City v. L.371, SSEU, 41 OCB 10 (BCB 1988) [Decision No. B-10-88 (Arb)]

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

THE CITY OF NEW YORK,

Petitioner,

-and- DECISION NO. B-10-88

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, DOCKET NO.BCB-983-87 (A-2566-87)

Respondent.

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DECISION AND ORDER

On July 24, 1987, the City of New York, through its Office of Municipal Labor Relations ("the City") filed a petition challenging the arbitrability of a grievance submitted by Social Service Employees Union, Local 371 ("the Union") on behalf of Felicita Montalvo, et al ("the grievants"). The Union filed an answer on September 9, 1987, to which the City replied on September 23, 1987.

Thereafter, on February 26, 1988, the Trial Examiner assigned to the case wrote to the parties and, on behalf of the Board, invited them to address the question of what effect, if any, the negotiation of subsection G under Article VI, Section 1 has on the instant

matter. The Union filed its response on March 9, 1988; and the City filed its response on March 15, 1988.

Background

The grievant, Felicita Montalvo, is employed by the Human Resources Administration, Bureau of Child Support (BCS) in the title Supervisor I. On or about September 15, 1986, Ms. Montalvo filed a grievance on behalf of herself and eight other BCS employees at Step II of the grievance procedure set forth in the 1980-1982 agreement between the parties objecting to

> "the inclusion in our personnel folders of a memorandum from present Manhattan Boro office Director, Mr. Lee Williams, which Memorandum is dated September 8, 1986 or thereabouts and refers to a Supervisory Conference held separately with each of us on or about September 5, 1986. Which conference refers to an incident occurred before his tenure on March 1, 1984, of which incident he does not have first hand knowledge. [sic]"

The Step II Hearing Officer determined that:

> "The issue concerning the 3/1/84 incident was addressed and responded to in the Step II grievance filed under LR#86/06-0008. That grievance was sustained and management has complied with the determination rendered by the Office of Labor Relations.
>
> Should grievant have objections to the revised memo she has the right of rebuttal and that response will be filed in her personnel folder along with the disputed memo."

Accordingly, on or about October 21, 1986, the Step II grievance was denied.

Thereafter, on or about October 31, 1986, Ms. Montalvo filed a grievance at Step III of the grievance procedure claiming that the Step II decision did not satisfactorily address the following questions: "(1) why should there be a reprimand when there was no offense proved by the investigations? (2) Is not the placement of a written reprimand unfair and unnecessary for a pound of cheese worth perhaps two dollars?"

Both the grievance filed at Step II and the grievance filed at Step III failed to specify any provision of the City-wide or Local 371 contract claimed to have been violated. The Step III Review officer determined, however, that Article X, Section 2 of the City-wide contract applies to the issue in dispute.[1] He concluded that

[1] ARTICLE X - EVALUATIONS AND PERSONNEL FOLDERS

Section 2
If any employee finds in the employee's personnel folder any material relating to the employee's work performance or conduct in addition to evaluatory statements prepared after July 1, 1967 ... the employee shall have the right to answer any such material filed and the answer shall be attached to the file copy.

since grievants have been afforded all the benefits and protections which are contained in that contractual clause, no violation of the applicable contract exists and, therefore, denied the grievance on or about February 2, 1987.

Following receipt of the Step III decision, the Union filed a request for arbitration which is the subject of the City's petition challenging arbitrability herein. The request for arbitration, dated March 16, 1987, claims that "grievants have been reprimanded without appropriate due process" in violation of Article VI, Sections 1 and 4 of the Local 371 contract.[2] As a remedy, the Union requests "compliance, removal of reprimand memos from grievants' personnel records, and any other just and proper remedy."

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[2] Article VI, Section 1 defines a grievance as:

> (E) A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service-Law or a permanent competitive employee covered by the Rules and Regulations of the Health and Hospitals Corporation upon whom the agency has served written charges of incompetency or misconduct while the employee is serving in the employees' permanent title or which effects the employee's permanent status;

Article VI, Section 4 sets forth the procedures that shall govern upon service of written charges of incompetency or misconduct in any case involving a grievance under Article VI, Section 1(E).

