City, Dep't of Parks & Rec. v. DC37, 41 OCB 25 (BCB 1988) [Decision No. B-25-88 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
- - - - - - - - - - - - - - - - - - x

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK AND THE DEPARTMENT OF PARKS AND RECREATION,
Petitioner,

DECISION NO. B-25-88

DOCKET NO. BCB-1037-88 (A-2776-88)

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
Respondent.
- - - - - - - - - - - - - - - - - - x

DECISION AND ORDER

On March 11, 1988, the City of New York and the Department of Parks and Recreation ("the City" or "DPR"), by the Office of Municipal Labor Relations, filed a petition challenging the arbitrability of a grievance submitted by District Council 37, AFSCME, AFL-CIO ("the Union"), on or about February 23, 1988. The Union filed its answer on March 30, 1988, to which the City did not reply.

Background

On September 16, 1987, the Union filed a grievance at Step I on behalf of John Juliano ("the grievant"), employed as a Principal Park Supervisor by the Department of Parks and Recreation. The grievance alleged that the City was in violation of Article VI, Sections 1(B) and

(C) of the Blue Collar Unit contract that exists between the parties, as well as Article 9 of the DPR Working Conitions letter of agreement dated May 15, 1986 and signed by both parties. The gravamen of the claim is that the City violated the aforementioned agreements by assigning a (Seasonal) Park Supervisor to duties on weekends which, according to the Union, should be performed by Principal Park Supervisors. These weekend duties, described as an assignment to "ride the borough", allegedly involve assisting an Administrative Park and Recreation Manager ("APRM"), or performing an APRM's function in the latter's absence. The Union demands that the City cease and desist such out-of-title assignments of (Seasonal) Park Supervisors, and, further, pay the grievant any lost earnings for days he should have been assigned to perform such duties.

Article VI, Sections 1(B) and (C) of the Blue Collar Unit contract defines a grievance, in pertinent part, as follows:

> "(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 ...
>
> (C) A claimed assignment of employees to duties substantially different from those stated in their job specifications...."

Article 9 of the DPR Working Conditions letter of Agreement provides, in pertinent part, as follows:

> "9. The alleged assignment, of a named employee or group of employees in DPR either to duties clearly set forth in the job specification for the title held by the grievant or to duties for a covered title as defined below which is next in the direct line of promotion from the grievant's title, shall be grievable under the applicable unit or working conditions agreement providing that the contested duties are substantially different from those set forth in the job specification for the title held by such named employee or group of employees ......

On September 28, 1987 the City denied the claim at the Step I grievance hearing, stating that an APRM is in charge on weekends, that the Seasonal Park Supervisor merely assists, and that the assignment of such duty is not a grievable matter. The Step II grievance was denied by letter dated October 29, 1987, which stated that Arbitration Award No. A-1603-82 (Spina v. DPR) precluded the instant grievance in that the matter previously had been determined. This letter also made reference to the fact that the grievant was offered the opportunity to "ride the borough" on weekends in the future.

On January 27, 1988, in its Step III decision, the City denied the grievance on the ground that the duties performed by the (Seasonal) Park Supervisor in assisting the APRM on weekends are within a Park Supervisors' scope of tasks as outlined in the job description for that title. Therefore, the City asserted that Article 9 of the DPR working conditions letter of Agreement had not been violated.

No satisfactory resolution of the dispute having been reached, on or about February 23, 1988 the Union filed a request for arbitration pursuant to Article VI, Section 2 of the Blue Collar Contract.

Positions of the Parties

City's Position

The City asserts that the subject of the request for arbitration is the same issue submitted to and decided by Arbitrator Irsay in Docket No. A-1603-82. Thus, since the instant dispute involves the same parties as in A-1603-82, it is alleged that the current request for arbitration is barred from arbitral consideration by the doctrine of res judicata and should not be entertained.

