

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

-between-

THE CITY OF NEW YORK AND THE
NEW YORK CITY DEPARTMENT OF
CORRECTION

Petitioners,

DECISION NO. B-35-87

-and-

DOCKET NO. BCB-962-87
(A-2588-87)

THE COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 1180,

Respondent.

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DECISION AND ORDER

On May 29, 1987, the City of New York, appearing through its Office of Municipal Labor Relations ("the City"), filed a petition challenging arbitrability of a grievance submitted by the Communications Workers of America, Local 1180 ("the Union"), in its April 30th request for arbitration. After the Union filed an amended request for arbitration on June 3, 1987, the City submitted an amended petition challenging arbitrability on June 15, 1987. The Union filed its answer on July 27, 1987, to which the City replied on August 6, 1987.

Background

Deborah Sherol ("grievant") had been employed as a principal administrative associate I ("PAA I") in the Department of Correction ("the Department") when, according to the Union, she was promoted to the title of principal administrative associate II ("PAA II") on February 19, 1986. Grievant, however, did not receive compensation as a PAA II until May 1, 1986.

On July 1, 1986, grievant filed a Step I grievance entitled "Out-of-Title Grievance #1 - Promotion from Principal Administrative Associate I to Principal Administrative Associate II." The grievance alleged that grievant's promotion became effective as of February 19, 1986 when the Department approved the action in accordance with the decision of the Committee on Civilian Personnel. Grievant thus requested "retroactivity in Title and Money from the date of February 19, 1986."

After receiving no response at Step 1, grievant filed a Step II grievance. She identified the subject of the grievance as "Retroactivity in Money and Title from February 19, 1986 to April 30, 1986" .and reiterated her position that she was entitled to PAA II com-

pensation from the date the Department approved her promotion.

In denying the step II grievance, the Director of Labor Relations indicated that the action taken by the Committee on Civilian Personnel at its meeting on February 19, 1986 did not mean that grievant had been promoted as of that date, since the Committee possessed only, advisory authority and had limited its approval pending identification of a funding source. The Director further noted that "in out-of-title claims, Office of Municipal Labor Relations Interpretative Memorandum #56, provides in cases as this one, monetary obligation retroactive only to the date of submission of the grievance."

The Step III hearing officer likewise denied the grievance, stating as follows:

Although on February 19, 1986 the Committee on Civilian Personnel did approve a recommendation to upgrade the grievant to P.A.A. II, the effective date of the implementation of such recommendation was not February 19, 1986. Certain budgetary review and personnel analysis reports had to be initiated before implementation could take effect.

Furthermore, it should be noted that the Union, in the Step III Conference, raised an allegation that the grievant had been performing out-of-level work as a P.A.A. II prior to February 19, 1986 and thereafter.

However, in reviewing the case record, it was found that such allegation was not raised by the grievant and/or the Union in writing at Steps I, II or III of the grievance procedure. Moreover, even when said allegation was first raised by the Union in the Step III Conference, data was not presented in support of said claim. Accordingly, the cited allegation is dismissed.

On April 30, 1987, the Union filed a request for arbitration identifying the grievance to be arbitrated as "Out-of-Title-Work" and requesting "Retroactivity in Title and money from the date of February 19, 1986 through the present between a PAA I and a PAA II." The City thereupon filed a petition challenging arbitrability, arguing that the Union may not seek arbitration of its claim of out-of-title work since it was not raised at the earlier stages of the grievance procedure.

The Union then filed an amended request for arbitration identifying the grievance to be arbitrated as "[f]ull retroactivity pay for Principal Administrative Associate, Level II, from February 19, 1986 to April 30, 1986." As a remedy, the Union seeks "retroactivity in title and money from February 19, 1986 to April 30, 1986."

Positions of the Parties

City's Position

In its amended petition challenging arbitrability, the City argues that the Union has failed to establish a nexus between the act complained of and the contract provision relied upon in seeking arbitration. The City points out that the amended request for arbitration relies on Article VI, Section 1c of the parties' collective bargaining agreement, which defines a grievance as, inter alia, "[a] claimed assignment of employees to duties substantially different from those stated in their job specifications." The City thus maintains that since the amended request alleges no out-of-title work, the Union has failed to demonstrate the required nexus and arbitration must be denied.

