure of a remedy for a violation of Article VI, Section 13 of the 1980-1982 agreement. Of course, the determination of appropriate remedies, if, any, rests within the broad discretion of the arbitrator.[14]

Finally, we shall deny arbitration, also on procedural grounds, of respondent's claim that the assignment of PAAs to perform borough coordinator duties violates a side-letter agreement between the parties. We do not reach the issue of whether the letter from a Police Department representative to a representative of the local union reflecting the results of a labor-management meeting is an agreement, or a rule, regulation, written policy or order of the employer for purposes of the parties' grievance procedure. D.C. 37 does not deny that this allegation was raised for the first time in its answer to the petition challenging arbitrability and there is no evidence that the City had any prior notice or opportunity to attempt

[14]Decision Nos. B-4-82; B-3-80; B-14-74; B-9-71.

to resolve this dispute voluntarily. Consistent with prior decisions, we shall not permit arbitration of an independent grievance asserted at this late stage of the proceedings.[15]

For the reasons stated herein, we shall order that the request for arbitration in this matter be granted to the extent that it complains of a violation of Article VI, Section 13 of the 1980-1982 agreement between the parties. Since the rights of PAAs are or may be affected, we shall also provide that a copy of the Determination and Order be served upon their certified representative,[16] and shall direct that said representative may apply to intervene, or may be interpleaded by the City, as a party in the 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

ORDERED, that the petition filed by the City of New York be, and the same hereby is, denied insofar as it contests the arbitrability of a claimed violation

[15]See Decision Nos. B-1-86; B-14-84. See also, decisions cited supra note 9.

[16]The Communications Workers of America is the certified bargaining representative for PAAS. Decision No. 4-79.

of Article VI, Section 13 of the 1980-1982 agreement, and granted in all other respects; and it is further

ORDERED, that the request for arbitration filed by Local 1549 of District Council 37 be, and the same hereby is, granted insofar it asserts a violation of Article VI, Section 13 of the 1980-1982 agreement, and denied in all other respects; and it is further

ORDERED, that a copy of this Determination and Order be served upon the Communications Workers of America; and it is further

ORDERED, that within ten (10) days after service of a copy of this Determination and Order, the Communications Workers of America may apply to this Board, on notice to all parties, to intervene in said arbitration, and the City of New York may apply to the Board on notice to all parties, to interplead the

the Communications Workers of America as a party to said arbitration.

DATED: New York, N.Y.
April 30, 1987

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

DEAN L. SILVERBERG
MEMBER

CAROLYN GENTILE
MEMBER

WILBUR DANIELS
MEMBER

EDWARD SILVER
MEMBER