Positions of the Parties

City's Position

The City contends that the request for arbitration must be denied because it presents a novel claim which the Union failed to assert in the prior steps of the grievance procedure. According to the City, no reference was made in the prior steps of the grievance procedure to Article VI, Sections 1 and 4, or to any other contractual provision, rule or regulation allegedly violated. The City asserts that Article VI, Section 1 when considered in conjunction with Article VI, Section 4 refers to disciplinary actions. The City maintains, however, that nothing in the prior steps of the grievance procedure suggested that the Union considered the inclusion of the memo in grievants' personnel files a wrongful disciplinary action.

The City notes that in the absence of any cited contractual provision, the Step III Review officer inferred that Article X, Section 2 of the City-wide contract was the provision alleged to be violated, misinterpreted or misapplied by the City. Article X, Section 2 refers to any "material relating to the employee's work performance or conduct" and gives employees the right to answer such statements and to have the answer attached to their personnel

file. The City claims that the particular memo in question constitutes "material" relating to an employees' conduct within the meaning of Article X, Section 2 - not a reprimand; and nowhere in Article X, Section 2 is there a provision that provides employees with the option to file a grievance.

The City submits that even assuming arguendo that the Union does not present a novel claim in its request for arbitration, Article VI, Section l(E) "is nevertheless inapposite in that it requires the service of 'written charges of incompetence or misconduct.'" The City asserts that in the instant case, no written charges were filed against the grievants either before or after the memo was placed in their personnel files and, in addition, the memo was not accompanied by formal charges or any other indicia of disciplinary action. Therefore, the City contends that there is no nexus between the act complained of (placement of memorandum in grievant's personnel files) and the source of the alleged right (Article VI, Section l(E).)

In support of its contention, the City notes that in the 1982-1984 round of bargaining, a new Subsection G was added to the definition of a grievance set forth

in Article VI, Section 1,[3] which provides a remedy through the grievance procedure in situations where the union perceives that a wrongful disciplinary action has been taken against an employee even though no formal charges have been filed. The City claims that "it is abundantly clear that if Article VI, Section l(E) covered the situation where an alleged disciplinary action had been taken and no formal charges had been served., [as in the instant case], Article VT, Section I(G) would never have been negotiated and added to the agreement."

For all of the reasons stated above, the City requests that the Board grant its petition challenging arbitrability.

[3] Subsection G under Article Vi, Section 1, defines the term "grievance" as follows:

> Failure to serve written charges as required by Section 75 of the Civil Service Law or the Rules and Regulations of the Health and Hospitals Corporation upon a permanent employee covered by Section 75(1) of the Civil Service Law or a permanent competitive employee covered by the Rules and Regulations of the Health and Hospitals Corporation where any of the penalties (including a fine) set forth in Section 75(3) of the Civil Service Law have been imposed.

Union's Position

The Union contends that the instant case is distinguishable from prior Board decisions wherein the request for arbitration was denied on the ground that it presented a novel claim. Unlike those cases, the Union asserts, it cannot be said that the parties herein confined themselves in the prior steps of the grievance procedure to a particular issue significantly different than the one submitted for arbitration.

The Union admits that the grievance filed at Step II of the grievance procedure was "hardly a model of clarity." It maintains, however, that the grievance, which was filed by Ms. Montalvo, not the Union, "does at least clearly identify the issue to be the alleged improper inclusion of a September 8, 1986 memorandum in [qrievantsl] personnel folders." Moreover, the Union claims that the Step III grievance clearly raised the issue of wrongful disciplinary action by stating” (l) why should there be a reprimand when there was no offense proved by the investigations? The fact that the Step III Review Officer ignored this aspect of the grievance in his determination and identified a different contractual provision as applicable, the Union argues, does not substantiate the City's claim that the Union failed to raise the issue of wrongful disciplinary action prior to its request for arbitration.

The Union also asserts that "the issue submitted for arbitration, though perhaps not perfectly pleaded below, was clearly not unpleaded." The Union claims that the Step II and Step III grievances were sufficient to put the City on notice as to the nature of the Qrievants' claim. Therefore, the Union maintains that on this record the City cannot legitimately assert that the Union attempted to change the nature of the claim or assert a new claim at the arbitration stage.