In support of its position, the City cites prior Board Decision Nos. B-27-82, B-28-81 and B-16-75, where the Board asserted jurisdiction to consider the relevance of the legal defense of res judicata in determining substantive arbitrability. In B-27-82, we stated:

> "[r]es judicata will bar the litigation of a claim which has already been decided, where there is an identity as to parties and as to the claim presented."

The City contends that the arbitrator's determination in A-1603-82, which denied an out-of-title duties claim by a Park Supervisor ("Spina") who was required to take turns on weekends to perform "essentially the same" duties at issue in the instant matter, precludes the instant grievant from bringing this request for arbitration. The City also asserts that there is identity as to the parties in that the same Union represented Spina in A-1603-82 as represents the grievant in the instant matter.

Therefore, given the identity of both claim and parties, the City asserts that the Board must find the doctrine of res judicata to constitute a bar to arbitrability in order to effectuate the purpose of the New York City Collective Bargaining Law's waiver provision

(512-312d) as well as to prevent an abuse of the Board's processes.

The Union's Position

The Union asserts that the doctrine of res judicata is not applicable to the Board's determination of arbitrability in this matter in that both the claims and the parties in A-1603-82 differ in several respects from those in the instant matter.

The Union alleges, in the first instance, that a critical element of res judicata, the identity of the cause of action in both the earlier and the later suit, is lacking because the two causes of action at issue here "involve different 'rights' and 'wrongs'". The Union contends that in Spina v. DPR, "the gravamen ... of the grievance was that [Spina] was exercising a supervisory function on the weekends greater than that exercised during the week" as a consequence of which he claimed out-of-title pay for the weekend supervisory duties which he performed. In contrast, in the instant matter, the Union asserts that the grievance is based upon the alleged out-of-title assignment of duties to employees serving in a lower title, in violation of Juliano's right to perform those same duties as "clearly set forth in the job specification

for the title held by the grievant or to duties for a covered title ... which is next in the direct line of promotion from the grievant's title" in accordance with the provisions of Article 9 of the DPR working conditions letter of Agreement. Insofar as there are different contractual rights invoked by each of the grievants, the Union asserts that this fact clearly distinguishes one from the other so as to defeat the City's challenge based upon the doctrine of res judicata. In support of this proposition, the Union cites to Board Decision No. B-27-82, wherein the Board held that "where it was not readily apparent that the issues are identical, the Board has not denied the [r]equest for [a]rbitration on the grounds of res judicata."

The Union alleges additional distinctions between the two matters in support of its position. While admitting that the Union is and was a party to both actions, the Union asserts that the individual grievants are the real parties in interest in that their individual job descriptions (Principal Park Supervisor in the present case versus Park Supervisor in the earlier case), and the rights that attach to each of the grievants in the performance of his distinct duties respectively, are unique. Therefore,

the Union asserts that the element of res judicata requiring identity of parties, has not been satisfied.

The Union also alleges as a distinguishing feature that the contract provisions violated in the instant matter include Article 9 of the DPR Working Conditions letter of Agreement, which in fact did not exist in 1982 when the out-of-title claim in Spina v. DPR was the subject of an arbitral dispute. This distinction, the Union claims, further supports their assertion that the arbitrator in A-1603-82 did not address the precise claim that is the subject matter of the instant request for arbitration.

Finally, the Union contends that what the City is attempting to do in their challenge to arbitrability is to convince the Board that the doctrine of res judicata applies when, in fact, their challenge is substantially based on the doctrine of stare decisis. The Union cites Board Decision No. B-3-86, where we defined the doctrine of stare decisis as a

> "... 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 are entirely different." (emphasis added)

The Union asserts that even if the doctrine of stare decisis applies, the precedential effect of a prior award is properly a determination to be made by an arbitrator.

Discussion

The parties in this matter do not dispute that they have agreed to arbitrate unresolved grievances, as that term is defined in the collective bargaining agreement and the DPR Working Conditions letter of Agreement. Nor do they dispute that a claimed violation of the out-of-title provisions of the Agreements is within the scope of their obligation to arbitrate. The issue presented here for our determination is whether the Union's request for arbitration should be barred, as the City contends, by the doctrine of res judicata.

