City v. DC37, 45 OCB 19 (BCB 1990) [Decision No. B-19-90 (Arb)]

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

THE CITY OF NEW YORK,

Petitioner,

DECISION NO. B-19-90

-and-

DOCKET NO. BCB-1189-89
(A-3159-89)

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,

Respondent.
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DECISION AND ORDER

On August 3, 1989, the City of New York ("City") filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by District Council 37, AFSCME, AFL-CIO ("DC 37" or "Union") on behalf of its members in the title of Climber and Pruner ("Grievants"). The request for arbitration alleges that the Department of Parks and Recreation ("Department") violated Article XVI, Section 1 of the l984-87 Blue Collar Agreement ("Agreement") when it failed to assign tree inspection duties to Grievants.

The Union filed an answer to the petition on August 15, 1989. The City filed a reply on September 14, 1989.

Background

On or about December 5, 1988, pursuant to Article VI, Section 7 of the Agreement, DC

37 filed a group grievance at Step III,[1] alleging that the Department failed to assign the duties of Tree Inspectors to employees in the title of Climber and Pruner. The Union contends that the Department violated Article XVI, Section 1 of the Agreement[2] when it assigned employees in the titles of Assistant Forester and Forester to perform the duties of Tree Inspector.

On June 16, 1989, the Step III Review Officer denied the grievance, maintaining that while employees in the title of Climber and Pruner are eligible for such assignments, the Agreement neither guarantees the assignment nor precludes the Department from exercising a managerial prerogative to assign the work to Assistant Foresters or Foresters.

No satisfactory resolution of the matter having been reached, DC 37 filed the instant request for arbitration on July 24, 1989. The Union seeks, as a remedy, "[a] cease and desist order."

Positions of the Parties

[1] Article VI, Section 7 of the Agreement 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.

[2] Article XVI, Section 1 of the Agreement provides:

> Until such time as an examination is held for Horticulture Inspector or other appropriate title, employees in the title of Climber and Pruner, and Gardener, are eligible for assignment as Tree Inspector. Prior to making an assignment to a position within a borough, notice of the existence of the assignment will be posted in the respective borough and applications will be accepted.

City's Position

In its petition challenging arbitrability, the City argues that because Article XVI, Section 1 of the Agreement in no way establishes that a Climber and Pruner is guaranteed assignment to the duties of a Tree Inspector, that section creates no limitation on the exercise of the City's statutory prerogative regarding the assignment of such work.[3] Therefore, the City argues, even though the Union "couches" its complaint in terms which would appear to demonstrate a nexus with Article XVI, Section 1, the gravamen of this case, i.e., the allegation that the Department failed to assign this duty to Grievants, clearly has no nexus to that provision.

The City also challenges what it characterizes as a belated attempt by the Union to submit a new claim to arbitration, i.e., the alleged failure by the Department to post notices concerning the availability of tree inspection work. The City points out that the only issue raised by DC 37 at Step III and in its request for arbitration was whether the Department's assignment of employees in the titles of Forester and Assistant Forester to perform the duties of the Tree Inspector violated Article XVI, Section 1 of the Agreement. The City claims that not until its answer to the petition challenging arbitrability did the Union put the City on notice of an alleged violation of the posting requirement. This allegation, the City asserts, impermissibly raises a novel issue which should have been presented for consideration throughout the course of the contractual grievance process.[4]

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[3] The City cites Section 12-307b of the New York City Collective Bargaining Law ("NYCCBL").

[4] The City cites Decision Nos. B-20-74; B-27-75; B-6-80.

Accordingly, the City submits that the Board should deny the request for arbitration in its entirety.

Union's Position

DC 37 does not challenge the Department's right, pursuant to Section 12-307b of the NYCCBL, inter alia, to direct its employees. Rather, in its answer to the petition challenging arbitrability, the Union argues that the City may not rely on managerial prerogative to avoid compliance with Article XVI, Section 1 of the Agreement, which affords Grievants a right to apply for such assignments.

The Union alleges that "[t]he fact that the City assigned tree inspection duties to the Foresters and Assistant Foresters titles demonstrates that assignments were available for Climbers and Pruners." Thus, the Union asserts, in view of Article XVI, Section 1 of the Agreement, an allegation that the City wrongfully denied Climbers and Pruners an opportunity to apply for these assignments states an arbitrable claim. Any further inquiry into the matter, i.e., "whether notices were posted for assignment to tree inspection duty or whether Climbers and Pruners applied for such assignments," the Union contends, "is a factual determination to be made by an arbitrator."

Discussion

In considering challenges to arbitrability, we have a responsibility to ascertain whether a prima facie relationship exists between the act complained of and the source of the alleged right,

redress of which is sought through arbitration. Thus, where challenged to do so, a party requesting arbitration has a duty to show that the contract provision invoked is arguably related to the grievance to be arbitrated.[5] Moreover, where there is an apparent conflict between the exercise of management's prerogative and an alleged contractual right, the burden will be on the union not only to prove its allegations ultimately, but also to establish at the outset that a substantial issue under the contract is presented. This, we have held, requires close scrutiny by the Board.[6]

There is no dispute that Article XVI, Section 1 of the Agreement provides that Grievants herein are eligible to apply for existing assignments as Tree Inspectors. However, the City contends, and we agree, that this provision does not also guarantee that the assignments at issue are the exclusive entitlement of any particular civil service classification, as the Union initially alleged. In this connection we note that in the absence of an express waiver in the contract or otherwise, the methods, means and personnel by which government operations are to be conducted is a statutory management right.[7] We have consistently held that only where it is

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[5] Decision Nos. B-5-88; B-16-87; B-35-86; B-8-82; B-15-79; B-7-79.

[6] Decision Nos. B-5-88; B-16-87; B-8-81.

[7] Section 12-307b of the NYCCBL in pertinent part, provides:

> It is the right of the city or any other public employer, acting through its agencies, to ... direct its employees;... maintain the efficiency of govern-mental operations; determine the methods, means and personnel by which government operations are to be conducted;... and exercise complete control and discretion over its organization and the technology of performing its work....

shown that there exists either an agreement between the parties[8] or a unilateral grant by the employer[9] which arguably limits management's statutory prerogative in this area, may a claim of the type presented in this case, i.e., that unit work had been wrongfully assigned to non-unit employees, be submitted to arbitration.[10] Therefore, were this the only issue in dispute, our inquiry would end here.

In its answer to the City's petition, however, the Union argues:

> The grievance arises out of the absence of a posted notice of assignment availability and, the consequent deprivation of the opportunity for Climbers and Pruners to apply for assignment to tree inspection duties.

In response, the City alleges that DC 37 has tried improperly to redefine the grievance in the course of answering the City's petition, raising an issue which had not been raised at the lower steps of the grievance procedure.

A review of the record below supports the City's contention that the sole issue presented and considered heretofore was "Whether the employer violated [the Agreement] by failing to assign Climbers and Pruners tree inspection duties."[11] According to the Step III Decision, DC 37

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[8] See e.g., Decision No. B-17-79 (where we found that the inclusion of a job description in the parties' contract arguably reserved the work to the unit).

[9] See e.g., Decision No. B-2-70 (where we found that Executive Order 52, which defined a grievance, inter alia, as a "claimed assignment of employees to duties substantially different from those stated in their job classifications," encompassed a claim that employees in a different title have been improperly assigned work within the grievants' duties and functions).

[10] See also, Decision Nos. B-11-88; B-12-77; B-1-71.

[11] See DC 37's request for arbitration. See also, Grievance Form submitted at Step III.

maintained at the hearing that "only employees in the Climber and Pruner title and the Gardener title [were] eligible for such assignment." Consequently, the Step III Hearing Officer denied the grievance, finding that nothing in Article XVI, Section 1 precluded the City from assigning the work to Foresters and Assistant Foresters. Furthermore, no inference can be drawn from the remedies the Union sought at Step III ("To have the Climbers and Pruners continue to perform tree inspection duties") or in its request for arbitration ("A cease and desist order") which would support a conclusion that the nature of the dispute was broader than the issue of the City's assignment of Tree Inspection work to Foresters and Assistant Foresters.

Based on these facts, we conclude that the Department's alleged failure to assign the work to Grievants was the only issue that was fully aired and discussed below. Surely, upon receipt of the Step III Hearing Officer's decision, the Union was on notice that the City considered the grievance to be limited to this dispute. If the Union believed that the scope of the grievance was broader than that, it had an obligation to make its belief known to the City, either in a request for reconsideration at Step III or in its request for arbitration.[12] Inasmuch as there is no indication that DC 37 took issue with the City's expressed understanding of the scope of the grievance at any time prior to submission of its answer to the challenge to arbitrability, and only then did it allude to an alleged failure to post notices, we find that the question whether the Department wrongfully deprived Grievants the opportunity to apply for such assignments is a novel claim, based on a hitherto unpleaded grievance. Therefore, we will not permit the Union to interpose this claim at this time.

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

In reaching this conclusion, we are guided by our often stated policy:

> The purpose of the multi-level grievance procedure is to encourage discussions 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 voluntary settlement.[13]

Consistent with this policy, we have denied arbitration of new claims or issues alleged for the first time in the request for arbitration,[14] or thereafter.[15] The instant matter is readily distinguishable from those cases where we did not find this policy to have been violated, despite a technical deficiency in the pleadings.[16] The common thread throughout those cases was that the City had clear notice of the "nature" of the Union's claim or, in appropriate circumstances, that the City "should have been on notice of the nature of a claim, based upon the totality of the grievance."[17] By contrast, in the instant matter the record indicates that the only issue discussed and considered below concerned an alleged exclusive entitlement to Tree Inspection assignments.

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[13] Decision Nos. B-6-80; B-22-74.

[14] Decision Nos. B-31-86; B-1-86; B-14-84; B-12-77; B-27-75; B-40-74; B-22-74.

[15] Decision Nos. B-40-88; B-11-81.

[16] See e.g., Decision No. B-29-89 (the record demonstrated that the HHC had clear notice of the nature of the Union's claim prior to submission of its request for arbitration); Decision No. B-44-88 (the Union merely restated in a somewhat different form the very same issues that were alleged and apparently processed below); Decision No. B-35-87 (the nature of the dispute was clear from the outset); Decision No. B-14-87 (the City was or should have been on notice of additional allegations set forth in the remedy section of the grievance form).

[17] Decision No. B-55-89 (the Board will not adopt a strict pleading rule when the nature of the underlying claim is clear).

As previously stated, Article XVI, Section 1, in pertinent part, merely confers eligibility status on certain employees; it does not constitute a waiver of management's right ultimately to determine the personnel by which government operations are to be conducted.

Accordingly, we grant the City's petition challenging arbitrability in its entirety. However, nothing in our decision will constitute prejudice to the Union's right to file a timely grievance, at the appropriate step, alleging a violation of the notice provisions of Article XVI, Section 1 of the Agreement.[18]

ORDER

Pursuant to the power vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the petition challenging arbitrability filed by the City of New York be, and the same hereby is, granted; and it is further

[18] In this connection we note that the relief sought by the Union was, in any event, prospective in nature.

ORDERED, that the request for arbitration filed by District Council 37, AFSCME, AFL-CIO be, and the same hereby is, denied.

DATED: New York, New York
April 25, 1990

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