Finally, the Union argues that "the new Subsection G of Article VI, Section 1 supports grievants' assertion that the dispute herein is grievable and that the petition (challenging arbitrability) must, therefore, be denied." According to the Union, "it is inescapable that the inclusion by the City of a reprimand in the grievants' personnel records without proceeding under Section 75 of the Civil Service Law constitutes a "Grievance" as that term is defined in the new Subsection G of Article VI, Section l."

Discussion

The issue to be determined in this case is whether the claim of wrongful disciplinary action was raised in the prior steps of the grievance procedure and, if so, whether the Union has established a sufficient nexus

between the act complained of and the contractual right to grieve wrongful disciplinary actions to support a finding that the instant dispute is within the scope of the parties' agreement to arbitrate.

This Board has consistently held that a party may not raise at the point of arbitration new claims or issues which were not raised in the proceedings below.[4] The basis for this rule 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.[5]

The record in this case shows that even though grievants failed to cite Article VI, Sections 1 and 4 as the contractual provisions allegedly violated, they did seek to demonstrate in the prior steps of the grievance procedure that the inclusion of the memo in their personnel

[4] Decision Nos. B-20-74; B-22-74; B-27-75; B-12-77; B-6-80; B-31-86.

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

files was a wrongful disciplinary action. Therefore, we find that the claim of wrongful disciplinary action was pleaded.

The original grievance filed at Step II was, as the Union concedes, "hardly a model of clarity." As a result, we find it understandable that the Step Il Hearing Officer did not address the issue of wrongful disciplinary action. However, upon receipt of the Step II decision, grievants filed a Step III grievance which states as follows:

> We have received a reply to our grievance of September 15, 1986 concerning the reprimand memo entered in our personnel records as a result of the cheese [sic] incident of March 1, 1984.
>
> We are not satisfied with the reply. The Step II Level did not satisfactorily address questions: (1) why should there be a reprimand when there was no offense proved by the investigations? (2) Is not the placement of a written reprimand unfair and unnecessary for a pound of cheese worth perhaps two dollars?
>
> Accordingly, as is our right. We reject the Step II decision as improper procedure, unjust and arbitrary and request a hearing at the Step III level.

In prior decisions this Board has stated that if the Union believes the scope of the qrievance is broader than that defined in the decision of the Hearing Officer, it has an obligation to make its belief known to the

City.[6] In the instant case, the Step III grievance referred to the memo as a "written reprimand" and urged as the basis for its appeal the failure of the Step II Hearing Officer to address specific questions. Although the Step III Review Officer ignored grievants' reference to the memo as a reprimand and failed to address the questions raised, we find that the Step III grievance can fairly be said to constitute an objection to the City's expressed understanding of the scope of the grievance. Moreover, we find that the reference to the memo as a "written reprimand" at Step III was sufficient to put the City on notice that grievants considered the inclusion of the memo in their personnel files to be a wrongful disciplinary action. Accordingly, we find that the request for arbitration does not present a novel claim.

Nevertheless, we find that the union has failed to establish a nexus between the act complained of and the source of the alleged right sought to be redressed in arbitration. Article VI, Section l(E) defines a grievance as "a claimed wrongful disciplinary action taken

[6] Decision Nos. B-6-80; B-31-86.

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 or misconduct....” In the instant case, no written charges were filed against the grievants either before or after the memo was placed in their personnel files; nor does the record show that the memo was accompanied by formal charges or any other indicia of disciplinary action. Since the instant dispute was brought pursuant to the 1980-1982 agreement which did not include Article VI, Section l(G), we find that the request for arbitration must be denied.

Accordingly, the City's petition challenging arbitrability shall be granted.

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 of the City of New York challenging the arbitrability of a request for arbitration filed by Social Service Employees Union, Local 371 be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by Social Service Employees Union, Local 371 be, and the same hereby is, denied.

Dated: New York, N.Y.
April 28, 1988

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
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