Furthermore, even assuming that the amended request for arbitration does allege an out-of-title claim, the City denies that the Union raised such a claim at the previous steps of the grievance procedure. Although it acknowledges that the words "out-of-title" appeared on various documents in the earlier stages of the proceedings, the City argues that, as the Step III review officer noted, no evi-

ence of grievant's performance of out-of-title duties was presented at any of the grievance steps. What was presented and investigated throughout the grievance steps was, in the City's view, merely a salary dispute. Therefore, the City argues that the amended request must be dismissed since it is based upon a claim with respect to which the Union presented no evidence at the earlier steps of the proceeding.

Union's Position

The Union maintains that it raised the claim of out-of-title work from the outset of the grievance procedure. It notes that in Step I, the subject was specifically identified as "out-of-title grievance." At Step II, the Union asserts, grievant implicitly raised out-of-title work as the basis for the grievance by listing the subject as "Retroactivity in Money and Title from February 19, 1986 to April 30, 1986." (Emphasis added).

The Union further argues that the City was aware of the nature of grievant's claim since the Step II determination stated that "in out-of"title claims, OMLR Interpretation Memorandum #56 provides in cases as this one, monetary obligation only to the date of

submission of the grievance." (Emphasis added). In addition, the Union points out that the City, in issuing a letter to reschedule the Step II Conference, referred to the case as "alleged out-of-title assignment."

In the Union's view, there is a clear relationship between the effective date of grievant's upgrading for the purpose of obtaining retroactive compensation and grievant's performance of out-of-title work. Thus, the Union argues that it is not raising a novel claim at the arbitration stage since its claim always has been that "grievant should be properly compensated for out-of-title work she performed from the time she began to do so... [i]n fact, her failure to be compensated for her duties is precisely why she was performing out-of-title work."

Discussion

The Board has consistently adhered to the principle that a party may not amend its request for arbitration to add claims that it failed to raise in the previous steps of the grievance procedure. The basis for this principle 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.¹ (Footnote omitted).

Thus, the Board has denied arbitration where the Union claimed for the first time in the request for arbitration that (1) certain provisions of the Civil Service Law,² the collective bargaining agreement,³ or a written policy of the agency⁴ had been violated (2) additional grievants were encompassed by the claim,⁵ or (3) the health and safety of employees were affected by the disputed practice of the City.⁶

Nevertheless, it is by no means the Board's intention to adopt a strict pleading rule which would

¹Decision No. B-22-74.

²Decision No. B-12-77.

³Decisions No. B-27-85; B-11-81.

⁴Decision No. B-1-86.

⁵Decision No. B-14-84.

⁶Decision No. B-22-74.

defeat arbitrability where the nature of the claim is clear. Thus, the Board ruled as follows in Decision No. B-21-84:

The City maintains that the grievant did not cite his alleged improper employment classification as a basis for the grievance herein until the request for arbitration stage of the procedure. However, the record shows that the grievant did raise the issue of HHC's "failure to integrate [him] into the per annum salary schedule as called for under Health and Hospitals Rules and Regulations" at Step I of the grievance procedure. Thus, the City was not deprived of notice of a claim founded on the grievant's employment classification nor did the parties lack the opportunity to discuss and resolve the claim from the earliest stage of the grievance process.

The purpose underlying our policy against permitting the tardy amendment of a claim is fulfilled when the parties are afforded the opportunity to discuss and settle their dispute short of arbitration. That the parties in this case did not, in fact, discuss or resolve the grievant's classification status in the context of a claim arising under Article VIII is not relevant to our determination. (Footnote omitted emphasis added).

Likewise, we find that the parties here had ample opportunity to discuss and resolve the claim at the prior stages of the grievance, since the nature of the dispute was clear from the outset, i.e., whether grievant was being compensated commensurate with her

position from February 19 to April 30, 1986. We are satisfied that grievant's statement of the dispute at the earliest stages as "out-of-title work" and "retro-activity in pay and title" adequately raises the issue of the level of her duties. Although the City did not fully explore this issue below, we cannot say that it lacked notice or was in any way surprised by a novel claim.

Neither is there merit in the City's argument that the Union has failed to establish the required nexus between Article VI, Section 1c and the claim for "full retroactivity pay for Principal Administrative Associate, Level II" in the amended request for arbitration. Again, we find that grievant's claim that she is entitled to greater compensation for work at a higher title is at least arguably related to the parties' agreement in Article VI, Section 1c to arbitrate disputes concerning "a claimed assignment of employees to duties substantially different from those stated in their job specifications."

Accordingly, the City's petition challenging arbitrability is denied.

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 City's petition challenging arbitrability be, and the same hereby is, denied; and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is, granted.

DATED: New York, N.Y.
August 27, 1987

ARVID ANDERSON
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

CAROLYN GENTILE
MEMBER