It is well settled, as the City correctly points out, that the Board of Collective Bargaining, rather than the arbitrator, is the forum charged with the duty of determining substantive arbitrability and that, in doing so, we may consider the validity of relevant legal defenses such as res judicata.[1] The City maintains that on the basis of res judicata, the Board should deny arbitrability

[1] See Decision No. B-27-82.

of the grievance in the instant matter since, allegedly, the same claim was previously resolved by an arbitrator in a dispute between the same parties.

In considering the application of the aforementioned doctrine, we recognize that in appropriate cases, res judicata should be employed to prevent vexatious and oppressive relitigation of previously arbitrated disputes.[2] In determining whether the doctrine should apply to bar arbitrability, we have held that the following "essential elements" of res judicata need be met: "(1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits."[3]

Applying this formulation to the instant matter, we find that the City's failure to establish the existence of the essential elements of res judicata precludes us from barring arbitrability of the instant matter on the basis of that doctrine. In the first instance, we find that the precise claim that was before the arbitrator in A-1603-82 is not presented in the request for arbitration herein. In B-27-82, we held "... the legal requirements for the

[2] See Decision Nos. B-27-85, B-16-75.

[3] See Decision No. B-22-86.

application of the res judicata defense [are not met] ... [when] there is no clear and obvious identity of issue...." In other words, we did not find the res judicata. argument applicable because "... it [was] not readily apparent that the issues [were] identical."

In the instant matter, the Union asserts that the legal "rights and wrongs" are altogether different in that the provisions of the collective bargaining agreements claimed to have been violated in each instance are separate and distinct. In A-1603-82, the Union grieved a violation of Article VI, Section 1(C) of the Blue Collar Unit contract, whereas in the instant matter, the focus of the Union's argument is based on a claimed violation of Article 9 of the DPR Working Conditions letter of Agreement dated May 15, 1986 as well as Article VI, Sections 1(B) and 1(C) of the Blue Collar Unit Contract. We find that arguably the DPR Working Conditions letter vests additional rights in the parties and, in particular, appears to expand upon the definition of a grievance in a manner that did not exist in 1982 when the earlier case was heard before an arbitrator.

Furthermore, we find merit in the Union's assertion that there are significant other distinctions which serve

to distinguish the causes of action in these two cases. The union claims that the interests at issue in these cases are derived from a unique interpretation of the terms and conditions of the applicable agreements as they relate to the individual grievants, since their job descriptions, work locations, and the transactions giving rise to the alleged violations are different.

We have held on different occasions that where two or more grievances are distinguishable because they arise from separate occurrences or transactions, relating to factually distinct incidents;[4] there have been contractual changes which redefine the terms and conditions of employment;[5] and when the claims, though factually close, are not identical;[6] the doctrine of res judicata will not be applied as a bar to arbitrability. Consistent with these holdings, we find that the Union's grievance herein differs from the dispute in A-1603-82 sufficiently that the doctrine of res judicata is inapplicable.

[4] See Decision Nos. B-3-86, B-22-86.

[5] See Decision No. B-9-78.

[6] See Decision No. B-27-82.

We further find merit to the Union's argument that the real issue presented by the City is whether the doctrine of stare decisis is applicable, there being a similarity of facts upon which "a standard of judgment with respect to subsequent cases involving the same issues" may be adopted.[7] With respect to this argument, however, as the Union correctly points out, it is well established that determination of the applicability of stare decisis is appropriately within the province of the arbitrator.[8]

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

[7] See Decision No. B-3-86.

[8] See Decision Nos. B-22-86, B-3-86.

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

DATE: New York, N.Y.
June 30 , 1988

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

DEAN L. SILVERBERG
MEMBER

PATRICK F.X. MULHEARN
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER