City v. L.621, SEIU, 45 OCB 31 (BCB 1990) [Decision No. B-31-90 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the
Arbitration

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

LOCAL 621, SEIU, AFL-CIO,

Respondent.

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DECISION NO. B-31-90

DOCKET NO. BCB-1203-89
(A-3182-89)

DECISION AND ORDER

On August 29, 1989, the City of New York, appearing by its Office of Municipal Labor Relations ("the City") filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by Local 621 of the Service Employees International Union ("the Union") on or about August 11, 1989. The grievance alleges that sixteen hours of pay were improperly taken from a Department of Parks and Recreation employee. The Union filed its answer on October 5, 1989. The City filed a reply on November 3, 1989.

BACKGROUND

Joseph Abbate ("the grievant") is employed by the City of New York Department of Parks and Recreation in the title of Supervisor of Mechanics (Mechanical Equipment). In December of 1988, a dispute arose between the grievant and the Department concerning his use of annual leave and sick leave.

On or about December 20, 1988, the grievant attended a supervisor's conference before the Bronx Deputy Chief of Operations. A post-conference memorandum, issued by the Deputy Chief on or about the same date, reads, in pertinent part, as follows:

> This memorandum will confirm our conversa-tion, held on Dec. 20, 1988 in my office, during which you were cautioned concerning your failure to comply with

> departmental rules and regulations, and/or your failure to follow the orders of your supervisor.
>
> Specifically, the following was brought to your attention:
>
> On Wednesday, December 14, 1988, you clocked out at 10 AM, using four (4) hours A/L. You failed to notify the Boro Office [or] myself of this absence during our telephone conver-sation earlier that morning.
>
> Therefore, you are considered to be AWOL for four (4) hours on December 14, 1988, and will not be paid for that time.
>
> You are advised that further similar conduct on your part may necessitate formal disci-plinary action against you. A copy of this memorandum will be placed in your personnel folder.

On or about January 16, 1989, the Union, on behalf of the grievant, filed a grievance with the Deputy Chief, claiming that he had not followed proper procedures. The Deputy Chief denied the grievance on the ground that "this unscheduled absence was taken without my permission or knowledge," and that "appropriate action was taken in accordance with agency policy."

On or about February 7, 1989, the Union appealed the grievance to Step II. By letter dated February 15, 1989, the Department's Director of Labor Relations advised the Union that its appeal was incomplete because it did not cite a specific section or article of the contract upon which the grievance was based. By letter dated March 7, 1989, the Union replied to the Director as follows:

> In regard to your memo as to Local 621's Step II Grievance, please be advised that Article V Section IV [disciplinary procedure] of the Contract between Local 621 and the City of New York [is] the basis of this grievance.
>
> At our meeting held on February 9, 1989, it was agreed that you would also consider at Step II, the supposed 16 hours of undocu-mented Sick Time, that Mr. Abbate was docked.

In his Step II decision, the Director denied the grievance on the ground that the grievant "clearly did not adhere to proper departmental established

procedures in both cases." He refused to reinstate "the 16 hours: four (4) for leaving early and twelve (12) of undocumented sick time."

On or about April 3, 1989, the Union appealed the grievance to Step III. At the outset of the Step III conference, the grievant's attorney "state[d] for the record that the instant case should be pursued as a disciplinary matter and not as a grievance."[1] He continued with his presentation after being informed by the review officer that "the grievant need not be served with formal charges prior to being docked for failure to comply [with time and leave rules]."[2] According to the grievant's attorney, the four hours of annual leave time had been approved in advance, and the grievant had not been informed that he had to submit doctor's notes to cover his sick leaves.

On or about August 4, 1989, the Office of Municipal Labor Relations denied the grievance, after it found that:

> Appendix, II-Sick Leave Allowance, Section 3 states in relevant part:
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> > Sick leave may be granted in the discretion of the agency head and proof of disability must be provided by the employee, satisfactory to the agency head.
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> . . . it was the grievant's responsibility in accordance with [departmental procedure] to notify the Department when unable to complete work as scheduled on 12/14/88. And that the denial of the sick leave requests for 11/15/88 and 12/5/88 were proper pursuant to the above quoted provisions.

With no satisfactory resolution of the grievance having been reached, the Union filed a request for arbitration on or about August 18, 1989. The request continued to claim that the action of the Department, in docking the grievant "four hours pay which were properly taken as annual leave and 12 hours pay improperly [docked] for alleged unapproved sick leave," violated the disciplinary procedure contained in the parties' collective bargaining

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[1] Step III Decision, dated August 4, 1989.

[2] Id.

agreement.

POSITIONS OF THE PARTIES

City's Position

The City maintains that the present grievance should not be arbitrated because the request for arbitration allegedly cites no contractual basis for the grievance. The City points out that item "2" on the request form requires the applicant to "Identify and attach copy of the contract provision, rule or regulation which you claim has been violated," and it notes that the section has been left blank. The City acknowledges that the Union, in its answer, alleges a violation of a New York City Comptroller's Determination, but it argues that the Union does not specify which determination it is referring to, nor does it identify the clause or provision allegedly violated. The City maintains that this defect prevents it from being able to respond fully to the request, and it prevents this Board from adequately being able to determine the arbitrability of the underlying grievance.

In the alternative, the City argues that even if the Union's claim is understood to be based upon a violation of the parties' disciplinary procedure, allegedly there is no nexus between that procedure, contained Article V, Section 4 of the Agreement, and the grievance underlying this case. According to the City, the Union has mischaracterized the facts in an attempt to expand the definition of discipline, which, in its view, requires that claimed wrongful disciplinary actions "are to be processed upon service of written charges or incompetency or misconduct." The City maintains that because the Union's request for arbitration did not contain an assertion that any disciplinary action had been taken against the grievant, the discipline provisions of the parties' agreement do not apply.

To the contrary, the City insists that the Department's actions did not constitute discipline. It points out that the grievant has never claimed that

he followed the proper procedure for obtaining time off, nor has he said that he submitted the proper documentation to cover his sick leave. The City further points out that the grievant has not alleged that his accrued leave balances have been reduced. According to the City, this case simply rests upon the principle that the employer is not, nor should it be, obligated to pay anyone for unauthorized or unaccrued leave.

Finally, the City asserts that before a union may proceed to disciplinary arbitration, this Board must first weigh the facts and issues asserted by the parties, and estimate the probability that the action complained of was arguably disciplinary in nature.[3] The City contends that, in this case, the Union cannot satisfy this intermediate test because it has not "a scintilla of evidence to show that the nonpayment of monies for time not worked is related to punishment." Thus, the City concludes, there is insufficient nexus between the contractual disciplinary procedure and the managerial action complained of to warrant a finding of arbitrability.

Union's Position

The Union maintains that the City has misstated and mischaracterized its position. It alleges that the Department of Parks took sixteen hours of pay away from the grievant, and it denies that there was any unauthorized sick leave or unauthorized annual leave to justify this deduction. Thus, it contends, although the Department never formally served the grievant with charges, it has, in effect, levied a fine against him. According to the Union, this unilateral action not only violates the parties' contractual disciplinary procedure, but it violates the contractual wage provisions as well.

In strongly disagreeing with the City's position, the Union reasons that if the City is correct, management could easily avoid disciplinary arbitration

[3] Quoting from Decision No. B-33-88.

through the simple expedient of not serving charges. In that case, an employer would be free to take away an employee's pay or levy other punitive assessments without notice, charges, or a hearing.

The Union concludes by stressing that this controversy involves a dispute concerning the application and interpretation of the collective bargaining agreement, and it is, therefore, a proper subject for arbitration. It asserts that, at a minimum, an interpretation of the disciplinary procedure is in issue. Moreover, the Union contends, the employer's alleged failure to pay the grievant the applicable rate established by the Comptroller's determination arguably violates the pay provision, which also is a proper subject for arbitration.

DISCUSSION

The City's objections to arbitration in this case are twofold: It claims that the action taken by the Department was non-disciplinary in nature, therefore the contractual disciplinary procedure does not apply; and it claims that it has received inadequate notice of the contractual provision that allegedly was violated so that it cannot fully respond to the Union's request for arbitration.

Turning first to the question of notice, we find implicit in the Union's statement of the nature of the controversy an allegation of an improper assessment of a penalty. In addition, we note that in the third section of the request for arbitration form, the Union expressly cites "Article V, Section 2, Step 4" of the contractual disciplinary grievance procedure as the section of the agreement under which the demand for arbitration has been made.

Moreover, discipline has been a component of this case since its very beginning. The supervisor's conference memorandum, that was the basis for at least part of the grievance, made explicit reference to discipline ("further similar conduct on your part may necessitate formal disciplinary action").

Later, as the Step III review officer acknowledged, a "grievant need not be served with formal charges prior to being docked for failure to comply with [departmental] rules."[4] We conclude, therefore, that the general context of this grievance involves the allegation of improper discipline, and we find that the City had more than adequate notice of the issue to be presented to the arbitrator.

We will not foreclose arbitral review of this claim simply because the Union failed to complete a section of the request for arbitration form, when the information appeared elsewhere on the form, and it was already part of the record. To deny arbitration on this ground would elevate form over substance, and would be tantamount to our adoption of a strict pleading rule that would, in effect, defeat arbitrability even though the underlying nature of the claim is clear.

Our finding herein is not to be construed as an approval of the submission of vague pleadings. Rather, it is an acknowledgement that, in appropriate cases, we may find that the City was or should have been on notice of the nature of the claim, based upon the totality of the grievance expressed by the Union.[5] This result is consistent with the clear mandate of Section 12-302 of the New York City Collective Bargaining Law ("NYCCBL"),[6] and with our well-established policy of favoring the resolution of disputes through

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[4] The review officer's ruling correctly follows the policy that we have set forth in a number of our decisions. See Decision Nos. B-52-89; B-33-88; B-5-84; and B-9-81.

[5] Decision Nos. B-55-89 and B-14-87.

[6] Section 12-302 of the NYCCBL provides, in pertinent part:

> **Statement of policy**. It is hereby declared to be the policy of the city to favor and encourage . . . the use of impartial and independent tribunals to assist in . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

impartial arbitration.[7]

Having found the notice requirement satisfied, we now turn to the City's assertion that the grievance itself is non-arbitrable.

In determining questions of arbitrability, it is the function of this Board to decide whether the parties are in any way obligated to arbitrate their controversies, and, if so, whether the controversy presented is within the scope of that obligation.[8] Although it is the policy of the NYCCBL to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances, we cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[9] In this case, the City denies that the withholding of the grievant's pay was in any way related to discipline, and it urges that we deny arbitration.

It is clear that the parties have agreed to arbitrate grievances, as defined in Article V, Section 1 of their collective bargaining agreement. The Union's claim that the disciplinary component of the initial supervisory conference ("further similar conduct on your part may necessitate formal disciplinary action"), brings the matter within the contractual definition of

[7] Decision Nos. B-55-89; B-29-89; B-20-79 and B-9-79.

[8] Decision Nos. B-33-88; B-46-86; B-23-86; B-10-77; B-5-76; B-14-74; B-4-72; and B-2-69.

[9] Decision Nos. B-11-90; B-10-90; B-49-89; B-35-89; B-41-82; and B-15-82.

an arbitrable grievance.[10] In addition, the docking of pay may amount to a wrongful withholding of wages. Wage disputes, on their face, also lie within the contractual definition of an arbitrable grievance.[11] Moreover, the City does not deny that wage disputes are arbitrable generally.[12]

The expectation that earned wages will be paid promptly and will be paid in full, is a quintessential quid pro quo of an employment relationship. The contention that an employer, simply by not serving written charges, can take earnings away from an employee without recourse or review, strains credulity. The mere assertion that the withholding of money from the grievant's pay was not disciplinary, and that an employer has the managerial right not to pay money for time not worked, cannot seriously be expected to deflect challenge nor to avert scrutiny of management's actions in such circumstances.

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[10] Article V, Section 1. reads, in pertinent part, as follows:

> DEFINITION: The term "grievance" shall mean:
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> * * *
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> (D) A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status.

[11] Article V, Section 1. further reads, in pertinent part, as follows:

> DEFINITION: The term "grievance" shall mean:
>
> * * *
>
> (A) A dispute concerning the application or interpretation of the terms of this Agreement, or any supplement thereto, or of a Comptroller's Determination, or wage or other agreement in lieu thereof, applicable to titles covered by this Agreement;

[12] See e.g., Decision No. B-14-88.

This is not the first time that we have been called upon to decide an asserted connection between the docking of pay for absenteeism and a contractual disciplinary procedure. Decision No. B-25-72 concerned a group of employees at two City social services centers who were docked pay for absences from work as an outgrowth of a job action protesting an alleged lack of adequate police protection. In our decision, we concluded that the Union's diverse arguments could be reduced to an assertion that the City violated the collective bargaining agreement by refusing to pay the employees their specified contractual wage, and we said that such an alleged violation of the contract is "patently a basis for grievance arbitration." At the same time, we also said that it was clearly up to the arbitrator to decide whether the Department of Social Welfare was merely deducting for an absence from the workplace, as the City contended, or whether it was disciplining employees for misconduct, as the Union claimed.

In Decision No. B-6-77, a case where hospital house staff officers' paychecks were withheld for not completing certain medical records, we again ruled that such action by the employer is subject to arbitration. Although the employer argued that its actions concerned matters involving medical procedures not subject to arbitration, we disagreed, saying that "[i]t is difficult to view the withholding of an employee's paycheck for failure to perform required duties as anything other than a disciplinary action."

More recently, in Decision No. B-30-86, we examined the case of a resident physician who was docked pay allegedly for missing four weeks work because, according to the employer, the wages provision of the agreement "did not cover periods when an employee absents himself from work." We held that an alleged failure to pay an employee the contractual wage was an arbitrable matter, and that the question of whether the employee was entitled to his wages involved the merits of the dispute, which was not for this Board to decide.

Lastly, we reject the City's contention that an intermediate test is a prerequisite to arbitrability of a wage entitlement dispute. As the City correctly points out, in Decision No. B-33-88 we applied a test seeking to strike a balance between managerial authority and an asserted contractual right. However, that case involved the involuntary transfer of two Fire Alarm Dispatchers where the parties had equally strong arguments. The Union pointed to the contractual definition of a grievance, which included "a claimed assignment of employees to duties substantially different from those stated in their job specification." The City pointed to its statutory managerial authority, under Section 12-307b. of the NYCCBL, "to direct, assign and transfer its employees." We responded to the conflict by weighing the facts and issues asserted by the parties as an intermediate step in our determination.

This case is dissimilar because the City does not rely upon Section 12-307b. as justification for its decision to withhold the grievant's wages. Thus, an intermediate test is unnecessary. In a nonpayment of wages dispute, all a union must do is allege sufficient facts to establish a prima facie relationship between the act complained of, in this case discipline, and the source of an alleged right to arbitration. Once the union has done so, we will direct the parties to arbitration without examining the underlying merits of the claim.[13]

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 challenging arbitrability filed by the City of New York, and docketed at BCB-1203-89, be, and the same hereby is,

[13] Decision Nos. B-49-89; B-63-88; B-36-88; B-30-86; B-31-85; B-1-75; B-18-72; and B-12-69.

dismissed; and it is further

ORDERED, that the request for arbitration filed by Local 621 of the Service Employees International Union in Docket No. BCB-1203-89 be, and the same hereby is, granted.

DATED: New York, N.Y.
June 27, 1990

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